VERMONT ENVIRONMENTAL BOARD
10 V.S.A. Chapter 151

Re: Stokes Communication Corp.
Land Use Permit #3R0703-EB
Appeal and Revocation

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision dated December 13, 1993, pertains to an appeal and a revocation petition filed with respect to Land Use Permit #3R0703 issued to Stokes Communication Corp. (Stokes) and Idora Tucker authorizing the permittees to replace a 120-foot broadcasting and communications tower with a 300-foot tower on land owned by Idora Tucker. For the reasons explained below, the Board 1) concludes that the project for which the District Commission issued a permit complies with Criteria 1(air) and 8 (aesthetics), and 2) concludes that although grounds for revocation exist because the permit was not complied with it will provide an opportunity for Stokes to correct the violation by applying for an amendment with Contel Cellular Telephone as co-applicant.

I. BACKGROUND

On September 22, 1992, Pierre LaFrance, Richard Theken, Bryant Smith, Elizabeth LaFrance, and Joan Sax (the Appellants) filed an appeal of Land Use Permit #3R0703 (the permit) and supporting findings of fact and conclusions of law issued by the District #3 Environmental Commission on August 25, 1992. The permit authorizes Stokes to replace a 120-foot broadcasting and communications tower with a 300-foot tower on a 93.5 acre tract of land on the Randolph Road in Randolph. The Appellants objected to the District Commission's findings with respect to 10 V.S.A. § 6096(a)(l)(air), 8(aesthetics, scenic or natural beauty), 9(K)(public investments), and 10(town and regional plans).

A prehearing conference was convened by Board Chair Elizabeth Courtney on October 29, 1992; due to the resignation of a staff attorney, a prehearing conference report was not issued until February 3, 1993.

On January 20, 1993, the Appellants filed a motion for a stay. On January 22, Stokes filed a motion to dismiss the appeal for lack of jurisdiction and requested a hearing on the motion.

On February 11, Stokes filed a motion to quash a subpoena issued to Stokes by Gerald Tarrant, the Appellants' attorney.

On February 26, the Board issued a Memorandum of Decision in which it denied the Appellants' motion for a stay.

On March 3, the Appellants filed a petition to revoke the permit. On that date the parties filed a stipulation of facts pertaining to the question of jurisdiction.

On March 10, the Board convened a public hearing and heard oral argument from the parties on Stokes's motion to dismiss.

On March 30, the Appellants filed a second motion to stay.

On March 31, the Board issued a Memorandum of Decision in which it a) denied Stokes's motion to dismiss; b) dismissed the appeal on Criteria 9(K) and 10; and c) granted party status to Bryant Smith on Criterion 8(aesthetics) pursuant to Rule 14(A), to Richard Theken on Criterion 8(aesthetics) pursuant to Rule 14(A), to Elizabeth LaFrance on Criterion 1(air) to the extent it pertains to interference with radio and television reception pursuant to Rule 14(A), to Joan Sax on Criterion 8(aesthetics) pursuant to Rule 14 (B) (l)(a) and (b), and to Pierre LaFrance on Criterion 1(air) to the extent it pertains to interference with radio and television reception and Criterion 8(aesthetics) pursuant to Rule 14(b)(l)(a) and (b).

On April 5, the Board issued a Memorandum of Decision in which it denied the Appellants' motion to stay, stated that the appeal and revocation petition will be consolidated, and ordered Stokes to comply with the subpoena issued to Stokes by Attorney Tarrant.

On May 19, the Board convened a public hearing, with the following parties participating:

Stokes by John R. Ponsetto, Esq.
The Appellants by Gerald R. Tarrant, Esq.

During the hearing the question of whether alternate sites may be considered as potential mitigation under Criterion 8 was raised. The Board asked the parties to submit briefs on this issue.

