STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 24-3345-PET

Limited Size and Scope Application)
of Bell Atlantic Mobile Systems, LLC)
d/b/a Verizon Wireless and Vertex Towers, LLC,)
for a Certificate of Public Good,)
pursuant to 30 V.S.A. § 248a, authorizing the construction)
of a telecommunications facility in Manchester, Vermont)

PETITIONER'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT; OPPOSITION TO TOWN'S CROSS-MOTION FOR SUMMARY JUDGMENT

NOW COMES Petitioner Vertex Towers, LLC ("Vertex") and Bell Atlantic Mobile Systems, LLC d/b/a Verizon Wireless ("Verizon;" collectively, "Petitioner"), and pursuant to Rule 2.219 of this Commission's Rules of Procedure, and hereby file this Reply Memorandum in Support of Petitioner's Motion for Summary Judgment and in Opposition to the Town of Manchester's (the "Town") Cross-Motion for Summary Judgment. As stated herein, Petitioner requests that judgment be granted in its favor and it be granted a Certificate of Public Good.

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INTRODUCTION

The Town believes the law compels this Commission to blindly adhere to the Town's factually unsupported opinion and strictly apply the Town's Land Use and Development Ordinance (the "Zoning Regulations"). The Town believes the law allows the Town to take non-regulatory, non-specific and legally non-controlling provisions in its town plan (the "Town Plan") and convert those provisions into controlling law by making conclusory statements in a municipal "recommendation." Ultimately, the Town believes these PUC proceedings should be condensed down to a simple question: does the Town approve of this project or not.

That is not the law of 30 V.S.A §248a, nor can it rationally be the law. Were these proceedings a *de facto* zoning proceeding as the Town desires, the entire purpose of 248a as concerns the regulation of telecommunications would be rendered meaningless. The point of 30 V.S.A. 248a(h)'s *exemption* from local permitting is to extract the permitting of towers from the whims of towns' individual and ever-changing views as reflected in their zoning regulations. The point of the 248a(h) exemption is to not subject the development of telecommunications towers to a hundred of different zoning regulations statewide. Rather, to subjected them to one impartial state standard to effect uniformity and consistency. The law is written for the good of all, and not just one individual town. The law is also clear that the paying of deference is not the legal equivalent of being forced to bend the knee and kiss the ring. Rather, deference only extends to the limits of good cause. Thus, the Town's recommendation and position is not all controlling. Good cause is an *evidentiary* question and one of facts; not opinions. Here the Town has *no tangible evidence* to counter the Petitioner's substantial evidence that there exists good cause to approve this project.

The Petitioner has demonstrated with uncontroverted testimony and evidence that:

a) There is a significant gap in coverage in the area to be served by the Project.
b) There is no other property available to locate this tower.
c) That collocation is not feasible.
d) That the strict application of the Town's zoning regulations result in a prohibition of coverage over an existing gap in coverage thereby defeating the State's goals and creating substantial shortcoming detrimental to the State's interests.
e) That the proposed tower is not shocking or offensive but rather similar to any number of medium sized, disguised monopole towers also known as a "monopines" approved across the State.
f) That the Town's "land conservation measures" have no force of law, no specific standards, and are otherwise complied with.

The Town's response to this evidence is deficient. The Town offers *opinions* but no facts. Good cause and the Federal Telecommunications Act of 1996, require that *facts* determine the outcome and that any denial be based on substantial evidence and not subjective opinions. For example, the Town does not assert that there are other locations to build this tower which could provide coverage or that other properties are available to locate a tower to fill the coverage gap. Nor even does the Town contend that the tower is visually shocking or offensive. It in fact appears to concede that a tower designed as a large pine tree is not visually offensive. Despite that, it still objects merely because the Tower could be *visible.* This is an unreasonable position as all towers are *visible* and a zero-visibility standard has never, and can never, be adopted. For the reasons set forth herein, the Town's motion should be denied and the Petitioner's granted.

ARGUMENT REGARDING CONTROLLING LAW

The Town's brief contains an assertion as to the controlling law and legal standards which the Petitioner disagrees with in many regards. Namely, the Town appears to over extend the meaning and import of Act 130, cite to law that does not support its position, and it seeks to

apply an incorrect standard of proof into these proceedings. Petitioner addresses these issues below.

a) Act 130 and 248a do not convert this PUC proceeding to a zoning proceeding.

The Town's reliance on Act 130 rests on assumptions not stated within the law itself and reads out key provisions of the statute. In its Opposition and Cross-Motion, the Town cites to Act 130 of 2016 to support several underlying themes. It attempts to use the Act's passage to invalidate any PUC decisions prior to 2016. The problem with the Town's argument there is that Act 130 didn't change 284a(h)(1)'s standard that a petitioner using 248a to obtain approval for a telecommunications tower is *exempt* from needing a permit or "other approval" under the provisions adopted pursuant to 24 VSA ch.117. Thus, any case decided before Act 130 that determined *zoning* regulations did not strictly apply because of 248a(h)(1) is valid.[1] But for adding a clarification that the exemption does not bar the Town's recommendation rights added by Act 130, the relevant law remained the same before 2016 and after.

Second, the difference between "preempted" and "exempted" is functionally meaningless. "Preempt" means to supersede, to forestall, to preclude. As applied, it means a law does not apply. To be "exempt" means to be released, excused, or freed from a duty or obligation others are subject to. As applied, it means to be released from compliance with a law or duty. In either case, under either word, the effect is the same: an ordinance or plan adopted under Title 24 does not control and a petitioner is not bound to it.

[1] In addition any citation to cases made prior to 2016 by the Petitioner are either used as factual analogies which still remain valuable, or cite to the still existing exemption set forth in 248a(h). Moreover, the logic of the PUC remains equally valid: these are *not* zoning cases.

The Town's argument is that a petitioner must be strictly held to a town's zoning standards, in particular its table of uses, if those are included in the town's recommendation. Thus, by recommendation, a town can convert these proceedings into a zoning hearing obligating a petitioner to prove compliance therewith. This is the very opposite from being "exempt"; from being freed or excused from the duty to comply. It places a telecommunications developer in no better position than a hotel developer, housing developer, or other private developer in functional practice.[2] That is an illogical reading of 248a(h) and Act 130. It results in striking 248a(h)'s exemption from Statute.

