

**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 V.S.A. § 248a, authorizing the installation of wireless telecommunications equipment off of Bordoville Road in Enosburgh, Vermont	
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**RESPONSE OF THE VERMONT DEPARTMENT OF PUBLIC SERVICE
TO MOTION TO DISMISS**

On July 24, 2026, Chris and Sandra Bruhn (the “Bruhns”) filed a motion to dismiss with the Vermont Public Utility Commission (“Commission”) for failure to state a claim upon which relief can be granted under V.R.C.P. 12(b)(6). The Bruhns argue that the doctrines of collateral estoppel and res judicata preclude Industrial Tower and Wireless, LLC (“Petitioner”) from bringing the above-captioned petition for a 120’ tower, given the Commission’s denial of Petitioner’s previous petition for a Certificate of Public Good (“CPG”) for a 140’ tower in the same location.¹ The Department does not agree that collateral estoppel and res judicata apply to this case and recommends that the Commission deny the motion.

Collateral estoppel, or issue preclusion, “bars the subsequent relitigation of an issue which was actually litigated and decided in a prior case between the parties resulting in a final judgment on the merits, where that issue was necessary to the resolution of the action.”² Collateral estoppel can be applied in administrative proceedings when all of the elements of the doctrine are met.³ The five elements of collateral estoppel are:

¹ *Petition of Industrial Tower and Wireless, LLC requesting a certificate of public good, pursuant to 30 V.S.A. § 248a, authorizing the installation of wireless telecommunications equipment off of Bordoville in Enosburgh, Vermont*, Case No. 22-2120-PET, Order of 8/03/2023.

² *Stevens v. Stearns*, 2003 VT 74, ¶ 12, 175 Vt. 428.

³ *In re Tariff Filing of Cent. Vermont Pub. Serv. Corp.*, 172 Vt. 14, 20 (2001).

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

Petitioner's proposal for a 120' tower does not meet all of the elements of collateral estoppel. In Case No. 22-2120-PET, the Commission denied Petitioner's request for a 140' tower solely on the basis that the project did not comply with the recommendations of the Northwest Regional Planning Commission ("NRPC") regarding the regional plan, concluding that Petitioner failed to qualify for a CPG because it failed to establish the project's compliance with 30 V.S.A. § 248a(c)(2).⁵ In reaching that conclusion, the hearing officer found it unnecessary to make findings or recommendations as to the other Section 248a criteria.⁶ In the instant case, Petitioner has modified its proposal in an effort to address the reason for the Commission's denial, the NRPC's determination that the 140' tower was taller than necessary and consequently inconsistent with the regional plan, by reducing the proposed height of the tower to 120'. While the parties discussed the impacts of a 120' tower in the previous proceeding in testimony and briefing, the issue of whether a 120' tower would comply with the regional plan, or with any of the other Section 248a criteria, was not part of the application before the Commission in Case No. 22-2120-PET. It was not fully litigated nor resolved by the Commission's final judgment. The Commission reached a conclusion on whether the proposed 140' tower met the requirements of Section 248a without determining whether a 120' tower would do so, as that issue was not necessary to the resolution of the action.

⁴ *In re Tariff Filing of Cent. Vermont Pub. Serv. Corp.*, 172 Vt. 14, 20 (2001).

⁵ Case No. 22-2120-PET, Order of 8/03/2023, at 7.

⁶ *Id.*

The doctrine of res judicata, or claim preclusion, applies when an administrative agency is acting in a judicial capacity, and “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.”⁷ However, the tower proposed here is not identical, or even substantially identical, to the tower proposed in the previous proceeding. The reduction in height from 140’ to 120’ is a significant difference considering its potential to impact compliance with Section 248a criteria, and Section 248a(c)(2) in particular. The current petition cannot fairly be characterized as the type of vexatious or repetitious litigation that the doctrine of claim preclusion is intended to prevent. Instead, it is an effort to respond to the recommendation of the NRPC and basis for the Commission’s denial in Case No. 22-2120-PET, which contemplated the possibility that Petitioner would “decide to submit an application consistent with the Regional Plan in the future.”⁸

The Department recommends that the Commission deny the Bruhns motion to dismiss.

DATED at Montpelier, Vermont, this 7th day of August 2026.

Respectfully submitted,
VERMONT DEPARTMENT OF PUBLIC SERVICE

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⁷ *In re Tariff Filing of Cent. Vermont Pub. Serv. Corp.*, 172 Vt. 14, 20, 39 (2001) (internal quotations removed).

⁸ Case No. 22-2120-PET, Order of 8/03/2023, at 7.