

In re. Application of Industrial Tower and Wireless, LLC for a Certificate of Public Good, pursuant to 30 V.S.A. § 248a, authorizing the construction of a wireless telecommunications facility in Tinmouth, Vermont, Case No. 25-1679-PET

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Case No. 25-1679-PET

Application of	)
Industrial Tower and Wireless, LLC	)
for a Certificate of Public Good,	)
pursuant to 30 V.S.A. § 248a, authorizing	)
the construction of a wireless telecommunications	)
facility in Tinmouth, Vermont.	)

**OBJECTION AND RESPONSE IN OPPOSITION TO HEARING OFFICER’S
PROPOSAL FOR DECISION AND REQUEST FOR ORAL ARGUMENT**

NOW COMES Industrial Tower and Wireless, the Petitioner in this docket (“ITW” or “Petitioner”), by and through its counsel MSK Attorneys, and hereby files this Objection and Response in Opposition to a Proposal for Decision dated September 29, 2025 (the “Proposal for Decision”). Further, with this filing ITW **requests oral argument.**

Table of Contents

1. Introduction and Request for Oral Argument (Pages 3-5)
2. Argument
 - I. The Vermont Administrative Procedures Act Requires a Hearing (Pages 5-7)
 - II. The Relevant Procedural Rules and Standards do Not Have a Deadline for Responses to Comments or Recommendations (Pages 7-11)
 - i. The Standards and Procedures for Implementing 248a do not provide for a Response to Comments or Recommendations (Pages 7-9)
 - ii. The Rules of Procedure do Not Provide a Deadline (or Process) for Responding to Comments or Recommendations (Pages 9-11)
 - III. ITW Already Addressed the Town’s Comments with its Application (Pages 11-12)
 - IV. The Proposal for Decision improperly converts a “Rebuttable Presumption” into Evidence (Pages 12-14)
 - V. The Proposal for Decision is Factually and Legally Incorrect; there is Evidence Supporting Good Cause in the Record. (Pages 14-22)
 - i. There is no District in Tinmouth More Amendable to Telecommunications Towers; the Project is Consistent with the Stated Purposes of the District (Pages 14-19)
 - ii. The Town Plan Does Not State any Relevant Area is a Scenic Resource (Page 20)
 - iii. A 130 foot Tower Does Not Serve the Coverage Objectives (Pages 20-22)
 - VI. Co-Location Cannot Be Achieved (Pages 22-23)
3. Request for Relief (Page 24)

INTRODUCTION

The Proposal for Decision deprives ITW of due process of law. For all contested cases like this docket, the Vermont Administrative Procedures Act requires a hearing. 3 V.S.A. §809(a). Oral argument is not a hearing. Nor is the public comment period. Depriving ITW of a hearing and substituting public comment for the hearing process mandated by law as the Proposal for Decision does violates due process and the Vermont Administrative Procedures Act.

The Proposal for Decision also applies invented and arbitrary process and procedure. There is no rule, deadline, nor process contemplated in this Commission's rules for a petitioner or applicant to respond to comments or the recommendation of a Town. Inventing a deadline to do so is arbitrary and a violation of due process and the Vermont Administrative Procedures Act as well. It is also inconsistent with recent practice of the Commission in other like cases. In recent matters, this Commission has not imposed a 14-day time period to respond to public comments or the recommendation of the Town with a risk of judgment attached thereto. To do so now runs afoul of the obligation to treat like cases alike. *See In re. Stowe Cady Hill Solar, LLC*, 2018 VT 3 ¶21, 206 Vt 430, 182 A.3d 53 ("A fundamental norm of administrative procedure requires an agency to treat like cases alike.").

To the extent that any comments or recommendations *could* be relied on as actionable requests to the Commission, the Proposal for Decision improperly converts the Town's comments and Motion to Intervene¹ into a dispositive summary judgment motion. The comment period set forth in the rules is designed to identify whether there is a "significant issue." It cannot be substituted for a hearing on the merits as the comment period does not come with any of the

¹ Which by its title seeks one thing only – intervention – and not judgment.

protections afforded by a hearing or even a Rule 2.219 Summary Judgment Motion process. The Summary Judgment process alone requires filing statements of fact, backed up by sworn affidavits and affords a 30-day response time. The Proposal for Decision circumvents those standards and creates a new summary and dispositive practice without the technical requirements of Rule 2.219 and with a 14-day response period without notice. This is violative of this Commission's Rules, Vermont law, and is patently unreasonable. If this Commission believes that applicants *must* respond to public comments and a Town's recommendation within 14 days of submission or face a decision adopting the non-evidentiary comments, then it must make such a rule.

Aside from the problematic procedure underlying the Proposal for Decision, the Proposal for Decision is wrong on the facts and law. For example, the Proposal for Decision adopts the Town's argument that there is some other zoning district is more amenable to a communications tower and thus good cause exists to follow the recommendation of the Town. This is not true.

