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Vermont Environmental Board
National Life Records Center Building
Drawer 20
Montpelier, Vermont 05620-3201

October 8, 1997

Office of the Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

RE: **WT Docket No. 97-192** Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934
ET Docket No. 93-62 Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation
RM-8577 Petition for Rulemaking of the Cellular Telecommunications Industry Association Concerning Amendment of the Commission's Rules to Preempt State and Local Regulation of Commercial Mobile Radio Service Transmitting Facilities

Dear Sir/Madam:

Enclosed for filing please find the original and 9 copies of the comments of the State of Vermont, Environmental Board in regard to the above referenced case now before the Federal Communications Commission.

Please note that this filing has been sent today in 3 envelopes using the U.S. Postal Service overnight Express Mail in order to comply with the filing deadline of Thursday, October 9, 1997.

Enclosed is an extra copy of our filing and a self-addressed return envelope. Please date stamp this copy and return it to us for our records.

If you have any questions, please do not hesitate to call me at 802-828-5444.

Sincerely,

David L. Grayck

David L. Grayck
General Counsel

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Enclosures: Exhibits as labeled and extra copy of filing for date stamp and return
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934	)	WT Docket No. 97-192
Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation	)	ET Docket No. 93-62
Petition for Rulemaking of the Cellular Telecommunications Industry Association Concerning Amendment of the Commission's Rules to Preempt State and Local Regulation of Commercial Mobile Radio Service Transmitting Facilities	)	RM-8577

SECOND MEMORANDUM OPINION AND ORDER
AND
NOTICE OF PROPOSED RULEMAKING

THE COMMENTS OF THE STATE OF VERMONT ENVIRONMENTAL BOARD

On September 24, 1997, the Vermont Environmental Board convened a public meeting to consider the above captioned matter which is referred to herein as "NPR." The Environmental Board hereby files these comments in response to the NPR pursuant to the September 24 meeting. As explained below, the Environmental Board opposes any further preemption of state and local land use laws relative to personal wireless service facilities.

I. INTRODUCTION

In 1969, Vermont found itself confronting rapid, uncontrolled development which threatened to undermine the integrity of the landscape. This threat originated out of Vermont's sudden accessibility to the major northeastern population centers via the newly constructed federal highway interstate system. Then Governor Deane C. Davis realized that

environmental protection was a true concern of all Vermonters, and that the only solution was a comprehensive legislative response. With then Attorney General James Jeffords, now United States Senator Jeffords, serving as one of the primary authors of the legislation, Governor Davis brought about the enactment of Vermont's premier environmental land use law. Codified at Title 10, Chapter 151 of Vermont Statutes Annotated, this law is simply known as "Act 250." Since June 1, 1970, under Act 250, the construction of improvements for a commercial purpose constitutes "development," and as such requires the prior issuance of an Act 250 permit.[1]

In reflecting on the twenty-fifth anniversary of the enactment of Act 250, United States Senator Jeffords described how Act 250 was specifically designed to control development, but not to stop development.[2] This sentiment, so clearly expressed in Act 250's findings and declaration of intent, has guided development in Vermont ever since. Moreover, it has guided the Environmental Board in its implementation and interpretation of Act 250's ten environmental criteria ever since those days when Governor Davis, and fellow Vermonters like Senator Jeffords, led Vermont to economic prosperity through the balanced environmental protection required by Act 250.[3]

The Environmental Board's position is that the Federal Communication Commission ("FCC") should not proceed with any further preemption of Vermont's Act 250 with regard to personal

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[1]Enclosed as exhibit A is "Vermont Environmental Board Twenty-fifth Annual Report." This report provides an excellent historical summary of the enactment of Act 250 as well as a review of the ten Act 250 environmental criteria.

[2]"Vermont's Act 250 Twenty-five Year Retrospective," an interview with United States Senator James Jeffords, former Vermont State Senator and present Environmental Board member Arthur Gibb, and former aide to Governor Davis Elbert Moulton, October 20, 1995, produced by Vermont Educational Television.

[3]For judicial interpretations of Act 250's legislative intent, see Southview Associates v. Bongartz, 980 F.2d 84 (2d Cir. 1992), cert. denied, 507 U.S. 987, 113 S. Ct. 1586 (1993); In re Agency of Administration, 141 Vt. 68, 444 A.2d 1349 (1982); and In re Preseault, 130 Vt. 343, 292 A.2d 832 (1972).

wireless service facilities.[4] First, any further preemption will undermine Act 250 and local environmental protection. Second, no further preemption is warranted as evidenced by the successful deployment of personal wireless services in Vermont, and around the country.[5] Finally, instead of further preemption, the FCC should allocate additional resources to education and training at the state level with regard to personal wireless service facilities. Ultimately, any further preemption would be detrimental to Vermont's ability to achieve economic prosperity through balanced environmental protection.

II. ACT 250's TEN CRITERIA AND THE ACT 250 HEARING PROCESS

Vermont has achieved balanced environmental protection through the consistent application of Act 250's ten criteria in the quasi-judicial process. These criteria include potential air or water pollution, soil erosion, burden on municipal services, aesthetics, wildlife habitat and endangered species, rural growth, and consistency with local and regional planning documents.[6] The first step in obtaining an Act 250 permit is the filing of an application with a district environmental commission.

