UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EXTENET SYTEMS, INC., Plaintiff vs. CITY OF CAMBRIDGE, MASSACHUSETTS, CITY OF CAMBRIDGE POLE AND CONDUIT COMMISSION and NICOLE MURATI FERRER, STEPHEN LENKAUSKAS and TERRANCE 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

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

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Plaintiff, ExteNet Systems, Inc. (hereinafter, "ExteNet") hereby opposes the Motion to Dismiss the Amended Complaint filed by the City of Cambridge, Massachusetts ("Cambridge"), the City of Cambridge Pole and Conduit Commission ("Commission"), and Nicole Murati Ferrer, Stephen Lenkauskas, and, Terrance James Shea, each in their official capacity as members of the City of Cambridge Pole and Conduit Commission (collectively, the "Defendants", "City", or "Commission") the Defendants (hereinafter, the "Defendants", the "City" and/or the "Commission").

I. Factual Background (from Plaintiff's Amended Complaint)

ExteNet provides wholesale, facilities-based telecommunications services throughout the United States. ExteNet, through its predecessor in interest, ClearLinx Network Corporation, is registered with the Massachusetts Department of Telecommunications and Cable to provide intrastate telecommunications services in Massachusetts. ExteNet builds, owns and operates wholesale, neutral-host distributed networks, "small cell wireless facilities" that improve the coverage and capacity of existing and new wireless telecommunications networks. ExteNet's small cell wireless facilities typically consist of small antennas and radio equipment that are attached to utility poles or other structures, such as municipal light poles located in public rights-of-way.

On April 3rd and 4th, 2019, ExteNet submitted various applications to the Defendants for permits to construct five "small wireless facilities," as defined by the Federal Communications Commission ("FCC") at 47 C.F.R. § 1.6002(l), for the provision of personal wireless services on City-owned street light poles in the City's public rights-of-way. The permit applications sought to modify existing City streetlight poles by replacing them with new streetlight poles at the same

location that mimicked the look and feel of the existing streetlight poles.[1] Each of the applications identified specific pole locations on Massachusetts Ave. in Cambridge. The new poles were designed to accommodate existing attachments, as well as antennas and radio equipment required for the provision of personal wireless services.

ExteNet is under contract with its customer, AT&T ("Customer") a provider of personal wireless services. In conjunction with ExteNet, the Customer identified the specific locations where ExteNet was to seek to install its facilities in order to enable the Customer to provide enhanced coverage and capacity to its wireless customers in the areas along Massachusetts Ave. that are identified in ExteNet's permit applications. Under the terms of the Customer's contract with ExteNet, the Customer would make its own arrangement with the City to provide power and fiber to the ExteNet facilities.

At no time within ten days of receipt of ExteNet's submission of the applications did the Commission, which has been delegated authority to grant such Applications by the City, indicate that ExteNet's applications were incomplete or deficient in any way. The Commission notified ExteNet that a public hearing on its applications would be held before the Commission on May 16, 2019. The City also notified ExteNet that the Commission would hold a public hearing regarding its "Policy Regarding Small Wireless Facilities on Public Ways" on May 16, 2019. At the hearing on ExteNet's permit applications on May 16, 2019, the City told ExteNet that unless ExteNet agreed to enter a tolling agreement to allow the Defendants additional time to develop their "Policy Regarding Small Wireless Facilities on Public Ways," (hereinafter, the City's "Small Cell Policy") it would have to reject ExteNet's permit applications. In response to this

[1] All of the replacement would be provided at ExteNet's sole cost and expense, and ownership would be transferred to the City upon completion. This is considered collocation within the neutral host provider industry.

ultimatum, ExteNet entered into a written tolling agreement extending the "shot clock" deadline until July 30, 2019, in which tolling agreement ExteNet expressly preserved all rights and remedies available to it.

On June 10, 2019, the City adopted an interim Small Cell Policy, which included aesthetic standards for small wireless facilities on the City's public rights-of-way, more than two months after ExteNet submitted its permit applications. The FCC, in its September, 2018 Declaratory Ruling and Order,[2] (hereinafter, the "*Third Report and Order"*) set a deadline for municipalities to issue aesthetic standards for small cell wireless facilities, at one hundred eighty days following publication of the FCC's *Third Report and Order* in the Federal Register, which occurred on October 15, 2018. Accordingly, the deadline for municipalities to adopt aesthetic standards for small cell wireless facilities was on or about April 15, 2019[3]--a deadline not met by the Defendants.

