VERMONT ENVIRONMENTAL BOARD
10 V.S.A. §§ 6001-6092

RE: Central Vermont Public Service Corporation
and New England Telephone and Telegraph
d/b/a Bell Atlantic Telephone Company
Land Use Permit Application # 2W1074-EB

MEMORANDUM OF DECISION

This proceeding concerns Land Use Permit #2W1074 ("Permit") and supporting Findings of Fact, Conclusions of Law, and Order ("Decision") issued to Central Vermont Public Service Corporation ("CVPS") and New England Telephone and Telegraph d/b/a Bell Atlantic Telephone Company. The Permit authorizes the construction of utility lines located along Lee Road in the Towns of Brattleboro and Guilford, Vermont. The constructed lines will be approximately 3,540 feet in length (2,740 feet in a new corridor) and encompass a twenty-two foot right-of-way (the "Project").

This Memorandum of Decision pertains to CVPS's Motion to Dismiss Ann Dixon's appeal. As discussed below, CVPS's Motion to Dismiss is granted and jurisdiction is returned to the District #2 Environmental Commission.

I. PROCEDURAL SUMMARY

On April 22, 1998, CVPS and New England Telephone and Telegraph d/b/a Bell Atlantic Telephone Company (collectively "Permittees") filed a land use permit application for the Project with the District # 2 Environmental Commission ("Commission") pursuant to 10 V.S.A. §§ 6001-6092 ("Act 250").

On October 5, 1998 the Commission issued the Permit and Decision to Permittees.

On March 30, 2000, Ann J. Dixon ("Appellant" or "Ann Dixon") filed an appeal with the Environmental Board ("Board") from the Permit and Decision alleging that the Commission erred in its conclusions concerning 10 V.S.A.§ 6086(a)(l)(G) and (8) ("Criteria l(G) and 8"). Ann Dixon also requests that the Board stay "any tree cutting or trimming related to this project until the appeal is resolved." The appeal was filed pursuant to 10 V.S.A.§ 6089(a) and Environmental Board Rule ("EBR") 40.

On April 4, 2000, CVPS filed a Motion to Dismiss Ann Dixon's appeal.

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On April 10, 2000, Toby Price filed a letter with the Board entitled "Cross Appeal."[1] Within this pleading, Toby Price seeks party status before the Board under Criteria l(G) and 8 and also requests that the Board stay "any tree cutting or trimming related to this project until the appeal is resolved."

On April 11, 2000, CVPS filed a Motion to Dismiss Toby Price's "Cross Appeal."

In an April 26, 2000 Chair's Preliminary Ruling, Chair Harding denied the Appellant's and Toby Price's stay requests.

On May 2, 2000, Chair Harding convened a prehearing conference with the following participants:

CVPS by Timothy 0. Upton and Greg Heaton,
Ann M. Dixon,
Toby Price, and
Ellen Capy Goldfarb.

On May 4, 2000, Chair Harding issued the Prehearing Conference Report and Order ("PHCR&O"). The PHCR&O identified CVPS's Motion to Dismiss Ann Dixon's appeal as a preliminary issue and scheduled an evidentiary hearing pertaining to the issue for June 21, 2000.

On May 5, 2000, Ellen Capy Goldfarb filed a Petition for Party Status under Criterion 8.

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1 Toby Price's "Cross Appeal" does not raise any issues beyond the issues raised by Ann Dixon's appeal. Accordingly, Ms. Price's filing is not a proper cross appeal, see EBR 40(D), and is treated by the Board as a Petition for Party Status in Ann Dixon's appeal. In the Preheating Conference Report and Order, Chair Harding granted Toby Price party status in the appeal brought by Ann Dixon.' The Board also notes, as set forth below, that Toby Price was served copies of the Permit and Decision on March 1, 2000 and filed her "Cross Appeal" on April 10, 2000. Even if the Board were to consider Toby Price's pleading an appeal, under the rationale discussed below, the appeal is untimely.

On May 19, 2000, CVPS filed a copy of its Subpoena Duces Tecum which it served on Linda Matteson, Assistant Coordinator for the Commission, compelling her appearance at the evidentiary hearing before the Board concerning CVPS's Motion to Dismiss Ann Dixon's appeal.

On May 23, 2000, CVPS and Ann Dixon prefiled direct testimony, lists of witnesses and lists of exhibits relating to CVPS's Motion to Dismiss Ann Dixon's appeal.

In a May 25, 2000 Chair's Preliminary Ruling, Chair Harding ruled that the Board would consider Ellen Capy Goldfarb's Petition for Party Status following its decision on CVPS's Motion to Dismiss, only if the Board denied the motion to dismiss.

On June 6, 2000, CVPS prefiled its rebuttal testimony, a revised list of exhibits and a Memorandum of Law in Support of its Motion to Dismiss.

