UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW CINGULAR WIRELESS PCS, LLC
D/B/A AT&T MOBILITY,

Plaintiff,

v. **20-CV-1388 (NAM/ATB)**

THE TOWN OF COLONIE,

Defendant.

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Hon. Norman A. Mordue, Senior United States District Court Judge:

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiff New Cingular Wireless PCS, LLC D/B/A AT&T Mobility ("Plaintiff" or "AT&T") brings this action pursuant to the Telecommunications Act of 1996 ("TCA") against the Town of Colonie ("Defendant" or the "Town") regarding the proposed placement of a single small cell wireless facility on a utility pole in Albany, New York. (Dkt. No. 1). Now before

the Court are: 1) Defendant's partial motion to dismiss the Complaint; and 2) Plaintiff's cross-motion for summary judgment.[1] (Dkt. Nos. 14, 19). The parties have also filed responsive papers. (Dkt. Nos. 22–23). For the reasons set forth below, Defendant's motion to dismiss is denied and Plaintiff's cross-motion for summary judgment is granted in part.

II. BACKGROUND

A. Facts[2]

Plaintiff AT&T is a Federal Communications Commission ("FCC") licensed wireless carrier that provides both telecommunications services and personal wireless services. (Dkt. No. 19-15, ¶ 1). Small cell wireless facilities ("small cells") are a low-profile, low-power type of wireless facility that are used to improve signal quality and capacity within wireless networks. (*Id.*, ¶ 2). Small cells typically consist of short antennas and supporting equipment that are attached to utility poles and other structures in public rights-of-way. (*Id.*, ¶ 4).

On August 13, 2020, Plaintiff submitted to the Town an application for any and all permits and authorizations required to construct one small cell facility. (Dkt. No. 19-2). The application was addressed to Sean M. Maguire, Director of the Town's Planning & Economic Development Department ("PEDD"), and John H. Cunningham, Commissioner of the Town's Department of Public Works ("DPW"). (*Id.*). The proposed small cell facility consisted of an approximately two-foot-tall antenna and a compact equipment cabinet to be mounted on a utility pole owned by National Grid, located at 782 Watervliet Shaker Road in Albany. (*Id.*). The

[1] This case was reassigned to the undersigned on February 8, 2022. (Dkt. No. 28).

[2] The facts have been drawn from Plaintiff's Statement of Undisputed Facts (Dkt. No. 19-15), Defendant's Response & Counterstatement of Material Facts, (Dkt. No. 22-2), and the parties' attached exhibits to the extent that they are in admissible form.

purpose of this small cell facility was to "help AT&T provide and improve critical wireless services in a business area adjacent to the Albany International Airport." (*Id.*).

As part of the application, Plaintiff attached the following documents: 1) project drawings and utility pole attachment construction drawings signed and stamped by a professional engineer; 2) antenna and equipment specification sheets; 3) a utility pole structural analysis report; 4) a radio frequency safety survey prediction report; 5) evidence of a National Grid pole attachment agreement and consent to file for permits; 6) a copy of Plaintiff's FCC licenses; 7) construction cost estimates; 8) contractor certificates of insurance; and 9) a check in the amount of $500.00. (*Id.*).

On September 4, 2020, Wayne Spenziero, Defendant's Building Inspector, sent an email to Roseanne Aikens, Plaintiff's Site Acquisition Manager, informing AT&T that its application was "incomplete and has not been accepted at this time." (Dkt. No. 19-5). Spenziero stated that he had not received the application until September 2, 2020 because it was "addressed to another department." (*Id.*). Spenziero also asked for and/or stated the following:

1) Please send an additional escrow check of $4500.00 payable to the Town of Colonie Building Department.

2) The shot clock does not start until escrow has been received.

3) The above referenced address will require a Special Use Permit (WTSUP) to the Town of Colonie Zoning Board of Appeals.

4) In order to start the process for a Special Use Permit and eventual Building Permit, please contact Dick Comi, the Town of Colonie's wireless consultant . . .

5) Please submit a commercial zoning verification (attached) with three stamped site plans [and a] check payable to the Town of Colonie Building Department [in the amount of] [$]205.00 . . .

6) The fee for a [S]pecial Use Permit to the [Zoning Board of Appeals] for [a] small cell will be $3500.00.

(*Id.*, p. 2).

