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

DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

AMENDED COMPLAINT

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I. BACKGROUND

On April 3rd and 4th, 2019, Plaintiff ExteNet Systems, Inc. ("ExteNet") filed applications in which it proposed to remove street lights owned by the City of Cambridge, and replace them with new structures that would support a street light along with cabling, shrouding and certain other equipment that would be part of a wireless facility.[1] ExteNet was not itself proposing to provide any wireless services, and does not claim that it was planning to provide any telecommunications services using the facility. Rather, as the Amended Complaint admits, ExteNet is "under contract with [AT&T] to build the small cell wireless facilities" which were the subject of the application "for [AT&T]."[2] ExteNet did not do basic engineering required to ensure that the replacement structure and associated wireless facilities could be properly placed and powered at the proposed locations. As the Amended Complaint shows, there was a reason why ExteNet did not provide this information: the project was piece-parted, and critical elements of the facility, including the power runs required to make the facility more than metal mounted on a pole, were to be installed by AT&T onto the new pole.[3] When asked whether the installation of the facility required excavation, ExteNet answered "yes" but when asked whether the design could use a joint trench, the company answered "I don't know," and it indicated it had not sent a required "common trench" letter to coordinate any trenching that might be required.[4]

At the time of the application, placement of communications facilities in the rights of

[1] ExteNet submitted five applications, Amended Complaint ¶38, attached to the Motion as Exhibits A through E to the Affidavit of Elizabeth Lint. Because ExteNet's answers to each application question are identical except with respect to locations of the sites, we will refer to Exh. A, App. No. 43999. Defendants have moved the Court to take notice of twelve exhibits. References to exhibits herein are to the exhibits to the Affidavit. Count I may be dismissed solely on the basis of the Amended Complaint.
[2] Amended Complaint, ¶41.
[3] *Id.*, ¶44-45.
[4] Exh. A, 2.

way was governed by a Pole and Conduit Siting Policy ("Siting Policy") adopted in 2000.[5] Consistent with the City Code,[6] the Siting Policy required those constructing communications networks, and well as those rebuilding or reconstructing existing networks, to obtain a Grant of Location from the City's Pole and Conduit Commission.[7] By its terms, the Siting Policy reached wireline and wireless networks, reaching "all public and private poles, towers, transmitters, receivers, relay devices, conduits, pipelines, cables, wires, ducts" and other structures and equipment used for transmitting or receiving "video, voice or data intelligence" whether by wire or "electromagnetic radiation."[8] Under Sections 3 and 7 of the Siting Policy the City's Pole and Conduit Commission required an applicant working with other companies on a project to build network facilities, including wireless network facilities, to file an application "concerning all aspects of the Network project."[9] The requirement is part of a Siting Policy that ensures that the City's Pole and Conduit Commission is in a position to minimize construction impacts on the roadways and the public by coordinating construction and encouraging joint trenching,[10] so that the number of trenches, and the number of times roads are blocked and excavated are minimized.

The applications originally came before the Pole and Conduit Commission on May 16, 2019, less than 45 days after submission.[11] At that meeting, the Pole and Conduit Commission also considered, but did not adopt, a policy regarding small cell wireless installations on public

[5] A copy of this policy is attached to the Motion as Exhibit L.
[6] Cambridge Municipal Code Section 15.16.100 requires Pole and Conduit Commission approval.
[7] Exh. L Sec. 1.
[8] *Id.* Sec. 2.0-2.1.
[9] *Id.* Sec. 7.3.
[10] *Id.* Under that policy, any communications utility engaged in network construction or reconstruction was required to provide notice of trenching.
[11] Amended Complaint ¶¶59, 62; Pole and Conduit Commission Statement of Reasons for Denial of Petition Number 43999 (July 30, 2019) (Exh. F). The SORs are Exhibits F through J. Because the statement of reasons is identical for each application, we refer to the denial for App. No. 43999.

ways, which was intended to supplement, but not replace the P&C Policy. ExteNet chose to enter into an agreement to toll the time for the Pole and Conduit Commission to act on its applications through and including July 30, 2019, which provided the Pole and Conduit Commission the opportunity to adopt and apply the small cell policy, and also provided ExteNet and opportunity to comment on the policy (which it did).[12]

