UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CELLCO PARTNERSHIP and NEW YORK SMSA LIMITED PARTNERSHIP, both D/B/A VERIZON WIRELESS,

Plaintiffs,

vs.

THE COUNTY OF MONMOUTH, NEW JERSEY THE MONMOUTH COUNTY BOARD OF COMMISSIONERS, DIRECTOR THOMAS A. ARNONE, in his official capacity and not as an individual, DEPUTY DIRECTOR NICK DIROCCO, in his official capacity and not as an individual, COMMISSIONER SUSAN M. KILEY, in her official capacity and not as an individual, COMMISSIONER LILLIAN G. BURRY, in her official capacity and not as an individual, and, COMMISSIONER ROSS F. LICITRA, in his official capacity and not as an individual,

Defendants

Civil Action No.
3:23-cv-18091-MAS-DEA

PROPOSED INTERVENOR-DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO DISMISS

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Proposed Intervenor-Defendants Belmar Against 5G Towers, Lawrence Reynolds, Rose Daganya, Michael Ushak, Dan Rubinetti, Paul M. Elia, Michael and Mary McHale, and Children's Health Defense (collectively "Intervenor-Defendants" or "Intervenors"),[1] submit this Memorandum of Law in support of their motion to dismiss the Complaint pursuant to Fed. R. Civ. P. 12(b).

INTRODUCTION

On September 7, 2023, Cellco Partnership and New York SMSA Limited Partnership, both d/b/a Verizon Wireless ("Verizon"), filed this action for declaratory and other relief against various County defendants (hereinafter "Defendants" or "County"). Stripped to the basics, Verizon seeks an order from this Court requiring the County to (1) agree to the placement of wireless facilities on county-owned right-of-way, allegedly pursuant to a "Right-of-Way Agreement" ("ROW Placement Consent") and (2) execute a landowner certification form ("CAFRA Landowner Certification") that Verizon claims is a necessary part of Verizon' application to the New Jersey Department of Environmental Protection ("NJDEP") for a Coastal Area Facility Review Act ("CAFRA") permit. The County (through its counsel and the County Engineer) rejected Verizon' request for

[1] Intervenor-Defendants moved to intervene on September 22, 2023. The Court has not yet ruled on that motion, which is returnable on November 6, 2023.

placement pursuant to the Right-of-Way Agreement and refused to execute the CAFRA Landowner Certification.[2]

Verizon alleges in its Complaint that the County's denial of the facility placement request was legally erroneous or invalid, and its failure to execute the CAFRA Landowner Certification is also legally erroneous or invalid and a breach of the Right-of-Way agreement. Intervenors contend the action should be dismissed under Fed. R. Civ. P. 12(b). If the action is not dismissed, the Court, pursuant to Rule 19, should require joinder of the NJDEP, which is an indispensable party.

LEGAL ARGUMENT

I. Introduction.

This Court should dismiss the Complaint because:

A. The Court has jurisdiction, if at all, under 28 U.S.C. § 1331. 47 U.S.C. §§ 253 and 332(c)(7) are not jurisdiction-conferring. If Plaintiff has not stated a claim for which relief can be granted there is no "federal question" jurisdiction (Counts I-IV).

B. Plaintiff has not stated a claim upon which relief can be granted for the ROW Placement Consent or CAFRA Landowner Certification (all Counts).

C. The statutory provisions and FCC rules the Plaintiff relies on for its legal claims (47 U.S.C. § 332(c)(7); 47 C.F.R. § 1.6003) do not apply or otherwise control the County's action or discretion relating to its refusal to execute the CAFRA Landowner Certification (Counts II, III, IV).

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[2] Plaintiff refers to its "CAFRA Application" to describe its ***request*** that the County execute the CAFRA Landowner Certification Verizon ("Certification") proffered to the County. The Certification would then become part of a much larger application to NJDEP for a CAFRA permit.

D. The standalone Count seeking Declaratory and Injunctive Relief should be dismissed (Count VII).

E. Plaintiff has failed to join a necessary party under Fed. R. Civ. P. 19 (Counts II, III, IV).

II. **This Court Lacks Subject Matter Jurisdiction.**

The Complaint avers that the Court has subject matter jurisdiction "pursuant to: (a) 47 U.S.C. §§ 253 and 332(c)(7)(B) of the Communications Act of 1934, as amended ("Act") because Verizon has been adversely affected and aggrieved by Defendants' actions in violation of those provisions of the Act; and (b) 28 U.S.C. § 1331 because this is a civil action that presents federal questions arising under the Act." Complaint ¶ 32.

Plaintiff is incorrect that 47 U.S.C. § 332(c)(7)(B) confers jurisdiction. This provision does not provide jurisdiction. To the contrary, it expressly requires that the action be filed in a "court of competent jurisdiction." This subsection provides a private ***cause of action***. The Third Circuit recognized the difference between a cause of action and jurisdiction in *Cellco P'ship v. White Deer Twp. Zoning Hearing Bd.*, 74 F.4th 96, 100 (3d Cir. 2023) ("Because the suit was ***brought under*** 47 U.S.C. § 332(c)(7)(B)(v), the District Court had ***jurisdiction under*** 28 U.S.C. § 1331.") (emphasis added).

47 U.S.C. §253 is also not jurisdiction-conferring and unlike § 332(c)(c)(7) does not even clearly provide an express or implied private cause of action. *See Superior Commc'ns v. City of Riverview*, 881 F.3d 432, 444 (6th Cir. 2018); *Spectra*

Commc'ns Grp., LLC v. City of Cameron, 806 F.3d 1113, 1119 (8th Cir. 2015); *NextG Networks of N.Y., Inc. v. City of N.Y.*, 513 F.3d 49, 52-53 (2d Cir. 2008); *Sprint Telephony PCS, L.P. v. County of San Diego*, 490 F.3d 700, 718 (9th Cir. 2007); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1265 (10th Cir. 2004).

Plaintiff contends there is a federal question and therefore jurisdiction exists under § 1331. But "federal question" jurisdiction under § 1331 only exists if Plaintiff has stated a "right to recover"[3] granted by federal law. As demonstrated below, among other problems, Plaintiff has failed to state a claim, so the Court does not have subject matter jurisdiction.