On July 25, 2019, the Defendants held a hearing on ExteNet's permit applications and for the first time, objected to the applications because ExteNet had not specified how it intended to provide power and fiber to the small wireless facilities. The Commission found that, without this information, the applications were incomplete. On July 25, 2019, the Commission voted unanimously to deny ExteNet's permit applications. The Commission's written denials, issued on July 30, 2019, included Statements of Reasons,[4] which focused primarily on the fact that ExteNet's applications failed to specify how power and fiber would be supplied to ExteNet's

[2] *In the Matter of Accelerating Broadband Deployment by Removing Barriers to Infrastructure Investment,* WT 17-79, WT 17-84, FCC 18-133 (September 26, 2018) (hereinafter " *Third Report and Order*").
[3] In its Amended Complaint, plaintiff mistakenly calculated the 180 days from the publication of the FCC's Third Report and Order, which occurred on October 15, 2018, as July 14, 2019. Amended Complaint, par. 15 and par. 77.
[4] Defendants' Memorandum In Support of Motion to Dismiss, Exhibits F, G, H, I and J.

small wireless facilities. The Statements of Reasons indicated that the Defendants relied, at least in part, on a retroactive application of the City's Small Cell Policy in reaching their Decision to deny ExteNet's permit applications.

II. Summary of Argument

ExteNet states, as to Count I, that the Motion to Dismiss should be denied because Defendants failed to meet their obligation under 47 C.F.R. § 1.6003(d)(1) to notify ExteNet that its permit applications were materially incomplete, nor did they meet their obligation, prior to denying ExteNet's permit applications, to "clearly and specifically identify the missing documents or information and the specific rule or regulation creating the obligation to submit such documents or information" as required by 47 C.F.R. § 1.6003(d)(1)." [5] Rather than meet these obligations, the Commission coerced ExteNet into entering a tolling agreement that extended the "shot clock" until July 30, 2019, on which date the Defendants denied ExteNet's applications as lacking critical information, despite the fact that, owing to the Commission's failure to meet its obligations under 47 C.F.R. § 1.6003(d)(1), the applications were presumptively complete.

ExteNet states, as to Count II, that the Motion to Dismiss should be denied because contrary to Defendants' repeated assertion that ExteNet fails to state a claim for effective prohibition under Section 332 of the Act because ExteNet "does not claim that it will be providing personal wireless services directly"[6] nothing in the language of Section 332 of the

[5] 47 C.F.R. §1.6003(d)(1).
[6] Defendants' Memorandum in Support of Motion to Dismiss, p. 11.

Telecommunications Act of 1996[7] either textually or as interpreted by myriad federal courts, implies that only providers of personal wireless services—as opposed to those, like ExteNet, who construct neutral host facilities on behalf of providers of personal wireless services, have a right to sue for effective prohibition.[8] Indeed, infrastructure providers such as tower developers, landowners and wireless facility operators have standing to pursue effective prohibition claims under Section 332 without directly providing personal wireless services.[9]

Defendants' sole reliance on the text of the Commission's Statements of Reasons in support of its Motion to Dismiss Count II is similarly misplaced. Whether a denial of an application for the provision of personal wireless services by a local authority pursuant to its local ordinances constitutes an "effective prohibition" in violation of the Act is a question decided by the federal court de novo, with no deference to the findings made by the municipality.[10] This Court may look beyond the record before the administrative board and consider additional evidence presented by the parties.[11]

ExteNet states, as to Count III, that the Motion to Dismiss should be denied because the FCC standard for whether a state or local law effectively operates as a prohibition or effective prohibition is the same standard under Section 253 as under Section 332.

