STATE OF VERMONT
PUBLIC SERVICE BOARD

Petition of Vermont RSA Limited Partnership and	)
Cellco Partnership, each d/b/a Verizon Wireless,	)
under 30 V.S.A. § 248a to install	)
a wireless telecommunications facility at	)
2382 Ridge Road, Brookfield, Vermont	)

BROOKFIELD PLANNING COMMISSION'S COMMENTS AND RECOMMENDATIONS

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The Brookfield Planning Commission (Planning Commission or Commission) submits these comments and recommendations on the application of Vermont RSA Limited Partnership and Cellco Partnership (collectively, Verizon Wireless or VZW) under 30 V.S.A. § 248a to increase the height of and install additional equipment (the Proposed Extension) at the existing wireless telecommunications facility at 2382 Ridge Road, Brookfield, Vermont (the Project). In accordance with 30 V.S.A. § 248a(n), the Planning Commission requests that the Public Service Board (PSB or Board) provide a detailed response to each of these recommendations.

Under 30 V.S.A. § 248a(m), the Commission has "the right to appear and participate on any application under this section . . . ." Because the language confers the right to participate on appearance, no motion to intervene is needed. In the alternative, the Commission moves to intervene under Rule 2.209(A) because § 248a(n) confers an unconditional right to intervene.

I. Summary

As explained below, the Commission recommends and moves that the Public Service Board (PSB or Board) dismiss the application for the following independent reasons:

1. VZW's 45-day notice failed to meet the directive of the Board's § 248a Procedures Order[1] to provide sufficient information about the Proposed Extension to allow the Planning Commission to understand its impact. The notice did not show the Commission the appearance and visual impact of the Project with the Proposed Extension. Instead VZW claimed and continues to claim that the Proposed Extension is no different from the extension approved in Docket 8126, even though it will result

[1] 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 at 6 (Sep. 5, 2014); Third Amended Order implementing standards and procedures for issuance of a certificate of public good for communications facilities pursuant to 30 V.S.A. § 248a at 5 (Aug. 19, 2015).

in a Project that is 10 feet taller. VZW declined multiple requests for information such as a viewshed analysis and a timely and well noticed balloon test that would allow assessment of the impact of the proposed extension on the rural and scenic character of Brookfield and consequently also the validity of their claim that the impacts are the same as the prior shorter project.

2. The application is incomplete because the Project's owner, American Tower Corporation (ATC) is not a co-petitioner. VZW asserts without any evidentiary support that ATC has given its permission to file the application. As the owner of the Project, ATC must be a co-petitioner to ensure that it is bound if the Board issues a certificate of public good (CPG) in this proceeding.
3. The application is incomplete because:
    a. It does not include all environmental and land use approvals for the Project as required by 30 V.S.A. § 248a(a) and the Procedures Order. VZW failed to include with the application a copy of the site plan approval issued by the Commission for the Project in 2009.
    b. It fails to identify conditions in other permits that could affect the Proposed Extension. Its only statement on these conditions is that it will comply with the "applicable conditions" of the conditional use permit issued by the Brookfield Board of Adjustment (BOA) in 2009, which implies that there are unidentified conditions that VZW considers inapplicable.
4. The application is incomplete and inadequate to support affirmative findings because it relies on expert testimony on aesthetics, compliance with local and regional plans, legal issues, and natural resources impacts that is unqualified and should be struck.

The Planning Commission recommends that, on dismissal, the Board direct VZW to resubmit a 45-day notice and application that remedies these defects, including[2]:

a. a viewshed analysis that is field-checked through a balloon test with notice and meaningful opportunity for the Planning Commission to assess the impacts suggested by the analysis and test; and

b. sufficient analysis of the project's impacts, including aesthetics and conformance with the Town of Brookfield's plan (the Town Plan)[3] by qualified personnel.

In the alternative, the Commission recommends that the Board determine that the application raises significant issues and requests a hearing. Specifically, the application fails:

- To demonstrate substantial deference to the land conservation measures and recommendations of the Planning Commission and Selectboard contained in Town Plan, including the Plan's policies that limit the height of telecommunications facilities and address removal of abandoned or unused towers. For example, the Town Plan incorporates the following policy regarding telecommunications facilities: "The height of the facility shall not exceed ten feet above the average height of the tree line on land immediately adjoining the proposed site." Town Plan at 11, incorporating Brookfield Development Bylaw § 4.16(E)(7). With the addition of the Proposed Extension, the Project will be 30 feet above the average height of tree line. Ex. LH-1, Sheet C-3.
- To supply sufficient information and analysis to demonstrate that the Proposed Extension will not have an undue adverse effect on aesthetics and scenic beauty.
- To provide means to ensure prompt decommissioning on cessation of operation and a schedule for construction of the Proposed Extension. If the Board issues a CPG, the

[2] As used in this document, "include," "includes" and "including" have the same meaning as under 1 V.S.A. § 145.
[3] Town of Brookfield, Vermont Town Plan (Jan. 24, 2011).

Commission recommends that the Board require the posting of a decommissioning bond and construction completion and activation within two years of when construction starts.

- To show good cause not to defer to the Town Plan and municipal recommendations. VZW has not shown that detriment to the general good of the State would result from such deference. In fact, it has neither investigated meeting nor demonstrated that it cannot meet its service objectives using one or more separate facilities that comply with the Plan's height limit and other provisions.

In view of these deficiencies, VZW fails to carry its burden of proof. For example, VZW has the burden to demonstrate substantial deference to the land conservation measures of the Plan and the recommendations of the Commission on the Plan or show good cause to find otherwise. 30 V.S.A. § 248a(c)(2). Under that section, a town may base recommendations on a bylaw and the Board must afford those recommendations the same deference. The Commission's recommendations on the Plan also create a presumption of noncompliance. Id.

For these reasons and those further elaborated below, the Commission requests a hearing before the Board.

II. Background

A. Context; Proposed Extension

Land use in Brookfield is largely rural, with a strong agricultural presence and with much of the Town forested. The Town also has a significant residential component. Brookfield's commercial uses are small scale, with the most visible commercial uses being an inn, a bed and breakfast, and a restaurant. There are no industrial uses. Town Plan (copy attached) at 5, 7.

The Project is located in the agricultural-residential district, the purpose of which is to promote, encourage, and protect farming of all kinds, maintain and conserve agricultural lands,

and provide areas for residence at low density. The Plan states that conformance requires that development in this district be at a density of one dwelling unit per five or more acres, with the scale and density of any commercial uses consistent with the average residential use in the district. Town Plan at 9 and Future Land Use Map.

Within this agricultural and residential context, the Proposed Extension will increase the height of the Project to approximately 95 feet and add a third set of antennae to its topmost portion. Lanpher, pf. at 4. These modifications will result in a facility that is 30 feet above average treeline, found previously to be 65 feet. Ex. LH-16 at 2; In re T-Mobile Northeast, LLC, No. 3R1021, Findings of Fact, Conclusions of Law, and Order at 5 (Dec. 1, 2009) (copy attached). VZW offers no evidence that the scale and density of the Project as modified by the Proposed Extension is consistent with the scale and density of the average residential use.

