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17 **UNITED STATES DISTRICT COURT**  
18 **NORTHERN DISTRICT OF CALIFORNIA**  
19 **SAN JOSE DIVISION**

20 **COMCAST OF CALIFORNIA II, L.L.C.,** )  
21 )  
22 Plaintiff, )  
23 )  
24 v. )  
25 )  
26 **CITY OF SAN JOSE, CALIFORNIA,** )  
27 )  
28 Defendant. )

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Case No. C03-02532RS

MEMORANDUM OF LAW IN SUPPORT  
OF PLAINTIFF'S MOTION FOR A  
PRELIMINARY INJUNCTION

Date: August 13, 2003

Time: 9:30 a.m.

Judge: The Hon. Richard Seeborg

Courtroom: 4

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
INTRODUCTION .....	1
STATEMENT OF RELEVANT PROCEDURAL HISTORY.....	2
ARGUMENT .....	6
I. COMCAST IS LIKELY TO PREVAIL ON THE MERITS.....	7
A. San Jose's Rules of Procedure Violate Section 546 of The Federal Cable Act And Constitutional Due Process.....	8
1. San Jose's Rules of Procedure Violate the Federal Cable Act and the Due Process Clause by Delegating Franchising Authority to a Hearing Officer and Entrusting that Hearing Officer with Unfettered Discretion. ....	9
2. San Jose's Rules of Procedure Violate the Federal Cable Act and Due Process by Failing to Require that the City Provide Comcast with Adequate Notice of the Bases for Its Claims in Support of Denial in Advance of the Administrative Renewal Proceeding.....	13
B. The Minimum Requirements of the RFRP and Model Ordinances Significantly Burden Speech and Violate The First Amendment Rights of Comcast.....	16
1. The City Cannot Show that It Has an Important or Substantial Interest in the Illegal Requirements of the RFRP and the Model Ordinances. ....	17
a. The RFRP Dictates Transmission Technology in Violation of 47 U.S.C. § 544(e).....	18
b. City Demands for an Institutional Network Exceed the City's Authority Under the Federal Cable Act and State Law.....	20
c. The RFRP Demands Non-Cable Services in Contravention of Federal Law. ....	24
d. PEG Demands Exceed the Scope and Purpose of Section 531.....	24

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
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21  
22  
23  
24  
25  
26  
27  
28

2. The Minimum Requirements Burden Substantially More  
Speech Than Necessary To Advance Any Legitimate  
Interests of the City and Are Overbroad. ....25

II. COMCAST CAN DEMONSTRATE IRREPARABLE HARM.....28

A. Based on San Jose's First Amendment Violations, Comcast Is  
Entitled To A Presumption Of Irreparable Harm. ....29

B. Comcast Stands to Suffer Irreparable Injury To Its Financial  
Interests if the Administrative Proceeding is Not Enjoined.....31

III. THE PUBLIC INTEREST AND BALANCE OF HARMS FAVOR  
GRANTING COMCAST AN INJUNCTION.....32

CONCLUSION.....35

**TABLE OF AUTHORITIES**

**Page(s)**

**Cases:**

*AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000) .....24

*Altmann v. Television Signal Corp.*, 849 F. Supp. 1335 (N.D. Cal. 1994).....30

*Arcamuzi v. Cont’l Air Lines, Inc.*, 819 F.2d 935 (9th Cir. 1987) .....7

*Associated Producers Co. v. City of Independence, Mo.*, 648 F. Supp.  
1255 (W.D. Mo. 1986).....32

*Ayers v. City of Chicago*, 966 F. Supp. 701 (N.D. Ill. 1997).....34

*Billington v. Underwood*, 613 F.2d 91 (5th Cir. 1980).....13

*Bloom v. O'Brien*, 841 F. Supp. 277 (D. Minn. 1993).....34

*Bullfrog Films, Inc. v. Wick*, 847 F.2d 502 (9th Cir. 1988).....11, 34

*Burkow v. City of Los Angeles*, 119 F. Supp. 2d 1076 (C.D. Cal. 2000).....30

*Century Federal, Inc. v. City of Palo Alto, Cal.*, 710 F. Supp. 1552  
(N.D. Cal. 1987).....18

