

STATE OF VERMONT  
PUBLIC UTILITY COMMISSION

Docket No. 8601

Petition of Vermont RSA Limited Partnership and )  
Cellco Partnership, for a certificate of public good, )  
pursuant to 30 V.S.A. § 248a, for the installation of )  
telecommunications equipment in Waterbury, )  
Vermont )

Order entered:

9/21/2017

PRESENT: Gregg Faber, Hearing Officer

APPEARANCES: Daniel Burke, Esq.  
For Vermont Department of Public Service

Brian Sullivan, Esq.  
Anthony LaRosa, Esq.  
Murphy Sullivan Kronk  
For Vermont RSA Limited Partnership and Cellco Partnership

Joseph McLean, Esq.  
Stitzel, Page & Fletcher, P.C.  
For the Towns of Stowe and Waterbury

Donald Einhorn, Esq.  
For the Vermont Agency of Natural Resources

David Grayck, Esq.  
Law Office of David Grayck  
For Marcy Blauvelt, Crea and Phillip Lintilhac, Sherm and  
Stephen Sisler, and Barbara and Thomas Tomasi

Daniel Richardson, Esq.  
Tarrant, Gillies & Richardson  
For the Robert Ball Trust

## I. INTRODUCTION

In this proposal for decision, I recommend that the Vermont Public Utility Commission (“Commission”)<sup>1</sup> deny the application (the “Petition”) filed by Vermont RSA Limited Partnership and Cellco Partnership, each d/b/a Verizon Wireless (the “Petitioners”) to install and operate a telecommunications facility in Waterbury, Vermont, pursuant to 30 V.S.A. § 248a, and the Commission's Procedures Order (“Procedures Order”).<sup>2</sup>

## II. BACKGROUND

On September 17, 2015, the Petitioners filed the Petition with the Commission.

On October 1, 2015, the Town of Waterbury (“Waterbury”) filed a request for party status in the docket.

On October 1, 2015, Brian Doyal filed public comments on the Petition.

On October 2, 2015, Jan Nyquist and David Harding (the “Adjoiners”), adjoining landowners, filed a motion to intervene in the proceeding.

On October 5, 2015, the Vermont Agency of Natural Resources (“ANR”) filed comments on the Petition.

On October 5, 2015, Marcy Blauvelt, a neighboring landowner, filed a motion to intervene and request for hearing in the proceeding.

On October 5, 2015, the Robert Ball Trust (the “Trust”), owner of an adjoining property, filed a motion to intervene and request for hearing in the proceeding.

On October 7, 2015, the Town of Stowe (“Stowe”) filed a motion to intervene and for enlargement of the comment period.

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1. Pursuant to Section 9 of Act 53 of the 2017 legislative session, the Vermont Public Service Board's name was changed to the Vermont Public Utility Commission, effective July 1, 2017. For clarity, activities of the Vermont Public Service Board that occurred before the name change will be referred to in Commission documents as activities of the Commission unless that would be confusing in the specific context.

2. *Third 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 19, 2015.

On October 8, 2015, the Vermont Department of Public Service (“Department”) filed a letter with the Commission in response to the motions to intervene filed by Waterbury, the Trust, and Stowe.

On October 9, 2015, the Petitioners filed a letter stating that it agreed to extend the comment period for non-statutory parties until October 19, 2015.

On October 9, 2015, the Petitioners filed a letter in which it agreed to extend the comment period for the Trust until November 2, 2015, due to an error in its service list.

On October 16, 2015, David Grayck, Esq., filed a notice of appearance in the proceeding on behalf of Ms. Blauvelt.

On October 22, 2015, the Petitioners filed a stipulated filing schedule for the proceeding further extending the comment period until December 31, 2015.

On October 23, 2015, Stowe and Waterbury filed a joint motion for a technical hearing in this proceeding.

On December 30, 2015, ANR filed supplemental comments on the Petition and a request for a technical hearing in the proceeding.

On December 31, 2015, the Department filed comments on the Petition.

On January 27, 2016, the Central Vermont Regional Planning Commission filed comments on the Petition.

On January 29, 2016, the Vermont Natural Resources Council and the Nature Conservancy filed comments on the Petition.

On February 1, 2016, the Trust filed an amended stipulated scheduling agreement further extending the deadline for comments and motions to February 15, 2016.

On February 12, 2016, Stowe filed supplemental comments on the Petition.

On February 16, 2016, Marcy Blauvelt, Crea and Philipp Lintilhac, Sharon and Stephen Sisler, and Barbara and Thomas Tomasi (together, the “Blauvelt Group”) filed a motion to intervene and request for hearing.<sup>3</sup>

On February 16, 2016, the Trust filed supplemental comments on the Petition.

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3. Ms. Blauvelt previously filed a motion to intervene on her own behalf on October 5, 2016.

On February 16, 2016, the Petitioners filed supplemental testimony and a memorandum of law in opposition to the December 30 comments filed by ANR.

On February 18, 2016, Stowe filed responsive comments.

On February 19, 2016, Stowe filed supplemental comments on the Petition.

On March 16, 2016, ANR filed a response to the Petitioners' February 16 memorandum of law.

On March 16, 2016, the Petitioners filed a response to the respective motions to intervene filed by the Trust and the Blauvelt Group, and additional supplemental testimony.

On March 31, 2016, the Petitioners filed a response to ANR's March 16 filing.

On April 15, 2016, Waterbury filed supplemental comments on the Petition.

On April 15, 2016, the Blauvelt Group filed supplemental comments on the Petition.

On April 15, 2016, the Trust filed supplemental comments on the Petition.

On May 9, 2016, the Petitioners filed additional responsive comments.

On July 8, 2016, I issued an order regarding the scope of the proceeding and the motions to intervene.