The Policy Regarding Small Cell Wireless Installations on Public Ways[13] was adopted on June 10 ("Small Cell Policy").[14] Among other things, the Small Cell Policy provided more detail as to compliance with Section 7 of the P&C Policy, where two or more entities would be involved in use of the "same location or structure," as in this matter.[15] On July 30, after providing ExteNet additional time to provide information, the Pole and Conduit Commission issued its decision on the application.[16] It found (and the facts are not challenged in the Amended Complaint) that ExteNet had refused to specify how power would be supplied to the attachment. The decision notes that "ExteNet stated that AT&T would be responsible for finding a way to supply power," and "it was up to AT&T to decide whether it would want to utilize the proposed attachment and equipment."[17] The Pole and Conduit Commission then noted that the failure to disclose all information regarding a proposed facility was required by its long-standing policies, including the new Small Cell Policy:

> Common sense dictates that the Commission cannot consider an attachment or installation piecemeal and without a showing of actual intent to utilize the installation or complete the installation per the Siting Policy. The Commission's existing Siting Policy does not allow Extenet to apply for a grant of location solely for the purpose of reserving a location for future use in the event that a

[12] Amended Complaint ¶¶63, 65; Exh. F, 1.
[13] A copy of the Small Cell Policy is attached to the Motion as Exhibit K.
[14] Amended Complaint, ¶73; Exh. F, 1.
[15] Exh. K, Sec. I.G.
[16] Amended Complaint ¶91; Exh. F, 1.
[17] Exh. F, 2.

> carrier or other client of Extenet eventually wishes to utilize the location. Such a reservation would result in the unnecessary cluttering of the City of Cambridge's public ways with unused antennas and equipment without providing any service or purpose while a carrier decides whether it needs such location. In addition, allowing one carrier to reserve space in the public way would create unfair competition as to other carriers who may also wish to reserve such space, would discriminate as to other carriers, and be would be contrary to the intent of the Commission's Siting Policy and the Commission's Small Cell Policy. Further, if the attachment cannot be powered, the attachment should not be approved; conversely, if the power cannot reach the attachment, the conduit should not be installed and left without a connection.[18]

The Pole and Conduit Commission also noted that ExteNet had not complied with the Commission's policy of coordinating work with other utilities.[19] Lastly, the Commission noted that the applications were subject to the City's design standards.[20]

ExteNet filed this action, alleging violations of two provisions of law, 47 U.S.C. §253, and 47 U.S.C. §332(c)(7), and associated FCC regulations.

Sec. 253 provides that no 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," unless the requirement is related to managing the "public rights-of-way," is compensation for use of the rights of way, or is an otherwise appropriate exercise of the police power.[21] Section 332(c)(7) preserves local authority over siting of wireless facilities, and upholds that authority so long as a decision satisfies certain statutory criteria. 47 U.S.C. §332(c)(7)(B)(i) provides that the decision may not "unreasonably discriminate among providers of functionally equivalent services and may not prohibit or have the effect of prohibiting the provision of personal wireless services. Section 332(c)(7)(B)(ii) states that a locality must act on an application "within a reasonable period of time" taking into account the nature and scope

[18] *Id.*
[19] *Id.*, 3.
[20] *Id.*
[21] 47 U.S.C. §253(a)-(c)

of a request. Section 332(c)(7)(B)(iii)-(iv) require a decision in writing supported by substantial evidence; and forbid deciding a case based on the environmental effects of radio frequency emissions. Only subsections (B)(i) and (ii) are implicated by the Complaint.[22]

In 2018, the Federal Communications Commission adopted new regulations regarding the regulation of small wireless facilities.[23] The FCC implemented subsection (B)(ii) by adopting new, presumptive deadlines for action on applications for placement of small wireless facilities, and codifying existing presumptive deadlines.[24] A 60-day deadline was adopted for placement of small wireless facilities on an existing facility, but where (as here) the wireless facility would be placed on a new or replacement structure, the presumptive deadline for action was 90 days.[25] The parties can agree in writing on a different deadline for action on an application, as was done here.[26] Finally, localities may toll the deadline for action by submitting an incompleteness notice to an applicant, identifying "missing documents or information."[27]

The FCC also purported to interpret the term "effective prohibition" in both section 332 and Section 253 as it applies to "deployment of services covered by those provisions" – viz., telecommunications services and personal wireless services.[28] It ruled that an ordinance "effectively prohibits" entry if it "materially inhibits or limits the ability of any competitor or

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[22] There is a substantial question as to whether a claim can lie under Section 253, as Section 332(c)(7)(A) provides that no other provision of the Act "shall limit or affect the authority of a…local government…over decisions regarding the placement…of personal wireless service facilities." The court need not address that issue to grant this motion.

