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IN THE 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,

v.

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

1:23-cv-18091-ESK-EAP

FIRST AMENDED AND SUPPLEMENTAL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND EXPEDITED REVIEW PURSUANT TO 47 U.S.C. § 332(c)(7)(B)(v)

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

Intervenor-Defendants.

Plaintiffs, Cellco Partnership and New York SMSA Limited Partnership both d/b/a Verizon Wireless (hereafter collectively "Verizon"), by their undersigned attorneys, as and for their First Amended and Supplemental Complaint against the County of Monmouth, New Jersey (the "County"), the Monmouth County Board of Commissioners (the "Board"), 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, (collectively, "Defendants"), respectfully allege as follows and hereby petitions this Court to conduct an expedited review of Defendants': (a) failure to support its denial with substantial evidence; (b) material inhibition of Verizon's provision of personal wireless service; (c) illegal regulation of the placement, construction and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency ("RF") emissions; (d) adoption of a new small wireless facility ordinance that is preempted by federal law; and (e) breach of contract, with respect to Verizon's proposed deployment of telecommunications facilities in the County's public rights-of-way (the "ROW").

INTRODUCTION AND REGULATORY FRAMEWORK

1. In 1996, Congress enacted the Telecommunications Act of 1996, No. 104-104, 110 Stat. 56 (1996), which amended the Communications Act of 1934, codified in 47 U.S.C. §151 et seq. (hereinafter, the "Act" or the "TCA") as a "pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans . . . ."[1]

2. Congress has declared that there is a need for wireless communication services, including "personal wireless services,"[2] as set forth in the Act, and the rules, regulations, and orders of the Federal Communications Commission ("FCC") promulgated pursuant thereto. In order to foster its pro-competitive, deregulatory national policy, Congress included provisions in the Act that encourage competition by restricting the regulation of the placement of personal wireless service facilities by State and local governments and instrumentalities thereof.

3. Section 332(c)(7) of the Act imposes substantive and procedural limitations on State and local governments and instrumentalities thereof to ensure that the Act's pro-competitive goals are not frustrated, and it expressly preempts any action or inaction by State or local governments or their agents that effectively prohibits the provision of wireless services.

4. Section 332(c)(7) of the Act strikes a balance between "preserv[ing] the traditional authority of state and local governments to regulate the location, construction, and modification of

[1] The Act, S. Rep. 104-230, at 1 (Feb. 1, 1996) (Conf. Report).

[2] Personal wireless service facilities include "Small Wireless Facilities," as defined by the Federal Communications Commission ("FCC") in 47 C.F.R. § 1.6002(l).

wireless communications facilities like cell phone towers" [3] and "reduc[ing] . . . the impediments imposed by local governments upon the installation of facilities for wireless communications."[4]

5. While Section 332(c)(7)(A) of the Act preserves "the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities," that authority is subject to significant limitations – including Section 332(c)(7)(B)(ii) of the Act, which requires States and local governments or instrumentalities thereof to "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with [the relevant] government or instrumentality, taking into account the nature and scope of such request."[5]

6. The purpose of Section 332(c)(7)(B)(ii) of the Act is to counteract delays in consideration of wireless facility siting applications by State or local governments or their agents, which thwart timely deployment of wireless service.

7. Section 332(c)(7)(B)(v) of the Act provides that:

> any person adversely affected by any . . . failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such . . . failure to act, commence an action in any court of competent jurisdiction.

8. As the Federal agency tasked with implementing the Act, the FCC has the authority to promulgate rules and regulations to achieve the purposes of the Act.

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[3] *T-Mobile S., LLC v. Township of Roswell*, 574 U.S. 293, 300; 135 S. Ct. 808, 814; 190 L.Ed.2d 679 (2015).

[4] *Township of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 115; 125 S. Ct. 1453, 161 L.Ed.2d 316, (2005)

[5] 47 U.S.C. § 332(c)(7)(B)(ii).

9. Pursuant to its statutory authority, in November 2009, the FCC adopted an initial order establishing what constitutes a "reasonable period of time" under the Act for a State or local government or instrumentality thereof to take action on an application for a wireless communications site.[6]

10. In the 2009 Shot Clock Order, the FCC recognized that "personal wireless service providers have often faced lengthy and unreasonable delays in the consideration of their facility siting applications, and that the persistence of such delays is impeding the deployment of advanced and emergency services."[7] In so holding, the FCC sought to promote the deployment of broadband and other critical wireless services.[8]

11. The FCC noted that the purpose of this "shot clock deadline" was to give State or local governments or instrumentalities thereof, "a strong incentive to resolve each application within the timeframe defined as reasonable, or they will risk issuance of an injunction granting the application. In addition, specific timeframes for State and local government deliberations will allow wireless providers to better plan and allocate resources. This is especially important as providers plan to deploy their new broadband networks."[9]

12. On September 26, 2018, the FCC revised its Shot Clocks and policy.[10]

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[6] *In the Matter of the Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance*, WT 08-165, FCC 09-99, 24 F.C.C.Rcd. 13,994, ¶ 71, Nov. 19, 2009. (the "2009 Shot Clock Order").

[7] 2009 Shot Clock Order, p. 14,005, ¶ 32.

[8] *Id.*

[9] *Id.* at p. 14,000, ¶38.

[10] *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT 17-29, WC 17-84, FCC 18-133, 33 FCC Rcd. 9088, Sept. 26,

13. In its Third Report and Order the FCC "adopt[ed] two new Section 332 shot clocks for personal wireless service facilities known as Small Wireless Facilities—60 days for review of an application for collocation of Small Wireless Facilities using a preexisting structure and 90 days for review of an application for attachment of Small Wireless Facilities using a new structure."[11]

14. The FCC also "determined that failure to meet the applicable time frame enables an applicant to pursue judicial relief within the next 30 days."[12]

15. The Shot Clock Order further codified that:

> *Timely action required.* A siting authority that fails to act on a siting application on or before the shot clock date for the application, as defined in paragraph (e) of this section, is presumed not to have acted within a reasonable period of time.[13]

16. The presumptively "reasonable period of time" runs from when an application is first submitted or proffered.[14]

17. The FCC specifically noted the following:

> if an applicant proffers an application, but a state or locality refuses to accept it until a pre-application review has been completed, the shot clock begins to run when the application is proffered. In other words, the request is "duly filed" at that time, notwithstanding the locality's refusal to accept it.[15]

18. Under the FCC's Rules and Regulations, a determination of incompleteness of a siting application tolls the shot clock only if the State or local government or instrumentality

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2018 ("Third Report and Order"); *aff'd in relevant part sub nom, City of Portland v. U.S.*, 969 F.3d 1020 (9th Cir. 2020), *cert. denied sub nom.*, 141 S. Ct. 2855 (2021).

[11] Third Report and Order at p. 9,142, ¶ 105. The "Shot Clock" timelines are codified at 47 C.F.R §1.6003.

[12] *Id.* at p. 9,104, ¶ 19.

[13] 47 C.F.R. § 1.6003(a).

[14] 47 C.F.R. § 1.6003(e).

[15] Third Report and Order at p. 9,162, ¶145 (citations omitted)

thereof provides notice to the applicant in writing within ten (10) days of the submission of the application, specifically identifying all missing information, and specifying any code provision, ordinance, application instruction, or otherwise publicly-stated procedures that require the information to be submitted.[16]

19. The expiration of the shot clock period without a determination by the State or local government or instrumentality thereof constitutes a "failure to act" under the Act and allows the applicant to seek redress in federal court pursuant to 47 U.S.C. § 332(c)(7)(B)(v).

20. Section 253 of the Act prohibits State or local authorities from erecting barriers that may prohibit or may have the effect of prohibiting the ability of any entity to provide telecommunications services, including taking action or inaction that results in an unreasonable delay in the deployment of the provider's facilities and provision of telecommunications services.[17]

21. Pursuant to 47 U.S.C. § 332(c)(7)(B)(iii), "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record."

22. Substantial evidence "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.'" *Cellular Telephone v. Zoning Bd. of Adjust.*, 197 F.3d 64, 71 (3d Cir. 1999).

