STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 8126

Petition of New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility, for a certificate of public good, pursuant to 30 V.S.A. § 248a, for the installation of telecommunications equipment in Brookfield, Vermont	)))))

Order entered: 10/18/2013

I. INTRODUCTION

In this Order, the Vermont Public Service Board ("Board") approves the application filed by New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility ("AT&T or the "Petitioner"), pursuant to 30 V.S.A. § 248a, and the Board's Procedures Order ("Procedures Order"),[1] and grants Petitioner a certificate of public good ("CPG") authorizing the installation of wireless telecommunications equipment at an existing telecommunications facility in Brookfield, Vermont (the "Project").[2] The Board does not approve or adopt the Stipulation filed with the Board by AT&T and the Town of Brookfield Planning Commission ("Planning Commission") on September 19, 2013.

II. BACKGROUND

This case involves a petition and prefiled testimony filed by the Petitioner on July 31, 2013, requesting that the Board issue a CPG, pursuant to 30 V.S.A. § 248a, authorizing the installation of telecommunications equipment at an existing facility in Brookfield, Vermont.

On August 21, 2013, the Vermont Department of Public Service ("Department") filed a letter with the Board stating that the "Project does not adversely impact any of the applicable

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1. *Amended order implementing standards and procedures for issuance of a certificate of public good for communications facilities pursuant to 30 V.S.A. § 248a*, Order issued August 10, 2011.

2. As used herein, the term Project is limited only to the equipment and modifications being proposed to the existing facility and described in Finding No. 4, below.

§ 248 criteria" and recommending that the Board issue an order approving the petition without additional hearings or investigation.

On August 21, 2013, the Planning Commission filed comments on the Project, a request for a hearing, a notice of appearance, and a motion to intervene in this proceeding.[3] The Planning Commission argues that the Project will have an undue adverse effect on aesthetics. However, the Planning Commission nonetheless recommends that the Board approve the Project because of the benefits associated with the Project.[4]

On September 19, 2013, AT&T filed a Stipulation setting forth agreements reached between AT&T and the Planning Commission, together with a Stipulated Proposed Decision and CPG. In the Stipulation, AT&T and the Planning Commission agree that the Petition satisfies the applicable statutory criteria under 30 V.S.A. § 248a, subject to the Stipulation's conditions. The stipulating parties further agree that litigation of this matter is not necessary and waive their right to a technical hearing in this docket, and request that the Board issue an order authorizing the Petitioners to install a wireless telecommunications facility, subject to the terms of the Stipulation.

No other comments on the petition were filed with the Board.

The Board has determined that the petition and prefiled testimony have satisfied the substantive criteria of 30 V.S.A. § 248a. Consequently, we find that the procedure authorized by § 248a is sufficient to satisfy the public interest, and that therefore no hearings are required.[5]

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3. In the absence of any objection, we hereby grant the Planning Commission's motion to intervene on a permissive basis.

4. Comments of the Brookfield Planning Commission, dated August 21, 2013, at 1 ("Planning Commission Comments").

5. We note that the Planning Commission waived its right to a hearing in this proceeding as part of the Stipulation. However, because we decline to adopt the Stipulation, the Planning Commission's request for a hearing in this case must be ruled upon. For the reasons explained later in this Order, we have determined that the petition does not raise a significant issue under the applicable criteria. Accordingly, the Planning Commission's request for a hearing is denied.

III. FINDINGS

1. The Project involves the collocation of wireless telecommunications equipment at an existing wireless telecommunications facility located at 2382 Ridge Road in Brookfield, Vermont. In 2009, T-Mobile Northeast, LLC received conditional use and site plan approvals from the Town of Brookfield and a land use permit under 10 V.S.A. Chapter 151 (Act 250) from the District No. 3 Environmental Commission, authorizing the construction of the existing facility. Exhs. 6B-1 at 1-3, and 6B-11.

2. The objective of the Project is to expand and enhance AT&T's wireless coverage in the Town of Brookfield, along Interstate Highway 89, and in the surrounding area. In addition, the Project will provide capabilities for the use of devices employing 4G LTE service in the Town of Brookfield and the surrounding area. Once operational, the Project will result in significant improvements to AT&T's existing wireless coverage in Vermont. Exh. 6B-1 at 1-3.

3. The existing facility consists of a 75' monopole tower with several antennas, and a 28' by 48' fenced-in compound served by an existing access road. Exhs. 6B-1 at 1, and 6B-2.

