

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 09-03777-RGK (SSx) Date October 8, 2009

Title ***OMNIPOINT COMMUNICATIONS, INC. v. CITY OF HUNTINGTON BEACH, et al.***

Present: The Honorable R. GARY KLAUSNER, U.S. DISTRICT JUDGE

Sharon L. Williams

Not Reported

Deputy Clerk

Court Reporter / Recorder

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: (IN CHAMBERS) Order Re Defendants' Motion to Dismiss and Plaintiff's Motion for Preliminary Injunction (DE 20 and DE 8)

I. INTRODUCTION

Plaintiff Omnipoint Communications, Inc. ("Plaintiff") is a provider of wireless telecommunications services. Plaintiff alleges that Defendants the City of Huntington Beach ("City") and the City Council (collectively, "Defendants") have violated the Telecommunications Act of 1996 ("TCA") by preventing Plaintiff from constructing two wireless communication antennas within the City limits. Before the Court is Defendants' Motion for Judgment on the Pleadings and Plaintiff's Motion for Preliminary Injunction. The Court consolidates the Motions for the purpose of this Order and for the reasons stated below **DENIES** both motions.

II. FACTUAL BACKGROUND

On July 24, 2007, Plaintiff submitted two applications to the City seeking authorization to construct two "monopalm wireless telecommunications facilities" ("antennas") within the City limits at 16600 Saybrook Lane in Harbour View Park ("Harbour View") and 5741 Brighton Drive ("Brighton"). The City Council approved the permit applications on August 14 and September 7, 2007. Since the antennas were to be located on land that belongs to the City, Plaintiff and the City negotiated and entered into two Site License Agreements for each antenna locations, according to which the City agreed to allow Plaintiff place the antennas on the City's land in return for certain contractual considerations and subject to certain contractual limitations, none of which are relevant to the issues before this Court on this Motion. The parties finalized and signed the Site License Agreement on or about January 20, 2009, at a publicly noticed hearing, during which the City Council unanimously approved the agreement by a vote of 7 to 0.

In addition to obtaining permits for the wireless antennas and entering into the Site License Agreements, the City required Plaintiff to obtain building construction permits for each facility

(“building permits”). The application form for the building permits prompted Plaintiff to report “total construction value” for each site. Without seeking clarification as to what comprised “total construction value” or the purpose of the inquiry, Plaintiff reported \$80,000.00 on each form. The city approved the building permits, and Plaintiff began construction of the Harbour View site antenna.

About 2 weeks after Plaintiff had started building the Harbour View site antenna, a number of local residents appeared at the construction site and objected to the project. It appears that most of those citizens were concerned with the environmental effect of the antenna, especially since an elementary school is located near the Harbour View location. Eventually, the objections gave way to serious protests, and the residents physically obstructed Plaintiff’s access to the construction site with their bodies and vehicles. Faced with fierce—and apparently unexpected—opposition from the residents, the City asked Plaintiff to voluntarily halt construction until the matter could be discussed with the residents at a City Council meeting. Plaintiff agreed.

On April 23, 2009, the City held a public hearing, which Plaintiff as well as about 200 residents of the City attended. During the meeting, the residents’ objections grew even more intense, and the residents did not allow Plaintiff’s representatives to voice their opinion. Again, the parties agreed to halt the construction project to give the City council and the residents some time to deal with the controversy.

The parties met on the following day. This time, the City representatives asked about the total construction cost of the two antennas. Plaintiff responded that each antenna would cost about \$200,000.00 to build. According to Plaintiff, this figure includes all construction costs for the antenna whereas the \$80,000.00 “total construction value” figure reported on the building permit form does not. The parties dispute the difference between “total construction cost” and “total construction value,” but the difference is immaterial to the Court’s decision on this Motion.

Once Plaintiff revealed the total construction value, the City informed Plaintiff of the existence of Measure C for the first time. Measure C is codified as Section 612 of the City Charter. (Yamaguchi Decl. Ex. A.) It states in pertinent part,

[No] structure costing more than \$100,000.00 may be built on or in any park or beach or portion thereof . . . unless authorized by the affirmative votes of at least a majority of the total membership of the City Council and by the affirmative vote of at least a majority of the electors voting on such proposition at a general or special election at which such proposition is submitted.

The City informed Plaintiff that since the total construction cost for the two antennas exceeds \$100,000.00, the City was unable to authorize the construction of the antennas. Instead, the City required Plaintiff to obtain voter approval before building the antennas. In order for Plaintiff to satisfy the requirements of Measure C, Plaintiff must either finance a special election at costs exceeding \$200,000.00 or wait until the next general election to put the construction of the two antennas up for a vote for a small fee.¹

¹Plaintiff’s First Amended Complaint states that the next general election is scheduled for November 2009. (Comp. ¶ 32.) Defendants state that the next general election is scheduled for November 2010. (McGrath Decl. Ex. 1 at 5.) The cost of obtaining voter approval is also in dispute. Plaintiff argues that in addition to the cost of putting the issue up for a vote, it has to incur significant campaign expenditures. Defendants disagree. The Court need not resolve the issue for the purpose of this Motion.

