No. 23-3768, 23-3799

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TowerCo 2013, LLC,
Plaintiff-Appellee/Cross Appellant,

v.

Berlin Township, OH, *et al.*,
Defendants-Appellants/Cross-Appellees.

On appeal from the United States District Court for the Southern District of Ohio, Eastern Division Case No. 2:22-cv-03294

THIRD (REPLY) BRIEF OF DEFENDANTS-APPELLANTS/CROSS-APPELLEES BERLIN TOWNSHIP, OH AND BERLIN TOWNSHIP BOARD OF TRUSTEES

Jeffrey C. Turner (0063154)
Dawn M. Frick (0069068)
8163 Old Yankee Street, Suite C
Dayton, Ohio 45458
(937) 222-2333, (937) 222-1970 (fax)
jturner@sdtlawyers.com
dfrick@sdtlawyers.com
Attorneys for Berlin Township Board of Trustees and Berlin Township, Ohio

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

I. INTRODUCTION

The TCA is crystal clear that nothing in the Act will limit or affect the authority of a local government over decisions regarding the placement, construction, and modification of personal wireless service facilities. 47 U.S.C. § 332 (c)(7)(A). This language leaves no doubt as to Congress' intent to preserve local jurisdictions' authority. However, the District Court's decision granting TowerCo 2013, LLC ("TowerCo") a preliminary injunction to enjoin Berlin Township and the Berlin Township Board of Trustees (collectively the "Township") from preventing the completion and deployment of TowerCo's cell tower, belies the Congressional intent of the TCA for the protection of local governmental zoning authority.

In enacting § 332, Congress sought to strike a balance between encouraging the growth of telecommunications systems and the right of local governments to make land use decisions. *SBA Commc'ns Inc. v. Zoning Comm'n of Town of Franklin*, 164 F. Supp. 2d 280, 284 (D. Conn. 2001). In *SBA Commc'ns Inc.*, the court recognized that:

> While requiring review of local zoning determinations regarding the placement of wireless facilities, the TCA and the courts interpreting this statute acknowledge the legitimate local interest in such determinations. As the Second Circuit recently noted in *Sprint Spectrum, L.P. v. Willoth*, 176 F.3d 630 (2d Cir.1999), the goals of increasing competition and "rapid deployment of new technology" do not "trump all other important considerations, including the preservation of the autonomy of states and municipalities." *Id.* at 639. Rather, "[i]n the context of constructing a national wireless telecommunications infrastructure, Congress chose to preserve all local

> zoning authority 'over decisions regarding the placement, construction, and modification of personal wireless service facilities,' 47 U.S.C. § 332(c)(7)(A), subject only to the limitations set forth in § 332(c)(7)(B)." *Willoth*, 176 F.3d at 639–40. The legislative history of the TCA illustrates the importance of preserving local land use authority.
>
> As stated in the Senate Report, § 332 "preserves the authority of State and local governments over zoning and land use matters except in the limited circumstances" specified in that section. *See* Sen. Rep. No. 104–230, at 458 (1996).

SBA Commc'ns Inc., *supra* at 284–85 (D. Conn. 2001).

Furthermore, "[t]he purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007) citing *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830 (1981). In this case, the granting of TowerCo's Motion for Preliminary Injunction had the opposite effect and led to TowerCo moving forward with the construction and deployment of the cell tower, rather than maintaining the status quo until a trial on the merits was held. As such, the District Court's decision must be overturned.

II. ARGUMENT

A. The District Court Abused Its Discretion in Granting the Preliminary Injunction

Prior to the granting of the preliminary injunction by the District Court, the parties agreed to stay any further action by TowerCo as to the construction and

deployment of the tower while merits of the case were considered by the state court.[1] (RE 14-1, PgID 1645-1646.) Specifically, the State Court's order stated:

> This matter came before the Court upon the unopposed motion of Plaintiff Berlin Township Board of Trustees to consolidate its application for a preliminary injunction with the trial of the action on the merits. The Court has reviewed the same and hereby GRANTS Plaintiff's motion with the condition that the Defendants will maintain the status quo in this matter and not conduct any further construction activities related to the wireless telecommunications tower at issue in this matter until the Court considers and rules on the merits of this matter. Having signed and approved this Judgment Entry below, the Court hereby acknowledges that the Defendants have agreed to be bound by the terms of this Judgment Entry.

(Id.) Therefore, the mutually-agreed-upon stay in the State Court Case, which the District Court did not alter, preserved the status quo. The preliminary injunction in favor of TowerCo in this case promoted the opposite and led to TowerCo defying the State Court order and moving forward with construction.

