

# A Guide to the § 248a Process for the Siting and Deployment of Telecommunications Facilities

## Overview

This guide is intended to walk readers through the Vermont Public Utility Commission’s process for the siting and construction of telecommunications facilities. Communications facilities can, and often do, raise many legitimate concerns for the communities they serve. From public safety to environmental and aesthetic impacts, these facilities often present complex challenges. In addition, Public Utility Commission practice can be confusing and difficult to those who are unfamiliar with it. This guide explains the permitting process for telecommunications facilities under 30 V.S.A. § 248a, and the role individuals and towns can play in the process. It is our hope that with the help of this guide, cities, towns, and individuals will be able to positively shape our telecommunications future through effective participation in the § 248a process.

## Public Utility Commission

The Vermont Public Utility Commission (the “Commission” or “PUC”) is an independent quasi-judicial agency that regulates electric power companies, telephone service providers, cable television providers, pipeline gas companies, and some water utilities. The Commission consists of three members, all of whom are appointed by the Governor for staggered six-year terms. As a quasi-judicial entity, the Commission operates much like a court. The Commission conducts evidentiary hearings and issues decisions, typically referred to as “orders.” Orders are legally binding decisions that can be appealed to the Vermont Supreme Court. The Commission manages a staff of attorneys, economists, engineers, and environmental analysts, among others. In most proceedings, a staff member acts as a hearing officer, conducting hearings and drafting proposals for decision with recommendations for the Commission’s consideration and ultimate determination. Generally, a hearing officer will oversee all hearings in a § 248a proceeding.

The Commission also establishes rules and procedures related to utility matters. The Commission’s interpretations of law and particular practices may be established by order, and the Commission has issued an Order establishing procedures for the administration and adjudication of § 248a applications (“*Standards and Procedures Order*”).<sup>1</sup> The Commission’s *Standards and Procedures Order* for § 248a can also be found on the PUC website.<sup>2</sup>

## Department of Public Service

The Vermont Department of Public Service (the “Department” or “DPS”) represents the public interest in proceedings before the Commission, generally relating to electricity, telecommunications, and water companies. The Department is a separate entity from the Commission and is part of the executive branch of Vermont state government. The Department is a statutory party to § 248a proceedings and provides comments to the Commission in response to

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<sup>1</sup> See *Order Adopting Revised Standards and Procedures Implementing 30 V.S.A. § 248a*, Case No. 22-5122-INV, Order of 1/18/2023 (referred to throughout this guide as the “*Standards and Procedures Order*”).

<sup>2</sup> Available at: <https://puc.vermont.gov/document/procedures-applicable-request-construction-or-installation-telecommunications-facilities>.

each application. The Department will also retain experts and conduct an independent analysis of a proposed facility when appropriate.

### Applicants

Applicants, also called “petitioners,” can initiate a § 248a proceeding by filing an application with the Commission.<sup>3</sup> Applicants are parties to the proceeding and must represent their interests before the Commission. Applicants in the § 248a process are generally telecommunications providers, but individuals and towns may submit an application as well. Telecommunications providers typically consider many factors when choosing a site, including availability of a host property, access to utilities, the location’s ability to meet service coverage goals, and the ability to co-locate equipment on existing structures. These issues are often resolved prior to the submission of an application.

### **The Section 248a Process**

Companies or persons wishing to construct a telecommunications facility may seek approval do so by applying to the Commission for a permit known as a certificate of public good (“CPG”).<sup>4</sup> This process is outlined in Vermont statute at 30 V.S.A. § 248a. The § 248a process begins with an application.

An applicant must submit an application to the Commission. For certain projects, applicants must also file a notice with a number of individuals and groups in advance, including the Commission, the Department, the Vermont Agency of Natural Resources, the Vermont Division for Historic Preservation, municipal legislative bodies and planning commissions in the town where the project is proposed, regional planning commissions, and adjoining landowners. When this advance notice is required, it must be made at least 60 days prior to filing a formal application with the Commission. There are three different types of projects recognized in § 248a. These are discussed in turn below.

### De Minimis Modifications to an Existing Facility

*De minimis* projects involve relatively small modifications to an existing facility or support structure. *De minimis* modifications can involve the co-location of new equipment on an existing structure, such as a telecommunications tower, building, or farm silo. To qualify for *de minimis* status, the proposed project must meet the following criteria:

- (A) The height and width of the facility or support structure, excluding equipment, antennas, or ancillary improvements, are not increased;
- (B) The total amount of impervious surface, including access roads, surrounding the facility or support structure is not increased by more than 300 square feet;

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<sup>3</sup> Application requirements can be found in the *Standards and Procedures Order* (<https://puc.vermont.gov/document/procedures-applicable-request-construction-or-installation-telecommunications-facilities>).

