

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

Re: Stokes Communication Corporation
Declaratory Ruling #357

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This decision pertains to a petition for a declaratory ruling regarding whether the construction of a 10 foot radio antenna support structure is subject to 10 V.S.A. §§ 6001-6092 ("Act 250"). As explained below, the Environmental Board concludes that an Act 250 permit is not required.

I. BACKGROUND

On March 2, 1998, Stokes Communication Corporation ("Stokes") appealed from Jurisdictional Opinion #3-68 issued on January 6 and February 2, 1998 ("Opinion") and petitioned for a declaratory ruling ("Petition"). In his Petition, Stokes contends that Act 250 jurisdiction is preempted by In the Matter of Preemption of Local Zoning Regulation of Satellite Earth Stations, In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996, Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service, IB Docket No. 95-59 and CS Docket No. 96-83, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking (FCC 96-328, Aug. 6, 1996) ("FCC 96-328"), and 47 C.F.R. 1.4000.'

On April 8, 1998, Marcy Harding, Chair of the Environmental Board, convened a prehearing conference and, on April 9, 1998, issued a Prehearing Conference Report and Order ("Prehearing Order"). No party objected to the Prehearing Order.

On May 13, 1998, Stokes tiled **prefiled** direct testimony.

'The FCC adopted 47 C.F.R. 1.4000 as a result of Section 207 of the Telecommunications Act of 1996. As clarified by the FCC, "[t]he rule is designed to promote two complementary federal objectives: (a) to ensure that consumers have access to a broad range of video programming services, and (b) to foster full and fair competition among different types of video programming services." FCC 96-328 at ¶ 6. 47 C.F.R. 1.4000 has no applicability to the receipt of non-video programming signals such as AM, FM, or personal wireless signals. Moreover, the protection afforded by 47 C.F.R. 1.4000 to television signals is limited to those signals which are "intended for reception in the viewing area." FCC 96-328 at ¶ 20. Thus, 47 C.F.R. 1.4000 does not "offer the same protection to consumers seeking to install, maintain, or use antennas designed to receive distant TVBS signals." FCC 96-328 at ¶ 20, footnote 46.

On June 16, 1998, Chair Harding, and Board members Holland and Martinez, convened a hearing panel ("Panel") in Randolph, Vermont at which Stokes was the sole participant.

On July 14, 1998, the Panel issued a proposed decision to the parties. Pursuant to 10 V.S.A. § 6027(g) and EBR 41(A), parties were allowed to request oral argument before the Board, and to file written objections or legal memoranda in response to the proposed decision.

No party requested oral argument or filed any written objection in response to the July 14, 1998 proposed decision.

On August 19, 1998, the Board convened a deliberation concerning this matter and, following a review of the proposed decision and the evidence and arguments presented in the case, declared the record complete and adjourned.

II. ISSUES

As stated in the Prehearing Order, the issues are as follows:

1. Whether the project is subject to Act 250 jurisdiction pursuant to 10 V.S.A. § 6001c.
2. Whether, if the project is subject to Act 250 jurisdiction, such jurisdiction impairs the project pursuant to FCC 96-328 and 47 C.F.R. 1.4000(a) since such jurisdiction:
 - i. unreasonably delays or prevents installation, maintenance or use of the project;
 - ii. unreasonably increases the cost of installation, maintenance or use of the project; or
 - iii. precludes the project's reception of an acceptable quality signal.
3. Whether, if issue #2 is answered affirmatively, Act 250 jurisdiction over the project is preempted because, pursuant to FCC 96-328 and 47 C.F.R. 1.4000(b):
 - i. such jurisdiction is not necessary to accomplish a clearly defined safety objective that is either stated in the text, preamble or legislative history of

Act 250 or described as applying to the project in a document that is readily available to antenna users, and would not be applied to the extent practicable in a non-discriminatory manner to other appurtenances, devices, or fixtures that are comparable in size, weight and appearance to the project and to which Act 250 would normally apply;

- ii. such jurisdiction is not necessary to preserve an historic district listed or eligible for listing in the National Register of Historic Places, as set forth in the National Historic Preservation Act of 1966, as amended, 16 U.S.C. § 470a, and does not impose a greater restriction on antennas covered by this rule than are imposed on the installation, maintenance or use of other modem appurtenances, devices or fixtures that are comparable in size, weight, and appearance to these antennas; and
- iii. it is more burdensome to affected antenna users than is necessary to achieve the objectives described in 3(i) or (ii) above.²

