

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

Re: Montpelier Broadcasting, Inc.  
Land Use Permit #5W0396-2-EB - Revocation

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision, dated February 17, 1994, pertains to a revocation petition filed with respect to Land Use Permit #5W0396-2 (the Permit) issued to Montpelier Broadcasting, Inc. (MBI) on June 18, 1992. The Permit authorizes the Permittee to replace an existing 110-foot high broadcast tower, to construct a 12- by 28-foot, one-story equipment building, and to construct minor improvements to the existing access road. For the reasons explained below, the Board has concluded that grounds for revoking MBI's permit exist and has revoked the permit.

I. BACKGROUND

On December 18, 1992, a petition to revoke the Permit was filed with the Environmental Board by Rocco DeLeonardis and Tina Mueller (the Petitioners), pursuant to Board Rule 38(A). The Petitioners contend that the permit should be revoked because information submitted by the Permittee with its application was false and misleading and construction of the project exceeded the scope of the permit and the right-of-way over the Petitioners' land. They also believe that they and Contel of Vermont should be co-applicants with the Permittee.

On January 20, 1993, the Permittee filed several motions with the Board, seeking to dismiss the revocation petition or, in the alternative, asking for a declaratory ruling on whether the project as built requires a permit amendment and arguing that, if so, the Board should remand the matter to the District Commission. The Permittee also argued that the answer as to whether the Petitioners should be co-applicants depends upon the outcome of litigation pending in superior court concerning the scope of the Permittee's easement on lands of the Petitioners and that the issues of co-applicancy should therefore be stayed pending a decision by the court.

On February 23, 1993, a prehearing conference was convened by Board Chair Elizabeth Courtney. On March 10, a prehearing conference report and order was issued. At the prehearing conference, the parties agreed that the question whether the Petitioners should be co-applicants will have to be postponed until after the decision of the superior court concerning the scope of the Permittee's easement. The

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parties also agreed to submit to the Board whether evidence is available on this issue in order for the Board to render a decision as soon as a decision on the scope of the easement is made by the court.

At the prehearing conference, the Permittee requested to delay the hearings until after mud season in order to provide sufficient time to conduct an as-built survey of the project, and a hearing date of July 28 was agreed upon.

The Board convened a hearing on July 28, 1993, with the following parties participating:

The Permittee by Richard A. Unger, Esq.  
The Petitioners by Michael M. Marks, Esq.

The Board viewed the site with the parties on July 28. The hearings were reconvened on July 29, September 20, and October 7, 1993.

On November 8, the Petitioners filed proposed findings and the Permittee filed requests to find. On November 12, the Petitioners filed a reply to the Permittee's proposed findings and the Permittee filed a rebuttal to the Petitioners' proposed findings.

On December 23, 1993, the Petitioners submitted a copy of a motion to intervene filed with the Vermont Public Service Board by **MBI** in a case concerning a proposal by Contel Cellular to sell its stock in certain Vermont operations. The Petitioners request the Board to take official notice of the motion and to enter it into the evidentiary record of this proceeding. On January 4, 1994, the Applicant responded to the Petitioners' motion.

On January 19, 1994, the Petitioners submitted another request to the Board to admit into the record of this proceeding additional documents from two other forums. On January 26, 1994, **MBI** filed an objection to the Petitioners' January 19, 1994 submission.

The Board deliberated concerning this matter on December 8, 1993, January 5, 1994, and February 11 and 16, 1994. On February 16, 1994, following a review of the record and 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

A. Substantive Issues

The issues were delineated in the prehearing conference report as follows:

1. Whether grounds for revocation exist either because the permit has been violated or because the Permittee 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.

2. If grounds for revocation do exist, whether an opportunity to correct violations should be provided.

3. If the project as built deviates from the project as permitted, whether the changes constitute material or substantial changes for which a permit amendment is required.

4. Whether Contel should be co-applicant.

5. The issue of whether the Petitioners should be co-applicants is deferred until the superior court issues a decision concerning the scope of the **Permittee's** easement over land of the Petitioners.

