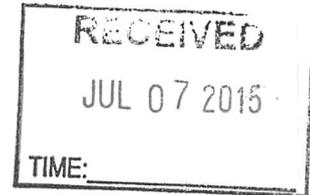


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July 6, 2015

VIA FIRST CLASS MAIL AND ELECTRONIC MAIL

Susan M. Hudson, Clerk
Vermont Public Service Board
112 State Street
Montpelier, VT 05602-2701

Re: *Petition of VTel Wireless, Inc., for Certificate of Public Good –
Telecommunications Facility at Bayne Comolli Road, Calais, Vermont*
Docket No. 8535

Dear Ms. Hudson:

Enclosed please find one (1) original and three (3) copies of the Town of Calais' Reply to VTel's Response to Motion to Dismiss Petition for filing with the Public Service Board in relation to the above-referenced matter.

Please contact me with any questions. Thank you for your assistance.

Sincerely,


Diane M. Sherman

DMS/gc
Enclosure

cc: See Attached List

**STATE OF VERMONT
PUBLIC SERVICE BOARD**

Petition of VTel Wireless, Inc., pursuant to 30)
V.S.A. § 248a, for a Certificate of Public Good)
To install a telecommunications facility at Bayne) Docket No. 8535
Comolli Road, Calais, Vermont)

TOWN'S REPLY TO VTEL'S RESPONSE TO MOTION TO DISMISS PETITION

NOW COMES the Town of Calais Selectboard ("the Town"), by and through its counsel Stitzel, Page & Fletcher, P.C., and hereby replies to VTel Wireless, Inc.'s ("Petitioner") response to the Town's Motion to Dismiss Petition in the above-captioned docket concerning a proposal for the development of a wireless telecommunications facility at 1056 Bayne Comolli Road in Calais, Vermont, on property owned by Steve Perkins ("the Project"), as described in the Petitioner's Petition filed on May 15, 2015 ("the Petition").

Memorandum

I. Town's Motion to Dismiss Petition Seeks Dismissal for Incompleteness

Petitioner misinterprets the Town's Motion to Dismiss Petition. The Town's motion principally requests that the Public Service Board ("the Board") dismiss the Petition as deficient pursuant to the Board's inherent authority to reject an incomplete petition and pursuant to Board Rule 2.208. Such a dismissal is not made pursuant to V.R.C.P. 12(b)(6). Such a dismissal would not preclude Petitioner from correcting the deficiencies in the Petition and filing a corrected

petition which would proceed anew through the comment and review period for § 248a petitions. Only if Petitioner fails to correct the noted deficiencies in its Petition does the Town request dismissal with prejudice pursuant to V.R.C.P. 12(b)(6).

A. Petition Must be Dismissed as Incomplete

The Board has inherent authority to reject an incomplete petition; this authority is akin to a municipal Administrative Officer's authority to return an incomplete zoning permit application without substantive review, *see* 24 V.S.A. § 4448(d), and a state agency's ability to reject an incomplete permit application.¹ Board Rule 2.208 codifies the Board's authority to reject an incomplete petition, indicating that "substantially defective or insufficient filings may be rejected by the Board" and that a "filing is substantially insufficient if, inter alia, it fails to include all material information required by statute or rule." The Board's authority in this regard is further evidenced by the language of 30 V.S.A. § 248a(f) and (j)(2)(C), which discuss the effect of an incomplete filing on the Board's timing for issuing a final determination. Section 248a(f) and (j)(2)(C) indicate that the clock for the Board's determination does not begin ticking until the Board determines a petition

¹ Additionally, an applicant's rights do not vest until he or she files a complete application that addresses all of the criteria required for approval. *See In re Ross*, 151 Vt. 54, 57-58 (1989) (indicating that the rights of an applicant seeking an Act 250 Permit vest only after an application is submitted that addresses all of the Act 250 criteria); *Smith v. Winhall Planning Comm'n*, 140 Vt. 178, 181 (1981) (indicating that the rights of an applicant seeking zoning approval vest when a proper application is filed).

is complete. Similarly, the comment period for interested parties with standing to participate in the proceeding necessarily begins anew when the Board determines a petition is complete.

The Board has rejected multiple petitions for incompleteness, including petitions for other wireless telecommunications projects proposed by Petitioner. *See, e.g.*, Memorandum from Susan M. Hudson, Clerk of the Board to David Ford of Centerline Communications LLC and the Vermont Department of Public Service, dated May 1, 2015 with the subject line “Wireless Telecommunications Facility in Cabot, Vermont” (informing Petitioner that its “filing is deficient and cannot be further processed”). The issue of a petition’s completeness does not concern the merits of the allegations in the petition and is not captured by V.R.C.P. 12(b)(6). Thus, the standard for ruling on a 12(b)(6) motion is not applicable to requests to dismiss a petition as incomplete.

