

**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.)

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

NOW COMES Industrial Tower and Wireless, LLC the Petitioner in this docket (“ITW” or “Petitioner”), by and through its counsel MSK Attorneys, and hereby files this Reply in Support of its Objection and Response in Opposition to Hearing Officer’s Proposal for Decision dated September 29, 2025 (the “Proposal for Decision”). Further, with this filing ITW retains its **request for oral argument.**

I. The Vermont Administrative Procedures Act (“VAPA”) Applies; Hearing Required

The Town takes the position that this is not a contested case because Applicant didn’t respond to the Town’s comment within 14 days. That is not what defines a “contested case” under the law. Nor is it a position that reflects the facts of this application.

Before the PUC, a contested case is “a proceeding, including ratemaking and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.” See PUC Commission Rule 2.102(B)(See also 2.102(H) “Proceeding: any case, docket, or other matter that is before the Commission”). This language is identical to that provided by VAPA which holds a contested case is one in which the rights, duties

and privileges of a party are determined after an opportunity for a hearing. 3 V.S.A. § 801(b)(2). This is plainly such a case. The Petitioner filed a complete application before the Commission to obtain a certificate of public good for the right to construct a telecommunications facility. The Town objected. This Commission thus must adjudicate the rights, duties and privileges of the parties. This is the essence of a contested case is. As such, the Vermont Supreme Court has routinely held the VAPA applies to commission proceedings concerning the issuance or denial, of a Certificate of Public Good. *See e.g. In re. Petition of Apple Hill Solar, LLC* 2023 VT 57; *In re. Apple Hill Solar, LLC* 2021 VT 69; *In re. Vermont Gas Systems Inc.*, 2024 VT 19, *In re. Derby GLC Solar, LLC* 2019 VT 77. Once the Town objected, this became a contested case like all other PUC adjudicative¹ proceedings. As a contested case, by law, and this Commission's practice in prior like cases, a hearing was/is required.²

The argument that this isn't a contested case because Petitioner didn't respond to the Town's Comments by September 29, 2025 also ignores the facts. The Petitioner filed an extensive application with every supporting document and affidavit needed to obtain approval. Within that, the Petitioner addressed every concern the Town expressed in its recommendation (since the Town made the same concerns known to Petitioner before it filed) with testimony and exhibits, the accuracy of which was sworn to. On that record, to argue it isn't a contested case is not credible and does not pass the straight-face test.

The Town also makes no tangible or credible defense to Petitioner's well-supported arguments that this Commission's rules do not a) require a party to respond to a comment, which

¹ The suggestion that the PUC is not sitting in an adjudicative or quasi-judicial capacity in deciding whether to grant a Certificate of Public Good, but rather in some legislative capacity, lacks credulity.

² In the sole case PUC cited by the Town to support its point, discovery was conducted, and an evidentiary hearing was held, prior to the issuance of a proposal for decision. See 22-2120-PET.

includes the special form of comment known as a municipal recommendation, b) provide any timeline to do so, or c) contain any consequence for failing to respond within 14 days. Nor did the Town make any argument that Petitioner has been treated the same as other similarly situated applicants. If the Town's logic were to apply equally against the Town, then the Town must be found to concede that Petitioner is correct in these regards and entitled to relief accordingly.

Further the Town argues that if the Petitioner's argument is correct, *every* case would need a hearing. The Town posits this as a reason to disagree with Petitioner's position. Petitioner's position is, however, exactly what the law and due process require. The VAPA is clear that in a contested case, hearings are required.³ This comports with due process which states that "a state must provide 'notice and opportunity for [a] hearing appropriate to the nature of the case' before depriving a person of life, liberty, or property." *Hogaboom v. Jenkins*, 2014 VT 11, ¶ 14, 196 Vt. 18, 93 A.3d 131 (alteration in original)." Notice and the right to a hearing being the bedrock of due process. *Id.* Thus, if a party makes a timely objection to a petition, a hearing is then required. That is due process and the essence of the protections afforded by the VAPA. This fundamental rule of fair procedure burdens and benefits all parties, the Town and the Petitioner, in equal measure. It is no defense to the Proposal for Decision to cry that if Petitioner's argument is upheld the result is a hearing – the bedrock of due process.

II. There is no Rule of "Procedure" that is Applicable

The Town makes no substantive argument to counter Petitioner's argument that this Commission's Rules along with the Standards and Procedures do not provide any basis to support the Proposal for Decision. As Petitioner outlined, neither body of rules contain a timeline to

³ Summary Judgment motions excepted.

respond to comments or municipal recommendations. Nor do they contain an obligation to respond to comments or municipal recommendations outside of a hearing, and certainly not before a determination as to whether there is a significant issue. Nor do either body of rules contain or provide any consequence – either stated or implied – for not responding to a municipal recommendation outside of a hearing process and before the determination of a significant issue. The simple fact is that no such rule exists. To hold Petitioner to an arbitrary and secret standard fails constitutional and procedural muster. The Town makes no argument to effectively rebut this conclusion.

