

**STATE OF VERMONT
PUBLIC UTILITY COMMISSION**

Case No. 22-2120-PET

Petition of Industrial Tower and Wireless, LLC)
for a Certificate of Public Good,)
pursuant to 30 V.S.A. § 248a, authorizing)
the construction of a wireless telecommunications)
facility in Enosburgh, Vermont.)

**COMMENTS OF
INDUSTRIAL TOWER AND WIRELESS, LLC REGARDING REMAND
AND IN RESPONSE TO REGIONAL PLANNING COMMISSION COMMENTS**

Petitioner, Industrial Tower and Wireless, LLC (“ITW”), by its counsel, MSK Attorneys, submits these Comments regarding the remand ordered by the Public Utility Commission (“PUC”) and in response to the Comments submitted by the Northwest Regional Planning Commission (“NRPC”) on April 28, 2023 as requested by the Hearing Officer in his May 4, 2023 Order Requesting Comment.

PRELIMINARY STATEMENT

As shown earlier in this case, ITW demonstrated the good cause necessary to overcome the substantial deference accorded to regional planning commissions in proceedings under 30 V.S.A. §248a. In particular, as the Hearing Officer found in his Proposal for Decision (PFD”) dated February 28, 2023, the co-location of antennas and ancillary equipment serving the St. Albans Police Department (“Police Department”) and the provision for the co-location of similar equipment by multiple commercial telecommunications carriers meet this standard. Further, the NRPC’s shifting comments in this proceeding are both internally inconsistent and at odds with other NRPC decisions in PUC cases involving construction of new telecommunications towers, some of which were taller than the one proposed by ITW in this case. Therefore, the NRPC’s

comments should also be rejected on that basis. For these reasons, ITW respectfully submits that there is no need for further proceedings on this remand.

POINT I

GOOD CAUSE EXISTS TO REFUSE TO GIVE SUBSTANTIAL DEFERENCE TO THE RPC'S COMMENTS

After receiving comments from first responders in the area concerning gaps in their coverage, ITW was directed to the Police Department, which coordinates the provision of emergency services throughout Franklin County. Supplemental Prefiled Testimony of Kevin Delaney ("Delaney Supp. Pf.") at 2-3. In response, the Police Department stated its commitment to co-locate its antennas at the 140' level of ITW's proposed tower ("Tower"). *Id.*, Letter of Police Department Chief Maurice Lamothe, dated August 8, 2022 (Exhibit KD-7). As Chief Lamothe observed:

The installation of the tower would be a valuable improvement for public safety communications for the following towns: Bakersfield, Enosburg, Berkshire and South Richford for Police, Fire and EMS.

Id. Expanding on his observation and stating the Police Department's interest in co-locating its equipment on the Tower, Chief Lamothe further observed:

These areas have been known to have dead spots for our current radio system while dispatching emergency calls. **We would want to install our equipment at the top, 140 feet, of the tower to get the best results for emergency dispatching.** This proposed tower site would improve the radio communication as we move forward in upgrading our service to the area.

Id. (emphasis added). In further communications with the Police Department, ITW stated its commitment to allow the Department to place its equipment on the Tower rent-free. Delaney Supp. Pf. at 3.

Section 248a(c)(2) states that, “[b]efore the Public Utility Commission issues a certificate of public good under this section, it shall find that ...”:

Unless there is **good cause to find otherwise**, substantial deference has been given to the plans of the affected municipalities; to the recommendations of the municipal legislative bodies and the municipal planning commissions regarding the municipal plans; and to the recommendations of the regional planning commission concerning the regional plan....

30 V.S.A. § 248a(c)(2) (emphasis added).

Section 248a(b)(3) defines “good cause” as a “**showing of evidence** that the substantial deference required under subdivision (c)(2) of this section would create a substantial shortcoming detrimental to the public good or the State’s interests in section 202c of this title.” 30 V.S.A. § 248a(b)(3) (emphasis added).

The State and the public have an interest in ubiquitous wireless communications, especially for emergency service purposes. *See generally* 30 V.S.A. § 202c(a)-(b).

In light of Chief Lamothe’s August 8th letter, good cause exists for the PUC to disregard the NRPC’S comments concerning Tower height and co-location because deferring to these Comments would create a substantial shortcoming detrimental to the public good *and* the State’s interests. Chief Lamothe’s letter constitutes a showing of evidence that fulfills the good cause requirement. *Compare* the following cases in which this Commission approved communications towers over objections from municipalities and a regional planning commission¹:

- *Petition of GMR Holdings of NH, LLC & T-Mobile Ne. LLC, for a Cert. of Pub. Good, Pursuant to 30 V.S.A. § 248a, for the Installation of Telecomms. Equip. in Vershire, Vt., No. 8689, 2016 WL 6276930, at *4 (Vt. P.S.B. Oct. 20, 2016)* (concluding that “compliance with the Town’s recommendation would defeat the coverage goals of the

¹ ITW notes that this PUC decided these cases under an earlier version of § 248a, in which the terms, “substantial deference” and “good cause” were not defined.

