

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

INDUSTRIAL TOWER AND)	
WIRELESS, LLC,)	
)		
<i>Plaintiff,</i>		
)		
)		
v.)
		Civil Action No. 2:24-cv-1426
EDWARD McNAMARA, MARGARET)
CHENEY, and RILEY ALLEN, as they)
are members of the STATE OF)
VERMONT PUBLIC UTILITY)
COMMISSION,)
)		
<i>Defendants.</i>		
)
)

COMPLAINT

Industrial Tower and Wireless, LLC (“Industrial” or “ITW”), 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. ITW 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 ITW’s application to construct a personal wireless service facility, consisting of a 140’ above ground level (“AGL”) telecommunications self-supporting lattice tower (“Tower”), a 50’ x 50’ fenced Compound (“Compound”) enclosed by an 8’ high chain link fence, with a locked gate.

2. The property on which these improvements will be located is an approximately 59.38-acre parcel owned by Peter Hyslop on 160 Frog Hollow Lane in the Town of Westmore, Vermont (“Tower Site”). ITW refers to the entire proposed facility as the “Project” or the “Proposed Facility.”

3. Failing to act within the applicable 150-day “shot clock” creates a presumption that the PUC failed to act within a reasonable period of time, resulting in an effective prohibition of the provision of wireless services under 47 U.S.C. § 332(c)(7)(B)(i)(II).

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction pursuant to 47 U.S.C. § 332(c)(7)(B)(v) because Counts I and II, below, allege ITW has been adversely affected and aggrieved by Defendants’ failure timely to act on its application, resulting in an effective prohibition of the provision of wireless services under 47 U.S.C. § 332(c)(7)(B)(i)(II), and 28 U.S.C. § 1331, because this action presents a federal question that arises under the laws of the United States -- the TCA.

5. In addition, this Court has subject matter jurisdiction under 28 U.S.C. § 2201 because Count III, below, seeks a declaratory judgment that the PUC’s “Standards and Procedures Implementing 30 V.S.A. § 248a” (effective Jan. 18, 2023) violates federal law and is preempted by federal law on the question of how much time the PUC is allowed to render a final determination on the merits of an application to construct a personal wireless service facility.

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

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

8. In addition, venue exists in this District pursuant to 28 U.S.C. § 1391(b)(2) because all of the events giving rise to ITW'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

9. ITW 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.

10. 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 the three Defendants in this Complaint.

11. Defendant Edward McNamara is the Chair of the PUC and, on information and belief, resides in the City of Montpelier, Vermont.

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

13. Defendant Riley Allen is member of the PUC and resides in the City of Montpelier, Vermont.

FACTS RELEVANT TO ITW'S CLAIMS

ITW's Federally-Licensed Services

14. ITW 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.

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

16. These services are “personal wireless services” for commercial and public entities for which ITW has erected systems of communications towers and facilities in New England and Florida.

17. ITW 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.

18. ITW holds an FCC license with the 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.

19. In addition, ITW 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.

20. ITW 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.

21. 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

22. ITW has recently begun to build out its Enhanced Specialized Mobile Radio (“ESMR”) 900 MHz system in Vermont. ITW has received Certificates of Public Good

(“CPGs”) from the PUC for facilities in Chester, Fairfax, Eden, and Ira, Vermont, and ITW is actively seeking permitting for a site in Enosburg, Vermont.

23. ITW seeks to permit and construct the Tower on the Tower Site.

24. The Project’s objective is to fill significant gaps in coverage along State Routes 5A, 5B and 16 in the Westmore area (the “Coverage Gap”) and to interconnect the proposed Tower with two previously approved ITW sites to the south, located in Fairfax and Eden, Vermont, respectively. The ultimate goal of this network of tower sites is to provide reliable wide-area ESMR services to the northern part of Vermont and, ultimately, statewide coverage by connecting existing ITW sites that already serve Massachusetts and New Hampshire.

