

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 26-0574-PET

Petition of Industrial Tower and Wireless, LLC
Requesting a certificate of public good pursuant
to 30 VSA §248a authorizing the installation of
wireless telecommunications equipment off of
Bordoville Road in Enosburgh, Vermont

MOTION TO DISMISS

NOW COME Chris and Sandra Bruhn, through counsel, DesMeules, Olmstead & Ostler, and hereby move to dismiss the above-referenced petition for failure to state a claim upon which relief can be granted pursuant to Vermont Rule of Civil Procedure 12(b)(6). Petitioner fully and fairly litigated questions relating to the proposed tower's height (it vigorously asserted it could not proceed at a lower tower height) and location in a previous petition and before federal courts on appeal.

Petitioner lost at each stop. Accordingly, Petitioner is estopped under the principle of issue preclusion (otherwise known as collateral estoppel) from proposing a 120-foot tower in the same location as it proposed a 140-foot before. Petitioner is also precluded from bringing the petition at all under the doctrine of res judicata (also called claim preclusion). In other words, it may not now rely on representations it previously stated on the record were impossible. It is barred under ordinary estoppel principles.

1. MEMORANDUM OF LAW

A. BACKGROUND

Petitioner filed its application for an earlier project at this location on June 8, 2022, which was assigned the case number 22-2120-PET. Petitioner's 2022 proposal was to construct a 140-foot telecommunications tower at latitude 44°50'27.60" North and longitude 72°48'39.42" West. *June 8, 2022 Application.*

Among others, Chris and Sandra Bruhn intervened in the proceeding. *Procedural Order of 8/19/22.*

Following discovery, the Hearing Officer convened an evidentiary hearing on January 12, 2023. Counsel for Intervenors cross-examined ITW's engineer Louis Hodgetts. Mr. Hodgetts opined that reducing the tower from 140 feet to 120 feet "would not be a reasonable mitigation method because 'it would significantly limit the ability for future collocation and reduce coverage.'" Industrial Tower and Wireless, LLC v. Roisman et al., Case No. 2:23-cv-365, at *20 (D.VT) (Opinion and Order 8/19/24), attached hereto as Exhibit A. Another expert, Kevin Delaney (who is, like Mr. Hodgetts, proffered as ITW's experts in the 2026 petition) testified that "we did run a view shed of the tower at 120-foot height to see whether or not it would make a substantial difference...and when compared to the 140-foot height that we ran, the difference was incremental at best." *Id.* at 18.

Ultimately, the Commission denied Petitioner's application for CPG. The Commission adopted the Hearing Officer's Proposal for Decision, which stated, in part

Regarding the Department's recommendation to collect additional evidence on lowering the Project tower height, I find this to be inappropriate at this point in the proceedings given that the Petitioner is not seeking a CPG for a 120-foot tower. However, I encourage the Department to explore this issue with the Petitioner,

should the Petitioner decide to submit an application consistent with the Regional Plan in the future.

Order of 8/3/23.

Petitioner did not seek amend its petition, nor did it move to reconsider the Commission's decision, or appeal the decision to the Vermont Supreme Court. Instead, Petitioner filed suit against the Commission in federal district court. *Case No. 2:23-cv-365; Exhibit A.* Petitioner contended, among other things, that the Commission effectively prohibited personal wireless service per 47 U.S.C. § 332(c)(7)(B)(i)(II) because a 140-foot tower "is the 'least intrusive means' to fill the gap in coverage." *Id.* at 33. Petitioner also brought claims alleging violations of 47 U.S.C. § 332(c)(7)(B)(iii) and that federal law preempted 30 V.S.A. § 248a(c)(2). Following conversion of the Commission's motion to dismiss into one for summary judgment, the district court granted summary judgment to the Commission.

Petitioner appealed the grant of summary judgment to the Second Circuit. See 24-2512-cv. ITW again asserted that 140-foot tower "is the least intrusive means to close the coverage gap." *Indus. Tower & Wireless v. Roisman*, 24-2512-cv, at 3; *Exhibit B.* It argued that "only a 140-foot tower can close the coverage gaps of all four national carriers." *Id.* The Second Circuit affirmed the grant of summary judgment.

Four years later, on March 27, 2026, Petitioner filed an application in the instant proceeding, proposing a telecommunications tower of 120-feet in height. *Application of March 27, 2026*, ¶ 4. The proposed location is Latitude 44°50'27.60" North and longitude 72° 48'39.42" West. *Id.* ¶ 3. Intervenors Chris and Sandra Bruhn were granted intervention on June 17, 2026. *Procedural Order of 6/17/26.*

B. LEGAL STANDARD

To prevail on a motion for failure to state a claim under V.R.C.P. 12(b)(6), the court takes “as true all facts as pleaded in the complaint, accept as true all reasonable inferences derived therefrom, and assume as false all contravening assertions in the defendant’s pleadings.” Vt. State Auditor v. OneCare Accountable Care Org., 2022 VT 29, ¶ 11 (quotation omitted). The court should grant the motion when “it is beyond doubt that there exist no facts no circumstances that would entitle the plaintiff to relief.” Birchwood Land Co. v. Krizan, 2015 VT 37, ¶ 6.