On August 1, 2016, I convened a prehearing conference in this proceeding.

On August 18, 2016, I issued a prehearing conference memorandum and scheduling order.

On September 22, 2016, I convened a status conference in this proceeding.

On October 26, 2016, I conducted a site visit to the Project location.

On February 21, 2017, the Towns of Waterbury and Stowe filed a motion to strike testimony.

On March 8, 2017, the Petitioners filed a response to the February 21 motion.

On March 10, 2017, I issued an order denying the February 21 motion.

On April 18 and 19, 2017, I convened a technical hearing in this proceeding.

On June 9, 2017, the Department, ANR, the Trust, and the Blauvelt Group each filed a brief in this proceeding.

On June 12, 2017, the Petitioners, and Waterbury each filed a brief in this proceeding.

On June 30, 2017, ANR filed a responsive brief in this proceeding.

On July 3, 2017, the Petitioners and Waterbury each filed a responsive brief in this proceeding.

On July 7, 2017, the Petitioners filed a letter regarding improper citation in the responsive briefs of ANR and Waterbury.

On July 7, 2017, ANR filed a response to the Petitioners' July 7 letter.

On July 10, 2017, Waterbury filed a response to the Petitioners' July 7 letter.

No other comments regarding the Project have been filed with the Commission.

### III. FINDINGS

1. The Project involves the construction of a telecommunications facility on an approximately 104-acre parcel of land located off Ruby Raymond Road in Waterbury, Vermont. The objective of the Project is to provide improvements in service and coverage in the Town of Waterbury and along portions of Vermont Route 100 and Interstate 89 located near the Project. AJ Lanpher, for Petitioners, ("Lanpher") pf. at 2-3; exh. LH-1.

2. The Project involves the installation of a telecommunications facility that will consist of two fenced, gravel based compounds one measuring 35' by 50' and the other measuring 20' by 20'. The Project includes the installation of an 88' monopine tower, with 12 panel antennas of various dimensions mounted at a centerline height of approximately 85' on the tower, in the smaller compound, and the installation of a 12' by 30' equipment shelter within the larger compound. The Project also includes underground utilities, and ancillary operating equipment. The Project will be accessed over an approximately 10'-wide road constructed partially over existing roads and extending approximately 3800' from the end of Ruby Raymond Road to the facility. Louis Hodgetts, for Petitioners, ("Hodgetts") pf. at 2-3; Hodgetts Supplemental pf. at 1; exh. LH-11.

3. The Project will involve approximately 19,935' square feet of permanent earth disturbance. Hodgetts pf. at 4.

4. The Project's location is near the summit of a ridgeline known as North Hill at an elevation of approximately 1600'. Lanpher pf. at 2.

**State Telecommunications Policy**

[30 V.S.A. § 248a(a)]

5. The Project is consistent with the goal of directing the benefits of improved telecommunications technology to all Vermonters pursuant to 30 V.S.A. § 202c(b). The Project will provide new service and improve existing wireless telecommunications service in this area. Fred Goldstein, for the Department, (“Goldstein”) pf. at 3; tr. 4/18/17 at 122-23 (Lanpher).

6. The Petitioners’ current Long Term Evolution (“LTE”) or 4G wireless coverage has gaps in the northern Waterbury area. The Project will allow the Petitioners to increase capacity in the northern Waterbury area. Goldstein pf at 1-2.

7. The Project will improve coverage in the Route 100 corridor near the Waterbury-Stowe line and into the Moscow area of Stowe. The Project would serve Waterbury Center while an existing facility in Duxbury would be downtilted to focus on downtown Waterbury and the Route 89 corridor. Overall LTE capacity would be increased and the Petitioners would eventually phase out existing 3G antennas located on a WDEV radio antenna near Route 89 in Waterbury. Goldstein pf. at 3.

**Aesthetics, Historic Sites, Air and Water Purity,  
the Natural Environment, and Public Health and Safety**

[30 V.S.A. § 248a(c)(1)]

8. The Project will have an undue adverse effect on aesthetics, historic sites, air and water purity, the natural environment, and the public health and safety. Specifically, the Project will have an undue adverse effect on the natural environment in the surrounding area. This finding is supported by findings 9 through 59, below.

**Public Health and Safety**

[30 V.S.A. § 248a(c)(1)]

9. The Project will not have an undue adverse impact on public health and safety. Lanpher pf. at 4-5; Hodgetts pf. at 4-6.

**Outstanding Resource Waters, Headwaters**

[10 V.S.A. §§ 1424a(d), 6086(a)(1)(A)]

10. The Project will be located at an elevation of approximately 1,612' and will, therefore, fall within a headwaters area. However, the Project will have no impact on the ability of the receiving waters to contribute to the water supply. Accordingly, the Project will have no adverse effect on outstanding resource waters or headwaters. Hodgetts pf. at 6-9; exh. CB-1.

**Water and Air Pollution**

[10 V.S.A. § 6086(a)(1)]

11. The Project will not result in undue water or air pollution. This finding is supported by findings 12-24, below.

12. Noise associated with construction activities will be short term and will have a minimal impact on the area. Construction activities will be short term and will take place between 7:00 a.m. and 5:00 p.m on weekdays, although occasional weekend work may be required. Dust control measures will be taken when necessary during construction. Hodgetts pf. at 5-6.

13. The Radio Frequency Radiation associated with the Project will meet all standards prescribed by the Federal Communications Commission. Lanpher pf. at 4-5.

**Waste Disposal**

[10 V.S.A. § 6086(a)(1)(B)]

14. The Project does not involve disposal of wastes or injection of any material into ground water or wells. Hodgetts pf. at 7-8.