23. Section 253(a) of the Act provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of

[16] 47 C.F.R. § 1.6003(d)(1).

[17] 47 U.S.C. § 253(a).

any entity to provide any interstate or intrastate telecommunications service." Moreover, Section 253(c) limits the power of State and local government authorities to "manage the public rights-of-way" on a "competitively neutral and nondiscriminatory basis."

24. In its Third Report and Order, the FCC also confirmed that the "materially inhibit" standard is the proper standard to be used to determine whether a state or local law operates as a prohibition or effective prohibition within the meaning of Sections 253 and 332 of the TCA.[18]

25. As further explained by the FCC, "a state or local government legal requirement will have the effect of prohibiting wireless telecommunications service if it materially inhibits the provision of such services. We clarify that an effective prohibition occurs where a state or local legal requirement materially inhibits a provider's ability to engage in any of a variety of activities related to its provision of a covered service. This test is met not only when filling a coverage gap but also when densifying a wireless network, introducing a new service or otherwise improving service capabilities." [19]

26. Significantly, in its Third Report and Order, the FCC also

> confirm[ed] that our interpretations today extend to state and local governments' terms for access to public ROW that they own or control, including areas on, below, or above public roadways, highways, streets, sidewalks, or similar property, as well as their terms for use of or attachment to government-owned property within such ROW, such as new, existing and replacement light poles, traffic lights, utility poles, and similar property suitable for hosting Small Wireless Facilities.[20]

[18] Third Report and Order at p. 4, ¶ 10.

[19] Third Report and Order at p. 17, ¶ 37.

[20] Third Report and Order at p. 9.134, ¶ 92.

27. The FCC's "materially inhibit" standard was recently adopted by the Third Circuit in *Cellco Partnership v. White Deer Township Zoning Hearing Board*.[21]

28. In *White Deer Township*, the Court held that the "materially inhibit" standard requires the Court to "consider the totality of the circumstances" in determining whether a state or local requirement "materially inhibits" service.

29. In 2018, the FCC also adopted an order clarifying how local moratoria, both *de facto* and express, violate Section 253 of the TCA.[22]

30. The FCC defines *de facto* moratorium as "state or local actions that are not express moratoria, but that effectively halt or suspend the acceptance, processing, approval of applications or permits for telecommunications services or facilities in a manner akin to an express moratorium."[23]

31. According to the FCC, "like express moratoria, *de facto* moratoria, prohibit or have the effect of prohibiting the provision of service and are thus prohibited by Section 253 [of the TCA]."[24]

JURISDICTION AND VENUE

32. This Court has subject matter jurisdiction over this action pursuant to: (a) 47 U.S.C. §§ 253 and 332(c)(7)(B) of the Act because Verizon has been adversely affected and aggrieved by Defendants' actions in violation of those provisions of the Act; and

[21] Docket 22-2392 (3d Circ. 2023).

[22] *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment*, WC Docket 17-84 (August 3, 2018) (the "Moratorium Order")

[23] Moratorium Order at ¶ 149.

[24] Moratorium Order at ¶ 151.

(b) 28 U.S.C. § 1331 because this is a civil action that presents federal questions arising under the Act.

33. This Court has jurisdiction to order declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202 and has supplemental jurisdiction with regard to any state law claims pursuant to 28 U.S.C. § 1367.

34. This Court has personal jurisdiction over the Defendants, and venue is proper in this Court, as the Defendants conduct or have conducted continuous, systematic, and routine business within the County of Monmouth in the State of New Jersey and within the jurisdiction of this Court, pursuant to 28 U.S.C. § 110.

35. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b)(2) in that a substantial part of the events or omissions giving rise to this action occurred in the District of New Jersey.

EXPEDITED PROCEEDING

36. Pursuant to 47 U.S.C. § 332(c)(7)(B)(v) of the Act, this Court "shall hear and decide [this] action on an expedited basis."

THE PARTIES

37. Cellco Partnership is a general partnership formed under the law of the State of Delaware and has been authorized to do business in the State of New Jersey and maintains its principal place of business at One Verizon Way, Basking Ridge, New Jersey 07920.

38. New York SMSA Limited Partnership is a limited partnership, with Cellco Partnership as is general partner, formed under the law of the State of New York and has been authorized to do business in the State of New Jersey and maintains its principal place of business at One Verizon Way, Basking Ridge, New Jersey 07920.

39. Verizon utilizes licenses issued by the FCC to provide personal wireless communications services.

40. Verizon uses Small Wireless Facilities, as defined by 47 CFR § 1.6002(I), ("SWFs") to assist in providing wireless telecommunications and broadband services to its customers.

41. Defendant County of Monmouth, New Jersey is a municipal corporation duly organized under the laws of the State of New Jersey with a principal place of business at One East Main Street, Freehold, New Jersey 07728.

42. Upon information and belief, Defendant Monmouth County Board of Commissioners is the governing body of Defendant County of Monmouth, New Jersey with authority under federal, New Jersey and County laws to manage access to the County's ROW for equipment used in the provision of telecommunications services and maintains its principal place of business at One East Main Street, Freehold, New Jersey 07728.

43. Upon information and belief, Defendant, Commissioner Director Thomas A. Arnone, in his official capacity and not as an individual, is a member of Defendant Monmouth County Board of Commissioners and is the Commissioner Director of Defendant County of Monmouth, New Jersey.

44. Upon information and belief, Commissioner Deputy Director Nick DiRocco, in his official capacity and not as an individual, is a member of Defendant Monmouth County Board of Commissioners and is the Deputy Direction of the Monmouth County Board of Commissioners.

45. Upon information and belief, Commissioner Susan M. Kiley, in her official capacity and not as an individual, is a member of Defendant Monmouth County Board of Commissioners.

46. Upon information and belief, Commissioner Lillian G. Burry, in her official capacity and not as an individual, is a member of Defendant Monmouth County Board of Commissioners.

47. Upon information and belief, Commissioner Ross F. Licitra, in his official capacity and not as an individual, is a member of Defendant County of Monmouth Board of Commissioners.

FACTS COMMON TO ALL COUNTS

Existing ROW Agreement

48. Verizon has spent more than seven (7) years seeking the County's approval to install SFWs that are needed to provide reliable wireless service to Verizon's users residing, visiting, working, and/or traveling in the County and surrounding areas.

49. To that end, on December 12, 2016, Verizon entered into a certain County Utility Agreement for Occupancy Within County Right-of-Way between County of Monmouth and New York SMSA Limited Partnership d/b/a Verizon Wireless (the "Existing ROW Agreement") with the County.

50. The Existing ROW Agreement provides for a procedure for the County's review and approval of the installation of SWFs within the ROW under the jurisdiction of Defendants.

51. Section 1 of the Existing ROW Agreement provides that the "County will allow and cooperate with Verizon Wireless with respect to the occupancy of the County right(s)-of-way by Verizon Wireless' facilities . . . which are to be located as set forth in Exhibit A.

52. Pursuant to Section 1 and Exhibit A, the Existing ROW Agreement provided for the initial installation of SWFs on six (6) existing utility poles and one (1) SWF on a new utility pole (i.e., the SWF located nearest to 520 Navesink River Road in Middletown New Jersey).

53. Section1 further provides that **"[t]his 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."** [emphasis added].

54. Significantly, the Existing ROW Agreement applies to "any additional installations" proposed by Verizon Wireless in the County's rights-of-way and is not limited to the seven (7) SWFs listed in Exhibit A of the Existing ROW Agreement.

55. The Existing ROW Agreement does not prohibit the installation of new utility poles if same are required for the installation of SWFs.

