

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

REPLY TO OPPOSITION MEMORANDUM

NOW COME Chris and Sandra Bruhn, through counsel, DesMeules, Olmstead & Ostler, and hereby respectfully submit this reply to Petitioner's opposition memorandum filed in response to the Bruhns' Motion to Dismiss.

Petitioner has already lost on the question of whether it has demonstrated good cause to overcome the Northwest Regional Planning Commission's recommendation *based on the height of the proposed tower*. It did not appeal that determination to the Vermont Supreme Court. Instead, it took its grievances to the federal courts and required Vermonters to foot the bill to defend the PUC's determination in a losing effort to prove its case that it could build its 140' tower. It now returns with a proposal for a 120' lattice tower in the same spot with the apparent imprimatur of the Town, the Regional Planning Commission, and the Department of Public Service. It does this **after** offering **both** direct and cross examination testimony and legal argument in 2022 and 2023 that it could not build a shorter tower, nor one that would ameliorate the concerns of the regional planning commission.

Along the way, it cites cases that actually support the Bruhns' arguments and, without clearly stating that there is Vermont Supreme Court case law to the contrary, represents to the PUC that this is a really a question of the successive-application doctrine. Petitioner's arguments

here also contravene basic questions of land-use law. Euclid v. Ambler Realty Co, 272 U.S. 365 (1926).

If the PUC takes the Petitioner’s arguments at face value, it will sanction a rule of law that discards the finality principal and permits § 248a applicants to perform a volte face once they lose on their preferred outcome and return to get the less preferred option. This is not the way litigation in Vermont courts or federal courts works because the common law protects against this kind of outcome. Indeed, it is the common law—which is a welcome source of common sense tested by centuries of judges in this country and others—that should prevail here.

The PUC should grant the motion to dismiss.

STANDARD OF REVIEW

The Bruhns hereby incorporate by reference the standards of review set out in their principal memorandum. Additionally, the Vermont Supreme Court gives no deference to the Commission on questions of res judicata and collateral estoppel. In re Tariff Filing of Cent. Vt. Pub. Serv. Corp., 172 Vt. 14, 32 (2001). The Supreme Court and the Commission apply preclusion when appropriate, in part, because of the finality principle, and the “finality of decisions ...conserves the resources of the administrative tribunal.” Id.

ARGUMENT

In its opposition memorandum, Petitioner focuses intensely on whether a 120’ tower was actually litigated in prior proceedings. But to prevail on this point it erects a straw man in the form of a prior CPG application that did not seek to build a 120’ lattice telecommunications tower. If somehow it can convince the PUC that the test for whether it is precluded from its current petition on the basis that it did not previously seek a 120’ tower proposal, it reckons that it can prevail. Yet it can point to no authority that supports that proposition because that is most

certainly not the test for determining whether an issue is precluded from being litigated in subsequent proceedings.

Instead, the issue here is that the question of a *lower tower height in general* was previously litigated in state and federal fora. This is the basis for the argument concerning the second Trepanier element in the Bruhns' motion to dismiss. See, e.g., Bruhn MTD at 6 ("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 120' height *was* proposed as a conforming alternative and it was vigorously contested during the course of the proceedings and Petitioner testified extensively on cross-examination and in legal filings about that particular height. The fact that the parties and the PUC *did* address that specific height, however, only supports the Bruhns' argument that the question of whether a *lower tower height in general* was actually raised and litigated. Trepanier v. Getting Organized, Inc., 155 Vt. 259, 265, 583 A.2d 583, 588 (1990) (holding that issue present in state-law claims was precluded based on issue litigated previously in federal court). But the "forest" here, instead of focusing too much on the trees—for purposes of issue preclusion and claim preclusion anyway—is that, unequivocally and for years, in testimony and in court filings, Petitioner asserted for a host of reasons that it could not proceed with a tower lower in height than 140'. And now it does the opposite.

The record in 22-2120-PET is replete with these arguments, which Petitioner appears to studiously avoid citing in its opposition memorandum. Take this example: Kevin Delaney

testified that “[i]f ITW were required to reduce the height of its proposed tower [from 140’]...we *could no longer meet*” the objectives that included “coverage along the Vermont Route 108 corridor and connecting to the south along Vermont Route 15 where ITS’s approved Fairfax tower is being constructed.” Supp. Prefiled Test. of Kevin Delaney at 3 (Exhibit C) (emphasis added).