**Water Conservation, Sufficiency of Water, and Burden on Existing Water Supply**

[10 V.S.A. §§ 6086(a)(1)(C), (a)(2) and (3)]

15. The Project will have minimal impact on water conservation measures, as the Project will not require water or sewer facilities. Hodgetts pf. at 8.

**Floodways**

[10 V.S.A. § 6086(a)(1)(D)]

16. The Project will not have an undue adverse impact on floodways as it is not located in a floodplain. Hodgetts pf. at 8.

**Streams**

[10 V.S.A. § 6086(a)(1)(E)]

17. The Project will not have an undue adverse impact on streams, as it is not located near a stream. Hodgetts pf. at 8.

**Shorelines**

[10 V.S.A. § 6086(a)(1)(F)]

18. The Project will not have an undue adverse impact on shorelines, as it is not located near a shoreline. Hodgetts pf. at 8.

**Wetlands**

[10 V.S.A. § 6086(a)(1)(G)]

19. The Project will not have an undue adverse impact on wetlands. This finding is supported by Findings 20 and 21, below.

20. There are two wetlands located within the Project area. One of these wetlands is Class II and the other is Class III. Neither of the wetlands will be adversely affected by the Project. Charlotte Brodie, for Petitioners, (“Brodie”) pf. at 1-2.

21. The Project is confined to the footprint of the existing roadbed where it intersects the wetlands buffer zone, and no additional impacts in the wetland and buffer zone are anticipated. Therefore, the Project is considered an allowed use under Section 6 of the Vermont Wetland Rules. Shannon Morrison, for ANR, (“Morrison”) pf. at 5.

**Discussion**

While the Project is an allowed use under the Wetland Rules, the Petitioners should be required to implement preventative measures to avoid any inadvertent impacts on the wetlands. ANR has recommended reasonable conditions regarding delineation and protection of the wetlands be added to any CPG issued for the Project. Therefore, should the Commission decide to issue a CPG for the Project, I recommend that the conditions recommended by ANR be added as conditions of the CPG.<sup>4</sup>

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4. ANR Brief at 51-52.



**Soil Erosion**

[10 V.S.A. § 6086(a)(4)]

22. The Project will not cause unreasonable soil erosion or a reduction in the capacity of the land to hold water. This finding is supported by Findings 23 and 24, below.

23. The Project qualifies for a State of Vermont Stormwater Discharge Permit for Construction Activities as a low risk category and a permit will be obtained prior to construction. Hodgetts pf. at 9.

24. Stormwater runoff during Project construction will be diverted or collected and treated as outlined in the State of Vermont Low Risk Site Handbook for Erosion Prevention and Sediment Control. Hodgetts pf. at 10.

**Discussion**

The Petitioners have stated that the Project will qualify for a “low risk” permit under the stormwater discharge rules. However, ANR has raised concerns as to whether the Project will ultimately qualify under the low risk category. Accordingly, ANR recommends that conditions regarding compliance with stormwater permitting requirements be added to any CPG issued for the Project. I agree that these conditions are a reasonable precaution and, in the event the Commission decides to issue a CPG for the Project, I recommend that the conditions proposed by ANR be added to the CPG.<sup>5</sup>

**Transportation System**

[10 V.S.A. § 6086(a)(5)]

25. The Project will not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports or airways, or other means of transportation, whether existing or proposed. Traffic to the unstaffed site will be limited following construction. Hodgetts pf. at 10-11.

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5. ANR Brief at 49-50.

**Educational Services**

[10 V.S.A. § 6086(a)(6)]

26. The Project will not cause an unreasonable burden on the ability of a municipality to provide educational services. Educational services will not be affected by the Project. Hodgetts pf. at 11.

**Municipal Services**

[10 V.S.A. § 6086(a)(7)]

27. The Project will not place an unreasonable burden on the ability of the local government to provide municipal or governmental services. Except for the unliely need for emergency services, the Project will not require any municipal or governmental services. Hodgetts pf. at 11.

**Aesthetics and Historic Sites**

[10 V.S.A. § 6086(a)(8)]

28. The Project will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, or historic sites. This finding is supported by findings 29 through 40, below.

29. The Project tower, while designed to resemble a leafless tree, will from many vantage points resemble an apparently solid cylinder that extends above the surrounding trees, creating an eye-catching anomaly on the horizon. The Project will, therefore, not appear to be in context with the surrounding area. Exh. DPS-MB-2 at 14-18; Raphael Report at 12.

30. The Project will not be visible from Route 100 within a mile of the Project, but there will be considerable visibility of the Project from Route 100 from one to three miles of the Project. The Project will be visible from varying distances along unpaved roads that serve the residential areas within a mile of the Project. Exh. DPS-MB-2 at 14-18.

31. The Central Vermont Regional Plan (“Regional Plan”) recognizes that scenic resources in the area are important to the quality of life. However, the Regional Plan has not inventoried or otherwise located these resources. Exh. DPS-MB-2 at 21-22.

32. The Regional Plan acknowledges the importance of modern wireless telecommunications facilities, while identifying the need for appropriate siting of these facilities in order to minimize the impact of these projects on scenic resources. Exh. DPS-MB-2 at 22; Raphael Report at 16.

33. The Waterbury Town Plan (“Town Plan”) clearly identifies scenic resources, such as ridgelines, as important resources subject to degradation from development. However, the Town Plan does not provide a standard to protect these scenic resources. Exh. DPS-MB-2 at 26; Raphael Report at 16.

34. The Town Plan identifies the need to provide modern wireless facilities while protecting scenic resources. Exh. DPS-MB-2 at 26.

35. Wireless telecommunications towers are an established presence in the landscape as seen from public roads and, as such, the average viewer is unlikely to be genuinely shocked by their presence. Exh. DPS-MB-2 at 27; Raphael Report at 19.

