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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

STEVEN JAY PINCUS HUETER aka  
“TAO,” ET AL.,

Plaintiffs,

vs.

AST TELECOMM LLC ET AL.,

Defendants.

CIVIL NO. 21-00077 JMS-KJM

STATEMENT OF INTEREST OF  
THE UNITED STATES

STATEMENT OF INTEREST OF THE UNITED STATES

In response to the Court's Order of April 13, 2021, ECF No. 44, the United States respectfully submits a Statement of Interest on behalf of the Federal Communications Commission, pursuant to 28 U.S.C. § 517,<sup>1</sup> to set forth its views concerning the above-captioned case. The Statement of Interest is set forth in the attached letter from the Federal Communications Commission.

DATED: July 15, 2021, at Washington, DC.

By: BRIAN M. BOYNTON  
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<sup>1</sup> Pursuant to 28 U.S.C. § 517, “[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States.”



## Federal Communications Commission

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July 9, 2021

Brian Boynton  
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Civil Division, U.S. Department of Justice  
950 Pennsylvania Avenue NW  
Washington, DC 20530

Re: *Hueter v. AST Telecomm LLC, et al.*, No. 1:21-cv-00077 (D. Haw.)

Dear Mr. Boynton:

The district court in the above-referenced case issued an order on April 13, 2021, inviting the Federal Communications Commission to submit an amicus brief addressing whether the Communications Act provides a private right of action for alleged violations of (1) “FCC regulations regarding RF emissions, 47 C.F.R. §§ 27.52, 1.1307, 1.1310”<sup>1</sup> and (2) “FCC regulations regarding antenna height and power requirements, 47 C.F.R. § 90.[205] (and provisions referenced therein).”<sup>2</sup> ECF #44, *Hueter v. AST Telecomm LLC*, No. 1:21-cv-00077 (D. Haw. Apr. 13, 2021). In response to the court’s invitation, the FCC respectfully requests that the Department of Justice provide the court with a copy of this letter.

1. As the defendants note,<sup>3</sup> two governing Ninth Circuit decisions address the availability of private actions to enforce the Communications Act and the

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<sup>1</sup> These regulations require that for any RF source above certain power levels, *see* 47 C.F.R. § 1.1307(b)(3), a licensee must evaluate the human exposure level from the RF source, *id.* § 1.1307(b)(1)(i). If the human exposure level exceeds limits set forth in 47 C.F.R. § 1.1310, the licensee must prepare an environmental assessment, *id.* § 1.1307(b)(1)(i)(C), and take certain mitigation measures (such as signage and fencing) so that access to high-exposure areas is restricted to trained personnel exercising appropriate precautions, *id.* § 1.1307(b)(1)(ii) & (b)(4).

<sup>2</sup> These regulations prescribe limits on the maximum power level of an antenna, generally based on its frequency and height above adjacent terrain.

<sup>3</sup> Defs.’ Mem. in Supp. of Mot. to Dismiss & Opp. to Pls.’ Mot. for TRO/Prelim. Inj. at 5–8 (ECF #31-1); Defs.’ Mem. in Opp. to Pls.’ 2d Mot. for TRO/Prelim. Inj. at 6–8 (ECF #74).

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FCC's implementing regulations. *North County Commc'ns Corp. v. Cal. Catalog & Tech.*, 594 F.3d 1149 (9th Cir. 2010); *Greene v. Sprint Commc'ns Co.*, 340 F.3d 1047 (9th Cir. 2003). Those decisions explain that private plaintiffs cannot bring actions to enforce these requirements unless Congress by statute has expressed a clear intent to provide a private right of action. *North County*, 594 F.3d at 1154–55; *Greene*, 340 F.3d at 1050, 1052–53. The decisions further hold—in accordance with the decisions of other circuits—that if there is no provision expressly conferring a private right of action, courts will not recognize any implied right of action under the Communications Act. *Greene*, 340 F.3d at 1052–53.

2. The plaintiffs purport to find an express private right of action in Sections 206 and 207 of the Communications Act.<sup>4</sup> Those sections provide that any person entitled to “damages sustained in consequence of any such violation of the provisions of” the Act may pursue relief either by “mak[ing] complaint with the Commission” or by “bring[ing] suit \* \* \* in any district court of the United States of competent jurisdiction.” 47 U.S.C. §§ 206–207.

The Ninth Circuit has explained, however, that Sections 206 and 207 do not create an independent right of action, but instead merely “establish[] procedures for private parties to pursue claims in federal court” where such private claims for compensation are conferred by some *other* provision of the Communications Act. *North County*, 594 F.3d at 1161 (citing *Greene*, 340 F.3d at 1050–51). Thus, for example, those sections allow suits to enforce explicit compensation requirements that the FCC has established to carry out Section 201(b)'s command that all rates and practices be just and reasonable. *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45 (2007); see *North County*, 594 F.3d at 1158–60.