Completeness is a threshold showing required of all § 248a petitioners. Allowing an incomplete application to proceed through § 248a review would deny a host municipality, and other interested parties with standing to participate, the due process rights provided in § 248a, including the parties’ right to receive actual notice of a final proposed project, to review and provide substantive comments on the final proposed project, and to otherwise participate in the proceeding in a meaningful way.

For the reasons stated in the Town's Motion to Dismiss Petition, the Town respectfully requests that the Board dismiss the Petition as deficient pursuant to the Board's inherent authority to reject an incomplete petition and pursuant to Board Rule 2.208. Should Petitioner thereafter file a complete application, the Town must be afforded the full comment period applicable to a project of the size proposed.

B. If Deficiencies Remain Uncorrected Petition Should be Dismissed Pursuant to V.R.C.P. 12(b)(6).

While the Town principally requests that the Board dismiss the Petition as deficient, should Petitioner seek substantive review without correcting the deficiencies, the Town requests an order dismissing the Petition with prejudice pursuant to V.R.C.P. 12(b)(6) for failure by Petitioner to satisfy the requirements of § 248a. Petitioner's response to the Town's Motion to Dismiss Petition fails to note that the Town's arguments are largely based on Petitioner's allegations in its Petition (i.e., the "pleadings" under Rule 12(b)(6)) rather than information submitted by the Town in the form of exhibits.

II. Petition is Deficient for Reasons Stated in Motion to Dismiss Petition

A brief reply to Petitioner's specific arguments regarding the deficiencies in its Petition follows.

A. Petition Includes Insufficient Historical Sites Analysis

Contrary to Petitioner's argument in its response to the Town's Motion to Dismiss Petition, the Town's argument that the Petition's historical sites analysis is deficient does not turn on evidence submitted by the Town or disagreement by the Town with the evidence submitted by Petitioner. Rather, the Town's argument is that the evidence submitted by Petitioner is insufficient to satisfy this criterion of § 248a(c)(1). The Board has dismissed petitions for other wireless telecommunications projects proposed by Petitioner for deficiencies analogous to those in the pending Petition. *See, e.g.*, Memorandum from Susan M. Hudson, Clerk of the Board to David Ford of Centerline Communications LLC and the Vermont Department of Public Service, dated May 1, 2015 with the subject line "Wireless Telecommunications Facility in Cabot, Vermont" (rejecting a petition whose project narrative stated that the project was "not intended" to have undue adverse impacts on historic sites and which relied upon a Draft NEPA Screening Report that was "still 'under review'"). Rejection of the incomplete Petition is similarly necessary here.

B. Project is Not of Limited Size and Scope, Petition Includes Insufficient Evidence on Criteria Applicable to Larger Facilities, and Project Lacks Necessary Elements

Dismissal is also warranted because Petitioner has failed to meet its burden to demonstrate that its Project qualifies as a facility of "limited size and scope," has

failed to provide sufficient information for the Board to reach a positive finding under all of the criteria that it must consider in its review of larger facilities, and has failed to include all necessary elements of the Project in its Petition.

Petitioner argues that the calculation of earth disturbance stated in the Project Narrative (Item 6B.1 of the Petition) and on the Intermediate Site Plan (Page 3 of Item 6B.2 of the Petition) should be presumed correct. Petitioner's argument is logically flawed, however, and fails to acknowledge or explain the information in the Petition—including that in other site plans which are part of Item 6B.2—that contradicts its calculation and must, under Petitioner's theory, also be presumed correct. Additionally, because the Petition fails to identify the location and dimensions of necessary components of the Project, Petitioner's calculation of earth disturbance is an estimate, not a final calculation. As explained in the Town's Motion to Dismiss Petition, the Petition does not identify where and over what area the woods trail and/or access drive will be expanded for vehicle access, the location and dimensions of parking and turnaround areas, or the location of an existing curb cut that will be used to access the Project (and that will determine the final location and length of the access drive).

The credibility of Petitioner's statement that the Project will not involve a parking or turnaround area is dubious, particularly where access to the site is designed to allow only single-track passage. Petitioner fails to explain how a

vehicle will be able to drive to and from the wireless telecommunications tower and associated equipment for monitoring, maintenance, and emergency response purposes, without an area designed to provide for reasonable vehicle circulation and parking.

Regarding the curb cut, contrary to Petitioner's claim, the Petition does not clearly identify the location of the curb cut which will be used to access the Project. The Petition, instead, includes at least two proposals—that the Project will share use of Steve Perkins' driveway curb cut or that a new curb cut will be proposed for access from Bayne Comolli Road. Practically speaking, approval for a new, potentially second or third curb cut for Steve Perkins' property cannot be presumed, and, without receipt of an approved curb cut from the Town, Petitioner cannot identify the accurate location and length of the access drive and therefore cannot provide an accurate calculation of the total amount of earth disturbance.

Petitioner's calculation of 9,900 square feet of earth disturbance is so near the threshold of 10,000 square feet that any unaccounted for disturbance will likely prevent the facility from qualifying as a facility of limited size and scope. The conflicting information provided in the Petition about the identified Project components and the lack of inclusion of all necessary Project components prevents the amount of total earth disturbance from being calculated and prevents Petitioner from demonstrating that the Project qualifies as a facility of limited size and scope.