36. The Project site could reasonably be considered a pristine environment. However, Route 100 or the nearby neighborhoods from which the Project can be viewed are not pristine. Exh. DPS-MB-2 at 27.

37. The Project is proposed to be sited on the southern side of North Hill which will greatly reduce Project visibility from the Town of Stowe. Exh. DPS-MB-2 at 28.

38. The Project will utilize a dark brown stealth tree type tower without leaves or needles to be more compatible with the surrounding forested landscape with an average tree height of 75'. Exh. DPS-MB-2 at 28; John Steele, for Petitioners, (“Steele”) pf. at 7-8; exh. JS-1.

39. The Project access will utilize existing woodland trails in order to minimize the amount of clearing for the Project. Steele pf. at 7-8; exh. JS-1.

40. The Project will not have an adverse impact on known historic sites. Steele pf. at 4; exh. JS-2.

### Discussion

The Commission has adopted the Environmental Board’s Quechee analysis for guidance in determining whether a proposed project would have an undue adverse impact on aesthetics. As the Commission has previously explained:

In order to reach a determination as to whether the project will have an undue adverse effect on the aesthetics of the area, the Board employs the two-part test first outlined by the Vermont Environmental Board in Quechee, and further defined in numerous other decisions.

Pursuant to this procedure, first a determination must be made as to whether a project will have an adverse impact on aesthetics and the scenic and natural

beauty. In order to find that it will have an adverse impact, a project must be out of character with its surroundings. Specific factors used in making this evaluation include the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability of the project's colors and materials with the immediate environment, the visibility of the project, and the impact of the project on open space.

The next step in the two-part test, once a conclusion as to the adverse effect of the project has been reached, is to determine whether the adverse effect of the project is "undue." The adverse effect is considered undue when a positive finding is reached regarding any one of the following factors:

1. Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?
2. Have the applicants failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the project with its surroundings?
3. Does the project offend the sensibilities of the average person? Is it offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area?<sup>6</sup>

In addition to the Quechee analysis, the Commission's consideration of aesthetics under Section 248 is "significantly informed by overall societal benefits of the project."<sup>7</sup>

Under the first step of the Quechee analysis, I conclude that the proposed Project would have an adverse impact on the aesthetics and the scenic and natural beauty of the surrounding area. The proposed Project tower will be visible from many vantage points in the surrounding area, will extend above the horizon from many viewpoints, and will not completely blend-in with the surrounding undeveloped ridgeline.

To determine whether the proposed Project's adverse aesthetic impact would be undue, the Commission applies the second step of the Quechee analysis: does the project violate a clear, written community standard, have the Petitioners failed to take all reasonable steps to mitigate the project's aesthetic impact, or does the project offend the sensibilities of the average person?

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6. *In re Petition of Tom Halnon*, CPG NM-25, Order of 3/15/01 at 10-11 ("Halnon").

7. *In Re: Northern Loop Project*, Docket 6792, Order of 7/17/03 at 28 ("Northern Loop").

To qualify as a clear, written community standard, a provision must be “intended to preserve the aesthetics or scenic beauty of the area” where the project is located, and must apply to specific resources in the project area.<sup>8</sup>

I conclude that the proposed Project would not violate any clear, written community standard. The Waterbury Town Plan and the Central Vermont Regional Plan both contain references to and discussions of scenic resource protection. However, neither plans provide standards that are sufficiently specific to constitute a clear, written community standard.

The aesthetic witness appearing on behalf of Waterbury, the Blauvelt Group, and the Trust, David Raphael, argues that the Commission should consider the provisions of the Waterbury Zoning Regulations together with the Town Plan. Specifically the witness maintains that the Commission should consider those provisions that prohibit telecommunication facilities in the conservation district where the Project is proposed to be located, as a clear written community standard in this case.<sup>9</sup>

With respect to the Zoning Regulations, the Commission has previously recognized that “zoning regulations are not the most appropriate source for a clear, written community standard under the Quechee test . . . [i]t is more appropriate to rely on the town plan as the primary source of clear written community standards.”<sup>10</sup> In addition, “[b]ecause towns often grant exceptions and variances to these ordinances on a case-by-case basis, it is difficult to rely on a zoning ordinance as a clear and consistent statement of a community’s policies or standards. The ability of a town to grant zoning variances will, in many cases, result in different zoning standards being applied depending upon the individual circumstances of the permit application.”<sup>11</sup> Finally, “[i]f zoning regulations were considered clear written community standards for the purpose of aesthetic review . . . , these could have the effect of mandating a particular outcome to a Section 248 proceeding. Such an outcome is inconsistent with Vermont law; the Vermont Supreme

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8. *In re Halnon*, NM-25, Order of 3/15/01 at 22 n. 5.

9. Landworks Report at 18-19; tr. 4/19/17 at 99-101 (Raphael)

10. *In Re: Petition of New Cingular Wireless PCS, LLC*, Docket No. 8160, Order of 12/5/13, at 12.

11. *Petition of Georgia Wind*, Docket 7508, Order of 6/11/10 at 53.

Court has clearly stated that, with respect to Section 248 proceedings, “municipal enactments . . . are advisory rather than controlling.”<sup>12</sup> I see no reason to deviate from the Commission’s precedent with respect to community standards in this case.

I turn next to whether the Petitioners have taken generally available mitigating steps to improve the harmony of the Project with its surroundings. The Petitioners have proposed two primary forms of mitigation to lessen the most visible aspects of the Project. The Petitioners have sited the Project on the southern side of the North Hill ridgeline, thereby reducing the visibility of the Project from the Town of Stowe. The Petitioners have also designed the Project tower to resemble a tree without leaves or needles to disguise the tower. With respect to the tower design, both the Department’s aesthetic expert and Mr. Raphael conclude that the design chosen by the Petitioners could actually increase the aesthetic impact of the tower rather than lessen it.<sup>13</sup> Therefore, I recommend that, in the event the Commission determines to issue a CPG in this case, a condition be included requiring the Petitioners to submit detailed design specifications for the tower for review by the Commission and the parties prior to commencement of construction. In addition, I recommend that a condition requiring that the trees surrounding the Project be preserved in order to maintain the screening effect of the surrounding vegetation also be included in the CPG. With these conditions in place, I conclude that the Petitioners will have taken generally available mitigating steps to improve the Project’s harmony with its surroundings.

