 Attachment A

U.S. DISTRICT COURT
DISTRICT OF VERMONT
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UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

INDUSTRIAL TOWER AND WIRELESS, LLC,

Plaintiff,

v.

ANTHONY Z. ROISMAN,[1] MARGARET CHENEY, and RILEY ALLEN, as they are members of the STATE OF VERMONT PUBLIC UTILITY COMMISSION,

Defendants.

Case No. 2:23-cv-365

OPINION AND ORDER
(Docs. 8, 12, 20, 22)

Senator Patrick Leahy was quoted in 1998 as stating that Vermonters did not wish to be left out of the telecommunications age, but also did not want Vermont "turned into a giant pincushion with 200-foot towers sticking out of every mountain and valley." Carey Goldberg, *It's a Control Thing: Vermont vs. Cell Phone Towers*, N.Y. Times, Mar. 9, 1998, at A12. Some of the same themes appear in this case.

Plaintiff Industrial Tower and Wireless, LLC ("ITW") sues the three members of Vermont's Public Utility Commission ("PUC") under Section 704 of the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7) ("TCA"), challenging the PUC's August 3, 2023 Order denying ITW's request for a certificate of public good under 30 V.S.A. § 248a for installation of a wireless telecommunications facility—including a 140-foot lattice tower—in Enosburgh,

[1] Edward McNamara succeeded Anthony Z. Roisman as Chair of the Public Utility Commission in 2024, shortly after Plaintiff filed its Amended Complaint. Chair McNamara is automatically substituted as a party under Fed. R. Civ. P. 25(d).

Vermont. The primary motions currently pending are Defendants' Amended Motion to Dismiss (Doc. 12) and ITW's Motion for Summary Judgment (Doc. 20). The court heard argument on the motions on May 24, 2024.

The court addresses a handful of procedural issues before proceeding to the facts and legal analysis in this case. First, Defendants' October 2023 Motion to Dismiss (Doc. 8) is directed to the original Complaint (Doc. 1). ITW filed an Amended Complaint in November 2023 (Doc. 9) and Defendants responded with an Amended Motion to Dismiss the Amended Complaint (Doc. 12). The court will therefore mark the October 2023 motion (Doc. 8) as moot.

At the May 2024 hearing, the court remarked that it might be sensible to convert the Amended Motion to Dismiss under Fed. R. Civ. P. 12 into a motion for summary judgment under Fed. R. Civ. P. 56. The defense agreed with that approach and suggested that there was no need to supplement the evidentiary record. The court granted a two-week period to file any supplemental memorandum on issues not addressed in the Amended Motion to Dismiss that might be relevant to that motion as converted to summary judgment. Defendants have not filed any supplemental memorandum. Although Defendants' Amended Motion to Dismiss does not itself present any "matters outside the pleadings," Fed. R. Civ. P. 12(d), the motion overlaps with ITW's summary judgment motion, which includes substantial documentation relevant to both motions. The court therefore concludes that conversion to summary judgment is both unopposed and proper. *See* 5C Charles Alan Wright et al., Federal Practice and Procedure § 1366 (3d ed.) ("[I]n some situations, conversion occurs even though neither party has introduced extra-pleading matter in connection with the Rule 12(b)(6) motion.").[2]

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[2] Conversion of the Rule 12 motion also makes it unnecessary to rule on the parties' dispute as to whether courts can properly rule on the TCA claims at the motion-to-dismiss stage. (*See* Doc. 18 at 8, 12–13; Doc. 19 at 2.) Conversion also makes it unnecessary to analyze

Standard of Review

As a result of the rulings above, the competing dispositive motions in this case are both analyzed as summary judgment under Fed. R. Civ. P. 56. Courts grant summary judgment under Rule 56 "only where there is no genuine issue of material fact to be tried, and the facts as to which there is no such issue warrant the entry of judgment for the moving party as a matter of law." *Moll v. Telesector Res. Grp., Inc.*, 94 F.4th 218, 227 (2d Cir. 2024) (quoting *Kaytor v. Elec. Boat Corp.*, 609 F.3d 537, 545 (2d Cir. 2010)). "In determining whether genuine issues of fact exist . . . the court must review the record taken as a whole." *Id.* (internal quotation marks omitted). "In so doing, it must draw all reasonable inferences in favor of the nonmoving party, even though contrary inferences might reasonably be drawn." *Id.* (cleaned up). Insofar as conversion of Defendants' Rule 12 motion to a Rule 56 motion results in cross-motions for summary judgment, the court "evaluate[s] each party's motion on its own merits, taking care in each instance to draw all reasonable inferences against the party whose motion is under consideration." *Jingrong v. Chinese Anti-Cult World All. Inc.*, 16 F.4th 47, 56 (2d Cir. 2021) (quoting *Byrne v. Rutledge*, 623 F.3d 46, 53 (2d Cir. 2010)).

Facts

The following facts are drawn from ITW's Statement of Undisputed Material Facts (Doc. 20-6), Defendants' Statement of Disputed Material Facts (Doc. 29-1), and the court's own

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Defendants' reliance on *New Cingular Wireless PCS, LLC v. Incorporated Village of Muttontown*, No. 22-cv-5524, 2023 WL 8791107 (E.D.N.Y. Dec. 18, 2023), for the proposition that that courts can properly consider a motion to dismiss a TCA "substantial evidence" claim. (Doc. 19 at 2.) Defendants' unopposed Motion to Correct Reply corrects Defendants' reply memorandum in support of their Amended Motion to Dismiss (Doc. 12) to expressly characterize the citation to *New Cingular Wireless* as a report and recommendation. (Doc. 22.) The court will grant that motion, but it ultimately does not affect the analysis in this case.

review of the record. Most of the facts are undisputed. Disputes are noted below. The court has added some of its own point headings to aid in organization.

I. Background

The following general background is drawn primarily from the February 1, 2024 declarations of ITW's president Michael J. Umano (Doc. 20-1) and ITW's vice president of site acquisition and development Kevin Delaney (Doc. 20-2).

A. ITW and ITW's SMR System

ITW is one of four interrelated entities that provide a broad array of telecommunications-related services across New England and Florida. ITW or its component entities have been in business since 1974. These entities—collectively referred to as "Industrial"—are: Industrial Tower and Wireless, LLC, Industrial Communications, LLC, Industrial Communications & Electronics, Inc., and Industrial Wireless Technologies, Inc.

ITW is Industrial's site acquisition, development, and tower site leasing business. ITW owns and operates approximately 150 tower facilities in New England, as well as sites in Florida, Colorado, and Nebraska. ITW also provides radio frequency ("RF") propagation and site leasing management services to a sister company that operates a network from over 800 tower sites in the Midwest. ITW's network provides the infrastructure necessary to support its own 900 MHz trunked digital commercial mobile radio service network, as well as infrastructure for federal, state, and local public safety communications systems (including E911), third-party cellular and personal communication service ("PCS") network coverage, wireless broadband and internet services, microwave backhaul, and radio and TV broadcast.

FCC regulations define a "Specialized Mobile Radio [SMR] System" as "[a] radio system in which licensees provide land mobile communications services (other than radiolocation

services) in the 800 MHz and 900 MHz bands on a commercial basis to entities eligible to be licensed under this Part, Federal Government entities, and individuals." 47 C.F.R. § 90.7.[3] One of the Industrial entities—Industrial Wireless Technologies, Inc.—is the licensee of two relevant Federal Communications Commission ("FCC") licenses for the "SMR" radio service.[4] (Docs. 20-8, 20-10.) The two FCC licenses relate to SMR services in locations including multiple Vermont counties.

Industrial also constructs, owns, and operates wireless service facilities, including communications towers, transmitters, and antenna structures for other providers of personal wireless services, including cellular service carriers. These facilities are constructed with the intent to lease space to such providers as "co-location" sites to reduce tower proliferation and advance the provision of wireless services. As a tower site developer (in addition to being a commercial mobile services provider), Industrial identifies gaps in coverage for the four national carriers: AT&T, Verizon, T-Mobile, and Dish Wireless (the "National Carriers"). Industrial

[3] An FCC webpage elaborates regarding the usage of SMR systems:

> Traditionally SMR systems were used for dispatch, but with the introduction of cellular systems in the band two-way voice use has become more prominent. The development of a digital SMR marketplace has allowed new features and services, such as internet access, two-way acknowledgment paging and inventory tracking, credit card authorization, automatic vehicle location, fleet management, remote database access, and voicemail. The growth of SMR systems has been significant due to these developments.

Fed. Commc'n Comm'n, Specialized Mobile Radio Service (SMR) (Mar. 8, 2017), https://www.fcc.gov/wireless/bureau-divisions/mobility-division/specialized-mobile-radio-service-smr [https://perma.cc/CYV4-MH3Y].

[4] Mr. Umano's declaration states that "Industrial Communications & Electronics, Inc." is a Specialized Mobile Radio licensee. (Doc. 20-1 ¶ 8.) That may be true as to other FCC licenses not relevant here. In any case, to the extent that there is a dispute over which Industrial entity is the licensee, the court concludes that the dispute is not material to any issue here.

works to identify sites at which to develop facilities to fill such gaps and permits and constructs facilities on such permitted sites.

ITW's Enhanced Specialized Mobile Radio ("ESMR") 900 MHz system[5] is a line-of-sight technology, which requires that radio signals pass between towers and the end-user's phone or mobile radio. To ensure continuous, high quality, and competitive services, ITW regularly performs propagation studies that identify coverage gaps for its own 900 MHz system, as well as those of other PWS providers, including the National Carriers.

