

STATE OF VERMONT
PUBLIC UTILITY COMMISSION

Case No. 22-2120-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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Order entered: 08/03/2023

ORDER DENYING CERTIFICATE OF PUBLIC GOOD

In this Order, the Vermont Public Utility Commission (“Commission”) adopts the following revised proposal for decision.

REVISED PROPOSAL FOR DECISION¹

I. INTRODUCTION

In this Revised Proposal for Decision, I recommend that the Vermont Public Utility Commission (“Commission”) deny the application filed by Industrial Tower and Wireless, LLC (the “Petitioner”), pursuant to 30 V.S.A. § 248a and the Commission’s Amended Standards and Procedures Order (“Procedures Order”).²

II. PROCEDURAL HISTORY

On June 6, 2022, the Petitioner filed a petition and prefiled testimony requesting that the Commission issue a certificate of public good (“CPG”) authorizing the installation of a wireless telecommunications facility in Enosburgh, Vermont (the proposed “Project”). A copy of the petition was filed with all required State agencies and the host municipality pursuant to § 248a(e). Notice of the filing of the petition was provided to all adjoining landowners of record.

On July 26, 2022, Cyrus House and Tara Lombardi, Sandra Bruhn, Charles Hungerford and Philippa Dorfman, Colleen Sheppard and Derek Jones, and the Bordoville SDA Church

¹ As explained below and in light of additional information received after my initial Proposal for Decision, I am issuing this Revised Proposal for Decision, which supersedes my previous order in its entirety.

² *Sixth amended order implementing standards and procedures for issuance of a certificate of public good for communications facilities pursuant to 30 V.S.A. § 248a*, Order issued September 21, 2018.

(together the “Neighbors”) filed motions to intervene and requests for a hearing to be held in this proceeding.

On July 26, 2022, the Vermont Department of Public Service (“Department”) filed comments on the Project and requested additional information regarding the future collocation of other carriers on the Project.

On July 26, 2022, the Northwest Regional Planning Commission (“NRPC”) filed public comments on the Project expressing concerns regarding the Project’s compliance with the Regional Plan given the height of the Project and the lack of identified collocaters on the Project. The NRPC stated that the Project does not conform to the Regional Plan as currently designed, but also stated that it would not have a substantial regional impact.

On August 12, 2022, the Petitioner filed a response to the Department’s request for additional information and to the NRPC’s comments.

On August 19, 2022, I issued an Order granting permissive intervention to the Neighbors.

On August 26, 2022, the Department filed comments stating that it would be retaining a consultant to perform an independent aesthetic evaluation of the Project.

On September 27, 2022, the Commission received a copy of a letter addressed to the Department from the Chair of the NRPC expressing concerns regarding the Project’s compliance with the Regional Plan. The letter was also filed as a public comment from the NRPC.

On October 6, 2022, I conducted a scheduling conference in this matter.

On January 12, 2023, an evidentiary hearing was held in this proceeding.

On February 28, 2023, I issued a proposal for decision in this case recommending that the Commission approve the Petitioner’s application.

On March 17, 2023, the Department filed comments in support of the proposal for decision.

On March 17, 2023, the Neighbors filed comments in opposition to the proposal for decision. The Neighbors maintain that the Project will have an undue adverse impact on aesthetics and will interfere with the orderly development of the region. The Neighbors also argue that the recommendations of the NRPC have not been given substantial deference.

On March 30, 2023, at the request of the Commission, I issued an order seeking clarification from the NRPC regarding its position with respect to the proposed project.

On April 28, 2023, the NRPC filed a public comment clarifying earlier public comments and recommendations made by the NRPC in this case. The NRPC states that the Project is not consistent with the goals of the Regional Plan due to its height and lack of identified collocating providers.

On May 3, 2023, the Commission issued an order reopening the evidentiary record and remanding the case to the Hearing Officer in light of the clarifying comments and recommendation of the NRPC.

On May 4, 2023, I issued an order requesting comment on the NRPC's April 28 comments.

On May 26, 2023, the Neighbors filed a response to the NRPC's April 28 comments. The Neighbors contend that the NRPC's comments demonstrate that the Project does not comply with the NRPC's recommendations regarding the Regional Plan. The Neighbors maintain that these recommendations should be afforded substantial deference by the Commission and, accordingly, the Project application should be denied.

