

STATE OF VERMONT
PUBLIC SERVICE BOARD

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 entered: 9/5/2014

INTRODUCTION

The procedures governing Public Service Board ("Board") approval of communications facilities are set forth in 30 V.S.A. § 248a. During the 2014 legislative session, the General Assembly enacted into law Act No. 199. Pursuant to Section 28 of Act No. 199, the Vermont Public Service Board ("Board") is required to revise its Amended Standards and Procedures Order ("Procedures Order")¹ to include definitions of the terms "good cause" and "substantial deference" for the purpose of 30 V.S.A. § 248a(c)(2)."

In order to implement the amended statute, on July 10, 2014, the Board provided notice and solicited comments and recommendations with regard to definitions for these terms from each municipal legislative body and planning commission, the Vermont League of Cities and Towns, the Department of Public Service, and wireless telecommunications providers. In addition, pursuant to Act No, 199, the Board is required to further amend its Procedures Order within sixty days of providing the July 10 notice.

The Board received comments from New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility ("AT&T"), NYNEX Mobile Limited Partnership 1, Vermont RSA Limited Partnership

1. *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 August 10, 2011.

and Cellco Partnership, all d/b/a Verizon Wireless ("Verizon")², the Department of Public Service ("Department"), the Vermont League of Cities and Towns, the Northeastern Vermont Development Association, the Vermont Association of Planning & Development Agencies, the Windham Regional Commission, and seven towns.³

II. DISCUSSION

Section 248a(c)(2), requires the Board to apply the following criteria when reviewing projects under this section:

Unless there is good cause to find otherwise, substantial deference has been given to the land conservation measures in the plans of the affected municipalities and the recommendations of the municipal legislative bodies and the municipal and regional planning commissions regarding the municipal and regional plans, respectively. Nothing in this section or other provision of law shall prevent a municipal body from basing its recommendations on an ordinance adopted under 24 V.S.A. 2291(19) or bylaw adopted under 24 V.S.A. chapter 117 by the municipality in which the facility is located.

Good cause

In broad legal terms "good cause" is defined as a legally sufficient grounds or reasons to take an action required by law. The term good cause is also a relative one and dependent on the circumstances of the individual case.⁴ The majority of the comments filed by the various planning commissions and organizations representing town planning commissions argue that the Board should define the term in a manner that would require a clear and convincing demonstration that the land conservation measures in the town or regional plan are not valid or are otherwise vague and unclear. The South Burlington Planning Commission contends that the

2. Both AT&T and Verizon provided additional comments and requests for clarifications that are outside the scope of this narrowly focused proceeding and that would require substantially longer to review than the expeditious timeframe provided for this proceeding allowed by Act 199. Accordingly, the Board has chosen not to address those additional comments in this proceeding.

3. The seven towns that filed comments with the Board are the South Burlington Planning Commission, the Brookfield Planning Commission, the Newark Planning Commission, the Town of Plainfield, the Town of Richmond, the Town of Orwell, and the Shelburne Planning Commission.

4. Black's Law Dictionary 692 (6th ed. 1990).

term should be defined to include statewide policy goals. AT&T and Verizon maintain that good cause would exist where the applicant can demonstrate that a project is reasonably necessary to fill a gap in coverage, or where the land conservation measures would prevent an applicant from meeting its stated coverage objective. The Department contends that good cause would exist where the land conservation measures in a plan "would create a substantial shortcoming detrimental to the public good or State's interests in 30 V.S.A. § 202c."⁵ Based upon these comments we conclude that "good cause" exists where the land measures in a plan would be detrimental to the public good or the State's interests articulated in 30 V.S.A. § 202c. We conclude that this approach is consistent with the intent of Section 28 of Act No. 199.

Substantial deference

The term "substantial deference" as used in this section implies that the Board should afford significant and meaningful weight to locally and regionally adopted plans and recommendations. The majority of the comments filed by the various planning commissions and organizations representing town planning commissions argue that the Board should define the term in a manner that would require the Board to apply the measures in the local and regional plans and the recommendations based on the plans, as set forth by the town and regional commissions, unless it was shown the plans were not valid. The South Burlington Planning Commission contends that the definition should indicate that substantial weight has been given to the measures in the local and regional plans and the recommendations based on the plans. The Department maintains that substantial deference means that the measures in the local and regional plans and the recommendations of the local and regional bodies based on those plans are "presumed correct, valid, and reasonable" unless shown otherwise.⁶ Based upon these comments we have defined the term "substantial deference" to require that meaningful weight be given to the land conservation measures and recommendations of municipalities and municipal and regional planning commissions. In arriving at this definition we emphasize that the term

5. Department Comments at 4.

6. *Id.* at 3.

