

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

SANTA FE ALLIANCE FOR PUBLIC HEALTH AND SAFETY,
ARTHUR FIRSTENBERG, and MONIKA STEINHOFF,

Plaintiffs,

vs.

No. 1:18-cv-00032-JAP-SCY

CITY OF SANTA FE,

Defendant.

**FIRST AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND
PRELIMINARY AND PERMANENT INJUNCTIVE AND OTHER RELIEF**

COME NOW the Santa Fe Alliance for Public Health and Safety (“Alliance”) and Monika Steinhoff by and through their attorney, and Arthur Firstenberg, pro se, and for their Complaint against the City of Santa Fe (“City”), state as follows:

INTRODUCTION

1. For over sixty years, substantial evidence has been accumulating in the scientific and medical fields—evidence that is now conclusive—that radio frequency (“RF”) radiation, used in radio and television broadcasting, radar, medical diathermy, heating and sealing applications, two-way radio communications, satellite communications, and modern wireless communications—including cell phones, cordless phones, WiFi, smart phones, smart meters, baby monitors, etc.—is injurious to human health and harmful to the environment.

2. Throughout the 1960s and 1970s all three branches of the United States military—the Army, Navy and Air Force—funded dozens of scientists to do intensive research on the health effects of RF radiation. For example Dr. Allan Frey, under contract with the Navy and Air Force, discovered that RF radiation damages the capillary barriers that protect our most vital organs from assault by viruses, bacteria, and toxic chemicals—the blood-brain barrier,

which protects the brain; the blood-vitreous barrier, which protects the eye; and the blood-placental barrier, which protects the developing fetus. He discovered that RF radiation disturbs the rhythm of the heart and can even stop the heart if the RF pulses coincide with the beginning of the cardiac rhythm. All of these effects, and others, can occur at extremely low radiation levels that, increasingly, the general population of the world is being exposed to.

3. In 1971, the Navy assigned Lt. Zorach Glaser, Ph.D. to collect, catalogue, and index all of the world's literature, which was already enormous, on the biological and health effects of RF radiation. His cataloguing effort, which ended in 1982, gathered 5,083 published scientific articles, books, and conference reports, which represented perhaps half of the literature that existed at that time, all of which reported one or more biological or health effects of RF radiation.

4. As in a microwave oven, high enough levels of RF radiation produce heat and damage in living organisms. Throughout the debate about the effects of RF radiation, the distinction between thermal and nonthermal levels of radiation has frequently been referred to. The telecommunications industry asserts that levels of radiation too low to produce much heat also produce no damage.

5. The Environmental Protection Agency ("EPA") had a Health Effects Research Laboratory in Research Triangle Park, North Carolina from 1971 to 1985, and during those years had as many as thirty full-time employees conducting experiments with RF radiation on rats, mice, dogs, chickens, monkeys, bacteria, and enzymes. These experiments disproved the assumption that nonthermal levels of RF radiation are not harmful.

6. The EPA has stated repeatedly that the human exposure guidelines that are in effect today, which were adopted by the Federal Communications Commission ("FCC") on

August 6, 1996, are protective only against shocks, burns, and gross heating and do not protect against chronic and low-level exposure.

7. When the FCC's safety guidelines were proposed in 1993, the EPA stated that they had "serious flaws." The Food and Drug Administration ("FDA") stated that "FCC rules do not address the issue of long-term, chronic exposure to RF fields." The National Institute for Occupational Safety and Health ("NIOSH") stated the FCC's proposed standard was inadequate because it "is based on only one dominant mechanism—adverse health effects caused by body heating."

8. After the FCC adopted its safety guidelines, the EPA repeated its objections. An EPA letter dated October 8, 1996 stated again that the guidelines "are thermally based, and do not apply to chronic, nonthermal exposure situations." And again on March 8, 2002, the EPA stated that "The FCC's current exposure guidelines, as well as those of the Institute of Electrical and Electronics Engineers (IEEE) and the International Commission on Non-Ionizing Radiation Protection, are thermally based, and do not apply to chronic, nonthermal exposure situations."

9. A June 17, 1999 letter, signed by the entire Radiofrequency Interagency Work Group ("RFIAWG"), whose members represented the FCC, EPA, FDA, NIOSH, Occupational Safety and Health Administration ("OSHA") and National Technical Information Agency ("NTIA"), stated that the FCC's guidelines are based on "thermal effects" and "acute exposures" and do not consider "chronic exposure to RF radiation, including exposures having a range of carrier frequencies, modulation characteristics, peak intensities, exposure duration, etc., that does not elevate tissue temperature on a macroscopic scale."

10. On June 16-17 and 27-29, 1977, Senate hearings on "Oversight of Radiation Safety and Health" were held, at which the EPA's Daniel Cahill testified that "we in our

laboratory and in the other laboratories have conducted our research as the Soviets had proposed, that is, by prolonged exposure to low power densities, and in fact we are corroborating some of their observations.” He reported “effects on immunological systems, fetuses born to exposed mothers, and changes to calcium binding to the surface of brain tissue.”

11. At a House of Representatives hearing on “Research on Health Effects of Nonionizing Radiation” held on July 12, 1979 it was reported that health effects included “adverse effects on the fetus, the blood-brain barrier, the central nervous system, and information transfer in the brain,” and effects in humans that included “headaches, vomiting, skin burns, visual damage, potential fetal damage as well as stress syndrome and other adverse behavioral reactions.”

12. On May 12-13, 1981, a House of Representatives hearing was held on “Potential Health Effects of Video Display Terminals and Radio Frequency Heaters and Sealers.” Joe Lary, research biologist at NIOSH, testified that “The following effects have been reported—abnormal bleeding and clotting, various skin problems, weight loss, genital problems, rapid heart rate, hormonal disturbances, fingernail deformities, auditory sensations, cataract formation, blindness, development of ocular opacities, loss of visual acuity, miscarriages, birth defects, retarded fetal development, and even death...”

13. In September 1984, the EPA’s Health Effects Research Laboratory published a 276-page report, with 18 authors, titled *Biological Effects of Radiofrequency Radiation*.

14. On July 30, 1986, the EPA published a Notice of Proposed Recommendations in the *Federal Register*. The EPA stated: “The Environmental Protection Agency (EPA) is proposing four alternative approaches to limit the public’s exposure to radiofrequency (RF) radiation... The EPA is considering this action for several reasons. The number and type of RF

radiation sources have increased, and the population is continuously exposed to varying degrees: environmental levels of RF radiation and the number of persons exposed to higher levels has grown. Concerns over potential health effects from RF radiation have also heightened. Effects occur in test animals exposed at RF radiation intensities found in the environment.”

15. On October 6, 1987, a House of Representatives hearing was held on “Health Effects of Transmission Lines.” Richard Phillips, director of Developmental and Cell Toxicology Program at EPA’s Health Effects Research Laboratory, testified that “[t]he research information now available, both from EPA and others, demonstrates that biological systems do respond when exposed to ELF fields... There are strong indications that exposure to ELF fields may be associated with reproductive problems, with some aspect of the cancer process, and with neurological and immunological effects.” Research by eleven EPA scientists was presented showing that extra low frequency (“ELF”) fields cause calcium to leak out of brain cells, and that this also occurs when RF radiation is modulated at ELF frequencies, such as occurs in radio communication systems. Dr. Phillips stated: “It is not possible to assign a low intensity limit or threshold below which the exposures are without effect”.

16. In October 1993, the EPA published a 393-page book titled “Evaluation of the Potential Carcinogenicity of Electromagnetic Fields: Review Draft.”

17. On August 10, 1992, a Senate hearing was held on ““The Effects of Traffic Radar Guns on Law Enforcement Officers.” It was held in response to an epidemic of testicular cancer among police officers who rested their radar guns between their legs. Gary A. Poynter, Research Officer for the National Fraternal Order of Police, presented a list of 168 police officers with testicular cancer.

18. In 1996, digital cell phones began to come into widespread use and cell phone towers began to proliferate in the U.S. and other countries.