On May 26, 2023, the Petitioner filed a response to the NRPC's April 28 comments. The Petitioner also filed supplemental testimony and an exhibit in support of its response. The Petitioner argues that the comments and recommendations filed by the NRPC have been internally inconsistent and should be rejected on that basis. The Petitioner also maintains that the State's and the public's interest in ubiquitous wireless communications and emergency services represent sufficient good cause to not defer to the recommendations of the NRPC.

On May 26, 2023, the Department filed a response to the NRPC's April 28 comments. The Department recommends that the Commission seek additional evidence regarding the effects of a reduction of the Project tower height, in terms of collocation opportunities and coverage, in order to determine whether good cause exists to not defer to the NRPC's recommendation.

No other comments on the application were received by the Commission.

The following are admitted as if presented at the hearing: the third supplemental prefiled testimony of Kevin Delaney and exh. KD-11; the NRPC public comments dated April 28, 2023.³

³ If any party has an objection to any of these documents being entered into evidence, the party shall include its objection in its comments on this proposal for decision.

III. FINDINGS

Pursuant to 30 V.S.A. § 8(c), and based on the record and evidence before me, I present the following revised proposed findings of fact to the Commission.

1. The Project involves the construction of a telecommunications facility at Bordoville Road in Enosburgh, Vermont. The objective of the Project is to expand and improve wireless broadband coverage in the surrounding area. Kevin Delaney, Petitioner (“Delaney”) pf. filed at 2.

2. The Petitioner provides Enhanced Specialized Mobile Radio service. This service includes voice calling, text messaging, and GPS integration for vehicle tracking for commercial businesses, schools, municipalities, utilities, and public safety entities. The proposed facility would also provide collocation opportunities for up to five additional carriers. In addition, the St. Albans Police Department has committed to collocating its communications equipment on the Project. Delaney supp. pf. at 1-4 (8/12/22).

3. The Project includes the installation of a 140' lattice tower with six whip antennas mounted at the top of the tower and extending to a height of 153', and one whip antenna reaching downward from the top of the tower approximately 13'. The Project also includes the installation of an equipment cabinet on a 10' by 10' concrete pad, underground utilities, and ancillary operating equipment within an 80' by 80' fenced compound. The Project would be accessed over an improved existing drive and trail from Bordoville Road. Richard Voci, Petitioner (“Voci”) pf. at 2-3.

4. The NRPC initially found that the project does not conform to the Regional Plan. NRPC Comment dated July 28, 2022.

5. The Project is not consistent with goals requiring the least obtrusive type of telecommunication facility contained in the Northwest Regional Plan. The Regional Plan requires that telecommunication facilities be the least obtrusive system possible. The Project tower, because it was designed to include collocation space for potential future telecommunication providers, is taller and more obtrusive than it needs to be. NRPC comment dated April 28, 2023.

6. The NRPC concluded that the co-location of St. Albans Police Department emergency radio services does not justify the 140' height of the tower because the Applicant has

not demonstrated that a specific height is necessary for expanding emergency radio services. NRPC comment dated April 28, 2023.

Discussion

Pursuant to 30 V.S.A. § 248a(c)(2), before the Commission issues a certificate of public good under this section, it shall find that:

[u]nless 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.

“Substantial deference” means that the plans and recommendations referenced under subdivision (c)(2) of this section are presumed correct, valid, and reasonable.⁴ 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.” In this case, the NRPC has recommended that the Commission find that the Project, due to its height, does not comply with the Regional Plan.

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.

The Petitioner argues that there is good cause to override the recommendations of the NRPC because the collocation of the St. Albans Police Department’s equipment on the tower will further important public safety goals. The Petitioner has submitted a letter from the St. Albans Police Department stating that it “would like to have the tower be at least 140 feet tall.”⁵ The Petitioner also argues that the NRPC’s comments in the case have been inconsistent, that the NRPC never moved to intervene in the case to defend its position, and that the comments should

⁴ 30 V.S.A. § 248a(b)(5).

