



Eric Sirotkin
Lawyer • Mediator • Educator

October 10, 2017

Hon. Javier M. Gonzales
Mayor
200 Lincoln Avenue
Santa Fe, NM 87501

Kelley Brennan
City Attorney
200 Lincoln Avenue
Santa Fe, NM 87501

Carmichael Dominguez
Michael Harris
Peter Ives
Signe I. Lindell
Joseph Maestas
Chris Rivera
Ron Trujillo
Renee Villarael
City Councilors
200 Lincoln Avenue
Santa Fe, NM 87501

Re: City's Liability with PROW-Mounted Cellular Antennas

Dear Mayor Gonzales, City Councilors and City Attorney Kelley Brennan:

I represent a group of Santa Feans (listed below) who are aware that the City of Santa Fe's City Council (the City) has passed An Ordinance Relating to the Telecommunications in the Public Rights-of-Way Ordinance, Amending Subsection 27-2.19 SFCC 1987 to Streamline the Land Use Review Process for Telecommunications Facilities in the Public Rights-of-Way;; Amending Subsection 27-2-20 to Include Facilities and Repealing Subsection 27-21 Relating to the Telecommunications Advisory Committee (2017-22). Now, as required by federal policy, the City must promulgate safety regulations. Telecom corporations must comply with these regulations when they install antennas on public right-of-ways (PROWs) such as traffic lights and lamp posts.

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My clients seek proof that the City's regulations will fulfill the City's obligations:

- 1) to provide proof of liability indemnification in the event of damages and/or injury caused by said installations;
- 2) to require that a licensed Professional Engineer (PE) certify that said installations safeguard the public's life, health and property; and
- 3) to protect workers who could be exposed routinely to radiofrequency radiation (RFR) emitted by PROW-mounted antennas in excess of FCC/OSHA limits.

We believe that the City is liable for any damages and/or injuries that occur that involve PROW-mounted antennas. If it is the City's position that it is *not* liable for the potential PROW-related damages and/or injuries outlined in this letter, then who *is* liable? Design regulations must clarify who is liable.

As you know, the State Torts Claim Act 40-4-1-40-4-30 NMSA explains the City's potential liability if it does not maintain its streets, highways and/or damages property. Correspondingly, under the provisions of the Tort Claims Act [41-4-1 NMSA 1978] and any liability imposed under Section 41-4-4 NMSA 1978, governmental entities are duty bound to cover every risk for which immunity has been waived.

In the City's regulations for cellular antenna installations on PROWs, my clients seek language from the City's liability insurance company or the municipal liability fund to demonstrate that the City is indemnified against losses in the event that an antenna-laden PROW catches fire or collapses (which they have been shown to do) and causes damage and/or injury to property or a person. My clients seek language demonstrating that the City will be covered in the event that ice on an antenna falls onto a person or object and causes damage.

Further, my clients expect that the City's regulations shall require any antenna installer and provider to comply with the New Mexico Engineering and Surveying Practice Act so that every installation shall be certified by an independent, licensed Professional Engineer. For examples, a licensed PE shall determine how much weight each structure installed on the PROW can bear. A licensed PE shall determine whether the electricity delivered to PROW-mounted antennas requires a second neutral on powerlines throughout the City in order to prevent stray voltage and or harmonics on electrical wires. If a second neutral is required, then PNM must be required to install it before any antennas are deployed.

Since the public walks and drives near and under lamp posts and traffic lights (PROWs that potentially bear cellular antenna installations), the public will have access to PROW-

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mounted antennas and their accompanying gear. These installations therefore fall under the purview of regulations that protect the public, even if they are installed and operated by private corporations. I am putting the City on notice that any guidelines, regulations or installations must be promulgated; and installations must be performed in compliance with PE statutes. We expect that you will verify this in your design regulations.

We also seek assurances that the City shall comply with FCC/OSHA radiofrequency (RF) exposure limits for workers, including when workers work on or near PROW-mounted antennas. Since the FCC and OSHA require that the City provide an RF safety plan for each antenna site, we expect that the City's design regulations shall require such plans from each telecom corporation who intends to provide cellular and/or Internet services. The City is responsible for ensuring that RF emissions from antennas are within OSHA/FCC limits so that workers (who may routinely be exposed to these antennas' RFR) are sufficiently informed, educated and protected, and that federal limits are obeyed.

My clients expect that the City's design regulations shall require antenna providers:

- 1) to identify who shall (at a minimum) annually monitor RF emissions from antennas,
- 2) to demonstrate how no worker shall be exposed to RF emissions above FCC safety limits;
- 3) to warn workers that a radiation-emitting antenna is nearby; and
- 4) to provide protective measures (such as the ability to turn off an antenna or multiple antennas; and access to whole body shielding clothing) for any worker who approaches and/or works near a PROW-mounted antenna.

To warn workers that a radiation-emitting antenna is nearby, my clients propose painting the antennas neon green or orange. While we expect that some Santa Feans will object to the aesthetics of neon green or orange antennas on PROWs, we value worker safety over aesthetics and are willing to sacrifice our aesthetics in this case.

My clients expect that a comprehensive plan to protect workers from RF exposure (as required by FCC and OSHA) shall be in place before any antennas are installed on PROWs. If not, the City may face liability or injunctive relief.

My clients seek language in the City's design regulations that demonstrates that the City is indemnified against losses in the event that a worker (including third party workers) is injured by overexposure to radiofrequency radiation emitted by antennas. On February

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28, 2015, Lloyds of London stated that they will not cover any liability "arising from claims directly or indirectly arising out of, resulting from or contributed to by electromagnetic fields, electromagnetic radiation, electromagnetism or radio frequency." Many U.S. insurance agencies are following suit. Still, 41-4-20 NMSA requires the City to hold such coverage. For the City's protection, my clients seek proof of the City's liability coverage in the event that a worker is injured by RF emissions from PROW-mounted antennas.

My clients fully expect that the City shall follow the State's liability requirements, PE statutes and federal OSHA/FCC worker exposure limits and protections. They fully expect that these provisions shall be written into the design regulations required now by 2017-22.

Because of your commitment and legal obligation to protect the City, my clients expect that you shall 1) request a report from PNM for its grid preparedness regarding PROW-mounted antennas; and 2) delay action on all telecom buildouts until such time that these liability, professional engineering processes and worker safety compliance issues are resolved.

My clients look forward to reviewing your design regulations before they are considered for enactment.

Sincerely,

Eric Sirotkin

cc. clients/class representatives

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Anon (3)

Michela Aveta

David Bacon

Jan Boyer

Erica Elliot

Bill Fishbein

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