

**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-01209-KG-JHR

CITY OF SANTA FE, NEW MEXICO;
HECTOR BALDERAS, Attorney General of New
Mexico; and the UNITED STATES OF AMERICA,

Defendants.

MOTION FOR PRELIMINARY INJUNCTION

COME NOW the Santa Fe Alliance for Public Health and Safety (“Alliance”) and Monika Steinhoff by and through their attorneys, and Arthur Firstenberg, pro se, and move the Court for entry of an order enjoining the City of Santa Fe (“City”) from permitting the placement of any wireless telecommunications facilities on the streets and sidewalks, i.e. public rights-of-way, of Santa Fe pending the outcome of the trial of this lawsuit. A preliminary injunction is in the public interest. Such facilities would cause irreparable harm to Plaintiffs’ lives, liberty, and property that far outweighs any possible harm an injunction could cause to Defendants.

Attached to this motion are 275 pages of exhibits consisting primarily of expert affidavits and exhibits to those affidavits.¹ Plaintiffs asked all parties for consent to the filing of up to 275 pages of exhibits to this motion; no party opposed Plaintiffs’ request.²

¹ Havas Aff. (Exs. 1, MH-A, MH-B); Balmori Aff. (Exs. 2, AB-1); Firstenberg Aff. (Exs. 3, AF-1, AF-2, AF-3, AF-4, AF-5, AF-6); Morton Aff. (Exs. 4, LM-1, LM-2, LM-3, LM-4); Goldberg Aff. (Exs. 5, SG-1); McGinnis Aff. (Ex. 6); Singer Aff. (Exs. 7, RS-1); Elliott Aff. (Exs. 8, EE-1).

In support of this motion, Plaintiffs submit the attached memorandum of law.

Respectfully submitted,



ARTHUR FIRSTENBERG, pro se
P.O. Box 6216
Santa Fe, NM 87502
(505) 471-0129
bearstar@fastmail.fm

/s/ Adam Cherson

ADAM CHERSON
10 West 66th Street
New York, NY 10023
(917) 922-1140, law@cherson.net
Attorney for Plaintiffs Monika Steinhoff and
Santa Fe Alliance for Public Health and Safety

² All parties were contacted by email or phone between March 19 and 22, 2019. The United States and the New Mexico Attorney General did not oppose, and the City of Santa Fe took no position. This motion was not filed at that time due to the delay caused by the change of counsel for Plaintiffs.

**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-01209-KG-JHR

CITY OF SANTA FE, NEW MEXICO;
HECTOR BALDERAS, Attorney General of New
Mexico; and the UNITED STATES OF AMERICA,

Defendants.

**MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF FACTS 3

 The Injured Parties 3

 The Challenged City Ordinances 7

 Plaintiffs’ Expert Witnesses..... 12

ARGUMENT 13

 Legal Standard 14

 Irreparable Harm 14

 Likelihood of Success on the Merits..... 17

 Balance of Equities and the Public Interest 18

 No Security Bond Should Be Required 19

CONCLUSION..... 20

TABLE OF AUTHORITIES

Cases

American Civil Liberties Union v. Johnson,
194 F.3d 1149 (10th Cir. 1999) 14

Baldwin v. Hale,
68 U.S. (1 Wall.) 223 (1863) 17

Brentwood Academy v. Tennessee Secondary School Athletic Assn.,
531 U.S. 288 (2001)..... 10

Continental Oil Company v. Frontier Refining Company,
338 F.2d 780 (10th Cir. 1964) 19

Crowley v. Local No. 82, Furniture & Piano,
679 F.2d 978 (1st Cir.1982), *rev'd on other grounds*, 467 U.S. 526, 104 S.Ct. 2557,
81 L.Ed.2d 457 (1984) 19

Evans v. Newton,
382 U.S. 296 (1966) 10

Federal Lands Legal Consortium v. United States,
195 F.3d 1190 (10th Cir.1999) 14

Fuentes v. Shevin,
407 U.S. 67 (1972)..... 17

Juliana v. United States,
No. 6-15-cv-01517-AA (D.Or.) 1, 2

No. 18-36082 (9th Cir.) 1

Kikumura v. Hurley,
242 F.3d 950 (10th Cir. 2001) 17

Lugar v. Edmondson Oil Co.,
457 U.S. 922 (1982) 10

McClendon v. City of Albuquerque,
272 F.Supp.2d 1250 (D.N.M. 2003) 14, 18

Navajo Health Foundation – Sage Memorial Hospital, Inc. v. Burwell,
100 F.Supp.3d 1122 (D.N.M. 2015) 19

Nken v. Holder,
556 U.S. 418 (2009)..... 18

Penn v. San Juan Hospital, Inc.,
528 F.2d 1181 (10th Cir. 1975) 13

People ex rel. Van De Kamp v. Tahoe Regional Plan,
766 F.2d 1319 (9th Cir. 1985) 19

Prairie Band of Potawatomi Indians v. Pierce,
253 F.3d 1234 (10th Cir.2001) 14

Qwest Corp. v. City of Santa Fe,
224 F.Supp.2d 1305 (D.N.M. 2002), *aff'd*, *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258
(10th Cir. 2004)..... 11

Qwest Corp. v. City of Santa Fe,
2013 WL 12241199 (D.N.M. 2013) 8

RoDa Drilling Co. v. Siegal,
552 F.3d 1203 (10th Cir. 2009) 19

Tool Box v. Ogden City Corp.,
316 F.3d 1167 (10th Cir. 2003) 9

United Keetoowah Band of Cherokee Indians v. Federal Communications Commission,
2019 WL 3756373 (D.C. Cir. 2019) 10 n. 13