B. Selection of Tower Sites; the National Carriers' Interests

Tower sites are not selected at random. Rather, tower sites are selected based on identifying a need for coverage and then finding a suitable site that meets well-established telecommunications siting criteria, as detailed below. Initial RF studies are run using computer modeling programs. The propagation software packaged used is called Signal and was developed by EDX Wireless. The software uses detailed terrain databases where the individual terrain points are separated by approximately 200 feet or less. The propagation model type used to run the RF studies is called TIREM, which stands for Terrain Integrated Rough Earth Model. The National Telecommunications and Information Administration developed this model in conjunction with various branches of the U.S. Department of Defense. This model is widely used by the U.S. Government and military organizations, as well as by private companies such as ITW. With this propagation software, Industrial is able to predict service areas and path performance using propagation models that take into account key variables such as distance, terrain variation, vegetation, transmitter/receiver characteristics, and the wavelength of RF transmissions.

[5] ESMR is a type of SMR system. 47 C.F.R. § 90.7.

To design any of these types of communications systems, it is essential to specify the detailed parameters. The parameters include the location in latitude and longitude, ground elevations, antenna heights, frequency, power levels, antenna types and gain, transmission line loss, foliage, and receiver characteristics. This type of modeling is widely accepted in the wireless telecommunications industry for determining the existence and location of gaps in PWS coverage. Using the propagation models described above, ITW identifies suitable areas for sites to fill significant coverage gaps—with a view toward co-location of services at those sites.

After an area has been identified, a search for suitable tower sites is made within that area. The suitability of a tower site, within the gap area, is based upon numerous factors including: (a) RF characteristics, including coverage of the entire gap area, location, elevation, tree cover, and compatibility with the nearby towers being constructed; (b) constructability; (c) availability; (d) zoning; (e) wetlands; and (f) co-location capacity.

According to Mr. Umano: "[I]t is standard operating procedure in our industry for the National Carriers not to commit to lease space at, and agree to locate their equipment on, a proposed telecommunications facility until that facility has received all of its permits and approvals." (Doc. 20-1 ¶ 20.) Mr. Umano further states that "once those permits and approvals are in place, the National Carriers invariably choose to co-locate their equipment on an existing permitted site because doing so is more economical for them than permitting and building a new facility, and co-location facilitates speed to market." (*Id.*) And according to Mr. Umano: "In nearly every instance in which ITW has permitted a new telecommunications site for co-location purposes, carriers have committed to the site either after permitting or after construction." (*Id.* ¶ 21.) ITW has reached out to the National Carriers but none of them "have been willing to commit to co-locate their antennas and other equipment at the proposed tower prior to the

necessary permits and approvals being in place." (*Id.* ¶ 22.) Defendants assert that any testimony by Industrial personnel (including Mr. Umano) as to the National Carriers' future intentions "would be inadmissible speculation." (Doc. 29-1 ¶¶ 26, 42.)

C. The Proposed Project

ITW has only recently begun to build out its ESMR 900 MHz system in Vermont. ITW has received Certificates of Public Good ("CPGs") for facilities in Chester, Fairfax, Eden, and Ira, Vermont. ITW seeks to permit and construct a 140-foot wireless telecommunications facility (the "Tower") on a portion of the approximately 506-acre parcel of land owned by Matthew Hull off Bordoville Road in Enosburgh, Vermont (the "Tower Site"). The objective of this Enosburgh project (the "Project") is to interconnect this Tower Site with two previously-approved ITW sites to the south, located in Fairfax and Eden, Vermont. The goal of this network of tower sites is to provide reliable wide-area ESMR services to the northern part of Vermont and, ultimately, to provide statewide coverage by connecting existing ITW sites that provide coverage in Massachusetts and New Hampshire.

ITW undertook propagation studies using the EDX Signal software program and TIREM propagation model for ITW's ESMR network that demonstrated that there is a significant gap in coverage (the "Coverage Gap") in southwest Enosburgh and north Bakersfield, along an approximate six-mile stretch of Vermont Route 108; in Enosburgh, along secondary roads such as Chester A. Arthur Road, Bordoville Road, Jones Road, and St Pierre Road; and finally, in Bakersfield, along secondary roads such as County Road, Hennessey Road, Pudvah Hill Road, and Ovitt Road. Similarly, ITW ran propagation studies for the Coverage Gap for the National Carriers; those studies also showed a gap in cellular service in the area. (Docs. 20-3, 20-14.)

The Coverage Gap is both physically large (at least six miles in length along Route 108) and affects a substantial number of individuals who travel along Route 108 or reside within the Coverage Gap. Traffic count data from the Vermont Agency of Transportation indicate that the annual average daily traffic count along Route 108 was approximately 1,388 vehicle trips per day in 2022.

ITW undertook an assessment of whether existing structures within or around the Coverage Gap would be capable of providing coverage to the Coverage Gap. None existed. ITW's research confirmed that there are only two existing towers within a ten-mile radius of the proposed Tower Site, and they are too far away or not tall enough to provide the necessary coverage. The Coverage Gaps can only be remedied by the construction of a new, properly sited tower facility.

ITW began searching for sites to fill the Coverage Gap between Enosburgh, Fairfax, and Eden. During the site acquisition process, ITW examined numerous sites to assess their availability and viability. Ultimately, ITW located nine properties that appeared to be potentially suitable tower sites. Of those, the only available and viable site that ITW was able to locate was the present Tower Site off Bordoville Road; all of the other sites were not available or did not have acceptable RF coverage characteristics. Based upon the RF studies and the conditions at the Tower Site, such as ground elevation and height of the tree cover, ITW determined that a 140-foot tower height is the minimum necessary to fill the Coverage Gap for ITW's 900 MHz ESMR Network and to provide space for co-location for all the National Carriers.

II. PUC Proceedings

A. ITW's June 2022 Application

On March 4, 2022, ITW filed with the State of Vermont Public Utility Commission ("PUC") the advance notice of its intention to file an application ("60-Day Notice"), as required by 30 V.S.A. § 248a(e). ITW filed that Notice at least 60 days before it filed the § 248a application. ITW also complied with the remaining provisions of § 248a(e) by serving the 60-Day Notice on the entities and individuals required to receive that Notice.

On June 8, 2022, ITW submitted an application ("Application") to the PUC for a CPG in connection with the Enosburgh Project. The Application included a petition, proposed findings, conclusions and CPG, prefiled testimony, affidavits, exhibits, and various required certifications. The Application described the Project as follows:

> ITW intends to construct a telecommunications facility on a portion of the approximately 506-acre parcel of land owned by Matthew Hull off of Bordoville Road in Enosburgh, Vermont. ITW refers to the project as "Enosburgh." The property owner has given ITW permission to proceed with this Application. The coordinates for the Project are latitude 44°50′27.60″ North and longitude 72°48′39.42″ West.
>
> ITW will create an 80′ x 80′ "Compound" enclosed by an 8′ high chain link fence, with a locked gate. Within the Compound, ITW will construct a 140′ above ground level ("AGL") telecommunications self-supporting lattice tower ("Tower"). Six (6) thin "whip" antennas ("Antennas") will be mounted at 140′ AGL of the Tower. Five (5) transmit Antennas will extend upward to a maximum height of 153.0′ AGL. The receive Antenna will reach downward from the 140′ AGL mounting level. Each Antenna will measure approximately 13′ long and 2.75″ in diameter.
>
> ITW will place an equipment cabinet ("Cabinet") on a 10′ by 10′ concrete pad inside the Compound, to the northwest of the Tower. The Cabinet will contain the electronics equipment necessary for the operation of the Project.
>
> Co-axial cables from the mounted Antennas will descend on the inside of the Tower. The cables will exit near the base of the Tower and will connect with the Cabinets via a proposed cable bridge.

> To provide access to the Compound, ITW proposes to follow an existing trail from Bordoville Road into a cleared area and then into the Compound ("Access"). The Access and utilities will run within a 25′ wide access and utility easement. Underground utilities will follow the Access from the closest existing utility connection point on Bordoville Road to the Compound and will be placed in a trench adjacent to the Access.
>
> Approximate clearing limits are shown on the enclosed plans. The contractor will limit clearing to the minimum required to construct the Access and Compound, which is estimated to be approximately 22,256 square feet. Culverts, check dams, water bars, and silt fencing will be placed along the Access and at the Compound as indicated on the enclosed plans to control erosion both during and after construction. Construction shall meet the requirements of the State of Vermont Low Risk Site Handbook for Erosion Prevention and Sediment Control. After the completion of construction, the amount of new impervious surface will be approximately 6,724 square feet.

(Doc. 20-13 at 9–11, ¶¶ 3–8 (citations omitted).)

