

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE**

----- X
Maine RSA # 1, Inc., which does business as US :
Cellular, :
:
Plaintiffs, :
vs. : Civil Action No. _____
The Town of Albion, Maine, :
Defendant. :
----- X

FIRST AMENDED COMPLAINT

1. Plaintiff is Maine RSA # 1, Inc., a Maine business corporation, doing business in Maine, and referred to herein, as “US Cellular” restates its Complaint dated July 7, 2010, by this First Amended Complaint and complains against Defendant as follows:

2. US Cellular brings this action because the Town of Albion, Maine (“Albion” or the “Town”) first failed to act, within a reasonable time, on US Cellular’s application to construct wireless antenna facilities (“Application”) on a parcel of land known as 17 Belfast Road in Albion, Maine (the “Property”), second, effectively prohibited US Cellular from provision of its wireless services because it denied the Application, and third, denied the Application without written decisions “supported by substantial evidence contained in a written record”.

3. The Town's failure to act on the Application violates Section 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. § 332(c)(7) (the "FCA"), effectively prohibiting US Cellular from providing personal wireless services in a significant portion of the Albion service area. US Cellular accordingly requests an injunction directing the Town to authorize construction of the proposed wireless antenna facility and associated equipment without further delay.

4. The Town's denial of the Application effectively prohibits US Cellular from providing its wireless services in violation of 47 U.S.C. § 332 (c) (7) (B) (i) (II).

5. The Town's denial of the Application without written decisions "supported by substantial evidence contained in a written record" violated 47 U.S.C. § 332 (c) (7) (B) (iii) .

PARTIES AND STANDING

6. US Cellular is licensed by the government of the United States of America to provide wireless telecommunications services in Kennebec County in the State of Maine.

7. US Cellular has been attempting to provide wireless services in Albion, and has been authorized by the owner of the Property to construct wireless antenna facilities thereon. US Cellular is aggrieved by both the Town's failure to timely act on the Application and its subsequent denials.

8. The Town is a municipal corporation having its principal place of business at 22 Main Street, Albion, Maine, 04910.

JURISDICTION AND VENUE

9. This civil action arises under a) Section 332(c)(7)(B)(v) of the FCA which provides that when a local government does not act within a “reasonable period of time under Section 332(c)(7)(B)(i)(II), and Section 332(c)(7)(B)(v); b) under Section 332 (c) (7) (B) (i) (II) for a local government’s effective prohibition of wireless services, and c) Section 332 (c) (7) (B) (iii) for a local government’s denial of an application by written decisions not “supported by substantial evidence contained in a written record”. Further, 47 U.S.C. § 332 (c)(7)(B)(ii) provides that “[a]ny person adversely affected by any final action or failure to act by a state or local government or instrumentality thereof that is inconsistent with this paragraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis.” 47 U.S.C. § 332(c)(7)(B)(v).

10. Jurisdiction is based on 28 U.S.C. § 1331 which grants this Court original jurisdiction over all civil actions arising under the laws or Constitution of the United States.

11. Venue is proper pursuant to 28 U.S.C. § 1391(b) (1), in that the Defendant is a municipality in this District and pursuant to 28 U.S.C. § 1391(b) (2), in that a substantial part of the events or omissions giving rise to the claim occurred here.

ALLEGATIONS COMMON TO ALL COUNTS

12. The FCA, as amended, was enacted to promote the rapid deployment in the United States of advanced communications systems, including personal wireless services (“PWS”). To that end, the statute provides that local government regulation may not prohibit or

have the effect of prohibiting the provision of PWS and imposes other substantive and procedural limits upon the ability of local governments to regulate PWS facilities.

13. US Cellular is a provider of wireless telecommunications services which are within the definition of PWS set forth at 47 U.S.C. § 332(c) (7) (C) (i). US Cellular is licensed by the FCC to provide PWS in the County of Kennebec, State of Maine.