As explained in ITW's pre-filed testimony, this project is located in the Conservation Zoning District. Within that district, communications towers are allowed as a conditional use. There are only four zoning districts in Tinmouth. They are Rural Residential, Conservation, Lakeshore and Protection. There are three overlay districts: Agricultural, Flood Hazard, and Ridgeline Protection. Telecommunication towers are conditionally allowed in Rural Residential, Conservation and the Ridgeline overlay. *See* Tinmouth Zoning Bylaws at Table of Uses, p.12. Thus, it is false to assert that there is another district in Tinmouth that as a matter of law is more appropriate for telecommunications towers. In all places where they are allowed under the Town's Zoning Bylaws, they are allowed as conditional uses subject to the same standards as the

proposed Project. Any further analysis is a question of disputed fact that is not appropriate for a decision on the papers.

The Proposal for Decision converts the Town's recommendation into a de-facto veto. It accepts as true any allegation of the Town, whether it be backed up by evidence or not. The Proposal for Decision does not acknowledge any dispute of material fact present in the record – namely the substantial application, pre-filed testimony, and exhibits. By adopting the Town's recommendation without any hearing process and without any legal analysis, the Proposal for Decision converts these state-level proceedings into a municipal zoning permit hearing. That is not the law, and the Proposal for Decision should be set aside.

For these reasons and those set forth below, the Proposal for Decision must be set aside, and this Commission set the matter for a hearing on the merits and grant Oral Argument.

ARGUMENT

I. The Vermont Administrative Procedures Act Requires a Hearing

The right of Petitioner to locate communications tower is to be decided by this administrative body and is opposed by the Town. This docket is therefore a “proceeding” and a “contested case.” *See e.g.* Vermont Public Utility Commission Rules of Procedure Generally Applicable, Rule 2.00 *et seq.* (“the Rules”) at Rule 2.102(B);(H). As such, this proceeding is governed by the Vermont Administrative Procedures Act (“the Act”). Under 3 V.S.A. §809(a), in a contested case, *all parties*, shall be given an opportunity for a hearing after notice. Further, under the Act, all parties must be given notice and an opportunity to respond to evidence. 3. V.S.A. §809(c).

As a party to a contested case, ITW is entitled by due process and the Act to a hearing and reasonable time to respond to evidence. An unstated timeline to respond to comments is not

a hearing. Oral argument is not a “hearing” either as it is not evidentiary as contemplated by the Act. Thus, by reaching a decision without an evidentiary hearing in a contested case, the Proposal for Decision violates the Act and ITW’s right to have a hearing and present countervailing evidence and testimony. Under the APA, there is no provision to waive a right to a hearing nor a provision whereby an affected party needs to demand a hearing. It is a right afforded to a party. Thus, the Proposal for Decision cannot stand as a matter of law.

Further as explained below, there is no rule stating that a Town’s comments and recommendations need to be responded to in 14 days (or at all). In other similar cases, assigning a 14-day response period to comments was not the Commission and Hearing Officer’s practice. For example, in *In re. Petition of Bell Atlantic Mobile Systems, LLC and Vertex Towers, LLC requesting a certificate of public good, pursuant to 30 V.S.A. § 248a, authorizing the installation of wireless telecommunications equipment at 410 Hunter Park Road in Manchester, Vermont*, No. 24-3345 PET the Town filed comments opposing a proposed tower. Instead of accepting the Town of Manchester’s assertions verbatim without notice, the Hearing Officer issued a notice asking that petitioner respond to the comments by a time a date certain and then opened a hearing on the matter. A similar process was followed in *In re. Limited Size and Scope Application of Bell Atlantic Mobile Systems, LLC d/b/a Verizon Wireless and The Towers, LLC d/b/a Vertical Bridge, for a Certificate of Public Good, pursuant to 30 V.S.A. § 248a, authorizing the construction of a telecommunications facility in Marshfield, Vermont*, No. 25-1543-PET where the Hearing Officer granted intervention and set the matter for on course for a hearing as opposed to summarily issuing judgment.²

² See also *In re. Petition of VTel Wireless, Inc for a certificate of public good pursuant to 30 V.S.A. §248a, for the installation of telecommunications equipment in Rochester, Vermont*, Docket No. 8548, Order dated December 14,

By not following any rule of procedure, and not following prior practice, the Proposal for Decision appears to arbitrarily invent a new standard. That too is a violation of the Act. *In re MVP Health Ins. Co.*, 2016 VT 111, ¶ 20, 203 Vt. 274, 155 A.3d 1207 (“[a]dministrative “decisions arrived at without reference to any standards or principles are arbitrary and capricious; such ad-hoc decision-making denies an applicant due process of law”). Lastly, by treating ITW’s case procedurally differently than other similarly situated cases, the Proposal for Decision violates this Commission’s obligation to “treat like cases alike.” *In re. Stowe Cady Hill Solar, LLC*, 2018 VT 3 ¶21, 206 Vt 430, 182 A.3d 53.