19. In November 1996, the EPA published a Fact Sheet titled “Electrosensitivity and Digital Cellular Base Stations.” It stated: “The Environmental Protection Agency (EPA) has for many years received complaints from relatively few individuals living in the general vicinity of air traffic control radar transmitters, which are pulsed systems similar in many respects to digital cellular telephone systems... With the advent of digital cellular telephone and paging systems, the number of complaints has increased significantly, both in the United States and world-wide.” The symptoms listed in the Fact Sheet included “nausea, headaches, dizziness, pain in the eyes, ringing of ears, screeching and sizzling sounds, and irregular heartbeat.”

20. In 2003, Roger Santini published an epidemiological study in France showing that radiation from cell towers hit young adults in their twenties and thirties the hardest; among this age group, 53% of those who lived within 300 meters of a cell tower had disturbed sleep, compared with only 12.5% of those with no nearby tower; 82.4% had fatigue, compared with 25% of those with no nearby tower; 57.6% had headaches, compared with 18.2% of those with no nearby tower.¹

21. On October 9, 2002, the Freiburger Appeal was issued, which called for a moratorium on the expansion of wireless technology. This document, signed by 3,000 German doctors, reported a dramatic increase in “Learning, concentration, and behavioural disorders; Extreme fluctuations in blood pressure, ever harder to influence with medications; Heart rhythm disorders; Heart attacks and strokes among an increasingly younger population; Brain-degenerative diseases (e.g. Alzheimer’s) and epilepsy; Cancerous afflictions: leukemia, brain

¹ Santini, R. et al. Survey study of people living in the vicinity of cellular phone base stations. *Electromagnetic Biology and Medicine* 22: 41-49, 2003.

tumors.” It also reported an increase in “Headaches, migraines; Chronic exhaustion; Inner agitation; Sleeplessness, daytime sleepiness; Tinnitus; Susceptibility to infection; Nervous and connective tissue pains, for which the usual causes do not explain even the most conspicuous symptoms.” They stated: “On the basis of our daily experiences, we hold the current mobile communications technology (introduced in 1992 and since then globally extensive) and cordless digital telephones (DECT standard) to be among the fundamental triggers for this fatal development. One can no longer evade these pulsed microwaves. They heighten the risk of already-present chemical/physical influences, stress the body’s immune system, and can bring the body’s still-functioning regulatory mechanisms to a halt. Pregnant women, children, adolescents, elderly and sick people are especially at risk.”

22. In August 2004, at their biennial convention in Boston, the International Association of Firefighters adopted Resolution 15, opposing the siting of antennas and towers at fire stations to protect the health of firefighters. The resolution states: “[M]any firefighters who are living with cell towers on or adjacent to their stations are paying a substantial price in terms of physical and mental health... the brain is the first organ to be affected by RF radiation and symptoms manifest in a multitude of neurological conditions including migraine headaches, extreme fatigue, disorientation, slowed reaction time, vertigo, vital memory loss and attention deficit amidst life threatening emergencies... most of the firefighters who are experiencing symptoms can attribute the onset to the first week(s) these towers/antennas were activated... RF radiation is emitted by these cellular antennas and RF radiation can penetrate every living cell, including plants, animals and humans.”

23. On May 15, 2015, 190 scientists from 39 nations, who collectively had authored over 2,000 peer-reviewed papers on the biological and health effects of RF and other nonionizing

radiation, sent an International Scientist Appeal to the United Nations, World Health Organization, and U.N. Member States, calling for stricter regulation of cellular and cordless phones, WiFi, broadcast antennas, smart meters, baby monitors and other emitters of RF radiation. They requested, among other things, that “children and pregnant women be protected,” “guidelines and regulatory standards be strengthened,” and “white zones (radiation-free areas) be established.”

24. On September 13, 2017, 184 scientists from 36 nations sent an appeal to the European Union for a moratorium on the rollout of 5G technology (see paragraph 41 below for a brief explanation of 5G technology), stating that “RF-EMF has been proven to be harmful for humans and the environment,” and that “5G leads to massive increase of mandatory exposure to wireless radiation.”

25. For two decades, doctors and scientists worldwide have issued dozens of such declarations and appeals calling for a halt to the expansion of wireless technology to protect health and environment:

- a. Vienna Resolution 1998
- b. Salzburg Resolution 2000
- c. Declaration of Alcalá 2002
- d. Catania Resolution 2002
- e. Freiburger Appeal 2002
- f. Bamberger Appeal 2004
- g. Maintaler Appeal 2004
- h. Coburger Appeal 2005
- i. Oberammergauer Appeal 2005

- j. Haibacher Appeal 2005
- k. Pfarrkirchener Appeal 2005
- l. Freienbacher Appeal 2005
- m. Lichtenfelser Appeal 2005
- n. Hofer Appeal 2005
- o. Helsinki Appeal 2005
- p. Parish Kirchner Appeal 2005
- q. Saarlander Appeal 2005
- r. Stockacher Appeal 2005
- s. Benevento Resolution 2006
- t. Allgäuer Appeal 2006
- u. WiMax Appeal 2006
- v. Schlüchterner Appeal
- w. Brussels Appeal 2007
- x. Venice Resolution 2008
- y. Berlin Appeal 2008
- z. Paris Appeal 2009
- aa. London Resolution 2009
- bb. Porto Alegre Resolution 2009
- cc. European Parliament EMF Resolution 2009
- dd. Dutch Appeal 2009
- ee. International Appeal of Würzburg 2010
- ff. Copenhagen Resolution 2010

- gg. Seletun Consensus Statement 2010
- hh. Potenza Picena Resolution 2013
- ii. Doctors' Appeal to Health Canada 2014
- jj. Scientists' Declaration to Health Canada 2014
- kk. International Scientists Appeal 2015
- ll. Brussels Declaration 2015
- mm. Paris Appeal 2016
- nn. Reykjavik Appeal 2017
- oo. International Scientists Appeal for a 5G Moratorium 2017
- pp. Nicosia Declaration 2017
- qq. Madrid Declaration 2017

26. Cell tower radiation is not just impacting human beings; it is destroying the environment. In a 2005 study in Valladolid, Spain, titled "Possible Effects of Electromagnetic Fields from Phone Masts on a Population of White Stork (*Ciconia ciconia*), 60 rooftop stork nests were observed. Storks couples that tried to nest within 100 meters of a cell tower fought over nest construction and never completed their nests; when a tower was less than 200 meters away, 40 percent of the nests were barren. In a 2009 Spanish study titled "Mobile Phone Mast Effects on Common Frog (*Rana temporaria*) Tadpole: The City Turned into a Laboratory," tadpoles were raised in two tanks on a rooftop 450 feet away from a cell tower. One tank was draped with a thin layer of shielding fabric that admitted air and light but kept out radio waves. The mortality rate in the unshielded tank was 90 percent and in the shielded tank was only 4 percent. In a 2009 study in India titled "Changes in Honeybee Behaviour and Biology under the Influence of Cellphone Radiations," scientists placed cell phones inside bee hives and turned

them on for half an hour twice a week. In three months “there was neither honey, nor pollen nor brood nor bees in the colony resulting in complete loss of the colony,” they wrote. When they investigated why, they found that a ten-minute exposure to a cell phone brought respiration to a standstill and the bees practically could not metabolize sugars, proteins or fats. In 2014 a scientist in France placed a flip phone in standby mode underneath an ant colony. Immediately all the ants left their nest, taking their eggs, larvae, and nymphs with them. “It looked spectacular,” she wrote in an article titled “Ants Can Be Used as Bioindicators to Reveal Biological Effects of Electromagnetic Waves from Some Wireless Apparatus.” In a 2010 study in Colorado titled “Adverse Influence of Radio Frequency Background on Trembling Aspen Seedlings,” twenty-seven aspen seedlings were grown in a backyard. Nine were surrounded by aluminum screening, which kept out radio waves; nine were surrounded by fiberglass screening, which did not keep out radio waves; and nine grew without any enclosure. The shoots of the radio-shielded aspens were 74 percent longer, and their leaves 60 percent larger than either the mock-shielded or unshielded plants. In the fall the shielded aspens displayed brilliant fall colors; the mock-shielded and unshielded plants were yellow and green and covered with decay.

