**CASE No. 11-2156**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE TENTH CIRCUIT**

ARTHUR FIRSTENBERG,

Plaintiff-Appellant,

v.

CITY OF SANTA FE, a municipality; and
AT&T MOBILITY SERVICES, LLC,

Defendants-Appellees.

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On appeal from the United States District Court
For the District of New Mexico
The Honorable James A. Parker, Case No. 1:2011-cv-00008

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# APPELLANT'S REPLY BRIEF

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February 21, 2012

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## INTRODUCTION

Plaintiff seeks to require the City of Santa Fe ("City") to consider his disability, which is unquestioned at this stage, in deciding whether to authorize a citywide increase in radiofrequency ("RF") radiation from City-permitted facilities that causes him severe injury. The City has refused to hear about such matters. City decisionmakers declare that they are constrained by federal law to ignore such impacts on citizens.

Although the City, under its Land Development Code ("LDC"), regulates telecommunications facilities as Special Exceptions; would normally require a new Special Exception for an increase in intensity of use of an existing facility; and is authorized to deny a Special Exception for a use involving harmful radiation, the City has taken the position that it lacks "jurisdiction" to consider an increase in intensity of RF radiation from such facilities. It accordingly took no action when Defendant AT&T Mobility Services, LLC ("AT&T") increased the radiation from all of its base stations when it initiated 3G broadcasting in November 2010.

The City relies upon Section 704 of the Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B)(4) ("TCA § 704"), which says that state entities may not regulate telecommunications facilities based upon the "environmental effects" of their RF emissions, so long as they comply with Federal Communications Commission ("FCC") regulations concerning such emissions. Those FCC

regulations, 47 C.F.R. §§ 1.1307(b) and 1.1310, set levels designed to protect the general population, but do not purport to protect persons with electromagnetic hypersensitivity ("EHS"). The FCC expressly refused to consider individuals who are disabled by EHS in establishing its radiation guidelines. Consequently the Court may not attribute preemptive effect to those regulations as to persons with EHS. EHS significantly impairs major life activities of persons so afflicted and constitutes a disability under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. ("ADA").

Under its policy, the City treats differently citizens who are similarly situated—disabled homeowners and residents who object to zoning decisions based on radiation, as against all others who may who object on any other environmental or aesthetic grounds.[1] Persons with EHS will not be heard if they object to a more intense use pursuant to a Special Exception, and impacts upon them will be given no weight by zoning authorities. Other persons—even persons

[1] The City describes its policy as one of "not regulating" RF radiation (City Br. 19). On the contrary, no one can erect an antenna emitting RF radiation without a permit from the City (LDC § 14-6.2(E)(2)). Antennas not emitting RF radiation ("receive only") are exempt (LDC § 14-6.2(E)(2)(a)). RF emissions can explicitly be prohibited by the City if they interfere with radio or TV reception (LDC § 14-6.1(A)(3)), or if they are deemed noxious to residents or passersby. (*id.*). It is most accurate to describe the City's policy as one of possessing authority under the LDC to deny a Special Exception based upon injurious radiation, but refusing such relief based upon an erroneous interpretation of TCA § 704, and entirely ignoring the City's obligations under the ADA.

with other disabilities—having other objections to a more intense use can require a hearing, and their views will be considered. This is an Equal Protection violation.

Further, by refusing to consider impacts upon persons disabled by EHS, the City has deliberately placed such persons in danger of severe reactions and life-threatening injury. This is a violation of substantive Due Process. The failure to accord a hearing to the small percentage of persons affected by the City's decision denies procedural Due Process as well.

Title II of the ADA requires the City to operate all of its programs to accommodate persons with disabilities. Such obligation includes the duty to avoid discriminatory impacts, including impacts of zoning decisions. A municipality may not regulate an activity within its boundaries in a way that specifically burdens disabled persons. The City's policy of declining to consider the effects of more intense radiation emitted pursuant to a Special Exception upon persons with EHS violates the ADA.

Defendants erroneously argue that the City cannot be found in violation of the Constitution or the ADA, because, they assert, its actions are required by TCA § 704. TCA § 704 cannot justify Constitutional violations. Moreover, TCA § 704 cannot be assumed to override the protections of the ADA. The proper course is to remand to permit discovery and to determine the requirements of the ADA and TCA in the specific circumstances presented, and then to deal with any perceived

conflict; it is erroneous to attempt to determine the extent of statutory conflict on a motion for judgment on the pleadings.

## I. The increase in radiation is a "more intense use" requiring scrutiny by the City.

The LDC requires an application for a new Special Exception, and a new hearing, if there is a change to a "more intense use." (LDC § 14-3.6(B)(4)(b)). Members of the Board of Adjustment said at a contemporaneous hearing that an increase in RF radiation was a "more intense use," ordinarily requiring a new Special Exception. (P.Br. 9-10[2]). The City does not contest this view on appeal. (City Br. 8[3]). AT&T opposes this view, appending to its brief findings of fact and conclusions of law written by the Assistant City Attorney. (AT&T Br. 12[4]). However, these documents do not say that an increase in radiation is not a "more intense use." They state that LDC § 14-6.2(E) does not regulate RF emissions, and that the proposed work does not "trigger the requirements of Code Section 14-6.2(E)." What that means is not clear, because LDC § 14-6.2(E) plainly authorizes the City to "impose conditions . . . to minimize any adverse effect" of a proposed special exception. (LDC § 14-6.2(E)(6)(a)(iv)) (Addendum ("Add") 106). Moreover, the Board may, under other LDC provisions, prohibit a use that the

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[2] Plaintiff-Appellant's opening brief is cited as "P.Br.".
[3] Defendant-Appellee City of Santa Fe's brief is cited as "City Br.".
[4] Defendant-Appellee AT&T's brief is cited as "AT&T Br."

