STATE OF VERMONT
NATURAL RESOURCES BOARD
DISTRICT ENVIRONMENTAL COMMISSION #3

RE: Application #3R1021
T-Mobile Northeast LLC
c/o Mark Hall, Esq., Paul Frank + Collins P.C.
P.O. Box 1307
Burlington, VT 05402-1307
and
Douglas and Diane Haggett
7523 VT Route 14
Brookfield, VT 05036

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER
10 V.S.A. §§ 6001 - 6092

I. INTRODUCTION

On August 18, 2009, T-Mobile Northeast LLC and Douglas and Diane filed an application for an Act 250 permit for a project generally described as **the construction of a 75-foot monopole tower, the installation of nine panel antennas to be mounted and centered at 72 feet above-ground level as well as related equipment including cabinets and necessary infrastructure**. **The project is located at 2382 Ridge Road in the Town of Brookfield.**

The tract of land consists of 66 acres with less than one acre involved in the project area. The Applicants' legal interest is ownership in fee simple described in a deed recorded in Book 75, Page 152, in the land records of the Town of Brookfield, Vermont.

The application was deemed complete on August 18, 2009.

Under Act 250, projects are reviewed based on the 10 criteria of 10 V.S.A. § 6086(a)(1)-(10). Before granting a permit, the District Environmental Commission (Commission) must find that the project complies with these criteria and is not detrimental to the public health, safety or general welfare.

Decisions must be stated in the form of Findings of Fact and Conclusions of Law. The facts we have relied upon are contained in the documents on file identified as Exhibits 1 through 42, and the evidence received at a hearing held on September 29, 2009. At the end of the hearing, the Commission recessed the proceeding pending submission of additional information. The Commission adjourned the hearing on November 24, 2009, upon receipt of the additional information and completion of Commission deliberations.

II. JURISDICTION

Jurisdiction attaches because it is construction of improvements for a commercial purpose on more than 1 acre of land in Brookfield, Vermont. 10 V.S.A. 6001(3)(A)(ii).

III. OFFICIAL NOTICE

Under 3 V.S.A. § 810(4) of the Administrative Procedure Act ("APA"), notice may be taken of judicially cognizable facts in contested cases. See 10 V.S.A. § 6007(c) and 3 V.S.A. § 801(b)(2). Under § 810(1) of the APA, "[t]he rules of evidence as applied in civil cases .... shall be followed" in contested cases. Under the Vermont Rules of Evidence, "(a) judicially noticed fact must be one not subject to reasonable dispute in that it is ... (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." V.R.E. 201(b); See *In re: Handy*, 144 Vt.601, 613 (1984).

The Commission may take official notice of a judicially cognizable fact whether requested or not, and may do so at any stage of the proceeding. See V.R.E. 201(c) and (f). Under 3 V.S.A. § 809(g), the Commission may make findings of fact based on matters officially noticed. A party is entitled, upon timely request, to an opportunity to be heard as to the propriety of taking official notice and the tenor of the matter noticed. See V.R.E. 201(e).

Accordingly, official notice is hereby taken of the Brookfield Town Plan, the Brookfield Development Bylaws and Two Rivers-Ottaquechee Regional Plan subject to the filing of an objection on or before thirty days from the date of this decision pursuant to Act 250 Rule 6.

IV. PARTY STATUS

A. Preliminary Party Status Determinations

Parties to this application are:

1. The Applicants, by Mark Hall, Zac Davis and Jeff Davis.

2. The Municipality of Brookfield.

3. The Brookfield Municipal Planning Commission by Aaron Alder.

4. The Two Rivers-Ottaquechee Regional Planning Commission.

5. The State of Vermont, Agency of Natural Resources (ANR)

The following persons or entities were admitted as parties pursuant to 10 V.S.A. § 6085(c)(1).:

6. Hope and Bob Krenick, 2401 Ridge Road, Brookfield, Vermont; admitted under Criteria 5, 8 and 9J. The Krenicks are concerned that the traffic associated with the project will increase the dangers of Ridge Road in that area. They feel it is

dangerous to have vehicles pulling out of the drive there, and they often pass by the house. They are also concerned that the project will negatively affect their property as they can see the project from their residence, and they are concerned that the project will increase the occurrence of power outages they experience at their residence.