27. When the City drafted its first Telecommunications Facilities Ordinance in 1998, it included protections from the dangers of cell towers. It required that the City:

- a. “Ameliorate any impacts upon residents on the city of Santa Fe and the municipality of expanding needs for telecommunications facilities”;
- b. “Minimize any adverse impacts of towers and antennas on residential areas and land uses”;
- c. “Encourage the location of towers in nonresidential areas”;
- d. “Minimize the total number of towers throughout the community”;

- e. “Gather information and provide remedies for the public health and safety impacts of communication towers”;
- f. “Avoid potential damage to adjacent properties from towers,”

Ord. No. 1998-16, § 15(F), (H), (I), (J), (N), and (O).

28. The 1998 ordinance applied to “[a]ll towers or antennas located within the city limits whether upon private or public lands,” Ord. No. 1998-16, § 17. Towers and antennas in residential or historic districts required a Special Exception and were not a permitted use in any zoning district. There were application requirements, notice requirements, noise requirements, height limitations, and setback requirements. A new tower had to be a minimum distance of one thousand feet from any existing tower.

29. The ordinance provided that antennas and towers in the public rights-of-way had to comply with all of the same land use requirements as antennas and towers on private land, except that there was an additional requirement that the applicant had to obtain a lease from the City, and that in deciding whether to grant or deny the lease the City had to consider the effect on the public health, safety and welfare, Ord. No. 1998-16, § 41.

30. The Santa Fe Task Force on Microwave Antennas, formed in February 2000, worked with the City for several years to minimize the impact of cell towers on public health. The Santa Fe Alliance for Public Health and Safety, a Plaintiff in this case, formed in 2005; its members have participated in every approval process and testified at every public hearing for every proposed ordinance and every telecommunications facility erected in Santa Fe from 2005 until the present day. Arthur Firstenberg, a Plaintiff in this case, was appointed by the Mayor in 2007 to a steering committee to advise the Information Technology and Telecommunications Department of the City of Santa Fe on the health effects of wireless Internet.

31. Despite knowing that RF radiation is hazardous, the City began in 2010 to deliberately dismantle the protections of the public health, safety, and welfare that it had encoded in the 1998 ordinance and to systematically eliminate every reference to the health effects of RF radiation from the City Code. It revised Chapter 27 of the City Code to exempt telecommunications facilities in the public rights-of-way from the land use regulations of chapter 14. It revised chapter 14 to eliminate the requirements that the City gather information and provide remedies for the health and safety impacts of communication towers. The requirement to minimize “*any* adverse impacts of antennas and towers” was changed to “*land use* impacts of antennas and towers.” Antennas were made a permitted use in all zoning districts.

32. Chapter 27, as revised in 2010, still required that applicants for wireless telecommunications facilities in the public rights-of-way provide specific information about their RF emissions; required that any subsequent increase in RF emissions be subject to approval by the City; required applicants to certify compliance with the FCC’s RF exposure limits; and authorized the City to retain an independent radio frequency engineer to verify such compliance. However, on August 30, 2017, the city repealed every one of those requirements, along with almost all notice, hearing, and application requirements, for telecommunications facilities in the public rights-of-way.

33. Plaintiffs seek a judgment from the Court restoring protections from radio frequency (“RF”) radiation that residents of Santa Fe formerly enjoyed, and declaring that Ordinances Nos. 2016-42 and 2017-18, adopted November 9, 2016 and August 30, 2017 respectively, are unlawful and unconstitutional and therefore void and unenforceable.

34. The only requirement left for putting telecommunications facilities on Santa Fe’s streets and sidewalks is the possession of a franchise. Franchises will be awarded to all

telecommunications providers on a non-discriminatory basis, and franchisees will be permitted to erect unlimited numbers of antennas and towers wherever they please in the public rights-of-way with no public hearings, no public comment, no public notice, no notice to neighbors, no setback requirements, no certification of compliance with the FCC's safety regulations, and without even submitting an application to the City. All they will have to do is tell the City that their facilities will comply with design guidelines that the City will have adopted. The facilities will be completely exempt from all other land use requirements. City residents will have no warning before cell tower transmitters suddenly appear in front of their homes and businesses or outside their children's bedroom windows, and they will have no recourse.

35. Because of previous litigation and the invalidation of successive versions of Chapter 27 by successive court decisions, no applications for telecommunications facilities in the public rights-of-way have been processed by the City since 2003. Plaintiffs ask the Court to intervene at this time to protect their homes and properties and to protect the public health, safety, and welfare that is immediately endangered.

36. This action has been made even more urgent by a Proclamation of Emergency ("Proclamation") that was signed by Mayor Javier Gonzales on November 21, 2017, which suspends the Land Development Code with respect to telecommunications facilities on any City-owned property. Plaintiffs ask the Court to declare that this Proclamation was issued without legal authority and is null and void.

PARTIES

37. Defendant City is a home rule municipality organized and incorporated pursuant to the laws of the State of New Mexico.

38. Plaintiff Arthur Firstenberg is the president of the Alliance and a homeowner and taxpayer within the City. He is a refugee from cell tower radiation elsewhere. The erection of a cell tower near his home in Brooklyn, New York on November 14, 1996 rendered his home uninhabitable to him and he left one week later.

39. Plaintiff Monika Steinhoff is a homeowner and taxpayer within the City and an artist with a gallery on Canyon Road. Her gallery was formerly located on Galisteo Street near Hotel Santa Fe. The erection of a cell tower on the roof of Hotel Santa Fe in 2013 rendered that place of business useless to her and she was forced to find another location for her gallery.

40. Plaintiff Santa Fe Alliance for Public Health and Safety (“Alliance”) is an unincorporated organization of doctors, health care practitioners, psychotherapists, artists, teachers, and others who reside within the City of Santa Fe, pay gross receipts taxes to the City, and pay telephone bills to telecommunications service retailers that operate within the City. Many are refugees from homes that they had to leave when a cell tower was erected. These include an architect and her daughter who were forced to move, a Health Department official and his wife who were forced to move, a psychotherapist who is now homeless, a psychologist and author who was homeless for five years, a world class athlete who had to move to a remote location, a physicist who had to leave his job at Los Alamos National Laboratory and almost became homeless, a city planner and civil engineer who must sell her home, and many others. The Alliance also includes physicians who have patients that were injured and/or made homeless by cell towers.

41. Plaintiffs Firstenberg and Steinhoff and many individuals who identified themselves as members of the Alliance testified at the public hearings that resulted in the adoption of Ordinances Nos. 2016-42 and 2017-18.

JURISDICTION AND VENUE

42. This Court has jurisdiction under 28 U.S.C., § 1331, giving the federal district courts original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States; 28 U.S.C. § 1343(a)(3), giving the federal district courts original jurisdiction of any civil action to redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States; and the Declaratory Judgment Act, 28 U.S.C. § 2201. Plaintiffs' claims raise questions under the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* and Amendments One, Five, and Fourteen of the United States Constitution.

43. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(1), as all parties are located in this District, and the events giving rise to this action occurred in this District.

MATERIAL FACTS AND RELATED PRIOR LITIGATION

44. Wireless telecommunications facilities emit RF radiation, which penetrates into houses and endangers life and safety. RF radiation causes acute effects including headaches, dizziness, nausea, eye pain, insomnia, tachycardia, hypertension, irregular heartbeat, anxiety, depression, memory loss, nosebleeds, digestive problems, and ringing in the ears. RF radiation causes chronic illness including diabetes, cancer, and heart disease. The acute effects have driven an estimated 20 million people from their homes worldwide, based on government surveys and data from 150 organizations with whom Plaintiffs here correspond, and have created a large class of environmental refugees.

