

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	
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TOWN OF TINMOUTH’S RESPONSE TO PETITIONER’S OCTOBER 13, 2025 FILING

On October 13, 2025, Petitioner filed a document into the above-captioned docket it styled, “Objection and Response in Opposition to Hearing Officer’s Proposal for Decision and Request for Oral Argument.” Among a myriad of arguments, Petitioner challenged (1) the basis of the Hearing Officer’s Proposal on Vermont Administrative Procedure Act (VAPA) and constitutional grounds, (2) challenged the Proposal’s substance, particularly with respect to the Town of Tinmouth’s recommendation, and (3) requested oral argument. The only problem? The filing was untimely.

The Town disputes Petitioner’s arguments on each basis Petitioner offers. However, because Petitioner’s filing is untimely and is not actually a *motion* per se, but legal argument untethered from the procedural posture, Petitioner’s arguments on the merits are moot. Therefore, the Town submits this memorandum for the limited purpose of opposing Petitioner’s request for the Commission to consider the filing at all for its substantive argument. Notwithstanding the scope of this memorandum, the Town otherwise expressly opposes each of Petitioner’s arguments, and hereby expressly reserves its right to respond accordingly if and when required.

I. NO HEARING REQUIRED

The VAPA does not require a “hearing” in this case.¹ Though Petitioner is correct that the VAPA requires a hearing in contested cases, this case is not contested because it failed to respond to the Town’s recommendation and DPS’s comments not only within fourteen days, as it was required to do, but within thirty days, which is the only other applicable waypoint for responding to a filing before the Commission. Commission Rule 2.219. Moreover, it is not clear that Petitioner is entitled to an evidentiary hearing in this posture given the Commission’s legislative function in § 248a. See *supra* Note 1.

But more importantly, the Commission need not decide whether the VAPA requires a hearing at all because Petitioner did not comply with the Commission’s rules of procedure.² It responded neither to the Town’s intervention and recommendation nor the Department of Public Service’s (DPS) comments, which, it should not be overlooked, declined to take a position *because Petitioner did not include enough information*. Even if no response was due within fourteen days to each of these submissions, which it was, Petitioner did not file anything until

¹ Petitioner contends the Hearing Officer “made up” rules in proposing to deny Petitioner a certificate of public good. That contention is hyperbole. If a party fails to participate in an action as prescribed by the procedural rules, it forfeits its right to continue. See, e.g., Vermont Rule of Civil Procedure 41(b)(2).

Moreover, it is not clear that a VAPA hearing applies to a “legislative, policy-making process” such as evaluating a CPG. See In re Derby GLC Solar, LLC, 2019, ¶ 18 (quotation omitted). It is a general principle of administrative law that no hearing is required where an administrative entity is performing a legislative function. See Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441 (1915). The § 248a process invites public comment and intervention—hallmarks of a legislative process. An evidentiary hearing is simply not required as the statute and the Commission’s own rules demonstrate.

² If the VAPA required a hearing in every contested case, the Commission’s Rules would mean nothing. An applicant, a municipality, the DPS, and interested parties must participate in the process under well-defined rules. If they do not, they do not get to participate. Petitioner’s logic essentially means that it gets to have a hearing even though it missed every conceivable deadline to respond to a Town’s recommendation and the DPS’s filing requesting more information in order to make a decision. Such logic is absurd and is not what the VAPA intended. See 30 V.S.A. § 248a(f) (providing short timeline for review periods); see also *id.* § 248a(l) (giving the Commission authority to “issue rules” implementing 248a); see also Rhodes v. Town of Georgia, 166 Vt. 153, 157 (1997) (explaining that “statutes should not be construed to produce absurd or illogical consequences”).

more than a month later, on October 13, 2025, the deadline for responding to the Hearing Officer's Proposal for Decision. This decision by Petitioner meant that it did not respond to the Town or DPS for more than thirty days, without seeking to enlarge the time to respond.

The Town notes that thirty days is the time to respond to a dispositive motion, such as a motion for summary judgment, about which Petitioner does a lot of hand waving.³ Put simply, Petitioner waived its opportunity for a hearing because it did not participate at all in these proceedings and its dilatory October 13, 2025 filing is not a substitute for a timely response.

II. MUNICIPAL RECOMMENDATION

Petitioner places significant weight on the canon of surplusage in urging the Hearing Officer to give Petitioner a free pass by not responding to the Town's recommendation within fourteen days. **See PB 8.** It urges the Commission to conclude that a motion, recommendation, and comment are all distinct phenomena. Assuming, without necessarily conceding, that Petitioner's citation of the relevant canon of statutory interpretation is correct, Petitioner's approach is to ask the Commission to silo each filing type into metaphysically distinct categories having supernatural qualities that do not overlap. This exaggerated approach is precisely what the Vermont Supreme Court has counseled against doing. Baldauf v. Vt. State Treasurer, 2021 VT 29, ¶ 10 (observing that Court does "not interpret a single word or phrase in isolation from the entire statutory scheme," instead it "read[s] and construe[s] together subsections of a statute that were drafted as part of an overall statutory scheme" (quotations and citations omitted)). Indeed, under Petitioner's own definition of what a motion is, a recommendation ticks all the same boxes. A recommendation "is a formal filing that seeks specific relief and comes with

³ The Hearing Officer did not convert the Town's recommendation into a motion for summary judgment. The better analog for Petitioner's cramped reading of the rules is that it simply failed to prosecute the case. See V.R.C.P. 41.

certain filing requirements.”⁴ **Id.** The Town’s recommendation sought specific relief in the form of a denial of a certificate of public good without a hearing. The Town had to file its “recommendation” by a date certain and had to follow “formal” filing requirement to do so.