On June 9, the Board issued a Memorandum of Decision in which it sustained Stokes's objections to testimony concerning alternate sites for the location of the tower and ordered that all prefiled testimony and exhibits relating to alternate sites be stricken from the record. On June 28 the

Board issued a corrected decision. A reconvened hearing date and dates for filing additional prefiled testimony were established.

On July 6, Stokes submitted a letter to the Board objecting to the introduction of prefiled testimony filed by the Appellants for Kathleen Ryan and Robert Cham, and on July 13 Stokes filed further objections.

On July 22, the Board issued a Memorandum of Decision in which it stated it would accept the supplemental prefiled testimony of Kathleen Ryan and Robert Cham, and provided additional time for Stokes to prepare a response. The Board also requested Stokes to submit prefiled testimony concerning the feasibility of shielding the lights on the tower.

On September 1, the Board reconvened the hearing. The Board recessed the hearing pending the filing of proposed findings and Board deliberation and decision.

On September 17, the Appellants and Stokes fiied proposed findings of fact and conclusions of law. On that date, Stokes's attorney, John Ponsetto, also submitted a letter containing additional legal argument and a request that the Board not consult with its General Counsel in its deliberation on the legal issues in this appeal and petition to revoke. On September 22, the Appellants' attorney, Gerald Tarrant, submitted a letter responding to the comments in Mr. Ponsetto's letter.

The Board deliberated concerning this matter on July 14, October 7, December 1 and December 8, 1993. On December 8, following a review of the evidence and arguments presented in the case, the Board declared the record complete and adjourned the hearing. This matter is now ready for decision. To the extent any proposed findings of fact and conclusions of law are included below, they are granted; otherwise, they are denied.

II. ISSUES

1. Whether to grant Stokes's request that the Board not consult with its General Counsel in its deliberations on the legal issues in this case.

2. Whether to revoke Land Use Permit #3R0703 either because:

a) Stokes willfully or with gross negligence submitted inaccurate, erroneous, or materially incomplete information in connection with the permit application, and that accurate and complete information may have caused the district commission to deny the application or to require additional or different conditions in the permit, or

b) Stokes has violated the terms of the permit or any permit condition.

3. Whether the project complies with Criterion 1(air) with respect to interference with television and radio reception.

4. Whether the project complies with Criterion 8(aesthetics, scenic and natural beauty).

5. Whether Contel Cellular Telephone should be a co-applicant.

III. FINDINGS OF FACT

1. On July 6, 1992, Stokes filed an application for an Act 250 permit, which stated: "We intend to erect a new 300' broadcasting and communications tower to improve the service area of radio station WCVR-FM. Currently, a 120' tower is on the site."

2. The permit application was signed by Ed Stokes on behalf of Stokes Communications Corporation. Idora Tucker, who owns the land on which the tower is located and leases it to Stokes for his tower, is a co-permittee.

3. The new tower is located on a one-acre parcel of land which had previously been leased by Stokes from Idora Tucker. Stokes has used the site since erecting the tower in 1982.

4. The District #3 Environmental Commission determined to treat the application as a minor, pursuant to Board Rule 51. In response to a request for a hearing, the District Commission convened a hearing on August 5, 1992 (the hearing).

5. Stokes's application included the following statements pertinent to this proceeding:

> The project is not located in a residential area and doesn't require any construction other than a small concrete footing for the tower. ...
>
> The site varies five to ten feet on the one acre land, but since there is only a small concrete footing for the tower, there is no erosion potential. ...
>
> The existing tower is not tall enough to meet the engineering specifications of our new authorization from the FCC. No buildings, parking areas, or signs are involved, just a new tower. ...

6. On August 25, 1992, the District Commission issued Land Use Permit #3R0703 (the permit) to Stokes and Idora Tucker authorizing them to replace the 120-foot tower with a 300-foot tower. On that date the District Commission also issued supporting Findings of Fact and Conclusions of Law (the findings).

7. Condition 1 of the permit states:

> The project shall be completed as set forth in Findings of Fact and Conclusions of Law #3R0703 in accordance with the plans and exhibits stamped "approved" and on file with the District Commission, and in accordance with the conditions of this permit and findings of fact. No changes shall be made without the written approval of the District Environmental Commission.