Unlike in *Global Crossing*, the plaintiffs here have not pointed to any separate provision of the Communications Act that confers them with a claim for compensation that could then be pursued through Sections 206 and 207. The regulations invoked here do not implement Section 201(b); they do not concern compensation or rates for telecommunications service; and nothing in these regulations purports to provide any right to compensation or damages at all. Cf. *Global Crossing*, 550 U.S. at 60 (“[I]n resting our conclusion upon the analogy with rate setting and rate divisions, \* \* \* we avoid authorizing the FCC to turn \* \* \* [Section] 207 into a backdoor remedy for violation of FCC regulations.”). Absent

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<sup>4</sup> See, e.g., Am. Compl. at 6–7 (ECF #5); Pls.' Opp. to Mot. to Dismiss at 26–27 (ECF #32); Pls.' Reply in Supp. of 2d Mot. for TRO at 2–3, 9–11 (ECF #75).

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some other provision of the Act conferring a claim for compensation, the plaintiffs do not have a private right of action under Sections 206 and 207.<sup>5</sup>

3. The plaintiffs have moved for leave to file a third amended complaint that, among other things, would add a claim under Section 332(c)(7)(B)(v).<sup>6</sup> We understand that the court has not yet decided whether to allow that amendment, and has instead directed that for now the case “will proceed with [the earlier] Complaint and motions as filed and briefed.” Minutes of 4/23/21 Status Conf. (ECF #50).

Even if the court were to allow the plaintiffs to amend their complaint, Section 332(c)(7)(B)(v) could not sustain the plaintiffs’ claims here. That section creates a private right of action to challenge a local government’s grant or denial of a request to construct or modify wireless communications facilities by filing a complaint within 30 days of such action. 47 U.S.C. § 332(c)(7)(B)(v). This suit does not challenge regulatory action by any local government entities, who are not among the defendants here, but instead seeks relief against a telecommunications carrier, which is not a matter covered by Section 332(c)(7)(B)(v). And the plaintiffs’ claims here do not appear to arise from government action on any recent request to construct or modify any wireless facility, nor do the plaintiffs identify any such request that was acted on within the preceding 30 days.

Related provisions of the Communications Act, such as Section 332(c)(7)(A) and Section 253(b), reflect that the placement, appearance, and safety of local telecommunications infrastructure are typically addressed by state and local law, instead of (or in addition to) the FCC or the federal Communications Act. The FCC expresses no view on whether the facts alleged in the complaint give rise to any claims under the law of American Samoa.

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<sup>5</sup> The plaintiffs also occasionally cite Section 1 of the Communications Act, 47 U.S.C. § 151, but Section 1 is a statement of congressional purposes that does not impose affirmative obligations, *see, e.g., Multicultural Media, Telecom & Internet Council v. FCC*, 863 F.3d 932, 935–36 (D.C. Cir. 2017), much less create a clearly expressed right of action for private parties to seek judicial enforcement of any alleged violation.

<sup>6</sup> [Proposed] 3d Am. Compl. at 8–9, 18, 39–40 (ECF #45-1); *see also* Pls.’ Surreply in Opp. to Mot. to Dismiss at 2–12 (ECF #40).

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4. Some courts have allowed private enforcement of certain FCC orders under Section 401(b) of the Communications Act. Because the plaintiffs here did not invoke Section 401(b) in their complaint or timely raise it in any of their other pleadings, they may have forfeited any reliance on it. *Conboy v. AT&T Corp.*, 241 F.3d 242, 254–56 (2d Cir. 2001). But even if the court were to overlook any forfeiture, we do not think Section 401(b) would permit private enforcement of the FCC regulations invoked here.

Section 401(b) provides that “[i]f any person fails or neglects to obey any order of the Commission \* \* \* the Commission or any party injured thereby \* \* \* may apply to the appropriate district court of the United States for the enforcement of such order.” 47 U.S.C. § 401(b). If the court then “determines that the order was regularly made and duly served, and that the person is in disobedience of the same,” the court “shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person or the officers, agents, or representatives of such person, from further disobedience of such order, or to enjoin upon it or them obedience to the same.” *Ibid.* The Ninth Circuit has held, consistent with the weight of authority, that the term “order” in Section 401(b) can potentially include requirements adopted through rulemaking (such as the regulations invoked here) as well as adjudicatory orders. *Hawaiian Tel. Co. v. Pub. Utils. Comm’n of Haw.*, 827 F.2d 1264, 1270–72 (9th Cir. 1987).

But the Ninth Circuit and other courts have held that not *all* such orders can be enforced through a private enforcement action under Section 401(b). Instead, courts have generally held that for a private plaintiff to bring a judicial enforcement action under Section 401(b), the order must clearly direct the defendant (either individually or as part of a particular class of regulated parties) to take some specific and concrete action.