There are nine district environmental commissions, each with

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[4]In addition, the Environmental Board opposes the preemption which is being considered in In the Matter of Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities, MM Docket No. 97-182, Notice of Proposed Rulemaking (August 18, 1997). The Environmental Board will be filing comments in opposition prior to the October 30, 1997 deadline.

[5]The two primary cellular service providers in Vermont are Atlantic Cellular, L.P., d/b/a Cellular One, and Bell Atlantic NYNEX Mobile. The former serves the entire state; the later serves the entire state except for two southern counties which are served by US Cellular. The Environmental Board urges the FCC to closely examine the extensive state-wide coverage achieved by these cellular providers, notwithstanding Vermont's challenging topography. Moreover, Sprint and Omnipoint purchased the PCS rights for Vermont and are expected to commence service in 1998.

[6]See 10 V.S.A. § 6086(a)(1)-(10). A copy of Act 250 and the Environmental Board's rules have been included as exhibits B and C.

an assigned geographical area. The commissions are comprised of three citizen volunteers. A full-time coordinator is assigned to each district commission. The district commissions conduct their Act 250 permit application hearings as contested cases under Vermont's Administrative Procedure Act.[7] There are formal notice requirements to "statutory parties," and usually to adjoining property owners. Other parties are allowed pursuant to the Environmental Board's rules, although only statutory parties have appeal rights to the Vermont Supreme Court.[8]

The applicant for an Act 250 permit always has the burden of going forward and producing evidence upon which affirmative findings can be made under all ten Act 250 criteria. The party that bears the burden of persuasion varies depending upon the particular criterion at issue.[9] The allocation of the burden of proof operates in conjunction with the requirement that before a permit can be issued, the district commission must make the affirmative findings required under the ten Act 250 criteria.

Appeals from district commission decisions are to the Environmental Board. The Environmental Board is a quasi-judicial board comprised of eight citizen volunteers, and a full-time chair. The Environmental Board also employs an executive director, general counsel, three staff attorneys, and a chief coordinator. One staff attorney is specifically assigned to serve the district commissions. Like the district commissions, an appeal to the Environmental Board is an administrative procedure contested case. The appeal is heard de novo.[10] On appeal, the allocation of the burden of proof is the same as that before the district commission.

Since Act 250 went into effect on June 1, 1970, a communication or broadcast facility requires an Act 250 permit if it (a) was constructed above an elevation of 2,500 feet; or (b) was constructed on a tract of land greater than 1 acre in size.

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[7]See 10 V.S.A. § 6085(a) and 3 V.S.A. Chapter 25.

[8]See 10 V.S.A. §6085(c) and Environmental Board Rule ("EBR") 14; In re Cabot Creamery Cooperative, Inc., 164 Vt. 26, 663 A.2d 940 (1995).

[9]See 10 V.S.A. § 6088.

[10]See 10 V.S.A. § 6089 for appeals to the Environmental Board as well as for appeals from the Environmental Board to the Vermont Supreme Court.

If the municipality in which the facility is to be constructed has adopted permanent zoning and subdivision, then the jurisdictional threshold increases from 1 acre to 10 acres. Since July 1, 1997, in addition to the aforementioned, any broadcast or communication facility that includes the construction of a support structure of 20 feet or more requires an Act 250 permit. The review extends to any ancillary construction such as equipment buildings, foundation pads, cables, wires, antennas or hardware, and all means of ingress and egress to the support structure.[11]

The preemption described in the NPR would adversely interfere with Act 250's review under 10 V.S.A. §§ 6086(a)(1)(air pollution). It also would shift the burden of proof in a manner that is contrary to Act 250's current provisions. Finally, it would interfere with legitimate fact finding by limiting the scope of what evidence may be introduced into the record. Such preemption is not warranted here in Vermont given Act 250's long standing regulation of issues related to communication and broadcast facilities, its sophisticated understanding of these issues, and the successful deployment of personal wireless services in Vermont.

III. ACT 250'S REVIEW OVER BROADCAST AND COMMUNICATION FACILITIES

The sudden demand for personal wireless service facilities has driven the recent increase in the construction of new support structures, or the expansion of existing support structures. However, the issues arising out of this demand are not new to Vermont, nor the Act 250 program.

In 1978, the Environmental Board issued a permit for a new broadcast facility on Mount Mansfield, Vermont's highest peak. Key issues with regard to this facility were the health and safety consequences of having high-powered broadcast facilities in close proximity to recreational users of the mountain top; the fragile condition of the mountain top's environment; and the aesthetic appearance of towers on Vermont's highest peak. As a result of this decision and subsequent decisions, a collocation society has been formed to manage and protect one of Vermont's

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[11] See 10 V.S.A. §§ 6001(3) for the 1 and 10 acre definition of development. See 10 V.S.A. § 6001c for jurisdiction over support structures higher than 20 feet constructed on or after July 1, 1997.

most significant landmarks.[12] Similarly, in 1985, the Board mandated such an arrangement with respect to the use of Mount Equinox in the Town of Manchester, Vermont.[13]

More recently, the Environmental Board has considered issues related to communication and broadcast facilities in the context of proposed state legislation, appeals from district environmental commission decisions, and a petition for rulemaking.[14]

In 1996, the Vermont legislature considered and rejected an amendment to Act 250 that would have eliminated jurisdiction over radiofrequency radiation ("RFR") under Criterion 1, undue air pollution. In opposing this amendment, the Board's staff made clear to the legislature that Act 250 jurisdiction did not extend to radiofrequency interference.[15] With respect to RFR, the Board

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[12]See Re: Karlen Communications, Inc., #5L0437-EB, Findings of Fact, Conclusions of Law, and Order (Aug. 28, 1978); and Re: University of Vermont and State Agricultural College, Declaratory Ruling #116 (June 25, 1980). Presently, there are four full size towers and one "stub tower," which are used by four different television stations and numerous other users ranging from the United States Marshal Service to private weather services to radio stations to cellular providers to the Federal Drug Enforcement Agency.