Winnebago Tribe of Neb. v. Stovall,
341 F.3d 1202 (10th Cir. 2003) 19

Winter v. Natural Resources Defense Council,
555 U.S. 7 (2008)..... 18

Administrative Decisions

In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure
Investment, Second Report and Order, WT Docket 17-79, FCC 18-30,
2018 WL 1559856 (Mar. 30, 2018) 10 n. 13

Constitutional Provisions

U.S. Constitution, Amendment Fourteen..... 1, 16, 17

New Mexico Constitution, Article II, Section 18 16

Statutes

Energy Policy Act of 1992, Pub. L. 102-486, 106 Stat. 2776,
 Sec. 201 1

National Environmental Policy Act, Pub. L. 91-190, 83 Stat. 852..... 10 and n. 13

National Historic Preservation Act, Pub. L. 89-665, 80 Stat. 915..... 10 and n. 13

Telecommunications Act of 1996, Pub. L. 104-104, Section 704 1, 20, 21

Wireless Consumer Advanced Infrastructure Investment Act,
 NMSA 1978 § 63-9I (2018)..... 8, 10 n.14, 20, 21

 § 63-9I-3(B) 10 n. 16

 § 63-9I-3(C) 10 n. 17

 § 63-9I-3(D)..... 10 n. 17

 § 63-9I-4(C) 8

 § 63-9I-5(B) 8

47 U.S.C. § 253..... 10 n. 16

47 U.S.C. § 332(c)(7)(B)(i)(II) 10 n. 16

47 U.S.C. § 332(c)(7)(B)(iv)..... 10 n. 12, 20

Ordinances

Santa Fe City Code,

 Chapter 14..... *passim*

 § 14-6.2(E) 21

 Chapter 27..... *passim*

 § 27-2.19(C)(1)(a) 8, 17 and n. 37

Ordinance No. 1998-16..... 7

Ordinance No. 2010-14..... 8

Ordinance No. 2016-42..... *passim*

Ordinance No. 2017-18..... *passim*

Rules

Fed. R. Civ. P. 65 20

Fed. R. Civ. P. 65(c) 19

INTRODUCTION

Just as *Juliana v. United States*, No. 6-15-cv-01517-AA, filed in the United States District Court for the District of Oregon on August 12, 2015,³ asks for declaratory and injunctive relief to restrain the production of carbon dioxide from the burning of fossil fuels, so Plaintiffs here ask for declaratory and injunctive relief to restrain the production of radio frequency (“RF”) radiation from wireless technology. Both RF radiation and carbon dioxide are global pollutants that threaten all life on Earth. Both types of pollutants have been increasing for about the same amount of time—more or less one and a half centuries, slowly at first, rapidly in recent decades. Both sets of plaintiffs allege that specific laws and government actions are unconstitutional because they deprive the plaintiffs of life, liberty and property without due process of law. The *Juliana* plaintiffs allege that Section 201 of the Energy Policy Act of 1992 is unconstitutional; Plaintiffs here allege that Section 704 of the Telecommunications Act is unconstitutional. Both sets of plaintiffs speak not only for themselves but for future generations and for all life forms. Both actions have serious economic implications for important, essential industries: the curbing of carbon dioxide emissions would be a threat to the oil and gas industries, while the curbing of RF radiation would be a threat to the wireless telecommunications industry.

There are three significant differences between the issues in *Juliana* and the issues in the present case, which make the present case even more urgent than *Juliana*, and which necessitate a preliminary injunction:

First, the very nature and scale of wireless technology is about to radically change, immediately, during 2019, with the implementation of the fifth generation of wireless technology

³ Presently on interlocutory appeal in the Ninth Circuit, Case No. 18-36082.

(“5G”). No radical change in the nature and scale of fossil fuel extraction or combustion is taking place right now, this year.

Second, the timescales of the threats to life are different. RF radiation has already deprived Plaintiffs as well as tens of millions of other people of their homes, their businesses, their health, and their lives. Climate change is accelerating but it is still occurring incrementally, year by year, with predicted catastrophe still years or decades away. The threatened submersion of populated islands and cities by rising sea levels has not happened yet. The *Juliana* plaintiffs are complaining largely about being deprived of their future; Plaintiffs here are pleading for their lives right now. If a preliminary injunction is not granted, Plaintiffs and Plaintiff’s members are in danger of losing their homes and their lives before trial.

Third, the visibility of the two problems is radically different. Climate change is widely known by the public and publicized by the media; curbing carbon dioxide emissions is a popular cause. The harm caused by RF radiation, although more immediate, is neither widely known nor publicized; curbing wireless telecommunications is a distinctly *unpopular* cause. No one, at any level of government, is addressing it. The courts are Plaintiffs’ last and only resort.

The facts in the two cases are closely parallel and the law is the same, but the need for a remedy is even more urgent in the present case than in *Juliana*: an existential threat to our planet must be prevented, and the plaintiffs who bring the threat to the Court’s attention must not be deprived of life, liberty, and property without due process, and certainly not before trial.

STATEMENT OF FACTS

The Injured Parties

RF radiation is injurious to all life and to every person. It interferes with neurological⁴ and cardiac⁵ function. It is the main cause of the modern epidemics of cancer, diabetes, and heart disease.⁶ It is a major cause of forest die-off and a primary cause of the worldwide decline, endangerment and extinction of so many species of insects, amphibians and birds.⁷ Tens of thousands of peer-reviewed scientific studies prove these effects.⁸

In addition to these universal effects on health and environment, RF radiation has caused particular injury to a growing number of people: the acute effects of RF radiation, known as radio wave sickness,⁹ have forced an estimated 20,000,000 people worldwide¹⁰ from their homes, which became uninhabitable due to nearby sources of RF radiation, usually cell towers. Plaintiffs and Plaintiff's members are among this population, having been forced to leave homes and/or businesses due to the erection of nearby cell towers erected by joint action of governments and private industry.

