

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

RE: Burlington Broadcasters, Inc. d/b/a WIZN; Land Use Permit
Charlotte Volunteer Fire & Rescue; Application #4C1004R-EB
& John Lane

MEMORANDUM OF DECISION

This proceeding is a consolidation of two appeals and two Declaratory Ruling petitions concerning the WIZN radio tower located in Charlotte, Vermont. This Memorandum of Decision addresses preliminary issues concerning radiofrequency radiation, radiofrequency interference, and federal preemption, as well as a late notice of appearance by the Charlotte School Board.

I. PROCEDURAL SUMMARY

On June 4, 1999 the District #4 Environmental Commission (Commission) issued Land Use Permit (LUP) #4C1004R (Permit) and supporting Findings of Fact, Conclusions of Law, and Order (Reconsidered Decision) to Burlington Broadcasters, Inc. d/b/a WIZN (Burlington Broadcasters), Charlotte Volunteer Fire and Rescue Services, Inc. (CVFRS), and John Lane (collectively, Permittees). The Permit authorizes a previously constructed 199-foot communication and broadcast tower and an equipment building (Project). The Project is located on 17 acres of land on the northwest side of Pease Mountain, off Church Road in Charlotte. The tower currently contains broadcast antennae used by WIZN and CVFRS, as well as four antennae presently used and maintained by Verizon. Verizon's use of the tower is authorized under Land Use Permit #4C0901.

On July 2, 1999, Mary Beth Freeman, Graeme Freeman, Elaine Ittleman, Dr. Frank Ittleman (Freeman et al.) and Citizens for Appropriate Siting of Telecommunications Facilities (CCAPTF) (Freeman et al. and CCAPTF hereinafter collectively referred to as Appellants) filed an appeal with the Vermont Environmental Board (Board) from the Permit and the Reconsidered Decision alleging that the Commission erred in its conclusions concerning 10 V.S.A. Sections 6086(a)(1), (9)(K), (10) and with respect to its rulings on party status. Appellants' July 2, 1999 appeal incorporates by reference their previously filed appeal dated July 6, 1998 of the Commission's initial decision dated June 5, 1998 (1998 Decision). On July 14, 1999, Verizon filed a cross-appeal pertaining to the Project, wherein it contests the Commission's denial of Verizon's party status in the #4C1004R proceeding. Verizon's cross-appeal supersedes a Notice of Appeal filed on July 6, 1998 relative to the Commission's 1998 Decision.

The issuance of the Permit by the Commission vested jurisdiction with the Board to hear several other appeals that were filed in June and July of 1998 (Other 1998 Appeals). The Other 1998 Appeals were held in abeyance pending the

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Commission's proceedings on Motions to Alter and Reconsider the Commission's Decision. The Other 1998 Appeals include an appeal filed by Charlotte Congregational Church (CCC), an appeal filed by Burlington Broadcasters, and an appeal filed by the Charlotte Central School Board (CCSB). Also pending on the Board's Docket are Declaratory Rulings #322 and #323, each of which appeals Jurisdictional Opinion # 4-116, dated March 29, 1996, which pertains to the Project.

As a result of the issuance of the Permit on June 4, 1999, Burlington Broadcasters' appeal of the Commission's June 5, 1998 Decision became moot. Verizon affirmatively superseded its July 6, 1998 appeal with its appeal of Land Use Permit #4C1004R filed on July 14, 1999 and so its July 6, 1998 appeal is also moot. Both of the appeals referenced in this paragraph have been dismissed.

Also as a consequence of the Commission's issuance of the 1998 Decision and Land Use Permit #4C1004R, the appeals filed by CCSB and CCC on July 13, 1998 and July 10, 1998, respectively, are moot.

Freeman et al. consolidated the claims set forth in their 1998 Appeals with those being pursued in their Notice of Appeal dated July 2, 1999, and have accordingly preserved any arguments raised in the former appeal to the extent now applicable.