B. Final Party Status Determinations

Pursuant to 10 V.S.A. § 6085(c)(2) and Act 250 Rule 14(E), the Commission made preliminary determinations concerning party status at the commencement of the hearing on this application. Prior to the completion of deliberations, the Commission re-examined the preliminary party status determinations and found that the parties continue to qualify under the relevant criteria as stated above.

V. FINDINGS OF FACT

The Commission initiated the review process on this application as a Minor application under Act 250 Rule 51 on August 25, 2009. The Commission distributed a notice and proposed permit establishing a deadline of September 9, 2009, by which parties, or the Commission on its own motion, could request a hearing on this matter. The Commission received timely requests for a public hearing from Hope Krenick under Criteria 5, 8 and 9J. On September 16, 2009, the Commission issued a Memorandum and Notice of Hearing indicating that a public hearing would be held to discuss Criteria 8. Pursuant to Act 250 Rule 51(F), the Commission need only prepare Findings of Fact and Conclusions of Law on those criteria or subcriteria at issue during the hearing. Therefore, the following Findings of Fact are limited to Criteria 5, 8 and 9J.

Prior to taking evidence with regard to the ten Criteria of 10 V.S.A. § 6086(a), the Commission and all parties agreed that the Applicants, through submission of the application material, have met the burden of proof with respect to the following criteria:

1 - Air Pollution
1(A) - Headwaters
1(B) - Waste Disposal
1(C) - Water Conservation
1(D) - Floodways
1(E) - Streams
1(F) - Shorelines
1(G) - Wetlands
2 - Water Supply
3 - Impact on Existing Water Supplies
4 - Erosion
6 - Educational Services
7 - Municipal Services
8(a) - Wildlife
9(A) - Impact of Growth
9(B) - Agricultural Soils
9(C) - Forest and Secondary Ag. Soils
9(D) - Earth Resources
9(E) - Extraction of Earth Resources
9(F) - Energy Conservation
9(G) - Private Utilities
9(H) - Costs of Scattered Development
9(K) - Public Investments

9(L) - Rural Growth Areas
10 - Local and Regional Plan

Therefore, the application shall serve as the Findings of Fact on these criteria.

The following written Findings of Fact pertain to Criteria 5, 8 and 9J.

To the extent that the Commission has agreed with the proposed findings of fact and conclusions of law submitted by the Applicants and other parties, those findings and conclusions have been incorporated herein. Otherwise, said requests to find are denied. In making the following findings, the Commission has summarized the statutory language of the 10 criteria of 10 V.S.A. § 6086(a):

GENERAL FINDINGS

1. T-Mobile is in the process of establishing service in the State of Vermont. Part of the process requires coverage along I-89 and I-91. This tower is required to connect the service coverage areas between Randolph, Vermont and Wiliamstown, Vermont. Testimony.

2. T-Mobile has attempted to find suitable colocations on existing structures where possible, and for this site, it was unable to find a suitable, existing structure. There is no other site available to fill the need in the gap in coverage. Testimony.

3. The project site is a 66-acre parcel and the project site will impact less than 0.5 acres. Testimony and Exhibits 2, 3, and 25.

4. The tower is located down from Ridge Road and will only be visible from a few locations on Ridge Road. Testimony.

5. The project was originally proposed as a 140-foot structure, but since reduced the height to 75 feet. Testimony.

6. The proposed telecommunications facility will consist of the following components:

    i. One monopole tower of 75 feet in height;
    ii. 3 sets of 3 antenna will be mounted to the tower. The panels are 72" tall, 13" wide and 5-7" deep;
    iii. The panel colors were chosen to be non-reflective and fit in with the natural background as much as possible;
    iv. The communications compound will be approximately 28' by 40';
    v. 3 self contained equipment cabinets with emergency back up batteries;

vi. Access is by the existing farm road within minimal improvements; and

vii. Overhead utility lines connecting the project to existing CVPS service at the house.

Testimony and Exhibits 2, 3, and 24-31.

7. The project will be situated within the Haggett property as depicted on Exhibit 25 and the utility layout is depicted on Exhibit 25.

SECTION 6086 (a)(5) TRANSPORTATION:

8. The site will be accessed via an existing dirt drive. The drive will be located within a 15-foot access and utility easement. Exhibits 3 and 25.

9. No changes are proposed to the intersection between the existing drive and Ridge Road. All sight distances will comply with all State and local regulations. Testimony and Exhibit 3.

