

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS (Boston)**

EXTENET SYSTEMS, INC.

Plaintiff,

v.

THE CITY OF CAMBRIDGE;
MASSACHUSETTS, CITY OF CAMBRIDGE
POLE AND CONDUIT COMMISSION, and
NICOLE MURATI FERRER, STEPHEN
LENKAUSKAS, and TERRENCE JAMES
SHEA, each in their official capacity as
members of the City of Cambridge Pole and
Conduit Commission,

Defendants.

Civil Action No. 1:19-cv-11836-ADB

**MOTION TO DISMISS AND TO TAKE
NOTICE OF MATERIALS CITED IN
COMPLAINT, AND REQUEST FOR
ORAL ARGUMENT**

DATE:

TIME:

Pursuant to Rule 12(b)(6), Fed. R. Civ. Proc., Defendants The City of Cambridge; Massachusetts, City of Cambridge Pole and Conduit Commission, and Nicole Murati Ferrer, Stephen Lenkauskas, and Terrence James Shea, each in their official capacity as members of the City of Cambridge Pole and Conduit Commission, move to dismiss the Amended Complaint in the above-captioned matter for failure to state a claim upon which relief can be granted.

More particularly, Count I, concerning unreasonable delay, rests on a misreading of applicable FCC rules, and is foreclosed by the admission that final action on the Complaint was taken by a time agreed upon by the parties. Counts II and III raise claims of “prohibition” and “discrimination” under the Telecommunications Act of 1996, but Plaintiff fails to plead essential elements of those claims. Count IV, seeking preemption of a City policy, appears to be a facial challenge to the policy in its entirety, but Plaintiff here is bringing an *as applied* challenge, and cannot satisfy standards applicable to facial challenges. Count V seeks broad injunctive relief but

offers no legal theories distinct from those in other Counts, relies on factual assertions the Complaint contradicts, and asks for relief far beyond what is permissible. For those reasons, and reasons set forth in the Memorandum of Law filed herewith, the Complaint should be dismissed.

In considering this Motion, the Court can “augment” facts and inferences from the body of the complaint with “data points gleaned from documents incorporated by reference into the complaint, matters of public record, and facts susceptible to judicial notice.” *Haley v. City of Boston*, 657 F.3d 39, 46 (1st Cir. 2001). Defendants request that the court take notice of the following, verified by and included with the attached Affidavit, and all cited by Plaintiff in its Complaint.

1. Five applications filed by Plaintiff seeking approval to remove City street lights and replace them with new poles (cited at Complaint ¶¶38-40, 47, 87-91). These five applications are attached as Exhibits A through E.
2. The written decisions denying each of ExteNet’s five applications (cited at Complaint ¶¶19, 91-92, 109, 117). These five decisions are attached as Exhibits F through J.
3. The June 10, 2019 Policy Regarding Small Cell Wireless Installations on Public Ways (cited at Complaint ¶¶60-61, 79-83, 142-43). This Policy is attached as Exhibit K.
4. The 2000 Pole and Conduit Commission Siting Policy governing telecommunications deployments (cited at Complaint ¶¶84-85). This Policy is attached as Exhibit L.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 7.1(d), the City hereby requests the Court hear oral argument prior to ruling on this Motion to Dismiss.

Dated at Washington D.C. this 17th day of March, 2020.

Respectfully submitted,

THE CITY OF CAMBRIDGE; MASSACHUSETTS,
CITY OF CAMBRIDGE POLE AND CONDUIT
COMMISSION and NICOLE MURATI FERRER,
STEPHEN LENKAUSKAS, and TERRENCE JAMES
SHEA, each in their official capacity as members of the
City of Cambridge Pole and Conduit Commission.

By their Attorneys,

By: /s/ Paul S. Kawai

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Local Rule 7.1(A)(2) Certification

I hereby certify pursuant to Local Rule 7.1(A)(2) that counsel has conferred in good faith
in an attempt to narrow any issues related to this motion.

/s/ Paul S. Kawai
Paul S. Kawai, Esq

CERTIFICATE OF SERVICE

THE CITY OF CAMBRIDGE; MASSACHUSETTS, CITY OF CAMBRIDGE POLE AND CONDUIT COMMISSION and NICOLE MURATI FERRER, STEPHEN LENKAUSKAS, and TERRENCE JAMES SHEA, each in their official capacity as members of the City of Cambridge Pole and Conduit Commission submitted this Motion to Dismiss and the Take Notice of Materials Cited in Complaint, and Request for Oral Argument to the Court on the date below. The document will be electronically served on all Parties when the Court posts a copy to the case file, and all Parties to this matter have elected to receive electronic notifications.

DATED at Washington D.C. this 17th day of March, 2020.

By: /s/ Joseph Van Eaton
Joseph Van Eaton