Or this:

The NRPC’s comment also misses the point and ignores the evidence that ITW submitted to show that the 140’ height was necessary for both ITW and future, co-locating carriers to achieve the signal propagation they requires at this location. As ITW’s Kevin Delaney explained: ITW must select a height for its antennas that will allow such clear lines of sight. In this case, ITW conducted propagation analyses that concluded that a Tower height of 140’ above ground level is the minimum necessary to provide optimal coverage on its network in the Enosburgh area. ITW’s objectives for this site include coverage along the Vermont Route 108 corridor and connecting to the south along Vermont Route 15 where ITW’s approved Fairfax tower is being constructed. If ITW were required to reduce the height of its proposed tower as the [NRPC] appears to suggest, we could no longer meet those objectives.”). Delaney Supp. Pf. at 2; see also Exhibits KD-1 and KD-10 (propagation maps showing loss of ITW’s projected coverage at lower heights).³ Finally, as found in the PFD, that height will allow the co-location of multiple carriers below the ITW and Police Department antennas. PFD at 9-10.

ITW Comment on PfD, May 26, 2023 (Exhibit D).

Or this:

The state of the determinative evidence at this point is as follows:

The NRPC has conceded that the project will not have a substantial regional impact;

The Intervenor will not be able to see the tower portion of the project, or its ground facilities, at all;

ITW has demonstrated that its chosen 140' tower height is necessary for meaningful colocation of commercial carriers to serve the area in question; and,

The Police Department has stated its preference to locate its public service antenna at the top of the 140' tower.

CONCLUSION

The RPFD defies common sense and public policy. No party who has intervened in this case has demonstrated that it will suffer any cognizable harm. In fact, they will not even be able to see the project. Conversely, ITW has established that its project will further the public good and the State's interest by allowing ITW to expand its network, by allowing the Police Department to extend the area in which it can communicate reliably, and by providing opportunities for commercial carriers to co-locate, thereby obviating the need for them to construct new towers. Therefore, good cause exists for the PUC to disregard the NRPC's Comments concerning the Tower's height and co-location, because deferring to these Comments would create a substantial shortcoming detrimental to the public good *and* the State's interests. In sum, the RPFD should be rejected and the original PFD adopted in its place.

ITW Comment on Revised PFD, July 21, 2023 (Exhibit E).

Or this:

Q2. Has ITW been in contact with the St. Albans Police Department regarding the proposed height of its antenna?

A2. Yes. Lt. Benjamin Couture gave the following response to in an email about the height at which that Department wants to mount its antenna: "Yes, we would still like to have the tower be at least 140 feet tall." *See* attached Exhibit KD-10. St. Albans Police Chief Maurice Lamothe previously stated his Department's wish to have its antenna mounted at the top of the tower. Exhibit KD-7.

Third Supplemental Prefiled Testimony of Kevin Delaney (Exhibit F).

Or this, in which Attorney Dingledine cross-examined Kevin Delaney during the evidentiary hearing on January 12, 2023:

Q. Okay. In terms of the 140, is there a lower height that you could mitigate the view of this by reducing the height of, you know,

say 20, 30, 40 feet, where it would not make any significant appreciable difference to your coverage of your antennas?

A. I believe we submitted that we could go down to 120 feet. And then it would provide no collocation opportunities for any additional carriers at that point.¹

Q. And why is that? If you're only losing 20 feet out of 100 that's above the tree line?

A. I submitted coverage maps that showed that the difference between the height, and if you review those you can see the difference when you start going down in height how it affects coverage.

Q. All right. That's 140. 120. 140. 120 (changing screen) 140. 120. Do you see much difference there?

A. I can see some difference, but at the same time I did say that 120 would work for us.

Q. So 120 does work. And this mapping is for your walkie-talkie radio system; right?

A. Yes. For the enhanced. That's the radio 1 system.

Q. Okay. So then if we go down even further another 20 feet to 100 feet. Right now we are on 120. So there is a much more drastic change in that 20 feet than between 140 and 120. So what you're saying is that one's not good enough for you guys. You would rather have the coverage at 120 at least; right?

