

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.**

In the Matter of)
)
Implementation of Section 621(a) of the Cable) MB Docket No. 05-311
Communications Policy Act of 1984 as Amended)
By the Cable Television Consumer Protection and)
Competition Act of 1992)

**MOTION FOR STAY OF THE NATIONAL LEAGUE OF CITIES; THE UNITED STATES
CONFERENCE OF MAYORS; THE NATIONAL ASSOCIATION OF REGIONAL COUNCILS; THE
NATIONAL ASSOCIATION OF TOWNS AND TOWNSHIPS; THE NATIONAL ASSOCIATION OF
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SUMMARY

Local government associations (“Movants”) respectfully request the Commission grant a stay of the Order pending judicial review. Movants are likely to succeed on the merits and will suffer irreparable harm if a stay is not granted. By contrast, the Commission and cable operators will not be harmed by a stay, and it is in the public’s interest to grant a stay.

Local government petitioners are likely to succeed on the merits because, *inter alia*, the Commission has exceeded its authority, inserting itself where Congress provided no authority or direction to do so in a manner contrary to the clear and unambiguous terms of the Cable Act. The Commission exceeded the bounds of the Cable Act’s plain language and thus exceeded its authority under *Chevron*.

Not only did the Commission exceed the bounds of the Cable Act, its Order is arbitrary and capricious. As it did in the Second Report and Order, the Commission—with little analysis—simply assumes that any franchise requirement is a “tax, fee or assessment,” and identifies no rational line between franchise obligations that are a “tax, fee or assessment,” and those that are not. The Commission again fails to address that this interpretation inherently undermines obligations and authority reserved for local franchising authorities (“LFAs”) in Sections 611, 622 and 626 of the Cable Act, and fails to address other significant implication of the Order.

Beyond its violation of the Administrative Procedure Act, the Commission’s ruling violates the Tenth and Fifth Amendments of the Constitution, incorrectly assuming federal power to direct the actions of local government the Commission does not possess and authorizing private use of municipal property without compensation.

Absent a stay, local governments will suffer irreparable harm. Those harms are compounded by and most evident in, the application of the new standard to existing franchises,

and franchises within the renewal window. The Order assumes that tens of thousands of franchise agreements in effect today can be summarily changed—regardless of the existing modification process set forth under the Cable Act—in 120 days. This flawed assumption attempts to mask that one effect of the Order may be to invalidate all franchises and state laws where material terms are no longer enforceable. Moreover, recent actions by at least one cable operator in the midst of a franchise renewal illustrates the chaos and unnecessary waste of resources the Order portends if it is not stayed.

The record also demonstrates the irreparable harm caused by the impossibility of replacing or paying for Institutional Networks (I-Nets) in the timeframe adopted by the Commission. Movants set forth herein multiple examples—from New York City to the State of Hawaii to Murfreesboro, Tennessee—explaining how these local jurisdictions rely on their I-Nets as backbone communications networks supporting emergency services, payroll, tax payments, universities and schools, legislative functions and more. Because local governments are bound by both procurement and budgetary rules and procedures, it is impossible for I-Nets to be replaced in 120 days, meaning at the least that capacity on the I-Net dedicated for educational and government use must be shut down while local governments procure alternatives or take steps to raise funds to compensate cable operators. The harms associated with emergency calls that are unanswered or delayed, underprivileged students who lose access to tutoring and similar support, and water that is not monitored for lead levels cannot be compensated through financial means, even if there were a means to provide such remuneration, which there is not. Cable operators, on the other hand, will not be harmed by a stay until judicial review is complete because cable operators, LFAs and the Commission have all been operating under the status quo for 35 years.

The public interest supports a stay to avoid impacting public safety and blocking public benefits while the legality of the Order is ascertained. The difficulty in repeating negotiations and franchise renewal proceedings as well as the harms to the public and to local government operations all support a stay.

For the above-mentioned reasons and the reasons set forth below, Movants request a stay until judicial review of the Order is complete. Movants respectfully request action on this Motion by October 28, 2019, the deadline for filing for judicial review of the Order.

MOTION FOR STAY

Movants¹ respectfully request that the Commission stay its Order in this proceeding pending the resolution of the appeals of the Order, for reasons stated below. Movants represent a diverse range of local governments in America, all of whom are significantly and adversely affected by the Order.

I. INTRODUCTION

The Order² at issue here was adopted on a 3-2 vote on August 1, 2019, released on August 2, 2019, published on August 26, 2019, and became effective on September 26, 2019. Multiple petitions for review of the Order have been filed in the Ninth Circuit Court of Appeals.³ Movants seek a stay of the effective date of the Order pending resolution of these appeals.

The Commission reached four primary conclusions in the Order: (1) that, with few exceptions, a cable operator's costs of complying with cable-related requirements set forth in cable franchises count toward the statutory cap on franchise fees; (2) that the Commission's mixed-use

¹ Movants include the following organizations: The National League of Cities ("NLC"), the oldest and largest organization representing 19,000 cities and towns of all sizes across the country; The United States Conference of Mayors ("USCM"), the official nonpartisan organization of cities with populations of 30,000 or more, which includes 1,192 such cities in the country today; The National Association of Regional Councils ("NARC"), which represents more than 500 councils of government, metropolitan planning organizations, and other regional planning organizations throughout the nation; The National Association of Towns and Townships ("NATaT"), which represents the interests of more than 10,000 towns and townships across the country at the federal level; and The National Association of Telecommunications Officers and Advisors ("NATOA"), whose membership includes local government officials and staff members from across the nation that are impacted by the Order.