Plaintiff Arthur Firstenberg is an individual who lives and owns property in Santa Fe and who has been severely injured by cell towers, resulting in the following life-threatening events: laryngospasm, which prevents him from breathing; irregular heart beat; elevated blood

⁴ Singer Aff. ¶¶ 32-39; Havas Aff. ¶¶ 18, 20, 23, 32, 76; Goldberg Aff. ¶ 19d; Firstenberg Aff. ¶¶ 11, 12; Morton Aff. ¶¶ 8, 21, 28.

⁵ Havas Aff. ¶¶ 18, 20-21, 76; Goldberg Aff. ¶ 17a; Singer Aff. ¶¶ 34e; Firstenberg Aff. ¶¶ 11, 12, 21; Morton Aff. ¶¶ 21, 26-28; Elliott Aff. ¶¶ 3-14.

⁶ Firstenberg Aff. ¶¶ 12, 21; Morton Aff. ¶¶ 12, 18, 21; Goldberg Aff. ¶¶ 17a, 18b, 18c;; Havas Aff. ¶¶ 8-12, 30-31, 96-99; Singer Aff. ¶ 34c.

⁷ Balmori Aff. ¶¶ 10-21; Havas Aff. ¶¶ 44-92; Morton Aff. ¶¶ 11, 15; Firstenberg Aff. ¶¶ 12, 21.

⁸ Havas Aff. ¶¶ 22-23; Firstenberg Aff. ¶ 8; Morton Aff. ¶ 11.

⁹ Havas Aff. ¶¶ 18, 34.

¹⁰ Firstenberg Aff. ¶ 6.

pressure; elevated cardiac enzymes, indicative of damage to heart muscle; and crippling pains. He has had to leave six homes, three cities, and two states to escape cell tower radiation. He has spent seven of the last twenty-three years living in his car looking for housing, including three years in Santa Fe, parking his car at night in the only location he could find where cell phones did not work. The adobe house he now owns is a partial shield against radiation and is his refuge. (Firstenberg Testimonial (Ex. AF-2), pp. 31-32; Morton Aff. ¶¶ 27, 28; Elliott Aff. ¶¶ 3-14).

Plaintiff Monika Steinhoff is an individual who lives and owns property in Santa Fe and who was injured first by 20 WiFi signals at her gallery on Santa Fe Plaza and then by a cell tower that was built adjacent to a later gallery location on Guadalupe Street. She was forced to relocate her gallery to yet another part of town to regain her health. Cell tower radiation causes her dizziness, nausea, heart palpitations, severe insomnia, and internal bleeding. (Steinhoff Testimonial, Ex. AF-2, pp. 10-11).

Plaintiff Santa Fe Alliance for Public Health and Safety is an organization of individuals who live, work and spend time in Santa Fe, who have either lost homes or businesses or are imminently threatened with the loss of homes or businesses because of the proximity of cell towers. Steinhoff and Firstenberg, who are individual Plaintiffs, are also members of the Alliance. **Alliance member John McPhee** is an official with the New Mexico Department of Health. When the cell towers on the hill above their home were upgraded to 4G, he and his wife began to experience headaches, nausea, chronic insomnia and loud ringing in their ears, and his wife started having seizures. They purchased and moved into a home near Santa Fe High School, which gave them both relief and immediately reduced the frequency and severity of his wife's seizures. (McPhee Testimonial, Ex. AF-2, pp. 4-6).

Alliance member Forrest Reed is a civil engineer and environmental planner who used to work for the City of Santa Fe. She was injured in 2005 when Verizon Wireless concealed a cell tower on the roof of a one-story building very near her home. She developed respiratory, neurological and cardiac problems, and has developed an unusual form of lung cancer (Reed Testimonial, Ex. AF-2, p. 25).

Alliance member Lynn Jacob, a resident of Santa Fe since 1994, was a caseworker for the City of New York for 22 years. She becomes irritable, tired and weak if she spends time in the vicinity of a cell tower or is exposed to WiFi. She has thyroid cancer which is presently stable and is afraid that any increase in radiation will encourage the growth and spread of her cancer. (Jacob Testimonial, Ex. AF-2, p. 37).

Alliance member Nina Zelevansky is a retired psychotherapist and an artist who has lived in Santa Fe for many years. Like most of the members of the Alliance, she is unable to use a cell phone because when she does, her face feels like it is on fire and she cannot think. She is presently homeless because she has not been able to finding housing which is not exposed to WiFi and/or a cell tower. (Zelevansky Testimonial, Ex. AF-2, p. 9).

Alliance member Erica Elliott is a physician in private practice in Santa Fe for over 30 years. She sees many patients who have been injured by wireless technology and who “suffer unimaginable hardship trying to avoid exposure to wireless devices and cell towers. Some have had to leave their job and their home.” She herself was injured by a mini cell tower that was placed on a neighbor’s balcony, causing her frequent nosebleeds, high blood pressure, and a complete inability to sleep. (Elliott Testimonial, Ex. AF-2, pp. 1-2).

Alliance member Janice Olch is an architect. She and her daughter were injured by cell phone antennas on a water tank near their home in Hondo Hills. She sold their home and they moved to a more remote area in Santa Fe County to recover their health. (Olch Testimonial, Ex. AF-2, p. 3).

