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, and

BELMAR AGAINST 5G TOWERS, LAWRENCE REYNOLDS, ROSE DAGANYA, MICHAEL USHAK, DAN RUBINETTI, PAUL M. ELIA, and MICHAEL AND MARY MCHALE,

Intervenor-Defendants.

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

NOTICE OF MOTION
TO DISMISS

PLEASE TAKE NOTICE that on Monday, April 15, 2024, or as soon thereafter as counsel may be heard, the undersigned, counsel for Intervenor-Defendants Belmar Against 5G Towers, Lawrence Reynolds, Rose Daganya, Michael Ushak, Dan Rubinetti, Paul, M. Elia, and Michael and Mary McHale (collectively "Intervenors"), shall move before the Honorable Michael A. Shipp, U.S.D.J., at the Clarkson S. Fisher Building and U.S. Courthouse, 402 East State Street, Trenton, New Jersey 08608 to dismiss Plaintiffs' Complaint pursuant Fed. R. Civ. P. 12(b).

In support of this motion, Intervenors submit a Memorandum of Law in Support of the Motion to Dismiss and a proposed order.

Pursuant to the Court Order dated March 7, 2024 (ECF No. 52) responsive papers, if any, must be filed and served no later than March 29, 2024, and reply papers, if any, must be filed and served no later than April 5, 2024.

PLEASE TAKE FURTHER NOTICE that Oral Argument is requested in the event opposition is filed pursuant to Local Rule 78.1(b); and

PLEASE TAKE FURTHER NOTICE that pursuant to Local Rule 7.1(e) a proposed form Order is submitted herewith.

WHEREFORE, the moving Intervenors respectfully request that this Court dismiss Plaintiffs' Complaint in its entirety and order such further relief as is just and equitable.

Respectfully Submitted,

/s/ *Layne A. Feldman*
Layne A. Feldman, Esq.
Anthony J. D'Artiglio, Esq.
365 Rifle Camp Road
Woodland Park, New Jersey 07424
Tel: (973) 247-9000
Fax: (973) 807-1835
lfeldman@ansell.law
adartiglio@ansell.law

/s/ *Kimberly M. Mack Rosenberg*
Kimberly M. Mack Rosenberg
Mack Rosenberg Law LLC
59 Wiggins St.
Princeton, NJ 08540
Tel: (609) 924-2990
F: (609) 228-6750
kim@mackrosenberglaw.com

/s/ *W. Scott McCollough*
W. Scott McCollough
(admitted *pro hac vice*)
MCCOLLOUGH LAW FIRM PC
2290 Gatlin Creek Rd.
Dripping Springs, Texas 78620
Tel: (512) 633-3498
F: (512) 692-2522
wsmc@dotLAW.biz

Dated: March 12, 2024

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, and

BELMAR AGAINST 5G TOWERS, LAWRENCE REYNOLDS, ROSE DAGANYA, MICHAEL USHAK, DAN RUBINETTI, PAUL M. ELIA, and MICHAEL AND MARY MCHALE,

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

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Intervenor-Defendants Belmar Against 5G Towers, Lawrence Reynolds, Rose Daganya, Michael Ushak, Dan Rubinetti, Paul M. Elia, and Michael and Mary McHale (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

[1] Intervenor-Defendants moved to intervene on September 22, 2023. The Court granted that Motion as to the referenced Intervenors on March 7, 2024 (*see* ECF No. 52) but denied the Motion to Intervene without prejudice as to proposed-intervenor the Children's Health Defense ("CHD"). CHD reserves the right to later seek intervention and will likely rely substantially on the arguments set forth herein for any potential intervention application.

(through its counsel and the County Engineer) rejected Verizon' request for 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

[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.

relating to its refusal to execute the CAFRA Landowner Certification (Counts II, III, IV).

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. <u>This Court Lacks Subject Matter Jurisdiction</u>.

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." *See* ECF No. 1 ¶ 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 Plaintiff's "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.

[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." ECF No. 1 ¶ 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 of the Complaint assert a "misapplication" of certain "standards." That is, once again, a legal question, not a "fact" question.[5]

Section 332©(7)(B)(iii) grants a form of procedural protection relating to a local authority's ***factual*** determinations. *See APT Pittsburgh Ltd. v. Penn Twp.*

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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.

Butler Cnty. of Pennsylvania, 196 F.3d 469, 474 (3d Cir. 1999). This subsection 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." *See* ECF No. 1 ¶ 89. 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 asserts in Count I of the Complaint.

"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. Count II.

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." *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv.*, 33 FCC Rcd 9088, 9113-9114, 9130 (2018).

Applying the *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." *See* ECF No. 1 ¶ 4). "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" (*See*

ECF No. 1 ¶ 50), and "[t]his service blocking, which is caused by inadequate capacity, most recently occurred this past Labor Day weekend." *See* ECF No. 1 ¶ 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]

[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. ROW Placement Consent.

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. *See 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. Nat'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. *See* ECF No. 1 ¶¶ 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. *See* ECF No. 1 ¶¶ 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

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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. Count III.

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." *See* ECF No. 1 ¶ 112. 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." *See* ECF No. 1 ¶ 113.

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]

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[17] The FCC has agreed that the Coastal Zone Management Act applies to FCC licensees. *See 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." *See* ECF No. 1 ¶¶ 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. *See* ECF No. 1 ¶ 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

[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. *See* ECF No. 1 ¶¶ 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 is also 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. *See* ECF No. 1 ¶¶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. *See* ECF No. 1¶¶ 145-148. Count IV also repeats Verizon's disagreements with the "Attorney Letter." *See* ECF No. 1 ¶ 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 then 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.

