Before the
VERMONT PUBLIC UTILITY COMMISSION

Order establishing proceeding pursuant to Act 25 (S.301)	)	Case No. 20-1958-INV

REPLY COMMENTS OF CTIA

I. INTRODUCTION

As enacted on July 1, 2020, Act 125, "An act relating to miscellaneous telecommunications changes," requires the Vermont Public Utility Commission ("Commission") to "review the criteria used in awarding a certificate of public good under 30 V.S.A. § 248a and report … any changes that should be made in light of recent developments in telecommunications technology."[1] To comply with this statutory mandate, the Commission opened the above-captioned docket and asked "commenters to identify any new technologies" and "provide proposed statutory changes" required to accommodate such technologies.[2]

30 V.S.A. § 248a ("Section 248a"), under the Commission's stewardship, has worked well to facilitate vigorous deployment of the robust wireless networks that so many Vermonters enjoy and rely on today. Wireless technology is a major economic driver and efficient, continued wireless deployment is essential to ensuring Vermonters continue to enjoy all the benefits that wireless connectivity delivers.

CTIA appreciates the Commission's commitment to fulfilling its duty under Act 125 and looks forward to engaging with the Commission to ensure that Section 248a continues to facilitate and encourage wireless deployment in Vermont.

[1] S.301, 2020 Gen. Assemb., Reg. Sess. (Vt. 2020) (Act 125) at § 2.
[2] Order Establishing Proceeding, Case No. 20-1958-INV (July 23, 2020) ("Order").

II. COMMENTERS URGING CHANGES TO SECTION 248A PRESENTED INFORMATION AND SUGGESTED STATUTORY AMENDMENTS THAT ARE UNRELATED TO THE PURPOSE OF THIS DOCKET

The Commission received a number of comments, but other than CTIA's and the Department of Public Service's ("DPS's") comments, none addressed the sole focus of this docket: to identify new technologies and any statutory changes necessary in relation to those technologies.[3] DPS appropriately concluded that "Section 248a as presently written adequately accommodates deployed and new technologies…."[4] Prudently, DPS cautions that "any amendments to Section 248a should facilitate increased deployment of broadband across the state…."[5]

In contrast to DPS's focused comments, the VCE Commenters failed to describe new technology and primarily engaged in hyperbole. The statutory changes suggested by the VCE Commenters essentially re-envision Section 248a with the Commission's role administering the statute rendered secondary and subordinate to municipalities that elect to regulate siting.[6] VCE proposes to assign to municipalities, not the Commission, primary jurisdiction over siting.[7] It also argues that "all new towers and utility poles regardless of height [must] go through [the] full process" and "all new Antennas [must] go through [the] full process."[8] VCE envisions creation of "a document that Petitioners send to [the] Service List informing them of their opportunities to comment and … [to] *encourage them to participate.*"[9] None of these are "changes that should

[3] *See* Order at 1. Other than CTIA and DPS, all other commenters expressed a common set of concerns and supported statutory amendments proposed by Vermonters for a Clean Environment ("VCE"). Several commenters submitted VCE's comments as attachments to their own. Where convenient, CTIA refers to those commenters collectively as the "VCE Commenters."
[4] Department of Public Service Comments, Case No. 20-1958-INV (Aug. 21, 2020) ("DPS Comments") at 9.
[5] *Id.* at 5.
[6] *See* Comments of Vermonters for a Clean Environment, Case No. 20-1958-INV (Aug. 21, 2020) ("VCE Comments") at 6, and in the redlined rule proposal attached to VCE Comments.
[7] *Id.*
[8] *Id.* at 5.
[9] *Id.* (emphasis in original).

be made in light of recent developments in telecommunications technology."[10] Rather, these are wholesale, generally-applicable structural revisions to Section 248a that are unrelated to technological changes.

A common theme among the VCE Commenters is their criticism regarding the opportunity to participate in consideration of siting applications under Section 248a's current processes.[11] These criticisms are not pertinent to the focus of this docket, and furthermore, they are contradicted by the considerable process and opportunity for participation afforded under Section 248a as written. Even the smallest deployments, those meeting the "*de minimis* modification" criteria,[12] are subject to significant notice requirements, including notice to landowners and the Selectboard or City Council of the municipality where the project is located.[13] Likewise, deployments that meet the "limited size and scope" criteria[14] are subject to substantial notice requirements, including notice to landowners, the relevant Selectboard or City Council, and others.[15] In certain instances, the Commission is also empowered to order further notice than required in the statute,[16] and Selectboards and City Councils can require an applicant, and DPS, to attend a public meeting regarding its application.[17] The difference between notice applicable to "*de minimis*" and "limited size and scope" deployments is warranted by their

