IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA ALEXANDRIA DIVISION

SOUTHERN WALK AT BROADLANDS HOMEOWNER'S ASSOCIATION, INC.,	)	
Plaintiff,	)	
v.	)	**Case No. 1:11cv517 (GBL/TCB)**
OPENBAND AT BROADLANDS, LLC,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendant OpenBand at Broadlands, LLC's ("OBB") Motion to Dismiss the Amended Complaint (Dkt. No. 32) and Plaintiff Southern Walk at Broadlands Homeowner's Association, Inc.'s ("Southern Walk") Motion for Leave to File Second Amended Complaint (Dkt. No. 44).

In this civil action, Southern Walk seeks declaratory judgments invalidating a series of agreements, easements, and other documents on federal- and state-law grounds. The challenged agreements include an Agreement to Obtain Telecommunications Services ("TSA") entered by Southern Walk and OBB and several documents referred to as "Ancillary Agreements" in Southern Walk's Amended Complaint. In Count I of its Amended Complaint, Southern Walk seeks a declaratory judgment holding the TSA and Ancillary Agreements to be "void and unenforceable" under the Telecommunications Act of 1996, the Federal Communications

Commission's ("FCC") Report and Order on Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments ("2007 Order" or "2007 Report and Order"), and 47 C.F.R. § 76.2000 ("Exclusive Access Rule"). Am. Compl. ¶¶ 61-64. In Count II, Southern Walk seeks a declaratory judgment holding the TSA and Ancillary Agreements "unconscionable" under Virginia law and therefore "void and unenforceable." Am. Compl. ¶¶ 65-73. In Count III, Southern Walk seeks a declaratory judgment holding the Ancillary Agreements to be "unenforceable servitudes" under Virginia law and therefore void. Am. Compl. ¶¶ 74-82.

OBB seeks dismissal of Southern Walk's first Amended Complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted under Rule 12(b) of the Federal Rules of Civil Procedure. The issue presented in OBB's Motion to Dismiss is whether the Court may properly exercise jurisdiction over an action for a declaratory judgment that a set of contracts, easements, and other documents are void where: (1) the action is brought under the FCC regulations prohibiting video programming service providers from executing or enforcing contractual provisions that grant exclusive rights to provide video services to real estate developments; and (2) Plaintiff Southern Walk has not alleged that Defendant OBB has taken action to enforce any such exclusivity provisions or that any video service provider has sought and was denied Defendant's consent to access and provide services to the SWAB Development.

The Court declines to exercise declaratory judgment jurisdiction in this matter and therefore grants OBB's Motion to Dismiss the Amended Complaint. The Court grants OBB's Motion to Dismiss as to Count I because: (1) the Amended Complaint fails to present a case of actual controversy; and (2) the FCC's 2007 Order and Exclusive Access Rule do not reach the

entire set of contracts, easements, and other documents challenged in this action. The Court grants OBB's Motion to Dismiss as to Counts II and III because it declines to exercise supplemental jurisdiction over claims brought under state law after the dismissal of the sole related claim brought under federal law.

In its Motion for Leave to File Second Amended Complaint, Southern Walk proposes to add new factual allegations based on recent events and a fourth count for declaratory relief. In Count IV of its Proposed Second Amended Complaint, Southern Walk seeks a declaratory judgment holding the challenged easements void for cessation of purpose. Pl.'s Br. in Supp. of Mot. for Leave to File 2d Am. Compl. at 1-2. Two issues are presented in Southern Walk's Motion for Leave to File a Second Amended Complaint under Rule 15(a)(2): (1) whether the infirmities of Southern Walk's first Amended Complaint are cured in its Proposed Second Amended Complaint such that it would survive a challenge under Rule 12(b)(6); and (2) whether Southern Walk's allegation that OBB will lose the legal right to operate an open video system in Loudoun County is sufficient to state a ripe claim for a declaratory judgment that the easements have terminated for cessation of purpose.

The Court denies Plaintiff's Motion for Leave to Amend and holds that: (1) Southern Walk's Proposed Second Amended Complaint does not cure the deficiencies of the first Amended Complaint with respect to Counts I, II, and III because the proposed amendments do not address these counts; and (2) Southern Walk's proposed Count IV is not ripe for adjudication and is not adequately pled because, according to the new facts alleged in the Proposed Second Amended Complaint, OBB presently retains the legal right to operate its open video system in Loudoun County and the purpose of the challenged easements would not be terminated by OBB's loss of its open video system franchise.

I. BACKGROUND

A. PLAINTIFF'S FIRST AMENDED COMPLAINT

The following is a summary of the facts alleged by Plaintiff Southern Walk in its first Amended Complaint, which the Court takes as true for the purpose of deciding Defendant OBB's Motion to Dismiss.

Southern Walk at Broadlands Homeowner's Association, Inc. ("Southern Walk") is an association for owners of the 1,117 residential properties in the Southern Walk at Broadlands real estate development ("SWAB Development") located in Loudoun County, Virginia. Am. Compl. ¶ 6. The developer of the community, Broadlands Associates, established Southern Walk in 2001 as a "sub-association" of Broadlands Association, Inc., which is the owner of the common areas within the SWAB Development. Am. Compl. ¶ 6. Broadlands Associates controlled Broadlands Association and Southern Walk in 2001 and remained in control of Southern Walk until the fall of 2009. Am. Compl. ¶¶ 7-8. The primary developer of the greater Broadlands community, Van Metre, Inc., owns and controls Broadlands Associates. Am. Compl. ¶ 11.

OpenBand at Broadlands, LLC ("OBB") was established in 2001 by its two members, OpenBand SPE II, LLC ("OSPE") and Broadlands Communications, LLC, a subsidiary of Broadlands Associates. Am. Compl. ¶¶ 10-12; Pl.'s Ex. 1 Attach. to Am. Compl. OBB and its affiliates provide a number of telecommunications services to the SWAB Development, including multichannel video programming services through operation of an open video system. Am. Compl. ¶ 12.

Southern Walk alleges that, "through an intricate web of inter-related agreements, easements, covenants and restrictions[,]" OBB "created an exclusive, long term access arrangement" under which OBB is the only wire-based provider of telephone, Internet, and multichannel video services with access to the SWAB Development. Am. Compl. ¶¶ 13, 17, 24-25. Other wire-based telecommunications service providers are precluded from accessing the community. Am. Compl. ¶¶ 13, 17, 52-55. The various documents that comprise the alleged exclusivity scheme are attached to the Amended Complaint as exhibits. These documents include the Agreement to Obtain Telecommunications Services ("TSA") entered by OBB and Southern Walk in 2001 (Pl.'s Ex. 2) and the following "Ancillary Agreements": OBB's Operating Agreement (Pl.'s Ex. 1); Southern Walk's Articles of Incorporation and Bylaws (Pl.'s Exs. 3, 4); the Declaration of Covenants, Conditions and Restrictions for the SWAB Development ("CC&Rs") (Pl.'s Ex. 5); and three easement deeds for telecommunications facilities and services for the SWAB Development (Pl.'s Exs. 7, 8, 9). Am. Compl. ¶¶ 22-25.

The Amended Complaint presents a list of references contained in these documents to OBB's exclusivity arrangement, which includes the following, *inter alia*: a provision in the TSA that forbids Southern Walk from engaging telecommunications service providers other than OBB (Pl.'s Ex. 2 at 5); Broadlands Associates' reservation, in the CC&Rs, of the right to grant to a third party an exclusive right to operate telecommunications utilities in the SWAB Development (Pl.'s Ex. 5 at 10); a provision in Southern Walk's Articles of Incorporation describing the association's role in providing for "the installation and maintenance of an exclusive private utility system within the property" (Pl.'s Ex. 3 at 2); and, in the challenged easement deeds, the grant of an exclusive right to operate telecommunications utilities on the SWAB Development (Pl.'s Exs. at 7, 8). Am. Compl. ¶¶ 18, 26-34.

Southern Walk claims that the exclusivity scheme created by the TSA and Ancillary Agreements violates a regulation promulgated by the Federal Communications Commission ("FCC") in 2007 and harms Southern Walk by precluding OBB's wire-based competitors from accessing the SWAB Development. Am. Compl. ¶¶ 38, 49, 59. In October 2007, the FCC issued its Report and Order in the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments ("2007 Report and Order" or "2007 Order"). Am. Compl. ¶ 36; 22 F.C.C. Rcd. 20235 (Oct. 31, 2007). The final rule entered by the FCC ("Exclusive Access Rule") prohibits cable operators and other multichannel video service providers from executing and enforcing provisions in contracts that grant them exclusive rights to access and provide services to multiple dwelling units ("MDUs") and other real estate developments. 22 F.C.C. Rcd. 20235 at Appx. D; 47 C.F.R. § 76.2000.

