UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Pittsfield Cellular Telephone Company d/b/a Verizon Wireless Plaintiff v Board of Health of the City of Pittsfield, Massachusetts Defendants	Civil Action No. 3:22-cv-10718-MGM

MOTION TO INTERVENE

Courtney Gilardi, Charlie Herzig, Judy Herzig, Mark Markham, Angelika Markham, and Elaine Ireland (collectively "Intervenors"), with the support of additional Centerville residents, move pursuant Fed. R. Civ. P. 24 to intervene. As the basis, therefore, the Intervenors state:

1. On May 10, 2022, Pittsfield Cellular Telephone Company d/b/a Verizon Wireless ("Verizon Wireless") filed this action challenging an Emergency Show Cause Order issued on April 11, 2022 (“Order”), by defendant Pittsfield Board of Health (“Board”) which: (i) declared that the operation of a personal wireless services facility located at 877 South Street, Pittsfield, Massachusetts (the “Facility”) by Verizon Wireless is a public nuisance and violates various Massachusetts state and local health codes and laws; (ii) required that Verizon Wireless show cause why the Board should not issue an order requiring that the Facility cease operations; (iii) required that Verizon Wireless request a hearing on the Order within seven days of its issuance (i.e., by April 18, 2022); and (iv) if Verizon Wireless failed to request a hearing, declared that the

order would become a notice of discontinuance requiring that Verizon Wireless abate and eliminate the nuisance and violations of the state sanitary code within seven days of the expiration of the period to request a hearing (i.e., by April 25, 2022).

2. Verizon Wireless alleges in its Complaint that the Order is preempted by Section 332(c)(7)(b)(iv) of the Telecommunications Act of 1996 ("Communications Act"), 47 U.S.C. § 332(c)(7)(B)(iv),[1] as the Order purportedly regulates "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."

3. The Intervenors are: (i) individuals who live in the immediate vicinity of the Facility which is subject to the Order; (ii) among the group of residents that were harmed by the Facility, and (iii) each expressly named in the Order.

4. The Intervenors participated in proceedings before the Board and presented testimony and evidence to the Board, which the Board found to be credible and persuasive.

6. The Intervenors have the right to intervene as a matter of right, given that the disposition of this case will impair or impede the Intervenors' ability to protect their interests unless they are adequately represented in connection with the instant matter. Fed. R. Civ. P. 24(a).

[1] Intervenors contend that 47 U.S.C. § 332(c)(7)(B)(iv) does not apply to the Board action. This will be one of the topics to be addressed in the motion to dismiss the Intervenors intend to file in the near future. Assuming without conceding that 47 U.S.C. § 332(c)(7)(B)(iv) does have some application here, as shown below Intervenors meet the test for both "as a matter of right" and "permissive" intervention under prevailing circuit precedent addressing that section.

7. Even if the Intervenors may not intervene as a matter of right, they have a significant interest in the outcome of the instant litigation and "a claim or defense that shares with the main action a common question of law or fact."

8. Assuming without conceding that 47 U.S.C. § 332(c)(7)(B)(iv) does have some application here, as shown below Intervenors meet the test for both "as a matter of right" and "permissive" intervention under prevailing circuit precedent addressing that section.

9. The Intervenors have submitted a memorandum in support of their motion.

WHEREFORE, the Intervenors respectfully request that this Court:

A. Allow the Intervenors to intervene and grant them full party status in the instant litigation; and,

B. Order such further relief as is just and equitable.

Respectfully Submitted,

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Dated: May 25, 2022

I hereby certify that this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/Paul Revere, III
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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Pittsfield Cellular Telephone Company d/b/a Verizon Wireless Plaintiff v Board of Health of the City of Pittsfield, Massachusetts Defendants	Civil Action No. 3:22-cv-10718-MGM

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE

Introduction

On May 10, 2022, Pittsfield Cellular Telephone Company d/b/a Verizon Wireless ("Verizon Wireless") filed this action challenging an Emergency Show Cause Order issued on April 11, 2022 ("Order"), by defendant Pittsfield Board of Health ("Board") which: (i) declared that the operation of a personal wireless services facility located at 877 South Street, Pittsfield, Massachusetts (the "Facility") by Verizon Wireless is a public nuisance and violates various Massachusetts state and local health codes and laws; (ii) required that Verizon Wireless show cause why the Board should not issue an order requiring that the Facility cease operations; (iii) required that Verizon Wireless request a hearing on the Order within seven days of its issuance (i.e., by April 18, 2022); and (iv) if Verizon Wireless failed to request a hearing, declared that the order would become a notice of discontinuance requiring that Verizon Wireless abate and

eliminate the nuisance and violations of the state sanitary code within seven days of the expiration of the period to request a hearing (i.e., by April 25, 2022).