56. Since 2016, Verizon has submitted to the County Engineer and the County has approved several applications for the installation of SWFs, pursuant to the Existing ROW Agreement, at least four (4) of which required the installation of a new utility pole for the mounting of the SWF.[25]

The Need for and Prior Approvals of the Subject SWFs

57. Verizon's wireless network has exceeded its capacity to handle the demand for wireless services in the Borough of Belmar (the "Borough"), which is a municipality located in the County.

58. This lack of capacity causes blocked calls on Verizon's network and impacts Verizon's ability to consistently provide reliable personal wireless services and telecommunications services.

[25] The aforementioned SWFs are located in Eatontown, New Jersey at 172 Tinton Road (new wood pole), 38 Industrial Way (new wood pole), 130 Route 35 (new wood pole) and 33 Tinton Road (replacement wood pole).

59. Addressing this issue, Verizon has sought all approvals necessary to install nine (9) SWFs (the "Subject SWFs"),[26] which are needed to remedy the significant gap in reliable wireless services and to meet the demand for personal wireless services and telecommunications services.

60. The Subject SWFs are the least intrusive means to remedy these needs.

61. The Subject SWFs will be installed in a portion of the County ROW of Ocean Avenue (the "Subject ROW"), which is located in the Borough, and owned, maintained, and managed by Defendants.

62. As such, Verizon needs to obtain the consent of both the County and the Borough for the installation of the Subject SWFs in the Subject ROW, pursuant to N.J.S.A. 27:16-6.

63. In accordance with this obligation, Verizon initiated discussions with the Borough approximately five years ago to deploy the Subject SWFs within the Subject ROW.[27]

64. After lengthy discussion with the Borough, Verizon submitted an application to the Borough that proposed the installation of, *inter alia*, the Subject SWFs, on January 12, 2021.

65. As part of its application, Verizon submitted an Electromagnetic Exposure Certification dated January 11, 2021, prepared by Andrew Petersohn, P.E., of dBM Engineering, for each of the Subject SWFs.

66. Based upon his analysis, Mr. Petersohn concluded that the predicted levels for each of the Subject SWFs will be fully compliant with, and in fact will be far below, the FCC RF Radiation Exposure Limits, and thus, "will not have a significant environmental impact as defined by the FCC General Population MPE Limit[.]"

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[26] The Subject SWFs are personal wireless services facilities that will provide personal wireless services and telecommunication services, as those terms are defined in 47 U.S.C. §§ 332(c)(7)(C) and 153(53), respectively.

[27] Verizon also sought the installation of additional SWFs; however, such SWFs are not the subject of this litigation.

67. Following the Borough's failure to act on Verizon's application, Verizon commenced a litigation against the Borough, which resulted in a settlement whereby the Borough granted its approval of the Subject SWFs.

Verizon's Application to the County

68. After receiving the Borough's approval, Verizon sought to receive all other approvals required for the installation of the Subject SWFs.

69. Such approvals include a road opening permit, as required under the County's regulations regarding the management of its ROW entitled "The County of Monmouth Regulations to Protect County Roadways and Related Facilities and Excavations" (the "County Regulations").

70. However, the County Regulations do not allow for the issuance of a road opening permit until all other state, local and federal permits have been obtained. The regulations pertinently provide the following:

> All applications submitted shall provide the following information: . . . a copy of all State, County and municipal permits or approvals required for the proposed work, including a copy of Monmouth County Planning Board action, as applicable, along with a sworn statement that all appropriate approvals from local, State and Federal jurisdictions have been obtained.[28]

71. Consequently, Verizon intended to apply for the necessary road opening permit after it had obtained siting approval from the County Engineer (in order for the Subject SWFs to be added to the Existing ROW Agreement, pursuant to the Existing ROW Agreement, and obtained the requisite approval from the New Jersey Department of Environmental Protection ("NJDEP") under the Coast Area Facilities Review Act ("CAFRA"), N.J.S.A. 13:19-1 et seq.[29]

[28] Page 3, Section 4 of the County Regulations.

[29] On April 22, 2024, Verizon received notice from the NJDEP that, due to recent changes in the NJDEP's requirements for the installation of utility poles in a disturbed ROW, CAFRA approval

72. On May 10, 2023, Verizon submitted an application to the County Engineer for siting approval (the "SWF Application"), in accordance with the procedure set forth in the Existing ROW Agreement,

73. Verizon also submitted a request that the County, as the owner of the ROW, execute the necessary CAFRA Property Owner Certification form (the "CAFRA Application").

74. Without the County's endorsement of the CAFRA Application, Verizon was unable to make application to the NJDEP for CAFRA approval.

75. Defendants did not notify Verizon of any missing information from either the SWF Application or the CAFRA Application within ten (10) days of filing, as is required under federal law.[30]

Public Opposition to the Subject SWFs

76. The topic of Verizon's SWF deployment has become a contentious matter in the Borough, notwithstanding the prior litigation between Verizon and the Borough and settlement of same.[31]

77. On May 8, 2023, a group of Belmar residents held a public meeting related to public opposition regarding Verizon's proposed installation of SWFs in the Borough.

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is no longer required for the installation of SWFs on utility poles located in the maintained grassy area of the Subject ROW, as is the case for the Subject SWFs (the "Jurisdictional Determination").

[30] Third Report and Order; p. 75, ¶143; *see also* 47 CFR § 1.6003(d)(1).

[31] https://newjersey.news12.com/verizons-cell-tower-plan-could-ruin-aesthetic-beauty-of-belmar-beaches-mayor-says (accessed August 28, 2023).

78. Defendant County Commissioner Director Thomas Arnone attended the meeting and, upon information and belief, stated that the County would support the citizen group's opposition to Verizon's proposed installations.[32]

79. Similarly, and as set forth in the Borough's official minutes, at the Borough's June 13, 2023, Council Meeting, a resident of the Borough asked for an update "from Monmouth County on Verizon" and Councilwoman Caitlin Donovan stated that she had attended a meeting of the County Commissioners "and they expressed support for us."

Defendants' Denial of the SWF Application

80. Because Verizon filed the SWF Application and the CAFRA Application on May 10, 2023, under the applicable ninety (90) day "shot clock," Defendants were required to take action on same by August 8, 2023.

81. On August 8, 2023, the County's Counsel, Michael Fitzgerald, Esq., transmitted a letter (the "Attorney Letter") to Verizon's counsel which stated: 1) there "is not an agreement between Monmouth County and Verizon;" 2) the Existing ROW Agreement did not apply to SWFs that require the installation of new poles; 3) that the correct process for Verizon to follow was to

[32] https://www.tapinto.net/towns/belmar-slash-lake-como/sections/community/articles/over-200-residents-protest-verizon-towers-at-taylor-pavilion (accessed August 28, 2023). Furthermore, on July 14, 2023 the County issued a press release regarding its goal to create a "master plan" limiting the "placement of 5G monopoles" in the County, which included a statement from Commission Director Thomas A. Arnone that "this is a strong statement of support for all of our towns, especially Belmar, where residents and their borough council, have raised concerns related to health and environmental impacts of 5G monopoles. . ." In addition to demonstrating Defendants' coordination with the Borough and underlying intent to obstruct Verizon's deployment, the statement also demonstrates an unlawful intent to regulate the "placement, construction and modification of personal wireless service facilities on the basis of environmental effects of radio frequency emissions to the extent such facilities comply with the [FCC's] regulations concerning such emissions" in violation of 47 U.S.C. 332(c)(7)(B)(iv). https://www.publicnow.com/view/A719627586271E34B743B18377902FA0A7F94FFF?1689342462 (accessed April 30, 2024).

obtain a road opening permit from the County; 4) because a road opening permit had not been submitted, the applicable FCC "shot clock" had not begun to run; 5) because the SFW Application "while not complying with Monmouth County's usual procedure is also deficient," same was therefore denied; and 6) that the County was not bound by Verizon's settlement with the Borough.

