IP 01-1833-C H/K Network Towers v. Hagerstown
Judge David F. Hamilton Signed on 5/15/02

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

| | | |
|---|---|---|
| NETWORK TOWERS LLC, | ) | |
| | ) | |
| Plaintiff, | ) | |
| vs. | ) | |
| | ) | |
| HAGERSTOWN, THE CITY OF, | ) | |
| HAGERSTOWN BOARD OF ZONING | ) | |
| APPEALS, | ) | |
| KELLER, DAVID, | ) | |
| ESKER, KAY, | ) | CAUSE NO. IP01-1833-C-H/K |
| FAST, DIXIE, | ) | |
| GETTINGER, LUANN, | ) | |
| RENEAU, DAVID, | ) | |
| | ) | |
| Defendants. | ) | |

π Diana C Bauer
Miller Carson Boxberger & Murphy
1400 One Summit Square
Ft Wayne, IN 46802

James S Stephenson
Stephenson Daly Morow Horn & Semler
8710 N Meridian St Suite 200
Indianapolis, IN 46260

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

| | | |
|---|---|---|
| NETWORK TOWERS, LLC, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | |
| | ) | CAUSE NO. IP 01-1833-C H/K |
| THE TOWN OF HAGERSTOWN, | ) | |
| THE HAGERSTOWN BOARD OF ZONING | ) | |
| APPEALS, DAVID KELLER, KAY ESKER, | ) | |
| DIXIE FAST, LUANN GETTINGER and | ) | |
| DAVID RENEAU, | ) | |
| | ) | |
| Defendants. | ) | |

ENTRY ON DEFENDANTS' MOTION TO DISMISS

Plaintiff Network Towers, LLC has twice applied for a conditional use permit to build a wireless telecommunications tower in Hagerstown, Indiana. Defendant Hagerstown Board of Zoning Appeals denied both applications. Network Towers appealed the first decision in state court and lost. In this action, Network Towers contends that the second decision violated the provision of the federal Telecommunications Act requiring that such a local government decision "be in writing and supported by substantial evidence contained in a written record." 47 U.S.C. § 332(c)(7)(B)(iii). Network Towers also seeks relief under 42 U.S.C. § 1983, as well as a declaration that it is a "public utility" under Indiana Code § 8-

1-2-1(a) and therefore is not required to obtain approval from the zoning board to build the tower.

The defendants have moved to dismiss plaintiff's complaint, arguing that: (1) the court lacks subject matter jurisdiction over the Telecommunications Act and Section 1983 claims under the *Rooker-Feldman* doctrine; (2) the Section 1983 claim fails to state a claim on which relief can be granted; and (3) the court should relinquish its supplemental jurisdiction over the claim seeking a declaratory judgment under Indiana law.

For the reasons discussed below, the defendants' motion is granted with respect to plaintiff's Section 1983 claim. The Telecommunications Act itself provides a sufficiently comprehensive and detailed remedial scheme so as to demonstrate that Congress did not intend to authorize a separate action for relief under Section 1983. See *Nextel Partners, Inc. v. Kingston Township*, 286 F.3d 687, 2002 WL 537900 (3d Cir. April 11, 2002). Defendants' motion is denied with respect to the Telecommunications Act claim and the request for declaratory relief under Indiana law.

*Background*

Plaintiff Network Towers, LLC is in the business of building wireless communications towers for use by cellular telephone service providers. It is a Delaware corporation with its principal place of business in Maryland. Network Towers is constructing wireless telecommunications towers at various locations to provide its customers with unobstructed coverage.

The defendants are the Town of Hagerstown, Indiana, its board of zoning appeals, and individual members of the board of zoning appeals. Hagerstown is an Indiana incorporated town and operates the Hagerstown Board of Zoning Appeals ("BZA") as a municipal agency. David Keller, Kay Esker, Dixie Fast, Luann Gettinger and David Reneau are BZA members.

