

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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<b>Pittsfield Cellular Telephone Company d/b/a</b>	)
<b>Verizon Wireless</b>	)
	)
<b>Plaintiff,</b>	)
	)
<b>v.</b>	)
	)
<b>Board of Health of the City of Pittsfield,</b>	)
<b>Massachusetts</b>	)
	)
<b>Defendants.</b>	)
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**COMPLAINT**

1. This is an action for declaratory judgment relief brought pursuant to Section 332 of the Telecommunications Act of 1996 (“TCA”), 47 U.S.C. § 332. Section 332(c)(7)(B)(iv) prohibits state and local governments from regulating a personal wireless service facility (“PWSF”) on the basis of perceived health effects of radiofrequency (“RF”) emissions, to the extent that the facility complies with Federal Communications Commission (“FCC”) regulations concerning such emissions. The defendant Pittsfield Board of Health (“Board”) violated this section of the TCA by issuing an order (the “Emergency Order”) to plaintiff Pittsfield Cellular Telephone Company d/b/a Verizon Wireless (“Verizon”) and its landlord requiring that Verizon cease and desist operating its lawfully constructed and lawfully operating PWSF at 877 South Street in Pittsfield, Massachusetts (the “Facility”). The Board improperly based its order on the premise that the RF emissions from the Facility have health effects and that state and local law give the Board authority to address those effects by requiring Verizon to shut down its tower, even though the Board recognized that the Facility complies with the TCA and the FCC

regulations. In fact, however, the TCA preempts the Board's authority to regulate the Facility on the basis of RF emissions. Therefore, the Emergency Order is unlawful, improper, and the relief this complaint requests in the form of a declaratory judgment is appropriate.

### **JURISDICTION AND VENUE**

2. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1331, as Plaintiff's claims arise under the laws of the United States, specifically 47 U.S.C. §332(c)(7)(B)(v), which provides that "any person adversely affected by any final action or failure to act by . . . local government or any instrumentality thereof" in violation of §332(c)(7)(B) may seek review "in any court of competent jurisdiction [and the] court shall hear and decide such action on an expedited basis." This Court also has jurisdiction over this action under 28 U.S.C. §1337(a), because the Federal Communications Act of 1934 and the TCA are Acts of Congress regulating commerce.

3. This Court has jurisdiction to order declaratory judgment relief under 28 U.S.C. §§2201 and 2202 because there is an actual controversy between the parties.

4. Venue is proper in the District of Massachusetts pursuant to 28 U.S.C. § 1391(b) because all of the Defendants reside in this District and all events or omissions giving rise to this action occurred within this District and the Facility is located in this District.

### **PARTIES**

5. Plaintiff Verizon is a Massachusetts general partnership with an office at 20 Alexander Drive, Wallingford, Connecticut, and with a principal place of business at 180 Washington Valley Road, Bedminster, New Jersey.

6. Defendant Board is an instrumentality of the City of Pittsfield, Massachusetts with an address of 100 North St., Pittsfield, Massachusetts. The Board has five members. The Mayor of the City appoints these members, subject to City Council approval.

7. Verizon provides Personal Wireless Services (“PWS”) as that term is defined in the TCA. The Federal Communications Commission (“FCC”) has licensed Verizon to provide service to the area that includes Pittsfield, Massachusetts using various bands of the radio spectrum.

8. Verizon’s network functions by exchanging low power signals between a user’s wireless device and a Verizon communications facility at a fixed location known as a PWS facility or a “cell site.” A cell site consists of one or more antennas and related radio and power equipment mounted on a building, tower, or other structure; a climate-controlled room, fenced off area or other enclosure that houses other radio and power equipment; and related cabling. Each cell site uses one or more radio spectrum bands licensed to Verizon and operates in compliance with FCC regulations. A cellular network like the one operated by Verizon is an interlinked system consisting of many individual cell sites, each serving a discrete geographic area or “cell.”

9. Connections to wireless network infrastructure, and the telecommunications and ancillary services offered over them, are a critical means by which Americans engage with each other, reach 911 emergency services, and obtain broadband data access to the Internet and a multitude of smartphone applications. Over 68% of adults and more than 79% of children live in households that do not have a landline telephone but do have at least one wireless telephone.<sup>1</sup> In 2018, 61.8% of Massachusetts households relied either exclusively or mostly on wireless for

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<sup>1</sup> Blumberg, Stephen J. and Julian V. Luke, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey*, Centers for Disease Control, Jan.-June 2021, Nat’l Center for Health Statistics, Nat’l Health Interview Survey Early Release Program (rel. 11/2021) available at <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless202111.pdf>.

