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**IN THE UNITED STATES DISTRICT COURT**

**FOR THE DISTRICT OF NEW JERSEY**

CELLCO PARTNERSHIP D/B/A VERIZON  
WIRELESS,

Plaintiff,

vs.

THE BOROUGH OF BELMAR, THE MAYOR &  
COUNCIL OF THE BOROUGH OF BELMAR,  
MAYOR MARK WALSIFER, in his official capacity  
and not as an individual, COUNCILMAN THOMAS  
BRENNAN, in his official capacity and not as an  
individual, COUNCILMAN JAMES MCCRACKEN,  
in his official capacity and not as an individual,  
COUNCILWOMAN PAT WANN, in her official  
capacity and not as an individual, COUNCILMAN  
TOM CARVELLI, in his official capacity and not as an  
individual,

Defendants.

Civil Action No. \_\_\_\_\_

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

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

Plaintiff, Cellco Partnership d/b/a Verizon Wireless (“Cellco” or “Plaintiff”), by its undersigned attorneys, as and for its Complaint against the Borough of Belmar, New Jersey, the

Mayor and Council of the Borough of Belmar, Mayor Mark Walsifier, in his official capacity and not as an individual, Councilman Thomas Brennan, in his official capacity and not as an individual, Councilman James McCracken, in his official capacity and not as an individual, Councilwoman Pat Wann, in her official capacity and not as an individual, and Councilman Tom Carvelli, in his official capacity and not as an individual (collectively, the “Borough” or “Defendants”), respectfully alleges as follows and hereby petitions this Court to: conduct an expedited review of Defendants’ failure to act on applications submitted by Cellco for access to the public rights-of-way for authorization to place, construct, or modify personal wireless service facilities, in violation of Federal and New Jersey Law, and to grant injunctive and declaratory relief to Cellco permitting access to the public rights-of-way.

### **INTRODUCTION AND REGULATORY FRAMEWORK**

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

2. Congress has declared that there is a need for wireless communication services, including “personal wireless services,”<sup>2</sup> as set forth in the Act, and the rules, regulations and orders of the Federal Communications Commission (“FCC”) promulgated pursuant thereto. In order to

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<sup>1</sup> The Act, S. Rep. 104-230, at 1 (Feb. 1, 1996) (Conf. Report).

<sup>2</sup> Personal wireless service facilities include “Small Wireless Facilities,” as defined by the Federal Communications Commission (“FCC”) in 47 C.F.R. § 1.6002(l).

foster its pro-competitive, deregulatory national policy, Congress included provisions in the Act that encourage competition by restricting the regulation of the placement of personal wireless service facilities by State and local governments and instrumentalities thereof.

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

4. Section 332(c)(7) of the Act strikes a balance between “preserv[ing] the traditional authority of state and local governments to regulate the location, construction, and modification of wireless communications facilities like cell phone towers”<sup>3</sup> and “reduc[ing] . . . the impediments imposed by local governments upon the installation of facilities for wireless communications.”<sup>4</sup>

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

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

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

the request is duly filed with [the relevant] government or instrumentality, taking into account the nature and scope of such request.”<sup>5</sup>

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

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

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

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

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

10. In the 2009 Shot Clock Order, the FCC recognized that “personal wireless service providers have often faced lengthy and unreasonable delays in the consideration of their facility siting applications, and that the persistence of such delays is impeding the deployment of advanced

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<sup>5</sup> 47 U.S.C. § 332(c)(7)(B)(ii).

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

and emergency services.”<sup>7</sup> In so holding, the FCC sought to promote the deployment of broadband and other critical wireless services.<sup>8</sup>

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

12. On September 26, 2018, the FCC revised its Shot Clocks and policy.<sup>10</sup>

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

14. The FCC’s “Shot Clock” timelines are codified at 47 C.F.R §1.6003.

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<sup>7</sup> 2009 Shot Clock Order, p. 14,005, ¶ 32.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at p. 14,000, ¶38.

<sup>10</sup> *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT 17-29, WC 17-84, FCC 18-133, 33 FCC Rcd. 9,088, Sept. 26, 2018. (“Third Report and Order”). The Third Report and Order became effective as of January 14, 2019. 83 Fed. Reg. 51,867 (2018). The Third Report and Order was affirmed, in part, in *City of Portland v. United States*, 969 F.3d 1020 (9<sup>th</sup> Cir. 2020).