[13]See Re: Carthusian Foundation, #8B0324-EB, Findings of Fact, Conclusions of Law, and Order (June 6, 1985).

[14]In addition, a member of the Board's legal staff has given numerous presentations around Vermont regarding the Telecommunications Act of 1996. Also, the Environmental Board and district commission members have received specialized training regarding the Act and the FCC's In the Matter of Guidelines for Evaluating the Environmental Effects of Radio frequency Radiation, Report and Order, ET Docket No. 93-62 (Aug. 1, 1996). The Environmental Board has also been briefed on the matters covered by Fact Sheet #1 and #2 issued by the FCC's Wireless Telecommunications Bureau, and Bulletin 65 "Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields" issued by the FCC's Office of Engineering & Technology.

[15]The Board's staff interpretation on this issue is consistent with that concluded by the United States District Court for the District of Vermont in In re: Appeal of Graeme and

made clear that it had a limited, but significant role, with respect to this issue.[16]

The Act 250 program has also responded to the increased demand for new communication and broadcast facilities through the adoption of a specialized application form for these types of facilities. The application form serves both the interests of the Act 250 program and FCC licensees since it requests information that is unique to broadcast and communication facilities. This information forms the basis for a more expedited and through review of the broadcast or communication facility.[17] The specialized application form is consistent with the original intent that Vermont achieve economic prosperity through compliance with the ten Act 250 criteria.

Finally, the statistics alone demonstrate that further preemption is not needed to ensure the successful deployment of personal wireless service. For the period January 1990 through December 1995, there were a total of 66 permit applications for new support structures, or the expansion of existing support structures. Of the 66 applications, 58 received permits and only 2 were denied.[18] Since that time, there have been more than 15 permits issued for additional towers, or the expansion of existing tower facilities. These numbers demonstrate that Act 250 can expeditiously review permit applications such that personal wireless services are and will continue to be successfully deployed in Vermont.

Mary Beth Freeman, et al., Docket No. 2:96-CV-295 (D. Vt), appeal docketed, Freeman v. Burlington Broadcasters, Inc., d/b/a WIZN-FM, Docket No. 97-9141 (US 2nd Cir .

[16]See January 23, 1996 Memorandum from Michael Zahner, Director of Administration, to Vermont State Senator Matt Krauss. A copy of this memorandum is attached as exhibit D.

[17]The specialized application form was adopted pursuant to Re: Petition for Rulemaking by Edward H. Stokes, Decision Regarding Request to Initiate Rulemaking (Oct. 9, 1996). The specialized application form is attached as exhibit E.

[18]A copy of the statistical breakout is included as exhibit F.

IV. COMMENTS IN RESPONSE TO THE NOTICE OF PROPOSED RULEMAKING

i. Section 332(c)(7)(B)(iv)-(v) petitions

The FCC anticipates that it will be called upon to resolve more petitions brought under Section 332(c)(7)(B)(iv)-(v) because expanding wireless services will require more facilities.

The Environmental Board has no data to dispute the FCC's anticipation that there will be an increase in petitions brought pursuant to Section 332(c)(7)(B)(iv)-(v).[19] However, the Environmental Board believes that the FCC should not adopt preemptive rules until the need for such rules is convincingly demonstrated. The Environmental Board believes that a single case such as BellSouth Mobility, Inc. v. Gwinnett County, 944 F. Supp. 923 (N.D. Ga. 1996), or even several like it, does not demonstrate a need for more preemption. Rather, BellSouth demonstrates that the FCC should first devote more of its resources to education and training at the state and local level.

Only after the FCC has made a reasonable investment in education and training should it consider further preemption. Such education and training needs to consist of more than the simple issuance of guidance documents. The FCC should organize seminars where local and state officials can come and receive a training outline prepared by the FCC. The FCC should seek to involve state and local governments in arranging such seminars. The Environmental Board would be pleased to participate in such a seminar.[20]

In addition to more education and training, the Environmental Board believes that the FCC should not underestimate the integrity of state and local land use review. Sections 332(c)(7)(B)(i), (ii), (iii) are clear in what they require. The Environmental Board understands that it has an obligation to be well versed in the requirements of these provisions. However, this task does not present any more of a

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[19]See NPR at ¶ 117.