their telephone service. Furthermore, 80% of 911 calls are made from wireless devices.<sup>2</sup> During the height of the COVID-19 pandemic, despite the fact that people were at home more than usual, there was a 24.3% increase in wireless voice traffic and a 19.6% increase in wireless data traffic.<sup>3</sup> In 2021, mobile wireless data usage per smartphone in North America was 14.6 GB per month, an increase of more than 30% in just one year.<sup>4</sup> This upward trend is expected to continue, as mobile data traffic per smartphone in North America is expected to reach 52 GB per month in 2027.<sup>5</sup>

10. The Facility is similar in design, function and operation to thousands of other tower-mounted facilities that Verizon operates in Massachusetts, throughout New England, and across the country. It consists of an array of panel antennas mounted near the top of a 115 foot tall tower with associated radio and power equipment on and adjacent to the tower, all within a fenced enclosure. Verizon leases the property containing the Facility and a utility and access easement from Farley White South Street, LLC (“Property Owner”).

11. After the City of Pittsfield properly issued to Verizon all required local zoning approvals and other required permits, Verizon began constructing the Facility in early 2020, and began operating it as part of the Verizon network on August 21, 2020.

12. After the Facility was constructed, however, the Board entertained allegations by certain members of the public who claimed that they or their family members were suffering from health issues that they attributed to RF emissions from the Facility. The Board discussed

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<sup>2</sup> NENA - The 9-1-1 Assoc., *9-1-1- Statistics*, available at <https://www.nena.org/page/911Statistics#:~:text=9%2D1%2D1%20Call%20Volume,more%20are%20from%20wireless%20devices>.

<sup>3</sup> CTIA, *The Wireless Industry, Industry Data* (2020 Wireless Use Surge) available at <https://www.ctia.org/the-wireless-industry/infographics-library>.

<sup>4</sup> Ericsson Mobility Report, at 39 (Nov. 2021) available at <https://www.ericsson.com/4ad7e9/assets/local/reports-papers/mobility-report/documents/2021/ericsson-mobility-report-november-2021.pdf>.

<sup>5</sup> *Id.*

the Facility at its meetings on April 12, 2021, May 5, 2021, June 2, 2021, July 7, 2021, September 1, 2021, October 6, 2021, February 2, 2022, February 23, 2022, March 16, 2022, and April 6, 2022.

13. On September 9, 2021, at the request of the Board, Verizon attended a meeting with Board members to address health concerns that had been raised about the Facility. During that meeting, Verizon affirmed that that the Facility operated in full compliance with the health requirements set forth in the FCC regulations.

14. The City of Pittsfield and Verizon each commissioned its own independent RF emissions study (dated June 15, 2021 and October 5, 2021, respectively) to measure and document actual RF emissions levels from the Facility. Both studies conclusively demonstrated that the RF emissions from the Facility are well below the FCC regulatory standards.

15. On January 7, 2022, again at the request of the Board, Verizon representatives attended another meeting with Board members. During that meeting Verizon representatives reiterated that Verizon operates the Facility in full compliance with all FCC regulatory standards.

16. During the September 9, 2021 and the January 7, 2022 meetings, and in other communications with City officials and the Board, Verizon repeatedly reminded the Board that the TCA preempts the Board from regulating the Facility on the basis of alleged environmental or health effects of its RF emissions.

17. On April 11, 2022, the Board issued the Emergency Order, the full caption of which is “Emergency Order Requiring that Pittsfield Cellular Telephone Company d/b/a Verizon Wireless, and Farley White South Street, LLC Show Cause Why the Pittsfield Board of Health Should Not Issue a Cease and Desist Order Abating a Nuisance at 877 South Street Arising from the Operation of a Verizon Wireless Cell Tower Thereon and Constituting Immediate Order of

Discontinuance and Abatement if No Hearing is Requested.” A copy of the Emergency Order is attached to this Complaint as Exhibit A.

18. The Emergency Order directed Verizon and the Property Owner “to show cause why the Board should not issue an order requiring cessation of operations” of the Facility. The Board of Health purported to act under its “statutory and historical” police powers.

19. The Emergency Order did not contend or allege that the Facility operated in violation of FCC RF emissions regulations.

20. The Emergency Order gave Verizon and the Property Owner seven days from the date of the Emergency Order to request a hearing. It stated that if no hearing were requested, “this Order shall become and constitute a notice of discontinuance” requiring that Verizon and the Property Owner, within seven days, “abate and eliminate all activities and operations that the Board of Health deemed to be a nuisance and in violation of the State Sanitary Code.”

21. In the Emergency Order, the Board purports to reserve the right to take direct action “to remove the offending facilities at the expense of Verizon Wireless and Farley White South Street LLC and or appointment of a receiver responsible for accomplishing the same.”

22. The Emergency Order is based entirely on the Board’s conclusions related to the alleged health effects of RF emissions—specifically that RF emissions from the Facility that fully comply with the levels set by the FCC are somehow causing “illness and negative health symptoms” in nearby residents.