45. Industry organizations are presently lobbying states, municipalities and Congress to abolish all environmental, historic preservation, and zoning regulations for telecommunications facilities located in the public rights-of-way. This is to enable the deployment of "5G"

wireless technology, whose purpose is to connect every person and almost everything we own and buy, from automobiles and appliances to clothing, hair brushes, milk cartons and diapers, to the Internet. Unlike present-day “4G” cell towers, which have a small number of relatively large antennas that broadcast their radiation in all directions, each 5G cell tower will have hundreds or thousands of tiny antennas that work together to focus their energy into powerful laser-like beams that will be aimed at smartphones held in people’s hands, and at 5G devices located in people’s homes and businesses. This will require small cell towers on every block in every city, and zoning, historic preservation, and environmental regulations are an obstacle to these plans. These towers will be smaller in size, but will emit much more radiation than previous generations of cell towers, which have already created large numbers of environmental refugees. 5G will expose people in their homes and on the street to levels of radiation that previously existed only in occupational settings.

46. The Santa Fe City Code (“SFCC”) has two chapters regulating telecommunications facilities. Chapter 27 generally regulates telecommunications facilities in the public rights-of-way, and chapter 14, section 14-6.2(E) specifically regulates antennas and towers, whether upon public or private land.

47. Chapter 27 as enacted in 1998 required a site-specific lease for every telecommunications facility placed in a City right-of-way.

48. After a legal challenge by Qwest Corporation (“Qwest”), the U.S. District Court for the District of New Mexico struck down the fee structure and certain other elements of the new ordinance. It ruled that the fees were excessive and certain other elements were overly burdensome, constituting an effective prohibition on the provision of telecommunications services, in violation of Section 253 of the Telecommunications Act of 1996 (“Section 253”).

Qwest Corp. v. City of Santa Fe, 224 F.Supp.2d 1305 (D.N.M. 2002). The Tenth Circuit affirmed. *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004).

49. No changes to Chapter 27 were adopted by the City for several years following the decision in *Qwest Corp. v. City of Santa Fe*, and no applications for telecommunications facilities in the public rights-of-way were processed.

50. In 2009, four specialized wireless telecommunications companies approached the City with proposals for a much more intensive use of the public rights-of-way called Distributed Antenna Systems (“DAS”). In contrast to existing wireless networks that placed antennas on a few tall widely dispersed cell towers, each serving a very large area, the proposed DAS systems would have consisted of antennas placed on hundreds of short poles, existing or new, spaced every quarter to half mile throughout Santa Fe. The first company to file an application, Extanet Systems, proposed to install antennas on 87 new and existing utility poles in just the greater downtown area.

51. In response to these inquiries, the City enacted Ordinance No. 2010-14 which was a revision of Chapter 27. It eliminated site-specific leases and leasing fees, providing instead for franchises and franchise fees. Under the revised ordinance, a DAS company would apply for a franchise and then submit a map showing the routes along which it planned to install its antennas and the tentative locations of the antennas. The routes would be approved after a single public hearing, after which the company would have carte blanche to erect antennas anywhere along those routes, without further application or notification of neighboring property owners and residents, provided they complied with height limitations and other requirements of the ordinance.

52. Other new provisions enacted by Ordinance No. 2010-14 included complete exemption from Chapter 14, Section 6.2(E) of the City Code, which regulates antennas and towers within the City, and from Chapter 14, Section 5.2, which regulates land use in historic districts.

53. The franchise fee under the new ordinance was imposed only on telecommunications networks located in the public rights-of-way. The fee was an annual payment of three percent (3%) of the provider's gross revenue derived from the provision of telecommunications services to customers served from facilities located in the public rights-of-way.

54. Qwest challenged this ordinance too, this time in both federal and state court. The First Judicial District Court ruled that the franchise fee was not a tax and therefore did not violate New Mexico law or the New Mexico Constitution. *Qwest Corp. v. City of Santa Fe*, Case No. D-101-CV-2011-01131, Order on Cross Motions for Summary Judgment (May 22, 2013).

55. The federal district court struck down the new franchise fee structure as it had struck down the old lease fee structure, and for the same reason: it was an effective prohibition on the provision of telecommunications services, in violation of Section 253. *Qwest Corporation v. City of Santa Fe*, 2013 WL 12241199 (D.N.M. 2013). The City of Santa Fe appealed to the United States Court of Appeals for the Tenth Circuit.

56. On July 1, 2015, Qwest and the City signed a Settlement Agreement and Release ("Settlement Agreement"), and stipulated to a dismissal of the City's appeal with prejudice. Under the terms of the Agreement, Qwest would pay the City a franchise fee of two percent (2%) of revenue, which would only be applied to its retail services.

57. On March 21, 2016, a DAS company called Mobilitie, LLC, d/b/a Broadband Network of New Mexico (“Mobilitie”), filed an application for a franchise under Chapter 27.

58. On November 9, 2016, the Santa Fe City Council adopted an ordinance revising Chapter 27 to comport with the Settlement Agreement that had been negotiated between the City and Qwest. Unlike the fee structure struck down by the court, the amended Chapter 27 no longer imposed a fee of three percent of gross revenue derived from facilities located in the public rights-of-way. Instead, it imposed a fee of two percent of gross revenue, on telecommunications retailers only, not limited to services derived from facilities located in the public rights-of-way, and required all telecommunications retailers in Santa Fe who are subject to this fee to pass the fee on to their customers.

59. Mobilitie states in its application for a franchise that it is not a telecommunications service provider. It is a wholesaler that builds and operates infrastructure under contract with service providers. Since it is not a retailer it is not subject to the two percent “franchise fee.”

60. Ordinance No. 2016-42 was adopted by the City Council after a public hearing on November 9, 2016.

61. On December 8, 2016, Plaintiffs here, Alliance and Firstenberg, filed a Complaint for Declaratory Relief in the First Judicial District Court, Case No. D-101-CV-2016-02801, asking the court to issue an order declaring Chapter 27 as amended by Ordinance No. 2016-42 void and unenforceable and asking for injunctive relief. The Complaint was dismissed by the court as not ripe for review because no franchises had yet been awarded.

62. On March 20, 2017, CNSP, Inc. d/b/a NMSURF (“CNSP”) filed an action against the City in United States District Court, asking the court to declare that Chapter 27 is federally

preempted, invalid and unconstitutional. Among other things, CNSP alleged that the following provisions of Chapter 27 are barriers to entry in violation of 47 U.S.C. § 253:

- a. Applicants are required to provide maps of proposed routes and locations;
- b. Applicants are required to provide information about radio frequency emissions;
- c. Each application must be accompanied by a \$2,500 application fee;
- d. All applications require planning commission approval; and
- e. Applicants must provide notice to neighbors and the general public.

63. In response to CNSP's lawsuit, the City passed another ordinance, No. 2017-18, further amending Chapter 27. The new bill repealed most of what CNSP found objectionable, but at the expense of Due Process for the public. The significance of Ordinance No. 2017-18 for the purposes of this complaint are that it:

- a. provided that new facilities shall not require submittal of an application at all if they conform to existing design standards (new section 27-2.19(C)(1)(a));
- b. exempted most new facilities from review by the Planning Commission (former sections 27-2.13(F) and 27-2.13(K) and new section 27-2.19(E));
- c. exempted all facilities in historic districts from review by the Historic Districts Review Board (former section 27-2.13(C)(5));
- d. repealed the requirement to provide information regarding radio frequency emissions (formerly in section 27-2.13(F)(1)(c));
- e. repealed all requirements for proof, or even self-certification, of compliance with the FCC's radio-frequency exposure standards (formerly section 27-2.13(O)(2) through (5)); and

- f. repealed the requirements for public notice and notice to neighbors of routes and planned locations of all facilities (formerly section 2.13(J)).

64. Because of concerns by members of the public about the repeal of all notice provisions, a provision was added to the bill before it passed requiring the posting of applications for land use review on the City's website for a period of ten days. This did nothing to alleviate Due Process concerns because under the ordinance the majority of facilities will be erected *without applications*. Another provision was added providing that the City must approve the locations of facilities that are exempt from land use review and for which applications are not required. This also added no protection for the public because no application for review still means no notice and because facilities that are exempt from land use review, by definition, cannot be denied based on location.