[23] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket No. 17-79, WC Docket No. 17-84, 33 FCC Rcd. 9088, ¶142 (2018) ("Small Cell Order").

[24] 47 C.F.R. §1.6003.

[25] 47 C.F.R. §1.6003(c)(1)(i)-(ii). ExteNet cites the wrong deadline in its Amended Complaint. The deadlines are presumptive only but the court need not determine whether there was a justifiable delay for purposes of this motion.

[26] 47 C.F.R. §1.6003(d); Amended Complaint ¶63.

[27] 47 C.F.R. §1.6003(d).

[28] *Small Cell Order,* n. 74.

potential competitor to compete in a fair and balanced legal and regulatory environment."[29] The FCC purported to overturn the decisions of this Circuit, and of several other Courts of Appeal, which required applicants to prove an effective prohibition by showing a significant gap in service, and by showing that the facility proposed was the least intrusive means of closing that gap.[30] Nonetheless, the FCC emphasized that the "material inhibition" standard was not meaningless, and does not preclude denial of applications.[31] It remains the case that "an individual denial is not automatically a forbidden prohibition" under 47 U.S.C. §332(c)(7)(B)(i)(II)[32], "The carrier has the burden to show an effective prohibition has occurred" and "[a] carrier cannot win an effective-prohibition claim merely because local authorities have rejected the carrier's preferred solution."[33] These elements of the Order went into effect on **January 14, 2019**.

The FCC also discussed regulations setting fees for small cells; aesthetic regulations; regulations governing distance between small cells; and undergrounding requirements. Setting aside fees, the FCC ruled that those regulations cannot be preempted if they are "are (1) reasonable, (2) no more burdensome than those applied to other types of infrastructure deployments, and (3) objective and published in advance.[34] These regulations did not go into effect until 180 days after Federal Register publication, or **April 15, 2019**, eleven days after

[29] *Id.*, ¶16.
[30] *Id.*, n. 94. Whether the FCC can replace court decisions requiring a showing of an actual prohibition or effective prohibition and replace those with a "material inhibition" standard is at issue in the appeal of the *Small Cell Order,* argued before the Ninth Circuit on February 10, 2020. *Sprint v. FCC,* 9th Cir. No. 19-70123. While City believes the First Circuit decisions should control unless and until the First Circuit rules otherwise, the motion can be granted regardless of the standard that applies.
[31] *Id.*
[32] *Town of Amherst, N.H. v. Omnipoint Commc'ns Enter., Inc.*, 173 F.3d 9, 14 (1st Cir. 1999)
[33] *Omnipoint Holdings, Inc. v. City of Cranston,* 586 F.3d 38, 48, 52 (1st Cir. 2009)
[34] *Small Cell Order,* ¶86.

ExteNet submitted its application.[35] The requirements thus were not intended to have retroactive application. The FCC did not address joint trenching requirements or coordination requirements in the Small Cell Order, or suggest that the three standards apply to them. But, in an earlier *Order*, it actually encouraged localities "to enact a street-cut requirement that allows for alternative means of deployment to still provide advance notice to enable providers to deploy in the right-of-way in the least disruptive manner possible."[36]

ARGUMENT

II. SUMMARY OF ARGUMENT

Under Fed. R. Civ. P. 12(b)(6), a claim may be dismissed if the complaint fails to set forth "factual allegations, either direct or inferential.[37] "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"[38] ExteNet therefore must allege factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. A "formulaic recitation of the elements of a cause of action will not do."[39]

A court faced with a Rule 12(b)(6) motion generally considers only those facts alleged in the complaint, but the court can "augment" the facts and inferences from the body of the

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[35] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* Third Report and Order and Declaratory Ruling, WC Docket No. 17-84, WT Docket No. 17-79, , 83 Fed. Reg. 51867, ¶ 32 (Because the 180th day fell on a weekend, the effective date of the aesthetic requirements was April 15, 2019, 1 C.F.R. §18.17(b). ExteNet's Amended Complaint miscalculated the date, Amended Complaint ¶77.