B. Procedural Issues

On December 23, 1993, the Petitioners submitted to the Board a copy of a motion to intervene filed with the Public Service Board by **MBI** in a case concerning a proposal by Contel Cellular to sell its stock in certain Vermont operations. On January 19, 1994, the Petitioners submitted documents concerning **MBI** and Contel submitted in connection with a lawsuit and a Federal Communications Commission filing. The Petitioners request the Board to take official notice of these documents and enter them into the evidentiary record of this proceeding.

III. FINDINGS OF FACT

1. The Permittee is a Vermont Corporation with offices in Montpelier, Vermont. It operates the FM radio station WNCS in Montpelier. Edward Flanagan is General Manager and Vice President of MBI; Steven Silberberg is an attorney and an officer of MBI.
2. In 1987, **MBI** purchased the station from North Country Communications, Inc. (NCC), along with a 2.5-acre parcel of land on East Hill in Middlesex on which the subject broadcasting tower is located.
3. From 1977 to 1987, George Spaulding was a principal in NCC. From 1977 to 1987 NCC owned and operated the WNCS radio station. In 1977, NCC leased what is now the **MBI** parcel on East Hill from George Spaulding.
4. In 1977, George and Susan Spaulding purchased a tract of land on East Hill on which they constructed a residence in which they lived.
5. In 1977, NCC applied for and obtained Land Use Permit #5W0396 (the 1977 permit), authorizing the installation of a **110-foot** radio broadcasting tower on a 2.5 acre parcel on East Hill. This land was adjacent to the land on which the Spauldings built their residence and lived. The 1977 permit also authorized New England Telephone and Telegraph to install electrical and telephone utility lines to service the tower.
6. Access to the tower site was by way of an old logging road through the woods and was used sporadically. The logging road was six feet wide. When the tower needed servicing, Mr. Spaulding either walked or used a snow machine or a Kubota tractor. After the sale in 1987 of NCC to MBI, access to the tower was gained by walking up the logging road or using an all terrain vehicle.
7. The Petitioners purchased the house and land that had belonged to George and Susan Spaulding that adjoins the 2.5 acre parcel owned by the Permittee. At the time they purchased the property, the Petitioners knew that the Permittee had a right-of way through part of the property. Because the tower merely provided a back-up antenna for **WNCS's** main tower at **Bolton**, because the Petitioners were told that it was used infrequently, and because the Petitioners knew that commercial

development was prohibited in their area, the Petitioners did not think the right-of-way would interfere with the privacy and rural setting of their residence.

8. Neither the tower nor the right-of-way was visible from the Petitioners' home at the time they purchased it.
9. The Petitioners' land borders the Permittee's property on two of its four sides. Access to the tower site was by a logging trail. Except for a short distance on a private road or shared common right-of-way, the access traversed entirely upon old logging trails through the woods on the Petitioners' and the Permittee's properties. The old logging trails consisted of meandering paths through the forest. The width of the trail varied from approximately six feet to slightly wider in the few areas where the trail intersected the power lines. It was vegetated and sprinkled with saplings and brush. Most of the remaining length of the path was indistinguishable.
10. On May 19, 1992, the Permittee submitted an application to the District #5 Environmental Commission for an amendment to the 1977 permit. The application states, under "**General** description": "Construct one story **12'x 28'** building, replace existing broadcasting antenna and recondition existing 2400 foot logging **road.**" The application also states that the legal interest in the land involved in the project is "ownership in fee simple," and that no local zoning permit was required.
11. The estimated construction costs provided by the Permittee on Schedule A of the permit application consist of the following:

Site preparation	\$ 2,000
Buildings	11,000
Roads and parking	15,000
Total costs	\$28,000
12. The actual cost of the building was at least \$35,000.
13. According to an **affidavit filed with the Board** on November 8, 1993, by Richard Unger, attorney for MBI, the actual costs of the roadway construction **totalled**

**\$132,457.89.** Attorney Unger also states in the affidavit that **MBI** is willing to comply with the requirements of Board Rule 11(F) with respect to payment of a supplemental fee.