In considering the Motion for Preliminary Injunction the District Court was required to balance whether TowerCo was likely to succeed on the merits of its claim; whether TowerCo was likely to suffer irreparable harm absent an injunction; the balance of equities; and the public interest. *Cath. Healthcare Int'l, Inc. v. Genoa Charter Twp., Michigan*, 82 F.4th 442, 447 (6th Cir. 2023) citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S.Ct. 365 (2008). However, to establish

[1] Although TowerCo argues that was not their intent, the State Court's November 29, 2022's Judgment Entry is clear that TowerCo agreed to be bound by the terms of the Court's entry. (RE 14-1, PgID 1645.)

success on the merits of a claim, a plaintiff must show more than a mere possibility of success. *Tenke Corp., supra*, at 543 citing *Six Clinics Holding Corp. v. Cafcomp Sys., Inc.,* 119 F.3d 393, 402 (6th Cir. 1997). The District Court wrongly concluded that TowerCo had established a strong likelihood of success on the merits because it failed to observe the clear language of the TCA; it misapplied the TCA in finding that the filing of the State Court Case constituted a final action; it wrongly applied *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(b)*, 24 F.C.C. Rcd. 13994, 14013 (2009) at ¶49 ("2009 FCC Ruling") to extend the time for TowerCo to file its federal action; and it gave undue weight to the minimal testimony of a "significant" gap in coverage; minimal evidence of consideration of the feasibility of alternate site locations; and TowerCo's concerns regarding potential loss of customer goodwill and potential monetary harms.

B. TowerCo Did Not Show A Strong Likelihood It Would Prevail on the Merits

A preliminary injunction should only be granted if the movant carries its burden. *Overstreet v. Lexington–Fayette Urban Cnty. Gov't*, 305 F.3d 566, 573 (6th Cir. 2002). TowerCo did not make such a showing and as such, the District Court abused its discretion in granting the preliminary injunction.

1) The filing of the State Court Case did not constitute a "final action" by Berlin Township

When the Communications Act of 1934 was enacted, it expressly preserved

some state regulatory authority. Specifically, Section 332(c)(7)(A) begins by explicitly preserving local authority:

> (7) 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.

Thereafter, the statute identifies three limitations. It prohibits state and local governments from using local zoning authority in a manner that "prohibit[s] or ha[s] the effect of prohibiting the provision of wireless services;" from "unreasonably discriminat[ing] among providers of functionally equivalent services;" and it requires them to "act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time." 47 U.S.C. 332 (c)(7)(B)(i)-(iii). Apart from these requirements, Section 332 preserves state and local authority over decisions regarding the "placement, construction, and modification of personal wireless service facilities."

With regard to Section 332(c)(7)(B)(i), the limitations are limited to:

> (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.

47 U.S.C. 332 (c)(7)(B)(i) (emphasis added). Thus, the clear and unambiguous language of the statute requires the limitation to involve a "regulation" by a state or local government.

What constitutes a "regulation" is not defined in the TCA, and thus "[w]hen a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning." *Boden v. St. Elizabeth Med. Ctr., Inc.*, 404 F. Supp. 3d 1076, 1085 (E.D. Ky. 2019) citing *Smith v. United States*, 508 U.S. 223, 228, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993). Often this means looking to dictionary definitions. *See id.* at 229, 113 S.Ct. 2050. Black's Law Dictionary defines "regulation" as "[c]ontrol over something by rule or restriction." REGULATION, Black's Law Dictionary (11th ed. 2019). Thus, when determining what constitutes a "final action" for purposes of Section 332(c)(7)(B)(v), the ordinary and natural meaning of regulation requires that the action be a rule or restriction as to the placement, construction and modification of personal wireless facilities; a failure to act on a request for authorization to place, construct or modify a personal wireless facility; or a decision to deny a request to place, construct or modify a personal wireless facility. Here, the Township did not regulate, fail to act, or deny a request.

Without a local authority acting in a manner that violates the limitations set forth in Section 332(c)(7)(B), the authority of a local government, over decisions

regarding the placement, construction, and modification of personal wireless service facilities is preserved. Therefore, under the clear and unambiguous terms of the statute, the decision by the Township to file suit and have the State Court interpret state law or to vindicate its rights is not a "regulation" or rule that prohibited or had the effect of prohibiting the provision of personal wireless services. (RE 1-17, PgID 240.) In fact, in *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 417 (2d Cir. 2002) the Second Circuit evaluated certain actions under the TCA and held:

> [a] State does not regulate ... simply by acting within one of these protected areas. When a State owns and manages property, for example, it must interact with private participants in the marketplace. In so doing, the State is not subject to pre-emption by the [federal statute], because pre-emption doctrines apply only to state *regulation.*

Id. citing *Bldg. & Const. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993) (emphasis in original).

Furthermore, in addition to the Township not regulating the placement, construction, and modification of personal wireless service facilities, the Township did not make a "decision *** to deny a request to place, construct, or modify personal wireless service facilities." 47 U.S.C. 332 (c)(7)(B)(iii). Again, the clear an unambiguous meaning of the statute requires the final action be a decision to deny the placement, construction or modification of a personal wireless service facility, not a decision to vindicate its rights and for interpretation of state law in the State

Court. For questions of statutory interpretation, courts must look to the statutory language as "the starting point for interpretation, and ... the ending point if the plain meaning of that language is clear." *Davenport v. Lockwood, Andrews & Newnam, Inc.*, 854 F.3d 905, 909 (6th Cir. 2017) citing *United States v. Henry*, 819 F.3d 856, 870 (6th Cir. 2016). Pursuant to the foregoing statutory scheme, in order for a court to evaluate whether an entity did not act in conformity with the foregoing limitations of Section 332 (c)(7)(B), the type of "final action" contemplated by that section of the TCA requires action by a local government on an application or request regarding the placement, construction and modification of a personal wireless service facility. *See Ottawa Twp. Bd. of Trustees v. New Par*, No. 3:17CV228, 2019 WL 1923331, at *11 (N.D. Ohio Apr. 30, 2019). No such request was made by TowerCo.