<sup>4</sup> Applicants seeking a permit through the § 248a process may do so as an alternative to local zoning and Act 250.

(C) The addition, modification, or replacement of equipment, antennas, or ancillary improvements does not increase the height or width of the facility or support structure by more than 10 feet; and

(D) The addition, modification, or replacement of equipment, antennas, or ancillary improvements on the support structure, excluding cabling, does not increase the aggregate surface area of the faces of the equipment, antennas, or ancillary improvements on the support structure by more than 75 square feet.<sup>5</sup>

There is no advance notice requirement for *de minimis* applications. Individuals or groups must limit comments to whether the proposed modification meets the *de minimis* criteria listed above. Comments on the *de minimis* classification must be filed within 30 days of the date the application was served on all required recipients, and must be filed using ePUC, the Commission's electronic case and document management system,<sup>6</sup> unless the filer obtains a waiver under Commission Rule 2.107 to allow for paper filings. If the Commission receives no timely objections pertaining to the classification of the project as *de minimis* within the 30-day comment period, the Commission shall issue a CPG without further proceedings.<sup>7</sup>

#### Projects of Limited Size and Scope

Limited size and scope projects include smaller new facilities and larger modifications to existing facilities. A new facility of limited size and scope must not exceed 140 feet in total height. An existing facility must remain under 200 feet after project completion and the modification cannot expand the width of the existing *support structure* by more than 20 feet. A limited size and scope project cannot disturb more than 10,000 square feet of earth.<sup>8</sup> Unlike *de minimis* projects, there are no limits on the amount of equipment the applicant is allowed to install. An applicant is required to issue an advance notice to the Commission and all required recipients at least 60 days prior to filing an application. If the Commission finds that an application does not raise a significant issue, it is required to make a final determination within 60 days of the date that the application was complete. In the event that an application raises a significant issue, the Commission must render a final determination on the application within 90 days.

#### Full § 248a Projects

A full § 248a project is any project that does not fall into the two other categories: in other words, it is not of limited size and scope or a *de minimis* modification to an existing facility. There

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<sup>5</sup> These criteria and additional guidance can be found in the *Standards and Procedures Order* (<https://puc.vermont.gov/document/procedures-applicable-request-construction-or-installation-telecommunications-facilities>).

<sup>6</sup> The ePUC system can be accessed at: <https://epuc.vermont.gov/>.

<sup>7</sup> 30 V.S.A. § 248a(k).

<sup>8</sup> 30 V.S.A. § 248a(b)(4)(A)(B). The Commission interprets this language to mean permanent earth disturbance and excludes temporary earth disturbance associated with construction activities from the calculation. *See Standards and Procedures Order* at 2 (<https://puc.vermont.gov/document/procedures-applicable-request-construction-or-installation-telecommunications-facilities>).

are no height or size limitations for a full project. The Commission must make findings that the project will not have an “undue adverse effect” on certain criteria discussed below before issuing a CPG. An applicant is required to issue a 60-day advance notice to the Commission and all required recipients before filing an application. The Commission shall issue an order within 60 days of receiving a complete application if it determines that an application does not raise a significant issue regarding the 248a criteria. In the event that an application raises a significant issue, the Commission must render a final determination on the application within 180 days.

## **248a Criteria**

### Undue Adverse Effect

Before the Commission can issue a CPG, it must make findings that the project will not have an “undue adverse effect” with regard to:

- Aesthetics
- Historic sites
- Air and water purity
- The natural environment
- Public health and safety
- Public use and enjoyment of I-89 and I-91 scenic corridors, and any highway designated as a scenic road.
- Criteria in 10 V.S.A § 1424a(d) and 10 V.S.A. §§ 6086(a)(1)-(8) and (9)(k).<sup>9</sup>

The criteria listed above are applicable to full projects.<sup>10</sup> Applicants filing a project of limited size and scope must address some of these criteria, namely 10 V.S.A. § 6086(a)(1)(D)(floodways) and 10 V.S.A. § 6086(a)(8)(aesthetics, historic sites, rare and irreplaceable natural areas, endangered species, necessary wildlife). A project of limited size and scope must also comply, at a minimum, with the requirements of the *Low Risk Site Handbook for Erosion Prevention and Sediment Control* issued by the Vermont Department of Environmental Conservation. *De minimis* project applicants are not required to address the substantive criteria listed above.