² *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Third Report and Order, MB Docket No. 05-311, FCC 19-80, 84 Fed. Reg. 44725 (August 27, 2019) ("*Order*").

³ See *City of Eugene v. FCC*, Case No. 19-72219 (9th Cir. 2019) ; *City of Portland, et al. v. FCC*, Case No. 19-72391 (9th Cir. 2019).

rule—which the Commission drastically modified in the Order—extends to incumbent cable operators that are not common carriers; (3) that state and local governments are preempted from regulating, or imposing fees on, cable operators’ non-cable services even where they otherwise have authority to do so outside the context of the Cable Act; and (4) that the Commission’s restrictions on local franchising authority regulation of cable operators should apply to state-level cable franchising actions and regulations.⁴ Movants seek a stay because the Commission’s action will irreparably harm local governments and the constituents they represent. Further, local government petitioners are likely to succeed on the merits because the Commission: 1) exceeded its authority under the Cable Act, 2) acted arbitrarily and capriciously and ignored the record, and 3) violated the Constitution.

If a stay is not granted, local governments across the country will be harmed because local governments will:

- Incur non-recoverable costs of negotiating and renegotiating long-standing agreements disrupted by the Order, and in attempting to account for the impacts of the Order in ongoing renewal proceedings;
- Face unknown costs associated with continued use of capacity dedicated for government and educational use on Institutional Networks—capacity upon which they rely for public safety, education and other local government functions—which makes it impossible to plan for, or replace, that capacity;
- Have their budgets and other resources commandeered by the Commission for the purpose of compensating cable operators in violation of legitimately adopted local franchises and state laws;

⁴ *Order* at ¶ 1.

- Lose their authority to protect local government operations and the residents they serve via taxing and other authority;
- Lose constitutionally-protected powers and rights; and
- Incur significant burdens on their ability to provide public, educational and government access (PEG) programming, even though the provision of PEG was one of the central values enshrined in the Cable Act.

In contrast, cable operators and the Commission will not be harmed if a stay is granted, because local franchising authorities and cable operators have been operating under the status quo for the past 35 years.

For all of these reasons, Movants seek a stay of the effective date of the Order until judicial review of the Order is complete. Movants respectfully request action on this Motion by October 28, 2019, the deadline for filing for judicial review of the Order.

II. LEGAL STANDARD

To qualify for a stay, a party must show that: (1) it is likely to succeed on the merits; (2) it will suffer irreparable injury absent a stay; (3) other interested parties will not be harmed by a stay; and (4) the public interest supports a stay.⁵ The first two factors are considered the most critical, and courts and the Commission apply a general balancing test between these factors when deciding whether to issue a stay.⁶ The standard for granting a stay is satisfied here.

⁵ See *Nken v. Holder*, 556 U.S. 418, 434 (2009); *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). The Commission applies the same standard applied by the courts. See *Rates for Interstate Inmate Calling Services*, Order Denying Stay Petition, 31 FCC Rcd. 10936 ¶ 9 (2016).

⁶ *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011).

III. ARGUMENT

A. Movants are Likely to Succeed on the Merits

“The first showing a stay petitioner must make is ‘a strong showing that he is likely to succeed on the merits.’”⁷ “The standard does not require the petitioners to show that ‘it is more likely than not that they will win on the merits.’”⁸ Rather, “a petitioner must show, at a minimum, that she has a substantial case for relief on the merits.”⁹ A substantial case is one that “raises serious legal questions, or has a reasonable probability or fair prospect of success.”¹⁰

Here, Movants raise serious legal questions and have more than a fair prospect of success in showing: (i) the Commission exceeds its authority in interpreting the statute in a manner that is contrary to the terms of the Cable Act; (ii) the Order is arbitrary and capricious; and (iii) the Order violates the U.S. Constitution.

1. The Order is Contrary to the Clear Terms of the Cable Act

An administrative agency is entitled to no deference to its interpretation of a statute if the language of the statute is clear and unambiguous.¹¹ Under the first step of the *Chevron* framework, if Congress has “directly spoken to the precise question at issue” using precise, unambiguous statutory language, the administrative agency is due no deference.¹² Courts are to use “traditional tools of statutory construction” to test whether the text is clear.¹³ “Absent persuasive evidence to

⁷ *Id.* (quoting *Nken*, 556 U.S. at 434).

⁸ *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012) (quoting *Leiva-Perez*, 640 F.3d at 968).

⁹ *Leiva-Perez*, 640 F.3d at 968.

¹⁰ *Id.* at 971.

¹¹ *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (an administrative agency is entitled to no deference to its interpretation of a statute if the language of the statute is clear and unambiguous) (herein “*Chevron*”).

¹² *Id.* at 842.