Network Towers wants to construct a wireless telecommunications tower at 10 Paul Foulke Parkway in Hagerstown to fill a significant gap in service. To comply with zoning ordinances, Network Towers filed a Petition for Conditional Use. Only the BZA can approve conditional use permits. On May 9, 2001, Network Towers appeared before the BZA and presented evidence in support of its petition. This evidence included Federal Aviation Administration approval for a tower up to 186 feet tall at the site. (Correspondence between Network Towers and the BZA indicates that Network Towers proposed a 170-foot tall tower, although there is some conflicting evidence about the tower's height. See

February 27, 2001 letter, Def. Ex. C.) Network Towers also had received "tall structure approval" for the proposed tower from the Indiana Department of Transportation.

Some individuals present at the May 9, 2001 board meeting supported the petition and others opposed it. The Hagerstown Airport Manager stated that he believed the tower would pose a threat for air navigation because the proposed tower site lies directly in a flight pattern. He stated that 48 pilots opposed the tower. He also presented a list 50 property owners who opposed the tower.

At the end of the May 9, 2001 meeting, the BZA denied Network Towers' petition. By answering yes or no to six questions on a form, the BZA made findings of fact on the petition. In relevant part, a majority of the BZA disagreed with the following proposition: "the establishment, maintenance, or operation of the conditional use will not be detrimental to or endanger the public health, safety, morals, or general welfare."

On June 11, 2001, Network Towers filed a petition for a writ of certiorari in Indiana state court, Wayne Superior Court No. 2. (A petition for a writ of certiorari is the procedural vehicle for seeking judicial review of such decisions under Indiana law.) Network Towers asserted that the BZA denied its application

because of the proposed tower's height and argued that the BZA's decision violated the Hagerstown zoning ordinance. In its response to the writ, the BZA explained its reasons for denying the application:

> [T]here was significant discussion and objection to the request for the Petitioner's conditional use based on the safety concerns involved with the proposed cellular tower, including concerns regarding the location of the tower. Further, as the vote of the Hagerstown Board of Zoning Appeals reflects, the Board members voted "no" on the following: question, "The condition of the establishment, main-tenance, or operation of the conditional use will not be detrimental to or endanger the public health, safety, morals, or general welfare." Pursuant to §151.113 of the Hagerstown Town Code, the Board of Zoning Appeals must answer the above question, as well as additional questions, in a satisfactory manner or the Board shall direct the Building Commissioner to reject the application . . . . Although the height of the cell tower may be relevant to the issue of safety, it is but one factor in the consideration of safety. The record would reflect that the location was an important factor in the board's consideration.

Return to Writ ¶ 3(a), Def. Ex. C.

On December 31, 2001, the Wayne Superior Court denied plaintiff's petition for a writ. The court concluded that Network Towers had failed to show that the evidence before the BZA was so insubstantial that the board's decision to deny the plaintiff's application was irrational or illegal.

In October 2001, while the writ of certiorari on the May 2001 permit denial was pending, Network Towers filed a second application to build a tower at the same site. Network Towers' second proposal was identical to the first except that it reduced the height of the proposed tower by 5 or 10 feet.[1] The BZA denied the second application on November 6, 2001. The BZA considered the same factors in denying the second application that it did when it denied the first application. BZA Minutes, Def. Ex. F. The Board again disagreed with the proposition that "the establishment, maintenance, or operation of the conditional use will not be detrimental to or endanger the public health, safety, morals, or general welfare." Network Towers bases its complaint in this action on the October 2001 application.

*Discussion*

I. *The Rooker-Feldman Doctrine*

The defendants have moved to dismiss both of plaintiff's federal claims for lack of subject matter jurisdiction. In addressing a challenge to subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1), the court may

[1]There is evidence that the plaintiff's first proposal was for either a 170- or 175-foot tower. The second proposal was for a 165-foot tower. In their briefs, defendants have referred to a 10-foot difference between the first and second proposals.

consider matters outside the pleadings and may resolve factual disputes. *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983, 990 (7th Cir. 2000); *Commodity Trend Service, Inc. v. Commodity Futures Trading Commission*, 149 F.3d 679, 685 (7th Cir. 1998).

The *Rooker-Feldman* doctrine instructs that the lower federal courts may not exercise what amounts to appellate jurisdiction over state courts. See *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). Under the *Rooker-Feldman* doctrine, a person who claims that her federal rights were violated by a state court judgment must assert those rights through an appeal of the judgment in the state courts – not by an action in a federal district court – with the only potential federal court review coming from the Supreme Court of the United States. See, *e.g.*, *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506, 509-10 (7th Cir. 1996); *Garry v. Geils*, 82 F.3d 1362, 1365 (7th Cir. 1996) ("the fundamental and appropriate question to ask is whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment").