### Town Plans, Regional Plans, and Recommendations of Municipal and Regional Planners

In addition to the criteria listed above, the Commission must also give “substantial deference” 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” unless

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<sup>9</sup> See 30 V.S.A. § 248a(c)(1). The law incorporates by reference certain Act 250 criteria. It includes water and air pollution, water supply, soil erosion, congestion or unsafe conditions with respect to the use of highways, waterways, railways, airways and other means of transportation, burden on the ability of a municipality to provide municipal or governmental services, and scenic and natural beauty.

<sup>10</sup> If the proposed facility relates to the provision of wireless service, applicants must also demonstrate compliance with the colocation criteria under 30 V.S.A. § 248a(c)(3).

“there is good cause to find otherwise.”<sup>11</sup> Towns and Regional Planning Commissions may submit recommendations to the Commission during the 30-day comment period. Section 248a defines “substantial deference” and “good cause” as follows:

“Substantial deference” means that the plans and recommendations [of the municipal legislative bodies, municipal planning commissions, and regional planning commissions regarding their respective plans] are presumed correct, valid, and reasonable.

“Good cause” means a showing of evidence that the substantial deference required . . . would create a substantial shortcoming detrimental to the public good or the State’s interests [under 30 V.S.A. § 202c].”<sup>12</sup>

### Applicability of Local Zoning

Applicants seeking a permit through the § 248a process are not required to adhere to local zoning ordinances. Zoning ordinances are preempted by § 248a.<sup>13</sup> This means that an applicant using the § 248a process is not obligated to adhere to zoning ordinances of the host town. The Commission may not deny a project based on the project’s non-conformance with local zoning bylaws. This does not mean, however, that local zoning bylaws are void. An applicant seeking permission outside of the 248a framework (i.e. by applying for a zoning permit from the town planning commission) would need to follow local zoning laws.

## **How to Participate in a Section 248a Proceeding**

### Towns and Cities

Towns where a proposed project is located may participate in the § 248a review process in three primary ways. First, a town has the right to request a public meeting with the applicant and the Department of Public Service. Second, a town may submit comments or recommendations to the Commission. Third, the town has the right to intervene in the proceeding and become a formal party.

### *Public Hearing*

During the 60-day notice period, the municipal legislative body and/or the planning commission of the host town have a statutory right to request that the applicant attend a public meeting.<sup>14</sup> This meeting gives town planners and the public an opportunity to ask questions and learn about the proposed project. The Department will also attend the meeting at the request of the

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<sup>11</sup> 30 V.S.A. §§ 248a(c)(2); 248a(b)(3) (defining “Good cause”); 248a(b)(5) (defining “Substantial deference”). This provision applies to limited size and scope and full projects.

<sup>12</sup> See 30 V.S.A. §§ 248a(b)(5) (defining “Substantial deference”); 248a(b)(3) (defining “Good cause”).

<sup>13</sup> 30 V.S.A. § 248a(h).

<sup>14</sup> 30 V.S.A. § 248a(e)(2).

town. The Department will consider the views expressed during the public meeting in its recommendation to the Commission.

### *Comments*

Towns may file comments with the Commission during the 30-day comment period without intervening. Recommendations by a municipal legislative body and/or planning commissions regarding town plans are given substantial deference “unless there is good cause to find otherwise.” The Commission must provide “a detailed written response to each recommendation of the municipal legislative body and planning commission.”<sup>15</sup>

### *Intervention*

A town is allowed to intervene in a § 248a proceeding by right. Intervention allows a interested person or group, such as a town planning commission, to become a formal party to the proceeding. Formal parties may provide testimony and participate in evidentiary hearings. All formal parties must follow the Commission’s rules of procedure<sup>16</sup> and are subject to the rules governing discovery and cross examination. The Commission’s rules mirror portions of the Vermont Rules of Civil Procedure and incorporate the Vermont Rules of Evidence.

### Members of the Public

Members of the public may submit comments to the Commission for consideration and may do so without becoming formal parties to the case. Interested persons may also become formal parties through the intervention process. Unlike towns, however, members of the public do not have the same statutory right to participate in the proceeding and will be permitted to participate only if the party first meets certain criteria.<sup>17</sup> Parties are allowed to appear before the Commission *pro se* (i.e. without a lawyer) but it is recommended that interested persons at least consider securing legal representation before intervening in a case.

## **Important Information about Procedure and Process**

### Filing Comments with the Commission

Any person wishing to file comments with the Commission is required to do so within the 30-day comment period that begins when the application is filed with the Commission and required recipients.<sup>18</sup> Comments on *de minimis* applications must be filed using ePUC unless the filer obtains a waiver under Commission Rule 2.107 to allow for paper filings. Comments on limited size and scope or full 248a projects may be filed using ePUC, by email to the Clerk of the Commission, or in paper form (as long as the comment does not include a motion to intervene or a request for a hearing). Paper letters should be addressed to the Clerk of the Commission, with a

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<sup>15</sup> 30 V.S.A. § 248a(n).