"substantial deference" does not mean that these measures or recommendations are necessarily controlling in cases under § 248a.

CONCLUSION

Consistent with the determinations described above, we hereby adopt the following standards and procedures.⁷

AMENDED STANDARDS AND PROCEDURES

I. Purpose and Applicability: The purpose of these standards and procedures is to implement 30 V.S.A. § 248a ("Section 248a"). These standards and procedures are applicable to the proposed construction or installation of telecommunications facilities that are to be interconnected with other proposed or existing telecommunications facilities. The Board may, upon request of the applicant and for good cause, waive or modify the standards and procedures with respect to a specific project.

II. Definitions: "Ancillary improvements" means telecommunications equipment and site improvements primarily intended to serve a telecommunications facility, including wires or cables and associated poles to connect the facility to an electric or telecommunications grid, fencing, equipment shelters, generators, and access roads.

"De minimis modification" means the addition, modification, or replacement of telecommunications equipment, antennas, or ancillary improvements on a telecommunications facility or existing support structure, or the reconstruction of such facility or support structure, provided:

- (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;
- (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.

7. In addition to adding the aforementioned definitions, we have also corrected the spelling of the word minimis.

For purposes of this definition, where the proposed ancillary improvements will be installed on, within, or at the base of a building, the ancillary improvements may be excluded from the aggregate surface area calculation in subsection (d) provided that: (1) the ancillary improvements comply with the limitations in subsection (c) measured from the outer walls of the building (for width) and the highest existing element of the building (for height); (2) the aggregate surface area of the antennas and equipment other than ancillary improvements does not exceed 75 square feet; and (3) any other additions, modifications, or replacements associated with the facility otherwise comply with subsections (a) and (b).

"Good cause" means a showing that deferring to the land conservation measures in the plans of the affected municipalities and the recommendations of the municipal legislative bodies and the municipal and regional planning commissions regarding the municipal and regional plans, respectively, would be detrimental to the public good or the State's interests articulated in 30 V.S.A. § 202c.

"Landowner of record of property adjoining the project site" means a person who owns land in fee simple if that land will be crossed by a new private right-of-way or new utility easement to access and service the facility, shares a property boundary with the property upon which the facility will be located, or would share a boundary with the property upon which the facility will be located but for the presence of an intervening river, stream, public highway, or railroad line which shares a boundary or intersects the property.

"Limited size and scope" means a new telecommunications facility, including ancillary improvements, that does not exceed 140 feet in height; or an addition, modification, replacement, or removal of equipment at an existing telecommunications facility or support structure, and ancillary improvements, that would result in a total facility height of less than 200 feet and does not increase the width of the existing support structure by more than 20 feet. In order to qualify as a project of limited size and scope, construction of the project shall not result in earth disturbance of more than 10,000 square feet of earth, excluding temporary earth disturbance associated with construction activities.

"Substantial deference" means to give significant and meaningful weight to the land conservation measures in the plans of the affected municipalities and the recommendations of the municipal legislative bodies and the municipal and regional planning commissions regarding the municipal and regional plans, respectively.

"Telecommunications facility" means a communications facility that transmits and receives signals from a network used primarily for two-way communications for commercial, industrial, municipal, county, or state purposes, any associated support structure, and any ancillary improvements that are proposed for construction or installation of the facility and are primarily intended to serve the communications facilities or support structure.

II. Advance Notice Requirements for Projects Other Than De Minimis Modifications:

The applicant must provide written notice, at least 45 days in advance of filing a § 248a application, to the following entities:

- (a) legislative bodies and municipal and regional planning commissions in the communities where the project will be located;
- (b) the Secretary of the Agency of Natural Resources;
- (c) the Division for Historic Preservation;
- (d) the Commissioner of the Department of Public Service and its Director for Public Advocacy;
- (e) the landowners of record of property adjoining the project sites;
- (f) the Public Service Board (the notice to the Board should be provided in electronic format only); and
- (g) the Natural Resources Board (if the application concerns a telecommunications facility previously permitted under 10 V.S.A. chapter 151).

