

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7527

Petition of Telephone Operating Company of)
Vermont, LLC, d/b/a FairPoint Communications,)
for authority, pursuant to 30 V.S.A. § 248a, to)
construct broadband telecommunications)
facilities in Essex and Milton, Vermont)

Hearing at
Montpelier, Vermont
October 13, 2009

Order entered: 12/3/2009

PRESENT: Gregg Faber, Hearing Officer

APPEARANCES: Peter H. Zamore, Esq.
Sheehey Furlong and Behm, P.C.
for Telephone Operating Company of Vermont, LLC,
d/b/a FairPoint Communications

Jeanne Elias, Esq.
for Vermont Department of Public Service

Judith Dillon, Esq.
for Vermont Agency of Natural Resources

Jared Margolis, Esq.
for the Meadows Edge Bixby Hill Homeowner's Association, Inc.

I. INTRODUCTION

In this proposal for decision, I recommend that the Vermont Public Service Board ("Board") approve the petition, as amended, filed by Telephone Operating Company of Vermont, LLC, d/b/a FairPoint Communications ("FairPoint" or the "Petitioner"), pursuant to 30 V.S.A. Section 248a, and grant the Petitioner a certificate of public good ("CPG") authorizing the construction of broadband telecommunications facilities located at: (1) 252 Sleepy Hollow

Road, Essex; (2) 291 Cadreact Road, Milton; and (3) 175 Manley Road, Milton, Vermont (the "Project").

II. INTRODUCTION & BACKGROUND

Pursuant to 30 V.S.A. §248a(a):

Notwithstanding any other provision of law, if the applicant in a single application seeks approval for the construction or installation within three years of three or more telecommunications facilities as part of an interconnected network the applicant may obtain a certificate of public good issued by the public service board under this section, which the board may grant if it finds that the facilities will promote the general good of the state consistent with subsection 202c(b) of this title.

Further, pursuant to 248a(f):

If the board rules that an application raises a substantial issue, it shall issue a determination on an application filed pursuant to this section within 180 days of its filing . . .

This case involves a petition and prefiled testimony originally filed by the Petitioner on June 2, 2009, requesting that the Board issue a CPG, pursuant to 30 V.S.A. § 248a, authorizing the construction of the three facilities identified above, and a fourth facility to be located at 52 Bixby Hill Road, Essex.

On July 6, 2009, the Agency of Natural Resources ("ANR"), filed comments on the petition stating that the project does not raise a significant issue with respect to the substantive criteria of 30 V.S.A. § 248a(c).

On July 7, 2009, the Vermont Department of Public Service ("Department"), filed comments on the petition stating that "the project is consistent with the policies and goals of the State of Vermont relating to telecommunications as defined in 30 V.S.A. § 202c and in the State Telecommunications Plan."

The Board received several comments expressing concerns regarding the project from neighboring landowners, the Essex Planning Commission, and the Essex Selectboard. The majority of these comments concern the Bixby Hill Road facility, which has since been removed from the petition. The concerns expressed were primarily focused on aesthetic impacts and radio frequency radiation associated with the Project.

On August 11, 2009, I convened a Prehearing Conference in this case. Present at the prehearing were Peter Zamore, Esq., Sheehey Furlong & Behm P.C., for Petitioner; Jeanne Elias, Esq., for the Department; Jared Margolis, Esq., for the Bixby Hill Homeowner's Association ("BHA"); and Michael Steeves, Esq., for ANR.

On October 6, 2009, the Petitioner filed an amended petition ("Amended Petition") and testimony, indicating that due to a dispute with the landowner underlying the Bixby Hill Road facility, FairPoint was deleting the Bixby Hill tower from the petition and that the Petitioner intended to file a separate request for approval at that location once the dispute is resolved.

On October 8, 2009, I convened a duly noticed public hearing in Essex, Vermont. Six members of the public attended the hearing.

On October 13, 2009, I conducted a duly noticed technical hearing.