As such, the District Court abused its discretion when it went beyond the clear and unambiguous language of the statute to determine that Defendants' decision to pursue an injunction in state court constituted a "final action." This Court has held that "respect for Congress's prerogatives as policymaker means carefully attending to the words it chose rather than replacing them with others of our own." *Weatherford U.S., L.P. v. U.S. Dep't of Lab., Admin. Bd.*, 68 F.4th 1030, 1038 (6th Cir. 2023) citing *Murphy v. Smith*, 538 U.S. ——, 138 S. Ct. 784, 788, 200 L.Ed.2d 75 (2018). As such, the District Court impermissibly went beyond the language of

the TCA to "include more than just decisions on permit applications where there has been assertion of *Brownfield* immunity." (RE 39, PgID 2154.)

It is a cardinal principle of statutory interpretation that courts "are not at liberty to supply words, insert phrases, or make additions to statutory language to cure a possible omission." *Boyd v. Doe*, No. CIV. 13-136-ART, 2014 WL 5307951, at *3 (E.D. Ky. Oct. 15, 2014) citing *Commonwealth v. Harrelson,* 14 S.W.3d 541, 545–546 (Ky.2000). This is even more so when the same statute explicitly preserves the local government's authority, subject only to the limitations contained therein. Thus, because no regulation of the Township prohibited, or had the effect of prohibiting, the provision of personal wireless services, nor did the Township fail to act on a request for authorization to place, construct or modify a personal wireless service facility or deny such a request, there has been no "final action." Accordingly, TowerCo's action under Section 332(c)(7)(B)(v) is premature, not ripe as there has been no violation of Section 332(c)(7), and this Court's analysis should end there.

2. TowerCo did not timely file this case

Notwithstanding the foregoing, even if the decision to file, or the actual filing of the State Court case constituted a final action, something the Township disputes, TowerCo's Complaint still was not timely filed. Section 332(c)(7)(B)(v) provides that "[a]ny person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this

subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction." Thus, if the decision to file the State Court action or the filing of the State Court action was the "final action" necessary to trigger their time to file, TowerCo had 30 days to commence this action.

Both the District Court's and TowerCo's reliance on *In the Matter of Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(b)*, 24 F.C.C. Rcd. 13994, 14013 (2009) at ¶49 ("2009 FCC Ruling") is misplaced. First, the 2009 FCC Ruling is inapplicable to this situation and only addresses the interpretation of what is a "reasonable period of time" to decide after an application is filed. More importantly, however, it is the August 23, 2022 voluntary dismissal of TowerCo's TCA claims that rendered this action untimely.

As TowerCo notes in its brief, "TowerCo's original TCA claim was filed on July 13, 2022, just 22 days after the Township enjoined deployment of the tower." (App. RE 24, PgID 46.) In response to the Township filing the State Court Case, TowerCo filed its Answer and Counterclaim asserting its TCA claims under Section 332 and improperly attempted to remove the case to federal court. Although the parties filed a Joint Motion to Stay that federal case on July 20, 2022, nothing in that motion indicated that there was "mutual consent" of TowerCo and the Township to extend the 30-day period to file suit as discussed in the 2009 FCC Ruling. In fact, there was no reason for the parties to mutually consent to tolling the filing period

because TowerCo had already chosen to raise its claims as counterclaims in the State Court action. (RE 5, PgID 439, Case No. 2:22-cv-02795.) However, rather than simply waiting for the agreed-upon remand or taking other action to attempt to preserve its rights, TowerCo inexplicably, voluntarily, and unilaterally dismissed all of its claims against the Township, including the TCA claims on August 23, 2022. (RE 10, Case No. 2:22-cv-02795.) [2]

> In *Bomer v. Ribicoff*, 304 F.2d 427 (6th Cir. 1962) this Court held:
>
> > An action dismissed without prejudice leaves the situation the same as if the suit had never been brought. *A. B. Dick Co. v. Marr*, 197 F.2d 498, 502 (2nd Cir.) cert. denied, 344 U.S. 878, 73 S.Ct. 169, 97 L.Ed. 680, rehearing denied, 344 U.S. 905, 73 S.Ct. 282, 97 L.Ed. 699; *Bryan v. Smith*, 174 F.2d 212, 214 (7th Cir.). In the absence of a statute to the contrary a party cannot deduct from the period of the statute of limitations the time during which the action so dismissed was pending. *Humphreys v. United States*, 272 F.2d 411, 412 (9th Cir.); *Willard v. Wood*, 164 U.S. 502, 523, 17 S.Ct. 176, 41 L.Ed. 531; *DiSabatino v. Mertz*, 82 F.Supp. 248, 249-250 (M.D.Pa.)
>
> > The right of action here sought to be enforced is one created by statute and is limited by the provisions thereof as to the time within which the right must be asserted.