A. Correct.

Q. Okay. So I want to go back to this issue of, let me stop sharing for a sec. All right. So if you cut this down to 120 and did some reasonable mitigation like that, what does that do to the other

¹ It is interesting that Mr. Delaney has contradicted his previous testimony and now testifies that "ITW has designed the Tower and Compound to accommodate the equipment of one other 3 wireless communications provider." KD Prefiled Testimony dated March 18, 2026 at 6. However, it should be noted that Petitioner also represents that it has space for two collocators on this tower. See Pets. Opp. Mem. at 4.

carriers? Maybe it bumps one of them off or something; right? But they can still go on because they are above the tree lines; correct?

A. No. I submitted some studies that showed what happened at the available heights if we went down to 120 feet. It would reduce their coverage to a point where it would almost be completely useless.

Q. Okay. How interested are they right now with only a 20-foot higher tower than the 120 you say won't work for anybody?

A. At this point we don't have a commitment from a carrier.

Transcript of 1/12/22 Hearing at 30-33 (Exhibit G).

Or this in which Attorney Dingledine cross examines Louis Hodgetts later in the same hearing:

Q. Okay. So do you see reducing the tower by 20 feet as reasonable mitigation considering those two coverage maps look almost identical and you would still be able to get four of the five other carriers on the tower?

A. I am not an RF expert. But in my limited expertise in the matter, I would say no. It is not a reasonable mitigation method.

Q. Why not?

A. As Kevin stated, it would significantly limit the ability for future collocation and reduce the coverage of the proposed applicant -- application.

Q. The coverage of what under the application?

A. The coverage of the Industrial's service.

Q. Those are those two maps that I was showing side by side, and I kept toggling back and forth on. Do you think those are substantially different?

A. I would defer to Kevin on that.

Q. But you would agree with me there would still be space for four of the five other carriers in the math that we did. Two feet difference to get them on the tower.

A. As Kevin stated, that is not accurate. And I would not agree with that.

Q. Why not?

A. Because as Kevin stated, the lower carriers on our plan as shown as future potential collocation capabilities would likely have limited serviceability,

Id. at 56-57 (Exhibit G). This is not an exhaustive recitation.

The point is, in contrast to Petitioner's straw man, the issue of its refusal and inability to reduce the tower height was extensively litigated and put squarely before this tribunal *and* two others. The framing of how the dispute concerning height arose was whether ITW had borne its burden to show good cause sufficient to overcome the substantial deference to the regional planning commission under §248a(c)(2). However, it was fundamentally the height of the tower and whether it contravened the regional planning document that was the nub of the dispute, and the questions of reducing the proposed tower height at all, and especially to 120', are precluded now. A discussion of a case that Petitioner appears to hold in regard is warranted because it sheds light on this discussion.

In In re Tariff Filing of Cen. Vermont Pub. Serv. Corp., 172 Vt. 14, 769 A.2d 668 (2001), the Vermont Supreme Court held that issue preclusion *did* apply to a decision of the Public Service Board, which makes Petitioner's citation to it all the more strange for the proposition that issue preclusion should not apply here. In 1987, appellant Central Vermont Public Service Corporation entered into a contract with Hydro-Quebec to purchase electricity from the latter for a term of thirty years. Id. at 17. For various reasons, the contract was amended several times over the course of the next decade. Id. In 1994, appellant sought a rate increase to cover unanticipated costs under the contract following its decision to "lock in" rates with Hydro-Quebec early on. Id. The

Department of Public Service opposed the request and offered expert testimony in an attempt to demonstrate that appellant had acted imprudently in the run up to the rate lock-in contract and in executing the contract, and had misused power purchased from Hydro-Quebec. Id. The Board approved a rate increase but reduced appellant's rate of return in part because it found that appellant had acted imprudently. Id. The decision was not appealed to the Vermont Supreme Court.

In 1997, appellant sought a second rate increase. The Board granted multiple motions to intervene and appointed independent counsel to investigate the prudence of appellant's decision to "negotiate, execute, lock in, and manage its contract with" Hydro-Electric. Id. at 19. Appellant countered that collateral estoppel and claim preclusion barred relitigation of those issues because they were litigated in the earlier 1994 rate proceeding. The Board concluded the issues raised in the later 1997 proceeding were distinct from those in the 1994 proceeding. An interlocutory appeal followed.

