Natural Resources Board
Districts #2&3 Environmental Commission
100 Mineral Street, Suite 305
Springfield, VT 05156-3168

September 17, 2008

Mark McElroy
3534 Sawnee Bean Road
Thetford Center, VT 05075

Gina Watkins and Bob Jacobson
WaveComm LLC
94 Main Street
West Lebanon, NH 03784

Re: Jurisdictional Opinion #2-259 WaveComm LLC Towers Support Structures for Fixed Wireless Broadband Access Points in Strafford

Dear Mr. McElroy, Ms. Watkins and Mr. Jabobson:

This is a jurisdictional opinion in response to your respective August 19, 2008, and September 17, 2008, (email from Gina Watkins and verbal request from Bob Jacobson) requests for jurisdictional opinion as to the applicability of Act 250 for previously constructed towers and support structures and a proposed tower in the Town of Strafford. This opinion is based on the following facts and analysis. It is my opinion that Act 250 permits are required for all such facilities that have been constructed in Strafford which are either on more than ten acres of land and/or are 50 feet or more in height.

FACTS

1. The Town of Strafford applied for an incentive grant from the Vermont Agency of Commerce for a "Broadband Demonstration Project." A $50,00.00 grant was approved in 2006. The Town of Strafford eventually signed a contract with WaveComm and, under the terms of the contract, the town subsidizes the cost of receivers for individuals who contract for broadband service with WaveComm.

2. WaveComm is a small, West Lebanon, New Hampshire based company offering wireless broadband service to communities in Vermont and New Hampshire along the Connecticut River. The Vermont towns served are Brownsville, Hartford, Norwich, Reading, Strafford, Thetford, Tunbridge, Weathersfield, and Windsor.

3. A "Strafford Broadband Committee" was formed in 2005 and there was obviously great interest and enthusiasm by residents to work with commercial entities to bring broadband service to the area. The Regional Planning Commission and the Vermont Department of Public Service Telecommunications Division also

were helpful to the committee in exploring and promoting broadband in this rural area. There was a convergence of government, private and commercial interests in getting infrastructure up and running as soon as possible. An example of this convergence is evident in this excerpt from the Strafford Broadband Committee blogsite:

> At 12:49 PM 7/21/2005, Chuck Sherman wrote:
> Hello everyone,
> Let me introduce myself (again to some of you).I'm Chuck Sherman (ham call
>
> N3WTO), and moved into Strafford last night.
> Margie and I live in Sue Miller's former house at 129 Pennock Road.
>
> We are not yet unpacked. I graduated from Dartmouth in 1967 and retired from
>
> NIH in Washington DC on June 30, 2005.
> I have been working with topographical mapping programs and Bob Jacobson of
>
> Wavecomm to design a method to bring broadband to Strafford. Bill Burden is familiar with our plans. I have been in touch with the Broadband Council and knew that a second round of grants were in the planning. We are perfect candidates, but it can happen even if we don't land a large grant. Our current plan is to use microwave to relay internet access from Bob's source in Norwich via his other tower in Tunbridge that is in line-of-sight with my hillside where I plan to build a ham radio antenna tower and a fix a microwave receiver. We have another relay point planned on John Hughe's hill that will allow us to provide people in Strafford with broadband internet via wifi, the same technology that Finowen is trying to provide in other parts of the Upper Valley. I'd be happy to meet with anyone interested in bringing broadband to town and coordinate plans and ideas that will benefit the residents of Strafford. ---Chuck

Source: http://dslvt.blogspot.com/2005/07/recent-email-discussion.html

4. Subsequently, the Chuck Sherman tower was constructed and WaveComm equipment installed.

5. Prior to entering the contract with the Town of Strafford, WaveComm commenced installations of equipment and began providing service to residents in Strafford. Service was in place before September 2006. At this time, approximately 100 residents are connected.

6. There is no documentation at the District Commission office of any individual or WaveComm requesting or obtaining a jurisdictional opinion or a project review sheet for the broadband commercial installations in the Town of Strafford. Gina Watkins, the WaveComm representative responsible for permitting states she discussed installations with "state people" including, Julia Schmitz, the former District 3 Coordinator and her successor Linda Matteson. There is, however, no documentation of any contacts or Act 250 determinations in the district office regarding WaveComm in Strafford. Ms. Matteson and Ms. Schmitz also do not have any specific recollections in this regard. (Personal communication with Matteson and Schmitz). I have requested Ms. Watkins provide any emails she may have from the District 3 Coordinators. She has not located any.