<sup>11</sup> Third Report and Order at p. 9,142, ¶ 105.

15. The FCC also “determined that failure to meet the applicable time frame enables an applicant to pursue judicial relief within the next 30 days.”<sup>12</sup>

16. The Shot Clock Order further codified that:

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

17. The presumptively “reasonable period of time” runs from when an application is first submitted or proffered.<sup>14</sup>

18. The FCC specifically noted that

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

19. Under the FCC’s Rules and Regulations, a determination of incompleteness of a siting application tolls the shot clock only if the State or local government or instrumentality thereof provides notice to the applicant in writing within 10 days of the submission of the application, specifically identifying all missing information, and specifying any code provision, ordinance, application instruction, or otherwise publicly-stated procedures that require the information to be submitted.<sup>16</sup>

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<sup>12</sup> *Id.* at p. 9,104, ¶ 19.

<sup>13</sup> 47 C.F.R. § 1.6003(a).

<sup>14</sup> 47 C.F.R. § 1.6003(e).

<sup>15</sup> Third Report and Order at p. 9,162, ¶145 (citations omitted)

<sup>16</sup> 47 C.F.R. § 1.6003(d)(1).

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

21. In addition, Section 253 of the Act prohibits State or local authorities from erecting barriers that may prohibit or may have the effect of prohibiting the ability of any entity to provide telecommunications services, including taking action or inaction that results in an unreasonable delay in the deployment of the provider’s facilities and provision of telecommunications services.<sup>17</sup> In particular, Section 253(a) of the Act provides that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” Moreover, Section 253(c) of the Act limits the power of State and local government authorities to “manage the public rights-of-way” on a “competitively neutral and nondiscriminatory basis.”

22. In its Third Report and Order, the FCC also

confirm[ed] that our interpretations today extend to state and local governments’ terms for access to public ROW that they own or control, including areas on, below, or above public roadways, highways, streets, sidewalks, or similar property, as well as their terms for use of or attachment to government-owned property within such ROW, such as new, existing and replacement light poles, traffic lights, utility poles, and similar property suitable for hosting Small Wireless Facilities.<sup>18</sup>

23. Here, following more than a year of discussions with Defendants regarding the need for the deployment of Small Wireless Facilities, the locations at which Plaintiff proposed to deploy

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<sup>17</sup> 47 U.S.C. § 253(a).

<sup>18</sup> Third Report and Order at p. 9.134, ¶ 92.

those Small Wireless Facilities to address Plaintiff's need and Defendants' preferences for the design, Cellco submitted an application to the Defendants on January 13, 2021, for construction of eighteen (18) Small Wireless Facilities on new poles in the public rights-of-way located within the Borough's jurisdiction (the "Application").<sup>19</sup>

24. Because the Application was for Small Wireless Facilities to be installed on or new poles to be placed in the public rights-of-way located with the Borough's jurisdiction, they are considered as the deployment of a Small Wireless Facility using a 'new structure' under FCC rules and regulations and, therefore, are subject to the ninety day shot clock. 47 C.F.R. § 1.6003(c)(1)(iii).

25. In support of the Application, Cellco submitted the following documents to the Borough Clerk:

- a. Minor Land Use Application with Addendum list of nineteen (19) proposed facilities.
- b. Engineering Plans.
- c. Foundation design analysis.
- d. Electromagnetic exposure certifications for each of the proposed 18 facilities.
- e. One photo simulation representing all of the proposed facilities.
- f. Radio frequency report with network and coverage Map, location map and related statements.

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<sup>19</sup> Each of the proposed facilities met the definition of a Small Wireless Facility. 47 C.F.R. § 1.6002(1).



- g. Copies of CAFRA applications for each of the proposed facilities.
- h. Draft 200' radius notification letter.
- i. Draft master license agreement.
- j. Check in the amount of \$950 (\$50/location) to cover the application fee.

Check in the amount of \$5,000 to cover the escrow deposit.

26. Defendants did not respond in writing to Cellco within the first 10 days identifying that any information was missing in the Application.

27. By letter dated February 23, 2021, Borough Engineer John J. Freda, P.E., requested further information from Plaintiff which was promptly provided.