65. On November 21, 2017, Mayor Gonzales issued a Proclamation of Emergency, stating that "insufficient telecommunications capacity in the City" was endangering City residents. He invoked Sections 20-1.1 through 20-1.5 of the Santa Fe City Code, which is the Riot Control Ordinance, and which gives the Mayor the authority to declare a state of emergency and prohibit certain activities for a maximum of three days. The Mayor, however, proclaimed a six-month state of emergency and declared that Verizon Wireless is permitted to install "temporary and/or mobile wireless telecommunications facilities on City property pending review and approval of fixed wireless facilities within the City." The Proclamation was issued in secret on November 21, 2017. The City Manager signed a contract for seven such facilities with Verizon Wireless, still in secret, on December 8, 2017. On information and belief, the City Council was not consulted or informed. A press release about the Proclamation was issued on December 11, 2017, and construction at various locations began forthwith.

66. The Mayor has since signed at least two more Proclamations of Emergency. The second, almost identical to the first, was signed on December 13, 2017. The third, signed on December 26, 2017, is almost identical except that it does not invoke the Riot Control Ordinance. Instead, it evokes the Mayor's "executive powers" under section 5.01 of the City Charter and section 2-1.3 of the Santa Fe City Code. The relevant wording of both is virtually identical; neither gives him the authority claimed. They provide: "The mayor of the city shall be the chief executive officer of the city and it shall be his special duty to cause the ordinances and regulations of the city to be faithfully and constantly obeyed. He shall have and exercise within the city limits the power conferred on the sheriffs of counties to suppress disorders and keep the peace. He shall also perform such other duties compatible with the nature of his office as the city council may from time to time require." SFCC 1987, § 2-1.3.

67. In providing free, unregulated access to the public rights-of-way to virtually all telecommunications companies that apply for a franchise, the City has abdicated its most basic responsibilities as a zoning authority to protect the public health, safety and welfare; has suspended due process for its citizens; and is in violation of numerous provisions of the United States and New Mexico Constitution, the Santa Fe City Charter, and State and City laws and ordinances that are necessary for an orderly society.

68. Attached hereto are Chapter 27 as adopted in 1998 (Exhibit C-1); Chapter 27 as revised in 2010 (Exhibit C-2); Ordinance No. 2016-42 (Exhibit C-3); Ordinance No. 2017-18 (Exhibit C-4); the Mayor's First Proclamation (Exhibit C-5); the Mayor's Second Proclamation (Exhibit C-6); and the Mayor's Third Proclamation (Exhibit C-7).

FIRST CAUSE OF ACTION
(Violation of U.S. Constitution, Amendment Fourteen,
and New Mexico Constitution, Article II, Section 18)

Chapter 27 as Amended Violates Due Process

69. All previous paragraphs are incorporated herein by reference.

70. Wireless telecommunications facilities emit dangerous radiation and are depriving many people of their homes, their health, their liberty, and their lives.

71. Under Chapter 27 as amended by Ordinances 2016-42 and 2017-18, the construction of wireless telecommunications facilities on private property in all zoning districts is subject to at least notice and comment prior to construction, and an appeals process afterwards, but the construction of most telecommunications facilities in the public rights-of-way in the same districts are not subject to notice, comment, or an appeals process. Notice and an opportunity to be heard are the minimum requirements for Procedural Due Process.

72. Chapter 27 as amended also violates Substantive Due Process. The U.S. Constitution and the New Mexico Constitution guarantee the fundamental right of citizens to be free from government actions that harm life, liberty, and property. These inherent and inalienable rights reflect a basic societal contract. The rights to life, liberty, and property have evolved and continue to evolve as technological advances pose new threats to these fundamental rights.

73. In enacting Ordinances Nos. 2016-42 and 2017-18, the City has determined to award franchises authorizing the unrestrained and unprotected siting of wireless telecommunications facilities in point blank range of thousands of residences and businesses with knowledge that the results of its acts endanger Plaintiffs' lives, liberties, and properties . Plaintiffs will no longer be safe in their homes, at work, or while traveling on the public streets.

74. For the past twenty years, the City has known about the danger to Plaintiffs' health and safety created by RF radiation, yet has repealed all protections from that danger. These deliberate actions by the City have resulted in dangerous levels of RF radiation, which deprive Plaintiffs of their fundamental rights to life, liberty, and property, their capacity to earn a living, safely raise families, and provide for their basic human needs. The City has acted with deliberate indifference to the known danger. Given that the dangers are so substantial, the City's deliberate indifference shocks the conscience.

75. The actions of the City have deprived Plaintiffs of the reasonable expectation of a home without radiation. These acts of the City cannot and do not operate to secure a more compelling state interest than Plaintiffs' fundamental rights to life, liberty, and property.

**SECOND CAUSE OF ACTION
(Violation of U.S. Constitution, Amendment Fourteen,
and New Mexico Constitution, Article II, Section 18)**

The Mayor's Proclamations of Emergency Violate Due Process

76. All previous paragraphs are incorporated herein by reference.

77. Under the Mayor's Proclamations of Emergency, the City has suspended all land use regulations for cell towers on City-owned land, regardless of height, aesthetics, zoning district, proximity to homes or businesses, or any thing else, and regardless of whether they conform to design standards or not. Under the Proclamations of Emergency, the City has not only suspended land use regulations but has signed a contract with Verizon Wireless for the erection of wireless telecommunications facilities on City-owned land without notice to anyone or an opportunity for anyone to be heard, as required by City zoning regulations and the U.S. and New Mexico Constitutions.

78. The Mayor's Proclamations of Emergency violate Procedural and Substantive Due Process.

**THIRD CAUSE OF ACTION
(Violation of U.S. Constitution, Amendments Five and Fourteen)**

Chapter 27 as Amended is an Unconstitutional Taking

79. All previous paragraphs are incorporated herein by reference.

80. In enacting Ordinances Nos. 2016-42 and 2017-18, the City has determined to award franchises authorizing the placement of wireless telecommunications facilities anywhere on the streets and sidewalks of Santa Fe without regard to their proximity to homes and businesses.

81. The placement of wireless telecommunications facilities on the sidewalk directly in front of Plaintiffs' homes and businesses will render their homes and businesses uninhabitable and unusable.

82. The award of such franchises by the City constitutes a taking without just compensation, in violation of the Fifth and Fourteenth Amendments.

**FOURTH CAUSE OF ACTION
(Violation of NMSA 3-21-1(A))**

The City Has Abdicated Its Responsibilities as a Zoning Authority

83. All previous paragraphs are incorporated herein by reference.

84. Cities have traditionally regulated utilities that occupy their rights-of-way in two ways: either by site-specific leases, by which the city retains control over the location of proposed facilities, or by franchises, by which cities give up that control.

85. In amending Chapter 27 by Ordinances 2016-42 and 2017-18, the City of Santa Fe not only has chosen franchises over leases, but has effectively eliminated all other land use

regulations, such that an application for a franchise is the only requirement before a telecommunications company can begin erecting unlimited numbers of telecommunications facilities in the City's public rights-of-way. The City has enacted an all-or-nothing ordinance. If the City grants a franchise, the applicant can erect unlimited numbers of antennas and towers without further interference. If the City denies a franchise, the applicant cannot operate in the City.

86. Under the federal Telecommunications Act ("TCA"), 47 U.S.C. §§ 253 and 332(c)(7)(B)(i)(I) and (II), a municipality's regulations may not (a) have the effect of denying telecommunications service, and (b) may not discriminate between providers of functionally equivalent services. Therefore, the way Chapter 27 is now structured, the denial of any franchise to any telecommunications company would violate federal law. The City has given up all control over its streets and sidewalks.

87. Under similar circumstances, San Francisco, having been approached by DAS companies applying for franchises, passed an ordinance in 2011 requiring site-specific leases instead of franchises for wireless telecommunications facilities in the public rights-of-way, and a public hearing on any proposed lease that is objected to by any member of the public.

