

STATE OF VERMONT
ENVIRONMENTAL BOARD
10 V.S.A., Chapter 151

RE: Vermont Electric Power Company, Inc. by
William A. Gilbert, Esq.
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St. Johnsbury, VT 05819-0099

Findings of Fact, Conclusions of Law and Order
Land Use Permit Application
#7C0565-EB

This decision pertains to an appeal filed with the Environmental Board ("the Board") on July 3, 1984 by Vermont Electric Power Company, Inc. ("VELCO") from the June 20, 1984 decision of the District #7 Environmental Commission ("the Commission") denying Land Use Permit Application #7C0565. That application sought authority to construct a 105' tower with two microwave dish antennae, a 12' by 20' building to house microwave radio equipment, and installation of a 746' long access road to the project site from Vermont Route 122 in Sheffield, Vermont.

Prehearing conferences were convened by the Board's Chairman on September 11 and September 18, 1984; Prehearing Conference Orders were issued September 14 and September 20. The public hearing before the full Board was convened on October 10, and on that date viewed the site and surrounding areas/1/. The hearing was reconvened on November 7. The following participated as parties at the hearing:

Applicant/Appellant VELCO by William A. Gilbert, Esq. and Elaine Kilburn, Esq.
The Town of Sheffield and the Sheffield Planning Commission by Vernon Whitcomb, Planning Commission Chairman;
William and Ruth Aiken, Nash Basom, Charles and Lois Barrows, F. Laird Evans, William McMaster Burton and Janet Porter, Peter and Elke Schumann, and John Young ("the Interested Residents") by Jonathan Brownell, Esq. Paul Muller.

The hearing was recessed on November 7, pending VELCO's response to a technical question posed by the Board, the filing of proposed findings and memoranda by the parties, a review of

/1/ Prior to the site visit, VELCO erected a mock tower consisting of approximately 40' of scaffolding, a pole-like extension and an artificial disk fabricated of camouflage cloth. While the prototype was certainly not authentic in every detail, it did fairly present the tower's height and the size of the 8' dish when erected.

the record for completeness, and deliberation. On November 26, the Interested Residents filed proposed findings and conclusions. On the same date VELCO filed a statement in response to the Board's technical inquiry, together with a brief and a proposed decision. On December 12, 1984 the Board determined the record complete and adjourned the hearing. This matter is now ready for decision. The following findings of fact and conclusions of law are based upon the record developed at the hearing. To the extent the Board agreed with and found necessary findings proposed by the parties, they have been incorporated herein; otherwise, those requests to find are denied.

I. ISSUES PRESENTED IN THE APPEAL

VELCO's application was denied by the Commission based upon negative findings under two Criteria of 10 V.S.A. §6086(a): Criterion 8 ("... the development ... [w]ill not have an undue adverse effect on the scenic or natural beauty of the area, [or] aesthetics ...") and Criterion 10 ("... the development ... [i]s in conformance with any duly adopted local or regional plan ..."). The Commission found that "the tower must extend to a height of 105 feet and, in this location, creates an undue aesthetic effect from the perspective of motorists on Vermont Route 122 and residents of the immediate vicinity." In respect to Criterion 10, the Commission found as follows:

Because of the Commission's finding under Criterion 8 with respect to the project creating an undue detriment to the scenic beauty of the immediate area, the Commission has no choice but to also find that the project is not consistent with Policy 9 of the Land Use Element of the Regional Plan and Coal 1 of the Sheffield Town Plan and therefore the project is found not to be in conformance with either plan.

VELCO argues that neither the 105' tower, nor the shortened version (see **section II**, below) will have an undue adverse effect on aesthetics and that the project is in conformance with the local and regional **plans**.^{/2/} The Interested Residents argue that neither version of the tower fulfills the requirements of Criterion 8. The Town generally supports VELCO's application. The Planning Commission believes that the project conforms with the Town Plan and that the tower will not have an undue aesthetic impact.

^{/2/} In view of the conclusions we reach below concerning Criterion 8, we need not address certain constitutional issues raised in VELCO's post-hearing brief.

II. BOARD JURISDICTION TO REVIEW THE AMENDED APPLICATION

At the September 7 prehearing conference, VELCO filed a statement indicating that it had modified its proposal. The stated provided, in part:

VELCO has modified its proposal as follows:

1. VELCO originally proposed to construct a 105-foot tower. VELCO now believes that the microwave system can operate reliably if the tower height is 76 feet.
2. The project will involve the installation of two microwave dishes. VELCO originally proposed that the dishes be ten feet and six feet in diameter, respectively. VELCO now proposes that the dishes [be] eight feet and six feet in diameter, respectively.

