

U.S. DISTRICT COURT
DISTRICT OF VERMONT
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UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

INDUSTRIAL TOWER AND
WIRELESS, LLC,

Plaintiff,

v.

ANTHONY Z. ROISMAN, MARGARET
CHENEY, AND RILEY ALLEN, as they
are members of the STATE OF
VERMONT PUBLIC UTILITY
COMMISSION,

Defendants.

Civil Action No. 2:23-cv-00045

COMPLAINT

Industrial Tower and Wireless, LLC (“Industrial”), by and through its counsel, MSK Attorneys, for its Complaint against the three members of the Vermont Public Utility Commission (“Defendants”), alleges as follows:

INTRODUCTION

1. Industrial brings this Complaint under Section 704 Telecommunications Act of 1996, as codified at 47 U.S.C. § 332(c)(7) (“TCA”), for an expedited hearing and relief, for a declaratory judgment, and for injunctive relief due to the “failure to act” by the members of the State of Vermont Public Utility Commission (“PUC”) within 150 days, or otherwise a reasonable period of time, on Industrial’s application to construct a personal wireless service facility, consisting of a 170-foot above ground level (“AGL”) telecommunications tower (“Tower”), an 80-foot by 80-foot fenced compound (“Compound”), and associated equipment used for the provision of Industrial’s personal wireless services.

2. The property on which these improvements will be located is an approximately 20-acre parcel owned by Stephen and Colleen Pietryka off of Toppin Road in the Town of Ira, Vermont (“Tower Site”). We refer to the entire proposed facility as the “Project” or the “Proposed Facility.”

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction pursuant to 47 U.S.C. § 332(c)(7)(B)(v) because Industrial has been adversely affected and aggrieved by Defendants’ failure timely to act on its application, and 28 U.S.C. § 1331, because this action presents a federal question that arises under the laws of the United States -- the TCA.

4. An expedited hearing is required pursuant to 47 U.S.C. § 332(c)(7)(B)(v).

5. Venue exists in this District pursuant to 28 U.S.C. § 1391(b)(1) because all Defendants reside in this District.

6. In addition, venue exists in this District pursuant to 28 U.S.C. § 1391(b)(2) because all of the events giving rise to Industrial’s claims against Defendants occurred within this District and because the property that is the subject of this action is situated in this District.

PARTIES

7. Industrial is a limited liability company duly organized and existing under the laws of the State of Delaware, with its principal office located at 40 Lone Street, Marshfield, Massachusetts 02050.

8. The PUC has a physical address of 112 State Street, Montpelier, Vermont 05620. Pursuant to *Ex parte Young*, 209 U.S. 123 (1908), the PUC itself cannot be a party to this action. However, its members can be and are named as such in this Complaint.

9. Defendant Anthony Z. Roisman is the Chair of the PUC and resides in the Town of Weathersfield, Vermont.

10. Defendant Margaret Cheney is a member of the PUC and resides in the Town of Norwich, Vermont.

11. Defendant Riley Allen is member of the PUC and resides in the Town of Montpelier, Vermont.

FACTS RELEVANT TO INDUSTRIAL'S CLAIMS

Industrial's Federally-Licensed Services

12. Industrial is a "Specialized Mobile Radio" licensee of the Federal Communications Commission ("FCC"), providing a variety of land mobile communications services throughout most of New England and part of Florida.

13. As a for-profit provider of interconnected services to the public, Industrial is a provider of "commercial mobile services" as defined in the TCA, 47 U.S.C. § 332(d)(1).

14. These services are "personal wireless services" for commercial and public entities for which Industrial has erected systems of communications towers and facilities in New England and Florida.

15. Industrial is therefore a personal wireless service provider under the TCA, 47 U.S.C. § 332(1), and a "company" as defined by 30 V.S.A. § 201, subject to the PUC's jurisdiction.

16. Industrial holds an FCC license with call sign WFRM297 for the provision of Specialized Mobile Radio ("SMR") services in the MTA001 – New York Submarket 4, which includes the Vermont counties of Addison, Bennington, Caledonia, Chittenden, Essex, Franklin, Grand Isle, Lamoille, Orange, Orleans, Rutland and Washington. *See* attached **Exhibit 1** (license) and **Exhibit 2** (list of included counties).