23. Verizon responded to the Emergency Order by promptly submitting a letter to the Board of Health explaining that federal law preempts the Emergency Order, that the Emergency Order is unlawful, and that Verizon does not intend to cease operating the tower, which is

operating in compliance with the FCC RF emission standards. A copy of this letter is attached to this Complaint as Exhibit B.

24. The Facility is a critical part of Verizon's communications network in Berkshire County. Before the facility was built and brought online, there was a gap of approximately five miles between Verizon's two existing facilities along U.S. Route 7/20 in Lenox and Pittsfield, including 3.6 miles where Verizon's existing facilities were incapable of providing indoor or in-vehicle coverage at a reliable signal strength. The increased coverage provided by the Facility eliminated the 3.6 mile gap for in-vehicle coverage and reduced the gap in reliable indoor coverage to less than 0.7 miles. Reliable indoor coverage is critical for residents and businesses that use Verizon's communications network for their personal, educational, and business needs. Reliable in-car coverage is critical for vehicle connectivity and safety systems. If the Facility were forced to power down, Verizon's customers in Pittsfield and Lenox would be subject to increased dropped calls, ineffective call processing and connections, and a 50% decrease in wireless data throughput. As a result, customers and first responders would also experience decreased reliability of wireless E-911 calls.

25. The Emergency Order targets just one of more than two dozen wireless facilities currently operating in the City of Pittsfield where Verizon maintains wireless equipment to provide cellular service in the area. Yet other Verizon facilities in the City operate at similar power, frequency, and proximity to the public as the Facility, and likewise fully comply with all federal RF emissions standards and FCC requirements. The TCA imposes a national standard requiring that PWSF facilities comply with FCC RF regulations and prohibiting local and state bodies from exercising their own discretion in regulating on the basis of RF emissions, precisely

to ensure that bodies like the Board cannot undercut federal telecommunications policy, as would be the result here if the Emergency Order were to stand.

26. The Board's conclusions and the Emergency Order are a direct challenge to the adequacy and supremacy of the FCC's RF emissions regulations. The Emergency Order stems from the Board's conclusion that "RF/EMF – *even if emitted at levels within the FCC emissions guidelines* – can be injurious to health or cause common injury to the significant portion of the public who are electromagnetic sensitive" and that such emissions are "a cause of sickness" (emphasis added). Simply stated, the Board's conclusion is both contrary to applicable federal law and specifically preempted by the TCA.

#### COUNT I

#### (Violation of TCA Prohibition on Local Regulation of PWSF Based on Alleged Effects of RF Emissions)

27. Plaintiff's allegations contained in paragraphs 1 through 26 above are incorporated by reference as if fully set forth herein.

28. The Board of Health is an instrumentality of state or local government within the meaning of 47 U.S.C. § 332(c)(7)(B)(iv).

29. The Emergency Order attempts to regulate the placement, construction, modification, and operation of a PWSF on the basis of the environmental and health effects of RF emissions and the Facility complies with the FCC's regulations concerning such emissions.

30. The Emergency Order violates Section 332 of the TCA because it purports to regulate the placement, construction, modification and operation of a PWSF based on alleged environmental and health effects of RF emissions. In 47 U.S.C. § 332(c)(7)(B)(iv), the federal government preempts local and state governments from regulating PWSFs on the basis of the

environmental and health effects of RF emissions “to the extent that such facilities comply with the [FCC] regulations concerning such emissions.” The Emergency Order explicitly states that the Board is exercising its local and state statutory and police powers and is in response to the Board’s belief that RF emissions from the Facility have affected the health of certain individuals.

31. 47 U.S.C. § 332(c)(7)(B)(iv) expressly and impliedly preempts the Emergency Order, and the Emergency Order was improperly issued, is null and void, and has no legal effect.

## COUNT II

(Declaratory Judgment pursuant to 28 U.S.C. §§ 2201 and 2202)

32. Plaintiff’s allegations contained in paragraphs 1 through 31 above are incorporated by reference as if fully set forth herein.

33. The Court has authority under 28 U.S.C. §§ 2201 and 2202 to declare that the Emergency Order violates and is preempted by the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B) (iv) and to grant further necessary and proper relief to Plaintiff.

WHEREFORE, Plaintiff Pittsfield Cellular Telephone Company d/b/a Verizon Wireless respectfully requests the following relief:

1. An expedited review of the matters set forth in this Complaint, pursuant to the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B)(v).
2. A declaratory judgment stating that the Emergency Order violates and is expressly or impliedly preempted by the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B)(iv), and is null and void and of no effect.
3. Such further relief as the Court may deem appropriate and proper.

**Plaintiff Pittsfield Cellular  
Telephone Company  
d/b/a Verizon Wireless,**

By its attorneys,

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