[20]Such seminars would demonstrate that the FCC is truly committed to "balance the legitimate role of state and local authorities in zoning and land use matters with the statutory goal of promoting fair competition in the provision of personal wireless services without compromising public health or safety." See NPR at ¶ 118.

challenge than is posed by the administration of Act 250 and the conduct of administrative procedure contested case proceedings. The FCC should not *anticipate* that state and local land use authorities will fail to reasonably and faithfully carry out their obligations under federal law.

ii. Final Action and Failure to Act under Section 332(c)(7)(B)(v)

The FCC proposes to adopt a definition of "final action" for purposes of Section 332(c)(7)(B)(v) which would allow a wireless provider to "seek relief from the [FCC] from an adverse action of a local zoning board or commission while its independent appeal of that denial is pending before a local zoning board of appeals."[21]

The Environmental Board opposes any preemption whereby Section 332 petitions are allowed prior to the completion of the administrative appeal process. Section 332 petitions should only be allowed when an applicant may appeal the administrative decision as a civil court action. To allow otherwise may actually encourage Section 332 litigation by wireless providers since these petitions will be conducted in Washington, D.C. Providers in possession of strong financial resources may opt for Section 332 petitions simply because ordinary citizens concerned about their health and safety will lack sufficient financial resources. For purposes of Vermont and Act 250, the Environmental Board believes that the appropriate time for such a petition would be when an applicant files its appeal with the Vermont Supreme Court since appeals from the Environmental Board are directly to the Vermont Supreme Court.

With regard to what constitutes a failure to act for purposes of Section 332(c)(7)(B)(ii), the Environmental Board agrees with the FCC's proposal to make such determinations on a case-by-case basis.

First, the Environmental Board notes that the time it takes to process an Act 250 permit application in large measure depends upon the quality of the application materials filed with the district commission. That is why the Environmental Board adopted the specialized application form for communication and broadcast facilities.

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[21] See NPR at ¶ 137.

Second, after an application is filed, a determination is made as to whether it is a "minor" or "major" application. If it is a minor application brought under EBR 51, such as the installation of additional antenna or microwave dishes, then no hearing is held and a permit is likely to be issued within 60 days of the filing of application.[22] If it is a major application requiring a full-review under all ten Act 250 criteria, then the process is likely to take between four and six months, but can take as little as two months or as much as eight months, depending upon the number of parties involved, the nature of the issues, and the quality of the applicant's application.[23] Where there is an appeal to the Environmental Board from a district commission decision the entire process is likely to take one year.[24]

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[22]For example, included as exhibit G is a copy of the Notice of Application for Land Use Permit #7C0467-6, and the permit. This application was processed under EBR 51 as a minor application. The application was filed on May 5, 1995. The project was the installation of 4 whip antennae and 1 panel antenna on an exiting tower. The district commission issued the permit on June 19, 1995, that is, 45 days after the application was filed.

[23]For example, included as exhibit H is a copy of Land Use Permit #2W1012 issued to US Cellular for a 120 foot tower, equipment building and access road. The application was filed on April 13, 1995, and the district commission issued the permit on June 22, 1995, that is, 70 days after the application was filed. In contrast, included as exhibit I is the decision denying Land Use Permit Application #1R0766 which was applied for on January 25, 1994, and denied on September 9, 1994. The basis for the denial was a dispute over which municipality the project was actually located in. The district commission convened three public hearings on the application over the eight month period it took to adjudicate the application.

[24]An extreme case is Re: Gary Savoie d/b/a WLPL and Eleanor Bemis, Application #2W0991-EB (Reconsideration), Findings of Fact, Conclusions of Law and Order (Aug. 27, 1997) which is included as exhibit J. The Environmental Board twice denied an application for a broadcast tower since the applicant failed to make a good faith effort to collocate his radio station on an existing tower pursuant to the applicable regional plan. The entire process took well over two years, but this was an extremely unusual case where the applicant was largely responsible for the lengthy process. The Environmental Board

The Environmental Board believes that the examples discussed herein support the FCC's position that a determination regarding the failure to act must be made on a case-by case basis.

iii. Definition of Directly or Indirectly in Section 337(c)(7)(B)(v)

The Environmental Board agrees with the FCC's interpretation of Section 337(c)(7)(B)(v) as stated in paragraphs #139 and #140 of the NPR. The Environmental Board would also encourage the FCC to routinely make its expertise available upon the request of a state or local land use authority, and not just to a court or party when there has been an appeal to a civil court from an administrative land use decision.

iv. Demonstration of RFR Compliance

Presently, the Environmental Board understands that it is preempted to consider RFR under Act 250 if the project meets the FCC's guidelines established in the August 1, 1996 Report and Order in ET Docket No. 93-62 ("Guidelines"). Accordingly, the Environmental Board considers this to be conditional preemption based on a question of fact.

Under Act 250's burden of proof allocation, it is the applicant's burden to demonstrate compliance. Typically, this is done through a combination of documentary evidence such as an FCC license, equipment specifications, and testimony by an applicant's site technician. In some cases, emissions measurements are provided to address the RFR issue under Criterion 1 of Act 250. Opponents are allowed to come forward with their own evidence to demonstrate non-compliance. The FCC should not adopt any rules which would undermine Act 250's requirement that an applicant demonstrate that its project complies with the Guidelines.

The Environmental Board disagrees with the FCC's position that "there should be some limit as to the type of information that a state or local authority may seek from a personal wireless service provider."[25] The FCC should not interfere with the Act 250 quasi-judicial process by prescribing what evidence is

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urges the FCC to closely read this decision as it demonstrates the high quality of decision making and decision writing which characterizes the Act 250 program.

[25]See NPR at ¶ 142.

relevant and admissible with regard to RFR in each and every case. The Environmental Board believes that site-specific conditions should dictate what information is relevant to the consideration of RFR.