VZW already has extensive coverage in the area. Ex. AL-1 (existing coverage). The main effect of the Proposed Extension will be to fill a small gap on I-89. Id. (compare existing coverage with post-construction ATC coverage). The Proposed Extension will provide small, almost incidental additional coverage on Vermont Rules 12 and 14. Id.

VZW has significant difficulty in quantifying the benefits of the Proposed Extension. Lanpher, pf. at 6. Witness Lanpher provides a "rough" estimate that "approximately 250 residents of Brookfield will receive coverage in their homes." Id. Even this rough estimate is unclear. Mr. Lanpher does not state whether these residents are currently unserved by VZW. He also uses the term "residents" – people – rather than "residences" – locations. Thus, the number of Brookfield residences to receive coverage may be much less than 250, since two or more people often reside at the same location.

B. 2009 Approval of Project at Height of 75 Feet

In 2009, T-Mobile Northeast, LLC (T-Mobile) obtained local and state approvals of the Project at height of 75 feet, with nine panel antennas to be mounted and centered at 72 feet above-ground level as well as related equipment including cabinets and necessary infrastructure. These approvals included a conditional use permit and site plan approval from the Town and approval under 10 V.S.A. Chapter 151 (Act 250). See, e.g., Ex. LH-16, conditional use approval by the BOA; In re T-Mobile Northeast, LLC, supra at 1.

In its 2009 approval, the BOA specifically conditioned its approval on a height limit of 75 feet, stating under "Permit Conditions:" "The tower may be *a maximum 75 feet in height*, with the potential to add a lightning rod as long as the road does not exceed the limitations in the Bylaws." Ex. LH-16 at 4 (emphasis added). The BOA made the following finding:

> Based on the treeline studies references above, the proposed 75-feet tower will be approximately 10 feet of the average tree height on land adjoining the proposed site. The Board of Adjustment finds that the addition of a lightning rod, if deemed necessary by T-mobile, would be reasonable as long as it is within the 16-inch girth limitation for structures above the maximum height prescribed for towers (75 feet for this proposal) under the Bylaws.

Id. at 3.

The BOA's conditions also required a decommissioning bond for the Project. The BOA stated: "T-mobile will provide documents showing adequate bonding for future dismantling and removal of the tower and compound. T-mobile shall submit updated proof of bonding (and amount) every five years to the Board of Adjustment for review and approval." Id. at 4. This condition binds ATC as T-mobile's successor-in-interest to the Project.

In approving the Project under 10 V.S.A. Chapter 151 (Act 250), the District No. 3 Environmental Commission (District Commission) found that the Project at 75 feet will have an

adverse effect on scenic beauty and aesthetics because of its visibility from multiple locations and its inability to fit within the area's rural character. The District Commission stated:

> With respect to these questions, and with due consideration of all evidence, the Commission finds that the proposed 75-foot monopole tower, which extends approximately 10 feet over the tree line on a ridge line and is visible from several locations, is not compatible with its surroundings and will not "fit" the existing rural character of the surrounding area. The Commission concludes that the project will have an adverse effect on the area.

In re T-Mobile Northeast, LLC, supra at 7-8.

The District Commission concluded that this adverse effect on scenic beauty will not be undue in significant part because the Project would conform to the Town's height limit, which the District Commission concluded constitutes clear, written community standard intended to preserve the aesthetics and scenic beauty of the area:

> The Commission notes the provisions of the Town of Brookfield Development Bylaw 4.16 entitled Telecommunications Facilities found in Exhibit 21 is a clear and written community standard intended to protect aesthetics and natural beauty. The provisions require that the height of a new telecommunications structure not exceed 10 feet above the average tree height. This project complies with the clear, written community standard.

Id. at 8.

C. 2013 Extension of Project to 85 Feet

In May 2013, New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (AT&T) submitted a 45-day notice to the Planning Commission proposing to increase the Project's height to 85 feet in order to install a second antenna array and ancillary facilities. An electronic copy of AT&T's 45-day notice is attached on disc. This was AT&T's second 45-day notice to add a 10-foot extension to the Project, the first having been submitted in 2011.

AT&T's 45-day notice included substantial information that provided the Planning Commission with a meaningful opportunity to understand the impacts of AT&T's proposal. This

information included a 12-page narrative with detailed analysis of the Town Plan and the incorporated provisions from the Town's telecommunications bylaw. It included a viewshed analysis and photographic simulations based on a 2011 balloon test conducted by a qualified design firm and for which the Commission was given notice. See attached disc, AT&T-2 (prefiling narrative) and -5 (Exhibit C, viewshed analysis and photographic simulations).

This proposal came during an initiative by the State of Vermont to achieve "statewide cellular and broadband deployment in Vermont by the end of the year 2013." 2011 Acts and Resolves No. 53, Secs. 1(a), 2. It also came at a time when AT&T had offered virtually no service in Brookfield. See attached disc, AT&T-7 (Exhibit E; propagation maps).

On review of AT&T's proposal, the Planning Commission recommended a conclusion that the extension would have an undue adverse effect on aesthetics and scenic beauty and, based on the specific facts and circumstances of the proposal, a further conclusion that its benefits outweighed this undue adverse effect. Importantly, the Commission emphasized the initiative for statewide deployment by the end of 2013. Ex. LH-13 at 3.

D. 2015 Verizon Wireless Proposals

In 2015, Verizon Wireless issued two 45-day notices concerning telecommunications facilities in Brookfield, each with a copy to the PSB. One notice, dated April 1, 2015, was for a potential new tower to be located on West Street.[4] The second notice, dated July 21, 2015, concerns the proposed extension to the existing tower on Ridge Road for which VZW has now filed an application. A copy of each notice is included on the attached disc.

[4] VZW states that it has not withdrawn this notice. Hodgetts, pf. at 8, n.2. But the notice is deemed withdrawn because more than 180 days has passed. Procedures Order at 5.

1. April 1 Notice, West Street

The April 1 notice for the West Street proposal consisted of a narrative letter of just over four pages and attached plans. There was scant information and analysis on the impacts of the proposed project under the § 248a criteria or the project's benefits. In fact, on those criteria, there was only a summary discussion of the local and regional plans that made broad assertions concerning the Town Plan and failed to apply any of its provisions. The discussion also referred to an agreement with the Department Fish and Wildlife (DFW) that was not provided.

By letter of April 15, 2015 (copy attached), the Planning Commission informed VZW that the April 1 notice was inadequate and asked that VZW provide a new 45-day notice or, in the alternative, supplement the 45-day notice with detailed information that would allow the Commission to understand the impacts of the proposed project, and agree that the 45-day period will run from that supplemental submittal. In either case, the Commission would then hold a public meeting to consider the proposed project. The Commission also requested a copy of the agreement between Verizon Wireless and DFW. Verizon Wireless declined the Commission's requests regarding the 45-day notice and the Commission therefore did not hold a public meeting. VZW did not respond to the Commission's request for the agreement with DFW.