Id. at 428-429 (6th Cir. 1962); see also *Shepherd v. Wellman*, 313 F.3d 963, 971 (6th Cir. 2002). The *Bomer* Court went even further and held that "in the absence of a

[2] This dismissal itself was inconsistent with the standstill agreement of the parties which contemplated no action would be taken. A "standstill agreement" is "[a]ny agreement to refrain from taking further action." STANDSTILL AGREEMENT, Black's Law Dictionary (11th ed. 2019).

statute to the contrary a party cannot deduct from the period of the statute of limitations the time during which the action so dismissed was pending." *Id.* Here, there is no such statute. Thus, it is as if the claims initially brought by TowerCo in July 2022, never happened.

Therefore, because there was no mutual consent to toll the time period contained within Section 332(c)(7)(B)(v) and the herein action was not brought within 30 days of any alleged final action, TowerCo's TCA claims against the Township were not timely and the District Court abused its discretion when it failed to dismiss TowerCo's TCA claims.

3. Berlin Township did not effectively prohibit personal wireless service

As is set forth above, this Court need not even get this far in making a decision in this matter, because the Township did not take any action to regulate the placement construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof. 47 U.S.C. § 332(c)(7)(B)(i)(II). There was no action by the Township to regulate or institute a rule or restriction as to the placement, construction and modification of personal wireless facilities; a failure to act on a request for authorization to place, construct or modify a personal wireless facility; or a decision to deny a request to place, construct or modify a personal wireless facility. In fact, the District Court recognized that:

> Defendants' initiation of suit in state court deviates from the typical "regulation[s] of the construction, placement, or modification of personal wireless services," which includes, for example, a blanket ban on cell towers, a zoning regulation that is applied so as to reject all proposed cell sites, *see City of Ferndal*, 61 F. App'x at 220–21, or the denial of a permit application.

(RE 39, PgID 2158.) However, it then abused its discretion by deviating from the clear language of the statute when it went on to state:

> Nevertheless, a suit asking to enjoin construction of telecommunications facilities is undoubtedly an attempt "[t]o control, govern, or direct [the provision of wireless services], esp. by means of regulations or restrictions." *Regulate*, OXFORD ENGLISH DICTIONARY (3rd ed. 2009).

(RE 39, PgID 2158.) First, the District Court only looked to part of the dictionary definition it cited because the initiation of suit in state court did not control, govern or direct the provision of wireless services *by means of a regulation or restriction*. Using the dictionary cited by the District Court, a "regulation" is "[a] rule or principle governing behaviour or practice; esp. such a directive established and maintained by an authority." "Regulation, N. & Adj." Oxford English Dictionary, Oxford UP, December 2023, https://doi.org/10.1093/OED/1189305281. The initiation of the state court lawsuit was not a rule or principal governing behavior or practice. Additionally, the District Court strayed even further from the statute by finding that all that was required was an "attempt" to regulate.

Moreover, despite the fact that the initiation of the state court lawsuit was not a regulation by the Township, TowerCo did not make its necessary showing that

there was (1) a "significant gap" in service coverage and (2) some inquiry into the feasibility of alternative facilities or site locations.'" *T-Mobile Cent., LLC v. Charter Twp. of W. Bloomfield*, 691 F.3d 794, 805 (6th Cir. 2012) (quoting *MetroPCS, Inc. v. City & Cnty. of San Francisco*, 400 F.3d 715, 731 (9th Cir. 2005)).

(i) TowerCo did not present sufficient evidence of a significant gap in coverage

TowerCo has not presented sufficient evidence to demonstrate either a significant gap in coverage or any requirement of the Township that "materially inhibit[ed]" the provision of wireless services. TowerCo points to *In re Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Rcd. 9088 (2018)("2018 FCC Declaratory Ruling") to argue that "effective prohibition occurs where a state or local legal requirement materially inhibits a provider's ability to engage in any of a variety of activities related to its provision of a covered services." (App. RE 24, PgID 26.)

However, this Circuit has not yet addressed whether it will adopt the 2018 FCC Ruling changing the standard for determining effective prohibition. At least one court recently recognized that "not only does the FCC's interpretation conflict with the interpretations of every Circuit that has addressed the issue and expand *California Payphone* to new contexts in which it had not been previously applied, it also appears to upset the balanced regulatory approach that was intended by Congress." *T-Mobile S., LLC v. City of Roswell, Georgia*, 662 F. Supp. 3d 1269,

1284 (N.D. Ga. 2023). Instead of accommodating the needs of wireless providers in a manner that would simultaneously preserve local government zoning authority, the FCC's interpretation would "strip State and local authorities of their Section 332(c)(7) zoning rights" and "effectively nullify local authority by mandating approval of all (or nearly all) applications." *Id.* citing 2009 Declaratory Ruling ¶ 60. Notwithstanding, even applying the 2018 FCC Ruling standard in this case, there was no legal "requirement" by the Township that "materially inhibited" the provision of services. The filing of the State Court Action by the Township did not do so, rather it merely sought an interpretation of state law by the State Court.

