

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 MOTION FOR INTERLOCUTORY APPEAL

The Town of Tinmouth, through counsel, DesMeules, Olmstead & Ostler, hereby moves for permission to take an interlocutory appeal of the Hearing Officer’s January 7, 2026 order on the Town’s Motion to Clarify pursuant to Commission Rule: 2.204(A)(4). In support whereof, the Town submits the following memorandum of law.

I. BACKGROUND

On November 7, 2025, the Public Utility Commission issued an order remanding the above-captioned petition to the Hearing Officer following the Hearing Officer’s issuance of his Proposal for Decision. The Commission reopened the evidentiary record and ordered the Hearing Officer “to solicit a schedule(s) from the parties to litigate the issues presented by the Town’s comments.”

On December 26, 2025, the Town filed a motion to clarify the scope of the remand order. Specifically, the Town sought clarification on what, precisely, the Commission meant when it ordered the Hearing Officer and the parties to do with respect to litigating “the issue presented by the Town’s comments.”

The Petitioner, Industrial Tower and Wireless, LLC, filed an opposition memorandum arguing that there was no procedural basis on which to file a motion to clarify.

On January 7, 2026, the Hearing Officer issued an Order on the Motion to Clarify. The Order provided that “the Commission’s November 7 order states that the scope of the remanding proceeding will be limited to litigation of the Town’s comments.” “Therefore,” it continued, “the Town’s request for further clarification on issues withing the Town’s scope of intervention is denied.”

The Order clarified that the citizen intervenors in the case were granted standing on aesthetics, and that therefore the “scope of the proceeding also includes aesthetic impacts.” The Hearing Officer opined that “the [November 7, 2025] order directs the parties to file a proposed schedule for the remainder of the proceeding pursuant to Commission Rule 2.219 under the standard for summary judgment.” Later in the same paragraph, the Hearing Officer then recited the requirements of the Commission remand order:

(1) a deadline for the Town to file supplemental evidence supporting its recommendation that the Project be denied a CPG; (2) a deadline for the Petitioner to file supplemental evidence in response to the Town’s recommendation; (3) the opportunity for discovery; and (4) a deadline for the parties to file memoranda and statements of disputed or undisputed facts, pursuant to Commission Rule 2.219 under the standard for summary judgment.

Finally, the Hearing Officer ordered the parties to propose schedules that are “limited to potential resolution of the narrow issue identified by the Town through summary judgment motions” or that are “more expansive to include a full litigation schedule that also includes deadlines for the intervenors to file testimony on issues within their scope of intervention.”

This appeal would, therefore, present the following controlling questions of law:

(1) The Town is not required to intervene to participate under 30 V.S.A. § 248a, nor is its participation in any way limited under 30 V.S.A. § 248a, and it is entitled to a ruling establishing the scope of the remand order from November 7, 2025.

- (2) *The litigation on remand should be strictly limited to the comments in the Town's recommendation.*
- (3) *The Town may, but cannot be required to under § 248a, submit supplemental evidence to support its recommendation.*
- (4) *The Town is not subject to discovery where it has filed an un rebutted recommendation that must be accorded "substantial deference."*
- (5) *The Town is not subject to the full CPG process in this case.*

II. LEGAL STANDARD

Interlocutory appeals from administrative agencies are governed by Vermont Rules of Appellate Procedure 5, 5.1, and 13, and 3 V.S.A. § 815(a).¹ Vermont Rule of Appellate Procedure 5(b)(1) provides that a court "must permit an appeal from an interlocutory order or ruling if the court finds that: (A) the order or ruling involves a controlling question of law about which there exists substantial ground for difference of opinion; and (b) an immediate appeal may materially advance the termination of the litigation."

The criteria in Appellate Rule 5(b) are "guiding criteria." In re Pyramid Co. of Burlington, 141 Vt. 294, 302 (1982). While all three criteria must be met, "[t]he three factors should be viewed as the statutory language equivalent of a direction to consider the probable gains and losses of immediate appeal." Id. (quoting 16 C. Wright, A. Mille, E. Cooper, & E. Gressman, Federal Practice and Procedure § 3930 (1977)).