Further, the striking of the term "preempted" was in 248a(h)(2) and that section applies to the applicability of ordinances enacted under 22 V.S.A. 2291(19), the municipal enabling statute allowing for the passage of non-zoning ordinances. That the word was struck has no bearing on this case and no meaning can be extracted. As the terms "preempted" and "exempt" are functional equivalents, for all this Commission knows, the legislature felt the term preempted in 248a(h)(2) was superfluous.

The legislative history is devoid of any commentary on the issue as the change originated in the Senate Finance Committee *sua sponte* without discussion. *See* Report of Legislative History available at https://legislature.vermont.gov/bill/status/2016/H.577. In fact, none of the suggested reasons for the passage of Act 130 woven in the Town's brief appear anywhere in the legislative history. The statement of purpose of Act 130 provides no guidance to suggest what the take away or import of the changes are. At best, the legislative history shows a discussion of the

[2] Arguably, it places then in far worse position because at a municipal zoning hearing, Act 250 hearing, and before the environmental court, a Town is afforded no deference.

proper word mix to define what is "good cause" and "substantial deference" but nothing more. *See* Document History, H.577 "Definitions of Substantial Deference" prepared by Maria Royle, Legislative Counsel, April 29, 2016 submitted to Senate on Tuesday May 6, 2016 available at https://legislature.vermont.gov/committee/document/2016/25/Bill/60690.

Additionally, the Town reads out of its analysis the word "presumed." A key element of the changes enacted by Act 130 is that within the definition of "substantial deference" the phrase "are presumed correct valid and reasonable" was included. A "presumption" is not proof and therefore substantial deference merely requires the location of a burden. This is further reflected in 248a(c)(2) which states that a municipal recommendation creates a "rebuttable presumption." The Town ignores the "presumption" written into the statute, but the statute is clear. It does not create a framework for a town's recommendation to have the force of evidence. Nor does it create a framework to convert these proceedings to a zoning hearing through the Town's recommendation.

b) The Town's citation to *Petition of Indus. Tower & Wireless Enosburg*, No. 22-2120-PET does not support the Town.

In its legal section, the Town cites to *Petition of Indus. Tower & Wireless, LLC Requesting A Certificate of Pub. Good, Pursuant to 30 V.S.A. S 248a, Authorizing the Installation of Wireless Telecommunications Equip. Off of Bordoville Rd. in Enosburgh, Vermont*, No. 22-2120-PET, 2023 WL 5125080, at *7 (Aug. 3, 2023)("*Industrial")*. The Town's use of this case overreaches. The Town cites *Industrial* to make the point that §202c does not always preempt the recommendations of a municipality. This is an immaterial point. Petitioner is not arguing that §202c *always* preempts the "recommendation" of a municipality. That's a strawman argument created by the Town designed to be knocked down for effect. The Petitioner's position in this

docket is that the Town's recommendation does not have the force of law, is not a *de facto* veto, and that the Town is required support its recommendation with tangible evidence in the face of evidence to the contrary.

Second, *Industrial's* holding is far more nuanced and supportive of Petitioner's argument than the Town suggests. In *Industrial,* this Commission held that the Northwest Regional Planning Commission's ("NRPC") recommendation was not overcome with good cause because the facts established that coverage could be met with a shorter tower. In *Industrial* the NRPC demonstrated with facts that the proposed tower could be shorter and was only made taller because of speculative collocation desires. *See* id. at *4.[3] Based on these facts, this Commission balanced the evidence in front of it and determined that the evidence did not establish good cause. It's holding was nuanced and illustrates that the question of good cause is one of evidence and not merely "because the NRPC said so" which is the standard the Town desires. The Commission explained:

> The recommendations of the NRPC are reasonable and specific to this particular tower. Had the tower been proposed with less height devoted to future collocation space, the recommendation of the NRPC may have been different. Conversely, had the NRPC's recommendations constituted a broad prohibition on the building of telecommunications facilities within the region, we would have found good cause to reject the recommendations. In this case, given the specificity of the NRPC's narrow recommendations we agree with the Hearing Officer that there is not sufficient good cause to reject the NRPC's recommendations in this case.

Id. at *7.

[3] "The NRPC contends that because the Project includes additional space for potential future providers, it is necessarily taller than it needs to be to accommodate the services provided by the Petitioner and the St. Albans Police Department. The NRPC maintains that the Regional Plan requires that telecommunications facilities be constructed and sited in the least obtrusive way possible and that including unused extra space on the tower for unidentified providers is not consistent with this policy. Accordingly, the NRPC recommends that the Commission find that the Project does not comply with the Regional Plan because it is taller than necessary."

Applied to this case, the *Industrial* ruling favors Petitioner. Here, the Town's recommendation effects a *broad* prohibition of coverage and there is no evidence the gap in coverage can otherwise be filled. Moreover, unlike the NRPC in *Industrial,* the Town here is not recommending that there is excessive colocation space or that the coverage objectives can be achieved with a lower tower. Instead, the Town is arguing that *any tower* should be denied because of zoning regulations. Also, unlike the NRPC, the Town here has no *evidence* that coverage can be provided from a lower tower or otherwise located tower. Thus, while §202c doesn't always preempt the recommendation, when there are no facts to support a town's recommendation, and the facts show that there is good reason to find in favor of a tower, §202c's public goals do tip the scales in favor of approval.

c) <u>The standard is not "clear and convincing" evidence.</u>

Lastly, the Town appears to insert a "clear and convincing" evidence standard when there is no basis to do so. The Town argues on page 5 that the standard to judge good cause is one of "clear and convincing evidence." This is not the standard in statute. Rather, good cause just requires "the *showing of evidence*." 30 V.S.A. §248a(b)(3)(emphasis added). The showing of evidence is not the same as the "clear and convincing standard" that the Town seeks to apply. The lack of the terms "clear and convincing" in 248a(b)(3) demonstrates that is not the standard. In fact, the legislative history illustrates that using the term "clear and convincing" was debated and then *dropped* from the final adopted version of amended 248a(b)(3). *S*ee Document History, H.577 "Definitions of Substantial Deference" prepared by Maria Royle, Legislative Counsel, April 29, 2016 submitted to Senate on Tuesday May 6, 2016 available at https://legislature.vermont.gov/committee/document/2016/25/Bill/60690.

That the term "clear and convincing" was rejected and not included in the final definition is dispositive that it is *not* the standard. Rather the standard is the normal civils standard requiring proof by a preponderance of the evidence. *Livanovitch v. Livanovitch*, 99 Vt. 327, 328, 131 A. 799, 800 (1926) (explaining that when one has burden of proof in civil case, one must "establish his claim by a preponderance of the evidence").