Board finds to be "noxious, dangerous, or offensive" by reason of, inter alia, "radiation." (LDC § 14-6.1(A)(3)) (Add. 69).

AT&T claims that LDC § 14-6.1(A)(3) has no bearing on whether an increase in emissions is a "more intense use," asserting that an antenna is "permitted by special exception" in a table in LDC § 14-6.1. (AT&T Br. 14). But in the process of considering a Special Exception (LDC § 14-6.1(A)(2)), the Board of Adjustment is authorized to decide whether it should be prohibited because it is noxious, dangerous or offensive due to radiation. (LDC § 14-6.1(A)(3)). Intensification of RF radiation is within the City's regulatory power and is a "more intense use."

In any event, after-the-fact statements contained in documents, such as the findings of fact, adopted after suit was brought, receive no credence. This case was filed December 15, 2010. (App. 09). The findings of fact that purport to support Defendants' litigating position were adopted on December 21, 2010—a week after this action was filed. This Court may not rely upon a " 'post-hoc rationalization' advanced by an agency seeking to defend past agency action against attack." *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

## II. An Equal Protection violation is shown.

AT&T argues that there is no Equal Protection violation because "neither the City's decision to refrain from regulating RF emissions nor section 704 of the TCA make any distinction between different classes of persons." (AT&T Br. 34). The

City's position is similar. (City Br. 20). However, the City plainly treats people disabled with EHS differently from others. "To prevail on an equal protection claim, [a plaintiff] must prove that he was treated differently than similarly situated individuals, and that such disparate treatment was not rationally related to legitimate state interests." *Backus v. Ortiz*, 246 Fed. Appx. 561, 564 (10th Cir. 2007) (*unpublished decision*), *citing Christian Heritage Academy v. Oklahoma Secondary School Activities Association*, 483 F.3d 1025, 1031-32 (10th Cir. 2007). The City has expressly stated that it will not "accommodate Plaintiff's disability" (App. 245), and it relies upon TCA § 704. Others similarly situated, but not having EHS, could object to injurious impacts and have their concerns and disabilities accommodated (LDC § 14-3.17(B), but not Plaintiff. If a cell tower were expanded so as to block wheelchair access to the sidewalk, or a strobe light were added to a tower causing seizures in persons with epilepsy, or increased noise levels from its equipment cabinets disturbed neighbors, those concerns would be heard. But if an increase in RF radiation injures people with EHS, those concerns will not be heard.

In *Christian Heritage Academy*, this Court found likewise that the plaintiff had demonstrated the elements of an equal protection violation:

> "In addition to establishing that it is similarly situated to at least some of the public school members of OSSAA, Christian Heritage has also demonstrated disparate treatment. Specifically, public schools are admitted to OSSAA without having to obtain approval from a majority of OSSAA's members, while nonpublic schools, even if they satisfy all other requirements for admission, must obtain majority

> approval from the members of the association." (483 F.3d at 1032-33).

The discrimination here is knowing and deliberate. Persons disabled with EHS have told City representatives in detail that its refusal to consider the impact of RF emissions imposes unique and severe hardships upon them. (App. 19-147). In the face of such presentations, the City maintains its policy; indeed, it has revised its Code to make it more difficult to seek relief. (See P.Br. 32-34). The City hides behind TCA § 704 and the FCC's implementing regulations, but the FCC expressly refused to adopt regulations that protect persons with EHS:

> "It would be impracticable for us to independently evaluate the significance of studies purporting to show biological effects, determine if such effects constitute a safety hazard, and then adopt stricter standards than those advocated by federal health and safety agencies. This is especially true for such controversial issues as non-thermal effects and whether certain individuals might be 'hypersensitive' or 'electrosensitive.' "

In re *Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934*, WT Dkt. No. 97-192, 12 F.C.C.R. 13494, 13505 (Aug. 25, 1997).

Thus, TCA § 704, and action taken by the City under its authority, are not "facially neutral" (AT&T Br. 35, 36), nor do they fail to "make any distinction between different classes of persons," because TCA § 704 expressly limits the authority of state entities to regulate personal wireless service facilities "on the basis of the environmental effects of radio frequency emissions"—referring to

effects on human health. In re *Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation,* ET Dkt. No. 93-62, 8 F.C.C.R. 2849 (April 8, 1993). Plaintiff is a human, a danger to whose health is being disregarded under TCA § 704. Defendants' construction of that law and the FCC regulations means that persons whose health is severely affected by RF emissions—those whom the FCC itself described as "hypersensitive" or "electrosensitive"—are specifically targeted for refusal of any consideration of their disabilities.

The Supreme Court has held that a law that might be termed "nondiscriminatory on its face," but which in fact "exposes *only* [a disfavored category] to the risk" of adverse impact, need not be analyzed for discriminatory motives. (AT&T Br. 37-38). In *M.L.B. v. S.L.J.*, 519 U.S. 102, 126-27 (1996), the Court struck down a state law imposing transcript costs upon an indigent person who appeals the termination of parental rights. The Court rejected the argument that under *Washington v. Davis,* 426 U.S. 229 (1976), equal protection analysis requires a showing of discriminatory intent.[5] The impacts on poor people in *M.L.B. v. S.L.J.,* the Court ruled, were "not merely *disproportionate* in impact. Rather, they are wholly contingent on one's" circumstances, and the law "visit[s] different consequences on two categories of persons"; it applies to all within that

[5] This decision regarding the indigent also refutes the argument (AT&T Br. 38 n. 11) that "disparate impact" analysis only applies if the affected population is a "suspect class."

class and "do[es] not reach anyone outside that class." (*id.*) (*italics original*). *See also: Williams v. Illinois*, 399 U.S. 235, 242 (1970), where a law permitting sentencing of convicted defendants to additional time to "work off" unpaid fines and court costs discriminated against the indigent; discriminatory purpose was not required to find an equal protection violation.