88. In upholding San Francisco's ordinance, the California Court of Appeal pointed out that requiring a franchise effects a prohibition on service whereas requiring a lease does not: "Requiring a local franchise, as the City did in *Pacific Telephone I*, has the immediate effect of prohibiting the telephone corporations' use of the public right-of-way, whereas local regulation on a site-by-site basis does not have the same impact." *T-Mobile West LLC v. City and County of San Francisco*, 3 Cal.App. 5th 334, 349 (Cal.App. 2016).

89. In requiring franchises instead of leases, and in abolishing all other land use regulations in the public rights-of-way, the City of Santa Fe has abdicated its responsibilities under State law, as well as under its own ordinances, to protect the health, safety, and welfare of the citizens of Santa Fe. Section 3-21-1(A) of the New Mexico Statutes states: “For the purpose of promoting health, safety, morals or the general welfare, a county or municipality is a zoning authority....” Section 14-1.3 of the Santa Fe City Code states: “The purposes of chapter 14 are to: (A) implement the purposes of the general plan, including guiding and accomplishing a coordinated, adjusted and harmonious development of Santa Fe that will best promote health, safety, order, convenience, prosperity and the general welfare....” Section 14-1.6 of the Santa Fe City code states: “The provisions of Chapter 14 apply to all land, buildings and other structures, and their uses, located within the corporate limits of Santa Fe, including land owned by local, county, state or federal agencies to the extent allowed by law.” Every resident of Santa Fe uses the public rights-of-way, and every property except those within private gated communities has frontage on one or more public rights-of-way. If land use regulations that are essential to the protection of health and safety are abolished within the City’s rights-of-way, then those protections become meaningless and the public’s health and safety are protected no longer.

90. In enacting Ordinances Nos. 2016-42 and 2017-18 the City has abdicated its responsibilities as a zoning authority under both state and City law.

**FIFTH CAUSE OF ACTION
(Violation of NMSA 1978, Section 3-21-1(B)(2))**

**Chapter 27 as Amended Provides for
Non-uniform Zoning Regulations**

91. All previous paragraphs are incorporated herein by reference.

92. The City is a zoning authority charged with promoting health, safety, morals and the general welfare and may “regulate or restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land in each district. *All such regulations shall be uniform for each class or kind of buildings within each district....*” NMSA 1978, Section 3-21-1(B)(2).

93. The purpose of uniform zoning laws is to protect private property and maintain order. Therefore “industries and structures likely to create nuisances” are excluded from residential districts. *Village of Euclid v. Amber Realty Co.*, 272 U.S. 365, 388 (1926). A person who purchases a home in a residential district has the right to rely on a single, uniform set of zoning regulations that apply throughout that district, not just on three sides of his or her property but on *all* sides. Setback requirements, for example, that were enacted for reasons of health and safety would become meaningless if they applied only on three sides of a person’s property.

94. Under Chapter 27 as amended by Ordinances Nos. 2016-42 and 2017-18, telecommunications facilities in the public rights-of-way are exempt from the zoning regulations in SFCC 1987, Section 14-6.2(E) that apply to all other telecommunications facilities, as well as from the zoning regulations in SFCC 1987, Section 14-5.2 that apply to all other buildings and structures in historic districts. Chapter 27 as amended by Ordinance 2016-42 therefore provides two-tier zoning regulations for every district in Santa Fe: one set of regulations that apply to

structures on private property, and a second, more relaxed set of regulations that apply to structures in the public rights-of-way.

95. Under Chapter 27 as amended, a tower or antenna on private land requires a site-specific application containing all the elements required by Section 14-6.2(E) including: notification of all neighbors within 200 feet of the antenna or tower; compliance with setback requirements from property lines; for new towers in a residential district, an early neighborhood notification meeting and a public hearing before the planning commission; and for towers and antennas in a historic district, a public hearing before the historic districts review board. A tower or antenna in the public right-of-way in the same district requires neither a separate application, notification of neighbors, setback requirements from property lines, early neighborhood notification meeting, nor public hearing.

96. Under Chapter 27 as amended, the rules for all property owners in Santa Fe suddenly changed on August 30, 2017. Homeowners can now wake up to find that cell tower transmitters have appeared overnight on the sidewalk within feet or even inches of their homes without any notice to them and without any recourse, regardless of what district they live in.

97. Chapter 27 as amended violates NMSA 1978, Section 3-21-1(B)(2).

**SIXTH CAUSE OF ACTION
(Violation of N.M. Const., Article II, Section 4)**

98. All previous paragraphs are incorporated herein by reference.

99. Article II, Section 4 of the New Mexico Constitution states: “All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.”

The Right to Protection of Property

100. Ordinances Nos. 2016-42 and 2017-18 deprives property owners of prior notice, an opportunity to comment and/or testify at a public hearing, a minimum setback distance from their property lines, and other protections from dangerous facilities being built on the sidewalk in front of their house.

101. Chapter 27 as amended by Ordinances Nos. 2016-42 and 2017-18 violates the inalienable right to protect property possessed by all persons under Article II, Section 4 of the New Mexico Constitution.

The Right to Safety and the Right to Defend Life

102. Chapter 27 as amended repeals all previous restraints on the pollution of private property with types of radiation proven to be harmful to life.

103. Chapter 27 as amended by Ordinances Nos. 2016-42 and 2017-18 violates the inalienable right to safety possessed by all persons under Article II, Section 4 of the New Mexico Constitution.

SEVENTH CAUSE OF ACTION (Violation of N.M. Const., Art. XX, § 21)

Chapter 27 as Amended Violates Pollution Control Requirements

104. All previous paragraphs are incorporated herein by reference.

105. Article XX, section 21 of the New Mexico Constitution is titled “Pollution control” and states: “The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. The legislature shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people.”

106. Ordinance No. 2017-18 repeals all previous restraints on the pollution of the environment with types of radiation proven to be harmful to life and safety. It even repeals self-certification of compliance with safety limits set by the FCC for human exposure to RF radiation.

107. Chapter 27 abdicates the responsibility of government under Article XX, section 21 of the New Mexico Constitution to control pollution.

**EIGHTH CAUSE OF ACTION
(Violation of NMSA 1978, § 3-21-1(A), NMSA § 3-21-5(A)(3),
SFCC §§ 14-1.3 and 14-4.1(A)(2))**

**Chapter 27 as Amended
Damages Health, Safety, and the General Welfare**

108. All previous paragraphs are incorporated herein by reference.

109. The protection of health, safety, and welfare is so fundamental to the function of government that this function is encoded in numerous provisions of law at every government level.

110. Section 3-21-1(A) of the New Mexico Statutes states: “For the purpose of promoting health, safety, morals or the general welfare, a county or municipality is a zoning authority....”

111. Section 3-21-5(A)(3) of the New Mexico Statutes states: “The regulations and restrictions of the county or municipal zoning authority are to be in accordance with a comprehensive plan and be designed to... (3) promote health and the general welfare.”

112. Section 14-1.3 of the Santa Fe City Code states that “[T]he purposes of chapter 14 are to: (A) implement the purposes of the general plan, including guiding and accomplishing a coordinated, adjusted and harmonious development of Santa Fe that will best promote health, safety, order, convenience, prosperity and the general welfare....”

113. Section 14-4.1(A)(2) of the Code states that the “regulations for the development and use of structures and land” in the City’s zoning districts “are made in accordance with the general plan and are designed to ... promote health and the general welfare...”

114. Chapter 27 as amended damages health, safety, and the general welfare, in violation of the fundamental responsibilities of government and numerous State and City laws.

**NINTH CAUSE OF ACTION
(Violation of NMSA § 3-21-6)**

**Ordinances 2016-42 and 2017-18
Adopted Zoning Changes Without Notice to Neighbors**

115. All previous paragraphs are incorporated herein by reference.

116. Section 3-21-6(B) of the New Mexico Statutes requires that “[w]henver a change in zoning is proposed for an area of more than one block, notice of the public hearing shall be mailed by first class mail to the owners, as shown by the records of the county treasurer, of lots or [of] land within the area proposed to be changed by a zoning regulation and within one hundred feet, excluding public right-of-way, of the area proposed to be changed by zoning regulation.”