The parties have agreed that we may accept and review this amended proposal and that a remand to the Commission is not necessary. The parties further agreed that the above alterations do not alter the project's impact under any of the Criteria of 10 V.S.A. §6086 except those that are currently before the Board. We briefly address the issue of our jurisdiction over the amended application.

The Supreme Court has stated that when a land use permit application is amended before the Board, the application must be returned to the District Commission if the amendment involves new construction on new lands potentially involving new parties. In re Juster Associates, 136 Vt. 577 (1978). Similarly, we have previously held that where an amendment implicates new substantive issues not previously considered by a District Commission, the case must be remanded. Re: Windsor Improvement Corporation, Application #2S0455-EB, issued March 27, 1980.

However, in the present case, project modifications do not involve new construction on different lands potentially involving new parties. Nor do the changes implicate any issues cognizable under the ten criteria which are not already the subject of **VELCO's appeal**.^{/3/} Therefore, the Board has jurisdiction to review the revised proposal and no remand is required.

^{/3/}The "power density" or strength of the signal transmitted at the Sheffield site will not exceed .00004 milliwatts per square centimeter, far lower than the stringent Soviet Union standard. We conclude from this finding that no new issue arises under Criterion 1 as a result of a reduction of the tower's height.

III. PARTY STATUS

At the prehearing conference, several residents of the area surrounding the project site expressed an interest in participating as parties in this appeal. With the exception of F. Laird Evans who is an adjoining property owner, party status requests were made pursuant to Board Rule 14(B). Prior to the Board's consideration of these requests, the parties agreed that the individuals listed above as "Interested Residents" could participate as parties in this proceeding. At a prehearing conference, the Chairman ruled pursuant to Board Rule 16(B) that only those individuals who could see the tower from their property would be admitted as parties and that participation would be limited to Criterion 8. The Chairman concluded that none of the residents had a specific interest in the project under Criterion 10 which was different in kind from the interest of any other Sheffield resident and that the Town and Planning Commission would provide any necessary assistance to the Board in its consideration of the Town Plan. These preliminary determinations were not appealed to the full Board.

On October 10, the Board granted Paul **Muller's** request to participate under Criterion 8 pursuant to Rule 14(B) as a resident of Sheffield who would be able to see the tower from his property.

IV. ALTERNATE SITES

As a preliminary matter, the Interested Residents sought to introduce evidence concerning the availability of sites, other than that chosen by VELCO on Sheffield Heights, which would, in the opinion of the Interested Residents, be suitable for **VELCO's** purposes yet impose less of an aesthetic **impact.**^{/4/} The parties submitted memoranda on this issue and briefly argued their positions. During its October 10 hearing, the Board orally issued its decision that evidence concerning the availability of alternative sites would not be **accepted.**^{/5/}

The Interested Residents argued that in considering whether the tower's impact on aesthetics is "undue," the Board should consider whether or not other options are available to VELCO. They argued:

^{/4/}VELCO did not concede the existence of any other site meeting its technical performance requirements which, in **VELCO's** opinion, would have less aesthetic impact than the Sheffield Heights locale.

^{/5/}The Chairman dissents from this portion of the decision.

Clearly, in order for this Board to determine whether a particular design or structure of a proposed development as applied for by an applicant is "necessary" or "reasonable," the Board must be able to consider alternative ways by which applicant could achieve its objectives, while minimizing the adverse effects upon the public values identified by the General Assembly to be protected.

The Interested Residents directed our attention to provisions of Vermont's Capability and Development Plan:

(12) Scenic resources

The use and development of lands and waters should not significantly detract from recognized scenic resources including river corridors, scenic highways and roads, and scenic views. Accordingly conditions may be imposed on development in order to control unreasonable or unnecessary adverse effects upon scenic resources. Act No. 85 of 1973, sec. 7.

This argument is both logical and reasonable. However, we are constrained by the statute to conclude that we have no authority to entertain debate concerning the existence of alternate sites. The Commissions and this Board on appeal have the authority to impose reasonable permit conditions to assure a project's conformance with the ten criteria. See 10 V.S.A. **§6086(c)**. Pursuant to this authority, we may inquire concerning feasible alterations to the project design. We interpret the provision of the Capability and Development Plan quoted above as an expression of the Legislature's intent that, where we find that a project will have adverse aesthetic consequences, conditions should be imposed in an attempt to eliminate those adverse effects which are unreasonable or unnecessary.