What Petitioner conspicuously fails to tell the Commission is that “municipal recommendations” are a major component of 30 V.S.A. § 248a. Section 248a provides that the Commission “shall consider the comments and recommendations submitted by the municipal legislative body and planning commission.” Id. § 248a(n). Petitioner, represented by competent counsel, was on notice therefore that the Town’s recommendation, in addition to being afforded substantial deference, *must* be addressed by the Commission. To not respond to the recommendation would be to concede the ground to the Town. See Gallipo v. City of Rutland, 2005 VT 83, ¶ 22 (holding that failure to respond to opponent’s argument is deemed an admission absent extraordinary reason). To not respond within the time granted by the Commission’s Rules of Procedure and any Vermont Rule of Civil Procedure is equally fatal. See, e.g., V.R.C.P. 12(b) (motion to dismiss; 30 days), 12(c) (motion for judgment on pleadings; thirty days), 56 (motion for default judgment; thirty days), 59 (motion to reconsider; twenty-eight days), 60 (motion for postjudgment relief; thirty days); see also Commission Rule 2.219. Moreover, Petitioner did not respond within the 30-day comment period to not only the Town’s recommendation and DPS’s comment, but more than thirty comments that opposed the project. If the purpose of the thirty-day comment period is to request a hearing on the basis that a substantial issue with regarding to at least one substantive criteria in 248a has been raised requiring a hearing—or not—Petitioner’s approach of sitting out the comment period in spite of what transpired during the period was a fatal mistake. Responding in a timely fashion to the

⁴ It is unclear what “locative to shift the burden of proof at a hearing to the Petitioner” means.

Hearing Officer’s Proposal for Decision—without any intermediate filing requesting emergency relief or an enlargement of time to file a response—cannot be considered a timely response to the Town.

III. SUMMARY JUDGMENT

As previously intimated herein, Petitioner’s contention that the Town’s recommendation is tantamount to a motion for summary judgement, **PB 10**, simply confuses the issue. The Town has not yet filed a motion for summary judgment. Although, even if it did, the Town notes again that even taking Petitioner’s argument at face value—it still did not comply with Rule 2.219’s thirty-day response window. Furthermore, even if the Commission did consider the procedural posture as such, Petitioner did not file a statement of undisputed material facts under Rule 2.219(C)(1)(a), supporting its opposition. Merely saying, without more, that “the Applicant addressed all the concerns expressed by the Town in its comments,” **PB 11**, is not enough to overcome that deficiency.

IV. CONCLUSION

Fundamentally, the Town’s recommendation is to be given substantial deference, which is only heightened when the applicant does not oppose the recommendation. The Town made its recommendation in a timely fashion,⁵ and it is due substantial deference. See Case No. 22-2120-PET (denying CPG where proposed project did not comply with recommendation and regional plan). The Commission should reject Petitioner’s dilatory filing as moot and deny the CPG without hearing. In the alternative, the Commission should make clear once and for all that a response to a Municipal Recommendation is no different than a response to a motion for all the

⁵ The Town notes that counsel for Petitioner has made essentially the opposite arguments in support of Industrial Tower and Wireless, LLC in Case No. 24-1755-PET.

reasons outlined above, and because arguably a recommendation is more pressing than a motion due to § 248a requiring the Commission itself to address it.

Petitioner is represented by competent counsel litigating other cases before the Commission. It has made no argument concerning excusable neglect, see In re Town of Killington, 177 Vt. 60, 69 (2003), nor offered a compelling reason why it ignored not only the response deadlines for the Town and DPS, and did not file any comment until more than a month after the comment period closed.

The Town reasserts that it does not concede any argument Petitioner made that the Town did not address herein. The scope of this memorandum is narrow and is intended only to address Petitioner's spurious reasons for requesting an evidentiary hearing more than a month late with no explanation other than it the Hearing Officer "made up" rules. The Hearing Officer did not make up rules. Section 248a provides tight timelines for review and if the Hearing Officer had to wait until a petitioner decided to participate in its own application each time, such conduct would violate the letter and the spirit of the statute, as well as depriving the parties that did participate of due process of law.

Dated at Norwich, this 27th day of October, 2025.

Town of Tinmouth

BY: DesMeules, Olmstead & Ostler

Signed: /s/ Andrew D. Cliburn
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