The *Rooker-Feldman* doctrine applies not only to claims and issues that were actually raised in the state court but also to claims that are inextricably intertwined with state court determinations. *Long v. Shorebank Development*

*Corp*., 182 F.3d 548, 554 (7th Cir. 1999). "The key inquiry is 'whether the district court is in essence being called upon to review the state-court decision.'" *Manley v. City of Chicago*, 236 F.3d 392, 396 (7th Cir. 2001), quoting *Ritter v. Ross*, 992 F.2d 750, 753 (7th Cir. 1993), quoting in turn *Feldman*, 460 U.S. at 483-84 n.16.

Before diving into the intricacies of the *Rooker-Feldman* doctrine here, the court acknowledges the comments of Professor Bandes in a symposium on the doctrine: "A review of many of the lower court opinions reflects that the lower courts, in attempting to delineate the doctrine's scope, have spawned a complex, confusing, and sometimes contradictory body of precedent." Susan Bandes, *The Rooker-Feldman Doctrine: Evaluating its Jurisdictional Status*, 74 Notre Dame L. Rev. 1175, 1176 (1999) (footnote omitted). Amen.

Perhaps nowhere has the complexity and confusion been greater than in efforts to draw and maintain a line between the *Rooker-Feldman* doctrine and principles of res judicata (claim preclusion). The Seventh Circuit has often drawn distinctions between the two: "We have consistently emphasized the distinction between *res judicata* and *Rooker-Feldman* and insisted that the applicability of *Rooker-Feldman* be decided before considering *res judicata*." *Garry*, 82 F.3d at

1365. The *Garry* court went on to provide some of the clearest guidance on the distinction between the two doctrines.

The *Garry* court identified a "rough guide" for determining whether *Rooker-Feldman* or res judicata applies: "If the federal plaintiff was the plaintiff in state court, apply *res judicata*; if the federal plaintiff was the defendant in state court, apply *Rooker-Feldman*." *Garry*, 82 F.3d at 1367; see also *Homola v. McNamara*, 59 F.3d 647, 650 (7th Cir. 1995); *Nesses v. Shepard*, 68 F.3d 1003, 1004 (7th Cir. 1995); *GASH Associates v. Village of Rosemont*, 995 F.2d 726, 728-29 (7th Cir. 1993) (*Rooker-Feldman* barred a § 1983 suit because alleged injury stemmed from the state court's decision confirming the sale of the federal plaintiff's property). The *Garry* court explained:

> In order to determine the applicability of the *Rooker-Feldman* doctrine, the fundamental and appropriate question to ask is whether the injury alleged by the federal plaintiff resulted from the state court judgment itself or is distinct from that judgment. If the injury alleged resulted from the state court judgment itself, *Rooker-Feldman* directs that the lower federal courts lack jurisdiction. If the injury alleged is distinct from that judgment, i.e., the party maintains an injury apart from the loss in state court and not "inextricably intertwined" with the state judgment, *see infra*, res judicata may apply, but *Rooker- Feldman* does not. While we have not always emphasized this aspect of the *Rooker-Feldman* doctrine (since the contrast to res judicata was not usually at issue), it emerges from the fountainhead cases themselves and has been consistently respected in our application of the doctrine.

82 F.3d at 1365-66. And as the *Homola* court also explained:

> A plaintiff who loses and tries again encounters the law of preclusion. The second complaint shows that the plaintiff wants to ignore rather than upset the judgment of the state tribunal. A *defendant* who has lost in state court and sues in federal court does not assert injury at the hands of his adversary; he asserts injury at the hands of the court, and the second suit therefore is an effort to obtain collateral review. It must be dismissed not on the basis of preclusion but for lack of jurisdiction.

*Homola*, 59 F.3d at 650. Stated another way, the Seventh Circuit also has observed:

> Our cases contemplating the applicability of the *Rooker-Feldman* doctrine have recognized the difference between "a federal claim alleging injury caused by a state court judgment (necessarily raising the *Rooker-Feldman* doctrine) and a federal claim alleging a prior injury that a state court failed to remedy (raising a potential res judicata problem but not *Rooker- Feldman*)."