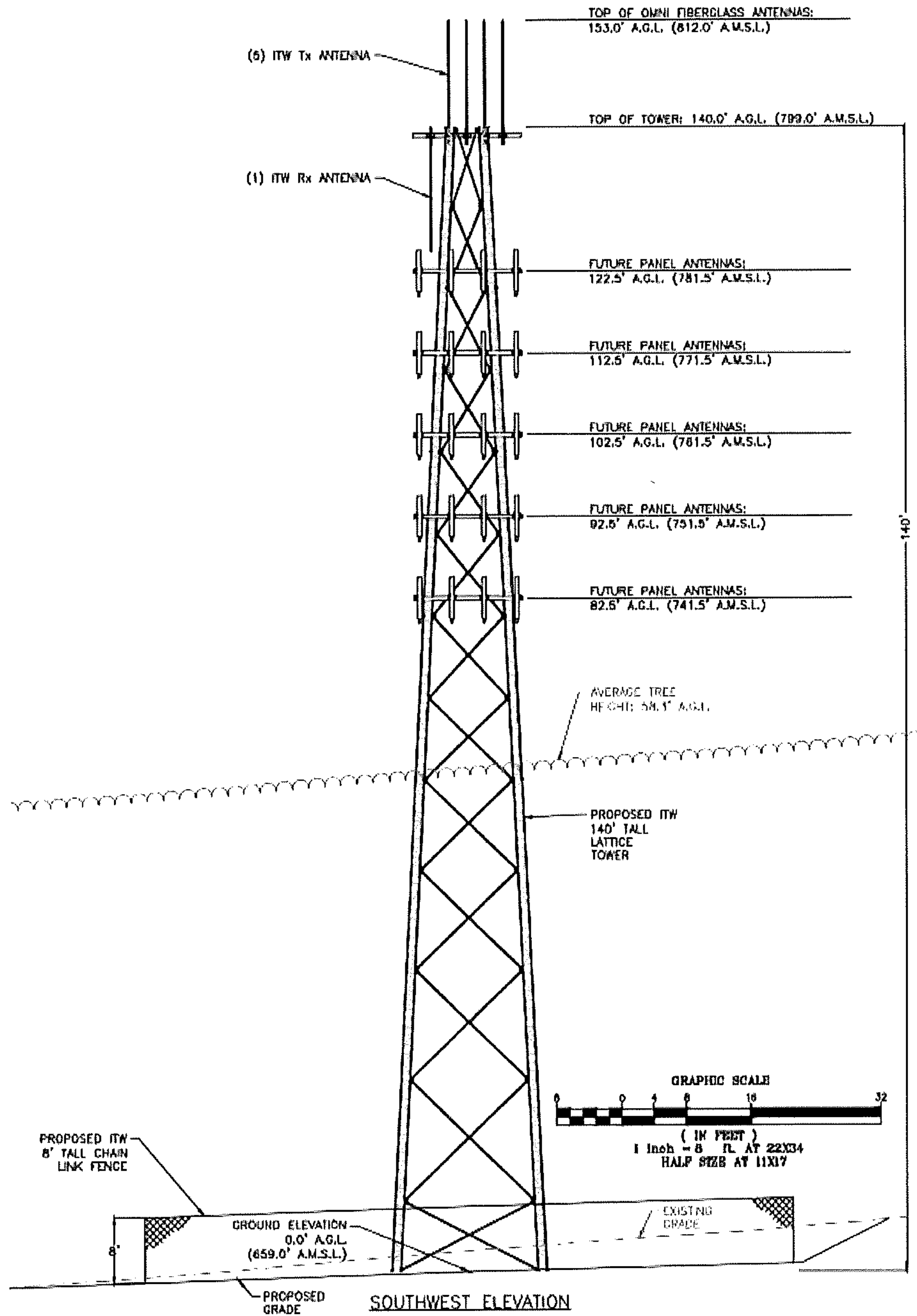
To show that it had explored the possibility of co-locating its facility on an existing telecommunications structure, ITW included the following passages in its Application:

> The Project cannot be located on or at an existing telecommunications facility. There are no such facilities within the area to be served by ITW's Enosburgh site. In particular, ITW examined the possibility of co-locating its antennas and other equipment at the only two (2) existing towers within a 10-mile radius of the location for its Enosburgh site. Due to distance, intervening terrain and vegetation, none of those towers would meet ITW's objectives for this site.
>
> The Route 108 corridor is a very difficult area to cover because it is a narrow, winding path that runs between mountainous terrain. That topography presents severe challenges with signal propagation. The propagation plots that Kevin Delaney created for this site illustrate these difficulties.
>
> In particular, intervening terrain causes a sharp drop off in coverage as illustrated in those plots. Moreover, the population density is quite low, so ITW (and other carriers) seeks to provide coverage with the least number of facilities possible. The existing facilities both within the Town of Enosburgh and the surrounding towns within a radius of ten (10) miles from the proposed site do not provide adequate coverage to the area being served by this project. In fact, research of the areas confirmed that there are only (2) two existing towers within a (10) mile radius of the proposed site. Those existing towers are simply too far away or not tall enough to provide the needed [coverage].

(*Id.* at 12–13, ¶ 12 (citations omitted).) The Application further explained that the proposed facility will be unmanned, will not generate wastewater, and will not involve on-site storage or disposal of toxic or hazardous waste. (*Id.* ¶ 13.)

The Application included a copy of an April 13, 2022 letter from EBI Consulting to the Vermont Division for Historic Preservation summarizing the Project. (*Id.* at 83.) Noting that the Project was required to undergo review with the State Historic Preservation Office under Section 106 of the National Historic Preservation Act, the letter sought the Division's concurrence with the engineers' findings of "No Historic Properties in the Area of Potential Effects-Direct Effects" and "No Adverse Effect on Historic Properties in the [half-mile radius] Area of Potential Effects-Visual Effects." (*Id.*) The letter bears a stamp signed by Vermont State Historic Preservation Officer Laura Trieschmann and dated May 23, 2022 stating: "NO ADVERSE EFFECT." (*Id.*)

The technical drawings included with the Application depicted the proposed structure, including antenna locations:



(Doc. 20-13 at 169.) ITW's proposed 900 MHz system antennas would be mounted at 140 feet, with the transmit antennas extending upward to a height of 153 feet and the receive antenna extending downward to 127 feet. The National Carriers would have mountings at 122.5 feet and downward in 10-foot increments.

The RF propagation begins to precipitously decrease when antenna arrays at the Project are installed below an elevation of 100 feet due to intervening terrain and vegetation in the area. A reduction in the height of the Tower to 120 feet would mean that only one National Carrier would be able to mount antennas above 100 feet, thereby undermining the usefulness of the Tower for co-location and requiring construction of additional towers in the Coverage Gap to fill that gap for multiple National Carriers.

B. Scheduling a Merits Hearing[6]

On June 10, 2022, the PUC issued a memorandum stating that ITW's Application was "administratively complete" and assigning it Case Number 22-2120-PET. (Doc. 20-15.) The memorandum stated that "interested parties" had until July 12, 2022 to file comments, motions to intervene, and requests for hearing on the Application. (*Id.*)

On July 6, 2022, the Vermont Department of Public Service ("DPS") filed a Motion for Extension of Comment Period, to which ITW assented, seeking to extend the July 12 deadline to July 26. (Doc. 20-16.) On or before July 26, 2022, various individuals and entities submitted comments, motions to intervene, and requests for a hearing. As a result, on August 2, 2022, the PUC issued a memorandum asking that ITW file a response to those motions on or before August 12, 2022. (Doc. 20-17.) On August 12, 2022, ITW filed and served its Consolidated

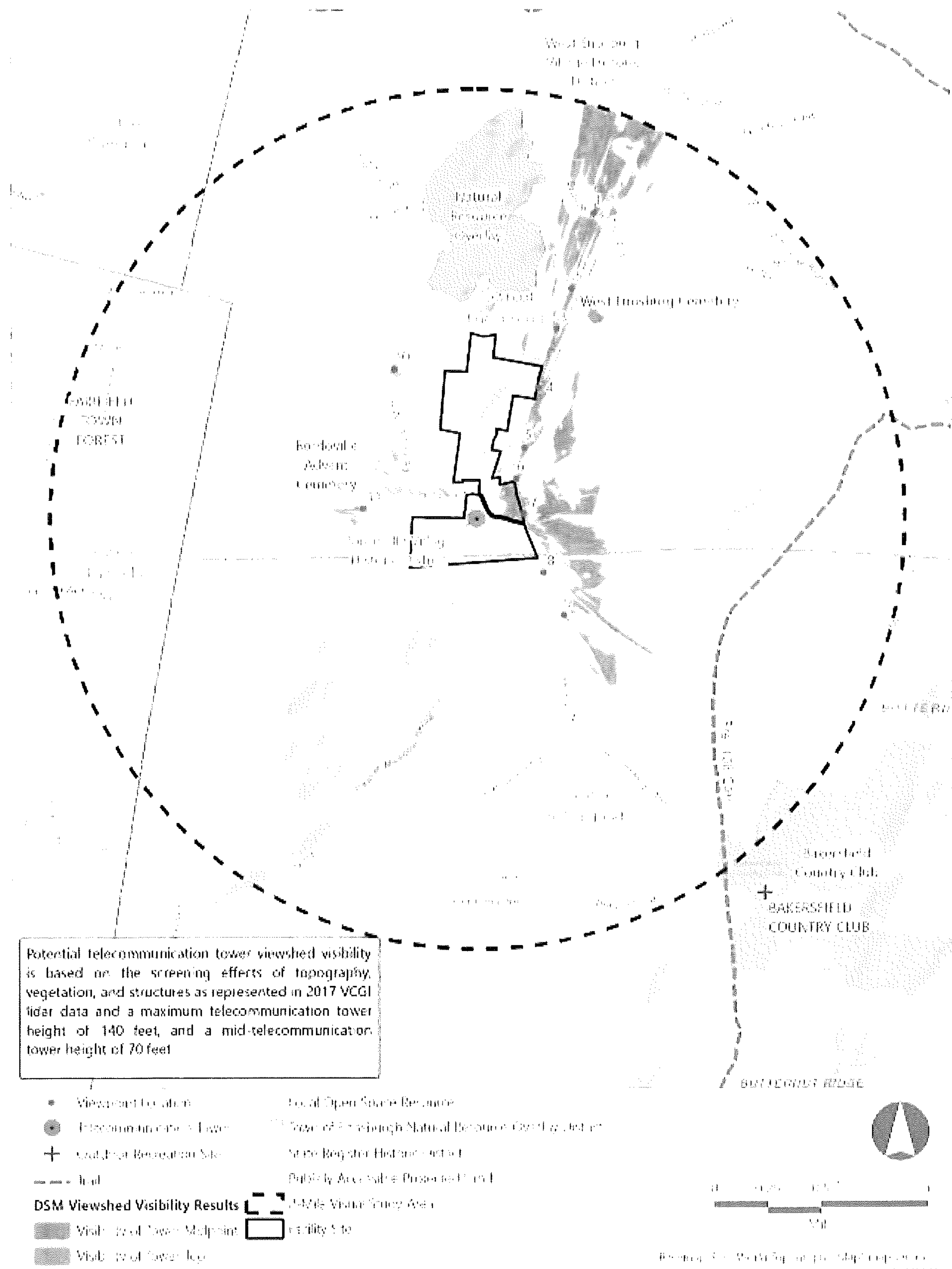
[6] The parties do not dispute the following facts about the process of scheduling a merits hearing. All three counts in the Amended Complaint invoke the Due Process Clause (Doc. 9 ¶¶ 98, 104, 112), which might be a basis for challenging the speediness of a hearing on the merits of the Application. *See In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(b)*, 24 F.C.C. Rcd. 13994, 14005 (2009) ("Shot Clock Order"). But ITW's motion does not address that issue, and the Amended Complaint does not appear to seek any relief on this particular basis. The following facts therefore might be immaterial to any issue before the court, but the court includes them here for completeness.