AT&T cites various decisions (AT&T Br. 35-38), none of which are applicable. In *Straley v. Utah Board of Pardons,* 582 F.3d 1208 (10th Cir. 2009), the petitioner made "bare equal protection claims [that were] simply too conclusory to permit a proper legal analysis." (at 1215). In *Muller v. Culbertson,* 408 Fed. Appx. 194 (10th Cir. 2011) (*unpublished decision*), "there [was] no allegation that he was treated differently than any other similarly situated person." (at 196). *Rylee v. Chapman,* 316 Fed. Appx. 901 (11th Cir. 2009) (*unpublished decision*), is irrelevant for the same reason. (at 907). *Lee v. City of Los Angeles,* 250 F.3d 668 (9th Cir. 2001), *Personnel Administrator of Massachusetts v. Feeney,* 442 U.S. 256 (1979), *Price-Cornelison v. Brooks,* 524 F.3d 1103 (10th Cir. 2008), and *United States v. McHorse,* 179 F.3d 889 (10th Cir. 1999), required proof of discriminatory intent, which is not required here, because the policy here is not "facially neutral." (AT&T Br. 38). Here, the policy directly addresses all persons disabled with EHS and "do[es] not reach anyone outside that class." (*M.L.B. v. S.L.J.*, 519 U.S. at 127).

Even if the City's policy were "facially neutral," the impacts upon persons with EHS are disproportionate, and discriminatory intent is suggested by "[t]he historical background of the decision" (*Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 267 (1977)), which shows consistent rejection of the concerns of people with EHS—an inference that is reinforced when an ordinance "suddenly was changed... when the [municipality] learned of" requests to comply with it. *Id.*

The City's posture toward persons disabled with EHS is far from neutral, as it has repeatedly curtailed their ability to seek relief. The City recently exempted antennas on City-owned land, hidden antennas, replacement antennas, and antennas on historic structures from the LDC; eliminated the right to appeal based on the Constitution or the ADA; deleted the provision requiring the City to remedy health impacts of communication towers; deleted the requirement of a Special Exception for a more intense use; and deleted the specific enforcement provisions of the Telecommunication Facilities ordinance. (See P.Br. 32-34). Plainly, despite the sympathy individual Board members expressed (AT&T Br. 39), the City has resolved to block any relief for people with EHS.

Defendants argue that the City has merely adopted as its policy the prohibition contained in TCA § 704, which the City reads as barring any consideration of the impacts of RF radiation, even upon the EHS-disabled. (AT&T

Br. 39-41; City Br. 26). But the City has done more than that. AT&T disingenuously argues that there is nothing improper about the City changing its Code on April 13, 2011 to eliminate appeals based on violations of state and federal laws and constitutions, which AT&T says "merely constitutes a clarification of prior policy" (AT&T Br. 42)—when AT&T itself, on March 16, 2011, appealed a denial of an antenna application to the City Council, arguing violations of the TCA, Due Process and Equal Protection. (Add. 147, Item No. 6(a); "Specific Bases for Verified Appeal Petition," Case #2010-190, attached hereto). The deletion by the City, shortly after this lawsuit was brought, of the provision allowing citizens to challenge projects that violate their legal and constitutional rights can only be seen as a deliberate action by the City to enable it to permit operation of future antennas and towers without further opposition from disabled citizens whose legal and constitutional rights are being violated.

Likewise, the addition of "if appropriate" to the former provision requiring a new Special Exception for a "more intense use" (new LDC § 14-3.6(C)(3) (Add. 143); old LDC § 14-3.6(B)(4)(b) (Add. 68)) constitute's the City's response to this lawsuit, intended to prevent future attempts by people with EHS to protect their rights, and giving the City discretion to violate them.

Moreover, neither Defendant disputes that Congress may not authorize a state to violate the Fourteenth Amendment. (P.Br. 25). The City may not

implement TCA § 704 in a discriminatory manner. If the City interprets the FCC's implementing regulations to preclude the protection of persons with EHS, that does not absolve the City of responsibility for adopting such discrimination. In *Feeney,* the Court stated that invidious discrimination would not become less so simply because a state intended to incorporate discriminatory federal practices. 442 U.S. at 277.

AT&T suggests that it would be a collateral attack to point out that the FCC guidelines leave the EHS-disabled unprotected from RF radiation impacts. (AT&T Br. 47 n.12). Of course, the FCC regulations do leave such persons unprotected, and no court has held that they may properly do so.[6] But Plaintiff does not attack the FCC regulations, which consider only the general public, but the City's firm policy of disregarding impacts upon people with EHS.

Additionally, the unequal treatment by the City severely burdens the constitutional right to travel. (P.Br. 21-22). Defendants say only that the burden is "indirect" (AT&T Br. 37 n. 10) and that scrutiny should not be strict. But the effect of RF radiation on travel is personal and immediate (App. 51), and the burden is direct. *Bowen v. Gilliard,* 483 U.S. 587 (1987), and *Philadelphia Police*

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[6] AT&T, in the same footnote, mentions the Second Circuit's rejection of a constitutional challenge to TCA § 704 (*Cellular Phone Taskforce v. FCC*, 205 F.3d 82 (2d Cir.2000)). Contrary to AT&T's suggestion, petitioners in that case neither pleaded, nor did that court rule on, any claim under the Equal Protection Clause.

*and Fire Association v. City of Philadelphia*, 874 F.2d 156 (3d Cir. 1989), do not apply, and a constitutional violation is shown.