ExteNet states, as to Count IV, that the Motion to Dismiss should be denied because Defendants' adopted a "Small Cell Policy" on June 20, 2019, nearly two months beyond the

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[7] 47 U.S.C. § 151 et seq. (hereinafter, the "Act").
[8] *See e.g. Green Mountain Realty Corp. v. Leonard*, 688 F. 3d 40, 44 (1st Cir. 2012); *ATC Realty LLC v. Town of Kingston, N.H.*, 303 F. 3d 91, 92 (1st Cir. 2002).
[9] *See, e.g. Liberty Towers, LLC v. Zoning Board of Tp. Lower Makefield, Bucks County, PA,* 748 F. Supp. 2d 438, 442 (E.D. Pa. 2010); *Horvath Towers III, LLC v. Zoning Hearing Board of Butler Twp.,* 247 F. Supp. 3d (M.D. Pa. 2017); *Industrial Tower and Wireless LLC v. Esposito*, No. 17-057-JJM-PAS,WL 526334, at *2 (D.R.I. January 22, 2018).
[10] *Green Mountain Realty Corp.*, 688 F. 3d, at 58.
[11] *Id.*, at 60.

deadline for adoption specified by the FCC, and because the Small Cell Policy failed to meet the standards for such policies articulated by the FCC. As written, a number of the Small Cell Policy's provisions discriminate against neutral host providers of small cell wireless facilities.

ExteNet states, as to Count V, that the Motion to Dismiss should be denied because the Count is a request for equitable relief that the Court need not address at this stage of the case.

III. Argument

Courts have long recognized the authority of the FCC, as the federal agency charged with administering the Act, to interpret Sections 253 and 332 of the Act, to issue interpretations of the language of the Act and to adopt implementing regulations that clarify and specify the scope and effect of the Act. [12]

On September 26, 2018, the FCC adopted its *Third Report and Order*, which was published in the Federal Register on October 15, 2018 and became effective on January 14, 2019[13]. In its *Third Report and Order,* the FCC sought to "clarify and update" its reading of the limits Congress imposed on state and local governments through Sections 253 and 332 of the Act.[14] The FCC's purpose in addressing these limits was to "ensure that our approach continues to make sense in light of the relatively new trend towards the large scale deployment of Small Wireless Facilities." [15]

Notably, in the *Third Report and Order,* the FCC specifically stated that:

> a state or local legal requirement will have the effect of prohibiting wireless telecommunications services if it materially

[12] *City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), (FCC has authority to set "shot clock" deadlines as measure of what is a presumptively reasonable time under 47 U.S.C. §332(c)(7)(B)(iii)); (aff'd. 569 U.S 290 (2013); *Nat'l Cable and Telecomm. Ass'n. v. Brand X Internet Services,* 545 U.S. 967, 983-986 (2005) (FCC's interpretation of an ambiguous statutory provision overrides earlier court decisions interpreting the same provision).

[13] 87 Fed. Reg. 51, 867 (2018).

[14] *Third Report and Order,* par. 30.

[15] *Id.*, at par. 30.

> inhibits a provider's ability to engage in any of a variety of activities related to its provision of a covered service. [16]

The FCC noted that among the purposes of the *Third Report and Order* was to address:

> state and local consideration of aesthetic concerns in the deployment of Small Wireless Facilities, recognizing that certain reasonable aesthetic considerations do not run afoul of Sections 253 and 332;[17]
>
> and
>
> to address the "shot clocks" governing the review of wireless deployments…and create a new set of shot clocks tailored to support the deployment of Small Wireless Facilities.[18]

A. DEFENDANTS' MOTION TO DISMISS SHOULD BE DENIED AS TO COUNT ONE BECAUSE DEFENDANTS' FAILURE TO TIMELY NOTIFY EXTENET OF ANY DEFICIENCIES IN ITS APPLICATIONS WAS PRESUMPTIVELY UNREASONABLE IN VIOLATION OF SECTION 332(c)(7)(B)(ii).

1. 47 C.F.R. § 1.6003(d)(1) imposes an affirmative obligation upon municipalities to notify applicants of incompleteness in a timely manner.

47 U.S.C. § 332 (c)(7)(B)(ii) provides that "(a) State or local government or instrumentality thereof shall act on any request for authorization to place, construct or modify personal wireless facilities within a reasonable period of time after the request is filed with such government or instrumentality, taking into account the nature and scope of such request." [19]

47 C.F.R. § 1.6003(d)(1) provides that, unless a written agreement between the applicant and the siting authority provides otherwise, the tolling period for an application, (if any) is set forth below.