OBB has taken the position that the FCC's Exclusive Access Rule does not reach the TSA and Ancillary Agreements and maintains that its exclusive easement rights to access the SWAB Development remain enforceable. Am. Compl. ¶¶ 51, 57, 59. Since Broadlands Associates relinquished control over the homeowner's association in fall 2009, Southern Walk's attempts to persuade OBB to modify the terms of the TSA and Ancillary Agreements in order to open the Development to other wire-based video service providers have failed. Am. Compl. ¶¶ 9, 47-51. In February 2011, representatives of Southern Walk met with representatives of telecommunications companies Verizon and Comcast, who stated that OBB's exclusive easement rights obstructed their access to the SWAB Development. Am. Compl. ¶¶ 53-56.[1]

[1] "The Verizon representatives stated that[] 'Openband was granted a couple of blanket easements and they are exclusive... we cannot access your community, even the public roads.'" Am. Compl. ¶ 53. "The Comcast representatives told Southern Walk 'it will be be very problematic for Comcast to bring our lines into the Southern Walk community, because of OpenBand's exclusive easements.'" Am. Compl. ¶ 55.

B. PLAINTIFF'S PROPOSED SECOND AMENDED COMPLAINT

The following is a summary of facts newly alleged by Plaintiff Southern Walk in its Proposed Second Amended Complaint, which the Court takes as true for the purpose of deciding Plaintiff's Motion for Leave to Amend.

As required by Loudoun County ordinance, OBB affiliate OpenBand Multimedia, LLC ("OBM") acquired a franchise to operate its open video system with a term of seven years beginning in 2002. Proposed 2d Am. Compl. ¶¶ 57-59. To permit "an orderly transition" to a new operator, the franchise agreement provided that OBM would continue to operate the open video system beyond the term of its franchise for a "transition period" not to exceed 36 months "unless extended by the County for good cause." Proposed 2d Am. Compl. ¶ 57-61. Since the expiration of the franchise in June 2009, OpenBand[2] has been operating its open video system in the transition period while applying for the renewal of its franchise. Proposed 2d Am. Compl. ¶¶ 60-63.

On November 2, 2011, OpenBand's application to renew the franchise was denied by the Loudoun County Board of Supervisors, and the transition period ends on June 30, 2012. Proposed 2d Am. Compl. ¶¶ 64-66.

---

[2] It is unclear from the face of the Proposed Second Amended Complaint whether the rights granted in the franchise agreement belong to OpenBand at Broadlands, LLC ("OBB") or its affiliate OpenBand Multimedia, LLC ("OBM"). An unsigned Open Video System Agreement, attached to the Proposed Second Amended Complaint as Exhibit 15, is an agreement between Loudoun County officials and OBM. According to the Proposed Second Amended Complaint, OBM acquired the open video system franchise. Proposed 2d Am. Compl. ¶ 57. However, subsequent paragraphs in the proposed addition refer to "OpenBand," meaning OpenBand at Broadlands, LLC, as the open video system operator and applicant for renewal of the franchise. Proposed 2d Am. Compl. ¶¶ 58-68, 102, 104, 107, 108; *see also* Proposed 2d Am. Compl. at 1. The Court notes that § 2.1.1 of the TSA permits OBB to engage third-party service providers to provide one or more telecommunications services to the SWAB Development. Pl.'s Ex. 2 at 5. It is not clear whether OBB has such an agreement with OBM to provide video programming services to the Development through operation of the open video system. When uncertain whether the Proposed Second Amended Complaint refers to OBB or OBM, the Court refers to the OpenBand entity as "OpenBand."

C. PROCEDURAL HISTORY

On May 13, 2011, Southern Walk filed a Complaint in this Court against OBB seeking declaratory judgments that the TSA and Ancillary Agreements are void as violative of federal telecommunications policy and state law. (Dkt. No. 1.) On July 29, 2011, after a hearing on Defendant OBB's Motion to Dismiss the Complaint, the Court dismissed the Complaint without prejudice because Southern Walk failed to present a case or controversy under Article III of the United States Constitution, the terms of the TSA did not constitute an exclusive access agreement prohibited by the FCC's Exclusive Access Rule, and, having dismissed Southern Walk's only federal-law claim, the Court declined to exercise supplemental jurisdiction over the remaining state-law claims. July 29, 2011 Order (Dkt. No. 18); July 29, 2011 Tr. at 31-37 (Dkt. No. 19). Additionally, the Court expressed doubt about whether freestanding claims for unconscionability and unenforceable servitude are viable under Virginia law. July 29, 2011 Tr. at 36, 38-39.

On September 9, 2011, after the Court granted Plaintiff leave to amend, Southern Walk filed its first Amended Complaint. Sep. 9, 2011 Order (Dkt. No. 28); Am. Compl. (Dkt. No. 29). On October 6, 2011, OBB filed its Motion to Dismiss the Amended Complaint under Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure. (Dkt. No. 32.) The matter was briefed, and a hearing on the Motion was held before the Court on October 21, 2011. After the hearing, the Court took the matter under advisement.

On November 16, 2011, Southern Walk filed its Motion for Leave to File Second Amended Complaint under Federal Rule of Civil Procedure 15(a)(2) (Dkt. No. 44) with its Proposed Second Amended Complaint attached to its brief in support of the Motion (Dkt. No. 45-1). In its Proposed Second Amended Complaint, Southern Walk alleges a set of new facts

based on recent events and requests a declaratory judgment that the challenged easements are void for cessation of purpose. Proposed 2d Am. Compl. ¶¶ 50-66, 100-110.

OBB's Motion to Dismiss the first Amended Complaint and Southern Walk's Motion to File Second Amended Complaint are now before the Court.

II. DEFENDANT'S MOTION TO DISMISS

The Court first takes up OBB's Motion to Dismiss the Amended Complaint under Rules 12(b)(1) and (6).

A. STANDARD OF REVIEW UNDER RULES 12(b)(1) AND (6)

Article III of the United States Constitution limits the subject matter jurisdiction of the federal courts. U.S. Const. art. III, § 2. A case must be dismissed under Federal Rule of Civil Procedure 12(b)(1) if the court lacks jurisdiction over the subject matter of the case. A Rule 12(b)(1) motion to dismiss should be granted unless the federal district court is presented with an actual and concrete case or controversy that either arises under federal law or meets the requirements of diversity jurisdiction under 28 U.S.C. § 1332. *See* U.S. Const. art. III, § 2; 28 U.S.C. §§ 1331, 1332.

A Rule 12(b)(6) motion to dismiss should be granted unless an adequately stated claim is "supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 561 (2007) (internal citations omitted). *See also* Fed. R. Civ. P. 12(b)(6). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 555). A complaint is also insufficient if it relies upon "naked assertions devoid of further factual enhancement." *Iqbal*, 129 S. Ct. at 1949 (internal citations omitted). To

survive a Rule 12(b)(6) motion to dismiss, a complaint must set forth "a claim for relief that is plausible on its face." *Id.* (quoting *Twombly*, 550 U.S. at 570). A claim is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 556).

In considering a motion to dismiss, the Court must construe the complaint in the light most favorable to the plaintiff, read the complaint as a whole, and take the facts asserted therein as true. *Mylan Lab., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). In addition to the complaint, the court may also examine "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2509 (2007).

B. ANALYSIS

The Court grants OBB's Motion to Dismiss the Amended Complaint because the Amended Complaint does not include any allegation that OBB has taken action to enforce any contractual provision granting it an exclusive access to the SWAB Development or that OBB has denied any request for access to the Development by competing video service providers. Without any request or demand for access made by any carrier, Plaintiff presents a merely hypothetical conflict where there is no actual case or controversy. Taking the facts alleged in the Amended Complaint as true, this Court concludes that it lacks sufficient bases for exercising declaratory judgment jurisdiction over Count I and supplemental jurisdiction over Counts II and III.

1. COUNT I IN THE AMENDED COMPLAINT

The Court grants OBB's Motion to Dismiss Count I because the facts alleged in Southern Walk's Amended Complaint fail to provide a sufficient basis for this Court's exercise of

declaratory judgment jurisdiction under the Federal Declaratory Judgment Act ("DJA"), 28 U.S.C. §§ 2201-2202 (2010), and fail to present a case of actual controversy for this Court's determination.