[10] Act 125 at § 2.
[11] *See, e.g.*, VCE Comments at 3 ("There is very little public notice or participation via the Section 248a process.")
[12] Deployments that do not increase the height and width of a support structure, make no or small increases to impervious surfaces, or that minimally enlarge or extend beyond the support structure. *See* 30 V.S.A. § 248(b)(2)(a) – (d).
[13] *See* 30 V.S.A. § 248a(k).
[14] 30 V.S.A. § 248a(b)(4)(a).
[15] *See* 30 V.S.A. § 248a(j). Deployments meeting the "limited size and scope" criteria require notice to the nearly the same persons and entities as deployments that exceed the criteria. Both require notice to legislative bodies and planning commissions for the community where construction will occur, the Secretary of Natural Resources, the Division of Historic Preservation, the Commissioner of Public Service and the Department of Public Service's Director for Public Advocacy, landowners of adjoining parcels, and – in designated instances – the Natural Resources Board. *See* 30 V.S.A. § 248a(j)(2)(A). For projects exceeding the "limited size and scope" criteria, notice to the Secretary of Transportation is also required. *See* 30 V.S.A. § 248a(e).
[16] *See, e.g.*, 30 V.S.A. § 248a(e)(1).
[17] *See* 30 V.S.A. § 248a(e).

comparative visual and environmental impacts, with the General Assembly directing that there be more process for the latter type of project than the former. Clearly, notice under Section 248a is comprehensive and not in need of expansion.

The VCE Commenters also have other concerns and misconceptions that fall outside the scope of the Commission's report. First, the Commission should recognize that small cells, which will be integral to many 5G deployments, have been in use in Vermont since at least 2012.[18] Use of small cells in 5G networks does not warrant any changes to Section 248a, and they are not "new technology" to be included in the Commission's report. Even more recent technology identified by commenters, such as beamforming,[19] is already well-integrated into 4G networks and also need not be considered in the Commission's report.

Second, the VCE Commenters' primary concerns appear not to be about new technology, but about alleged health effects of radio frequency ("RF") emissions. They claim without basis that "health and safety matters involving RF [radiation] are often ignored"[20] and that "this type of radiation causes cancer."[21] Such allegations ignore decades of science and a comprehensive regulatory scheme, and are contradicted by the consensus view of scientific experts. The Federal Communications Commission ("FCC") has established emission limits for RF-emitting

[18] *See e.g. "*VTA and CoverageCo sign contract for improved cellular coverage," VTDigger, June 1, 2012 ("The planned network will use small-cell radio equipment installed on utility poles and other existing structures….") (available at: https://vtdigger.org/2012/06/01/vta-and-coverageco-sign-contract-for-improved-cellular-coverage/, last visited August 27, 2020); New Technology brings cell service to Rt. 30," Brattleboro Reformer, September 3, 2014 (available at: https://www.reformer.com/stories/new-technology-brings-cell-service-to-rt-30,333654, last visited August 27, 2020). Wireless carriers other than just CoverageCo have been deploying small cells in Vermont for several years. *See e.g.* Petition of NYNEX Mobile Limited Partnership 1 and Cellco Partnership for a certificate of public good pursuant to 30 V.S.A. § 248a, for the installation of telecommunications equipment in Shelburne, Vermont, Order, Docket No. 8762 (July 8, 2016), Petition of New Cingular Wireless PCS, LLC, pursuant to 30 V.S.A. § 248a(k), requesting a certificate of public good authorizing the installation of telecommunications equipment in South Burlington, Vermont, Order, Case No. 18-0400-PET (March 28, 2018).

[19] *See* Comments of Mark Alexander, Case No. 20-1958-INV (Aug. 21, 2020) (describing use "of phased arrays (or 'beamforming')").

[20] Comments of Martine Victor, Case No. 20-1958-INV (Aug. 21, 2020).

[21] Comments of Gwendalyn Brown, Case No. 20-1958-INV (Aug. 21, 2020).

communications devices and facilities. In 2019, the FCC—after a multiyear study to determine whether to reassess its standards for RF emissions—concluded that no changes to its RF exposure limits were warranted, notwithstanding the advent of 5G.[22] The FCC indicated that it "takes its duty to protect the public from any potential harm due to RF exposure seriously."[23] Following recommendations from the U.S. Environmental Protection Agency, the Food and Drug Administration, and other federal health and safety agencies, the FCC concluded that:

> we find no appropriate basis for and thus decline to initiate a rulemaking to reevaluate the existing RF exposure limits. This decision is supported by our expert sister agencies, and the lack of data in the record to support modifying our existing exposure limits. Specifically, no expert health agency expressed concern about the Commission's RF exposure limits. Rather, agencies' public statements continue to support the current limits.... The record does not demonstrate that the science underpinning the current RF exposure limits is outdated or insufficient to protect human safety…. Accordingly, it is imprudent to revise these scientifically accepted recommendations without appropriate evidence supporting such a change….[24]

CTIA is happy to identify for the Commission information that it may wish to avail itself of regarding wireless deployments, as it may be helpful for the Commission to review the work of experts that have examined this issue, including dozens of studies of millimeter wave spectrum on which some 5G technology is being deployed.[25] The consensus of scientists and other health experts who have studied those effects is that there is no causal link between