8. Condition 6 of the permit states:

> Any material change to the exiting [sic] utility shed or other existing improvements, or increase in lighting, or increase in tower height and visibility shall first be approved by the District III Environmental Commission.

9. The findings, which are based upon oral and written representations of Stokes, contain the following statements relevant to this proceeding:

a. Aesthetics, Scenic Beauty, Historic Sites or Natural Areas:

. . .

(B) The proposed tower would be either at the same spot or within twenty feet of the existing tower. The existing tower would remain erect until the proposed tower is functional. Testimony.

(C) The proposed tower will be painted white and bright orange, and have two red beacon aircraft warning lamps at the top and obstruction lamps at the midpoint. The top lamps are required to be 620 or 700 watts each, with aviation red color filters, and to produce between 12 and 40 flashes per minute. Two lamps of 116 or 125 watts will be installed at the middle height of the tower and encased with aviation red obstruction light globes, designed for aircraft visibility. Exhibit 9.

(D) The tower and all four lamps would be visible from surrounding property. Testimony.

(E) Based on our general knowledge of the Randolph topography and our interpretation of the U.S.G.S. map contours, we conclude the tower and four lamps would be visible from Interstate 89 for at least several miles in either direction, north or south-bound. The tower lights might be visible for as much as five miles from the interstate. Exhibit 5.

(F) The applicants require the proposed height of 300 feet to achieve the necessary effective power as described under criterion l-Air Pollution, incorporated by reference. If the tower were lowered, it would need more power that would likely significantly interfere with radio and television reception. Exhibit 13, Testimony.

(G) The project is in a rural area, known for its scenic quality when viewed from the interstate or elsewhere within the township. The proposed 300 feet tower, with its red lights, would not be in harmony with these surroundings. Testimony.

10. Operation of Stokes's radio station is regulated by the Federal Communications Commission (FCC). In June 1989 Stokes applied for an FCC permit to erect a 303-foot communications tower. On July 24, 1992, Stokes received authorization from the FCC to construct the tower.

11. One of the purposes of the new 303-foot tower is to increase Stokes's FM broadcasting power from 3,000 watts to 25,000 watts to provide a better signal. The increase in power is achieved by increasing the height of the tower from 120 feet to 303 feet and by installing a more directional antenna.

12. The change in height and gain of the antenna allow Stokes to increase the efficiency of the tower without increasing the amount of electrical energy used. To achieve the same performance as a 303-foot tower, the existing 120-foot tower would require installation of a larger transmitter and use of substantially more electricity, which would increase radio frequency fields in the immediate vicinity of the tower and increase the potential for local interference.

13. At the District Commission hearing, Stokes testified that in addition to improving the performance of his radio station, the tower would be equipped with antennas to serve Randolph's ambulance and emergency organizations, Gifford Medical Center, and the Town's police and public works-departments.

14. At the hearing, Stokes testified that the 120-foot tower had a cross-section of 18 inches, and that the new tower would have an "equally narrow profile."

15. In January 1992, Stokes had contact with representatives of the PC Cellular Phone Company about leasing space on the tower. On June 19, 1992, Brian Schaffer of Contel Cellular, Inc. (Contel) called Stokes and asked for information about renting space on the tower. Stokes sent Schaffer a letter describing the company's facilities and the tower location. The letter further stated, under "Our deal":

> Tower and facilities charge: $500/month. We would also like to do a trade deal with you for phones and service in exchange for radio advertising. ...

16. At the time of the hearing, Stokes had contact with cellular telephone companies about the possibility of their leasing space on his tower, but no lease arrangements had been worked out.

17. On September 17, 1992, Stokes contacted Contel's Atlanta office by telephone. For the first time, Contel discussed with Stokes Contel's requirements for cellular telephone service on the tower. The telephone conversation was confirmed by letter dated September 18, 1992 from a Contel engineer to Stokes.