III. Plaintiff Has Not Stated A Claim Upon Which Relief Can Be Granted (All Counts).

Each of Plaintiffs "federal" claims is defective; none state a right entitled to relief and all should be dismissed. The remaining state-law claims should also be dismissed.

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[3] "…the District Court has jurisdiction if "the ***right of petitioners to recover*** under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (emphasis added).

A. **Count I.**

Count I is a 47 U.S.C. §332(c)(7)(B)(iii) "substantial evidence" challenge to the so-called "Engineer Letter."[4] But Plaintiff does not truly assert there is not "substantial evidence" supporting the determinations in that letter. Count I raises purely legal arguments that the "denial" is "erroneous, misapplies certain standards, and fails to logically connect its denial to applicable standards." Complaint ¶ 89. For example, Complaint ¶ 85 asserts a purely legal claim: that the "Engineer Letter erroneously treated the ROW Application as an application for a road opening permit." That may or may not be so, but the argument has nothing to do with any finding on an adjudicative fact. Similarly, ¶¶ 86 and 88 assert a "misapplication" of certain "standards." That is, once again, a legal question, not a "fact" question.[5]

Section 332(c)(7)(B)(iii) grants a form of procedural protection relating to a local authority's ***factual*** determinations. *See APT Pittsburgh Ltd. v. Penn Twp. Butler Cnty. of Pennsylvania*, 196 F.3d 469, 474 (3d Cir. 1999). This subsection

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[4] Count I relates only to the ROW Placement Consent. It does not seek or support relief regarding the CAFRA Application Landowner Certification.

[5] Paragraph 87 complains that the "Engineer Letter" prohibits extension into or overhang in pedestrian areas, but then alleges that the poles are "stealth designed" and all equipment is "located internally" so there will not be extension or overhang. When the Court reaches the merits it will be easy to see that the plans clearly show some "equipment" that is not "located internally." The "Engineer Letter" was noting a "minimum clearance" deficiency as to that external equipment. The plans detailed a 3'-0" minimum clearance but the County requires at least 4'-0" minimum clearance.

applies to decisions made solely on the basis of the factual record before the agency and are the subject of deferential substantial evidence review. *Id*. ***Substantial evidence is a legal term of art***. *See Omnipoint Communs. Enters., L.P. v. Zoning Hearing Bd.*, 248 F.3d 101, 106 (3d Cir. 2001) (all emphasis added). It "does not mean a large or considerable amount of evidence, 'but rather such evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.* (citing *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (*quoting Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938))). A court reviewing under the substantial evidence standard "is not to weigh the evidence contained in that record or substitute its own conclusions for those of the fact finder," but rather is to "determine whether there is substantial evidence in the record as a whole to support the challenged decision." *Id.* (citing *Cellular Telephone Co. d/b/a AT&T Wireless v. Zoning Board of Adjustment of the Borough of Ho-Ho-Kus*, 197 F.3d 64, 71 (3d Cir. 1999)). "[S]ection 332(c)(7)(B)(iii) ***is not intended to supplant the substantive standards to be applied under state or local law***." *Id.* (internal citations omitted). Accordingly, "the first step for the court in a case in which the provider of wireless services is relying on state or local law is to identify the relevant issues under that law. ***If those issues require findings of adjudicative fact, the local authority's resolution of those factual issues must be supported by substantial evidence***. Otherwise, any conclusion based on those findings violates subsection 332(c)(7)(B)(iii) and cannot stand." *Id.* (emphasis added). The "substantial evidence" requirement in § 332(c)(7)(B)(iii) is ***only*** about whether there is sufficient evidentiary support for ***findings of adjudicative facts***. This subsection does not "federalize" the other familiar administrative law grounds for judicial relief, such as "arbitrary and capricious," "abuse of discretion," "lack of reasoned decision making," or "affected by error of law."[6] Any right to review under those grounds must arise from, and be disposed based on, the forum state or local law.

In Paragraph 89 of the Complaint, Plaintiff asserts that the "denial" is "erroneous, misapplies certain standards and fails to logically connect its denial to applicable standards." This is merely a repackaging of the familiar administrative law grounds for judicial relief other than "substantial evidence." As the Third Circuit noted in *Penn Township*, "…subsection 332(c)(7)(B)(iii) is not intended to apply to decisions that are not to be made solely on the basis of the factual record before the agency and that are not to be the subject of deferential substantial evidence review." 196 F.3d at 745.

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[6] It is true that action not supported by substantial evidence can also be said to be arbitrary, capricious, an abuse of discretion or reflective of a lack of reasoned decision making. The point, however, is that substantial evidence review is about the quantum of evidence that supports a finding of adjudicative fact. It is not about whether the tribunal below misinterpreted the law or applied the wrong standard, which is what Verizon's Count I asserts.

"Substantial evidence" is an oft-invoked judicial review subject, but it is only one among several causes of action in administrative law. For example, although the federal APA does not apply here, "substantial evidence" review occurs pursuant to 5 U.S.C. § 706(2)(E), whereas "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" review comes from § 706(2)(A), review to determine whether the decision is "contrary to constitutional right, power, privilege, or immunity" is covered by § 706(2)(B), a challenge for action "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right" arises under § 706(2)(C), and review for "observance of procedure required by law" is authorized by § 706(2)(D). Each of these subjects involve different tests and contemplate higher or lower forms of deference. Some may be pure *de novo*, while others are not.

Congress was surely aware of these various types of review, but it only "federalized" ***one*** – the substantiality of the evidence supporting adjudicative findings – in § 332(c)(7)(B)(iii). It could have, but did not, provide a "federal right to review" for the other basic judicial review prongs. That means Congress intended to leave them subject to the forum's state law.