Finally, as to whether the Project would be shocking and offensive, I conclude that the Project, due to its relatively low height and the common presence of telecommunications facilities in the landscape, will not appear shocking and offensive to the average viewer. Mr. Raphael argues that because the Project will be located in a pristine forested locale that it will offend viewers of the Project. I find this argument unpersuasive. While I agree that the Project location is currently undeveloped, the surrounding area from which the Project will be seen is a developed area, which includes the Route 100 corridor. Further, I conclude that the sight of a telecommunications tower from these vantage points is unlikely to offend the typical person.

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12. *Petition of Georgia Wind*, Docket 7508, Order of 6/11/10 at 53.

13. Exh. DPS-MB-2 at 28; Raphael Report at 21.

**Irreplaceable Natural Areas, and Wildlife (including endangered species and necessary habitat)**

[10 V.S.A. § 6086(a)(8)]

41. The Project will have an unduly adverse impact on rare and irreplaceable natural areas and will destroy or significantly imperil necessary wildlife habitat. The Project will not destroy or significantly imperil endangered species. This finding is supported by findings 42 through 59, below.

42. Construction of the Project will require 83,990 square feet of total earth disturbance, 19,935 square feet of permanent earth disturbance, 43,495 square feet of tree clearing, and 1,750 square feet of new impervious surface. Eric Sorenson, for ANR, (“Sorenson”) pf. at 26.

43. Blasting of rock ledge will be required to construct the Project and will take approximately three weeks to complete. Tr. 4/18/17 at 15-17 (Hodgetts).

44. The new access road will result in opening the forest canopy for the entire 1700' length of the road. The opening will be up to sixty feet wide in some areas. Tr. 4/18/17 at 15 (Hodgetts).

45. Forest or habitat blocks are areas of contiguous forest and other natural habitats that are unfragmented by roads, development, or agriculture. Sorenson pf. at 7.

46. The North Hill forest block, where the Project is proposed to be located, is one of only nine regionally significant linkages for providing landscape scale connectivity in the northeast region. Sorenson pf at 19-20; tr. 4/19/17 at 63-65 and 77 (Sorenson).

47. The North Hill forest block is 2,067 acres of contiguous forest that extends from Route 100 on the west to Stowe Hollow Road and Barnes Hill Road on the east. Sorenson pf. at 8.

48. The North Hill forest block is the critical stepping stone between the Mount Mansfield forest block to the west and the Worcester Range forest block to the east. Sorenson pf. at 16.

49. Forest fragmentation is the process of transforming contiguous patches of forest into smaller patches that become isolated. Forest fragmentation is typically caused by roads, residential and commercial development, utility corridors and infrastructure, and agriculture. John Austin, for ANR, (“Austin”) pf. at 4-5.

50. Forest fragmentation within highest priority connectivity blocks will reduce the ecological integrity of the natural communities within the block and alter ecological processes. Sorenson pf. at 19.

51. The effects of the fragmentation caused by the Project would radiate beyond the Project's relatively small footprint and into the forest block. Tr. 4/19/17 at 56 (Austin).

52. The North Hill forest block and the landscape connectivity function it provides are considered a rare and irreplaceable natural area. Sorenson pf. 25.

53. The fragmenting effects of the Project will result in an undue adverse impact to a rare and irreplaceable natural area and the natural environment. Sorenson pf. at 26-27.

54. The Project area provides necessary wildlife habitat for bears which will be adversely affected by the Project. Austin pf. at 21.

55. The location of the Project creates a more significant impact than if it were located closer to the periphery of the forest block. The Project is located directly in the middle of an important forest habitat connection and in proximity to mast trees, forested wetland, and wildlife signs. Austin pf. at 17.

56. Relocating the Project down slope on North Hill closer to the edge of the forest block will significantly reduce the fragmentation effects of the Project. Sorenson pf. at 37-38.

57. Relocating the Project down slope on North Hill as proposed by ANR would cause loss of coverage to the northern portion of the projected coverage area. Tr. 4/19/17 at 167 (Goldstein).

58. Relocating the Project to the alternative site identified by ANR would allow the Project to cover almost all the areas in Waterbury currently covered by the Petitioners' existing 3G coverage. Tr. 4/19/17 at 131 (Goldstein).

59. There are no endangered species that would be impacted by the Project. Hodgetts pf. at 11-12; exh. LH-7.

### Discussion

Section 248a(c)(1) requires that the Commission determine whether the Project will have an undue adverse impact on the natural environment, with due consideration to certain Act 250 criteria, including 10 V.S.A. § 6086(a)(8), impact on rare and irreplaceable natural areas.



Accordingly, to make a determination under § 248a(c)(1), I do not need to simply address the issue of whether the Project site is a rare and irreplaceable natural area, but I must also address whether the Project will have an undue adverse impact on the natural environment.

The only Act 250 criterion that specifically addresses wildlife is 10 V.S.A. § 6086(a)(8)(A). This portion of the statute states, in its entirety:

**Necessary wildlife habitat and endangered species.** A permit will not be granted if it is demonstrated by a party opposing the applicant that a development or subdivision will destroy or significantly imperil necessary wildlife habitat or any endangered species, and

- (i) the economic, social, cultural, recreational, or other benefit to the public from the development or subdivision will not outweigh the economic, environmental, or recreational loss to the public from the destruction or imperilment of the habitat or species, or
- (ii) all feasible and reasonable means of preventing or lessening the destruction, diminution, or imperilment of the habitat or species have not been or will not continue to be applied, or
- (iii) a reasonably acceptable alternative site is owned or controlled by the applicant which would allow the development or subdivision to fulfill its intended purpose.