18. By letter dated October 9, 1992, Stokes confirmed his understanding of the agreement. An outline of the final agreement was communicated in a letter dated October 15, 1992 from Contel to Stokes. A sublease agreement dated February 4, 1993 was signed by representatives of Contel and Stokes.

19. Stokes and Contel subsequently agreed that Contel would construct the tower and antennas and finance them in exchange for five years' rent-free use of the tower. After five years, the tower would become the property and responsibility of Stokes.

20. The agreement between Contel and Stokes allows Contel to place a 12 by 28 foot equipment building at the base of the tower, as well as to install four to seven cellular whip antennas as near the top of the tower as possible. The initial term of the lease is five years. At the end of the initial term, Contel has an option to renew and extend the lease for five additional terms of five years each.

21. The sublease also provides that Contel will pay all legal expenses after the first $1,000 associated with this proceeding and that Contel will remove the tower if the Board either revokes the land use permit or denies the application on appeal.

22. In order for Contel to achieve maximum coverage for its cellular telephones in mountainous terrain, the higher the tower, the better.

23. After receiving the permit, Stokes initiated construction of a 303-foot tower that is more than 36 inches wide; a 28-foot by 12-foot building on a concrete foundation to house Contel's equipment; and a 4-foot by 12-foot concrete pad for a back-up generator. The construction at the tower site also included the erection of an ice bridge, which is a structure approximately 8 feet high by 60 feet long, running from the existing utility shed to the new Contel building, the purpose of which is to protect the transmission line from falling ice. The construction also included a 6-foot high chain link fence that encloses the new tower, the utility shed, new ice bridge, and new Contel building and concrete pad.

24. Subsequent to the construction of the tower, Stokes attached four Contel "whip" antennas and six two-way antennas to its 303-foot tower. Stokes's FM antenna was then placed below the Contel antennas. The FM antennas are comprised of five bays. They are 40 feet high and are placed on the side of the tower and run vertically up and down the tower. These were covered by Z-foot by 4-foot protective coverings called radomes. The 20-foot whip antennas are attached to the top of the tower. The six two-way antennas have been placed on the tower vertically; each antenna requires approximately 30 feet of vertical space on the tower. Six two-way antennas now take up approximately 180 feet of vertical space on the tower. New mounting arms were also attached to the tower which added to its overall dimensions and visibility.

25. Radomes are protective coverings to prevent icing on the antenna bays, made from rust-colored plastic. They completely enclose the bays. Each radome is approximately 12 inches high and 27 inches wide, with what are described as "stovepipes" 12 inches high protruding from both the top and the bottom of each structure. Each of the five bays has a radome structure. The radomes add considerable bulk to the tower and make it more visible.

26. The tower and associated facilities and structures constructed under Stokes's supervision and control were different from Stokes's representations to the District Commission prior to and during the hearing in the summer of 1992.

27. Stokes did not seek or receive approval from the District Commission for the construction of Contel's building or the concrete pad, the ice bridge, or the

chain link fence. Stokes also did not seek or receive approval from the District Commission to install radomes or Contel's antennas on the tower.

28. Stokes did not identify Contel to the District Commission as a potential designer, engineer, contractor, or user of the proposed tower.

29. Stokes did not contact the District Commission prior to making changes to determine whether an amendment to the permit would be required.

An acceptable engineering alternative to placing the two-way antennas vertically on a tower is to place the two-way antennas horizontally, one next to the other. Up to eight antennas can be placed horizontally on a tower so that they take up only 30 feet of vertical space. The more antennas placed horizontally, the more complex it is to engineer the placement for reception. Although vertical placement is easiest, two antennas placed horizontally on the tower is only slightly more complex. As the number of antennas is increased within a defined horizontal space, the more complex the engineering becomes. Two or three antennas placed side by side on the tower can be easily engineered, as long as the antennas have the same frequency.