For example, on Burke Mountain, in Burke, Vermont, the district commission determined that the cumulative impact of successive multiple users on a tower located in a recreational area could cause the applicable ANSI/EE standards to be exceeded. As a remedy, the district commission required the submission of a master plan so as to ensure that this would not occur. In each case, the district commissions and the Environmental Board should be free to look at all of the contributors of emissions in determining whether there is preemption of concerns related to RFR.[26]

a. first alternative

The evidence which would be allowed under the first alternative as described in paragraph #143 is evidence which is sufficient for an applicant to meet its burden of production in an Act 250 proceeding. As a routine matter, this evidence is also sufficient to meet the burden of persuasion such that an applicant will be issued an affirmative finding under Criterion 1 of Act 250. Presently, an opponent may offer evidence which contradicts the applicant's contention that the FCC's Guidelines are and will be complied with. If the first alternative is adopted, then the present conditional preemption will be done away with, and questions which could and should be asked when a project is proposed will only be asked after a facility is built, operating, and exceeding the FCC's Guidelines. In such a case, under Act 250, the remedy for when a licensee falsely certifies would be a revocation proceeding (assuming that such a proceeding would not be preempted under Section 332(c)(7)(B)(v)).

The Environmental Board strongly opposes the first alternative as described in paragraph 143. It exceeds what is necessary, and will lead to after-the-fact resolution of problems which should be addressed before a wireless provider commences using a facility.

b. second alternative

As between the first and second alternative, the

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[26]The district commission's decision is included as exhibit K.

Environmental Board supports the second alternative, although the Environmental Board believes that there should be no restrictions imposed by the FCC on what evidence is relevant and admissible in state and local land use proceedings.

As the record in Vermont demonstrates, there has been no delay on the siting of facilities based upon radiofrequency emissions and a provider's compliance with the FCC's Guidelines. Thus, in response to paragraph #144's request for comments on the criteria for demonstrating compliance, the Environmental Board believes that it is the applicant's responsibility to determine how best to demonstrate compliance with the FCC's Guidelines, and to be solely responsible for the cost of such demonstration. The FCC should not determine how providers will meet their burden of proof in administrative land use proceedings.

The FCC's uniform demonstration of compliance described in paragraph #146, if preemptive of any cross-examination or contrary evidence, would be tantamount to a self-certification process by wireless providers. If the FCC is going to take such action, then the Environmental Board believes that the detailed showing described in (1)-(4) of paragraph #146 should be incorporated into the second alternative, and that all costs should be paid for by the wireless provider.[27]

v. Procedures for Reviewing Request for Relief

The Environmental Board does not oppose the declaratory ruling process as the remedy for relief under Section 332(c)(7)(B)(v), although it is incumbent upon the FCC to make such a process as accessible to ordinary citizens who lack substantial financial resources. Accordingly, it is imperative that a copy of the request for relief be served on the state attorney general *and* the land use authority whose action is being challenged.[28]

With regard to standing, in the first instance the authority whose ruling is being appealed from should have standing to participate as a party in the FCC's declaratory ruling. The land use authority has as much an interest in its own decision, and how it is to make decisions in the future, as do wireless providers and the citizens that adjoin or live close to the

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[27]See NPR at ¶ 148.

[28]See NPR at ¶ 149.

facility at issue. Accordingly, the definition of who is a "person adversely affected" should be broader than just people living close to the facility.

At a minimum, if a person had standing to participate in the state or local land use proceeding, then that same person should automatically be able to participate in the FCC's proceeding. For purposes of Act 250, the Environmental Board's rules allow as parties individuals or groups who can demonstrate that the project *may* affect their interest under any of the Act 250 criteria. Thus, ownership of property either adjoining or in close proximity to a facility is not the sole factor in determining who can participate in an Act 250 proceeding. For example, recreational users of a state-owned mountain top may be adversely affected by a wireless facility and, accordingly, can participate as a party in an Act 250 proceeding.

For simplicity, the FCC should consider simply incorporating Federal Rule of Civil Procedure 24. Vermont has adopted a rule of civil procedure which is substantially identical to the federal rule, and the Vermont rule has been incorporated as the standing rule for a specialized type of environmental appeal proceeding here in Vermont.[29] A benefit to incorporating the federal rule is that there is an existing body of guiding precedent.

Ultimately, any rule which is adopted must not hinder citizen participation before the FCC. It will be a substantial burden for citizens to participate in a formal proceeding before the FCC in Washington, D.C. In fact, the mere filing of such a petition by a wireless provider may prove to be all that is necessary to win such a proceeding. Opponents with legitimate concerns will simply lack the financial resources to proceed with the declaratory ruling. That is why it is vital that the authority being appealed from be admitted as a party to any declaratory ruling proceeding before the FCC. Unless the FCC is prepared to conduct meaningful enforcement of its licensees on a nation-wide basis, the FCC should not create barriers to citizen participation, or the participation of the authority whose ruling is being challenged.

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[29] See 10 V.S.A. §6102; In re Chittenden Recycling Service, 162 Vt. 84, 643 A.2d 1204 (1994).

vi. Rebuttable Presumption of Compliance

The Environmental Board opposes any rebuttable presumption of compliance as described in paragraphs #151-#154. The wireless provider is the FCC permittee as well as the applicant for a state or local land use permit, and it should bear the burden of proof to demonstrate that its facility complies with the FCC's Guidelines at the state level and, if necessary, before the FCC.