Other members of the Alliance who have been injured by cell towers include **Orejona Ashton**, a massage therapist, artist, and model (Ashton Testimonial, Ex. AF-2, p. 8); **Virginia J. Miller**, a retired teacher and lifelong peace, justice and community activist (Miller Testimonial, Ex. AF-2, pp. 12-13); **Chellis Glendinning**, a psychologist who was homeless for five years due to inability to find a home that was not near cell towers or other sources of radiation (Glendinning Testimonial, Ex. AF-2, p. 14); **Mary Beth Peters**, a massage therapist who is no longer able to work (Peters Testimonial, Ex. AF-2, p. 15); **Julia Whitfield**, a former internet marketer and webmaster who was injured by her work and who has become an Electromagnetic Radiation Specialist who measures and mitigates radiation in homes and businesses (Whitfield Testimonial, Ex. AF-2, pp. 16-17); **Mary Ellen Underwood**, retired Marketing Director at El Castillo Retirement Community (Underwood Testimonial, Ex. AF-2, pp. 18-19); **Jeraldine Peterson-Mark**, a massage therapist and Qigong instructor (Peterson-Mark Testimonial, Ex. AF-2, pp. 21-22); **Caroline Walker**, a world-class athlete who was homeless for eight years due to inability to find a home that was not near cell towers or other sources of radiation (Walker Testimonial, Ex. AF-2, p. 23); **Barbara Stavola**, an Ayurvedic Medicine practitioner (Stavola Testimonial, Ex. AF-2, p. 27); **Deborah Sie**, a naturopathic doctor (Sie Testimonial, Ex. AF-2, pp. 28-29); and **Lola Moonfrog**, president of the Pond Foundation (Moonfrog Testimonial, Ex. AF-2, p. 30).

The Challenged City Ordinances

The City ordinances Plaintiffs are challenging in this action, and whose enforcement Plaintiffs are asking the Court to enjoin, are Ordinances Nos. 2016-42 (Doc. 19-3) and 2017-18 (Doc. 19-4). Both these ordinances amended Chapter 27 of the Santa Fe City Code, which regulates telecommunications facilities in the public rights-of-way.

Prior to May 2018, the City did not authorize the placement of any antennas or towers in the public rights-of-way. Chapter 27 had originally regulated telecommunications services in the City generally, while antennas and towers, “whether upon private or public lands,” were governed by the land use regulations contained in Chapter 14. Ord. No. 1998-16, § 17 (Doc. 19-12, p. 7). The notice, hearing and setback requirements contained in Chapter 14, the requirements for site-specific leases on public land contained in Chapter 27, and the provision requiring consideration of the “public health, safety and welfare” before granting any application for a lease (Doc. 19-1, p. 9) acted to ensure that antennas and towers were located only on private property.

In 2002, the leasing fees set by the City for placing telecommunications facilities on public land were struck down as excessive by this Court. *Qwest Corp. v. City of Santa Fe*, 224 F.Supp.2d 1305 (D.N.M. 2002), *aff'd*, *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258 (10th Cir. 2004).

In 2010, the City revised Chapter 27. The revised Chapter 27 exempted telecommunications facilities in the public rights-of-way from the regulations contained in Chapter 14; enacted less restrictive regulations that applied only to facilities located in the public rights-of-way; replaced site-specific leases with franchises; and eliminated the requirement for

consideration of the public health, safety and welfare. Ord. No. 2010-14 (Doc. 19-2). That ordinance was immediately challenged, and the franchise fees were struck down by this Court as well. *Qwest Corporation v. City of Santa Fe*, 2013 WL 12241199 (D.N.M. 2013). The City thus had no enforceable ordinance regulating telecommunications facilities in the public rights-of-way between 2002 and 2016.

Ordinance No. 2016-42 (Doc. 19-3) re-instituted the franchise provisions with a revised fee structure. Ordinance No. 2017-18 (Doc. 19-4) eliminated virtually all land use regulations for antennas and towers in the public rights-of-way. Under these ordinances, the only requirement left for placing antennas and towers in the public rights-of-way is possession of a franchise. Franchises are to be awarded to all telecommunications providers on a non-discriminatory basis, and franchisees are 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 Federal Communications Commission's safety regulations, and without even submitting an application to the City. The only remaining requirement besides possession of a franchise is for telecommunications providers to comply with design guidelines that the City will have adopted. Santa Fe City Code § 27-2.19(C)(1)(a) (2018) (Doc. 19-4, pp. 2-3). But even this minimal requirement is not being enforced because under a new State law, the Wireless Consumer Advanced Infrastructure Investment Act ("WCAIIA"), also under challenge in the present action, such facilities are exempt from *all* land use requirements. NMSA 1978 §§ 63-9I-4(C) and 5(B) (2018) (Doc. 19-8, pp. 12 and 19-20). 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 school classrooms, and they will have no recourse.

On May 9, 2018, the City granted the first five franchises under the new ordinances, to Plateau Telecommunications, Inc.; Cyber Mesa Computer Systems, Inc.; Conterra Ultra Broadband, LLC; Computer Network Service Professional, Inc. dba NMSURF; and Mobilitie, LLC dba Broadband Network of New Mexico, LLC, which is a contractor for Sprint.¹¹ The first antennas on the sidewalk are being constructed right now by Cyber Mesa, NMSURF, and Broadband Network of New Mexico. (*See* Exs. AF-4, AF-5, and AF-6). The goal of these companies, and others that are applying for franchises, is to blanket the streets of Santa Fe with a dense network of antennas as part of the 5th Generation of wireless technology. Arunabha Ghosh, director of wireless communications at AT&T Labs, has said 5G will require “several small cells deployed every block to support this 100 megabits per second that we need.” (Ex. AF- 3).