The Supreme Court reversed. It explained that "the Board ordered the parties to specifically address whether the lock-in decision was prudent" in the 1994 proceeding. Id. at 27. The Court continued: appellant "vigorously and thoroughly addressed the issue raised by the Board. Insofar as the evidence submitted to the Board was insufficient to establish the prudence of the lock-in, the conclusion that must be drawn is that the decision to lock in was imprudent." Id. It drew a distinction between the appellant's prudence with respect to Hydro-Quebec specifically and with power sources generally, concluding that in the 1994 rate proceeding the "Board made clear, however, that the most significant [appellant] action, and the one with the greatest impact on rates, was its decision to lock in the [Hydro-Quebec] contract early. Thus, the Board directed the parties to submit specific evidence on the prudence of that action, and the

parties did so.” Id. at 28. The Court concluded the issues were the same between the two rate proceedings under the second Trepanier element. So too here.

The parallels are striking. Instead of a rate increase, here Petitioner filed a petition for a 140’ lattice telecommunications tower in 2022. Petitioner submitted multiple rounds of prefiled testimony and exhibits about why a 140’ tower was necessary to achieve its coverage objectives and collocating objectives. Following the regional planning commission’s July 2022 comments raising issues with the height of the tower, Petitioner’s coverage expert submitted supplemental prefiled testimony relating to why the 140’ height was the minimum necessary required to meet its various objectives in light of the regional planning commission’s comments. Petitioner’s witnesses submitted various exhibits on the issue—including analyzing a potential 120’ tower—and were cross examined on the topic of a lower tower height at the evidentiary hearing.

Petitioner’s comments on the original proposal for decision vigorously contended that it had met its burden to overcome the substantial deference to the regional planning commission’s recommendation. So, instead of “directing the parties to submit specific evidence on the prudence” of the applicant’s decision-making with respect to entering a contract as in In re Tariff, the Commission did functionally the same thing when it issued an order “to reopen the evidentiary record in this case and remand the case to the Hearing Officer for any further process associated with” the regional planning commission’s April 28, 2023 “public comment clarifying earlier public comments and recommendations made by the NRPC in this case.” Commission Order Remanding Case to Hearing Officer of 5/3/23 (Exhibit H). The regional planning commission’s April 28, 2023 public comment recommended against approving the proposed 140’ tower. (Exhibit I).

Petitioner thereafter had its coverage expert submit more supplemental prefiled testimony concerning the height of the tower. It filed comments on the revised proposal for decision that

now recommended denying the petition. On August 3, 2023, the Commission entered an order denying the CPG. (Exhibit J). As Petitioner helpfully points out in its opposition memorandum, the Commission in that order concluded that “[h]ad the tower been proposed with less height devoted to future collocation space, the recommendation of the NRPC may have been different.”² Order Denying CPG at 9. It explained that the recommendations of the “NRPC are reasonable and specific to this particular tower.” *Id.* (emphasis added). And like the decision by the parties in *In re Tariff*, Petitioner did not appeal this order. It therefore became a final order. See *In re Tariff*, 172 Vt. at 32 (“[O]ur earlier decisions to apply issue preclusion in rate cases mean that we have concluded that expensive and time-consuming relitigation of contested issues is in the interest of

² The Department’s August 7, 2026 response to the Bruhns’ motion to dismiss appears to miss this point. The Department suggests that the issue of a 120’ tower was “not necessary to the judgment.” DPS Resp. at 2, because the issue that the Commission decided was whether a 140’ tower did not comply with the recommendations of the regional planning commission. *Id.* at 1. But this case is analogous to the situation in *Trepanier v. Getting Organized*, 155 Vt. 219 (1990), in which the Supreme Court addressed a similar problem. There, plaintiffs sought to maintain state-law claims based on allegations that they were fired for age-related reasons. “The gist of the [state-law] complaint is that defendants advised Nordic to fire plaintiffs because of their ages, and that Nordic followed defendants’ advice.” *Trepanier*, 155 Vt. at 266. Earlier, a federal jury returned a verdict for the defendant in which the jury instructions included, in relevant part, the “plaintiff ‘must prove that his age was a ‘determining factor’ in the discharge, in the sense that, *but for* the employer’s motive to discriminate against him because of age, he would not have been discharged.’ (Emphasis in original.)” Because the jury decided against the plaintiffs on the issue of whether age was a determining factor in their dismissals, they could not continue to litigate the question of “age played ‘some role’ in defendants’ advice that they be discharged.” *Id.*