On September 8, 2020, Plaintiff (via its siting consultant) sent an email to Spenziero, Maguire, and Cunningham, informing them of AT&T's position that the 60-day Shot Clock for its application was still running. (Dkt. No. 19-6). Plaintiff also suggested that the Town's attorney be consulted on whether Chapter 189 of the Town Code should be applied to Plaintiff's small cell application. (*Id.*). Some correspondence followed between Plaintiff's counsel and the Town's attorney, but they were unable to resolve the matter. (Dkt. No. 19-9). As a result, the project did not go forward. (Dkt. No. 19-15, ¶¶ 66–68).

According to Richard Comi, the Town's wireless consultant, Plaintiff's application was not "duly submitted" to the Town because Plaintiff "refused to provide the consultant escrow fee and file the special use permit requirements under the Town's local law." (Dkt. No. 22-1, ¶ 35). Comi's consulting company is paid to review applications to assess: 1) the structural integrity of the pole/apparatus to which the antenna is attached; 2) the effect of ice and wind loads on the structure and cabinet/antenna; 3) the adequacy of the design of the structure used to support the cabinet/antenna; 4) the adequacy of the proposed foundation for the facility as a factor of the total load the foundation will be required to handle; 5) Radiofrequency ("RF") emissions that might affect public safety; and 6) aesthetic and camouflaging concerns. (*Id.*, ¶¶ 19–21, 30).

B. Regulatory Framework

The TCA requires State and local governments to "act on any request for authorization to place, construct, or modify personal wireless services facilities within a reasonable period of

time after the request is duly filed with [the relevant] government or instrumentality, taking into account the nature and scope of such request." 47 U.S.C. § 332(c)(7)(B)(ii). Any decision by a State or local government "to deny a request to place, construct, or modify personal wireless facilities shall be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). Any person adversely affected by a "final action or failure to act" by a State or local government regarding the regulation of such facilities may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. 47 U.S.C. § 332(c)(7)(B)(v).

The "Shot Clock" for action on a siting application for a wireless facility is the sum of: 1) the number of days of the presumptively reasonable period of time for the relevant type of application; and 2) the number of days of the tolling period, if any. *See* 47 C.F.R §1.6003(b). As relevant here, the FCC has established that the presumptively reasonable period of time for action on an application seeking to co-locate a small cell wireless facility using an existing structure is 60 days.[3] 47 C.F.R §1.6003(c)(1)(i). A small cell wireless facility is generally one mounted on a structure less than 50 feet in height, with a short antenna. 47 C.F.R §1.6002(l).

In a 2018 Rulemaking Statement, the FCC explained that regulatory obstacles have threatened the rollout of the small cell facilities necessary to support 5G, the next generation of wireless services. In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv., 33 F.C.C. Rcd. 9088 (F.C.C. 2018) ("2018 Shot Clock Order").

[3] The Supreme Court has held that the FCC's declaratory rulings regarding reasonable time periods for action on wireless facility siting applications are entitled to deference pursuant to *Chevron, U.S.A., Inc. v. Nat. Resources Def. Council, Inc.*, 467 U.S. 837 (1984) because "Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication." *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 307 (2013).

5G services promise faster wireless communication, but they require a greater density of transmission facilities. *Id.*, ¶ 3. Wireless companies are now "increasingly looking to densify their networks with new small cell deployments that have antennas often no larger than a small backpack," as opposed to the "large, 200-foot towers that marked the 3G and 4G deployments of the past." *Id.* The FCC recognized that these smaller facilities do not implicate the same regulatory concerns as the larger facilities of old. *Id.* Therefore, the FCC set shorter Shot Clocks for small cells, rather than adopting a one-size fits all regime. *Id.*, ¶ 6. The FCC's goal was to "reduce regulatory barriers to the deployment of wireless infrastructure and to ensure that our nation remains the leader in advanced wireless services and wireless technology." *Id.*, ¶ 29.

The FCC has also made clear that the Shot Clocks' presumption of reasonableness can be rebutted by the State or local government based on the "actual circumstances they face." *See* 2018 Shot Clock Order, ¶¶ 109, 130. Further, State and local governments retain the authority to manage their public rights-of-way; they may require reasonable compensation to access their rights-of-way; and they may otherwise regulate the placement, construction, and modification of personal wireless facilities so long as their regulations do "not prohibit or have the effect of prohibiting the provision of personal wireless services." 47 U.S.C. §§ 253(a), (c); 47 U.S.C. § 332(c)(7)(B)(i)(II). The FCC has stated that the "materially inhibit" standard is the appropriate standard for determining whether a State or local law operates as a prohibition or effective prohibition within the meaning of Sections 253 and 332. 2018 Shot Clock Order, ¶¶ 10, 31.