31. Another engineering alternative would be diplexinq and mounting transmitters and receivers onto the same antenna. This method allows several transmitters to share the same antenna.

32. In order to comply with Federal Aviation Administration (FAA) and FCC safety requirements, towers which exceed 200 feet in height must be painted in alternating bands of orange and white. Red flashing lights must be placed at the top of the tower and non-flashing white lights must be placed at the midpoint of the tower.

33. The top of the tower has two red 620-700 watt lights that flash at approximately 30 flashes per minute. At the mid-point of the tower there are two 116-125 watt red lights. One or both lights are clearly visible in the night sky from any vantage point from which the tower can be seen. They are visible from at least four miles in all directions; on a clear night the blinking lights can be seen from Berlin Hill almost 20 miles away.

34. The base of the tower is located at an elevation approximately 1480 feet above sea level. The top of the tower is higher than any hilltop within a four mile radius. It rises more than 230 feet above the tallest trees that surround it.

35. The tower is located approximately two miles from Interstate 89.

36. As one travels north on the Interstate, the tower is minimally visible. It is never directly in the front view of the traveler, and to see it a traveler must turn and look back at an angle that ranges from 95 degrees to 150 degrees.

37. The tower is more visible to southbound travelers on I-89. The tower is visible for up to 1.5 minutes along a 1.6 mile stretch of road for a traveler driving at 65 miles per hour.

38. The landscape viewed from the Interstate has very high visual quality. Historically the Town of Randolph has had the highest number of working farms in Orange County. The views from the Interstate in the area are typical of the classic Vermont rural landscape and include views of open fields, farmsteads with clustered silos, and a background of rolling wooded fields. Most of the industries and commercial land uses in the Randolph area are located in or close to Randolph Village. Some small-scale commercial uses are located along Route 66 near the Randolph interstate exit.

39. In the viewshed area of the tower, cultural elements such as farmsteads, homes, and institutional buildings are all of traditional New England village scale. Buildings are in the height range of 25 to 40 feet with church steeples reaching somewhat higher.

40. A predominant feature of the area is Vermont Technical College's 120-foot high water tower.

41. The Village of Randolph Center is on the National Register of Historic Places. It has the typical compact character of a Vermont village with a high concentration of outstanding buildings, and its hilltop location provides a broad panoramic view from the village.

42. The Two Rivers Ottauquechee Regional Plan states that "prominent ridge lines, mountain tops ... can be readily viewed as public corridors along with

exceptional agricultural and historic areas, recognized as outstanding resource values." The Plan also states: Where land development or subdivision is proposed in the scenic areas highly visible from the public corridor, design plans should work toward the goal of minimizing the adverse visual impacts ... in ways that reduce the apparent scale of the project on the site."

43. The Theken property abuts the tower site to the west, the residence of Mrs. LaFrance abuts the tower to the south, and the Smith residence abuts the tower site to the east. The residence of Mr. and Mrs. Sax is across the street and south-east of the Smith residence and has a clear view of the tower from its living room window and front yard. The tower is visible from all these places. The lights on the tower are highly visible at night.

44. The Lake Champagne Campground is directly adjacent to the tower. It is approximately 150 acres and can accommodate approximately 130 families or groups. It often hosts 400 or more people on peak season weekends. The majority of people come from out of state and are drawn to the unique rural and pastoral character of the area. Of the total 130 campsites, 105 have direct views of the tower. The open character of the campground provides very little vegetative screening of the tower. The presence of the tower, especially at night, diminishes the rural Vermont environment associated with a camping experience.

45. The tower is also visible from the north along "Pickles Pond Road," from the South Randolph Road and Davis Road, from several town roads around Randolph Center, from Randolph Village, from several roads on Braintree Hill west of the Interstate, from the entry to the State Veterans Association Cemetery on Furnace Road and from the cemetery itself.

46. Several of the historic homes in Randolph Center have a clear view of the tower from their north and east windows. The lights on the tower heighten its visibility at night.