The U.S. Court of Appeals for the Fourth Circuit has held that, under the DJA, there are three requirements for a federal court's exercise of jurisdiction in an action for a declaratory judgment:

> (1) the complaint alleges an actual controversy between the parties of sufficient immediacy and reality to warrant issuance of a declaratory judgment; (2) the court possesses an independent basis for jurisdiction over the parties (*e.g.*, federal question or diversity jurisdiction); and (3) the court does not abuse its discretion in its exercise of jurisdiction.

Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co., Inc., 386 F.3d 581, 592 (4th Cir. 2004) (citing DJA, 28 U.S.C. § 2201) (internal quotations omitted).

The Court properly declines to exercise jurisdiction over Count I of the Amended Complaint because: (1) Plaintiff Southern Walk does not allege any injury-in-fact likely to be redressed by the declaratory relief requested in Count I and therefore fails to present "an actual case or controversy . . . of sufficient immediacy and reality to warrant issuance a declaratory judgment[;]" and (2) the declaratory relief Plaintiff seeks in Count I would require the Court to reach beyond the scope of the federal laws upon which Plaintiff bases its claim, and, therefore, this Court would risk abusing its discretion by taking declaratory judgment jurisdiction in this case. *Volvo Constr.*, 386 F.3d at 592.

a. Count I Does Not Present a Case of Actual Controversy

Like the original Complaint filed in this case, the Amended Complaint fails to present an actual case or controversy for adjudication because Plaintiff Southern Walk has not pled that

Defendant OBB has taken any action to bar competing video service providers from access to the SWAB Development or that such competitors have requested and were denied access.

The DJA grants federal courts the power to "declare the rights and other legal relations of any interested party seeking such declaration" but limits this power to enter declaratory judgments to "case[s] of actual controversy within its jurisdiction[.]" 28 U.S.C. § 2201(a). In upholding the DJA, the U.S. Supreme Court held that this limit to "case[s] of actual controversy" is the same limit to cases and controversies imposed by Article III of the Constitution on the subject matter jurisdiction of federal courts. *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 239-240 (1937). *See also* U.S. Const. art. III, § 2 (limiting jurisdiction of federal courts to particular classes of cases and controversies); *Rhodes v. E.I. duPont de Nemours & Co.*, 636 F.3d 88, 99 (4th Cir. 2011) (federal court must dismiss case for lack of subject matter jurisdiction if it fails to meet the Article III case-or-controversy requirement).

This case-or-controversy requirement is met with disputes that are "definite and concrete," that are "real and substantial," and that "touch[] the legal relations of parties having adverse legal interests[.]" *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (quoting *Aetna Life*, 300 U.S. at 240-241) (internal quotations omitted). The Supreme Court recognizes a constitutional distinction between a judicial decision that "admit[s] of specific relief through a decree of a conclusive character[]" and "an opinion advising what the law would be upon a hypothetical state of fact." *Id.* (internal quotations and brackets omitted). The latter advisory opinion fails to meet the case-or-controversy requirement and therefore constitutes an improper exercise of jurisdiction by federal courts. *Id.* The issue presented in each suit for declaratory relief "is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy

and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

A definite and concrete Article III case or controversy can only be presented by a party who establishes standing to bring the claim for relief in its complaint. *Raines v. Byrd*, 521 U.S. 811, 818 (1997). Article III requires that the claimant allege "'such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (quoting *Warth v. Seldin*, 422 U.S. 490, 498-499 (1975)) (emphasis in original). "[I]n order to have standing, a party must be able to demonstrate a 'distinct and palpable injury' that is likely to be redressed if the requested relief is granted." *Md. Highways Contractors Ass'n, Inc. v. Maryland*, 933 F.2d 1246, 1250 (4th Cir. 1991) (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 488 (1982)). More specifically, the Supreme Court has held that, "to satisfy Article III's standing requirements, a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

There are two distinct theories upon which an association like Southern Walk may plead standing: (1) standing in its own right as an association; and (2) standing on behalf of its members in a representative capacity. *Md. Highways*, 933 F.2d at 1250. Southern Walk fails to establish standing under either theory.

i. Plaintiff Lacks Standing to Sue in Its Own Right

Plaintiff Southern Walk fails to establish standing to bring the present suit in its own right.

An association "may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Id.* (quoting *Warth*, 422 U.S. at 511). In its complaint, however, the association must plead that it suffered an actual and particularized injury-in-fact that is "fairly traceable to the challenged action of the defendant" and is likely to be "redressed by a favorable decision[]" from the court. *Friends of the Earth*, 528 U.S. at 180-181. *See also Md. Highways*, 933 F. 2d at 1250 ("When determining whether an association has standing, a court conducts the same inquiry as in the case of an individual[.]").

The Amended Complaint includes allegations of injury to Southern Walk as an association in its contractual obligations under the TSA and Ancillary Agreements, which it claims are invalid under the FCC's 2007 Report and Order. The association alleges that, under the TSA, it is prohibited from "engaging" any provider of certain telecommunications services, including basic multichannel video services, other than OBB. Am. Compl. ¶¶ 18, 29(a). *See also* Pl.'s Ex. 2 at 5 (TSA § 2.1). Southern Walk alleges further that, under each of the three easement deeds included among the Ancillary Agreements attached to its Amended Complaint, the association is prohibited from "tak[ing] any action inconsistent with the terms of [the deed] and the rights [t]herein granted." Am. Compl. ¶¶ 30(e), 31(e), 32(b). *See also* Pl.'s Ex. 8 at 7 (Easement One ¶ 10); Pl.'s Ex. 9 at 7 (Easement Two ¶ 10); Pl.'s Ex. 7 at 7 (Surviving Easement ¶ 10).

The allegations related to Southern Walk's obligations under the TSA and Ancillary Agreements are insufficient to establish standing to bring this action. The Amended Complaint does not include any factual allegations demonstrating how Southern Walk or its interests as an organization are harmed by its obligations under the TSA and easements. When asked by this Court to identify the injury to Southern Walk at the October 21, 2011 hearing on OBB's Motion to Dismiss the Amended Complaint, Southern Walk's counsel stated that the challenged agreements "prohibit" the association from fulfilling its "obligation to its members to make services available to it [*sic*] at market rates." Oct. 21, 2011 Tr. at 31-32 (Dkt. No. 39). In the Amended Complaint, Southern Walk alleges that the association's "sole purpose is to administer the Telecommunications Services Agreement . . . for the benefit of the homeowners in the [SWAB Development]." Am. Compl. ¶ 7. However, Southern Walk's Articles of Incorporation, attached to the Amended Complaint as Exhibit 3, states the association's specific purposes as "assur[ing] maintenance, preservation and architectural control[] . . . of the Lots and Common Area within [the SWAB Development and] provid[ing] for[] the installation and maintenance of an exclusive private utility system within [the Development.]" Pl.'s Ex. 3 at 2. Southern Walk does not allege that its obligations under the TSA and easements prevent it from fulfilling the specific purposes set forth in its Articles of Incorporation.

Even if Southern Walk properly alleges that it is obstructed from fulfilling its organizational purposes by the challenged agreements, such an injury is insufficient to support an association's standing. The Supreme Court has held that an organization fails to establish standing to sue in its own right insofar as it relies upon its special interest in the subject matter of the litigation without alleging a concrete injury to itself as an organization. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976). Accordingly, in *Maryland Highways Contractors*

Association, Inc. v. Maryland, the Fourth Circuit rejected the plaintiff association's argument that "a non-economic injury to its 'organizational purpose'" was sufficient to support standing. 933 F. 2d at 1250-1251 (citing *Simon*, 426 U.S. at 40). Thus, any alleged injury relating to Southern Walk's organizational purpose or abstract duties to its members is insufficient to support the association's standing to bring the present suit in its own right. Without any concrete or actual injury to itself as an organization, Southern Walk "can establish standing only as [a] representative[] of those of [its] members who have been injured in fact, and thus could have brought suit in their own right." *Simon*, 426 U.S. at 40.

ii. Plaintiff Lacks Standing to Sue in a Representative Capacity

Plaintiff Southern Walk also fails to establish standing to bring suit on behalf of its members because the Amended Complaint does not include sufficient pleading that any of its members would have standing to bring this suit in their own right.