[36] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* Third Report and Order and Declaratory Ruling, WC Docket No. 17-84, WT Docket No. 17-79, 33 FCC Rcd. 7705, n.563 (2018).

[37] respecting each material element necessary to sustain recovery under some actionable legal theory." *Gagliardi v. Sullivan,* 513 F.3d 301, 305 (1st Cir. 2008) (quoting *Centro Medico del Turabo, Inc. v. Feliciano de Melecio,* 406 F.3d 1 (1st Dist. 2005).

[38] *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)).

[39] *Twombly,* 550 U.S. at 555-556.

complaint with "data points gleaned from documents incorporated by reference into the complaint, matters of public record, and facts susceptible to judicial notice."[40] In this case, the relevant documents (all cited in the Amended Complaint) are the applications filed by plaintiff ExteNet (Exhibits A through E); the decision of the City (Exhibits F through J); the Small Cell Policy adopted on June 10, 2019. (Exhibit K); and the Pole and Conduit Siting Policy in place at the time the applications were submitted (Exhibit L). Copies of these document, authenticated by affidavit, are attached to the Motion.

Count 1 (unreasonable delay in determining the completeness of applications) rests on the legally incorrect assumption that the City has a duty to provide a notice of incompleteness if an application is inadequate, but FCC rules make it clear that the notice is only required if a locality wishes to toll the time to act on an application. The City did not toll the time based on incompleteness (the time was tolled by agreement), so Count 1 may be dismissed.

The broader claims of "prohibition" and "discrimination" in Count 2 (unlawful prohibition on provision of personal wireless services under 47 U.S.C. §332(c)(7)) and Count 3 (prohibition of service and bar to entry under 47 U.S.C. §253) also fail. No fact is pled that would support a discrimination claim. The prohibition claims rest on the assertion that it is legally prohibitory to require an applicant to submit a complete plan for the construction associated with a proposed facility. There is no basis for that assertion. Count IV, while nominally seeking preemption under Section 253, appears to be a facial challenge to the City's Small Cell Policy, but ExteNet's challenge is *as applied*, and its facial challenge is properly dismissed. Finally, Count V, which seeks broad injunctive relief, asks this court to declare that ExteNet is entitled to install facilities, even though the Amended Complaint and applications

[40] *Haley v. City of Boston*, 657 F.3d 39, 46 (1st Cir. 2001) (citing *In re Colonial Mortg. Bankers Corp.*, 324 F.3d 12, 15 (1st Cir. 2003).

show (i) ExteNet has not yet done basic engineering on the project, a point it admits; (ii) ExteNet proposes to remove City property and replace it with another structure, and has no license or lease to do so, and proposes no compensation for the work; and (iii) the Amended Complaint does not allege that the company for which ExteNet is building the facility has pole and conduit approvals required for use of the rights of way, or for use of the City's street lights. In effect, ExteNet is arguing (a) it was unlawful to require it to submit an application with complete engineering for the project as a whole; and now (b) it should be allowed to proceed with its work, taking critical infrastructure out and replacing it with a structure of its choosing. Even if one assumed that ExteNet has a likelihood of succeeding on any count, its own Amended Complaint shows that no injunctive relief is needed, as it is not even alleged that AT&T will use the facility (it may or may not); or that ExteNet and AT&T are willing and able to enter into the licenses, or obtain the other permits required for the facility.

III. COUNT I FAILS BECAUSE THE AMENDED COMPLAINT SHOWS THE CITY ACTED IN A TIMELY WAY.

ExteNet's admission that it "agreed, in writing, to toll the 'shot clock'" until July 30, 2019,[41] renders any claim of unreasonable delay under 47 U.S.C. §332(c)(7)(b)(ii) unsustainable. ExteNet admits that "[o]n July 30, 2019, the Defendants issued written denials of ExteNet's Applications."[42] Because FCC regulations explicitly permit the parties to agree on deadlines for action, *supra*, there is no ground on which Count I may survive.