C. Town of Colonie Laws

Chapter 173 of the Colonie Town Code ("Town Code") is entitled "Telecommunications Franchising and Use of Town Rights-of-Way." (Dkt. No. 19-11). The Town Code states that:

> No person shall install, construct, repair and/or maintain any equipment in the rights-of-way used to provide telecommunications services without first obtaining such permits or other authorizations as may be required by the Department of Public Works.

§ 173-5. Telecommunications Services are defined as "[a]ny telecommunications service provided by means of the telecommunications system of the franchisee or any affiliated person in accordance with applicable federal, state, and local law." § 173-2. Public rights-of-way are defined as the surface of (plus the space above and below) "any and all streets, alleyways, avenues, highways, boulevards, driveways, bridges, tunnels, parks, parkways, public grounds or waters, and any other public property or place belonging to the Town." *Id.*

Prior to the issuance of a permit for telecommunications services, an applicant must submit an application to the Town's Planning and Economic Development Department ("PEDD"), which is then forwarded to the Department of Public Works ("DPW"). § 173-6. An application must contain, at a minimum, the following: 1) contact information for the applicant; 2) a description of the proposed franchise or license area of the right-of-way and the portions thereof proposed to be used; 3) a proposed construction schedule; 4) plans showing the proposed location of the telecommunications systems and existing utilities; 5) ownership of the applicant and identification of affiliates; and 6) a cost estimate. § 173-6(C).

Chapter 173 identifies the factors the DPW may consider in evaluating an application as: 1) the willingness and ability of the applicant to pay any compensation required under Chapter 173; 2) the willingness and ability of the applicant to maintain Town property in good condition; 3) the extent to which uses of the rights-of-way may be adversely affected by the grant of a franchise or license; and 4) the willingness and ability of the applicant to meet construction,

physical requirements and Town highway and drainage standards and to abide by lawful conditions and requirements. § 173-7(A). Further, the Town "may reject any application which is incomplete or otherwise fails to comply with applicable law, ordinances, resolutions, rules, regulations and other directives of the Town and any federal, state or local authority having jurisdiction." § 173-8.

Chapter 189 of the Town Code is entitled the "Wireless Telecommunications Facilities Siting Law." (Dkt. No. 19-12, p. 2). Wireless telecommunications facility is defined as "[a] structure, facility, or location designed, or intended to be used as, or used to support antennas or other transmitting or receiving devices for transmitting and/or receiving . . . cellular services." § 189-4. Such facilities include "towers of all types and kinds" and "buildings, steeps, silos, water towers, signs or other structures that can be used as a support structure for antennas." § 189-4. Chapter 189 requires a wireless telecommunications special use permit for any new, co-location, or modification of a wireless telecommunications facility; an application for such a permit must be filed with the Town's Building Department. § 189-7. At the time when a person applies for a special use permit, they must pay a non-refundable application fee in an amount to be determined by the Town Board. § 189-17.

As part of its review process, the Town may hire a consultant or expert to assist with evaluating the application. § 189-15(A). An applicant for a special use permit must pay to the Town $8,500 for reasonable costs incurred by the consultant/expert, to be placed in escrow by the Town, and if any of this amount remains upon completion of the project, it shall be refunded to the applicant. § 189-15(B). Chapter 189 also sets forth several other procedural steps in the review process, including zoning verification and a public hearing. *See* § 189-7(A).

III. STANDARD OF REVIEW

Although Defendant originally moved to partially dismiss the Complaint, Plaintiff responded with a cross-motion for summary judgment, and the parties have now fully briefed their arguments based on the summary judgment standard. Therefore, the Court will review their arguments using that standard, and Defendant's motion to dismiss will be denied as moot.