17. In addition, Industrial holds an FCC license with the call sign KNNX992 for the provision of SMR services in the MTA008, BTA227 – Keene, New Hampshire and BTA249 – Lebanon-Claremont, New Hampshire Submarkets, which include the Vermont counties of Windsor and Windham. *See* attached **Exhibit 3** (license) and **Exhibit 4** (list of included counties).

18. Industrial also constructs, owns and operates wireless service facilities, including communications towers, transmitters and antenna structures for other providers of personal wireless services, including personal communications service (“PCS”) and cellular service carriers.

19. These facilities are constructed with the intent to lease space to such providers as “co-location” sites to reduce tower proliferation and advance the provision of wireless services.

The Proposed Project

20. Industrial went through an extensive process to determine the most suitable location for the Tower Site. That process included steps to mitigate the impact of the Tower on the surrounding areas.

21. On June 27, 2022, Industrial submitted an application (“Application”) to the PUC for a Certificate of Public Good (“CPG”). Therein, Industrial described its project (the “Project”) as follows:

- a. ITW intends to construct a telecommunications facility on a portion of the approximately 20-acre parcel of land owned by Stephen and Colleen Pietryka off of Toppin Road in Ira, Vermont. ITW refers to the project as “Ira.” The property owner has given ITW permission to proceed with this Application. The coordinates for the Project are latitude 43°31’13.75” North and longitude 73°03’48.18” West. [See attached Permit Plans, attached **Exhibit 5**, for a visual depiction of the Project’s location.]
- b. ITW will create an 80’ x 80’ “Compound” enclosed by an 8’ high chain link fence, with a locked gate. Within the Compound, ITW will construct a 170’ above ground level (“AGL”) telecommunications self-supporting lattice tower (“Tower”).

- c. Six (6) thin “whip” antennas (“Antennas”) will be mounted at 170’ AGL on the Tower. Five (5) transmit Antennas will extend upward to a maximum height of 183.0’ AGL. The receive Antenna will reach downward from the 140’ AGL mounting level. Each Antenna will measure approximately 13’ long and 2.75” in diameter.
- d. Industrial will place an equipment cabinet (“Cabinet”) on a 10’ by 10’ concrete pad inside the Compound, to the northwest of the Tower. The Cabinet will contain the electronics equipment necessary for the operation of the Project.
- e. Co-axial cables from the Antennas will descend on the inside of the Tower. The cables will exit near the base of the Tower and will connect with the Cabinets via a proposed cable bridge.
- f. To provide access to the Compound, ITW proposes to utilize the existing drive and trail from Toppin Road to the Compound (“Access”). Access improvement include relocating and widening the existing access route and stabilizing the roadbed. The Access and utilities will run within a 25’ wide access and utility easement. Underground utilities will follow the Access from the closest existing utility connection point on Toppin Road to the Compound and will be placed in a trench adjacent to the Access.
- g. Approximate clearing limits are shown on the enclosed plans [Exhibit 5 hereto]. The contractor will limit clearing to the minimum required to construct the Access and Compound, which is estimated to be approximately 10,529 square feet. Culverts, check dams, water bars, and silt fencing will be placed along the Access and at the Compound as indicated on the enclosed plans to control erosion both during and after construction. Construction shall meet the requirements of the State of Vermont Low Risk Site Handbook for Erosion Prevention and Sediment Control. After the completion of construction, the amount of new impervious surface area will be approximately 15,728 square feet.