47. Stokes has proposed to install devices on the tower lights that will shield them. The light shields are bowl shaped and about 48 inches in diameter. They consist of ring-type louvers angled to shield light

below the horizontal plane. The shields will be 90 to 100 percent effective in reducing the visibility of the lights below the horizontal plane of the lights.

IV. CONCLUSIONS OF LAW

A. The Board deliberated on the Permittee's request to disqualify Ms. Kaplan and decided that Ms. Kaplan would continue to assist the Board in the drafting of the decision in this case. The Board does not find Ms. Kaplan's assistance will bias its decision making in this case.

B. Revocation

Board Rule 38(A) provides the following, concerning revocation, in pertinent part:

> (2) Grounds for revocation. The board may after hearing revoke a permit if it finds that: (a) The applicant or his representative willfully or with gross negligence submitted inaccurate, erroneous, or materially incomplete information in connection with the permit application, and that accurate and complete information may have caused the district commission or board to deny the application or to require additional or different conditions on the permit; or (b) the applicant or his successor in interest has violated the terms of the permit or any permit condition, the approved terms of the application, or the rules of the board; or (c) the applicant or his successor in interest has failed to file an affidavit of compliance with respect to specific conditions of a permit, contrary to a request by the board or district commission.
>
> (3) Opportunity to correct a violation. Unless there is a clear threat of irreparable harm to public health, safety, or general welfare or to the environment by reason of the violation, the board shall give the permit holder reasonable opportunity to correct any violation prior to any order of revocation becoming final. For this purpose, the board shall clearly state in writing the nature of the violation and the steps necessary for its correction or elimination. These terms may include conditions, including the posting of a bond or payments to an escrow account, to assure compliance with the board's order. In the case where a permit holder is

responsible for repeated violations, the board may revoke a permit without offering an opportunity to correct a violation.

The first part of Rule 38(A) requires a determination of whether Stokes "willfully or with gross negligence submitted inaccurate, erroneous, or materially incomplete information'* to the District Commission. A review of the facts leads us to conclude that in its description of the project in the application materials and at the hearing, Stokes submitted inaccurate, erroneous, and materially incomplete information to the District Commission, in the following respects:

1. The new tower was constructed approximately 40 feet west of where Stokes said the tower would be located.

2. Stokes told the District Commission that the tower cross-section would be the same as the 120-foot tower (18 inches) but in fact it is more than twice that size.

3. Stokes's application stated: "The project ... doesn't require any construction other than a small concrete footing for the tower." Stokes did not tell the District Commission that a 28 foot by 12 foot building with a concrete foundation, a concrete pad for a back-up generator, an ice bridge, or a chain link fence would be constructed at the tower site.

4. Stokes did not disclose that radomes would be installed around the antenna bays or that mounting arms would be installed, both of which increase the visibility of the tower.

Based upon the evidence in the record, it is not clear to the Board whether or not Stokes willfully or with gross negligence submitted the inaccurate, erroneous, or materially incomplete information. We therefore do not find that grounds for revocation exist based upon this standard in Rule 38(A)(2).

The second inquiry under Rule 38(A) is whether Stokes violated "the terms of the permit or any permit condition, the approved terms of the application, or the rules of the board." In this respect, the Board does find that there would be grounds to revoke the permit, unless an amendment permitting the above noted deviations were obtained.

Condition 1 of the permit requires that the project be completed in accordance with the findings and the representations of the permittee, and states: "No changes

shall be made without the written approval of the District Environmental Commission." A number of changes, as enumerated above, were made without review or approval by the District Commission. Thus Condition 1 of the permit was violated by Stokes's failure to seek and obtain District Commission approval prior to making changes in the project.