14. The narrative submitted as part of the permit application contained the following relevant statements:

Montpelier Broadcasting, Inc,  
proposes to put a new **12' x 28' one-**  
story prefabricated building on the site  
along with a pad for a new propane fired  
generator and replace the existing 110  
foot broadcast antenna with one of like  
height in the same location. At the  
same time the existing logging road will  
be reconditioned (to replace failed  
water bars, fill in low spots that have  
eroded, and top dress the existing  
access with gravel to hold it in place).

. . .

15. Included with the application was an "**Access road plan**" prepared by the engineering firm of **Fitzpatrick-Llewellyn**. This plan showed a 10-foot wide road, traversing approximately one-half mile from the Petitioners' property to the tower site. The plan contains no description of construction methods.
16. The plans were prepared for Contel but when they were submitted to the District Commission all references to Contel were deleted
17. The application contained no mention of Contel or any use of the tower by an entity other than the Permittee.
18. The application was prepared by Edward Flanagan, general manager for WNCN. Mr. Flanagan had previously prepared an application and obtained a permit to erect **WNCN's** tower in **Bolton**.
19. The District Commission treated the application as a minor application under Board Rule 51. The Petitioners received a notice of the minor application. Because of the minimal nature of the improvements proposed by the Permittee, they took no steps to participate in the Act

250 process. The District Commission issued a permit without taking a site visit and without holding a hearing, as authorized by Rule 51, based on its review of the application materials submitted by the Permittee.

20. Construction on the project commenced on September 2, 1992 and was continuous through the end of October. From the end of October until the end of December, work on the roadway continued intermittently.
21. The project began by clear cutting a wide route through the woods on land of the Petitioners and the Permittee. While the trees were being cut and cleared, other crew members dug up boulders and removed stumps out of the emerging roadbed. Embankments were cut with large bucket loaders and bulldozers. Large earth-moving equipment scraped away the native soils. Concussion equipment was used to pulverize ledge in several locations. Numerous vehicles brought gravel to the site. Vehicles **with heavy** pounding and vibrating rollers packed the layer of gravel. Finally, the entire roadbed was surfaced with crushed shale. The shale was packed and pounded with heavy rollers. Ditching was installed along parts of the road. A contractor removed logs from the site. Branches were chipped at the site. Some stumps were buried on site; others were hauled away with other materials.
22. Several areas adjacent to the roadbed were clear cut to provide additional staging, parking, storing, and turn-around areas. These areas were constructed large enough to accommodate the substantial equipment that was used. One of these areas was used for a gasoline refueling reservoir and pump. An Agway fuel truck periodically refilled the reservoir from which on-site contractors refueled their equipment.
23. The "**Access Road Plan**" submitted with the application does not contain road profiles, cross-sections, ditch design sections, gravel or material specifications, or compaction criteria. Review of the plan would not disclose that a new roadway was to be built. **MBI** also did not disclose in its application materials that the road improvement would require ledge removal.
24. The roadway as built does not conform to the design plans, which showed a road 10 feet wide. The average

width of the road is 15.3 feet, and in some areas it exceeds 25 feet. The average width of the cut/fill areas is 24.7 feet. The total width in some areas is more than 30 feet. The road's center line slopes varied considerably from the design plans.