Response to Public Comments and Comments Submitted by the DPS and the Northwest Regional Planning Commission ("NRPC"). (Doc. 20-18.)

On August 19, 2022, the PUC issued a Procedural Order Granting Motions to Intervene and Requests for Hearing. (Doc. 20-19.) The Procedural Order stated that a hearing would be necessary but did not set the date for the hearing. On September 29, 2022, the PUC issued a Notice of Hearing for the purpose of holding a scheduling conference on October 6, 2022 to determine the date of the hearing on the merits of ITW's Application. (Doc. 20-20.) At the scheduling conference, counsel for ITW suggested that the parties would be unlikely to agree on a schedule because, in ITW's view, federal law required the PUC's proceedings to conclude by November 7. (Doc. 20-22 at 9–10.) Later in the day on October 6, ITW filed a proposed schedule requesting a merits hearing during the week of October 24–28, 2022. (Doc. 20-21.) On October 20, 2022, the PUC issued a Scheduling Order setting an evidentiary hearing for January 12, 2023. (Doc. 20-23.) The Scheduling Order did not specify when the PUC would issue a decision on the Application.

C. Aesthetics Expert's December 2022 Report

DPS's aesthetics expert Gordon Perkins issued a report entitled "Aesthetic Analysis and Orderly Development Review" on December 12, 2022. (Doc. 20-24.) After defining a Visual Study Area ("VSA") as "a two-mile radius around the proposed tower" (*id.* at 8), the report presented the following graphic showing the results of a digital surface model ("DSM") viewshed analysis:


Natural
West Enosburg Cemetery
BAKERSFIELD
COUNTRY CLUB
Potential telecommunication tower viewshed visibility is based on the screening effects of topography, vegetation, and structures as represented in 2017 VCGI lidar data and a maximum telecommunication tower height of 140 feet, and a mid-telecommunication tower height of 70 feet
DSM Viewshed Visibility Results

(*Id.* at 23.) The accompanying text stated:

> The results of the DSM viewshed analysis indicate that the tower could be visible from approximately 3.1% of the VSA (i.e., the tower would be entirely screened from 96.9% percent of the VSA). Areas where the tower is predicted to be visible occur almost entirely in Rural Valley locations along State Route 108 to the north and east of the tower, with small, scattered areas of visibility indicated in Forest Upland locations. It is worth noting that these viewshed results indicate where any portion of the tower may be visible, and it is possible that only a small portion of the tower may be visible from many locations within the tower's viewshed due to screening provided by intervening vegetation. In order to provide additional information on the amount of tower visibility that is likely to occur, a second DSM-based viewshed analysis based on the tower's mid-point was conducted. The results of this viewshed analysis indicate that the upper half of the tower would be visible from 1.4% of the VSA (i.e., from roughly half of the areas where visibility is predicted to occur, the bottom half of the tower will be screened by topography, vegetation, and/or structures).

(*Id.* at 22.)

ITW asserts that "[t]he neighboring property owners who had intervened in the PUC Case ("Neighbors") live on or near Bordoville Road, away from State Route 108" and that "[t]herefore, none of them would see any part of the Tower from their properties." (Doc. 20-6 ¶ 52.) Defendants maintain that Mr. Perkins's analysis does not support that assertion. (Doc. 29-1 ¶ 52.) The court can take notice that Bordoville Road is located west of Route 108. Inspection of the DSM viewshed analysis graphic also indicates that most of the calculated visibility is along or east of Route 108. However, the DSM graphic above also shows some scattered locations of visibility west of Route 108, and the report also expressly states that there is potential visibility "along portions of Bordoville Road." (Doc. 20-24 at 24.)[7] Drawing all reasonable inferences in Defendants' favor, the court concludes that ITW has not shown that none of the "Neighbors" would see any part of the Tower from their properties.

[7] A zoomed-in view of the DSM study shows several areas where the proposed Tower is calculated to be visible in locations around the Bordoville Village Historic District, including several locations abutting Bordoville Road. (*Id.*)

D. January 2023 Merits Hearing

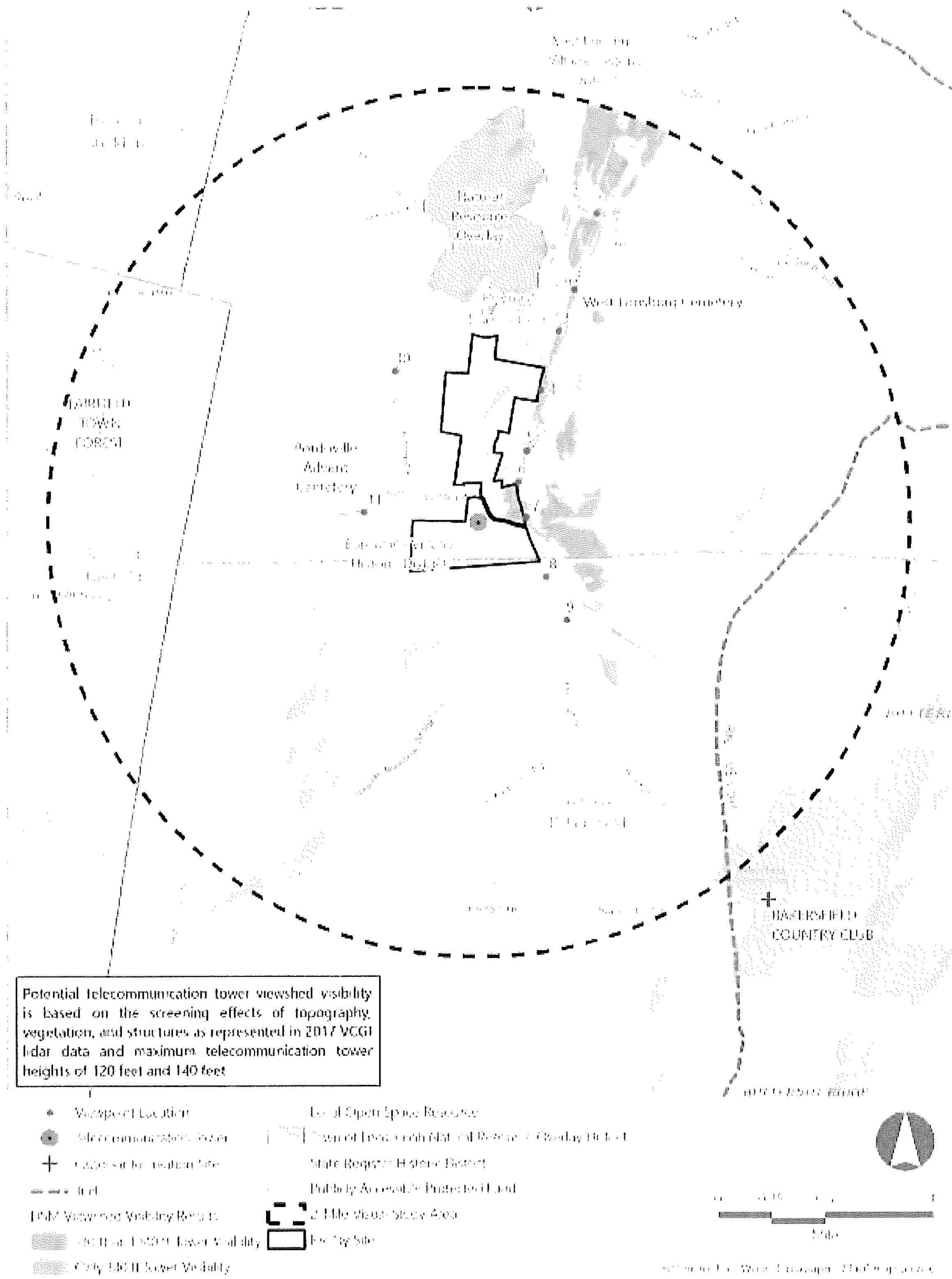
The PUC convened a videoconference evidentiary hearing on January 12, 2023. PUC Hearing Officer Gregg C. Faber presided. Attorney Brian Sullivan appeared for ITW, attorney Michael Swain appeared for DPS, and attorney L. Brooke Dingledine appeared for several of the individual intervenors. The NRPC did not participate in the merits hearing. (*See* Doc. 20-25.)