III. FINDINGS OF FACT

1. Stokes is a corporation organized under the laws of the State of Vermont. Stokes is the licensee of radio stations WCVR-FM and WWWT-AM, located in Randolph, Vermont, Stokes' president is Edward H. Stokes. Stokes' sole witness is Mr. Stokes.
2. Stokes' studio building is located in Randolph, Vermont. The height of the studio building's peak is 15 feet above ground level.
3. In part, Stokes' Petition states:

This is an appeal from the enclosed decisions of the District 3 Coordinator, dated January 6 and February 2, 1998. [Stokes] submitted an application to the coordinator, dated December 31, 1997, in which it declared its intention to "construct a support structure which will be primarily for communication purposes and

*Issues #2 and #3 essentially set forth the preemption test contained in 47 C.F.R. § 1.4000.

which will extend 25 feet vertically from the roof of our building in order to receive broadcast signals.”

[Stokes] request[s] that the board rule whether, and under what circumstances and legal authority, an Act 250 permit is required for the installation of ordinary broadcast receivers, and the antennas, cables, hardware, and support structures reasonably required for the operation of such receivers. Does a television receiver and an aerial mounted on a 6 inch by 25 foot outdoor support require an Act 250 permit? Does an FM radio receiver and an antenna mounted on the same support structure require an Act 250 permit? Submitted March 4th, 1998 by Edward H. Stokes, for Stokes Communications Corporation.

4. Stokes' prefiled testimony is that "[t]he aerial will extend 25 feet above the ground and will be mounted on the roof of the studio building, using a pole of suitable diameter not to exceed 6 [inches].”
5. Stokes' testimony given at the evidentiary hearing convened on June 16, 1998, is that the support structure for the aerial will be 10 feet tall, and will be mounted on the 15 foot high studio building.
6. The 10 foot tall support structure to be mounted on the 15 foot high building is not a support structure proposed for construction which will itself extend vertically 20 feet or more. The 10 foot tall support structure is for broadcast purposes. and is solely intended to receive communication signals for a commercial purpose (“Project”).
7. The Act 250 permit application for construction of a support structure is done pursuant to Act 250 program documents “Guide to Schedule B for Communications Facility” and “Act 250 Application for Communications Facility,” both of which are attached hereto and incorporated herein, respectively, as Board Exhibit #1 and Board Exhibit #2.
8. In part, the Guide to Schedule B for Communications Facility provides as follows:
 1. THE APPLICATION FORM:

The application form must be completely filled out. This two-page form is the request for a permit - everything else is supporting documentation. All landowners, tenants, and other holders of an interest in the tract or tracts must sign the application even if the communications facility is leased on a portion of a large tract. All easements, rights-of-way, and other encumbrances to the land should be described.

The project description should include all construction and all changes for which approval is required. The description is used to create a legal notice for the public.

II. THE SITE PLAN AND PROJECT DRAWINGS

Site plans should show the communications facility and all associated construction in sufficient detail to understand the project. All natural and cultural features near or impacted by the project should be shown, including septic systems, wells, streams and other bodies of water, wetlands, forests, roads, easements, buildings, etc.

Drawings should be prepared that show how the project will look, including towers, antennas, guy wires, sheds, support pads, vegetation and/or landmarks.

A USGS map or similar map is also required so that reviewers can identify the project location. This map can also be used to indicate communication coverage or service area.

Please call the district coordinator if you have any questions about what to include on the site plan and drawings.

III. SCHEDULE B

The short form schedule B is a fill-in-the-blanks form that can be used for all types of projects by addressing the relevant questions. Given the Commission's legal obligation to make positive findings, all ten criteria are relevant and should be addressed. The following is an advisory guide based on common issues that

normally arise under the ten criteria. There may be other issues depending on the circumstances associated with your particular project and site.

1 AIR POLLUTION

- * Describe all emissions, odors, and sources of noise.
- * Describe all measures, devices, procedures that will reduce emission, noise, odor.
- * Does the project meet FCC regulations including radio frequency radiation (RFR) standards? Please provide documentation.
- * Address control of dust and other particulate matter.

* * *

8 AESTHETICS

In many cases, this is the Act 250 criterion needing particular attention for communications applications. Perform a visual impact assessment (VIA) of all parts of the project, including roads, utility lines, cleared land, towers and other structures. The VIA may need to be only a few pages with drawings or it could be fairly extensive, depending on the nature of the project. In any case, it should address at least the following:

- * Describe the visual appearance of the project site as it exists without the project. How exposed is the area?
- * Submit drawings of all structures and proposed equipment.
- * How much land will be cleared?
- * Describe mass, height, signs, lights, colors, materials and all other visual aspects of the project.