On October 30, 2009, FairPoint filed a motion to extend the schedule in this docket by ten days. On November 15, 2009, the Board issued an order granting the motion.

On November 16, 2009, FairPoint filed a draft proposal for decision.

Based on the Amended Petition and the associated prefiled testimony, I hereby recommend, pursuant to 30 V.S.A. § 8, that the Board make the following findings and issue a CPG to the Petitioners.

III. FINDINGS

A. The Project

1. The Petitioner is a company as defined by 30 V.S.A. § 201, and as such is subject to the jurisdiction of the Board pursuant to 30 V.S.A. § 203. Amended Petition at 1.

2. Under the terms of the transfer of the landline telephone business from its predecessor Verizon New England Inc. ("Verizon"), FairPoint is required by the end of 2010 to provide broadband service (1) to 80% of its service area and (2) to all access lines in at least 50% of its exchanges. Brown pf. at 1-2.

3. As part of meeting its broadband commitments, FairPoint intends to provide 100% broadband coverage for the Essex Junction and Milton exchanges. This commitment will be met by FairPoint's existing facilities, additional facilities, and five wireless facilities, consisting of a

replacement tower located adjacent to the Colchester Fire Station at 483 Main Street, Colchester, Vermont (recently permitted under Act 250), a low-profile rooftop installation located at 356 Mountain View Drive, Colchester, Vermont (recently permitted under Act 250 and by municipal approval), and three telecommunications facilities and related improvements (the "Project") that are the subject of this Petition, located adjacent to 252 Sleepy Hollow Road, Essex, 291 Cadreact Road, Milton, and 175 Manley Road, Milton. Brown pf. at 2-3.

4. The three proposed locations were selected because of their high elevation and terrain necessary to provide the required line-of-sight capability to expand coverage to the unserved areas (including Milton, Essex and adjacent areas), proximity to fiber and vehicular access. Frazier pf. at 3.

5. The facilities are designed to support download and upload speeds available at the consumer site of at least 1.5 Megabytes per second ("Mbps") and will be integrated into FairPoint's existing network at backhaul speeds of up to 1 gigabyte per second. Frazier pf. at 8.

6. Each of the three proposed telecommunications facilities will consist of a galvanized steel-tapered triangular lattice tower, up to eleven sector and dish antennas, equipment cabinet, concrete foundation for the tower and cabinet, temporary vehicular access and an underground electric line. Each tower will consist of a 120-foot-tall unguyed, tapered triangular steel lattice structure, with a 15-foot base tapering to three and one-quarter feet per side and located on a 27-foot by 27-foot by three-foot concrete slab (with varying amounts of above-ground exposure), with three 42-inch square piers protruding up to 8 feet above the ground. The tower sites will be stabilized with crushed stone following placement of each tower foundation. Because the towers are less than 200 feet tall, no tower lighting is required under Federal Aviation Administration guidelines. There will also be no security lighting or signage. Frazier pf. at 3-5, 7; Frazier Supp. pf. at 1-2; Dreher pf. at 5.

7. The proposed project involves "telecommunications facilities" that are "part of an interconnected network," as defined in 30 V.S.A. § 248a(b)(1), (2), because the towers will be interconnected by FairPoint's fiber and wireless point-to-point connections, and therefore will be

part of a single interconnected network. Specifically, all three towers will be interconnected, directly or indirectly, to fiber facilities. The proposed facilities will also provide coverage to adjacent exchanges. Frazier pf. at 12- 13.

8. The Sleepy Hollow Road facilities will be located in a relatively remote location at an elevation of 861 feet. Surrounding vegetation includes mature pine and mixed deciduous trees. The site is located approximately 80 feet off of an existing dirt road, and the landowner is the nearest resident. The site sits near the top of a rise and is surrounded by pine trees approximately 80 feet in height. Frazier pf. at 9.