*Chalk v. U.S. Dist. Court Cent. Dist. of Cal.*, 840 F.2d 701 (9th Cir. 1988).....32

*Chicago Cable Communications v. Chicago Cable Comm’n*, 879 F.2d  
1540 (7th Cir. 1989).....27

*City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999) .....22

*City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750 (1988).....11

*City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488  
(1986).....16

*City of New York v. FCC*, 486 U.S. 57 (1988) .....19, 20

*Clear Channel Outdoor, Inc. v. City of Los Angeles*, 234 F. Supp. 2d 1127  
(C.D. Cal. 2002).....30

*Demarest v. Athol/Orange Cmty. Television, Inc.*, 188 F. Supp. 2d 82  
(D. Mass. 2002).....33

*Elrod v. Burns*, 427 U.S. 347 (1976) .....29

*FCC v. Pottsville Broad. Co.*, 309 U.S. 134 (1940) .....13

1 *Firecross Ministries v. Municipality of Ponce*, 204 F. Supp. 2d 244  
(D.P.R. 2000) .....34

2 *Foti v. City of Menlo Park*, 146 F.3d 629 (9th Cir. 1998) .....30

3 *Gai v. City of Selma*, 79 Cal. Rptr. 2d 910 (Cal. Ct. App. 1998) .....12, 13

4 *Grayned v. City of Rockford*, 408 U.S. 104 (1972) .....11

5 *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954  
6 (N.D. Cal. 1987).....17, 18, 30

7 *Hess & Clark, Div. of Rhodia, Inc. v. FDA*, 495 F.2d 975 (D.C. Cir. 1974).....14

8 *Hoffman Estates v. Flipside*, 455 U.S. 489 (1992) .....12

9 *Howard v. City of Jacksonville*, 109 F.Supp. 2d 1360 (M.D. Fla. 2000) .....34

10 *In re Ruffalo*, 390 U.S. 544 (1968) .....14

11 *James P. v. Lemahieu*, 84 F. Supp. 2d 1113 (D. Haw. 2000).....7

12 *Jones Intercable of San Diego, Inc. v. City of Chula Vista*, 80 F.3d 320  
13 (9th Cir. 1996).....31

14 *Leathers v. Medlock*, 499 U.S. 439 (1991) .....16

15 *Matthews v. Eldridge*, 424 U.S. 319 (1976) .....13, 15, 29

16 *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991).....29

17 *Morgan v. United States*, 30 U.S. 1 (1938) .....14

18 *Napa Valley Publ'g Co. v. City of Calistoga*, 225 F. Supp. 2d 1176  
(N.D. Cal. 2002).....12, 30, 34

19 *Navato v. Sletten*, 560 F.2d 340 (8th Cir. 1977) .....14

20 *North Ala. Express, Inc. v. United States*, 585 F.2d 783 (5th Cir. 1978) .....13

21 *Oakland Tribune Inc. v. Chronicle Publ'g Co., Inc.*, 762 F.2d 1374 (9th  
22 Cir. 1985) .....7

23 *One World One Family Now, Inc. v. State of Nevada*, 860 F. Supp. 1457  
(D. Nev. 1994) .....34

24 *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604 (9th Cir. 1993).....11, 12

25 *Pac. W. Cable Co. v. City of Sacramento*, 672 F. Supp. 1322  
26 (E.D. Cal 1987) .....18, 27

27 *Perez-Funez v. District Dir., INS*, 611 F. Supp. 990 (C.D. Cal. 1984) .....32

1 *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396  
(9th Cir. 1985).....17

2 *Preferred Communications, Inc. v. City of Los Angeles*, CV 83-5846, 1990  
3 U.S. Dist. LEXIS 20205 (C.D. Cal. Jan. 5, 1990), *aff'd in part*,  
4 *vacated and remanded in part on other grounds*, 13 F.3d 1327  
(9th Cir. 1994).....18