<sup>16</sup> See Commission Rule 2.000 *et seq.* The rules can be found on the PUC website at <https://puc.vermont.gov/about-us/statutes-and-rules/current-rules-and-general-orders>.

<sup>17</sup> See Commission Rule 2.209.

<sup>18</sup> See Commission Rule 2.207 for rules governing the computation of time.

copy sent to the Department of Public Service, and should include a heading stating the project type, petitioner name, and location. For example:

Re: [Petitioner name] § 248a Project of Limited Size and Scope – [Town]

### Motion to Intervene and Other Pleadings

Parties wishing to intervene must file a motion to intervene within the 30-day comment period that begins on the date the application was served on all required recipients. A motion to intervene, like all other formal pleadings, should be made in legal memoranda submitted to the Clerk of the Commission. All motions to intervene and requests for a hearing must be made using ePUC, unless accompanied by a request for a waiver under Commission Rule 2.107 to allow paper filings. Parties granted intervenor status by the Commission will need to file a notice of appearance, even in instances where a party will represent themselves without a lawyer. A standard form for motions to intervene can be found on the Commission’s website.<sup>19</sup>

### Prehearing Conference

In cases where a party has raised a significant issue, the Commission will typically hold a prehearing conference to determine how the case will be managed. During this hearing, the Commission sets a schedule for the case. The schedule may include a time period for discovery and evidentiary hearings, as well as time to submit legal memoranda. It is during this time that the Commission will scope out the issues necessary to resolve the case.

### Discovery

The Commission may designate a period of time for discovery. Discovery allows parties the opportunity to ask other parties for information relevant to the issues in the case, and to ask other parties about what their witnesses have said in the exhibits they have provided. Discovery can be through written questions to the other parties (“interrogatories”), written requests for documents (“requests to produce”), or through depositions. Parties are obligated to answer questions posed by the other side, provide documents when necessary, or provide a good faith reason why an answer or document is not necessary. Discovery is governed by Commission Rules 2.214 and 2.230.

### Evidentiary Hearings

Evidentiary hearings occur when there is an issue of material fact regarding the substantive criteria of § 248a. Litigants are allowed to put forward evidence and cross examine other parties’ witnesses during an evidentiary hearing. The Commission will schedule a hearing when it needs

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<sup>19</sup> See <https://puc.vermont.gov/document/motion-intervene-form>.

evidence to make a final decision. The Commission will often invite parties to submit legal briefs to the Commission at the close of an evidentiary hearing.<sup>20</sup>

### Final Order

Once the evidentiary hearings have been completed and the parties have been given the opportunity to submit briefs, the Commission will issue a decision. A final order must be based on the evidentiary record, and will include findings of fact under the Section 248a criteria as well as conclusions of law. In many cases, a hearing officer will write a preliminary decision (known as a “proposal for decision”) and solicit written comments from the parties. The proposal for decision and any comments are then submitted to the Commission for review and issuance of a final order. Final orders are subject to motions for reconsideration under Commission Rule 2.221. Any final decision by the Commission may be appealed to the Vermont Supreme Court. Appeals from an order of the Commission are governed by the Vermont Rules of Appellate Procedure.

### Conclusion

Readers interested in participating in a 248a proceeding are encouraged to familiarize themselves with the source material discussed in this Guide. The full text of the statute can be found at 30 V.S.A. § 248a. The Public Utility Commission’s Rules and Orders are accessible on the Commission’s website.<sup>21</sup> The Commission’s Adopted Procedures, including the *Standards and Procedures Order*, can also be found on its website.<sup>22</sup> Statutes and Commission rules may change from time to time. Therefore, parties may want to consult the Vermont General Assembly’s website for the most recent version of Section 248a,<sup>23</sup> and the Commission’s website for the most up to date versions of its Rules and Procedures.

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<sup>20</sup> More information about public participation in Commission proceedings, including evidentiary hearings, is available on the Commission’s website: <https://puc.vermont.gov/document/public-participation-and-intervention-proceedings-public-utility-commission>.

<sup>21</sup> <https://puc.vermont.gov/>; <https://puc.vermont.gov/about-us/statutes-and-rules/current-rules-and-general-orders>.

<sup>22</sup> <https://puc.vermont.gov/public-participation/adopted-procedures>.

<sup>23</sup> <https://legislature.vermont.gov/statutes/>. Section 248a can be found in Title 30, chapter 5.