However, we do not find in the Capability and Development Plan or elsewhere in Act 250, authority to investigate alternative sites in respect to matters of aesthetics. The Legislature has, in specific instances, required us to evaluate alternatives (see 10 V.S.A., **§6086(a)(1)(F)** - Shorelines, (8) (a) (iii) - necessary wildlife habitat and endangered species, (9) (B) (iii) and (9) (C) (iii) - primary agricultural, secondary agricultural and forest soils). The Legislature has not given us such discretion in respect to matters of aesthetics.

Therefore, our options are limited to imposing reasonable conditions (an option we will exercise **in this case**) or denial of an application where undue adverse aesthetic impacts cannot be corrected by imposition of conditions, an option we have exercised in the past. See Brattleboro Chalet Motor Lodge, Inc., application #4C0581-EB, issued October 17, 1984.

V. FINDINGS OF FACT

1. VELCO proposes to construct a microwave relay tower on an approximately 2 acre parcel of land located on Sheffield Heights, near Vermont Route 122, in Sheffield, Vermont. Access to the project site will be via an approximately 745' long drive to be constructed by the Applicant, a portion of which will lie within a right-of-way through lands owned by Joseph Vesley. A perimeter fence and electrical service will also be installed. Exhibit #17.
2. A large, poured concrete base will be installed approximately 3.7' below existing grade. The tower will rise 78' above the base and two parabolic dish antennae will be mounted at the top of the tower, one 6' in diameter and one 8' in diameter. Because the perimeter of the 8' dish will extend beyond the top of the tower, the total height of the facility will be 76'.
3. The tower will be constructed of structural steel of lattice design and will be dull grey in color. The structure tapers from 6 feet wide at the base to 3 feet wide at the top. There will be no guy wires to support the structure. The dishes will be painted green and one will be directed generally north and the other generally southeast.
4. The project is one component in a radio communication system that VELCO deems necessary to regulate the flow of electric power through the interconnection between New England and Quebec. The tower will receive and send signals to Mt. Orford, Quebec and Monroe, New Hampshire. Radio equipment will be housed in a concrete block building, located adjacent to the tower, which will be 12' wide, 20' long and 10' high.
5. The tower will be approximately 550' from Route 122 at its closest point. The structure will not be visible from Route 122 or surrounding property to the south of the project site. The tower will be visible intermittently along Route 122 for several miles to the north of the site and from several other vantage points to the north.
6. When constructed, the tower will extend from 0' to 20' above the existing tree line, depending upon the vantage point.^{/6/} Surrounding trees are expected to grow an average of one foot each year, providing additional screening. The bottom 50' of the tower, together with the

^{/6/}The Commission found that the 105' proposal would have extended 55' above the existing tree line.

radio building, perimeter fence and power line, will be substantially screened by existing vegetation.

7. Communication reliability has been compromised to some extent by VELCO's reduction of the tower's height. Other than use of an alternate communication method, no additional steps are available to VELCO which would reduce the Tower's visibility while maintaining operability, without imposing additional aesthetic impacts at other locations in the area.
8. The tower will be visible to the traveling public on Route 122 only intermittently and for quite brief periods of time. While Route 122 provides panoramic views of the surrounding countryside, it has not been designated a "Scenic Corridor." Route 122 travelers are likely to see the tower only if they seek it out.
9. The structure will also be visible to residents along Route 122 and from other sites north of the tower. However, because of existing vegetation and land contours, the tower only becomes visible a substantial distance from the project site. At these distances, we find that the tower will not be a significant protrusion and will not present a significant interruption in the existing landscape. From many, if not most vantage points, the tower's tip will be little more than an irregularity along the horizon indistinguishable from large trees which now dot the horizon of neighboring hills.
10. Protection of existing vegetation surrounding the construction site is essential if the tower's aesthetic impact is to be minimized. VELCO intends to preserve several large Maple trees adjacent to the access road route. However, continued preservation of trees beyond the confines of VELCO's 2 acre site is essential to provide screening for the lower portions of the tower.
11. The Northeastern Vermont Development Association's Regional Development Plan is the regional plan applicable to Sheffield within the meaning of Criterion 10. That plan identifies certain policies in an introductory fashion, including "Policy 9" which states:

Encourage the retention and enhancement of scenic qualities of the region through the protection of the historic heritage as expressed in structures, scenic roads, vistas and rural landscape with a blending of open and forest land. Exhibit #20, page 3.

The regional plan further emphasizes the protection of visual qualities in a section pertaining to rural

development and a section which focuses on the protection of existing natural resources. Exhibit #20, pages 15-17.

12. "The Comprehensive Plan, Town of Sheffield, Vermont" (the **local plan** in this matter for the purposes of Criterion 10) provides as its first goal:

To clean up and maintain the environment of the Town. The Planning Commission feels that the Town will be found more attractive if eyesores are cleaned up or prevented.