On April 27, 2009, the City held another City Council meeting to discuss “the status of the License Agreement with [Plaintiff].” (Yamaguchi Decl. Ex. G at 18.) Twenty-one residents spoke against the construction of the antenna at the Harbour View location during the public comment period of the meeting. The majority of comments reflect concerns with the environmental effects of the antennas on the residents in general and the health of the children who attend the local elementary school nearby in particular. At the meeting, the City Council voted—once again unanimously—to “renegotiate the existing license agreement with [Plaintiff].” Plaintiff has not been allowed to resume construction of the antennas since then.

III. JUDICIAL STANDARD

A. Motion to Dismiss

Defendants have filed a Motion for Judgment on the Pleadings. Yet Defendants had not filed an Answer at the time of filing their 12(c) Motion. Therefore, the Court construes Defendants’ Motion as a 12(b)(6) Motion to Dismiss. *See Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989)(“The principal difference between motions filed pursuant to Rule 12(b) and 12(c) is the time of the filing. [T]he motions are functionally identical.”).

A party may move to dismiss for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure 12(b)(6). Fed. R. Civ. P. 12(b)(6). In deciding a Rule 12(b)(6) motion, the Court must assume that the plaintiff’s allegations are true and construe the complaint in the light most favorable to the non-moving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). Dismissal is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory. *Mendonzo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The court need not accept as true unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in the form of factual allegations. *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

B. Preliminary Injunction

In order for a preliminary injunction to issue, the moving party has to establish a likelihood of success on the merits of the case and a clear showing of the *likelihood*—not the mere possibility—of irreparable injury in the absence of the preliminary injunction. *Winter v. Natural Res. Def. Council, Inc.*, ___ U.S. ___, 129 S. Ct. 365, 374 (2008). *See also Stormans, Inc. v. Selecky*, 571 F.3d 960, 977 (9th Cir. 2009). In *Winter*, the Supreme Court rejected the “possibility of irreparable harm” standard that the Ninth Circuit had previously applied. *See, e.g., Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 906 (9th Cir. 2007)(*overruled in Winter*, 129 S. Ct. at 375). The Supreme Court found that “the Ninth Circuit’s ‘possibility’ standard [for granting preliminary injunctions] is too lenient.” *Winter*, 129 S. Ct. at 375. The Court pointed out that “issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter*, 129 S. Ct. at 375 (citation omitted). Therefore, unless the plaintiff establishes that without the preliminary injunction it is likely to suffer irreparable harm, preliminary injunction will not issue.

IV. DISCUSSION

Under the TCA, local authorities “shall not prohibit or have the effect of prohibiting the provision of personal wireless services.” 47 U.S.C. § 332(c)(7)(B)(i)(II). *See also*, 47 U.S.C. § 253(a); *Sprint Tel.’y PCS, L.P. v. County of San Diego*, 543 F.3d 571, 576 (9th Cir. 2008). In the Ninth Circuit, the provider may establish “effective prohibition” where the local government has barred the provider from using the least intrusive means to close a significant gap in its network. *T-Mobile USA, Inc. v. City of Anacortes*, 572 F.3d 987, 995 (9th Cir. 2009). Moreover, the TCA provides that local governments “shall act on any request for authorization to . . . construct . . . personal wireless service facilities within a reasonable period of time.” 47 U.S.C. § 332(c)(7)(B)(ii). “Any decision by a State or local government . . . to deny [the provider’s] request . . . shall be in writing and supported by substantial evidence.” *Id.* § 332(c)(7)(B)(iii).

Here, Plaintiff argues that the TCA preempts Measure C. In particular, Plaintiff argues that by applying the requirement of Measure C and preventing the construction of the two antennas, the City has kept Plaintiff from using the least intrusive means to close significant gaps in its network. Plaintiff also argues that the requirements of Measure C do not allow the City to approve Plaintiff’s applications within a reasonable time or to deny the applications in writing that is supported by substantial evidence.

A. Defendants’ Motion to Dismiss Is Denied Because Measure C Is A Local “Regulation.”

Preemption rules only apply to state regulation. *Building & Constr. Trades Council v. Associated Builders & Contractors* (“*Boston Harbor*”), 507 U.S. 218, 226-27 (1993). Not every local or state government function is a regulation. *Engine Mfr.’s Ass’n v. S. Coast Air Quality Mgmt. Dist.*, 498 F.3d 1031, 1041 (9th Cir. 2007). A state or local government may participate in the market just as a private person and manage its “purely proprietary interests . . . where analogous private conduct would be permitted” without being limited by the preemption doctrine. *Boston Harbor*, 507 U.S. at 231-32.