5 *Ram v. Heckler*, 792 F.2d 444 (4th Cir. 1986) .....29

6 *Rolla Cable System, Inc. v. City of Rolla*, 761 F. Supp. 1398  
(E.D. Mo. 1991).....14

7 *Ry. Labor Executives' Ass'n v. Gibbons*, 448 U.S. 1301 (1980).....32

8 *Sammartano v. First Judicial Dist. Court in and for the County of Carson*  
9 *City*, 303 F.3d 959 (9th Cir. 2002).....29, 30, 33

10 *San Diego Comm. v. Governing Bd.*, 790 F.2d 1471 (9th Cir. 1986),  
*distinguished on other grounds* (same).....30

11 *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970) .....32

12 *Senate of Cal. v. Mosbacher*, 968 F.2d 974 (9th Cir. 1992).....2, 6, 7

13 *State of Alaska v. Native Vill. of Venetie*, 856 F.2d 1384 (9th Cir. 1988) .....7

14 *Time Warner Cable v. Bloomberg*, 118 F.3d 917 (2d Cir.1997).....25

15 *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957  
16 (D.C. Cir. 1996) .....26

17 *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622 (1994) .....16, 17, 18, 25, 26

18 *United States v. O'Brien*, 391 U.S. 367 (1968) .....17, 18, 26

19 *United States v. Odessa Union Warehouse Co-op*, 833 F.2d 172  
(9th Cir. 1987).....7

20 *Univ. Books & Videos, Inc. v. Metro. Dade County*, 33 F. Supp. 2d 1364  
21 (S.D. Fla. 1999).....34

22 *Varandani v. Bowen*, 824 F.2d 307 (4th Cir. 1987) .....29

23 *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).....17, 26

24 *Welker v. Cicerone*, 174 F. Supp. 2d 1055 (C.D. Cal. 2001) .....34

25 *Williams v. County of Los Angeles*, 22 Cal. 3d 731 (Cal. 1978) .....12, 13

26 *Wolff v. McDonnell*, 418 U.S. 539 (1974) .....14

Statutes:

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

47 C.F.R. § 76.922(f) .....23

42 U.S.C. § 1983.....6

42 U.S.C. § 1988.....31

47 U.S.C. § 521 et seq.....1

47 U.S.C. § 521(4) .....8

47 U.S.C. § 531.....20, 21, 22, 23, 26

47 U.S.C. § 531(b) .....22

47 U.S.C. § 531(e) .....26

47 U.S.C. § 531(f).....22

47 U.S.C. § 532.....22

47 U.S.C. § 541(b)(3)(D).....21, 22, 24

47 U.S.C. § 542(b) .....23

47 U.S.C. § 542(g)(1) .....23

47 U.S.C. § 542(g)(2)(C) .....23

47 U.S.C. § 543(a) .....25

47 U.S.C. § 543(b)(4) .....23

47 U.S.C. § 544(b)(1) .....24

47 U.S.C. § 544(e) .....18, 19, 20

47 U.S.C. § 546..... *passim*

47 U.S.C. § 546(c) .....1, 4

47 U.S.C. § 546(c)(1).....15

47 U.S.C. § 546(c)(2).....8, 9, 13, 14

47 U.S.C. § 546(c)(3).....8, 9

47 U.S.C. § 546(e)(1).....6, 28

47 U.S.C. § 555.....6, 28

	<u>Page</u>
1 47 U.S.C. § 555a(a).....	31
2 47 U.S.C. § 626.....	8, 22
3 Chapter 15.28 of the San Jose Municipal Code.....	31
4 Section 2.1.1 of Cable Franchise Ordinance.....	24
5 Section 11.3 of Cable Franchise Ordinance .....	24
6 <b><u>Legislative Materials:</u></b>	
7 H.R. Rep. No. 98-934, at 25 (1984), <i>reprinted in</i> 1984 U.S.C.C.A.N. 4655.....	8, 9, 21, 25
8 S. Conf. Rep. No. 104-230, at 180 (1996) .....	21
9 <b><u>Administrative Materials:</u></b>	
10 <i>In re Implementation of Section 302 of the Telecommunications Act of</i> 11 <i>1996 - Open Video Sys., Third Report &amp; Order and Second Order</i> <i>on Reconsideration, 11 FCC Rcd 20,227 (1996).....</i>	22
12 <i>In re Inquiry Concerning High-Speed Access to the Internet Over Cable</i> 13 <i>and Other Facilities, 17 FCC Rcd 4798 (2002) appeal pending.....</i>	24
14 <i>In re TCI Cablevision of Oakland County, Inc., 13 FCC Rcd 16,400</i> <i>(1998), aff'g, 12 FCC Rcd 21,396 (1997) .....</i>	24
15 <i>Report and Order, 14 FCC Rcd 5296, recon. denied, 17 FCC Rcd 7609 (2002).....</i>	19

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1 **INTRODUCTION**

2 In 1984 Congress enacted the Federal Cable Act, 47 U.S.C. § 521 et seq., to limit  
3 overreaching and coercive behavior of local franchising authorities by establishing uniform federal  
4 limits on cable-related franchising authority activities, including, among others, renewal of local  
5 franchise agreements, and to rationalize overlapping federal and state regulation of cable  
6 television. Since the Act was passed, few cable operators have sought judicial intervention under  
7 the franchise renewal provisions of the Federal Cable Act, 47 U.S.C. § 546, undoubtedly because  
8 they have not been faced with franchise renewal processes in which a franchising authority has  
9 injected as many legal and constitutional irregularities as the City of San Jose, California has here,  
10 or been faced with such an extensive package of “public benefits” requirements. Virtually all of  
11 the thousands of cable renewals that have been granted since the passage of the Federal Cable Act  
12 have been accomplished through an informal process. Denial of a renewal, even the preliminary  
13 denial that has set this process in motion, is extremely rare.

14 In what is undeniably a case of significant import in the area of cable law, and of  
15 substantial financial value for the parties, Plaintiff Comcast of California II, L.L.C. (“Comcast”)   
16 files this Memorandum of Law in support of its motion for a preliminary injunction to enjoin  
17 Defendant the City of San Jose (“San Jose”) from continuing the formal cable franchise renewal  
18 proceeding it has commenced under 47 U.S.C. § 546 of the Federal Cable Act. As currently  
19 designed, San Jose’s renewal process violates the Federal Cable Act as well as the United States  
20 and California Constitutions. In the course of the formal proceeding, San Jose has caused, and  
21 continues to cause, irreparable harm to the First Amendment, due process, and other rights of  
22 Comcast. Comcast seeks to have this Court stay that proceeding unless and until San Jose reforms  
23 its renewal process, including its Request for Renewal Proposal (“RFRP”), and cable renewal  
24 administrative Rules of Procedure.<sup>1</sup>

25  
26  
27 <sup>1</sup> Rules of Procedure for City of San Jose Administrative Proceeding for Renewal or Nonrenewal  
of Cable franchise pursuant to 47 U.S.C. § 546(c) (“Rules of Procedure”).

1 Cable franchise renewals may proceed informally through negotiations, or formally  
2 through administrative proceedings, but all are governed by the Federal Cable Act. *See* 47 U.S.C.  
3 § 546. Fundamentally, this case is about San Jose’s effort to exact a favorable resolution of its  
4 informal negotiations with Comcast – to force Comcast to provide an excessive and unlawful  
5 package of public benefits in exchange for the right to continue to speak in the City – by  
6 unlawfully manipulating the formal federally prescribed franchise renewal process to the ongoing  
7 detriment of Comcast and its subscribers. In particular, San Jose has issued a preliminary denial of  
8 Comcast’s franchise based upon an RFRP that seeks to impose multiple illegal conditions and  
9 requirements on Comcast. Adding insult to injury, San Jose has instituted Rules of Procedure that  
10 deny Comcast a fair opportunity to show that denial is unlawful, and attempt to render such denial  
11 effectively unreviewable by the federal courts.