4. The Project involves installing a 10' extension to the existing 75' tower, and mounting twelve panel antennas, each measuring approximately 96" by 12" by 7", at a centerline height of 81' on the tower. The Project also includes the installation of an approximately 12' by 20' equipment shelter, a diesel generator on a new 4' by 8' concrete pad, a new 12' wide swing gate in the existing fence, and ancillary conduit, cabling, and equipment. Exh. 6B-1 at 1-2.

5. In order to minimize the visual impact of the Project, AT&T chose to use a 10' antenna mounting array which represents the smallest commercially available mount for the proposed antennas and tower. Exh. 6B-1 at 5.

6. The Project will involve earth disturbance of approximately 258 square feet. Exh. 6B-1 at 2.

7. The Project will not have an undue adverse impact on floodways, the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas. This finding is supported by findings 8-12, below.

8. The Project will fit within the context of its surroundings insofar as the Project involves the collocation of antennas and equipment at an existing telecommunications facility. The 10'

extension to the existing tower will increase the visibility of the Project, however the extension will use suitable colors and materials that are compatible with the existing equipment, and will have virtually no effect upon either the views of the Project from surrounding areas, or on open spaces. Therefore, the Project will not have an adverse effect on aesthetics. Exh. 6B-1 at 4.

9. The Project as a whole furthers the goals and policies set forth in the applicable municipal and regional plans. Exh. 6B-1 at 8, 12-13.

10. AT&T investigated an alternative structure in the area for collocation, and concluded it could not be used to fulfill its coverage objectives for the Project. Exh. 6B-1 at 10.

11. The Project, which involves collocation of equipment at an existing telecommunications facility with minimal ground disturbance, will have no impact on rare or irreplaceable natural areas, wildlife habitat, or endangered species within the vicinity of the Project. Exhs. 6B-1 at 6-7 and 6B-8.

12. The Project will have no undue adverse effect on historic sites. Exh. 6B-1 at 5-6.

13. The Project will have no adverse impacts on floodways. Exh. 6B-1 at 7.

14. The Project substantially complies with the applicable land use conservation measures in the municipal and regional plans other than the zoning bylaw provision limiting the height of these types of facilities to approximately 75', in the Brookfield Town Plan. The Planning Commission supports the Project in light of the significant societal benefits it will bring: improved safety, and increased wireless coverage in the surrounding area. The Project is also supported by the Two Rivers-Ottauquechee Regional Planning Commission. Exhs. 6B-1 at 8-13, 6B-14, and 6B-16.

15. The Project, with the exception of height restrictions placed on the previously approved tower, is consistent with existing land use and zoning permits. Exh. 6B-1 at 13-14.

IV. Discussion

The procedures governing Board approval of communications facilities are set forth in 30 V.S.A. § 248a. Section 248a(l) provides that the Board:

> may issue rules or orders implementing and interpreting this section. In developing such rules or orders, the board shall seek to simplify the application and review process as appropriate . . . .

In order to implement the statute the Board adopted the Procedures Order. In accordance with § 248a(b)(3), the Procedures Order, at Section II, defines a project of "limited size and scope" as:

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

As required by § 248a (c)(1), and set forth in Section IV(H) of the Procedures Order, in reviewing projects of limited size and scope the Board conditionally waives:

> all criteria under 30 V.S.A. § 248a (c)(1), with the exception of 10 V.S.A. §§ 6086(a)(1)(D) (floodways) and 6086(a)(8) (aesthetics, historic sites, rare and irreplaceable natural areas, endangered species, necessary wildlife).

The Project will result in an overall facility height of approximately 85' and will result in approximately 258 square feet of earth disturbance. Therefore, the Project qualifies as a project of limited size and scope within the meaning of § 248a(b)(3)(A).

Pursuant to § 248a(c)(2), unless there is good cause to find otherwise, the Board is required to give substantial deference to land conservation measures and recommendations of municipal and regional entities. The Town of Brookfield has adopted a zoning bylaw that has been incorporated by reference into Brookfield's town plan, and that restricts the maximum height of telecommunications facilities to approximately 75' in this area. Construction of the Project will cause the existing facility to exceed this height restriction by 10'. However, notwithstanding these circumstances, the Planning Commission nonetheless recommends that the Board approve the Project because of its societal benefits, including the increased coverage, improved safety, and expanded capacity that the Project will bring to the area. Accordingly, in substantial deference to the Planning Commission's ultimate approval recommendation, we find

that it is appropriate to approve the Project, notwithstanding that the Project will exceed the height restrictions reflected in the Town of Brookfield's town plan and in its zoning bylaw.