*Rizzo v. Sheahan*, 266 F.3d 705, 714 (7th Cir. 2001) (plaintiff's claim was not barred by *Rooker-Feldman* because she alleged an injury she incurred before she sought relief in state court), quoting *Garry*, 82 F.3d at 1366.

These lessons have their limits, however, as seen in the Seventh Circuit's explanation of them in *Kamilewicz*:

> Our cases have attempted to make the analysis of this issue easier by offering a sometimes helpful tip. That tip is that often, if a federal plaintiff was the plaintiff in the state court action, the doctrine he must contend with is *res judicata*, not *Rooker-Feldman*. On the

> other hand, if the federal plaintiff was the defendant in state court, *Rooker- Feldman* is the applicable doctrine. *Homola v. McNamara*, 59 F.3d 647 (7th Cir.1995); *Nesses v. Shepard*, 68 F.3d 1003 (7th Cir.1995). The tip, however, is merely that, and allows exceptions. As we pointed out in *Garry*, both the *Rooker* and *Feldman* plaintiffs were also plaintiffs in the state judicial proceedings. Although it may be that the federal plaintiff's position as either a plaintiff or a defendant in the state court proceeding will "usually coalesce with the source-of-the-injury standard," as we said in *Garry*, it may not always do so, and the important issue remains the source of the injury: the issue is whether the federal plaintiff is injured by the state court judgment or by a prior injury at the hands of the defendant.

92 F.3d at 510.

The Seventh Circuit's "rough guide" and "helpful tip" teach that the *Rooker-Feldman* doctrine does not divest the court of subject matter jurisdiction in this case. Network Towers was the plaintiff in state court and is the plaintiff here. In this action, Network Towers alleges that it has been harmed by the BZA's denial of its second application, not by the state court's decision on the denial of its first application, which was only a failure to remedy an injury inflicted by the BZA's first decision. Also, the BZA took two separate actions in response to two separate applications by Network Towers. The plaintiff's current claim was not "inextricably intertwined" with the state court decision because the action on which it is based occurred some six months after the plaintiff initiated the state court action.

That said, defendants' *Rooker-Feldman* defense draws significant support from *Manley v. City of Chicago*, 236 F.3d 392. In *Manley*, the Seventh Circuit held that *Rooker-Feldman* barred federal court review of the decision to terminate the plaintiff's employment. The plaintiff had challenged the termination decision in state administrative proceedings and in state court. The plaintiff then brought federal constitutional claims in federal court based on his termination and on the state court proceedings. The Seventh Circuit held that *Rooker-Feldman* applied because plaintiff's claims were inextricably intertwined with his state court claims and were merely an attempt to challenge the state court's decision upholding his termination: "Like the injury suffered by the plaintiffs in the cases discussed above, Manley's injury stems directly from the state court judgment upholding the decision to terminate him made by an administrative board." 236 F.3d at 397.

That reasoning in *Manley* certainly seems to apply here, but it also seems to run contrary to the decisions drawing a distinction between the *Rooker-Feldman* doctrine and res judicata. The *Manley* opinion did not directly address that distinction, however, and this court respectfully suggests that res judicata and/or issue preclusion might have been more directly applicable there. In view of the Seventh Circuit's repeated and explicit attempts to maintain the distinction, this court follows the teaching of *Garry*, *Homola*, and *GASH*

*Associates*, and denies defendants' motion to dismiss for lack of subject matter jurisdiction.

Whether Network Towers' claim might be barred by res judicata is a question left for another day. Res judicata, or claim preclusion, is an affirmative defense designed to prevent the "relitigation of claims that were or could have been asserted in an earlier proceeding." *Rizzo*, 266 F.3d at 714, quoting *D & K Props. Crystal Lake v. Mutual Life Ins. Co. of N.Y.*, 112 F.3d 257, 259 (7th Cir.1997). The defendants have not argued that they are entitled to dismissal because of res judicata, although they have indicated that they believe the doctrine will provide a basis for a later summary judgment motion. See Case Management Plan at 6.