In *Hawaiian Telephone*, for example, the Ninth Circuit held that Section 401(b) allowed judicial enforcement of orders that “require particular actions be taken by the [particular] carriers” at issue, but declined to hold that “every rule, order, or regulation promulgated by the FCC is an enforceable order under Section 401(b).” 826 F.2d at 1272; *cf. Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d 1056, 1071 (9th Cir. 2005) (rejecting interpretations that “would make *every* pronouncement of the Commission automatically enforceable in a private action” and “would create, automatically, a private right of action for violation of any ‘order’” under an adjacent provision, Section 416(c)), *aff’d*, 550 U.S. 45 (2007). The Sixth Circuit has adopted the Ninth Circuit’s analysis in *Hawaiian Telephone* and

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held that an order is “enforceable \* \* \* under Section 401(b)” if it “mandates specific action” by the defendants. *Alltel Tenn., Inc. v. Tenn. Pub. Serv. Comm’n*, 913 F.2d 305, 308–09 (6th Cir. 1990). The Fourth Circuit has similarly held that “only those [orders] that ‘require[] a defendant to take concrete actions’ may be enforced” under Section 401(b). *Lansdowne on the Potomac Homeowners Ass’n v. Openband at Lansdowne, LLC*, 713 F.3d 187, 200–01 (4th Cir. 2013) (quoting *CGM, LLC v. BellSouth Telecomms., Inc.*, 664 F.3d 46, 53 (4th Cir. 2011)). And the Third Circuit has held that to be enforceable under Section 401(b), an order must “require a defendant to take concrete actions.” *Mallenbaum v. Adelpia Commc’ns Corp.*, 74 F.3d 465, 468–69 (3d Cir. 1996).<sup>7</sup>

The FCC regulations invoked here are not the sort of simple, specific, and concrete directives that courts have found to be judicially enforceable under Section 401(b). The regulations at issue are complex and highly technical, and they turn on facts that are not readily ascertained and that fall outside the ordinary knowledge of most courts and private litigants. To be sure, the regulations might ultimately require certain concrete actions to be taken, but those actions are contingent on an array of technical facts and measurements that make these regulations anything but straightforward for courts to apply. Private parties can always seek to alert the FCC to any potential violations of its rules, and the agency possesses broad enforcement powers it can employ if it ultimately determines that a violation has occurred, but the regulations invoked here are not the type of

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<sup>7</sup> The First Circuit, in a decision holding that Section 401(b) cannot be used to enforce regulations adopted by rulemaking, expressed concern that private enforcement of such regulations, which may be “general in form and \* \* \* highly general in content,” could result in courts and private litigants usurping the FCC’s role in developing and applying federal communications law. *See New England Tel. & Tel. Co. v. Pub. Utils. Comm’n of Me.*, 742 F.2d 1, 5–7 (1st Cir. 1984) (Breyer, C.J.); *see also id.* at 11 (“[G]iven the general language and broad scope of many FCC rules, to allow private rule enforcement risks significant court interference with FCC control over its own docket, with the FCC’s power to interpret its own rules, and with the FCC’s ability to set its own communications policy.”). Although other circuits have disagreed with the First Circuit’s view that regulations adopted by rulemaking can *never* be privately enforced under Section 401(b), the concern expressed by the First Circuit supports the decision by other courts to limit Section 401(b) to enforcement of orders that clearly direct the defendant to take some specific and concrete action.



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simple and specific requirements that are readily amenable to private enforcement.<sup>8</sup>

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To bring a private action challenging alleged violations of FCC regulations, the plaintiffs must identify some specific provision in the Communications Act that clearly authorizes private actions to enforce the regulations they invoke. Here, however, the plaintiffs have not identified any such provision or supporting legal authority that authorizes a private action to enforce the FCC regulations at issue, and we are not aware of any other provision of the Communications Act that would support a private right of action in these circumstances.

Sincerely,

/s/ P. Michele Ellison

P. Michele Ellison

*Acting General Counsel*

*Federal Communications Commission*

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<sup>8</sup> It also is not evident whether the plaintiffs here, who did not participate in the FCC proceedings that led to the rules at issue, are “part[ies]” eligible to bring a judicial action under Section 401(b) to directly enforce those rules. *Compare* 47 U.S.C. §§ 227(b)(3), 332(c)(7)(B)(v) (allowing any “person” to sue to enforce certain other requirements) *with id.* § 401(b) (conferring right to sue on “any party” injured by violation of an order); *see Sierra Club v. U.S. Nuclear Regul. Comm’n*, 825 F.2d 1356, 1360–61 (9th Cir. 1987) (holding that, in a related statutory provision allowing “[a]ny party” to seek review of FCC orders, 28 U.S.C. § 2344, the term “party” means that only those who participated in the underlying FCC proceeding may seek judicial relief).