9. The Act 250 Application for Communications Facility at question 6 calls for a project description. Question 6 presents four blank lines to be filled-in for the project's description. In part, question 7 calls for a list of the names and addresses of all adjoining property owners whose fee simple ownership of property shares a property boundary with the project tract(s) or whose lands are adjacent and separated only by a river, stream, or public highway; names and addresses of all landowners whose lands are subject to rights of way for project access; and an

elevation drawing showing the height and scaled appearance of any tower, antenna(s), guy wires, or buildings proposed to be constructed or installed.

10. The district coordinator's January 6, 1998 Opinion states, in part:

Dear Mr. Stokes: Upon review of your December 31, 1997 letter, I find it incomplete as an Act 250 permit application under Environmental Board Rule ("EBR") 10(D). 10 V.S.A. § 6083, EBR 10, and the Act 250 application require the applicant to provide basic information to the District Environmental Commission and statutory parties, including five copies of a plan of the proposed development showing the intended use of the land, the proposed improvements, and the project details; the book and page number where the deed for the land is recorded; the size of the project tract; fee information; the appropriate fee; an adjoiner list; and a complete response to the ten criteria set forth at 10 V.S.A. § 6086(a). Because your December 31, 1997, letter lacks the above information, it is a substantially incomplete application and it will not be processed. My decision that your application is incomplete may be appealed in accordance with EBR 3(C)-(D). EBR 10(D). I have enclosed an application for your convenience.

IV. CONCLUSIONS OF LAW

Stokes has the burden of proof on all issues relevant to this Petition and the Project since he is solely in possession of the facts pertaining to the Project. In addition, Stokes has the burden of proof since he is the person who is claiming that the Project is exempt from Act 250 jurisdiction. Re: Weston Island Ventures, Declaratory Ruling #169 at 5 (June 3, 1985), citing Bluto v. Employment Security, 135 Vt. 205 (1977). The burden of proof consists of the burdens of production and persuasion. Re: John Gross Sand and Gravel, Declaratory Ruling #280 at 9 (July 28, 1993); Re: Pratt's Propane, Findings of Fact, Conclusions of Law, and Order #3R0486-EB at 4-6 (Jan. 27, 1987).

Pursuant to 10 V.S.A. § 6007(c) and EBR 3(D), a petition for declaratory ruling is conducted de novo to determine the applicability of any statutory provision or of any rule or order of the Board. Although it may come to the Board as an appeal of a jurisdictional opinion or project review sheet, the issue in a declaratory ruling proceeding is not whether a jurisdictional opinion or project review sheet, or any part thereof, is correct. Thus, facts stated or conclusions drawn are not considered by the Board. Provided a petition is timely tiled, the only issue is the applicability of any statutory provision or any

rule or order of the Board over the project described in the jurisdictional opinion or project review sheet.

The Vermont Supreme Court's precedent is clear that declaratory rulings must pertain to "actual" controversies. In Town of Cavendish v. Vermont Public Power Supply Authority, 141 Vt. 144 (1982), the Court explained that declaratory rulings before administrative boards are like declaratory judgment actions in court, and that there must be "an actual controversy" to confer jurisdiction to hear the case. Id. at 147. The "actual controversy" requirement cannot be waived by the parties or the Board. The Court has also stated that Act 250 jurisdiction should be determined based upon proposed activities which are "settled in intention and purpose." In re Agency of Administration, 141 Vt. 68, 82 (1982). Finally, the Court has stated that, in a declaratory ruling, it is not the Board's function to issue guidelines or to outline for petitioners activities which will or will not require permits. In re Orzel, 145 Vt. 355,360 (1985). Rather, the Board is to determine the applicability of the statute to a *particular* set of facts. Orzel, 145 Vt. at 360; Town of Cavendish, 141 Vt. at 147. These limitations exist because a declaratory ruling will turn on the specific facts of a case.

Based on the findings of fact, Stokes has modified the Project since the Opinion's issuance. The Opinion considered whether the construction of a 25 foot by 6 inch support structure required a permit under 10 V.S.A. § 6001c. In contrast, the Project at issue in this Petition as described by Stokes on June 16, 1998, is the construction of a 10 foot support structure on a 15 foot high building.