25. Three corrugated metal culverts, each 12 inches in diameter by 30 feet long, were installed. These were not shown on the plans, nor was there any description of their design or hydraulic capacity. Several of the culverts were partially blocked on the day of the site visit. It was apparent that surface water runoff is causing serious erosion.
26. The road is approximately one-half mile long and is built on slopes that average 18.5 percent and are as steep as 30 percent. Eighty-three percent of the road was constructed perpendicular to the contours of the land rather than parallel to the contours. Due to the compacted surface of the road, water can and does travel down the slope of the road rather than absorbing into the vegetation that constituted the road surface prior to construction. With such steep slopes and a compacted surface, severe erosion would appear to be inevitable.
27. Some erosion control measures have been used, such as hay mulch, vegetative cover, and water bars were implemented. Because of the steepness of the slopes and the thin soils of the area, much more extensive erosion control measures would be needed on permanent basis. It is possible that due to the grade of the road and the condition of the soils, the road cannot be stabilized regardless of erosion control measures.
28. Due to the road's steep slopes, road maintenance in the wintertime is difficult. It has required a great deal of plowing and sanding to keep the road open for access to the tower. As a consequence of more frequent use of the access road, there are substantially more vehicles using the road, especially heavy **equipment**, than there were previously.
29. **MBI's** application stated the following with respect to the tower:

Montpelier Broadcasting, Inc. proposes  
t o . . . replace the existing 110 foot

broadcast antenna with one of like height in the same location. ...

30. The original tower was a galvanized tubular steel Rohn tower with a face of approximately 18  $-1/2$  inches, with a footprint area of 148 square inches. The galvanized solid-rod steel Andrew M-46 replacement tower has a face of 47- $1/2$  inches, with a footprint area of 976 square inches. The stabilizer arms under which the guy wires attach increase the footprint by approximately another six times. There are also three six-foot sidearm mount supports installed on the tower, which again increase the footprint of the tower.
31. The new tower is the same height as the old tower. It has no lights, and has the same flat, galvanized, non-reflective surface as the old tower. The old tower was not visible from the Petitioners' house or from most vantage points in the area.
32. Contel Cellular, Inc. filed an application with the FCC to construct "a new 110' tower with whip-like antennas extending upwards for a total height of 123'."
33. On October 9, 1992, Steven Silberberg wrote a letter to Steven Korwan of Contel in which he acknowledged that the face of the tower was 42 inches rather than the 24 inches which the Permittee had represented to the town in its application for a zoning permit. Mr. Silberberg then stated:

I want us both to be aware of the fact that the size of the tower may exceed the town's expectations based on information we provided to the town supplied to us by Contel. I think we should both be aware that if the town complains, we may have to make alterations down the road.

34. The application stated that the reason for the building was to house broadcast equipment. In fact, the sole or primary reason for the building is to accommodate telecommunications equipment required by Contel. The Permittee did not disclose this fact to the District Commission.

35. The building has cooling and dehumidifying equipment in order to maintain the proper climate control in the building. The noise from the compressors for the double air-conditioning ventilation system can be heard in the woods surrounding the building. The Permittee did not disclose to the District Commission that there would be compressors in the building.
36. Contrary to the Permittee's representation on its application that no zoning permit was required, a zoning permit was required.
37. The application did not mention stump disposal or on-site fueling from gasoline trucks.
38. In 1991 and 1992, the Permittee entered into negotiations with Contel Cellular for the purpose of Contel's leasing space on the tower for placing an antenna for cellular telephone transmission.
39. In a letter from Contel Cellular dated February 15, 1991, regarding Contel's "interest in the East Hill, Vermont **site**," Steven S. Korwan, P.E., Construction Engineer, states that they are concerned about the structural integrity of the existing tower for the use contemplated by Contel, and would like to undertake a tower analysis. Mr. Korwan then says:
- If the results of the analysis are positive, we will then begin to work with your office to put a lease together.
- Please be assured that we are still very interested in your site and will do everything we can to expedite the work required to make sure the site is usable.     ...
40. In a letter from Contel Cellular dated April 13, 1991, Steven S. Korwan states the following:
- After reviewing all of the information presented by Ed Flanagan and myself, David Brent of Rohn Tower has informed us that the existing tower on East Hill in Vermont is not strong enough to support the proposed loading. In order

for this site to be usable, a new tower would have to be built.