ExteNet attempts to manufacture a claim by arguing that the "tolling" provisions of the FCC rules, discussed above, *require* the City to notify an applicant if the City is dissatisfied with the application.[43] ExteNet alleges that because the City failed to notify ExteNet "within 10 days"

[41] Amended Complaint ¶63.
[42] Amended Complaint ¶91.
[43] *Id.* ¶97.

that the applications were "incomplete," Defendants were prohibited from issuing a denial on the basis of incompleteness.[44] The allegation fails for two reasons. First, a locality is under no obligation to inform an applicant of its failure to submit information unless the City wishes to toll the shot clocks. The FCC describes the tolling framework as preserving "localities' ability to pause review when they find an application to be incomplete."[45] Rather than codifying an obligation to toll, the rule refers to a tolling period "if any."[46] When a community does not toll the shot clock, that only means that the FCC shot clock continues to run – it does not result in the effective pre-approval of an application. Second, the denial is based on the substantive failure to support the application, not the failure to complete a form. ExteNet affirmatively claims that it was not required to provide the information whose absence lead to the applications' denial. As the decision explains, the application was denied, *inter alia*, because ExteNet chose not to provide the engineering information necessary to evaluate the proposed project, and it never went through the required coordination with other utilities for trenching it admitted was associated with the project.[47] ExteNet conflates the "incompleteness" arising from a failure to fill out a form with the substantive failure to support an application. As no grounds support Count One; it should be dismissed.

IV. EXTENET HAS FAILED TO PLEAD KEY FACTS NECESSARY TO THE MAINTENANCE OF COUNTS TWO THROUGH FOUR

A. As Proposed, the Facilities in Question Do Not Qualify As Personal Wireless Facilities Entitled to the Protections of Section 332(c)(7).

Local government actions are constrained by Section 253(a) only to the extent they "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or

[44] *Id.* ¶¶105-06.
[45] *Small Cell Order,* ¶42.
[46] *Id.*
[47] The decision uses the term "complete" three times, and the first two references explain that ExteNet was choosing not to provide information as to how it would complete construction.

intrastate *telecommunications service*"[48] while Section 332(c)(7) only prescribe regulations that "have the effect of prohibiting the provision of *personal wireless services*."[49] Both services are by definition common carrier services,[50] and do not include Internet Access services.[51] ExteNet does not claim that *it* will be prohibited from providing personal wireless services directly, but instead argues that one of its customers will be injured unless a personal wireless facility is constructed at the precise location requested.

However, what ExteNet plans to construct cannot be used as, and will not be a "personal wireless facility" unless it can be powered, as the SOR notes.[52] ExteNet concedes the facilities it wants to build will require both power and fiber connections to be constructed by a third party.[53] Effectively, ExteNet is arguing a facility must be treated as a "personal wireless service facility," even when there is no allegation that there is a plan to power it, that it can be powered, and that there is any way to use it as planned. What ExteNet asks, essentially, is that it be allowed to treat what is, on the face of the Amended Complaint, unusable equipment on a pole as a personal wireless facility. The protections of the law do not extend that far, and ExteNet has failed to plead sufficient facts to demonstrate that it wants to build could, even if constructed, actually serve as a personal wireless service facility on its own.

To be clear: while a denial of construction may ultimately have an impact on service, and a denial of an application to build could under some circumstances result in an effective prohibition of service, there at least have to be facts alleged to indicate that *but for these denials,*

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[48] 47 U.S.C. §253(a) (emphasis added).
[49] 47 U.S.C. §332(c)(7)(B)(i) (emphasis added).
[50] 47 U.S.C. §153(53); 47 U.S.C. §332(c)(7)(C)(i).
[51] See *Restoring Internet Freedom,* Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311, 312 (2017) (classifying broadband Internet access service as an information service, not a telecommunication service).
[52] Exh. F, 2.
[53] Amended Complaint ¶¶44-45, 49.