Although the Ninth Circuit has not directly addressed the issue, the Second Circuit applied this market participation doctrine as a limitation to the reach of the TCA to the autonomy of local state entities in *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404 (2nd Cir. 2002)(*cited with approval in Engine Mfrs. Ass’n*, 498 F.3d at 1041). In *Sprint*, the Second Circuit held that the TCA did not preempt a particular provision of a lease agreement between a school district and a wireless provider because the school district had entered into the lease agreement as a private market participant, not a regulator. *Sprint*, 283 F.3d at 420-21. The Second Circuit framed the inquiry as whether “the challenged action essentially reflect[ed] the entity’s own interest in its efficient procurement of needed goods and services,” and whether “the narrow scope of the challenged action defeat[ed] an inference that its primary goal was to encourage a general policy.” *Id.* at 420 (internal citation omitted). Since the school district had entered into a lease agreement in pursuit of its interests as a land owner in the marketplace, and since the lease agreement dealt narrowly with one particular land transaction rather than a governmental policy, the Second Circuit held that the TCA did not preempt the private lease agreement between the parties. *Id.* at 420-21.

Here, the City’s main argument on its Motion to Dismiss is that preemption laws do not apply to Measure C because Measure C is not a state regulation. Rather, the City suggests, the City acted as a private land owner in applying the requirements of Measure C to Plaintiff and preventing the construction of the antennas at the locations in dispute. The City relies on the Second Circuit’s decision in *Sprint Spectrum L.P.* in support of its position, arguing that just as any other land owner, it has the right to refuse to lease property to Plaintiff. 283 F.3d at 417.

Defendants’ position is untenable because Measure C is a regulation both in form and substance.

With respect to form, Measure C is codified as Section 612 of the City Charter. Hence, unlike in *Sprint*, where there was “no state or local statute or ordinance or guideline . . . at issue,” the City’s acts are based on the express mandate of a particular section of the City Charter. *Id.* at 420. With respect to substance, Measure C regulates the process through which an entity may seek permission to build on the City’s land. Measure C’s reach is not limited to a particular transaction; it is a broad regulatory requirement that applies to any beach or park within the City limits. In this sense, Measure C is similar to a zoning ordinance that regulates land use: it dictates how the City may allocate construction permits for building structures in parks or beaches that cost more than \$100,000.00 to build. Therefore, unlike the terms of the lease agreement in dispute in *Sprint*, Measure C has nothing to do with how the City wishes to negotiate “procurement of goods and services” as a market participant. *Id.* Rather, Measure C is a regulatory scheme that chips away at the City Council’s authority to enter into agreements without voter approval, even where the City feels the need to do so as a market participant. Therefore, the City’s argument that Measure C is outside the reach of preemption laws is without merit.

B. Plaintiff’s Motion for Preliminary Injunction Is Denied Because Plaintiff Has Not Sufficiently Demonstrated A Likelihood of Irreparable Harm.

Plaintiff appears to seek an injunction that allows it to resume construction of the two wireless communication facilities while the case is pending before this Court.² Plaintiff alleges that it would suffer irreparable harm if it had to wait for this action to come to resolution. Plaintiff states that significant gaps in its network “thwart [its] ability to compete in the market,” and that “[a]s each day goes by . . . [Plaintiff] suffers an immediate and irreparable injury to its reputation and goodwill.”

Yet Plaintiff has not offered specific facts that show Plaintiff cannot wait for this case to end without suffering irreparable harm. Plaintiff offers a wireless signal propagation map that demonstrates Plaintiff has “no in-building” and “little to no in-vehicle” wireless signal coverage “in and around Harbour View Park.” But Plaintiff does not indicate the size or population of the Harbor View area, the number of dropped calls in the recent past within that area, or the number of consumers that are currently affected by the “gap” in the network. Plaintiff also does not offer any quantitative projections as to how the current signal levels will affect its consumers in the near future while the case is pending before this Court.

Moreover, Plaintiff’s irreparable harm argument is undermined by the fact that Plaintiff does not appear to have seriously considered alternative locations for the antennas. Plaintiff does not offer any evidence that suggests it has diligently negotiated placing the antennas at other locations, either on land owned by the City or a private entity. Plaintiff attempts to justify this deficiency by arguing that no alternative sites are technologically feasible to close a significant gap in its network coverage. For example, Plaintiff offers additional wireless signal propagation maps that demonstrate what Plaintiff’s coverage would be like if Plaintiff’s antennas were located at any of three alternative sites near the Harbour View Park and suggests that the alternative sites are significantly inferior to the Harbour View Park location. However, although the coverages corresponding to the three

²Plaintiff does not specifically ask for permission to resume the construction process. In fact, the Motion for Preliminary Injunction does not specifically outline what Plaintiff seeks at all. The Proposed Order form that Plaintiff has filed with the Motion for Preliminary Injunction suggests that the Court restrain the City “from: 1) taking any action to impose the requirements of [Measure C] on the permits, approvals, and the related Site License Agreements, for the Plaintiff’s wireless telecommunications facilities . . . and 2) taking any other action on the basis of Measure C that inhibits or impedes the construction , use, operation, maintenance, or management of Plaintiff’s . . . wireless telecommunications facilities.”