25. ITW went through an extensive process to assess the Radio Frequency (“RF”) characteristics of the Coverage Gap, and to identify existing tower sites that might be available to ITW upon which to co-locate. Using RF propagation software, ITW was able to examine service areas and path performance using propagation models that consider key variables such as distance, terrain variation, vegetation, transmitter / receiver characteristics and the wavelength of RF transmissions.

26. After assessing numerous sites, ITW is able to locate a tower site with RF characteristics capable of substantially filling the relevant coverage gap that is compatible with its existing locations, available for lease/purchase, and is buildable, considering wetlands, access, topography and other construction related issues. That process also includes steps to mitigate the impact of the relevant tower on the surrounding areas in terms of height, and location. This process allowed ITW to locate the Tower Site.

27. On June 6, 2024, ITW submitted an application (“Application”) to the PUC for a Certificate of Public Good (“CPG”). Therein, ITW described the Project as follows:

ITW intends to construct a telecommunications facility on a portion of the approximately 59.38-acre parcel of land owned by Peter Hyslop on 160 Frog Hollow Lane in Westmore, Vermont. ITW refers to the project as "Westmore." The property owners have given ITW permission to proceed with this Application. The coordinates for the Project are latitude 44° 46'30.60" North and longitude 72° 05'14.29" West.

ITW will create an 50' x 50' "Compound" enclosed by an 8' high chain link fence, with a locked gate. Within the Compound, ITW will construct a 140' above ground level ("AGL") telecommunications self-supporting lattice tower ("Tower").

Six (6) thin "whip" antennas ("Antennas") will be mounted at 140' AGL on the Tower. Five (5) transmit Antennas will extend upward to a maximum height of 153.0' 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. Full and accurate specifications for the Antennas are attached as Exhibit KD-2.

ITW 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.

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.

Approximate clearing limits are shown on the enclosed plans. The contractor will limit clearing to the minimum required to construct the Access and Compound, which is estimated to be approximately 12,635 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 4,334 square feet.

Application ¶¶ 2-7.

28. To show that it had explored the possibility of co-locating its facility on an existing telecommunications structure, ITW 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 ITW's Westmore site. In particular, the Route 5A corridor is a very difficult area to cover because it is a narrow, winding road that runs between mountainous terrain. That topography presents severe challenges with signal propagation. The propagation plots that Kevin Delaney created for this site illustrate these difficulties. See Exhibit KD-1. In particular, intervening terrain causes a sharp drop off in coverage as illustrated in those plots. Moreover, the population density is quite low so ITW (and other carriers) seeks to provide coverage with the least number of facilities possible. The existing facilities both within the Town of [Westmore] 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. Although research of the areas confirmed that there are ten (10) existing towers within a ten (10) mile radius of the proposed site, the propagation maps show that these existing sites do not provide coverage to the identified gap. The existing towers are simply too far away, not tall enough, or do not have space available to provide the needed coverage (the closest existing site is 2 miles away). See Existing Tower Analysis (Exhibit KD-3); Delaney pf. at 3-4.

Application ¶ 14.

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

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

31. All of the commercial carriers so approached have deferred their decision until ITW obtains a CPG for the Project, as is typical and common trade practice in the telecommunications industry.

32. In a February 20, 2024 letter, Glover Emergency Medical Services committed to place its antenna at the 140-foot level of the Tower at the Tower Site to improve the level of its

communications in Orleans County. ITW has agreed to allow this co-location with no rent to be charged.

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

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

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

Proceedings before the PUC

36. On December 15, 2023, ITW filed with the PUC the advance notice of its intention to file the Application.

37. As required by 30 V.S.A. § 248a(e), ITW filed that notice (“60-day Notice”) at least 60 days before it filed its Application.

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

39. On June 6, 2024, more than 60 days after the filing and service of the 60-day Notice, ITW 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.

40. On June 11, 2024, the PUC issued a Memorandum stating its determination that ITW’s Application was “administratively complete” and assigning it Case Number 24-1755-PET.

41. As stated in the PUC’s June 11, 2024 Memorandum, all “interested parties” had until July 9, 2024 by which to file with the PUC their comments, motions to intervene and requests for hearing on the Application.