To satisfy due process and the Vermont Administrative Procedures Act, the Proposal for Decision needs to be set assigned and the case set for a hearing.

II. The Relevant Procedural Rules and Standards do Not Have a Deadline for Responses to Comments or Recommendations.

This Commission has promulgated two relevant procedural standards. First are the Standards and Procedures Implementing 30 V.S.A. §248a (“the Standards and Procedures”). Second are the Rules of Procedure, Rule 2.000 *et seq.* Generally Applicable to Proceedings Before the Commission (the “Rules”). Neither provides for any deadline to respond to comments or the recommendation of a Town. The Proposal for Decision invents procedure without notice and therefore must be set-aside.

1) The Standards and Procedures for Implementing 248a do not provide for a Response to Comments or Recommendations.

2015 (wherein the Town filed comments and recommendations adverse to the project on April 26, 2015, the PUC issued a memorandum on May 1, 2015 asking that the applicant provide a response to the comments, and the applicant responded on June 3, 2015).

The Standards and Procedures provide for a 30-day comment period after a complete petition is filed. Standards and Procedures at VII. The Standards and Procedures also allow that within the 30-day period a party may file a Motion to Intervene. *Id.* By statute, a town wherein a facility is sited is a party by right and any intervention must be granted. 30 V.S.A. §248a(m). A Motion to Intervene and “comments,” including a “municipal recommendation” are different filings. Each term, “Motion,” “comments” and “municipal recommendation” are used separately in Vermont Statute and in the Standards and Procedures, along with the Rules, thus indicating that they are not the same. Reading them as the same document would run afoul of standard canons of construction. *See In re Mountain Top Inn & Resort*, 2020 VT 57, ¶ 37, 212 Vt. —, 238 A.3d 637 (“Words used are to be given their meanings and each accorded meaning so as to not render any superfluous.”)

Moreover, under general legal principles, each is different. A motion is a formal filing that seeks specific relief and comes with certain filing requirements. By its name, a motion to intervene, which is all the Town filed, only asks that a party be allowed to participate. It does not seek more – i.e. judgment as the Proposal for Decision appears to conclude. Conversely, comments and a municipal recommendation are not motions. In fact, as discussed below, they are not evidence. Rather they are locative to shift the burden of proof at a hearing to the Petitioner. To treat the two filings – recommendations and motions - as equitable violates the Rules and general legal principles.

As to comments and the recommendation of the Town, the Standards and Procedures have *no* process or deadline for responding to comments and recommendations. All the Standards and Procedures state is that upon receipt of an application and comments, the Commission shall determine whether there is a “significant issue.” Standards and Procedures at

VII. The Standards and Procedures say nothing about how, or when, an applicant responds to comments. Nor whether an applicant even *can* respond to comments before the Commission decides if there is a “significant issue.” Despite that, the Proposal for Decision takes the position that not only *must* an applicant respond to comments, but that there is a) an unstated timeline to do so, and b) that the decision *not* to respond to comments, before the Commission even decides if there is a significant issue can, or will result in an adverse decision. That is not in accord with the Standards and Procedures, is a significant departure from standard procedure, prejudicial and legally incorrect. The Proposal for Decision must be therefore set aside.

ITW also notes that there was never even a determination of a “significant issue.” The Proposal for Decision may imply there is a “significant issue”, but it is not a determination identifying what is the significant issue or providing an opportunity to try said issue. The Proposal for Decision ultimately skips over the entire contested case process set out in the Standards and Procedures.

2) The Rules of Procedure do Not Provide a Deadline (or Process) for Responding to Comments or Recommendations.

The Rules also apply as this docket is “proceeding” under the Rules. See Rule 2.102(H) defining “Proceeding;” Rule 2.105. The Rules do not contain any deadline or process for responding to comments and/or a municipal recommendation. All the Rules contain in Rule 2.206 is the standard motion practice procedure adopted from the Vermont Rules of Civil Procedure setting forth a 14-day response, and 14-day reply period for all written motions other than Summary Judgment motions. As the recommendation of a Town is not a motion, this provision does not apply.

Though, assuming *in arguendo* a town's recommendations and/or comments could be considered a "motion" (despite any lack of support for that conclusion in the Rules) such a filing could only be considered a Motion for Summary Judgment as it seeks disposition and judgment in the town's favor based on the "record." Under Rule 2.219, Motions for Summary Judgment need to be filed with certain supporting documentation, including citations to record evidence, and critically are afforded a **30-day** response period. The Proposal for Decision both improperly converts comments and recommendations into a dispositive motion *and* then assigns a 14-day response period in violation of Rule 2.219's 30-day response period. It must be set aside.