2. July 21 Notice, Ridge Road

The July 21 notice on Verizon Wireless's Ridge Road proposal consisted of a narrative letter of just over five pages, attached plans, and two documents related to the AT&T project in Docket 8126. It included minimal information and analysis concerning the impacts of the Proposed Extension under the § 248a criteria or the project's benefits. Again, there was only summary discussion of the local and regional plans. VZW made general assertions concerning the Town Plan without actually citing or applying any of its provisions. VZW then proceeded to

argue that the same reasoning under which the Commission agreed to AT&T's 2013 proposal applies to the current proposal, while providing little supporting information.

By letter of August 12, 2015 (copy attached), the Planning Commission informed VZW of its concerns that the July 21 notice was insufficient and asked that VZW provide a new 45-day notice or, in the alternative, supplement the 45-day notice with detailed information that would allow the Commission to understand the impacts of the Proposed Extension, and agree that the 45-day period will run from that supplemental submittal.

The same letter also responded to an e-mail from VZW of July 23, 2015 requesting a public meeting. Without waiving its concerns regarding the sufficiency of the July 21 notice, the Commission agreed to conduct a public meeting and asked VZW for additional information.

VZW again declined the Commission's requests regarding the 45-day notice. It provided a portion, but by no means all, of the information requested by the Commission. The Commission conducted a public meeting on September 3, 2015 (minute attached).

III. Recommendations for Dismissal

The Planning Commission recommends and moves that the Board dismiss this application for the following separate reasons:

- The July 21 notice failed to provide sufficient information about the Proposed Extension to allow the Planning Commission to understand its impact.
- The application is incomplete because ATC is not a co-petitioner.
- The application fails to include all existing permits and identify conditions in those permits that may affect the Proposed Extension.
- The application is incomplete and inadequate to support affirmative findings because it relies on testimony that is unqualified and should be struck.

The Planning Commission provides the following arguments in support.

A. Inadequate 45-day Notice

Implementing the requirements of 30 V.S.A. § 248a(e), the Procedures Order requires § 248a applicants to provide written notice, at least 45 days before filing a § 248a application, to various parties including the municipal planning commission. The Order mandates that the 45-day notice provide sufficient information to allow each party to understand the impacts of the projects on their interests. Meeting these requirements of statute and order is a prerequisite to filing a § 248a application. Sec. III of the Procedures Order states:

> 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);
> > (g) the Natural Resources Board (if the application concerns a telecommunications facility previously permitted under 10 V.S.A. chapter 151); and
> > (h) the Secretary of Transportation.
>
> 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. .*
>
> * * *

Procedures Order at 4-5 (emphasis added).

Further, the applicable statute indicates that, 45 days before the application is filed with the Board, the municipal and regional planning commissions must receive not only this notice but also a copy of the application that is to be filed. 30 V.S.A. § 248a(e) states:

> Notice. No less than 45 days prior to filing an application for a certificate of public good under this section, the applicant shall serve written notice of an application to be filed with the Board pursuant to this section to the legislative bodies and municipal and regional planning commissions in the communities in which the applicant proposes to construct or install facilities; the Secretary of Natural Resources; the Secretary of Transportation; the Division for Historic Preservation; the Commissioner of Public Service and its Director for Public Advocacy; the Natural Resources Board if the application concerns a telecommunications facility for which a permit previously has been issued under 10 V.S.A. chapter 151; and the landowners of record of property adjoining the project sites. *In addition, at least one copy of each application shall be filed with each of these municipal and regional planning commissions.*

(Emphasis added).

The July 21 notice fails to meet these requirements and therefore neither VZW nor the Board has authority to proceed with this application. The notice omitted substantive information and analysis on § 248a criteria not waived for projects of limited size and scope. For example, it provided no information or analysis on impacts to natural resources or historic sites.

On scenic beauty and aesthetics, the July 21 notice did not show the appearance or visual impact of the Project with the Proposed Extension. It provided only: (a) an assertion that the location of the Proposed Extension is "visually familiar" to residents and (b) a claim that the Proposed Extension will not cause adverse effect on the Town's scenic vistas. July 21 notice at 3, 5. It provided no assessment of the Extension's impact on the Town's scenic beauty, whether through viewshed analysis or otherwise. It provided no photographic simulations. It provided no analysis of the Proposed Extension under the Quechee test, that is, the test for determining whether a project will have an undue adverse effect on aesthetics and scenic beauty set out by the

former Environmental Board in In re Quechee Lakes Corporation, Findings of Fact, Conclusions of Law, and Order No. 3W0411–A–EB at 18-20 (Vt. Env. Bd. Jan. 13, 1986).

The July 21 notice similarly provided little of the information needed to determine whether substantial deference has been given to the land conservation measures of the Plan and the recommendations of the Planning Commission and Selectboard contained in the Plan. The notice made a broad assertion about the Plan without citing or applying a single actual provision. It then argued that the Planning Commission should conclude that the Proposed Extension is like AT&T's extension approved in 2013. Examples of omissions from the July 21 notice include:

- The Plan's policy for the agricultural-residential district, which would contain the Proposed Extension: "Conformance with this plan requires that development be at a density of one dwelling unit per five or more acres, *with the scale and density of any commercial uses consistent with the average residential use in the district*." Plan at 9 (emphasis added). The Project is a commercial use. But the July 21 notice failed to compare the scale and density of the Project with the Proposed Extension to the average residential use in the district.
- The Plan's policy that large structures are to use vegetation and existing topography to reduce their intrusiveness. Town Plan at 10. The July 21 notice provided no specific information on how vegetation and existing topography will reduce the intrusiveness of the Project with the Proposed Extension.
- The Plan's policy to assure that new development in town is consistent with its historic and rural character. Id. at 10. The July 21 notice provided little, if any, specific information on how the rural character of the area will be affected and no opportunity for the Planning Commission to see a balloon test to assist it in assessing this impact.

- The Plan's policies on height, dimensions, decommissioning of telecommunications facilities incorporated from the Town's telecommunications bylaw. Id. at 11. The July 21 notice includes no application of these policies.

The July 21 notice also provided cursory information on what alternatives VZW considered, stating simply that it considered "a number of locations, including the construction of a new support structure . . . ." July 21 notice at 5. There was no information on the specific locations and project configurations considered.[5] The notice did not state whether VZW considered siting one or more facilities that would comply with the policies of the Town Plan, including its height limit, or provide information and analysis on this option's feasibility.

The July 21 notice lacked detail on the Proposed Extension's benefits as well. Instead, it made general assertions the Project would "improve the quality of its [VZW's] service in this area," "provided needed improvement," "support the availability of voice and high-speed data, both within travel corridors and in the community," and help businesses and homes offices "succeed in the global economy." July 21 notice at 2, 3, 4, and 5. There was no detail on the degree of benefit that would be provided and no maps showing the actual areas to benefit.