7. Steve Willbanks, a member of the Strafford Broadband Committee and former Act 250 Commissioner, recalls Ms. Schmitz verbally opined to him and to WaveComm that Act 250 permits would likely be required and she had requested additional information from WaveComm which was not submitted. According to Mr. Willbanks, the committee's focus was on obtaining services and not ascertaining whether WaveComm was obtaining appropriate permits. (Personal communication with Steve Willbanks)

8. On January 15, 2008, WaveComm filed a petition for a Certificate of Public Good (CPG) from the Public Service Board (PSB) under provisions of Title 10 §248(a) which provides exemptions for construction or installation of three or more "telecommunications facilities" if part of an interconnected network. The WaveComm CPG application has been ruled incomplete and has not been assigned a docket number. On February 7, 2008, PSB staff Judith Whitney sent Daniel Hershenson, Esq., on behalf of WaveComm, a detailed memo outlining the inadequacies of the application. As of today, the additional requested information has not been filed.

9. In the absence of either an Act 250 permit or a CPG application or permit, WaveComm proceeded with construction for a commercial purpose in Strafford. Clearly, construction has also occurred in other towns served by WaveComm, but this opinion will only address construction in Strafford.

10. Site plan reviews or conditional use permits have been issued by the Town of Strafford for WaveComm fixed wireless broadband access points. Three of these applications, which are also the subject of the CPG application, are as follows:

1. Tower built on the property of Gary Kendall– permit issued for broadband and ham radio. The Kendall property is more than ten acres. The tower was initially constructed at 65 feet, but was lowered to 50 feet because it was thought the change would obviate the need for Act 250 review. (Personal communication with Watkins).

2. Installation of broadband access point equipment mounted on a 50-foot pole anchored to a tree on land owned by Elizabeth Deneen. Ms. Deneen's parcel is more than ten acres.

3. Installation of broadband access point equipment mounted on a 50-foot pole anchored to a tree on land owned by Sherman Wilson. This parcel is also more than ten acres.

These approvals were issued prior to the filing of the CPG application.

11. The Strafford Town Clerk states review also was conducted on a joint application for a fixed wireless broadband Access Point (a tower) proposed by Chuck Sherman and WaveComm. This tower has been constructed. The construction is on a 38-acre parcel owned by Chuck Sherman and Margaret Carpenter. Other joint applications for "fixed wireless broadband access points" have been filed. The town clerk reports all applications have been joint application with the property owner and WaveComm. The Clerk also notes many instances of tower heights being crossed out and changed on applications.

12. WaveComm has lease agreements with the landowners on which fixed wireless broadband Access Points have been constructed which provides "[t]he landowner has granted WaveComm permission the use of the land located on ----------, Landowner shall granted WaveComm free access to location for maintenance in return WaveComm has agreed to supply landowner with broadband Internet Service."

13. On July 10, 2008, WaveComm and property owner Wendy Sichel applied jointly to the Town of Strafford for a zoning permit for a "tower site for a fixed wireless broadband Access Point." The application is for a "Rohn 25G open face truss design with tubular legs and power supplied by solar panels . . . Tower Height: 50 feet." The parcel size is 123 acres. The drawing of the tower included with the application tower shows the initial tree line height reference crossed out and replaced with "approx 45' " and the height tower reference crossed out and

replaced with “up to 50'.” The town zoning administrator has given “preliminary approval” with “final approval” contingent on approval by the Development Review Board. WaveComm has informed the town that Act 250 permits are not required for this tower either because they were under the mistaken impression that because the tower was 50 feet in height, it would not need an Act 250 permit. The next hearing is scheduled on September 17, 2008, and abutting property owner, Mark McElroy, has requested the jurisdictional opinion be available for this hearing. There is no CGP application filed that includes this tower.

14. The CPG application is for three locations; the Morrill Mountain location owned by Sherman Wilson; the Cotton Mountain location owned by Elizabeth Deneen; and the Power Mountain location owned by Gary Kendall. The application states that ”antennas will be on three 65-foot Rohn 25g tower structures.” What the application does not make clear, is that the Kendall tower has already been constructed and the town permit was issued in 2007 and that there is existing fixed broadband access point equipment mounted on 50-foot poles on the Deneen and Wilson properties.