In that vein, to the extent that the Proposal for Decision finds facts in deciding the matter on the papers, that too is improper. The record currently contains just one set of sworn documents – ITW's affidavits and pre-filed testimony. Within that ITW asserts that a) there is no ability to co-locate, b) that it cannot accommodate its coverage objectives with a 130-foot tower as allowed by the Tinmouth Zoning Regulations and c) there is no other property available to it to locate this Tower. The Town's recommendations disagree with these assertions, though provides no substantive evidence supporting its disagreements. It does not provide any other property that is available, does not provide a coverage analysis of a 130-foot tower, and does not provide any basis to establish co-location can be achieved. At best, all the Town's filing does is create a dispute of material fact which under Rule 2.219 cannot be resolved in a summary manner "on the papers." The Proposal for Decision wrongly ignores the dispute of material fact standard.

Lastly, to the extent that the Town moved to intervene, and ITW did not file a response to the Town's request to intervene, that does not, and cannot, result in a waiver of ITW's rights to a hearing under the law, or a concession of its positions. ITW need not respond to a town's motion

to intervene and frankly should *not* respond to a town's motion to intervene because such an opposition would be futile.

The Town of Tinmouth has a statutory right to intervene. 30 V.S.A. §248a(m). It's intervention should be granted as a matter of course. Objecting to Tinmouth's intervention would violate the Rules' which mirror Rule 11 of the Vermont Rules of Civil Procedure's requirements that filings not be futile and wasteful. Honoring its obligations to limit filings and not unreasonably burden the Commission and parties with excessive filings cannot serve as a waiver of ITW's prima facie case that it is entitled to a Certificate of Public Good. ITW's filings certainly provide facts that support this prima facie position, are on record, and cannot be ignored as the Proposal for Decision does.

The Proposal for Decision must be set aside as it follows no adopted rule or procedure and the matter set for a hearing as contemplated by the Standards and Procedures, Rules, and prior practice of the Commission.

III. ITW Already Addressed the Town's Comments with its Application.

The Proposal for Decision ignores the record. In its application, the Applicant addressed all the concerns expressed by the Town in its comments. Before the formal application was filed, the Town submitted comments in opposition to the Project. *See* Town Comments filed June 26, 2025 in 25-0316-AN. These comments articulated that the proposed project did not conform to the Town's Zoning Bylaws. The Town highlighted that the proposed height exceeded that "allowed" by the Bylaws and the Town raised a concern about the scenic "impacts."

With its Application, ITW addressed *every* single provision of the Bylaws and the Town's comments. ITW articulated that it met *every* single provision of the Bylaws but two – the height and setback. *See* Application at pages 14-30. This full analysis is on the record and

incorporated herein by reference. It represents a complete and comprehensive argument in opposition to the Town's comments. For example, on page 10 of the Applicant's 32-page Application, the Applicant addressed the Town of Tinmouth's comments that raise concern over "scenic viewshed" impacts. ITW explained with reference to visual exhibits how the lattice tower was reduced to the lowest possible height to meet the coverage objectives, designed to let light pass through and blend into the backdropping hillside and avoid any location within the protected open fields.

The Proposal for Decision ignores this record evidence and seems to invent a procedure whereby ITW would need to copy and paste these 15 pages, its supporting pre-filed testimony, and supporting exhibits, into another submission just to re-assert it disagrees with the Town and wants approval. That is not reasonable, rational or in compliance with the Rule 2.219's summary standards.

IV. The Proposal for Decision improperly converts a "Rebuttable Presumption" into Evidence.

Pursuant to 30 V.S.A. § 248a(c)(2), before the Commission issues a certificate of public good under this section, it shall find that:

[u]nless there is good cause to find otherwise, substantial deference has been given to the plans of the affected municipalities; to the recommendations of the municipal legislative bodies and the municipal planning commissions regarding the municipal plans; and to the recommendations of the regional planning commission concerning the regional plan.

"Substantial deference" means that the plans and recommendations referenced under subdivision (c)(2) of this section are presumed correct, valid, and reasonable. Section 248a(b)(3) defines "good cause" as a "showing of evidence that the substantial deference required under subdivision (c)(2) of this section would create a substantial shortcoming detrimental to the public good or the

State's interests in section 202c of this title.” Importantly, and omitted from the Proposal for Decision is the principal that the presumption afforded is not *dispositive*. Rather it is what is known as a rebuttable presumption. By statute, any correspondence by a municipality regarding compliance, or non-compliance as it may be, with the applicable plan merely creates a “rebuttable” presumption. *See* 248a(c)(2).

