

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

INDUSTRIAL COMMUNICATIONS)
AND ELECTRONICS, INC.,)
)
Plaintiff)
)
v.)
)
TOWN OF FALMOUTH, et al.,)
)
Defendants)

Docket No. 98-397-P-H

RECOMMENDED DECISION ON DEFENDANTS’ MOTION TO DISMISS

Defendants Town of Falmouth and Town of Falmouth Zoning Board of Appeals have moved to dismiss the amended complaint in this action alleging violations of the Telecommunications Act of 1996 (the “Act”), specifically that portion of the Act codified at 47 U.S.C. § 332, and asserting a claim under 42 U.S.C. §1983 based on those statutory violations. Motion to Dismiss (Docket No. 8). The remaining defendants, Paul Griesbach, Wilfred Audet, Jr., Hugh Smith, Kathleen Silverman, Michael Pearce and David McConnell, later joined in the motion to dismiss. Docket No. 12. I recommend that the court deny the motion.

I. Applicable Legal Standard

The motion to dismiss is based on a statute of limitations found at 47 U.S.C. § 332(c)(7)(B)(v). The defendants contend that application of the statute of limitations deprives this court of subject-matter jurisdiction, Motion to Dismiss at 5, presumably invoking Fed. R. Civ. P.

12(b)(1), but in this court motions to dismiss based on statutes of limitations are treated as arising under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. *Monday v. United States*, 688 F. Supp. 788, 789 (D. Me. 1988).¹ See also *Aldahonda-Rivera v. Parke Davis & Co.*, 882 F.2d 590, 594 (1st Cir. 1989).

“When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in its favor.” *Pihl v. Massachusetts Dep’t of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if “it appears to a certainty that the plaintiff would be unable to recover under any set of facts.” *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); see also *Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

II. Factual Background

The amended complaint (Docket No. 4), and the complaint filed by the plaintiff in state court against the Town of Falmouth arising out of the same events, include the following pertinent factual allegations. The plaintiff, a Massachusetts corporation, provides land mobile communications services and personal wireless service facilities throughout New England. Amended Complaint ¶¶ 10, 19-20. It owns four telecommunications towers, and the land upon which they are located, in Falmouth, Maine. *Id.* ¶¶ 1-2. Defendants Audet, Smith, Silverman, Pearce and McConnell are the members of the defendant Zoning Board of Appeals (the “Board”). *Id.* ¶ 12. Defendant Griesbach

¹ The plaintiff’s contention that a dispositive motion based on a statute of limitations may only be brought pursuant to Fed. R. Civ. P. 56, Memorandum of Law in Support of Plaintiff Industrial Communications and Electronics, Inc.’s Response and Opposition to Defendants’ Motion to Dismiss (“Plaintiff’s Memorandum”) (Docket No. 18) at 6 n.2, is incorrect.

is the Town of Falmouth's Code Enforcement Officer. *Id.* ¶13. Part of the tallest tower on the site was destroyed during the ice storm of January 1998, and the plaintiff has been unable to provide adequate service to the greater Portland area since that event. *Id.* ¶¶ 25, 27-29.

On or about May 7, 1998 the plaintiff submitted to the defendant Town an application for a building permit seeking approval to replace the damaged tower. *Id.* ¶ 43. Defendant Griesbach denied the application. *Id.* On or about May 15, 1998 the plaintiff submitted to the defendant Board an application for a conditional use permit pursuant to section 5.33(g) and 8.3 of the Town's Zoning Site Plan Review Ordinance (the "Ordinance"). *Id.* ¶¶ 30, 44. This application was subsequently amended to request, in the alternative, a variance pursuant to section 8.4 of the Ordinance. *Id.* ¶ 44. Under the plaintiff's proposal the four towers on the site would be replaced with a single 200-foot tower — the tallest existing tower having been 170 feet before the ice storm — that would provide a site to be used by other providers of mobile radio services, cellular telephone service, and other personal communications services. *Id.* ¶¶ 19-20, 25, 45.

The Board considered the plaintiff's application at meetings held on June 23 and September 22, 1998. *Id.* ¶ 46. The Board voted to deny the application on September 22, 1998. Complaint, *Industrial Communications & Elec., Inc. v. Town of Falmouth*, Maine Superior Court (Cumberland County) [Docket No. AP-98-95] ("State Complaint") (Exh. B. to Motion to Dismiss), ¶ 6; Motion to Dismiss at 4. The Board issued two written notices of decision on the plaintiff's application dated October 22, 1998² accompanied by a statement of findings of fact and reasons for denial of the application dated October 20, 1998. Amended Complaint ¶ 48. The plaintiff does not contend that

² The notices apparently violated the statutory requirement that they be issued within seven days of the board's decision. 30-A M.R.S.A. § 2691(3)(E).

it did not have notice of the Board's vote to deny its application at the time it occurred on September 22, 1998.