Project to provide wireless service in the surrounding community and therefore would be contrary to goals expressed in § 202c” and holding that “good cause exists to not defer to the Town’s recommendation to deny the Project”);

- *Petition of VTel Wireless, Inc., for a Cert. of Pub. Good, Pursuant to 30 V.S.A. § 248a, for the Installation of Telecomms. Equip. in Rochester, Vt.*, No. 8548, 2015 WL 9425796, at *7 (Vt. P.S.B. Dec. 14, 2015) (“[W]hile the Project will be visible from some surrounding areas, it will not have an undue adverse effect on the aesthetics of the area. Therefore, I conclude that good cause exists to not defer to the Town’s recommendation regarding Project height reduction.”);
- *Petition of VTel Wireless, Inc., for a Cert. of Pub. Good, Pursuant to 30 V.S.A. § 248a, for the Installation of Telecomms. Equip. in Ludlow, Vt.*, No. 8352, 2014 WL 6713556, at *6 (Vt. P.S.B. Nov. 24, 2014) (“the Project is intended to expand wireless broadband service to thousands of homes and businesses in the surrounding area, many of which are in currently underserved areas. Accordingly, we find that there is good cause to reject Ludlow’s recommendation” to deny the CPG);
- *Petition of SBA Towers IV, Inc., & VTel Wireless, Inc., for a Cert. of Pub. Good, Pursuant to 30 V.S.A. § 248a, for the Installation of Telecomms. Equip. in Richmond, Vt.*, No. 8162, 2014 WL 5493886, at *8 (Vt. P.S.B. Oct. 24, 2014) (“While I recommend the Board conclude that the Project complies with the land conservation measures in the town plan, I also recommend the Board conclude that there exists sufficient good cause to approve the Project even if the Project had not been in compliance with the town plan. Pursuant to § 202c(b)(3), it is the policy of the State to support ‘the availability of modern mobile wireless telecommunications services along the State’s travel corridors and in the State’s communities.’ The Project is designed to provide wireless telecommunications services in the Town of Richmond and the travel corridor of I-89; therefore, the Project will support the statutory policy goals and there exists sufficient good cause to approve the Project.”);

and

- *Petition of New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility, & Am. Towers, LLC, for a Cert. of Pub. Good, Pursuant to 30 V.S.A. § 248a, for the Installation of Telecomms. Equip. in Peru, Vt.*, No. 8304, 2014 WL 3811125, at *6 (Vt. P.S.B. July 29, 2014) (“In addition, the Board concludes that there is sufficient good cause in this case to approve the Project despite the recommendations of the [Bennington County Regional Planning Commission]. The Project will fulfill an important coverage objective by providing AT&T service for motorists and residents along Route 11 in the area that cannot be addressed by using a shorter tower.”).

POINT II**THE NRPC'S SHIFTING COMMENTS ARE INCONSISTENT WITH ONE ANOTHER AND, THEREFORE, SHOULD NOT BE ACCORDED SUBSTANTIAL DEFERENCE**

After filing its initial recommendation on July 26, 2022, the NRPC did not attempt to rebut ITW's showing of public good. Instead, the NRPC Chair sent a letter to the Department of Public Service's attorney suggesting that further formal NRPC comments were forthcoming. Letter of William Irwin to Benjamin Civiletti, dated September 27, 2022. However, the NRPC filed no such comments. Nor did it move to intervene in this case.

At its January 11, 2023 meeting, the NRPC discussed ITW's Petition again, but the NRPC did not participate in the Evidentiary Hearing in the present matter, which took place the next day. This lack of action suggested that the NRPC was unwilling to defend its earlier objections in light of the Police Department's commitment to co-locate on the Tower.

Despite this non-participation, the PUC gave the NRPC another chance to file comments, this time after the PFD was entered. *Order Requesting Clarification*, dated March 30, 2023. Not surprisingly, the NRPC reverted to its original position, asserting that the Project would not comply with its regional plan. See April 28, 2023 letter from NRPC Regional Planner to the PUC.