15. In an effort to sort out the history and sequence of the construction, as well as, the context of the CPG application, I asked Ms. Watkins, the WaveComm representative, why applications were submitted for local permits if WaveComm was pursuing the CPG since § 248a(h)clearly provides that if an applicant qualifies for a CPG and is “using the procedures provided in this section (he/she) shall not be required to obtain local zoning or Act 250 permits.”

16. Ms. Watkins responded that WaveComm was basically doing what she thought was necessary to meet State permit exemptions for installations less than 50 feet. She related that initially the Kendall tower installation was 65 feet, but now it was 50 feet.

17. I asked Ms. Watkins if she had consulted with an attorney about permitting issues and she said that she had basically done the work on her own and had relied on the “state people” for guidance. She indicated that if they (the state people) had told her WaveComm shouldn’t do something they wouldn’t have.

18. I later leaned that attorney Dan Hershenson filed the CPG materials with the PSB on behalf of WaveComm. According to Ms. Watkins, Mr. Hershenson was just employed to complete the CPG application.

Conclusion

Relevant Law

Act 250

10 V.S.A. Chapter 151 § 6001. (3)(A)(I)

"Development" means:

> The construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within a radius of five miles of any point on any involved land, for commercial or industrial purposes in a municipality that has adopted permanent zoning and subdivision bylaws.

10 V.S.A. Chapter § 6001c. Jurisdiction over broadcast and communication support structures and related improvements

1. In addition to other applicable law, any support structure proposed for construction, which is primarily for communication or broadcast purposes and which will extend vertically 20 feet, or more, above the highest point of an attached existing structure or

2. 50 feet, or more, above ground level in the case of a proposed new support structure, in order to transmit or receive communication signals for commercial, industrial, municipal, county or state purposes, shall be a development under this chapter, independent of the acreage involved. If jurisdiction is triggered for such a support structure, then jurisdiction will also extend to the construction of improvements ancillary to the support structure, including buildings, broadcast or communication equipment, foundation pads, cables, wires, antennas or hardware, and all means of ingress and egress to the support structure. To the extent that future improvements are not ancillary to the support structure and do not involve an additional support structure, those improvements shall not be considered a development, unless they would be considered a development under this chapter in the absence of this section. The criteria and procedures for obtaining a permit under this section shall be the same as for any other development. (Added 1997, No. 48, § 2.)

Natural Resources Board Rule (2)(C).

(2) "*Commencement of construction*" means the construction of the first improvement on the land or to any structure or facility located on the land including work preparatory to construction such as clearing, the staking out or use of a right-of-way or in any way incidental to altering the land according to a plan or intention to improve or to divide land by sale, lease, partition, or otherwise transfer an interest in the land.

(3) "*Construction of improvements*" means any physical action on a project site which initiates development for any purpose enumerated in Rule 2(A) except for the construction of improvements for a home occupation. Activity which is principally for preparation of plans and specifications that may be required and necessary for making application for a permit, such as test wells and pits (not including exploratory oil and gas wells), percolation tests, and line-of-sight clearing for the placement of survey markers may be undertaken without a permit, provided that no permanent improvements to the land will be constructed and no significant impact on any of the 10 criteria will result. A district commission may approve more extensive exploratory work prior to issuance of a permit after complying with the notice and hearing requirements of Rule 51 herein for minor applications.

(4) " *Commercial purpose* means the provision of facilities, goods or services by a person other than for a municipal or state purpose to others in exchange for payment of a purchase price, fee, contribution, donation or other object or service having value.

Act 248

§ 248a. CERTIFICATE OF PUBLIC GOOD FOR MULTIPLE TELECOMMUNICATIONS FACILITIES

(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.

(b) For the purposes of this section,

(1) “Telecommunications facility” means any support structure extending more than 50 feet above the ground that is proposed for construction or installation which is primarily for communications purposes and which supports facilities that transmit and receive communications signals for commercial, industrial, municipal, county, or state purposes.

(2) Telecommunications facilities are “part of an interconnected network” if those facilities would allow one or more communications services to be provided throughout a contiguous area of coverage created by means of the proposed facilities or by means of the proposed facilities in combination with other facilities already in existence.