> "For an initial application to deploy Small Wireless Facilities, if the siting authority notifies the applicant on or before the 10th day after

[16] *Id*., at par. 37.
[17] *Id*., at par. 12.
[18] *Id*., at par. 12.
[19] 47 U.S.C. § 332 (c)(7)(B)(ii).

> submission that the application is materially incomplete and clearly and specifically identifies the missing documents or information and the specific rule or regulation creating the obligation to submit such documents or information, the shot clock date calculation shall restart at zero on the date on which the applicant submits all the documents and information identified by the siting authority to render the application complete." [20]

Defendants contend that, because the parties entered a tolling agreement, the Commission had no obligation either to notify ExteNet that its application was incomplete nor any obligation to identify the missing documents or information or to identify the specific rule or regulation creating the obligation to submit such documents or information.[21]

This is simply not so. Defendants can point to nothing in the *Third Report and Order* to support their position, which is inconsistent with previous FCC Orders and case law in support of those Orders.

2. The parties' tolling agreement did not absolve the Defendants of their obligation to notify ExteNet of any deficiencies in its applications.

The FCC has clearly indicated that the establishment of a review period during which a siting authority must notify an applicant that its application is incomplete serves the dual purpose of giving State and local governments sufficient time for reviewing applications for completeness, while protecting applicants from a last minute decision that applications should be denied as incomplete."[22]

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[20] 47 C.F.R. §1.6003(d)(1).

[21] Defendants' Memorandum in Support of Motion to Dismiss, pp. 9-10.

[22] *In Re 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, (November 18, 2009) par. 53 (hereinafter "2009 Declaratory Ruling"), *aff'd City of Arlington v. FCC*, 668 F.3d 229 (5th Cir. 2012), aff'd 569 U.S. 290 (2013); *Third Report and Order*, par. 88.

Courts have affirmed the FCC's rational for such a review period.

> The FCC …recognized… that a state or local government that confronted an incomplete application, but delayed alerting the applicant to the deficiencies in the application, should be presumed to have acted unreasonably if the government ultimately did not act on the application within the time frames. Thus, the FCC allowed for tolling of the . . . time frames in cases of incompleteness, but also imposed a separate time frame for state and local governments to notify applicants of incompleteness in order to prevent state and local governments from manipulating the process. This does not strike us as an unreasonable application of § 332(c)(7)(B)(ii).[23]

In the instant proceeding, the City was confronted with applications that it deemed incomplete, but failed to alert ExteNet within the ten day time frame period provided by 47 C.F.R. §1.6003(d)(1). The Defendants did not merely delay alerting ExteNet to what it regarded as deficiencies in its applications, it did not disclose such deficiencies until the hearing at which the Commission unanimously denied those applications**.**

Following the *City of Arlington* case, the fact that the parties entered a tolling agreement with respect to the date which the City would rule on ExteNet's applications does not absolve the Defendants from meeting their affirmative obligations, pursuant to 47 C.F.R. § 1.6003(d)(1), to notify ExteNet of any incompleteness in its application. [24] This is particularly so under the circumstances present here, where the Commission coerced ExteNet into entering the tolling agreement by threatening to deny ExteNet's applications if ExteNet did not do so. Such conduct is the epitome of "manipulating the process" [25] decried in the *City of Arlington* case. Given that the Commission did not assert that the applications were incomplete for nearly four months, the

[23] *City of Arlington v. FCC*, at 257-258.
[24] *See, City of Arlington*, at 257-258.
[25] *City of Arlington*, at 258.

Defendants should be presumed to have acted unreasonably in violation of Section 332 (c)(7)(b)(ii).[26] Accordingly, Plaintiff's Motion to Dismiss should be denied as to Count One.

B. DEFENDANTS' MOTION TO DISMISS AS TO COUNT II SHOULD BE DENIED BECAUSE EXTENET HAS STANDING TO PURSUE DE NOVO ADJUDICATION OF ITS CLAIM THAT DENIAL OF ITS APPLICATION EFFECTIVELY PROHIBITS THE PROVISION OF PERSONAL WIRELESS SERVICES IN CAMBRIDGE.