117. Ordinances 2016-42 and 2017-18 adopted zoning changes only in the public rights-of-way.

118. No notices were mailed to any owners of lots of land within one hundred feet of any public right-of-way.

119. Changes in land use regulations that affect health and safety may not be made without adequate notice to every citizen who will be affected by those changes.

120. These zoning changes are void because they violated Procedural Due Process.

**TENTH CAUSE OF ACTION
(Violation of Santa Fe City Charter, § 2.02)**

**Chapter 27 as Amended
Violates the Human and Civil Rights of the Residents of Santa Fe**

121. All previous paragraphs are incorporated herein by reference.

122. Section 2.02 of the Santa Fe City Charter states that “[t]he human and civil rights of the residents of Santa Fe are inviolate and shall not be diminished or otherwise infringed.”

123. Chapter 27 as amended deprives the residents of Santa Fe of the ability to protect themselves against types of radiation proven to be harmful to life and safety.

124. Many residents of Santa Fe, including Plaintiffs and their members, are refugees from RF radiation elsewhere and their ability to remain healthy, earn a living, raise their families, provide for their needs, and continue to live in Santa Fe is dependent on non-exposure to RF radiation.

125. Chapter 27 as amended deprives Plaintiffs of their human and civil rights in violation of section 2.02 of the Santa Fe City Charter.

**ELEVENTH CAUSE OF ACTION
(Violation of Santa Fe City Charter, § 2.03)**

**Chapter 27 as Amended
Damages the City’s Environment**

126. All previous paragraphs are incorporated herein by reference.

127. Section 2.03 of the Santa Fe City Charter, titled “Environmental protection,” requires that “the governing body shall protect, preserve and enhance the city’s natural endowments... and promote and maintain an aesthetic and humane urban environment.”

128. Chapter 27 as amended damages the City’s environment in violation of section 2.03 of the Santa Fe City Charter.

TWELFTH CAUSE OF ACTION
(Violation of NMSA 1978, § 30-8-1 and SFCC §§ 10-9.3 and 23-1.2(B)(3))

Chapter 27 as Amended
Provides for the Creation of Public Nuisances

129. All previous paragraphs are incorporated herein by reference.

130. Under NMSA 1978, § 30-8-1, a public nuisance is a misdemeanor that consists of “knowingly creating, performing or maintaining anything affecting any number of citizens without lawful authority which is either: A. injurious to public health, safety, morals or welfare; or B. interferes with the exercise and enjoyment of public rights, including the right to use public property.”

131. Ordinance No. 2017-18 was adopted without lawful authority.

132. Under Section 10-9.3(E) of the Santa Fe City Code, a public nuisance as “knowingly creating, performing or maintaining anything affecting any number of citizens without lawful authority which is either (1) Injurious to public health, safety, morals or welfare; or (2) Interferes with the exercise and enjoyment of public rights, including the right to use public or private property.”

133. Under Section 23-1.2(B)(3) of the Santa Fe City Code, a public nuisance is “any activity, function, status, or the result of such activity, function, or status whether participated in by one person or several, whether caused by machines, persons, or other devices, which affects the health, safety, and welfare of an individual, a neighborhood or community and degrades the quality of life for such individual, neighborhood or community,” without regard for whether the nuisance was created by lawful authority.

134. Section 10-9.2 of the Santa Fe City Code requires “[t]he abatement of public nuisances for the protection of public health, safety, and welfare....”

135. Chapter 27 as amended provides for the creation of public nuisances, not their abatement, in violation of State and City law.

**THIRTEENTH CAUSE OF ACTION
(Violation of N.M. Const., Art. IX, § 14)**

**Chapter 27 SFCC 1987 As Amended
Is an Unconstitutional Subsidy to Private Corporations**

136. All previous paragraphs are incorporated herein by reference.

137. N.M. Const., Art. IX, Sec. 14 states in pertinent part: “Neither the state nor any county, school district or municipality, except as otherwise provided in this constitution, shall directly or indirectly lend or pledge its credit or make any donation to or in aid of any person, association or public or private corporation...”

138. Chapter 27 SFCC 1987, as amended by Ordinance No. 2016-42, imposes no fee on telecommunications providers who use and occupy the public rights-of-way if they are not retailers.

139. Chapter 27 SFCC 1987, as amended by Ordinances No. 2016-42 and No. 2017-18, represents an unconstitutional subsidy to private corporations.

FOURTEENTH CAUSE OF ACTION

The Mayor’s Proclamation of Emergency Was Issued without Legal Authority

140. All previous paragraphs are incorporated herein by reference.

141. Section 20-1, the Riot Control Ordinance, permits the Mayor to proclaim a state of emergency if he “determines that a public disorder, riot, disaster or emergency exists in the municipality.” SFCC § 20-1.2. Once he declares a state of emergency, he is authorized, by proclamation, to “prohibit... activities the mayor reasonably believes should be prohibited to help maintain life, property or the public peace.” These include prohibiting: any person being on

the street after curfew, § 20-1.2(A); any designated number of people from assembling or gathering, § 20-1.2(B); the manufacture, use, or transportation of explosives, § 20-1.2(C); the transportation, possession or use of combustible materials except for normal home or commercial use, § 20-1.2(D); the possession of firearms in public, § 20-1.2(E); the sale of alcoholic beverages, § 20-1.2(F); and the use of designated streets or highways, § 20-1.2(G).

142. Section 20-1.4 of the Santa Fe City Code states that any state of emergency proclaimed by the mayor under the Riot Control Ordinance “terminates automatically at noon on the third day after it becomes effective unless sooner terminated by proclamation of the mayor.”

143. Section 5.01 of the City Charter and Section 2-1.3 of the City Code command the Mayor to “cause the ordinances and regulations of the city to be faithfully and constantly obeyed,” not to unilaterally suspend them. They allow the Mayor to “perform other duties compatible with the nature of the office as the governing body may from time to time require,” not as he unilaterally may decide. They give the Mayor “the power conferred on the sheriffs of counties to suppress disorders and keep the peace”; the sheriffs do not have the power to order cell towers to be built. The City Charter gives the Mayor none of the powers that are frequently exercised by executives of the state and federal governments.

144. The Mayor is not authorized by Sections 5.01 or Section 20-1 or any other Code provision, or Section 5.01 or any other provision of the City Charter, to suspend the Land Development Code or any portions of it.

145. The Mayor is not authorized to declare that any state of emergency will last for six months.

146. The fire chief and two deputy police chiefs were interviewed in the *Santa Fe New Mexican* and have stated that there is no emergency.

147. The Mayor has acted beyond his authority.

148. The Proclamations are null and void.

FIFTEENTH CAUSE OF ACTION

Preliminary and Permanent Injunction Against the Enforcement of Chapter 27

149. All previous paragraphs are incorporated herein by reference.

150. The enforcement of Chapter 27 as amended should be preliminarily and permanently enjoined because of violations of City, State, and Federal laws, charter, and constitutions.

151. Absent injunctive relief, citizens will have RF radiation coming into their homes and bodies from point blank range without notice. This would be irreparable harm that is not remediable by monetary damages.

SIXTEENTH CAUSE OF ACTION

Preliminary and Permanent Injunction Against the Enforcement of the Mayor's Proclamation of Emergency

152. All previous paragraphs are incorporated herein by reference.

153. Under the Mayor's Proclamation of Emergency, the City contracted with Verizon Wireless to erect towers at seven new locations without regard for the requirements of the Land Development Code. At this writing, one tower has been erected within 10 feet of a popular eating establishment, and another in the parking lot of the largest recreation facility in Santa Fe.

154. The enforcement of the Mayor's Proclamations of Emergency should be preliminarily and permanently enjoined because the City's Riot Control Ordinance does not give the Mayor the authority to suspend the Land Development Code or any portion of it, and he also does not have that authority under any other City ordinance or City Charter provision.