82. The Attorney Letter enclosed a letter from the County Engineer, Joseph M. Ettore, P.E. (the "Engineer Letter") which, incorrectly, treated the SWF Application as an application for a road opening permit and denied same. In fact, Verizon had not yet filed for a road opening permit because it could not do so without the County Engineers' siting approval and without CAFRA approval, which could not be obtained without the County's execution of the CAFRA Application.

83. The Engineer Letter includes a number of arbitrary and erroneous bases for denial of the SWF Application, including: 1) "any pole mounted equipment/cabinets shall not extend into or overhang pedestrian areas" despite the fact that the plans for the SWFs show that the poles are a "stealth design" in which all equipment is located internally within the pole; and 2) "poles shall be of a breakaway design and meet [Federal Highway Administration Standards] standards" despite the fact that (a) these standards have no applicability to a county road that is not a state or interstate highway and subject to federal jurisdiction, and (b) the weight of the proposed poles is approximately 2,000 lbs. and more than double the weight appropriate for breakaway pole designs..

84. Defendant did not take any action on the CAFRA Application at any time prior to the NJDEP's Jurisdictional Determination.

85. Verizon has filed this action within 30 days of Defendants' action upon Verizon's SWF Application, and therefore this action is timely.

86. Under Sections 253(a) and 332(c)(7)(B) of the Act, Verizon is entitled to injunctive and declaratory relief permitting it access to the public rights-of-way to deploy the nine (9) SFWs included in the SWF Application.

The County's New SWF Ordinance

87. Following the commencement of this action, on September 28, 2023, the Board passed a resolution adopting a new small wireless facilities ordinance, entitled "An Ordinance . . . Establishing Procedures and Standards Regarding Deployment of Small Wireless Facilities in Public Rights-of-Way in the County of Monmouth (the "SWF Ordinance").

88. Upon information and belief, the County has taken the position that the Subject SWFs must comply with the SWF Ordinance

89. The SWF Ordinance requires that any applicant seeking to:

> place a [SWF] in any right-of-way [must] first fil[e] a [SWF] siting permit application, in the form specified [in the SWF Ordinance] and in accordance with the procedures specified [in the SWF Ordinance], with the County Supervising Road Inspector and obtaining a siting permit therefore, except as otherwise may be provided in [the SWF Ordinance].

90. The SWF Ordinance further requires satisfaction of the following before "the siting permit authorizing placement of a [SWF] in a [ROW] shall . . . be issued by the County Supervising Road Inspector:

a. All siting permit application fees and escrow fees, as established [in the SWF Ordinance], have been paid; and

b. All other governmental permits or other governmental approvals that are required for the deployment(s) proposed by the Applicant's siting permit application under this Ordinance and by any other applicable federal, state, County or municipal law have been issued by the appropriate issuing authority therefore to the Applicant and the Applicant has supplied copies of such other permits or approvals to the County Supervising Road Inspector for inclusion with the Applicant's application documents; and

c. The Applicant has entered into a 'Right-of-Way Use Agreement,' the approved form of which is set forth in Appendix 'A' to [the SWF Ordinance], with the County. . . [However,] [m]inor deviations to the terms and conditions that are set forth in the approved form of Right-of--Way Use Agreement may be approved by the Monmouth County Board of County Commissioners at the time that it grants consent to use a right-of-way to a siting permit Applicant.

91. The SWF Ordinance also imposes, *inter alia*, the following requirements:

a. [The minimum spacing between SWFs must be greater than] five hundred (500) feet . . . unless it can be established by clear and convincing evidence that co-location on an existing or previously approved [SWF] is not feasible. Any claims of carriers of technical incompatibility or inability to collocate need to be proven by the carrier, not disproven by the County. Responsibility for judging proof of said claims lies solely with the County and/or or its chosen representative(s)[;]

b. The use of wooden poles is not permitted[;]

c. [An SWF may only be] deploy[ed] upon an existing structure in a right-of-way [if] the structure is one of the types of Concealment Poles that are set forth in Section One [of the SWF Ordinance] and such Concealment Pole specifically is designed to accommodate the reasonable and customary equipment necessary for [co-location of] at least three carriers[, and] allow space for municipal use for other services and/or equipment[;]

d. [Such Concealment Poles must also] be a maximum of 45 feet in height and a maximum of 26" in diameter at its widest cross-section including antenna shrouds and pedestal cabinets/bases, . . . have no external latches, external hinges, external cabling, nor external antennas, . . . [and] [i]f required by the County, the pole shall be of breakaway design in conformance with FHWA design and testing requirements[;]

e. All 5G and related equipment, including but not limited to, electrical and telecom service disconnects, breaker panels and patch panels shall be housed internally within the concealment pole. Further, all utility connections to the concealment pole (i.e., electric and telecom providers) shall be made via an underground conduit system routed through the pole foundation. The use of aerial cable connections with attachments to concealment poles for any purpose are not permitted[;]

f. All [SWFs] must be placed within a 50 ft. radius of . . . specific locations set forth a [sic] County Wireless Siting Plan[, if required by the County] unless a waiver is granted pursuant to the Procedure on Permit Application of this Agreement[;]

g. No more than one (1) Concealment Pole shall be permitted per intersection of block if the Siting Plan calls for the deployment of a [SWF] at any location other than an intersection, unless otherwise specified within a County Wireless Siting Plan or a waiver is granted pursuant to the Procedure on Permit Application of this Agreement[;]

92. The SWF Ordinance also requires that:

An Applicant . . . [for] the installation of any new Concealment Pole . . . shall provide the County with access to any of the technological features that are a component the new Smart Pole structure such as, for example, public access Wi-Fi, 911 call service or security cameras, before the Applicant offers such access to any other person or entity. Should the County decide to utilize any such technological features then the County, on an annual basis, shall reimburse the Applicant or the subsequent owner of the structure, the costs, on a dollar-for-dollar basis, of providing the County with such access. Such costs shall be limited to the costs of providing electricity to the components used by the County and the costs of any repairs required to be made to the components used by the County, unless the repair costs are necessitated by the acts of the Applicant or subsequent owner of the structure, without regard to whether such acts are negligent or intentional.

93. The SWF Ordinance also requires that the Applicant, in its [SWF] siting permit application, must certify, *inter alia*, that:

a. the Applicant . . . shall market the availability of approved facilities to all major wireless carriers in the marketplace [and] that [the Applicant] will encourage, manage and coordinate the location and placement of any interested carrier's equipment on their structure[;]

b. the poles are built to allow three (3 carriers) to utilize the same pole, . . . that the poles will not be taller than 45 feet . . . [and] that the proposed pole being built can accommodate three total carrier [sic] without having to be replaced[;]

c. if the pole location is found to be in a high traffic and/or sensitive area as determined by the County, the Applicant will place a pole in another location for safety[;]

d. the location and number of internal housing units needed for their poles in the County of Monmouth. All poles shall have the capability to house three (3) carriers within one pole at the time of installation[;]

94. The SWF Ordinance also requires that the Applicant, as part of its [SWF] siting permit application, "shall procure any and all necessary State and/or local permits required for placement of poles in the County[.]

95. The SWF Ordinance provides that, "[n]o [SWF] siting permit application shall be deemed complete until the Applicant has applied for all other permits and approvals required by all other [applicable] laws and regulations[.]"

96. The SWF Ordinance further provides that if the County denies a SWF siting permit application, "the Applicant may cure any deficiencies identified by the County within thirty (30) days of the denial without paying an additional application fee, provided the County Supervising Road Inspector shall approve or deny the revised application within thirty (30) days of receipt of the amended application."

97. The SWF Ordinance further provides that "[t]he County Engineer may waive any siting standard set forth in this Chapter if the carrier can scientifically demonstrate strict enforcement will prohibit or have the effect of prohibiting any interstate or intrastate telecommunications service or personal wireless service . . . Responsibility for judging proof of said claims lies solely with the County and/or its chosen representative(s).

