

VERMONT ENVIRONMENTAL BOARD
10 V.S.A. § 6001 et seq.

RE: Stokes Communication Corp. and Idora Tucker
Land Use Permit #3R0703-EB (Revocation)

MEMORANDUM OF DECISION

I. INTRODUCTION

On October 11, 1995, Pierre LaFrance, Richard **Theken**, Bryant Smith, Elizabeth LaFrance and Joan Sax ("Petitioners") filed a Petition for Revocation of Permit ("**Petition**"). The Petition seeks revocation of Land Use Permit #3R0703 which the District #3 Environmental Commission ("District **Commission**") issued to Stokes Communications Corp. ("**Stokes**") on August 25, 1992 and the Environmental Board amended on December 13, 1993. The Petition is based upon two grounds: (a) failure by Stokes to submit an amendment application; and (b) failure by Stokes to install certain light shields. On November 1, 1995, the Petitioners filed a Motion to Rename Petition to Revoke ("**Motion to Rename**") by which they seek to change the name of the Petition to Motion to Enforce Existing Revocation Order ("**Motion to Enforce**").

On November 29, 1995, the Board considered the Petition, Motion to Rename and Motion to Enforce in deliberative session. As discussed more fully below, the Board denies them all in part and grants them all in part. As a consequence, the Board will hold two separate and distinct revocation proceedings, one pursuant to 3 V.S.A. § 814 and the other pursuant to EBR 38, and consider further whether to initiate enforcement actions.

II. BACKGROUND

In 1992, the District Commission issued Stokes a permit to replace a 120 foot broadcasting and communications tower with a 300 foot tower, and Stokes appealed. While the appeal was pending, Stokes built a tower and conducted related development activity, and the Petitioners filed a petition to revoke the permit. The Petitioners alleged that the tower and the related development activity, as built, violated the permit. In early 1993, the Board consolidated the appeal and revocation.

On December 13, 1993, the Board issued a bifurcated decision Re: Stokes Communication Corp., #3R0703-EB, Findings of Fact, Conclusions of Law, and Order (Dec. 13, 1993 ("Decision")). With respect to the revocation, the Board compared the tower and related development activity, as built, to the permit and found that Stokes violated the permit. However, the Board gave Stokes a chance to cure the

violation by filing an amendment application addressing the tower and related development activity, as built, with the District Commission on or before January 26, 1994 ("Amendment Application Requirement"). The Board warned Stokes that it would revoke the permit if Stokes did not cure the violation: 'With respect-to-the -appeal, the Board reviewed the tower, as approved by the District Commission, under Criteria 1 (air) and 8 (aesthetics).¹ The Board found that the tower, as approved by the District Commission, complied with Criteria 1 and 8 if certain light shields were installed on or before February 18, 1994 ("Light Shield Condition*'). The Board returned jurisdiction back to the District Commission.² Neither the Board nor the District Commission has as yet reviewed the tower and related development activity, as built, under the criteria.

Stokes appealed both "parts" of the Decision to the Vermont Supreme Court. While the appeal to the Court was pending, the Board stayed the Decision until the appeal was resolved. On July 21, 1995, the Court affirmed the Board in In Re Stokes Communications Corporation, No. 94-208 (slip op., July 21, 1995). In August and September of 1995, Stokes and the Appellants communicated with the Board and the Board issued a Memorandum of Decision regarding the Amendment Application Requirement and Light Shield Condition deadlines.

On or about November 3, 1995, Stokes filed an amendment application and related cover letter with the District

¹ *Stokes did not appeal under any other criteria.*

² *The Board could not and did not remand jurisdiction over comparison of the tower and related development activity, as built, with the permit. All revocation petitions are filed with and heard by the Board. See 10 V.S.A § 6090(c) and Environmental Board Rule ("EBR") 38. Jurisdiction over this revocation related comparison remains with the Board. However, the Board could and did remand jurisdiction over comparison of the tower and related development activity, as built, with the criteria. This latter comparison will necessarily involve consideration of those matters specifically addressed in paragraph 1 of the Decision's Order section.*

Commission.³ On or about November 7, 1995, the Petitioners filed a Motion to Dismiss the amendment application. On November 9, 1995, District #3 Coordinator, Robert M. **Sanford**, determined that the amendment application was substantially incomplete and directed Stokes to submit certain information **and/or take** additional steps to correct the deficiencies.

Stokes acknowledges- that it has not yet installed the light shields.

III. DEADLINES

The Decision was issued on December 13, 1993. Stokes had 44 days to cure the violation with an amendment application and 67 days to install the lights shields. The Board has not altered these timeframes. However, the Board stayed the Decision pending resolution by the Supreme Court. The Supreme Court affirmed the Board on July 21, 1995. 44 days from July 21, 1995 is September 4, 1995." 67 days from July 21, 1995 is September 26, 1995. Even if it is assumed **that** the Amendment Application Requirement and Light Shield Condition deadlines were stayed until September 4, 1995 and September 26, 1995, it appears that Stokes did not meet **either** of them.