9. Access to the Sleepy Hollow site for construction purposes will be accomplished by means of an existing dirt road serving the landowner's residence and property and a temporary access road 12 feet wide by 80 feet long. No extension or reconstruction of the existing road will be necessary. Power will be supplied by means of a proposed underground line extending approximately 520 feet from an existing distribution line located on the property to a proposed transformer. Secondary power will be supplied from this point by means of an underground line approximately 80 feet to the site. Frazier pf. at 9.

10. The Cadreact Road facilities will be located at an elevation of 372 feet and the canopy of trees close to the site are primarily mixed hardwoods that average approximately 50 feet in height. Frazier pf. at 9.

11. Access to the Cadreact Road site for construction purposes will be accomplished by means of an existing access road approximately 450 feet long starting from a house located off of Cadreact Road. Primary power will be supplied by means of a proposed underground line approximately 345 feet in length extending from an existing transformer on the property to a proposed transformer to be installed on the property. Secondary power will be supplied from this point to the site by means of an underground line approximately 315 feet in length. Frazier pf. at 10.

12. The Manley Road facilities will be located at an elevation of 521 feet. The canopy of trees close to the site are primarily mixed northern hardwoods that average 59 feet in height. Frazier pf. at 10.

13. Access to the Manley Road site for construction purposes will be accomplished

by means of an existing logging road approximately 450 feet in length starting from Manley Road. Primary power will be supplied by means of an underground line extending approximately 275 feet from an existing distribution line located on Manley Road to a proposed transformer located on the property. Secondary power will be supplied from this point to the site by means of an underground line approximately 355 feet in length. Frazier pf. at 10.

B. Review of the Project under the Section 248a(c)(1) Criteria

**Aesthetics, Historical Sites, Air and Water Purity,
the Natural Environment, and Public Health and Safety**

14. The Project will not have an undue adverse effect on aesthetics, historical sites, air and water purity, the natural environment, and the public health and safety. This finding is supported by findings 15-39, below, which are the criteria specified in 10 V.S.A. §§ 1424a(d) and 6086(a)(1)-(8) and (9)(k).

Outstanding Resource Waters, Headwaters

[10 V.S.A. §§ 1424a(d), 6086(a)(1)(A)]

15. The Project is not located on or near any outstanding resource waters or headwaters. Dreher pf. at 3.

Water and Air Pollution

[10 V.S.A. § 6086(a)(1)]

16. The Project will not result in undue water or air pollution. This finding is supported by findings 17-19, below.

17. There will be no heating or cooling systems (other than a heat exchanger located inside each equipment cabinet) and any air-related impact associated with construction vehicles and clearing/grading will be very minor. Dreher pf. at 2; FairPoint Supplemental Comments dated July 10, 2009 ("Supplemental Comments") at 4-5.

18. Due to limited earth disturbance, the potential for erosion is minor. The Project will not result in any substantial increase in impervious area, except for minimal amounts for the three telecommunications towers and equipment cabinet foundations. As a result, a Stormwater Discharge Permit is not required for the Project. All construction activities and the

post-construction condition of the sites will conform to the State of Vermont's Acceptable Management Practices for Maintaining Water Quality on Logging Jobs in Vermont ("Logging Road Handbook"). Stormwater runoff during construction will be diverted or collected and treated as outlined in the State of Vermont Low Risk Handbook for Erosion Prevention and Sediment Control ("EPSC"). Silt fencing will be installed parallel to grade, down gradient from construction to prevent eroded sediment from leaving the site. If necessary, check dams will be installed to reduce flow velocities and provide sediment pools within flow channels. Temporary and permanent stabilization methods, including seeding, mulching or installation of impervious surfaces will be put in place as soon as feasible and regular inspections by the site contractor will ensure that the EPSC measures are in place and functioning. If winter earthwork is necessary, additional winter erosion control measures will be applied. These measures include minimizing the soil disturbance, installation of silt fencing prior to the ground freezing, and protecting the disturbed area with hay mulch at twice the normal rate as soon as feasible. To limit the effect of the spring snowmelt, all snow removed from the site will be kept down gradient and all erosion control measures will be inspected regularly. Dreher pf. at 3, 5-6; exh. FP-AD-5.