The lack of specific information on alternatives and benefits undermined the Planning Commission's ability to understand what impact, if any, compliance with the Plan's policies would have on the general good of the State. The Commission is directly interested in these issues because the Board may decline to give substantial deference to the Plan and town recommendations if good cause is shown otherwise, and the Procedures Order defines "good cause" with reference to the public good. Procedures Order at 4. The Commission also has an

[5] While the Commission was aware of VZW's West Street proposal, the notice referred to a "number of *locations*" in the plural. (Emphasis added.)

unqualified to right to appear and participate under § 248a, without any limitation to particular issues or criteria. 30 V.S.A. § 248a(m).

The sufficiency of the July 21 notice is necessarily determined on its face. While the Commission sought additional information from VZW after receiving the notice, the Procedures Order states that it is the *notice* that "must contain sufficient detail . . . ." Procedures Order at 5. In the alternative, VZW omitted to supply the Commission with much of the information it requested, including a viewshed analysis and specific information on project benefits. Planning Commission, Letter to B. Sullivan at 2 (Aug. 12, 2015); Planning Commission Minutes at 1 (Sep. 3, 2015). VZW also refused to conduct a balloon test with notice to and the ability of the Town and residents to participate. Planning Commission Minutes at 3.

VZW's July 21 notice subverted the opportunity provided by the 45-day notice requirement to engage in meaningful discussion to see if an accommodation can be reached. To support an informed dialogue, parties need specific information and analysis on a project's impacts to assess if a project is acceptable or requires change. VZW's actions and omissions stand in contrast to those of AT&T preceding Docket 8126. AT&T conducted a balloon test with notice and opportunity to participate and, in its 45-day notice, provided far more specific information on the impacts of its proposed project. See attached disc, AT&T-2 (prefiling narrative), -5 (Exhibit C, viewshed analysis and photographic simulations), and -7 (Exhibit E; propagation maps). VZW's refusal to provide the Commission with the type of information that allowed an accommodation with AT&T in 2013 undermines VZW's reliance on that docket.

B. Omission of Project Owner as Co-petitioner

VZW's omission of Project owner ATC as co-petitioner is a separate ground for dismissal. ATC is an independent owner, operator, and developer of wireless communications

infrastructure. In re Petition of New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility, and American Towers LLC (Fairfax), Docket 8533, Order of June 24, 2015 at 1, n. 1. ATC has been a co-petitioner on other facilities. Id.; In re Petition of American Towers LLC and T-Mobile Northeast, LLC (Irasburg), Docket 8543, Order of July 22, 2015; In re Petition of American Towers, LLC and Cellco Partnership, d/b/a Verizon Wireless (Dover), Docket 8145, Order of Nov. 20, 2013. But in this case, VZW simply asserts that ATC has given permission, without supporting documentation, and does not explain why ATC is not a co-petitioner. Petition at 1.

The omission of ATC as a co-petitioner raises the question of whether the Project owner will be bound by the terms and conditions of the CPG if one is issued for the Proposed Extension. It also affects VZW's statement, in its memorandum of law, that it agrees to comply with "applicable" conditions imposed by the BOA in issuing conditional use approval in 2009, because VZW's agreement may not also bind ATC. The Board should require ATC to be a co-petitioner that is bound by the terms and conditions of the CPG, if issued.

C. Omission of Existing Permit and Failure to Identify Affected Conditions

30 V.S.A. § 248a(a) requires that "[a]n application under this section shall include a copy of each other State and local permit, certificate, or approval that has been issued for the facility under a statute, ordinance, or bylaw pertaining to the environment or land use." In addition, the Procedures Order states: "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." Procedures Order at 6.

The application fails to meet these requirements for two separate reasons. First, it omits the site plan approval issued by the Commission for the Project in 2009 pursuant to the Brookfield Development Bylaw. Docket No. 8126, Order of Oct. 18, 2013 at 3, finding 1.

Second, the application sets forth no analysis that identifies specific conditions of any existing permit that are affected by the Proposed Extension or a representation that no such conditions are affected. Instead, VZW states that it will comply with the "applicable" conditions of the 2009 conditional use permit, except for limits on height of the Project and size of the equipment compound. VZW, Mem. of Law Regarding Application of Town Plan at 4 (Oct. 23, 2015). This statement implies that there are other conditions in that permit, aside from limits on height and compound size, that VZW considers inapplicable, but it has not identified them. In addition, VZW's representation does not apply to the 2009 site plan approval.

VZW's statement also differs significantly from the representation of AT&T cited by the Commission in 2013, which was that "AT&T represents that it will comply with *all conditions* in the *existing conditional use and site plan approvals* for the tower and its site, except for the height limit." Ex. LH-13 at 3 (emphasis added). It was not limited to "applicable" conditions.

D. Unqualified Testimony; Evidentiary Objection

The application should be dismissed for the independent reason that it relies on unqualified expert testimony that should be struck and therefore the application does not support affirmative findings on many of the § 248a criteria. Even if the Board does not dismiss this application, it should still strike this testimony and associated exhibits. The Planning Commission objects to the introduction of:

- Prefiled testimony of Louis Hodgetts, beginning on p. 5, line 3 through p. 10, line 6.
- Ex. LH-8, EBI Consulting, Preliminary Review of Historic Resources (Oct. 1, 2015).
- Ex. LH-9, Photosimulations.
- Ex. LH-10, ANR Natural Resources Atlas.
- Ex. LH-11, C. Brodie, Field Naturalist, Memorandum (Sep. 1, 2015) and attachments.

The above-referenced testimony is inadmissible because the sponsoring witness does not qualify as an expert under VRE 702 in that he does not have the knowledge, skill, experience, training, or education to render an opinion on whether the proposed telecommunications facility will have an undue adverse effect on scenic beauty, aesthetics, historic sites, natural areas, wildlife and endangered species, and conformance with local and regional plans or whether parts of the Plan "are enforceable in this proceeding." Hodgetts, pf. at 6.

The VRE apply to this proceeding. 3 V.S.A. § 810(1); PSB Rule 2.216. VRE 702 states allows expert testimony by a qualified witness only. The rule states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Through the challenged testimony and exhibits, Mr. Hodgetts attempts to provide expert opinions on whether the Proposed Extension will have an undue adverse effect on scenic beauty and aesthetics, applying the Quechee test; on historic sites; and on natural areas. He also attempts to provide expert opinions on whether the Proposed Extension will have an impact on wildlife or endangered, on whether it conforms to the local and regional plans, and on whether provisions of the Plan are enforceable.

But Mr. Hodgetts is not qualified to give these opinions. Mr. Hodgetts is a civil engineer. Hodgetts, pf. 1. He is not a landscape architect, professional landscape designer, naturalist, biologist, botanist, wetland ecologist, lawyer, or land use planner. He sets forth no training or education in any of these areas. He makes the bare assertion that he has "experience" in evaluating aesthetics and land use impacts, without providing specifics on that experience or

showing that it qualifies him to give the opinions contained in his testimony. Id. He lists several dockets before the Board in which he claims to have provided testimony but there was no objection to or ruling on Mr. Hodgetts' qualifications in those dockets. See, e.g., Docket 8103 (Town of Norwich), Order of Sep. 11, 2013; Docket No. 8169 (Duxbury), Order of Dec. 19, 2013; Docket 8219 (West Rutland), Order of March 26, 2014; Docket 8220 (Bradford), Order of March 26, 2014; and Docket 8221 (Berlin), Order of March 26, 2014. In fact, only one of these cases – Docket No. 8103 – cites testimony by Mr. Hodgetts.