28. Defendants did not approve, deny or take any formal action in relation to the Application by the 90<sup>th</sup> day following Cellco's submission of same, i.e. by April 13, 2021.

29. Defendants did not take any official action on Plaintiff's Application within the ninety (90) day Shot Clock required by 47 C.F.R. § 1.6003(c)(1)(ii).

30. Cellco offered to enter into a tolling agreement with Defendants with the hope that with additional time this matter could be resolved amicably, without litigation, but the parties were unable to agree upon the terms of same.

31. Plaintiff has filed this action within 30 days of Defendants' action, or failure to act, upon Plaintiff's Application and therefore this action filed on this date is timely.

32. Under Sections 253(a) and 332(c)(7)(B) of the Act, Cellco is entitled to injunctive and declaratory relief permitting it access to the public rights-of-way set forth in the Application to construct its personal wireless service facilities under the Act.

**JURISDICTION AND VENUE**

33. This Court has subject matter jurisdiction over this action pursuant to: (a) 47 U.S.C. §§ 253 and 332(c)(7)(B) of the Act because Cellco has been adversely affected and aggrieved by Defendants' actions in violation of those provisions of the Act; and (b) 28 U.S.C. § 1331 because this is a civil action that presents federal questions arising under the Act.

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

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

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

**EXPEDITED PROCEEDING**

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

**THE PARTIES**

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

39. Cellco is licensed by the FCC as a personal communications services provider.

40. Cellco uses Small Wireless Facilities to assist in providing wireless telecommunications services to retail consumers.

41. Defendant Borough of Belmar, New Jersey is a municipal corporation duly organized under the laws of the State of New Jersey with a principal place of business at 601 Main Street, Belmar, New Jersey 07719 in the County of Monmouth.

42. Upon information and belief, Defendants The Mayor and Council of the Borough of Belmar is the local governing body of the Borough, with authority under federal, New Jersey and local laws to manage access to public rights of way for equipment used in the provision of telecommunications services and maintains its principal place of business at 601 Main Street, Belmar, New Jersey 07719 in the County of Monmouth.

43. Upon information and belief, Defendant, Mayor Mark Walsifer, in his official capacity and not as an individual, is a member of Defendant The Mayor and Council of the Borough of Belmar, New Jersey with his principal place of business at 601 Main Street, Belmar, New Jersey 07719 in the County of Monmouth.

44. Upon information and belief, Councilman Thomas Brennan, in his official capacity and not as an individual, is a member of Defendant The Mayor and Council of the Borough of Belmar with his principal place of business at 601 Main Street, Belmar, New Jersey 07719 in the County of Monmouth.

45. Upon information and belief, Councilman James McCracken, in his official capacity and not as an individual, is a member of Defendant The Mayor and Council of the

Borough of Belmar with his principal place of business at 601 Main Street, Belmar, New Jersey 07719 in the County of Monmouth.

46. Upon information and belief, Councilwoman Pat Wann, in her official capacity and not as an individual, is a member of Defendant The Mayor and Council of the Borough of Belmar, with her principal place of business at 601 Main Street, Belmar, New Jersey 07719 in the County of Monmouth.

47. Upon information and belief, Councilman Tom Carvelli, in his official capacity and not as an individual, is a member of Defendant The Mayor and Council of the Borough of Belmar with his principal place of business at 601 Main Street, Belmar, New Jersey 07719 in the County of Monmouth.

**FACTS COMMON TO ALL COUNTS**

48. On January 13, 2021, Cellco submitted the Application to the Borough for approvals necessary to construct nineteen (19) Small Wireless Facilities on new poles in the public rights-of-way located in the Borough.