Dated: March 12, 2024

Respectfully Submitted,

/s/ *Layne A. Feldman*
Layne A. Feldman, Esq.
Anthony J. D'Artiglio, Esq.
365 Rifle Camp Road
Woodland Park, New Jersey 07424
Tel: (973) 247-9000
Fax: (973) 807-1835
adartiglio@ansell.law
lfeldman@ansell.law

/s/ *Kimberly M. Mack Rosenberg*
Kimberly M. Mack Rosenberg, Esq.
Mack Rosenberg Law LLC
59 Wiggins St.
Princeton, NJ 08540
V: 609.924.2990
F: 609.228.6750
Email: kim@mackrosenberglaw.com

/s/ *W. Scott McCollough*
W. Scott McCollough, Esq.

(admitted *pro hac vice*)
McCollough Law Firm, PC
2290 Gatlin Creek Rd.
Dripping Springs, Texas 78620
V 512.633.3498
F 512.692.2522
Email wsmc@dotLAW.biz

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.

/s/ *Layne A. Feldman*
Layne A. Feldman, Esq.
365 Rifle Camp Road
Woodland Park, New Jersey 07424
Tel: (973) 247-9000
Fax: (973) 807-1835

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,

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, and

BELMAR AGAINST 5G TOWERS, LAWRENCE REYNOLDS, ROSE DAGANYA, MICHAEL USHAK, DAN RUBINETTI, PAUL M. ELIA, and MICHAEL AND MARY MCHALE,

Intervenor-Defendants.

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

DECLARATION OF LAYNE A. FELDMAN IN SUPPORT OF MOTION TO DISMISS

Layne A. Feldman, Esq. declares as follows:

1. I am an associate of the law firm of Ansell Grimm & Aaron, P.C. We are local counsel to Intervenor-Defendants Belmar Against 5G Towers, Lawrence Reynolds, Rose Daganya, Michael Ushak, Dan Rubinetti, Paul M. Elia, and Michael and Mary McHale. I submit this Declaration in support of Intervenors' Motion to Dismiss.

2. A true and correct copy of the Right of Way Agreement ("ROW Agreement") is annexed hereto as **Exhibit A**.

3. A true and correct copy of Plaintiffs' May 10, 2023 submission to the County of Monmouth is annexed hereto as **Exhibit B**.

4. A true and correct copy of the August 8, 2023 rejection letter is annexed hereto as **Exhibit C**.

Pursuant to 28 U.S.C. § 1746, I certify under penalty of perjury that the foregoing is true and correct.

Dated: Woodland Park, New Jersey
March 12, 2024

ANSELL GRIMM & AARON, P.C.

By: s/ *Layne A. Feldman*

Layne A. Feldman, Esq.
Anthony J. D'Artiglio, Esq.
365 Rifle Camp Road
Woodland Park, New Jersey 07424
Tel: (973) 247-9000
Fax: (973) 247-9199
lfeldman@ansell.law
adartiglio@ansell.law

Attorneys for Intervenors

EXHIBIT A

COUNTY UTILITY AGREEMENT FOR OCCUPANCY WITHIN COUNTY RIGHT-OF-WAY

THIS AGREEMENT, made and executed this 12 day of December 2016 by and between the County of Monmouth, with offices at Hall of Records, 1 East Main Street; Freehold, New Jersey 07728, a Municipal Corporation of the State of New Jersey, (hereinafter "County"), the Grantor; and New York SMSA Limited Partnership d/b/a Verizon Wireless with offices located at One Verizon Way, Basking Ridge, New Jersey 07920,, (hereinafter "Verizon Wireless"), the Grantee.

WHEREAS, Verizon Wireless proposes to expand its existing wireless telecommunications infrastructure and requests permission from the County to occupy County road right(s)-of-way for the purpose of constructing, installing, operating, repairing, maintaining and replacing a wireless telecommunications system ("Communications System"); and

WHEREAS, Verizon Wireless intends to install its Communications System aerially on existing utility poles and subsurface within County right(s)-of-way along portions of County Route(s) as identified in the attached **Exhibit A** "Verizon Wireless Equipment Sites; and

WHEREAS, the new facilities of Verizon Wireless may require certain modifications, relocations, adjustments and additions due to any future work by the County; and

WHEREAS, the County is empowered to enter into this Agreement pursuant to applicable State law; and as authorized by Resolution of the Monmouth County Board of Chosen Freeholders;

NOW, THEREFORE, in consideration of the mutual conditions, covenants, promises, and terms hereinafter contained, **IT IS AGREED THAT:**

1. The County will allow and cooperate with Verizon Wireless with respect to occupancy of the County right(s)-of-way by Verizon Wireless' facilities (hereinafter referred to as "facilities"), which are to be located as set forth in Exhibit A. This Agreement will also apply to any additional installations to be approved by the County Engineer, after review of further plans, to be appended hereto as supplemental exhibits, except that fees shall be individually calculated by the County Engineer on each installation in accordance with applicable law.

2. Verizon Wireless' facilities shall be planned and installed such that they do not impair any existing or currently planned improvements, as disclosed by the County to Verizon Wireless, or interfere with the County's use or other authorized use of its right(s)-of-way, or interfere with an area designated for roadway extension, relocation, or widening. Verizon Wireless shall obtain the necessary permits and approvals from the County and other governmental authorities as required, and comply with the provisions of the Monmouth County Specifications and Fee Schedules for Road Openings prior to any installation or relocation of their facilities, including any necessary permits or approvals as they may change from time to time. Additionally, Verizon Wireless agrees to 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 Wireless' facilities within the right(s)-of-way area(s).

3. Verizon Wireless, by execution of this Agreement, agrees to cooperate with the County and its agents for the proper coordination of all work in connection with any planned and future County improvements in or adjacent to the right(s) of way and any extensions, relocations or widening thereof. Verizon Wireless also agrees, at its sole cost and expense, to relocate,

adjust, or support its facilities in a timely manner in order to accommodate the installation, reconstruction, replacement and/or maintenance of future County infrastructure improvements or other construction or maintenance projects.

Verizon Wireless also agrees, at its sole cost and expense, to relocate, adjust, and/or support its facilities in a timely manner to accommodate the installation of infrastructure improvements by any affected municipality or those improvements which are required as a condition of approval by the County Planning Board or any local Planning Board for the approvals of subdivisions or site plans that may be approved on or in the vicinity of Verizon Wireless' facilities.