There was also a revocation proceeding relative to a Permit #4C0901 issued to Steve Korwan d/b/a Contel Cellular, to which Verizon is a successor in interest. By a decision dated August 7, 2000, the Board dismissed the revocation petition. That decision has now become final.

On April 10, 2003, Chair Moulton Powden convened a prehearing conference. At the prehearing conference, the parties agreed that the two declaratory rulings should remain continued awaiting resolution of this appeal proceeding. During the prehearing conference, Chair Moulton Powden made verbal party status rulings and also established additional party status issues to be decided as preliminary issues following filings by the parties and potential parties all of which are set forth in the April 18, 2003 Prehearing Conference Report and Order.

On April 17, 2003, Burlington Broadcasters filed Motions to Dismiss Mary Beth Freeman, CCAPTF, and CCC. On the same date, Appellants filed a Motion to Recuse Board Member Christopher Roy, Esq. This motion currently remains under advisement.

On April 25, 2003, Verizon filed an objection to the merits hearing date. On April 29, 2003, Appellants, Verizon and CCC filed petitions for party status. The

Board deliberated on these motions and petitions on May 21, 2003 and issued a Memorandum of Decision on them on June 6, 2003.

On June 18, 2003, the Charlotte School Board filed a letter seeking to enter a late appearance. Burlington Broadcasters, Inc. objected to this request on June 27, 2003.

Briefs on the Group 1 preliminary issues were filed in early July.¹ On July 16, 2003, the Board deliberated on the Group 1 Preliminary Issues (defined below) and objections to the late notice of appearance by the Charlotte School Board.

II. GROUP 1 PRELIMINARY ISSUES

The Group 1 Preliminary Issues before the Board are as follows:

- A. Does the Board have jurisdiction over Radio Frequency Interference (RFI) as part of the Board's review of the Project's compliance with Criterion 1(air)?
- B. Does the Board have jurisdiction over Radio Frequency Radiation (RFR) issues as part of the Board's review of the Project's compliance with Criterion 1(air)? (Stated otherwise, is the Board preempted by the Federal Communication Commission (FCC) jurisdiction for consideration of RFR as part of the Board's review of the Project's compliance with Criterion 1(air)?)
- C. If the Board has jurisdiction (the Board is not preempted), is the Board bound by law to apply the FCC Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation (Guidelines) as part of the Board's review of the Project's compliance with Criterion 1(air)?
- D. If the Board is not bound to use the Guidelines, should the Board use the Guidelines or another standard as part of the Board's review of the Project's compliance with Criterion 1(air)?

These issues are addressed in the discussion section below.

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Two of the reply briefs were not received until the day after they were due. The Board did review these late briefs, but cautions the parties that it may not accept late filings in the future.

III. DISCUSSION

The Board must decide several preliminary issues² related to radiofrequency radiation (RFR), radiofrequency interference (RFI), and federal preemption, as well as objections to a late notice of appearance by the Charlotte School Board. Each issue is addressed in turn, below.

A. Does the Board have jurisdiction over Radio Frequency Interference (RFI) as part of the Board's review of the Project's compliance with Criterion 1(air)?

As Burlington Broadcasters points out, the United States Court of Appeals for the Second Circuit has held that federal law preempts state and local regulation of RFI. *Freeman v. Burlington Broadcasters, Inc.*, 204 F.3d 311, 320 (2d. Cir. 2000), *cert. denied*, 531 U.S. 917 (2000). This decision involved the parties to this Act 250 proceeding, in the context of a zoning appeal. As Burlington Broadcasters correctly points out, there is ample support for this in caselaw from other jurisdictions, including the FCC itself. The law on this point is clear: "federal power in the area of radio frequency interference is exclusive; to the extent that any state or local government attempts to regulate in this area, their regulations are preempted." *In re 960 Radio, Inc.*, FCC 85-578 (Nov. 4, 1985), 1985 WL 193883 (1985). The Board does not have jurisdiction to regulate RFI.