22. To show that it had explored the possibility of co-locating its facility on an existing telecommunications structure, Industrial included the following passage in its Application:

The Project cannot be located on or at an existing telecommunications facility. There are no such facilities within the area to be served by Industrial’s Ira site. In particular, the Route 133 corridor is a very difficult area to cover because it is a narrow, winding path that runs between mountainous terrain. That topography presents severe challenges with signal propagation. The propagation plots that Industrial has created for this site illustrate these difficulties. [See attached **Exhibit 6**]. Intervening terrain causes a sharp drop off in coverage to both the existing sites north

and south of the proposed Tower as depicted in coverage as illustrated in those plots. Moreover, the population density is quite low, so Industrial (and other carriers) seeks to provide coverage with the least number of facilities possible. The existing facilities both within the Town of Ira and the surrounding towns within a radius of ten (10) miles from the proposed site do not provide adequate coverage to the area being served by this project. The existing sites are simply too far away or not tall enough to provide the needed coverage (the closest existing site is 3.1 miles away in Middletown Springs, VT). *See* Existing Tower Analysis [attached **Exhibit 7**]. The Proposed Facility will be unmanned, will not generate wastewater, and will not involve on-site storage or disposal of toxic or hazardous waste.

23. Industrial's highly trained crews are the only persons who will be allowed to climb the Tower or work on equipment on the Tower.

24. Industrial has attempted to secure the commitment of other carriers to co-locate their equipment at the Tower Site.

25. All of the commercial carriers so approached have deferred their decision until Industrial obtains a CPG for the Project.

26. The Rutland Regional Ambulance Service has committed to co-locating its equipment at the Tower Site to improve the level of its communications in Rutland County. *See Exhibit 8* [Letter of James A. Finger, Chief Executive Administrator, dated September 27, 2022.] Industrial has agreed to allow this co-location with no rent to be charged.

27. The Proposed Facility will be visited by both Industrial personnel, carrier technicians and subcontractors as necessary for troubleshooting, security inspections, maintenance of the facility, equipment inspections and maintenance and repairs.

28. Industrial will monitor the Proposed Facility remotely 24 hours a day, 365 days per year.

29. There will be no water, sewer or septic service at the Proposed Facility. The only utilities will be for electric power, natural gas and fiber optic cable.

Proceedings before the PUC

30. On March 10, 2022, Industrial filed with the PUC the advance notice of its intention to file the Application.

31. As required by 30 V.S.A. § 248a(e), Industrial filed that notice (“60-day Notice”) at least 60 days before it filed its Application. *See* attached **Exhibit 9**.

32. Industrial also complied with § 248a(e)’s remaining provisions by serving the 60-day Notice on the entities and individuals required to receive that Notice.

33. On June 27, 2022, more than 60 days after the filing and service of the 60-day Notice, Industrial filed its Application – consisting of, *inter alia*, a Petition, Proposed Findings, Conclusions and CPG, Prefiled Testimony, Affidavits, Exhibits and various required Certifications – with the PUC. The entire Application (without the numerous Exhibits) is attached as **Exhibit 10**.

34. On June 28, 2022, the PUC issued a Memorandum stating its determination that Industrial’s Application was “administratively complete” and assigning it Case Number 22-2242-PET. *See* attached **Exhibit 11**.

35. As stated in the PUC’s June 28, 2022 Memorandum, all “interested parties” had until August 1, 2022 by which to file with the PUC their comments, motions to intervene and requests for hearing on the Application.

36. On July 26 2022, the Vermont Agency of Natural Resources (“ANR”) filed a Motion for Extension of Comment Period (“Motion”) seeking to extend the August 1st deadline

by two weeks to August 15, 2022. *See* attached **Exhibit 12**. Industrial assented to the ANR’s Motion. This action “paused” the 150-day “shot clock” (described in detail below) for 14 days.

37. On or before August 1, 2022, various individuals and entities submitted comments, motions to intervene (“Motions”) and requests for a hearing.

38. On August 2, 2022, Industrial filed a motion with the PUC requesting that the deadline for it to respond to various Motions and comments filed by would-be intervenors be extended to August 29, 2022. This action paused the 150-day shot clock for an additional 14 days.

39. On August 4, 2022, the PUC issued an Order granting ANR’s Motion and requiring that Industrial file a response to the Motions on or before August 29, 2022. *See* attached **Exhibit 13**.

40. On August 26, 2022 Industrial filed a Motion to Extend Response Deadline (“Motion to Extend”), seeking a new due date of September 9, 2022. *See* attached **Exhibit 14**. This action paused the shot clock for an additional 14 days.

41. On September 1, 2022, the PUC issued an Order granting Industrial’s Motion to Extend and set a deadline of September 9, 2022 for Industrial to respond to all Motions and comments. *See* attached **Exhibit 15**.