In anticipation that the City will assert federal preemption by Section 704 of the Telecommunications Act of 1996 as a defense, Plaintiffs plead these additional issues:

SEVENTEENTH CAUSE OF ACTION

**“Environment” Does Not Mean “Health” in
Section 704 of the Telecommunications Act of 1996**

155. All previous paragraphs are incorporated herein by reference.

156. Section 704 of the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B)(iv) (“Section 704”), prohibits states from adopting stricter regulations than the FCC regarding “the environmental effects of RF radiation.”

157. If Congress had meant health it would have said so plainly.

158. Section 704 is not a bar to any of Plaintiff’s Claims for Relief because “environment” does not mean “health.”

EIGHTEENTH CAUSE OF ACTION – FIFTH AMENDMENT

**Section 704 of the Telecommunications Act of 1996,
47 U.S.C. § 332(c)(7)(B)(iv), is Unconstitutional.**

159. All previous paragraphs are incorporated herein by reference.

160. The FCC has no statutory authority over human health and its RF exposure standards are neither mandatory nor enforceable.

161. The FCC has stated that its RF exposure standards are procedural only and serve only to determine whether an FCC licensee must file an Environmental Assessment or not.

162. Non-mandatory regulations cannot have preemptive effect.

163. Section 704 prohibits the States from providing any remedy for injury by RF radiation without providing a substitute federal remedy.

164. The preemption contained in Section 704 violates Substantive Due Process because it forecloses any and all remedies for injury by RF radiation.

165. Section 704 is not a bar to any of Plaintiff's Claims for Relief because Section 704 violates the Fifth Amendment.

NINETEENTH CAUSE OF ACTION – FIRST AMENDMENT

Section 704 of the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B)(iv), is Unconstitutional.

166. All previous paragraphs are incorporated herein by reference.

167. Section 704 prohibits States and local governments from regulating RF radiation *on the basis of* its environmental effects.

168. If the public gives voice to their concerns about RF radiation from a proposed telecommunications facility and their city council subsequently denies the application, Section 704 provides that the applicant can “commence an action in any court of competent jurisdiction.” 47 U.S.C. § 332(c)(7)(B)(v). *See Cellular Telephone Company v. Town of Oyster Bay*, 166 F.3d 490, 495 (2nd Cir. 1999) (“A review of the record before us of the two hearings reveals that the bulk of the testimony addressed citizens' fears of adverse health effects from the cell sites...”).

169. If a city councilor gives voice to his or her concerns about RF radiation, the telecommunications company can likewise sue the city in any court of competent jurisdiction. *See T-Mobile Northeast LLC v. Town of Ramapo*, 701 F.Supp.2d 446, 460 (S.D.N.Y. 2009):

“[T]he Town has now admitted that one of the Planning Board's three stated reasons for denying T-Mobile's application was that the proposal raised health concerns... In Planning Board hearings on July 11, September 12, and October 17, 2006, town residents repeatedly spoke of their concern that T-Mobile's proposed facility would create a health hazard... The Court has no trouble concluding that the Town's decision was at least partly based on the environmental effects of the proposed tower's radio frequency emissions...

170. This prohibition is nothing more than a burden on the content of speech.

171. Section 704 is not a bar to any of Plaintiff's Claims for Relief because Section 704 violates the First Amendment.

The Wireless Consumer Advanced Infrastructure Investment Act ("WCAIIA") (Senate Bill 14, House Bill 38) passed both houses of the New Mexico Legislature on February 13, 2018. The WCAIIA will go into effect on September 1, 2018. In anticipation that the City will assert state preemption by this Act as a defense, Plaintiffs plead this additional issue:

**TWENTIETH CAUSE OF ACTION
(Violation of U.S. Constitution, Amendment Fourteen,
and New Mexico Constitution, Article II, Section 18)**

The Wireless Consumer Advanced Infrastructure Investment Act Violates Due Process

172. All previous paragraphs are incorporated herein by reference.

173. Various sections of the WCAIIA purport to prohibit municipalities from regulating wireless telecommunications facilities in the public rights-of-way. For example, Section 4(C) provides that a small wireless facility that extends no higher than ten feet above a utility pole or support structure is not subject to zoning review or approval. Section 5(C) provides that a new pole is not subject to zoning review if it is 50 feet tall or less, or 10 feet taller than any existing utility pole within 500 feet, whichever is higher.

174. Any law that prohibits a zoning authority from protecting the public health, safety, and welfare violates Procedural and Substantive Due Process.

175. The WCAIIA is not a bar to any of Plaintiff's Claims for Relief because the WCAIIA violates the Due Process Clauses of the U.S. and New Mexico Constitutions.

REQUESTS FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court issue an Order and Judgment:

1. Declaring that Chapter 27 as amended by Ordinances Nos. 2016-42 and 2017-18 violates the Procedural and Substantive Due Process requirements of the United States and New Mexico Constitutions.
2. Declaring that the Mayor's Proclamations of Emergency violate Procedural and Substantive Due Process.
3. Declaring that Chapter 27 as amended is a taking without just compensation, in violation of the Fifth and Fourteenth Amendments.
4. Declaring that by requiring franchises instead of leases, the City has unlawfully abdicated its responsibilities as a zoning authority.
5. Declaring that Chapter 27 as amended provides non-uniform zoning regulations for every zoning district, in violation of state law.
6. Declaring that Chapter 27 as amended violates the inalienable right to safety guaranteed in New Mexico's Constitution.
7. Declaring that Chapter 27 as amended violates the inalienable right to protect property guaranteed in New Mexico's Constitution.
8. Declaring that Chapter 27 as amended violates the inalienable right to defend life guaranteed in New Mexico's Constitution.
9. Declaring that Chapter 27 as amended damages the health, safety, general welfare, and environment in violation of Article XX, section 21 of New Mexico's Constitution.

10. Declaring that Chapter 27 as amended damages health, safety and the general welfare in violation of NMSA 1978, section 3-21-1(A) and 3-21-5(A)(3), as well as sections 14-1.3 and 14-4.1(A)(2) of the Santa Fe City Code.

11. Declaring that Ordinances 2016-42 and 2017-18 unlawfully adopted zoning changes without notice to neighbors.

12. Declaring that Chapter 27 as amended violates the human and civil rights of the residents of Santa Fe in violation of the Santa Fe City Charter.

13. Declaring that Chapter 27 as amended damages the City's environment in violation of the Santa Fe City Charter.

14. Declaring that Chapter 27 as amended provides for the creation of public nuisances in violation of City and State law.

15. Declaring that Chapter 27 SFCC 1987 is a subsidy to private corporations in violation of the New Mexico Constitution.

16. Declaring that the Mayor's Proclamations are null and void.

17. Temporarily and permanently enjoining the City, its officers, agents, servants, employees, and attorneys and those persons in active concert or participation with it who receive actual notice of the Order by personal service or otherwise, from enforcing Chapter 27 SFCC 1987 as amended by Ordinances 2016-42 and 2017-18, and prohibiting the granting of any franchises pending the outcome of this lawsuit.

18. Temporarily and permanently enjoining the City, its officers, agents, servants, employees, and attorneys and those persons in active concert or participation with it who receive actual notice of the Order by personal service or otherwise, from enforcing the Mayor's

Proclamations of Emergency, and prohibiting the construction of any telecommunications facilities pursuant to those Proclamations.

19. Awarding costs, and reasonable attorneys' fees as provided under law.

20. Awarding such other relief as this Court considers just and proper.

21. If the City raises Section 704 of the Telecommunications Act as a defense to any of the above, Plaintiffs further request that the Court:

a. Declare that "environment" does not mean "health" in Section 704 of the Telecommunications Act of 1996;

b. Declare that Section 704 violates Due Process and Free Speech in violation of the United States Constitution.

22. If the City raises the Wireless Consumer Advanced Infrastructure Investment Act as a defense, Plaintiff further requests that the Court declare that the new law violates Procedural and Substantive Due Process requirements of the United States and New Mexico constitutions.

Respectfully submitted,

/s/ Jonathan Diener

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I certify that a true and correct copy of Plaintiffs' First Amended Complaint was served on Defendant through the PACER system on the date of acceptance for filing.

/s/ Jonathan Diener