service would have been provided. Without power or communications connections, provision of service is impossible, and thus effective prohibition is impossible. We do not know whether AT&T will ultimately use the facility, or even can use the facility (since the basic electrical engineering has not been performed, and any such requests may, or may not, ultimately satisfy the City's requirements).[54] While the Amended Complaint identifies the application as concerning the possession and removal of five poles owned by the City, to be replaced by "the construction of five (5) personal wireless service facility nodes on replacement City-owned street light poles"[55] it does not allege that AT&T is obligated to actually use the new facilities to provide personal wireless services – only that the facilities will be constructed for that purpose. The SOR states that ExteNet itself suggests that the solution for the uncertainty is to require it to remove what it installed if nothing is completed within a year. As the SOR notes, neither the Siting Policy or the Small Cell Policy permit that sort of delay.[56] It is impossible to read FCC regulations as requiring localities to permit that sort of speculative construction.[57] On the face of this Amended Complaint, there is thus no basis for concluding there will be any impact on *any* service, much less a "material inhibition" in the provision of either protected services.

ExteNet's suggestion[58] that it may be forced to reveal what *may* be trade secrets if it

[54] This is, of course, why the City could reasonably require that all engineering be performed that is required to ensure a particular location is a viable location for placement of a facility, and the interest in ensuring that all prior engineering is performed is particularly acute where work will involve replacement of City street lights with different street lights.
[55] *Id.* ¶38.
[56] Exh. F, 2.
[57] The result in this case is illustrative of the problem. ExteNet proposes to secure a valuable position in the right-of-way with a design of its choosing. Not only does it prevent other competitors who may have more complete plans from using the facility, it requires the City to first bear the burden of removal and replacement of street lighting, and then, at the end of the year, go through the process of having what ExteNet placed removed, and restoring the street lighting again.
[58] Amended Complaint ¶¶123-24.

coordinates with others cannot save the Counts. First, ExteNet submitted an application showing what it proposes to install and where, and has alleged for whom the work is being performed.[59] ExteNet alleges the remaining work would involve public construction, subject to permitting, which would be performed by AT&T or at its behest.[60] The Amended Complaint does not allege that any ExteNet or any other person's trade secret *will be* or in fact *would have been* revealed had a joint application been filed. Given that Massachusetts state law (which ExteNet does not challenge) requires coordination of construction,[61] and provides ample protection if trade secrets would be revealed,[62] this mere alleged possibility cannot support an effective prohibition claim. The bare allegation that AT&T will be effectively prohibited from providing personal wireless services is insufficient. The allegation would have to show that requiring AT&T to do engineering that would be essential for facilities to operate "prohibits" AT&T from providing services, and that coordinating construction "prohibits" AT&T from providing services. The allegation of effective prohibition goes to whether the site is necessary – not whether the *grounds* that actually led to denial are prohibitory, *see also infra*, p. 20.

B. The Arguments That the Small Cell Policy Was Adopted Too Late Is Misplaced.

ExteNet repeatedly suggests that the decision of the City was defective because the City adopted a small cell policy *after* April 15, 2019.[63] But that argument provides no ground for challenging the decision.

Nothing in the FCC's Small Cell Order required localities to adopt special policies for small wireless facilities. As far as the Small Cell Order is concerned, a locality could continue to apply the same policies to small wireless facilities that were being applied to other

[59] Exh. A; Amended Complaint ¶41.
[60] *Id.* ¶¶44-45.
[61] M.G.L. Ch. 82 §40.
[62] M.G.L. Ch. 66 §10, Ch. 93 §§41-42G.
[63] Amended Complaint ¶141.

communications facilities in the rights-of-way. That is what the City did here. While the Amended Complaint argues the standards should not apply to small cells, they do apply by their terms, and were in place at the time the application was filed. The decision is fully justified based on the prior standards.

Setting aside that fatal flaw, ExteNet largely bases its legal attack on the City's action on this line of reasoning (a) the FCC issued a ruling that states that aesthetic standards are not prohibitory if they meet certain FCC requirements (including publication in advance); (b) the ExteNet applications are the beneficiary of the rule; and (c) it is unlawful to adopt any small cell policy after April 15, 2019. The problem for ExteNet is that the denial is primarily based on its failure to provide necessary construction and coordination plans, not on aesthetic standards. As discussed at p. 7, *supra*, the FCC actually encourages the sort of coordination requirements with which ExteNet failed to comply. The "aesthetic tests" applied only after April 15, not to applications filed before that date, and ExteNet's were filed before April 15. And if that were not enough, nothing in the Small Cell Order prevents localities from changing standards (otherwise, every community in the nation would be bound by standards that could not change as technology, and communities change). The aesthetic standards are simply intended to provide applicants with some prior notice of what is expected of them, so that they may submit applications that are likely to satisfy local standards.[64] In this case, even if one assumed the FCC's "aesthetics standards" did apply (a) the denials can be fully justified based on policies that were in effect prior to submission of ExteNet's applications and (b) ExteNet had ample notice of, and an opportunity to conform its application to the Small Cell Policy, and for an entity which had applications pending *prior* to the effective date of the FCC Order can hardly ask for more.