B. Does the Board have jurisdiction over Radio Frequency Radiation (RFR) issues as part of the Board's review of the Project's compliance with Criterion 1(air)? (Stated otherwise, is the Board preempted by the Federal Communication Commission (FCC) jurisdiction for consideration of RFR as part of the Board's review of the Project's compliance with Criterion 1(air)?

The second preliminary issue is whether the Board is preempted from considering RFR in its review under Criterion 1(A). The Telecommunications Act of 1996 makes clear that the Board is preempted with respect to regulation of

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The Board notes that these are preliminary legal issues and that none of the documents submitted in support of briefs is in the evidentiary record. Should any party wish to have any of these documents prefiled as an exhibit, that must be done in accordance with the prefiling schedule. However, given the unusually high volume of material already filed, the parties are encouraged to incorporate previously filed documents into their prefiled cases where possible by providing clear references in each exhibit list on where to find the specific exhibit, and exhibit labels for each.

personal wireless services facilities that comply with FCC regulations. 47 U.S.C. § 332(c)(7)(B)(iv).³ But this is the extent of federal preemption.

Personal wireless service facilities are defined as facilities for the provision of commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services, commonly referred to as "cell phone" services. 47 U.S.C. § 332(c)(7)(C)(i)(defining "personal wireless service") and § 332(c)(7)(C)(ii)(defining "personal wireless service facilities").

The preemption with respect to personal wireless service facilities is conditional, based on a showing that the facility complies with FCC regulations (currently, the FCC Guidelines).

No binding legal authority indicates that the Board is preempted from regulating RFR with respect to other sources than personal wireless facilities, such as radio broadcasting towers. In fact, there is legal authority to the contrary. See, e.g., *In the Matter of Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation*, F.C.C. 96-326, No. 93-62 (Aug. 1, 1996) ("The Telecommunications Act does not preempt state or local regulations relating to RF emissions [RFR] of broadcast facilities or other facilities that do not fall within the definition of personal wireless facilities."), *aff'd in relevant part on reconsideration* (Aug. 1997). Statements by the FCC that it will expressly preempt states from

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The Telecommunications Act of 1996 provides, in relevant part, that:

- (7) Preservation of local zoning authority
 - (A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

- (B) Limitations

* * *

- (iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

47 U.S.C. § 332(c)(7).

regulating RFR if states raise impediments to radio and telecommunications providers do not support Burlington Broadcasters' position. Instead, they demonstrate that this area of regulation is not preempted currently.

This, of course, does not mean that the Board should not avail itself of the Guidelines or other federal guidance in deciding this case, if appropriate. It merely means that the Board has jurisdiction to consider RFR effects in its review under Criterion 1(air) with respect to anything but a personal wireless service facility.

C. If the Board has jurisdiction (the Board is not preempted), is the Board bound by law to apply the FCC Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation (Guidelines) as part of the Board's review of the Project's compliance with Criterion 1(air)?

The Board is an independent regulatory body with supervisory powers over environmental matters. *In re Stokes Communication Corporation*, 164 Vt. 30, 38 (1995)(citing *In re Hawk Mountain Corp.*, 149 Vt. 179, 185, 542 A.2d 261, 264 (1988)). Pursuant to 10 V.S.A. § 6086(c), the Board may impose reasonable permit conditions within the limits of its police power to ensure that projects comply with the statutory criteria. See, *In re Denio*, 158 Vt. 230, 239-40 (1992)(citing *In re Quechee Lakes Corp.*, 154 Vt. 543, 550 n.4 (1990)).

As discussed above, except where personal wireless service facilities are concerned, there is no legal authority which binds the Board to use any particular regulatory guidelines in its review under Act 250 and Board rules. The Board may choose to consider compliance with the Guidelines in its review, but the Board is not limited in its review. See, e.g., *Re: Hannaford Brothers Co. and Southland Enterprises, Inc.*, #4C0238-5-EB, Memorandum of Decision at 4 (Jul. 2, 2002) (EPA standard provides only guidance to Board's review of noise under Criterion 8). Also, Burlington Broadcasters' argument that the Board's Act 250 application forms somehow bind it to use these guidelines is misguided. The Board is not bound by law to apply the Guidelines.