We would like to replace the existing tower with a new, stronger tower of the same height at our expense. In addition, we would like to place our 12' x 28' pre-fab equipment shelter by the tower and do any other site and roadwork we require but within the restrictions of the local jurisdiction and State Act 250 policies. Of course, all of this work will be done at our expense and coordinated fully with your office's approval and with Ed Flanagan's as well.

. . .

41. In a letter dated July 18, 1991 to Steven S. Korwan at Contel, Steven A. Silberberg of **MBI** made the following statements:

11) Tower Replacement - At the sole option of Contel Cellular, Contel may replace existing tower with a type and size to accommodate the antenna requests set forth above in section 6. **WNCS** shall approve such replacement, and once specifications are chosen, said tower shall meet acceptable engineering standards.

12) At the request of Contel, **WNCS** shall endeavor to modify its existing Act 250 permit to incorporate transmitter building and other contemplated equipment. **WNCS** shall be reimbursed for time of its staff environmentalists as well as any other costs incurred by it.

42. In a letter to Steven Korwan of Contel dated November 15, 1991, concerning the proposed lease between Contel and the Permittee, Steven Silberberg stated the following:

[The lease] provides for the opportunity to add a 12 x 28 foot addition to our

existing building for the exclusive use of Contel as well as for the replacement of the existing tower if you believe that wind loading of the one in place is not sufficient.

43. On March 1, 1992, the Permittee and Vermont RSA Limited Partnership (the General Partner of Contel) entered into a lease agreement whereby Contel rents space on the **Permittee's** tower. The initial lease runs from December 1, 1991 to November 30, 1997. The lease is renewable for five five-year periods. The lease provides that Contel will pay to the Permittee the sum of \$18,000 for the initial rental period.
44. The lease grants to the Lessee (Contel) the right to install and operate **Contel's** facilities on the 2.5-acre parcel of land owned by the Lessor (the Permittee). It also grants Contel an exclusive right to the space leased by Contel and a nonexclusive right of access to the leased property to enable Contel to **"install, operate, maintain and monitor its Equipment."**<sup>1</sup>
45. Section 25 of the lease provides the following relevant provisions:

(A) In consideration of the covenants of the Lessee set forth herein, Lessor agrees to make certain technical improvements to its facilities. Said improvements consist of facility improvements set forth in Exhibit D hereof<sup>2</sup> and enhancement of tower capacity. All costs associated therewith shall be reimbursed by Lessee.

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<sup>1</sup> "Equipment" is defined in the lease as "Lessee's main and standby broadcast transmitters, receivers, broadcast and receive antennas, transmission lines and related equipment identified specifically by type, model number and size in Exhibit B hereof, and any replacements thereof subject to the terms of paragraph 14 hereof. In the copy of the lease entered into the record as Exhibit P18, Exhibit B is blank.

<sup>2</sup> Exhibit D of the copy of the lease entered into the record as Exhibit P18 is blank.

(1) Lessor agrees to permit Lessee to erect a transmitter building and to grant an exclusive license to use said improvements currently designated as the space indicated in Exhibit A. Upon termination of this lease, said building shall be removed and the area restored to its original condition.

(2) Lessee may replace the existing tower structure with a structure of equal or greater capacity. Prior to commencement of construction of said tower structure Lessee shall provide engineering specifications of said tower to Lessor for approval. Title to any improvements or replacement tower shall vest with Lessor.

(B) Lessor agrees to use its good offices to assist in obtaining Act 250 land use permits for the tower replacement and building addition. Lessee shall be billed on a monthly basis for direct expenses and charges of the station's environmentalist at a rate of \$45.00 per hour.

(C) All improvements and additions of Lessee shall be approved by Lessor. Lessee agrees to reimburse Lessor for any and all costs or charges occasioned by the contemplated construction.

. . .

(E) Any and all costs incurred by Lessor with respect to installation of Lessee's equipment or operation of said equipment or Lessor's equipment shall be billed to Lessee and reimbursed by Lessee within 30 days.