49. The locations of Cellco's proposed Small Wireless Facilities are as follows:

Site Name	Approx Address	Latitude	Longitude	B/L
JS BELMAR BOARDWALK 01 SC	100 Ocean Ave	40.185927	-74.010367	3/1
JS BELMAR BOARDWALK 02 SC	201 Ocean Ave	40.184897	-74.010748	3/3
JS BELMAR BOARDWALK 03 SC	205 Ocean Ave	40.18403	-74.011067	3/3
JS BELMAR BOARDWALK 04 SC	313 Ocean Ave	40.182918	-74.011453	3/3
JS BELMAR BOARDWALK 05 SC	500 Ocean Ave	40.181686	-74.011907	3/3
JS BELMAR BOARDWALK 06 SC	512 Ocean Ave	40.181053	-74.012169	3/3
JS BELMAR BOARDWALK 07 SC	605 Ocean Ave	40.179894	-74.01255	3/3
JS BELMAR BOARDWALK 08 SC	711 Ocean Ave	40.178916	-74.012898	3/3
JS BELMAR BOARDWALK 09 SC	900 Ocean Ave	40.177888	-74.013277	3/3
JS BELMAR BOARDWALK 10 SC	906 Ocean Ave	40.176846	-74.013645	3/3
JS BELMAR BOARDWALK 11 SC	1100 Ocean Ave	40.175784	-74.014036	3/3
JS BELMAR BOARDWALK 13 SC	1206 Ocean Ave	40.174192	-74.0146	3/3
JS BELMAR BOARDWALK 14 SC	1401 Ocean Ave	40.173512	-74.014855	3/3
JS BELMAR BOARDWALK 15 SC	1409 Ocean Ave	40.172832	-74.015103	3/3
JS BELMAR BOARDWALK 16 SC	1501 Ocean Ave	40.172144	-74.015339	3/3
JS BELMAR BOARDWALK 17 SC	1609 Ocean Ave	40.171461	-74.015597	3/3
JS BELMAR BOARDWALK 19 SC	1813 Ocean Ave	40.169621	-74.01626	3/3
JS BELMAR BOARDWALK 20 SC	2000 Ocean Ave	40.16851	-74.016665	3/3
JS BELMAR BOARDWALK 21 SC	1110 Ocean Ave	40.174904	-74.014374	3/3

50. Prior to filing the Application, Cellco had numerous discussions with representatives of the Borough regarding the Applications that spanned well over one year.

51. According to the FCC's Third Report and Order, Cellco's filing of the Application with the Borough, started the formal application process and the "FCC Shot Clock."

52. Cellco's Application consisted of proposed Small Wireless Facilities using a 'new structure' under FCC rules and regulations and, therefore, the Borough is subject to the ninety (90) day shot clock. 47 C.F.R. § 1.6003(c)(1)(iii).

53. Pursuant to the FCC's rules, Defendants had ninety (90) days from the date of submission of the Application to approve or reject the Application and, if approved, issue any necessary approvals and permits to Cellco.

54. This ninety (90) day shot clock expired on April 13, 2021.

55. The Borough did not notify Cellco that the Application was incomplete, as required pursuant to 47 C.F.R. § 1.6003(d)(1) to allow Defendants to toll the Shot Clock.

56. The Borough has not acted on the Application before or since April 13, 2021.

57. Pursuant to 47 U.S.C. § 332(c)(7)(B)(v), this Action is timely filed within thirty (30) days of the Defendants' April 13, 2021, failure to act.

### **COUNT I**

#### **(Unreasonable Delay and Failure to Act on the Applications in Violation of 47 U.S.C. § 332(c)(7)(B)(ii), the Shot Clock Order and the Third Report and Order)**

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

59. 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 service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.”

60. Pursuant to 47 C.F.R §1.6003(a), “a siting authority that fails to act on a siting application on or before the shot clock date for the application . . . is presumed not to have acted within a reasonable period of time.”

61. The Applications submitted by Cellco constitute a request for the placement of Small Wireless Facilities and, as such, Cellco is entitled to the benefits and protections of the Act, FCC Orders, and the FCC’s Rules and Regulations with respect to the Application.

62. Based on information and belief, each of the facilities referenced in the Applications are within the public rights-of-way owned or under the jurisdiction of the Borough.

63. Pursuant to 47 C.F.R. § 1.6003(d), a determination of incompleteness of a siting application tolls the shot clock only if the State or local government or instrumentality thereof provides notice to the applicant in writing within ten (10) days of the submission of the application, specifically identifying all missing information, and specifying any code provision, ordinance, application instruction, or otherwise publicly-stated procedures that require the information to be submitted.

64. If the State or local government or instrumentality thereof does not respond in writing within the first ten (10) days of submission of a siting application, and fails to specifically identify what, if any, information is missing, the shot clock is not tolled. *Id.*

65. Neither the Borough nor anyone acting on the Borough's behalf notified Cellco in writing within ten (10) days of submission of the Application of any missing information from the Application.