1. ExteNet has standing to pursue its claim under Section 332(c)(7)(B)(i)(II).

U.S.C. § 332 (c)(7)(B)(i)(II) provides that "the 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."[27]

Section 332 of the Act confers standing to seek relief under Section 332 on **"(a)ny person** adversely affected by any final action or failure to act by a state or local government or any instrumentality thereof…." [28] The *definition* section of the Act defines "person" in broad fashion, to include an "individual, partnership, association, joint-stock company, trust or corporation."[29] Nothing in that language suggests that only direct providers of personal wireless services have a right to sue under Section 332 as opposed to those engaged in one or more of the vital elements for the provision of personal wireless services. Nor does the statute distinguish between the providers of personal wireless services and the providers of small wireless facilities as having the right to seek redress for effective prohibition.

ExteNet meets the criteria for seeking relief under Section 332. As a Delaware corporation, it falls within the definition of "person" under the Act. It has been adversely

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[26] *Id*.
[27] 47 U.S.C. § 332 (c)(7)(B)(i)(II).
[28] 47 U.S.C. § 332 (c)(7)(B)(v) (emphasis added).
[29] 47 U.S.C. § 153 (32).

affected by Defendants' denials of applications it filed. Such denials prevent ExteNet from constructing small wireless facilities.

Congress intended, by passing the Act, to encourage the rapid deployment of new telecommunications services and new telecommunications technologies.[30] "One of the means by which (Congress) sought to accomplish these goals was reduction of the impediments imposed by local governments upon the installation of facilities for wireless communications."[31]

In support of this goal, the Act's protections extend beyond the providers of personal wireless services to others involved with telecommunications technologies, allowing cell tower managers and real estate developers, for example, to make claims for effective prohibition under Section 332 (c)(7) despite the fact that they do not themselves provide personal wireless services.[32] Many of these cases, like in the instant case, involve standing challenges against entities seeking to construct wireless facilities that have a business connection, such as a lease or letter of intent with a personal wireless service provider or telecommunications carrier. For example, an entity that constructs and operates wireless communication facility survived a motion to dismiss challenging its standing to sue under Section 332 to challenge denial of a variance to construct a wireless facility,[33] a builder of radio towers that subleases towers to personal wireless service providers was held to have standing to sue under Section 332,[34] and a site acquisition company survived challenge to its standing to sue under the Act despite the fact that it does not provide telecommunications services.[35] Accordingly, Defendants' contention that ExteNet fails to state a claim for effective prohibition under Section 332 because it "does not

[30] *Rancho Palos Verdes v. Abrams,* 544 U.S. 113, 115 (2005).
[31] *Id*., at 115.
[32] See e.g. *Green Mountain Realty Corp. at* 44 (cell tower manager); *ATC Realty LLC* at 92 (developer).
[33] *Liberty Towers*, 748 F. Supp. 2d at 442.
[34] *Horvath Towers III*, 247 F. Supp. 3d at 528.
[35] *Industrial Tower and Wireless LLC*, WL 526334 at *2.

claim that it will be providing personal wireless services directly" a proposition for which Defendants offer no case law to support—should be rejected.

As noted by ExteNet, at Paragraphs 41 and 42 of the Amended Complaint, it is under contract with its customer, AT&T ("Customer"), a provider of personal wireless services, to construct small wireless facilities. In the contract, the Customer identified the specific locations where ExteNet was to seek to install its facilities in order to enable the Customer to provide enhanced coverage and capacity to its wireless customers in the areas along Massachusetts Ave. identified in ExteNet's permit applications. It has stated, at Paragraph 43 of the Amended Complaint, that the small cell wireless facilities identified in its permit applications play an essential role in said area of Cambridge, and without those facilities, the Customer's provision of enhanced coverage and capacity to its personal wireless services customers would be materially inhibited.

Because ExteNet has standing to bring a claim for effective prohibition under Section 332 regardless of whether or not it is the licensed provider of personal wireless services whose ability to provide covered services is materially inhibited by the Commission's legal requirements, the foregoing states an actionable claim for relief under 47 U.S.C. § 332 (c)(7)(B)(i)(II). Defendants' Motion to Dismiss should be denied as to Count II.

2. Defendants' reliance on the text of the Commission's Statement of Reasons ignores that an effective prohibition is decided by the federal court de novo.