42. On or before July 9, 2024, various individuals and entities submitted comments, motions to intervene (“Motions”) and requests for a hearing.

43. On July 29, 2024, ITW filed a letter motion with the PUC requesting that the deadline for ITW’s response to the Motions and comments be extended to August 30, 2024 due to the illness of ITW’s then-attorney.

44. On August 5, 2024, the PUC issued an Order granting ITW’s July 29th letter motion and setting an August 30, 2024 deadline for ITW to respond to all Motions and comments.

45. On August 29, 2024, ITW filed its consolidated response to public comments and motions for intervention.

46. On August 30, 2024, David Anderson filed a Motion to Intervene.

47. On September 3, 2024, the PUC issued a Memorandum requesting ITW and any other parties file a response to David Anderson’s Motion to Intervene on or before September 13, 2024.

48. On September 10, 2024, the PUC issued a Procedural Order re the Motions to Intervene and Requests for Hearing. Ronald and Kathy Holmes’ Motion was denied. All other Motions were granted in part with respect to the Project’s aesthetic impact and with respect to Project’s compliance with the municipal plan. The Motions were denied in part to the extent that the Project would impact the Intervenors’ property rights or property values. The Motions were also denied in part to the extent that the Project would impact the local economy, historic sites,

natural environment, public health and safety, primary agricultural soils, and greenhouse gas impacts.

49. The PUC’s September 10th Procedural Order directed in part that “the Intervenors should coordinate their activities through a single representative for the remainder of this proceeding.”

50. On September 11, 2024, intervenor, Megan Patten, submitted a Response in Support of David Anderson’s Motion to Intervene.

51. On September 13, 2024, the Vermont Department of Public Service (“DPS”) filed its Response to David Anderson’s Motion to Intervene.

52. Also on September 13, 2024, intervenors Robert Fitzpatrick, Donna Dzugas, Elizabeth Tucker and Andrew Zebrowski individually filed a Response to David Anderson’s Motion to Intervene.

53. Also on September 13, 2024, then non-intervenors Ronald and Kathy Holmes filed their Response to David Anderson’s Motion to Intervene.

54. Additionally, on September 13, 2024, ITW filed its Consolidated Response to Department of Public Service Comments and David Anderson’s Motion to Intervene.

55. Finally, on September 13, 2024, then non-intervenors Ronald and Kathy Holmes also filed a Motion for Reconsideration of the PUC’s September 10, 2024 denial of their Motion to Intervene.

56. On September 26, 2024, David Anderson filed a response to Ronald and Kathy Holmes’ Motion for Reconsideration.

57. On September 27, 2024, ITW filed a response to Ronald and Kathy Holmes’ Motion for Reconsideration.

58. On October 2, 2024, the PUC issued a Procedural Order Denying David Anderson's Motion to Intervene.

59. Also on October 2, 2024, the PUC issued a procedural Order granting Ronald and Kathy Holmes' Motion for Reconsideration of Procedural Order re Motions to Intervene and Requests for Hearing.

60. On November 5, 2024, the PUC issued a Notice of Hearing announcing a November 21, 2024 scheduling conference.

61. The November 5th Notice of Hearing directed the parties to try to work together to come up with a joint proposed schedule.

62. On November 7, 2024, ITW's counsel emailed the other parties in an attempt to jumpstart discussions on a proposed schedule. Therein, counsel noted in part as follows:

[P]lease note that ITW's position is that, under the federal shot clock, the last day for the PUC to issue a merits decision is Monday, December 9, 2024. As such, ITW seeks a merits hearing sufficiently in advance of December 9th such that the PUC can issue a merits decision by that date.

63. On November 15, 2024, Intervenor Donna Dzugas responded to ITW's counsel's November 7th email. Therein, Ms. Dzugas announced that she would serve as the Intervenors' representative.

64. Also in her November 15th email, Ms. Dzugas proposed a schedule that included a PUC merits hearing during the week of February 10, 2025.