A civil rebuttable presumption places the burden of going forward with the evidence on the party against whom it operates. *Rocque v. Co-operative Fire Ins. Ass'n of Vt.*, 140 Vt. 321, 325–26, 438 A.2d 383, 386 (1981). A rebuttable presumption is *not evidence* nor probative. *State v. Giard*, 2005 VT 43, ¶ 9, 178 Vt. 544, 546, 871 A.2d 976, 978–79 (2005). It is locative and merely shifts the burden to another party at trial. *citing Chittenden v. Waterbury Ctr. Cmty. Church, Inc.*, 168 Vt. 478, 492, 726 A.2d 20, 29 (1998) (*quoting Tyrrell v. Prudential Ins. Co. of Am.*, 109 Vt. 6, 23, 192 A. 184, 192 (1937)).

To rebut a presumption does not mean overcoming it. Rather all a party needs to do is produce evidence that fairly and reasonably tending to show the fact is not as presumed. *Id. citing Tyrrell*, 109 Vt. at 23. A presumption disappears as soon as the low threshold evidence to support a reason to rebut the presumption is proffered. *Lawson v. Halpern-Reiss*, 2019 VT 38, ¶ 36. The matter is then tried. As applied under Title 30, this Commission has followed the law and held that rebuttable presumptions do not serve as evidence. *See e.g. Application of Seneca Mountain Wind, LLC, for Auth., Pursuant to 30 V.S.A. Ss 246 & 248, to Install Four Temp. Meteorological Stations, Two in the Town of Brighton, Vermont & One Each in the Towns of Ferdinand & Newark, Vermont.*, No. 7867 (July 30, 2012)(“In Section 246 cases, the rebuttable presumption is an evidentiary burden-shifting device that does not apply to the Board's initial

determination whether a significant issue with regard to aesthetics has been raised in an application or by the comments filed in response to an application.”)³

The Proposal for Decision does not follow the law. Aside from being deprived of the right and opportunity to make a complete “showing of evidence” the Proposal for Decision converts a “rebuttable presumption” into evidence; it takes the Town’s recommendation as evidence which is not what the law states it is. By creating a “rebuttable presumption” Section 248a merely makes the recommendations of Tinmouth a locative burden shifting document that shifts the burden at a hearing to ITW to prove good cause exists. It cannot legally serve as evidence supporting a decision. The Proposal for Decision must therefore be set aside.

The Proposal for Decision also ignores that there is record evidence, including the application, pre-filed testimony and exhibits, which rebut the presumption. Section V of this response highlights the record evidence which would rebut the presumption.

V. The Proposal for Decision is Factually and Legally Incorrect; there is Evidence Supporting Good Cause in the Record.

- 1) There is no District in Tinmouth More Amendable to Telecommunication Towers; the Project Is Consistent with the Stated Purposes of the District.

The Proposal for Decision states that “the Town contends that because the Project would be located in the Conservation District it will not comply with the requirement to preserve the scenic and natural characteristics of that district.” Proposal for Decision at p. 5. This statement is then the basis for a determination that the proposed project does not comply with Section 248a(C)(2). The Proposal for Decision is based on assertions by the Town that there exists some

³ While this is a Section 246 case, both §246 and §248a use the term “rebuttable presumption” and the analysis as to the legal and evidentiary value of a “rebuttable presumption” remains the same under §246 and §248a.

other zoning district more appropriate for communications towers and that the subject district, the conservation district, is created to prevent commercial development. These are not factually accurate arguments.

The Town of Tinmouth Zoning Bylaws (a complete copy of which was filed as Exhibit LH-7) creates four base zoning districts: Rural Residential, Conservation, Lakeshore and Protection. There are three overlay districts: Agricultural, Flood Hazard, and Ridgeline Protection. Telecommunication towers are conditionally allowed in Rural Residential, Conservation and the Ridgeline overlay. *See* Tinmouth Zoning Bylaws, Table of Uses, p.12. No district allows towers as a permitted use. The Conservation district allows towers as a conditional use. *Id.*

It is false to assert that there is another district in Tinmouth that as a matter of law is more appropriate for telecommunications towers. In all places where they are allowed under the Town's Zoning Regulations, they are allowed as conditional uses subject to the same standards as the proposed Project. If the goal of the state is provide universal communications coverage, then one of these districts must host a tower. Each district is equally qualified as a matter of law and therefore adopting the Town's position does substantial harm to State policy.

Further, it is not accurate to hold the Project is inconsistent with Conservation district purpose. The purpose of the Conservation district is:

"To preserve the physical, natural, and scenic characteristics of lands in the district; to ensure the maintenance of existing contiguous forest wildlife habitat and viability of working lands associated with a sustainable forest products economy. To promote low-intensity development on the edge of open fields or forested land to avoid loss of either resource. Zoning Bylaw at p. 6. [emphasis added]."