14. US Cellular's PWS network requires deployment of antennas throughout the area to be covered, which are connected to receivers and transmitters that operate in a limited geographic area known as a "cell." US Cellular's portable telephones operate by transmitting and receiving low power radio frequency signals to and from these cell sites. The signals are transferred to and from ground telephone lines and routed to their destinations by sophisticated electronic equipment. The antennas, electronic equipment and associated facilities are referred to in the FCA as "personal wireless services facilities" ("PWS facilities"). See 47 U.S.C. § 332(c) (7) (C).

15. The size of the area served by each cell site is dependent on several factors, including the number of antennas used, the height at which the antennas are deployed, the topography of the land, vegetative cover and natural or man-made obstructions in the area. As customers move throughout the service area, the transmission from the portable unit is automatically transferred to the closest US Cellular facility without interruption in service, provided that there is overlapping coverage from the cells.

16. In order for US Cellular's PWS network to function properly, there must be some overlapping coverage between adjoining cells to allow for the transfer or "hand-off" of calls from one cell to another and to avoid disconnection or "dropped" calls. In other words, US Cellular's antennas must be strategically located within the targeted area in order to provide

sufficient radio frequency coverage, connectivity with surrounding sites, adequate service and adequate capacity. US Cellular's antennas also must be located high enough above ground level to allow transmission (or "propagation") of the radio frequency signals above trees, buildings and natural or man-made other structures that may obstruct the signals. Areas without adequate radio frequency coverage have substandard or no wireless service.

17. Albion is a municipality located approximately twenty-five miles northeast of Augusta, Maine. The Town includes business and residential areas, is transected by Maine Routes 9 and 137. It is an area in which actual and potential US Cellular customers live and work, and through which they travel.

18. US Cellular presently has a gap in its network coverage in the Town of Albion, and has been trying to find a way to close this gap. There is one other existing wireless facility in the Town, which went into service in June 2010, six months after US Cellular filed its application with the Town of Albion, but US Cellular conducted "drive tests" of that facility and determined that it could not provide adequate service or close the gap.

19. US Cellular searched the area for suitable sites and eventually determined that it could close its gap by constructing a 190-foot tall wireless telecommunications tower on the Property, located in the Town's Village District at 17 Belfast Road, Albion.

20. US Cellular entered into an agreement with the owner of the Property, pursuant to which US Cellular is authorized to construct a 190-foot tall tower.

21. The Town's Land Use Ordinance ("Ordinance") in Section II, F, 1 requires "wireless telecommunications facilities" to secure a site plan permit from the Town's Planning Board.

22. On January 11, 2010, US Cellular submitted an application to the Albion Planning Board in order to obtain the requirement of its proposed telecommunications facility on the Property.

23. On February 8, 2010, the Planning Board at public meeting voted to accept the Application as complete.

24. As of June 11, 2010, 150 days after US Cellular submitted its Application, the Albion Town Planning Board had failed to act on the Application, even though it had held a public hearing on April 14, 2010, and several other public meetings at which it reviewed the Application.

25. The Town's Land Use Ordinance, Section II(3)C requires the Planning Board to render its decision within 30 days after the public hearing on the Application .

26. As of July 7, 2010, less than 30 days after the 150 days from January 11, 2010 when US Cellular filed the Application, the Planning Board, had failed to make a decision regarding the Application.

27. The Planning Board finally acted on July 12, 2010, denying US Cellular's Application.

28. By a timely appeal to the Town's Board of Appeals dated July 29, 2010, US Cellular appealed the Planning Board's decision, by filing an administrative appeal pursuant to the Town's Land Use Ordinance, Section 11(7) and its Ordinance to Establish Town of Albion Board of Appeals.

29. In its appeal to the Board of Appeals, US Cellular claimed that the Planning Board erred in its determination that US Cellular had not satisfied Subsection 2 (b) 7 of the Land Use Ordinance's Section II (F) "wireless Telecommunication". US Cellular also argued that the

Planning Board had made at least six other procedural errors in its review and consideration of the Application.

30.. US Cellular explained to the Board of Appeals that it had satisfied the Planning Board's review criteria of the Land Use Ordinance stated in Subsection 2 (d).