4. Verizon Wireless shall be responsible for all costs of construction, relocation, maintaining, supporting and adjusting its facilities in County right(s)-of-way and confirms its obligation to comply with conditions regulating the installation, servicing, readjustment, and/or maintenance of its utility facilities within the County right(s)-of-way, as well as its obligation to comply with any other conditions necessary to comply with State laws and regulations.

5. Any and all work by Verizon Wireless 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.

6. Verizon Wireless will apply for all required County road opening permit(s) and will not perform any work until such permit(s) is (are) approved. The initial road opening permit only covers the initial installation of facilities. Subsequent repairs or reinstallation will require a separate road opening permit(s).

7. Verizon Wireless shall provide the County with as-built drawings, within six (6) months from completion of construction, which as-builts shall be within tolerances in accordance with generally accepted industry standards.

8. In the event of an emergency which causes a break in the cable or a service disruption to or any outage of the Communications System, upon notification to the County Highway Division, Verizon Wireless shall be entitled to immediate access to the County property to effect repairs or modifications to restore service.

9. Where the right(s)-of-way must be cleared of brush, Verizon Wireless will provide for off-site disposal of the debris created during construction and installation of its facilities, restore the ground to its original contour, and seed and mulch the same to the reasonable satisfaction of the County Engineer. No trees will be cut or trimmed without the prior approval of the Superintendent, Monmouth County Shade Tree Commission.

10. Verizon Wireless shall be given no less than sixty (60) days prior written notice in advance of when the County or its contractor will start work on any roadway improvement project that impacts its facilities.

11. Upon written notice from the County, Verizon Wireless shall, in a timely manner, complete the relocation and adjustment work to eliminate conflict with any planned improvements within the County right(s)-of-way, whether occasioned by a project to be advanced directly by the County, or to be advanced as a result of condition of approval of the County Planning Board or any local planning board.

12. The term of this Agreement shall be for a period of fifty (50) years commencing on the date of this executed Agreement.

13. At its sole cost and expense, Verizon Wireless shall defend, indemnify, release, protect and hold harmless, at all stages of the judicial and/or claims process, the County and its elected and appointed representatives, agents, servants, and employees, from and against any and all losses, suits, claims, demands, or damages of whatsoever kind or nature, no matter the legal theory, arising out of or alleged to arise out of the performance of this Agreement. The obligation to indemnify includes, but is not limited to, damages, delay damages, expenditures for costs of investigations, expert witnesses, costs, counsel fees, judgments, expenses, penalties, cleanup costs, amounts paid in settlement, or similar expenses, except to the extent that any claims, damages, losses and expenses are sustained due to the gross negligence, willful misconduct or criminal actions of the County.

The obligation to indemnify includes, but is not limited to, damages, delay damages, expenditures for cost of investigations, expert witnesses, costs, counsel fees, judgments, expenses, penalties, cleanup costs, amounts paid in settlement, or similar expenses, except to the extent that same are sustained due to the gross negligence, willful misconduct or criminal actions of the County.

The County shall promptly notify Verizon Wireless of any claim hereunder and shall cooperate in the defense of any litigation to the extent such cooperation does not adversely impact the County's interests. If requested by the County, Verizon Wireless may take control of the litigation and settlement process, provided that no settlement affecting non-monetary matters shall be entered without the consent of the County, which consent shall not be unreasonably withheld. If requested by the County, Verizon Wireless may choose defense counsel to represent the County, subject to the consent of the County, which shall not be unreasonably withheld.

14. Verizon Wireless shall indemnify and hold harmless the County, its successors, elected and appointed representatives, employees, servants, and agents, against all claims for infringement of patent, trademark, or copyright, as well as claims of a similar nature, and shall pay the County's costs and expenses, including expert witness fees, attorneys' fees and other defense costs and judgments, except to the extent that any such claims, costs, or expenses are sustained due to the gross negligence, willful misconduct or criminal actions of the County.

15. In addition to other insurance carried by it, Verizon Wireless, shall carry, or cause to have carried during construction of its facilities on the right(s)-of-way until substantial completion of this project, insurance coverage as set forth below.

A. Verizon Wireless shall furnish evidence by virtue of a standard certificate of insurance that, with respect to the operations it performs, it carries (i) Commercial General Liability Insurance providing for $5,000,000 combined single limit for damages arising out of bodily injuries (including death), and Property Damage of an aggregate limit of $5,000,000 each occurrence; and (ii) Commercial Automobile Liability Insurance in the amount of $2,000,000 combined single limit per accident. The County, its elected and appointed officials, and employees, shall be included as additional insured's as their interests may appear under this Agreement, on the Commercial General Liability Insurance policy(ies).

B. Verizon Wireless shall also furnish evidence that its contractors and subcontractors have obtained and will maintain insurance of the same type and with substantially the same limits as are required of Verizon Wireless hereunder.

C. Verizon Wireless shall provide to the County a certificate of insurance showing that Verizon Wireless carries Workers' Compensation and Employer's Liability Insurance to satisfy the minimum statutory requirements of the State of New Jersey.

D. Notwithstanding any provision to the contrary, the County in its discretion, shall have the right to waive any of these insurance requirements or demand higher policy limits provided said increases are reasonable and are consistent with changes in the Consumer Price Index.

E. All insurance required by this Agreement shall be provided at the sole cost of Verizon Wireless and shall be in full force and effect during the entire term of this Agreement.

F. Upon receipt of a Notice of Cancellation from its insurer, Verizon Wireless shall provide the County with thirty (30) days' notice of such cancellation, by certified mail addressed to:

County Engineer
Monmouth County Division of Engineering
Hall of Records Annex, 1 East Main Street
Freehold, New Jersey 07728

G. Verizon Wireless may self-insure for some or all of its insurance obligations; in its discretion.

16. County shall be entitled to reimbursement by Verizon Wireless of the reasonable costs for actual services provided by the County in connection with the occupancy of the County right(s)-of-way by Verizon Wireless' facilities, in accordance with N.J.S.A. 54:30A-124.