Indeed, the Court applied the test more rigorously in *Trepanier* than would be the case here. In *Trepanier*, the plaintiffs were estopped from litigating *any* question of age in their dismissals following the jury verdict that turned on whether age was merely the counterfactual reason they were fired. Here, the gist of Petitioner’s earlier petition was that it could not construct a shorter tower to comply with the regional planning commission’s recommendation because doing so would foreclose its coverage objectives and eliminate or essentially eliminate collocation opportunities for AT&T and Verizon. The counterfactual scenario (the but for logic used in the jury instructions in *Trepanier*)—whether a shorter tower and/or a 120’ tower would pass muster—was laced throughout the proceedings to such an extent that the hearing officer and the Commission each addressed the issue in their respective decisions. It lost on the basis that its proposed height of 140’ did not comply with the planning document—but also that a lower height could comply, and which lower height(s) the parties vigorously litigated. Petitioner is estopped now from returning with a conforming proposal in the same way that plaintiffs in *Trepanier* were estopped from relitigating whether age was a “determining factor” in claims styled as whether age played “some role” in their claims under state law. Unlike plaintiffs in *Trepanier* who were barred from litigation the question of age at all in future litigation, Petitioner could refile for a tower proposal on a different site or for one taller than 140’. The distinction here that the Department draws elevates form over function, and, more importantly, misunderstands the requirements under the third *Trepanier* element.

neither the public nor the utilities. The same finality that benefits the utility investors can serve the interests of consumers who know that if a utility is once denied relief because of its failure to prove its case, it may not return repeatedly on the same facts until the [Board] yields. Moreover, finality of decisions also conserves the resources of the administrative tribunal.” (quotation omitted)).

Petitioner did not propose a shorter tower in 2022 or 2023 in light of the clear issues it was facing from the regional planning commission *from as early as one month after it filed its petition in early June 2022*. It could have. It did not reapply or seek to amend its application in light of what appeared to be solicitations to do so by the PUC and the Department. It could have. It did not appeal the Commission’s order denying the CPG. It could have. It instead filed suit in federal court. It did not have to, but in so doing it doubled down on its position that building a shorter tower was impossible.

Petitioner cites In re Petition of Apple Hill Solar LLC, 2019 VT 64, for the proposition that it is not estopped from maintaining this petition. The citation is inapposite even if it were correctly characterized by the Petitioner. The issue there was whether Apple Hill Solar LLC was precluded from maintaining a § 248 CPG petition where the PUC had previously determined that *a different*, adjacent project—the Chelsea Solar project—“would violate clear, written community standards in the Bennington Town Plan.” Id. ¶ 7.³ The Commission had thereafter issued the following with respect to the Chelsea Solar project following Chelsea Solar’s motion for relief filed with the PUC during the pendency of the appeal:

[It] encourages Chelsea to file a new petition reflecting its proposed...project and proposed measures to achieve its prompt review....[W]e appreciate Chelsea’s efforts to revise the Chelsea Project and its desire to exercise commons sense in response to the

³ The Court did not reach arguments about privity between Chelsea Solar and Apple Hill, which the parties vigorously contested. Id. ¶ 23.

Town Selectboard's vote to support the revised Apple Hill project. To this end and to promote judicial efficiency, the Commission encourages Chelsea to withdraw its appeal with the Vermont Supreme Court and file a new petition.

Id. ¶8.

The Vermont Supreme Court affirmed the Commission's ruling that Apple Hill was not estopped. It held that the fourth and fifth Trepanier elements were not met because Chelsea Solar withdrew its appeal on the PUC's encouragement to do so. Id. ¶ 23. It did not hold that "the interests in protecting judicial economy and finality of judgments are particularly slight" because of anything Apple Hill did or did not do, in contrast to Petitioner's characterization. It instead held that because another litigant withdrew its appeal in response to an express and extraordinary communication from the PUC, and relied on that request, the "countervailing desire not to deprive [Apple Hill] of an adequate day in court" was "particularly strong." Id. (quotation omitted). Nothing of the sort obtains here.

First, the applicant had its own adequate day in court. Indeed, it had its day in court multiple times. Second, even if the Bruhns conceded—which they do not—that the language from the hearing officer and the Commission in 2023 in this matter was equivalent to the language in Chelsea Solar, the applicant did not appeal to our Supreme Court much less seek relief from the PUC in the manner in which Chelsea Solar did. Instead, it sued the Commission in federal court. Nothing about this situation tends to demonstrate that "interests in protecting judicial economy and finality of judgments are particularly slight here." Id. ¶ 23.