Based upon all of the evidence set forth above, we conclude that the petition does not raise a significant issue with respect to the relevant substantive criteria of 30 V.S.A. § 248a, that the public interest is satisfied by the procedures authorized in 30 V.S.A. § 248a, and that the proposed Project will promote the general good of the State.

The Planning Commission's Comments

The Planning Commission states that, when originally approved by the District Three Environmental Commission, the existing facility was found to have an adverse effect on aesthetics. Therefore, the Planning Commission contends that the Project raises a significant issue with regard to the aesthetics criterion because "adding height and facilities" to the existing facility will necessarily "magnify that adverse effect."[6] Accordingly, the Planning Commission has requested a hearing regarding the significant issue it believes it has raised.

We note that no party to this proceeding opposes the construction of the Project. We recognize that the Planning Commission has sought to raise several arguments regarding the appropriate legal analysis to be applied in reviewing this Project pursuant to Section 248a, but we observe that none of these legal arguments, if adopted, would result in any change to the project as proposed by AT&T. Given that we have expressly afforded substantial deference to the Planning Commission's ultimate recommendation to approve the Project as proposed by AT&T, we find the Planning Commission's legal arguments regarding the additional aesthetic impacts of the Project on the existing facility to be of no avail in the absence of any objection from the Planning Commission as to the design, approval and eventual construction of the Project. Therefore, notwithstanding the Planning Commission's legal arguments, we find no significant issue has been raised with regard to aesthetic impacts that would require a hearing. Accordingly, we decline to grant the Planning Commission's request for a hearing.

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6. Planning Commission Comments at 4.

The Stipulation

The Stipulation submitted by AT&T and the Planning Commission memorializes their disagreement as to "whether the Project will have an adverse effect on aesthetics."[7] However, AT&T and the Planning Commission contend that the Board "need not resolve this disagreement because the two parties agree that the Board should approve the Facility."[8] Typically, a stipulation or a memorandum of understanding seeks to resolve a disagreement between the parties to a proceeding through joint advocacy for the placement of mutually agreeable conditions by the Board on its approval of a proposed project. In this case, AT&T and the Planning Commission do not request that the Board resolve any disagreement between them, nor do they request that the Board place any conditions on the Project. Given that the Planning Commission does not oppose the approval of the Project as proposed by AT&T, we perceive no purpose to be served by adopting the Stipulation, and therefore we decline to do so.

V. CONCLUSION

Pursuant to 248a(j)(1) with regard to telecommunications facilities of limited size and scope:

> The Board may, subject to such conditions as it may otherwise lawfully impose, issue a certificate of public good in accordance with the provisions of this subsection and without the notice and hearings required by any provision other than subdivision (2) of this subsection if the board finds that such facilities will be of limited size and scope, and the application does not raise a significant issue with respect to the substantive criteria of this section. The Board may make findings based on the application and the supporting evidence submitted by the applicant.

As noted above, we have determined that the Project is of limited size and scope. Furthermore, based upon all of the above evidence and having considered all of the comments we have received about the Project, we conclude that the petition does not raise a significant issue with respect to the relevant substantive criteria of 30 V.S.A. § 248a, that the public interest is satisfied

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7. Stipulation at 10 and Stipulation Attachment A at 5-6.

8. *Id.*

by the procedures authorized in 30 V.S.A. § 248a, and that the proposed Project will promote the general good of the State.

VI. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that the installation and operation of communications facilities at the location specified in the above findings, by New Cingular Wireless PCS, LLC, d/b/a AT&T Mobility, in accordance with the evidence and plans submitted in this proceeding, will promote the general good of the State of Vermont in accordance with 30 V.S.A. § 248a(a), and a certificate of public good to that effect shall be issued in this matter.

Dated at Montpelier, Vermont, this 18th day of October, 2013.

s/James Volz	PUBLIC SERVICE
s/John D. Burke	BOARD
s/Margaret Cheney	OF VERMONT

OFFICE OF THE CLERK

FILED: October 18, 2013

ATTEST: s/Judith C. Whitney
Deputy Clerk of the Board

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

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and Order.