## III. A Due Process violation is shown.

Defendants argue that the City has caused no substantive due process violation, asserting that (a) Plaintiff's injury was caused by a third party, AT&T, not by the City, and (b) Plaintiff was not within the City's control or direction at the time of the violation. Such contentions disregard the applicable precedents.

A state entity violates due process when it creates a special danger to the plaintiff. (*See* cases cited at P.Br. 36-37). "The 'danger creation' doctrine generally provides that state officials may be liable for injuries caused by a private actor where those officials created the danger that led to the harm." *Sutton v. Utah State School for the Deaf and Blind*, 173 F.3d 1226, 1237 (10th Cir. 1999). *Accord: Armijo v. Wagon Mound Public Schools*, 159 F.3d 1253, 1264 (10th Cir. 1998); *Radecki v. Barela*, 146 F.3d 1227, 1230 (10th Cir. 1998); *Uhlrig v. Harder*, 64 F.3d 567, 572-73 (10th Cir. 1995); Medina *v. City and County of Denver*, 960 F.2d 1493, 1495-97 (10th Cir. (1992).

It is not necessary to liability for "danger creation" that the plaintiff was under the defendant's control or direction:

> "To make out a proper danger creation claim, a plaintiff must demonstrate that (1) the charged state entity and the charged individual actors created the danger or increased plaintiff's vulnerability to the danger in some way; (2) plaintiff was a member of

> a limited and specifically definable group; (3) defendants' conduct put plaintiff at substantial risk of serious, immediate, and proximate harm; (4) the risk was obvious or known; (5) defendants acted recklessly in conscious disregard of that risk; and (6) such conduct, when viewed in total, is conscience-shocking." *Currier v. Doran*, 242 F.3d 905, 918 (10th Cir. 2001).

Plaintiff here is a member of a "limited and specifically definable group"—persons disabled by EHS. Other cases have found similarly as to disabled plaintiffs. *See Armijo,* 159 F.3d at 1264; *Medina,* 960 F.2d at 1496-97.

An intent to injure is not required. The Supreme Court has stated that, "when actual deliberation is practical," it will employ a "deliberate indifference" standard. *County of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998). *Sherwood v. Oklahoma County*, 42 Fed. Appx. 353, 359 (10th Cir. 2002) (*unpublished decision*), explains:

> "The law recognizes a constitutional violation based on deliberate indifference where defendants create a dangerous situation, enjoy the luxury of making an unhurried judgment, have the chance for repeated reflection largely uncomplicated by competing obligations, and nevertheless take action which at 'best sanction[s], at worst intend[s]' Plaintiff's injury." (*internal citation omitted*)

*See also: Radecki*, 146 F.3d at 1231-32. Thus, state actors are liable if they exhibit deliberate indifference in failing to prevent injury. *Sutton,* 173 F.3d at 1239-41. Here, City personnel were fully informed as to Plaintiff's EHS and had ample time to consider their actions.

This Court has explained the core of its "shock-the-conscience' test:

> " 'The key to the state-created danger cases . . . lies in the state actors' culpable knowledge and conduct in affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources of private aid. Thus the environment created by the state actors must be dangerous; they must know it is dangerous; and, to be liable, they must have used their authority to create an opportunity that would not otherwise have existed for the third party's [acts] to occur' " *Armijo*, 159 F.3d at 1263, *quoting* Johnson v. Dallas Ind. Sch. Dist., 38 F.3d 198, 201 (5th Cir. 1994)

By deciding to disregard the danger from telecommunications facilities to people with EHS, and by refusing to enforce a mandatory ordinance, the City affirmatively placed Plaintiff in danger and stripped him of any means to defend himself.

Moreover, Plaintiff lives in the City under its laws. Plaintiff can no more avoid being irradiated by City-permitted facilities than the plaintiff in *Sherwood* could avoid breathing the paint fumes to which he was required to be exposed on the job. Whether the charged conduct is "conscience-shocking" must be determined in "context as determined after a full trial," which has not been had. *Armijo,* 159 F.3d at 1264.

AT&T cites *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189 (1989), and *Bowers v. DeVito,* 686 F.2d 616 (7th Cir. 1982), in opposition. (AT&T Br. 50). But in *DeShaney* the county officials simply returned a child to his father's custody; they did not authorize his father's conduct. (at 201).

In *Bowers* likewise defendants did not authorize the conduct that endangered the decedent. However, the court cautioned:

> "If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit." (at 618).

Here, the City should not be heard to claim that it took no active part. (City Br. 26). It knew the impact of RF radiation upon Plaintiff, it approved applications for facilities that emit such radiation, and it formulated a deliberate policy disregarding the injuries that would result.

AT&T asserts that there is no procedural due process violation if a private entity (AT&T) violates the law, which the City merely fails to enforce. (AT&T Br. 48-49). However, the City refused to enforce a mandatory ordinance, LDC § 14-3.6(B)(4)(b), prescribing procedures to which Plaintiff was entitled.

Plaintiff alleges that he is a homeowner in the City. (App. 170). His interests must be protected by due process. *Pater v. City of Casper,* 646 F.3d 1290, 1293 (10th Cir. 2011). Where a municipality adopts a land use policy that affects a small percentage of persons, due process requires that they have a hearing:

> "Governmental determinations of a general nature that affect all equally do not give rise to a due process right to be heard. But, when a relatively small number of persons are affected on individual grounds, the right to a hearing is triggered."