46. Contel needs to be able to get to the tower site at least once a month in order to maintain its equipment.
47. Contel paid for the costs of the road improvements and most other costs. The contractor for the project **was**

hired by Contel and reported both to Contel and Ed Flanagan.

48. **MBI** is responsible for supervising and paying for maintenance of the access road.

IV. CONCLUSIONS OF LAW

A. Reauest to Admit New Evidence Into the Record

On December 23, 1993, the Petitioners submitted a request to the Board to take official notice of a motion filed by **MBI** with the Public Service Board (PSB) and admit the motion into the record of this proceeding. They contend that **MBI** makes representations in the PSB motion that contradict certain statements made in the Environmental Board's hearings.

On January 19, 1994, the Petitioners submitted another request to the Board to admit into the record of this proceeding additional documents from two other forums. One concerns a lawsuit filed by Contel against **MBI** in Chittenden Superior Court that involves the East Hill Tower that is the subject of this revocation proceeding. The other forum is the Federal Communications Commission (FCC). On November 18, 1993, **MBI** filed a petition with the FCC to deny the transfer of control from VRSA to NYNEX. The Petitioners argue that these documents contain additional statements that contradict testimony of **MBI** at the Environmental Board hearings.

The Board does not believe that the information contained in the documents submitted by the Petitioners is necessary to the Board in its consideration of this case. As is explained below, the Board has concluded that grounds for revocation exist. The Board therefore denies the Petitioners' request.

B. Revocation

Board Rule 38(A) governs revocations in Act 250 proceedings. It states, 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 Tower

**MBI's** application for a permit amendment stated that the new tower would be the same height as the existing one, but did not address the size of the footprint of the tower or appurtenances thereto. The Board does not believe that the additional 13 feet that the antenna rises above the tower is material. The Board also believes that the failure of **MBI** to inform the District Commission that the footprint of the new tower is larger than the old one or that the antenna would rise 13 feet above the tower does not constitute a material misrepresentation because any increase in the visibility of the tower is insignificant.

### The Road

**MBI's** application stated that it intended to "recondition the existing logging road ... (replace failed water bars, fill in low spots that have eroded, and top dress the existing access with gravel to hold it in place.)" **MBI** submitted a plan for the road construction that showed a lo-foot wide road but contained no description of construction methods details. The permit issued to **MBI** for such road construction authorized **MBI** to construct "minor improvements to the existing access road."

The construction that **MBI** actually undertook was vastly different from the "minor improvements" that were authorized. In fact, the "minor improvements"\* amounted to a major construction project that included cutting a large number of trees, digging up boulders, cutting embankments, removing stumps, pulverizing ledge, digging ditches, installing culverts, laying down and packing gravel, and surfacing with crushed shale. The construction changed a narrow trail through the woods into a road with an average width of 15.3 feet, and wider in some places, and an average grade of 18.5 percent with areas as steep as 30 percent. One consequence of the steep grades is a great deal of erosion taking place on the road and difficulties with maintenance of the road in the wintertime.

The magnitude of the disparity between the road construction as proposed to the District Commission and as actually built is highlighted by the difference in road construction costs between the estimate which Mr. Flanagan provided to the District Commission (\$15,000) and the actual costs (\$132,457.89).

### The Building

**MBI's** application states that the building would house only broadcast equipment. In fact, the sole reason for the building was to store telecommunications equipment required by Contel. This fact was not disclosed to the District Commission. **MBI** also did not disclose to the District Commission that the building would have cooling and dehumidifying equipment as well as compressors that generate noise.

Co-apwlicancy of Contel

Board Rule 10(A) states:

An application shall be signed by the applicant and any co-applicant, or an officer or duly-appointed agent thereof. The record owner(s) of the tract(s) of involved land shall be the applicant(s) or co-applicant(s) unless good cause is shown to support waiver of this requirement. 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 applicant cannot be accepted or the review cannot be completed without their participation as co-applicants.