On June 21, 2000, the Board convened an evidentiary hearing to take evidence on CVPS's Motion to Dismiss. Following the hearing, the Board deliberated on CVPS's Motion on June 21 and 28, 2000. This matter is now ready for decision.

II. ISSUE

At the evidentiary hearing on June 21, 2000, the Board took testimony from the parties on the following preliminary issue:

> Should Ann Dixon's appeal of Land Use Permit #2W1074 be dismissed on the basis that the appeal was not timely filed with the Environmental Board.'

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[2] The evidentiary hearing focused on the timeliness of the appeal and did not consider the two other grounds of CVPS's Motion to Dismiss, failure to give evidence of commission error and that the appeal is based on inaccurate information, because the Board's resolution of the motion to dismiss on these grounds could **have been based solely on the notice of appeal itself. Because** the Board concludes that the appeal is out of time, it did not deliberate **on** the second two grounds for the motion to dismiss as they are rendered moot.

III. FINDINGS OF FACT

Based on the evidence admitted in prefiled testimony and at the hearing the Board finds the following facts.

1. On October 5, 1998 the Commission issued the Permit and Decision to Permittees.

2. Contrary to the Commission's general practice, copies of the Permit and Decision were not sent to Ann Dixon or Toby Price.

3. On February 15, 2000, in response to a telephone call from Ann Dixon, Julia Schmitz, Commission Coordinator, faxed a copy of the Permit and Decision to Ann Dixon's husband's office. The facsimile copy included all three (3) pages of the Permit and all seven (7) pages of the Decision. The facsimile copy did not include the certificate of service.

4. Ann Dixon received the facsimile copy of the Permit and Decision sent to her husband's office during the morning of February 16, 2000 at the latest.

5. The final paragraphs at the bottom of page 3 of the Permit and the bottom of page 7 of the Decision state the following:

> Any appeal of this decision must comply with all provisions of IO V.S.A. $6089 and Environmental Board Rule 40 including the submission of the original and ten copies of the following...

6. Between February 18 and March 1, 2000, Linda Matteson, the Commission's Assistant Coordinator, had approximately 12 telephone contacts with Ann Dixon. These contacts included voice mail messages and telephone conversations.

7. Ann Dixon never told Linda Matteson that she had received a facsimile copy of the Permit and Decision on or before February 16, 2000.

8. Linda Matteson had no knowledge that Ann Dixon had received a facsimile copy of the Permit and Decision on or before February 16, 2000.

9. Linda Matteson never told Ann Dixon that she had until March 30, 2000 to appeal the Permit and Decision. Linda Matteson did suggest, to Ann Dixon that she could request a 30 day right to appeal.

10. Ann Dixon never requested a 30 day appeal period.

11. On February 24, 2000, Ann Dixon left a voice mail message for Linda Matteson specifically referencing page 5, Findings of Fact, item 4 of the Decision.

12. CVPS personnel, including Timothy 0. Upton and Greg Heaton, met with Ann Dixon, Toby Price and other neighbors on February 24, 2000 at the Project's location. Mr. Upton read to Ann Dixon, Toby Price, and the other neighbors specific conditions within the Permit and Decision relating to tree trimming activities. Mr. Upton did this to be sure everyone understood the Permit conditions relating to tree trimming because he was worried that the neighbors would claim Permit violations without understanding the Permit conditions.

13. As Mr. Upton was reading the Permit conditions, the neighbors were close enough to Mr. Upton to see that he was reading from a permit.

14. Upon review of the Commission's files in February 2000, Linda Matteson became aware that Ann Dixon was mistakenly omitted from the certificate of service and was not sent a copy of the Permit and Decision when it was issued on October 5, 1998.

15. On March 1, 2000, Linda Matteson mailed copies of the Permit and Decision to the neighbors, including Ann Dixon and Toby Price, who were omitted from the certificate of service when the Permit and Decision were originally issued.

16. On March 1, 2000, Linda Matteson mailed a letter to Timothy 0. Upton stating that she sent copies of the Permit and Decision to Ann Dixon and Toby Price on the same date. In this letter Ms. Matteson states:

> . ..These parties will need to determine what action, if any, to undertake with respect to the decision and their late notification...

17. On March 30, 2000, Ann Dixon filed an appeal with the Environmental Board from the Permit and Decision alleging that the Commission erred in its conclusions concerning 10 V.S.A. § 6086(a)(l)(G) and (8).

IV. CONCLUSIONS OF LAW

10 V.S.A. § 6089(a) states, in part:

> An appeal from the district commission shall be to the Board. ... Notice of the appeal shall be filed with the Board within 30 days.