⁵ Exh. KD-11.

be rejected on this basis. Finally, the Petitioner maintains that the NRPC's recommendation should be rejected because the NRPC has, in other cases, not voiced opposition to the construction of taller towers in the region. However, as the Petitioner notes, all of these other cases were decided under an earlier version of § 248a, in which the terms, "substantial deference" and "good cause" were not defined.

The Department maintains that lowering the height of the Project tower would curtail collocation opportunities and would, thus, conflict with the State's interest in providing universal access to wireless telecommunications pursuant to 30 V.S.A. § 202c. Nonetheless, the Department recommends that the Commission seek additional evidence regarding a reduction in the Project tower height from 140' to 120'.

I agree with both the Petitioner and the Department that the construction of telecommunications facilities that include collocation space is consistent with the State's interests pursuant to § 202c and the public good in general. I also agree with the Petitioner that the NRPC's position in this case has been far from clear and that the case would have benefitted from greater participation on the part of the NRPC. However, I conclude that the NRPC's request for some evidentiary showing on the part of the developer that the extra tower height is necessary to build the facility, and that the extra collocation space will result in services that the surrounding community may benefit from, is reasonable.

The Petitioner has submitted evidence that lowering the height of the Project tower would compromise potential collocation opportunities.⁶ However, there is no evidence to demonstrate that those collocation opportunities will ever be used or that, even if collocation were to occur, that it would result in benefits to the surrounding community. The Petitioner's testimony at the evidentiary hearing suggests that a height of 120' could still meet at least some of the Project's goals.⁷ In addition, the NRPC's recommendations here do not amount to a blanket prohibition on the construction of telecommunications facilities in the region. As the Petitioner points out, the NRPC has not raised opposition to other similar facilities in the region. The Project will further the State's goals in providing universal access to wireless telecommunications services pursuant to § 202c. However, because these goals could, at least in part, be achieved with a

⁶ See Delaney, supplemental pf. at 2 (8/12/22); Exhibit KD-9.

⁷ See tr. 01/12/23 at 32 (Delaney).

lower tower height, I do not find this sufficient good cause to reject the NRPC's recommendation in support of a less obtrusive facility. Accordingly, I recommend that the Project application be denied on the grounds that it is not consistent with the Regional Plan, with substantial deference accorded to the recommendation of the NRPC pursuant to § 248a(c)(2).

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.

IV. CONCLUSION

Based upon all of the above evidence, I recommend that the Commission conclude that the petition be denied because the Project does not comply with the recommendations of the Planning Commission regarding the Regional Plan and therefore does not qualify for a CPG under 30 V.S.A. § 248a(c)(2). Because I recommend finding that the Project fails to comply with 30 V.S.A. § 248a(c)(2), and because that recommendation, if accepted by the Commission, is dispositive, I have not made recommendations addressing the other Section 248a criteria.⁸

This revised Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

Date: July 6, 2023



Gregg Faber
Hearing Officer

⁸ See *In re Application of Derby GLC Solar, LLC*, 2019 VT 77, ¶19, 211 Vt. 144, 221 A.3d 777 (holding that in Section 248 proceedings where all relevant criteria must be met, when the Commission finds “that a project fails to satisfy one or more criteria,” that finding “is fatal to the project,” and there is therefore “no need” for the Commission to address any other criteria).

V. COMMISSION DISCUSSION

On July 21, 2023, the Department filed comments on the Revised Proposal for Decision (“RPFD”).

On July 21, 2023, the Neighbors filed comments in support of the RPFD.

On July 21, 2023, the Petitioner filed comments opposed to the RPFD.

After considering these comments, we adopt the hearing officer’s revised proposed decision. We also discuss the comments below.

The Petitioner argues that there is good cause to override the recommendations of the NRPC because the Project will further the State’s interest in providing additional wireless telecommunications pursuant to 30 V.S.A. § 202c. Therefore, the Petitioner maintains, the Commission should reject the RPFD and accept the original PFD in its place.

The Neighbors contend that the RPFD affords substantial deference to the recommendations of the NRPC as required under 30 V.S.A. § 248a(c)(2). Further, the Neighbors maintain that there is no good cause to override the recommendations of the NRPC regarding the Project. The Neighbors also argue that proposed finding number 1 of the RPFD, which describes the Project objective as expanding and improving wireless broadband coverage, is overly broad. The Neighbors contend that the Project will only provide enhanced radio services and the finding should be revised to reflect this more limited service provision.