The Petitioner next contends that neither issue nor claim preclusion applies because the issue of a 120-foot tower was never litigated. Pets Opp. Mem. at 8-12. On its face, this is not true

for the reasons explained above and in the Bruhns' Motion to Dismiss.⁴ Moreover, as described herein, the issue was whether it could proceed with a shorter tower, whether that lower height was 120' (which most certainly came up *repeatedly*) or some other height. But Petitioner's arguments on this point with particular respect to claim preclusion again rely on a straw man. Petitioner contends that "there is no mandatory duty to amend" and therefore the Bruhns' argument that "the prior application could have or should have been amended" fails. *Id.* at 10. Petitioner somehow equates "mandatory duty" with "could" and "should." The Vermont Supreme Court recently explained that "in order for claim preclusion to apply, it has to have been possible for the claim to be brought in the previous case. Sutton v. Purzycki, 2022 VT 56, P30 n.2 (2022) (citing Restatement (Second) § 26(1)(c) for proposition that "general rule for claim preclusion does not apply where litigant was unable to seek relief in first action due to lack of subject-matter jurisdiction") (emphasis added). The Court explained that it uses the transactional analysis outlined Faulkner v. Caledonia County Fair Ass'n, 2004 Vt 123 to determine whether the claim that could or should have been brought is sufficiently similar to the one that was actually brought.⁵ Petitioner called this case "an ordinary civil action" that was "vastly overstated by the Bruhns." Pets Opp. Mem. at 11. Not so. It actually is the citation our Supreme Court refers to for analyzing whether a claim is one that should have been brought in the earlier proceeding. Suffice it to say, that based on the record, it was more than possible to have brought the alternative height of 120'

⁴ Indeed, Kevin Delaney testifies in his direct prefiled testimony dated March 18 2026 that "[t]he Northwest Regional Planning Commission objected to that [earlier] project on the basis that a 120' foot tower would meet the minimum ITW's coverage requirements. This Tower was designed in line with the NRPC's prior concerns." KD Prefiled Testimony at 4.

or some other lower tower height.⁶ The Bruhns see no need to revise their position on this taken in the principal memorandum.⁷

Petitioner makes two final points that can be addressed in short order. First, it cites to Echeverria v. Town of Tunbridge, 2024 VT 47, ¶ 14 for the proposition that “new facts defeat preclusion.” Pets Opp. Mem. at 12. While that is true as far it goes, it is overly simplistic, and

⁶ Indeed, in 25-1679-PET, the PUC recently allowed the Petitioner to reduce a proposed lattice telecommunications tower from 160’ to 130’—a greater change than in the present case—on the basis that it qualified as a de minimus modification and “did not constitute a substantial change to the originally approved Project and, accordingly, does not require further proceedings.” Order Grating [Sic] a Non-Substantial Change Determination, order of 6/3/26 (Exhibit L). And it is notable that the Department filed a response to ITW’s motion for non-substantial change determination in 25-1679-PET representing that “[t]he Department maintains that the modest reduction in Tower height proposed by ITW, with no other changes, will not result in a significant impact under any criteria applicable to the Project because the reduction is likely to reduce impacts or at most impose impacts that are comparable to the original petition.” DPS Resp. to ITW Mot. for NSCD at 2 (Exhibit M). It also cited another recent PUC determination in support of its position in which the Commission found that a 27’ reduction in the proposed tower’s height was nonsubstantial. See Case Number 25-0257-PET, order of 8/14/25 at 2 as cited by DPS Resp. to ITW Mot. for NSCD at 2 (Exhibit M). It is not entirely clear why the Department takes the opposite approach in this case—where the sole change is a 20’ reduction in height—when it represents that “[t]he reduction in height from 140’ to 120’ is a significant difference considering its potential to impact compliance with Section 248a criterion, and Section 248a(c)(2) in particular.” DPS Resp. at 3.