As asserted in the pre-filed testimony of Louis Hodgetts this project is just that: ITW's project would be low intensity as it is an unmanned facility that would be visited on a limited basis. Hodgetts pre-filed at p. 7, 12. There is no proposal for water or sewer infrastructure. The Project has been sited on the edge of forested land on the boundary with an existing gravel quarry, which in itself is a far more intense development activity than what is proposed here. Hodgetts pre-filed at p. 13. It is not in the center of a forest block or prime agricultural land and not in any wetland or wetland buffer. Hodgetts pre-filed at p. 12. It is sited outside of any sensitive wildlife habitat and away from critical resource areas. Hodgetts pre-filed at p. 8-9.

In making its recommendations, the Town omitted, as did the Hearing Officer, the bolded provisions of the Bylaws. Both just relied on the first clause of the purposes section, ignoring the remaining clauses. The Proposal for Decision and Town therefore are legally inaccurate in concluding this district's purpose is land preservation. It is not. It is a mixed purpose.

Further, the supposition that any other district's purpose is more amenable to telecommunications towers is false. The Town prohibits permanent structures in the Protection district. *See* Town Plan at p. 48. Thus, it is clearly not suitable. The Lakeshore district also essentially bans development. Its purpose is to "protect Chipman Lake (Tinmouth Pond) from excessive density and from uses which would cause excessive pollution, erosion or invasive plants, prohibit public access, or significantly reduce its scenic qualities." *Id.* at Zoning Bylaws at p. 7. Thus, no tower could go in that district.

That leaves the Rural Residential district as the only other district. Its purpose is much the same as the Conservation district. It provides that its purpose is to:

"[P]reserve a traditional rural development pattern, conserving and maintaining historic sites and structures, when possible, while accommodating the demand for new rural housing with minimal economic and environmental impacts.

Development shall be located on sites which preserve open space, forested areas, and natural resource areas.”

Zoning Bylaws at p. 6. This purpose is effectively the same as the Conservation district as concerns open space preservation and aesthetics. Thus, if a tower does not meet the Conservation district’s purposes, it wouldn’t meet the Rural Residential’s purposes. That would leave *no* zoning district in Tinmouth for communication towers and invariably the Town’s recommendation would be the same in every district – no tower. This logic and holding results in a prohibition of towers in Tinmouth. That is against State policy and would cause substantial harm to the State’s interest. Therefore, there must be good cause to not adhere to the Town’s recommendations and reading of the Bylaws.

In addition, Proposal for Decision erroneously asserts that the “Project is inconsistent with the goal of requiring preservation of scenic and natural characteristics in that district” (PFD at p. 4). The Conservation district isn’t a scenic resource and it isn’t marked as a scenic resource. Rather the scenic resource discussed in the Zoning Bylaws are open fields and ridgelines. *See* Bylaws at p. 72-73. The project is in neither an open field nor a ridgeline.

Any review of the pre-filed testimony and maps provided in the application, along with a review of the topography of Tinmouth also illustrates that there is *no* way to fill the coverage gap located in the center of Tinmouth without having some visual impact. Tinmouth is a small town. The central valley of Tinmouth is roughly 2.5 miles wide. This valley has an existing coverage gap as it is sunken down between two 1600-2000ft ridgelines running north-south on either side. From the ridgelines the valley generally slopes down towards the center of Town. The center of town is effectively a bowl.

As stated in the pre-filed testimony of Mr. Delaney, no coverage exists at the at center of this bowl. The proposed tower seeks to address that gap. Given the topography there is *no* way to cover this gap at the center Tinmouth without locating a tower within that bowl. The proposed location is the best location within the center of Tinmouth because it is one of the very few that is not an open field, not an extensive tract of forest, has buildable land outside of any wetland, is already impacted by commercial development and has existing road access (Hodgetts pre-filed at p. 4-10). Certainly, the Town would *not* support a tower located on a ridgeline, nor would it support a tower located on one of the fields along East Road and Route 140 (see fields - views #1-3; 5 in Hodgetts Exhibit LH-6). Thus, the only reasonable way to fill the coverage gap is to build a tower where it is proposed. Substantial harm would come to state policy if a town were simply given the veto power to say a tower is objectionable when there is no other place to build a tower.

As this Commission is also aware, communications towers are a line-of-sight technology (for the most part). The Town's position doesn't reflect the reality that to fill this coverage gap, any tower must extend above the tree line and be of suitable height to reach the edges of the bowl. Even a 130-foot tower (which is not adequate) would extend significantly above the 59 ft+/- tree line. Moreover, a 160-foot and 130-foot tower are indistinguishable from a distance and both would have much the same "visual" effect. The Town's position appears to be that any visual impact is unacceptable – however that is not the law, nor reasonably should be the law.