The imminent harm that Plaintiffs request the Court to enjoin, i.e. the erection of wireless facilities on the sidewalks by private companies, is attributable to State action under the nexus test as set forth in *Tool Box v. Ogden City Corp.*, 316 F.3d 1167 (10th Cir. 2003). The State can be held responsible for a private decision “when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.” *Id.* at 1176. In the present case the State has done this to such a degree that it is in effect mandating 5G. Governments and private industry have acted in concert to mandate the placement of 5G antennas on the sidewalk on every block in every city in the United States,

¹¹ City Council Minutes, May 9, 2018, https://www.santafenm.gov/archive_center/document/18683, pp. 27-47.

including, in particular, Santa Fe. Congress has prohibited consideration of health or environment.¹² The FCC has exempted these antennas from the National Environmental Policy Act (“NEPA”) and the National Historic Preservation Act (“NHPA”).¹³ New Mexico and Santa Fe have repealed all land use regulations including public notice.¹⁴ Franchises have replaced site-specific leases.¹⁵ Franchise applications may not be denied.¹⁶ Franchise fees have been strictly limited.¹⁷ This is no longer just a matter of State regulation. This is a matter of State encouragement to such a degree that the outcome (antennas in front of every third to fifth house) is in no doubt whatsoever. The State has done this with deliberate indifference to the known harm.

State action is also found when private action is “entwined with governmental policies,” *Brentwood Academy v. Tennessee Secondary School Athletic Assn.*, 531 U.S. 288, 296 (2001) (citing *Evans v. Newton*, 382 U.S. 296, 301 (1966)), or “when a private actor operates as a ‘willful participant in joint activity with the State or its agents.’” *Brentwood Academy*, 531 U.S. at 296 (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982)). Such is the case here:

- a. The Mayor’s first Proclamation of Emergency (Doc. 19-5), which gave a contract to Verizon Wireless to erect cell towers on public land, stated that “the purpose of these

¹² 47 U.S.C. § 332(c)(7)(B)(iv).

¹³ *In Re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Second Report and Order, WT Docket 17-79, FCC 18-30, 2018 WL 1559856 (March 30, 2018). (Since the filing of the present lawsuit, this action by the FCC has been reversed. On August 9, 2019, the D.C. Circuit vacated the FCC’s order removing small cells from the purview of NEPA and NHPA. *United Keetoowah Band of Cherokee Indians v. Federal Communications Commission*, 2019 WL 3756373 (D.C. Cir. 2019)).

¹⁴ City Ordinance 2017-18; NMSA 1978 § 63-9I (2018).

¹⁵ City Ordinance 2016-42.

¹⁶ 47 U.S.C. §§ 253 and 332(c)(7)(B)(i)(II); NMSA 1978 § 63-9I-3(B).

¹⁷ NMSA 1978 §§ 63-9I-3(C) and (D).

temporary telecommunications facilities is to supplement the capacity of the cellular networks in the City so that emergency responders, like police, fire, and EMS, will be better able to communicate with their departments, other agencies, and most importantly, the public”;

- b. Cyber Mesa, one of the companies awarded a franchise under the amended Chapter 27, has both a franchise and a contract with the City. The first antennas it has installed under its franchise are to supply “WiFi on the Plaza,” a free service offered to the public by the City of Santa Fe (Ex. 9).
- c. Plateau Telecommunications is another of the companies awarded a franchise under the amended Chapter 27. Its application for a franchise states: “Initial efforts will be focused on providing interconnection services for other service providers and some government facilities” (Ex. 10, p. 2).
- d. Conterra Ultra Broadband is another of the companies awarded a franchise under the amended Chapter 27. Its application for a franchise states: “Conterra Ultra Broadband, LLC (‘Conterra’) is under contract with the Santa Fe Public Schools... Conterra will also deploy additional strands [of fiber] at its own cost for possible future use by other entities, such as the city and county of Santa Fe...” (Ex. 11, p. 2). The franchise allows Conterra to install not just fiber but also wireless facilities.
- e. Broadband Network of New Mexico, a contractor for Sprint, is another of the companies awarded a franchise under the amended Chapter 27. It will be erecting antennas on the sidewalks throughout Santa Fe. Its application for a franchise states: “These facilities are not dedicated to any particular customer, and, to the extent

capacity on the structures is available to be used by other entities, including the City of Santa Fe” (Ex. 12, p. 2).

The imminent harm Plaintiffs ask the Court to enjoin is State action under any of these tests. The State has provided such significant encouragement as to amount to a mandate. Private action to erect antennas is entwined with government policy to provide universal wireless service. Private companies are willful participants in joint activity with the State.