Under cross-examination by Attorney Dingledine, DPS's aesthetics expert Mr. Perkins testified regarding the possibility of reducing the proposed Tower from 140 feet to 120 feet:

> [I]n our visual impact assessment and orderly development review, we did run a view shed of the tower at 120-foot height to see whether or not it would make a substantial difference. And when compared to the 140-foot height that we ran, the difference was incremental at best. It did not substantially reduce the visibility of the tower within the visual study area. And there were no substantial reductions in the locations where the tower would be visible.

(*Id.* at 79.) Later in his testimony, Mr. Perkins similarly testified that, based on the viewshed analysis, "the mitigating effect of that height reduction was not significant in any way from areas where we thought adverse visual impact could occur" and that a 20-foot reduction in height "would not be effective in reducing the visual impacts." (*Id.* at 90–91.)

The parties disagree about how to characterize the difference in visual impact between 120-foot and 140-foot structures. ITW asserts that a height reduction to 120 feet "would not be effective in reducing visual impacts." (Doc. 20-6 ¶ 56.) Defendants maintain that there would be a difference in visual impact if the Tower were 120 feet tall, noting that Mr. Perkins's report indicates that a 140-foot tower could be visible from approximately 3.1% of the VSA while a 120-foot tower could be visible from only about 2.5% of the VSA. (Doc. 29-1 ¶ 55; *see also* Doc. 20-24 at 22, 31.) Regardless of the dispute about how to describe the difference in words, there appears to be no dispute over the following DSM viewshed graphic comparing visibility of 120-foot and 140-foot structures:



(Doc. 20-24 at 32.)

The Hearing Officer also admitted into the record prefiled testimony and exhibits from ITW's engineer Louis Hodgetts. (Doc. 20-25 at 43.) The exhibits included photographic simulations of the Tower's visibility from 11 different viewpoints. (Doc. 20-13 at 85–100.) On cross-examination by Attorney Dingledine, Mr. Hodgetts opined that, although he was not an RF expert, reducing the tower by 20 feet would not be a reasonable mitigation method because "it would significantly limit the ability for future collocation and reduce the coverage" of ITW's ESMR 900 MHz service. (Doc. 20-25 at 58.)

E. February 2023 Proposal for Decision, NRPC Comments, and Remand

On February 28, 2023, after post-merits hearing briefing, the Hearing Officer issued a Proposal for Decision ("First PFD") recommending that the PUC approve ITW's Application. (Doc. 20-26.) On March 30, 2023, the Hearing Officer signed an "Order Requesting Clarification" seeking clarification from the NRPC "as to what, if any, recommendations the NRPC has with respect to the proposed facility's compliance with the regional plan." (Doc. 20-27.) On April 24, 2023, the PUC issued a "Notice of Hearing" setting an oral argument to take place on May 4, 2023 on unspecified matters relating to the Application. (Doc. 20-28.)

On April 28, 2023, the NRPC submitted its Project Review Committee's ("PRC") comments to the PUC. (Doc. 20-32.) The PRC stated, among other things, that the Project "is not in conformance with the [Northwest Regional Plan[8]] due to the height of the tower" and that "[t]he project's height is not compatible with the scenic rural character of the Bordoville hamlet

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[8] Vermont law requires each regional planning commission to "[p]repare a regional plan." 24 V.S.A. § 4345a(5). The regional plan at issue in this case is the Northwest Regional Plan (the "Regional Plan"). The current version of the plan became effective on August 30, 2023. Northwest Regional Plan 2023–2031, https://www.nrpcvt.com/wp-content/uploads/2023/10/ADOPTED_RegionalPlan_2023_August30.pdf [https://perma.cc/Z4Y8-NJEP]. The Regional Plan at the times relevant to this case would presumably have been the version immediately preceding the current version.

and has a negative impact on the area's historic resources, such as the Bordoville Seven[th] Day Adventist Church." (Doc. 20-32 at 2–3.) According to the PRC's April 2023 letter:

> As stated in Goal 3 and Policy 4b of the Economic Infrastructure chapter of the Regional Plan, telecommunications infrastructure must be "the least obtrusive system" and shall be "sited in the least obtrusive and least ecologically sensitive areas possible." The tower is not the least obtrusive possible system to provide the applicant's service due to its height. As shown in the permit drawings, the tower has co-location opportunities for 5 panel antennas, despite the applicant's service requiring only whip antennas. While the Regional Plan supports co-location, it does not support building a significantly taller and more obtrusive tower than necessary when the applicant has not provided evidence that there will be co-located panel antenna services on the tower.

(*Id.* at 3.) The PRC had presented substantially similar statements in an earlier set of comments dated July 26, 2022. (*See* Doc. 20-30.)

But the PRC's April 2023 letter included a topic that was not mentioned in the July 2022 letter:

> The Committee notes that as stated in the letter from the St. Albans Police Department dated August 8, 2022, co-location for emergency services is to be provided on the tower. However, the Committee fails to find how this co-location justifies the height of the tower as the letter does not specify a specific height which is necessary for expanding emergency radio services. Additionally, emergency radio services generally do not require panel antennas, and would not occupy one of the five proposed locations for co-located panel antennas.

(Doc. 20-32 at 3.) Also on April 28, 2023—the same day as the date of the PRC's letter—the PUC canceled the hearing that it had previously noticed for May 4, 2023. (Doc. 20-34.)

In an Order dated May 3, 2023, the PUC remanded the case to the Hearing Officer. The PUC cited the NRPC's April 28, 2023 letter and stated: "In light of this clarification, the Vermont Public Utility Commission has decided to reopen the evidentiary record in this case and remand the case to the Hearing Officer for any further process associated with this document." (Doc. 20-35.)

F. July 2023 Revised Proposal for Decision

In an Order dated May 4, 2023, the Hearing Officer requested the parties' responses to the NRPC's April 2023 comments. (Doc. 20-36.) ITW submitted comments on May 26, 2023. (Doc. 20-37.) In those comments, ITW referenced St. Albans Police Chief Maurice Lamothe's August 8, 2022 letter stating that the Tower would improve public safety communications in several areas of the community and that "[w]e would want to install our equipment at the top, 140 feet, of the tower to get the best results for emergency dispatching." (Doc. 20-14 at 9.) ITW also represented that, after reviewing NRPC's April 2023 comments, the St. Albans Police Department "reiterated its desire to have its antenna located at 140′ above ground level." (Doc. 20-37 at 7.)

On July 6, 2023, the Hearing Officer issued a Revised Proposal for Decision ("Second PFD"), recommending that the PUC deny ITW's Application. (Doc. 20-38.) The Hearing Officer wrote that he recommended denial "in light of additional information received" after the First PFD. (*Id.* at 2 n.1.) He reasoned in part:

> I agree with both the Petitioner and the Department that the construction of telecommunications facilities that include collocation space is consistent with the State's interests pursuant to § 202c and the public good in general. I also agree with the Petitioner that the NRPC's position in this case has been far from clear and that the case would have benefitted from greater participation on the part of the NRPC. However, I conclude that the NRPC's request for some evidentiary showing on the part of the developer that the extra tower height is necessary to build the facility, and that the extra collocation space will result in services that the surrounding community may benefit from, is reasonable.

(*Id.* at 7.) The Hearing Officer further stated:

> The Petitioner has submitted evidence that lowering the height of the Project tower would compromise potential collocation opportunities. However, there is no evidence to demonstrate that those collocation opportunities will ever be used or that, even if collocation were to occur, that it would result in benefits to the surrounding community. The Petitioner's testimony at the evidentiary hearing suggests that a height of 120′ could still meet at least some of the Project's goals. In addition, the NRPC's recommendations here do not amount to a blanket

> prohibition on the construction of telecommunications facilities in the region. As the Petitioner points out, the NRPC has not raised opposition to other similar facilities in the region. The Project will further the State's goals in providing universal access to wireless telecommunications services pursuant to § 202c. However, because these goals could, at least in part, be achieved with a lower tower height, I do not find this sufficient good cause to reject the NRPC's recommendation in support of a less obtrusive facility. Accordingly, I recommend that the Project application be denied on the grounds that it is not consistent with the Regional Plan, with substantial deference accorded to the recommendation of the NRPC pursuant to § 248a(c)(2).

(*Id.* at 7–8 (footnotes omitted).) Regarding DPS's recommendation to collect additional evidence on lowering the Tower height, the Hearing Officer found that "inappropriate at this point in the proceedings given that the Petitioner is not seeking a CPG for a 120-foot tower" but indicated that the Department should "explore this issue with the Petitioner, should the Petitioner decide to submit an application consistent with the Regional Plan in the future." (*Id.* at 8.)