Verizon Wireless alleges in its Complaint that the Order is preempted by Section 332(c)(7)(b)(iv) of the Telecommunications Act of 1996 ("Communications Act"), 47 U.S.C. § 332(c)(7)(B)(iv),[1] as the Order purportedly regulates "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." The Intervenors, Courtney Gilardi, Charlie Herzig, Judy Herzig, Mark Markham, Angelika Markham, and Elaine Ireland are individuals who live in the immediate vicinity of the Facility which is subject to the Order. They are among the group of residents that were harmed by the Facility, and are each expressly named in the Order. They presented testimony and evidence to the Board, which the Board found to be credible and persuasive. They have moved to intervene in this action. This memorandum of law supports that motion.

<u>Summary</u>

The Intervenors are individuals who live and own property in the immediate vicinity of the Facility, have been directly affected by the Facility, and fully participated below. The Court should allow them to intervene in the instant matter as a matter of right. The disposition of this case will impair or impede the Intervenors' ability to protect their interests and they are not adequately represented in connection with the instant matter. Even if the Intervenors may not intervene as a

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[1] Intervenors contend that 47 U.S.C. § 332(c)(7)(B)(iv) does not apply to the Board action. This will be one of the topics to be addressed in the motion to dismiss the Intervenors intend to file in the near future. Assuming without conceding that 47 U.S.C. § 332(c)(7)(B)(iv) does have some application here, as shown below Intervenors meet the test for both "as a matter of right" and "permissive" intervention under prevailing circuit precedent addressing that section.

matter of right, they have a significant interest in the outcome of the instant litigation, in that they are persons who have been injured by the Facility and were the parties below (among others) that the Board sought to provide relief for by issuing the order. Accordingly, this Court should permit the Intervenors to intervene pursuant to Fed. R. Civ. P. 24.

The Identity of the Intervenors

The Intervenors are two property owners who live and own property in the immediate vicinity of the Facility as follows:

Courtney Gilardi
17 Alma St.
Pittsfield, MA 01201

Mark and Angelika Markham
128 Elmer Ave.
Pittsfield, MA 01201

Charlie and Judy Herzig
140 Plumb St.
Pittsfield, MA 01201

Elaine Ireland
17 Alma St.
Pittsfield, MA 01201

The properties owned by the Intervenors are in a neighborhood known as "Shacktown" that is adjacent to the property on which the facility is located. The individual properties are located approximately 150 to 400 feet from the boundary of the property on which the Facility is located.

Factual and Procedural Background

Verizon Wireless constructed the Facility and it was activated in August, 2020. Order (Exhibit A to the Complaint), at p. 1. Soon thereafter, the Board of Health for the City of Pittsfield received numerous reports of "illness and negative health symptoms" from residents living nearby including the Shacktown neighborhood. *Id.* These complaints included "headaches, sleep problems, heart palpitations, tinnitus (ringing in the ears), dizziness, nausea, skin rashes, and memory and cognitive problems, among other medical complaints." *Id.* Some of the residents were

forced to abandon their homes, and others are deciding whether they must do the same "because [their home have been made] inaccessible and uninhabitable." *Id.* at 13.

The Board held numerous hearings,[2] reviewed evidence and testimony, and engaged in a thorough investigation of the human health impacts of electromagnetic emissions from the Facility. *Id*, at *passim*. Each of the Intervenors testified as to specific injuries and harms they suffered since the Facility was activated in August 2020. *Id.*, at pp. 12-13. Verizon Wireless was invited to submit testimony to the Board and the Board heard extensive testimony on September 9, 2021, from Verizon Wireless representatives including, specifically, Dr. Eric S. Swanson, a Professor in the Department of Physics and Astronomy of the University of Pittsburgh. *Id.* at 9.

