

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

*Re: Nextel WIP Lease Corporation
d/b/a Nextel Partners and
Charles Andrews*

Land Use Permit Application
#3W0876-EB

Remand Order

This proceeding involves an appeal from the denial of Land Use Permit Application #3W0876 and accompanying Findings of Fact, Conclusions of Law, and Order (Decision), issued by the District 3 Environmental Commission (Commission) to Nextel WIP Lease Corporation d/b/a Nextel Partners and Charles Andrews (Nextel).

I. History

On May 1, 2002, Nextel filed Land Use Permit Application #3W0876 (Application) with the Commission seeking authorization to construct two flush-mounted, eight-foot panel antennas on a ninety-six-foot wood "pole tower" and an equipment shed, all served by a 2,120-foot access road, on a 10,000 s. f. leased area on a 118-acre tract of land in Bridgewater, Vermont (Project).

On September 27, 2002, the Commission denied the Application.

On October 24, 2002, Nextel filed an appeal with the Environmental Board (Board) from the Decision alleging that the Commission erred in its conclusions concerning 10 V.S.A. §6086(a)(10) (Bridgewater Town Plan and Two Rivers-Ottawaquechee Regional Plan) and its refusal to limit the scope of the "permitted project" under the Board's decision in *Stonybrook Condominium Owners Association*, Declaratory Ruling #385, Findings of Fact, Conclusions of Law, and Order (May 18, 2001) (*Stonybrook*).

On November 26, 2002, Board Chair Marcy Harding convened a Prehearing Conference with the following participants:

Nextel by Charles F. Storrow, Esq.
Two Rivers-Ottawaquechee Regional Commission (TRORC) by Kevin Geiger and Don Bourdon
Town of Bridgewater, Vermont by Nelson B. Lee, Jr.

On November 27, 2002, Chair Harding issued a Prehearing Conference Report and Order.

On January 9, 2003, Nextel, TRORC, and the Town of Bridgewater filed a Stipulated Motion, asking that the Board remand this matter to the Commission and further asking that proceedings before the Board in the matter be continued pending proceedings before the Commission following remand.

On January 10, 2003, the Agency of Natural Resources (ANR) orally informed the Board's General Counsel that it did not oppose the Stipulated Motion.

On January 10, 2003, Chair Harding issued a Proposed Remand Order, proposing that this matter be remanded to the Commission as the parties had requested. The Proposed Order allowed objections to be filed on or before close of business on January 17, 2003; no objections were filed by that deadline.

II. Discussion ¹

A. Request for Remand

This matter involves Nextel's proposed wireless telecommunications facility located on property owned by co-applicant Charles Andrews in the Town of Bridgewater. By decision dated September 27, 2002, the Commission denied Nextel's and Mr. Andrews' application for a Land Use Permit on the basis that the proposed project did not comply with either TRORC's regional plan or the Town of Bridgewater's Town Plan and thus did not satisfy Criterion 10. The Commission determined that both the Regional Plan and the Town Plan favor the utilization of existing and available wireless telecommunications facilities over the development of new facilities and that, in this case, Nextel had not sufficiently explained why it could not utilize the wireless telecommunications facility proposed by Devon Mobile Communications (Devon) on a nearby tract of land, which had been authorized under Land Use Permit #3W0863, issued on January 30, 2002 (Devon Permit).

Nextel is now in the process of acquiring Devon's rights under the Devon Permit. The tower and related improvements authorized under the Devon Permit have not yet been constructed. Once it has completed the acquisition of Devon's rights under the Devon Permit, Nextel intends to formally abandon its rights under that permit by way of filing a Petition for Declaration of Abandonment with the Commission, which, if approved by the Commission, will negate the effectiveness of the Devon site as an alternative to Nextel's proposed facility.

Nextel's request for a Declaration of Abandonment will be coupled with (and contingent upon) a Motion for Reconsideration under Environmental Board Rule (EBR)

¹ The facts set forth in this decision are drawn from the statements made in the Stipulated Motion, which, for the purposes of this motion are assumed to be accurate.