17. Verizon Wireless shall not assign this license or its rights hereunder without the prior written consent and approval of the County, which consent shall not be unreasonably withheld. Verizon Wireless shall have the right, however, upon notice to the County, to assign this license to any parent, subsidiary or affiliate of Verizon Wireless or any person, firm or corporation which shall be under the control of Verizon Wireless, or any corporation into which

Verizon Wireless may be merged or consolidated with or which purchases all or substantially all of the assets of Verizon Wireless, or a creditor of Verizon Wireless or a guarantor of its obligations which has a security interest in Verizon Wireless' facilities, provided that such other entity assumes in writing all of Verizon Wireless' obligations hereunder.

18. This Agreement shall terminate upon the occurrence of any of the following events:

(A) Abandonment by Verizon Wireless of its facilities;

(B) Subsequent written mutual agreement of the parties hereto;

(C) The expiration of the term of this Agreement; or

(D) Verizon Wireless' failure to move its facilities in a timely fashion to facilitate County or other improvements, as required by this Agreement.

(E) Material breach of this Agreement on 30 days written notice and 30 days opportunity to cure.

19. In the event of termination by the parties hereto, Verizon Wireless shall remove its facilities at Verizon Wireless' cost within 45 days.

20. If the County has not received from Verizon Wireless any payment specified in this Agreement within thirty (30) calendar days after the date on which payment is due, the County may notify Verizon Wireless in writing of Verizon Wireless' failure to pay and of the County's intention to terminate this Agreement.

21. Either party may terminate this Agreement if the other party becomes insolvent or bankrupt or ceases to pay its debts as they mature (except to the extent said debts are the subject of a bona fide dispute), or makes a general assignment for the benefits of creditors, or commences a voluntary case under any bankruptcy insolvency or other similar law, or if

bankruptcy, insolvency or similar proceedings shall be instituted against the party pursuant to the laws of any jurisdiction; provided however, that if bankruptcy, insolvency, or similar proceedings are instituted against the party without the consent and against the wishes of the party, the party shall have a period of one hundred eighty (180) days from the date of the institution of such proceedings within which to seek dismissal of the proceeding(s) or otherwise to cure the default under this Paragraph.

22. Except as provided in Paragraph 8, all notices required to be given under this Agreement shall be sent by a recognized overnight carrier, or by hand-delivery, to the persons named below, except that either party may change the address upon written notice to the other.

For Verizon Wireless:

New York SMSA Limited Partnership d/b/a Verizon
180 Washington Valley Road
Bedminster, New Jersey 07921
Attn: Network Real Estate
Emergency Contact: Network Operation Center – 1800-264-6620

Warren O. Stillwell, Esq.
Cooper Levenson, P.A.
1125 Atlantic Avenue
Atlantic City, New Jersey 08401

For the County:

Clerk of the Board of Chosen Freeholders
Monmouth County Hall of Records
1 East Main Street
Freehold, New Jersey 07728

With a copy to:

County Engineer
Monmouth County Division of Engineering
Hall of Records Annex
1 East Main Street
Freehold, New Jersey 07728

23. This Agreement (including all Exhibits hereto) represents the entire agreement of the parties and supersedes any and all prior agreements, understandings, promises and representations concerning the subject matter hereof and the terms applicable hereto. This Agreement may not be modified or altered except pursuant to written agreement between the parties.

24. If any part of this Agreement is determined to be invalid, illegal, or unenforceable, such determination shall not affect the validity, legality, or enforceability of any other part of this Agreement, and the remaining parts of this Agreement shall be enforced as if such invalid, illegal or unenforceable part were not contained herein.

25. By entering this Agreement, the parties are not establishing any joint undertaking, joint venture or partnership and each party shall act solely for its own account.

26. This Agreement shall be governed by and construed in accordance with the laws of the State of New Jersey without regard to conflicts of law rules. Any disputes which cannot be settled shall be brought in the Superior Court of New Jersey, Monmouth County, in either the Law Division or the General Equity Part.

27. The remedies provided in this Agreement are cumulative and in addition to any remedies provided for by law or equity.

28. Unless otherwise specified in this Agreement, no failure or delay on the part of the parties of exercising any right hereunder, irrespective of the length of time of such failure or delay, shall operate as a waiver or impair any such right. No single or partial exercise of any such right shall preclude any other or further exercise thereof or the exercise of any other right. No waiver of any such right shall be effective unless given in a signed writing. No waiver of any such right will be deemed a waiver of any other right hereunder.

29. The parties have negotiated this Agreement with the assistance of counsel, and, therefore, the parties agree that neither party shall be presumed to be the drafter of this Agreement.

30. The County, by virtue of this Agreement, is not agreeing to any obligation not specifically set forth herein, and is not agreeing to purchase or condemn real property on behalf of Verizon Wireless.

31. This Agreement shall be binding upon the successors and assigns of the parties hereto and may be recorded with the County Clerk.

IN WITNESS WHEREOF, the parties have duly executed this Agreement the day and year first above written.