ARGUMENTS AS TO GOOD CAUSE AND THE MERITS

a) Whether the Project Violates Manchester's Zoning Regulations is not the test; the question is one of good cause and fact.

The Town opens by asserting what is undisputed - the Town's Zoning Regulations' table of uses does not list new cellular communications towers as an allowed use in the MU2 District. This is a new cellular communication tower and therefore does not align with the table of uses. Were this a zoning case, the discussion would likely end there. However, it is not a zoning case.

The purpose of 248a(h) is to prevent a Town from doing exactly what Manchester seeks to do – direct where towers go without question and without regard to the resulting coverage. The evidence before this Commission shows that the Town's insistence on strict compliance with the adopted zoning regulations results in a large section of heavily traveled Manchester being devoid of reasonable coverage or a means to achieve that coverage.

Perhaps had the Town retained an expert who could opine that there was a way to meet the coverage objectives and needs while still complying with the Zoning Regulations, the Town would have a leg to stand on like the NRPC did in *Industrial, supra.* But the Town didn't offer that evidence. It in fact offers no evidence that *any* coverage can be provided while still meeting the Zoning Regulations' strict limits.

The evidence presented is uncontroverted and clear. It demonstrates that following the strict land use limitations in the Town's zoning regulations causes a significant and substantial determent to the good of the state and Section 202c. The evidence shows that this Tower cannot be located in strict compliance with the zoning ordinance and still provide coverage to an existing and uncontested gap. Statement of Undisputed Material Fact ("SUMF") ¶¶25-37, 57. The evidence establishes that the sole property within the Office/Industrial district which allows new towers and could possibly even fit a new tower is an active quarry which after many attempts, is unavailable to the Petitioner. SUMF ¶¶45-49. Furthermore, the evidence shows that the only property available to host a tower that provides coverage to this zone is the property chosen as no other options were available, including colocation opportunities. *Id.* Therefore, the strict application of zoning that the Town seeks does result in the prohibition of coverage which is a substantial detriment to the goals of the State.

b) Town's Argument "B" Overstates the Meaning of the Town Plan and the Project meets the Plan.

The Town's argument in "Section B" rests on a non-sequitur logic without factual support. In this section, the Town asserts that sections of the Town Plan which use the words "should" or which provide no specifics such as "in a manner that protects scenic resources" are controlling, mandatory provisions. As the Petitioner briefed in its Motion for Summary Judgment, these are not controlling provisions of a Town Plan with regulatory merit. Paying substantial deference cannot convert non-regulatory, non-specific provisions, and suggestive provisions into mandatory, legally sufficient provisions.

The Town's central argument is around Section 3.3 of the Town Plan and pages 30 and 43. Section 3.3 of the Town plan. Section 3.3 states that:

> In order to enhance the aesthetics and visual character of the downtown area, public utilities (including . . . telecommunications facilities) *should* be relocated from public view along main streets whenever possible. This may include behind buildings, away from the street, along streets, or underground. Where this is not possible, these should be screened from adjacent properties with dense coniferous plantings.

Pages 30 and 43 then list various recreation paths in the Town including parts that run through Dana Thompson Memorial Park. The Town's argument connects these "dots" with the statement that these paths are scenic resources. Town Brief at pp. 11 ("Included among these recreation pathways is the 'spur' trail constructed through the Dana Thompson Memorial Park and on to Riley Rink, passing through Hunter Park—all of which are scenic and cultural resources within the Town. Town Plan, pp. 30, 43."). This would be a reasonable statement if it were accurate, but it is not.

At no point on either pages 30 or 43 are these "paths" identified as scenic resources. On Page 30, the Town Plan identifies Scenic Roads and byways. It says:

> Two designated scenic byways run through the Town of Manchester. They are the Shires of Vermont Byway and the Stone Valley Byway. The Shires of Vermont Byway begins in Pownal at the Massachusetts border and runs along Route 7A to Manchester, where it continues on Main Street until turning onto Depot Street and terminating at the Route 7 interchange. The Stone Valley Byway begins at the Bonnet Street intersection with Main Street and courses north along Route 30 all the way to Hubbardton. These scenic byways are recognized officially, protected under state statute, and marketed by the state's tourism department. These roads are often lined by stone walls and sugar maples, and provide especially scenic views, as well as historic sites. Other roads in Manchester also provide such scenic amenities, including Barnumville Road, East Manchester Road, Overlook Road, Richville Road, River Road, West Road and Wind Hill Road. Public or private actions which would impact these roads must be carefully evaluated, and development must be planned to minimize adverse impacts.
>
> In addition to traditional engineering considerations, rural character, natural topography, and scenic corridors should be considered when designing new roads in Manchester. Roads that are wider than necessary cause the destruction of trees, stone walls, and other features integral to the area's rural character. In order to protect the town in the future, appropriate rights-of-ways must be dedicated, and roadbeds constructed, to town specifications. However, the constructed road width should be appropriate to the traffic flow anticipated. The town will reserve or allow sufficient rights-of-way for longer-term future needs, and yet avoid building roads that are wider than necessary and negatively impact the scenic qualities that are essential to Manchester's community well-being.

Town Plan at pp. 30. Nothing in this section identifies any of the aforementioned pathways as scenic. Nor does the following section for "Recreation Pathways" call them scenic resources. In fact, the words "scenic" and "cultural" do not appear. Nor is there any provision saying views *from* these pathways are scenic and to be protected. In full this section states:

The Manchester community has long expressed a strong desire for a greenway network of pedestrian, cross country ski, and bicycle paths that would link the outskirts of town with the downtown. Although debate about the extent of public funding and the particular locations of pathways continues, the town supports the concept. Such a network would improve opportunities for non-motorized travel within the core, while creating new recreational opportunities close to town for residents and visitors alike. In line with this desire, public sidewalks should be continuous throughout the entire downtown, and should connect with adjacent neighborhoods. Provisions for pedestrian and bicycle travel should be incorporated into all private developments and public works projects. Consequently, links should be made between new development and adjoining paths, bike racks should be provided, sidewalks should be extended along bridges, ample crosswalks should be provided throughout the town core, and roadway shoulders should be paved and adequately stripped wherever possible. Furthermore, Manchester employers should be encouraged to provide appropriate facilities, including showers and secure bicycle storage, in order to encourage energy-efficient commuting.