ANR contends that the Project will have an undue adverse impact on a rare and irreplaceable natural area (“RINA”) without appropriate mitigation. ANR states that North Hill forest block contains diverse natural communities where natural conditions predominate and that the ecological integrity and processes within the block are intact. ANR argues that:

The fragmenting effects of Verizon’s Project would impact the natural ecological processes which presently exist within the intact natural communities in the core of the North Hill forest block. Alteration of these processes will degrade the forest block’s ecological integrity leading to the demise of its function as a critically important linkage for landscape connectivity.<sup>14</sup>

Further, ANR argues that the fragmentation caused by the Project on the forest block and the landscape connectivity function it provides will result in an undue adverse impact on necessary wildlife habitat. Therefore, ANR recommends that the Commission deny the Project application.

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14. ANR brief at 43.

In the alternative, ANR recommends, as mitigation to the Project's impact on RINA and necessary wildlife habitat, that the Board require, among other conditions, that the Project be relocated to a lower elevation on the same parcel, and that a portion of the property where the Project is located be placed in a permanent conservation easement.

The Petitioners state that they are willing to accept all of the conditions requested by ANR with the exception of the conditions related to Project relocation and the conservation easement. The Petitioners argue that adherence to the conditions they find acceptable will provide sufficient mitigation of the Project's impact on the natural environment. The Petitioners argue that moving the Project 200' lower on North Hill, as suggested by ANR, would result in a 31% loss of coverage.<sup>15</sup> Further, the Petitioners maintain that, because the Project will still remain in the North Hill Forest Block, relocation would result in no discernable gain to the environment.

I conclude that the Project as currently proposed will have an undue adverse effect on rare and irreplaceable natural areas and necessary wildlife habitat. The evidence presented by ANR demonstrates that the North Hill Forest Block constitutes a rare and irreplaceable natural area which will be unduly adversely impacted by the construction of the Project in the core of the block. The Project will also result in the loss of necessary wildlife habitat in the area. Further, a reasonable alternative location exists that would allow for construction of the Project. Relocating the Project to the lower elevation as proposed by ANR would result in lesser coverage than the currently proposed site for the same size project. However, I conclude that some loss in coverage would be reasonable given the impacts associated with the currently proposed location.

#### **Municipal Plans and Recommendations**

[30 V.S.A. § 248a(c)(2)]

60. The Waterbury Town Plan ("Town Plan") identifies the Shutesville Hill area, where the Project is located, as a critical wildlife corridor. Exh. Town-Sup-2 at 57 (Waterbury Town Plan); tr. 4/18/17 at 49-50 (Hodgetts).

61. The Town Plan states that the impact of "forest fragmentation" should be considered in the review of individual development projects. Exh. Town-Sup-2 at 60.

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15. Petitioners Response Brief at 3.

62. The Project compound and portions of the access road will be located in Waterbury's Conservation District. Tr. 4/18/17 at 49-50 (Hodgetts); exh. Town-Sup-1 at appendix B (Waterbury Zoning Regulations).

63. The Waterbury Zoning Regulations state that wireless telecommunications facilities may be permitted as a conditional use in all districts except the conservation district. Exh. Town-Sup-1 at 49.

64. The primary coverage goal for the Project is to cover the northern portion of Waterbury. Providing coverage in the Moscow area of Stowe is a secondary coverage objective for the Project. Tr. 4/18/17 at 84-85 (Lanpher).

### Discussion

Pursuant to § 248a(c)(2), the Board shall find that:

Unless 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 recommendations of the municipal legislative bodies and the municipal and regional planning commissions regarding the municipal and regional plans, respectively. Nothing in this section or other provision of law shall prevent a municipal body from basing its recommendations on an ordinance adopted under 24 V.S.A. § 2291(19) or bylaw adopted under 24 V.S.A. chapter 117 by the municipality in which facility is located.

The Procedures Order defines "good cause" as "a showing that deference to . . . the recommendations of the municipal legislative bodies and municipal and regional planning commissions regarding the municipal and regional plans, respectively, would be detrimental to the public good or the State's interest articulated in 30 V.S.A. § 202c." Pursuant to § 202c(3), the State's interests include supporting "the availability of modern mobile wireless telecommunications services along the State's travel corridors and in the State's communities." The burden of proof to demonstrate "good cause" rests with the Petitioner.

Waterbury recommends that the Project be relocated to an area that is not in the Conservation District and is not in area of critical wildlife habitat.<sup>16</sup> Waterbury's recommendation is based on the provisions in the Town Plan regarding protection of wildlife and habitat, and the Waterbury Zoning Regulations which prohibit wireless telecommunications

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16. Schneider and Lotspeich pf. at exh. DS-1.

facilities in the Conservation District. Waterbury maintains that the “Zoning Regulations were implemented to support the goals of conservation of open space, the working landscape, and wildlife habitat as established by the Municipal Plan.”<sup>17</sup> Accordingly, Waterbury recommends that the Project application be denied. In the alternative, Waterbury contends that approval of the application should be conditioned on relocation to the alternative site identified by ANR.<sup>18</sup> Waterbury argues that there is no “good cause” to not defer to its recommendation given that the alternative location would still allow the Project to meet its primary coverage objective.<sup>19</sup> In addition, Waterbury requests that, should the Commission require relocation of the Project, it be given a full and fair opportunity to review and supplemental material and to submit additional comment and testimony.