IV. PETITION, MOTION TO RENAME AND MOTION TO ENFORCE

As noted above, the Petition is based upon two grounds. "First, the Petitioners assert that the permit should be revoked because Stokes violated it and has not filed a **timely** and complete amendment application to cure the

³ In the cover letter, Stokes erroneously asserts that **"the District Commission's limited authority in the amendment application is to issue an amendment to the Land Use Permit #3R0703-EB, so that the document accurately reflects what has been constructed, and to consider Stokes' request for an amendment of the deadline for filing the amendment application and installing the light shields."** First, the District Commission must review the amendment **application** under all of the criteria. Before it can do so, **Stokes** must submit detailed and complete information **adequately** addressing each criterion. Second, Stokes' **'deadline extension request is, most likely, impacted or controlled by the principles of collateral estoppel and/or res judicata.**

violation. As suggested by the Petitioners in the Motion to Rename, the Board is not compelled to hold another hearing to determine if Stokes has violated the permit. The Board already determined in the Decision that such a violation occurred. As further suggested by the Petitioners in the Motion to Rename, a **show cause hearing to determine** whether Stokes cured the violation is necessary. See 3 V.S.A. § 814. Thus, the Board grants the Motion to Rename and the Motion to Enforce as they apply to the Amendment Application Requirement.⁴ Based upon the record in this matter, it appears that Stokes has not met the Amendment Application Requirement. The Board will decide this factual issue after a public hearing.

Second, the Petitioners assert that the permit should be revoked because Stokes has not installed the light shields. Compliance with this permit condition has not yet been addressed by the Board in a revocation proceeding. As a consequence, with respect to the Light Shield Condition, the Board will treat the Petition as an **initial** pleading in a contested case. See 10 V.S.A. § 6090(c) and EBR 38.⁵

V. ENFORCEMENT

The Motion to Enforce raises the question of Act 250 enforcement vis-a-vis permit violations. The Board's **enforcement** authority is set forth in 10 V.S.A. § 8001 et seq. and 10 V.S.A. § 8221. The Board may pursue enforcement **options** independent of revocation proceedings. The Board's rules provide:

Nothing in this rule shall be construed to preclude the Board or any other agency-of the-state from instituting such other action, criminal or civil, as may be

⁴ *The Board does not interpret the Motion to Enforce as applying to the Light Shield Condition. To the extent it does, it is denied.*

⁵ *This determination is contrary to the relief requested by the Petitioners. If the Petitioners do not wish to proceed with a full revocation proceeding regarding the Light Shield Condition, they should file a motion to dismiss the Petition with the Board. As noted earlier, the Motion to Enforce addresses the Amendment Application Requirement.*

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permitted by law against the permit holder for any violation.

EBR 38(A)(4). The Board has sole discretion to determine whether or not initiation and/or pursuit of an enforcement action is warranted.

ORDER

1. The Board intends to revoke the permit and/or take other related action due to Stokes' alleged failure to cure the violation addressed in the Decision with a timely and complete amendment application.
2. The Board will convene a public hearing on Wednesday, December 20, 1995, at **2:15** p.m. in the Ethan Allen Room, Capitol Plaza, 100 State Street, Montpelier, Vermont in accordance with 3 V.S.A. § 814(c) to give Stokes an opportunity to show compliance with all lawful requirements for retention of the permit ("Show Cause Hearing"). Proceedings relating to the Amendment Application Requirement shall be captioned and appear on the docket as follows:

Re: Stokes Communications Corp.,
Land Use Permit Amendment #3R0703-EB
(Amendment Application Revocation)

1. A public notice **duly** warning this public hearing shall be published in The Valley News in a timely manner.

Any party wishing to present evidence at the Show Cause Hearing shall advise the Board accordingly, in writing, on or before Friday, December 15, 1995. Any party wishing to file a written memorandum addressing matters raised by paragraphs 1 and 2 of this Order may do so on or before Friday, December 15, 1995. Such memoranda should not exceed ten double spaced pages in length.

3. The Board will establish, on its own motion and/or that of the Petitioners pursuant to the Petition, a separate and independent revocation proceeding in accordance with 10 V.S.A. § 6090 and EBR 38 to determine whether or not to revoke the permit due to Stokes alleged failure to comply with the Light Shield Condition in a timely and complete manner. Proceedings relating to the Light Shield Condition shall be captioned and appear on the docket as follows:

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Re: Stokes Communications Corp.,
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4. On Wednesday, December 20, 1995, at **3:30** p.m. in the **Ethan** Allen Room, Capitol Plaza, 100 State Street, Montpelier, Vermont the Chair of the Board or its duly authorized delegate, will meet with the parties or their representatives regarding the following matter:

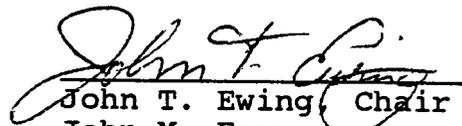
Re: Stokes Communications Corp.,
Land Use Permit Amendment #3R0703-EB
(Light Shield Revocation)

A public notice duly warning this public meeting shall be published in The Valley News in a timely manner. The procedural requirements associated with this public meeting shall be set forth in the Notice:

5. Any party wishing to file a written memorandum addressing any matter raised by this Memorandum of Decision and Order may do so on or before Friday, December 15, 1995. Such memoranda should not exceed ten double spaced pages in length.

Dated at Montpelier, Vermont this 6th day of December, 1995.

ENVIRONMENTAL BOARD


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