⁷ Furthermore, Louis Hodgetts, in his prefiled testimony dated March 27, 2026, testifies that, with respect to the newly proposed 120’ tower, “

A visibility analysis was conducted to review the potential visibility of the 1 proposed installation and balloon float was conducted on January 21, 2022, to confirm 2 the visual impact of the proposed Tower on the surrounding community. A 3’ diameter 3 red balloon was inflated, connected to a 150’ long string, and tethered at the proposed site 4 location. While the balloon was in the air at the proposed height, our staff drove the 5 primary public roads within a two-mile radius of the project location to determine the 6 visibility of the proposed installation. Views of the proposed installation were limited to 7 about 1 mile on VT 108 and from more limited spots of short duration due to the steep 8 terrain and foreground vegetation. We attempted to see the balloon from ten (10) 9 different viewpoints, identified in Exhibit LH-6. Of those, the balloon was only visible 10 from four (4) viewpoints and simulations were developed of the proposed installation. As 11 the proposed tower height was reduced to 120 feet, the photo simulations have been 12 adjusted to account for this reduction which further reduced the visibility of the tower. 13 The photo simulations at a 120 foot height are submitted as Exhibit LH-6.

There is no principled argument that new evidence was required to support this new petition. Petitioner had all of it either prepared in 2022 and 2023 as demonstrated by the record, the testimony at the evidentiary hearing, and ITW’s own witnesses’ testimony in 2026.

certainly what happened in Echeverria has not happened here. In Echeverria, the defendant Town issued a policy sua sponte about the subject of the plaintiff's pending complaint. As the Court explained, by definition, this development constituted "facts [that] were not available at the time plaintiffs filed their first complaint." Id. Furthermore, the trial court expressly did not rely on many of the new allegations in the amended complaint, which, it stated "would not cure" the underlying pleading deficiency in any event. Id. Accordingly, because the plaintiff had not had a chance to fully and fairly litigate the issue of justiciability given the new facts over which it had no control, and because the procedural posture was an appeal from a motion to dismiss, id. ¶ 10, the Court was inclined to take a lenient approach, and did. See Blake v. Petrie, 2020 VT 92, ¶ 7 ("Although disfavored, motions to dismiss should be granted when it is beyond doubt that there are no facts or circumstances which would entitle the plaintiff to relief"); see also Stowe Aviation, LLC v. Agency of Commerce & Commun. Dev., 2024 VT 11, ¶ 19 (holding that trial courts should take extremely solicitous approach to permitting litigants to replead pursuant to Rule 15).

It is clear that none of that obtains in this case. Petitioner was on actual notice in the first proceeding that the regional planning commission had recommended against issuing the CPG due to the tower's proposed height of 140'. Petitioner responded with additional testimony and legal argument from seasoned counsel. The posture there was not a motion to dismiss as in Echeverria, but quite the opposite. It had every opportunity to cure its petition to overcome its inherent deficiencies—indeed it appeared to be invited to do so by the PUC and by the Department. It chose not to. But more crucially, the fact of the regional planning commission's present support in favor of the petition was entirely foreseeable to the petitioner because it was the basis of the

denial in the first petition.⁸ Indeed, it was on notice as early as July 26, 2022, barely a month after the application was deemed complete, when the Northwest Regional Planning Commission filed a public comment stating, in part, “[u]pon review of the proposed project, the NRPC Project Review Committee has found that the project does not conform the Regional Plan as currently designed. Under 30 V.S.A. § 248a, the recommendations of the NRPC concerning the Northwest Regional Plan are entitled to substantial deference in the Section 248a proceedings.” (Exhibit K). The letter went on to state: “The Project Review Committee notes that the application could be found in conformance with the Regional Plan if evidence of co-location of other telecommunication services is provided by the applicant.” Id. And finally:

As stated in both Goal 3 and Policy 4b, telecommunications towers must be the least obtrusive system with the least obtrusive siting possible. In this case, the Project Review Committee believes that the height of the tower is not the least obtrusive system to provide the applicant’s service. Rather it seems that the height of the tower is driven by the design choice to provide 5 opportunities for future co-location of panel antenna. While the Regional Plan supports co-location, it does not support building a significantly taller and more obtrusive tower than necessary when the applicant has not provided evidence that there will be co-located services on the tower. In short, the Project Review Committee believes that the tower is not the “least obstructive system possible” and will create a greater aesthetic impact on the character of the area than is necessary to provide the applicant’s service.

Id. This is obviously not the same thing as a party opponent changing the rules governing the subject of the dispute while a complaint is pending. Moreover, as has been demonstrated, the current prefiled testimony of Kevin Delaney and Louis Hodgetts each say the quiet part out loud:

⁸ Petitioner makes the strange assertion that the Town’s endorsement is somehow a new fact. Pets Opp. Mem. at 12. The Town did not file anything into the prior proceeding, and therefore its position did not have any impact on the proceedings, nor does its *endorsement* in this instance materially change the posture of the case. See 30 V.S.A. § 248a(c).

the issue and claim of a lower tower in general, and specifically one 120' in height, was thoroughly litigated and responded to by the Petitioner in 2022-23. The only new fact here is that is that the Case Number has changed—indeed, even a cursory review of the relevant prefiled testimonies between the two proceedings demonstrates an overlap in analysis, including large passages with essentially the same language.⁹ The analogy to Echeverria is meritless.