The stated basis for the NRPC's second shift of position was that ITW had not provided evidence that the Tower's 140' height was necessary for the Police Department's antenna to function properly. *Id.* at 2 ("The [NRPC] notes that as stated in the letter from the [Police Department] dated August 8, 2022, co-location for emergency services is to be provided on the tower. However, the Committee fails to find how this co-location justifies the height of the tower

as the letter does not specify a specific height which is necessary for expanding emergency radio services.”).²

After having been apprised of the NRPC’s most recent comments, the Police Department has reiterated its desire to have its antenna located at 140’ above ground level (“AGL”). Third Supplemental Prefiled Testimony of Kevin Delaney; Exhibit KD-11. Therefore, the NRPC’s statement to the contrary is neither correct, valid nor reasonable, and the PUC need not defer to it.

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.

For these reasons, the NRPC’s shifting comments are not entitled to substantial deference.

² Note also that the NRPC’s comments never specified how much of a height reduction it thought would be appropriate.

³ At the Evidentiary Hearing in the Case, Mr. Delaney noted that there was not much difference in ITW’s signal propagation if the height of the Tower was reduced to 120’ AGL. Transcript of January 12, 2023 Hearing (“Tr.”) at 32. However, he went on to testify that this height reduction would likely cause the loss of two potential spots for co-locating carriers. Tr. at 35-38.

POINT III**THE NRPC’S COMMENTS ADVOCATING FOR DENIAL OF ITW’S APPLICATION
CONFLICT WITH THE POSITIONS IT HAS TAKEN IN SIMILAR CASES
AND CAN BE DISREGARDED FOR THAT REASON ALONE**

In defining the “substantial deference” that the PUC must initially grant to an RPC’s recommendations, the Vermont Legislature chose language that matched that developed by the Vermont Supreme Court determining when a court must defer to an action by an administrative agency. *See, e.g., In re Devoid*, 130 Vt. 141, 148, 287 A.2d 573, 577 (1972) (“On review of the acts or orders of an administrative body, the court will presume, among other things, that the administrative action is correct and that the orders and decisions of the administrative body are valid and reasonable.”). The Court cited 73 C.J.S. *Public Administrative Bodies and Procedure* § 205 in support of the above.

However, that presumption is not irrefutable. Courts have repeatedly held that the presumption may be overcome where an agency acts in a manner that is inconsistent with its previous actions in similar circumstances absent a reasoned (and reasonable) explanation for that changes. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221-22 (2016). As the *Encino* Court held:

When an agency changes its existing position, it “need not always provide a more detailed justification than what would suffice for a new policy created on a blank slate.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515, 129 S.Ct. 1800, 173 L.Ed.2d 738 (2009). But the agency must at least “display awareness that it is changing position” and “show that there are good reasons for the new policy.” *Ibid.* (emphasis deleted). In explaining its changed position, an agency must also be cognizant that longstanding policies may have “engendered serious reliance interests that must be taken into account.” *Ibid.*; see also *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996). “In such cases it is not that further justification is demanded

by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.” *Fox Television Stations, supra*, at 515–516, 129 S.Ct. 1800. It follows that an “[u]nexplained inconsistency” in agency policy is “a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.” *Brand X, supra*, at 981, 125 S.Ct. 2688. An arbitrary and capricious regulation of this sort is itself unlawful and receives no *Chevron* deference. See *Mead Corp., supra*, at 227, 121 S.Ct. 2164.

Encino, 579 U.S. at 221-22.

Here, the NRPC has offered **no** explanation, let alone a reasoned one, for treating the present application differently than others it has reviewed in cases involving the construction of new telecommunications towers of similar or even greater height. Indeed, the NRPC has recommended that the PUC deny ITW’s application to build a 140-foot tall lattice tower with antennas reaching 153’ AGL. That recommendation is at odds with all of its recent considerations of new telecommunications towers within its territory, as shown in the table below, including two towers greater than 153’ in total height – 168’ and 180’, respectively.⁴

TOWN	TOWER HEIGHT AND TYPE	PUC CASE NO.	NRPC ACTION
Enosburgh	121’ Monopole	17-0319-PET	No Recommendation
Fairfax	155’ + 13’ (168’) Lattice (ITW)	21-3174-PET	No Recommendation
Fairfax	130’ Monopole (Verizon)	21-4033-PET	Commented that project was in conformance with Regional Plan
Grand Isle	180’ Monopole	20-0685-PET	No Recommendation
Richford	120’ Monopole	17-2957-PET	No Recommendation
South Hero	110’ + 14’ (124’) Monopole	19-1153-PET	No Recommendation

⁴ Our search of previous new tower cases in which the NRPC was involved was limited to those cases in the ePUC database.

CONCLUSION

For all of the foregoing reasons, the NRPC has failed to raise issues that preclude the PUC from issuing the Certificate of Public Good for which ITW has petitioned. In particular, 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. Further, the shifting nature of the NRPC's position in this case and regarding previous tower applications constitutes good cause for denying substantial deference to that commission's current position.

Dated: May 26, 2023
Burlington, Vermont

Respectfully submitted,

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