10. Construction traffic will likely occur for 2-3 weeks. Routine maintenance trips are anticipated to be once a month or possibly once every other month. Testimony.

Conclusion:

Therefore, the Commission concludes that this project will not cause unreasonable congestion or unsafe conditions with respect to transportation.

SECTION 6086 (a)(8) AESTHETICS, SCENIC BEAUTY, HISTORIC SITES AND NATURAL AREAS:

11. There are no historic sites or rare and irreplaceable natural areas which will be affected by this project. Exhibit 3.

12. The tower height and location was designed to minimize locations from which it will be visible. Testimony.

13. The existing canopy averages 65 feet, and, therefore, the project will extend slightly above the tree line. Testimony and Exhibits 3 and 26.

14. The tower is among trees and will be earth toned to blend into the surroundings. The antennas are non-reflective. Exhibit 3.

15. The Applicants revised the plan to reduce and change the size of the communications compound in order to minimize tree cutting along the I-89 border of the project site. The original project involved a square 40-foot by 40-

foot compound, and the project now involves a rectangular 28-foot by 40-foot compound. This change also reduces the amount of grading. Testimony.

16. Photo simulations were provided to demonstrate what the project will look like upon completion. Exhibit 37.

17. The power lines providing service to the project are above ground. Burying the power lines is estimated to cost $60,000.00 to $68,000.00 which is substantially more than the $15,000.00 estimate for overhead power lines. Exhibits 40-42.

18. As found above, the necessity for this telecommunications facility is the lack of coverage in the area. Testimony.

19. Sheets T-1, C-1, C-2, A-1, and S-2 show the routes of the access for the utility line service as well as the tower compound site layout and grading plan. Exhibits 24-30.

20. Exhibit 38 is a series of photographs of the balloon flight taken by Mrs. Krenick demonstrating that the project is visible from several locations including her residence.

21. The Town of Brookfield Town Plan does not contain any provisions specific to the scenic value of Ridge Road. Exhibit 22.

22. The Town of Brookfield Development Bylaw 4.16 specifically addresses Telecommunications Facilities. The purpose of the bylaw is to "protect the scenic qualities of Brookfield's natural environment and to guide development that may have adverse health, safety or visual impacts." Exhibit 21.

23. Town of Brookfield Development Bylaw 4.16 requires review by the planning commission and shall meet the requirements of that bylaw which includes a height limitation of ten feet above the tree line of the average canopy. Testimony and Exhibit 21.

Conclusion:

In evaluating the potential impacts of projects on the values set out in Criterion 8, the Commissions apply the protocol established by the Environmental Board in its 1985 *Quechee Lakes* decision (Findings of Fact 3W0411-EB and 3W0439-EB).

In *Quechee*, the Board framed a fundamental question to answer in determining if a project's impacts will be adverse: Will the project be in harmony with its surroundings and fit the context within which it will be located? Several specific features must be evaluated, according to *Quechee*, in answering this question.

1. *What is the nature of the project's surroundings? Is the project to be located in an urban, suburban, village, rural or recreational resort area? What land uses presently exist? What is the topography like? What structures exist in the area? What vegetation is prevalent? Does the area have particular scenic values?*

2. *Is the project's design compatible with its surroundings? Is the architectural style of the buildings compatible with other buildings in the area? Is the scale of the project appropriate to its surroundings? Is the mass of structures proposed for the site consistent with land use and density patterns in the vicinity?*

3. *Are the colors and materials selected for the project suitable for the context within which the project will be located?*

4. *Where can the project be seen from? Will the project be in the viewer's foreground, middleground or background? Is the viewer likely to be stationary so that the view is of long duration, or will the viewer be moving quickly by the site so that the length of view is short?*

5. *What is the project's impact on open space in the area? Will it maintain existing open areas, or will it contribute to loss of open space?*

All of these factors must be weighed collectively in deciding whether the proposed project is in harmony with- - i.e., "fits" - - its surroundings. The land uses which surround a project are crucial to the analysis.

Id.

The Board cited particular categories of land forms which are especially sensitive to change "*because these land forms tend to be visible from a wide area or they are seen by large numbers of peoples."* These land forms include open space, ridge lines, steep slopes, shorelines, flood plains, wetlands and natural areas.

All of the above factors must be applied in a collective analysis to see if the project impacts will be "adverse."

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.

