STATE OF VERMONT
PUBLIC SERVICE BOARD

Petition for investigation pursuant to 30 V.S.A. § 202d concerning Vermont 911 Emergency Calling System reliability and planning	**)** **)** **)**	**Docket No. 8842** **February 22, 2017**

REPLY COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

CTIA[1] hereby provides the Vermont Public Service Board ("PSB" or the "Board") with its reply to Charles Larkin and Stephen Whitaker's (the "Petitioners") January 31, 2017 Compliance Filing (the "Filing") in connection with the above captioned proceeding. CTIA respectfully submits that the Board should decline to grant the relief requested by the Petitioners for the reasons set forth below.

I. INTRODUCTION

The Petitioners request that the Board assert jurisdiction over E911 services in order to mandate that all providers of telecommunications services maintain some minimal level of backup power. For several reasons, the Board should deny Petitioners' request. First, the Petitioners fail to satisfy the standard for standing established by Vermont courts. Second, CTIA respectfully submits that the Board lacks jurisdiction under state and federal law to grant the requested relief. Finally, the Petitioners' Filing represents a prohibited collateral attack on matters resolved by Memorandum of Understanding ("MOU") in Docket No. 8390, *Petition of Vermont Department of Public Service for an Investigation of Telephone Operating Company of Vermont LLC's d/b/a Fairpoint Communications, Provision of Service Quality* ("Docket No. 8390"), and by the Department of Public Service ("DPS") in its

[1] CTIA – The Wireless Association® ("CTIA") (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association's members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

ten-year telecommunications plan ("Ten-Year Plan"). For the reasons expressed below, the Board should dismiss the Petitioners' Petition.

II. DISCUSSION

A. The Petitioners Do Not Meet the Standard for Standing Established by Vermont Courts

During the Board's January 12, 2017 Prehearing Conference in the instant docket, CTIA, the DPS, Charter, Comcast, and FairPoint all argued that the Petitioners lack standing to bring before the Board the demands described in their various filings. To satisfy the threshold requirement of standing, a plaintiff "must present a real—not merely theoretical—controversy involving the threat of actual injury to a protected legal interest rather than merely speculating about the impact of some generalized grievance."[2] The U. S. Supreme Court has held that, to satisfy the "irreducible constitutional minimum of standing, a plaintiff must show a legally protected interest that is … concrete and particularized."[3] Even where the circumstances satisfy these requirements, the Vermont Supreme Court has held that there are judicially imposed prudential limits, including the rule against adjudication of generalized grievances.[4] These federal standing requirements have been adopted in Vermont.[5]

Apart from the Petitioners, every participant in this proceeding argued that the Petitioners have failed to reflect a concrete and particularized interest, rather than the generalized interest of members of the public. Indeed, even the Hearing Officers expressed concern that the Petitioners had not alleged a specific complaint, but rather a general request; more like a customer complaint. It was for this reason the Hearing Examiners asked the

[2] Brod v. Agency of Nat. Res., 2007 VT 87, ¶ 9, 182 Vt. 234, 936 A.2d 1286 (quotations omitted).
[3] Allen v. Wright, 468 U.S. 737, 752, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc., —— U.S. ——, 134 S.Ct. 1377, 188 L.Ed.2d 392 (2014).
[4] Hinesburg Sand & Gravel v. State, 166 Vt. 337, 341 (1997).
[5] Parker v. Town of Milton, 169 Vt. 74 at 77-78 (1998) (explaining that in Hinesburg Sand & Gravel, the Vermont Supreme Court adopted the standing test articulated in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

Petitioners to submit a "brief" specifically setting forth the legal basis for their standing to bring their request before the Board.

However, the Petitioners' Filing makes no such showing. The Petitioners fail to identify any particularized interest to support their requested relief. Indeed, the Petitioners cannot make such a showing. The Petitioners merely present generalized grievances that any member of the public might raise. Accordingly, the Petitioners fail to meet the standard for standing adopted by the court in *Parker*.

B. The Commission Lacks Jurisdiction Under State and Federal Law to Grant Petitioners' Requested Relief

The Petitioners' Issue 4 (Amended Petition, 9/12/16 at 1) asked the PSB to open an investigation to determine whether, *inter alia*, cellular carriers should be required by rule to provision backup power.[6] Petitioners request a rulemaking "for the purposes of regulating all companies subject to the Board's jurisdiction as necessary to fully accomplish the … objectives set forth at 30 V.S.A. §208: to (1) regulate or prescribe terms and conditions of extension of utility service to customers …."[7] As explained below, granting the Petitioners' requested relief would violate state and federal statutes. Accordingly, the Board should reject the Petitioners' request.

Vermont law specifies that the E911 Board "*shall be the single government agency responsible for statewide enhanced 911.*"[8] Petitioners seek to circumvent the E911 Board's exclusive jurisdiction, arguing that that the PSB has jurisdiction, pursuant to 30 V.S.A. § 209, to grant the relief the Petitioners seek. Section 209 empowers the PSB to "prescribe the

[6] *See also,* Compliance Filing at 7 ("… backup power must be required to be provided by all other telecommunications providers …").
[7] Compliance Filing at 2.
[8] 30 V.S.A. §7053 (emphasis added). *See also* 30 V.S.A. § 7052 (the E911 Board is "to develop, implement and supervise the operation of the statewide E911 system.").

equipment for and standard of measurement, pressure, or initial voltage of such product."[9] While the quoted statute clearly vests in the PSB some general jurisdiction, such jurisdiction must be construed in harmony with, and secondary to, the exclusive jurisdiction entrusted to the E911 Board by 30 V.S.A. § 7053.[10] Because the Petitioners' claim relates directly to the adequacy of E911 service in Vermont, the PSB lacks jurisdiction under state law to consider the issues raised by Petitioners.