The notice shall state that the applicant intends to make a § 248a application, identify the location of the telecommunications facility site(s) and provide a description of the proposed project(s), including a description of the amount of any clearing proposed for the project(s). In addition, the notice must contain sufficient detail about the proposed project(s) to allow the parties receiving the notice to understand the impact of the project(s) on the interests of those parties. The notice shall also state that recipients may contact the applicant with questions or comments regarding the proposed project. The notice shall state that the application is being filed pursuant to this Order and that the Order is available at the Board's offices and website. If the applicant has not filed an application for the project, pursuant to the filing requirements below, within 180 days of the date of the advance notice, the notice will be considered withdrawn. Written notice may be filed electronically at the request of or with the permission of the recipient.

If the applicant makes a substantial change to the proposed project, the applicant is required to provide notice of this change to all parties and entities already notified, including any newly affected adjoining property owners. For the purpose of this subsection, a substantial change is one that has the potential for significant impact with respect to any of the criteria applicable to the project.

IV. Application Filing Requirements for Projects Other Than De Minimis Modifications:

Upon filing an original and two copies of the application with the Board, the applicant must also submit a copy of the application to the legislative bodies, municipal planning commissions and regional planning commissions in the communities where the project is located, the Secretary of the Agency of Natural Resources, the Division for Historic Preservation, and the Natural Resources Board (if the application concerns a telecommunications facility previously permitted under 10 V.S.A. chapter 151). Two copies must be submitted to the Department of Public Service. The applicant shall also provide notice to the landowners of record of property adjoining the project site(s) that the application has been filed with the Board and provide

information on where the landowner may obtain a copy of the application. The application and notice provided shall inform recipients that they have 21 days to file comments, motions to intervene, or requests for hearing on the project with the Board. The notice must also state that if a recipient would like to request a hearing, the recipient must make a showing that the project raises a significant issue with respect to the applicable criteria under 30 V.S.A. § 248a(c)(1) and pursuant to this Order.

The applicant shall ensure that the application filed includes testimony or exhibits addressing each of the areas listed below. Any witness sponsoring an exhibit must have personal knowledge of and be able to testify as to the validity of the information contained in the exhibit. The applicant shall file proposed findings of fact and a proposed certificate of public good with its petition.

A. Applicant's Name. The application shall include the name, contact information and a description of the company or person making the application.

B. Host landowners. The application shall include the names and addresses of the landowners on whose property the proposed facility would be built.

C. Adjoining Landowners. The application shall include the names and addresses of all adjoining property owners. This information shall be obtained from the most recent version of the town's grand list.

D. Certification that Notice Requirements Have Been Met. The applicant must certify it has complied with all notice requirements.

E. Existing Permits. The applicant must provide copies of any relevant local or state permits (including Act 250 and municipal zoning permits) that relate to the facility and identify conditions in the permits that could impact the proposed development. If the proposed project would be inconsistent with any existing permit conditions, the applicant shall identify those conditions and explain why it is not feasible to harmonize the proposed project with those conditions. The applicant shall certify that it has not obtained or been denied a permit or permit amendment under the provisions of Title 24 or chapter 151 of Title 10 for the same or substantially the same project. An applicant may seek approval under Section 248a for a modification to a previously permitted project.

F. Project Description

1. Site Plans

The applicant must provide a site plan for each telecommunications facility project. A site plan shall include:

(a) Proposed telecommunications facility locations and any ancillary improvements.

- (b) Property boundaries and setback distances to the base(s) of the proposed support structure or existing structure and to the nearest corners of each of the related structures to those boundaries, and dimensions of all proposed improvements.
- (c) Proposed utilities, including distance from source of power, sizes of service available and required, and locations of any proposed utility or communication lines.
- (d) A description of any areas where vegetation is to be cleared or altered and a description of any proposed direct or indirect alterations of wetlands.
- (e) Detailed plans for any drainage of surface and/or sub-surface water and plans to control erosion and sedimentation both during construction and as a permanent measure.
- (f) Locations and specific descriptions of proposed screening, landscaping, ground cover, fencing, exterior lighting, and signs.
- (g) Plans of any proposed access driveway, roadway, or parking area at the facility site, including grading, drainage, and traveled width, including a cross-section of the access drive indicating the width, depth of gravel, and paving or surface materials.
- (h) Certification that the project construction complies, at a minimum, with the requirements of the Low Risk Handbook for Erosion Prevention and Sediment Control issued by the Vermont Department of Environmental Conservation, regardless of any provisions in the handbook that limit its applicability.
- (i) The latitude and longitude coordinates for each proposed telecommunications facility.