19. The Radio Frequency Radiation ("RFR") associated with the Project will meet all standards prescribed by the Federal Communications Commission ("FCC"). The actual RFR associated with the equipment is 18 millionths of a watt per square centimeter, which is more than 50 times below the FCC limit. The energy level at 500' from the equipment is 80% less than a cellular tower at the same distance, 75% less than a baby monitor at 4 feet, 50% less than a residential wireless router at 12 feet, and 97% less than a television transmitter at 3,000 feet. Since energy levels decrease exponentially with distance, the RFR at 400 feet from the equipment is 1000 times below the FCC's Maximum Permissible Exposure level. Frazier pf. at 8.

Waste Disposal

[10 V.S.A. § 6086(a)(1)(B)]

20. The Project does not involve disposal of wastes or injection of any material into ground water or wells. The Project will not generate solid waste, except for construction debris typical

for a project of this type. All construction debris produced during construction of the Project will be disposed of in accordance with the law. Dreher pf. at 4.

Water Conservation, Sufficiency of Water, and Burden on Existing Water Supply

[10 V.S.A. §§ 6086(a)(1)(C),(a)(2) and (3)]

21. The Project will not use water, either during construction or on an on-going basis. Dreher pf. at 4.

Floodways

[10 V.S.A. § 6086(a)(1)(D)]

22. The Project is not located in a floodway. Dreher pf. at 5-6.

Streams

[10 V.S.A. § 6086(a)(1)(E)]

23. The Project will not be located on, adjacent to or near any streams or other water bodies. Dreher pf. at 5.

Shorelines

[10 V.S.A. § 6086(a)(1)(F)]

24. The Project is not located on a shoreline. Dreher pf. at 5.

Wetlands

[10 V.S.A. § 6086(a)(1)(G)]

25. The Project is not located near any significant wetlands. Dreher pf. at 5.

Soil Erosion

[10 V.S.A. § 6086(a)(4)]

26. The Project will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water. Due to the limited amount of earth disturbance required for the Project, the potential for erosion is minor. Dreher pf. at 5-6.

27. The Project will conform to Department of Environmental Conservation's regulations with respect to the protection of surface and groundwater quality. Dreher pf. at 5-6; exh. FP-AD-5.

Transportation System

[10 V.S.A. § 6086(a)(5)]

28. The Project will not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports or airways, and other means of transportation existing or proposed. Traffic in and out of the site will be by means of existing streets and through minor improvements to the land at each tower site. Dreher pf. at 7-8.

Educational Services

[10 V.S.A. § 6086(a)(6)]

29. The Project will not cause an unreasonable burden on the ability of a municipality to provide educational services. Educational services will not be impacted by the Project. Dreher pf. at 8.

Municipal Services

[10 V.S.A. § 6086(a)(7)]

30. The Project will not place an unreasonable burden on the ability of the local government to provide municipal or governmental services. The Project will not require any additional municipal or governmental services. Dreher pf. at 8-9.

Aesthetics, Historical Sites, and Rare and Irreplaceable Natural Areas

[10 V.S.A. § 6086(a)(8)]

31. The Project will not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas. This finding is supported by findings 32-38, below.

32. Each of the three tower sites will have adverse impacts on the aesthetics and scenic beauty of the area that they are located in. Exh. DPS-DR-1 at 11; exh. FP-MJB-2 at 15-27.

33. The Project does not violate any clearly identified community standards contained in the relevant regional or town plans. Exh. DPS-DR-1 at 12.

34. Telecommunications towers would not be considered shocking or offensive to the average viewer. Exh. DPS-DR-1 at 13.

35. The Petitioner has taken generally available steps to mitigate the aesthetic impacts associated with the Project by locating the tower sites in areas with the least potential for construction disturbance and environmental impacts. The medium gray color for the towers will also serve to reduce the visibility when seen against the sky. Exh. DPS-DR-1 at 13-14; FairPoint Supp. Comments at 3-4.

