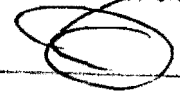


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SOUTHERN DISTRICT OF CALIFORNIABY  DEPUTY

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

IN RE CELL TOWER LITIGATION

LEAD CASE NO. 07-cv-399 – BEN
(WVG)
CONSOLIDATED WITH CASE NO.
08-cv-435 – BEN (WVG)

**ORDER GRANTING IN PART
AND DENYING IN PART
PARTIES' RESPECTIVE
MOTIONS TO RE-TAX COSTS**

[Doc. Nos. 321, 346, 347, 348]

These cases involve alleged violations of certain portions of the Telecommunications Act of 1996, 47 U.S.C. §§ 251 *et seq.* Plaintiffs American Tower Corporation (“ATC”) and T-Mobile West Corporation asserted that Defendants City of San Diego, City Council of City of San Diego, and Development Services Department of City of San Diego (“the City”) denied them conditional use permits (“CUPs”) for wireless communications facilities located at several sites. Currently before the Court are parties’ respective motions to re-tax costs awarded by the Clerk of Court (“clerk”). Having considered the parties’ arguments, and for the reasons set forth below, the Court **GRANTS IN PART and DENIES IN PART** the motions and **ORDERS** that each party bear its own costs.

BACKGROUND

The background is outlined in the Court’s August 5, 2011 and August 26, 2011 orders ruling on the parties’ cross-motions for summary judgment. [*See* Doc. Nos. 267, 292.] As relevant to these

1 motions, Plaintiffs filed several complaints (later consolidated with this lead case) seeking approval
2 of CUPs for several sites. Plaintiffs alleged numerous claims against the City, including violations
3 of the Telecommunications Act, preemption of the City's regulations, unreasonable discrimination,
4 lack of substantial evidence for the City's determination, and violation of the Permit Streamlining Act
5 ("PSA"). The Court ruled in the City's favor on all of Plaintiffs' claims except ATC's claims under
6 the PSA. With regard to the PSA claims, the Court ordered the City to issue the CUPs sought by ATC.
7 [See Order Denying the City's Motion for Reconsideration, at 3 [Doc. No. 313].)

8 On August 29, 2011, the Court entered judgment in Case No. 07-cv-399 in favor of the City
9 on all of the claims except the PSA claim, and in favor of ATC on the PSA claim. [Doc. No. 296.]
10 On August 30, 2011, the City filed a motion for reconsideration, which the Court denied on September
11 16, 2011. On September 16, 2011, the Court entered an amended judgment in Case No. 07-cv-399
12 in favor of the City on all of the claims except the PSA claim, and in favor of ATC on the PSA claim.
13 [Doc. No. 315.] The Court also entered judgment in Case No. 08-cv-435 in favor of the City on all
14 of the claims except the PSA claim, and in favor of ATC on the PSA claim. [Doc. No. 314.]

15 After the parties submitted their respective bills of costs, the clerk held several hearings
16 regarding the taxation of costs. On September 27, 2011, the clerk taxed costs in Case No. 07-cv-399
17 in the amount of \$42,221.82 against ATC. [Doc. No. 317.] On October 28, 2011, the clerk taxed costs
18 in Case No. 07-cv-399 in the amount of \$21,649.24 against the City. [Doc. No. 342.] Also on October
19 28, 2011, the clerk taxed costs in Case No. 08-cv-435 in the amount of \$78,028.18 against ATC and
20 in the amount of \$21,445.56 against the City. [Doc. Nos. 341, 343.]

21 On October 4, 2011 and November 3, 2011, ATC filed timely motions to re-tax the clerk's
22 September 27, 2011 (Case No. 07-cv-399) and October 28, 2011 (Case No. 08-cv-435) taxation of
23 costs. [Doc. No. 321.] On November 4, 2011, the City filed timely motions to re-tax the clerk's
24 October 28, 2011 (Case Nos. 07-cv-399 and 08-cv-435) taxation of costs. [Doc. Nos. 347, 348.]

25 Each party essentially argues that the clerk erred in taxing costs against it (but not the other
26 party) because it (and not the other party) was the sole "prevailing party." Each party further contends
27 that if the other party is to be considered the "prevailing party," the Court should exercise its discretion
28 in denying that party recovery of costs. Finally, the City argues that to the extent the Court allows

1 costs to be taxed against the City, the Court should reduce the amount of those costs. The Court
2 decides these motions without oral argument pursuant to Civil Local Rule 7.1(d)(1).