Negotiations between Contel and MBI for Contel to replace MBI's tower and use it for cellular telephone transmission began in early 1991. The lease agreement was signed on March 1, 1992. MBI filed its application for the Act 250 permit amendment on May 19, 1992. At the time that MBI filed its application for a permit amendment with the District Commission, MBI knew that Contel had a lease to use the tower, that Contel planned to install a building on the site for its use, and that Contel intended to pay for the costs associated with installation of the new tower and building.

Inaccurate, Erroneous, or Materially Incomplete Information

The Board concludes that with respect to the road, the building, and Contel's interest, MBI "submitted inaccurate, erroneous, or materially incomplete information in connection with the permit application, and that accurate information may have caused the district commission . . . to deny the application or require additional or different

conditions on the **permit.**" The Board believes that the failure of **MBI** to disclose 1) its lease arrangement with Contel, 2) Contel's ownership of the equipment building, 3) the purpose of the equipment building as housing Contel's equipment, 4) the cooling and dehumidifying equipment and the compressors in the building, 5) the scope and extent of the road improvements, and 6) an accurate estimate of the costs of the proposed road improvements was either willful or grossly negligent, or **both.**<sup>3</sup>

The Board also believes that had **MBI** provided the District Commission with accurate information, at the very least, the District Commission would not have determined to treat the application as a minor, so that full hearings would have been held. Based upon the evidence in the record concerning the severe erosion problems on the road due to its excessively steep grades, it is also likely that the District Commission would either have denied the application for the road improvements or imposed additional conditions. Similarly, disclosure to the District Commission of the cooling and dehumidifying equipment and compressors in Contel's building may have caused the District Commission to require additional conditions in the permit.

#### Violation of the Board Rules and the Permit

The second inquiry under Rule 38(A) is whether **MBI** 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, we find the following violations:

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 **MBI's** failure to seek and obtain District Commission approval prior to making the above-described unauthorized changes in the project.

In addition to the physical changes made to the project after the permit was issued for which no amendment was

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<sup>3</sup>Members Lixi Fortna and Arthur Gibb do not believe that **MBI** acted with gross negligence, but they do believe that **MBI** acted willfully.

sought, **MBI** should have disclosed **Contel's** property interest in the project for the District Commission to determine whether Contel should be a co-applicant pursuant to Board Rule **10(A)**. Examples of "substantial property interest" enumerated in Rule **10(A)** include "lease." At the time that **MBI** filed the application on May 19, 1992, the lease with Contel had been signed on March 1, 1992. Thus **MBI** violated Rule **10(A)** by not disclosing the lease with Contel.

Failure of **MBI** to disclose the interests of Contel also violated Condition 1 of the permit.

#### Revocation

We have determined that grounds for revocation exist by **MBI's** willfully or with gross negligence<sup>4</sup> submitting inaccurate, erroneous, or materially incomplete information; violating the terms of the permit; and violating Board Rule **10(A)**. Under Rule 38(A), 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.

Based on the evidence and our observations of the erosion of the road, we conclude that the current state of the road poses a clear threat of irreparable harm to the environment. As of the fall of 1993, adequate permanent erosion control measures were not in place. Stabilization of the road to prevent further erosion would be very difficult, if not impossible, to achieve. Accordingly, the Board will revoke the permit without first providing an opportunity to correct the violations.

**MBI** may apply for a permit amendment to authorize whatever plans it has for this road and the use of the tower in the future. That is, **MBI** has a valid permit, Land Use Permit #5W0396, authorizing installation and use of a tower and use of a right-of-way to gain access to the tower site. Any material or substantial changes to that permit will require an amendment. **MBI** may file an application with the District Commission for a permit to authorize whatever it plans to do beyond what is authorized by Land Use Permit

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<sup>4</sup>See footnote 3, above.

**#5W0396.** Until it receives such authorization, neither **MBI** nor Contel may use the recently constructed roadway to the tower or the equipment building at the tower site.

We will require **MBI** either to apply for a permit authorizing the construction of improvements beyond those authorized by Land Use Permit #5W0396 or to submit a plan to stabilize and restore the road to allow for its return to its condition prior to the recent improvements.