36. Equipment cabinets containing backup batteries will be installed at each tower location. Noise emitted from the equipment cabinets will be minimal at the site and will be negligible at increased distance from the tower site. Frazier pf. at 7.

37. The Project will have no impact on historic or archeological sites. Buscher pf. at 5-9; exh. FP-MJB-7.

38. There are no known endangered species sites or areas of necessary wildlife habitat in the Project area. Dreher pf. at 8.

Development Affecting Public Investments

[10 V.S.A. § 6068(a)(9)(K)]

39. The Project will not unnecessarily or unreasonably endanger any public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to public investments. The Cadreact Road facility will be visible from the beach at Sand Bar State Park and Lake Champlain. However, the tower will be over two miles from the beach, difficult to detect through surrounding foliage, and will not appear imposing. Dreher pf. at 8; exh. FP-MJB-2 at 20-24; exh. DPS-DR-1 at 11-12.

C. Review of the Project under the Section 248a(a) Criteria

State Telecommunications Policy

[30 V.S.A. § 248a(a)]

40. The Project is consistent with the goal of directing the benefits of improved telecommunications technology pursuant to 30 V.S.A. § 202c(b). The area to be covered by the Project is currently not served in its entirety by FairPoint's Internet access network.

The Project is required to enable those services to be provided to the unserved populace in the coverage area. These facilities will provide backhaul speeds of 300 Megabytes per second wirelessly and 1 Gigabyte per second via the fiber network. Brown pf. at 4-5.

D. Review of the Project under the Sections 248a(c)(2) and 248a(d) Criteria

Town and Regional Plans

[30 V.S.A. § 248a(c)(2)]

41. The Project by facilitating the expansion of broadband coverage is consistent with the land conservation measures contained in the Town plans of Essex and Milton, and the Chittenden County Regional Plan. Dreher pf. at 8; exh. FP-AD-6.

42. The Essex Town Plan (Section 6.14 Telecommunications Facilities) states that "[n]o wide spread wireless internet access has been developed in the community, ... Such access - whether through a public or private initiative, could provide economic development opportunities within the service area(s) and should be encouraged." Dreher pf. at 8-9; exh. FP-AD-6.

43. A goal in the Milton Comprehensive Plan, "Goals and Objectives", Goal 3.1.3, is to "pursue the expansion of broadband and wireless broadband internet access throughout Town to ensure that these are available to the maximum number of residents and businesses." Dreher pf. at 8-9; exh. FP-AD-6.

44. The Chittenden County Regional Plan states that "[t]elecom services such as high-speed digital communications are critically important economic-development assets in the global information-based economy; they help Chittenden County's employers to overcome the County's remoteness from major national and international markets." Dreher pf. at 9; exh. FP-AD-6.

Discussion

Pursuant to 30 V.S.A. 248a(c)(2), the Board must give "substantial deference . . . to the land conservation measures in the plans of the affected municipalities and the recommendations of the municipal and regional planning commissions regarding the municipal and regional plans, respectively." On July 6, 2009, the Town of Essex Planning Commission filed recommendations regarding the proposed tower to be located at Bixby Hill Road in Essex. However, that tower was subsequently removed from the petition by FairPoint and is not currently under consideration

in this proceeding. No other recommendations from town or regional planning commissions have been filed with the Board. Therefore, I conclude that, based on the above findings, the project is consistent with the provisions of § 248a(c)(2).

State and Local Permits

[30 V.S.A. § 248a(d)]

45. The Project is not inconsistent with permits relating to the landowner parcels of which the Project sites are a portion. This includes local permits related to the houses at the Sleepy Hollow Road and Manley Road parcels, and local subdivision approval and a Conditional Use Determination for the Cadreact Road site. Dreher pf. at 9; exh. FP-AD-7.