Because Stokes's negotiations with Contel were not substantial until after the permit was issued, the Board does not find that Stokes should have disclosed Contel's property interest in the project for the District Commission to determine whether Contel should be a co-permittee pursuant to Board Rule 10(A), which states in pertinent part:

> The application shall list the name or names of all persons who have a substantial property interest, such as through title, lease, purchase, or lease option, right-of-way or easement, in the tract or tracts of involved land by reason of ownership or control and shall describe the extent of their interests. The district commission or board may, upon its own motion or upon the motion of a party, find that the property interest of any such person is of such significance that the application cannot be accepted or the review cannot be completed without their participation as co-applicants.

However, because Contel now holds a substantial property interest in Stokes's installation, the Board does require Contel to be a co-applicant in the amendment application requested in this order.

Violation of a permit constitutes grounds for revocation of the permit. Under Rule 38(A), however, unless there is a clear threat of irreparable harm to public health, safety, or general welfare or to the environment by reason of the violation, or the permit holder is responsible for repeated violations, the Board must provide an opportunity for the permittee to correct the violation prior to any order of revocation becoming final.

We do not find that the failure to receive District Commission approval prior to commencing the unauthorized construction presents a clear threat of irreparable harm, nor do we find that there have been repeated violations. Accordingly, we will provide an opportunity for Stokes to

correct the violations in order to avoid revocation of the permit. The violations may be corrected by the filing of a permit amendment application and receipt of a permit amendment as specified in the order, below.

Stokes argues that the changes made to the project have no potential for impacts and that therefore the District Coordinator can issue an administrative amendment pursuant to Board Rule 34(D). We do not agree.

Board Rule 34(A) states:

> An amendment shall be required for any material or substantial change in a permitted project, or any administrative change in the terms and conditions of a land use permit.

"Substantial change" is defined at Rule 2(G) as

> any change in a development or subdivision which may result in significant impact with respect to any of the criteria specified in 10 V.S.A. section 6086(a)(l) through (a)(10).

"Material change" is defined at Rule 2(P) as

> any alteration to a project which has a significant impact on any finding, conclusion, term or condition of the project's permit and which affects one or more values sought to be protected by the Act.

The changes made to the project are material because they are alterations which may have significant impacts on the District Commission findings which describe the project differently from what was actually constructed. However, due to the particular circumstances of this case, including the facts that the installations on the ground are not visible from off-site and that the view of the tower from Interstate 89 is a distant one, the Board does not find that the changes to the permitted project are substantial changes as defined by Rule 2(G).

C. Criterion 1(air)

The issue on appeal with respect to Criterion 1 is whether the tower will interfere with television and radio reception. Based upon the unrefuted testimony of Stokes that the tower will not interfere with television and radio reception in the area, and Stokes's representation that the

FCC requires Stokes to satisfy any complaints of "blanketing interference" during the first year of operation with the taller tower, we conclude that Criterion 1 is satisfied.

D. Criterion 8(aesthetics, scenic and natural beauty)

10 V.S.A. § 6086(a)(8) requires that, prior to issuing a permit for the proposed project, the Board must find that the project "[w]ill not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics . ...

The Board's review under Criterion 8 must be based upon the project as reviewed by the District Commission. That is, while it is obviously difficult to distinguish between the authorized and unauthorized antennas on the tower, that distinction is made in this decision, and only the visual effect of the project for which the District Commission issued a permit is addressed here. The District Commission will review the changes made that were not authorized by the permit when it previously considered Stokes's amendment application. See Re: Ouechee Lakes Corvoration ("Ridge Condominiums"), #3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order (Feb. 3, 1987). In that case, the permittee made unauthorized changes while constructing its condominium project and then sought a permit amendment to authorize the changes. On appeal, when reviewing whether the changes had an undue adverse effect on aesthetics, we stated: "The question to be decided in this appeal is ... whether the changes constructed by QLC, when coupled with the original project, have [an undue adverse effect on aesthetics]."
Id. at 12.

The Board uses a two-part test to determine whether a project meets Criterion 8. First, it determines whether the project will have an adverse effect. Second, it determines whether the adverse effect, if any, is undue. Re: Ouechee Lakes Corv., Applications #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law and Order at 18-19 (January 13, 1986).