An association may have "standing to bring suit on behalf of its members when [1] its members would otherwise have standing to sue in their own right, [2] the interests at stake are germane to the organization's purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth*, 528 U.S. at 181 (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). In order for an association to establish that its members would have standing to sue in their own right, it must plead that its members have suffered a concrete and actual injury-in-fact that is traceable to the defendant's challenged conduct and likely to be redressed by a favorable decision from the court. *Friends of the Earth*, 528 U.S. at 180-81.

Southern Walk alleges injuries to its members, as SWAB residents and video service consumers, due to their lack of choices for wire-based video services and the lack of competition

among service providers for the SWAB residents. *See* Am. Compl. ¶¶ 38, 50; Pl.'s Opp. to Mot. to Dismiss at 10. Southern Walk further alleges that the harms suffered by SWAB homeowners are traceable to the exclusive rights enjoyed by OBB. Am. Compl. ¶¶ 53-56. According to the Amended Complaint, wire-based telecommunications service provider Verizon represented to Southern Walk that, in deploying its broadband telecommunications network, it was forced to "build around" the SWAB Development due to the easements granted to OBB. Am. Compl. ¶ 53. Verizon also represented that it "cannot currently access [the Development] because of the current access restrictions from Openband." Am. Compl. at ¶ 54. Wire-based telecommunications service provider Comcast represented to Southern Walk that "OpenBand's exclusive easements" were an obstacle to Comcast's access to the Development. Am. Compl. ¶¶ 55, 56. Southern Walk points out that the harms associated with the lack of competition among video service providers were recognized by the FCC in its 2007 Report and Order. Am. Compl. ¶ 38; Pl.'s Opp. to Mot. to Dismiss at 14. *See also* 22 F.C.C. Rcd. 20235 at ¶¶ 17, 22, 28. The 2007 Order prohibited the execution and enforcement of contractual provisions creating exclusive rights to access and provide multichannel video services to real estate developments. *See generally* 22 F.C.C. Rcd. 20235. According to the FCC, such exclusivity provisions deny residents choice in video services and "thus deny them the benefits of increased competition[,]" such as "lower prices, more channels, and a greater diversity of information and entertainment from more sources." 22 F.C.C. Rcd. 20235 at ¶ 17.

Southern Walk fails to adequately plead an injury-in-fact to its members in the consumer harm addressed in the FCC's 2007 Report and Order. First, the challenged Agreement to Obtain Telecommunications Services ("TSA"), which is attached to the Amended Complaint as Exhibit 2, includes a provision permitting SWAB homeowners to obtain telecommunications services,

including video services, from alternate providers. Pl.'s Ex. 2 at 6 (TSA § 2.1.3).[3] The fact that the TSA expressly gives Southern Walk's members the right to obtain video programming services from OBB's non-wire-based competitors weakens Southern Walk's claim that its members are injured by a lack of competition among video service providers.

Second, Southern Walk falls short of pleading that the consumer harm associated with the lack of competition among wire-based video service providers is concrete and actual for SWAB homeowners and that the declaratory relief it requests will likely redress this harm. The Amended Complaint does not include sufficient factual allegations to support the claim that, if alleged video service exclusivity provisions in the TSA and Ancillary Agreements were invalidated or removed, wire-based competitors to OBB would take steps to wire and provide services to the SWAB Development and SWAB homeowners would enjoy the benefits of competition cited by the FCC. Specifically, although the Amended Complaint alleges that both Verizon and Comcast identified the challenged easements as barring their entry to the SWAB Development, it does not allege that either Verizon or Comcast represented that they would wire the Development if OBB's exclusive rights were set aside.

Southern Walk does not even allege that any of OBB's wire-based competitors ever approached OBB about accessing the Development or made any other attempt to offer video services to SWAB residents. Each of the challenged easement deeds, which are attached to the Amended Complaint, provide that the grantee may provide consent for other entities to operate telecommunications utilities on the SWAB Development. Pl.'s Ex. 8 at 6-7 (Easement One ¶ 9);

[3] Under the TSA, a homeowner who exercises her right to obtain services from an alternate provider would not be relieved of her obligation to pay for OBB's services. Pl.'s Ex. 2 at 6 (TSA § 2.1.3). In this type of bulk billing arrangement, an operator wires and provides services to each unit within a real estate development and requires a fee whether or not individual residents actually use the services. 75 Fed. Reg. 12458 (Mar. 16, 2010). Bulk billing arrangements are specifically deemed permissible by the FCC in its Second Report and Order in the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments, issued in 2010. *Id.*

Pl.'s Ex. 9 at 7 (Easement Two ¶ 9); Pl.'s Ex. 7 at 7 (Surviving Easement ¶ 9). These provisions clearly contemplate that any entity that seeks to wire and provide services on the Development may seek OBB's consent. Southern Walk does not allege that any wire-based video service provider ever sought OBB's consent to wire and provide services to the Development. In describing the consumer harms precipitated by "exclusivity clauses in existing MDU [multi-dwelling unit] contracts[,]" the FCC states that these provisions "impose adverse and absolute impacts upon would-be competitors who are otherwise *ready and able* to provide customers the benefits of increased competition." 22 F.C.C. Rcd. 20235 at ¶ 57 (emphasis added). Southern Walk cannot sufficiently plead a concrete injury to its members without alleging that OBB's wire-based competitors are "ready and able" to wire and provide video services the SWAB Development.

Without the allegation that OBB's competitors are prepared and willing to provide wire-based video services to the Development, it is not at all clear that the declaratory relief Southern Walk requests would—or is even likely to—redress the alleged harms suffered by the SWAB homeowners. Indeed, there are grounds for significant doubt that a declaration invalidating the TSA and Ancillary Agreements would result in greater wire-based video service competition within the SWAB Development. Considering the frequency with which the FCC's 2007 Report and Order cite comments submitted by Verizon and Comcast,[4] there can be little doubt that these and other video service providers affected by the 2007 Order and Exclusive Access Rule are aware of the FCC's prohibition against the enforcement of video service exclusivity clauses. Despite their awareness of the FCC's rulemaking and the obstruction from entering the SWAB Development posed by the easements challenged in the present lawsuit, there is no indication in

[4] *See, e.g.*, 22 F.C.C. Rcd. 20235 at ¶¶ 8 n.18, 10 n.24, 12 n.38, 20 n.60, 25 n.77.

Southern Walk's Amended Complaint that Verizon, Comcast, or any other wire-based video service provider took any steps of their own to challenge the validity of OBB's exclusive rights. Such action on part of OBB's wire-based competitors would demonstrate their readiness to provide services to the SWAB Development and support an inference that Southern Walk's requested declaratory relief would redress the alleged harms to Southern Walk's members as video service consumers. Thus, the Amended Complaint fails to provide sufficient pleading that the declaratory relief it requests is likely to redress the injuries to its members that it alleges are traceable to the exclusive rights granted to OBB under the TSA and Ancillary Agreements.

Without sufficient pleading of a concrete and actual injury-in-fact suffered by its members that is likely to be redressed by the declaratory relief it requests, Southern Walk fails to establish that its members would have standing to bring this suit in their own right and therefore fails to establish standing in its representative capacity. *See Friends of the Earth*, 528 U.S. at 180-181 (to have representative standing, association must plead that its members have suffered an injury-in-fact that is likely to be redressed by a favorable decision from the court).

By failing to establish its standing to bring the present suit either in its own right or on behalf of its members, Southern Walk fails to present a case of actual controversy for adjudication by this Court. *See Raines*, 521 U.S. at 818 (Article III case or controversy can only be presented by a party who has standing). Therefore, this Court lacks grounds upon which to exercise declaratory judgment jurisdiction over the action under the DJA and is barred from exercising such jurisdiction by Article III's case-or-controversy requirement. *See Aetna Life*, 300 U.S. at 239-240 (DJA's case-of-actual-controversy requirement is same as Article III case-or-controversy requirement).

b. The FCC Rule Does Not Warrant the Declaratory Relief Sought in Count I

The Court also declines to exercise declaratory judgment jurisdiction in this case because the declaratory relief sought in Count I of the Amended Complaint reaches beyond the scope of the FCC's 2007 Order. Even if Plaintiff Southern Walk presented an Article III case or controversy, the 2007 Report and Order does not entitle Plaintiff to a wide ranging declaratory judgment indiscriminately voiding the entire set of contracts, easements, and other documents challenged in this action.