ATTEST:

Marion Masnick, Clerk of the Board
Board of Chosen Freeholders

Dated:

COUNTY OF MONMOUTH

Thomas A. Arnone, Director
Board of Chosen Freeholders

ATTEST:

Name: Jennie Quick
Title: Real Estate Specialist

Dated: 10/3/16

New York SMSA Limited Partnership d/b/a Verizon Wireless

By CELLCO Partnership, its General Partner

Name: SUSAN PELUSO
Title: Director, Network Field Engineering

114828462v1

EXHIBIT "A"

VERIZON WIRELESS EQUIPMENT SITES

1. Avon Bradley Beach #02 oDAS	600 Ocean Ave. N Avon-By-The-Sea, NJ 07717
2. Avon Bradley Beach #03 oDAS	101-199 Evergreen Ave. Bradley Beach, NJ 07720
3. Avon Bradley Beach #04 oDAS	100 Ocean Ave. Avon-By-The-Sea, NJ 07717
4. Hazlet Rt 36#01 oDAS	162 County Rd 516 Hazlet, NJ 07730
5. Middletown Navesink Riv oDAS	520 Navesink River Rd. Middletown, NJ 07748
6. W Long Branch Locust oDAS	201 Locust Ave. West Long Branch, NJ 07764
7. Wall Church Rd Rt 35 #02 oDAS	1000 Xanadu Ln. Wall, NJ 07719

EXHIBIT B

PRICE, MEESE, SHULMAN & D'ARMINIO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

50 TICE BOULEVARD, SUITE 380
WOODCLIFF LAKE, NJ 07677
TELEPHONE (201) 391-3737
FACSIMILE (201) 391-9360
www.pricemeese.com

GREGORY D. MEESE *
GAIL L. PRICE * +
FREDERIC M. SHULMAN * +
LOUIS L. D'ARMINIO * ☖
JOHN R. EDWARDS, JR. *
MICHAEL K. BREEN *
PAUL A. CONCIATORI * #
WILLIAM D. BIERMAN •
THOMAS C. MARTIN •
JOHN L. MOLINELLI * x
JEFFREY L. LOVE *

RICHARD M. FRICKE * +
J. SHELDON COHEN
ELLEN O'CONNELL *
MARK W. GREENE * ☖
KAREN F. EDLER *
MICHAEL A. OROZCO * •
RICK A. STEINBERG * ☖
DOROTHY A. KOWAL
JENNIFER M. KNARICH * ◇
RENEE A. FATOVIC * •
JASON M. HYNDMAN

JACQUELINE E. ESPOSITO * •
AARON COHEN
MICHELLE L. KRONE
EDWARD W. PURCELL
MATTHEW R. WEISS

* Also admitted in NY
+ Also admitted in DC
☖ Also admitted in PA
◇ Also admitted in CT
^ Also admitted in FL
• Also admitted NY Fed Cts.
Also LEED AP
x Bergen County Prosecutor (ret.)

Additional Offices:
89 HEADQUARTERS PLAZA NORTH
SUITE 1465
MORRISTOWN, NJ 07960
TELEPHONE: (973) 828-9100
FACSIMILE: (201) 391-0998

115 EAST STEVENS AVE., SUITE 109
VALHALLA, NY 10595
TELEPHONE (914) 251-1618
FACSIMILE (914) 251-1230

ONE GATEWAY CENTER, SUITE 2600
NEWARK, NJ 07102
TELEPHONE: (973) 799-8551
FACSIMILE: (973) 735-2719

May 10, 2023

Via FedEx
Joseph M. Ettore, P.E.
Monmouth County Engineer
Monmouth County Department of Public Works and Engineering
Hall of Records Annex
Freehold, NJ 07728

Re: Verizon Wireless with County of Monmouth

Dear Mr. Ettore:

I represent New York SMSA Limited Partnership d/b/a Verizon Wireless ("Verizon Wireless") in connection with its land use matters in New Jersey.

Reference is made to that certain County Utility Agreement for Occupancy Within County Right-Of-Way dated December 2, 2016, between Verizon Wireless and the County of Monmouth (the "Agreement"), a copy of which is enclosed herewith for your ready reference.

Pursuant to Paragraph No 1 of the Agreement, I am enclosing herewith for your review and approval, nine (9) sets of construction drawings and site surveys for additional small wireless facilities proposed by Verizon Wireless on Ocean Avenue in Belmar, a map of the locations of the new facilities and a new Exhibit A to the Agreement that includes these nine additional facilities.

In addition to the above, I am enclosing a CAFRA permit application for these nine facilities that requires the County's signature as the property owner. I assume that the County Commissioners will require your review and approval of the permit application prior to the Commissioners' execution of the same. Kindly inform me if you have any questions regarding the application and whether you will forward the same for execution, or whether you prefer that I do so.

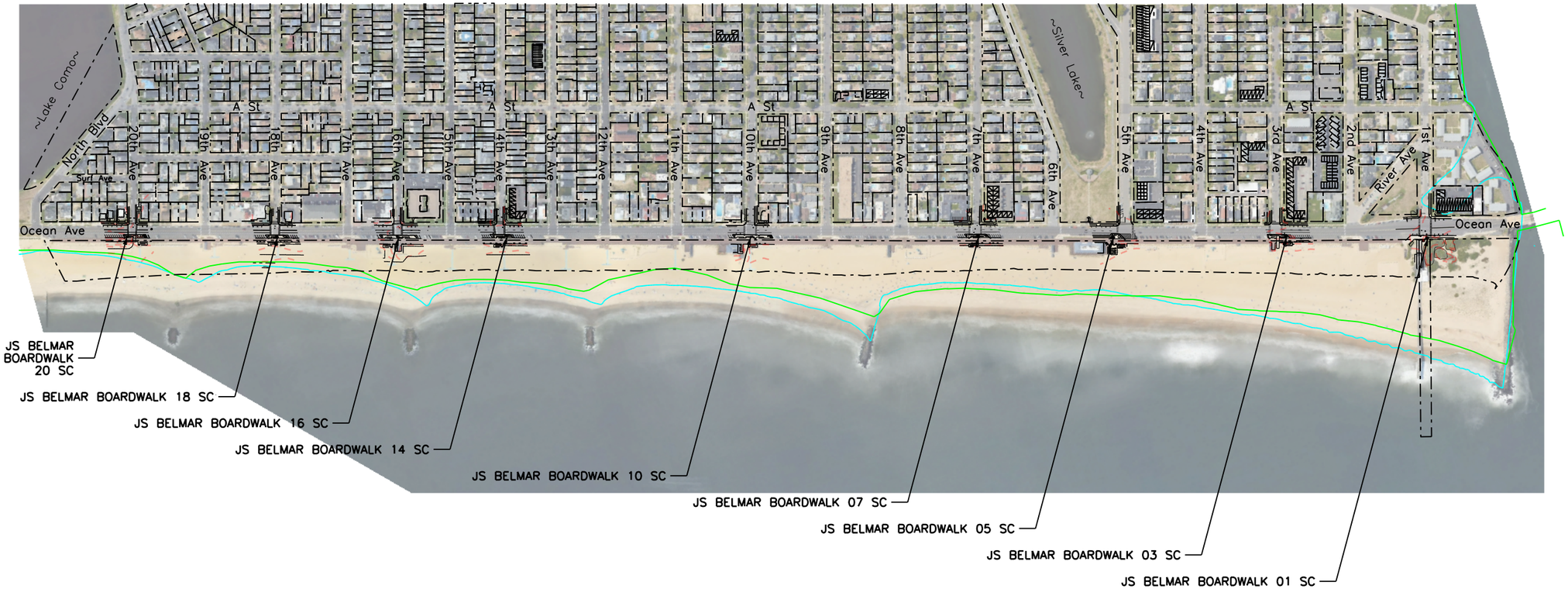
Thank you for your assistance.