The Town makes some argument about how its recommendation made a specific request for relief as a means to trigger the motion practice rule set forth in Rule 2.219. The Town's argument is not legally coherent. As Petitioner explained, stating a request for relief in a recommendation or document, does not make the recommendation or document into a motion. For example, an answer to a complaint states a request for relief (denial). It is not a motion to dismiss. Though, *were it the case* that asking for denial in a recommendation is a *dispositive* motion as the Town suggests, then the Town makes Petitioner's argument that the Proposal for Decision is in error. The sole dispositive motion provided for in the Commission's rules is a Motion for Summary Judgment. Motions for Summary Judgment are afforded a 30-day response period – not the 19-day response period created by the Proposal for Decision. Thus, if the Town's recommendation *was* a dispositive motion, it was a summary judgment motion, and the Proposal for Decision needs to be set for failing to provide for the requisite 30-day response. Further, if the Town's recommendation was a motion for summary judgment in disguise, there is no way relief could be granted in its favor as the application materials create a dispute of material fact. *See e.g.* Rule 2.219

(requiring that Motions for Summary Judgment may only be granted where there is no dispute of material fact)

III. The Town Cites Inapplicable Law

The Town cites a litany of civil procedure rules in an effort create some argument that there is an applicable rule of procedure setting forth a deadline (or process) requiring that the Petitioner respond to a municipal recommendation. None of the rules cited apply as Rule 2.103 of this Commission's Rules of Procedure state that the Vermont Rules of Civil Procedure do not apply. (A party may make a request to apply them, but the Town has not done so, nor would it be appropriate to do so now.)

Moreover, *even if* the rules cited applied, they would not help the Town. For example, the Town cites Rule 12(b) of the Vermont Rules of Civil Procedure as "support." Rule 12(b) allows a party to file a dispositive motion. Dispositive motions filed under Rule 12 have *thirty-day* response periods. *See* V.R.C.P 7(b)(4). The Town filed its recommendation on September 9, 2025. The Proposal for Decision was issued on September 29th. This is 19 days after the recommendation was filed and not the statutorily required 31⁴ days required by Rule 12. Following Rule 12 as the Town suggests means the Proposal for Decision is a clear reversible error of law.

The Town also sites "Rules 56 (motions for default judgement)"[SIC] as supporting the Proposal for Decision. Again, this is no help to the Town. Rule 56 is for *summary judgment* and not *default judgment*. To the extent this reference refers to summary judgment, as explained by Petitioner, those motions have a 30-day response period. By issuing a decision on a Rule 56 motion in 19 days, the Proposal for Decision is clear reversible error and a breach of due process.

⁴ With a 30-day response period, a decision can only be issued on day 31 at the earliest.

To extent the Town meant to cite Rule 55, which governs Default Judgment, that too provides no aid to the Town. First, there is no default judgment standard in this Commission's Rules, nor would that seemingly be possible against a Petitioner who filed a complete application. Further, Rule 55 provides no support for the Town because default judgment can only be entered against a party who appeared following *a hearing*.

The remainder of the rules cited by the Town appear to be an summary of every rule the Town could find that has a deadline associated with the rule. It is not disputed that deadlines are attached to certain civil rules. That is not the issue in this case.

In furtherance of its argument the Town cites to *Gallipo v. City of Rutland*, 2005 VT 83, ¶22 and asserts that “a failure to respond to an opponents’ argument is deed an admission...” This is misleading and an inaccurate squib of the *Gallipo* holding. The question in *Gallipo* was whether the *failure to respond to Requests to Admit* – a specific discovery device- could be deemed an admission for summary judgment purposes. *Gallipo v. City of Rutland*, 2005 VT 83, ¶21-22. Reasonably, the Court ruled that a failure to respond to Requests to Admit could be deemed an admission for summary judgment purposes. *Id.* To hold that this somehow provides any guidance to the questions before this Commission is improper and incorrect.

The Town also miscites and misleads in citing to *In re. Town of Killington*, 2003 VT 87A⁵. This case concerns the specific question of when, and how, the deadline to file an *appeal* may be extended. It has no relevance. The timeliness of an appeal is a jurisdictional threshold question and the failure to file a timely appeal – where there are clear rules concerning the deadline – deprives a court of jurisdiction. *Casella Constr., Inc. v. Dep't of Taxes*, 2005 VT 18, ¶ 3, 178 Vt. 61

⁵ Miscited by the Town as *In re. Town of Killington*, 177 Vt. 60 (2003).

(recognizing that “timely filing of a notice of appeal is a jurisdictional requirement”). Thus, the standard articulated in *Killington* applies when such a threshold jurisdictional deadline is at issue. The Commission is confronted with no such jurisdictional question and the standard of *Killington* has no relation to the instant case.

The Town also appears to argue that the Proposal for Decision is valid by analogy to Rule 41 dismissals based on the lack of prosecution. Any cursory review of cases concerning dismissals for lack of prosecution illustrates that the reference by the Town has no weight and credibility. Dismissals for lack of prosecution are only proper when there a party repeatedly fails to pursue the case, causes undue delay, refuses to comply with court orders, fails to attend hearings, and unreasonably delays its responses to court orders. *See e.g. Ditech Financial LLC v. Brisson*, 2025 VT 54, ¶25 (collecting cases). Not responding to a Town recommendation in 19 days, when no rule provides an obligation to respond in 19 days, nor was any such response requested by the Commission, falls far short of failing to prosecute under the law.