Plaintiffs’ Expert Witnesses

Magda Havas has a Ph.D. in Environmental Toxicology and is Professor Emeritus at the Trent School of the Environment in Peterborough, Ontario, Canada. Her research helped bring in clean air legislation in the 1990s in both Canada and the United States. She has done research on the effects of cell phones and cell towers on the health of adults and children. **Alfonso Balmori Martínez**, a wildlife biologist in Valladolid, Spain, is one of the world’s foremost researchers on the effects of RF radiation on plants and animals. **Raymond Singer, Ph.D.** is a neuropsychologist and neurotoxicologist who has reviewed the scientific literature on electromagnetic field neurotoxicity since at least 2010. **Walter McGinnis** is an electrician who measures and reduces electric and magnetic fields and RF radiation in the homes and businesses of his clients. **Sharon Goldberg, M.D.** is a specialist in internal medicine whose research interest is chronic disease and the deterioration of personal and public health seen over the last two decades. **Leah Morton, M.D.** has submitted an affidavit applying her knowledge of the scientific literature on RF radiation to her own clinical experience as a family practice doctor in Santa Fe over the past three decades. She was Plaintiff Firstenberg’s physician from 2009 to 2010, during a time when he was sleeping in his car in below-freezing temperatures to avoid cell

tower radiation. As part of her review of the science, Dr. Morton has attached to her affidavit a review of cell tower studies from around the world. (Exhibit LM-3). **Erica Elliott** specializes in chronic illness and is board certified in environmental medicine and family practice. Plaintiff Firstenberg has been her patient since 2006. **Arthur Firstenberg** is the president of the Cellular Phone Task Force, the oldest and largest organization in North America devoted to reducing electromagnetic pollution. He is a scientist, a consultant to doctors, and the author of *The Invisible Rainbow: A History of Electricity and Life* (AGB Press, 2017), the first comprehensive history of the development of electricity from an environmental point of view. Attached to Firstenberg's affidavit are testimonials (Exhibit AF-2), solicited by the New Mexico Attorney General during a meeting about 5G, of 25 members of the Alliance who have been injured, disabled, and/or made homeless by exposure to wireless technology in its various forms.

ARGUMENT

The purpose of a preliminary injunction is to “preserve the status quo pending the litigation of the merits.” *Penn v. San Juan Hospital, Inc.*, 528 F.2d 1181, 1185 (10th Cir. 1975). The status quo in the present case is the situation that existed prior to the filing of this action, and that still substantially exists today: there are no wireless telecommunications facilities in the public rights-of-way of Santa Fe. The enforcement of the challenged ordinances prior to trial would dramatically change the status quo. A preliminary injunction would avoid irreversible harms that would result from hundreds or thousands of antennas appearing on the streets and sidewalks of Santa Fe prior to trial.

1. Legal Standard

A court will grant a preliminary injunction, pending trial, when the moving party meets these conditions:

(1) the movant will suffer irreparable harm unless the injunction issues; (2) there is a substantial likelihood the movant ultimately will prevail on the merits; (3) the threatened injury to the movant outweighs any harm the proposed injunction may cause the opposing party; and (4) the injunction would not be contrary to the public interest.

American Civil Liberties Union v. Johnson, 194 F.3d 1149, 1155 (10th Cir. 1999). Further, if the moving party can establish the other three factors, then, instead of showing a substantial likelihood of success, the party need only establish that there are “““questions going to the merits ... so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.””” *McClendon v. City of Albuquerque*, 272 F.Supp.2d 1250, 1253 (D.N.M. 2003) (citing *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir.2001) (citing *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190, 1194 (10th Cir.1999))).

2. Irreparable Harm

When rats are exposed to a cell phone, or to the equivalent of a nearby cell tower, just once for two hours, it destroys up to two per cent of their brain cells.¹⁸ When rats are exposed to a cell phone, or to the equivalent of a nearby cell tower, for two hours once a week for a year, they develop cognitive deficits.¹⁹ These injuries are caused by radiation-induced disruption of the

¹⁸ LG Salford et al., Nerve Cell Damage in Mammalian Brain after Exposure to Microwaves from GSM Mobile Phones, *Environmental Health Perspectives* 11(7): 881-883 (2003) (Firstenberg Aff. ¶ 12 n. 16).

¹⁹ H Nittby et al., Cognitive Impairment in Rats after Long-Term Exposure to GSM-900 Mobile Phone Radiation, *Bioelectromagnetics* 29: 219-232 (2008) (Firstenberg Aff. ¶ 12 n. 19); J Tang

blood-brain barrier.²⁰ Since the blood-brain barrier is very similar in a rat and a human being,²¹ it is reasonably certain that these injuries occur in the brains of all human beings who use cell phones or live next to cell towers. The brain has no pain receptors, so the radiation does not hurt. It is the same reason surgeons can operate on the brain while the patient is awake. It does not hurt, but the damage is done.²²

When honey bees are exposed to a cell phone, within ten minutes it halts their metabolism completely.²³ The same thing happens to a person's brain next to a cell phone: glucose levels rise because their brain cells are no longer metabolizing glucose.²⁴ A cell tower does this to one's whole body to a lesser extent. One cannot efficiently metabolize sugars, resulting in diabetes.²⁵ One cannot efficiently metabolize fats, which get deposited in one's coronary arteries, causing heart disease.²⁶ One cannot efficiently utilize the oxygen one breathes,

et al., Exposure to 900 MHz electromagnetic fields activates the mcp-1/ERK pathway and causes blood-brain barrier damage and cognitive impairment in rats, *Brain Research* 2015 Mar 19; 1601:92-101 (Singer Aff. ¶ 35(b)(iv)(3) and n. 13).

²⁰ See nn. 18 and 19, *supra*; Singer Aff. ¶ 35(b); Firstenberg Aff. ¶ 12; Goldberg Aff. ¶ 17g; Morton Aff. ¶¶ 17, 21.

²¹ H Nittby et al., Increased blood-brain barrier permeability in mammalian brain 7 days after exposure to the radiation from a GSM-900 mobile phone, *Pathophysiology* 16(2-3):103-112 (2009) (Firstenberg Aff. ¶ 12 n. 18).

²² Singer Aff. ¶ 4.