2. Elevation Drawings

- (a) For each proposed support structure, the applicant must provide elevation drawings.
- (b) The elevation drawings must be at appropriate scales but no smaller than 1"/20'.
- (c) The applicant must include two elevation drawings of the proposed support structures drawn at right angles to each other, showing the ground profile to at least 100 feet beyond the edge of any proposed clearing, and showing any guy wires or supports. The elevation drawing shall show all proposed antennas, including their location on the tower or other support structure and the height of the tower or other support structure above grade at the base, and describe the proposed finish of the tower or antenna.
- (d) For proposed towers, the elevation drawing shall indicate the relative height of the tower to the tops of surrounding trees as they presently exist.

(e) For proposed towers, the elevation drawing shall include a description of available space on the structure.

(f) For proposed towers, the elevation drawing should include a description of the tower and foundation design.

(g) Each plan sheet shall be clearly labeled with the project title, date, revision date(s), scale, and name of the professional or firm that prepared the plan.

3. Coverage maps

The applicant shall provide a signal propagation study that clearly identifies the proposed coverage area of each communications service that will use the proposed telecommunication facilities at the completion of construction or installation of the facilities.

(a) For proposed telecommunication facilities that will extend the coverage area of an existing communications network, the coverage maps shall show the areas of existing coverage as well as the additional areas of coverage which the proposed facilities will enable.

(b) Radial plots shall be in bright colors, showing clear demarcations between signal strengths. For each antenna or antenna array, identify the power output of the antenna(s) and any non-standard assumptions used to calculate the projected coverage area.

4. Project Scope and Narrative

The applicant shall provide a written narrative describing how the proposed facility will be interconnected with other telecommunications facilities proposed or existing. If the facility relates to the provision of wireless service, the applicant shall demonstrate that the facility reasonably cannot be collocated on or at an existing telecommunications facility, or such collocation would cause an undue adverse effect on aesthetics.

G. Public Good

The applicant must explain how the proposed project would promote the general good of the state consistent with 30 V.S.A. § 202c(b).

H. Environmental Criteria

1. The applicant must address each of the criteria set forth in 10 V.S.A. §§ 6086(a)(1) through (8), (9)(k) and 1424a(d). To the extent that the proposal will create an adverse impact affecting any of these criteria, the applicant should describe what measures, if any, will be taken to minimize such impact.

2. Conditional waiver of criteria for projects of limited size and scope: Pursuant to 30 V.S.A. § 248a(k), for telecommunications facilities of limited size and scope, the Board conditionally waives all criteria under 30 V.S.A. § 248a(c)(1), with the exception of 10 V.S.A.

§§ 6086(a)(1)(D) (floodways) and 6086(a)(8) (aesthetics, historic sites, rare and irreplaceable natural areas, endangered species, necessary wildlife).

I. Local and Regional Plans

The applicant shall provide copies of the relevant sections of the Town Plans and Regional Plans in effect in the communities in which the proposed facility will be located and describe how the project meets or complies with the land conservation measures in those plans. If the project does not so comply with a plan, the applicant should explain why not and demonstrate how the applicant has nevertheless given substantial deference to those measures or explain why there is good cause not to give substantial deference to those measures. A rebuttable presumption respecting compliance with the applicable plan shall be created by a letter from an affected municipal legislative body or municipal planning commission concerning compliance with the municipal plan and by a letter from a regional planning commission concerning compliance with the regional plan.

V. Application Filing Requirements for De Minimis Modifications:

For de minimis modifications, upon filing an original and two copies of the application with the Board, the applicant must also submit a copy of the application to the legislative bodies in the communities where the project is located, and the landowner of record of property on which the facility is located. Two copies of the application must also be submitted to the Department of Public Service.

Applicants shall ensure that the application includes testimony or exhibits addressing each of the areas listed below. Any witness sponsoring an exhibit must have personal knowledge of and be able to testify as to the validity of the information contained in the exhibit. Applicants shall file proposed findings of fact and a proposed certificate of public good with the petition.

A. Applicant's Name. The application shall include the name, contact information and a description of the company or person making the application.

B. Host landowners. The application shall include the names and addresses of the landowners on whose property the proposed facility would be built.

C. Certification that Filing Requirements Have Been Met. The applicant must certify that it has complied with the filing requirements listed above.

D. Existing Permits. The applicant must provide copies of any relevant local or state permits (including Act 250 and municipal zoning permits) that relate to the facility and identify conditions in the permits that could impact the proposed development. If the proposed project would be inconsistent with any existing permit conditions, the applicant shall identify those conditions and explain why it is not feasible to harmonize the proposed project with those conditions. The applicant shall certify that it has not obtained or been denied a permit or permit

amendment under the provisions of Title 24 or chapter 151 of Title 10 for the same or substantially the same project. An applicant may seek approval under Section 248a for a modification to a previously permitted project.