Under Federal Rule of Civil Procedure 56(a), summary judgment may be granted only if all the submissions, taken together, "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). The moving party bears the initial burden of demonstrating "the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. A fact is "material" if it "might affect the outcome of the suit under the governing law," and is genuinely in dispute "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

If the moving party meets this burden, the nonmoving party must "set out specific facts showing a genuine issue for trial." *Anderson*, 477 U.S. at 248, 250. Further, "[w]hen no rational jury could find in favor of the nonmoving party because the evidence to support its case is so slight, there is no genuine issue of material fact and the grant of summary judgment is proper." *Gallo v. Prudential Residential Servs., Ltd. P'ship*, 22 F.3d 1219, 1224 (2d Cir. 1994) (citation omitted). "When ruling on a summary judgment motion, the district court must construe the facts in the light most favorable to the nonmoving party and must resolve all ambiguities and draw all reasonable inferences against the movant." *Dallas Aerospace, Inc. v.*

CIS Air Corp., 352 F.3d 775, 780 (2d Cir. 2003).

IV. DISCUSSION

Plaintiff asserts seven claims against Defendant:

1) "Unreasonable Delay and Failure to Act on the Application" in violation of 47 U.S.C. § 332(c)(7)(B)(ii) and related Regulations (Count 1);

2) "Unlawful Prohibition of Personal Wireless Services" in violation of 47 U.S.C. § 332(c)(7)(B)(i)(II) (Count 2);

3) "Preemption of Discriminatory and Revenue Based Non-Recurring Municipal Fees and Third-Party Consultant Costs" in violation of 47 U.S.C. § 253 (Count 3);

4) "Effective Prohibition of Services and a Discriminatory Bar to Entry" in violation of 47 U.S.C. § 253 (Count 4);

5) "Prohibition of Services Through a Town De Facto Moratorium on Small Wireless Facility Installations in Public Rights-of-Way" in violation of 47 U.S.C. § 253 (Count 5);

6) "State Constitutional Preemption and Violations of" New York State Transportation Corporations Law §§ 27, 31 ("Transportation Corporations Law") (Count 6); and

7) "To Strike Portions of the Town's Commercial Fee Schedule and Section 189-15 of the Wireless Siting Law as Illegal Local Taxes and in Excess of State Granted Authority" (Count 7).

(Dkt. No. 1).

A. Counts 1–4

Plaintiff's first four claims are closely intertwined, relating to Defendant's alleged inaction on Plaintiff's small cell application and Defendant's use of Chapter 189 of the Town Code. Defendant argues that Counts 1 and 2 should be dismissed for lack of subject matter jurisdiction because the Town did not violate the TCA's Shot Clock. (Dkt. No. 14-3, pp. 5–8;

Dkt. No. 22, pp. 5–8). Specifically, Defendant contends that Plaintiff's application was incomplete because it did not comply with Chapter 189 of the Town Code, and therefore, the Shot Clock never started to run. (*Id.*). Defendant also suggests that Counts 3 and 4 must fail because Plaintiff cannot maintain a facial challenge to Chapter 189. (Dkt. No. 14-3, pp. 12–14; Dkt. No. 22, p. 10).

In contrast, Plaintiff contends that the Town's failure to act on the application constitutes a Shot Clock violation. (Dkt. No. 19-16, p. 18). According to Plaintiff, the Shot Clock began to run when Plaintiff submitted its application on August 13, 2020, and thereafter, the Town failed to provide a deficiency notice within 10 days, did not act on the application within 60 days, and there was no tolling of the Shot Clock. (*Id.*, pp. 18–20). Relatedly, Plaintiff argues that Defendant's application of Chapter 189 to small cells in the public right-of-way is unreasonable, unlawful, and preempted by the TCA. (*Id.*, pp. 22–29).

1. Shot Clock Starting Time

First, the record shows that on August 13, 2020, Plaintiff submitted its application for a small cell facility to the Town's relevant agencies, the DPW and PEDD. (Dkt. No. 19-1, ¶ 4; Dkt. No. 19-2, p. 2). Although the Town's Building Inspector said that he did not receive the application until September 2nd because it was sent to the wrong department, (Dkt. No. 19-5), the Town's laws specify that Chapter 173 applications are to be submitted to the PEDD, which forwards them to the DPW. § 173-6. This timeline thus supports a finding that the Shot Clock began to run on August 13, 2020.