IV. Municipal Recommendations are not Motions; Do not have Response Period

The Town’s recommendation isn’t a motion. The Town didn’t call it a motion, it wasn’t filed as a motion and wasn’t logged in the docket as a motion. Nor was the Town’s Motion to Intervene a *dispositive* motion. As Petitioner explained, each of these things – Motions to Intervene, and comments, including municipal recommendations, are different. They are separate terms in the Rules of Procedure, the Standards and Procedures Implementing 248a, and in Title 30. Comments, including municipal recommendations, don’t have any response obligation or deadline pursuant to the rules.

The Town suggests that the Petitioner took a risk by “sitting-out” the comment period. This is disingenuous. First the 30-day period provided doesn’t apply to the Petitioner. It governs when

and how the Town may file a recommendation and/or Motion to Intervene. It can't reasonably apply to Petitioner's deadline to *also* respond to a recommendation. The Town filed its municipal recommendation on the last day of the comment period. Under no circumstances would it be reasonable to require that a petitioning party respond to a comment made on day 30 within the 30-day comment period. Thus the "comment period" can't serve as both the deadline for recommendations *and* the deadline to respond to comments as the Town seems to suggest. Asserting there is some unspoken or unstated deadline after the 30-day statutory comment and recommendation period closes which secretly defines the "comment period" governing when the Petitioner needs respond is the definition of reversible arbitrary, case-by-case, rule-making.

The Town oddly cites *Baldauf v. Vermont State Treasurer*, 2021 VT 29, ¶10 for support and argues it stands for the proposition that the Vermont Supreme Court will not read a provision of statute in isolation. Petitioner does not suggest doing so and so the citation writ large has no real relevance. Moreover, the Town's citation is neither technically, nor argumentatively correct. First, paragraph ten contains no reference to any canon of construction as claimed by the Town. That discussion, which contains a far deeper summary of the canons of construction, is contained in ¶¶18-20.

Argumentatively, the citation is not correct either as the *Baldauf* discussion supports Petitioner. In *Baldauf*, the Court reflects Petitioner's argument and states that when reading a statute (or rule) the Court is to presume that the Legislature choose statutory language intentionally. Thus "different words carry different meanings" when read as part of the entirety of the statutory scheme. *Baldauf v. Vermont State Treasurer*, 2021 VT 29, ¶ 19, 215 Vt. 18, 28, 255 A.3d 731, 738 (2021).

As the *Baldauf* law would apply here, the Petitioner's view prevails. The rules, and statute, treat the terms "motion," and "comments," including "municipal recommendations," quite differently. They do not have interchangeable purposes within the statutory scheme, but rather have distinct purposes. Motions to Intervene exist to allow parties with a protected interest the right to participate in the proceeding. A municipal recommendation is a special class of comment which creates a rebuttable, locative presumption and is afforded deference. Comments are less than that. They may be filed by any person and reflect an intent to open the PUC proceedings to the public in addition to the rights afforded to the Town to make a recommendation. It would not make sense if all three terms meant the same thing or were interchangeable. Comments do not get presumptions, and do not trigger a right to intervene. Nor do Motions to Intervene (or any motion) create a presumption or reflect an intent to allow open ended comments by any person.⁶

Further, the unified statutory scheme clearly contemplates a process whereby once a party files a complete petition, affected parties and persons are then given a time to file objections, comments, or requests to participate in the proceedings. After that period closes, the scheme contemplates that should those comments, questions, concerns, etc. raise a "significant issue" the matter would be heard and tried consistent with the VAPA standards. If one of the comments is a "recommendation" from the Town, it is afforded a presumption and the burden on that issue will shift to the petitioner at a hearing. Any other view creates a wild-west like adjudicative process whereby the second a comment or recommendation is from a Town, an applicant is at risk of a denial without a hearing. That's not a coherent view of statute or a fair and equitable result.

⁶ This is also why any citation to ITW's position here by parties to the *Westmore* case is misplaced. ITW's position is not that there are no deadlines or that a Town has free reign to file a recommendation whenever it so chooses. There are clear rules governing the timeline for those actions to take place. Those rules strike a balance between openness and procedural fairness. ITW's position is that in the total absence of any rule, and without notice, the Commission here deprived ITW of due process in failing to hold a hearing and failing to provide meaningful notice.

The Town also appears to take the position that the failure to respond to the DPS Motion to Intervene/Comment is relevant. It's not. The DPS's first filing was ambiguous. It asked for the submission of additional information and made a statement that the Department couldn't recommend approval. The sentence was framed in the passive voice and to ITW, was not an affirmative request for denial. To Petitioner, being unable to recommend approval is not the same as recommending denial. Further, the information the DPS sought was already provided in Petitioner's application materials. This is a point Petitioner highlighted in its October 13, 2025, and its October 27, 2025 Reply to DPS's October 13th filing and to which the DPS has not responded or acknowledged.

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 5th day of November, 2025

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