Additionally, TowerCo has not sufficiently demonstrated a gap in coverage. A "gap" exists when a user of wireless service is unable to connect with the national telephone network or "maintain a connection capable of supporting a reasonably uninterrupted communication." *Cellco P'ship v. White Deer Twp. Zoning Hearing Bd.*, 609 F. Supp. 3d 331, 338 (M.D. Pa. 2022), *aff'd,* 74 F.4th 96 (3d Cir. 2023) citing *Cellular Tel. Co. v. Zoning Bd. of Adjustment of Ho-Ho-Kus*, 197 F.3d 64, 70 (3d Cir. 1999). The evidence, however, revealed that there was coverage. TowerCo's expert, Pergil Yabis testified that there was coverage in the area for 700 megahertz and a customer still has cell phone coverage. (RE 34-1, PgID 2101.) Therefore, because a user of the wireless service could connect with the network and maintain communication, there was no gap.

It is significant to point out that in its Brief, TowerCo's support for its claim of a gap in coverage does not come from the actual testimony of their RF Engineer expert, Mr. Yabis, but rather to his affidavit regarding a statement in his report that customers reported problems connecting to the network. However, when testifying under oath at the preliminary injunction hearing, Mr. Yabis testified he was personally unaware of such complaints:

> Q. We talked yesterday, you're not aware of any complaints from customers in this area complaining that they have dropped calls, correct?
>
> A. I personally, no.
>
> Q. You're not aware of any complaints from customers saying my Internet speed is really slow when I use my phone, correct?
>
> A. Correct.
>
> Q. You're not aware of any instances of blocked calls in this area, correct?
>
> A. Correct. But that doesn't mean that there is no complaints in the area.
>
> Q. But you're not aware of it?
>
> A. I am not, yes.

(RE 30, PgID 1972.) Furthermore, Mr. Yabis testified that while he could have verified "if existing sites are over 100 percent," he personally did not do that in this case. (RE 34-1, PgID 2100.) In fact, although TowerCo relies on Mr. Yabis as their

argument that a gap in coverage exists, he is not the one who makes that determination. (RE 34-1, PgID 2100.)

In contrast, in cases such as *Eco-Site, Inc. v. City of Huber Heights, Ohio*, No. 3:16-CV-338, 2018 WL 3092901, at *7 (S.D. Ohio June 22, 2018), cited to by the District Court, very specific data regarding the number of people and area that the alleged gap affects, as well as the types of businesses and services and roadways it would affect was presented to the court. Similarly, in *Tarpon Towers II, LLC v. City of Sylvania*, 625 F. Supp. 3d 667 (N.D. Ohio 2022), *T-Mobile Cent. LLC v. City of Fraser*, 675 F. Supp. 2d 721, 728 (E.D. Mich. 2009), and *Omnipoint Holdings, Inc. v. City of Cranston*, 586 F.3d 38, 49 (1st Cir. 2009) there was specific evidence of safety issues, dropped calls—including 9-1-1 calls—and the size of the gap and number of users it impacted. Although TowerCo acknowledges the persuasive influence of such evidence, it asks this Court to find that the District Court did not abuse its discretion in finding that testimony of Mr. Yabis, which lacked personal knowledge and specifics evidence, was sufficient to demonstrate TowerCo could potentially show a significant coverage gap. Such a determination was inconsistent with the evidence and as such was an abuse of discretion by the District Court.

(ii) TowerCo did not make a reasonable inquiry into the feasibility of alternative facilities or site locations

In addition, TowerCo did not present sufficient evidence that it considered less intrusive alternatives. In fact, Jason Catalini, General Counsel for TowerCo,

testified at the preliminary injunction hearing that the only area that was considered was the school and that there were no areas outside the school that were even examined. (RE 30, PgID 1951, P. I. Trans. p. 49.) Furthermore, Pergil Yabis testified that when he got involved with the project, the location was already predetermined. (RE 30, PgID 1960, 1967.)

Unlike the substantial evidence in *Branch Towers, LLC v. City of Knoxville*, No. 3:15-CV-00487, 2016 WL 3747600, at *7 (E.D. Tenn. July 11, 2016), TowerCo itself did nothing to determine alternate locations, and Verizon apparently only viewed a ½ mile search ring and limited its review to the school district property. While the "least intrusive" standard may not require an exhaustive search, it does require evidence of some search and reasons why other sites were not appropriate and were eliminated.

Based upon all the foregoing, the Township did not take any action to regulate the placement, construction, or modification of a personal wireless facility. In fact, the Township did not issue any regulation that materially inhibits such. Notwithstanding, TowerCo did not demonstrate a significant gap in coverage or that it made a reasonable inquiry into alternative facilities or locations, and as such, the District Court abused its discretion in determining that Berlin Township effectively prohibited personal wireless services in violation of 47 U.S.C. § 332(c)(7)(B)(i)(II).