E. Project Description

1. Site Plans

The applicant must provide a site plan for each telecommunications facility project. A site plan shall include:

- (a) Proposed telecommunications facility locations and a description of any antennas or any ancillary improvements, including the dimensions and aggregate surface areas of antenna faces.
- (b) Property boundaries and setback distances to the base(s) of the proposed support structure or existing structure and to the nearest corners of each of the related structures to those boundaries, and dimensions of all proposed improvements.
- (c) Proposed utilities, including distance from source of power, sizes of service available and required, and locations of any proposed utility or communication lines.
- (d) A description of any areas where vegetation is to be cleared or altered and a description of any proposed direct or indirect alterations of wetlands.
- (e) Detailed plans for any drainage of surface and/or sub-surface water and plans to control erosion and sedimentation both during construction and as a permanent measure.
- (f) Locations and specific descriptions of proposed screening, landscaping, ground cover, fencing, exterior lighting, and signage.
- (g) Plans of any proposed access driveway, roadway, or parking area at the facility site, including grading, drainage, and traveled width, including a cross section of the access drive indicating the width, depth of gravel, and paving or surface materials.

2. Project Scope and Narrative

The applicant shall provide a written certification that the proposed facility constitutes a de minimis modification to an existing facility.

F. Public Good

The applicant must explain how the proposed project would promote the general good of the state consistent with 30 V.S.A. § 202c(b).

VI. Waiver of Notice Requirements

An applicant seeking a waiver or modification of the notice requirements for an application shall file a request for such waiver or modification with the Board and the Department of Public Service not later than 30 days prior to the date the notice is required, together with a description of the project, the reason for seeking the waiver or modification, and a demonstration that good cause exists for granting a waiver or modification. Any granting of such a waiver or modification shall be based on a determination that the entities subject to the waiver or modification could not reasonably be affected by one or more of the proposed facilities, and that notice to such entities would constitute a significant administrative burden without corresponding public benefit. The Board shall rule on a waiver or modification request within 21 days of the filing of the request.

VII. Completed Applications

Upon receiving an application under Section 248a, Board staff will review the application for completeness. If the application does not substantially comply with the application requirements set forth herein, the Clerk of the Board will inform the applicant of the deficiencies. Upon submission of all information necessary to address the deficiencies, the Clerk of the Board shall notify the applicant that the filing is complete.

VIII. Submission of Comments and Requests for Hearing

If any person wishes to submit comments or motions to intervene to the Board concerning an application filed pursuant to Section 248a or request a hearing for projects other than de minimis modifications, such correspondence is due at the Board within 21 calendar days of the date that the application was submitted to the Board and all required recipients. In order to request a hearing, commenters must make a showing that the application raises a significant issue regarding one or more of the substantive criteria applicable to the proposed project.

For de minimis project applications, if a person receiving a copy of the application wishes to object to a project's classification as a de minimis modification, such correspondence is due at the Board within 21 calendar days of the date that the application was submitted to the Board and all required Parties. If no objections to the classification of the project are timely filed with the Board, a CPG shall be issued without further proceedings.

IX. Issuance of Decision

A. For de minimis modifications: If no objections to the classification of the project are timely filed with the Board, the Board shall issue a CPG without further proceedings.

B. For projects of limited size and scope: Unless the Board determines that an application raises a substantial issue, it shall issue a final determination on an application within 45 days of its filing or, if the original filing was not complete, within 45 days of the date on which the Clerk of the Board notifies the applicant that the filing is complete. If the Board determines that an application raises a substantial issue, it shall issue a final determination on an application filed pursuant to this section within 90 days of its filing or, if the original filing was not complete,

within 90 days of the date on which the Clerk of the Board notifies the applicant that the filing is complete.

C. For all other projects: Unless the Board determines that an application raises a significant issue, it shall issue a final determination on an application within 60 days of its filing or, if the original filing was not complete, within 60 days of the date on which the Clerk of the Board notifies the applicant that the filing is complete. If the Board rules that an application raises a significant issue, it shall issue a final determination on the application within 180 days of its filing or, if the original filing was not complete, within 180 days of the date on which the Clerk of the Board notifies the applicant that the filing is complete.

SO ORDERED.

Dated at Montpelier, Vermont, this 5th day of September, 2014.

<u>s/ James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/ John D. Burke</u>)	BOARD
)	
)	OF VERMONT
<u>s/ Margaret Cheney</u>)	

OFFICE OF THE CLERK

FILED: September 5, 2014

ATTEST: s/ Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)