With respect to the analysis of adverse effects on aesthetics and scenic beauty, the Board looks to whether a proposed project will be in harmony with its surroundings or, in other words, whether it will "fit" the context within which it will be located. In making this evaluation, the Board examines a number of specific factors, including the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability for the project's context of the colors and

materials selected for the project, the locations from which the project can be viewed, and the potential impact of the project on open space. Id. at 18.

We believe that the 303-foot tower has an adverse effect on the aesthetics and scenic beauty of the area. The tower is visible from many places in the area, and it is out of character with the highly scenic classic rural Vermont landscape in which it is located.

In evaluating whether adverse effects on aesthetics and scenic beauty are undue, the Board analyzes three factors and concludes that a project is undue if it reaches a positive conclusion with respect to any one of these factors, which are:

a. Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?

b. Does the project offend the sensibilities of the average person? Is it offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area?

c. Has the Applicant failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the proposed project with its surroundings?

Quechee at 19-20.

With respect to the first factor, the Two-Rivers Ottauquechee Regional Plan, which encourages minimizing adverse visual impacts in highly visible scenic areas, does provide a clear, written community standard for minimizing visual impacts of development along ridgelines as seen from highly traveled corridors. However, the Board does not find that the tower, as built, violates this standard in the day time.

With respect to the second standard, we believe that a distinction must be made between the tower during the day and the tower at night. Although the tower is out of character with the landscape, we do not find that it unduly diminishes the scenic qualities of the area. It is visible from the Interstate for only a short period of time. Even though it is visible from a number of other places in the area, it does not dominate the landscape.

However, the lights increase the visibility of the tower so that it dominates the landscape and unduly diminishes the aesthetic quality of the nighttime sky.

Stokes has proposed installing shields on the lights so that their visibility except to aircraft is greatly reduced. Based upon Stokes's representations, the Board finds this to be reasonable mitigation of the adverse aesthetic impact of the lights at night. Accordingly, the Board will require Stokes to install shields on the tower lights that result in substantial (75-90 percent) reduction in the direct visibility of the lights, not including light reflected or refracted by fog, clouds, or precipitation, below the horizontal plane of the lights.

With respect to the Appellants' suggestions that the visibility of the tower could be mitigated by a shorter tower with antennas installed on the tower horizontally rather than vertically, the Board does not find that this would reduce the visibility of the tower. A shorter tower with antennas branching off horizontally would be at least as visually intrusive as a tall, thin tower with antennas stacked vertically.

Accordingly, we conclude that with the visibility of the night lights reduced substantially by the installation of shields, the tower will not create an undue adverse effect upon aesthetics and scenic and natural beauty.

V. ORDER

1. Stokes has not complied with, and is therefore in violation of, Land Use Permit #3R0703 by making changes to the project prior to approval from the District Commission. This permit will be revoked unless the following corrective measures are taken:

On or before January 26, 1994, Stokes and Contel, as co-applicants, shall file an application for an amendment to the permit to authorize i) the new location of the tower; ii) the actual size of the tower's cross-section; iii) the Contel building and concrete foundation at the tower site; iv) the concrete pad for a back-up generator; v) the ice bridge; vi) the chain link fence; and vii) all the antennas, radomes, mounting arms, and any other structures or appurtenances that are now or in the future will be attached to the tower. Stokes shall diligently pursue the amendment application and shall respond to requests from the District Commission for additional information within two weeks of such requests.

2. Land Use Permit #3R0703-EB is hereby issued. Jurisdiction is returned to the District #3 Environmental Commission.

Dated at Montpelier, Vermont this 13th day of December, 1993.

ENVIRONMENTAL BOARD

Elizabeth Courtney, Chair
Ferdinand Bongartz
Terry Ehrich
Lixi Fortna
Arthur Gibb
Samuel Lloyd
Jean Richardson
Steve E. Wright

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