The combination of a Section 332(c)(7)(B)(v) petition occurring at the time proposed in paragraph #137 with a rebuttable presumption will be tantamount to a system where RFR is regulated through wireless provider self-certifications with all oversight being done by the FCC. This regulatory scheme will impose a tremendous cost on any challenger to the wireless provider. This is unreasonable. The wireless provider should bear the burden of proof to show that it complies with the FCC's Guidelines. Thereafter, it is incumbent upon any project opponent to come forward with evidence to the contrary.

If the FCC adopts a rebuttable presumption of compliance in combination with quick resort to a Section 332(c)(7)(B)(v) petition, then it will have substantially eliminated all Act 250 review of RFR emissions. The FCC's proposal in paragraph #153 with regard to a prima facie showing does not lessen the severity of the FCC's proposed preemption. Accordingly, the Environmental Board strongly opposes the process described in paragraphs #151-#154. If it is adopted, then the Environmental Board urges the FCC to not adopt a rebuttable presumption/prima facie procedure. Rather, the FCC should adjudicate each declaratory ruling petition with the wireless provider bearing the burden of proof.

V. SUMMARY

The very interstate system which opened Vermont to rapid development 30 years ago, as well as the remainder of the state, is well served by personal wireless service facilities. This coverage has benefited Vermont's population and economy, and the Environmental Board shares with all of Vermont the common goal of reliable personal wireless service coverage. Far from being an impediment to personal wireless service deployment, Vermont's Act 250 demonstrates that the path to economic prosperity is through balanced environmental protection, not the preemption of such protection.

Accordingly, the Environmental Board requests that the FCC decline to further preempt state and local laws pertaining to personal wireless services facilities.

Dated at Montpelier, Vermont this 8th day of October, 1997.

VERMONT ENVIRONMENTAL BOARD

By: John T. Ewing

John T. Ewing, Chair

EXHIBIT A

VERMONT
Environmental Board

Twenty-fifth Anniversary Report
1970 – 1995

HOWARD DEAN, M.D.
Governor

State of Vermont
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On the 25th Anniversary of Act 250, I welcome this opportunity to express my strong support and belief in the principles of this law. Adopted at a time when Vermont was entering a period of rapid and largely uncontrolled development, it has served the state well, providing its citizens with a unique opportunity to have a say in how their communities should grow and, at the same time, protect precious natural resources and heritage.

As times change, regulations also need to adjust to new demands and issues. The Environmental Board has recognized this need by a focus on improving the process without weakening the ten criteria which are so fundamental to the success of Act 250. I support the Board's efforts, with full recognition that the integrity of the law cannot be compromised. The future of our state depends upon it.

In reading the 25th Anniversary Report which follows, I hope you also will come to a fuller understanding of the long-term benefits of this law in maintaining the high quality of life in Vermont.

Governor Howard Dean, M. D.

Act 250 went into effect on June 1, 1970. It consisted of nine pages of text, followed shortly thereafter by fourteen pages of regulations implementing the law.

Today the annotated text of the law has grown to sixty-seven pages, and the implementing regulations consume eighty-three more. There have been countless decisions and court appeals over the years as close to 15,000 applications have been processed.

Yet, remarkably, the law is still managed by the same number of district commissioners and Board members, aided by nine district coordinators, their assistants and a Montpelier staff of eleven. These people are experienced, competent and committed to Act 250. Thus, the Act is still basically administered by local decision makers, men and women involved in their communities and thoroughly familiar with the issues, in the manner envisioned by Governor Dean C. Davis as he developed the framework for the law in 1970.

Certainly Vermont has changed over the past 25 years, but Vermonters continue to put a high priority on protecting our environment and our quality of life, values which are incorporated in the ten criteria of Act 250. These criteria have withstood the test of time, and remain as relevant today as they were in 1970 when unregulated development threatened Vermont's natural resources, a threat to which Governor Davis responded so promptly.

At this period in Vermont, there is considerable concern over the state of the economy. Act 250 is not an anti-growth law. In fact, most feel that it protects our most valuable assets and, with its long term focus, will ensure Vermont's future. However, it is essential that the administration of Act 250 be efficient and timely. The current emphasis of the Environmental Board, staff and district coordinators is to improve the processing of applications, and a series of changes are being implemented to achieve this result.

The basic mission of the Environmental Board and District Commissions is to make sound and reasonable decisions based on the evidence presented in a quasi-judicial mode of objectivity and fairness. As we move into the next twenty-five years of Act 250, we will always seek to achieve this mission, making sure that the law continues to address the critical issues for Vermont: the protection of our natural resources and the maintenance of our high quality of life.

John T. Ewing, Chair
Vermont Environmental Board

Twenty-fifth Anniversary Comments

On this 25th Anniversary we asked our former Governors, our Congressional Delegation, and our Lieutenant Governor to comment on Act 250. Their responses follow:

The passage of Act 250 was more than an act to protect against uncontrolled growth. I believe that history will record it as a defining moment involving the rejection of unfettered materialism and a commitment of the people of this state to a value system based upon man's spirituality and a love of and respect for land and its creatures. May it always be thus.

Philip H. Hoff
October 4, 1995

Act 250 was instrumental in preserving the Vermont we love. Many will not remember the crisis we faced 25 years ago with unchecked development running rampant through the countryside. Nor may everyone recall the unique convergence of political forces, behind the leadership of Governor Dean Davis, that led to the enactment of Act 250. As Attorney General at the time, I am proud of the role I played, along with countless Vermonters, working under tremendous pressure from all directions to pass the bill. The benefits accrue even today.