Exhibit 19, page 1.

13. We have previously found that the tower will only be visible from locations to the North of the project, that most points of visibility are a substantial distance from the tower site, and that unless one seeks out the tower it will not likely be a significant feature on the existing landscape. We, therefore, find that the project will not contravene Policy 9 of the regional plan nor the plan's provisions concerning protection of scenic qualities. We further find that the shortened version of the tower will not be an "eyesore" within the meaning of the Town plan. The project is in conformance with both the regional and local plan.

VI. CONCLUSIONS OF LAW

The sole issue presented in this case is whether the 76' tower proposed by VELCO to be constructed on Sheffield Heights will have an undue adverse effect on the scenic beauty, natural beauty, or aesthetics of the Sheffield area. Professional opinion is of little assistance in answering this question. The aesthetic suitability of the proposal has been left to our personal judgment, aided only by mock depictions of the project and our evaluation of the scenic qualities of the surrounding countryside.

In our visits to Sheffield we have been compelled to agree that the area surrounding the project site is one of great natural beauty. The visitor is treated to pastoral scenery, forested hillsides, old farmhouses, and clear running streams. Within this context, we can only conclude that a microwave relay tower 76' high, exposed above the surrounding treetops would have an adverse aesthetic impact: it is a structure without similarity in the Sheffield area, to be erected for a purpose which is not indigenous to the community, and which would tend to diminish one's appreciation of the tower's surroundings.

However, we are unable to conclude that the tower will have an undue adverse effect on the natural beauty of the area. Applying an ordinary interpretation to the term "undue"--exceeding what is appropriate or normal, excessive--the extension of the tower no more than 20 feet above the existing tree line, and being visible only from a substantial distance, the project will not have an undue adverse impact. The tower will be visible and recognizable to those who look for it.

We heard substantial testimony concerning the expected impact of the tower on the lives of Sheffield residents. We do not underestimate strongly held beliefs expressed by individuals who have chosen the Sheffield area for its natural beauty unencumbered by major manifestations of technology. However, we sense that adverse reaction is based not just upon aesthetic impact but, rather, on the simple presence of the tower independent of its visibility; The shortened tower, we conclude, will have only negligible aesthetic impact. Criterion 8 does not permit us to judge the propriety of placing structures whose function is foreign in areas not accustomed to technological intrusion, unless that intrusion is accompanied by an undue aesthetic impact.

Because we have concluded that the tower survives scrutiny under Criterion 8, we also conclude that the project is in conformance with the local and regional plans. We have found that both the local and the regional plans emphasize the protection of existing scenic qualities and the prevention of visual blight. Because we also found that the tower will not be a significant feature on the landscape, and because we found that the tower's visual impact will be negligible, we must conclude that the project is in conformance with both the regional and local plan to the extent that they address aesthetic concerns.

While we will issue a permit for the project, we will also impose conditions designed to assure that the tower's aesthetic impact is minimized. We will require that large maple trees adjacent to the proposed access roadway be marked, protected by snow fence, and retained. We will prohibit any additions or changes to the project without Commission approval. We will require that VELCO secure the preservation of all surrounding vegetation which will provide screening for the lower portions of the tower. We conclude that these measures are necessary to assure that the project conforms with the requirements of Criterion 8 and 10.

In accordance with these findings of fact and conclusions of law, we will issue Land Use Permit #7C0565-EB. The Board hereby incorporates by reference as if fully set forth, and adopts as its-own, those findings of fact and conclusions of law reached by the Commission which were not appealed. The permit now issued approves the project subject to conditions which are reflected in the Commission's findings and conclusions.

Based upon the foregoing findings of fact and conclusions of law, it is the conclusion of the Board that the project described in application #7C0565, if completed and maintained in accordance with all the terms and conditions of that application, the exhibits presented to the Board and the Commission by the Applicant, and the conditions set forth in Land Use Permit #7C0565-EB, will not cause or result in a detriment to public health, safety or general welfare under the criteria set forth in 10 V.S.A. §6086(a).

VII. ORDER

Land Use Permit #7C0565-EB is hereby issued in accordance with the findings of fact and conclusions of law herein. Jurisdiction over this matter is returned to the District #7 Environmental Commission, except as otherwise provided in the permit.

Dated at Montpelier, Vermont this 12th day of December, 1984.

VERMONT ENVIRONMENTAL BOARD

By:


Margaret P. Garland, Chairman
Warren M. Cone
Melvin H. Carter
Ferdinand Bongartz
Dwight E. Burnham, Sr.

Dissenting:
Lawrence H. Bruce, Jr.
Roger N. Miller