¹ An alternative path to appeal where an agency's action or decision is ultra vires is under the Vermont Administrative Procedure Act. Section 815(a) of Title 3 provides that "a preliminary, procedural, or intermediate agency action or ruling is immediately appealable...if review of the final decision would not provide an adequate remedy, and the filing of the appeal does not itself stay enforcement of the agency decision." Review under § 815(a) is for those agency actions that are "extraordinary cases where the normal appellate route will almost surely work injustice, irrespective of this Court's final decision." In re Maple Tree Place Assocs., 151 Vt. 331, 333 (1989) (per curiam). The burden is on the party taking the appeal to show that an interlocutory appeal is required to provide an adequate remedy. Beaupre v. Green Mountain Power Corp., 168 Vt. 596, 597, 715 A.2d 1292, 1293 (1998) (mem.).

The criteria for interlocutory appeal under Rule 5(b) are each met here.

III. ANALYSIS

A. The January 7, 2026 Order Involves a Controlling Question of Law

“A controlling question of law is one that deals solely with substantive issues of law.” In re Eagles Place, LLC, 2015 Vt. Super. LEXIS 188, *3, Docket Number 55-4-14 Vtec (citing In re Pyramid, 141 Vt. at 303). “An answer to a controlling question of law will, at a minimum, have an immediate effect on the course of litigation and save resources to either the court system or the litigants.” Id.

Here, the principal controlling question of law is whether the PUC’s ad hoc interpretation of 30 V.S.A. § 248a(c) and (n) unlawfully exceeds administrative authority and thwarts legislative intent. The Vermont legislature has authorized towns to submit municipal recommendation letters to the PUC pertaining to telecommunications siting. By statute, those recommendation letters must be afforded substantial deference; a municipal recommendation essentially establishes a prima facie case:

(c) Findings. Before the Public Utility Commission issues a certificate of public good under this section, it shall find that:

...

- (1) Unless 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. Nothing in this section or other provision of law shall prevent a municipal body from basing its recommendations to which substantial deference is required under this subdivision (2) on an ordinance adopted under 24 V.S.A. § 2291(19) or bylaw adopted under 24 V.S.A. chapter 117 by the municipality in which the facility is located.

...

(n) Municipal recommendations. The Commission shall consider the comments and recommendations submitted by the municipal legislative body and planning commission. The Commission's decision to issue or deny a certificate of public good shall include a detailed written response to each recommendation of the municipal legislative body and planning commission.

30 V.S.A. § 248a(c), (n).

The Hearing Officer's January 7, 2026 order in this case is untethered from statutory authority and without legal grounds. The PUC has never engaged in rulemaking to implement 30 V.S.A. § 248a, and the nonregulatory guidance it has produced, Standards and Procedures Implementing 30 V.S.A. § 248a (comprising an Order issued in PUC Case Number 22-5512-INV), establishes no process for the submission of municipal recommendations under 30 V.S.A. § 248a(c) and (n). The PUC is simply making procedure up as it goes. The upshot is that the PUC is forcing the Town (and, concededly, the Petitioner, the Intervenors, and the Department of Public Service) into uncharted territory.

The Legislature has not required towns be parties to a PUC § 248a case in order to submit recommendation letters. Nor does statute require that such letters be submitted in the form of testimony, or that a Town submitting a recommendation letter is subsequently subject to discovery. Being subject, on an ad hoc basis, to a PUC order to create and submit evidence, and then to be subject to discovery, means that towns with extremely small municipal staffs and budgets, such as Tinmouth, are forced into extraordinary positions of pressure and commitment, being required to go far beyond what the Legislature contemplated. This ad hoc approach to § 248a must come to an end.

This is not the first time that PUC's ad hoc consideration of towns and municipal recommendation letters on § 248a cases has come up. Indeed, on appeal before the Vermont

Supreme Court at present is an appeal in which the PUC treated the Town of Westmore as an ordinary member of the public submitting a public comment rather than a municipality whose precise role is unambiguously laid out in § 248a. In re Petition of Industrial Tower and Wireless, LLC (Donna Dzugas-Smith, et al.), Case Number 25-AP-427.

The PUC's failure to engage in rulemaking to implement the municipal recommendation process of § 248a(c) creates an unconscionable burden on municipalities, like Tinmouth. Continuing to decide cases under § 248a without rules implementing the statute (and indeed without reference to § 248a in its orders at all) is arbitrary and capricious, see In re Misericocchi, 170 Vt. 320, 325 (2000) (“[A] decision arrived at without reference to any standards or principles is arbitrary and capricious...such ad hoc decision-making denies [the party] due process of law.” (overruled on other grounds)), and constitutes conduct that falls far outside the PUC's jurisdiction and creates an ongoing extreme and irreparable harm to the Town.