*Nasierowski Brothers Investment Co. v. City of Sterling Heights,* 949 F.2d 890, 896 (6th Cir. 1991). *See also: Harris v. County of Riverside,* 904 F.2d 497, 502 (9th Cir. 1990). When a small number of landowners are restricted in the use of their property by a municipality, they must be provided notice and an opportunity to be heard. *Moreland Properties, LLC v. City of Thornton,* 559 F.Supp.2d 1133, 1160-61 (D. Colo. 2008). Whether the City's actions are characterized as "legislative" (AT&T Br. 48), "adjudicatory," or "administrative" is not determinative. *Harris,* 904 F.2d at 501. "[T]he character of the action, rather than its label, determines whether those affected by it are entitled to constitutional due process." *Id.* at 501-502. Here, the City has adopted a firm policy of refusal to consider the effects upon City residents and homeowners of RF radiation emitted by holders of Special Exceptions. Due Process mandates that residents with EHS who are directly affected by this policy receive notice and a hearing, but this was not done.

## IV. The City's action violates the Americans with Disabilities Act.

The City's policy to disregard citizen complaints about the impacts of RF radiation violates Title II of the ADA. The ADA applies to "anything a public entity does." 28 C.F.R. pt. 35, App. B at 660 (2010). The City calls its action "not regulating" (City Br. 12), but in fact the City has a suite of regulations governing Special Exceptions for telecommunications facilities, including regulations addressing radiation. The City's action—to refuse to consider, in its zoning

decisions, the impact of RF radiation upon persons disabled by EHS—brings discrimination against the disabled into the heart of a governmental program.

A municipality's regulatory program, even if facially neutral, may not unduly burden disabled persons. *McGary v. City of Portland,* 386 F.3d 1259 (9th Cir. 2004) (nuisance abatement ordinance must accommodate the needs of the disabled); *Heather K. v. City of Mallard,* 946 F.Supp. 1373 (N.D. Iowa 1996) (regulation of open burning may not disadvantage disabled persons); *Crowder v. Kitagawa,* 81 F.3d 1480 (9th Cir. 1996) (pet quarantine regulations may not disadvantage disabled persons). Failure to provide "reasonable modification" is a distinct violation of Title II.

> "In the context of disability, therefore, equal treatment may not beget equality, and facially neutral policies may be, in fact, discriminatory if their effect is to keep persons with disabilities from enjoying the benefits of services that, by law, must be available to them." *Presta v. Peninsula Corridor Joint Powers Board,* 16 F.Supp.2d 1134, 1136 (N.D. Cal. 1998).

Thus, the City's statements about "equal access" (City Br. 14-15) miss the point; under the ADA a facially neutral policy is not allowed to have a discriminatory impact.

It is argued that the impacts here are caused by a private entity, AT&T. (AT&T Br. 27-28). But it is settled that a state entity's zoning decisions are subject to the ADA. (P.Br. 43). *See, e.g., Innovative Health Systems, Inc. v. City of White Plains,* 117 F.3d 37, 44-46 (2d Cir. 1997) ("*IHS*"), and *Bay Area Addiction*

*Research and Treatment, Inc. v. City of Antioch*, 179 F.3d 725, 730-32 (9th Cir. 1999) ("*BAART*"), in which zoning decisions affected disabled persons through the regulation of third party private entities.

AT&T also protests that Plaintiff is not seeking to construct wireless facilities. (AT&T Br. 28). But in *IHS*, disabled individuals, affected by the city's refusal to approve facilities sought to be constructed by third parties, stated cognizable claims under the ADA. (at 48-49). In *BAART* the court ruled similarly, remanding for determination of whether plaintiffs were otherwise "qualified individuals with a disability." (at 737). *See also: Kennedy v. Fitzgerald*, 2002 WL 1796816 (N.D.N.Y. 2002) (*unpublished decision*) (where city refused to modify zoning policy to allow ice cream store to construct wheelchair ramp, disabled patron stated a claim against the city under the ADA); *Heather K.* (child with severe cardiac and respiratory conditions stated ADA claim where city's regulation of open burning failed to protect her).

AT&T argues that the "benefits" of the City's regulatory program, which include "ensuring harmony with surrounding land uses" (AT&T Br. 29), accrue equally to all (*id.*), but this is obviously untrue. When disabled homeowners are evicted from their homes by such a program, it is plainly not in harmony with residential land use by these individuals.

Defendants offer only *Safe Air for Everyone v. Idaho,* 469 F.Supp.2d 884 (D. Idaho 2006), in arguing that state regulation may lawfully disadvantage the disabled. In *Safe Air* the court thought that plaintiffs had not alleged that the state's system of regulating open burning discriminated based upon disabilities; rather, the court stated, plaintiffs alleged only that the state had failed to accommodate the program to their disabilities, which the court considered

> "an attempt to bypass the threshold questions of whether there is discrimination by the State and, second, whether the discrimination is based upon an individual's disability." (at 888).

So saying, the court departed from numerous decisions—including *Heather K.* about regulation of open burning—holding that facially neutral state treatment that burdens the disabled is itself a violation, and that it is also a violation to fail to accommodate such treatment to the disabled. (See page 18, *supra*). In distinguishing cases such as *McGary* on the ground that the regulation in those cases directly burdened the disabled (at 889), *Safe Air* disregarded decisions protecting the disabled from regulations that govern third parties, in turn disadvantaging the disabled. (See pages 18-19, *supra*).

## V. There is no basis to find an implied repeal of the ADA.

Defendants do not contest that implied repeals of federal law are strongly disfavored and very rarely found. Nevertheless, they assert that the Court must find that TCA § 704 repealed the ADA, at least as to impacts of RF radiation on

people disabled with EHS.[7] AT&T cites several decisions finding that TCA § 704 preempts state laws (AT&T Br. 8-9), but none concerns implied repeal of a federal statute, the question here.[8]

AT&T bases its argument on an asserted "irreconcilable conflict" between TCA § 704 and the ADA. (AT&T Br. 19). But this is precisely the conclusion that the court below assumed, without proper exploration. Under the TCA, municipalities can require alternative antenna plans, and must balance competing public goals. (P.Br. 49). And under the ADA the City must modify its policy to develop a "reasonable accommodation" for the disabled. (P.Br. 49-50). Neither aspect was explored in the decision below, which was based only on the Petition. It is error to decide "reasonable accommodation" issues by summary judgment. *Robertson v. Las Animas County Sheriff's Department,* 500 F.3d 1185, 1199 (10th Cir. 2007).