ITW filed objections to the Second PFD on July 21, 2023. (Doc. 20-39.) ITW argued that:

- The NRPC conceded that the Project will not have a substantial regional impact;
- The Neighbors (a/k/a "Intervenors") will not be able to see the Tower portion of the Project, or its ground facilities, at all;
- ITW demonstrated that its chosen 140′ tower height is necessary for meaningful co-location of commercial carriers to serve the area in question; and
- The Police Department stated its preference to locate its public service antenna at the top of the 140′ Tower.

(*See id.*; *see also* Doc. 20-6 ¶ 72.)

G. August 2023 Denial Order

The PUC adopted the Second PFD in an Order Denying Certificate of Public Good dated August 3, 2023. (Doc. 20-40.) The PUC's Order stated, in pertinent part:

> We agree with [ITW] and the [DPS] that the construction of telecommunications facilities is, in general, consistent with the State's broad interests pursuant to § 202c and the public good in general. However, we conclude that these interests could, at least in part, be served with a shorter and less obtrusive tower as recommended by the NRPC.

(*Id.* at 9–10.) The Order elaborated: "[G]iven the specificity of the NRPC's narrow recommendations, we agree with the Hearing Officer that there is not sufficient good cause to reject the NRPC's recommendations in this case." (*Id.* at 10.)

III. This Federal Suit

ITW did not appeal the PUC's August 2023 Order under 30 V.S.A. §§ 12 and 234. Instead, ITW exercised its right to seek review in this court under 47 U.S.C. § 332(c)(7)(B)(v). ITW filed its original Complaint in this federal action on August 31, 2023. (Doc. 1.)

Analysis

ITW's Amended Complaint contains three counts: (1) violation of the TCA for lack of substantial evidence to support the PUC's denial (the "Substantial Evidence Claim"); (2) violation of the TCA by "effective prohibition" of personal wireless services offered by ITW and National Carriers (the "Effective Prohibition Claim"); and (3) a count seeking declaratory judgment (the "Declaratory Judgment Claim") that the "substantial deference" provision of 30 V.S.A. § 248a violates the "substantial evidence" requirement of the TCA at 47 U.S.C. § 332(c)(7)(B)(iii). (*See* Doc. 9.) Defendants seek judgment in their favor on each of those counts. (Doc. 12.) ITW seeks judgment in its favor on each of the three counts. (Doc. 20.)

I. Substantial Evidence Claim (Count I)

The parties do not dispute the applicability of the TCA's "substantial evidence" standard. Under 47 U.S.C. § 332(c)(7)(B)(iii): "Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record."

Although Defendants challenge Mr. Umano's statement that land mobile communications services (such as ITW's ESMR 900 MHz service) are "personal wireless services" (Doc. 29-1 ¶ 5), Defendants have already conceded that "SMR is a type of personal wireless service." (Doc. 12 at 9.)[9] The TCA's "substantial evidence" standard applies to the PUC's August 2023 Denial Order.

The parties also do not dispute the requirements of the TCA's "substantial evidence" standard. "Whether a decision is supported by substantial evidence must be determined according to 'the traditional standard used for judicial review of agency actions.'" *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 638 (2d Cir. 1999) (quoting *Cellular Tel. Co v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999)); *see also Indep. Wireless One Corp. v. Town of Charlotte*, 242 F. Supp. 2d 409, 414 (D. Vt. 2003) [hereinafter "*IWO*"]. "Substantial evidence requires evaluation of the entire record, including opposing evidence . . ., and requires a decision to be supported by 'less than a preponderance but more than a scintilla of evidence.'" *Sprint*, 176 F.3d at 638 (quoting *Cellular Tel. Co.*, 166 F.3d at 494).

This standard of review is deferential.[10] *Cellular Tel. Co.*, 166 F.3d at 494. The court is not permitted to engage in its own fact-finding or to "supplant the [PUC's] reasonable

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[9] This is consistent with the statutory definitions of "personal wireless services" and "personal wireless service facilities" at 47 U.S.C. § 332(c)(7)(C). Notably, the cellular service that would be provided by a National Carrier would also qualify as a "personal wireless service." *See N.Y. SMSA Ltd. P'ship v. Town of Clarkstown*, 603 F. Supp. 2d 715, 725 n.13 (S.D.N.Y. 2009) ("For purposes of the Telecommunications Act, personal communications services fall within the larger class of personal wireless services."). The distinction between "personal wireless" and "personal communications" service does not impact the applicability of the relevant TCA provisions in this case.

[10] The Supreme Court's recent decision in *Loper Bright Enterprises v. Raimondo*, 144 S.Ct. 2244 (2024), discusses the deference that agencies previously enjoyed under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), when interpretating the statutes that the agencies administer. *Loper* overruled *Chevron* but does not appear to affect "judicial review of agency policymaking and factfinding." *Loper*, 144 S.Ct. at 2261. Because

determinations." *Id.* Still, review under the "substantial evidence" standard is more demanding than the "rational basis" review standard. *IWO*, 242 F. Supp. 2d at 414. "When evaluating the evidence, local and state zoning laws govern the weight to be given the evidence." *Cellular Tel. Co.*, 166 F.3d at 494. The TCA "establishes procedural requirements that local boards must comply with in evaluating cell site applications." *Id.* But the TCA generally does not "affect or encroach upon the substantive standards to be applied under established principles of state and local law." *Id.* (quoting *Cellular Tel. Co. v. Zoning Bd. of Adjustment*, 24 F. Supp. 2d 359, 366 (D.N.J. 1998)).[11]

Under Vermont law, the PUC may grant a CPG for the construction or installation of telecommunications facilities "if it finds that the facilities will promote the general good of the State consistent with [30 V.S.A. § 202c(b)]." 30 V.S.A. § 248a(a). Before issuing a CPG under § 248a, the PUC must find that, among other things, "[t]he proposed facility will not have an undue adverse effect on aesthetics, historic sites, air and water purity, the natural environment, and the public health and safety" and that, if it relates to the provision of wireless service, "the proposed facility reasonably cannot be colocated on or at an existing telecommunications facility, or such colocation would cause an undue adverse effect on aesthetics." *Id.* § 248a(c)(1), (3).

Count I primarily concerns agency factfinding and does not involve any agency's interpretation of a statute, *Loper* does not appear to impact the analysis here.

[11] The TCA does impose some substantive limitations, including the proviso that the "[d]ecisions of local zoning boards may not 'prohibit or have the effect of prohibiting the provision of personal wireless services.'" *Indep. Wireless One*, 242 F. Supp. 2d at 414 (quoting 42 U.S.C. § 332(c)(7)(B)(i)(II)). The court considers that substantive limitation in its analysis of Count II, below.

A. Burden-Shifting

ITW argues that, because it has shown that it made a good-faith effort to evaluate alternative sites, "the burden shifts to Defendants to demonstrate that there is substantial evidence in the record that a more feasible site exists to remedy the coverage gap." (Doc. 18 at 10; *see also* Doc. 20 at 9.) And ITW asserts that there is no such evidence. (Doc. 18 at 11; Doc. 20 at 10.) Defendants maintain that "no burden shifting has occurred because Plaintiff has not made a good faith effort to evaluate alternative sites like a shorter tower." (Doc. 19 at 3.)

The court is not persuaded that a shorter tower would constitute an alternative "site." But Defendants also assert that "the Denial Order is not based on the existence or nonexistence of an alternative site for the Tower." (Doc. 29 at 9.) Defendants point out that the PUC's August 2023 Denial Order did not discuss the issue of alternative sites. The court agrees with Defendants on this issue.

The possibility of alternative sites is relevant to the issues of aesthetics enumerated at 30 V.S.A. § 248a(c)(1) and (3). *See, e.g.*, *Petition of New Cingular Wireless PCS, LLC*, No. 7998, 2013 WL 871477, at *4 (Vt. Pub. Serv. Bd. Mar. 4, 2013) (discussing alternative locations for proposed telecommunications facility as part of aesthetics discussion); *see also In re Rutland Renewable Energy, LLC*, 2016 VT 50, ¶ 56 n.11, 202 Vt. 59, 147 A.3d 621 (Reiber, C.J., dissenting) (noting that alternative sites are "appropriate for consideration in CPG proceedings"). Alternative sites could also potentially be relevant if raised as part of the recommendations of a municipal planning commission under 30 V.S.A. § 248a(c)(2).

In this case, however, it does not appear from the record that the NRPC ever raised the issue of possible alternative sites. The NRPC's position was that the Project did not conform to the Regional Plan "due to the height of the tower." (Doc. 20-32 at 2.) The NRPC did not

otherwise assert an objection to the location of the Tower. In this litigation, the parties do not dispute that ITW examined numerous potential sites and that the Bordoville Road site was "the only available and viable site that ITW was able to locate." (Doc. 20-6 ¶¶ 32–33.) If there ever was a dispute about the possibility of alternative sites, the court has not found it in the record.

Thus—even assuming (without deciding) that ITW is correct about a burden-shifting procedure for the analysis of alternative sites[12]—that framework is not applicable here. The absence of a burden-shifting analysis on the issue of alternative sites does not prove that the PUC's Denial Order was unsupported by substantial evidence.