Very truly yours,
Gregory D. Meese
Gregory D. Meese
gdm/encl.

cc: Ms. Jennie Quick
Ms. Claire DiNardo

LEGEND	
R.O.W. LINE	—·—·—
TOPOGRAPHIC LINE	- - - - -
TIDELANDS CLAIM LINE	———
UPPER WETLANDS BOUNDARY LINE	———

BELMAR OUTSIDE STATION 853-2337	
MEAN HIGHER HIGH WATER	4.95 Feet
MEAN HIGH WATER	4.61 Feet
MEAN WATER	2.38 Feet
MEAN LOW WATER	0.16 Feet
MEAN LOWER LOW WATER	0.00 Feet



1	BELMAR BOARDWALK	0 150' 300'
11x17 SCALE: 1"=6 200'-0"	22x34 SCALE: 1" = 300'-0"	

SDG
SCHERER DESIGN GROUP, LLC
100 Corporate Drive, Suite 202
Lebanon, NJ 08833
Ph 908.323.2513 Fax 908.323.2525

DRAFT
NOT FOR CONSTRUCTION
DRAWING CONTENTS ARE CONCEPTUAL AND ARE SUBJECT TO FINAL ENGINEER'S APPROVAL (INCLUDING BUT NOT LIMITED TO QUANTITIES AND SIZES)

COLLEEN CONNOLLY
NJ PROFESSIONAL ENGINEER # 24GE04133700

APPLICANT:

verizon

CONTRACTOR SHALL CONTACT SDG PRIOR TO ORDERING MATERIALS OR BEGINNING CONSTRUCTION TO ENSURE THAT THEY HAVE THE LATEST REVISION OF THE CONSTRUCTION DOCUMENTS.

NO.	ISSUE OR REVISION	DATE	BY
B	CLIENT COMMENTS	04/11/23	NS
A	ISSUED FOR REVIEW	03/17/23	RR

PROJECT TITLE:

CONSTRUCTION DOCUMENT

SITE NAME:
BELMAR BOARDWALK

[NEAREST TO]
OCEAN AVE
BELMAR, NJ
MONMOUTH COUNTY

SDG PROJECT #: 20TIL030

SCALE: AS NOTED	DATE: 03/17/23

DRAWING TITLE:

BELMAR BOARDWALK

DRAWING NO.:	PAGE NO.:
S1	1 of 1

New Jersey Department of Environmental Protection
Land Use Management Program
Division of Land Use Regulation

PROPERTY OWNER CERTIFICATION

INSTRUCTIONS: All applicants are required to complete Sections A and B of this form. Applicants who are individual owners of record of the property upon which the activities will occur must also complete Section C.

All other persons who are required to certify to this application in accordance with N.J.A.C. 7:7-23.2(d), N.J.A.C. 7:7A-16.2(d), and N.J.A.C. 7:13-18.2(d) must complete Sections A and C.

Separate forms may be submitted for each signatory, or a single form may be submitted with all required signatures.

SECTION A. SITE INFORMATION (required)

Project Name: Belmar Ocean Avenue Nodes (01, 03, 05, 07, 10, 14, 16, 18 and 20)

Applicant's Name: New York SMSA Limited Partnership dba Verizon Wireless

Street Address: Ocean Avenue (from 1st Avenue through 20th Avenue)

Municipality: Borough of Belmar County: Monmouth Zip Code: 07719

Blocks and Lots: No Block or Lot - sites located in the Ocean Avenue Right-of-Way

SECTION B. SIGNATURE OF APPLICANT

The undersigned applicant hereby certifies that he/she is one of the following: 1) an owner of the site on which the activity is proposed or conducted; 2) an agent designated by the site owner(s) to obtain the permit, verification, or letter of interpretation on the owner's behalf; 3) a representative of a public entity proposing an activity within a right-of-way or easement that is held or controlled by that entity or that will be appropriated by the entity under the power of eminent domain; OR 4) a person with the legal authority to perform the proposed activities.

The undersigned applicant also certifies to the following:

1. Does the application include any activities within an easement or right-of-way? ☒ Yes ☐ No
   If "**Yes**," has written consent from all easement or right-of-way holders in accordance with N.J.A.C. 7:7-23.2(g), 7:7A-16.2(g), and 7:13-18.2(g) been attached to this form? ☒ Yes ☐ No
2. Will any part of the project be located within property belonging to the State of New Jersey? ☐ Yes ☒ No
3. Does the application include activities on any property owned by any public agency that would be encumbered by Green Acres? ☐ Yes ☒ No
4. Does this project require a Section 106 (National Register of Historic Places) Determination as part of a federal approval? ☒ Yes ☐ No

Applicant's Name: _____ Date: _____

Applicant's Signature: _____

Applicant's Name: _____ Date: _____

Applicant's Signature: _____

Applicant's Name: _____ Date: _____

Applicant's Signature: _____

Applicant's Name: _____ Date: _____

Applicant's Signature: _____

SECTION C. PROPERTY OWNER'S CERTIFICATION

All individual owners of record of the property upon which the activities will occur must certify to this application unless the applicant is a corporation, partnership, sole proprietorship, municipality, or State, Federal, or other public entity. If the applicant is a corporation, a principal executive officer of at least the level of vice president must certify below. In the case of partnerships and sole proprietorships, a general partner or the proprietor, respectively, is required to certify. For a municipality or for a State, Federal, or other public entity, the certification must be provided by either a principal executive officer or ranking elected official.