Senator James M. Jeffords
September 25, 1995

Act 250 has been a shield, defending Vermont against the degradation resulting from fast buck development. It has been a great benefit as a cornerstone in creating a superior quality of life. It can be of even greater benefit if the ability to use it as a sword for limited agendas can be blunted to advance the broader public interest.

F. Ray Keyser, Jr.
September 15, 1995

Act 250 is partly responsible for my running for the Vermont General Assembly in 1972. No sooner had the law been passed, when it came under attack, inspiring me to conclude that the law needed defenders. Why not do so from a seat in the legislature? Since then, the law has been both criticized and defended with great regularity just about every year, and from time to time, amended, but never substantially changed because Vermonters have made it work in their interest.

It is an unusual law in the amount of citizen input it provides, and in the criteria it spells out to assure that development is appropriate and done with care. I know of no other state which has approached the tough task of managing development in such an effective manner, but then no other state has protected its communities and landscape quite as successfully as Vermont. Act 250 has given us the tools necessary for responsible growth, while enabling us to maintain the character and values of this special place.

Madeleine M. Kunin
September 15, 1995

It would be difficult to imagine what kind of place my native state of Vermont might have become in the years between 1970 and 1995 without act 250. One thing is clear — it would not be the same Vermont we call home today. We Vermonters should never lose sight of this law's monumental contribution to the quality of our lives and communities. Vermonters today, and for generations to come, owe a debt of gratitude to Governor Davis and the 1970 General Assembly. Their foresight is responsible for Vermont's distinction today as among the most beautiful states in America.

Senator Patrick Leahy
September 15, 1995

Act 250 was an idea whose time had come. It represented an intuitive, bipartisan, Vermont response by our then Governor, Dean C. Davis, to a clear and present danger. Tough medicine was required to prevent the exploitation of our natural resources and our heritage as the State of Vermont was being discovered with the advent of the Interstate highway system. History records that the most significant period of economic growth in Vermont has occurred following enactment of this visionary statute which insists that Vermont will employ value driven criteria as the basis for development decisions. It has tempered how we have grown in a manner that helps make this state the special world that it is.

Thomas P. Salmon
September 12, 1995

The State of Vermont is proud of its natural beauty and our respect for the environment. For twenty-five years Act 250 has led the way in environmental protection and historic preservation. It has been a significant factor in preserving the beauty of our state which attracts so many tourists and helps sustain our economy. Controlled development and community involvement help us prevent or change plans that are not in the interest of Vermonters and only benefit developers.

Representative Bernard Sanders
September 15, 1995

Vermont's unique vision in creating Act 250 established this state as the nation's leader in environmental preservation, a reputation that has been an exceedingly valuable asset. The current objective must be to make Act 250 more user-friendly as it interfaces with the complexity of state and federal environmental regulations. Preservation of Vermont's environment and the generation of good jobs must be recognized as interdependent. Wise integration of environmental preservation and jobs creation is not only desirable but absolutely essential for the quality of life of future Vermonters.

Lt. Governor Barbara W. Snelling
September 20, 1995

The enactment of Act 250, 25 years ago came at a crucial moment. Vermont was in a very expansive period in terms of population growth and business activity. The adoption of Act 250 made it possible to assure that our state could enjoy this growth period and grow in ways that kept Vermont's unique qualities as well as her attractive and wholesome features. Vermont was an environmental example I could be proud of during the 1980's as Chairman of the US Senate Committee on Environment and Public Works.

Robert Stafford
September 14, 1995

The Evolution of Act 250

By Art Gibb and Sam Lloyd

Passage of the Law

By Executive Order No. 7, in May of 1969, Governor Dean C. Davis created the Governor's Commission on Environmental Control. The Commission was ordered to submit a report with recommendations to the Governor for the coming legislative session. In addition, the Governor appointed an Advisory Committee of some 30 individuals, all well-known in the field of environment and civic activities, who proved to be of invaluable assistance to the Commission.

The Commission (which came to be known as the "Gibb Commission") held 15 meetings during the summer of 1969. Subcommittees were also formed which held numerous meetings during the same period, and made recommendations in specific areas. The most difficult question facing the Commission over the summer was how to effectuate proper land use controls. At the time local zoning and planning was in its infancy in Vermont. The Planning and Development Act had been expanded in 1968, but very few towns had zoning ordinances, and even fewer had planning commissions. Much of the environmental legislation which we now take for granted, such as wetlands and water quality laws, had not been passed.

Another question facing the Commission was whether or not it wished to impose the regulatory power of the State directly on large developments. The Commission wrestled with this problem all through the summer, and in September of that year made the decision to subject large developments to State control.

Commission member Walter Blucher, a retired planner, was given the task of outlining how a new regulation governing land use could work. He did so, and in October he submitted a memorandum to the Commission. The main elements of the Blucher memorandum were as follows: There should be a State agency to implement the proposed controls. Every subdivision of land consisting of five or more lots shall be submitted to the State Agency for determination of the suitability of the land for development. In determining such suitability the Agency shall take into consideration the elevation of the property, the nature of the soils and the slopes, the ability of soils and slopes to provide for effluent, the availability of highways, the effect on local governments, and the conformance of the development to a state plan or regional or local plans.