C. TowerCo Did Not Show It Would be Irreparably Harmed if the Preliminary Injunction Was Not Granted

Whether a plaintiff will suffer irreparable harm is a significant factor in whether a court may grant a preliminary injunction. *Meece v. Ballard*, No. 5:16-CV-114-TBR, 2016 WL 4536445, at *5 (W.D. Ky. Aug. 30, 2016) citing *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982). The "harm alleged must be both certain and great, rather than speculative or theoretical." *Ohio ex rel. Celebrezze*, 812 F.2d at 290. Here, the irreparable harm put forth by TowerCo is the risk of loss of customer goodwill. However, TowerCo has never articulated how it will suffer the alleged irreparable harm.

Ohio Revised Code Section 519.211(B)(3) provides that when there is an intent to construct a telecommunications tower in an area subject to township zoning regulations, the entity must provide written notice to contiguous property owners and the board of township trustees. In this case, TowerCo itself must have believed that it was intending to build in an "area subject to township zoning regulations" because it sent such a letter to residents and the Township. (RE 5, PgID 750.) However, it was not until it was met with resistance by surrounding residents that it notified the Township that they requested that the Township's zoning regulations be applied to the proposed tower and the Township issued a notice to TowerCo of such, that TowerCo claimed it was entitled to *Brownfield* immunity. (RE 1-5, PgID 42–43; RE 5, PgID 751; RE 1-6, PgID 44–46.) Notwithstanding the fact that TowerCo

began to follow the state statutory procedure and implicitly acknowledged it was subject to township zoning regulations, it later argued it would be irreparably harmed if the court did not prevent the Township from seeking a declaration from the State Court as to the applicability of O.R.C. Chapter 519—something the TCA does not preclude.

Now, TowerCo instead argues that it will suffer the irreparable harm of a "risk" of the loss of customer goodwill by Verizon and TowerCo. However, whether Verizon, a non-party, loses goodwill is not relevant to this Court's analysis and whether TowerCo risks the goodwill of customers, i.e. Verizon, is too speculative. This is especially true since the evidence before the Court is that TowerCo's general counsel, Jason Catalini, testified "TowerCo continues to work on new projects for and enter new contracts with both Verizon and other cell providers without interruption." (RE 30, PgID 1950.) Simply stating that the loss of customer goodwill can be irreparable harm is speculative and not sufficient.

Rather, the standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 375–76, 172 L. Ed. 2d 249 (2008) citing *Los Angeles v. Lyons,* 461 U.S. 95, 103, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); *Granny Goose Foods, Inc. v. Teamsters,* 415 U.S. 423, 441, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974); *O'Shea v. Littleton,* 414 U.S. 488, 502, 94 S.Ct.

669, 38 L.Ed.2d 674 (1974); see also 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948.1, p. 139 (2d ed.1995) (applicant must demonstrate that in the absence of a preliminary injunction, "the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered"); *id*., at 154 – 155, 94 S.Ct. 669 ("[A] preliminary injunction will not be issued simply to prevent the possibility of some remote future injury"). In fact, the U.S. Supreme Court stated that "[i]ssuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief. *Id.* citing *Mazurek v. Armstrong,* 520 U.S. 968, 972, 117 S.Ct. 1865, 138 L.Ed.2d 162 (1997) (*per curiam*). Accordingly, TowerCo has not put forth sufficient evidence of irreparable harm to it and the District Court abused its discretion in finding that it did.

D. The Balancing of the Equities Favors the Township

The balancing of equities and consideration of the public interest—are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent. *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 32, 129 S. Ct. 365, 381, 172 L. Ed. 2d 249 (2008). To balance the equities of the parties, the Court must first closely examine the provisions of the TCA. Specifically, the intended interplay between the limitations of the TCA and the explicit preservation of local authority

over decisions regarding the placement, construction and modification of personal wireless facilities.

In fact, Section 332 guides the Court by beginning with the directive that nothing shall limit or affect the authority of a State or local government in making decisions regarding the placement, construction and modification of wireless facilities—exactly what the Township is seeking to protect. However, the District Court's decision prevents a local government from making decisions which are not regulatory. This is contrary to the express language of Section 332 and detrimental to local governments and especially in this instance, Berlin Township. As such, a balance of the equities favors the Township.

E. A Denial of the Preliminary Injunction Is in the Public's Interest

The final factor is whether an injunction would serve the public interest. *Meece v. Ballard*, No. 5:16-CV-114-TBR, 2016 WL 4536445, at *6 (W.D. Ky. Aug. 30, 2016) citing *Abney v. Amgen, Inc.*, 443 F.3d 540 (6th Cir. 2006). Zoning regulations are specifically enacted by a township for the purpose of protecting the public's health and safety. *See* O.R.C. 519.02(A). Further, the Ohio Legislature through the Ohio Revised Code has determined that "in the interest of the public convenience, comfort, prosperity, or general welfare," a Board of Trustees by resolution may regulate the location of and set back lines for a structure and may establish reasonable landscaping standards and architectural standards in the

unincorporated territory of the township. *See* R.C. 519.02(A). Additionally, specifically in the interest of the public convenience, comfort, prosperity, or general welfare, the board may regulate by resolution "the height, bulk, number of stories, and size of buildings and other structures" *Id.*