Nonetheless, Defendant argues that the Shot Clock did not start because the application was never fully or "duly" submitted because Plaintiff did not include consultant fees and a

special use permit application required by Chapter 189 of the Town Code. (Dkt. No. 22, p. 7). But this interpretation squarely contradicts the FCC's statement that "a shot clock begins to run when an application is first submitted, not when the application is deemed complete." 2018 Shot Clock Order, ¶ 141. Further, the Town's application of Chapter 189 to a small cell in this case is at odds with the language and purpose of the TCA.

The TCA generally seeks to balance two aims: 1) promoting the public interest in rapidly expanding access to wireless services; and 2) preserving a role for local government to regulate wireless facilities. 2018 Shot Clock Order, ¶ 135. Thus, the TCA allows locals governments to retain decision-making authority over applications for wireless facilities but requires action within a reasonable period of time. 47 U.S.C. § 332(c)(7)(B)(ii). What is reasonable depends upon the "nature and scope" of the request. *Id.* As relevant here, the presumptively reasonable period of time for local government to act on an application seeking to co-locate a small cell using an existing structure, in this case a utility pole, is 60 days.[4] 47 C.F.R §1.6003(c)(1)(i).

Notably, Chapter 189 makes no mention of small cell facilities. Rather, Chapter 189 aims to provide a "single, comprehensive, wireless telecommunications facilities application and permit process," § 189-2, just the sort of one-size fits all scheme the FCC counsels against. Further, Chapter 189 appears to be geared toward the large facilities common in 2009, when the law was adopted. Among other things, Chapter 189 requires that an applicant deposit with the Town $8,500 for any project, which may be used to retain an expert/consultant to assist with reviewing the application. § 189-15. Chapter 189 also requires an application fee, § 189-17,

[4] Although Plaintiff's application proposed attaching the small cell to a replacement utility pole, there is no dispute that the utility pole constituted an "existing structure" for purposes of the 60-day Shot Clock.

which in this case was $3,500. (Dkt. No. 19-5). In addition, applicants must obtain a zoning verification from the Building Department and submit to a public hearing before any permit can be approved. § 189-7(A).

However, the FCC has recognized that regulatory concerns differ markedly between small cell facilities used to deploy 5G wireless networks and the large towers that marked the 3G and 4G deployments of the past. *See* 2018 Shot Clock Order, ¶¶ 3–4. In particular, the latter implicated safety and aesthetic concerns that called for close scrutiny and public comment. The specter of a 200-foot blinking tower looming over a picturesque small town comes to mind. Small cells, on the other hand, often have antennae no larger than a small backpack and are readily affixed to existing utility poles with little or no structural concerns or "risk of adverse effects on the environment or historic preservation." *Id.*, ¶ 40. For these reasons, the FCC set a shorter Shot Clock for small cells versus other wireless facilities and established a presumptively reasonable fee of $500 for small cell applications. *Id.*, ¶¶ 79–80. But Chapter 189 fails to recognize this distinction, setting up fees and procedural steps that do not adequately account for the "nature and scope" of different requests, and which are fundamentally inconsistent with the FCC's goal of speeding up the rollout of small cells and 5G services. Thus, for a single small cell to be placed on an existing utility pole in the Town of Colonie, an applicant must go through a gauntlet of costly red tape. And given the density of small cells needed for 5G services, an applicant would have to repeat this arduous process over and over again.

Under these circumstances, the Court finds that Chapter 189 of the Town Code, as applied to a single small cell facility on an existing structure in a public right-of-way, materially inhibits Plaintiff's efforts to improve its services, and therefore, effectively prohibits the

provision of personal wireless services in violation of 47 U.S.C. § 332(c)(7)(B)(i)(II).[5] For the same reasons, the Court finds that the Town wrongfully invoked Chapter 189 before accepting Plaintiff's application, and the Shot Clock began on August 13, 2020, when Plaintiff delivered its application to the DPW and PEDD.[6] *See also* 2018 Shot Clock Order, ¶ 134 ("A narrow reading of the scope of Section 332 would frustrate [the purpose of the TCA to rapidly deploy new wireless facilities] by allowing local governments to erect impediments to the deployment of personal wireless services facilities by using or creating other forms of authorizations outside of the scope of Section 332(c) (7)(B)(ii).").