(c) Before the public service board issues a certificate of public good under this section, it shall find that the proposed facilities, in the aggregate, will:

(1) not unduly interfere with the orderly development of the region, with substantial deference having been given to the following, unless there is good cause to find otherwise: the recommendations of the municipal and regional planning commissions, the recommendations of the municipal legislative bodies, and the land conservation measures contained in the plan of any affected municipality;

(2) 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 subsection 1424a(d) and subdivisions 6086(a)(1) through (8) and (9)(K) of Title 10.

(d) When issuing a certificate of public good under this section, the board shall give due consideration to all conditions in an existing state or local permit and shall harmonize the conditions in the certificate of public good with the existing permit conditions to the extent feasible.

(e) No less than 45 days prior to filing a petition for a certificate of public good under this section, the applicant shall serve written notice of an application to be filed with the board pursuant to this section to the legislative bodies and municipal and regional planning commissions in the communities in which the applicant proposes to construct or install facilities; the secretary of the agency of natural resources; the commissioner of the department of public service and its director for public advocacy; and the landowners of record of property adjoining the project sites. Upon motion or otherwise, the public service board shall direct that further public or personal notice be provided if the board finds that such further notice will not unduly delay consideration of the merits and that additional notice is necessary for fair consideration of the application.

(f) Unless the public service board identifies that an application raises a substantial issue, the board shall issue a final determination on an application filed pursuant to this section within 90 days of its filing or, if the original filing did not substantially comply with the public service board's rules, within 90 days of the date on which the clerk of the board notifies the applicant that the filing is complete. If the board rules that an application raises a substantial issue, it shall issue a final determination on an application filed pursuant to this section within 180 days of its filing or, if the original filing did not substantially comply with the public service board's rules, within 180 days of the date on which the clerk of the board notifies the applicant that the filing is complete.

(g) Nothing in this section shall be construed to prohibit any person from executing a letter of intent or entering into a contract before the issuance of a certificate of public good under this section, provided that the obligations under that letter of intent or contract are made subject to compliance with the requirements of this section.

(h) An applicant using the procedures provided in this section shall not be required to obtain a local zoning permit or a permit under the provisions of Chapter 151 of Title 10 for the facilities subject to the application or to a certificate of public good issued pursuant to this section. Ordinances adopted pursuant to subdivision 2291(19) of Title 24 or a municipal charter that would otherwise apply to the construction or installation of facilities subject to this section are preempted. Disputes over jurisdiction under this section shall be resolved by the public service board, subject to appeal as provided by Section 12 of this title.

Analysis as Applied to the Previous and Proposed WaveComm Construction

The Act 250 jurisdictional analysis for commercial construction for commercial fixed point broadband access points in Strafford is straightforward. Under Act 250, jurisdiction is triggered in Strafford in at least the following two ways:

1. Under **§ 6001.** (3)(A)(I) an Act 250 permit is required for "construction of improvements on a tract or tracts of land, owned or controlled by a person, involving more than 10 acres of land within a radius of five miles of any point on any involved land, for commercial or industrial purposes in a municipality that has adopted permanent zoning and subdivision bylaws.

2. Under **§ 6001c. Jurisdiction over broadcast and communication support structures and related** improvements when "any support structure proposed for construction, which is primarily for communication or broadcast purposes and which will extend vertically 20 feet, or more, above the highest point of an attached existing structure or 50 feet, or more, above ground level in the case of a proposed new support structure, in order to transmit or receive communication signals for commercial, industrial, municipal, county or state purposes".

The past installations at the Kendall, Deneen and Wilson and Sherman properties (and possibly others for which information has not been provided), as well as the proposed Sichel property tower, trigger Act 250 jurisdiction as construction for a commercial propose. Jurisdiction is triggered under ***either*** provision because the **acreage** requirements for commercial construction are met (more than 10 acres in a municipality that has adopted permanent zoning and subdivision bylaws) **and because** the installations extend vertically **50 feet** above ground level. WaveComm was mistakenly under the impression that as long as the height of the towers/support structures was **at 50 feet**, and not over 50 feet, they were exempt from Act 250.