The DJA requires that actions for declaratory relief present an Article III case or controversy but does not require federal district courts to take jurisdiction over actions in which the requirements of Article III are met; the statute *permits* district courts to take jurisdiction over such actions. *See* § 28 U.S.C. 2201 ("In a case of actual controversy within its jurisdiction any court of the United States *may* declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.") (emphasis added). "[D]istrict courts have great latitude in determining whether to assert jurisdiction over declaratory judgment actions." *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488, 493 (4th Cir. 1998) (quoting *Aetna Cas. & Sur. Co. v. Ind-Com Elec. Co.*, 139 F.3d 419, 422 (4th Cir. 1998)). However, the district court's discretion is not without bounds; it "must have 'good reason' for declining to exercise its declaratory judgment jurisdiction." *Volvo Constr.*, 386 F.3d at 594 (quoting *Cont'l Cas. Co. v. Fuscardo*, 35 F.3d 963, 965 (4th Cir. 1994)).

In Count I, Southern Walk seeks a declaratory judgment that the TSA and Ancillary Agreements are "void and unenforceable" under the FCC's 2007 Order, Am. Compl. ¶ 64, but the FCC policy does not reach so far as to modify property owner's rights or justify a judicial declaration that the entire set of challenged agreements are void. The Exclusive Access Rule was

promulgated by the FCC through the 2007 Report and Order and under the authority granted to the Commission by Congress in § 628(b) of the Telecommunications Act of 1996. *See* 47 U.S.C. § 548(b); 22 F.C.C. Rcd. 20235 at ¶¶ 4, 32, 40 (FCC has authority under § 628(b) to adopt Exclusive Access Rule); 47 C.F.R. § 76.2000; *Nat'l Cable & Telecomms. Ass'n v. F.C.C.*, 567 F. 3d 659, 666 (D.C. Cir. 2009) (section 628(b) authorizes FCC's Exclusive Access Rule). Section 628(b) prohibits cable operators, satellite cable programming vendors and satellite broadcast programming vendors from "engag[ing] in unfair methods of competition or unfair or deceptive acts or practices [that] hinder significantly or . . . prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers." 47 U.S.C. § 548(b). As noted in the 2007 Order, "the substantial majority of programming carried by MVPDs [multichannel video programming distributors]" are "delivered by satellite[.]" 22 F.C.C. Rcd. 20235 at ¶ 4. *See also Nat'l Cable*, 567 F. 3d at 662. The FCC's final rule states that "[n]o cable operator or other provider of MVPD service subject to 47 U.S.C. § 548 shall enforce or execute any provision in a contract that grants to it the exclusive right to provide any video programming service (alone or in combination with other services) to a MDU [multiple dwelling unit]." 47 C.F.R. § 76.2000(a).

Given the limits of the Commission's authority under § 628(b), the FCC's 2007 Order and Exclusive Access Rule only reach the conduct of cable operators, satellite cable programming vendors, and satellite broadcast programming vendors. *See* 47 U.S.C. § 548(b). The policy does not reach the conduct of property owners or other parties with whom MVPDs may contract. In the 2007 Report and Order, the FCC recognized the limits of its authority under § 628 and explicitly limited the reach of the Exclusive Access Rule to "cable operator[s]" and "other provider[s] of MVPD[.]" 47 C.F.R. § 76.2000(a). *See also* 22 F.C.C. Rcd. 20235 at ¶¶ 1,

37, 60. The Commission stated that its new rule "prohibit[ed] the enforcement of existing exclusivity clauses and the execution of new ones *by cable providers and others subject to the relevant statutory provisions*." 22 F.C.C. Rcd. 20235 at ¶ 1 (emphasis added). The FCC was careful to note that owners of MDUs "retain[] the rights [they have] under relevant state law to deny a particular provider the right to provide service to its property." *Id.* at ¶ 37. The Commission also declared that the Exclusive Access Rule "does not require any new entrant to be given access to any MDU[]" or "MDU owners to provide access to all MVPDs[.]" *Id.* at ¶¶ 37, 60. Thus, "[t]he terms of the [Exclusive Access Rule] apply only to cable companies[;] they neither require nor prohibit any action by MDUs." *Nat'l Cable*, 567 F. 3d at 666.

Additionally, the FCC was careful in explicitly limiting the reach of the Exclusive Access Rule to clauses in contracts granting MVPDs the exclusive right to access and provide video services to MDUs—*not entire contracts* for video services or for any other purpose. *See* 47 C.F.R. § 76.2000(a) (prohibiting MVPDs from "execut[ing] or enforc[ing] any *provision* in a contract that grants to it the exclusive right to provide any video programming service . . . to a MDU[]") (emphasis added). In the 2007 Report and Order, the FCC stated that "[w]hile [the] Order prohibits the enforcement of existing exclusivity clauses, it does not, on its own terms, purport to affect other provisions in contracts containing exclusivity clauses." 22 F.C.C. Rcd. 20235 at ¶ 37. State law and the terms of the contracts continue to govern how contractual provisions that do not grant exclusive access and service rights to MVPDs will be treated. *Id.* at ¶ 37 n.112. The 2007 Order and the Exclusive Access Rule do not reach such contractual provisions. Accordingly, the 2007 Report and Order makes repeated reference to "exclusivity *clauses*" as the object of the regulation and never purports to regulate or invalidate full contracts, much less easements or other interests in land. *See, e.g., id.* at ¶¶ 1, 3, 4, 15, 32, 37, 57.

Because the FCC's Exclusive Access Rule is limited to exclusivity clauses and to the conduct of cable operators and other MVPDs in executing and enforcing such clauses, it cannot support a claim for declaratory relief invalidating the entire set of contracts, easements, covenants, association bylaws, and other documents challenged in this action.

i. The TSA Is Not Voidable Under the FCC Rule

Taking first the TSA, this agreement does not contain a single provision or clause that grants OBB the exclusive right to access and provide video services to the SWAB Development. *See* Pl.'s Ex. 2. To the contrary, the TSA includes a provision permitting SWAB homeowners to obtain telecommunications services, including video services, from service providers other than OBB. Pl.'s Ex. 2 at 6 (TSA § 2.1.3).[5] The only TSA provision that could possibly be construed as granting such an exclusive right is a clause in § 2.1 that forbids Plaintiff Southern Walk, as manager of the areas on which the community's telecommunications infrastructure is installed, from "engag[ing] any . . . provider of Platform Services[,]"[6] including video services, other than OBB. Pl.'s Ex. 2 at 5. *See also* Am. Compl. ¶ 18. This clause does not grant OBB the exclusive right to provide video programming service to the SWAB Development, and, therefore, the Exclusive Access Rule does not reach it. Even if the provision could be construed as an exclusivity clause forbidden by the Exclusive Access Rule, the TSA is contract for the provision of several telecommunications services, not just video services. The 17-page contract includes numerous provisions that have nothing to do with securing any alleged exclusive right for OBB.

---

[5] *See supra* note 3.

[6] "Platform Services" include basic telephone, Internet, and video services "for which residents pay as a part of their required [homeowner's association] fees in accordance with [the terms of the TSA]." Pl.'s Ex. 2 at 3. These basic services are distinguished from "Premium Services," which are "available to the Development and/or to Consumers on an elective basis" and include certain "complementary and value added" services and "additional viewing selections[.]" Pl.'s Ex. 2 at 3, Appx. C.

The Exclusive Access Rule is confined to contractual grants of exclusive rights to provide multichannel video services and therefore does not invalidate the TSA.

ii. The CC&Rs, Articles of Incorporation, and OBB Operating Agreement Are Not Voidable Under the FCC Rule

The Exclusive Access Rule, for this same reason, does not invalidate any of the Ancillary Agreements challenged in this suit. The SWAB Development CC&Rs is a 38-page document that describes and implements various covenants, easements, conditions, and restrictions on the property and its use by residents of the Development. *See* Pl.'s Ex. 5. Southern Walk's Articles of Incorporation establishes Plaintiff Southern Walk as a corporate entity, describes the powers and purposes of the association, provides rules for membership and voting, and discusses other internal association matters. *See generally* Pl.'s Ex. 3. The CC&Rs and the Articles of Incorporation are not alleged to contain a single provision for OBB's right to access and provide video services to the SWAB Development. Brief mention is made in each document to an "exclusive" utility system to be installed and maintained on the Development. *See* Pl.'s Ex. 3 at 2; Pl.'s Ex. 5 at 10; Am. Compl. ¶¶ 27-28. However, phrases making reference to exclusive rights to a utility system for telecommunications services, without mentioning any entity as the holder of those rights, are not the sort of exclusivity clauses regulated by the FCC's 2007 Order and Exclusive Access Rule. The FCC regulation does not reach the CC&Rs or the Articles of Incorporation in their entirety or their particular references to the telecommunications utility system at the SWAB Development; therefore, these documents cannot be declared void on the basis of that rule.