98. The SWF Ordinance also requires the execution of a new form ROW agreement, which itself violates federal law and the Existing ROW Agreement for several reasons including that: (1) it requires the applicant to certify compliance with the aforementioned preempted provisions; and (2) the Existing ROW Agreement remains in effect through 2066.

99. The foregoing requirements do not apply to any other telecommunications utilities.

100. Accordingly, the SWF Ordinance is not competitively neutral.

Fees Required Under the SWF Ordinance

101. The SWF Ordinance requires that a SWF applicant submit the following SWF siting permit application fees:

a. For . . . installation[s] [on existing structures within the ROW], $500.00 for up to five (5) [SWFs] with an additional $100.00 for each [SWF] beyond five (5)[;]

b. For . . . installation[s] [on a new structure within the ROW], $1,00.00 for up to five (5) [SWFs] with an additional $100.00 for each [SWF] beyond five (5)[.]

102. The SWF Ordinance requires that a SWF applicant also pay initial escrow fees as follows:

a. For applications . . . not requir[ing] a road opening permit or roadway occupancy: $5,000.00[;]

b. For applications . . . requir[ing] a road opening permit or roadway occupancy: $7,500.00.

103. The SWF Ordinance requires that "[i]f at any time during the application review process 75% of the money originally posted shall have been expended, the Applicant shall fully replenish the escrow deposit to 100% of the amount originally deposited by the Applicant[.]"

104. The SWF Ordinance does not cap the amount of escrow fees that may be required of the Applicant.

105. The SWF Ordinance provides that escrow funds are required to pay for the costs of professional services, including . . . legal . . . consulting services . . . and the preparation of any . . . necessary legal agreement regarding [ROW] use.

106. The SWF Ordinance further provides that escrow funds are:

> required to reimburse the County for all fees, costs and expenses . . . incurred and paid by the County for the review process of a [SWF] siting permit application, such as, but not limited to:
>
> . . . .

> 5. Review or preparation of [ROW] use agreements, easements, deeds, [ROW[municipal consent ordinances or resolutions and any and all other like or similar documents; and
>
> 6. Preparation for and attendance at all meetings by third-party professionals or consultants serving the County, such as the County Attorney, County Engineer and County Planner or other experts as required.

107. The foregoing fee requirements do not apply to any other telecommunications utilities.

108. Accordingly, the SWF Ordinance is not competitively neutral.

COUNT I
(Defendants' Denial Was Not Supported by Substantial Evidence in Violation of 47 U.S.C. §332(c)(7)(B)(iii))

109. Verizon repeats and re-alleges each and every paragraph stated above and incorporates those paragraphs by reference, as though fully stated here.

110. Pursuant to 47 U.S.C. § 332(c)(7)(B)(iii), "[a]ny decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record."

111. Here, the Engineer Letter denied the SWF Application on the ground that the proposed plans did not comply with nine (9) alleged requirements for a road opening permit application. However, the County Engineer's denial of the SWF Application based upon such grounds was not supported by substantial evidence because it was premature for the County Engineer to apply such requirements for two (2) reasons.

112. First, no such application was filed, and as will be discussed below, at that time, no such application **could** be filed without CAFRA approval.

113. Second, the ROW Agreement does not set forth such requirements as a condition precedent to the addition of new SWFs to the ROW Agreement by the County Engineer.

114. Moreover, the Engineer Letter is not supported by substantial evidence in the written record because the County Engineer failed to cite any ordinances, regulations, or other County rules that set forth such requirements or otherwise provide any basis to support any of its findings.

115. In other words, the Engineer Letter is premised solely upon conclusory statements unsupported by reasoning or evidence.

116. Furthermore, the Engineer Letter misapplies certain standards that govern the review of these types of facilities and is otherwise erroneous, conclusory and fails to cite to relevant standards that govern its review and to adequately explain the basis for its denial.

117. For example, the Engineer Letter erroneously requires that "any pole mounted equipment/cabinets shall not extend into or overhang pedestrian areas" where the plans for the SWFs show that the poles are a "stealth design" in which all equipment is located internally within the pole.

118. Similarly, the Engineer Letter erroneously requires that "poles shall be of a breakaway design and meet [Federal Highway Administration Standards] standards" where such standards have no applicability to the subject right-of-way and the weight of the proposed poles make the use of the breakaway pole design inappropriate and dangerous to pedestrians.

119. In sum, Defendants' denial is not supported by substantial evidence because, *inter alia,* it is erroneous, misapplies certain standards, fails to logically connect its denial to applicable standards, and is premised solely upon unsupported conclusory statements.

120. Defendants' actions are in violation of and preempted by § 332(c)(7)(B)(iii) of the Act and should be set aside and enjoined by the Court. Further, this Court should exercise its power to issue an order directing Defendants to approve Verizon's SWF Application.

COUNT II

(Defendants Actions Including Defendants' Denial Prohibited and Effectively Prohibited the Provision of Personal Wireless Services and Telecommunications Services in Violation of 47 U.S.C. §§ 332(c)(7)(B) & 253(a), and the Third Report and Order)

121. Verizon repeats and re-alleges each and every paragraph stated above and incorporates those paragraphs by reference, as though fully stated here.

122. 47 U.S.C. § 332(c)(7)(B)(i)(II) provides that "[t]he regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof . . . *shall not prohibit or have the effect of prohibiting* the provision of personal wireless services." (Emphasis added).

123. Likewise, 47 U.S.C. § 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may *prohibit or have the effect of prohibiting* the ability of any entity to provide any interstate or intrastate telecommunications service."

124. Section 253 also prohibits State or local authorities from erecting barriers that may prohibit or may have the effect of prohibiting the ability of any entity to provide telecommunications services, including taking action or inaction that results in an unreasonable delay in the deployment of the provider's facilities and provision of telecommunications services.[33]

125. Section 253(c) of the Act limits the power of State and local government authorities to "manage the public rights-of-way" on a "competitively neutral and nondiscriminatory basis."

126. Federal district courts review "effective prohibition" claims under the Act on a *de novo* basis, and such review is not limited to the record below.

[33] 47 U.S.C. § 253(a).

127. The FCC has confirmed that a state or local legal requirement constitutes an effective prohibition under Sections 253(a) and/or 332(c)(7)(B)(i)(II) of the Act if it "materially limits or inhibits" a provider's ability to engage in any of a variety of activities related to its provision of a covered service.[34] The FCC explained that "[t]his test is met not only when filling a coverage gap, but also when densifying a wireless network, introducing new services or otherwise improving service capabilities."[35]

128. Adopting the FCC's materially inhibit standard, this Circuit further explained that "not only does insufficiency in coverage ordinarily entitle a provider to [zoning approvals] but so does insufficiency in network capacity, 5G services, or new technology." *Cellco P'ship v. White Deer Twp. Zoning Hearing Bd.*, 74 F.4th 96, 106 (3d Cir. 2023).

129. Verizon requires that the subject SWFs be installed in order to provide much needed network capacity in the Borough.

130. The Subject SWFs are the least intrusive means to remedy Verizon's need.

131. In the subject case, the facts clearly demonstrate that Defendants' have erected barriers which have the effect of prohibiting Verizon's ability to provide personal wireless services and telecommunications services. Specifically, Defendants' action with respect to denying the SWF Application prevented Verizon from deploying its SWFs and materially inhibited Verizon from providing wireless services.

132. As an initial matter, if the Defendants truly believed that the ROW Agreement did not apply to the nine (9) SWFs proposed by Verizon, or that Verizon should have filed a road

[34] Third Report and Order, ¶ 40 n. 95.

[35] *Id.* at ¶ 37 (internal citations omitted).

opening permit for same, Defendants should have notified Verizon that its ROW Application was incomplete within ten (10) days of filing as required by federal law.[36]

133. Defendants did not so notify Verizon.

134. Defendants' initial denial of the existence of the ROW Agreement and subsequent strained interpretation of the same set forth in the Attorney Letter, smacks of obstruction and ignores the fact that a new pole had been approved by the County at the time it executed the ROW Agreement, and that several additional SWFs that required the installation of new poles have been subsequently approved by the County pursuant to the terms of the ROW Agreement.