66. Pursuant to 47 C.F.R. § 1.6003(c), the Borough was required to act on Cellco's Applications within 90 days of submission, or no later than April 13, 2021.

67. The Borough has not taken official action to either approved or rejected Cellco's Applications.

68. Defendants' failure to meet the applicable timeframe presumptively constitutes a failure to act under Section 332(c)(7)(B)(v), enabling Cellco as applicant to pursue judicial relief.

69. In the Third Report and Order, the FCC specifically found:

State or local inaction by the end of the Small Wireless Facility shot clock will function not only as a Section 332(c)(7)(B)(v) failure to act but also amount to a presumptive prohibition on the provision of personal wireless services within the meaning of Section 332(c)(7)(B)(i)(II). Accordingly, we would expect the state or local government to issue all necessary permits without further delay. In

cases where such action is not taken, we assume, for the reasons discussed below, that the applicant would have a straightforward case for obtaining expedited relief in court.<sup>20</sup>

70. Cellco has commenced this action within thirty (30) days of Defendants' failure to act under the shot clock.

71. The Applications have been pending for more than the requisite ninety (90) days, and the Defendants have failed to take final (or any) action on them.

72. The Defendants' unreasonable delay has included, without limitation:

- a) the failure to request any purported missing information from the Applications within ten (10) days of submission of the Applications; and,
- b) the failure to take final action within the "shot clock" timeframe codified in 47 C.F.R. § 16003.

73. Defendants' failure to act has delayed and prevented Cellco from securing the necessary approvals and permits to construct and install Small Wireless Facilities in the public right-of-way located in the Borough.

74. By its acts and omissions, Defendants have violated 47 U.S.C. § 332(c)(7)(B)(ii), as authoritatively interpreted by the FCC and codified in the Code of Federal Regulations.

75. Under the circumstances, Cellco is entitled to permanent injunctive relief through an order and judgment granting Cellco's Applications and ordering that Defendants: 1) issue all necessary permits, and, 2) authorize Cellco to immediately begin the necessary work to deploy its infrastructure in the public rights-of-way.

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<sup>20</sup> Third Report and Order at p. 9,148, ¶ 118.



**COUNT II**  
**(Unlawful Prohibition on Provision of Personal  
Wireless Services in Violation of 47 U.S.C. § 332(c)(7)(B)(i)(II))**

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

77. Section 332(c)(7)(B)(i)(II) of the Act 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.”

78. Under the FCC’s Third Report and Order,

failing to issue a decision up or down during this time is not simply a “failure to act” within the meaning of applicable law. Rather, missing the deadline also constitutes a presumptive prohibition. We would thus expect any locality that misses the deadline to issue any necessary permits or authorizations without further delay. We also anticipate that a provider would have a strong case for quickly obtaining an injunction from a court that compels the issuance of all permits in these types of cases.<sup>21</sup>

79. Pursuant to the FCC’s rulings, including the Third Report and Order, Defendants’ unreasonable delay and failure to act on the Applications within the 90-day shot clock period constitutes a presumptive prohibition under Section 332(c)(7)(B)(i)(II).

80. Defendants’ failure to act on the Applications had the effect of prohibiting Cellco from providing personal wireless services in violation of 47 U.S.C. § 332(c)(7)(B)(i)(II).

81. Under the circumstances, Cellco is entitled to permanent injunctive relief through an order and judgment granting Cellco’s Application and ordering that Defendants: 1) issue all

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<sup>21</sup> Third Report and Order, p. 9,092, ¶13.

necessary permits, and, 2) authorize Cellco to immediately begin the necessary work to deploy its infrastructure in the public rights-of-way.

**COUNT III**

**(For Prohibition of Services and Bar to Entry in Violation of 47 U.S.C. § 253(a))**

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

83. 47 U.S.C. § 253(a) provides that “No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”

84. 47 U.S.C. § 253(a) applies to a State or local government’s failure to act, which unreasonably delays deployment of a provider’s personal wireless service facilities and provision of telecommunications services.

85. Cellco has been attempting to exercise its right to access the public rights-of-way under exclusive control of the Borough to provide telecommunications services.

86. The Borough has unreasonably delayed acting on Cellco’s Application seeking authorization to install Small Wireless Facilities in the public rights-of-way under the jurisdiction of the Borough.