The 1996 Manchester Commercial District Parking and Pedestrian Plan evaluated six potential corridors that would comprise a network of recreation pathways. Of the six, a spur from MEMS through the Dana Thompson Memorial Park and on to Riley Rink has been developed. Other

corridors include a Manchester Depot spur running roughly parallel to Main Street from Town Hall to Barnumville Road and then continuing south to Depot Street roughly parallel to Highland Avenue along an abandoned rail bed and ravine. Two of the spurs essentially run along the Batten Kill through the downtown, corresponding at least partially with what the Manchester Riverwalk hopes to establish as a public pathway along the river. The fifth spur would link the Batten Kill with the Equinox Hotel in Manchester Village. In the coming years, the town will revisit the feasibility of developing these corridors in conjunction with Manchester Village, Manchester Riverwalk and private landowners along the identified corridors. In addition, a town meeting vote in 2016 authorized town officials to pursue planning of a northerly spur linking Riley Rink to North Road along the old OMYA railroad bed. This effort is being conducted in cooperation with the owners of the old rail bed as well as landowners whose land may need to be traversed to connect the rail bed to existing recreation path at Riley Rink. In addition, easements or land exchanges may be sought to address concerns about proximity of the rail bed to existing residences.

Town Plan at pp. 30-31. Thus, there is no basis in the Town Plan here to support the Town's assertation connecting a generic desire to preserve scenic resources and these pathways as being scenic resources.

Nor does the Town's citation to page 43 of the Town Plan provide any basis for the statement that these paths are cultural resources in need of protection. Section 4 covers "Recreation, Arts & Culture." (Each being its own "thing" in the Town Plan). Section 4.1 on p. 43 concerns "Recreation." It identifies various opportunities for recreation in Manchester. Within

that is a paragraph discussing Dana Thompson Memorial Park. It offers no language supporting the idea that it is scenic, or would be harmed by a cellular tower, especially a disguised facility designed to mimic the appearance of a pine tree. In full this paragraph states:

> Thus, the town's recreation area (officially known as the Dana L. Thompson Memorial Park, but more commonly just called the Rec Park) is heavily used year-round for both scholastic and community organized sporting events, annual events such as the July 4 celebration, and family gatherings. The Manchester Parks & Recreation Department maintains a full schedule of sporting events, summer camps, and pool activities at the Rec Park. The Park House was built in 2012 and offers office space for department staff, functions as a pool house in the summer, and is a venue for hosting yoga and other activities year-round. The Rec Park includes several athletic fields, including Applejack Stadium, a championship quality regulation (up to 120 yards by 75 yards) soccer, football and lacrosse field complete with lighting, announcing booth, historic grandstand and food concessions. Eckhardt Field and McClellan Field, located just north of Applejack Field, are 125 yards by 75 yards and include benches and electronic scoreboards. The town is supporting plans by a local skateboarding group for a new and expanded skateboard facility at the park. An Eagle Scout project approved by the selectboard in 2016 involves adding exercise stations along the one-mile walking path at the park.

Town Plan at p. 43.

In fact, as described therein, this park is heavily developed with a number of existing impacts, including, a large stadium, tower lights, several fields, electronic scoreboards, a pool, offices, and skateboarding facilities. To argue that these sections of the Town Plan support the conclusion that bike paths and this park are scenic areas to be protected from even *seeing* a cellular tower is not a credible argument.

Following is stretching of the Town Plan, the Town tries to connect these non-specific provisions of the Town Plan to perceived non-compliance therewith by way of a "zero-visiblity" standard. The Town's position is that because the Tower would be *visible* from *any*[4] areas that are part of a greenway, downtown, or public park the tower does not "protect[] the scenic, cultural and natural resources of the Town." Town Brief at pp. 10-11. Notably the Town Plan does not

[4] This is an important point. The Town's position does not rest on any volume of visibility, or amount of visibility. Rather the Town's argument is that if the Tower is visible in even .01% of the area, it must violate the Plan.

state that "no Tower shall be visible from any greenway, downtown or public park." If the Town wanted that to be the standard, it needed to say so expressly. Rather it used non-specific language like "should be" or "protects." The Town's view is that any visibility violates these terms. It doesn't argue the resources are not protected because the Tower should be designed differently, the antennas' camouflaged better, or the Tower shortened. Rather the Town pushes for a zero-visibility standard. This Commission has never adopted a zero-visibility threshold as the standard.

Adopting a zero-visibility threshold would not only overturn the *Quechee* test, but also bar coverage across much of the state. As this Commission is aware, towers must be visible at to provide coverage and this Tower must be visible to provide coverage to this gap. Both as applied here, and across the State, a zero-visibility threshold bars coverage and is unworkable.

c) Town's Arguments as to Good Cause applies the wrong standard and offers conclusory statements without factual support; Petitioner proves Good Cause

In Section C of the Town's Brief (pp. 12-16) the Town offers two arguments that the Petitioner has not met its standard of proof. The Town's argument in Section C.i argues that there was no good cause proven to overcome the Town's insistence on strict compliance with Zoning Regulations. The Town's Section C.i states the law relatively accurately and then jumps to the conclusion that the project doesn't comply with the law. The great problem with the Town's argument in C.i is that it offers *no facts* to support its conclusions.

In section C.ii the Town's argument suffers from the same ailment when it argues that the Petitioner has not proven good cause that it complies with the Town Plan. In addition, in Section C.ii the caselaw relied on by the Town undercuts the Town's case as it reflects a consistent pattern of this Commission's reliance on proof of alternatives in finding against a Petitioner.

Here, the Town offers not a single alternative means to fill the coverage gap and thus all the cases cited by the Town illustrate is the Town's failings.

c.i – Town's Argument in C.i. lacks any factual support; Petitioner has Proven Good Cause

In section C.i the Town states the law for one and a half pages and then says in two sentences it disagrees (p. 14-15) that good cause was proven. It's argument boils to a conclusory statement that proof was not made to overcome the literal and strict application of the Town's Zoning Regulations. The Town cites *no evidence* supporting its conclusion. For example the Town does not assert there is not a coverage gap that needs to be filled; that there is any way to fill this gap in coverage other than by using the subject property or that the Petitioner failed to investigate other options. Nor does it offer any evidence that the Petitioner could have redesigned the Tower to meet the objectives and satisfy the Town. The Town does not even argue that there is no public good met by the Project. Rather, the Town's position is wholly conclusory and devoid of any factual connection between the starting point (the law) and the ending point (the conclusion).