*Elephant Butte Irrigation District v. U.S. Department of the Interior,* 269 F.3d 1158 (10th Cir. 2001), relied upon by AT&T (AT&T Br. 19), instead supports

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[7] The City asserts that RF radiation is a "federally preempted field" (City Br. 14), but the issue presented is not preemption but possible conflict between two federal laws: ADA and TCA.

[8] In arguing that "[n]o one contends that the TCA impliedly repeals" the ADA (AT&T Br. 19), AT&T asserts a distinction without a difference. "The later act to the extent of the [alleged] conflict constitutes an implied repeal of the earlier one." *Elephant Butte Irrigation District*, 269 F.3d at 1164.

Plaintiff. There, the "plain language of the statute [did] not purport to repeal" prior legislation. (at 1164). Further, legislative history showed that the intent of the later law was much narrower than contended. (*id.*). The Court found no implied repeal, adding:

> "Furthermore, even if we assume the wording of [the later law] is confusing, that fact would cut against finding repeal by implication, which must be *clear and manifest.*" (*id.*) (*italics original*).

Here, similarly, TCA § 704 contains no language of repeal. The legislative history shows Congress's concern about erroneous presentations of the health effects of RF radiation on the *general public*. (AT&T Br. 21). Confusion certainly exists, as the City's interpretation shows. But that cuts against finding repeal by implication —which must be "clear and manifest."

It is not shown that, to apply the ADA, one must "gut" the TCA. (AT&T Br. 20, 25). No conclusion is possible on the bare pleadings about the range of accommodations under which both statutes can be effective. The supposed problem of "potentially different standards from community to community" (AT&T Br. 22) is addressed in ADA regulations, requiring accommodation only to the extent that it will not "fundamentally alter the nature" of the City's program. 28 C.F.R. § 35.130(b)(7).

AT&T argues that in the TCA Congress simultaneously expanded "the ability of the disabled to access and use telecommunications services and

equipment" (AT&T Br. 22), while repealing the ADA for persons disabled by EHS. Obviously, it is not a reasonable interpretation that Congress, *sub silentio*, simultaneously intended to protect the disabled and to condemn them.

Most basically, it is improper, in weighing a potential statutory conflict, to inveigh against "gutting" one of them. Defendants' approach would "gut" the ADA, which is equally problematic. Rather, this Court's approach is premised upon giving effect to both enactments. AT&T rejects (AT&T Br. 23) the parallel illustrated by *Sierra Club-Black Hills Group v. U.S. Forest Service*, 259 F.3d 1281 (10th Cir. 2001), but the situation is similar. In *Sierra Club* the Forest Service ignored a location-specific statute, 16 U.S.C. § 675, dating from 1920, in favor of the National Forest Management Act, 16 U.S.C. § 1604 *et seq.*, enacted in 1974, in drafting a management plan for the Norbeck Wildlife Preserve. This Court held that the Forest Service cannot "effectively abolish[] the specific statutory mandates Congress has established" (at 1287), even though they bear an earlier date.

Similarly, in *Franklin v. United States*, 992 F.2d 1492, 1501-02 (10th Cir. 1993), this Court held that a later statutory amendment, delimiting governmental liability for torts of federal employees (28 U.S.C. § 2679(b)(1)), does not impliedly repeal an earlier statute that extended both employee immunity and governmental liability to include intentional torts (38 U.S.C. § 7316(f)). The Court relied upon the " 'cardinal principle of statutory construction that repeals by implication are not

favored,' " *quoting AMREP Corp. v. FTC,* 768 F.2d 1171, 1176 (10th Cir. 1985). Most importantly, it emphasized the need to give effect to both statutes:

> "Thus, even where two statutes are not entirely harmonious, courts must, if possible, give effect to both, unless Congress clearly intended to repeal the earlier statute. *United States v. Barrett,* 837 F.2d 933, 934 (10th Cir. 1988)." *Franklin,* 992 F.2d at 1502.

AT&T further asserts that TCA § 704 impliedly repeals ADA Title II because TCA § 704 is the more specific provision. (AT&T Br. 16). Here AT&T compares apples to oranges in arguing that a law regulating cell towers is "more specific" than one regulating disabilities. None of the precedents AT&T cites for this proposition comes close to the current situation.[9] Clearly, in ADA Title II Congress intended to constrain the actions of local governments, requiring changes in local programs that burden the disabled (*See Tennessee v. Lane,* 541 U.S. 509, 524 (2004)). In contrast, TCA § 704 makes no reference to disabilities and requires only that local governments not consider "environmental effects" of RF emissions in regulating "personal wireless service facilities." In describing the

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[9] In *NISH v. Rumsfeld,* 348 F.3d 1263 (10th Cir. 2003), where two statutes both give employment preference to the disabled, the Court found the statute which protects disabled vendors in the specific situation to have precedence. (at 1272). *Skelton v. United States,* 88 F.2d 599 (10th Cir. 1937), cites the general rule and gives "great weight" to agency construction. (at 604). *Rodgers v. United States,* 185 U.S. 83 (1902), concerns a possible conflict between two sections of the same statute and is not pertinent here. *United States v. Singleton,* 165 F.3d 1297 (10th Cir. 1999), applies the principle, here irrelevant, that general statutes do not apply to the United States unless expressly so stating (at 1300); the passage cited by AT&T appears in a concurring opinion. (at 1305).

purpose of this clause, the House Commerce Committee said only that TCA § 704 seeks to preclude local governments from limiting construction of such facilities based on misinformation about effects of radiation on the general public. In adopting RF emission guidelines, the FCC expressly declined to address the needs of persons with EHS. (See page 7, *supra*). Therefore, the ADA is the *only* statute that protects their interests, and is clearly more specifically directed to disabilities than any other.