The Department argues that the Project will promote the state’s telecommunications goals by increasing the availability of wireless telecommunications services. The Department also maintains that relocating the Project as proposed by ANR will limit the amount of available coverage from the Project. However, the Department contends that “the record demonstrates that substantial deference to the Town’s request to relocate the tower is warranted.”<sup>20</sup> Further, the Department states that relocating the Project “will mitigate many of the environmental and aesthetic impacts identified by the Town and ANR with minimal impact of the coverage objectives of the project.”<sup>21</sup> Therefore, the Department recommends that the Project be relocated in accordance with the Waterbury’s recommendations.

The Petitioners argue that “good cause” exists not to defer to Waterbury’s recommendations. The Petitioners contend that the Project would further the State’s interest in supporting the availability of wireless communications in the area consistent with § 202c(3). The Petitioners maintain that this alone is sufficient good cause to not defer to the town. In addition,

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17. *Id.* at 6.

18. Waterbury brief at 28-29.

19. *Id.*

20. Department brief at 10-11.

21. *Id.* at 11.

the Petitioners argue that denying the application would have “a chilling effect on the provision of telecommunications services in Vermont.”<sup>22</sup> The Petitioners contend that such an outcome would be detrimental to the public good.

I find the Petitioners’ arguments unpersuasive. Waterbury has made a reasonable recommendation regarding the Project with respect to its town plan and zoning regulations and articulated a reasonable basis for that recommendation. In a previous proceeding, the Commission found that there was good cause to reject a town's recommendation based upon its zoning because the town had not provided a basis for its recommendation other than its desire for strict compliance with its zoning, and that compliance with the zoning bylaw would have frustrated the coverage goals of the project.<sup>23</sup> In this case, Waterbury bases its recommendation on the goals of protecting a critical wildlife corridor and avoiding forest fragmentation set forth in its town plan and zoning regulations. In addition, complying with the Town’s recommendation to relocate would not frustrate the primary coverage goal of the Project to provide coverage throughout northern Waterbury. Therefore, I conclude that there is not sufficient good cause to reject the recommendations of Waterbury in this case. In prior cases under § 248a, the Commission has found that requiring that project sites be relocated to comply with towns’ recommendations, even where the relocation would cause a loss of coverage, is consistent with the State’s interests.<sup>24</sup> However, in those cases the relocation did not warrant a significant or substantial change to the projects. In this case, the relocation to the site identified by ANR would likely require significant and substantial modifications to the Project. In order to provide Waterbury and the other parties with the opportunity to fully review any such modified proposal from the Petitioners, I recommend that the Commission deny the Project without prejudice in order to allow the Petitioners to file an application for a revised project in the alternate location. Should the Petitioners decide to submit an amended application consistent with Waterbury’s recommendations, the application must be served on all required recipients

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22. Petitioners brief at 28.

23. *Petition of SBA Towers IV, Inc., and Vtel Wireless, Inc.*, Docket No. 8162, Order of 10/24/14 at 13.

24. *See Petition of Vtel Wireless*, Docket 8548, Order of 12/14/2015; *Petition of Vtel Wireless*, Docket 8549, Order of 7/15/2016.

pursuant to §248a and all parties will have an opportunity to submit comments and request a hearing with respect to the amended application at that time.

**Collocation**

[30 V.S.A. § 248a(c)(2)]

65. The Project cannot be located on or at an existing telecommunications facility. There are no existing facilities in the area that would allow the Petitioner to satisfy its coverage objectives. Goldstein pf. at 3; exh. DPS-FG-2 at 4.

**IV. CONCLUSION**

For the reasons set forth above, I conclude that the Project will not promote the general good of the state. Therefore, I recommend that the Commission not issue a CPG for the Project. However, if the Commission does issue a CPG, I recommend that it include the conditions referenced in this Proposal for Decision to the extent that those conditions remain applicable.

This Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

**SO ORDERED.**

Dated at Montpelier, Vermont, this 26<sup>TH</sup> day of JULY, 2017.

  
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Gregg Faber  
Hearing Officer

### V. COMMISSION DISCUSSION

On August 7, 2017, the Department and ANR filed comments in support of the proposal for decision (“PFD”).

On August 8, 2017, the Blauvelt Group filed comments in support of the PFD.

On August 9, 2017, the Towns of Waterbury and Stowe filed comments in support of the PFD.

On August 9, the Petitioner filed comments in opposition to the PFD and a request for oral argument.

On August 10, the Trust filed comments in support of the PFD.

On September 12, 2017, the Commission conducted an oral argument in this proceeding.

After considering all of these comments, including those made at the oral argument, we adopt the hearing officer's proposed decision. We address the Petitioner's comments on the proposal for decision below.

The Petitioner argues that requiring relocation of the Project to the area identified by ANR would result in an overall coverage loss of 31%. Verizon maintains that this loss in coverage departs from Commission precedent in that it is significantly larger than coverage losses incurred by Projects that were required to be relocated in previous dockets.

First we point out that the Hearing Officer recommends that the Commission deny the petition, not that the Project be relocated. While we agree with the Petitioner that relocation of the Project to the alternative area identified by ANR would cause a loss in coverage, that is not what is recommended in the PFD. The Hearing Officer concluded that the Project, as proposed, would have an undue adverse impact on the natural environment and that there was not sufficient good cause to reject the recommendations of the Town of Waterbury to deny the Project. We conclude that the Hearing Officer's conclusions and recommendations were properly based on the evidence of record in this case.