Similarly, the OBB Operating Agreement establishes OBB as a limited liability company and provides many details about the composition of and financial matters relating to OBB. *See generally* Pl.'s Ex. 1. The Operating Agreement is a 72-page document executed by OBB

members Broadlands Communications and OSPE, which are not parties to the present suit or otherwise before this Court. Southern Walk does not allege that the Operating Agreement grants exclusive rights for OBB to access or provide video services to the SWAB Development. Instead, Southern Walk points out references to various other Ancillary Agreements that appear in the document as well as a provision absolving OSPE of certain obligations imposed by the Operating Agreement in the event that exclusive rights granted to OBB in Easements One and Two are invalidated, altered, diminished, or removed. Am. Compl. ¶ 33. *See also* Pl.'s Ex. 1 at 53-54. While making reference to the exclusivity enjoyed by OBB under Easements One and Two and removing certain liabilities from OSPE in the event that this exclusivity is destroyed, none of the provisions of the Operating Agreement identified in the Amended Complaint can be reasonably construed as granting OBB exclusive rights to provide video services to the SWAB Development. Thus, again, the FCC's Exclusive Access Rule and this Court's authority under the FCC regulation do not reach the Operating Agreement or any particular provision in the Agreement identified by Southern Walk. Indeed, it would be a gross miscarriage of justice if, in the name of removing OBB's exclusive rights, this Court were to declare void and unenforceable the contractual provision executed precisely to OSPE in the event that OBB's exclusive rights were removed simply because that provision makes reference to OBB's exclusive rights.

The Court holds that the FCC's Exclusive Access Rule does not reach, in whole or in part, the Southern Walk Articles of Incorporation, OBB Operating Agreement, the SWAB Development CC&Rs, or any of the other Ancillary Agreements challenged in the Amended Complaint.

iii. The Easements Are Not Voidable Under the FCC Rule

The FCC's Exclusive Access Rule does not invalidate the series of easements challenged in this suit. The challenged easement deeds were executed on November 16, 2001 for the provision of telecommunications services to the SWAB Development. They include two easement deeds titled "Easements for the Exclusive Provision of Telecommunications Services for Southern Walk at Broadlands," identified as Easement One and Easement Two in the Amended Complaint, and a third easement deed titled "Deed of Easement for Telecommunications Facilities for Southern Walk at Broadlands," identified as the Surviving Easement in the Amended Complaint. Pl.'s Exs. 7, 8, 9. Of all of the agreements and documents challenged in the Amended Complaint, these easements are perhaps most central to the exclusivity scheme alleged by Southern Walk.

Parties to the Surviving Easement are Broadlands Association, Broadlands Associates, Southern Walk, and, as "Grantees," alleged OBB affiliates, OpenBand Multimedia, LLC ("OBM") and OpenBand of Virginia, LLC ("OBV"). Pl.'s Ex. 7 at 1. *See also* Am. Compl. ¶ 12. In the Surviving Easement, Broadlands Association and Broadlands Associates convey easements to the OpenBand affiliates for the purpose of building, operating, and maintaining a telecommunications infrastructure, or "Utilities," on the SWAB Development, which include:

> antennae, satellite or terrestrial receiving or transmitting dishes, and communication towers [and] underground or above ground telecommunications lines and cables . . . and all above and below ground structures and appurtenances necessary for the collection, provision, distribution and transmission of video, telephonic, internet, data services or other communications, data or media[.]

Pl.'s Ex. 7 at 2-4. The Surviving Easement also provides for the replacement of this "blanket" easement with easements specific to the actual locations of the Utilities as installation is completed on portions of the Development. Pl.'s Ex. 7 at 3-4.

Parties to Easement One are, collectively as "Grantor," Broadlands Association, Broadlands Associates, and Southern Walk, and, as "Grantee," Broadlands Communications. Pl.'s Ex. 8 at 1. "[A]s part of an overall plan to provide certain services to [the Broadlands Development]," Easement One grants Broadlands Communications "the right to be the exclusive provider of such services to Southern Walk[.]" Pl.'s Ex. 8 at 2. Additionally, Easement One grants Broadlands Communications "exclusive rights to Operate Utilities on, under and across [the SWAB Development] such that no other person or entity other than the grantees under the Surviving Easement [OBB affiliates OBM and OBV] shall be entitled to Operate any Utilities on, under or across [the Development] without the written consent of the [Broadland Communications]." Pl.'s Ex. 8 at 7.

The parties to Easement Two are Broadlands Communications, as "Grantor," and OBB, as "Grantee." Pl.'s Ex. 9 at 1. Easement Two grants OBB "the exclusive right to Operate Utilities on, under and across [the SWAB Development] such that no other person or entity other than the grantees under the Surviving Easement [OBB affiliates OBM and OBV] shall be entitled to Operate any Utilities on, under or across [the Development] without the written consent of [OBB]." Pl.'s Ex. 9 at 6-7.

The FCC's Exclusive Access Rule does not reach so far as to invalidate the challenged easements in their entirety or even, more narrowly, their grant of exclusive rights to OBB. The challenged easements were executed for the provision of telephone and internet services as well as video services to the SWAB Development. Because the Exclusive Access Rule does not apply to any telecommunications service other than multichannel video programming services, this Court would need to reach beyond the scope of the rule to invalidate the challenged easements or their exclusivity terms. Any attempt by this Court to confine its declaration in a way that works

to invalidate OBB's alleged exclusive right to provide wire-based video services to the SWAB Development without affecting any exclusive right to provide other wire-based telecommunications services that it possesses, if at all possible, would constitute nothing less than the rewriting of the challenged easements. Given the complexity of this task and the significant state law interests at stake with land contracts, this Court exercises sound discretion in refusing the task of rewriting the easements challenged by Southern Walk in this action.

The Court concludes that it lacks jurisdiction to provide the declaratory relief Southern Walk requests in Count I of its Amended Complaint because Count I fails to present an Article III case or controversy. However, even if Southern Walk presented a case of actual controversy, the declaratory relief it requests reaches beyond the scope of the FCC's Exclusive Access Rule to interfere with interests in real property and other contractual rights and obligations governed by state law. For these reasons, Court declines to exercise declaratory judgment jurisdiction over Count I of the Amended Complaint and grants OBB's Motion to Dismiss Count I.

2. COUNTS II AND III IN THE AMENDED COMPLAINT

The Court also grants OBB's Motion to Dismiss Counts II and III of the Amended Complaint because, having dismissed Southern Walk's sole federal claim, the Court declines to exercise jurisdiction over these remaining state-law claims. In Counts II and III, Southern Walk seeks declaratory judgments invalidating the TSA and Ancillary Agreements as unconscionable contracts and "unenforceable servitudes" under Virginia law. Am. Compl. ¶¶ 65-82. In federal question cases in which claims are brought under both federal and state law, district courts have supplemental jurisdiction over those state law claims that "form part of the same case or controversy" as the federal claims. *Shanaghan v. Cahill*, 58 F.3d 106, 109 (4th Cir. 1995). *See also* 28 U.S.C. § 1367(a). "[W]hen all federal claims have been extinguished[,]" however "trial

courts enjoy wide latitude in determining whether or not to retain jurisdiction over [the remaining] state claims." *Shanaghan*, 58 F.3d at 110. *See also* 28 U.S.C. § 1367(c)(3) ("district courts *may* decline to exercise supplemental jurisdiction over a claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction[]") (emphasis added); *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966) ("pendent jurisdiction is a doctrine of discretion, not of plaintiff's right[]"). In making the decision whether to retain jurisdiction courts consider the "convenience and fairness to the parties, the existence of any underlying issues of federal policy, comity, and considerations of judicial economy." *Shanaghan*, 58 F.3d at 110 (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988)). If all federal claims are eliminated before trial, the balance of these factors will usually favors declining to exercise supplemental jurisdiction over the remaining state-law claims. *Cohill*, 484 U.S. at 350 n.7. *See also Gibbs*, 383 U.S. at 726 ("if the federal claims are dismissed before trial, . . . the state claims should be dismissed as well[]").