Conclusory statements do not defeat summary judgment. *Boyd v. State*, 2022 VT 12, ¶ 26, 216 Vt. 272, 284, 275 A.3d 155, 164 (2022)("Testimony which presents nothing but conclusions is insufficient to defeat a motion for summary judgment.") *citing Starr Farm Beach Camp owners Ass'n v. Boylan,* 174 Vt. 503, 506, 811 A.2d 155, 160 (2002). The Town would likely counter by saying the deference it is afforded allows it to make unsupported conclusions that carry the weight of evidence. Not so. As discussed earlier, the deference afforded by statute is not absolute. Moreover, even when an Agency is afforded the highest levels of deference, its decision must still be made based on evidence. Agency decision-making, even under the highest

deference standards are invalid as arbitrary and capricious if they are "standardless, *unsupported by the evidence*, or contrary to law." *Plum Creek Maine Timberlands, LLC v. Vermont Dep't of Forests, Parks & Recreation*, 2016 VT 103, ¶ 24, 203 Vt. 197, 155 A.3d 694 (emphasis added), *see also In re Woodford Packers, Inc*., 2003 VT 60, ¶ 17, 175 Vt. 579, 830 A.2d 100("Agency decisions are erroneous and jeopardize due process when they are not "soundly grounded and supported by the evidence."). The Town's position here the embodiment a position lacking in any evidence and thus not sustainable under any deference.

Moreover, this is not merely a state standards issue. This Commission is subject to the Federal Telecommunications Act. That Act requires that any decision to deny a project be based on "substantial evidence." 47 U.S.C. §332(c)(7)(B)(iii) Here, the Town just offers its zoning regulations and a mere conclusion wholly unsupported by tangible evidence. As such it fails the substantial evidence standard of 47 U.S.C. §332. *See e.g. Indus. Tower & Wireless, LLC v. Roisman*, No. 24-2512-CV, 2025 WL 3002379, at *4 (2d Cir. Oct. 27, 20250 ("For example, if a planning commission's recommendation was wholly unsupported, the ordinary deference granted to the commission would give way to § 332(c)(7)(B)(iii)'s substantial evidence requirement.")[5]

In addition, the Town argues that whether or not an alternative property is available is immaterial and irrelevant to the good cause analysis. That can't be, and has not been, true. Whether there is an alternative property available, or other means available to meet the public objectives of universal coverage, must be inherently relevant to the analysis of good cause. This is particularly true when the Town's recommendation is based on an argument that the project

[5] Of significance is that the basis of this Commission's decision in *Industrial Tower and Wireless,* and the Second Circuit's affirmation, was that the testimony and evidence that made clear that a shorter tower of 120' (which was consistent with the regional plan) *would meet the coverage objective.* Here, there is *no* offer by the Town that there is any option to meet the coverage objectives and the land use ordinance.

falls within a specific land-use district that does not allow towers. If it can be demonstrated that there is a significant gap in coverage and that there is no property outside of that district which can provide coverage to the area such that a persistent and key gap in coverage would result, then surely that must be a relevant consideration in the good cause analysis. Historically this Commission has taken that view. It has looked at whether other options and properties were available to fill coverage in evaluating good cause. In, *Petition of Vermont Rsa Ltd. P'ship & Cellco P'ship, for A Certificate of Pub. Good, Pursuant to 30 V.S.A. S 248a, for the Installation of Telecommunications Equip. in Waterbury, Vermont.,* No. 8601, 2017 WL 4419262, at *8 (Sept. 21, 2017)(*"Waterbury, No. 8601")* the Commission denied an application after finding that there were options available outside of the subject land use district that could provide adequate coverage.

As the Petitioner demonstrated there is not another property that Petitioner was able to locate that was available to host a tower, available to the Petitioner, and which could provide coverage but the property chosen. SUMF ¶¶27-48. Further, the Petitioner has demonstrated that it *tried. Id.* Undisputed facts show that the Petitioner searched for years to locate a property, or location, that could provide coverage and still meet the Town's standards. *Id.* None existed. *Id.* As such, there exists a gap in coverage which if the Town's argument is sustained will persist. This causes a substantial shortcoming detrimental to the public good and the State's interests in making sure all Vermonters have access to a robust, modern telecommunications network, including the provision of modern mobile wireless services along travel corridors and in communities.

Further, allowing the Town to dictate where towers go through direct enforcement of its land use ordinances when there is no evidence that any coverage can be provided while meeting those land use ordinances causes a substantial determinant to the public good and State's interests because it neuters the point of this Commission. If the land use ordinances control without regard to their effect or the possibility of compliance, or without regard to any facts offered by the Town to support that the application of their regulations is reasonable under the circumstances, then there is no value to this Commission. This is just a zoning hearing, and 30 V.S.A 248a(h) is reduced to meaningless words.

c.ii The Town's argument in C.ii suffers from a lack of evidence; case law supports Petitioner and Good Cause Exists to overcome the Town's Recommendation as to the Town Plan

The Town's position as to the validity of its recommendation under the Town Plan suffers from the same evidentiary problem. For example, in section C.ii of its brief, the Town cites the Town Plan's desire that development "should" "protect" "scenic resources." Then the Town concludes that this Project doesn't protect scenic resources without explaining or offering evidence as to *why or how*. All it says is because the Tower is visible it doesn't protect scenic resources. Given that the vast majority of towers approved by this commission are "visible" the Town's conclusory statement has little merit. The Town doesn't explain what protecting scenic resources entails, what is unacceptable or acceptable protection, what about the tower offends, or how the word "should" actually is a "shall" and what exactly compliance could even look like.

The Town also suffers from trying to turn "should" into "shall." As the Petitioner explained in its initial brief, the Town is seeking to elevate provisions of its Town Plan that lack mandatory language into mandatory provisions. Whatever "deference" means, it does not convert

the word "should" to "shall" or "may" to "must." Nor does it allow a town to insert standards when it chooses into an otherwise standardless plan. That's arbitrary government action beyond the bounds afforded by deference. *In re MVP Health Insurance Company*, 203 Vt. 274 (2016).

In making its arguments, the Town cites to the decision in *Waterbury, No. 8061, supra.* The Town's citation does not help the Town. In *Waterbury, No. 8601*, this Commission denied Verizon a CPG for the installation of a tower in Waterbury. The decision was based on recommendations from the Town of Waterbury who objected to the tower on the basis that the land use district did not allow towers and was within critical wildlife habitat. Waterbury was clear, and proved, that the project could be relocated to an area not in the conservation district and not in a critical wildlife habitat and still provide adequate coverage. *Id.* at *13. As key evidence, Waterbury and the Agency of Natural Resources offered into the record an alternative location for the project that was available to the petitioner which would meet the balance of the coverage objectives and the Town's zoning concerns. *Id.* In sum, *"*Waterbury argue[d] that there is no 'good cause' to not defer to its recommendation given that the alternative location would still allow the Project to meet its primary coverage objective." *Id*.