For purposes of this Rule 12(b)(6) motion, Intervenor accept as true the well-pleaded factual assertions in the Petition and supporting materials, but are not required to accept legal conclusions or conclusory statements. Colby v. Umbrella, Inc., 2008 VT 20, ¶ 10, 184 Vt. 1. “Where pleadings rely upon outside documents, those documents ‘merge[] into the pleadings and the court may properly consider [them] under a Rule 12(b)(6) motion to dismiss.” Davis v. Am. Legion, Dep’t of Vermont, 2014 VT 134, ¶ 13, 198 Vt. 204 (quoting Kaplan v. Morgan Stanley & Co., 2009 VT 78, ¶ 10 n. 4, 186 Vt. 605 (mem.) (alterations in quotation)); see also Kaplan, 2009 VT 78, ¶ 10 n.4 (explaining that trial court properly relied on entirety of town plan where plaintiff specifically referred to it in complaint but did not attach full text). “[W]hen a written instrument contradicts allegations in the complaint to which it is attached, the exhibit trumps the allegations.” Id. (quoting N. Ind. Gun & Outdoor Shows, Inc. v. City of S. Bend, 163 F.3d 449, 454 (7th Cir. 1998) (alteration in quotation)). “The trial court may consider such documents without converting the motion into one for summary judgment.” Id. “[I]t is well settled that, in ruling on a Rule 12(b)(6) motion to dismiss, courts may properly consider matters subject to judicial notice, such as statutes and regulations, and matters of public record.” Kaplan, 2009 VT 78, ¶10 (citing Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322, 127 S.

Ct. 2499, 168 L. Ed. 2d 179 (2007) (in ruling on a motion to dismiss, “courts must consider the complaint in its entirety, as well as ... documents incorporated into the complaint by reference, and matters of which a court may take judicial notice” and also citing Levy v. Southbrook Int’l Invs., Ltd., 263 F.3d 10, 13 n.3 (2d Cir. 2001) (holding that it was “appropriate for the district court to refer to the documents attached to the motion to dismiss since the documents were referred to in the complaint”))).

C. ANALYSIS

1. ISSUE PRECLUSION

“It is generally recognized that [t]he doctrines of res judicata and collateral estoppel are applicable to administrative proceedings when an agency is acting in a judicial capacity.” Sheehan v. Dep’t of Emp. & Training, 169 Vt. 304, 308, 733 A.2d 88, 91 (1999) (quotation omitted).

In Vermont, issue preclusion bars the relitigation of an issue when the following elements are present:

(1) preclusion is asserted against one who was a party or in privity with a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as the one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair.

Trepanier v. Getting Organized, Inc., 155 Vt. 259, 265, 583 A.2d 583, 588 (1990). “The party opposing application of collateral estoppel has the burden of showing that it is appropriate to relitigate an issue.” In re M.V., 2022 VT 31, § 26 (holding that guilty pleas have collateral estoppel effect in subsequent civil litigation (quotation omitted)).

Each Trepanier element is present here.

As to the first Trepanier element, ITW was a party in the earlier action because it was the applicant in 22-2120-PET, plaintiff in 2:23-cv-00365-gwc, and appellant in 24-2512-cv. Therefore, the first element is met. Trepanier, 155 Vt. at 265, 583 A.2d at 588 (“(1) preclusion is asserted against one who was a party or in privity with a party in the earlier action”).

As to the second Trepanier element, the PUC denied the petition, summary judgment was entered against ITW in federal district court, and which order was affirmed on appeal to the Second Circuit. See Mitchell v. Nat’l Broadcasting Co., 553 F.2d 265, 271 (2d Cir. 1977) (restating rule that grant of motion to dismiss for failure to state a claim and grant of summary judgment are final judgments on merits). The second Trepanier element is met. Trepanier, 155 Vt. at 265, 583 A.2d at 588 (“(2) the issue was resolved by a final judgment on the merits”).