65. On November 18, 2024, ITW's counsel responded to Ms. Dzugas's November 15th email. Therein, counsel wrote in part as follows:

As I noted in my November 7th email (below), under the federal shot clock, the last day for the PUC to issue a merits decision is Monday, December 9, 2024. As such, ITW is seeking a merits

hearing sufficiently in advance of December 9th such that the PUC can issue a merits decision by that date.

If you are willing to stipulate to a shot clock extension from December 9, 2024 to **January 17, 2025**, we can work on a proposed schedule that calls for the PUC to issue a merits decision by January 17th.

66. ITW's counsel did not receive a response to his November 18th email.

67. Later on November 18, 2024, ITW filed a Proposed Schedule with the PUC containing the following scheduling proposal, which ITW explained was "intended as a stipulated modification of the Shot Clock and not a waiver of the Shot Clock or ITW's rights thereunder":

Discovery Served on Petitioner	November 22, 2024
Petitioner Responses to Discovery	December 6, 2024
Non-Petitioner Prefiled Testimony	December 9, 2024
Discovery Served on Non-Petitioner Prefiled Testimony	December 13, 2024
Non-Petitioner Discovery Responses	December 27, 2024
Evidentiary Hearing	Week of January 6-10, 2025
PUC to issue merits decision on ITW's Petition	On or before January 17, 2025

68. The PUC scheduling conference took place on November 21, 2024 via GoTo Meeting web conferencing.

69. During the November 21st scheduling conference, ITW reiterated that the PUC must hold a merits hearing in time to allow the PUC to render its decision on the merits as required by the TCA's timing requirements as interpreted by subsequent FCC Orders. ITW offered to stipulate to a Shot Clock extension to January 17, 2025. However, PUC hearing officer

Gregg Faber declined to comply with the Shot Clock deadline of December 3 or 9, 2024, and would not agree to an extension of the Shot Clock to January 17, 2025.

70. Mr. Faber stated that “the [federal] shot clock does not apply here.”

71. During the November 21st scheduling conference, Mr. Faber directed counsel for the DPS to circulate a proposed schedule among the parties “that’s more feasible for this case” and to file the proposed schedule by December 6, 2024.

72. In addition, Mr. Faber directed the DPS to include additional time in the schedule for retention by the DPS of an aesthetics consultant, despite the lack of any request for same by the DPS.

73. On December 6, 2024, the DPS filed a “Proposed Schedule” that suggested two rounds of discovery on ITW as well as PUC merits hearing date during the final week of April, 2025:

Event	Date
Non-Petitioners File Discovery on ITW	Friday, January 10, 2025
Petitioner Files Responses to First Round Discovery	Friday, January 31, 2025
Non-Petitioners File Second Round Discovery on ITW	Friday, February 7, 2025
ITW files Discovery Second Round Discovery Responses	Friday, February 21, 2025
Non-Petitioners File Direct Testimony	Friday, March 7, 2025
Discovery Filed on Non-Petitioners	Friday, March 21, 2025
Non-Petitioners File Discovery Responses	Friday, April 4, 2025
Rebuttal Testimony	Friday, April 18, 2025
Evidentiary Hearing	(TBD) Week of April 28, 2025

74. In its December 6, 2024 “Proposed Schedule,” the DPS noted ITW’s objections as follows:

The Petitioner responded that it objects to the Department’s proposed schedule on the grounds that “it violates the federal shot clock,” that the Department hiring an aesthetics expert at this time exacerbates the shot clock violation, and that the second round of discovery on Petitioner is not necessary. The Department has

retained the second round of discovery at the request of the intervenors.

75. On December 16, 2024, PUC Hearing Officer Faber issued an “Order re Schedule” adopting the DPS’s December 6th Proposed Schedule.

76. In the December 16th PUC “Order re Schedule,” Mr. Faber ordered that “I find proposed schedule submitted by the [DPS] reasonable and, therefore, I adopt the schedule below”:

Deadline for first round of discovery to be served on Petitioner	January 10, 2025
Petitioner response to first round of discovery due	January 31, 2025
Deadline for second round of discovery to be served on Petitioner	February 7, 2025
Petitioner response to second round of discovery due	February 21, 2025
Deadline for filing non-Petitioners testimony	March 7, 2025
Deadline for discovery on non-Petitioners	March 21, 20245 [sic]

Deadline for non-Petitioners response to discovery	April 4, 2025
Rebuttal testimony	April 18, 2025
Evidentiary Hearing	April 30, 2025

TCA “Shot Clock” Violation

77. 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.”