Other than one part in Paragraph 87, Count I is not, in fact, about the substantiality of the evidence supporting the County's adjudicative findings. Verizon' legal claims in Count I concern other grounds for judicial review that are not cognizable under the federalized "substantial evidence" cause of action. Indeed, Plaintiff probably realizes this is so, since the factual and legal claims in Count VII (state law administrative review) are almost identical to those in Count I.[7]

Since the relevant averments are not about "evidence," Verizon has failed to state a claim under 47 U.S.C. § 332(c)(7)(B)(iii) and Count I must be dismissed.

B. <u>Count II</u>.

Count II seeks relief relating to the County's rejection of the ROW Placement Consent and its refusal to execute the CAFRA Landowner Certification. Plaintiff claims each refusal is an independent "material inhibition" in violation of 47 U.S.C. §§ 253(b) and 332(c)(7)(B)(iii).

A complaint must be dismissed under Fed. R. Civ. P. 12(b)(6) if it does not allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when

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[7] Intervenors acknowledge that the New Jersey Supreme Court has held that for purposes of state law "the substantial evidence standard is analogous to the arbitrary, capricious, and unreasonable standard of review traditionally afforded to decisions of zoning boards under the MLUL." *Cell S. of N.J. v. Zoning Bd. of Adjustment*, 172 N.J. 75, 89 (*citing Rowatti v. Gonchar*, 101 N.J. 46, 50-51 (1985)). But "analogous to" does not mean "the same as." In any event, in *Cell S.,* the Court was addressing ***adjudicative fact-findings***. The applicant had presented expert testimony finding no impact on property values but the contesting residents offered only lay testimony on that subject. 172 N.J at 87. The Court reaffirmed a prior decision (*Smart SMR of New York, Inc. v. Fair Lawn Board of Adjustment*, 152 N.J. 309, 336 (1998)) that "proof of an adverse effect on adjacent properties … generally will require qualified expert testimony."

the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (internal citations, alterations, and quotation marks omitted). A court "take[s] as true all the factual allegations in the Complaint and the reasonable inferences that can be drawn from those facts, but... disregard[s] legal conclusions and threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Ethypharm S.A. France v. Abbott Labs.*, 707 F.3d 223, 231, n.14 (3d Cir. 2013) (internal citation, alteration, and quotation marks omitted). The "presumption of truth attaches only to those allegations for which there is sufficient 'factual matter' to render them 'plausible on [their] face.'" *Schuchardt v. President of the U.S.*, 839 F.3d 336, 347 (3d Cir. 2016) (alteration in original) (*quoting Iqbal*, 556 U.S. at 679). "Conclusory assertions of fact and legal conclusions are not entitled to the same presumption." *Id*.

Courts in the Third Circuit take three steps to determine the sufficiency of a complaint:

> First, the court must "tak[e] note of the elements a plaintiff must plead to state a claim." Second, the court should identify allegations that, "because they are no more than conclusions, are not entitled to the assumption of truth." Finally, "where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly[8] give rise to an entitlement for relief.

Burtch v. Milberg Factors, Inc., 662 F.3d 212, 221 (3d Cir. 2011) (citations omitted)

Complaint Count II argues that the County's refusal of the ROW Placement Consent ***and*** the failure to execute the CAFRA Application Landowner Certification each violated 47 U.S.C. §§ 253 and 332(c)(7)(B)(iii) by prohibiting (or effectively prohibiting) Verizon's ability to provide its telecommunications services. *Cellco P'ship* overturned prior Circuit precedent and adopted the FCC's basic formulation for what is, and is not, an effective prohibition. 74 F.4th at 103. Even though "insufficiency in coverage" and "insufficiency in network capacity, 5G services or new technology" will "***ordinarily*** entitle a provider" to a permit, there are exceptions. As the FCC noted in the case relied on by the Third Circuit, both §§ 253 and 332(c)(7)(B)(i)(II) preserve "state 'requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers'" even ***if*** they may materially inhibit the provider's ability to serve. Section 253(c) also preserves state and local authority to manage the public rights-

[8] While "[t]he plausibility standard is not akin to a 'probability requirement' ... it asks for more than a sheer possibility..." *Iqbal*, 556 U.S. at 678.

of-way. These "safe harbors" "permit some legal requirements that might otherwise be preempted." *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 FCC Rcd 9088, 9113-9114, 9130 (2018).

Applying *Milberg Factors*, Verizon fails to make a claim in Count II. Paragraphs 91-94 and 107 merely recite law and have no factual claims. Paragraphs 97-98 actually pertain to Count III (failure to act within reasonable time) and do not pertain to Count II. Paragraph 96 is purely conclusory. Paragraphs 99-105 appear to be about "motive," not outcome (*e.g.*, does the outcome prohibit or have the effect of prohibiting). Paragraph 106 is legal and argumentative, not factual.

Within Count II, only Paragraph 95 actually addresses the factual foundation of a possibly viable prohibition claim. It states, without evidence or explanation, that "Verizon requires that the subject SWFs be installed in order to provide much needed network capacity in the Borough." Paragraphs 49-51 (within "Facts Common to all Counts") also supply averments that bear on the required elements. Plaintiff avers that: "Verizon's network has exceeded its capacity to handle the demand for wireless services in Belmar and Verizon seeks to deploy the subject SWFs in order to provide additional wireless capacity in the Borough ¶ 49). "During the summer months this lack of capacity causes blocked calls on its network which means that some of the Borough's residents and visitors are unable to make phone calls or have access to the internet via their personal devices" (¶ 50), and "[t]his service blocking, which is caused by inadequate capacity, most recently occurred this past Labor Day weekend" (¶ 51).

Plaintiff will bear the burden of proving these averments with actual evidence if this case moves forward, but they do at least plausibly allege "insufficiency in coverage" and "insufficiency in network capacity, 5G services or new technology" for purposes of Rule 12(b)(6). But that does not end the inquiry because insufficiency in coverage or capacity is not all that is required to "plausibly give rise to an ***entitlement for relief***." Iqbal, 556 U.S. at 679. At most Plaintiff has shown ***possibility*** of entitlement, but that is not the same thing as *plausibility*. *Iqbal*, 129 U.S. at 678.