¹³ *Id.* at 843 n.9.

the contrary, reviewing courts are required to give statutorily defined terms their ordinary meaning.¹⁴

Here, the Commission’s interpretation of the Cable Act is owed no deference because the definition of “franchise fee” contained in the Cable Act is clear and unambiguous. In 1984, Congress defined the term “franchise fee” in the Federal Cable Act as “any tax, fee, or *assessment* of any kind *imposed by a franchising authority* or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such.”¹⁵ Though the plain meaning of this definition should end the inquiry,¹⁶ any doubt is resolved by the fact that the Cable Act expressly differentiates between franchise fees on the one hand and the costs of franchise requirements on the other.¹⁷ The basic principles of statutory construction and the legislative history of the Cable Act—not to mention judicial precedent, FCC precedent, and 35 years of past practice—render this definition unambiguous.¹⁸

Similarly, the Order’s mixed-use rule and sweeping preemption of local authority is unsupported by the Communications Act. Nothing in the Cable Act imposes any limit on authority municipalities may have outside the Cable Act to regulate those services.¹⁹ Not only is this

¹⁴ *Dallas v. FCC*, 118 F.3d 393, 396 n. 4 (5th Cir. 1997).

¹⁵ 47 U.S.C. § 542(g)(1) (emphasis added).

¹⁶ *Perrin v. United States*, 444 U.S. 37, 42 (1979) (stating that a “fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning”).

¹⁷ Compare 47 U.S.C. § 542(c)(1) with 47 U.S.C. § 542(c)(2); 47 U.S.C. § 543(b)(2)(C)(v) with 47 U.S.C. § 543(b)(2)(C)(vi).

¹⁸ See *Chevron* 467 U.S. at 843 n.9 (holding that courts are to use “traditional tools of statutory construction” to test whether the text is clear).

¹⁹ The provisions of the Act that address local authority over telecommunications services very clearly refers only to actions taken pursuant to Title VI. For example, Section 621(b)(3)(A)(i) says a cable operator providing telecommunications services “shall not be required to obtain a franchise *under this title* for the provision of telecommunications services.” (Emphasis added.) Section 621(b)(3)(A)(ii) says “the provisions *of this title* shall not apply to such cable operator ...

contrary to the statute, as the D.C. Circuit recently held in *Mozilla v. FCC*, the Commission does not have broad powers to issue sweeping preemptions of state and local regulation of information services.²⁰

The Order also contradicts Section 625, which governs modifications to franchise agreements.²¹ The Order attempts to bypass this Section to instead press franchising authorities and cable operators to negotiate informally, and threatens preemption if franchise authorities refuse.²² And the Order also purports to rewrite Section 626, substituting the term “adequate” in Section 621 for the express renewal standards set forth in Section 626.

As these examples illustrate, Movants are likely to prevail in demonstrating that the Order is beyond the scope of the Commission’s authority and contrary to the plain language of the Cable Act.

2. The Order is Arbitrary and Capricious

“The Administrative Procedure Act . . . permits . . . the setting aside of agency action that is ‘arbitrary’ or ‘capricious.’”²³ “A decision is arbitrary and capricious if the agency ‘has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the

for the provision of telecommunications services.” (Emphasis added.) Section 621(b)(3)(B) says “A franchising authority may not impose any requirement *under this title* that has the purpose or effect of prohibiting . . . the provision of telecommunications services by a cable operator. . . .” (Emphasis added).

²⁰ *Mozilla v. FCC*, No. 18-1051 (D.C. Cir. filed Oct. 1, 2019) slip. op. at 124.

²¹ See 47 U.S.C. § 545.

²² See Order at ¶ 62; see also n. 247. Compounding the issue, the Order purports to preempt franchise provisions a franchising authority refuses to modify, but provides no remedy when a cable operator refuses to agree to a modification.

²³ *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (citing 5 U.S.C. § 706(2)(A)).

product of agency expertise.”²⁴ In addition to the arguments made above, the Order cannot withstand scrutiny under the APA’s “arbitrary and capricious” standard.

For example, the Order is arbitrary and capricious because the FCC failed to answer, for a second time, several unanswered questions identified by the Sixth Circuit in *Montgomery County Maryland v. FCC*.²⁵ The FCC again fails to grapple with the consequences and statutory inconsistencies caused by its decision to include “cable-related in-kind obligations” in the franchise fee definition.²⁶ Further, the new Order identifies no rational line between franchise obligations that are a “tax, fee or assessment,” and those that are not.

The Commission also fails to address the significant public safety issues that will result from the Order.²⁷ A number of commenters expressed concerns about the threat to public safety that would arise under the Order, particularly with respect to I-Nets.²⁸ Though two Commissioners voiced concerns about these issues,²⁹ the Order contains no discussion or analysis of these impacts, which is fatal to the Order.

Other summary conclusions and unsupported assumptions in the Order—such as the assumption that the Order will lead to more investment in cable systems despite the lack of any

²⁴ *O’Keeffe’s, Inc. v. U.S. Consumer Product Safety Com’n*, 92 F.3d 940, 942 (9th Cir. 1996) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). See also *Chevron U.S.A. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984) (“A court may not substitute its own construction of a statutory provision for a *reasonable* interpretation made by the administrator of an agency.” (emphasis added)).