Here, having dismissed Southern Walk's only federal claim, the Court declines to exercise supplemental jurisdiction over Plaintiff's state-law claims because these claims raise a potentially novel issue of Virginia law and do not involve any issues of federal policy distinct from those raised in the dismissed count. The novel issue raised by Counts II and III of the Amended Complaint is whether a plaintiff may bring a freestanding claim for a declaratory judgment that a contract is unconscionable or is an unenforceable servitude under Virginia law. During the July 29, 2011 hearing on Defendant's Motion to Dismiss the original Complaint, the Court expressed serious doubts about whether the claims asserted in Counts II and III exist under the Virginia law as guidance to Southern Walk in its effort to amend the Complaint such that it would survive another motion to dismiss. July 28, 2011 Tr. at 37-39 (Dkt. No. 19). Southern

Walk's Amended Complaint presents factual allegations in connection with its state-law claims that were not presented in the original Complaint, but none of these amendments address the Court's doubts about whether Counts II and III would be viable under Virginia law. The arguments raised in Southern Walk's brief in Opposition to OBB's Motion to Dismiss the Amended Complaint also fail to address the question. As the Supreme Court held in *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966), federal courts should avoid "[n]eedless decisions of state law . . . both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." It would be unfair to Defendant OBB to permit Southern Walk to press claims under Virginia law in this Court that Virginia courts may not recognize. The Court holds that the issue of whether freestanding claims for judicial declarations of unconscionability and unenforceable servitude are viable under Virginia law is a question better handled by Virginia state courts.

Accordingly, the Court grants Defendant OpenBand's Motion to Dismiss as to all counts in Plaintiff Southern Walk's Amended Complaint.

III. PLAINTIFF'S MOTION FOR LEAVE TO AMEND

The Court now considers Plaintiff Southern Walk's Motion for Leave to File a Second Amended Complaint under Rule 15(a)(2) of the Federal Rules of Civil Procedure.

A. STANDARD OF REVIEW UNDER RULE 15(a)(2)

A Federal Rule of Civil Procedure 15(a)(2) motion for leave to amend pleadings before trial should be granted unless the proposed amendment would be futile or prejudicial to the opposing party or the moving party has acted in bad faith. *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006). *See also* Fed. R. Civ. P. 15(a)(2) ("The court should freely give leave [to amend pleadings] when justice so requires."); *Foman v. Davis*, 371 U.S. 178, 182 (1962) (leave to amend should be "freely given" absent reasons such as "undue delay, bad faith or dilatory motive on party of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc."); *Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999); *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986). "Although leave to amend should be freely given when justice so requires, a district court has discretion to deny a motion to amend a complaint, so long as it does not outright refuse to grant the leave without any justifying reason." *Simmons v. United Mortgage & Loan Inv., LLC*, 634 F.3d 754, 769 (4th Cir. 2011) (quoting *Equal Rights Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597, 603 (4th Cir. 2010)). *See also Foman*, 371 U.S. at 182 ("outright refusal to grant the leave without any justifying reason" as abuse of discretion). A motion for leave to amend should be denied as futile if the amended complaint "could not withstand a motion to dismiss." *Perkins v. United States*, 55 F.3d 910, 917 (4th Cir. 1995) (citing *Glick v. Koenig*, 766 F.2d 265, 268-269 (7th Cir. 1985)). *See also Frank M. McDermott, Ltd. v. Moretz*, 898 F.2d 418, 420-421 (4th Cir. 1990) ("no error in disallowing an amendment when the claim sought to be pleaded by amendment plainly would be subject to a [Rule 12(b)(6)] motion to dismiss").

B. ANALYSIS

The Court denies Southern Walk's Motion for Leave to File a Second Amended Complaint because the Proposed Second Amended Complaint would not withstand a motion to dismiss and, therefore, the proposed amendment is futile. First, the proposed amendment fails to cure the deficiencies of the first Amended Complaint. Second, the proposed Count IV for a declaratory judgment that the challenged easements have terminated for cessation of purpose would not survive a motion to dismiss because the claim is not ripe for adjudication and is not supported by the allegations in the Proposed Second Amended Complaint.

1. COUNTS I, II, AND III IN THE PROPOSED SECOND AMENDED COMPLAINT

Southern Walk's Proposed Second Amended Complaint presents the same claims for declaratory relief on Counts I, II, and III as the first Amended Complaint without curing the deficiencies of the pleading such that these counts would survive a Rule 12(b) motion to dismiss. The only amendments to the First Amended Complaint that Southern Walk proposes in its Motion for Leave to Amend are: (1) the addition of factual allegations involving a franchise agreement between OBB affiliate OBM and Loudoun County and the recent denial of its application to renew the franchise; and (2) a fourth count for a declaratory judgment that the easements for telecommunications infrastructure on the SWAB Development have terminated for cessation of purpose. Proposed 2d Am. Compl. ¶¶ 50-66, 100-110).

Southern Walk's failure to adequately plead a concrete and actual injury-in-fact likely to be redressed by the declaratory judgment requested in Count I[7] is not cured in the Proposed Second Amended Complaint. The proposed amendments do not include any allegations demonstrating how Southern Walk or its interests as an organization are harmed by its

[7] *See supra* Part II.B.1.a.

obligations under the TSA and easements. The proposed amendments also lack sufficient allegations to support the conclusion or inference that, if the TSA and Ancillary Agreements are declared void, wire-based competitors to OBB like Verizon and Comcast would take actual steps to wire and serve the SWAB Development. Without any allegations that wire-based video service providers other that OBB are ready and able to serve the SWAB Development and that OBB has taken action to deny them access to the Development, the Proposed Second Amended Complaint does not include adequate pleading that its requested declaratory relief will deliver the benefits of increased wire-based competition to SWAB homeowners. Thus, Southern Walk's failure to present an Article III case or controversy in Count I persists in its Proposed Second Amended Complaint, which, for this reason, would not survive a Rule 12(b) motion to dismiss.

Because this sole federal-law claim would be dismissed, and because the same freestanding claims for declaratory judgments that the TSA and Ancillary Agreements are unconscionable and unenforceable are retained in Counts II and III of the Proposed Second Amended Complaint, these state-law claims would survive a motion to dismiss no better than Counts II and III of the first Amended Complaint.[8]

Thus, Southern Walk's proposed amendment is futile with respect to Counts I, II, and III. *See Foman*, 371 U.S. at 182 (leave to amend may be denied if amendment is futile); *Laber*, 438 F.3d at 426; *Perkins*, 55 F.3d at 917 (leave to amend should be denied as futile if amended complaint "could not withstand a motion to dismiss[]").

2. COUNT IV IN THE PROPOSED SECOND AMENDED COMPLAINT

The fourth count Southern Walk proposes to add to its Complaint is not ripe for adjudication and is not supported by the factual allegations in the Proposed Second Amended

[8] *See supra* Part II.B.2.

Complaint. For this reason, Southern Walk's proposed amendment is also futile with respect to the proposed Count IV.

In connection with this new count, Southern Walk alleges that OBM obtained a franchise with Loudoun County that permitted it to operate its open video system at the SWAB Development, but the franchise expired in June 2009. Proposed 2d Am. Compl. ¶¶ 57-60. Since that time, OpenBand[9] has been operating within a "transition period" provided by the franchise agreement while OpenBand applied for renewal of the franchise. Proposed 2d Am. Compl. ¶¶ 61-62. OpenBand's application for renewal was denied by the Loudoun County Board of Supervisors on November 2, 2011, but OpenBand continues to operate its open video system lawfully within the transition period, which does not expire until June 30, 2012. Proposed 2d Am. Compl. ¶¶ 62-66. With the support of these new factual allegations, Southern Walk seeks a declaratory judgment that "the blanket exclusive Easements" (presumably Easement One, Easement Two, and the Surviving Easement) are void for cessation of purpose in its proposed Count IV. Proposed 2d Am. Compl. ¶¶ 100-110.