Twombly explains that one cannot just "suggest" an entitlement to relief if there are two alternative interpretations, where one would show a right to recover and the other interpretation would negate a right to recover. 550 U.S. at 556-557. The Court required sufficient evidence of an illegal agreement, the predicate to eliminating plausible "lawful parallel conduct." *Id.*[9]

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[9] "It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action."

To be "entitled to relief" Plaintiff must therefore plausibly allege that the denial ***cannot be*** justified on "safety and welfare" or "right-of-way management" grounds *independent of any other "lawful" motive*. Verizon asserts the denial is actually driven by illicit motives, but even if one accepts (*arguendo*) the County wanted to find a reason to reject, the decision must stand if the County found a valid reason to do so. Here, the reasons for denial of ROW Placement Consent given in the "Engineer Letter" are reasonable on their face and they each fit squarely within the "safe harbors" recognized by the FCC and Third Circuit.

Plaintiff should have included the three seminal documents it repeatedly references as part of its Complaint: the ROW Agreement, Verizon's May 10, 2023 submission to the County, and the August 8, 2023 rejection ("Engineer Letter"). These are necessary to any plausible showing of an entitlement to relief. Intervenors attach these documents as Exhibits A, B and C.[10]

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[10] All three documents can be properly considered at this stage without converting this pleading into a Rule 56 Motion for Summary Judgment. *See State Farm Fire & Cas. Co. v. ADT Sec. Servs.,* 2010 U.S. Dist. LEXIS 74556, *4 (D.N.J. 2010) ("In reviewing a motion to dismiss, pursuant to Rule 12(b)(6), a court may consider the allegations of the complaint, as well as documents attached to or specifically referenced in the complaint and matters of public record. *Pittsburgh v. W. Penn Power Co.*, 147 F.3d 256, 259 (3d Cir. 1998); see also 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure: Civil 3d* § 1357 (3d ed. 2007). 'Plaintiffs cannot prevent a court from looking at the texts of the documents on which its claim is based by failing to attach or explicitly cite them." *In re Burlington Coat Factory Sec. Litig*., 114 F.3d 1410, 1426 (3d Cir. 1997)"); *see also Snyder v. Farnam Cos*., 792 F. Supp. 2d 712, 717 (D.N.J. 2011) ("In considering a motion to dismiss, the court generally relies on the complaint, attached exhibits, and

1. <u>ROW Placement Consent</u>.

47 U.S.C. § 253(c) and (d), when read together, effectively require that local governments allow telecommunications providers (including wireless companies) to occupy right-of-way on a "competitively neutral and nondiscriminatory basis," subject to an agreement and "fair and reasonable compensation." The FCC has clarified that the local government may impose agreement terms and conditions designed to, among other things, protect the public safety and welfare or to engage in reasonable right-of-way management even ***if*** they may materially inhibit the provider's ability to serve. *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 FCC Rcd at 9113-9114, 9130.

The mere fact of the County's denial does not on its own plausibly suggest an unlawful material inhibition. It is equally plausible that the County was acting pursuant to a recognized "safe harbor" and/or was within its rights under the ROW Agreement.[11] The ROW Agreement (see **Exhibit A**) imposed several obligations

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matters of public record. *Sands v. McCormick*, 502 F.3d 263 (3d Cir. 2007). The court may also consider 'undisputedly authentic documents] that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the [attached] documents].' *Pension Benefit Guar. Corp. v. White Consol. Indus*., 998 F.2d 1192, 1196 (3d Cir. 1993). Moreover, 'documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered.' *Pryor v. Na''l Coll. Athletic Ass'n*, 288 F.3d 548, 560 (3d Cir. 2002).")

[11] Plaintiff's hand-waving over whether the ROW Agreement covers the nine towers in issue or whether Verizon had to also submit a road opening permit is pure distraction. Complaint ¶¶ 63-64, 68-70, 85, 123-128, 132-13, 1496. The

on Verizon. Facilities cannot "interfere with the County's use or other authorized use of its right(s)-of-way." *See* **Exhibit A.** They must also "adhere to all applicable safety requirements and applicable laws for the federal, state, county, and local governments that may have jurisdiction over the right(s)-of-way area(s) or the construction or maintenance of Verizon' facilities within the right(s)-of-way area(s)." ROW Agreement § 2. Section 5 requires that all "work by Verizon will be done in a good and workmanlike manner, in conformity with all applicable statutes, laws, ordinances, regulations. rules. codes, orders or specifications of any public body or authority having jurisdiction thereof."

Verizon submitted a request to add the nine towers in issue through a letter and attached plans dated May 10, 2023. *See* **Exhibit B**. The County Engineer, consistent with ROW Agreement Section 1, reviewed those plans and identified several deficiencies that conflicted, or did not sufficiently demonstrate compliance, with ROW Agreement Sections 2 and 5. These deficiencies were detailed in the August 8, 2023 "Engineer Letter." *See* **Exhibit C**. Each of the nine deficiencies was clearly spelled out on pages 4-5.[12] Every deficiency has a direct relation to the

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fundamental problem Plaintiff faces is that its "plans" did not demonstrate full compliance with the requirements of the ROW Agreement. The County Engineer had every right to reject the application for each of the nine identified deficiencies. That effectively ends the game for Verizon.

[12] The nine independent grounds for denial set out by the County Engineer were:

"safe harbors" recognized by the FCC in that they pertain to protection of the public safety and welfare or are reasonably related to right-of-way management.[13]

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1. The complete route/connection for all underground conduit(s) shall be detailed on the overall site plan. The plans currently detail the underground conduits between the 5G pole and nearest junction boxes but fail to include the conduit connections between the small wireless facility and utility providers (i.e., electric and telecom).

2. Junction boxes shall not be located in roads, sidewalks or pedestrian areas. Revise the plans accordingly.

3. Existing sidewalk widths shall not be reduced, and any pole mounted equipment/cabinets shall not extend into or overhang pedestrian areas. The 3'-0" minimum clearance detailed on the plans shall be increased to a 4'-0" minimum clearance. Revise the plans accordingly.

4. Poles shall be of a breakaway design and meet FHWA standards. Provide revised details and catalog cut sheets from the pole manufacturer.