More importantly, regardless of which statute is considered more "specific," where they address the same subject matter, the courts must strive to give effect to both:

> "A specific statute controls over a general statute, *Morton v. Mancari*, 417 U.S. 535, 550-51, 94 S.Ct. 2474, 2482-2483, 41 L.Ed.2d 290 (1974), but '[t]he courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.' *Id*. at 551." *Pitzak v. Office of Personnel Management*, 710 F.2d 1476, 1478-79 (10th Cir. 1983).

Thus, in *AMREP Corp.*, defendants claimed that the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701 *et seq.*, impliedly repealed Federal Trade Commission jurisdiction over interstate land sales, "based on the principle... that when two statutes arguably apply to the same subject matter, the more specific statute applies to the exclusion of the general statute." (768 F.2d at 1175). This Court disagreed, stressing that repeals by implication are disfavored and that it is

the Court's duty to treat both statutes as effective. (at 1176). Again, in *United States v. Barrett*, a statute making it a misdemeanor to forge a treasury check for less than $500 did not impliedly repeal a more general statute penalizing forgery of any treasury check as a felony. The Court held both statutes effective, adding that "[t]his is so, as here, even when the later statute is specific and the earlier a general criminal statute." (837 F.2d at 934).

Defendants contend that the savings clause, TCA § 601(c)(1), does not apply here, because the case involves "express" (AT&T Br. 24; City Br. 18)—not implied—repeal, but this is plainly incorrect, because the TCA expresses no intention to repeal the ADA. AT&T itself emphasizes that the TCA "makes no mention of persons with electromagnetic hypersensitivity" (AT&T Br. 36) and agrees that "*Congress was not even aware it was impacting people with disabilities*" (AT&T Br. 46). It therefore could not have intended to repeal ADA protections, and certainly did not do so "expressly."

AT&T protests that the savings clause cannot be used to "nullify" TCA § 704 (AT&T Br. 25), but there has been no showing that this is so. TCA § 704 does not address effects on the disabled, and neither do the FCC guidelines. The clause that prohibits local regulation of RF emissions "to the extent" that the FCC has regulated them would not be nullified, since the FCC has no such regulations concerning the disabled. *Resolution Trust Corp. v. Miramon*, 22 F.3d 1357 (5th

Cir. 1994) and *Bastien v. AT&T Wireless Services, Inc.,* 205 F.3d 983 (7th Cir. 2000) (AT&T Br. 25), are inapplicable, because Plaintiff's position does not "nullify" TCA § 704 but only accommodates it to the requirements of the ADA. As the court says in *PMC, Inc. v. Sherwin-Williams Co.,* 151 F.3d 610, 618 (7th Cir. 1998) (AT&T Br. 25), "[t]he legislature doesn't want to wipe out people's rights inadvertently"; TCA § 601(c)(1) prevents the inadvertent repeal of the ADA.

The ADA has been found to be inapplicable to a state regulatory system where a parallel system of protection, including protection of "the most sensitive members of the population" and a private right of action, exist and will afford relief for the injuries to the disabled. *See, e.g., Save Our Summers v. Washington State Department of Ecology,* 132 F.Supp.2d 896, 912 n. 5 (E.D. Wash. 1999). Defendants offer no such protection from RF radiation to support an implied repeal here. No implied repeal can be found; instead, the statutes must be accommodated to one another.

## VI. To avoid serious constitutional questions, the Court should find no implied repeal.

"There is a strong preference for construing a statute to avoid constitutional questions." *United States v. Theron,* 782 F.2d 1510, 1516 (10th Cir. 1986). This Court should construe ADA Title II and TCA § 704 to accommodate the application of both statutes, so that in zoning decisions the City may, and must, consider the effect of RF radiation from telecommunications facilities upon

persons disabled by EHS, but need not consider effects upon the general public if a facility complies with FCC exposure guidelines. It is clear from Points II and III herein, and Appellant's Opening Brief, that to construe TCA § 704 to repeal by implication the ADA would authorize local authorities to violate principles of Due Process and Equal Protection, as the City has done here—a construction that should be avoided.

## VII. Alternatively, the Court should hold TCA § 704 unconstitutional

TCA § 704 should not be interpreted to injure an identifiable segment of the population, exile them from their homes and their city, leave them no place where they can survive, and allow them no remedy under City, State or Federal laws or constitutions.

Should the Court nevertheless so interpret TCA § 704, then it must find that TCA § 704 is unconstitutional, violating Plaintiff's procedural and substantive Due Process and Equal Protection rights as incorporated in the Fifth Amendment.

## CONCLUSION

The Court should vacate the judgment below and remand the case for trial in accordance with the principles expressed herein.

Respectfully submitted,

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February 21, 2012

## CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 6,988 words:

Complete one of the following:

X: I relied on my word processor to obtain the count and it is Word 2007.

_: I counted five characters per word, counting all characters including citations and numerals.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after reasonable inquiry.

By: /s/Lindsay A. Lovejoy, Jr.
Lindsay A. Lovejoy, Jr.

## CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I certify that this brief has been submitted in PDF format to the Tenth Circuit's Electronic Case Filing System; is an exact copy of the written document filed with the Clerk; that all required privacy redactions have been made; and that the digital submission has been scanned for viruses with the ESET Smart Security 4.2.71.2 Virus Signature Database: 6715 (20111215) and, according to the program, is free of viruses.