3 **LEGAL STANDARD**

4 Federal Rule of Civil Procedure 54(d)(1) provides that unless a federal statute, the rules, or a
5 court order direct otherwise, “costs—other than attorney’s fees—should be allowed to the prevailing
6 party.” The clerk may tax costs on 14 days’ notice. *Id.* The Court may review the clerk’s action upon
7 a motion served within seven days after the costs are taxed. *Id.* The Court reviews the clerk’s taxation
8 of costs de novo. *Rivera v. NIBCO*, 701 F. Supp. 2d 1135, 1137 (E.D. Cal. 2010).

9 **DISCUSSION**

10 Rule 54(d)(1) “creates a presumption in favor of awarding costs to a prevailing party.” *Ass’n*
11 *of Mex.-Am. Educators v. State of California*, 231 F.3d 572, 591 (9th Cir. 2000) (en banc). “Courts
12 consistently confirm that ‘a party in whose favor judgment is rendered is generally the prevailing party
13 for purposes of awarding costs under Rule 54(d).’” *San Diego Police Officers’ Ass’n v. San Diego*
14 *City Employees’ Ret. Sys.*, 568 F.3d 725, 741 (9th Cir. 2009) (citations omitted). It is not necessary
15 for the party to prevail on all of its claims to be considered the prevailing party. *Id.* Rather, what is
16 necessary is for the party to obtain some “actual relief on the merits of his claim [that] materially alters
17 the legal relationship between the parties by modifying the [other party’s] behavior in a way that
18 directly benefits [the first party].” *See Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992) (concluding that
19 a plaintiff who wins nominal damages is a prevailing party under 42 U.S.C. § 1988).

20 In the present case, the parties disagree as to which one of them qualifies as the “prevailing
21 party.” On the one hand, the City argues persuasively that it should be considered the prevailing party
22 because it had judgment entered in its favor on the majority of Plaintiffs’ claims. On the other hand,
23 ATC is equally persuasive in arguing that it is the prevailing party because, although it did not succeed
24 on most of its claims, it was successful in obtaining the ultimate relief sought in the complaints—the
25 issuance of the renewed CUPs for the several sites. Accordingly, each party appears to have prevailed
26 to some extent in these cases. This quandary creates a dilemma for the Court because, as the parties
27 acknowledge, although the clerk taxed the costs against both parties, there can be only one prevailing
28 party under Rule 54(d)(1). *See Shum v. Intel Corp.*, 629 F.3d 1360, 1367 (Fed. Cir. 2010).

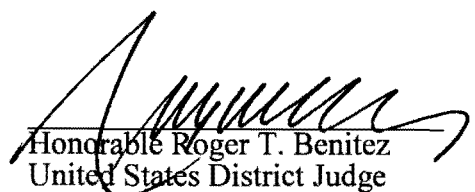
1 It is hard for the Court to determine whether the City or ATC prevailed the most. Pursuant to
2 Civil Local Rule 54.1(f), in the event each side recovers in part, “ordinarily the party recovering the
3 larger sum will be considered the prevailing party.” In this case, the City did not “recover” anything.
4 At the same time, it successfully defended against a plenitude of Plaintiffs’ accusations and avoided
5 paying any damages or attorney’s fees to Plaintiffs. On the other hand, ATC lost on all of its claims,
6 except the PSA claim. But that one claim provided ATC with the ultimate relief sought—the issuance
7 of the CUPs despite the City’s refusal to do so. Accordingly, no matter how the Court looks at it, this
8 case represents a stereotypical example of a mixed judgment. The Ninth Circuit has indicated that
9 “[i]n the event of a mixed judgment, . . . it is within the discretion of a district court to require each
10 party to bear its own costs.” *Amarel v. Connell*, 102 F.3d 1494, 1523 (9th Cir. 1996). Having
11 considered all of the relevant circumstances in these cases, and in light of the mixed judgment, the
12 Court will exercise its discretion and will require each party to bear its own costs.

13 **CONCLUSION**

14 In light of the mixed judgments in these cases, the Court will exercise its discretion and will
15 required each party to bear its own costs. Accordingly, the parties’ respective motions to re-tax costs
16 are **GRANTED IN PART and DENIED IN PART**. The Court **ORDERS** that the clerk’s taxation
17 of costs be **RE-TAXED** such that the costs are not taxed against either party.

18 **IT IS SO ORDERED.**

19
20 Date: May 24, 2012


Honorable Roger T. Benitez
United States District Judge