A duly authorized representative may sign this application on behalf of any individual who is required to certify provided that the authorization is made in writing and is submitted as part of this application. Please note that in lieu of a property owner's signature, a legal agreement with the current property owner may be attached to this form. Acceptable legal agreements include, but are not limited to, certificates of eminent domain and certificates of inverse condemnation. **Please note that contracts of sale are not considered an acceptable substitute for a property owner's signature.**

I certify under penalty of law that I have personally examined and am familiar with the information submitted in this document and all attachments and that, based on my inquiry of those individuals immediately responsible for obtaining and preparing the information, I believe that the information is true, accurate, and complete. I am aware that there are significant penalties for knowingly submitting false information, including the possibility of fine and imprisonment. I hereby grant permission for the conduct of the proposed activities and consent to allow access to the site by representatives or agents of the Department for the purpose of conducting a site inspection(s) of the property in question.

Name of Owner/Easement Holder: _____ Date: _____

Signature: _____

Specific Block(s) and Lot(s) Owned: Ocean Avenue Right-of-Way - Borough of Belmar - Owner and Easement Holder

Name of Owner/Easement Holder: _____ Date: _____

Signature: _____

Specific Block(s) and Lot(s) Owned: _____

Name of Owner/Easement Holder: _____ Date: _____

Signature: _____

Specific Block(s) and Lot(s) Owned: _____

Name of Owner/Easement Holder: _____ Date: _____

Signature: _____

Specific Block(s) and Lot(s) Owned: _____

Name of Owner/Easement Holder: _____ Date: _____

Signature: _____

Specific Block(s) and Lot(s) Owned: _____

Name of Owner/Easement Holder: _____ Date: _____

Signature: _____

Specific Block(s) and Lot(s) Owned: _____

EXHIBIT C

MONMOUTH COUNTY
BOARD OF COUNTY COMMISSIONERS
OFFICE OF COUNTY COUNSEL

MICHAEL D. FITZGERALD, ESQ.
MONMOUTH COUNTY COUNSEL

HALL OF RECORDS
ONE EAST MAIN STREET, ROOM 236
FREEHOLD, NJ 07728
TELEPHONE: 732-683-8640
FAX: 732-431-0437
Michael.Fitzgerald@co.monmouth.nj.us

August 8, 2023

Via Email Only gmeese@pricemeese.com

Gregory D. Meese, Esquire
Price, Meese, Shulman & D'Arminio
50 Tice Boulevard, Suite 380
Woodcliff Lake, New Jersey 07677

Re: Verizon Wireless with County of Monmouth

Dear Mr. Meese:

Please accept the within correspondence as a follow-up to your May 10, 2023 letter to Joseph Ettore along with the subsequent phone calls and emails. Unfortunately, last week you had indicated you would be speaking with your client, Verizon, related to extending the asserted 90 day "shot clock" but never provided a reply in spite of an email and a phone call to your attention. As of August 7, 2023, you've not provided any response on behalf of Verizon, and accordingly, we are placed in the unfortunate position of having to respond.

Representatives of Verizon have taken the position that the "shot clock" began to run on May 11, 2023. The County of Monmouth does not agree with this position for a number of reasons as outlined below.

NO ROAD OPENING PERMIT HAS BEEN SUBMITTED

As Verizon is well aware, the County of Monmouth has a staid procedure which is initiated by making application through a "Monmouth County Highway Department Road/Bridge Permit Application", commonly referred to as a "Road Opening Permit". To our knowledge, no such road opening permit has been submitted for any 5G monopole at any time. We find this of interest as Verizon has, in the past, made application for "repeater stations" at seven (7) different locations. For every one of these locations, Verizon made application through a road opening permit and the road opening permits were in fact issued. A listing of the SEVEN locations (five antennas at existing wood poles and two installed on wooden poles at new locations) can certainly be provided; however, they are undoubtedly within the possession of your client.

The County's procedure is to handle a Road Opening Permit when it is received and act on the permit application appropriately. Verizon is both well aware of the procedure and has, as noted above, availed themselves of the same process in the past. To take the position that a letter from your office with attached plans (interestingly, carrying a last date of "dimensions added" of May 11, 2023) does not constitute an application by any stretch.

As you have kindly pointed out in the past, 47 USC Section 253(b) permits a governmental entity to "manage the public rights of way…". The process enumerated above is the procedure by which the County of Monmouth maintains the management of public rights of way.

THERE IS NOT AN AGREEMENT BETWEEN MONMOUTH COUNTY AND VERIZON

The County is also perplexed by the assertion by Verizon that an Agreement exists between the County and Verizon related to the siting of 5G monopoles. In the letter sent by your office dated June 29, 2023, you made reference to an Agreement dated December 12, 2016. The Agreement was attached to your previous May 10, 2023 letter to the County. "Exhibit A" specifically references five "Verizon wireless equipment sites", none of which are located in Belmar. As we have discussed, the same Agreement referenced contains a "Whereas" clause specifically related to "existing utility poles".

The information submitted with the May 10, 2023 letter is not related to existing utility poles nor does it relate to the five sites enumerated in "Exhibit A". Thus, the County is unsure of the basis upon which Verizon believes there is an "Agreement" related to the siting of monopoles.