Furthermore, as is stated above, the TCA's express language states that nothing in the Act will limit or affect the authority of a local government over these types of decisions regarding the placement, construction, and modification of personal wireless service facilities. 47 U.S.C.A. § 332 (c)(7)(A). This language clearly illustrates Congress' intent of preserving local jurisdictions' authority and the purpose of that authority is to protect the public's health, safety and welfare. Examples of harm to the public when a township is unable to enforce its regulations regarding placement and construction, are no more evident than when recent storms swept through the Township, causing significant damage to structures in the township, including the school property where the tower is sited. Local regulations addressing location and setbacks lines are designed to ensure that a tower does not risk damaging other property. However, the preliminary injunction seeks to prevent the Township's from enforcing its zoning resolution which was enacted for to ensure the health, safety and welfare of the public, and therefore, the preliminary injunction is not in the public's interest.

F. The District Court Properly Determined that the Township Did Not Violate the Shot Clock

The Township did not violate the "shot clock" provision of the TCA. The TCA requires that a state or local government 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. As the District Court noted, this is colloquially known as the "shot clock" provision. (RE 39, PgID 2148.) In the 2009 FCC Ruling, the FCC determined that a reasonable period of time was 90 days for requests relating to collocation and 150 days for all other requests. *2009 FCC Ruling*, 24 FCC Rcd. 13994 ¶ 32 (Nov. 18, 2009).

TowerCo argues that its November 11, 2021 letter to the Township, in which it claimed it was exempt from local zoning regulations pursuant to *Brownfield* was such a request. TowerCo sent a second letter to the Township on November 19, 2021, and requested a response from the Township by November 24, 2021. In this case, the District Court properly determined that TowerCo's November 11, 2021 letter was not a request for authorization, because it was not seeking permission from the Township to proceed. (RE 39, PgID 2155-2156.) If TowerCo reasonably believed it was such a request, it would not have put the November 24, 2021 deadline on the Township and would not have simply proceeded to build the tower anyway. (Id. at 2156.)

Furthermore, as determined by the District Court, if the November 11, 2021 letter was a request for authorization, the Township had 150 days to respond. Thus, the District Court held that either TowerCo did not truly view its own letter as a "request for authorization" or it attempted to rush the Township into a decision, in contravention of binding regulations. (RE 39, PgID 2156.) As such, TowerCo should be estopped from now claiming it was such a request. Moreover, as was noted by the District Court, the Township did respond through the County Prosecutor on December 23, 2021, stating that it disagreed that TowerCo was entitled to zoning immunity and recommending that it submit a zoning application under the BTZR. (RE 5, PgID 753; RE 1-10, PgID 210–11). Simply because TowerCo did not agree with the caselaw cited or believed it to be an inadequate response does not mean it was not a response. The District Court held that if TowerCo disagreed, it could have sought a determination by the courts as to the applicability of *Brownfield* immunity. (RE 39, PgID 2157.) However, TowerCo did not and instead began to construct the tower. Additionally, if the November 11, 2021 letter was a request, then the County Prosecutor's letter on behalf of the Township would have to be viewed as a denial, which would have triggered TowerCo's time to file an action—something it did not do.

This case is factually distinguishable from *GTE Mobilnet, Inc. v. Pierce Twp.*, No. C-1-97-501, 1998 U.S. Dist. LEXIS 22007 (S.D. Ohio Nov. 6, 1998) relied upon

by TowerCo. In *GTE Mobilnet, Inc.*, the plaintiff submitted a letter to the township requesting acknowledgement that it was a public utility, exempt from the township's zoning resolutions. *Id.* at *3–4. However, in *GTE*, the township did not respond. *Id.* at *4. Thereafter, plaintiff issued notices to the surrounding landowners regarding its proposed telecommunications tower. *Id.* at *5. Because one landowner objected, and the township's zoning requirements applied, plaintiff applied for a formal zoning certificate. *Id.* The township denied the request. *Id.* However, because the township did not respond to the original informal request, the court determined that the township had failed to act within the reasonable time period, in violation of 47 U.S.C. § 332(c)(7)(B)(ii). *Id.* at *14–15.

In contrast, in this case, the Township responded to TowerCo's request within forty-two days and advised that TowerCo should proceed with a zoning application under the Township's zoning regulations. Instead, TowerCo—before the Township responded, and certainly before the 150-day period expired—circumvented the Township by applying for a building permit, determining that because Berlin Township had not responded yet, it had "assented" or acquiesced to zoning immunity and the project altogether—something the Township had not done. (RE 5, PgID 752.) Thus, *GTE Mobilnet* is distinguishable and not binding.

Rather, as is clear from the evidence, the November 11, 2021 letter from TowerCo was not a "request." Even if it was, the Township timely responded and as such, the District Court properly determined that there was no shot clock violation.