5. Provide design calculations for all pole and foundation designs.

6. Provide details on the means and methods for the foundation installation.

7. Provide construction details for maintaining the stability of the foundation excavation and protecting adjacent structures.

8. The included details do not meet County standards for backfill and pavement restoration. Construction and restoration details meeting County standards shall be provided.

9. Site specific Maintenance and Protection of Traffic (MPT) details shall be provided for each pole/conduit installation.

[13] The FCC has interpreted what right-of-way management entails:

160. While the Act does not define 'manage[ment of] rights-of-way,' the Commission has recognized in the context of section 253(c) that '[l]ocal governments must be allowed to perform the range of vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, [and] to manage gas, water, cable . . . and telephone facilities that crisscross the streets and public rights-of-way.' The Commission has described the 'types of activities that fall within the sphere of appropriate rights-of-way management' as including 'coordination of construction schedules, determination of insurance, bonding and indemnity requirements, establishment and

Complaint Paragraph 150 states an *ipse dixit* that "all of the reasons cited by Defendants for their denial of Verizon's ROW Application are erroneous" but the Complaint is bereft of ***fact averments*** that plausibly refute items 1-2 and 5-9. Plaintiff takes issue ***only*** with items 3 and 4. Complaint ¶¶ 79, 87-88, and 147-148. Denial and required resubmission would be fully justified based on any one of the nine listed grounds. Since Verizon did not plead facts that would plausibly negate every one of the nine independent grounds for refusal it has failed to state a claim for relief relating to the ROW Placement Consent.

2. CAFRA Landowner Certification.

Local governments must suffer physical occupation in their right-of-way (subject to reasonable compensation and health and safety requirements). But the Communications Act and FCC rules do not expressly or implicitly impose an affirmative obligation that Monmouth County certify unknown assertions in a document it has not seen (here a complete CAFRA permit). The County, as a landowner, cannot be forced to certify the contents of an application against its will

enforcement of building codes, and keeping track of the various systems using the rights-of-way to prevent interference between them.' *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment*, 33 FCC Rcd 7705, 7786 (2018).

and especially if it disagrees on the merits. There is no lawful federally-based duty even if and to the extent a refusal to execute may result in a material inhibition.[14]

Even if there was some nominal obligation, the County cannot be compelled to execute this specific document given what it is, does, and says. Verizon supplied the NJDEP form "Property Owner Certification" as part of the package. *See* **Exhibit B**, pp. 3-4. But that certification is only one part of an extensive and detailed set of forms and required contents. Section C of the certification form requires that the property owner "certify" "to this application" – meaning the ***entire application***. The property owner must certify to have "personally examined" and is "familiar with the information in this document ***and all attachments***" and "the information is ***true, accurate and complete***." (emphasis added). Verizon did not supply the entire CAFRA application it wants the County to "certify."[15] The County cannot be reasonably expected to "certify" something it has not fully seen.

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14 A legal duty could arise only where the County has contractually bound itself to certify, and even then the County would have the right to verify the application content before it so certified. Notably, Verizon does not contend that the ROW Agreement imposes any such duty or that the refusal to execute the consent is a breach of the ROW Agreement. Complaint Count V – the state law breach of contract claim – addresses only the ROW Placement Consent denial.

15 The cover letter to the May 10, 2023 Verizon submission implies that the full and complete "CAFRA permit application" was in fact attached. That is simply not true. Verizon provided only the landowner certification, not the entire CAFRA application. *See* **Exhibit B**, pp.3- 4.

The NJDEP "application content" rules also demonstrate that the CAFRA Landowner Certification is far more than just a consent to "conduct of the proposed activities" (Form, Section C). N.J.A.C. §§ 7:7-23.1 – 7:7-23.6.[16] Among other things, the application must include an Environmental Impact Statement ("EIS"). N.J.A.C. § 7:7-23.6(b). The EIS mandates a statement on "potential impacts from the construction process, and, as applicable, the operation of the development after completion." N.J.A.C. § 7:7-23.6(b)(iii). The application must assert that the development, among other things:

> 5. Would cause minimal feasible interference with the natural functioning of plant, animal, fish and human life processes at the site and within the surrounding region;
> 6. Is located or constructed so as to neither endanger human life or property nor otherwise impair the public health, safety and welfare;
> 7. Would result in minimal practicable degradation of unique or irreplaceable land types, historical or archaeological areas and existing public scenic attributes at the site and within the surrounding region…

N.J.A.C. § 7:7-1.4(b)(4-7) (referenced in § 7:7-23.5(a)(2) and therefore an application content requirement). The County was not presented with the application portions addressing these required contents and assertions, so it has no way of knowing what Verizon intends to say about them. No one can "certify" something they have not seen.

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16 These rules are judicially cognizable under Fed. R. Evid. 201(b). *See In re Plum Baby Food Litig.*, 637 F. Supp. 3d 210, 219-220 (D.N.J. 2022).

Assuming, *arguendo*, that Verizon had shared the full CAFRA application draft with the County. -What if there was a factual assertion contained in that application that the County honestly and in good faith did not agree with? For example, what if the County honestly and in good faith believes that the project would ***not*** cause "minimal feasible interference with the natural functioning of plant, animal, fish and human life processes at the site and within the surrounding region." What if County experts conclude that the project would in fact be ***harmful*** to plants, animals, fish and human life based on available peer-reviewed and published science showing exactly that? What federal law compels the County to "certify" to something it firmly disputes? There is none.

Verizon failed to provide the full CAFRA application it demands that the County "certify." Even if it had done so, nothing in federal law compels the County to "certify" something it may very well disagree with based on reasonable information and belief, backed by reliable science. Even if, perhaps, the failure to certify leads to Verizon being unable to secure the CAFRA permit and that in turn "prohibit(s) or has the effect of prohibiting" Verizon' ability to provide personal wireless service. The County may have to suffer this occupation, but it cannot be forced – by Plaintiff, Congress or this Court – to "certify" something it may, upon examination, conclude is simply not "true, accurate, and complete."