MONMOUTH COUNTY WAS NOT NOTICED, NOR A SIGNATOR TO THE "CONSENT ORDER" FILED SEPTEMBER 8, 2022

Your June 29, 2023 letter to the attention of the Clerk of the Board of County Commissioners provided a copy of the Consent Judgment and Settlement Agreement between Verizon and the Borough of Belmar (ECF - Document 32). The County has two significant issues with reference to the subject Consent Order. Initially, the County of Monmouth was not a party to this Agreement nor was the County of Monmouth advised of the cause of action being filed initially. This is of interest to the County of Monmouth as the right of way which appears to be the subject of the Agreement is actually a County right-of-way yet, the County of Monmouth was not noticed of the litigation nor involved in the Consent Order. It is difficult to understand Verizon's assertion that the County is "bound" by a Consent Order to which they were not a party.

Basically, Verizon seeks to bind Monmouth County to siting of monopoles with no input from Monmouth County. Further, the County of Monmouth takes issue with paragraph 18 of the Consent Order which asserts that an Agreement exists utilizing the aforementioned December 12, 2016 document. Specifically, the County takes issue with the reference to the parenthetical reference to represent to the court that there was an Agreement "… Which allows the installation of small wireless facilities in the Monmouth County public rights of way…". In fact, the words "small wireless facilities" do not appear in the December 12, 2016 "Agreement" anywhere.

Arguably, the 90 day "shot clock" has not even begun to run as Monmouth County was not a party to any siting discussions.

THE SUBMISSION BY VERIZON, WHILE NOT COMPLYING WITH MONMOUTH COUNTY'S USUAL PROCEDURE IS ALSO DEFICIENT

The letter of May 10, 2023 characterized as an "application" does not follow Monmouth County's procedure for application which is well known to Verizon. Further, it is apparent that Verizon assembled the attachment hastily in response to learning all prior discussions and litigation had failed to include the actual property owner. In fact, an informational meeting was held in Belmar, attended by County Commissioner Director Thomas Arnone, on May 8, 2023. At the meeting, Commissioner Director Arnone shared that the County was "surprised" to learn of a Consent Order since Ocean Avenue in Belmar is a County Road. It is not lost on the County that the "submission" is dated two days later with attachments which are dated May 11, 2023.

Getting to the point of the hastily assembled "submission" many items are either missing or deficient.

The denial letter, with a listing of the nine (9) comments is attached.

Verizon's conduct; specifically NOT including Monmouth County in litigation related to the siting of monopoles in rights-of-way owned by Monmouth County, not contacting Monmouth County prior to the May 10, 2023 letter "submission", not following the Road Opening Permit procedures Verizon themselves had previously utilized, and choosing to not respond to Monmouth's reasonable requests for discussion on the commencement of, and/or expiration of the 90 day "shot clock" clearly evidences a desire to place monopoles in Monmouth County via any means possible, including subterfuge.

The unfortunate turn of events has placed the interested parties in an adversarial position. The County of Monmouth is both well aware of and prepared to move forward in an orderly way to effectuate the deployment of the requisite 5G coverage for the protection of the residents of, and visitors to, the County of Monmouth. Sadly, Verizon's chosen methods makes a considered and responsible analysis nearly impossible.

Very truly yours,

MICHAEL D. FITZGERALD
Monmouth County Counsel

MDF: gsg
Attachment
cc: Board of County Commissioners
Teri O'Connor, County Administrator

The Board of County Commissioners
of the County of Monmouth

DEPARTMENT OF PUBLIC WORKS & ENGINEERING

JOHN W. TOBIA
Director
Email: jwtobia@co.monmouth.nj.us

JOSEPH M. ETTORE
County Engineer
Email: engineer@co.monmouth.nj.us

DIVISION OF ENGINEERING & TRAFFIC SAFETY
Hall of Records Annex
Freehold, New Jersey 07728
Telephone: (732) 431-7760
Fax: (732) 431-7765

August 8, 2023

Price, Meese, Shulman & D'Arminio
50 Tice Boulevard
Suite 380
Woodcliff Lake, NJ 07677
Attn: Gregory D. Meese

RE: Verizon Wireless Proposed 5G deployment along County Route 18 (Ocean Avenue), Borough of Belmar with County of Monmouth

Dear Mr. Meese:

In response to your letter of May 10, 2023 and attached plans, your submission is denied. Verizon is aware that any work within the County right-of-way requires the submission of a "Monmouth County Highway Department Road/Bridge Permit Application". Despite the lack of a complete submission, a preliminary review of the plans identified the following deficiencies:

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. Juncition 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.

To advance your project, please submit the above referenced permit application with revised plans which address the identified deficiencies.

Please do not hesitate to contact this office if you have any questions or require additional information.

Very truly yours,

Joseph M. Ettore, P.E.
County Engineer

Cc: Teri O'Connor, County Administrator
Michael D. Fitzgerald, County Counsel

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, and

BELMAR AGAINST 5G TOWERS, LAWRENCE REYNOLDS, ROSE DAGANYA, MICHAEL USHAK, DAN RUBINETTI, PAUL M. ELIA, and MICHAEL AND MARY MCHALE,

Intervenor-Defendants.

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

[PROPOSED] ORDER

THIS MATTER having come before the Court upon application of Intervenor-Defendants Belmar Against 5G Towers, Lawrence Reynolds, Rose Daganya, Michael Ushak, Dan Rubinetti, Paul, M. Elia, and Michael and Mary McHale (collectively "Intervenors") to dismiss the Complaint filed by Plaintiffs Cellco Partnership and New York SMSA Limited Partnership, both d/b/a Verizon Wireless ("Plaintiffs"), and the Court having considered the papers submitted, and the arguments of counsel, if necessary, and for other good cause having been shown;

IT IS on this ____ day of _____ 2024;

ORDERED that Intervenors' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b) is GRANTED; and it is further

ORDERED that Plaintiffs' Complaint is dismissed with prejudice.

_____

Hon. Michael A. Shipp, U.S.D.J.