87. The Borough’s failure to act on the Application constitutes an unreasonable ongoing delay which has had the effect of prohibiting the ability of Cellco to provide personal wireless facilities and telecommunications services in violation of 47 U.S.C. § 253(a).

88. Cellco has suffered and will continue to suffer irreparable harm as a result of Defendants’ failure to act on the Application and the resulting delay to Cellco’s infrastructure deployment within the public rights-of-way under the jurisdiction of Defendants.

89. Under the circumstances, Cellco is entitled to permanent injunctive relief through an order and judgment granting Cellco's Applications and declaring that Defendants: 1) issue all necessary permits, 2) authorize Cellco to immediately begin the necessary work to deploy its infrastructure in the public rights-of-way.

**COUNT IV**  
**(For Declaratory Relief and Permanent Injunction)**

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

91. A present and actual controversy has arisen and now exists between the parties regarding their respective legal rights and duties. Cellco contends that the Defendants' actions and omissions are in violation of the Act, the Shot Clock Order, the 2014 FCC Order, and the Third Report and Order. Upon information and belief, the Defendants deny such allegations.

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

93. Accordingly, declaratory relief is appropriate and necessary to adjudicate the extent of Cellco's rights and the Defendants' obligations and authority.

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

95. The harm caused by the Defendants' actions and omissions includes, but is not limited to, an effective prohibition on Cellco's ability to provide necessary personal wireless services in parts of the Borough, and unreasonable delay in taking final (and any) action on the Application, all impairing Cellco's (a) ability to provide the public with reliable wireless

telecommunications service; (b) ability to compete with other providers of telecommunications services; (c) full use of its existing FCC telecommunications authorizations, and or licenses and business investments; and (d) good will and business reputation.

96. Cellco has a likelihood of success on the merits because it is entitled to access public rights-of-way under Federal law and there is no reasonable justification for Defendants' failure to act on Cellco's Applications to install Small Wireless Facilities in the public rights-of-way.

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

98. Given that the matter in dispute is Defendants' failure to grants approvals and permits to authorize Cellco to install Small Wireless Facilities in the public rights-of-way, Cellco cannot be made completely whole by damages and has no other adequate remedy at law other than the Court ordering that the Applications be deemed granted or by the Court compelling Defendants to grant Cellco's Applications.

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

100. In contrast, Defendants have failed to act as required by Federal law.

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

102. As such, Cellco is entitled to a judgment and order of permanent injunction compelling Defendants to issue permits and any other approvals required to allow Cellco to install Small Wireless Facilities in the public rights-of-way that are the subject of this Action.

**PRAYER FOR RELIEF**

**WHEREFORE**, Cellco respectfully requests that, pursuant to 47 U.S.C. § 332(c)(7)(B)(v), the Court hear and decide this action on an expedited basis, and issue an Order and Judgment in its favor as follows:

- a) finding and declaring that Defendants' failure to act upon Cellco's Application within a reasonable time constitutes a violation of 47 U.S.C. § 332(c)(7)(B)(ii);
- b) finding and declaring that Defendants' failure to act upon Cellco's Application within a reasonable time, pursuant to 47 C.F.R §1.6003(c), amounts to an illegal and unreasonable delay in violation of 47 U.S.C. § 332(c)(7)(B)(ii);
- c) finding and declaring that Defendants' failure to act upon Cellco's Application have prohibited or had the effect of prohibiting Cellco from providing personal wireless services in violation of 47 U.S.C. § 253(a) and 47 U.S.C. § 332(c)(7)(B)(i)(II);
- d) granting the Applications and issuing an order mandating or an order requiring that Defendants immediately issue all approvals, necessary permits and authorizations for Cellco to immediately install Small Wireless Facilities in the

- Borough controlled public-rights-of-way as set forth in the Application;
- e) awarding Cellco its damages, reasonable attorneys' fees, costs, disbursements, and other expenses of this action as permitted by law; and
  - f) granting such other and further relief as the Court deems just and proper.

Respectfully submitted,

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May 10, 2021

**L. CIV. R. 11.2 CERTIFICATION**

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

PRICE, MEESE SHULMAN & D'ARMINIO, P.C.

May 10, 2021

By: /s/ Gregory D. Meese

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