The lack of inclusion of the necessary Project components also, in and of itself, prevents the Petition from being complete.

D. Petitioner Failed to Provide 45-Day Notice

The Town disputes Petitioner's assertion that its notice dated February 25, 2015 ("the February Notice") satisfies the requirements of § 248a(e). The Board's Second Amended Standards and Procedural Order² requires that the 45-day advance notice for § 248a projects meet basic requirements; these include that the notice must identify the location of the proposed wireless telecommunications facility site and provide a description of the proposed project. The Board's Order requires this information to be provided with sufficient detail to "to allow the parties receiving the notice to understand the impact of the project on the interests of those parties." The Board has made clear that an advance notice that does not meet the requirements of the Board's procedural order will lead to rejection of the noticed petition as incomplete. *See Petition of Central Vermont Public Service Corporation*, Docket 7714, Order of June 27, 2011 (rejecting a petition for incompleteness where petitioner's 45-day advance notice did not include a full description of the project proposed and was not provided 45 days in advance of the petition being filed).

² *Second 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 5, 2014.

The February Notice provided by Petitioner fails to meet the basic requirements required by the Board's procedural order. The February Notice served as advance notice of a project to be located 430' south of the Project proposed in the Petition, by Petitioner's own calculations. See Exhibit D of Motion to Dismiss Petition. The February Notice also included a project narrative not descriptive of the Project proposed in the Petition. By arguing that the February Notice is sufficient, Petitioner is necessarily arguing that shifting the location of its wireless telecommunications tower and associated equipment by 430' and relocating and lengthening the access road to the tower and associated equipment has no appreciable impact on the Project's review under the substantive criteria of § 248a(c). Because a § 248a project is principally composed of a tower, accompanying equipment, and an access road, moving and changing the dimensions of all of these components to the extent Petitioner has done essentially creates a new project. The location and dimensions of the Project's components fundamentally impacts the analysis of the Project under a majority of the substantive criteria of § 248a(c) and is determinative of the impact of the Project on the Town's interests under the criteria. Under the basic requirements set forth in the Second Amended Standards and Procedural Order, the February Notice is not a sufficient advance notice for the Project proposed in the Petition, and the Petition should be dismissed as incomplete.

Petitioner's response to the Town's Motion to Dismiss Petition purports to cite to proceedings in which the proponents of wireless telecommunications facilities allegedly made changes to or shifted the location of project components during the 45-day advance notice period and in which the changes or shifts were allegedly acceptable to the Board. However, none of the Board Orders cited by Petitioner discuss the issue of whether the 45-day notice requirement was impacted by the described change or shift in the project component's location. Indeed, it does not appear that this question was ever actually raised, in these proceedings, by a party entitled to such notice or addressed by the Board. At least one of the Orders cited by Petitioner does not even concern an original petition request; the Order of July 9, 2014 in Docket No. 8216 is a ruling by the Board that Petitioner did not need to apply for an amendment for an already-obtained Certificate of Public Good. Finally, the alleged changes or shifts in the location of project components in all but one of the proceedings, as described by Petitioner,³ are of a much smaller magnitude than the 430' change in placement of the Project's components at issue here.

To summarize, none of the Orders cited by Petitioner are persuasive or controlling on the question of whether a valid 45-day notice was provided in this proceeding. A valid 45-day advance notice for a § 248a project is both necessary

³ The Town was unable to verify most of the distances described by Petitioner because most of the Board Orders cited do not discuss the alleged shifts in the location of the proposed projects.

under the Board's Second Amended Standards and Procedural Order and § 248a(e) and vital to the preservation of a host municipality's due process rights afforded it in § 248a. As stated in the Town's Motion to Dismiss Petition, a host municipality needs the full time provided by statute—45 days in addition to the 21 days following receipt of a complete § 248a(j) petition—to enable it to obtain technical reviews of a proposed project and, if the municipality determines necessary to protect its interests, to develop substantive evidence that will be both acceptable to and aid the Board in its review of the project.

Because the February Notice does not constitute advance notice for the Project under § 248a(e), the Petition must be dismissed. If the lack of a sufficient 45-day is not cured by Petitioner, it is fatal to the Petition, warranting dismissal of the Petition with prejudice pursuant to V.R.C.P. 12(b)(6).

Conclusion

For the foregoing reasons and as discussed in the Town's Motion to Dismiss Petition, the Town respectfully requests that the Board dismiss the Petition as deficient pursuant to the Board's inherent authority to reject an incomplete petition and pursuant to Board Rule 2.208. Should Petitioner be unwilling to correct the Petition's deficiencies, the Town requests dismissal with prejudice pursuant to V.R.C.P 12(b)(6).

[Signature page follows]

Dated at Burlington, Vermont this 6th of July, 2015.

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