Mr. Hodgetts' application of the Quechee test demonstrates his unreliability as an expert. Mr. Hodgetts only flew a balloon and drove around town roads to look for the balloon. Hodgetts, pf. at 5. He did not use any other tools to identify points of potential visibility, such as a viewshed analysis. Id. He states that he did not have authorization to enter private property but does not state whether he sought this authority or whether the property was posted. Id.

Importantly, Mr. Hodgetts omitted many factors required to determine whether a project has an adverse impact on aesthetics such as: (a) the nature of the surrounding area (e.g., urban, rural, recreational); (b) the land uses present in the area, (c) the type, style, and design of existing structures in the area, and (d) the surrounding landscape and topography. In re Quechee Lakes Corporation, supra at 18. The former Environmental Board stated in that decision: "*All* of these factors must be weighed collectively in decided whether the proposed project is in harmony with – i.e. "fits" – its surroundings." Id. (emphasis added).

Instead, Mr. Hodgetts states that the Proposed Extension fits within the existing context "[b]ecause there is a tower there now . . . ." It is an unreliable application of the Quechee test to assert that the Proposed Extension will fit into the context based on the very Project whose effects it will increase. A viewer observing the Project with the Proposed Extension and no

obstruction will experience more than the Proposed Extension. The viewer will experience the entire facility. Ex. LH-2, Sheet C-3. Similarly, a viewer observing the Project with the Proposed Extension over the tree line will experience the 30 feet of the facility above the tree line will all three antenna arrays. Id. As the PSB previously stated: "We must consider the Project as a whole and its cumulative aesthetic effects, and not review portions simply as if they were stand-alone projects." In re Northwest Vermont Reliability Project, Docket No. 6860, Order of Jan. 28, 2005 at 80.

Due to Mr. Hodgetts' lack of expertise, the exhibits he uses to support the unqualified opinions in his prefiled testimony – Exhibits LH-8 through -11 – are inadmissible. Further, LH-8 and -11 are inadmissible as hearsay because they are statements made by persons other than Mr. Hodgetts offered for the truth of the matter asserted. VRE 801, 802. VZW cannot rely on the exception that allows experts to rely on hearsay because that exception applies only to experts "in the particular field." VRE 703. Mr. Hodgetts is not an expert on historic sites (Ex. LH-8) or on impacts to natural resources (Ex. LH-11).

There also is no foundation for admitting the challenged testimony and exhibits into evidence under the exception to the rules of evidence in the Administrative Procedure Act. That exception only applies "[w]hen necessary to ascertain facts not reasonably susceptible of proof under those rules . . . ." 3 V.S.A.§ 810(1). VZW can make its case using qualified experts.

The lack of competent evidence on impacts to scenic beauty, aesthetics, historic sites, natural resources, and necessary wildlife habitat and endangered means that the application does not support affirmative findings on these criteria. The application there must be dismissed because the Board must find that these criteria are met to issue a CPG. 30 V.S.A. § 248a(c)(1).

E. Instructions on Dismissal

On dismissal, the Planning Commission recommends that the Board direct VZW to:

1. Cause competent professionals to prepare sufficient analyses under the § 248a criteria applicable to projects of limited size and scope, including:

   a. Complete investigation and analysis of the impacts of the Proposed Extension under the Quechee test, including a viewshed analysis and field review at all potential locations from which the Project with the Proposed Extension may be visible The field review should include a balloon test after notice to the Town and its residents, on a date mutually agreed-on with between VZW and the Commission.

   b. An analysis applying all of the relevant provisions of the Town Plan, including each provision cited in this document.

   c. Analysis of alternatives using one or more facilities that meet both the height limit of the Town Plan and VZW's service objectives, including visual impacts, costs, and other impacts under the § 248a criteria.

2. Resubmit a 45-day notice for the Proposed Project containing sufficient information on all criteria, including:

   a. The analyses described in no. 1, immediately above.

   b. Specific details on the incremental benefits provided by the project.

3. Submit an application that includes ATC as co-petitioner and is supported by evidence from qualified experts.

IV. Town Plan and Municipal Recommendations

In the alternative to dismissal, the Planning Commission requests a hearing and recommends that the Board determine that the application raises significant issues because it

fails to demonstrate substantial deference to the land conservation measures of the Plan and municipal recommendations or to meet the applicant's burden to show good cause otherwise.

The Town Plan states that those provisions that "guide the location, siting, and design of land development in Brookfield constitute recommendations of the Selectboard and Planning Commission." Town Plan at 11. The Plan states the intent that all goals and objectives of the Plan that address the conservation, preservation, or protection of "natural, agricultural, forestry, and scenic resources" be treated as land conservation measures. Id. The Plan also states:

> For the purposes of Public Service Board proceedings on telecommunications facilities, the height and other dimensional and decommissioning requirements of the telecommunications bylaw specifically are incorporated into this plan as measures to conserve the scenic qualities of land in Brookfield and as recommendations of the Selectboard and the Planning Commission.

Id.

The Planning Commission will discuss several provisions of the Town Plan, decommissioning and construction completion, the legal effect of town recommendations, VZW's burden of proof, and its legal arguments against the Plan's height limit.

A. Specific Plan Provisions

The application does not demonstrate substantial deference to, acknowledge, or apply many relevant provisions of the Town Plan.

First, the application proposes to locate the Proposed Extension in the Plan's agricultural-residential district, for which the Plan states: "Conformance with this plan requires that development be at a density of one dwelling unit per five or more acres, *with the scale and density of any commercial uses consistent with the average residential use in the district*." Town Plan at 9 (emphasis added). The Project is a commercial use. But the application fails to address this provision or compare the scale and density of the Project with the Proposed Extension with

the district's average residential use. Because of Brookfield's rural nature, it is unlikely that the Proposed Extension will be consistent with the scale of density of that average use because it will cause the Project to reach a height of 95 feet with three antenna arrays in a cluster above the tree line and with a on-ground footprint of the tower and three equipment compounds, all in addition to the residential use that already exists on the parcel. Ex. LH-2, sheets C-1 through C-3.

Second, the Plan includes a policy to assure that new development in town is consistent with its historic and rural character. Town Plan at 10. The application provides little, if any, information on how the Proposed Extension is consistent with that rural character. The Commission also received no notice of a balloon test, rendering it unable to perform any on-the-ground assessment. Without such information, a proposed commercial use at a height of 95 feet must be considered inconsistent with the Town's rural character.

Third, the Plan states a policy that large structures are to use vegetation and existing topography to reduce their intrusiveness. Town Plan at 10. The application fails to specifically identify or apply this provision. It also lacks sufficient information on whether the choice of this site enables vegetation and existing topography to reduce the Proposed Extension's intrusiveness. It includes no comprehensive analysis of the area's existing vegetation and topography. It proffers no viewshed analysis that models locations of potential visibility using data on vegetation and topography and is followed by field review of these locations. Instead, it relies primarily on the limited and unreliable review of visual impacts conducted by Mr. Hodgetts discussed above. Even if the Board does not strike the testimony of Mr. Hodgetts on scenic beauty, the Planning Commission's arguments demonstrate its lack of weight.