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[22] *See In Re: Proposed Changes in the Commission's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields Reassessment of Radiofrequency Exposure Limits and Policies Targeted Changes to the Commission's Rules Regarding Human Exposure to Radiofrequency Electromagnetic Fields*, 2009 WL 6681944, 2 (Dec. 4, 2019) ("*FCC Order")* ("After reviewing the extensive record submitted in response to that inquiry, we find no appropriate basis for and thus decline to propose amendments to our existing limits at this time."); *accord City of Portland v. U.S.*, F.3d ___, 2020 WL 4669906, 15 (9th Cir, Aug. 12, 2020) (recognizing the FCC's decision not to amend the 1996 standards while taking 5G technology into account, and dismissing challenge to FCC's declaratory ruling for small cell technology deployment).

[23] *Id.* at ¶ 11.

[24] *Id.* at ¶ 10-11.

[25] CTIA maintains a website, http://www.wirelesshealthfacts.com, that contains much useful information regarding the effects of RF emissions. Among the resources found there are testimony from Dr. Eric Swanson, https://www.youtube.com/watch?v=Ea4S2W4o8gc, and a paper authored by Dr. William Bailey, http://www.wirelesshealthfacts.com/wp-content/uploads/2020/04/Bailey-5G-Whitepaper-4-15-20.pdf.

wireless network RF emissions and cancer or other harmful health effects. Thus, the FCC found no basis "for revisiting our existing RF limits,"[26] following its multiyear study that elicited over 1,000 public comments and presentations.

Furthermore, this Commission is preempted from taking any action to regulate the type of spectrum used in wireless networks. The FCC has exclusive jurisdiction to regulate (among other things) the use of radio spectrum in terms of the nature of service to be offered, spectrum to be used, transmission power, times of operation, location, areas, or zones of operation, and apparatus stations may use.[27] Federal jurisdiction over the operation of wireless networks is pervasive and precludes states from excluding wireless deployment.[28] VCE's proposals, which would treat deployments differently based on whether they increase radio frequency emissions[29] and require "monitoring for compliance with FCC RF emission standards,"[30] are examples of the type of regulation that federal law proscribes the states from imposing. CTIA recognizes that the Commission has jurisdiction to regulate certain elements of the siting and construction of wireless facilities,[31] but even that jurisdiction is narrowly cabined within a statutory structure that broadly prohibits state regulation of wireless facilities, including the design of their networks.[32] The regulation that the VCE Commenters seek is beyond the Commission's limited jurisdiction and well outside of the scope of what the Commission was asked to report on under Act 125.

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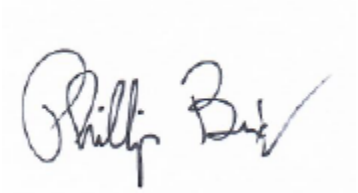
[26] *FCC Order* at ¶ 12.
[27] *See* 47 U.S.C. §§ 303(b), (c), (d), (e), and (h).
[28] *See, e.g.*, 47 U.S.C. § 332(c)(3)(A); *Bastien v. AT&T Wireless Svcs. Inc*., 205 F.3d 983 (7th Cir. 2000); *Johnson v. Am. Towers, LLC*, 781 F.3d 693, 705 (4th Cir. 2015) ("[I]n amending the Communications Act, Congress preempted state laws that not only regulate market entry, but also state laws that 'obstruct or burden a wireless service provider's ability to provide a network of wireless service coverage.'") (citation omitted).
[29] VCE Comments at 6.
[30] *Id.* at 7.
[31] *See* 47 U.S.C. § 332(c)(7).
[32] *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088, 9103 n.84 (2018) (citing 47 U.S.C. § 332(c)(3)(A) and *Bastien*, 205 F.3d at 989), *pets. for review denied in part and granted in part sub nom* ("local jurisdictions do not have the authority to require that providers offer certain types or levels of service, or to dictate the design of a provider's network.").

The Commission has done well in its role administering Section 248a, ensuring that its processes are inclusive of interested parties and that the public interest in the deployment of wireless broadband networks is vindicated. Further, the Commission has realized these goals while remaining appropriately mindful of the jurisdictional rubric governing siting of wireless facilities. The VCE Commenters invite the Commission to stray from its successful role under Section 248a, and CTIA urges the Commission to decline that invitation. Nothing presented to the Commission in this docket provides any reason for the Commission to support changes to Section 248a.

III. CONCLUSION

CTIA urges the Commission to ignore the VCE Commenters' transparent attempts to exceed the State's narrow authority to regulate siting of wireless network deployments. Nothing in the record identifies any recent telecommunications technology developments that warrant statutory changes. The Commission's report to the Legislature should reflect that Section 248a has served Vermont well and should not recommend any modifications or amendments.

Respectfully submitted,



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September 4, 2020