As Mr. Delaney explained, ITW ran the analysis for a 130-foot tower (per the Zoning Bylaws) and the coverage from a tower of that height was substantially limited and left significant coverage gaps. Application at p. 24; Delaney pre-filed at p. 8. A tower that didn't extend above the tree line such that it had no visual impact would not provide any meaningful

coverage. Thus, following the Town's assertion which appears to be that any impact is unacceptable essentially prohibits coverage in central Tinmouth. *See* Pre-filed testimony of Kevin Delaney at p. 3-5. Good cause therefore exists to not follow the Town's recommendation and comments. It does substantial harm to the state's policy as to coverage.

Further, the Proposal for Decision appears to essentially boil these proceedings down to a municipal zoning process regulated by Title 24 and the Zoning Bylaws. As this Commission has articulated, Zoning ordinances are preempted. *Petition of Vtel Wireless, Inc., for A Certificate of Pub. Good, Pursuant to 30 V.S.A. S 248a, for the Installation of Telecommunications Equip. in Ludlow, Vermont.*, No. 8352, 2014 WL 6713556, at *6 (Nov. 24, 2014)(Finding Good Cause to not follow Ludlow's recommendations for denial which were based on a zoning regulation that banned towers in the subject district and stating that "the zoning ordinance is statutorily preempted.") The Commission explained that:

While a zoning ordinance may form the basis of a recommendation with regard to a proposed facility, compliance with the ordinance is not dispositive in these cases. If the Board were to deny an application solely on the basis of its lack of compliance with a town's zoning ordinance, it would mean that zoning was controlling in these cases. This would clearly be at odds with the statutory preemption of zoning and the legislative intent of § 248a, which provides for a state-level review of these projects rather than a local review. *Id.*

While that decision was reached under an older version of Title 248a, the statute still contains the preemption that the Commission relied on and the point expressed remains true. These state level proceedings are not a zoning proceeding. The Town does not, and cannot, simply exercise veto power over a proposed tower by asserting non-compliance with its zoning regulations. The Proposal for Decision, however, takes that exact approach. The Proposal for Decision converts a town's recommendation into the ancient *Pollice verso* – the turned thumb of the emperor signaling the fate of a gladiator.

2) The Town Plan Does Not State any Relevant Area is a Scenic Resource

The Town's assertion that the Project would harm a designated scenic resource in the Town Plan is not true. In the Town's recommendation suggests that the project parcel is within a protected scenic resource. The Proposal for Decision appears to rely on this statement by the Town. This is not what the Town Plan states. It provides that:

Of particular scenic concern listed under unsuitable areas, page 17, are the open lands at the entrances to the town: lands bordering Vt. Rte. 140 between the Wallingford town line and Ballou's swamp and lands at the junction of Rte. 140 and Rte. 133. Also lands at the junction of Rte. 140 and Gulf Road and **open fields visible** from the intersection of Vt. 140 and East Road, the agricultural heart of the Tinmouth Valley.

Town Plan at p. 72 [emphasis added].

Read in total, the Town Plan refers to the open fields visible from this intersection and not the project parcel. The Plan's objective is to preserve the views of the fields, not from the fields (a) and not of the backdropping hillside (b). While the Tower will be visible from the fields, the project site is over half a mile away and the site is not located within an open field. Even then, as the Photo-Simulations demonstrate, the visibility will be limited along the majority of East Road. See Exhibit LH-5 at p. 3-8. Moreover, any tower serving the coverage gap which exists over Tinmouth must be visible from these fields and intersection. There is no way for a mostly line-of-sight based communication system to serve the state and public roads of Rte. 140 and Rte. 33 and *not* be visible from the intersection of Rtes. 140 and 33.

3) A 130 Foot Tower Does not Serve the Coverage Objectives

The Applicant stated in its pre-filed testimony that it cannot meet the coverage objectives through the installation of a 130-foot tower as "allowed" by the Zoning Regulations. The

Applicant provided in its Application (pp. 23-24) the following response to the Town's comments regarding height.

4. Height. In addition to other standards herein, no tower or structure shall exceed 130 feet in height. No tower or structure may be higher than 10 feet above the average height of buildings within 300 feet of the proposed facility. The Facility will not project more than 20 feet above the average elevation of the tree line measured within 50 feet of the highest vertical element of the Wireless Telecommunication Facility on lands owned or leased by the applicant.

The Project cannot strictly comply with this provision. ITW has good cause to exceed a 130' arbitrary limit. According to testimony from ITW's RF Engineer, for the Tower to meet ITW's coverage goals for the surrounding valley, the antennas must be placed at the proposed height. Delaney pf. at p 8. In other words, the Tower's current height is the minimum viable height. The Project would not meet its coverage objectives with a 130' peak height. Id. At that height extensive coverage gaps would exist. Id. This would require additional towers – the very thing Tinmouth would not desire. Further, in the event a carrier other than ITW wanted to use this tower, a tower of 117 (130' – 13ft antennas) would prevent such collocation. Id. This runs counter to the State and Tinmouth's expressed desires for collocation. Here, given that the coverage objectives of ITW and the State cannot be met with a 130' tower, nor would collocation be feasible at that height, good cause exists to deviate from the height set forth in the Regulations.