²⁵ *Montgomery County v. FCC*, 863 F.3d 485 (6th Cir. 2016).

²⁶ The *Montgomery County* Court found that the Commission did not respond to several LFA arguments, including their argument that “if the costs of [PEG channels, I-Nets and anti-redlining obligations] count toward the five-percent cap, the Regulators will not be able to impose these requirements in the first place, thereby thwarting Congress’s intent in enacting these provisions.” *Montgomery County*, 863 F.3d at 491.

²⁷ *Mozilla*, slip op. at 93-94.

²⁸ See Order at ¶55 n. 221.

²⁹ See Order, Dissenting Statements of Commissioners Rosenworcel and Starks.

rational economic analysis—similarly render it arbitrary and capricious. And there are numerous examples of the Commission’s failure to consider important aspects of the issues impacted by the Order. One of the most important relates to the requirement that franchise provisions be valued at their “fair market value” for purposes of offsetting franchise fee payments.³⁰ The Order does not analyze or even address the record evidence that in many cases cable operators have fully recovered the cost of these networks or obligations (plus interest) either through a line-item fee or cable rates (per the Cable Act), which would allow cable operators to double recover these costs. Further, the Order finds that the “ongoing costs associated with the maintenance or operation” of PEG transport is a “franchise fee,”³¹ but provides no guidance as to how the fair market value of PEG transport is to be calculated. Finally, the Commission failed to address how Section 622(e), which requires cable operators to “pass through to subscribers the amount of any decrease in a franchise fee,” impacts its goal of incentivizing cable operators to deploy more infrastructure.³² While cable operators may be writing smaller checks to LFAs, they will not pocket any savings, which undermines the notion that the Order will enable additional deployment.

3. The Order Is Unconstitutional

Movants have more than a fair prospect of success in demonstrating that the Order violates the Tenth and Fifth Amendments.

With respect to the Tenth Amendment, the Supreme Court recently affirmed that “‘the federal government’ may not ‘command the state’s officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.’”³³ The Order does exactly that by directing

³⁰ See Order at ¶ 55.

³¹ Order at ¶ 49.

³² See Order, Appendix B at ¶ 3.

³³ *Murphy v. National Collegiate Athletic Ass’n.*, 138 S. Ct. 1461, 1477 (2018) (quoting *Printz v. United States*, 521 U.S. 898, 935 (1997).)

state and local governments to surrender their property and management rights to “advance ... federal policies” related to broadband deployment.³⁴ By barring local government oversight of its rights-of-way, as the Order does in the “mixed-use rule,” the Commission is effectively commanding local government to grant right-of-way access on the terms the Commission, not local government or the states, set. This is textbook commandeering.

The Order also raises significant Fifth Amendment concerns by, among other things, authorizing private use of municipal property without just compensation.³⁵ The Order’s preemption of regulation of information services provided by a franchised cable operator unduly deprives municipalities of fair and reasonable compensation for use of the scarce and valuable public rights-of-ways.³⁶ Further, the Commission’s proposed *ex post facto* modification of franchise contracts confers only a private benefit and offers no public use, which is an impermissible taking under the Fifth Amendment.³⁷

B. Movants Will Suffer Irreparable Injury Absent a Stay

The inquiry under the second factor focuses on the likelihood of irreparable injury absent the issuance of the stay.³⁸ “But, in contrast to the first factor, we have interpreted *Nken* as requiring the applicant to show under the second factor that there is a probability of irreparable injury if the stay is not granted.”³⁹ Parties must show that irreparable injury is not merely possible but

³⁴ Order at ¶ 103.

³⁵ Order at ¶ 90.

³⁶ See *St. Louis v. W. Union Tel. Co.*, 148 U.S. 92, 101 (1893).

³⁷ See *Kelo v. City of New London*, 545 U.S. 469 (2005); *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229 (1984).

³⁸ See *Nken v. Holder*, 556 U.S. at 434-35.

³⁹ *Lair v. Bullock* 697 F.3d 1200, 1214 (9th Cir. 2012) (citing *Leiva-Perez*, 640 F.3d 962, 968 (9th Cir. 2011)).

probable.⁴⁰ “In analyzing whether there is a probability of irreparable injury, we also focus on the individualized nature of irreparable harm and not whether it is ‘categorically irreparable.’”⁴¹ However, despite this individualized analysis, harms to constitutional rights are assumed to constitute irreparable injury. “It is well established that the deprivation of constitutional rights ‘unquestionably constitutes irreparable injury.’”⁴²

1. The Effects of the Order will Harm Movants Irreparably

There is ample evidence in the record that LFAs will be irreparably harmed should this Order take effect prior to resolution of the pending appeals. Several specific examples are detailed below, though it is important to note that the Order will require modifications to the franchise fee payments and/or franchise obligations of the overwhelming majority of the tens of thousands of cable franchises in effect today.⁴³ The Order states that compliance with the Commission’s interpretation of the Act “is not optional.”⁴⁴ As interpreted by one cable operator, this statement means “these requirements *may not be waived* by either an LFA or a cable operator, but rather must be complied with in every franchise as a matter of federal law.”⁴⁵ The Order contemplates

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

⁴³ See *Ex Parte* Letter from NCTA at 4 (Mar. 21, 2019) (Stating that “[t]here are tens of thousands of cable franchises across the country” and estimating that “80-90% of franchises impose some level of free video services,” which is just one of the “in-kind” deductions noted in the Order).