2. Shot Clock Expiration

Once the Shot Clock began to run on August 13, 2020, the Regulations required Defendant to either: 1) send Plaintiff a deficiency notice within 10 days; 2) issue a decision within 60 days; 3) or seek an agreement for tolling the Shot Clock. The undisputed facts show that Defendant did none of the above. First, the email sent by Defendant's Building Inspector on September 4, 2020 was not timely, as the Shot Clock started to run more than 10 days earlier. (Dkt. No. 19-5, p. 2). Second, that email did not identify substantive deficiencies supported by specific rules and regulations, as required by 47 C.F.R. § 1.6003(d)(1). Thus, the September 4th email did not toll the Shot Clock. Further, the parties did not agree to any tolling of the Shot

[5] The FCC has clarified that the effective prohibition test "is met not only when filling a coverage gap but also when densifying a wireless network, introducing new services or otherwise improving service capabilities." 2018 Shot Clock Order, ¶ 37.

[6] Although Defendant argues that issues of fact "exist with regard to the reasonableness of the fees charged by the Town of Colonie with respect to Plaintiff's application," (Dkt. No. 22, p. 11), the Court has found as a matter of law that Chapter 189's *combination* of procedural obstacles and high fees, applied to a single small cell in a public right-of-way, violates the TCA. Put another way, Defendant was preempted by federal law from using Chapter 189 to review Plaintiff's application.

Clock, even though Defendant offered. (Dkt. No. 19-1, ¶ 9). The Shot Clock continued to run and expired on October 12, 2020. It is undisputed that Defendant never acted on the application.

Since the presumptively reasonable 60-day Shot Clock expired without action, it is incumbent upon Defendant to rebut that presumption by showing why more time was needed to review Plaintiff's application. *See* 2018 Shot Clock Order, ¶¶ 109, 130. The FCC has stated that only "extraordinary circumstances" would excuse a Shot Clock violation. *Id.*, ¶¶ 115, 120. Here, Defendant has not adduced any such evidence. Defendant suggests that issues of fact exist as to "how the pandemic affected the application process, and whether the Town can rebut the presumption given the underlying circumstances." (Dkt. No. 22, p. 9). But speculation and argument are not evidence. Indeed, the only evidence submitted by Defendant is the declaration of its wireless consultant, Richard Comi. (Dkt. No. 22-1). And Comi does not provide any extraordinary reasons that required extra time to review Plaintiff's application. He simply identifies aspects of small cell technology that were accounted for in the 2018 Shot Clock Order. Further, Plaintiff's application included professional reports on structural analysis and radio frequency safety, (Dkt. No. 19-2, pp. 26, 33), which are not challenged by Defendant. The Court therefore finds that Plaintiff has failed to rebut the 60-day presumption of reasonableness.

In sum, the undisputed facts show that the Shot Clock for Plaintiff's application began on August 13, 2020 and expired on October 12, 2020, without any action by Defendant. Accordingly, Plaintiff is entitled to summary judgment on its claim that Defendant failed to act

on its small cell application, in violation of 47 U.S.C. § 332(c)(7)(B)(ii).[7] For the same reasons, Plaintiff is also entitled to summary judgment on its claims that Chapter 189 of the Town Code, as applied to a single small cell proposed for co-location on an existing structure in a public right-of-way, amounts to an effective prohibition on the provision of personal wireless services, in violation of 47 U.S.C. § 332(c)(7)(B)(i)(II) and 47 U.S.C. § 253(a). *See Upstate Cellular Network v. City of Auburn*, 257 F. Supp. 3d 309, 317 (N.D.N.Y. 2017) (granting summary judgment on the plaintiff's effective prohibition claim where the "defendant's failure to consider Verizon's Application had the effect of prohibiting wireless service within the City of Auburn in violation of the TCA").

3. Remedy

Having found violations of 47 U.S.C. §§ 253(a) and 332(c)(7)(B), the Court must determine the proper remedy. Plaintiff argues that it is entitled to an injunction directing the Town to issue the permits and authorizations for deployment of the proposed small cell facility. (Dkt. No. 19-16, p. 21). In response, Defendant contends that if Plaintiff is found entitled to relief, "the appropriate remedy is an order directing the Town to review the application within a specified period of time." (Dkt. No. 22, p. 15).