The Petitioner maintains that ANR's interpretations of statutory provisions are not entitled to deference because the agency's position changed during the course of the docket. The Petitioner contends that ANR did not raise significant concerns regarding the Project's impact on

the forest and connectivity block in its initial comments on the petition. Therefore, the Petitioner argues, ANR's subsequent testimony regarding those impacts "does not deserve any deference . . ."25

We conclude that the Hearing Officer's recommendation was based on the evidence presented in the case. While it is understandable that the Petitioner could have been caught off-guard by the evolving nature of ANR's testimony, the Petitioner had ample opportunity to rebut that testimony or request additional time to do so. The Hearing Officer did not provide any special deference to ANR's statutory interpretations. The Hearing Officer simply found that the evidence presented in the case by ANR supported a finding that the Project would have an undue adverse impact on the natural environment based on his interpretation of § 248a(c)(1). Nonetheless, we believe that those who are commenting on a proposal, particularly where, as here, there is advance notice of the proposed application, should be more diligent and timely in raising concerns that could have been raised at a much earlier time. Such diligence and timeliness apply with equal, if not greater force, to the comments and concerns of government agencies.

The Petitioner contends that the Hearing Officer's reliance on ANR's testimony regarding forest block classification violates the principle of vested rights. The Petitioner maintains that ANR has asked the Commission to rule that highest-priority forest blocks are rare and irreplaceable natural areas. The Petitioner further contends that this classification is essentially a rulemaking that occurred after it submitted its application. Therefore, the Petitioner argues that it has a vested right in having its application judged without the classification system.

We find this argument unpersuasive. ANR's forest block classification was not presented as rules or regulations by ANR, nor did the Hearing Officer treat them as such. ANR presented evidence that the North Hill forest block constituted a rare and irreplaceable natural area based on the specific attributes of that site. The Hearing Officer found that the evidence presented by ANR was persuasive and relied upon that evidence to form his recommendation to the Commission. Therefore, the vested rights principle does not apply in this case. Moreover, the Petitioner offered little in the way of contrary evidence.

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25. Petitioner's comments on the PFD at 3.



The Petitioner contends that the PFD is based on a misunderstanding of the Project's primary coverage goal. The Petitioner argues that it has multiple primary coverage objectives for the Project, which include the replacement of existing 3G coverage in Waterbury and improving coverage along Route 100, and that both would be negatively affected by denial of the petition.

We conclude that the coverage goals for the Project are clearly identified in the PFD. The PFD recognizes that one of the goals of the Project is to improve coverage along the Route 100 corridor and portions of Waterbury.<sup>26</sup> The PFD also recognizes that relocation of the Project to the alternative site identified by ANR would allow the Project to cover almost all the areas in Waterbury currently served by the Petitioner's existing coverage in the area.<sup>27</sup>

The Petitioner argues that the decision to deny the petition as recommended in the PFD will have a detrimental effect on the public good. The Petitioner maintains that the PFD could be broadly construed to prohibit the construction of telecommunications facilities in high-priority forest blocks, thereby reducing the amount of coverage available in the state.

We find this argument unpersuasive. The Hearing Officer's recommendations are based on the facts presented in this case. As is clear in the PFD, the evidence in this case demonstrates that the North Hill forest block is a rare and irreplaceable natural area due to its particular and unique attributes. The evidence presented in this regard applies to this forest block only. ANR has not asked, nor has the Hearing Officer recommended, that development of telecommunications facilities be prohibited in all forest blocks in the state. In fact, ANR recommended that in this case the Project be relocated to an alternative site within the same forest block. In order to avoid any confusion on this issue, we clarify that the Hearing Officer's recommendations and our adoption of those recommendations should not be interpreted as a prohibition of development in high-priority forest blocks. The Commission will continue to judge each petition based on the evidence presented in that particular case.

The Petitioner also asserts that even if the Project has an undue adverse affect on the natural environment, and thus is unable to meet the requirements of § 248a(c)(1), if the Project

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26. Finding No. 7

27. Finding No. 57.

would “promote the general good” of the State as stated in § 248a(a), it should be approved.


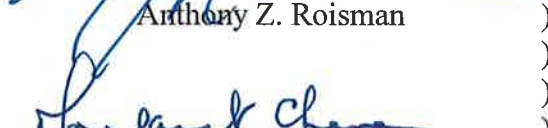
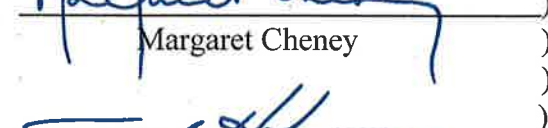
The Petitioner misreads the statutory language. First, § 248a(c)(1) provides that before the Commission can issue a CPG it “shall find” that the Project will “not have an undue adverse effect on . . . the natural environment . . .” There is no statutory authority for the Commission to ignore that mandate. Second, § 248a(a) states that the Commission “may grant [a CPG] if it finds that the project will promote the general good of the State . . .” That discretionary language neither requires issuance of a CPG if it will promote the general good, nor overrides the requirements of § 248a(c)(1), nor rejects the reasonable interpretation that a project that cannot meet the requirements of § 248a(c)(1) will, by definition, fail to promote the general good of the State.

#### **VI. ORDER**

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Utility Commission of the State of Vermont that:

1. The findings and recommendations of the Hearing Officer are adopted.
2. The Project will not promote the general good of the State of Vermont in accordance with 30 V.S.A. § 248a(a), and a certificate of public good to that effect shall not be issued in this matter.

Dated at Montpelier, Vermont, this 21st day September, 2017.

  
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 Anthony Z. Roisman )  
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 Margaret Cheney )  
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 Sarah Hofmann )

PUBLIC UTILITY  
COMMISSION  
OF VERMONT

OFFICE OF THE CLERK

FILED: September 21, 2017

ATTEST: Judith C. Whitney  
Clerk of the Commission

*NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)*

*Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Commission within thirty days. Appeal will not stay the effect of this Order, absent further order by this Commission or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Commission within ten days of the date of this decision and Order.*