G. The District Court Properly Found That There Was No Violation of Section 332(c)(7)(B)(iii)

The Township did not deny a request to place, construct, or modify a wireless service facility and thus, it could not have put its decision in writing. However, TowerCo argues that the Motion for Preliminary Injunction in the State Court Case was a denial by the Township which did not contain substantial evidence for such denial. Again, because there has not been a denial by the Township, there cannot have been a violation of Section 332(c)(7)(B)(iii).

The District Court recognized the complication of such a claim when it stated that the "Court has noted previously, no zoning authority has denied a request from TowerCo; to construe the state court complaint and motion for injunction as a "denial" requires this Court to extend traditional understandings of the TCA to the novel context of *Brownfield* immunity." (RE 39, PgID 2164.) However, it went on to state that even "assuming *arguendo* that the state court motion for injunction is a "denial" it does not appear that [the Township's] decision to file that motion lacked substantial evidence." (RE 39, PgID 2164.)

The standard that a court must look at "requires a determination whether the zoning decision at issue is supported by substantial evidence in the context of

applicable state and local law." *T-Mobile Cent., LLC v. Charter Twp. of W. Bloomfield*, 691 F.3d 794, 798 (6th Cir. 2012) citing *MetroPCS, Inc. v. City & Cnty. of San Francisco,* 400 F.3d 715, 723–24 (9th Cir.2005). In other words, the limited focus is on the nature of the evidence before the Township and whether it is substantial. The Ninth Circuit found that it "may not overturn the Board's decision on 'substantial evidence' grounds if that decision is authorized by applicable local regulations and supported by a reasonable amount of evidence. *W. Bloomfield*, 691 F.3d at 798–99.

If this Court accepts that the Motion for Preliminary Injunction in the State Court case is the written denial, then the District Court properly determined that the Board of Trustees relied upon substantial evidence. In fact, the District Court found that to find otherwise, as TowerCo suggests, would be to effectively overturn the State Court decision granting the temporary restraining order, something it declined to do. (RE 39, PgID 2165.)

Notwithstanding, in its Motion for Preliminary Injunction, the Township noted that it took all the necessary steps to cause TowerCo's project to be subject to the procedures set forth under the Ohio Revised Code. (RE 27-16, PgID 1869.) Furthermore, the Township argued that its rights would be infringed upon because it did not have the right to review the proposed project to determine whether it satisfied the zoning resolution's requirements for a conditional use permit. (RE 27-

16, PgID 1870.) Additionally, it asserted its duty to protect the health, safety and welfare of its residents. (Id.) Finally, it noted the public's interest in requiring entities such as TowerCo to follow the laws specifically enacted to address the construction of cell towers. (RE 27-16, PgID 1871.)

Thus, based upon the reasoning set forth therein, the District Court determined that TowerCo did not dispute that the Township is "authorized to sue to enforce its local zoning regulations under Ohio law—and, specifically, it is authorized to require telecommunications providers to apply for a conditional use permit where owners of property adjoining a telecommunications project object." (RE 39, PgID 2164.) The District Court found further that because the State Court granted the Township's request for an injunction, it was additional support that the Township had substantial evidence in the context of applicable state and local law. (RE 39, PgID 2165.)

In other words, since the Township was authorized to enforce its local regulations under state law, this Court must take applicable state law and evaluate the Township's decision to seek an injunction and the evidentiary support relative to that law. *W. Bloomfield, supra*, 691 F.3d at 799 citing *ATC Realty, LLC v. Town of Kingston,* 303 F.3d 91, 94 (1st Cir.2002) ("The TCA's substantial evidence test is a procedural safeguard which is centrally directed at whether the local zoning authority's decision is consistent with the applicable [local] zoning requirements.")

Accordingly, if this Court is to find that the filing of the Motion for Preliminary Injunction constitutes a "written denial" of a request to place, construct, or modify a personal wireless service facility, then the District Court did not abuse its discretion in finding that the Township had substantial evidence for filing its Motion for Preliminary Injunction.

III. CONCLUSION

Based upon all the foregoing, as well as the arguments set forth in Appellant's First Brief, Appellants request that this Court overturn the District Court's Order granting TowerCo 2013, LLC's preliminary injunction enjoining Berlin Township Board of Trustees and Berlin Township, Ohio from preventing the completion and deployment of the cell tower.

Respectfully submitted,

/s/ Dawn M. Frick
Jeffrey C. Turner (0063154)
Dawn M. Frick (0069068)
8163 Old Yankee Street, Suite C
Dayton, Ohio 45458
(937) 222-2333, (937) 222-1970 (fax)
jturner@sdtlawyers.com
dfrick@sdtlawyers.com
Attorneys for Berlin Township Board of Trustees and Berlin Township, Ohio

IV. CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type-Style Requirements.

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 7388 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font.

/s/ Dawn M. Frick
Dawn M. Frick (0069068)
SURDYK, DOWD & TURNER CO., L.P.A.
8163 Old Yankee Street, Suite C
Dayton, Ohio 45458
Phone: (937) 222-2333
Fax: (937) 222-1970
dfrick@sdtlawyers.com

Dated: March 18, 2024

V. CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record.

/s/ Dawn M. Frick
Dawn M. Frick (0069068)