135. Ultimately, Defendants grasped onto the argument that rather than file under the ROW Agreement, Verizon should have filed for a road opening permit, but under its own County Regulations, no road opening permit could be accepted as complete or issued without first obtaining the necessary CAFRA permit.

136. The County's failure to endorse the CAFRA Application prevented Verizon from applying for the road opening permit under the County Regulations.

137. Consequently, Defendants' position that Verizon was required to, at least initially, file for a road opening permit, is incorrect and pretextual.

138. Defendants' recalcitrance to approve the SWF Application pursuant to the Existing ROW Agreement, and Defendants' argument that Verizon should obtain a road opening permit (while withholding a necessary precondition to obtain same) is part of a larger effort to stop Verizon from deploying its facilities in the Borough.

139. To be clear, the Borough's consent for the Subject SWFs was obtained in the settlement agreement that resolved the prior litigation between Verizon and the Borough.

[36] Third Report and Order; p. 75, ¶143; *see also* 47 CFR § 1.6003(d)(1).

Defendant County Commissioner Director Thomas Arnone's attendance at a meeting of Belmar residents at which he stated that the County would support the residents' opposition to Verizon's proposed installation of SWFs in the Borough was inappropriate, at best. Furthermore, Councilwoman Donovan's remarks at the June 13, 2023, Borough council meeting that the County Commissioners "support us" in response to a request for an "update from Monmouth County on Verizon" further demonstrates Defendants' true purpose in obstructing Verizon.[37]

140. Unfortunately, in deploying SWFs in Belmar, Verizon has not once, but now twice, been forced to file litigation in the face of local refusal to process necessary applications in the normal course.

141. Here, like the *Deer Township* case, the totality of factors must be considered, and in weighing these factors, it is clear that Defendants have "materially inhibited" Verizon's ability to densify its network and "to provide existing services more robustly, or at a better level of quality, all to offer a more robust and competitive wireless services for the benefit of the public"[38] in and around the Borough because the County's "regulatory structure [as same exists in the subject case] gives an advantage" to incumbent telecommunications and broadband facilities located in the Borough and constricts Verizon's ability to compete in a "fair and balanced" regulatory environment.

142. As such, Defendants' denial, in addition to not being supported by "substantial evidence" in violation of § 332(c)(7)(B)(iii) of the Act, are in violation of and preempted by §§ 332(c)(7)(B) & 253(a) of the Act and the Third Report and Order and should be set aside and enjoined by the Court. Further, this Court should exercise its power to issue an order directing

[37] *See* Footnote 32. Verizon also notes that Director Arnone's attendance at the meeting was acknowledged in the Attorney Letter.

[38] Third Report and Order at ¶ 40 n. 95.

Defendants to approve Verizon's SWF Application and add the Subject SWFs to a supplemental exhibit to the Existing ROW Agreement.

COUNT III

(Defendants' Actions Including Defendants' Denial Was Improperly Based on Perceived Environmental Effects of Radio Frequency Emissions in Violation of 47 U.S.C. § 332(c)(7)(B)(iv))

143. Verizon repeats and re-alleges each and every paragraph stated above and incorporates those paragraphs by reference, as though fully stated here.

144. Pursuant to 47 U.S.C. §332(c)(7)(B)(iv), "[n]o State or local government or instrumentality thereof 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 Commission's regulations concerning such emissions."

145. In or about January 2021, Andrew Petersohn, P.E., of dBM Engineering performed a RF compliance evaluation of each of the Subject SWFs.

146. For each of the Subject SWFs, Mr. Petersohn prepared a separate Electromagnetic Exposure Certification dated January 11, 2021.

147. Based upon his evaluation, Mr. Petersohn concluded that the predicted levels for each of the Subject SWFs will be fully compliant with, and in fact will be far below, the FCC Radiofrequency Radiation Exposure Limits, and thus, "will not have a significant environmental impact as defined by the FCC General Population MPE Limit[.]"

148. Opposition to the Subject SWFs raised by the community was based on the unfounded concerns of RF exposure.[39]

149. Despite the fact that the Subject SWFs comply with the RF exposure limits, Defendants capitulated to the community's opposition and denied the SWF Application based upon the federally preempted issue of RF exposure.

150. Upon information and belief, Defendants failed to notify Verizon of any deficiencies in the SWF Application and CAFRA Application, denied the SWF Application, and failed to take action on the CAFRA Application as a means to delay the County's approval of the SWFs until such time that the County was able to adopt the SWF Ordinance, thereby further supporting the community's efforts to oppose the Subject SWFs based upon the federally preempted issue of RF exposure.

151. The Defendants' actions, including their Denial, illegally regulate the placement, construction and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions in violation of 47 U.S.C. §332(c)(7)(B)(iv) of the Act. Accordingly, the Defendants' Denial must be set aside and enjoined on that basis. Further, this Court should exercise its equitable power to issue an order directing Defendants to approve Verizon's SWF Application and add the Subject SWFs to a supplemental exhibit to the Existing ROW Agreement.

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[39] https://www.tapinto.net/towns/belmar-slash-lake-como/sections/community/articles/over-200-residents-protest-verizon-towers-at-taylor-pavilion (accessed August 28, 2023); Furthermore, on July 14, 2023 the County issued a press release regarding its goal to create a "master plan" limiting the "placement of 5G monopoles" in the County, which included a statement from Commission Director Thomas A. Arnone that "this is a strong statement of support for all of our towns, especially Belmar, where residents and their borough council, have raised concerns related to health and environmental impacts of 5G monopoles. . ." https://www.publicnow.com/view/A719627586271E34B743B18377902FA0A7F94FFF?1689342462 (accessed April 30, 2024).

COUNT IV

(The SWF Ordinance Is Facially in Violation of and Preempted by 47 U.S.C. § 253(a))

152. Verizon repeats and re-alleges each and every paragraph stated above and incorporates those paragraphs by reference, as though fully stated here.

153. 47 U.S.C. § 253(a) provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may *prohibit or have the effect of prohibiting* the ability of any entity to provide any interstate or intrastate telecommunications service."

154. Section 253 also prohibits State or local authorities from erecting barriers that may prohibit or may have the effect of prohibiting the ability of any entity to provide telecommunications services, including taking action or inaction that results in an unreasonable delay in the deployment of the provider's facilities and provision of telecommunications services.[40]

155. Section 253(c) of the Act limits the power of State and local government authorities to "manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers on a competitively neutral and nondiscriminatory basis[.]"

156. The SWF Ordinance contains several provisions that impose unfair, unreasonable, and unlawful requirements, and thus, are not within the limited authority reserved to the County under Section 253(c).

Preempted Siting Requirements

[40] 47 U.S.C. § 253(a).

157. The SWF Ordinance mandates that "[n]o siting of a [SWF] shall be permitted within five hundred (500) feet of another [SWF;]" however, such a restrictive siting requirement violates the Act.[41]

158. Further, "local jurisdictions do not have the authority . . . to dictate the design of a provider's network." Third Report and Order at ¶ 36 n. 84 (citing *Bastian v. AT&T Wireless Services*, 205 F.3d 983, 89 (7th Cir. 2000).

159. The SWF Ordinance provision that the "County may require small wireless facilities be located at locations set forth within a County Wireless Siting Plan" is in violation of Section 253 (a) because such a County Wireless Siting Plan would effectively be dictating Verizon's network.

160. Furthermore, the County's Wireless Siting Plan is not uniformly applied in all instances and only "may" apply at the County's whim (i.e., is not applied on a competitively neutral and nondiscriminatory basis), and thus, is arbitrary, capricious, and unreasonable.