The governing statute simply does not contemplate that the Town must provide evidence to support its recommendation. Section 248a of Title 30 provides that, the Commission “shall find that”:

Unless 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” is language of appellate review, and the Vermont Supreme Court has long given substantial deference to agency interpretation of statutes it must implement, Town of Killington v. State, 172 Vt. 182, 192 (2001) (discussing “well-established rule that the interpretation of a statute by the administrative body responsible for its execution will be sustained on appeal absent compelling indication of error” (quotation omitted)), and its own

rules, In re Petition of Conservation Law Found., 2018 VT 42, ¶ 15 (explaining that Court gives deference to an agency's "interpretation of its own promulgated regulation"). The analogy is illuminating: towns are in the best position to interpret their own planning documents just as administrative agencies are in the best position to interpret their own rules and implementing statutes.

Here, though, the Hearing Officer is requiring the Town to substantiate its recommendation that the proposed tower violates its planning documents with the submission of evidence. In PUC practice, this means written testimony and exhibits must be submitted by municipal officers who have neither the time nor the funds to proffer such evidence. And more importantly, nothing in § 248a requires the Town to do so. Tinmouth did not ask for this litigation, the litigation came to Tinmouth.

A plain reading of § 248a does not support the Hearing Officer's order. "Absent compelling indication of an error, interpretation of a statute by an administrative body responsible for its execution will be sustained on appeal,' unless it is unjust or unreasonable." Laumann v. Dep't of Public Safety, 2004 VT 60, ¶ 7, 177 Vt. 52, 857 A.2d 309 (quoting Bedini v. Frost, 165 Vt. 167, 169, 678 A.2d 893, 894 (1996)). To the extent that the Hearing Officer engaged in an interpretation of any provision of § 248a in concluding that this case can be subject to a full CPG process, which is unclear because there is no citation to any statute in the Order, such an interpretation is unjust and unreasonable.

Indeed, the specter of being subject to onerous discovery requests by extremely well-funded out-of-state developers simply by virtue of filing a recommendation letter has, and will continue to have, a chilling effect on short-staffed and cash-strapped municipalities. Municipal officers, many of whom are volunteers who sit on planning commissions and selectboards, may

think twice before weighing in on whether to recommend against a tower proposed *in their own town*. The net effect is a less democratic process, and more centralized control of the siting, permitting, and construction of these towers. The Legislature contemplated more participation from towns like Tinmouth, not less, in § 248a cases. Under the current framework, to the extent there is a consistent framework, there is every incentive for towns sit on the sidelines and hope citizen intervenors can carry the day. See Petition of Apple Hill Solar LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 2.0 MW solar electric generation facility to be located at 1133 Willow Road in Bennington, Vermont, Case No. 8454 (case in which, in context of § 248, citizen intervenors drove later stages of litigation against aggressive developer).

The answer to the questions of whether the Town is subject to the specter of the full CPG process, whether it must support its recommendation with evidence, and whether it must be subjected to discovery absent a finding of good cause when it has filed its recommendation, will have an immediate effect on the litigation in this case. The answer will determine the scope of evidence. Indeed, the Intervenor, ordinary citizens whose time and resources are limited, may not even have to join the litigation if the scope of the proceeding is limited to whether the Petitioner has provided enough to rebut the Town's recommendation.

The parties' positions on the questions will be clear and will be preserved for direct appeal. Should the issue(s) be reversed on direct appeal, the petition would need to be refiled and the evidence resubmitted. Accordingly, permitting the Town to litigate these issues on appeal at this time will spare the Town, the Petitioner, the Intervenor, and the Department of Public Service the significant time and expense of proceeding under the current Order only to repeat the proceeding upon remand, if the Supreme Court reverses the Order.

B. There Exists Substantial Ground for Difference of Opinion as to the Legal Issue

The main issue here—whether the Town has to be subject to a full CPG process where it has filed a recommendation and has been ordered to submit evidence to support its recommendation without a finding that Petitioner has proffered sufficient evidence to overcome its evidentiary burden—is a question of first impression. Therefore, by its very nature, there is “substantial ground for difference of opinion,” as to the correct course. State v. Haynes, 2019 VT 44, ¶ 7 (citing V.R.A.P. 5(b)).