46. With respect to the Cadreact Road Site, the Town of Milton Subdivision Permit No. SB 7-99, Condition No. 2 states that "No construction or clearing shall take place within forested areas of the subdivision without approval of the State or county forester." The proposed Project site is located in an area of small trees and shrubs, with limited occurrence of larger trees. The Project has been designed to minimize clearing of trees and impacts to the forested area by use of the following sustainable design methods: access and utility services to the site will be routed along an existing woods road in order to minimize clearing; and disturbance to the road will be minor and limited to only those required for access during construction. A state or county forester will be consulted prior to finalization of construction plans. The Cadreact Road subdivision also received a Conditional Use Determination related to a wetland restoration project approximately 1,000 feet from the Project site. Based on a site visit by a wetlands biologist to the Cadreact Road site and a review of ANR wetlands mapping, no Class II or Class III wetlands or wetlands buffers will be impacted by the Project. Dreher pf. at 9-11; exh. FP-AD-7.

47. Neither the Manley Road nor the Sleepy Hollow Road sites have permit conditions that could bear on the Project. Dreher pf. at 10; exh. FP-AD-7.

IV. DISCUSSION AND CONCLUSIONS

As a result of the terms of the transfer of the landline telephone business from its predecessor Verizon New England Inc. ("Verizon"), FairPoint is required by the end of 2010 to provide broadband service (1) to 80% of its service area and (2) to all access lines in at least 50% of its exchanges. As part of meeting its broadband commitments, Fairpoint intends to provide 100% broadband coverage for the Essex Junction and Milton exchanges. The area to be covered by the Project is currently not served in its entirety by FairPoint's Internet access network. The Project is required to enable those services to be provided to the unserved populace in the coverage area through wireless broadband internet access to wireless broadband equipped devices owned by consumers. These wireless facilities will provide backhaul to the internet via the fiber network.

Based upon all the above evidence, I conclude that the Project:

- (a) will not have an undue adverse effect on aesthetics, historic sites, air and water purity, the natural environment and the public health and safety, with due consideration having been given to the criteria specified in 10 V.S.A. § 1424a(d) and §§ 6086(a)(1) through (8) and (9)(K);
- (b) substantial deference has been given to the land conservation measures contained in the Regional and Town plans, and the recommendations of the planning commissions, of the affected communities;
- (c) is consistent with the conditions contained in local and state permits; and
- (d) is part of an interconnected telecommunications network pursuant to 248a(b)(2)
- (e) will promote the general good of the state.

All parties to this proceeding have waived their rights under 3 V.S.A. § 811 to file written comments or present oral argument with respect to this proposal for decision, provided that this proposal for decision is substantially in the form as that agreed to by the Parties. Because this proposal for decision is substantially in the agreed-upon form, it has not been circulated to the parties.

Dated at Montpelier, Vermont, this 2nd day of December, 2009.

s/Gregg Faber
Gregg Faber
Hearing Officer

IV. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. The findings, conclusions, and recommendations of the Hearing Officer are adopted.
2. The Petition, as amended, of Telephone Operating Company of Vermont, LLC, d/b/a FairPoint Communications ("FairPoint"), for authority, pursuant to 30 V.S.A. § 248a, to construct broadband telecommunications facilities in Essex and Milton, Vermont, in accordance with the evidence and plans submitted in this proceeding (the "Project"), will promote the general good of the State of Vermont under 30 V.S.A. § 248a, and a certificate of public good to that effect shall be issued.
3. FairPoint shall comply with the following conditions to be set forth in the certificate of public good:
 - a. Construction, operation, and maintenance of the Project shall be in accordance with the plans and evidence submitted in this proceeding.
 - b. Prior to commencement of site preparation for and construction of the Project, FairPoint shall file with the Board confirmation that it has obtained all required permits and copies of the same shall have been filed with the Board.

Dated at Montpelier, Vermont, this 3rd day of December, 2009.

<u>s/James Volz</u>)	
)	PUBLIC SERVICE
)	
<u>s/David C. Coen</u>)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: December 3, 2009

ATTEST: s/Susan M. Hudson
Clerk of the Board

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

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