II. *Section 1983*

The defendants also seek dismissal of plaintiff's Section 1983 claim under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief can be granted. In considering that portion of the defendants' motion, the court reviews all facts alleged in the complaint and any inferences reasonably drawn from the alleged facts in the light most favorable to the plaintiff. See *Caldwell v. City of Elwood*, 959 F.2d 670, 671 (7th Cir. 1992). Dismissal is warranted only

if the plaintiff can prove no set of facts consistent with its complaint that would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Defendants argue that plaintiff is entitled to relief, if at all, only under the Telecommunications Act itself, and that the additional remedies of Section 1983 should not be available here. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983. Plaintiff's Section 1983 claim is based on the same alleged violation of the Telecommunications Act set forth in Count I of the complaint.

The Telecommunications Act of 1996 provides, in pertinent part:

> (7) Preservation of local zoning authority
>
> (A) General Authority
>
> Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government . . . over decisions regarding the placement, construction, and modification of personal wireless service facilities.

> (B) Limitations
>
> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government . . .
>
> (I) shall not unreasonably discriminate among providers of functionally equivalent services; and
>
> (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.
>
> * * * * *
>
> (iii) Any decision by a State or local government . . . 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).

Section 1983 historically has provided remedies for violations of constitutional rights, but the Supreme Court has held that plaintiffs may also use the statute to remedy violations of some federal statutes. See *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980) (§ 1983 remedy "broadly encompasses violations of federal statutory as well as constitutional law"). Section 1983 remedies are not available in actions for violations of all federal statutes, however. To invoke § 1983's remedies for a federal statutory violation, a plaintiff must meet several requirements. First, Congress must have intended that the provision in question

benefit the plaintiff. Second, the plaintiff must demonstrate that the right asserted is specific enough to be judicially enforceable. Third, the statutory provision must be expressed in mandatory rather than precatory terms. Finally, even if those requirements are met, the right is enforceable under § 1983 only if Congress did not explicitly bar such an action and if it did not implicitly bar such an action by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983. See *Blessing v. Freestone*, 520 U.S. 329, 340-41 (1997).

The first three requirements are satisfied here. The Telecommunications Act plainly intended § 332(c)(7) to benefit wireless communications companies like plaintiff (and their customers). The rights are specific enough for judicial enforcement, and the statute speaks in mandatory terms. The contested issue is whether the enforcement scheme in the Telecommunications Act itself signals an intent by Congress to foreclose reliance on § 1983, as well.

Until recently, the issue had divided the district courts and no Court of Appeals had decided it. Finding no remedy under § 1983, see, *e.g.*, *Omnipoint Communications Enterprises, L.P. v. Charlestown Tp.*, No. Civ. A. 98-CV-6563, 2000 WL 128703, *4 (E.D. Pa. 2000) ("This Court concludes that the remedial scheme of the [Telecommunications Act] is sufficiently comprehensive to infer

congressional intent to foreclose a § 1983 remedy."); *AT&T Wireless PCS, Inc. v. City of Atlanta*, 50 F. Supp. 2d 1352, 1362 (N.D. Ga.1999) (same); *National Telecomm. Advisors, Inc. v. City of Chicopee*, 16 F. Supp. 2d 117 (D. Mass. 1998) (same). On the other side, finding that § 1983 remedies were available, see, *e.g.*, *Omnipoint Communications Enters., L.P. v. Zoning Hearing Bd. of Chadd's Ford Township*, No. Civ. A. 98-3299, 1998 WL 764762, at *4-10 (E.D. Pa. Oct. 28, 1998) (concluding that a violation of the Telecommunication Act gives rise to a Section 1983 action for damages and attorneys' fees); *Cellco Partnership v. Town Plan & Zoning Comm'n of Farmington*, 3 F. Supp. 2d 178, 186 (D. Conn. 1998) (same); *APT Minneapolis, Inc. v. City of Maplewood*, No. Civ. 97-2082, 1998 WL 634224, *7 (D. Minn. Aug. 12, 1998) (same); *Sprint Spectrum L.P. v. Town of Easton*, 982 F. Supp. 47, 53 (D. Mass. 1997) (same).