The remaining issues, each in some way connected to the main issue, all stem from a misreading (or nonreading) of § 248a(c) and (n). See In re Pyramid Co., 141 Vt. at 307 (describing standard of substantial ground for difference of opinion as one that “would require a trial court to believe that a reasonable appellate judge could for reversal of the challenged order.” (quotation omitted)). In effect, the parties are being forced to engage in further litigation to flesh out what out what is already in front of the Hearing Officer.

The Petitioner filed voluminous documents supporting its petition, including testimony and exhibits—in other words, evidence. The Town filed its recommendation opposing the grant of a CPG. The correct procedure here, in light of § 248a, is that the Hearing Officer should decide on the record before him whether the Petitioner has done enough to rebut the Town’s recommendation. The parties’ cards are already on the table. At most, the Petitioner could be accorded an opportunity to respond to the prima facie case the recommendation creates, to which the Town could then respond. Put simply, a further exchange of discovery to decide the “narrow issue identified by the Town” in this case is unnecessary.

However, even if the issue proceeds under a summary-judgment standard and not a motion-to-dismiss standard, the burden to overcome the presumption that the Town’s

recommendation has created a prima facie case in favor of denying the CPG is squarely on the Petitioner—the Town bears no burden to advance its case absent a finding of “good cause shown” firmly tethered to § 248a (c) and (n). Therefore, it is the Petitioner that should be required to proffer additional evidence in the first instance, if at all, to which the Town and the Department may choose to respond.

There is no authority for the present procedural posture of this case, which appears to change with each new Order, and there is certainly no Supreme Court precedent controlling the questions. Given that the Commission resurrected Petitioner’s case, the Town is entitled to a finding before the litigation proceeds any further that either the Petitioner has made the requisite showing of “good cause,” or it has not.

C. Permitting the Appeal May Materially Advance Termination of the Litigation

Permitting an appeal of the Hearing Officer’s decision will materially advance the litigation because it will have a significant impact on the scope of the evidence and the proceedings, and therefore likely advance the litigation to a final decision much sooner. See In re Pyramid, 141 Vt. at 305 (holding that granting motion for interlocutory appeal is appropriate when “it may advance the ultimate termination of the case”).

If the Order is vacated or reversed, the parties will expend significantly less time and resources to litigate this petition. The Town will be relieved from onerous and intrusive litigation, and the Petitioner will conserve its own time and money as it seeks to do business in Vermont. Moreover, precious resources of the PUC will be conserved by needing to rule on fewer filings and conducting fewer hearings.

A direct appeal is likely in this case. If the Supreme Court reverses or vacates the final order, no matter the final decision, the parties will be forced to relitigate the petition, in whole or

in part. The Environmental Division summed up this rationale well in In re Bennington Wal-Mart Demolition/Constr. Permit, 2012 WL 5357960, at *1 (Vt. Super. Aug. 31, 2012) (Walsh, J.).

There, the Court opined:

If we deny the motion for interlocutory appeal and hear the case on its merits, the decision will likely be appealed to the Vermont Supreme Court. If the Supreme Court then finds that we were required to remand the case rather than hearing it on its merits, then our merits hearing, and all of the associated proceedings, will have been for naught. All of the litigation will ultimately have to be repeated—first before the Commission and then before the Environmental Division on appeal. Alternatively, if the Supreme Court affirms our decision, then we can proceed to hear the case on its merits, without remand.

Id. If the present motion is denied, the decision will almost surely be appealed to the full Commission and to the Vermont Supreme Court, including the issues raised in this motion for interlocutory appeal. If the Court agrees, the parties will be in a position where they are now, at the outset of the litigation, without a schedule, facing potentially a months- or years-long process, including further potential appeals. Put more succinctly, an immediate conclusion from would “advance the ultimate termination of the case by avoiding relitigation.” In re Morgan Meadows/Black Dog Realty Subdivision Act 250 Permit, 2008 WL 7193316, at *1.

In light of the above, each criterion for interlocutory appeal is satisfied. Therefore, the Hearing Officer should grant the motion, and permit the Town to take an appeal to the full Commission for review of the Order.

Dated at Norwich, this 19th day of January, 2026.

Town of Tinmouth

BY: DesMeules, Olmstead & Ostler

Signed: /s/ Andrew D. Cliburn
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