Therefore, Count II does not state a claim for which relief can be granted.

C. <u>Count III</u>.

Count III relates only to the "CAFRA Application." Verizon argues that the County had to act on the request to execute the CAFRA Landowner Certification within 90 days under the FCC's "shot clock" rules. Verizon further asserts that the Court should rule its failure to do so was an "unreasonable delay" and "failure to act" in violation of 47 U.S.C. § 332(c)(7)(B)(ii) and then compel the County to execute the CAFRA Landowner Certification.

Complaint ¶ 112 contends that Verizon's May 10, 2023 request that the County execute the CAFRA Landowner Certification was a "request for placement of SWFs." Paragraph 113 implies it was a "siting application" as defined by the FCC's shot clock rules, but that is incorrect. 47 C.F.R. §1.6002(j) states that a "[s]iting application or application means a written submission to a siting authority requesting authorization for the deployment of a personal wireless service facility at a specified location."

The NJDEP form "Property Owner Certification" does not purport to authorize deployment or placement of any SWF. The document represents the landowner's certification of ownership of the land and a verification under oath that the entire contents of an NJDEP permit application are true, accurate and complete. This part of the May 10, 2023 transmittal was not a "siting application." 47 U.S.C.

§ 332(c)(7)(B)(ii) and the FCC shot clock rules simply do not apply as a matter of law.

Verizon's characterization of the CAFRA-related issues reveal an important but lurking legal issue: whether 47 U.S.C. § 332(c)(7)(B)(iv) and the FCC's "shot clock" rules preempt or repeal local, state and even federal environmental laws and programs arising under federal laws such as the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq* and New Jersey state laws like the New Jersey Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A and various state and federal programs administered by the NJDEP.

One federal program administered by NJDEP involves Coastal Zone Management Act, 16 U.S.C. 1456(c) "consistency determinations." *See* 15 C.F.R. Part 930 (Federal Consistency With Approved Coastal Management Programs). Federal licensees and permit applications must obtain NJDEP's concurrence that the contemplated activity by the licensee or permit applicant is "consistent" with the State's Coastal Management Plan. 47 C.F.R. § 930.6(b). One way this can occur is through the "issuance or denial of "relevant State permits." 47 C.F.R. § 930.6(c).[17]

[17] The FCC has agreed that the Coastal Zone Management Act applies to FCC licensees. *In re Amendment of Parts 1 & 63 of the Commission's Rules*, 22 FCC Rcd 11398, 11414-11415 (2007) ("The statutory language is unambiguous that such review applies to any activity requiring a federal license or permit that will have coastal effects. The obligation to provide a consistency certification expressly applies to 'any applicant for a required federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural

NJDEP has consolidated its state and federal permitting regime for coastal areas, so a CAFRA permit filing also invokes federal consistency review. *See* N.J.A.C. § 7:7-1.1(a).[18] There is a specific rule for "construction of telecommunication towers such as cellular telephone and radio towers." *See* N.J.A.C. § 7:7-6.21. Verizon has implicitly admitted that it cannot rely on the "general permit" provisions in this rule because this project does not fit within any of the provisos in 7:7:6.21(a)(1)-(4) and Verizon will have to comply with "the endangered or threatened wildlife or vegetation species habitats rule, 7:7-9.36, and the critical wildlife habitat rule, 7:7-9.37" in any event. 7:7-6.21(a)(5).

Count II asserts that "CAFRA Applications" are subject to Communications Act and FCC rule-based substantive and procedural mandates in that they "constitute

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resource of the coastal zone' shall certify that the proposed activity complies with the state's approved program. The legislative history confirms that Congress intended for section 1456(c)'s consistency requirements to apply broadly to any federal agency activities regardless of their location, and that no activities having coastal effects will be categorically exempt.")

[18] "(a) This chapter establishes the rules of the Department regarding the use and development of coastal resources. The rules are used in reviewing applications for coastal permits under the Coastal Area Facility Review Act, 13:19-1 et seq. (CAFRA permits), the Wetlands Act of 1970, 13:9A-1 et seq. (coastal wetlands permits), and the Waterfront Development Law, 12:5-3(waterfront development permits). The rules are also used in the review of water quality certificates subject to Section 401 of the Federal Clean Water Act, 33 U.S.C. § 1341, and Federal consistency determinations under Section 307 of the Federal Coastal Zone Management Act, 16 U.S.C. § 1456. The rules also provide a basis for recommendations by the Program to the Tidelands Resource Council on applications for riparian grants, leases, and licenses.")

a request for placement of SWFs" and are therefore "siting applications." Complaint ¶¶ 109-112. This necessarily means that more than just County execution of the CAFRA Landowner Certification is in issue.

Verizon is contending that the forthcoming CAFRA permit application to NJDEP will be a "siting application." To the extent that is true (it is not) then NJDEP will also be subject to the same 90-day "shot clock" Verizon asserts the County missed. Further, if Verizon is correct (it is not) then NJDEP is subject to 47 U.S.C. § 332(c)(7)(B)(iv) and 47 C.F.R. §1.1307(e), each of which states that a state or local government may not "regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the regulations contained in this chapter concerning the environmental effects of such emissions."

Verizon is contending that the NJDEP cannot regulate the environmental effects of wireless facilities – even if those facilities' operation would directly and materially impact listed species protected by federal and/or state law. Verizon is asserting the astounding proposition that the FCC has preempted the operation and administration of programs overseen by entirely different federal agencies. Here, the National Oceanic and Atmospheric Administration (NOAA) (under the Coastal Zone Management Act, (16 U.S.C. §§ 1451 *et seq*)) has delegated administration of the federal program's administration, at least in the first instance, to the NJDEP.

NJDEP conducts that authority through its CAFRA program. N.J.A.C. § 7:7-1.1(a). Verizon asserts that the FCC rules preempt any inconsistent *federal* substantive and procedural obligations. That is not so and it cannot be so. One federal agency cannot "preempt" another. A federal agency regulation cannot override a federal statute or another federal agency's rules and programs.