Whether a denial of an application for the provision of personal wireless services by a local authority pursuant to its local ordinances constitutes an "effective prohibition" in violation of the Section 332 of the Act is a question decided by the Federal Court de novo, with no

deference to the findings made by the municipality.[36] This Court may look beyond the record before the administrative board and consider additional evidence presented by the parties.[37]

The Court must be allowed to determine whether the City's legal requirements and corresponding denial of ExteNet's permit applications materially inhibits a provider's ability to engage in the provision of services. Defendants' Motion to Dismiss as to Count II of the Amended Complaint should be dismissed.

C. DEFENDANTS' MOTION TO DISMISS SHOULD BE DENIED AS TO COUNT THREE BECAUSE THE CITY'S DENIAL OF ITS PERMIT APPLICATIONS MATERIALLY INHIBITS A PROVIDER'S ABILITY TO PROVIDE A COVERED SERVICE.

47 U.S.C. § 253 (a)[38] provides that "no state or local statute or regulation or other state or local requirement may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

> In the 3rd Report and Order the FCC specifically stated that:
>
> a state or local legal requirement will have the effect of prohibiting wireless telecommunications services if it materially inhibits a provider's ability to engage in any of a variety of activities related to its provision of a covered service.[39]

This standard for adjudicating effective prohibition claims applies equally to claims under Section 253(a) and Section 332(c)(7).[40] For the reasons set forth with respect to Section 337 (c)(7), in Section B, above, Defendant's Motion to Dismiss should be denied as to Count III.

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[36] *Green Mountain Realty Corp*, 688 F. 3d, at 58.
[37] *Id.*, at 60.
[38] 47 U.S.C. § 253 (a).
[39] *Third Report and Order,* par. 37.
[40] *Id*., par. 36.

D. DEFENDANTS' MOTION TO DISMISS AS TO COUNT IV SHOULD BE DENIED BECAUSE THE CITY'S POLICY REGARDING SMALL CELL WIRELESS INSTALLATIONS ON PUBLIC WAYS WAS ADOPTED TWO MONTHS BEYOND THE DEADLINE SET BY THE FCC FOR ITS ADOPTION OF AESTHETIC REQUIREMENTS.

In its *Third Report and Order*, the FCC advised municipalities to publish aesthetic requirements, such as the City's Small Cell Policy.[41] The FCC specifically directed that the aesthetic standards must incorporate clearly defined and ascertainable standards and be published in advance.[42] The FCC explained that "providers cannot design or implement rational plans for deploying Small Wireless Facilities if they cannot predict in advance what aesthetic requirements they will be obligated to satisfy to obtain permission to deploy a facility at any given site."[43] The FCC urged municipalities to adopt written policies within 180 days after the publication of the Third Report and Order in the Federal Register, which occurred on October 15, 2018.[44] Accordingly, the deadline for municipalities to adopt aesthetic standards for small cell wireless facilities was on or about April 15, 2019.

The Defendants adopted their interim Small Cell Policy on June 20, 2019, fifty eight days after the FCC's deadline for adopting such policies and sixty nine days after ExteNet filed its permit applications. Despite the fact that Massachusetts law discourages retroactive application of such rulings and bars retroactive application of municipal ordinances,[45] the Defendants based their denials of ExteNet's permit applications, at least in part, on the Policy. On that basis alone, the Policy should be excluded from the Statement of Reasons in the City's denials of ExteNet's permit applications.

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[41] *Third Report and Order*, par. 88.
[42] *Id*., par 88.
[43] *Id*., par. 88.
[44] *Id*., par. 89.
[45] See, e.g. *Sentry Fed. Savings Bank v. Cooperative Cent. Bank,* 406 Mass. 412, 414 (1990).

E. DEFENDANTS' MOTION TO DISMISS SHOULD BE DENIED AS TO COUNT FOUR BECAUSE MULTIPLE PROVISIONS WITHIN THE POLICY SHOULD BE PREEMPTED AS THEY DISCRIMINATE AGAINST NEUTRAL HOST PROVIDERS OF SMALL WIRELESS FACILITIES SUCH AS EXTENET AND EFFECTIVELY PROHIBIT THEIR PROVISION OF PERSONAL WIRELESS SERVICES.

More troubling than the Defendants' retroactive application of its belatedly adopted Policy is the fact that it incorporates issues only marginally related to aesthetic requirements and imposes burdens that discriminate against neutral host providers of small wireless facilities seeking to build, install and operate such facilities in the public rights-of-way.

