STATE OF VERMONT
PUBLIC SERVICE BOARD

In re: Order Revision pursuant to Act No. 199 (S.220) implementing standards and procedures for issuance of a certificate of public good for communications facilities pursuant to 30 V.S.A. § 248a	)))))	Docket No. _____

COMMENTS AND RECOMMENDATIONS TO REVISE SECTION 248A PROCEDURES ORDER

COMES NOW the Department of Public Service ("Department") and respectfully provides comments and recommendations for the Public Service Board ("Board") to further amend and revise its Amended Standards and Procedures Order ("Procedures Order"),[1] to include definitions of "good cause" and "substantial deference" as required by Section 28 of Act No. 199[2] and as requested in the Board memorandum dated July 10, 2014. The Department hereby submits comments and recommendations as follows:

1. The Procedures Order provides the standards and procedures to implement 30 V.S.A. § 248a. Before the Board issues a certificate of public good ("CPG") under § 248a, it shall find that, "[u]nless there is *good cause* to find otherwise, *substantial deference* has been given to the land conservation measures in the plans of the affected municipalities and the recommendations of the municipal legislative bodies and the municipal and regional planning commissions regarding the municipal and regional plans, respectively."[3] The statute does not define "good cause" or "substantial deference."

2. The Department suggests that while giving substantial deference to the land conservation measures in the plans and the recommendations of municipalities and regional planning

[1] *Amended Order implementing standards and procedures for issuance of a certificate of public good for communications facilities pursuant to 30 V.S.A. § 248a*, Order issued August 10, 2011.

[2] 2014 Acts and Resolves No. 199, An act relating to furthering economic development, Sec. 28.

[3] 30 V.S.A. § 248a(c)(2) (emphasis added).

commissions regarding their plans (collectively "Municipal Recommendations") is an important protection afforded them, it is not a veto. To the contrary, allowing applicants the opportunity to show good cause why their project should proceed allows the Board the ability to weigh the sometimes competing interests of parties and make a determination as to the general public good.

Substantial Deference

3. "Substantial deference" is a standard of review applied by a tribunal. It is generally the standard that an adjudicator applies to review decisions made by another body that has considered an issue within its area of expertise.[4] But the term is not independently defined. To reach a definition of "substantial deference" it is instructive to review the standard as it is applied in other areas. In a recent Order, the Board gave substantial deference to an Agency of Natural Resources' (ANR) decision, taking ANR's interpretation of its Stormwater Management Manual as "correct, valid, and reasonable."[5] The Board cited *Gasoline Marketers of Vt., Inc. v. Agency of Natural Res.*, for the standard of review it gave to ANR. In *Gasoline Marketers of Vt.*, the Vermont Supreme Court declined to apply substantial deference to a decision ANR made outside of its expertise, drawing the distinction that "decisions made within the expertise of administrative agencies are presumed to be correct, valid, and reasonable."[6] This standard is identified as "substantial deference."[7]

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[4] *In re Existing Rates of Shoreham Tel. Co., Inc.*, 2006 VT 124, 181 Vt. 57, 65, 915 A.2d 197, 203 (2006) (Vermont Supreme Court recognizing "the complexities of utility regulation" and affording substantial deference to "the Board's particular expertise in ratemaking"); *Town of Killington v. Department of Taxes*, 176 Vt. 70, 838 A. 2d 91, 93 ¶ 5 (2003) (Vermont Supreme Court reviewing a decision of the Department of Taxes, applying the standard of substantial deference "particularly where, as here, a decision involves highly complicated valuation and equalization methodologies within the agency's area of expertise"); *In re ANR Permits in Lowell Mountain Wind Project*, --- A.3d ----, ¶ 15 (2014) (Vermont Supreme Court reviewing a decision of the Public Service Board, stating, "we generally give substantial deference to an agency's interpretation of its own regulations) (quoting *In re Johnston*, 145 Vt. 318, 322, 488 A .2d 750, 752 (1985)); *State v. Int'l Collection Serv., Inc.*, 156 Vt. 540, 545, 594 A.2d 426, 430 (1991) (giving "substantial deference to the FTC's express position as outlined in its brief").

[5] Docket No. 7628A-E, *In Re: Lowell Mountain Wind Project Stormwater Permit #6216-INDC (Appeal of Energize Vermont, Inc., et al), In Re: Lowell Mountain Wind Project Stormwater Permit #INDC.1 (Appeal of Energize Vermont, Inc. et al), In Re: Lowell Mountain Wind Project Stormwater Permit #6216-INDS (Appeal of Energize Vermont, Inc., et al), In Re: Lowell Mountain Wind Project Water Quality Certification (Appeal of Energize Vermont, Inc. et al),* and *In Re: Lowell Mountain Wind Project Wetland Permit #2008-364 (Appeal of Energize Vermont, Inc., et al),* at fn 182, Order issued March 20, 2013. On appeal, the Supreme Court upheld the Board's decision to defer to ANR's interpretation of its own regulation absent "compelling indication of error." *In re ANR Permits in Lowell Mountain Wind Project*, --- A.3d ----, ¶ 11 (2014).