31(B) in which Nextel will ask the Commission to reconsider its denial of a permit for Nextel's facility in light of the abandonment of the permit for the Devon facility. In essence, Nextel's acquisition and abandonment of the Devon Permit will negate the sole basis for the Commission's denial of a permit for the Nextel facility by buying out Devon and then abandoning the rights Devon had under the permit it obtained.²

Because jurisdiction over this matter cannot be both in the Board and the Commission simultaneously, see *Kotz v. Kotz*, 134 Vt. 36, 38 (1975), and see, *Re: Town of Milton, #4C0046-5*, Memorandum of Decision at 4 (Apr. 14, 2000) ("Accordingly, jurisdiction lies either in the lower court of the appellate court, but not both"), and Nextel wishes to ask the Commission to reconsider its permit denial in light of Nextel's acquisition of Devon's rights it is necessary that the Board first remand jurisdiction over this matter back to the Commission in order to allow Nextel to seek such reconsideration from the Commission.³

Further, as jurisdiction over the Devon Permit is presently vested in the Commission (as no appeal to the Board has been taken regarding that permit), abandonment of the Devon Permit must be initiated in the first instance in the Commission. See, EBR 38(B)(2); *Re: Rutland Gas & Oil Co. d/b/a Rutland Fuel Company*, Declaratory Ruling Request #410, Dismissal Order at 3 (Jul. 19, 2002). Thus, as the abandonment of the Devon Permit is inextricably tied to Nextel's reconsideration, it is only logical that this matter be remanded to the Commission for further proceedings.

² Nextel notes that, from its perspective building and utilizing the Devon tower is not an attractive alternative to its own proposed facility because the radio signal coverage afforded by the Devon tower would not be very effective and may require Nextel to reconfigure the network of facilities it is trying to establish in the Ottauquechee river valley/Route 4 corridor. Additionally, Nextel and the other movants feel that Nextel's facility is preferable, in terms of its aesthetic impact, to the Devon facility, and point to the Commission's finding in this case that Nextel's facility would not have an "adverse" aesthetic impact.

³ Nextel also intends to ask the Commission to reconsider the portion of its decision denying Nextel's request to limit Act 250's jurisdiction to a portion of Mr. Andrews' property per the Board's *Stonybrook* decision. In its decision the Commission stated that Nextel had not sufficiently delineated the portion of Mr. Andrews' property that would be impacted by Nextel's project. Nextel has subsequently commissioned a survey-type drawing demarcating the portions of Mr. Andrews' property that it feels should be the extent of Act 250's jurisdiction over his property, and would like to present that drawing to the Commission.

B. *Request for Continuance*

Pursuant to the Prehearing Conference Report and Order (Prehearing Order) in this matter the parties were directed to file their direct pre-filed testimony, exhibits and list of witnesses by January 8, 2003. This date, obviously, has come and gone, and no party has made such filings, as they have rightly expended their efforts to resolve this case as described above.

The parties' Stipulated Motion requests, in order to accommodate Nextel's efforts to resolve this matter, the deadlines and hearing provided for in the Prehearing Order be continued until after the Commission has acted on Nextel's requests for abandonment of the Devon Permit and reconsideration of the Commission's permit denial in the instant matter. Unfortunately, for the reasons relating to dual jurisdiction as noted above, the Board cannot both remand this matter to the Commission and yet still retain jurisdiction over this matter by virtue of a Continuance Order. *See, Re: Town of Milton, supra*, at 4: "Under the teachings of *Kotz*, if the Board wants to remand this case, it must remand *the entire case* back to the District Commission." (Emphasis added)

Should proceedings before the Commission not proceed as envisioned by the parties, any party can initiate an appeal from those proceedings as provided by law and the Board Rules.

III. Order

Jurisdiction over this matter is remanded to the District 3 Environmental Commission.

Dated at Montpelier, Vermont this 21st day of January 2003.

ENVIRONMENTAL BOARD

_____/s/Marcy Harding_____
Marcy Harding, Chair