Federal law also bars the relief requested by the Petitioners insofar as the request relates to wireless telecommunications providers. In 1993, Congress reinforced federal primacy over mobile services by adding language to Section 332 of the Communications Act, stating that "no State or local government shall have any authority to regulate the entry or rates charged by any commercial mobile service…."[11] Imposing requirements such as minimum backup power standards would be a clear violation of 47 U.S.C §332(c)(3)(A)'s prohibition against state regulation of the terms of wireless market entry (or the ongoing provision of such services). The cases construing the difference between regulating "entry" and "other terms and conditions" in 47 U.S.C §332(c)(3) make it clear that the states lack jurisdiction to regulate the placement of wireless facilities or network quality. As one federal appeals court noted, "[t]he Act makes the FCC responsible for determining the number, placement and operation of the cellular towers and other infrastructure."[12] Federal courts have concluded that state action that "would directly alter the federal regulation of tower construction, location and coverage, [and] quality of service" inevitably "tread directly on the

[9] 30 V.S.A. § 209.
[10] *See*, Our Lady of Ephesus House of Prayer, Inc. v. Town of Jamaica, 178 Vt. 35,41 (2005) ("Where two statutes cover the same subject and one is more specific than the other, we harmonize them by giving effect to the more specific provision according to its terms"); *See also*, U.S. v. Torres Echavarria, 1291 F.3d 629,699, fn.3 (1997) ("The operative principle of statutory construction is that a specific provision takes precedence over a more general provision").
[11] 47 U.S.C §332(c)(3)(A).
[12] *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983, 988 (7th Cir. 2000) (citing regulations governing, *inter alia*, geographic coverage and antenna power and height requirements).

very areas reserved to the FCC: the modes and conditions under which [a wireless carrier] may begin offering service" and "force [a wireless carrier] to do more than required by the FCC: to provide more towers, [and] clearer signals. . . ."[13]

Congress has also stressed the importance of unified management of radio spectrum and the licensing of radio facilities, and rendered them subject to the exclusive jurisdiction of the Federal government.[14] This is particularly true with respect to the E911 system, where the FCC has recognized that a "comprehensive national approach to the quality and reliability of 911 service is needed, to avoid the risk of confusion and incompatibility that would arise from a patchwork of potentially inconsistent standards.[15] Accordingly, federal law bars the Board (or other entity) from mandating backup power requirements for wireless carriers, and therefore, the Commission cannot grant Petitioners' requested relief.

C. The Board Should Reject Petitioners' Collateral Attack on Issues Resolved By the Memorandum of Understanding Entered Into in Docket 8390, and Issues Regarding the Adequacy of the DPS's Ten-Year Plan

Petitioners acknowledge that the PSB recently considered network reliability in Docket 8390.[16] That proceeding was resolved by a MOU entered into by Fairpoint and the DPS. The Petitioners allege that adoption of the MOU resulted inappropriately in the conclusion of Docket 8390 prior to technical meetings and development of an evidentiary record.[17] The Petitioners also indicate their dissatisfaction with the DPS's discharge of its duties, under 30 V.S.A. § 202d, to develop and periodically update a Ten-Year Plan.[18] Citing their dissatisfaction with the resolution of Docket No. 8390 and the DPS's development of

[13] *Id.* at 989.
[14] See, e.g., *Inquiry Into the Use of Bands 825-845 and 870-890 MHz for Cellular Communications Systems*, Report and Order. 86 F.C.C. 2d 469, 504 ¶ 80 (1981), *modified on other grounds*, 89 F.C.C. 2d 58 (1982).
[15] *911 Governance and Accountability*, PS Docket No. 14-193, Policy Statement and Notice of Proposed Rulemaking , FCC 14-186 (2014).
[16] Compliance Filing at 10.
[17] *Id.* at 10-13.
[18] Compliance Filing at 6, 10, 12, and 15-18.

Vermont's Ten-Year Plan, the Petitioners seek in this docket to collaterally attack issues that have been resolved in Docket No. 8390 and the Ten-Year Plan.

The Petitioners' current request is nothing more than a manifestation of their frustration over matters addressed elsewhere, but not resolved in a manner satisfactory to them. Public policy supports resolution of issues by agreement—such as the MOU—and the Board should not upset the accord reached in Docket No. 8390. As pertains to the DPS's Ten-Year Plan, Petitioners' claims in that regard appropriately are addressed to the DPS, not aired in the form of a Petition before the Board. In both regards, the Board should not countenance the Petitioners' collateral attacks on Docket No. 8390 and the Ten-Year Plan.

III. CONCLUSION

The Board should reject the Petitioners' requests for relief. Not only do the Petitioners' fail to satisfy the standard for standing established by Vermont courts, but even if they did, state and federal law would prohibit the Board from granting the relief requested. Further, Petitioners' issues have previously been properly considered and disposed of with finality elsewhere. Accordingly, the Petition should be dismissed.

CTIA-The Wireless Association®

By: */s/ David W. Bogan*

David W. Bogan, Esq.
Donald E. Frechette, Esq.
Locke Lord LLP
20 Church Street
Hartford, CT 06103
Tel: (860) 541-7711
david.bogan@lockelord.com
donald.frechette@lockelord.com

CERTIFICATION

This is to certify that a copy of this submission has been sent to all designated on the ePSB Service List on this 22nd day of February, 2017.

/s/ David W. Bogan
David W. Bogan, Esq.