78. 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).

79. As stated above, on June 6, 2024, ITW filed its complete Application for a new tower with the PUC. The PUC deemed that Application complete on June 11, 2024.

80. 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).

81. The 150-day Shot Clock applicable to ITW's Application was extended for a total of 30 days, following the PUC's August 5, 2024 granting of ITW's July 29, 2024 letter request -- due to the illness of ITW's then-counsel -- for an extension to August 30, 2024 to respond to the Motions and comments.

82. With that extension, the Shot Clock expired on December 3 or 9, 2024 (depending on whether the Shot Clock begins to run when the Application was first submitted (June 6, 2024) or when the PUC deemed the Application complete (June 11, 2024)).

83. Therefore, the PUC was required to issue a decision on the merits on ITW's Application on or before December 3 or 9, 2024.

84. ITW is adversely affected and aggrieved by the PUC's failure to issue a decision on the merits of its Application on or before December 3 or 9, 2024 because ITW is a personal wireless service provider, because ITW constructs, owns and operates personal wireless service facilities used by other personal wireless service providers, and because the PUC's failure to act within reasonable time has the effect of prohibiting both ITW from obtaining coverage for the Coverage Gap for its own ESMR system, and for the four nationwide personal wireless service providers, T-Mobile, Verizon, AT&T, and Dish Wireless (the "National Carriers").

85. The PUC's failure to act within the applicable 150-day Shot Clock creates a presumption that the PUC failed to act within a reasonable period of time, resulting in an effective prohibition of the provision of wireless services under 47 U.S.C. § 332(c)(7)(B)(i)(II).

COUNT I

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

86. ITW repeats and re-alleges all of the above paragraphs.

87. 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.

88. 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.

89. 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.

90. ITW filed its Application with the PUC on June 6, 2024. The PUC deemed that Application complete on June 11, 2024.

91. ITW agreed to extend the time for a decision by the PUC for a period of 30 days.

92. ITW, the DPS, and the Intervenors have filed extensive comments, motions and other information regarding the Application. The PUC has been well-aware of the substantive

bases for the Application since June 11, 2024, and for the Intervenors' objections since July 9, 2024.

93. The 150-day period under the Shot Clock Ruling by which the PUC was required to act on ITW's Application, as extended, expired on December 3 or 9, 2024.

94. The PUC did not hold a scheduling conference until November 21, 2024.

95. The "Order re Schedule" that the PUC issued on December 16, 2024 sets a hearing date of April 30, 2025, rendering it unlikely that the PUC would issue a final decision until June 2025 or later, and more than a year after ITW filed the Application.

96. Thus, as of the December 17, 2024 filing of this Complaint, the PUC has not substantively considered, approved, denied, or otherwise acted upon the Application in a dispositive written decision.

97. 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 ITW's Application. The PUC did not timely set a scheduling conference, has not timely set a hearing date, has expressly repudiated the applicability of the Shot Clock Ruling and has failed to comply with even the requirements to issue a final determination within 180 days of a complete filing pursuant to 30 V.S.A. § 248a(f) (which ITW challenges in Count III, below).

98. 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 ITW's Application under the Shot Clock Ruling.

COUNT II

VIOLATION OF TCA: EFFECTIVE PROHIBITION OF PERSONAL WIRELESS SERVICES OFFERED BY ITW AND NATIONAL CARRIERS

99. ITW repeats and re-alleges all of the above paragraphs.

100. The TCA provides in relevant part that “[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . shall not prohibit or have the effect of prohibiting the provision of personal wireless services.” 47 U.S.C. § 332 (c)(7)(B)(i)(II).

101. The PUC’s failure to act within the applicable 150-day Shot Clock effectively prohibits the provision of personal wireless services in violation of the TCA because the 140-foot Tower on the Project Site is the only feasible location and Tower height to fill the Coverage Gap for ITW and the National Carriers.