As of July 1, 1997, Act 250 was amended to provide as follows at 10 V.S.A. § 6001c:

In addition to other applicable law, any support **structure** proposed for construction, which is primarily for communication or broadcast purposes and which will extend vertically 20 feet, or more, in order to transmit or receive communication signals for commercial, industrial, municipal, county or state purposes, shall be a development under this chapter, independent of the acreage involved. If jurisdiction is triggered for such a support structure, then jurisdiction will also extend to the construction of improvements ancillary to the support structure, including buildings, broadcast or communication equipment, foundation pads, cables, wires, antennas or hardware, and all means of ingress and egress to the support structure. To the extent that future improvements are not ancillary to the support structure and do not involve an additional support structure, those improvements shall not be considered a development, unless they would

be considered a development under this chapter in the absence of this section. The criteria and procedures for obtaining a permit under this section shall be the same as for any other development.

In order to determine jurisdiction, the Board will not count the height of Stokes' studio building since it is an existing building and 10 V.S.A. § 6001c only applies to a support structure proposed for construction. In making this conclusion, the Board is assuming that the studio building constitutes a "support structure" primarily for broadcast purposes, although this may not be the case. Nevertheless, since the support structure proposed by Stokes is *itself* only 10 feet tall, the construction of the 10 foot tall support structure does not require an Act 250 permit under 10 V.S.A. § 6001c. In contrast, the support structure reviewed in the Opinion and described in the Petition identifies the support structure as being 25 feet by 6 inches. While not necessary to the decision herein, clearly a support structure which is itself 25 feet tall would require a permit under 10 V.S.A. § 6001c, and the Opinion is correct based on the facts that were available to the district coordinator.³

Because the Board concludes that the 10 foot tall support structure does not require a permit under 10 V.S.A. § 6001c, it is not necessary to determine issues #2 and #3 as those issues pertain solely to the preemption of jurisdiction pursuant to an order of the Federal Communications Commission. In addition, the Board has determined on other occasions that it is *not* the proper forum for deciding constitutional issues. See, e.g., Re: Okemo Mountain, Inc., #2S0351-12A-EB, Memorandum of Decision at 4 (Sept. 18, 1990). Such questions are appropriately raised in a court of competent jurisdiction. See, e.g., Southview Associates, Ltd. v. Bongartz, 980 F.2d 84 (2nd Cir. 1992), cert. denied 507 U.S. 987 (1993); Killington, Ltd. v. State of Vermont, 164 Vt. 253, 259 (1995). Therefore, the Board is without jurisdiction to adjudicate claims that Stokes' state or federal constitutional rights are violated by the application of 10 V.S.A. § 6001c to the project.⁴

The Board notes, however, that the Guide to Schedule B for Communication

³The Board will not remand the Petition since the Board, until now, has not issued a declaratory ruling interpreting 10 V.S.A. § 6001c relative to the exclusion of a building's height from the 20 foot threshold.

⁴The Prehearing Order informed Stokes that the Board is without jurisdiction to adjudicate constitutional claims. Stokes did not object to the Prehearing Order in any respect.

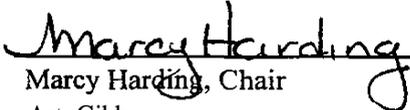
Facility and Act 250 Application for Communications Facility do not require Stokes to disclose the frequencies, signals, broadcasts, stations or programs Stokes intends to receive. Rather, the Guide to Schedule B for Communication Facility and Act 250 Application for Communications Facility seek only that information in relation to a project's size and scope that is necessary to effectuate the Legislature's intent when it enacted 10 V.S.A. § 6001c, and that which is authorized under applicable statutes and regulations. See 10 V.S.A. §§ 6084 and 6085; EBR 10; and Re: Stokes Communications Corporation, #3R0703-EB, Findings of Fact, Conclusions of Law, and Order (Dec. 13, 1993), *aff'd*, In re: Stokes Communications Corporation, 164 Vt. 30 (1995). Likewise, the coordinator's Opinion did not request Stokes to disclose the frequencies, signals, broadcasts, stations, or programs Stokes intends to receive.

V. ORDER

Stokes' construction of a 10 foot tall support structure on Stokes' 15 foot high studio building is not subject to Act 250 jurisdiction and, accordingly, does not require an Act 250 permit.

Dated at Montpelier, Vermont, this 20th day of August, 1998.

ENVIRONMENTAL BOARD



Marcy Harding, Chair

Art Gibb
George Holland
Samuel Lloyd
Rebecca Nawrath
Gregory Rainville