On April 11, 2002, the Third Circuit held that Congress impliedly foreclosed any Section 1983 action by including a comprehensive remedial scheme in the Telecommunications Act. See *Nextel Partners Inc. v. Kingston Township*, 286 F.3d 687, 2002 WL 537900 (3d Cir. Apr. 11, 2002) (assuming that an enforceable federal right existed). The Eleventh Circuit had reached a contrary conclusion, but in a decision that was later vacated. See *AT&T Wireless PCS, Inc. v. Atlanta*, 210 F.3d 1322, *vacated on jurisdictional grounds*, 223 F.3d

1324 (11th Cir. 2000), *opinion reinstated*, 250 F.3d 1307, *opinion vacated on rehearing en banc*, 260 F.3d 1320 (11th Cir. 2001).

In reaching its decision, the Third Circuit relied on two Supreme Court decisions holding that a comprehensive remedial scheme indicates a congressional intent to preclude a § 1983 action based on the same statute. See *Nextel Partners*, 286 F.3d at 694, citing *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981) (where Congress had provided comprehensive enforcement mechanisms for protection of a federal right and those mechanisms did not include a private right of action, a litigant could not obtain additional relief under § 1983), and *Smith v. Robinson*, 468 U.S. 992, 1011-12 (1984) (comprehensive procedures and guarantees provided by Education of the Handicapped Act were evidence of congressional intent to create an exclusive remedy under the statute; additional remedies under § 1983 would render superfluous the statute's detailed remedial provisions).

The Third Circuit found that the "key distinction" between statutory schemes that are sufficiently comprehensive to preclude a Section 1983 claim and those that are not is the availability of private judicial remedies under the statute at issue. *Nextel Partners*, 286 F.3d at 694, citing *Wright v. Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418, 427 (1987) (holding that § 1983

remedies were available under Brooke Amendment to Housing Act, which did not expressly provide any private right of action). The *Nextel Partners* court pointed out that the Telecommunications Act provides for an aggrieved party under § 332(c)(7) to file an action in any court of competent jurisdiction. 286 F.3d at 694-95.

The *Nextel Partners* court also considered the differences between the remedial schemes available under the Telecommunications Act and § 1983. An action under the Telecommunications Act must be brought within 30 days of the challenged action, and the act provides for "streamlined" judicial review on an expedited basis. *Id*. at 695. In contrast, the statute of limitations on a § 1983 claim is much longer – in Indiana it would be two years. See *Snodderly v. R.U.F.F. Drug Enforcement Task Force*, 239 F.3d 892, 894 (7th Cir. 2001) (under *Wilson v. Garcia*, § 1983 borrows the statute of limitations from personal injury actions in the jurisdiction where the action is being tried; in Indiana the limitations period is two years); cf. *Nextel Partners*, 286 F.3d at 695 (statute of limitations on § 1983 claim based on Telecommunications Act presumably would be four years under 28 U.S.C. § 1658). In addition, the Telecommunications Act does not provide for any award of attorneys' fees, while fees are available under § 1983 pursuant to 42 U.S.C. § 1988.

The Third Circuit rejected the argument, which the plaintiff makes here, that the Telecommunications Act's "savings clause" indicates congressional intent to allow a Section 1983 claim based on the statute. The savings clause provides that the Telecommunications Act is not to be construed "to modify, impair, or supercede Federal, state, or local law unless so provided in such Act or amendments." Pub. L. No. 104-104, Title VI, § 601(c)(1), 110 Stat. 143 (1996), reprinted in 47 U.S.C.A. § 152, historical and statutory notes. The court clarified that its holding that there was no § 1983 remedy for a violation of the Telecommunications Act did not mean that the statute in any way modified, impaired or superceded Section 1983. *Nextel Partners*, 286 F.3d at 696. The court again relied on *National Sea Clammers*, 453 U.S. at 20 n. 31, where the Supreme Court held that, despite a savings clause, the comprehensive remedial schemes of water pollution statutes impliedly foreclosed a Section 1983 action. The Third Circuit's reasoning is sound on this point. The Telecommunications Act took nothing away from § 1983 or other pre-existing remedies, but without the enactment of the Telecommunications Act, there would not be even a colorable § 1983 claim here. Thus, enactment of the Telecommunications Act, providing its own remedies for violations of § 332(c)(7) and implicitly rejecting a separate § 1983 remedy for violation of the new statutory rights, did not modify, impair, or supercede any pre-existing rights or remedies under § 1983. But see *AT&T Wireless PCS v. Atlanta*, 210 F.3d at 1327-30 (finding that plain language

of savings clause allowed use of § 1983), *vacated en banc*, 260 F.3d 1320 (11th Cir. 2001).