161. Likewise, the SWF Ordinance requirement that Verizon certify that it would move a SWF "if the pole location is found to be in a high traffic and/or sensitive area as determined by the County" is likewise arbitrary, capricious and unreasonable and violates federal law.

162. Such a mandatory vague standard that lacks any clarity or direction is clearly unlawful.

163. Moreover, such a vague requirement that permits the County to deny an application based on any "public interest factors . . . that are deemed pertinent by the [County]" violates the

[41] *Third Report and Order at* ¶ 91 ("municipal requirements ... mandating that facilities be sited ... some ... minimum distance, away from other facilities ... may violate 253(a)"); *Crown Castle Fiber LLC v. City of Pasadena*, 618 F. Supp. 3d 567, 587 (S.D. Tex. 2022), *aff'd* 76 F.4th 425 (5th Cir. 2023) (holding a 300-foot minimum "spacing requirement effectively prohibits [the] provi[sion of] telecommunications services" and "[t]hus . . . is preempted by [§] 253(a)").

Act because same "clearly has the effect of prohibiting . . . telecommunications services." *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67, 76-77 (2nd Cir. 2002).

164. The SWF Ordinance also unlawfully mandates County access to "any new concealment pole."

165. Such a requirement is an unlawful *quid pro quo* requirement. *Third Report and Order* at ¶ 82 (another type of restriction that imposes substantial burdens on providers, but does not meaningfully advance any recognized public-interest objective, is an explicit or implicit *quid pro quo* in which a municipality makes clear that it will approve a proposed deployment only on condition that the provider supply an "in-kind" service or benefit to the municipality").

166. Furthermore, the SWF Ordinance provides that the County "shall reimburse the applicant" only for the "costs of providing electricity to the components used by the County[.]" The County would thus not reimburse Verizon for the upfront cost of the infrastructure deployment itself.

167. In addition to any equipment that the County chooses to have installed in the Concealment Poles, the SWF Ordinance requires that the Concealment Poles also be "designed to accommodate to the reasonable and customary equipment necessary for [co-location of] at least three carriers[.]"

168. The proposed Concealment Poles are capable of housing three (3) carriers; however, they only have space to provide two (2) carriers with a full antenna array each and the third carrier with a partial array of antennas, not including any space that will be required for the County's equipment. Accordingly, the collocation requirement of the SWF Ordinance is technically not feasible.

169. While another type of Concealment Pole is capable of providing a full array of antennas for three (3) carriers, the cost of such Concealment Poles is nearly twice as expensive as the proposed Concealment Poles. Such an unreasonable increase in cost would "materially inhibit" service in violation of the TCA.

170. The SWF Ordinance also requires that "the pole shall be of breakaway design in conformance with FHWA design and testing requirements." However, due to the weight of the proposed poles, there is no approved FHWA breakaway design that is appropriate for the installation of the Subject SWFs.

171. The SWF Ordinance also requires that "all 5G and related equipment, including but not limited to, electrical and telecom service disconnects, breaker panels and patch panels shall be housed internally within the concealment pole." However, Jersey Central Power & Light does not permit electric meters to be housed internally. Accordingly, compliance with this SWF Ordinance requirement is not feasible.

Preempted Fee Requirements

172. Further, the fee provisions set forth in the SWF Ordinance effectively prohibit the provisions wireless services.

173. A local fee has the effect of prohibiting service in violation of Sections 253(a) and 332(c)(7)(B)(i)(II) if it materially inhibits the ability to compete in a fair and balanced legal and regulatory environment. *Third Report and Order*, at ¶¶ 37, 43–80.

174. Fees imposed by state or local government for the deployment of SWFs, including ROW access fees, application fees, and review fees, "violate Sections 253 or 332(c)(7) unless [all of] these conditions are met: (1) the fees are a reasonable approximation of the state or local government's costs, (2) only objectively reasonable costs are factored into those fees, and (3) the

fees are no higher than the fees charged to similarly-situated competitors in similar situations." Third Report and Order, at ¶ 50. In addition, "fees imposed by localities, above and beyond the recovery of localities' reasonable costs, materially and improperly inhibit deployment that could have occurred elsewhere." *Id.* ¶ 60.

175. To assist local governments when creating fee structures for small wireless facilities, such as the SWFs, the FCC set the following fees as the presumptive limit for which local fees would not effectively prohibit the provision of wireless services under § 253 and 332(c)(7):

a) $500 for non-recurring fees, including a single up-front application that includes up to five [SWFs], with an additional $100 for each [SWF] beyond five, or $1,000 for non-recurring fees for a new pole (i.e., not a collocation) intended to support one or more [SWFs]; and

b) (b) $270 per [SWF] per year for all recurring fees, including any possible ROW access fee or fee for attachment to municipally-owned structures in the ROW.

Id., ¶ 79.

176. The SWF Ordinance requires not only the payment of such amounts for the application fees itself but also an initial $7,500.00 escrow deposit for the Subject SWFs. Accordingly, the fees set forth in the SWF Ordinance far exceed the FCC's presumptively reasonable fee limits, and thus, materially inhibit the provision of wireless services.

Unlawful *De Facto* Moratorium

177. The SWF Ordinance also violates Section 253(a) because it creates an unlawful *de facto* moratorium as defined by the FCC in the Moratorium Oder.[42]

178. Specifically, the SWF Ordinance requires that the Applicant, as part of its [SWF] siting permit application, "shall procure any and all necessary State and/or local permits required for placement of poles in the County[.]

179. The SWF Ordinance further requires that:

> [t]he siting permit authorizing placement of a Small Wireless Facility in a public right-of-way shall not be issued by the County Supervising Road Inspector to any applicant unless:
> . . .
> (2) All other governmental permits or other governmental approvals that are required for the deployment(s) proposed by the Applicant's siting permit application under this Ordinance and by any other applicable, federal, state, County or municipal law have been issued by the appropriate issuing authority therefore to the Applicant and the Applicant has supplied copies of such other permits or approvals to the County Supervising Road Inspector for inclusion with the Applicant's application documents.

180. However, the Uniform Construction Code ("UCC") requires that all "prior approvals" be obtained before a construction permit can be issued. N.J.A.C. 5:23-2.16 (j)(2).

181. Consequently, the SWF Ordinance purports to require a UCC permit as a condition precedent to issuance of a ROW siting permit, but the UCC would require a ROW siting permit under the SWF Ordinance prior to the issuance of a construction permit.

182. Similarly, according to the County's own regulations, a road opening permit cannot be issued until:

> . . . . a copy of all State, County and municipal permits or approvals required for the proposed work, including a copy of Monmouth County Planning Board action, as applicable, along with a sworn statement that all appropriate approvals from

[42] Moratorium Order at ¶ 149 (a *de facto* moratorium is defined as "state or local actions that are not express moratoria, but that effectively halt or suspend the acceptance, processing, approval of applications or permits for telecommunications services or facilities in a manner akin to an express moratorium).

local, State and Federal jurisdictions have been obtained. *The County of Monmouth Regulations to Protect County Roadways and Related Facilities and Excavations*, Page 3, Section 4.

183. Such a "catch-22" creates a *de facto* moratorium on the processing of SWF applications because the UCC and County regulations require the issuance of a ROW siting permit before construction permits and road opening permits can be issued, and the SWF Ordinance requires the opposite.

184. The requirements set forth in the SWF Ordinance do not apply to any other telecommunications utilities, and thus, the SWF Ordinance is not competitively neutral.

185. For the foregoing reasons, the SWF Ordinance effectively prohibits the provision of service, and is thus, in violation of and preempted by Section 253(a) of the TCA, and must be set aside and enjoined on that basis.

COUNT V
(Breach of Contract)

186. Verizon repeats and re-alleges each and every paragraph stated above and incorporates those paragraphs by reference, as though fully stated here.

187. Defendants' refusal to approve the SWF Application and acts and omissions described above constitute a breach of the Existing ROW Agreement.