Fourth, the application fails to demonstrate substantial deference to the Plan's measures on the height, dimensions, and decommissioning of telecommunication facilities incorporated

from the development bylaw.[6] For example, as already discussed, the Plan requires that the height of the facility shall not exceed 10 feet above the average height of the adjacent tree line:

> The height of the facility shall not exceed ten feet above the average height of the tree line on land immediately adjoining the proposed site. Notwithstanding the above, where the girth of the tower, antennae or related fixture does not exceed sixteen inches at any point ten feet above the tree line, additional height may be permitted subject to the approval of the Board of Adjustment and conformity with other criteria in this subsection.

Town Plan at 11, incorporating Development Bylaw § 4.16(E)(7). The application demonstrates that the Proposed Extension will not comply because it will cause the Project to be 30 feet above the average height of tree line. Ex. LH-1, Sheet C-3.

The incorporated provisions also address the removal of telecommunications facilities that are no longer in use. They require that "[a]bandoned or unused towers and associated facilities be removed within 180 days of cessation of operations at the site . . ." and that "[u]nused portions of towers shall be removed within 180 days of the time that such portion is no longer used for antennas." Town Plan at 11, incorporating Development Bylaw § 4.16(G). The application does not address these requirements or state what measures VZW will undertake to ensure that they are met. The failure to include ATC as a co-petitioner also undermines compliance with these provisions since ATC as the owner will be affected by Project removal.

B. Decommissioning and Construction Completion

The Planning Commission recommends that, should the Board issue a CPG, it require VZW to post a decommissioning bond adequate to cover dismantling and removal of the Proposed Extension and associated facilities and improvements and site restoration. The Board should ensure that ATC is bound by the condition. Such a condition would be consistent with

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[6] The Brookfield Development Bylaw is available at this link: http://www.brookfieldvt.org/wp/wp-content/uploads/2014/08/Brookfld-Dev-Ord-2010.pdf.

the BOA's similar requirement in the 2009 conditional use permit and appears to be within the scope of VZW's agreement to "applicable" conditions.

The recommended condition is appropriate to ensure that sufficient funds exist once the Project or Proposed Extension is no longer in use to remove the Proposed Extension and the associated impact and to ensure that removal of the Facility is enforceable.

Similarly, if a CPG is issued, the Board should require the completion of the Proposed Extension's construction including all associated improvements and activation within two years of when construction starts. This condition is appropriate to ensure that, if the Town of Brookfield is going to host the Proposed Extension and experience its aesthetic impact, the Town receives such benefits as the Proposed Extension will provide soon after the Facility is built.

C. Legal Effect of Municipal Recommendations and Plan Provisions

The Planning Commission will address: (1) the rebuttable presumption created by these comments and recommendations, (2) substantial deference to these municipal recommendations and plan provisions, and (3) statutory authority allowing recommendations based on bylaws.

1. Rebuttable Presumption of Noncompliance

Vermont law provides that these comments create a rebuttable presumption that the Facility does not comply with the Town Plan: "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." 30 V.S.A. § 248a(c)(2). Accordingly, the burden of proof under this criterion rests with VZW.

2. Substantial Deference

The Board must afford substantial deference to the land conservation measures in the Town Plan and the recommendations of the Planning Commission concerning the Plan, unless VZW demonstrates good cause otherwise. Before issuing a CPG, 30 V.S.A. § 248a(c)(2) provides that the Board must find that "[u]nless 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."

Comparison of this language with 30 V.S.A. § 248(b)(1)'s "due consideration" provision demonstrates that the General Assembly intended to give greater weight to municipal plans and recommendations under this statute than under 30 V.S.A. § 248, the siting statute for in-state energy facilities. The Board should apply the definitions in the Procedural Order that interpret "substantial deference" and "good cause" consistently with this intent because the primary purpose of statutory interpretation is to give effect to the intent of the legislature. Lydy v. Trustaff, 2013 VT 44, ¶ 6. The Board also should apply its definitions consistently with the case law of the Vermont Supreme Court on the meaning of these terms. See, e.g., Travia's, Inc. v. Dept. of Taxes, 2013 VT 62, ¶ 18; Lydy, supra, ¶ 4.

3. Statute Expressly Authorizes Recommendations Based on Bylaws

Section 248a(c)(2) allows municipal bodies to base their recommendations on their bylaws: "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."

Therefore, if a municipality bases recommendations on its bylaws, the Board must consider those recommendations in making its decision and give them substantial deference.

Reliance on other statutes that exempt telecommunications facilities from municipal bylaws would be misplaced because § 248a(c)(2) expressly sets those provisions aside by stating: "Nothing in this section or *other provision of law* . . . ." Id. (emphasis added).

Such reliance also would contradict multiple principles of statutory construction. For example, it would render ineffective § 248a(c)(2)'s language allowing municipalities to base recommendations their bylaws, including the specific language setting aside any other provision of law. The Supreme Court has stated: "We will avoid a construction that renders any part of a statute ineffective or superfluous." Murdoch v. Town of Shelburne, 2007 VT 93, ¶ 5.

Reliance on the exemption provisions similarly would contradict the principle of harmonizing statutes that may be in conflict. The Supreme Court has stated: "When provisions are in apparent conflict, we favor the interpretation that harmonizes the conflicting provisions." Agency of Natural Resources v. Riendeau, 157 Vt. 615, 620 (1991). A ready interpretation is available to harmonize the language of § 248a(c)(2) and statutes that exempt § 248a facilities from local bylaws: A municipality may not require a land use permit for a § 248a facility but the municipality may base its recommendations to the Board on those bylaws and the Board must give the recommendations substantial deference unless good cause is shown otherwise.

Even if a conflict among statutes existed, the rules on resolving those conflicts would require giving effect to § 248a(c)(2) because it is the later enacted statute[7] and because it is the more specific statute on whether a municipality may employ its bylaws in making

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[7] The General Assembly added the relevant sentence to § 248a(c)(2) in 2009. 2009 Acts and Resolves No. 54, Sec. 44. In contrast, the provisions that exempt § 248a facilities from municipal bylaws were adopted in 2007. 24 V.S.A. § 4412(6), (9); 30 V.S.A. § 248a(h); 2007 Acts and Resolves No. 79, Secs. 15, 17.

recommendations to the Board. Section 248a(c)(2) therefore controls over the statutes that provide a general exemption from land use bylaws for § 248a facilities. The Court has stated that "we normally enforce a new statute over an older one in conflict with the newer statute." Central Vt. Hospital v. Town of Berlin, 164 Vt. 456, 459 (1995). It has also stated that, in construing statutes the deal with the same subject matter, the more specific provision controls over the more general one. Pearson v. Pearson, 169 Vt. 28, 37 (1999).