B. Evidence for the Denial Order

Apart from its contention regarding burden-shifting, ITW asserts that "there was *no* evidence for the Denial Order." (Doc. 20 at 8.) ITW maintains that it demonstrated "that a Coverage Gap exists, that there is a need for improved service in the Coverage Gap, and that the proposed Tower would remedy the situation" and further demonstrated "that the proposed Tower is the only feasible and least obtrusive alternative to fill the Coverage Gap." (*Id.* at 9.) Defendants contend that the Denial Order articulates multiple reasons for the denial and that each of those reasons is supported by substantial evidence. (Doc. 29 at 9–12.) In reply, ITW argues

[12] The authorities that ITW cites for its burden-shifting theory involve application of New York law's "public necessity" standard, not Vermont's "general good of the State" standard under 30 V.S.A. § 248a(a). *See Crown Castle Fiber LLC v. Town of Oyster Bay*, No. 21-CV-6305, 2024 WL 1051171 (E.D.N.Y. Jan. 19, 2024), *report and recommendation adopted*, 2024 WL 1090305 (E.D.N.Y. Mar. 13, 2024); *Up State Tower Co. v. Town of Tonawanda*, No. 19-CV-00952, 2020 WL 8083693, at *13 (W.D.N.Y. Nov. 18, 2020), *report and recommendation adopted*, 2021 WL 50906 (W.D.N.Y. Jan. 6, 2021), and *New York SMSA Limited Partnership v. Incorporated Village of Mineola*, No. 01-CV-8211, 2003 WL 25787525, at *9 (E.D.N.Y. Mar. 26, 2003). Nor is it clear that those decisions actually employed the burden-shifting framework upon which ITW relies.

that the NRPC's opinion cannot outweigh the "substantial evidence that ITW and the [DPS] adduced." (Doc. 32 at 3.)

The court agrees that the record contains significant evidence regarding aesthetics and regarding the performance of the radio equipment on the proposed 140-foot Tower and on a 120-foot version. And that evidence might even amount to "substantial" evidence that could support a conclusion that, when compared to a 140-foot tower, a 120-foot tower would provide significantly less RF coverage while having only have a marginally lesser impact on aesthetics. But as the Second Circuit has observed in other contexts involving a "substantial evidence" standard, "whether there is substantial evidence supporting the [plaintiff's] view is not the question here; rather, [the court] must decide whether substantial evidence supports *the [PUC's] decision*." *Bonet ex rel. T.B. v. Colvin*, 523 F. App'x 58, 59 (2d Cir. 2013) (summary order).

On that issue, the court has no difficulty concluding that substantial evidence supports the PUC's August 2023 Denial Order. The PUC stated in that order:

> We agree with [ITW] and the [DPS] that the construction of telecommunications facilities is, in general, consistent with the State's broad interests pursuant to § 202c and the public good in general. However, we conclude that these interests could, at least in part, be served with a shorter and less obtrusive tower as recommended by the NRPC.

(Doc. 20-40 at 9–10.) The PUC further stated: "The recommendations of the NRPC are reasonable and specific to this particular tower." (*Id.* at 10.) And the PUC declined to accept "the notion that [30 V.S.A.] § 202c always preempts the recommendations of town or regional planning commissions" because doing so would "render[] the substantial deference standard found in § 248a(c)(2) virtually meaningless." (*Id.*)

For the reasons discussed below, the "substantial evidence" requirement at 47 U.S.C. § 332(c)(7)(B)(iii) does not preempt the "substantial deference" standard at 30 V.S.A.

§ 248a(c)(2). *See infra* Part III.[13] Following § 248a(c)(2)'s directive to give "substantial deference" to the recommendations of the regional planning commission concerning the regional plan, the PUC considered the requirements of the Northwest Regional Plan—including the Regional Plan's goal that telecommunications infrastructure be "the least obtrusive system possible" and the policies that new telecommunications infrastructure be "sited in the least obtrusive and least ecologically sensitive areas possible" and that it "fit within the character of the area." (Doc. 20-32 at 2.) The PUC also considered the NRPC's letter opining that "[t]he project is not in conformance with the plan due to the height of the tower." (*Id.*)

The evidence before the PUC showed that a 120-foot tower would be visible from fewer locations than a 140-foot tower. (*See* Doc. 20-24 at 32.) As noted above, the parties dispute how to characterize this difference and whether it is a significant difference. Nevertheless, the differences in visibility between the 120-foot and 140-foot versions support the PUC's conclusion that a 120-foot structure would be "less obtrusive" than the proposed 140-foot Tower. (Doc. 20-40 at 10.)

At the same time, the PUC recognized that the State of Vermont has "broad interests" that include the construction of telecommunications facilities. (*Id.* at 9.) Substantial evidence supports the PUC's conclusion that those interests could be served "at least in part" with a 120-foot tower. (*Id.* at 9–10.) Mr. Delaney testified that a 120-foot tower "would work" for ITW's

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[13] Defendants assert that if the PUC's Denial Order is based on "substantial evidence," then it is unnecessary to address the preemption argument in Count III of ITW's Amended Complaint. (Doc. 12 at 12–13.) But the Denial Order is based on an application of § 248a(c)(2)'s "substantial deference" standard. The court is not persuaded that it can evaluate whether "substantial evidence" supports the PUC's decision without recognizing that the PUC was applying § 248a(c)(2)'s "substantial deference" standard. The court accordingly analyzes the parties' competing motions as to Count III below.

ESMR 900 MHz system. (Doc. 20-25 at 33.)[14] As for the clusters of antennas that cellular carriers could use for their service, Mr. Delaney testified that a 120-foot tower could support one fewer carrier than the five depicted on the elevation drawing for the proposed 140-foot structure. (*Id.* at 38.) He further opined that the two lowest locations on a 120-foot tower would be "unlikely" to attract a cellular carrier, but he conceded that "[u]nlikely doesn't mean it won't be." (*Id.* at 40.) This evidence supports the PUC's conclusion that a 120-foot structure would serve the State's telecommunications interests "at least in part."

In sum, the evidence before the PUC illustrated a tradeoff between aesthetics and RF performance depending on whether the proposed structure is 120 feet or 140 feet. Granting "substantial deference" to the NRPC's comments under 30 V.S.A. § 248a(c)(2), the PUC found insufficient "good cause to reject the NRPC's recommendations" and denied ITW's Application for a 140-foot tower. (Doc. 20-40 at 10–11.) The court concludes that substantial evidence supports the PUC's decision for the reasons stated above.

II. Effective Prohibition Claim (Count II)

Count II is a claim that the PUC's August 2023 Denial Order violates 47 U.S.C. § 332(c)(7)(B)(i), which states in pertinent part: "The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services." ITW contends that the undisputed material facts show that the PUC's Denial Order violates § 332(c)(7)(B)(i)(II)'s mandate. (Doc. 20 at 10.) Defendants oppose that argument (*see* Doc. 29 at 12) and seek judgment in their favor on Count II

[14] Mr. Delaney also testified that if the tower were only 100 feet tall, that would result in a "much more drastic change" and the coverage of ITW's ESMR system would "not [be] good enough." (*Id.* at 34.)

"[b]ecause the proposed Facility is not the least intrusive means to close a gap in coverage." (Doc. 12 at 12.)[15]

The Second Circuit has explained that "[t]he TCA's 'ban on prohibiting personal wireless services precludes denying an application for a facility that is the least intrusive means for closing a significant gap in a remote user's ability to reach a cell site that provides access to land-lines.'" *Orange Cnty.-Cnty. Poughkeepsie Ltd. P'Ship v. Town of E. Fishkill*, 632 F. App'x 1, 2 (2d Cir. 2015) (summary order) (quoting *Sprint Spectrum L.P. v. Willoth*, 176 F.3d 630, 643 (2d Cir. 1999)). "A plaintiff will prevail on an effective prohibition claim, therefore, 'if it shows both that a significant gap exists in wireless coverage and that its proposed facility is the least intrusive means to close that gap.'" *Id.* (quoting *T-Mobile Ne. LLC v. Town of Ramapo*, 701 F. Supp. 2d 446, 456 (S.D.N.Y. 2009)).[16]

A. "Significant Gap" in Wireless Coverage

In opposition to ITW's motion, Defendants are content to assume that a "significant gap" in coverage exists. (Doc. 29 at 12.) In their own motion, Defendants go so far as to say that they "do not dispute that there is likely a significant gap in coverage in the area where Plaintiff

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[15] Defendants also argue that ITW failed to show that the Facility "independently provides personal wireless service." (*Id.*) But as noted above, the distinction between "personal wireless" and "personal communications" service does not impact the applicability of the relevant TCA provisions in this case.

[16] There is no dispute that this is ITW's burden. But as to the standard of review, ITW cites cases—most from outside the Second Circuit—for the proposition that effective-prohibition claims are reviewed de novo. (Doc. 18 at 12; Doc. 20 at 11; Doc. 32 at 5.) Citing *IWO*, Defendants disagree on that point. (Doc. 19 at 5.) The court recognizes that, unlike 42 U.S.C. § 332(c)(7)(B)(iii), section 332(c)(7)(B)(i) does not mention "substantial evidence." On the other hand, this court stated in *IWO* that—without drawing any distinction between types of TCA claims—"decisions that are subject to the TCA are reviewed under the . . . substantial evidence standard." *IWO*, 242 F. Supp. 2d at 414. Ultimately the court need not decide this question because the court's conclusion on Count II is the same under either a "de novo" or "substantial evidence" standard.

proposed to site the Facility." (Doc. 12 at 9.) Either way, this element of ITW's effective-prohibition claim does not appear to be at issue.[17]

B. Least Intrusive Means to Close the Gap

ITW argues that the record shows that the 140-foot Tower proposed in the Application is the "least intrusive means" to fill the gap in coverage. (Doc. 20 at 7, 12.) Defendants maintain that the design proposed in ITW's Application was "not the least intrusive means" for closing the gap in wireless coverage. (Doc. 12 at 2, 12; Doc. 29 at 12.) The court agrees with Defendants and concludes that they are entitled to judgment in their favor on Count II.