The Board specifically found that "involuntary radiation exposure directed upon Shacktown residents . . . has effectively evicted several residents injured by pulsed and modulated [radio frequency radiation]" and "has rendered their homes uninhabitable – unfit for human habitation." *Id.* at 11. The Board noted that the United States Court of Appeals for the District of Columbia Circuit has held that the Federal Communication Commission's decision to not update its 1996 guidelines for wireless radiation emissions because "there is no evidence of non-cancerous and environmental harm from RF emissions below the FCC 1996 emissions guidelines was arbitrary, capricious, and not evidenced based" as there was "substantial evidence of harm filed in the FCC record." *Id.* 8, *see also Environmental Health Trust, et al. v. FCC*, 9 F.4th 893 (D.C. Cir., 2021) ("Environmental Health Trust Litigation"). The Order recites a litany of scientific and medical studies, reports and diagnoses that support the Board's expert conclusion and finding that

[2] Hearings where evidence addressing the facility was introduced or the Facility was discussed were held on April 12, 2021, May 5, 2021, June 2, 2021, July 7, 2021, September 1, 2021, September 9, 2021, October 6, 2021, November 3, 2021, December 1, 2021, February 2, 2022, February 23, 2022, and March 16, 2022.

the residents' symptoms and conditions are real, medically confirmed and significant, and the Board specifically found that the Facility is the direct cause of the residents' injuries. Order, pp. 1-14. The Board also found that Professor Swanson lacked professional training or qualifications in medicine, medical research, biology, environmental studies, public health, epidemiology, or toxicology, his testimony was not credible, did not address all the issues and not persuasive in light of the other substantial evidence in the record. Order, pp. 9-11.

Based upon the foregoing, the Board issued the Order on April 11, 2022 which: (i) declared that the operation of the Facility by Verizon Wireless is public nuisance and violates the Massachusetts state and local health codes and laws; (ii) required that Verizon Wireless show cause why the Facility should not issue an order requiring that the Facility cease operations; (iii) required that Verizon Wireless request a hearing on the Order within seven days of its issuance (i.e., by April 18, 2022); and (iv) if Verizon Wireless failed to request a hearing, declared that the order would become a notice of discontinuance requiring that Verizon Wireless abate and eliminate the nuisance and violations of the state sanitary code within seven days of the expiration of the period to request a hearing (i.e., by April 25, 2022). Complaint at Exhibit A, pp. 14-15.

Verizon Wireless did not request a hearing before the Board after the Order was issued on April 11, 2022. The "notice of discontinuance" terms became effective on April 18, 2022. Verizon Wireless filed this action challenging the Order on the basis of express preemption on May 10, 2022, twenty-nine (29) days after the Order issued and twenty two (22) days after the "notice of discontinuance" provision went into effect after Verizon's refusal to request a hearing.

As of the date of Intervenors' motion, no answer has been filed on behalf of the Board.

Legal Argument

I. Standards for Motions to Intervene.

Motions to intervene are governed by Fed. R. Civ. P. 24. Motions to Intervene may be made as of right, or by permission of the court. *See* Fed. R. Civ. P. 24 (a) and (b). Whether motions made by right or by permission, motions must be timely, such that the original parties' rights will not be prejudiced. *See* Fed. R. Civ. P. 24(a) and (b). Motions to intervene by right must be permitted if the movant, "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may, as a practical matter, impair or impede the movant's ability to protect its interest unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). Pursuant to Fed. R. Civ. P. 24(b), the Court may permit the parties to intervene to the extent that they have "a claim or defense that shares with the main action a common question of law or fact." *See* Fed. R. Civ. P. 24(b)(l)(B). In considering a motion to intervene, the Court must accept as true non-conclusory allegations of the motion. *In re Lavallee,* 2015 WL 4978709, at ***1** (D. Mass. Aug. 20, 2015). In the context of federal lawsuits challenging a purported violation of the federal Communications Act, this Court has granted homeowners permission to intervene as of right. *Varsity Wireless, LLC v. Town of Boxford,* 2016 WL 11004357 (D. Mass. Sep. 9, 2016).

II. The Intervenors' Motion is Timely.

The Motion to Intervene is timely if it filed early in the litigation such that intervention does not interfere with the prompt administration of justice nor unfairly prejudice the parties to the proceeding. In determining timeliness, no rigid formula exists to determine whether an application to intervene is timely. In fact, the determination of timeliness is contextual, and should not be used as a tool of retribution to punish the tardy, would-be intervenor. *See, Ross v. Marshall*, 426 F.3d

745, 754 (5th Cir., 2005). The "timeliness requirement is often applied less strictly with respect to intervention as of right." *R & G Mortgage Corporation v. Federal Home Loan Mortgage Corporation*, 584 F.3d 1, 7 (1st Cir., 2009). In conducting a timeliness inquiry, there are "no ironclad rules about just how celeritously in terms of days or months, a person must move to protect himself after he has acquired the requisite quantum of knowledge." *Id.* "The timeliness inquiry centers on how the putative intervenor has acted once he received actual or constructive notice of the impending threat." *Id.*