Typically, but not in the instant proceeding, small wireless facilities consist of fiber optic cable and small antennas and supporting equipment that ExteNet attaches to utility poles or other structures in the public rights of way.

The following provisions of the Policy involve anti-competitive burdens that are not imposed upon other telecommunications service providers:

a) The requirement, imposed by Part I (C) of the Small Cell Policy,[46] that competitors be notified before an Application is filed. (This requirement would require neutral host providers to divulge their business plans to each other, a requirement unheard of in any industry);

b) The requirement, imposed by Part I (E) of the Small Cell Policy,[47] that if an application remains incomplete thirty days after its submission, the Application will be considered withdrawn. (This requirement is inconsistent with the FCC shot clock rules, which govern the process for other telecommunications service providers);

[46] Defendants' Motion to Dismiss, Exhibit K, p. 1.
[47] *Id.,* at p.1.

c) The requirement, imposed by Part I (C) of the Small Cell Policy,[48] that if notice of an Application and hearing by certified mail cannot be proven to have been delivered, then proof of service of notice by constable shall be required. (This requirement places a cost burden on neutral host provider that is not imposed on other telecommunications service providers);

d) The requirement, imposed by Part V (B)(xiii) of the Small Cell Policy,[49] that where the City has planned a redevelopment or change to a street, sidewalk or other area of the City, applicants shall remove their installation at their own cost within 60 days of notice by the City. (This requirement imposes a substantial cost burden on neutral host providers that is not imposed on other telecommunications service providers).

The following provisions presume that the City can require neutral host small cell providers to apply for permits in tandem with personal wire services providers and telecommunications service providers without effectively prohibiting the provision of such services--an issue in the case at bar.

e) The requirement, imposed by Part II (F) of the Small Cell Policy,[50] of a detailed map in digital format…including the amount of cell coverage in such area and evidence that the proposed installation is needed to prevent a material inhibition of wireless services. (Such information may be available to personal wireless services provider but is unavailable to neutral host providers);

[48] *Id.,* at p. 1.
[49] *Id.,* at p. 7.
[50] *Id.,* at p. 4.

f) The requirement, imposed by Part II (H) of the Small Cell Policy[51] of an affidavit from a Radio Frequency Engineer outlining the network/network service requirements in the City and how the Installation addresses that need in the City. (Such information may be available to personal wireless service providers but is unavailable to neutral host providers);

g) The requirement, imposed by Section II (I)(v) of the Small Cell Policy,[52] granting the Pole and Conduit Commission authority to disapprove of an application if there are more convenient…locations such that the applicant may densify its network through such…locations. (Decisions of this nature would be made by a personal wireless services provider not a neutral host provider);

h) The requirement, granted by Section II (O) of the Small Cell Policy,[53] of documentation from the FCC showing that Applicant is in good standing and currently licensed by the FCC and the proposed installation shall comply any regulations of the FCC. (Personal wire services providers have FCC licenses, while neutral host providers generally do not.).

Consequently, the above-referenced provisions should be preempted as effectively prohibiting the provision of wireless services by, and unfairly discriminating against, neutral host providers of small wireless facilities. Accordingly, Defendants' Motion to Dismiss should be denied as to Count IV.

[51] *Id.*, at p. 4.
[52] *Id.*, at p. 4.
[53] *Id.*, at p. 5.

F. DEFENDANTS' MOTION TO DISMISS AS TO COUNT FIVE SHOULD BE DENIED BECAUSE IT IS A REQUEST FOR RELIEF THAT THE COURT NEED NOT ADDRESS AT THIS TIME.

The First Circuit has long held that "in the majority of cases the proper remedy for a (siting authority)'s decision that violates the Telecommunications Act will be an order…instructing the (siting authority) to authorize construction."[54] Nevertheless, Count Five represents a claim for relief, rather than a legal claim, and it need not be addressed at this stage of the case. Defendants' motion should be denied as to Count V.

IV. Conclusion

For the reasons stated above, Defendants' Motion to Dismiss should be denied.

[54] *Brehmer v. Planning Board of Town of Wellfleet,* 238 F 3d. 117, 121 (1st Cir. 2001).

Respectfully submitted,

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Date: March 31, 2020

CERTIFICATE OF SERVICE

I, William A. Worth, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on March 31, 2020.

/s/ William A Worth
William A. Worth