31. US Cellular further argued to the Planning Board's denial of the Application was based on the Planning Board's incorrect interpretation of the Land Use Ordinance's requirement that an applicant reimburse the Town for expenses that it has incurred in reviewing an application.

32. Despite US Cellular's evidence, and despite the lack of any contrary evidence, the Board of Appeals denied US Cellular's administrative appeal in a written decision dated July 29, 2010, without sufficient findings of fact or conclusions of law as required by State statute.

AS AND FOR A FIRST CAUSE OF ACTION
VIOLATION OF 47 U.S.C. § 332 (c) (7) (B) (v)

33. US Cellular repeats, realleges and incorporates herein by reference the allegations of paragraphs 1 through 32 of this Complaint as though fully alleged herein.

34. The Town's failure to act on the Application "within a reasonable period of time" under Section 332(c)(7)(B)(i)(II) constitutes "a failure to act" under Section 332 (c)(7)(B)9v) permitting US Cellular to seek judicial relief pursuant to a Declaratory Ruling of the Federal Communications Commission, dated November 18, 2009, WT Docket No. 08-165.

35. US Cellular is accordingly entitled to an injunction directing the Town Planning Board to grant site plan approval for the Application for construction of its proposed telecommunications facility.

AS AND FOR A SECOND CAUSE OF ACTION,
VIOLATION OF 47 U.S.C. § 332 (c) (7) (B) (iii)

36. US Cellular repeats, realleges and incorporates herein by reference the allegations of paragraphs 1 through 35 of this Complaint as though fully alleged herein.

37. The Town's denial of authorization to US Cellular to construct the 190 foot wireless antenna facility was not "in writing and supported by substantial evidence contained in a written record" as required by the FCA, 47 U.S.C. § 332 (c) (7) (B) (iii).

38. US Cellular is accordingly entitled to an injunction directing the Town to grant either the Planning Board approval, as well as all other permits and approvals, necessary for construction and operation of its facilities to proceed.

AS AND FOR A THIRD CAUSE OF ACTION
VIOLATION OF 47 U.S.C. § 332 (c) (7) (B) (i) (II)

39. US Cellular repeats, realleges and incorporates herein by reference the allegations of paragraphs 1 through 38 of this Complaint as though fully alleged herein.

40. US Cellular has a significant gap in its network coverage in the Town which it will be unable to close because the Town has improperly denied the Application.

41. US Cellular accordingly is entitled to a declaration that the Town has effectively prohibited US Cellular's provision of wireless services and an injunction directing the Town to issue the Planning Board permit, as well as all other permits and approvals necessary, for construction and operation of its facility to proceed.

WHEREFORE, US Cellular respectfully requests that this Honorable Court issue the following relief on an expedited basis as required by 47 U.S.C. §332(c)(7)(B)(iv):

A. Declare that the Town failed to timely act on its application for permission to construct PWS facilities, and, therefore, has violated the FCA;

B. Declare that the Town has denied an application for permission to construct PWS facilities without written decisions “supported by substantial evidence contained in a written record” and, therefore, has violated the FCA;

C. Declare that the Town’s denial of US Cellular’s Application has effectively prohibited US Cellular from providing PWS and, therefore, has violated the FCA;

D. Issue an injunction ordering the Town and its instrumentalities immediately to issue the Planning Board permit, as well as all other approvals and permits necessary to allow construction and operation of the proposed facilities to begin without further delay; and,

E. Grant such other and further relief as justice and equity may require.

Dated: November 8, 2010

Respectfully submitted,

Maine RSA # 1, Inc.
a/k/a US Cellular

By its attorneys,

TRAFTON & MATZEN, LLP

By: /s/ Richard L. Trafton
Richard L. Trafton (Bar # 204)
(e-mail: rtrafton@traftonandmatzen.com)

/s/ Verne E. Paradie, Jr.
Verne E. Paradie, Jr. (Bar # 8929)
(e-mail: vparadie@traftonandmatzen.com)
P.O. Box 470
Auburn, Maine 04212
Telephone: (207) 784-4531