Because the Commission found the impact on the area to adverse, it must now apply the remainder of the Quechee analysis test as determined by the Environmental Board. The Commission must not determine if the adverse impact is "undue." If a positive conclusion is reached with regard to any one of the following, and adverse impact is undue:

> 1. *Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic, natural beauty of the area? Such standards may, for example, be set forth in the local or regional plan, or be adopted in the creation of an historic design district, or be incorporated into a municipal or State scenic road designation?*

Id. 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.

> 2. *Does the project offend the sensibilities of the average person? The Legislature has directed the Commissions and this Board, composed of lay people from many different communities within Vermont, to determine what is acceptable in terms of new developments' impact on aesthetics and scenic and natural beauty. If our sensibilities are, collectively, offended by a project, its impact under Criterion 8 is undue. It is not enough that we might prefer to see a different design or style of building, or that we might prefer a different type of land use, but that the project, when viewed as a whole, is offensive or shocking, because it is out of character with its surroundings, or significantly diminishes the scenic qualities of the area.*

Id. The Commission concludes that the project will not offend the sensibilities of the average person. While the tower will result in the placement of an industrial structure in a rural setting and will be approximately 10 feet above the treeline, its siting is such that it will not appear in an offensive or shocking manner within its overall setting.

> 3. *Has the Applicant failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the proposed project with its surroundings? Such steps may include selection of less obtrusive colors and building materials, implementation of a landscaping plan, selection of a less obtrusive building site within the project area, or reduction of the mass or density of a project. If there are reasonable alternatives to the applicant that would mitigate the adverse impact of the project, failure to take advantage of those alternatives may, in some circumstances, render undue an otherwise acceptable aesthetic impact.*

Id. The siting of the facility is designed to minimize visibility from off-site. The Applicants chose the location because it minimized the number of locations from which it will be visible. The Applicants are using materials which will reduce the visibility of the project and the Applicants reduced the height of the tower to conform with the standard required by the Town Development By-Laws to protect the scenic beauty of the area. The Applicants also changed the size and location to minimize tree cutting and help the tower blend with the tall trees along the I-89 side of the project site. The Applicants have taken generally available mitigating steps to improve the harmony of the proposed project with its surroundings.

Conclusion:

Therefore, the Commission concludes that the project will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites, or rare and irreplaceable natural areas.

SECTION 6086(a)(9)(J) PUBLIC UTILITY SERVICES:

24. CVPS has stated that it can provide utility service to the project and that the project will not place an excessive or uneconomic demand on the service. Exhibit 19.

25. The project will have no more than seven utility poles not to exceed 40 feet in height, including the portions of the poles below ground. Testimony.

Conclusion:

Therefore, the Commission concludes that utility service is available to this project, that an excessive or uneconomic demand will not be placed on such facilities or services, and that the provision of such services has been planned on the basis of a projection of reasonable population increase and economic growth.

VI. SUMMARY CONCLUSION OF LAW

Based upon the foregoing Findings of Fact, it is the conclusion of this District Environmental Commission that the project described in the application referred to above, if completed and maintained in conformance with all of the terms and conditions of that application, and of Land Use Permit #3R1021, will not cause or result in a detriment to public health, safety or general welfare under the criteria described in 10 V.S.A. § 6027(g).

VII. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, Land Use Permit #3R1021 is hereby issued.

Dated at Springfield, Vermont on December 1, 2009.

By: Joshua B. Powers /s/
Joshua B. Powers, Chair
District #3 Environmental Commission
Natural Resources Board

Commissioners participating in this decision:

Roderick J. Maclay
Paul E. Kendall, Jr.

Any party may file a motion to alter with the District Environmental Commission within 15 days from the date of this decision, pursuant to Act 250 Rule 31(A). See 10 V.S.A. § 8504(k) for further restrictions on the right to appeal. Appeals must be filed with the clerk of the Environmental Court within 30 days of the date of the decision, pursuant to 10 V.S.A. Chapter 220. The Notice of Appeal must include all information required by Rule 5(b)(3) of the Vermont Rules for Environmental Court Proceedings (VRECP). The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, National Life Records Center Building, Drawer 20, Montpelier, VT 05620-3201, in accordance with Rule 5(b)(4)(B) of the VRECP. For further information, see the Vermont Rules for Environmental Court Proceedings, available on line at www.vermontjudiciary.org. The address for the Environmental Court is: Environmental Court, 2418 Airport Road, Suite 1, Barre, VT 05641-8701. (Tel: 802-828-1660)

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