²³ N Kumar et al., Exposure to Cell Phone Radiations Produces Biochemical Changes in Worker Honey Bees, *Toxicology International* 18(1): 70-72 (2011) (Firstenberg Aff. ¶ 12 n. 49).

²⁴ MS Kwon et al., GSM mobile phone radiation suppresses brain glucose metabolism, *Journal of Cerebral Blood Flow and Metabolism* 31: 2293-3301 (2011) (Firstenberg Aff. ¶ 12 n. 26).

²⁵ SA Meo et al., Association of Exposure to Radio-Frequency Electromagnetic Field Radiation (RF-EMFR) Generated by Mobile Phone Base Stations with Glycated Hemoglobin (HbA1c) and Risk of Type 2 Diabetes Mellitus, *Int. J. Envir. Res. Public Health* 12: 14519-14528 (2015) (Goldberg Aff. ¶ 18(c) and n. 18); A Firstenberg, *The Invisible Rainbow: A History of Electricity and Life* (AGB Press 2017), chapter 12 (Firstenberg Aff. ¶ 12 n. 36).

²⁶ A Firstenberg, *The Invisible Rainbow: A History of Electricity and Life* (AGB Press 2017), chapter 11 (Firstenberg Aff. ¶ 12 n. 42).

so one's cells revert to anaerobic metabolism—the metabolism of cancer.²⁷

Most cancers, most heart disease, and most diabetes²⁸ is caused by electromagnetic radiation, today largely produced by cell phones and their infrastructure. The global decline of insects,²⁹ amphibians³⁰ and birds³¹ is due largely to RF radiation: they cannot navigate,³² they cannot reproduce,³³ they cannot metabolize their food.³⁴

In addition to sharing these general harms to the public health and environment with the entire population, Plaintiffs and Plaintiff's members have been specifically harmed by cell towers. They have been deprived of their health, careers, businesses, ability to work, and/or homes by cell towers on private property in Santa Fe and other cities.³⁵ For the City of Santa Fe to permit franchisees to erect antennas on the sidewalk where they walk, and in front of their bedrooms and offices would re-injure them and be an immediate threat to their lives, homes, livelihoods, and environment. This harm is imminent.³⁶

Even before any antennas are placed on the sidewalks, Plaintiffs are being deprived of due process of law, in violation of U.S. Constitution, Amendment 14 and New Mexico Constitution, Article II, Section 18. Notice and an opportunity to be heard are the minimum

²⁷ *Id.* chapter 13 (Firstenberg Aff. ¶ 12 n. 32); Y Li and P Héroux, Extra-low-frequency magnetic fields alter cancer cells through metabolic restriction, *Electromagnetic Biology and Medicine* 33(4):264-275 (2014) (Firstenberg Aff. ¶ 12, n. 35).

²⁸ See nn. 24-27, *supra*; S. Milham, *Dirty Electricity: Electrification and the Diseases of Civilization* (iUniverse 2010) (Firstenberg Aff. ¶¶ 12 and 21, and n. 33).

²⁹ Balmori Aff. ¶ 21.

³⁰ Balmori Aff. ¶¶ 16, 17.

³¹ Balmori Aff. ¶¶ 10-15.

³² Havas Aff. ¶¶ 68-71.

³³ Balmori Aff. ¶¶ 10-15, 24; Havas Aff. ¶¶ 45, 58-66.

³⁴ See nn. 23-27, *supra*.

³⁵ Morton Aff. ¶¶ 26-29; 25 testimonials (Firstenberg Aff., Ex. AF-2).

³⁶ Firstenberg Aff., Exs. AF-4, AF-5, AF-6.

requirements for due process. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (“Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified” (citing *Baldwin v. Hale*, 1 Wall. 223, 233)). The newly amended Section 27-2.19(C) of the Santa Fe City code states:

No Application Required

(1) The following shall not require submittal of an application for review under this subsection: (a) the construction of new telecommunications facilities that conform to design parameters established from time to time by the land use department ...

No application means no notice. The amendments to Chapter 27 allow wireless telecommunications facilities to be erected on the sidewalk in front of homes and businesses without any application to the City, notice to neighbors, or opportunity for property owners to be heard.³⁷ This deprives Plaintiffs of their rights in property, their health, their right to safely travel, and potentially their lives without due process. A deprivation of due process *in itself* constitutes irreparable harm. “When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.” *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (citation omitted).

3. Likelihood of Success on the Merits

In bringing this lawsuit, Plaintiffs are putting RF radiation on trial. Plaintiffs are well aware that their factual claims about RF radiation, i.e. that it is both acutely and chronically dangerous, are controversial and that the resolution of these claims will not be decided without adequate discovery, testimony and a trial. However, the evidence accompanying this motion, and summarized above, is so substantial and the threatened harm to life, liberty and property so

³⁷ SFCC § 27-2.19(C)(1)(a).

serious as to merit a preliminary injunction. If the moving party can establish the other three requirements for an injunction, then instead of showing a substantial likelihood of success, the party need only prove that there are “questions going to the merits so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.” *McClendon v. City of Albuquerque*, 272 F.Supp.2d at 1253. Plaintiffs meet this standard.

4. Balance of Equities and the Public Interest

A party seeking a preliminary injunction must demonstrate both “that the balance of equities tips in [its] favor, and that an injunction is in the public interest.” *Winter v. Natural Resources Defense Council*, 555 U.S. 7, 20 (2008). “These factors merge when the Government is the opposing party.” *Nken v. Holder*, 556 U.S. 418, 435 (2009).