The Town's comments, and the Proposal for Decision, appear to believe otherwise but provide no substantive evidence to support the position. This Commission cannot simply accept arbitrary heights in town zoning regulations as the Proposal for Decision appears to do. That would result in violating the statutory pre-emption of zoning regulations.

Moreover, there is no evidence to support the Proposal for Decisions' conclusion – to the extent it is embedded therein – that the State's telecommunication's goals would be met with a 130-foot tower. Since documents creating a rebuttable presumption are not evidentiary, this is a significant defect in the Proposal for Decision as the record shows that the State's coverage goals cannot be met from a shorter tower.

Fundamentally, the Proposal for Decision places undue evidentiary weight on the unfounded assertions by the Town that the Project fails to comply based on location and height and mutates these PUC proceedings in a Town zoning proceeding. The Petitioner provided ample evidence in the Petition, pre-filed testimony, and exhibits to support its position and establish good cause to overcome the Town's recommendations. At the very least the Petitioner's filings created a dispute of fact and contested case under the Act requiring a hearing. The "evidence" presented by the Town cannot not be deemed conclusive as the Petitioner was not provided the opportunity to present evidence at a hearing, and the evidence in the pre-filed testimony of the Petitioner should not have been summarily ignored in violation of due process.

VI. Co-Location Cannot Be Achieved.

The Proposal for Decision improperly concludes that the Department of Public Service's filing, which made no actual recommendation (it stated in plain terms it couldn't make a recommendation) was a summary filing seeking denial. Rather, as stated in the Department's filing, the Department sought additional information on co-location. Without even being afforded reasonable time to marshal the required materials, the Proposal for Decision reached a conclusion as to co-location. That is improper as there is no timeline to respond to a request for information by the Department within the Rules and Standards and Procedures. To create a deadline is arbitrary.

The Petitioner *also notes* that the alternative site maps the Department sought were provided in the Petitioner's application materials as part of the Existing Tower Analysis filed as KD-3. Thus, the Department's requested propagation plots from the sites noted, are already on record on ePUC. To supplement the explanation included in the Pre-filed testimony of Kevin

Delaney and on Exhibit KD-3, the petitioner provides the following with respect to Site 1 and Site 2 identified on KD-3:

Site 1 (Middletown Springs) is a 100' AGL monopine-style tower. Adding 13' omni antennas to the tower would compromise the camouflage obligated by the CPG. There is no feasible way to conceal 13' omni antennas within the existing or any new branches that would constitute an extension. If ITW were to extend the tower, it would require a 40' extension, but again, could not camouflage the antennas. Again, running afoul of the existing CPG obligations. Furthermore, as shown on KD-4, this site cannot not provide coverage to the area that is the subject of the current proposal. It leaves significant coverage gap in Tinmouth, between Middletown Springs and Wallingford north to West Rutland and south to Danby, the exact area served by the proposed project.

Site 2 (Wallingford) is an 85' monopine-style tower with 2 carriers currently co-located on it. It suffers the same challenges as Middletown Springs in that a 40' extension would required over and above the existing carriers. As it exists, even were co-location possible, this site is too low to provide coverage to the center of Tinmouth that is the subject of the current proposal.

Thus, the Applicant can show, and has shown, the co-location is not feasible to satisfy the coverage objectives. Of note, no party asserts that there is not a coverage gap, and that this project would not fill that gap. Rather the Department's sole concern was whether it had enough evidence to determine whether co-location was possible. The record supports the Petitioner's conclusion that co-location cannot be accomplished. The Proposal for Decision is wrong to hold otherwise and causes substantial harm to the State's interests. The State's interest is not met by

blindly following assertions by a Town. Rather it is to provide universal telecommunications coverage.

WHEREFORE the Applicant requests that the Proposal for Decision be set aside, the matter be set for a hearing, and that the Applicant be provided an opportunity for oral argument on these points and its application before any further decision be reached. The Proposal for Decision violates the Vermont Administrative Procedures Act, is arbitrary in that it makes up rules that do not exist and is factually and legally inaccurate.

Dated in Burlington, Vermont this 13th day of October, 2025

MSK ATTORNEYS

By: /s/ Alexander LaRosa
Alexander LaRosa, Esq.
W. Cooper Hayes, Esq.
MSK Attorneys
275 College Street
Burlington, VT 05401
(802) 861-7000

Attorneys for Applicant Industrial Tower and Wireless