The Department argues that the Commission should consider whether additional analysis or clarification is appropriate regarding whether good cause exists to override the NRPC’s recommendation. The Department also contends that allowing the NRPC to clarify its position so late in the case “has compromised the resolution of this matter to some degree.” Accordingly, the Department suggests that going forward the Commission should consider issuing further guidance regarding the participation of parties and regional planning commissions in these types of cases to avoid similar situations in the future.

We agree with the Petitioner and the Department that the construction of telecommunications facilities is, in general, consistent with the State’s broad interests pursuant to § 202c and the public good in general. However, we conclude that these interests could, at least

in part, be served with a shorter and less obtrusive tower as recommended by the NRPC. 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. The Petitioner's argument that the general State interest embodied in § 202c overrides the specific recommendation made by the NRPC in this case would require us to accept the notion that §202c always preempts the recommendations of town or regional planning commissions, rendering the substantial deference standard found in § 248a(c)(2) virtually meaningless. This we decline to do.

With respect to proposed finding number 1, as discussed above, the Project was designed to provide future collocation opportunities for additional carriers, including wireless broadband providers. Therefore, the ultimate objective of the Project is to expand and improve wireless broadband in the area. Accordingly, we conclude that finding No. 1 of the RPFD is factually correct and we decline to revise the finding.

We agree with the Department that allowing the NRPC to clarify its position so late in the case was less than ideal. As discussed by the Hearing Officer in the RPFD, the NRPC's position in this case has been far from clear and the NRPC has declined to participate as a party in the case. Therefore, given the statutory requirement to provide substantial deference to the recommendations of regional planning commissions under § 248a(c)(2), the Commission was compelled to allow the NRPC an additional opportunity to clarify its recommendations in this case. We also agree with the Department that additional guidance on the participation of regional planning commissions and municipalities would be helpful going forward. In this regard, we look forward to working with the Department on ways to improve participation in the § 248a process as required under the recently enacted Act 20 of the Vermont Legislature.⁹

⁹ Act 20 requires that the Department, in consultation with the Commission, submit a report to the legislature on ways to improve and encourage municipal participation in the § 248a process. The Act also requires that the Department hear from the Vermont League of Cities and Towns, utilities, and any other interested parties in preparing the report.

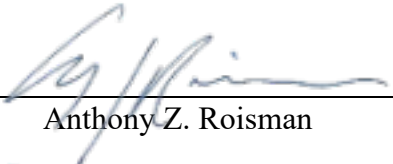
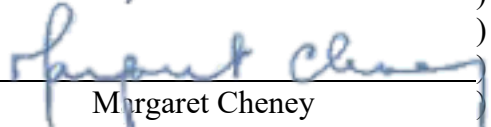
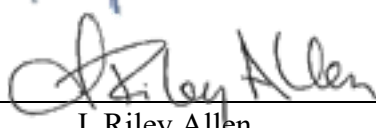
VI. ORDER

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED by the Public Utility Commission (“Commission”) of the State of Vermont that:

1. The findings, conclusions, and recommendations of the Hearing Officer are adopted. All other findings proposed by parties, to the extent that they are inconsistent with this Order, were considered and not adopted.

2. The application for the installation and operation of a wireless telecommunications facility at the location specified in the above findings, by Industrial Tower and Wireless, LLC, in accordance with the evidence and plans submitted in this proceeding, is denied.

Dated at Montpelier, Vermont, this 3rd day of August, 2023.

	)	
Anthony Z. Roisman	)	PUBLIC UTILITY
	)	
	)	
Margaret Cheney	)	COMMISSION
	)	
	)	
J. Riley Allen	)	OF VERMONT

OFFICE OF THE CLERK

Filed: August 3, 2023

Attest: 
Clerk of the Commission

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Commission (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: puc.clerk@vermont.gov)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Commission within 30 days. Appeal will not stay the effect of this Order, absent further order by this Commission or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Commission within 28 days of the date of this decision and Order.

PUC Case No. 22-2120-PET - SERVICE LIST

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