One out of every three women and one out of every two men today will get cancer during their lifetime. (Firstenberg Aff. ¶ 21). The majority of American adults have elevated blood sugar and four hundred million people in the world have diabetes. (*Id.*). The burden of these (Goldberg Aff. ¶¶ 17a, 18b, 18c; Firstenberg Aff. ¶¶ 12, 21; Havas Aff. ¶¶ 8-12, 30-31, 96-99; Morton Aff. ¶¶ 12, 18, 21) and other diseases (Morton Aff. ¶¶ 3-8, 13-24; Firstenberg Aff. ¶¶ 11-12, 18-19; Havas Aff. ¶¶ 13-23, 32-34, 42; Goldberg Aff. ¶¶ 17a, 18a-f, 19a-d) is caused largely by ever-increasing exposure to RF radiation. Forest dieoff and the worldwide decline, extinction and threatened extinction of so many species of insects, amphibians and birds are caused largely by RF radiation (Balmori Aff. ¶¶ 10-21; Havas Aff. ¶¶ 44-91). It is in the public interest to halt the further increase in these diseases and further damage to the natural environment. The harm to

the health, safety and living environment of Plaintiffs and the public outweighs any possible harm an injunction could cause to Defendants.

5. No Security Bond Should Be Required

Courts have wide latitude in determining whether to require a security bond. “[O]ur case law indicates that trial courts have ‘wide discretion under Rule 65(c) in determining whether to require security’” *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1215 (10th Cir. 2009), quoting *Winnebago Tribe of Neb. v. Stovall*, 341 F.3d 1202, 1206 (10th Cir. 2003). Plaintiffs here are not wealthy, are not seeking monetary damages, and are litigating for the public good. The relative wealth of the parties that would be affected by a preliminary injunction is a relevant consideration here. See *Continental Oil Company v. Frontier Refining Company*, 338 F.2d 780, 782 (10th Cir. 1964) (“[Rule 65(c)] leaves wide discretion with the trial judge.”). See also *People ex rel. Van De Kamp v. Tahoe Regional Plan*, 766 F.2d 1319, 1325 (9th Cir. 1985) (“The court has discretion to dispense with the security requirement, or to request mere nominal security, where requiring security would effectively deny access to judicial review”). See also *Navajo Health Foundation – Sage Memorial Hospital, Inc. v. Burwell*, 100 F.Supp.3d 1122, 1191 (D.N.M. 2015), which held:

[I]n determining whether to order a bond “the court should consider the possible loss to the enjoined party together with the hardship that a bond requirement would impose on the applicant.” *Crowley v. Local No. 82, Furniture & Piano*, 679 F.2d 978 (1st Cir.1982), *rev'd on other grounds*, 467 U.S. 526, 104 S.Ct. 2557, 81 L.Ed.2d 457 (1984)...

While a preliminary injunction does not place a substantial burden on the Defendants, requiring Sage Hospital to post a bond may force it into insolvency.

The evidence submitted herein³⁸ that RF radiation is the *primary* cause of cancer, diabetes and heart disease today, and the most immediate threat to life on our planet, weighs heavily against requiring a security bond from ordinary people who are litigating for the public good.

CONCLUSION

A likelihood of irreparable harm to Plaintiffs' lives, liberty and property has been demonstrated that far outweighs any possible harm to the City, and that cannot be remedied by an award of monetary damages. A preliminary injunction is in the public interest and should be granted.

To preserve the *status quo ante*, i.e. the absence of wireless telecommunications facilities in the public rights-of-way of Santa Fe, it is necessary to enjoin not only the City from permitting such facilities, but also any attempts at enforcement by the State and Federal Defendants of laws mandating such deployment in the City, and whose constitutionality are also under challenge in this action. The Wireless Consumer Advanced Infrastructure Investment Act ("WCAIIA") provides that wireless telecommunications facilities in the public rights-of-way are not subject to land use regulations within the State of New Mexico. Section 704 of the Telecommunications Act of 1996 provides that cities and states may not regulate wireless telecommunications facilities on the basis of environment or health. For these reasons, the Court should issue an order under Fed. R. Civ. P. 65:

1. Enjoining the City of Santa Fe ("City") from enforcing Chapter 27 of the Santa Fe City Code as amended by Ordinances Nos. 2016-42 and 2017-18 pending trial;

³⁸ Plaintiffs possess far more such evidence, which will be presented at trial and which could not be attached to this Motion due to the page limitation.

2. Enjoining the New Mexico Attorney General from enforcing the Wireless Consumer Advanced Infrastructure Investment Act, NMSA 1978 § 63-9I pending trial;

3. Enjoining the United States of America from enforcing Section 704 of the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B)(iv) pending trial;

4. Requiring the City to apply the land use regulations contained in Section 14-6.2(E) of the Santa Fe City Code to *all* telecommunications facilities in the City, not just to facilities on private property, pending trial;

5. Requiring the City to prohibit the operation of any telecommunications facilities that have been installed in the public rights-of-way subsequent to the filing of this action, pending trial.

Respectfully submitted,



ARTHUR FIRSTENBERG, pro se
P.O. Box 6216
Santa Fe, NM 87502
(505) 471-0129
bearstar@fastmail.fm

/s/ Adam Cherson

ADAM CHERSON
10 West 66th Street
New York, NY 10023
(917) 922-1140
law@cherson.net

*Attorney for Plaintiffs Monika Steinhoff and
Santa Fe Alliance for Public Health and Safety*

CERTIFICATE OF SERVICE

I certify that on this date of September 3, 2019, I served the foregoing Motion for Preliminary Injunction on counsel of record for all parties via the CM/ECF system.

/s/ Adam Cherson
ADAM CHERSON