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## CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(c) and Tenth Circuit Rule 25.3, I hereby certify that on this date, February 21, 2012, I caused the foregoing Brief and its Addendum to be filed upon the Court through the use of the Tenth Circuit CM/ECF electronic filing system, and this also served counsel of record. Seven hard copies of this Brief were sent by U.S. Mail to the Office of the Clerk on this date. One hard copy of the Brief was sent by U.S. Mail to a counsel for each party listed below. The resulting service is consistent with the Service Method Report:

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February 21, 2012

Attachment:  Specific Bases for Verified Appeal Petition, Case #2010-190

Specific Bases for
Verified Appeal Petition
Case #2010-190

Comes now the Appellant, New Cingular PCS, LLC, d/b/a AT&T, by and through its agent and counsel, Basham & Basham, P.C. and states its grounds for appeal as follows.

**A. Noncompliance of the Final Action with Law**

**1. Noncompliance with City Code.**

The actions of the Board of Adjustment (BOA) are in violation of the law on several grounds. The first ground is the City Code. The Findings of Fact and Conclusions of Law (Hereinafter the "Findings") site only one provision of the code for the denial. § 14-6.2 (E)(1)(n) is a subsection of the "Purposes" provision of the Telecomm code and reads "The purposes of this section are to.... [g]ather information and provide remedies for the public health and safety impacts of communication towers" This section of the code is merely a recitation of the purposes and is not included within the review criteria under 14-3.6 (C ) or the substantive evaluation factors provided under §§ 14-6.2 (E)(3) (general requirements) 14-6.2 (E)(6) (special exceptions) 14-6.2 (E) (7) (equipment storage) or 14-6.2 (E) (10) (waivers). The Board itself and its legal counsel both called attention to the fact that the decision should not rest upon the purposes provisions of the code. (Transcript, pp. 52, 53) But the maker of the motion chose to ignore the correct application of the law and simply stated "I said I felt that they didn't comply with Section 14-16.2 (E)(1)(n) and that was it. I don't want to complicate it further."

**2. Noncompliance with Telecommunications Act.**

The decision was also clearly in violation of federal law. The highlighted provisions of federal law have been violated. The Telecommunications Act of 1996. 47 U.S.C. 332 (c ) (7) provides:

> Preservation of local zoning authority
>
> (A) General authority — Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.
>
> (B) Limitations
>
> (i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof —
>
> **(I) shall not unreasonably discriminate among providers of functionally equivalent services; and**

**(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.**

(ii) **A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed** with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and **supported by substantial evidence** contained in a written record.

**(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.**

**3. Noncompliance with Due Process**

The actions of the BOA effectively denied the applicant both substantive and procedural due process rights as the applicant has an interest in use of the property consistent with the law and the proceedings clearly caused the application to be denied and deprived the applicant of its interests based upon considerations that should have been barred from the proceedings.

**4. Noncompliance with Equal Protection**

The actions of the BOA violated the applicant's equal protection rights under the law. The applicant was treated differently from other similarly situated applicants under the doctrine announced in *Oleach v. Village of Willowbrook.*

**5. Violations of the Appellants Rights**

The BOA's actions deprived the appellant of contract rights property rights and amounted to a *prima facie* tort under the law.

**B. Improper Interpretation of the Law.**

As stated above in Section A.1. of this appeal the BOA failed to properly interpret its own code when it chose to use the "Purposes" provision of the code as a basis for denial.

The BOA also failed to comply with the above sited federal laws and even after the Board's counsel read a detailed letter from the FCC into the record the BOA chose to ignore their careful findings, analysis and response on the health impacts of EMF radiation and chose to impose requirements upon the applicant that are not expressly provided under local, state or federal laws.

**C. Lack of Substantial Evidence.**

Under both the City Code and the federal laws the BOA is supposed to base its decision upon substantial evidence. Instead the Board ignored the application, the applicant, the staff recommendation of approval, the advice of their legal counsel and relied entirely upon the testimony of opponents of the application who provided extensive testimony regarding the environmental effects of radio frequency emissions and no testimony regarding the compliance of the application with the actual evaluation criteria.

**D. Other Legally Permissible Bases of Appeals under the Law.**

Notwithstanding the City Codes express statement in § 14-3.17 (A) (2) that the reasons for appeal may be limited to the above three categories the Appellant reserves the right to argue. and appeal the decision on any and all legally permissible bases contained in the laws of the United States and the State of New Mexico.

To the extent that §14-3.17 (D) (2) (e) authorizes the Appellant to raise issues of fact that were incorrectly determined, the appellant further alleges that the determination, express or implied, that the approval of the application would negatively impact public health and safety, that the applicant therefore needed to "specifically provide remedies for the public health and safety impacts of communications towers" is an incorrect statement of the code, is not supported by substantial evidence and is federally preempted.

**E. Reservation of Rights**

The appellant expressly reserves the right to supplement and amend this appeal under § 14-3.17 (C ) (2) and such other laws as may apply to the present appeal. Appellant also reserves the right to brief and argue the matters raised in this appeal as may be provided by the City code or otherwise provided by law. The Appellant reserves the right to supplement the appeal with such other and additional information as may be necessary in light of any other pleadings, filings or other matters that arise during the course of this appeal.

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**Verification**

State of New Mexico )
) ss.
County of Santa Fe )

I/We _____, being first duly sworn, depose and say/s: I/We have read the foregoing appeal petition and know the contents thereof and that the same are true to my/our own knowledge.

**Petitioner/s:**

_____ _____
[*Sign name*] [*Sign name*]

Peter Dwyer _____
[*Print name*] [*Print name*]

Subscribed and sworn to before me this 16th day of March, 2011.

_____
NOTARY PUBLIC
My commission expires:
8/22/2014