In general, to obtain a permanent injunction the movant must show: 1) success on the merits; and 2) irreparable harm if relief is not granted. *See Upstate Cellular Network*, 257 F. Supp. 3d at 317. Notably, "[c]ourts have consistently held that a mandatory injunction is an

[7] Defendant's failure to act on Plaintiff's small cell application supports subject matter jurisdiction pursuant to 47 U.S.C. § 332(c)(7)(B)(v). Further, the failure to act amounts to a "presumptive prohibition on the provision of personal wireless services within the meaning of Section 332(c)(7)(B)(i)(II)," *see* 2018 Shot Clock Order, ¶ 118, which Defendant has failed to rebut.

appropriate remedy for violations of the TCA." *Nextel Partners, Inc. v. Town of Amherst, NY*, 251 F. Supp. 2d 1187, 1200 (W.D.N.Y. 2003) (citing cases). The FCC has also stated that in the context of small wireless facilities, "the most appropriate remedy in typical cases involving a violation of Sections 332(c)(7)(B)(i)(II) and/or 332(c)(7)(B)(ii) is the award of injunctive relief in the form of an order to issue all necessary authorizations." 2018 Shot Clock Order, ¶ 123. Among other things, the FCC recognized that the public interest would likely favor injunctive relief because "the public would benefit if further delays in the deployment of such facilities—which a remand would certainly cause—are prevented." *Id.*

The Court finds that injunctive relief is appropriate in this case. First, Plaintiff has prevailed on the merits of its failure-to-act claim. Second, Plaintiff faces continuing irreparable harm if relief is not granted because remand to the Town would serve no useful purpose and would further delay Plaintiff's ability to provide personal wireless services in the area where the deployment is proposed. *See* 2018 Shot Clock Order, ¶ 123. The record shows that Plaintiff's application has already been delayed far too long, principally because the Town took an untenable position with respect to its review. Further, the application appears to be complete and fully compliant with the TCA, and Defendant has not identified any *substantive* deficiencies. Thus, any harm to the Town would be minimal because the only right of which it would be deprived by injunctive relief is the right to act on the application beyond a reasonable time, which is not a cognizable right at all. *Id.* Conversely, it is in the public interest to deploy the facility as soon as possible to improve wireless services.

Accordingly, the Town shall be ordered to immediately approve Plaintiff's application and issue all necessary permits and authorizations for the proposed small cell facility. *See also*

ExteNet Sys., Inc. v. Village of Plandome, No. 19 Civ. 7054, 2021 WL 4449453, at *23, 2021 U.S. Dist. LEXIS 186651, at *71 (E.D.N.Y. Sept. 29, 2021) (granting injunctive relief for TCA claim and ordering the defendant "to grant plaintiff's application and issue all necessary permits and authorizations for plaintiff to put its application into effect"); *Upstate Cellular Network*, 257 F. Supp. 3d at 318 (granting injunctive relief for TCA claim and ordering the defendants "to approve plaintiff's application and issue all applicable permits and/or approvals"); *Omnipoint Commun., Inc. v. Village of Tarrytown Plan. Bd.*, 302 F. Supp. 2d 205, 226 (S.D.N.Y. 2004) (granting injunctive relief for TCA claim and ordering the defendant to issue any and all approvals necessary for installation of the plaintiff's proposed wireless facility).

B. Remaining Claims

The Court declines to address Plaintiff's remaining claims that Chapter 189 is unlawful as applied to small cells in general and/or that Chapter 189's fee provisions should be stricken entirely. These claims exceed the narrow set of facts in this case, and the Court lacks an adequate evidentiary record to make a ruling. To be clear, this decision is limited to one specific *application* of Chapter 189 and does not reach its continued viability as a whole.

V. CONCLUSION

For these reasons, it is

ORDERED that Defendant's Partial Motion to Dismiss (Dkt. No. 14) is **DENIED as moot;** and it is further

ORDERED that Plaintiff's Cross-Motion for Summary Judgment (Dkt. No. 19) is **GRANTED in Plaintiff's favor on Counts 1–4, as set forth in this Order**; and it is further

ORDERED that Plaintiff's Cross-Motion is **otherwise DENIED**; and it is further

ORDERED that Defendant Town of Colonie shall immediately approve Plaintiff's application and issue all necessary permits and authorizations for the proposed small cell facility; and it is further

ORDERED that the Clerk provide a copy of this Memorandum-Decision and Order to the parties in accordance with the Local Rules of the Northern District of New York.

IT IS SO ORDERED.

March 31, 2022
Syracuse, New York

Norman A. Mordue
Senior U.S. District Judge