42. On September 8, 2022, Industrial filed a Second Motion to Extend Response Deadline (“Second Motion to Extend”), seeking a new due date of September 30, 2022. *See* attached **Exhibit 16**. This action paused the shot clock for 21 days.

43. On September 12, 2022, the PUC issued an Order granting Industrial’s Second Motion to Extend and setting a deadline of September 30, 2022 for Industrial to respond to all Motions and comments. *See* attached **Exhibit 17**.

44. On September 29, 2022, Industrial filed its Response to Motions for Permissive Intervention and its Consolidated Response to Public Comments and Comments Submitted by the Department of Public Service (“DPS”). *See* attached **Exhibit 18**.

45. On October 3, 2022, the PUC issued a Memorandum asking that the DPS file a Response to Industrial’s September 29, 2022 filing directed toward the DPS on or before October 21, 2022. *See* attached **Exhibit 19**.

46. On October 7, 2022, the would-be intervenors submitted a Motion for Hearing or Opportunity to Supplement the Evidentiary Record and Submit a Brief (“Motion for Hearing”). *See* attached **Exhibit 20**.

47. On October 11, 2022, the PUC issued a Memorandum asking that Industrial file a response to the Motion for Hearing on or before October 21, 2022. *See* attached **Exhibit 21**.

48. On October 14, 2022, the PUC issued a Procedural Order Granting Motions to Intervene and Requests for Hearing. In that Order, the PUC granted the would-be Intervenors’ Motions to Intervene, limited to the issues of aesthetic impacts and orderly development, but did not rule on their requests for the PUC to hold a hearing on Industrial’s application. *See* attached **Exhibit 22**.

49. On October 18, 2022, the DPS filed a Motion to Change Schedule requesting that the October 21, 2022 deadline contained in the PUC’s October 3, 2022 Order be extended to October 28, 2022. *See* attached **Exhibit 23**. Industrial assented to this Motion and asked that it receive the same extension for its response to the Intervenors’ Motion for Hearing. This action paused the shot clock for 7 days.

50. On October 21, 2022, the PUC issued an Order setting October 28, 2022 as the due date for the DPS to reply to Industrial's September 29 filings and as the due date for Industrial to file its response to Intervenors' Motion for Hearing. *See attached Exhibit 24.*

51. On October 27, 2022, Industrial filed its Opposition to Intervenors' Motion for Hearing. *See attached Exhibit 25.*

52. On October 28, 2022, the DPS filed its Reply Comments. *See attached Exhibit 26.*

53. On October 31, 2022, Industrial filed its Supplement to its Opposition to Intervenors' Motion for Hearing. *See attached Exhibit 27.*

54. On November 4, 2022, the PUC issued an Order re Motion to Extend Comment Deadline giving the DPS and the Intervenors until December 19, 2022 to make further filings on the question of whether a hearing should be convened on Industrial's application. *See attached Exhibit 28.*

55. On December 15, 2022, the DPS filed a Motion to Change Schedule to extend its filing deadline to December 23, 2022. *See attached Exhibit 29.* Industrial assented to that Motion. That action paused the shot clock for four days.

56. On December 23, 2022, the DPS filed an Aesthetics Analysis compiled by EDR Consulting ("Aesthetics Analysis") and accompanying documents. *See attached Exhibit 30.* On the same day, the Intervenors filed a Brief. *See attached Exhibit 31.*

57. On December 27, 2022, the PUC filed a Memorandum asking that Industrial file a response to the DPS's Aesthetics Analysis and accompanying documents on or before January 16, 2023. *See attached Exhibit 32.*

58. On January 13, 2023, Industrial filed its Response to the Comments filed on December 23, 2022 by the DPS and the Intervenors. *See attached Exhibit 33.*

TCA “Shot Clock” Violation

59. Pursuant to 47 U.S.C. § 332(c)(7)(B)(ii), a state or local government must act on a wireless siting application “within a reasonable period of time after the request is duly filed.”