EBR 40(A), pertaining to appeals provides, in part, that "[a]n appeal shall be filed with the board within 30 days after the date of the decision of the commission." The first day of the thirty-day period begins on the day after the date of the Commission's decision. *EBR* 6. Neither the statute nor EBR 40 require district commissions to provide notice of a permit decision to the parties. In fact, no language in Act 250 or any other Environmental Board Rule requires personal notice of a permit decision. It is, however, the common practice of the district commissions to send copies of permit decisions to the parties to the proceedings.

The notice of appeal filed in this case was not filed with the Board's office until more than 30 days had elapsed after the Commission's issuance of its October 5, 1998 Permit and Decision. The Board must, therefore, decide whether or not it has the legal authority to entertain the appeal.

The Board has previously concluded that the 30 day limit fixed by 10 V.S.A. § 6089 is jurisdictional: a failure to comply with the 30 day limit eliminates this Board's authority to entertain the appeal. *Re: Puppy Acres* Boarding Kennel, #2W0568-2-EB, Memorandum of Decision (Oct. 11, 1985) and the cases cited therein. 10 V.S.A. § 6089 and EBR 40, when read together, state that an appeal notice must be filed no later than 30 days after the date of the Commission decision. Although the facts of this case do not necessitate that the Board rely solely on this statute and rule, the Board could find that it has no jurisdiction to hear the appeal on the basis that the Appellant failed to timely file her appeal within 30 days of the date of the Permit and Decision.

The Appellant argues that the 30 day appeal period should be triggered upon her receipt of the Permit and Decision from the Commission. Even if the Board adopted this approach, the appeal would still be out of time. It is uncontradicted that

Appellant received a facsimile copy of the Permit and Decision from the Commission on February 16, 2000, at the latest. Appellant filed her appeal on March 30, 2000, more than 30 days after receipt of the Permit and Decision. Under this approach, the appeal is still untimely.

Appellant also attempts to estop the Board from imposing the 30 day time limit to appeal by arguing that she relied on statements of the Commission Assistant Coordinator that Appellant had until March 30, 2000, to file her notice of appeal. The evidence does not support that the Commission's Assistant Coordinator ever made such a representation. Even if the evidence could be interpreted to support this argument, Appellant had not established the elements of estoppel.

To successfully apply estoppel against the State, a party must establish four elements:

> 1) the party to be estopped must know the facts;
> 2) the party to be estopped must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended;
> 3) the party asserting the estoppel must be ignorant of the true facts; and
> 4) the party asserting the estoppel must rely on his injury due to the conduct of the party to be estopped.

In re McDonalds Corp., *146* Vt. 380, 383 (1985), *and Town of Bennington v. Hanson-Walbridge Funeral Home, Inc., 139* Vt. 288 (1981). Appellant fails to establish the first and third elements of estoppel. It is clear that Appellant knew that she had a copy of the Permit and Decision as of February 16, 2000, that she did not disclose that fact to the Assistant Coordinator, and the Assistant Coordinator was otherwise unaware of the fact that Appellant had received a copy of the Permit and Decision as early as February 16, 2000. Accordingly, Appellants estoppel argument fails.

Lastly, Appellant argues that the Act 250 process should be citizen friendly and that the Board should ensure that the process is fair, especially to a citizen, not represented by counsel, such as Appellant. The Board believes that its decision to dismiss Appellants appeal because it is out of time is fair to all parties. The Board appreciates the difficulty a person has in appealing a decision if he or she does not have notice that the decision existed. See *Re: Triple M Marketplace,* Declaratory Ruling # 274M (Jan. 15, 1993) (Board declined to dismiss an appeal based on timeliness where Appellant did not have notice of a project review sheet.) In this case,

Appellant had actual notice of the Permit and Decision by February 16, 2000, at the latest. Furthermore, Appellant was put on notice of the appeal procedure because the Permit and Decision expressly state that appeals must comply with 10 V.S.A. § 6089 and EBR 40. Finally, Appellant has some prior experience and familiarity with the Act 250 process, and specifically, with the dismissal of untimely appeals. In *Re: Puppy Acres Boarding Kennel, supra,* Appellant and her husband successfully moved to dismiss an appeal because the appeal was untimely filed beyond 30 days following the issuance of the district commission's decision.

,For all of these reasons, Ann Dixon's appeal must be dismissed.

V. ORDER

1. CVPS's Motion to Dismiss Ann Dixon's Appeal is GRANTED.

2. Ann Dixon's Appeal is DISMISSED.

3. Jurisdiction is returned to the District #2 Environmental Commission.

Dated at Montpelier, Vermont this 29th day of June, 2000.

ENVIRONMENTAL BOARD

Marcy Harding

Marcy Harding, Chair
John Drake*
George Holland
Samuel Lloyd
Rebecca M. Nawrath
Alice Olenick
Donald Sargent
Nancy Waples

* Board member John Drake concurs with this decision but did not review the memorandum of decision.

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