The initial complaint in this action, alleging violations of the Act in three counts and asserting one count under section 1983, was filed on November 19, 1998.

III. Discussion

A. Counts I - III

The amended complaint alleges violations of 47 U.S.C. § 332(c)(7)(B)(i)(I), by unreasonable discrimination against providers of functionally equivalent wireless communication services (Count I); 47 U.S.C. § 332(c)(7)(B)(i)(II), by prohibiting the provision of personal wireless service facilities (Count II); and 47 U.S.C. § 332(c)(7)(B)(iii), by failure to base the denial of the plaintiff's applications on a written record (Count III). Amended Complaint ¶¶ 57-76. The motion to dismiss invokes 47 U.S.C. § 332(c)(7)(B)(v), which provides:

Any person adversely affected by any final action or 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 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. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commissioner for relief.

The terms "final action" and "failure to act" are not defined in the Act. The defendants take the position that the final action at issue here was the vote of the Board to deny the plaintiff's application on September 22, 1998, more than 30 days before the complaint was filed. The plaintiff understandably responds that the Board's action was not final until it issued the notice of its decision on October 22, 1998, making the filing of the complaint timely under the quoted statutory language.

The defendants contend that state law provides the definition of “final action” for claims under the Act and that Maine law provides that the period in which an appeal from the decision of a municipal zoning board may be taken runs from the date on which the decision is made, not the date upon which written documentation of the decision is issued. 30-A M.R.S.A. § 2691(3)(G); *see Vachon v. Town of Kennebunk*, 499 A.2d 140, 142 (Me. 1985) (construing prior version of statute). The plaintiff in turn argues that the written notices of decision issued by the Board were “clearly” the Board’s final action within the meaning of the federal statute. Plaintiff’s Memorandum at 7.

There is no reported federal case law on point. The legislative history includes the following relevant statement:

The term “final action” . . . means final administrative action at the State or local government level so that a party can commence action under [section 332(c)(7)(B)(v)] rather than waiting for the exhaustion of any independent State court remedy otherwise required.

H. R. Conf. Rep. No. 104-458, at 209 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 223. In this context, I find it significant that section 332 also includes the following language, which precedes the statute of limitations quoted above:

Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

47 U.S.C. § 332(c)(7)(B)(iii). This requirement “accommodate[s] and enable[s] judicial review” by allowing a reviewing court “to review the specific rationale for the denial, and determine if such rationale is consistent with the requirements of the Telecommunications Act.” *AT&T Wireless PCS, Inc. v. City Council of the City of Virginia Beach*, 979 F. Supp. 416, 427 (E.D.Va. 1997), *aff’d in part, rev’d in part* 155 F.3d 423 (4th Cir. 1998). No such meaningful review is possible until there

is a written decision. Accordingly, there can be no final action by the local permitting body until there is a written decision. *See Virginia Metronet, Inc. v. Board of Supervisors of James City County*, 984 F. Supp. 966, 973 n.9 (E.D.Va. 1998) (defendant provided letter allegedly detailing reasons for denial of application six days after court action was filed and thirty-four days after application was denied; court noted that “allowing Defendant to wait until the limitations period has expired to provide reasons for their [sic] action is to effectively preclude review of those decisions, contrary to Congressional intent”).³ An applicant cannot be expected to set forth in a complaint the violations of the Act that may have occurred until it has been provided with a written statement of the reasons for the denial of its application.

State statutes might provide for further action after the issuance of a written denial that would make the “final action” of the permitting body something other than the required written decision, but state statutory law cannot make the “final action” to which section 332(c)(7)(B)(v) refers anything that occurs before the written decision required by section 332(c)(7)(B)(iii) is issued. Here, for example, Maine law requires a written notice of the decision to be mailed or delivered within seven days but also allows the board of appeals to reconsider its decision within thirty days. 30-A M.R.S.A. § 2691(3)(E) & (F).

The plaintiff filed this action within thirty days after the board’s written decision was issued. That is sufficient for purposes of section 332(c)(7)(B)(v).

³ A state or municipal government entity may not indefinitely postpone judicial review of its denial of an application otherwise subject to the Act by failing to issue a written decision. Such a tactic would be a “failure to act” that would be “inconsistent with [§ 332(c)(7)],” allowing the applicant to bring an action in court. § 332(c)(7)(B)(v). In addition to the requirement of a written decision, the subparagraph requires the permitting agency to act “within a reasonable period of time after the request is duly filed.” § 332(c)(7)(B)(ii).

B. Count IV

The defendants argue that Count IV must be dismissed if Counts I-III are dismissed because “[t]he viability of Count IV depends upon a violation of the Telecommunications Act being found under Counts I, II or III.” Motion to Dismiss at 8.⁴ They assert no other grounds for dismissal of this count. Accordingly, my recommendation that the motion to dismiss Counts I-III be denied necessarily leads to a recommendation that the motion to dismiss Count IV be denied as well.