[6] *Gasoline Marketers of Vt., Inc. v. Agency of Natural Res.*, 169 Vt. 504, 508, 739 A.2d 1230, 1233 (1999). Many of these cases indicate the standard to overcome substantial deference is a "clear and convincing" showing to the

4. Although municipal legislative bodies and regional planning commissions are not administrative agencies, they each have their respective areas of expertise. Among other things, they create and implement their town and municipal plans. By assigning them the standard of review of "substantial deference" in § 248a(c)(2), the General Assembly established that municipal legislative bodies and planning commissions can be considered to be acting with informed judgment[8] regarding their Municipal Recommendations. It would follow that in showing substantial deference, the Board should presume Municipal Recommendations to be correct, valid, and reasonable.

5. Accordingly, the Department recommends the following definition of substantial deference:

> "**Substantial deference**" means the land conservation measures in the plans of the affected municipality and the recommendations of the affected municipality's local legislative bodies and local or regional planning commission regarding their respective plans are presumed correct, valid, and reasonable unless there is good cause to find otherwise.

Good Cause

6. In Section 248a, the General Assembly reduced the high review standard associated with "substantial deference" by allowing a showing of "good cause" to overcome giving substantial deference to Municipal Recommendations.

7. Under section 248a(c)(2) "good cause" provides a sufficient reason for the Board not to defer to Municipal Recommendations. Various tribunals require a showing of good cause as

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contrary, but the Board has also applied "compelling indication of error" as the standard. *In re ANR Permits in Lowell Mountain Wind Project*, --- A.3d ----, ¶ 11 (2014). As discussed infra, however, for 248a the General Assembly allowed a showing of "good cause" to overcome substantial deference.

[7] *In re Williston Inn Group*, 183 Vt. 621, 624, 949 A.2d 1073, 1077 (2008) (quoting *Gasoline Marketers of Vt., Inc. v. Agency of Natural Res.*, 169 Vt. 504, 508, 739 A.2d 1230, 1233 (1999)); *Town of Killington v. Department of Taxes*, 176 Vt. 70, 72 838 A. 2d 91, 93-94 (2003) (citing *In re Johnston*, 145 Vt. 318, 322, 488 A.2d 750, 752 (1985) which is citing *Vermont Dep't of Taxes v. Tri–State Indus. Laundries, Inc.*, 138 Vt. 292, 294, 415 A.2d 216, 218 (1980)); *Vermont State Employees' Ass'n v. State*, 185 Vt. 363, 373, 971 A.2d 641, 648 (2009).

[8] *Petition of E. Georgia Cogeneration Ltd. P'ship*, 158 Vt. 525, 531-32, 614 A.2d 799, 803 (1992) (Vermont Supreme Court reviewing findings of fact adopted by the Public Service Board) (citing *In re Telesystems, Corp.*, 143 Vt. 504, 509, 469 A.2d 1169, 1172 (1983), and *In re Green Mountain Power Corp.*, 131 Vt. 284, 303, 305 A.2d 571, 589 (1973)).

rationale to perform or excuse an action, although it is seldom defined. The bulk of Vermont jurisprudence regarding "good cause" is found in employment cases. Determining good cause is not arbitrary. An employment case that discussed the question of whether an employer had good cause for dismissing a grievant, *In re Brooks*, held that an employer's reasoning cannot be arbitrary but must show "some substantial shortcoming detrimental to the employer's interests, which the law and a sound public opinion recognize as a good cause for his dismissal."[9] The discussion of "good cause" in *In re Brooks* is instructive. In 248a, instead of the law and sound public policy giving weight to an employer's interests, the law and adherence to the public good give weight to the State's express interest in "maintaining a robust, modern telecommunications network in Vermont" and in promoting the "benefits of improved telecommunications technology to all Vermonters."[10] Showing "good cause" in the case of 248a suggests that "law and a sound public opinion recognize as a good cause" a showing of "some substantial shortcoming detrimental to" the State's stated interests.

8. Compiling the Court's explanations of "good cause" for purposes specific to 248a, the Department recommends the following definition of good cause:

> "**Good cause**" means a showing of evidence that deferring to the land conservation measures in the plans of the affected municipalities and the recommendations of the municipal legislative bodies and the municipal and regional planning commissions regarding the municipal and regional plans, respectively, would create a substantial shortcoming detrimental to the public good or State's interests in 30 V.S.A. § 202c.

Further changes to the Procedures Order

9. In AT&T's July 11, 2014 comments[11] AT&T requested that the Board open the Procedures Order for additional amendments and consider convening a workshop that addresses the many issues and opportunities for clarification that AT&T raised. The Department agrees that it is appropriate to re-open the Procedures Order to provide clarity on certain issues.

[9] *In re Brooks*, 135 Vt. 563, 568, 382 A. 2d 204, 207 (1977) (internal citations omitted).

[10] 30 V.S.A. § 202c.

[11] On or about July 11, 2014, New Cingular Wireless PCS, LLC d.b.a. AT&T Mobility (AT&T) filed "Comments and Recommendations to Revise Section 248a Procedures Order."

WHEREFORE the Department respectfully requests that the Board consider these comments when adopting definitions for "substantial deference" and "good cause" pursuant to Section 28 of Act No. 199 and when considering the reopening of the Procedures Order for additional revision and clarification.

DATED at Montpelier, Vermont, this 4th day of August, 2014.

Vermont Department of Public Service

By: _____

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