Note that the above language tracks very closely with the evolution of the ten criteria of Act 250. The final section of the Blucher memo called for the adoption of a generalized land use plan for the State within one year after the adoption of the regulations. It stated that "such generalized land plan shall be used by regional and local planning agencies as a frame of reference in preparing and adopting regional or local land use and zoning regulations." It is unfortunate that a land use plan was never adopted, because if it had been, the full effect of the Blucher memo would have been realized.

The broad outlines of the Blucher plan were adopted and approved by the Commission, and legislation was prepared. Assistant Attorney General John Hansen, assigned to the Commission as its counsel, did the drafting along with then Attorney General, James Jeffords. Between them, Jeffords and Hansen wrote all the legislation for Act 250 as well as Act 252, the Water Control legislation.

These recommendations together with proposed legislation were all included in the Commission's report of January 19, 1970. It is interesting to note that all of the recommendations in the Commission's January report, and a subsequent one submitted in May of that year, have been enacted into law in one form or another during the last 25 years, including the recommendation to create a Department of Environmental Conservation.

One very basic change was made in the legislation at the instigation of Governor Davis. The recommendations of the Commission called for a state agency to administer the Act. Governor Davis was adamant in his belief that control should be as close to the people as possible, and it was his recommendation that the permitting process be placed in the hands of local district commissions with appeal rights to the Environmental Board. This was of great importance from the standpoint of passage of the legislation inasmuch as the concept of local control was still paramount in the State, and the Governor's insistence on keeping this process close to the people through local commissions turned out to be essential to its passage and continued success over the past 25 years.

Governor Davis delivered an environmental control message to the General Assembly on January 8, 1970. In the speech he outlined several priorities for environmental legislation. Regarding land use regulation he stated:

> "One of the most important recommendations we will make to you is the [Gibb] Commission's suggestion for statewide land development controls. This will be the workhorse bill in this package and will establish guidelines for growth in the State according to an overall land development plan."

There is no question that the success of the passage of Act 250 in 1970 was the direct result of the leadership of Governor Davis. He put the full weight of his office behind the Act and assigned a capable member of his staff, Al Moulton, to serve as his liaison with the legislature on the issue. As a result, Act 250 became law in the same year that it was introduced.

Act 250 Takes Its Final Form

In January 1973 Dean Davis turned his office over to newly elected Governor Tom Salmon. The crowd assembled at the Statehouse to hear Salmon's inaugural address was treated to a sample of dynamic leadership by departing Governor Davis as he delivered his farewell address. Citing his strong views on many of the issues facing the new Governor and legislature, he ended his summation by referring to the Land Capability and Development Plan, initially prepared in his administration, and about to be introduced into the 1973-1974 session. In most forceful and eloquent fashion, he charged the Legislature to "Read it, study it, debate it, amend it — but pass it!"

That bill — the mandated second part of the Act — provided all of the detailed subcriteria to the original "bare bones" ten. The final bill emerged from the Natural Resources Committee after several weeks of drafting and debate and proceeded to the House floor. After the bill was reported to the House, an historic four days of debate ensued. With no more than "housekeeping" amendments, the bill passed by a nearly two to one margin and went to the Senate, where it was approved with little difficulty. For all practical purposes, this ended the enactment process of Act 250 — without the adoption of a Land Use Plan, as originally required.

What caused the aborted end of this innovative environmental control thrust, lacking the Land Use Plan envisioned in 1970? Several factors combined to dampen the enthusiasm shared by the public, Legislature, and two administrations which had propelled the original Act and its second mandated component into statute in 1970 and 1973. First, the requirement of the Act to produce "a map" as part of the Land Use Plan: the existing county maps suggested as the basis for a statewide map produced immediate doubts as to accuracy, and inevitable questions and deep concerns as to where development could or could not take place. There was also disagreement between the State Planning Office and the Environmental Board as to what form the Land Use Plan should take. Another factor was the lack of a clear need to "save the State" from the destructive southern mountainside development that had posed such a visible and obvious threat previously. In addition, there was a sense of satisfaction that the first two parts of Act 250 had likely curbed what needed to be curbed. Finally, there was a concern that specific "do's and don't's" prescribed for specific locations determined by questionable maps would amount to "Statewide Zoning."

Looming over these concerns was an unwelcome and unexpected development that served to accentuate them all: the oil embargo, with the accompanying recession of 1973. In retrospect, it is easy to understand the rapid decline of interest in further far reaching land use controls. So much had been achieved in so short a time that perhaps it would be prudent to digest and refine what had already been accomplished — particularly with hard times looming ahead.

After a few ineffective efforts to create a statewide plan in 1974 and 1975, the legislature, after ignoring the Land Use Plan mandate in the original Act for several more years, removed that language with little debate in 1983.

Arthur Gibb chaired the "Gibb Commission" which recommended the legislation eventually enacted as Act 250. He served in the Vermont House of Representatives from 1963 to 1970 and in the Vermont Senate from 1971 to 1986. He has been a member of the Environmental Board since 1987 and served as Chair from 1994 to 1995. He lives in Weybridge, Vermont.

Sam Lloyd owned and operated the Weston Bowl Mill in Weston, Vermont from 1961 to 1991 and is an accomplished actor. During the the past 25 years he has served numerous local and state boards and in the Vermont House of Representatives. He has been a member of the Environmental Board since 1985.

Art Gibb, Jim Jeffords and Al Moulton discussing their roles in the passage of Act 250.