To the extent that prior Board decisions are contrary to § 248a's express authority that municipalities may base recommendations on bylaws, they must be reconsidered because they are in error. Cases under the siting statute for energy facilities – 30 V.S.A. § 248 – do not provide relevant precedent because that statute contains no language authorizing municipal recommendations based on bylaws.

Further, the Town Plan's incorporation of the height, dimensional, and decommissioning provisions of Brookfield's telecommunications bylaw means that application of these provisions is no different from application of any other portion of the Plan. It does not require obtaining a municipal land use permit. It does not incorporate any other provisions of the bylaw such as variances. The applicable standard under § 248a remains substantial deference unless good cause is shown otherwise.

C. Burden on the Applicant

Under § 248a(c)(2), the burden is on the applicant to rebut the presumption created by this comments and recommendations and demonstrate good cause for not affording substantial deference. The Procedures Order defines "good cause" as a showing that deference "would be detrimental to the public good or the State's interests articulated in 30 V.S.A. § 202c." Procedures Order at 4.

VZW has not shown any detriment to the public good or the State's statutory interests through compliance with the land conservation measures and recommendations of the Planning Commission and Selectboard contained in the Plan, including the height limit. In fact, it has failed to address nearly all of the relevant measures and recommendations in the Plan. Far short of demonstrating detriment to the public good, VZW has neither investigated nor analyzed whether it can meet its service objectives through one or more facilities that comply with the height limit and other Plan policies. Planning Commission Minutes at 2 (Sep. 3, 2015).

D. VZW's Legal Memorandum Lacks Merit

VZW's legal memorandum does not meet VZW's burden because it does not address whether compliance with the Plan will result in detriment to the public good. Instead, it makes three diversionary points that the Planning Commission will discuss in turn.

1. 2013 Agreement to 85-foot Project

VZW's legal memorandum erroneously claims that alleged similarities between this application and AT&T's 2013 extension of the Project "compel" reaching the same result for VZW's Proposed Extension. VZW, Mem. of Law Regarding Application of Town Plan at 5. But VZW cites no state law that compels the same result, and there is none.

VZW's reasoning misses the most obvious difference between the two extensions: The Proposed Extension will cause the Project to reach a height of 95 feet, with nearly one-third to be above tree line. In contrast, AT&T's extension caused the Project to reach 85 feet.

AT&T also provided the Commission with far more information and analysis through its 45-day notice than did VZW. This information allowed the Commission's to assess the project's impact. For example, AT&T provided a viewshed analysis and conducted a balloon test in which the Town and residents were able to participate.

Further, the competitive benefit from AT&T's extension exceeds that of VZW's proposal. Before 2013, AT&T provided almost no service in the area. See attached disc, AT&T-7 (Exhibit E; propagation maps). In contrast, VZW already has a substantial presence in the area. Ex. AL-1 (existing coverage map).

Finally, the Commission agreed to AT&T's extension as part of the State's initiative to reach statewide deployment by December 31, 2013, specifically citing that initiative in its determination. 2011 Acts and Resolves No. 53, Secs. 1(a), 2; Ex. LH-13 at 3. These circumstances do not apply to the Proposed Extension. December 31, 2013 has passed. The State met the goal of ubiquitous broadband availability by the end of 2013. Dept. of Public Service, Vermont Telecommunications Plan at 7 (Dec. 2014).

2. 2009 Approval of 75-foot Project

VZW's argument on the 2009 conditional use permit lacks merit. The BOA approved a 75-foot telecommunications facility, not a 95-foot facility. Its conditions allow a "maximum" height of 75 feet. Ex. LH-16 at 4. VZW cannot fit a 95-foot tower into a 75-foot space.

The argument also depends on the unsustainable belief that the BOA has approved or would approve construction that violates the Town's Development Bylaw, which limits the Project to 10 feet above average tree line. Brookfield Development Bylaw § 4.16(E)(7).

VZW's claim regarding the BOA's findings on collocation is not based on any statement, finding, or conclusion of the BOA from 2009. Instead, it mistakenly depends on the 2015 testimony of Mr. Lanpher on the feasibility of collocating below 75 feet. Mr. Lanpher's testimony cannot establish the 2009 intent of the BOA because it comes six years later and because Mr. Lanpher was not a member of the BOA.

3. Federal Law Claim

VZW errs in claiming that applying the height limit to the Proposed Extension would constitute unreasonable discrimination among carriers. It cannot sustain its claim that AT&T's extension is "as or more intrusive" than the Proposed Extension for the following reasons:

- VZW's proposal will raise the Project to 95 feet and add a third antenna array to the Project, creating greater potential for significant impact on the scenic and rural character of the Town.
- VZW has failed to offer qualified testimony or perform complete analysis on the "intrusiveness" of the Proposed Extension.
- VZW has failed to perform the level of analysis submitted by AT&T to demonstrate that the 2013 extension minimized visual impacts.

Moreover, VZW's proposal does not and cannot advance the 2013 statutory statewide deployment initiative, which is a critical distinction between the proposals.

V. Scenic Beauty; Aesthetics

Again in the alternative to dismissal, the Planning Commission recommends a determination that the application raises significant issues with respect to the impact of the Proposed Extension on aesthetics and scenic beauty and requests a hearing.

A. The Quechee Test

The Board employs the Quechee test for determining whether a project will have an undue adverse effect on aesthetics. In re Halnon, 174 Vt. 514, 515 (2002) (mem.). This test consists of two parts: (a) whether there will an adverse effect on aesthetics because the project is not in harmony with its context and (b) whether this adverse effect will be undue. As stated by the Vermont Supreme Court on appeal from the Board:

> The two-part Quechee test was first outlined by the Environmental Board in a previous case and has since been followed by this Court. See In re McShinsky, 153 Vt. 586, 591, 572 A.2d 916, 919 (1990). Under this test a determination must first be made as to whether a project will have an adverse impact on aesthetics and the scenic and natural beauty of an area because it would not be in harmony with its surroundings. Id. at 591, 572 A.2d at 919. If the answer is in the affirmative the inquiry then advances to the second prong to determine if the adverse impact would be "undue." Id. Under the second prong an adverse impact is undue if any one of three questions is answered in the affirmative: 1) Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area? 2) Does the project offend the sensibilities of the average person? 3) Have the applicants failed to take generally available mitigating steps that a reasonable person would take to improve the harmony of the proposed project with its surroundings? Id. at 592, 572 A.2d at 920. An affirmative answer to any one of the three inquiries under the second prong of the Quechee test means the project would have an undue adverse impact. Id. at 593, 572 A.2d at 920.

Halnon, 174 Vt. at 515 (2002) (mem.). The Commission will discuss each part of the test and then arguments of VZW on project benefits.

B. Adverse Effect

The Planning Commission recommends a conclusion that VZW has not demonstrated that the Proposed Extension will not have an adverse effect on aesthetics and scenic beauty. All of the comments above concerning the omissions and unreliability of Mr. Hodgetts' testimony demonstrate that little, if any, weight should be given to his testimony on this issue. As previously stated, Mr. Hodgetts failed to consider most of factors required to determine whether a project has an adverse impact on aesthetics, including: (a) the nature of the surrounding area (e.g., urban, rural, recreational); (b) the land uses present in the area, (c) the type, style, and design of existing structures in the area, and (d) the surrounding landscape and topography. In re Quechee Lakes Corporation, supra at 18.