188. Section 1 of the Existing ROW Agreement provides that the "County will allow and cooperate with Verizon Wireless with respect to the occupancy of the County right(s)-of-way by Verizon Wireless' 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."** [emphasis added].

189. The Existing ROW Agreement does not prohibit the installation of new poles and specifically applies to "any additional installations" proposed by Verizon for use of the County's rights-of-way.

190. Every "contract in New Jersey contains an implied covenant of good faith and fair dealing." *Sons of Thunder, Inc. v. Borden, Inc.*, 148 N.J. 396, 420 (1997).

191. Defendants' denial of the existence of the ROW Agreement and subsequent determination that it does not apply to SWFs that require the installation of new poles is contrary to the terms of the ROW Agreement and the course of dealing between the parties and is a violation of the implied covenant of good faith and fair dealing.

192. Indeed, of the seven (7) sites initially set forth in Exhibit A of the Existing ROW Agreement, one site included the installation of a new pole located nearest to 520 Navesink River Road in Middletown New Jersey, and several additional SWFs that required the installation of new poles have been approve by the County.

193. On May 10, 2023, Verizon submitted the SWF Application with the expectation that same would be approved pursuant to the Existing ROW Agreement, as similar applications have been approved previously.

194. However, the SWF Application was wrongfully denied by Defendants on August 8, 2023.

195. Defendants breached the Existing ROW Agreement by denying the ROW Application.

196. As a result of the Defendants' breach, Verizon will be prevented from constructing the nine (9) proposed SWFs.

197. Verizon respectfully requests that this Honorable Court enter an order of specific performance directing Defendants to approve the nine SWFs included in the SWF Application.

COUNT VI
(Defendants' Actions are Arbitrary, Capricious and Unreasonable Under New Jersey State Law)

198. Verizon repeats and re-alleges each and every paragraph stated above and incorporates those paragraphs by reference, as though fully stated here.

199. Municipal action will "be overturned by a court if it same arbitrary, capricious or unreasonable." *Bryant v. City of Atlantic City*, 309 N.J. Super. 596, 610 (App. Div. 1998).

200. Here, Defendants' actions are clearly arbitrary, capricious or unreasonable and should be reversed.

201. The Engineer Letter fails to cite to relevant standards that should govern its review and misapplies certain standards.

202. Rather, the Engineer Letter is erroneous, conclusory and fails to adequately explain the basis for its denial.

203. For example, the Engineer Letter erroneously requires that "any pole mounted equipment/cabinets shall not extend into or overhang pedestrian areas" where the plans for the SWFs show that the poles are a "stealth design" in which all equipment is located internally within the pole.

204. Similarly, the Engineer Letter erroneously requires that "poles shall be of a breakaway design and meet [Federal Highway Administration Standards] standards" where such standards have no applicability to the subject right-of-way and the weight of the proposed poles make the use of the breakaway pole design inappropriate and dangerous to pedestrians.

205. The Attorney Letter is also arbitrary, capricious and unreasonable because it maintains that Verizon should have filed for road opening permits as an initial filing, without CAFRA approval, where the County Regulations clearly state that such an application would not be accepted as complete and could not be granted.

206. Because all of the reasons cited by Defendants for their denial of Verizon's ROW Application are erroneous, arbitrary, capricious and unreasonable, Verizon respectfully requests that this Honorable Court enter an order directing Defendants to approve the nine SWFs included in the SWF Application and add the Subject SWFs to a supplemental exhibit to the Existing ROW Agreement.

COUNT VII
(For Declaratory Relief and Permanent Injunction)

207. Verizon repeats and re-alleges each and every paragraph stated above and incorporates those paragraphs by reference, as though fully stated here.

208. A present and actual controversy has arisen and now exists between the parties regarding their respective legal rights and duties. Verizon contends that the Defendants' actions and omissions are in violation of the Act, the Third Report and Order, the Moratorium Order and the Existing ROW Agreement.

209. Upon information and belief, the Defendants deny such allegations.

210. Verizon and the public have been and will continue to be adversely affected by the Defendants' actions and omissions.

211. Accordingly, declaratory relief is appropriate and necessary to adjudicate the extent of Verizon rights and the Defendants' obligations and authority.

212. As a result of Defendants' actions and omissions, Verizon has been, and will continue to be, damaged and irreparably harmed absent the relief requested herein.

213. The harm caused by the Defendants' actions and omissions includes, but is not limited to, an effective prohibition on Verizon's ability to provide personal wireless services within the Borough, impairing Verizon's (a) ability to provide the public with reliable wireless telecommunications service; (b) ability to compete with other providers of telecommunications services; (c) full use of its existing FCC authorizations, and or licenses and business investments; and (d) good will and business reputation.

214. Verizon has a likelihood of success on the merits because it is entitled to access public rights-of-way under Federal law and there is no reasonable justification for Defendants' actions and omissions.

215. The harm that Verizon has suffered and continues to suffer from the Defendants' actions and omissions is not reasonably susceptible to accurate calculations and cannot be fully and adequately addressed through an award of damages.

216. Given that the matter in dispute is Defendants' denial of the SWF Application and adoption of the SWF Ordinance that is facially in violation of the TCA, Verizon cannot be made completely whole by damages and has no other adequate remedy at law other than the Court ordering that the SWF Applications be deemed granted and enjoining the County from enforcing the SWF Ordinance.

217. A balancing of the equities tips in Verizon's favor in that it has proceeded throughout the application process in good faith and has submitted all requested forms and documents, while Defendants failed to timely request any missing information from Verizon within the requisite ten (10) day period from submission.

218. Defendants have failed to act as required by federal law and have actively violate same.

219. In contrast to the immediate and irreparable injury being suffered by Verizon, its customers, and the public interest, the Defendants will suffer no significant injury if the Court issues the requested injunction.

220. As such, Verizon is entitled to a judgment and order of permanent injunction compelling Defendants to approve the SWF Application and add the Subject SWFs to a supplemental exhibit to the Existing ROW Agreement, and enjoining the County's enforcement of the SWF Ordinance.

PRAYER FOR RELIEF

WHEREFORE, Verizon respectfully requests that, pursuant to 47 U.S.C. § 322(c)(7)(B)(v), the Court hear and decide this action on an expedited basis, and issue an Order and Judgment in its favor as follows:

a) Declaring that Defendants' actions were not supported by substantial evidence in violation of § 332(c)(7)(B)(iii) of the Act;

b) Declaring that Defendants' actions constitute a material inhibition of service in Violation of 47 U.S.C. §§ 332(c)(7)(B) & 253(a) and the Third Report and Order;

c) Declaring that Defendants' actions, including their Denial, illegally regulate the placement, construction and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions in violation of 47 U.S.C. §332(c)(7)(B)(iv);

d) Declaring that the SWF Ordinance materially prohibits the provision of telecommunications services in violation of 47 U.S.C. § 253(a) and the FCC's Moratorium Order;

e) Declaring that Defendants' denial of the SWF Application was a breach of the

ROW Agreement and, consequently, a breach of contract that Defendants should be directed to perform by approving the SWF Application;

f) Granting the SWF Application;

g) Enjoining the County's enforcement of the SWF Ordinance;

h) Awarding Verizon's reasonable attorneys' fees, costs, disbursements, and other expenses of this action as permitted by law; and

i) Granting such other and further relief as the Court deems just and proper.

Dated: Tarrytown, New York
May 17, 2024

Respectfully submitted,

/s/Robert D. Gaudioso

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L. CIV. R. 11.2 CERTIFICATION

Pursuant to Local Civil Rule 11.2, and 28 U.S.C. § 1746, the undersigned members of the bar of this Court hereby declare that the matter in controversy is not presently the subject of any other action pending in any other Court, or of any pending arbitration or administrative proceeding.

Dated: Tarrytown, New York
May 17, 2024

Respectfully submitted,

/s/Robert D. Gaudioso

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