[64] Small Cell Order ¶88.

C. ExteNet Fails to State A Discrimination Claim.

Although not a separately numbered Count, ExteNet does claim that the City unlawfully discriminated among providers of "functionally equivalent services."[65] Aside from reciting the text of the law, no facts are pled to support that claim, and hence it cannot survive a motion to dismiss. To the extent that facts are alleged, ExteNet seems to be complaining that it is being treated like other providers of telecommunications service.[66]

V. EXTENET CANNOT MAINTAIN A FACIAL CHALLENGE

ExteNet's Fourth Count appears to be a facial challenge solely under Section 253.[67] Even assuming that section can apply to denial of an application for wireless facilities, *see,* n.13, *supra,* "[t]o prevail in a facial challenge to an ordinance that does not regulate constitutionally protected conduct, ExteNet must surmount a dauntingly high hurdle."[68] The "challenger must establish that no set of circumstances exists under which the Act would be valid."[69] At minimum, ExteNet must point to a requirement that, on its face, effectively prohibits it from providing telecommunications services.[70] ExteNet points to no such requirement.

The hurdle is particularly insurmountable here because ExteNet does not provide personal wireless services and because, as shown above, what ExteNet submitted *can* lawfully be denied under preexisting policies as well as the new Small Cell Policy.

For the Siting Policy to fall to a facial challenge, it would need to be impossible for a

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[65] Amended Complaint ¶¶123-24.
[66] *Id.* ¶85 ("The Defendants' application of the pre-existing "Pole and Conduit Siting Policy Relating to Grants of Location for Telecommunications Services Networks" should be inapplicable to the placement of personal wireless service facilities").
[67] *Id.* ¶145.
[68] *Donovan v. City of Haverhill*, 311 F.3d 74 (1st Cir. 2002) , citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982); *United States v. Salerno*, 481 U.S. 739, 745, (1987) ("[a] facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully").
[69] *Salerno*, 481 U.S. at 745.
[70] *Sprint Telephony PCS, L.P. v. Cnty. of San Diego*, 543 F.3d 571 (9th Cir. 2008).

provider to construct personal wireless services facilities, or to provide telecommunications or personal wireless services, while remaining compliant with the Siting Policy provisions. ExteNet pleads no facts to demonstrate such an impossibility, however. ExteNet merely lists nine elements of the Siting Policy which it asserts are "preempted as effectively prohibiting and discriminating against" companies seeking to deploy small cells in the public right of way.[71] But these alleged prohibitions are merely listed – ExteNet makes no effort to explain them, and fails in its "obligation to provide the grounds of his entitlement to relief [which] requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[72] ExteNet states, for example, that it is prohibitory to require documentation of compliance with FCC regulations.[73] Merely listing provisions ExteNet finds objectionable is not enough: ExteNet must provide some indication as to *why* those provisions allegedly prohibit or effectively prohibit the provision of covered services, *and* to sustain a facial challenge, must, for example, make some effort to show that no circumstances exist in which, for example, requiring proof of compliance with FCC RF standards would be permissible.[74]

Even had ExteNet made such an attempt, however, it would be undermined by ExteNet's own admissions that compliance is possible, but that ExteNet simply does not wish to do so. ExteNet alleges in Count Three that requiring it to "provide information not in its possession" and "coordinate with other entities that are not the subject of [ExteNet's] application" is a prohibitory requirement, for example.[75] But ExteNet elsewhere admits that it "is under contract