It was upon this record *evidence* that the Commission found there was no good cause. This Commission explained that the Town's recommendation was reasonable since the Town offered an alternative which met the coverage objectives. It wrote:

> Waterbury has made a reasonable recommendation regarding the Project with respect to its town plan and zoning regulations and articulated a reasonable basis for that recommendation. In a previous proceeding, the Commission found that there was good cause to reject a town's recommendation based upon its zoning because the town had not provided a basis for its recommendation other than its desire for strict compliance with its zoning, and that compliance with the zoning bylaw would have frustrated the coverage goals of the project. In this case, Waterbury bases its recommendation on the goals of protecting a critical wildlife

> corridor and avoiding forest fragmentation set forth in its town plan and zoning regulations. In addition, complying with the Town's recommendation to relocate would not frustrate the primary coverage goal of the Project to provide coverage throughout northern Waterbury.

Id. at *14 (Sept. 21, 2017)

Here, the Town offers *no such evidence.* Unlike Waterbury, which offered evidence that there was an alternative means to meet the coverage objectives while still complying with its town plan and zoning regulations, Manchester offers nothing. Manchester offers no alternative and no evidence there is any way to provide coverage and still meet its Town Plan or Zoning Regulations. For example, the Town could have supported its position with evidence that a lower tower could meet its Town Plan's statement that scenic resources should be protected while still providing coverage. Or it could have proven that a tower could be sited on some other property or tall structure and meet the coverage objections. Yet it didn't do that either.

Thus, unlike in *Waterbury, No. 8601,* this Commission is not faced with a reasonable position reflecting a balance between the goals of coverage and a town's desires with alternatives existing that may better balance those factors. It's faced with a town taking an unsupported position against a tower *regardless* of the coverage objectives, options and needs. All *Waterbury, No. 8601* illustrates why there is good cause overcome Manchester's position. There are no alternatives, the Tower is the least intrusive means to meet the coverage objectives given the real-world constraints. Tower is also mitigated to reduce any visual impact. It's at the lowest height possible, screened as a tree, and located as far from a public main road and town center as possible.

d) <u>The Project Does not Have an Undue and Adverse Aesthetic Impact</u>

First, the Town argues that its Town Plan and zoning ordinances are clearly written community standards. This Commission has already ruled they are not. *Petition of Mhg Solar LLC for A Certificate of Pub. Good, Pursuant to 30 V.S.A. Ss 8010 & 248, to Install & Operate A 500 Kw Grp. Net-Metered Solar Elec. Generation Facility in Manchester, Vermont*., No. 20-1261-NMP, 2021 WL 4295245, at *20 (Sept. 17, 2021)("The Manchester Town Plan generally does not present a clear written community standard …... The Town Plan does not prohibit development on roads with scenic amenities; it only requires that such development must be carefully evaluated, and adverse impacts minimized. This statement is general in nature and does not give the Commission sufficient guidance because it 'does not state with specificity what type of development is permitted' or prohibited along Richville Road."). While *Mhg Solar* concerned a solar facility, the analysis is the same.

The Town's position that this tower offends a clearly written community standard first rests on its Zoning Regulations. Town Brief at p. 17. ("The Project also fails the second part of the modified Quechee Test because it would violate multiple clear, written community standards, found in the Land Use Ordinance and the Town Plan"). Land use ordinances are not applicable as clearly written community standards. This commission made that clear in *Waterbury, No. 8601*, at *8 (Sept. 21, 2017) which was cited by the Town in support of the Town's other arguments. In *Waterbury, No. 8601,* this Commission wrote:

> With respect to the Zoning Regulations, the Commission has previously recognized that "zoning regulations are not the most appropriate source for a clear, written community standard under the Quechee test … [i]t is more appropriate to rely on the town plan as the primary source of clear written community standards." In addition, "[b]ecause towns often grant exceptions and variances to these ordinances on a case-by-case basis, it is difficult to rely on a zoning ordinance as a clear and consistent statement of a community's policies or standards. The ability of a town to grant zoning variances will, in many cases,

> result in different zoning standards being applied depending upon the individual circumstances of the permit application." Finally, "[i]f zoning regulations were considered clear written community standards for the purpose of aesthetic review …, these could have the effect of mandating a particular outcome to a Section 248 proceeding. Such an outcome is inconsistent with Vermont law; the Vermont Supreme Court has clearly stated that, with respect to Section 248 proceedings, "municipal enactments … are advisory rather than controlling." I see no reason to deviate from the Commission's precedent with respect to community standards in this case.

Id. at 12.

Secondly, the "clear written community standard" that the Town seeks to apply as an aesthetic standard is the land use table setting forth that cellular communications towers are not allowed in the district. This is not an aesthetic standard. To the extent the Town claims that to be the case in its brief, there is no statement in the Zoning Regulations which provides for that.

Nor is the statement that the purpose of the MU2 district is to "preserve, maintain and enhance" the "aesthetics of streetscapes and buildings" a clearly written community standard as concerns aesthetics. Nothing about "preserve, maintain, and enhance" is a "clear" "standard." It's amorphous and subjective. It does not identify the area as a special scenic resource to be protected or identify how it is to be protected. Nor in reality is the Town's recitation of the MU2 statement of purpose fully accurate. The MU2 district's is much more complex and clearly designed for development. It's complete purpose is:

4.5 Mixed Use 2 District (MU2)

4.5.1 Purpose. The Town of Manchester intends for the Mixed Use 2 District to provide an opportunity for growth in areas within or adjacent to the town core that are currently served by public infrastructure or where infrastructure could reasonably be provided. The purpose of this district is to:

(1) Provide economic development opportunities through office, service, lodging, and other compatible, primarily non-retail commercial and light industrial uses;
(2) Provide opportunities for new compact residential neighborhoods and a range of housing opportunities in proximity to the town core;
(3) Ensure that proposed land development incorporates access management and avoids congestion; and
(4) Promote a quality streetscape and pedestrian-friendly environment.

Zoning Regulations at p. 42.

To illustrate how this is not a clearly written standard for aesthetic purposes, compare how similar this statement is with that for the Office/Industrial District which allows towers:

4.7.1 Purpose. The Town of Manchester intends for the Office Industrial District to provide opportunities for diversifying the town's economy and accommodating the growth of local businesses. The purpose of this district is to promote Manchester's long-term economic vitality by providing locations for primarily non-retail, non-visitor-based office, service, and light industrial uses.