Verizon's legal argument, if accepted, will mean that NJDEP will have only 10 days to review the application for sufficiency and completeness. Complaint ¶ 97 & n. 31. The NJDEP rules – all of which were promulgated under both federal and state law – expressly provide for a 20-day sufficiency/completeness review period. N.J.A.C. § 7:7-26.3(b).[19] Verizon's interpretation says the agency rule is preempted. NJDEP may have something to say about that.

Under Verizon's theory, once the CAFRA application is found complete NJDEP will have to take final action within 90 days of submission. That is not how things work, or even ***can*** work, at the agency. The NJDEP rules require public notice and comment. The department must ensure public notice has been given and then schedule a public comment period within 15 days of a determination the application is complete. N.J.A.C. § 7:7-26.4(a). The comment period may begin up to 60 days

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[19] The FCC rule provisions on completeness review conflict with the NJDEP rules in several ways, including what happens after a deficiency finding. *Compare* 47 C.F.R. § 1.6003(d), (e) *with* N.J.A.C. § 7:7-26.3(c) and (d). The allowed days and day calculation method are different.

after application completeness. The comment period must be at least 30 days. *Id.* The rules on their face practically guarantee that the FCC "shot clock" will expire even before the NJDEP comment period closes.

But NJDEP is just getting started. After the comment period closes the NJDEP rule allows the department to reassess completeness in light of the comments and require more information from the applicant. N.J.A.C. § 7:7-26-4(b)-(d). According to Verizon, however, the FCC shot clock rules prohibit demands for additional information after 10 days from initial application receipt. Complaint ¶¶ 18, 71, 97 and n. 31.

After NJDEP has finished its initial and secondary completeness review (which under the rules may take more than 90 days) the department can then schedule a public hearing on the application. This hearing may occur up to 60 days after the completeness review. N.J.A.C. § 7:7-26.5(b)1. The department also is required to accept further written comments within 15 days after the public hearing. N.J.A.C. § 7:7-26.5(b)3. But, even then, the department is allowed to reassess completeness based on the public hearing and subsequent comments. N.J.A.C. § 7:7-26.5(c). Only then – more than 100 days later and far longer than the 10 days Verizon says is allowed – does the agency make the "complete for review" decision. The FCC shot clock has long expired, but the NJDEP rules say they still have another

60-90 days to "approve or deny the application." N.J.A.C. §§ 7:7-26.5(e) and 7:7-26.6(b)-(d).

Even then, however, the process is not necessarily complete. Any person who wishes to contest the decision to approve or deny the permit can seek an adjudicatory hearing. N.J.A.C. § 7:7-28.1. If the requestor is a person other than the permittee the permit is not automatically stayed but the matter can be referred to the Office of Administrative Law for a contested case hearing. The permit and ultimate decision is not administratively final until after the Commissioner acts on the hearing officer recommendation. N.J.A.C. §§ 7:7-28.1, 28.3. The FCC 90 day shot clock expiration will have been only a distant memory.

Verizon is laying a trap. Plaintiff is trying to secure a ruling from this Court that would bind the NJDEP and then gut the CAFRA application process and substantive environmental review Verizon pretends it merely wants to get started.[20]

47 U.S.C. § 332(c)(7)(B)(ii) and the FCC shot clock rules do not apply to Verizon's CAFRA Application as a matter of law. Thus, Verizon has failed to state a claim for which relief can be granted.

[20] This is the basis of Intervenors' contention that additional parties – specifically the state and, in particular, the NJDEP – must be joined as parties.

D. Count IV.

Count IV asserts that the refusal to execute the CAFRA Landowner Certification results in a *de facto* moratorium under the FCC's *Moratorium Order*.[21] This is so, according to Plaintiff, since Verizon cannot secure a road opening permit from the County until after Plaintiff has received a CAFRA permit and Verizon cannot seek a CAFRA permit without the Landowner Certification. Complaint ¶¶125-126.

Intervenors have already explained why Verizon has not shown an entitlement to an order compelling County execution of the CAFRA Landowner Certification, even if that leads to an effective prohibition. The same is true as to claimed moratoria.[22]

The County's refusal to execute the CAFRA Landowner Certification is not a *de facto* moratorium. When Verizon delivers a full, accurate and complete CAFRA Application for review there is no reason to assume the County will not sign. Any delay is due to Verizon's failures. Again, Verizon failed to present a claim for which relief can be granted.

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[21] In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment, Declaratory Ruling, 33 FCC Rcd 7705 (2018).

[22] *Moratorium Order* ¶156, 33 FCC Rcd at 7784, recognizes that there may be "limited situations where an express or *de facto* moratoria that violates section 253(a) may nonetheless be 'necessary' to 'protect the public safety and welfare.'"

E. Count V.

Verizon contends the rejection of the ROW Placement Application is a breach of the ROW Agreement. Intervenors will let the parties to the ROW Agreement debate whether new poles, as opposed to "new installations" on ***existing*** poles or structures, are subject to that agreement. We will just reiterate that the County had separate and independent grounds for rejecting the ROW Placement Application. The "Engineer Letter" listed 9 deficiencies in the plans, any one of which would justify rejection, and Verizon has contested only 2 of them. That should end the inquiry.

F. Count VI.

Count VI relates only to the ROW Placement Application denial and does not seek review of the refusal relating to the CAFRA Application. Verizon invokes state law based administrative review under the arbitrary, capricious or unreasonable standard. The averments once again attack the Engineer Letter's findings the plans do not meet, or do not demonstrate compliance with, the substantive standards in the ROW Agreement. Complaint ¶¶ 145-148. Count IV also repeats Verizon's disagreements with the "Attorney Letter." Complaint ¶ 149.

As before, Plaintiff has failed to state a claim. Even if, *arguendo*, Verizon is correct about items 3 and 4 in the Engineer Letter, there are seven other independent reasons for denial and any one of them is sufficient to not grant the request.