The Third Circuit also noted the potentially harsh results that could occur under Section 1983:

> [Telecommunications Act] plaintiffs are often large corporations or affiliated entities, whereas TCA defendants are often small, rural municipalities. Such municipalities may have little familiarity with the TCA until they are confronted with a TCA claim, and in land-use matters they may generally rely on attorneys who may likewise know little about the TCA. See *Omnipoint Communications v. Penn Forest*, 42 F. Supp. 2d 493, 506 (M.D. Pa.1999). Allowing TCA plaintiffs to recover attorney's fees from such municipalities might significantly alter the Act's remedial scheme and thus increase the federal burden on local land-use regulation beyond what Congress intended.

286 F.3d at 695. The potential under § 1983 for imposing huge financial liability on part-time, and usually volunteer, citizen-members of local boards of zoning appeals, and the potential distorting effects that such risks could have on local decisions on applications, add further weight to the Third Circuit's point.

The Third Circuit concluded:

> While the remedial scheme provided by the [Telecommunications Act] is not complicated, we believe that it is comprehensive in the relevant sense: it provides private judicial remedies that incorporate both notable benefits and corresponding limitations. Allowing

> plaintiffs to assert [Telecommunications Act] claims under § 1983 would upset this balance.

286 F.3d at 694.

This court agrees with the result and reasoning of the Third Circuit holding that the Telecommunications Act implicitly forecloses a cause of action under § 1983 for alleged violations of 47 U.S.C. § 332(c)(7). Accordingly, the court grants the defendants' motion to dismiss Count II of the plaintiff's complaint. This dismissal concludes plaintiff's case against the individual defendants.[2]

III. *The Declaratory Judgment Claim*

Plaintiff also seeks a declaration under Indiana Code § 8-1-2-1(a) that it is a "public utility" and therefore not subject to the jurisdiction of the BZA or any other municipal agency. See Cplt. ¶¶ 37-38. Because the court has federal question jurisdiction over plaintiff's Telecommunication Act claim, the court has supplemental jurisdiction over this claim. See 28 U.S.C. § 1367(a). Defendants'

[2]The complaint does not indicate which counts are against which defendants. Plaintiff did not respond to the portion of the defendants' brief that argued that the Telecommunications Act does not create a cause of action against individual officials. To the extent the complaint could be construed to assert a Telecommunications Act claim against the individual defendants, any such claim also is dismissed.

request for the court to relinquish its jurisdiction pursuant to § 1367(c)(3) is moot because the court is not dismissing all of plaintiff's federal claims.

Defendants also contend that the court should relinquish jurisdiction over the declaratory judgment claim pursuant to 28 U.S.C. § 1367(c)(1), which provides that the court may decline its supplemental jurisdiction over a claim that raises a novel or complex issue of state law. The court has discretion in deciding under § 1367(c)(1) whether to exercise its supplemental jurisdiction. See, *e.g.*, *Kennedy v. Schoenberg, Fisher & Newman, Ltd.*, 140 F.3d 716, 727-28 (7th Cir. 1998).

While it is true that no Indiana court has decided whether a builder of wireless communication towers falls under the definition of "public utility" under Indiana Code § 8-1-2-1, the court will retain at least for now its supplemental jurisdiction over the claim. A number of state court decisions interpret the definition of "public utility" under the relevant statute. The defendants have not shown that the state law question is so novel or complex that this court should not decide it. The cases cited by the defendants are inapposite because they all involved situations where courts had dismissed all federal claims before trial.

*Conclusion*

Defendants' motion to dismiss plaintiffs' claim under 42 U.S.C. § 1983 is granted, and Count II of plaintiff's complaint is dismissed with prejudice. Defendants' motion is denied in all other respects.

So ordered.

Date: May 15, 2002

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

Copies to:

Diana C. Bauer
Miller, Carson, Boxberger & Murphy
1400 One Summit Square
Fort Wayne, IN 46802

James S. Stephenson
Stephenson, Daly, Morow, Horn & Semler
8710 North Meridian Street
Suite 200
Indianapolis, IN 46260