C. Abstention or Stay

The defendants request, in the alternative, that this court abstain or stay this action because the plaintiff has filed an action challenging the Board’s denial of its application in state court under M.R.Civ.P. 80B. Motion to Dismiss at 8-10. The plaintiff responds that the state court action has been stayed, Plaintiff’s Memorandum at 14, that the issues in the two actions are not identical, and that abstention is not justified on the merits. The defendants point out that the state court action was stayed at the request of the plaintiff, Defendants’ Reply Memorandum in Response to Plaintiff’s Opposition to Motion to Dismiss (Docket No. 20) at 6, and rely primarily on *Huffmire v. Town of Boothbay*, 35 F.Supp.2d 122 (D. Me. 1999).

This action does not present the factual circumstances appropriate for abstention under *R.R. Comm’n of Texas v. Pullman Co.*, 312 U.S. 496 (1941) (resolution of an unsettled question of state

⁴ The courts differ on the question whether a section 1983 claim based on a violation of the Telecommunications Act may be asserted. *Compare Cellco Partnership v. Town Plan & Zoning Comm’n*, 3 F.Supp.2d 178, 186 (D.Conn. 1998) (plaintiff may assert § 1983 claim based on violation of 47 U.S.C. §332(c)(7)(B)), and *Sprint Spectrum L.P. v. Town of Easton*, 982 F. Supp. 47, 53 (D. Mass. 1997) (same), with *Omnipoint Communications, Inc. v. Penn Forest Township*, ___ F.Supp.2d ___, 1999 WL 181954 (M.D.Pa. Mar. 31, 1999), at *10 (violations of § 332(c)(7) do not provide basis for §1983 claim), and *National Telecomm. Advisors, Inc. v. City of Chicopee*, 16 F.Supp.2d 117, 122 (D.Mass. 1998) (same). The defendants have not raised this issue, and it will accordingly not be addressed by the court.

law would render unnecessary any decision on a federal constitutional question), or *Younger v. Harris*, 401 U.S. 37 (1971) (federal jurisdiction invoked to restrain state criminal proceedings). For the reasons set forth in *Huffmire*, abstention under *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), would also be inappropriate in this case. 35 F.Supp.2d at 127-32. That leaves *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), as the only possible source for authority to abstain in this case. 35 F.Supp.2d at 127 & n.4.

The case at hand is distinguishable from *Huffmire* with respect to *Burford* abstention. In *Huffmire*, this court's jurisdiction was based on diversity of citizenship. *Id.* at 126-27. The plaintiffs challenged the procedures used by a local board of appeals in the process of denying their application for a permit to sell their artwork from the porch of their residence. *Id.* at 125. The lawsuits filed in state and federal court were identical. *Id.* This court held that it would abstain in order to avoid creating "a parallel, additional federal regulatory review mechanism" to that already available under state law in an area of local concern and to avoid acting as an appellate court, because a federal district court "does not have appellate power over original proceedings in a state's administrative tribunals." *Id.* at 133.

Here, while the complaint filed in state court does allege violation of the Telecommunications Act, it also includes allegations not present in the federal court complaint, State Complaint, Counts I & II, and the federal complaint includes claims under the Act that are not present in the state complaint, Amended Complaint (Docket No. 4), Counts III & IV.⁵ The complaint

⁵ Even when state and federal complaints overlap, "[d]uplication and inefficiency are not enough to support a federal court's decision to bow out of a case over which it has jurisdiction." *Burns v. Watler*, 931 F.2d 140, 146 (1st Cir. 1991), quoting *Villa Marina Yacht Sales, Inc. v. Hatteras Yachts*, 915 F.2d 7, 13 (1st Cir. 1990).

in this court invokes a federal statute that specifically entitles the plaintiff to relief in the nature of appellate review from a federal district court; to the extent that a parallel regulatory review mechanism is created, it is Congress that has done so, not the courts. Federal courts that have addressed requests for abstention in cases brought under section 332(c)(7)(B) have found that abstention would be improper. *E.g., Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Township*, 20 F.Supp.2d 875, 878 (E.D.Pa. 1998); *Mountain Solutions, Inc. v. State Corp. Comm'n of the State of Kansas*, 966 F. Supp. 1043, 1045-46 (D.Kan. 1997). I agree.

The state court action has apparently been stayed. Even if that were not the case, there is no reason for the action in this court to be stayed. Section 332(c)(7)(B)(v) directs the courts to hear and decide the claims made in this action “on an expedited basis.” This court has the resources and ability to do so.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants’ motion to dismiss the amended complaint or, in the alternative, for abstention or a stay, be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge’s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court’s order.

Dated this 10th day of June, 1999.

David M. Cohen
United States Magistrate Judge