60. In November 2009 the FCC, relying on its statutory authority to implement the TCA, issued a declaratory ruling (the so-called “Shot Clock Ruling”) holding that there is a rebuttable presumption that “a reasonable period of time” to act under § 332(c)(7)(B)(ii) for a new tower site is 90 days for collocation of antennas on existing structures and 150 days for all other applications. *See In re Petition for Declaratory Ruling*, 24 FCC Rcd. 13994, 14001, ¶¶ 32, 49 (FCC Nov. 18, 2009), *aff’d*, *City of Arlington, Tex. v. FCC*, 668 F.3d 229 (5th Cir. 2012), *aff’d*, 569 U.S. 290 (2013).

61. As shown above, on June 27, 2022, Industrial filed its complete Application for a new tower with the PUC.

62. Under the FCC’s Shot Clock Ruling, the reasonable period of time may be extended beyond the 150-day period by mutual consent. *See In re Petition for Declaratory Ruling*, 24 FCC Rcd. 13994, 14001, ¶ 49 (FCC Nov. 18, 2009).

63. Due to the actions described above, the 150-day Shot Clock applicable to Industrial’s application to the PUC was paused a total of 74 days.

64. With those pauses, the Shot Clock expired on February 6, 2023.

65. Therefore, the PUC was required to issue a decision on the merits on Industrial’s Application on or before February 6, 2023. The PUC failed to do so.

COUNT

**VIOLATION OF TCA - FAILURE TO ACT - UNREASONABLE DELAY
(VIOLATION OF FCC SHOT-CLOCK ORDER)**

66. Industrial repeats and re-alleges all of the above paragraphs.

67. The Shot Clock Ruling creates a presumption that a state or local government that fails to act on a zoning application within the applicable 90- or 150-day time frame has failed to act within a reasonable period of time as required under the TCA.

68. The FCC recognized that there are certain circumstances under which the Shot Clock's time periods could be tolled or extended: (1) by mutual consent, of the applicant and the local government; or (2) if a provider's application is incomplete.

69. If an application is incomplete, then the time it takes for the provider to respond to a request for additional information will not count toward the 90- or 150-day time frame, but only if the state or local government notifies the applicant, within 30 days of receiving the application, that the application is incomplete.

70. Industrial filed its Application with the PUC on June 27, 2022. The PUC deemed that Application complete on June 28, 2022.

71. Industrial agreed to extend the time for a decision by the PUC for an aggregate period of 74 days – consisting of extensions of 14 days (three times), 21 days (once), seven days (once) and four days (once).

72. Industrial, the DPS, and the Intervenors have filed extensive comments, motions and other information regarding the Application.

73. The 150-day time period under the Shot Clock Ruling by which the PUC was required to act on Industrial's Application, as extended, expired on or about February 6, 2023.

74. To date, the PUC has not decided whether it will hold a hearing on Industrial's Application, nor has it approved or denied that Application, nor issued a dispositive written decision or otherwise acted on the merits of the Application.

75. The PUC violated the Shot Clock Ruling and the provisions of § 332(c)(7)(B)(ii) by failing to act within a reasonable time period on Industrial's Application.

76. This action is brought pursuant to § 332(c)(7)(B)(v) within 30 days following expiration of the 150-day period for the PUC to act on Industrial's Application under the Shot Clock Ruling.

PRAYER FOR RELIEF

WHEREFORE, Industrial requests respectfully that this Honorable Court issue the following relief:


1. Enter judgment for Industrial that the PUC failed to act on Industrial's Application within a reasonable period of time under the TCA, resulting in a TCA violation; and ordering that the PUC issue the Certificate of Public Good to Industrial to construct and operate the Proposed Facility per the Application;
2. Order that the PUC, and all employees, officials, representatives, and agents thereof, are enjoined from denying any further permits and approvals necessary to construct the Proposed Facility and/or from otherwise interfering with the development of the Proposed Facility;
3. Grant temporary, preliminary, and permanent injunctive relief, ordering that Industrial is immediately permitted to construct and operate the Proposed Facility in accordance with its Application, including issuance of the necessary CPG; and
4. Award Industrial such other and further relief as this Court may deem just and proper.

Dated: March 6, 2023
Burlington, Vermont

Respectfully submitted,

MSK ATTORNEYS

By: _____


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