D. If the Board is not bound to use the Guidelines, should the Board use the Guidelines or another standard as part of the Board's review of the Project's compliance with Criterion 1(air)?

The only standards the Board is bound to apply are Act 250 and Board rules, except with respect to personal wireless service facilities, as set forth above. Whether the Board should apply Guidelines (or any other such standard) to gauge

compliance with Criterion 1(air) is a question of fact that cannot be answered until the evidence is heard. The Board may find that the Guidelines (or some other standard) are appropriate to use in this case. However, this issue cannot be decided as a matter of law.

The Board is not bound to apply any such standard. Regarding whether it would be advisable for the Board to apply any particular standard, this issue is premature.

E. Late Notice of Appearance by Charlotte School Board

By letter dated June 14, 2003 the Charlotte School Board seeks to enter a late appearance in this case. The school board argues that it has good cause for this late appearance because its representative, Richard Bernstein, was out of the country for two weeks in mid-April 2003 and could not put this before the school board until mid-May 2003. Burlington Broadcasters objects.

Notice of the April 10, 2003 prehearing conference was sent to the Charlotte School Board on March 24, 2003, before Dr. Bernstein left the country. In that notice, parties were instructed to notify the Board of any intent to participate as a party. The Charlotte School Board did not do so.

Dr. Bernstein states that he was unable to place this before the school board until mid-May, due to his absence from the country in mid-April. This does not explain why Dr. Bernstein failed to file anything with the Board -- not even a request for a continuance -- before mid-June of 2003. The Board concludes that the Charlotte School Board has failed to demonstrate good cause to allow this late appearance.

Burlington Broadcasters points out that other parties may call Dr. Bernstein as a witness on Criterion 6, so the school would not be unduly prejudiced by its inability to participate as a party. Other parties are also free to call Dr. Bernstein as a witness on the RFR health issues under Criterion 1(air) in which the school has expressed an interest. However, there is no guarantee that anyone will call Dr. Bernstein as a witness or otherwise give the school an opportunity to be heard.

Burlington Broadcasters also claims that it would be unfairly burdened if the school is allowed to participate as a party. No doubt allowing a new party to participate would have caused some inconvenience. But given the fact that the hearing is not scheduled until March 2004, that inconvenience would not rise to the level of prejudice or undue burden. Nevertheless, this burden is not justified by Charlotte School Board.

The Charlotte School Board failed to make its interest in participating as a party known in a timely manner, despite ample opportunity to do so. Because the school board has failed to state good cause for its untimely appearance, the Board denies the school board's request.

III. ORDER

1. The Board does not have jurisdiction over Radio Frequency Interference (RFI) as part of the Board's review of the Project's compliance with Criterion 1(air). The first Group 1 Preliminary Issue is answered in the negative.
2. The Board has jurisdiction over Radio Frequency Radiation (RFR) issues as part of the Board's review of the Project's compliance with Criterion 1(air), except where it is preempted by FCC jurisdiction over regulation of personal wireless service facilities, as stated herein.
3. The Board is not bound by law to apply the FCC Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation (Guidelines) as part of the Board's review of the Project's compliance with Criterion 1(air). The third Group 1 Preliminary Issue is answered in the negative.
4. The fourth Group 1 Preliminary Issue, whether the Board should use the Guidelines or another standard as part of the Board's review of the Project's compliance with Criterion 1(air), is dismissed as premature.
5. The Charlotte School Board's Request to Enter a Late Appearance is DENIED.

DATED at Montpelier, Vermont this 8th day of August, 2003.

ENVIRONMENTAL BOARD*



Patricia Moulton Powden, Chair
George Holland
Samuel Lloyd
Donald Marsh
Patricia A. Nowak
Alice Olenick
Richard C. Pembroke, Sr.
Jean Richardson

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* Board Member Christopher Roy did not participate in this decision because the Motion to Recuse remains pending.

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