In assessing the Proposed Extension's adverse effect, the Board should give great weight to the District Commission's conclusion in 2009 that the Project would have an adverse effect on

aesthetics and scenic beauty. The District Commission found that the Project "is not compatible with its surroundings and will not 'fit' the existing rural character of the surrounding area." In re T-Mobile Northeast, LLC, supra at 8. As the decision-maker on Act 250 permits for the district that includes Brookfield, the District Commission is the primary agency charged with interpreting and applying the Quechee test in this area. 3 V.S.A. § 4001, 10 V.S.A. § 6026(a)(3).

If the Project had an adverse effect on this rural area at height of 75 feet, the probability tilts decisively toward the Proposed Extension's having an adverse effect at a height of 95 feet. The Commission incorporates its comments above that a viewer of the Project will experience it as a whole with the Proposed Extension and emphasizes that a viewer seeing the Project over the tree line will experience 30 feet of the facility with all three antenna arrays, set against the rural nature of the area. Ex. LH-2, Sheets C-1 and C-3. The Board has stated that it "must consider the Project as a whole and its cumulative aesthetic effects . . . ." Docket No. 6860, supra at 80.

C. Undue

The Planning Commission recommends a conclusion that VZW has not demonstrated that the Proposed Extension passes any of the three factors under "undue." In this regard:

- As shown above, VZW fails to demonstrate compliance with several provisions of the Plan that constitute clear, written community standards intended to preserve the aesthetics and scenic beauty of the Town. These standards include the Plan's policies on consistency with the scale and density of the average residential use in the district, using vegetation and topography to reduce intrusiveness, assuring that the Proposed Extension is consistent with the Town's rural character, and compliance with the Plan's height, dimensional, and decommissioning policies for telecommunication facilities. Town Plan at 10, 11.

- VZW fails to demonstrate the Proposed Extension will not be or cause the Project to be shocking or offensive to the average person due to the serious deficiencies, discussed above, in VZW's investigation and analysis.
- VZW fails to satisfy the mitigation factor because, as shown above, VZW has not investigated, analyzed, or submitted evidence on the use of options to meet its service objective that comply with the Town Plan, including its height limit. In addition, collocation in and of itself is not a sufficient mitigation measure because § 248a directs the Board not to require collocation if it "would cause an undue adverse effect on aesthetics." 30 V.S.A. § 248a(c)(3).

On the issue of community standard, the Town Plan states that the provisions discussed in these comments are intended to preserve the aesthetics and scenic beauty of the Town:

> All of the goals and objectives of this plan that address the visual, aesthetic, scenic or rural qualities of Brookfield are meant to be written community standards intended to preserve the aesthetics and scenic beauty of Brookfield. The Brookfield telecommunications bylaw specifically constitutes and is incorporated into this plan as such a written community standard, including but not limited to those provisions that regulate the height of telecommunications facilities.

Town Plan at 11. In addition, the incorporated bylaw states: "The purpose of this section is to protect the scenic qualities of Brookfield's natural environment and to guide development that may have adverse health, safety or visual impacts." Brookfield Dev. Bylaw § 4.16(A).

The Board must therefore treat the Plan's height limit as a clear, written community standard under Quechee. The General Assembly has directed that: "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." 30 V.S.A. § 248a(c)(2).

Further, the Board should give effect to the District Commission's 2009 conclusion that the bylaw, including the height limit, "is a clear and written community standard intended to protect aesthetics and natural beauty." In re T-Mobile Northeast, LLC, supra at 8. The Planning Commission contends in a separate memorandum that this determination binds the Board and parties. But binding or not, the determination deserves great weight because it was made by the primary agency charged to apply the Quechee test in the area that includes Brookfield.

D. Weighing "Undue" and Project Benefits

In its legal memorandum, VZW adopts the Planning Commission's position that the Board may weigh an undue adverse effect on scenic beauty and aesthetics against project benefits in deciding whether a facility promotes the general good of the state. VZW, Mem. of Law Regarding Application of Town Plan at 2-3.

As a matter of law, the Board may perform this weighing only *after* applying the Quechee test and making a finding on whether Proposed Extension will have an undue adverse effect on scenic beauty and aesthetics. In making such a finding, the Board may consider only evidence relevant to the facility's aesthetic effect. 3 V.S.A. § 810(1), PSB Rule 2.216, VRE 402. Under the VRE, nonaesthetic societal benefits such as an increase in telecommunication services are irrelevant to an aesthetic finding because they do not make a facility's aesthetic effects more or less probable. VRE 401 states that "relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Nonaesthetic societal benefits by definition do not alter a facility's size, design, color, or fit into the landscape.

Modifying the test to include those benefits fundamentally alters the balance between two sets of goals adopted by the General Assembly: protecting Vermont's scenic beauty and

achieving the benefits of wireless telecommunications services. See 2011 Acts and Resolves No. 53, Sec. 1(a) (benefits of telcommunications), (15) (the "imperative" for deployment to be consistent with the State's scenic beauty); 10 V.S.A. § 6086(a)(8) (scenic beauty, aesthetics); 30 V.S.A. §§ 202(c) (telecommunications goals) and 248a(c)(1) (aesthetics). If the effect of a project on scenic beauty would be undue without the project's benefits, then the weight given to that effect should not be artificially reduced by nonaesthetic factors. Instead, the balancing should be of an *undue* adverse effect on scenic beauty against the project's benefits.

The absence of sound information and analysis undermines any showing that the impacts of the Proposed Extension are outweighed by its benefits. As demonstrated above, VZW's investigation, analysis, and application provide insufficient information to fully assess the Proposed Extension's impacts on scenic beauty, aesthetics, and other § 248a criteria. Its assertions of benefits are similarly general and it is unable to proffer reliable or clear quantification of those benefits. For the reasons discussed above, its attempts to analogize the benefits of the Proposed Extension to AT&T's 2013 extension miss the mark. In particular, AT&T's extension significantly improved competition in the area because AT&T's prior coverage was highly limited. VZW already has widespread coverage in the area.

VII. Conclusion

Based on the foregoing, the Commission recommends and moves that the Board dismiss this application with the instructions set out in Sec. III.E, above. In the alternative, the Planning recommends and moves that the Board:

1. Strike the challenged testimony and exhibits of Louis Hodgetts described in Sec. III.D, above.

2. Determine that this application raises significant issues with respect to:

i. the land conservation measures in the Town Plan;

ii. the recommendations of the Planning Commission and the Selectboard in the Town Plan;

iii. the recommendations of the Planning Commission contained in these comments; and

iv. scenic beauty and aesthetics.

3. Convene a hearing to take evidence on the issues identified in no. 2, above.

Brookfield, Vermont. November 19, 2015.

Respectfully submitted,

Aaron Adler, Chair