As to the third Trepanier element, the issue is the same in each proceeding. “The key question is whether the factual or legal question presented in the first action is the same as the question presented in the second.” In re M.V., 2022 VT 31, § 37 (quotation omitted and cleaned up). The issue in the prior proceeding involved tower height as applied to the legal standards in 30 V.S.A. §248a. The issue in this proceeding is the very same issue as in the prior proceeding-- the tower height. Indeed, the proposed tower height in this petition (120’) is precisely that which ITW strenuously represented could not work in the prior proceeding. Indeed, effectively the entire litigation, including the federal court litigation, was predicated on this precise issue. The third Trepanier element is met. Trepanier, 155 Vt. at 265, 583 A.2d at 588 (“(3) the issue is the same as the one raised in the later action”).

As to the fourth Trepanier element, there was a full and fair opportunity to litigate the issue of tower height. The fourth and fifth Trepanier elements are analyzed under a multi-factorial test. In re M.V., 2022 VT 31, § 40. The factors include “the type of issue preclusion,

the choice of forum, the incentive to litigate, the foreseeability of future litigation, the legal standards and burdens employed in each action, the procedural opportunities available in each forum, and the existence of inconsistent determinations of the same issue in separate prior cases.” Id. (quoting Trepanier, 155 Vt. at 265, 583 A.2d at 587). None of these factors weigh in favor of ITW.

This is an example of the less-controversial defensive collateral estoppel where a party is estopped from asserting an issue that it had previously litigated and lost. Trepanier, at 265 n.2, 583 A.2d at 588 n.2 (“There is defensive use of collateral estoppel, as in the instant case, where a plaintiff is estopped from asserting a claim that he or she had previously litigated and lost on the same issue against another defendant, see, e.g., Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971), and offensive use of collateral estoppel, where a new plaintiff seeks to estop a defendant from relitigating an identical issue that the defendant previously litigated and lost against another plaintiff. See, e.g., Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979). The use of offensive collateral estoppel is more controversial than the use of defensive collateral estoppel, and generally requires additional considerations. See Parklane, 439 U.S. at 329-31.”)).

The legal and evidentiary standards are the same between the first petition and the present petition. ITW obviously availed itself of the full procedural toolkit at its disposal in filing suit against the PUC for its denial of its petition in 22-2120-PET, there are no inconsistent determinations of the issues in multiple prior cases, and the choice of fora afforded ITW a full and fair opportunity to litigate the issues. See In re M.V., 2022 VT 31, § 40 (reciting factors to evaluate the fourth and fifth Trepanier elements). ITW should also have foreseen the possibility of future litigation because it was represented by competent counsel in the prior proceeding (and

so now too), it alone decided to revive the petition this year, and it alone has a lease with the landowner. Indeed, Petitioner was on notice from the Proposal for Decision that it could have returned with a petition for a 120-foot tower—or could have simply moved for amended petition at any point during the proceedings when it became clear that a 140-foot tower was not the least intrusive means to achieve its goals. *Order of 8/3/23*.

As to having the opportunity to fully and fairly litigate the issue, ITW certainly did have the opportunity and pressed every opportunity. It vigorously argued, to the fullest extent of which it appeared capable, that the PUC got it wrong with respect to denying its petition, including specifically issues relating to the proposed height. In the PUC order denying the petition, it stated that “we conclude that [the interests of the State] could, at least in part, be served with a shorter and less obtrusive tower.” ITW did not appeal that order, it filed suit in federal court.

The fourth Trepanier element is therefore met because ITW was highly motivated to litigate the issue, and did so. Trepanier, 155 Vt. at 265, 583 A.2d at 588 (“(4) there was a full and fair opportunity to litigate the issue in the earlier action”).

For similar reasons to the fourth Trepanier element, applying collateral estoppel in this case is fair under the fifth Trepanier element. *Id.* (“(5) applying preclusion in the later action is fair”). In the Vermont Supreme Court’s most recent major decision discussing the Trepanier elements, the Court analyzed the fifth Trepanier element according to the evidentiary burdens between the two cases. In re M.V., 2022 VT 31, § 47.

ITW is subject to an equal evidentiary burden between PUC proceedings. See *id.* (holding that where State proves elements of criminal charge to standard of beyond reasonable doubt, subsequent civil action by State on same issue estopped defendant from relitigating issue

in civil proceeding because standard of proof was higher in prior proceeding). However, somewhat analogous to M.V., the prior proceeding—litigating a summary judgment action—involved a more deferential standard of review in ITW’s favor. Summary judgment (even when converted from a F.R.C.P. 12(b)(6)) is a proceeding in which all reasonably pleaded allegations and the inferences therefrom were construed in a light most favorable to it. In re Constr. & Operation of a Meteorological Tower, 2019 VT 20, ¶ 8 (“The party opposing summary judgment is given the benefit of all reasonable doubts and inferences.”). ITW’s claims could not survive even that deferential review.