Zoning Regulations at 44. The purposes are almost identical. They offer no clear written community standard, as concerns aesthetics.

The Town leans heavily on the Design Review Overlay District as being a clear community standard. Despite referring to it in its brief, the Town makes no actual argument how it applies, how it is not followed, or what facts support a conclusion that it is not complied with. The Town has therefore waived any actual argument that it controls and is violated.

Though, even if the Town had tried to make a full argument, it cannot establish that the Design Review Overlay District is a clear written community standard. The Design Overlay (Section 5.1 of the zoning regulations) does not identify a specific resource to be protected other than the general scenic nature of Manchester. It contains only a general statement of purpose stating that the Town wants to "preserve, maintain and enhance" the historic character, quality of

design, construction, aesthetics, and walkability that supports Manchester tourist-based economy. Manchester Town Plan at 5.1.1.[6] This is a platitude and not a standard. There is no town in Vermont that does not want to "enhance" the aesthetics of the town. Nor one that doesn't want to enhance the quality of design and construction.

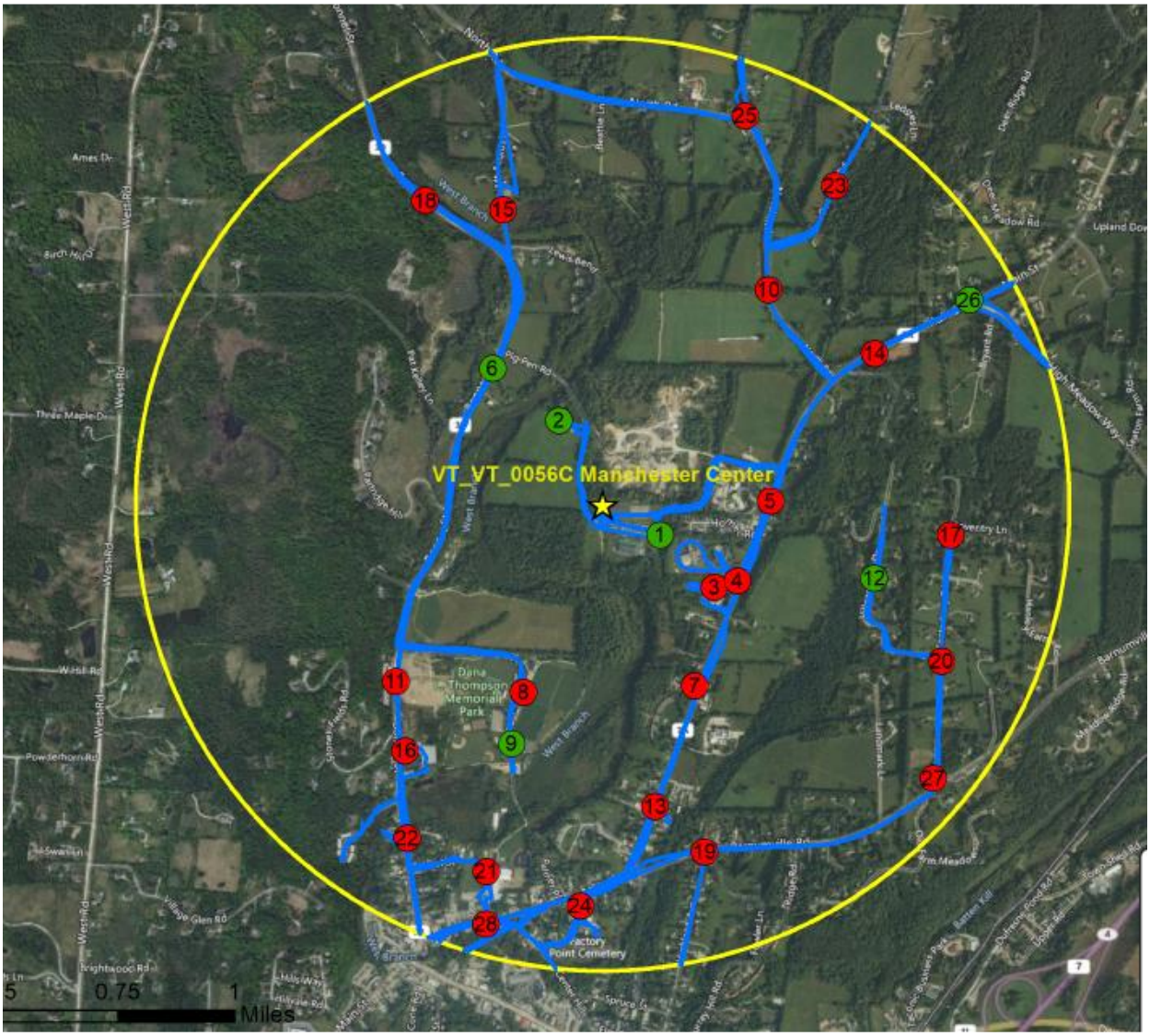
The purpose of the clear, written community standard requirement is "to encourage towns to identify scenic resources ... of special importance [such as] a wooded shoreline, a high ridge, or a scenic back road," which would help …. in determining the scenic value of specific resources to a town, and would guide applicants as they design their projects." *Re: Town of Barre*, # 5W1167-EB, Findings of Fact, Conclusions of Law, and Order at 21 (June 2, 1994)(quoted in *Hannaford, Findings*, Conclusions and Order at 21). To be a clear written community standard the relevant language must be "clear and unqualified, and create[] no ambiguity." *John A. Russell Corp*., 2003 VT 93, ¶ 16. Statements evidencing a broad desire to preserve general scenic qualities or the overall attractiveness of an area are not clear standards. *See e.g. In re. Rinkers, Inc.* 2011 VT 78, ¶10 (rejecting contention that Hardwick Town Plan created a clear standard when it merely stated it wanted to preserve the present pattern of land use and maintain a natural and rural skyline); *In re. Acord Energy Solar 2, LLC,* 2021 VT 3 (where Supreme Court affirmed PUC's determination that Shoreham Town Plan was not a clear written community standard when it only contained general siting criteria rather than specifically designating areas for protection); *Re: Casella Waste Management, Inc., and E.c. Crosby & Sons, Inc.*, 2000 WL 994877, at *25 (holding the year 2000 version of Manchester's Town Plan and

[6] Section 5.1.2 also states it wants to also preserve the historic qualities of the Manchester Historic district but this project is not in the historic district, not on a historic property, and is not visible from any historic area. The Town does not assert that this section applies either or there is some historic impact.

zoning were not clear community standards because they neither address specific aesthetic resources nor identify the area surrounding the proposed access road as a location of particular concern.). Section 5.1, the Design Review Overlay does no such thing. It is not a clear written community standard. It only contains language referring to broad aesthetic desires, and generic objectives. It does not meet the required thresholds.