Courts normally consider four factors to inform the timeliness inquiry: "(i) the length of time that the punitive intervenor knew or reasonably should have known that his interests were at risk before he moved to intervene; (ii) the prejudice to existing parties should the intervention be allowed; (iii) the prejudice to the putative intervenor should intervention be denied; and (iv) any special circumstances militating for or against intervention." *R & G Mortgage Corp. v. Federal Home Loan Mortgage Corp.*, 584 F.3d 1, 7 (1st Cir, 2009). Each of the foregoing factors must be appraised in light of the posture of the case at the time the motion is made. Although "motions to intervene that will have the effect of re-opening settled cases are regarded with particular skepticism," "motions filed promptly after a person obtains actual or constructive notice that a pending case threatens to jeopardize his rights are timely." *Id.* at 7-8. The touchstone in determining timeliness is "the status of the litigation at the time of the request for intervention[.]" *Id.* at 7. "As a case progresses towards its ultimate conclusion, the scrutiny attached to a request for intervention necessarily intensifies." *Id.*

The Intervenors satisfy all four of the timeliness considerations. The Intervenors filed their motion within two weeks after the Complaint was filed in this matter, even before the defendant Board has filed a responsive pleading. The prejudice to existing parties by intervention is *de*

minimus to nonexistent because the Intervenors seek party status in the procedural infancy of the case. Given that the instant case remains in the early stages of litigation, little prejudice will obtain by virtue of intervention.

The harm to the Intervenors if this motion is denied is significant. Since the Facility was activated, the Intervenors have suffered direct injuries to their health and property interests. Intervenors were among the initiating parties below that sought to have the Board take action to protect their homes and neighborhood from the damage caused by the Facility. Furthermore, to the extent the defendant Board might decide to no longer defend the decisions of the Board, the Intervenors will lose any opportunity to be heard relative to this important, local issue. Finally, special circumstances exist for allowing intervention. In this particular case, the Intervenors were actively involved in the proceedings before the Board, are represented by counsel who represented the petitioners in the Environmental Health Trust Litigation and other related litigation and are well-able to address the legal and practical implications flowing from plaintiff's arguments relating to federal preemption.

III. Intervention as of Right

A. Intervenors' Have Interest in this Litigation

Rule 24(a) requires an applicant for intervention to possess an interest relating to the property or transaction that is the subject of the litigation. "While the type of interest sufficient to sustain intervention as of right is not amendable to precise definition, a putative intervenor must show at a bare minimum that it has a 'significantly protectable' [...] interest that is 'direct, not contingent.'" *Pub. Serv. Co. v. Patch,* 136 F.3d 197,205 (1st Cir.1998). The First Circuit has consistently ruled that nearby property owners have a sufficient interest in actions brought under the Communications Act and, thus, satisfy the second element of intervention as of right. *Varsity*

Wireless LLC v. Town of Boxford, 2016 WL 11004357 at *5 (citing *Nextel Commc'ns of Mid-Atlantic, Inc. v. Town of Hanson,* 311 F. Supp. 2d 142, 150 (D. Mass. 2004); *Indus. Comm. and Elec., Inc. v. Town of Alton, N.H,* 646 F.3d 76, 80 (1st Cir.2011) (abutters have an interest under state law in the protection that zoning laws afford to their property); *Metheny v. Becker,* 352 F.3d 458, 462 (1st Cir.2003); *Brehmer v. Planning Bd,* 238 F.3d 117, 119 n. 2 & 122 (1st Cir.2001)). Courts have paid particularly close attention to the potential economic harm that a would-be intervenor stands to suffer. *Patch,* 136 F.3d at 205.

In this matter, each of the Intervenors has a legally protectable interest in the subject matter of this action. This action concerns an order issued by the Board that was issued after their request for relief, participation below and direct findings of injury to them and their property interests. The Order was issued, at least in part, to address nuisance conditions and violations of state health laws, including but not limited to the state sanitary code, that directly impact the use and occupancy of each of the Intervenor's residence. The Intervenors, therefore, have a direct, protectable interest in this action since they are the intended and direct beneficiaries of the Board's action in issuing the Order and will suffer personal and economic injury if those nuisance and violative conditions continue.