The fifth Trepanier element is met here because ITW is not unfairly prejudiced where it vigorously, and under the same evidentiary standards and more deferential judicial review standards, and with the full panoply of the civil rules, litigated the issues of tower height in prior proceedings. Trepanier, 155 Vt. at 265, 583 A.2d at 588 (“(5) applying preclusion in the later action is fair”).

ITW cannot return to this Commission seeking that which it previously said it could not do. It had its opportunity to litigate that issue and it lost squarely in multiple fora. Taking all well-pleaded factual allegations in the light most favorable to Petitioner, the Commission must conclude that movants are entitled to judgment as a matter of law because Petitioner is precluded from relitigating the issue of the tower height.

2. RES JUDICATA

“Res judicata bars the litigation of a claim or defense if there exists a final judgment in former litigation in which the parties, subject matter and causes of action are identical or substantially identical.” Lamb v. Geovjian, 165 Vt. 375, 379, 683 A.2d 731, 734 (1996) (quotations omitted). “The doctrine applies both to claims that were or should have been

litigated in the prior proceeding.” Faulkner v. Caledonia County Fair Ass’n, 2004 VT 123, ¶ 8 (2004). “Claim preclusion flows from the fundamental precept that a final judgment on the merits puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever.” Id. (quotation omitted).

The relevant parties in this action are substantially identical to those in the prior proceeding. ITW brought both the 2022 and 2026 petitions and Chris and Sandra Bruhn have intervened in each petition. Nearly every citizen intervenor that was a party in the first petition has intervened in this petition. Both the Department of Public Service and Agency of Natural Resources are parties in both petitions. The first element is satisfied. Faulkner, 2004 VT at ¶ 8.

The causes of action are identical. ITW seeks a CPG pursuant to § 248a to construct a tower at the same location in Enosburg, Vermont. The third element is satisfied. Id.

The subject matter of the causes of action is identical in every respect except that now ITW proposes a tower 20 feet shorter—120 feet instead of 140 feet. In Faulkner, the Vermont Supreme Court stated that “the current Restatement's approach precludes a second lawsuit arising out of the same transaction as a prior lawsuit even where the second action will include ‘evidence or grounds or theories of the case not presented in the first action, or ... remedies or forms of relief not demanded in the first action.’” 178 Vt. 51, 2004 VT 123, ¶ 14, 869 A.2d 103 (alteration in original) (quoting Restatement (Second) of Judgments § 25 (1982)); see also 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure: Jurisdiction § 4408 (3d ed. 2021) (“In most circumstances, claims growing out of the same transaction are ... precluded even though an effort is made to advance new theories or to substitute new remedies.”).

The second petition here arises out of the same transaction as the first. The location is identical between the two petitions. The tower type—a lattice tower with six Omni fiberglass

antennas on top—is identical between the two petitions. Indeed, the date stamp for the permit plans in the current petition, Exhibit LH-1 (filed on March 27, 2026), is January 2022, which bears the same date as the permit plans filed in the 2022 petition under Exhibit RV-1. Petitioner simply recycled most of what it had already prepared to support this petition.

Even more, ITW’s experts each testified about this proposed tower height in the first proceeding. Indeed, Kevin Delaney, as noted above, testified that ITW had run view shed analyses of a 120-foot tower. This tower height—indeed lower tower heights than 140 feet in general—were expressly part of the evidence in the first proceeding. Simply changing the proposed tower height by 20 feet does not change the subject matter in such a way to take it out of the “same transaction” as the prior proceeding. Faulkner, 2004 VT at ¶ 14. And even if it somehow does—which it does not—the 120-foot proposal was thoroughly litigated in the first petition. The 2026 petition disturbs the finality of the prior final decision—and affirmed by two different federal courts. The Bruhns are entitled to move on with their lives—as are their neighbors who have intervened *twice*—and Petitioner must find some other site to try to build its two-way radio-service tower.

II. CONCLUSION

Petitioner is estopped from maintaining an application that proposes a 120-foot tower in this location after vigorously maintaining that such a tower was not possible in a prior petition, ignoring invitations to amend the petition, and then doubling down in federal court on the issue. Moreover, Petitioner is barred from bringing this petition in the first instance because it is res judicata. Petitioner brings the effectively the same application, with substantially the same parties in the same configuration, and substantially identical subject matter. There is nothing in the 2026 petition that requires new evidence, new argument, let alone new remedies.

For the above reasons, the movants should prevail on either basis—issue preclusion or claim preclusion—because when all well-pleaded allegations and the inferences drawn therefrom are taken in the light most favorable to Petitioner, it is beyond doubt that it cannot survive dismissal. The Commission must dismiss the petition.

Dated at Norwich, Vermont this 24th day of July 2026.

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