Nor can the Town salvage its argument with reference to the Section 3.4, Design Review Standards, referred to in the Design Overlay District section. Section 3.4.A provides five generalized guidelines for development and no specific standards or scenic resources to be protected. First it has a height limitation that cannot be met for a tower and is direct conflict with Section 7.1.12's allowance for a tower to be 130' tall. There is no way to afford Section 7.1.12 any meaning while at the same time find Section 3.4.A.1 applicable. Second, 3.4.A.2 is a statement that speaks to the arrangement of windows and dimensions of new buildings. This is not a clearly defined standard and cannot be applied to *any* telecommunications project. The same logic applies to Section 3.4.3 which speaks to "roofs." This standard directs that roofs match that in the underlying district. It is not a specific standard and is impossible for this to be a standard for telecommunications facilities as they don't have roofs. Section 3.4.A.4 states that the materials used must be of a durable and quality material but again, this is not a standard. Also, it is met as the proposed facility is high grade metal that is painted brown and green with substantial screening applied so that it matches the trees which surround it and the hockey arena just in front of it. Section 3.4.A.5 concerns a general desire to align the look of new buildings with those around it. It is not clear and not applicable as concerns a telecommunications tower.

Manchester's Town Plan is also not a clear written community standard. It provides general statements using the words "should" and "whenever possible." To be a valid standard shall and must are the words needed. Further, scenic resources it identified are "main streets" (which is an undefined term potentially meaning any street) and the "downtown area." This general language does not create a specific standard given the broad nature of the terms. More importantly, the tower isn't visible from the "downtown area." *See* Exhibit DA-2:



SUMF at ¶118, Exhibit DA-2, (Photo-stimulations and viewshed analysis).

The Town next tries to stretch language that says "Manchester recognizes the importance of efficient and functioning electrical power and telecommunications facilities, and will work with utility providers to ensure that siting of facilities is accomplished in a manner that protects the scenic, cultural and natural resources of the town" into a clear written community standard. That is not the case. The statement is amorphous and, if anything, supports the Petitioner as it underscores that there is a public need and desire in the Town Plan for functional and modern telecommunications. The Town then continues to try to connect disparate dots and link the discussions about Dana Thompson and Hunter Park elsewhere in the Town Plan to the statements on Page 37 and 38 of the Town Plan discussing them as parks within the Town. There is, however, no actual connection made in the Town Plan between aesthetics and those parks. Moreover, as was discussed above, those parks are not scenic resources. They are developed locations with 80-foot light towers, a large football stadium, offices, and one regularly hosts large summer concerts with lights, speakers, and a stage. SUMF ¶¶69-73.

In addition, the Town Plan itself makes no reference to any specific scenic protection standard, design guide, reference or visual mitigation measure when it speaks about utilities. All it states is that the Manchester Development Review Board must consider visual impacts, lighting, noise generation, natural resource impacts and site screening before approving new facilities. This is not a standard. Rather it is a restatement of conditional use review law.

The Town's citation to Industrial Wireless's Ira case here does not support the Town. As the Commission found in *Ira*, the Ira Town Plan was not a clear written community standard because it contained general statements evidencing a desire to protect scenic resources in the area. *Petition of Indus. Tower & Wireless, LLC Requesting A Certificate of Pub. Good, Pursuant*

to 30 V.S.A. S 248a, Authorizing the Installation of Wireless Telecommunications Equip. Off of Toppin Rd. in Ira, Vermont, No. 22-2442-PET, 2023 WL 3151215, at *9 (Apr. 20, 2023) ("For purposes of our aesthetic review 'broad and general language in a municipal plan' about preserving the scenic character of an area does not constitute a clear, written community standard."). The Manchester Town Plan contains the same generalized statements as did the Ira Town Plan and thus should be viewed the same way.

Given that the Town waived any argument that the Tower is visually offensive or shocking, the Town's position that it offends the generalized standards in the Town Plan and zoning Design Review Overlay lacks any tangible evidentiary support. How can a facility *not* be shocking or offensive but yet still not protect the general scenic qualities? It's hard to fathom any rational way to reconcile those two positions. That the Town does not offer any evidence that the tower is offensive also is a problem under the Telecommunications Act. Under the Act, generalized objections as to the aesthetics of a tower do not meet the substantial evidence position. *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 496 (2d Cir. 1999)("Therefore, we find that the few generalized expressions of concern with "aesthetics" cannot serve as substantial evidence on which the Town could base the denials."); *Omnipoint Corp. v. Zoning Hearing Bd.*, 20 F.Supp.2d 875, 880 (E.D.Pa.1998) (holding that "unsubstantiated personal opinions" expressing "generalized concerns ... about aesthetic and visual impacts on the neighborhood do not amount to substantial evidence"). Accordingly, any denial based on the Town's generalized but unsupported and non-specific aesthetic concerns violates federal law.

In the end, the Town's position comes down to a desire to strictly enforce Zoning Regulations. The Town's clear aim is to have its Zoning Regulations control the location and

development of cellular towers. That is not the law of 30 V.S.A. 248a and enforcing the Town's Zoning Regulations perpetuates the existing lack of coverage on key roads and heavily used and traveled areas. It also would supplant the purpose of 248a and invalidate 248a(g). If a town's table of uses controlled as Manchester seeks to have be the result, then the 248a process just becomes a zoning case. This Commission has never held that to be the rule nor reasonably can hold that to be the rule.

The Petitioner has demonstrated with substantial evidence that this Tower is in the public good. It has demonstrated that good cause exists to overcome the Town's recommendation. The Petitioner has demonstrated that there is a significant gap in coverage over a heavily traveled and populated area, that after an exhaustive search no other property is available to fill this coverage and that its tower is at the lowest height it can be to meet the coverage objectives. It has taken every available mitigating step possible and the Town does not even argue there is any additional mitigation or screening possible. With this uncontroverted evidence, the Petitioner has proven that substantial harm and detriment to the State's interests would come as a result of the Towns' recommendation. Accordingly, the Petitioner asks that the Town's recommendation be set aside and the project granted a CPG.

Dated in Burlington, Vermont this 13th day of February, 2026

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