⁴⁴ *Order* at ¶ 63 n. 251.

⁴⁵ *In re Comcast Cable Television Franchise Renewal Applications to Member – Northern Dakota County Cable Communications Commission*, Case No. OAH 8-8047-36195, Comcast of Minnesota Inc.’s Memorandum of Law in Support of Motion in Limine (“Comcast Brief”) at 7 (emphasis in original). Comcast refers to this as the “non-waiver rule.” The Comcast Brief is filed herewith as Exhibit A.

that these modifications will require negotiations, and assumes that agreement normally will be reached within 120 days.⁴⁶

In short, in the next four months, changes will be made to tens of thousands of existing, mutually-agreed upon franchises—an effort that will require significant resources from both LFAs and cable operators. This massive, expensive undertaking should be reason enough to delay the effective date of the Order until after the appeal process is complete.

To make matters worse, as more fully explained below, the result of these negotiations will have ripple effects that go well beyond the expense of renegotiation. Decisions to relieve cable operators of their previous agreements to provide I-Net and cable services, for example, will require schools, police and fire departments and libraries to find new funding and perhaps go through a competitive procurement process to replace these services. Decisions to reduce franchise fee revenue in order to retain these services will force budget reductions, which the record demonstrates will impact public safety and PEG channels, among other things.⁴⁷ The magnitude of the changes wrought by the Order warrants a stay, as these tens of thousands of changes across the country cannot ever be fully undone.

a. The Order upends the renewal process that is ongoing in many jurisdictions.

LFAs currently in the renewal process will be irreparably harmed even if the Order is vacated on review. The Order’s new interpretation of the Act will require abandoning previous

⁴⁶ *Order* at ¶ 62 and n. 247.

⁴⁷ *See County of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 526-28 (N.D. Ca. 2017) (justifying an injunction because challenged decision “places at risk funds on which the Counties could previously rely that is causing them harm” including obligation to set aside reserve funds and risk of loss of public safety through reallocating funds). *See also Clinton v. City of New York*, 524 U.S. 417, 438 (1998); *Organized Village of Kake v. U.S. Dep’t of Agric.*, 795 F.3d 956, 965 (9th Cir. 2015).

negotiations on franchise provisions implicated by the Order and incurring significant additional expense to start the process again should the Order be vacated.⁴⁸ Moreover, the Act does not have any clear mechanism to recover the costs of repeated renegotiations as the interpretation of the Act changes.

These harms are evident in the experience of the Northern Dakota County Cable Communications Commission (NDC4) renewal. There, the cable operator has taken the position that the Order's clarifications of the Cable Act "conclusively answer" the issues raised in the formal renewal process and the "statutory clarifications and guidance in the *621 Order* must be followed, and may not be collaterally attacked in this or any other proceeding, notwithstanding an appeal."⁴⁹ The cable operator's position that NDC4 has no ability to challenge the conclusions in the Order in the formal renewal process would require NDC4 to complete the renewal process—meaning, enter into a new franchise or risk litigation under Section 626—based on the holdings of the Order that may ultimately not withstand scrutiny.

In addition, the Order's interpretation of the Act as applying the "adequate" standard to the renewal process—despite the "reasonable" standard expressly established in Section 626—will irreparably harm LFAs currently undergoing franchise renewals. In NDC4's case, the cable operator is now arguing, based on the Order, that the correct standard for the PEG provisions of the renewal is "adequate."⁵⁰ The operator appears to intend to challenge, through an evidentiary

⁴⁸ See, e.g., Reply Comments of the City of Philadelphia *et al.* at 7, MB Docket No. 05-311 (Dec. 14, 2018) ("Philadelphia Reply Comments") (describing the resources that go into the franchise renewal process: "Literally hundreds of task hours were spent on both sides of the negotiating table reviewing and discussing the needs demonstrated, various ways to meet those needs and the cost of meeting those needs.")

⁴⁹ Comcast Brief, at 9, n. 1.