G. **Count VII.**

Count VII seeks declaratory and injunctive relief. This count should be dismissed. "[C]ourts in this circuit routinely dismiss stand alone counts for declaratory and injunctive relief, since such claims are requests for remedies, and not independent causes of action." *N.J. Coalition of Auto. Retailers, Inc. v. Mazda Motor of Am., Inc.*, 2021 U.S. Dist. LEXIS 120541, *6 (D.N.J. 2021) (citing *ASAH, The Children's Inst. v. N.J. Dep't of Educ.*, Civ. A. No. 16-3935, 2017 U.S. Dist. LEXIS 101736, at *35 (D.N.J. June 30, 2017) (internal citations omitted); *see also Chruby v. Kowaleski*, 534 F. App'x 156, 160 n.2 (3d Cir. 2013)); *Myers v. Advanced Stores Co.*, Civ. A. No. 19-18183, 2020 U.S. Dist. LEXIS 91764, at *19 (D.N.J. May 27, 2020) ("[D]ismissal is . . . appropriate, because [p]laintiff has improperly pled a request for equitable relief as a separate claim."); *Neuss v. Rubi Rose, LLC*, Civ. A. No. 16-2339, 2017 U.S. Dist. LEXIS 83444, at *24-25 (D.N.J. May 31, 2017) (citations omitted) (dismissing the plaintiff's separate "claims for injunctive and equitable relief" as "not properly pled," because "injunctive and declaratory relief are remedies—not independent causes of action"); *Mulqueen v. Energy Force, LLC*, Civ. A. No. 13-1138, 2013 U.S. Dist. LEXIS 162930, at *22 (M.D. Pa. Oct. 3, 2013) ("Plaintiff may seek injunctive and declaratory relief as remedies but not as viable causes of action.").

Courts in the Third Circuit also dismiss claims for declaratory relief related to breach of contract claims (such as Count V) since they are redundant to the remedies available under contract law. Adjudication of the breach of contract claim will resolve the same issue and necessarily decide the question raised by the declaratory judgment claim. *Liberty Mut. Fire Ins. Co. v. Reade Mfg. Co.*, 2023 U.S. Dist. LEXIS 89630, *11 (D.N.J. May 23, 2023*); Commvault Sys. v. Marriott Hotel Servs.*, 2023 U.S. Dist. LEXIS 71328, *20 (D.N.J. Apr. 24, 2023); *Law Office of Drew J. Bauman v. Hanover Ins. Co*., 2023 U.S. Dist. LEXIS 31844, at *7 (D.N.J. Feb. 27, 2023); *Golden State Med. Supply Inc. v. AustarPharma LLC*, Civ. No. 21-17137, 2022 U.S. Dist. LEXIS 115835at *7 (D.N.J. June 30, 2022); *Universal Prop. Servs. Inc. v. Lehigh Gas Wholesale Servs. Inc.*, No. 20-3315, 2021 U.S. Dist. LEXIS 83058, at *16 (D.N.J. Apr. 30, 2021).

Accordingly, Count VII should be dismissed.

IV. Plaintiff Failed To Join A Necessary Party (Counts II, III, And IV).

Intervenors, pursuant to Fed. R. Civ. P 12(b)(7), assert that Plaintiff failed to join an indispensable party under Fed. R. Civ. P. 19. The case should be abated until the NJDEP is joined by Plaintiff, by the Court's order, or voluntarily intervenes.

Fed. R. Civ. P. 19(a) states, in pertinent part:

> (a) Persons Required to Be Joined if Feasible.
>
> (1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:

> …
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> (i) as a practical matter impair or impede the person's ability to protect the interest …

Parties are indispensable if "in the circumstances of the case [they] must be before the court." *Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 421 (3d Cir. 2010) (citing *Steel Valley Auth. v. Union Switch & Signal Div.*, 809 F.2d 1006, 1011 (3d Cir. 1987) (internal quotations omitted); Indispensable parties are "'[p]ersons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.'" *Id*. (*quoting Steel Valley*, 809 F.2d at 1011; *see also Tarek Holdings, LLC v. Shockley*, 2022 U.S. Dist. LEXIS 193135, *12 (D.N.J. 2022).

The NJDEP is a required party. Joinder will not deprive the court of subject matter jurisdiction. The Court should require that NJDEP be joined as a party.

As explained in Part III.C. above, Plaintiff's claims relating to the "CAFRA Application" will require rulings that directly affect and determine NJDEP's legal obligations under state and federal law, including but not limited to whether NJDEP (a state "instrumentality") may "regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the [FCC's] regulations concerning such emissions." 47 U.S.C. § 332(c)(7)(B)(ii). NJDEP's entire purpose is to regulate "the environmental effects" of "placement, construction and modification" proposed projects – including wireless towers[23] – within the Coastal Zone. As part of this jurisdiction NJDEP must assess impact on species deemed endangered or threatened under state and federal law. If Verizon's emissions are harmful to listed species than NJDEP must take action. This duty arises under both state and federal law. Verizon's contention that its "CAFRA Application" is subject to the limits/restrictions/requirements in 47 U.S.C. § 332(c)(7) directly challenges the NJDEP's authority under state and federal law. Similarly, Verizon's contention that the FCC "shot clocks" apply to the CAFRA Application directly challenges the operation of the NJDEP's procedural rules, including its own "shot clocks" that are materially different.

If Verizon's claims succeed the NJDEP will not be able to follow its own regulations, enforce its state law statutory requirements, comply with its binding Coastal Management Plan or accomplish administration of delegated federal authority pursuant to contractual agreements NJDEP has with other federal agencies. Verizon seeks relief that will directly impair NJDEP's rights, duties and obligations under state law, federal law and its own regulations.

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[23] *See* N.J.A.C. § 7:7-6.21.

Plaintiff seeks legal rulings and declaratory relief that will bind NJDEP. Without joinder the NJDEP will not be able to protect its interests. NJDEP is an indispensable party.

CONCLUSION

For the foregoing reasons, Intervenors respectfully request that the Court (i) dismiss the Complaint; and (ii) if the Court does not dismiss the Complaint, that it require NJDEP to be joined as a party; and (iii) grant such, other, further, and additional relief as the Court deems just and equitable.

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CERTIFICATION OF SERVICE

I hereby certify that this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

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