B. Disposition of the Action Would Impair or Impede the Intervenors' Ability to Protect their Property Interests

An applicant for intervention as of right must be so situated that the disposition of the action <u>may</u> as a practical matter impair or impede the applicant's ability to protect that interest." Fed. R. Civ. P. 24(a) (emphasis added). The Intervenor's all own property impacted by the Facility and their ability to protect those properties will be substantially impaired or impeded if they not allowed to intervene. In particular, if Verizon Wireless succeeds in its preemption claim and this

Court issues an order is enjoining the Order or a judgment declaring the Order unlawful, the Intervenors, their health [and the health of their children or other occupants of their property] will once again be imperiled by the Facility. Further, the activity restrained by the Order at the Facility will be allowed to continue unimpeded and Intervenors will not be able to return to their residences, from which the Order concludes that the Intervenors have been constructively evicted. As a practical matter, the instant litigation affords the Intervenors their only opportunity to protect their interests in the Board's decisions, should the defendant Board abdicate its defense of the instant matter. *See NexTel Communications of the Mid Atlantic, Inc. v. Town of Hanson*, 311 F.Supp.2d 142, 161 (D.Mass. 2004) (cell tower matter allowing intervention on the basis that the town may not adequately represent abutters' interests given the potential for possible settlement with the Town).

C. The Intervenors' Interests Are Not Adequately Represented

Finally, intervention by right requires a finding of "lack of adequate representation by existing parties." *Travelers Indem. v. Dingwell*, 884 F.2d 629, 637 (1st Cir. 1989), *see also* Fed. R. Civ. P. 24(a)(2). With respect to the final element, the First Circuit adopted a three factor test in considering a motion to intervene as a right. The three factor test is, "1) are the interests of a present party in the suit sufficiently similar to that of the absentee such that the legal arguments of the latter will undoubtedly be made by the former; 2) is that present party capable and willing to make such arguments; and, 3) if permitted to intervene, would the intervenor add some necessary element to the proceedings which would not be covered by the parties in the suit?" *United Nuclear Corp. v. Cannon*, 696 F.2d 141, 144 (1st Cir. 1992). An intervenor need only show that representation **may** be inadequate, not that it **is** inadequate. *Conservation Law Foundation of New*

England, Inc. v. Mosbacher, 966 F.2d 39, 44 (1st Cir. 1992). In *NexTel*, the Court found that "an uncompromising opposition to construction of any" cell tower may add the "necessary element to the proceedings which would not be covered by the parties in the suit." *NexTel*, *supra* at 152. The Court further found that the Intervenors may establish inadequate representation based on the threat of the Town dropping opposition to the construction of the cell tower in exchange for consideration. *Id*. For these reasons, the First Circuit has suggested in recent cases that abutting landowners should, as a general matter, be permitted to intervene in federal actions brought under the [Communications Act]." *See, Id.* at 153; *citing Metheny v. Becker*, 352 F.3d 458, 462 (1st Cir. 2003) and *Brehmer v. Planning Board*, 238 F.3d 117, 119, note 2 and 122 (1st Cir. 2001).

Intervenors have reason to believe that the defendant may not choose to raise all available defenses available to the Board or the City of Pittsfield may utilize its authority to control litigation by its subservient agencies to settle this proceeding.[3] To the extent that is correct several valid defenses (outline in Part V, below) will not be asserted in this action unless intervention is allowed. Intervenors intend to raise those defenses. Further, the existing parties in this action do not adequately represent Intervenors' interest in the action because the Board is not the direct legal representative of any of the individual Intervenors. The defendant Board is exercising its state-law police power, and its defense of this action will relate to that police power only and the lawfulness of its exercise. Intervenors benefit from the Board's action. Intervenors also have independent personal rights that the Board does not and cannot represent.

[3] Generally, municipal boards may not expend funds to retain their own counsel or litigate on their own behalf without the consent of the executive branch of the municipality. *Bd. of Public Works of Wellesley v. Bd. of Selectman of Wellesley*, 377 Mass. 621 (1979); *see also* Pittsfield Code Section 2-9.1 ("and no money shall be paid from the City Treasury for any legal services or advice without the sanction of the city council except as authorized by this article.").

D. Summary as Intervention as of Right

The four elements necessary to allow intervention as of right under Rule 24(a) are present: the Intervenors Motion is timely, the Intervenors have a clear and concrete interest relating to the subject matter of this case, the Intervenors are at risk that this action may impair their ability to protect their interests and the Intervenors currently lack adequate representation by the existing parties, in that the Town may inadequately represent their interests, to the extent it softens, settles, or refuses to defend the instant matter.