As discussed above, the parties dispute how to characterize the intrusiveness (or obtrusiveness) of a 140-foot tower versus a 120-foot tower.[18] However, the record does not support ITW's contentions that a 140-foot tower "will not be obtrusive at all" (Doc. 20 at 5) or that "a height reduction to 120 feet would not make the Tower less visible" (Doc. 32 at 6). As stated above, ITW has not shown that none of the "Neighbors" would see any part of the 140-foot Tower from their properties. More generally, the evidence shows that there are differences in visibility between the 120-foot and 140-foot structures and that a 120-foot structure would be at least somewhat "less obtrusive" than the proposed 140-foot Tower. (*See* Doc. 20-24 at 32.)

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[17] As to whether a gap "must be determined from the perspective of a cell phone customer or from the perspective of the provider," courts have given *Chevron* deference to the FCC's interpretation of 47 U.S.C. § 332(c)(7) rejecting the "user-based approach." *Up State Tower Co. v. Village of Lakewood*, 431 F. Supp. 3d 157, 172 (W.D.N.Y. 2020) (citing *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(b)*, 24 F.C.C. Rcd. 13994, 14017 (2009)). As noted above, *Loper Bright* overruled *Chevron*. However, it is unnecessary here to determine the impact that *Loper Bright* might have on the applicable perspective for determining a "significant gap" in wireless coverage because there appears to be no question that such a gap is present in this case.

[18] Defendants suggest that the least "obtrusive" solution is necessarily also the least "intrusive" solution. (Doc. 29 at 2 n.1.) ITW similarly equates "obtrusive" and "intrusive." (Doc. 32 at 4.)

For the reasons discussed above, a 120-foot tower could accommodate ITW's ESMR 900 MHz system and at least a subset of the National Carriers. And the Denial Order expressly contemplates that ITW could submit an application for a 120-foot structure. (Doc. 20-40 at 8.) No "substantial evidence" supports ITW's contention that the PUC's Denial Order prohibits or has the effect of prohibiting the provision of personal wireless services. The court would reach the same conclusion under a "de novo" standard.

ITW relies on the statement in *Up State Tower Co. v. Village of Lakewood* that "[t]o deny a siting application on aesthetic grounds, there must be substantial evidence: (1) that 'residents will be able even to see the antenna[s]' and (2) there will be an actual 'negative visual impact on the community.'" 431 F. Supp. 3d 157, 173–74 (W.D.N.Y. 2020) (quoting *T-Mobile Ne. LLC v. Town of Islip*, 893 F. Supp. 2d 338, 358 (E.D.N.Y. 2012)).[19] ITW asserts that there is no evidence for either prong. (Doc. 20 at 13.) Defendants maintain that the cited test in *Lakewood* is inapplicable because the PUC's Denial Order was not "based on aesthetics grounds under 30 V.S.A. § 248a(c)(1)" but instead on the "substantial deference" standard under § 248a(c)(2). (Doc. 19 at 6.)

The court is not convinced that the "substantial deference" consideration under § 248a(c)(2) necessarily excludes any consideration of aesthetics that might inform or appear in the "recommendations" of a planning commission. In any event, the court disagrees with ITW's contention that the record lacks evidence to support the two *Lakewood* prongs. The DSM viewshed analysis shows that a 140-foot tower would be visible to residents traveling along the Route 108 corridor and from some locations west of the Tower, including along Bordoville Road

[19] "Antennae" in original. The better plural term in the context of radio equipment is "antennas."

and from some areas of the Bordoville Village Historic District. (Doc. 20-24 at 24, 32.) The same evidence constitutes "substantial evidence" that a 140-foot tower would have a "negative visual impact on the community."

III. Declaratory Judgment/Preemption Claim (Count III)

Finally, in Count III, ITW seeks a declaratory judgment that the "substantial deference" provision of 30 V.S.A. § 248a(c)(2)—on its face and as applied in this case—violates the TCA's "substantial evidence" requirement at 47 U.S.C. § 332(c)(7)(B)(iii) and is preempted by that federal statute. (Doc. 9 ¶ 118.) In ITW's view—repeated throughout its papers:

> The fundamental and fatal problem with Section 248a(c)(2)'s "substantial deference" requirement is that it creates situations where—as here—the PUC denies a CPG to a tower applicant despite the absence of substantial evidence justifying the denial. Put differently, the "substantial deference" requirement unduly elevates unsupported aesthetics 'opinion' testimony above actual and uncontroverted third-party expert evidence that a proposed tower would have a minimal aesthetics impact.

(Doc. 18 at 16; Doc. 20 at 15; Doc. 32 at 9–10.) Defendants maintain that there is no conflict between 30 V.S.A. § 248a(c)(2) and 47 U.S.C. § 332(c)(7)(B)(iii) and therefore no preemption. (Doc. 12 at 12–15; Doc. 29 at 14–17.) Here, for the reasons discussed above, there is no "absence of substantial evidence" to support the PUC's August 2023 Denial Order. As to ITW's facial challenge, the court concludes that, for the reasons below, Defendants are entitled to summary judgment on ITW's preemption claim.

"The doctrine of federal preemption provides that '[u]nder the Supremacy Clause of the Constitution, state and local laws that conflict with federal law are without effect.'" *Williams v. Marinelli*, 987 F.3d 188, 198 (2d Cir. 2021) (alteration in original) (quoting *N.Y. SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 103–04 (2d Cir. 2010) (per curiam)). The Second Circuit has described three general types of preemption:

> (1) express preemption, where Congress has expressly preempted local law; (2) field preemption, where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law; and (3) conflict [or "obstacle"] preemption, where local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives.

Id. (quoting *SMSA*, 612 F.3d at 104). Here, ITW does not appear to rely on express or field preemption, so the court considers only the question of obstacle preemption.

"In order to establish obstacle preemption, the party asserting preemption must show more than the 'mere fact of tension between federal and state law.'" *Id.* (quoting *Madeira v. Affordable Hous. Found., Inc.*, 469 F.3d 219, 241 (2d Cir. 2006)). "Rather, there must be a 'sharp' conflict between state law and federal policy." *Id.* "[F]ederal law does not preempt state law under obstacle preemption analysis unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together." *Id.* at 188–89 (alteration in original) (quoting *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 725 F.3d 65, 102 (2d Cir. 2013)).

Even with the benefit of all reasonable inferences, ITW has failed to make this showing. Granting "substantial deference" to the plans and recommendations of the affected municipalities and planning commissions as required by 30 V.S.A. § 248a(c)(2) is not in "direct and positive" conflict with 47 U.S.C. § 332(c)(7)(B)(iii)'s requirement that a state government's denial be "supported by substantial evidence." ITW has cited several authorities for the proposition that denial of an application for a wireless communications facility on aesthetics grounds "must be based on more than just unsupported opinion." *New Cingular Wireless PCS, LLC v. Town of Fenton*, 843 F. Supp. 2d 236, 252 (N.D.N.Y. 2012).

On the issue of aesthetics in TCA cases, "courts tend to require objective evidence of a negative visual impact that is 'grounded in the facts of the case.'" *Town of Islip*, 893 F. Supp. 2d

at 359 (quoting *Sw. Bell Mobile Sys. v. Todd*, 244 F.3d 51, 61 (1st Cir. 2001)). But that does not mean that only aesthetics experts like Mr. Perkins can supply probative evidence. To the contrary, objective evidence of a negative visual impact "can be established through 'aesthetic objections raised by neighbors who know the local terrain and the sightlines of their own homes.'" *Id.* (quoting *Omnipoint Commc'ns, Inc. v. City of White Plains*, 430 F.3d 529, 534 (2d Cir. 2005)). Similarly, the court has no difficulty concluding that the "recommendations" of a regional planning commission—a body composed of representatives from the region whose duties require substantial knowledge and judgment on land-use and development issues[20]—can qualify as objective evidence.

This conclusion does not mean that a regional planning commission's recommendations, standing alone, qualify as "substantial evidence" in every case. If the recommendations are not grounded in the facts of the case or are entirely conclusory, then the PUC might find "good cause" not to give substantial deference (or any deference) to those recommendations. 30 V.S.A. § 248a(c)(2). But where a regional planning commission's recommendations are properly entitled to substantial deference, they can form a part of the "substantial evidence" that is required under 47 U.S.C. § 332(c)(7)(B)(iii). The court concludes that ITW cannot meet its burden to show obstacle preemption and that Defendants are entitled to judgment on Count III.

Conclusion

Defendants' October 2023 Motion to Dismiss (Doc. 8) is MOOT.

Defendants' Motion to Correct Reply (Doc. 22) is GRANTED.

Defendants' December 2023 Amended Motion to Dismiss (Doc. 12) is converted to a motion for summary judgment and is GRANTED.

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[20] *See* 24 V.S.A. §§ 4342 (membership), 4345a (duties).

Plaintiff's Motion for Summary Judgment (Doc. 20) is DENIED.

Dated at Burlington, in the District of Vermont, this 19th day of August, 2024.

/s/ Geoffrey W. Crawford
Judge, U.S. District Court