[71] Amended Complaint ¶143.
[72] *Twombly*, 550 U.S. at 555 (alteration, citations, and internal quotation marks omitted).
[73] Amended Complaint ¶143(h).
[74] The Act expressly permits localities to require compliance with FCC RF standards, and it is difficult to imagine why an entity is "effectively prohibited" from providing some proof that it actually complies with standards it must meet to protect public safety.
[75] Amended Complaint ¶¶133-34. Note that for AT&T to be prohibited from providing personal

with AT&T to build the small wireless facilities" in question, and that AT&T would be responsible for power[76] and fiber and data[77] to the sites. ExteNet *is* coordinating with other entities – its entire business depends on cooperation with "[w]ireless service providers – such as Verizon Wireless, AT&T, Sprint, and T-Mobile – [who] pay ExteNet to use its distributed network facilities."[78] And of course, even the allegations fail to allege that ExteNet is unable to do what the law requires:[79] file *jointly* with other entities that *are* the subject of, and the raison d'etre for the proposed facility.

ExteNet admits it was "under contract" with AT&T to build these sites,[80] and that AT&T would be building additional power and data connections to the site.[81] All ExteNet needed to do to comply, therefore, was to apply with its contractual partner. ExteNet pleads no facts as to any impossibility in doing so, or any cause imposed by the City as to why this was impossible – it simply chose not to do so, and chose not to provide required information.

Having failed to demonstrate or allege that it is impossible to comply with the City's policies under any circumstances, the facial challenge cannot survive. ExteNet's Count Four should therefore be dismissed, as ExteNet's own facts demonstrate a clear path to compliance.

VI. COUNT V SHOULD BE DISMISSED.

Though styled as an independent count, Count V advances arguments more properly made in a Motion for Temporary Restraining Order or Summary Judgment. It identifies no violation of law not already covered in Counts I-IV. In any case, Count V depends on factual

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wireless services, an allegation that ExteNet cannot coordinate is insufficient – it must be impossible for any company to coordinate.

[76] *Id.* ¶44.

[77] *Id.* ¶45.

[78] *Id.* ¶32.

[79] Exh. L, Sec. I.G.

[80] Amended Complaint ¶41.

[81] *Id.* ¶¶44-45.

assertions contradicted by the Amended Complaint, and seeks relief unsupported by the facts.

ExteNet alleges there is "no reasonable justification for Defendants' failure to act on ExteNet's Applications."[82] But Defendants have acted – as ExteNet concedes.[83] The law entitles ExteNet only to a decision "in writing and supported by substantial evidence contained in a written record" within the time allotted.[84] Defendants acted – no "failure to act" exists.

ExteNet also twice alleges its right to "install personal wireless service facilities on […] existing utility poles in the public rights-of-way" has been violated.[85] But the applications are to replace "City owned street light poles," not to use existing utility poles.[86] ExteNet, in short, claims injunctive relief is proper because of an alleged failure to act (which the Amended Complaint shows did not occur) with respect to facilities on existing utility poles (when it is proposing destruction and replacement of City street lights).

ExteNet asks this court to direct Defendants to authorize construction of facilities for which ExteNet has not completed basic engineering (which it acknowledges). That work involves removal and replacement of City property, which ExteNet does not indicate it has any right to occupy or remove. The Amended Complaint does not allege that ExteNet's customer has the approvals required to actually power or connect these facilities, or to occupy the rights-of-way, or to use a City street light. ExteNet argues, in effect, that federal law requires localities to permit removal of critical infrastructure and replacement with structures of ExteNet's choosing without submitting critical engineering information including details regarding provision of power and without executing agreements necessary to permit removal and

[82] *Id.* ¶152.
[83] *Id.* ¶¶63, 91.
[84] 47 U.S.C. §332(c)(7)(B)(iii).
[85] Amended Complaint ¶¶152-53.
[86] *Id.* ¶¶38-40.

replacement, or use of, City-owned facilities. It does not.

Even if ExteNet pled facts sufficient to sustain any of the Counts in the Amended Complaint, no injunctive relief appears necessary or appropriate. ExteNet does not allege that AT&T has immediate or concrete plans to use these facilities; or that ExteNet and AT&T are willing and able to enter into the licenses, or apply for and obtain the consents required to use these facilities. Count V should be dismissed.

CONCLUSION

Defendants respectfully request that this Court dismiss ExteNet's Amended Complaint.

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

Respectfully submitted,

CITY OF CAMBRIDGE; 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,

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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 MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS 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, as 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