⁵⁰ Comcast Brief at 8.

process with a hearings officer, the needs ascertainment (completed long before the Order was even in the rulemaking stage) on the new “adequacy” standard first established in the Order:

And, as the 621 Order makes clear, both LFAs and cable operators must ensure that any renewal franchise complies with the five percent cap on franchise fees and “adequacy” standards in the Cable Act. These requirements cannot be waived. *** Under section 546(c)(2), therefore, Comcast has a federal statutory right to introduce evidence and legal argument challenging the basis for and reasonableness of NDC4’s community needs ascertainment, as well as the reasonableness and lawfulness of NDC4’s renewal demands based on that ascertainment.⁵¹

The Order puts NDC4, and all other LFAs in the renewal process, in an untenable position that cannot be remedied if the Court of Appeals vacates the Order. NDC4 must complete its renewal process pursuant to Section 626, but it is not clear what remedy, if any, NDC4 would have to turn back the clock to undo the franchise that comes out of its formal process, or to recoup the administrative and legal costs related to that process. At best, NDC4 will have to renegotiate the franchise yet again should the Order be vacated even in part, and again there is no clear means to recover the significant costs of these duplicative efforts. Other LFAs who have completed the renewal process’s ascertainment study, which is designed to identify “reasonable” needs and interests as directed in Section 626, face the prospect of redoing these extensive studies to look at what is “adequate” as well. In many instances there is no mechanism to recoup the costs to the LFA.⁵²

Finally, the cable operator appears to read the Order as requiring NDC4 to calculate and offset its franchise fees regardless of any engagement by the cable operator, arguing it “would

⁵¹ Comcast Brief at 11.

⁵² See *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking at ¶ 104, 22 FCC Rcd 5101 (2007) (finding that attorney and consultant fees are considered “franchise fees” and thus, if collected from the cable operator, would result in an offset of franchise fee payments—effectively requiring the LFA to absorb the costs).

violate the Cable Act and non-waiver rule” if NDC4 does not “offset against ... franchise fees the full amount of PEG-related funds” pursuant to the Order. The assertion that LFAs have the obligation to calculate franchise fee reductions contemplated by the Order shifts to LFAs the time consuming and expensive burdens of complying with the Order and renders LFAs disproportionately at risk of litigation related to compliance with the demands of the Order.

The language of the Order makes these positions available to all franchisees that are in renewal negotiations, and it is naïve not to expect that many will use them in both formal and informal renewal. If the Order is overturned, LFAs nonetheless may be locked into franchises based on the Order for the entire (usually 10 or 15 year) term.

b. The Order’s impacts on I-Nets will irreparably harm LFAs and communities.

Under the Order, an operator apparently will be permitted to charge for construction of an I-Net (that is, a network designed to serve the non-residential users), for maintaining an I-Net, and for any service provided by the operator with respect to an I-Net.⁵³ I-Nets are an integral part of the communities in which they have been deployed. They are often used for public safety communications—*e.g.*, backhaul for emergency radio systems and other police, fire and EMS dispatch functions—as well as for day-to-day municipal communications and processes such as payroll, tax payments, and other fiscal processing functions without which the city simply cannot function. Going without is not an option without putting citizens at physical risk and shutting down city functions essential to public health, safety and welfare. The Order forces LFAs with I-Nets to figure out how to fund this critical infrastructure and, perhaps, procure alternative services. Either choice results in irreparable harm, particularly under the presumption that the choice can be implemented in 120 days.

⁵³ See Order at ¶ 55.

The City of New York described the significant, irreparable harms they will incur under the Order: “Every City agency is in some fashion using the City’s I-Net,” which has been in place close to fifty years.⁵⁴ “City services, including public safety services, [are] at risk” under the Order.⁵⁵ The City’s Fire Department uses the I-Net for “critical public safety communications and to support all firehouses’ connectivity” and there is “no viable alternative” to the I-Net.⁵⁶ Building a parallel network would take years and critical services would be “completely disrupted” if the City attempted to competitively bid for alternative services.⁵⁷

The State of Hawaii provides another example. In Hawaii, the I-Net is “the backbone of the State’s communications infrastructure.”⁵⁸ The I-Net “operates as the primary communications infrastructure for all State and county government agencies in Hawaii. In short, all or most of the State and local governmental agencies use the INET [in] some form or manner on a daily basis including, but not limited to, the University of Hawaii, the Hawaii State legislature, the State Judiciary, the social service agencies, and local police and fire stations.”⁵⁹ “[I]f the State were forced to purchase INET capacity at retail rates, the costs would greatly exceed what the State would be able to pay[,]” leaving the State without this critical infrastructure.⁶⁰ Further exacerbating the issues in Hawaii, the State likely has no alternative to its I-Net because “[t]he level of

⁵⁴ *Ex Parte* Letter from NYC Department of Information Technology and Telecommunications at 1 (July 25, 2019).

⁵⁵ *Id.* at 2.

⁵⁶ *Id.* at 1.

⁵⁷ *Id.* at 1-2.

⁵⁸ Comments of the State of Hawaii at 6, MB Docket No. 05-311 (Nov. 14, 2018).

⁵⁹ *Id.* at 11.

⁶⁰ *Id.* at 8.

connectivity provided by the State's INET matches, and in most cases exceeds, the capacity available from competitive telecommunications carriers in Hawaii."⁶¹

Smaller jurisdictions are also impacted, as reflected in the record. For example, the City of Murfreesboro, Tennessee commented that the "I-Net provides broadband communication services to our public schools, fire and police stations, 911 communications center, emergency operation center, and other government institutions/buildings to benefit in part the safety and welfare of our citizens."⁶² The I-Net was "completely paid for and funded by cable subscribers via a separate line item on their bill"⁶³ so if taxpayers must fund a new I-Net, many citizens will have paid twice (with no additional services or facilities to show for it).