In addition, because of the existing erosion on the road and the need for it to be stabilized, we will require that if **MBI** decides to apply for a permit authorizing construction of improvements to its right-of-way, it concurrently file a plan with the District Commission for stabilization of the road during the **pendency** of the proceeding. **MBI** must implement the plan approved by the District Commission immediately upon receiving approval.

Substantial and Material Change

A permit amendment is required for any substantial or material change to a permitted project. Board Rule 34(A). A 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)(1) through **(a)(10)**.

A 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.

We conclude that the aspects of the project that were different from the representations made to the District Commission -- the cooling and dehumidifying equipment and generators in the building, and the scope and extent of the road construction -- constitute material and substantial changes for which a permit amendment is required. They constitute material changes to the permit because they are alterations which have significant impacts on all of the

District Commission findings which describe the project different from what was actually constructed, and because they affect at least the following values sought to be protected by Act 250: aesthetics, noise, soil erosion, and forestry soils.

The changes made in the project also constitute substantial changes because they are changes which have the potential for significant impact under at least Criteria 1 (noise)<sup>5</sup>, 4 (soil erosion/capacity of the land to hold water), 8 (aesthetics and scenic beauty), and 9(C) (forestry soils). In addition, there may be issues under Criterion 10 with respect to the town plan.

Accordingly, a permit amendment is required.

V. ORDER

1. MBI willfully or with gross negligence<sup>6</sup>, or both, submitted inaccurate, erroneous, or materially incomplete information in connection with its permit application, and accurate and complete information may have caused the district commission to deny the application or to require additional conditions on the permit.
2. MBI violated Land Use Permit #5W0396-2 by making changes to the project beyond what was authorized in the permit without the written approval of the District Commission.
3. MBI violated Board Rule 10(A) by not disclosing its lease with Contel.
4. Land Use Permit Amendment #5W0396-2 is hereby revoked. Any further use of the road constructed under that permit or of the equipment building at the tower site is not authorizea.
5. On or before April 1, 1994, MBI shall either apply to the District Commission for a permit amendment

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<sup>5</sup>Members Lixi Fortna and Arthur Gibb do not believe that the noise of the generator in the equipment building at the tower site has the potential for significant impact under Criterion 1.

<sup>6</sup>See footnote 3, above.

authorizing the construction of improvements beyond what was authorized by Land Use Permit #5W0396 or it shall submit a plan to the District Commission to stabilize and restore the road to allow for its return to its condition prior to the recent improvements.

6. If **MBI** applies for a permit amendment authorizing construction of improvements to its right-of-way, on or before **April 1, 1994** it shall also file a plan with the District Commission to stabilize the road during the **pendency** of the amendment proceeding. **MBI** must implement the plan approved by the District Commission immediately upon receiving approval.

7. **MBI** shall file with the District #5 Environmental Commission, along with the application, a certification of actual construction costs and payment of a supplemental fee that accurately reflects the actual construction costs.

8. Any application filed by **MBI** shall include an affidavit of estimated construction costs signed by a professional registered engineer.

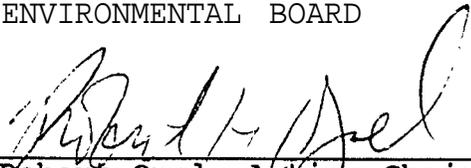
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Montpelier Broadcasting, Inc.  
Findings of Fact, **Conclusions** of Law, and Order  
Land Use Permit #5W0396-EB (Revocation)  
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Dated at Montpelier, Vermont this 17th day of  
February, 1994.

ENVIRONMENTAL BOARD

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Robert Opel, Acting Chair\*  
Ferdinand Bongartz  
Lixi Fortna  
Arthur Gibb  
Steve E. Wright

\* Robert Opel was not present at the hearings on September 20, 1993, and October 7, 1993, but listened to the tapes of those hearings.

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