And finally, Petitioner contends that a § 248a CPG proceeding is really a land-use proceeding and therefore subject to the successive-application doctrine. However, the Supreme Court has long applied preclusion principles to PUC proceedings, including those arising under § 248, which is not materially different than § 248a for purposes of “land use,” or the lack thereof. See, e.g., In re Petition of Apple Hill Solar LLC, 2019 VT 64 (analyzing preclusion in § 248 case). And as recently as a final order in Case Number 25-0284-PET, the Commission refused to consider changes to the property boundaries as “substantial change that required Commission approval.” Final Order Granting Non-Substantial Change Determination and Amended Net-Metering Certificate of Public Good, Case No. 25-0284-PET, issued on 3/26/2026 (on appeal to the Vermont Supreme Court as Case No. 26-AP-180). The rule change that Petitioner requests here, without expressly telling the Commission, is one that would contravene years of Supreme Court and Commission precedent.

Even more fundamentally, however, Petitioner’s reasoning is flawed. The Legislature’s grant of power to the PUC is precisely outlined in § 248a. There is no provision requiring the *landowner* to be a party to the CPG proceeding because the PUC has no jurisdiction over the

⁹ Compare, e.g., Louis Hodgetts’s review of the Act 250 criteria in his prefiled testimony dated June 1, 2022 with his March 27, 2026 testimony discussing same. See also Supra FN 6 regarding nonsubstantial change determinations.

landowner. A land-use permit, whether issued by a municipality or a state entity binds the entire parcel and therefore is a derogation of the rights of the landowner. See Euclid, 272 U.S. at 379 (explaining that municipal zoning authority is derived from its police power and “[i]n every ordered society the State must act as umpire to the extent of preventing one man from so using his property or rights as to prevent others from making a correspondingly full and free use of their property and rights. The abstract right of a man to build a fire trap is limited by the rights of other people not to have their houses subjected to the peril created by it. The right of a man to maintain a nuisance on his own property is limited by the rights of others not to be subjected to the danger of its proximity. Accordingly, the so-called police power is an inherent right on the part of the public umpire to prevent misuses of property or rights which impair the health, safety, or morals of others, or affect prejudicially the general public welfare.)” Fundamentally, land-use permits infringe on a landowner’s rights to use property. In the § 248a context, it is a land lease between the petitioner and the landowner that burdens the landowner, not the permit. Nor do § 248a permits encumber the entire parcel. They are licenses to operate a facility on a particular parcel for the public good by an entity that is not the landowner (in the vast majority of cases).

It is beyond doubt that the Petitioner can state no claim upon which relief can be granted. Birchwood Land Co. v. Krizan, 2015 VT 37, ¶ 6. The Petitioner is relitigating issues it previously did so fully and fairly on which this tribunal and two others issued final decisions. It is also pressing a claim that it should have brought in the earlier proceeding with the same parties, arrayed in the same manner, in the same tribunal. Yet it can advance no fact or inference—even when construed in the light most favorable to it—that can overcome these realities. The Bruhns should prevail as a matter of law.

Wherefore, the Bruhns respectfully request the Commission to dismiss this petition. Applicant can refile it for another location or for a height higher than 140', but it is barred from proceeding under present facts and circumstances.¹⁰

Dated at Norwich, Vermont this 14th day of August, 2026.

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¹⁰ The Bruhns note that Petitioner requests attorney's fees and costs for "responding" to the Bruhns' motion. Petitioner cites no authority for such a shift in fees, nor does it ask the PUC to apply Vermont Rule of Civil Procedure 11 which, in extraordinary cases, permits a trial court to assess "appropriate sanction" after "notice and reasonable opportunity to respond." The Bruhns'—it should go without saying—have good-faith bases to file their Motion to Dismiss, and have litigated the motion with every attempt to avoid needless delay, including communicating their intent to file the motion to the Petitioner in the event the parties could not come to an amicable settlement, which the parties endeavored to do and failed.