Section 248a provides an opportunity to apply for a CPG for approval for the construction or installation, within three years, for three or more telecommunications facilities as part of an interconnected network. This legislation exempts such projects from both local review and Act 250 review, but also embodies requirements that must be met. The first requirement is that the telecommunications facility meet the definition which reads in relevant part as follows:

> "Telecommunications facility" means any support structure extending more than 50 feet above the ground that is **proposed** for construction. (Emphasis added)

WaveComm has filed an application for a CPG which was ruled incomplete and has been inactive for the past nine months. The application is seeking the permitting of the previously constructed Kendall tower as well as the reconstruction of previously constructed facilities which required Act 250 permits prior to construction. The Kendall tower was apparently permitted by the town and constructed at 65 feet and then lowered to 50 feet. As part of the CPG application, this tower would be raised again to

65 feet. The other two existing 50-foot structures, which were constructed without benefit of Act 250 permits prior to filing the CPG application, would be replaced with 65-foot towers.

Subsection 248a(h) provides "An applicant using the procedures provided in this section shall not be required to obtain a local zoning permit or a permit under the provisions of Chapter 151 of Title 10 for the facilities subject to the *application* or to a *certificate of public good* issued pursuant to this section. Ordinances adopted pursuant to subdivision 2291(19) of Title 24 or a municipal charter that would otherwise apply to the construction or installation of facilities subject to this section are preempted. Disputes over jurisdiction under this section shall be resolved by the public service board, subject to appeal as provided by §12 of this title" (Emphasis added).

Arguably, this section could be interpreted to mean that as long as at some time a person files an *application* within three years of construction of three or more qualifying structures, no local permits or Act 250 permits need be obtained. Such an interpretation, however, could lead to absurd and irrational results. For example, an applicant could, as in this case, construct commercial facilities which would otherwise trigger the need for local and Act 250 permits and never actually file a *complete* CPG application or ever obtain a CPG. (In the Kendall case, the tower was permitted by the town and built to 65 feet in height, then lowered in hopes of avoiding Act 250 jurisdiction.) This interpretation would result in a de facto authorization of construction with no review and oversight as long as a CPG application has been filed. While the intent of §248a was undoubtably to promote the rapid expansion of broadband interconnected facilities throughout the State, it was to occur through an orderly and comprehensive review. The process was intended to review "proposed facilities" and not be used to establish a network of new telecommunication sites just below the §248a height requirement for telecommunication facilities and could operate without State review for an indefinite period of time and then be retrofitted to comply with the §248a definition of "telecommunication facility".

The most sensible interpretation of the word *application* in subsection (h) would be in instances when a qualified project is proposed, *but not yet constructed* and a complete application has been filed. Filing of a complete CPG application should also not be used to absolve past violations and failure to obtain either local or State permits for projects already constructed. Such an interpretation would prevent shopping for jurisdiction which appears to have happened in this case.

In conclusion, Act 250 permits are required for all commercial telecommunication facilities that have been constructed in Strafford which are either located on more than ten acres of land and/or are 50 feet or more in height. An Act 250 permit is also required for the proposed WaveComm/Sichel tower.

Normally, appeals of jurisdictional opinions are heard by the Vermont Environmental Court, however § 248a(h) provides that "[d]isputes over jurisdiction under this section shall be resolved by the public service board, subject to appeal as provided by Section 12 of this title."

If you have any questions, please do not hesitate to contact me at 885-8844.

Sincerely,

April Hensel /s/

April Hensel,
District 2 Coordinator

cc: Certificate of Service

This is a jurisdictional opinion issued pursuant to 10 V.S.A. § 6007(c) and Act 250 Rule 3(A).

Reconsideration requests are governed by Act 250 Rule 3(B) and should be directed to the district coordinator at the above address. Any appeal of this decision must be filed with the clerk of the Environmental Court within 30 days of the date of issuance, pursuant to 10 V.S.A. Chapter 220. The appellant must attach to the Notice of Appeal the entry fee of $225.00, payable to the State of Vermont. The appellant must also serve a copy of the Notice of Appeal on the Natural Resources Board, National Life Records Center Building, Montpelier, VT 05620-3201, and on other parties in accordance with Rule 5(b)(4)(B) of the VRECP.

For further information, see the Vermont Rules for Environmental Court Proceedings, available on line at www.vermontjudiciary.org. The Environmental Court mailing address is: Environmental Court, 2418 Airport Road, Suite 1, Barre, VT 05641-8701. (Tel: 802-828-1660).

See also § 248a.(h) CERTIFICATE OF PUBLIC GOOD FOR MULTIPLE TELECOMMUNICATIONS FACILITIES