IV. Permissive Intervention Should Be Allowed Under Rule 24(b).

Fed. R. Civ. P. 24(b)(l)(B) allows Intervenors to intervene, at the Court's discretion, if they have "a claim or defense that shares with the main action a common question of law or fact." As set forth, *supra,* the Intervenors have standing and sufficient interest in the Order to warrant their interest and defense in same. Under the standard articulated by the First Circuit Court of Appeals, district courts have broad discretion in determining whether a motion for permissive intervention and "can consider almost any factor rationally relevant." *Varsity Wireless, LLC v. Town of Boxford,* 2016 WL 11004357 at *2 (quoting *Daggett v. Comm'n on Governmental Ethics & Election Practices,* 172 F.3d 104, 113 (1st Cir.1999).

This action concerns whether Verizon Wireless is subject to state health law requirements and whether it can simply ignore them causing negative impacts on the Intervenor Pittsfield residents' health and property. The questions posed by the defenses (see below) to be added by Intervenors share common questions of fact and law and justify intervention because the additional defenses of Intervenors provide a separate justifications for the Order. Further, judicial economy will be served by allowing intervention because the same facts that justified the Order would also

support a separate positive cause of action, and a somewhat similar claim for relief by Intervenors, at least in part. The evidence on harm to Intervenors' health and property interests is common to both the defenses asserted by the defendant Board and the proposed defendants-in-intervention. Separate actions would be duplicative and wasteful.

Specifically, Intervenors deny that this court has jurisdiction over Verizon Wireless' claims for various reasons. As further set forth below, these defenses will be one of the subjects addressed by Intervenors' Motion to Dismiss, which will be filed instead of an Answer and by the deadline for defendant Board's first responsive pleading to the complaint under Fed. R. Civ. P. 12. To the extent this court holds it does have subject matter jurisdiction this court will have jurisdiction over all of the defenses proposed to be added by Intervenors because they intimately relate to the claims made by plaintiff.

Finally, Intervenors will be represented by W. Scott McCollough[4] who served as arguing counsel in the Environmental Health Trust Litigation and are backed by parties related to that proceeding with the goal of establishing precedent as to whether 47 U.S.C. § 332(c)(7)(B)(iv) operates to preempt state or local health boards (in contrast to the zoning boards that are the subject of 47 U.S.C. § 332(c)(7)(B)(iv)) even after they conduct an exhaustive and expert investigation of the science and medical testimony, find both injury and direct causation and exercise their broad state police power to protect specifically identified citizens from a specifically identified harm, along with the rest of the local community. Intervenors' counsel has almost 40 years' experience in federal and state communications law and has litigated several cases involving whether and to

[4] A motion to admit Mr. McCollough *pro hac vice* has been contemporaneously filed in this action.

what extent the federal Communications Act operates to preempt state law and state/local authorities' actions.

Accordingly, the Court should, to the extent it does not allow intervention as of right under Fed. R. Civ. P. 24(a)(2), exercise its discretion because the requested intervention "will significantly contribute to the full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented." *In re Acushnet River & New Bedford Harbor: Proceedings re Alleged PCB Pollution,* 712 F.Supp. 1019, 1023 (D. Mass. 1989).

V. Intervenors Should be Considered Defendants

Fed. R. Civ. 24(c) requires that the Intervenors must provide a pleading which "sets out the claim or defense for which intervention is sought." Intervenors seek to be joined as Defendants but have not attached as pleading because Intervenors intend to file a Motion to Dismiss under Rule 12(b) of the Federal Rules of Civil Procedure. Specifically, Intervenors intend to raise the following defenses by motion, as allowed by Rule 12:

A. Lack of subject-matter jurisdiction (47 U.S.C. 332(c)(7) not applicable to Board action);

B. Lack of subject-matter jurisdiction (failure to exhaust administrative remedies);

C. Failure to state a claim upon which relief can be granted;

D. Failure to join a party under Rule 19;

E. Defendant-in-intervention reserves the right to raise additional defenses.

Defendants-in-intervention may raise the following defenses at the time any answer is due (if an answer is ultimately required): (i) waiver; (ii) estoppel; (iii) fraud; (iv) illegality; and (v) unclean hands. Further, Defendants-in-intervention reserve the right to raise additional defenses.

Defendants-in-intervention reserve the right to bring counter-claims and become a counter-plaintiff-in-intervention at the appropriate time for such claims to be filed.

Respectfully Submitted,

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Dated: May 25, 2022

I hereby certify that this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/Paul Revere, III
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