The Order assumes that LFAs can comply with the Order simply by allowing the deduction from franchise fees of the "fair market value" of their I-Nets. This assumption ignores the likelihood that many LFAs will be required to undertake a procurement process required by state and local law for these services rather than simply paying the cable operator. The process for procuring replacement networks is complicated, time-consuming and uncertain. In most jurisdictions, such high-cost procurements are governed by competitive bidding laws that make it impossible to replace an I-Net in anything close to the 120 day time frame contemplated by the Commission, and expose local governments to legal challenge, creating more delay and the risk of monetary damages if they shorten the process to the Commission's apparently arbitrary time frame.

Municipal budgets are governed by laws (often state laws) that require an annual budgeting process that does not permit quickly shifting funds from one purpose to another. These budgeting

⁶¹*Id.* at 6.

⁶² Comments of the City of Murfreesboro, TN at 2, MB Docket No. 05-311 (Nov. 6, 2018).

⁶³ *Id.*

processes, which typically require hearings and action by the city’s legislative body, as well as months of preparation by the city’s administration, preclude funding I-Net replacement in anything close to the Commission’s 120 day timeline. Further, the funds that will have to be shifted to pay for I-Net services will mean other services are not provided. Compounding these harms is the fact that there is no practical way to address the risk, as LFAs do not know how any given cable operator will calculate the “fair market value” of the I-Net (another issue on which the Order provides no meaningful guidance). LFAs have no means of planning to fund whatever this amount may be, and even assuming they can find the funds by cutting elsewhere, it is probable they would experience a complete loss of their I-Nets during the procurement process. In the case of many such services, the harm to affected citizens is irreparable in that it cannot be compensated for by later taxing and spending.⁶⁴

c. The impacts of the loss of franchise fees is irreparable and cannot be adequately compensated by monetary damages.

LFAs that choose to forego franchise fees to “pay” for previously agreed-upon franchise requirements will be required to divert funds from other public needs—like police, fire and other public services. Even if cable operators are required to return these payments should the Order be vacated, this cannot undo the harm caused by having fewer police officers or fire fighters available when the need arises. Examples of these harms in the record abound.⁶⁵

⁶⁴ Clear examples are emergency calls that are unanswered or delayed, resulting in physical injury or death; special educational services not delivered to special needs students; after-school programs, tutoring and similar support for students from underprivileged backgrounds, cuts to homeless services, and cuts to water and air quality monitoring and remediation (lead levels in municipal water systems is an obvious example). The loss of such services cannot be “repaired” by the Order being vacated on appeal and the funds restored, or even by later increases in taxing and spending to compensate for the lost funds. The impact on recipients who do not receive such services is permanent.

⁶⁵ See, e.g., *Ex Parte* Letter from Town of Pelham, MA at 1 (July 25, 2019) (“The loss of revenue caused by the Third Report and Order will force municipalities like Pelham to divert key

PEG access channels are uniquely vulnerable under the Order, which targets many PEG-related franchise provisions for franchise fee set-offs. This is especially true for the significant number of PEG channels that rely on franchise fees for their funding. As amply described in the record, a decrease in those funds will slash PEG programming and, in some cases, shutter PEG stations entirely.

For example, the City of Montague, Massachusetts’s comments stated that “any disruption to our funding stream will force the closure of our center,” which, for more than thirty years, has “allow[ed] the most marginalized segments of the population the opportunity to participate in civics and culture via the cable system.”⁶⁶

The City of Toppenish, Washington found that “[r]eduction in franchise fee would end [the public and government access] program in our four cities.”⁶⁷ Toppenish has no local newspaper or local news media coverage, so the “Community Access Channel is the only local avenue for local school events, community events, non-profits and city government to share information with our citizens.”⁶⁸

resources away from core municipal and school resources harming our community and our local government.”); Comments of the City of Wilsonville, Oregon at 1, MB Docket No. 05-311 (Nov. 14, 2018) (“The cable operators each pay to the City a ‘franchise fee’ which is used to support both Public-Education-Government (PEG) services and general government services, e.g., street maintenance, fire, police, parks.”); Comments of the City of Sherwood, Oregon at 1, MB Docket No. 05-311 (Oct. 25, 2018) (“With a potential reduction in franchise fees the City of Sherwood will likely be forced to cut public services such as those handled by our Police, Library, and Parks departments.”); Comments of King County, Washington at 8, MB Docket No. 05-311 (Nov 13, 2018) (“King County utilizes the franchise fee payments that it receives from [cable operators] to fund several General Fund agencies, including the Police and Fire Departments. A reduction in these fee collections will have a significant negative impact on those agencies ‘ budgets.”).

⁶⁶ Comments of Montague, MA at 1, MB Docket No. 05-311 (Dec. 13, 2018).

⁶⁷ Comments of the City of Toppenish, Washington at 2, MB Docket No. 05-311 (Oct. 30, 2018).

⁶⁸ *Id.* at 1.