Because Count IV arises under Virginia law, the Court declines to exercise supplemental jurisdiction over this claim for declaratory relief for the same reason that it declines to take supplemental jurisdiction over Counts II and III. The Court also rejects Southern Walk's proposal to add Count IV for two additional reasons: (1) the facts alleged, which include the fact that OpenBand may continue to lawfully operate its open video system in the SWAB Development until June 2012, indicate that Count IV is not ripe for adjudication; and (2) the facts alleged do not support Southern Walk's claim that the purpose of the challenged easements

[9] It is unclear whether the term "OpenBand" in the proposed additions refers to Defendant OpenBand at Broadlands, LLC ("OBB") or its affiliate OpenBand Multimedia, LLC ("OBM"). *See supra* note 2. When uncertain whether the Proposed Second Amended Complaint refers to OBB or OBM, the Court refers to the OpenBand entity as "OpenBand."

has ceased. For these reasons, the proposed Count IV would not survive a Rule 12(b) motion to dismiss, and, therefore, further amendment of Southern Walk's Amended Complaint to include Count IV would be futile. *See Perkins*, 55 F.3d at 917 (amendment as futile where amended complaint would not survive motion to dismiss).

a. Count IV Is Not Ripe

Based on the facts alleged in the Proposed Second Amended Complaint, Southern Walk's claim that the easements for the provision of telecommunications services to the SWAB Development are void for cessation of purpose is not ripe for this Court's consideration. The ripeness doctrine developed from Article III's case-or-controversy requirement to prevent federal courts from engaging in "premature adjudication" and "entangling themselves in abstract disagreements[.]" *Ostergren v. Cuccinelli*, 615 F.3d 263, 287-288 (4th Cir. 2010) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967)). Courts assess the ripeness of a claim by "balanc[ing] the fitness of the issues for judicial decision with the hardship to the parties of withholding court consideration." *Franks v. Ross*, 313 F.3d 184, 194-195 (4th Cir. 2002) (quoting *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998) (internal quotations omitted)).

First, taking the facts alleged in Southern Walk's Proposed Second Amended Complaint as true, the issue of whether the purpose of the easements for telecommunications infrastructure on the SWAB Development has ceased is not presently fit for judicial decision. The proposed amendment includes the conclusory allegation that "it is illegal for OpenBand to continue to operate the 'open video system[.]'" Proposed 2d Am. Compl. ¶ 102. However, this legal conclusion is contradicted by other facts alleged in the proposed amendment, which indicate that OpenBand may legally operate its open video system on the SWAB Development until June 30,

2012. Proposed 2d Am. Compl. ¶ 66. Indeed, the Open Video System Agreement entered by OBM and Loudoun County *requires* OBM, "[a]t the County's request," to continue operating its open video system for a "transition period" following the termination of its franchise. Ex. 15 Attach. to Pl.'s Brief in Supp. of Mot. for Leave to File 2d Am. Compl. at 11. This transition period is not to exceed "the reasonable period required to select another [open video system operator to hold the franchise] and to build a replacement [open video system]" and not to exceed 36 months "unless extended by the County for good cause." Proposed 2d Am. Compl. ¶ 61. According to Southern Walk, "OpenBand has been operating in the 'transition period' since June 2009[,]" when OBM's franchise terminated, and transition period therefore expires in June 2012, 36 months after the period began. Proposed 2d Am. Compl. ¶¶ 60-61, 66. Southern Walk bases its claim that the purpose of the challenged easements has ceased on OpenBand's loss of its right to operate its open video system on the SWAB Development. However, OpenBand will not lose its legal right—or legal obligation—under the franchise agreement with Loudoun County to operate until June 2012. Proposed 2d Am. Compl. ¶ 66. Thus, the basis for Southern Walk's claim that the easements it challenges have lost their purpose has not yet—and perhaps never will—materialize. Between now and June 2012, the franchise may be successfully transferred to a new operator, Loudoun County may extend the transition period "for good cause," or the decision to deny the application for renewal may be reversed. For this reason, the Court holds that judicial consideration of Count IV would be premature and inappropriate at this time.

Second, there is no indication from the facts alleged in the Proposed Second Amended Complaint that withholding judicial consideration of this matter will impose any substantial hardship on the parties to this litigation. Southern Walk offers no reason why the Court should

take up the question of whether the purpose of the challenged easements has ceased before OpenBand loses its legal right to provide services through its open video system.

Because Count IV is not presently fit for judicial consideration and no substantial hardship would be imposed on Southern Walk or OBB by withholding judicial consideration of Count IV, the Court holds that Count IV is not ripe, does not present an Article III case or controversy, and therefore would not survive a motion to dismiss under Rule 12(b)(1). *See Franks v. Ross*, 313 F.3d 184, 194-195 (4th Cir. 2002) (ripeness of claim determined by "balanc[ing] the fitness of the issues for judicial decision with the hardship to the parties of withholding court consideration").

b. The Purpose of the Challenged Easements Has Not Ceased

Even if Count IV were ripe for adjudication, the facts alleged in Southern Walk's Proposed Second Amended Complaint do not support its theory that the purpose of the challenged easements has ceased or will cease when OpenBand's transition period ends. Southern Walk's allegation that the challenged easements "were created for the sole purpose of providing OpenBand exclusive access to the Southern Walk Real Estate Development to operate its 'open video system[,]'" Proposed 2d Am. Compl. ¶ 101, is plainly contradicted by other allegations within every version of its Complaint and by the easement deeds themselves as well as the other Ancillary Agreements. According to the easement deeds and other Ancillary Agreements, the easements were granted for the construction and maintenance of telecommunications infrastructure and for the provision of various telecommunications services to the SWAB Development, including telephone and internet services in addition to video programming service. *See, e.g.*, Pl.'s Ex. 7 at 2-4 (Surviving Easement); Pl.'s Ex. 8 at 2, 7 (Easement One); Pl.'s Ex. 9 at 1, 6-7 (Easement Two); Pl.'s Ex. 5 at 10 (CC&Rs). Southern

Walk quotes these same provisions in its Proposed Second Amended Complaint. *See* Proposed 2d Am. Compl. ¶¶ 27, 30, 31. Thus, it is clear from the facts presented in the Proposed Second Amended Complaint and its attached exhibits that the challenged easements have a purpose larger than merely permitting OpenBand to operate its open video system in the SWAB Development. Even if OpenBand loses its right to operate the open video system in Loudoun County and ceases to provide video programming service to the SWAB Development, the easements will continue to serve the purpose of facilitating telephone and internet services on the Development. Thus, the facts alleged in, and exhibits attached to, Southern Walk's Proposed Second Amended Complaint fail to support its claim that the purpose of the challenged easements has ceased. For this reason, Count IV for the invalidation of the easements on the grounds that their purpose has ceased would not survive a motion to dismiss under Rule 12(b)(6).

Because none of the counts in Southern Walk's Proposed Second Amended Complaint would survive a Rule 12(b) motion to dismiss, Southern Walk's proposed amendment is futile. *See Perkins*, 55 F.3d at 917 (amendment as futile where amended complaint would not survive motion to dismiss); *Rhodes*, 636 F.3d at 99 (court must dismiss case for lack of subject matter jurisdiction if it fails to present case or controversy under Article III); *Twombly*, 550 U.S. at 561 (Rule 12(b)(6) motion to dismiss should be granted unless an adequately stated claim is "supported by showing any set of facts consistent with the allegations in the complaint[]").

IV. CONCLUSION

The Court grants Defendant OBB's Motion to Dismiss the Amended Complaint and denies Plaintiff Southern Walk's Motion for Leave to File a Second Amended Complaint. The Court dismisses Count I of the First Amended Complaint, in which Plaintiff Southern Walk

seeks declaratory relief from alleged violations of federal telecommunications law and FCC regulations, because Plaintiff fails to present a case of actual controversy, as required by Article III of the Constitution and the Declaratory Judgment Act. The Court dismisses Counts II and III because, having dismissed the only claim Plaintiff asserts under federal law, the Court declines to exercise supplemental jurisdiction over the remaining state-law claims. The Court denies Southern Walk's Motion for Leave to Amend because amendment would be futile. Southern Walk's Proposed Second Amended Complaint fails to cure the infirmities of Counts I, II, and III, and the proposed Count IV is not ripe for adjudication or adequately pled.

For these reasons, it is hereby

ORDERED that Defendant OpenBand at Broadlands, LLC's Motion to Dismiss the Amended Complaint is GRANTED. It is further

ORDERED that Plaintiff Southern Walk at Broadlands Homeowner's Association, Inc.'s Motion for Leave to File Second Amended Complaint is DENIED. It is further

ORDERED that this case is DISMISSED WITH PREJUDICE.

The Clerk is directed to forward a copy of this Order to counsel of record.

Entered this 13th day of February, 2011.

Alexandria, Virginia

02/13/12

/s/
Gerald Bruce Lee
United States District Judge