102. The PUC’s conduct in failing to act within the applicable 150-day Shot Clock demonstrates a hostility toward the TCA and the provision of personal wireless services in the Coverage Gap.

103. The substantial delays in adjudicating the Application, and the prospect of waiting a year or more for a final decision has the effect of prohibiting the provision of personal wireless services.

104. As a result, ITW has suffered and continues to suffer irreparable harm by being denied the ability to construct and operate a telecommunications facility at the Project Site to fill the Coverage Gap.

105. This Court should declare that the PUC’s failure to act within the applicable 150-day Shot Clock violates the effective prohibition provision of 47 U.S.C. § 332(c)(7)(B)(i).

COUNT III

DECLARATORY JUDGMENT THAT THE PUC'S "STANDARDS AND PROCEDURES IMPLEMENTING 30 V.S.A. § 248a" (EFFECTIVE JAN. 18, 2023), ON ITS FACE AND AS APPLIED IN THIS CASE, VIOLATES FEDERAL LAW AND IS PREEMPTED BY FEDERAL LAW

106. ITW repeats and re-alleges all of the above paragraphs.

107. The PUC's "Standards and Procedures Implementing 30 V.S.A. § 248a"

(effective Jan. 18, 2023), provides as follows in Section VIII entitled, "Issuance of Decision":

A. For de minimis modifications: If no objections to the classification of the project are timely filed with the Commission, the Commission shall issue a CPG without further proceedings.

B. For projects of limited size and scope: Unless the Commission determines that an application raises a substantial issue, it shall issue a final determination on an application within 60 days of the date on which the Commission notifies the applicant that the filing is complete. If the Commission determines that an application raises a substantial issue, it shall issue a final determination on an application filed pursuant to this section within 90 days of the date on which the Commission notifies the applicant that the filing is complete.

C. For all other projects: Unless the Commission determines that an application raises a significant issue, it shall issue a final determination on an application within 60 days of the date on which the Commission notifies the applicant that the filing is complete. **If the Commission rules that an application raises a significant issue, it shall issue a final determination on the application within 180 days of the date on which the Commission notifies the applicant that the filing is complete.**

Id. at § VIII, pp. 10-11, https://puc.vermont.gov/sites/psbnew/files/doc_library/22-5122-inv-248a-standards-procedures-eff-01-18-23.pdf (last visited Dec. 17, 2024) (bold emphasis added).

108. The PUC's "Standards and Procedures Implementing 30 V.S.A. § 248a" (effective Jan. 18, 2023), on its face and as applied in this case, violates federal law and is

preempted by federal law because it purports to allow the PUC to render a final determination on the merits of an application to construct a personal wireless service facility within 180 days.

109. Therefore, pursuant to 28 U.S.C. § 2201, ITW seeks a declaratory judgment that the PUC’s “Standards and Procedures Implementing 30 V.S.A. § 248a” (effective Jan. 18, 2023), on its face and as applied to ITW’s Application, violates the Shot Clock Ruling, and is preempted by that Ruling and the TCA.

PRAYER FOR RELIEF

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

A. On Counts I and II, enter judgment for ITW that the PUC failed to act on ITW’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 ITW to construct and operate the Proposed Facility per the Application;

B. On Counts I and II, 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;

C. On Counts I and II, grant temporary, preliminary, and permanent injunctive relief, ordering that ITW is immediately permitted to construct and operate the Proposed Facility in accordance with its Application, including issuance of the necessary CPG;

D. On Count III, issue a declaratory judgment that the PUC’s “Standards and Procedures Implementing 30 V.S.A. § 248a” (effective Jan. 18, 2023), on its face and as applied in this case, violates federal law and is preempted by federal law because it purports to allow the

PUC to render a final determination on the merits of an application to construct a personal wireless service facility within 180 days; and

E. Award ITW such other and further relief as this Court may deem just and proper.

Dated: December 17, 2024
Burlington, Vermont

Respectfully submitted,

MSK ATTORNEYS

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