The Philadelphia School District described how “[a] reduction or complete loss of funding under the City of Philadelphia’s current cable franchising would be incredibly detrimental to the School District’s ability to continue providing educational access services to our student community ... especially to those that are economically disenfranchised in the Philadelphia community.”⁶⁹ The School District found that even “an *interruption* in this funding would target and eliminate a wide array of existing and proven opportunities for the most important segment of our population: our children and young adults.”⁷⁰

As noted above, these harms are not theoretical. The franchise fee reductions and/or franchise modifications are “not optional.”⁷¹ Once these changes are made to the tens of thousands of cable franchise agreements across the country, the harm cannot be remedied.

2. The Order Violates Movants’ Constitutional Rights

Movants will suffer irreparable injury absent a stay because their constitutional rights will be injured. As discussed above, Movants’ Tenth Amendment and Fifth Amendment rights will be injured by this Order. In the context of preliminary relief, the deprivation of constitutional rights is unquestionably an irreparable injury.⁷²

C. A Stay Will Not Harm Other Parties and Is in the Public Interest

The inquiry under the third and fourth factors focuses on the opposing party’s interests and the public interest. “Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and weighing the public interest.”⁷³ When the

⁶⁹ Comments of the School District of Philadelphia at 6-7, MB Docket No. 05-311 (Dec. 14, 2018).

⁷⁰ *Id.* (emphasis added).

⁷¹ *Order* at n. 251.

⁷² *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

⁷³ *Nken v. Holder*, 556 U.S. at 435.

government is the opposing party, these factors merge.⁷⁴ LFAs and cable operators have been operating under the prior interpretation of the Cable Act for over three decades. Maintaining the long-standing status quo pending judicial review of the Order would not harm other parties, and would serve the public interest.

1. Other Parties Will Not Be Harmed by a Stay Because they are Flourishing Under the Status Quo

Granting a stay will maintain the current regulatory framework pending judicial review of the Order, and would not harm either the Commission or other parties. A stay will maintain the status quo, allowing all parties—including the cable industry—to avoid expending significant and potentially unnecessary costs to conform to a fundamentally different regulatory regime that is fraught with uncertainty.

As a result of the Order, cable operators will have to negotiate thousands of franchise modifications with communities across the country. These negotiations will, in turn, require cable operators to make other adjustments—change their billing practices and adjust I-Net and complementary services—to comply with the negotiated modifications. It is in the interest of cable operators to wait until a final decision is made on the Order before taking the time and incurring the cost of compliance efforts.

Further, because the explicit provisions of the Cable Act require any franchise fee reductions to be directly passed through to subscribers,⁷⁵ cable operators will not be foregoing revenues during any period the Order is stayed. To the contrary, they will be avoiding the costs of implementing the Order while the court determines its enforceability.

⁷⁴ *Id.*

⁷⁵ 47 U.S.C. § 542(e) (“Any cable operator shall pass through to subscribers the amount of any decrease in a franchise fee.”).

Finally, the cable franchising model LFAs and cable operators have followed for over three decades has resulted in cable companies having the most robust broadband systems in the country.⁷⁶ There is no reason to believe a delay in the effective date of the Order would impact that long-standing trend.

2. Granting a Stay is in the Public Interest

The D.C. Circuit recently recognized that where the Commission's Orders threaten public benefits in the name of eliminating costs, granting a stay may be in the public interest.⁷⁷ "While there may be some public benefit to eliminating unnecessary spending, the Tribal Lifeline program has been in existence for nearly two decades, and the Federal Communications Commission has not demonstrated that allowing it to continue in its current form while these consolidated cases remain pending will result in significant harm to the government or the public at large."⁷⁸

Here, the unprecedented reinterpretation of the Cable Act, in a manner that is contrary to decades of practice and the settled understanding of the parties, threatens public safety operations flowing over critical I-Net infrastructure, PEG operations providing local news and services to communities across the nation, carefully negotiated digital equity programs, and local government budgets set prior to the Order's implementation, as detailed in section B, *supra*. These harms will directly affect the public interest.

Further, the public interest would be harmed by proceeding with implementation of this radical change before judicial review of the Order is complete. If the Order is overturned, cable

⁷⁶ See Philadelphia Reply Comments at 14-16.

⁷⁷ See *Nat'l Lifeline Ass'n v. FCC*, No. 18-1026, 2018 WL 4154794, at *2 (D.C. Cir. Aug. 10, 2018).

⁷⁸ *Id.*

operators will owe LFAs un- or underpaid franchise fees, which they presumably will choose to recover from subscribers.⁷⁹

Finally, “[i]t is in the public interest for courts to carry out the will of Congress and for an agency to implement properly the statute it administers.”⁸⁰ Movants have raised significant doubts about the foundation upon which this Order rests and thus the public interest is best served by a stay.

IV. CONCLUSION

For the foregoing reasons, Movants respectfully request that the Commission stay the effective date of the Order until after the decision on appeal of the Order. In the interim, existing laws and standards, as defined by the courts and the Commission, would remain in place.

Respectfully submitted,

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⁷⁹ See 47 U.S.C. § 542(c).

⁸⁰ *Sherley v. Sebelius*, 644 F.3d 388, 405 (D.C. Cir. 2011) (quoting *Mylan Pharms., Inc. v. Shalala*, 81 F.Supp.2d 30, 45 (D.C. Cir. 2000)).