12 Under the law of this Circuit, a party is entitled to a preliminary injunction if it can “show  
13 either (1) a combination of probable success on the merits and the possibility of irreparable harm,  
14 or (2) the existence of serious questions going to the merits, the balance of hardships tipping  
15 sharply in its favor, and at least a fair chance of success of the merits.” *Senate of Cal. v.*  
16 *Mosbacher*, 968 F.2d 974, 977 (9th Cir. 1992). As set forth below, Comcast amply meets the  
17 standard set forth in *Mosbacher*.

18 **STATEMENT OF RELEVANT PROCEDURAL HISTORY**

19 Comcast currently provides cable service to more than 159,000 cable households as the  
20 cable television franchisee in San Jose. On June 11, 2002, San Jose issued an RFRP to the  
21 Company, based, *inter alia*, on a community cable-related needs and interests assessment prepared  
22 by the City, also dated June 11, 2002.<sup>2</sup> Declaration of Kathleen A. Behan (“Behan Decl.”) at ¶ 8 &  
23 Exh. B. This RFRP contains numerous conditions and requirements that the Company believes  
24 either are illegal under the Federal Cable Act, or otherwise unlawful. These unlawful requirements  
25 include, but are not limited to:

26 \_\_\_\_\_  
27 <sup>2</sup> The Federal Cable Act provides for both the preparation of the community needs assessment  
28 and the issuance of the RFRP. *See* 47 U.S.C. § 546.

- 1 • A statement that if the applicant requests any change to the various franchise terms  
2 established in the RFRP and Model Ordinances that the City finds unacceptable to the  
3 City, the City may deny renewal on the basis that the applicant is not “legally  
4 qualified.” Behan Decl. ¶ 8 & Exh. B at 7.
- 5 • A requirement that Comcast obtain prior approval from the City before changing any  
6 PEG channel<sup>3</sup> location. *Id.* & Exh. B at 38.
- 7 • A requirement that Comcast manage PEG channels for up to two years while the City  
8 determines whether the City, or another party designated by it, should ultimately  
9 manage PEG access. *Id.* & Exh. B at 17.
- 10 • Requirements that dictate the use of fiber and impose specific transmission, equipment  
11 and design requirements. *Id.* & Exh. B at 21, 28, 29.
- 12 • Requirements that the cable system have the capability to deliver non-cable services,  
13 including advanced broadband services, interactive services and telecommunications  
14 services. *Id.* & Exh. B at 20-22.
- 15 • Requirements that force Comcast to build a telecommunications network for the City  
16 under the guise of an “I-NET,”<sup>4</sup> and prevent Comcast from charging “I-NET” costs  
17 against franchise fees in contravention of the 5% federal cap on franchise fees. *Id.* &  
18 Exh. B at 34.
- 19 • Requirements that tax a subset of San Jose residents for the costs of building a City-  
20 wide telecommunications system, and violate the notice and approval provisions of  
21 Article XIII of the California Constitution. *Id.* & Exh. B at 32-34.
- 22 • Model system requirements, including PEG requirements, that cost substantially more  
23 to design, construct and operate than any reasonable proposal that might have been  
24 submitted by a cable operator, particularly in the context of the current competitive  
25 marketplace. *Id.* & Exh. B at 19-40.<sup>5</sup>

26 On September 11, 2002, the Company provided a timely response to San Jose’s RFRP  
27 containing the information required by the City, or where the RFRP sought inappropriate,  
28 proprietary or illegal information, setting forth the Company’s position with regard to the  
requested information. Behan Decl. ¶ 9 & Exh. E. On December 10, 2002, San Jose, through its  
City Council, met and issued Resolution No. 71331 recommending preliminary denial of the  
Company’s franchise renewal proposal, and indicating that the City would issue a preliminary

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<sup>3</sup> PEG channels are those channels that are designated for public, educational or governmental use. Declaration of Scott Binder (“Binder Decl. “) at ¶ 5.

<sup>4</sup> Here the City has attempted to force Comcast to build a telecommunications system rather than limit itself to capacity on a system built by the Company for its business practices. Declaration of Donald Gould (“Gould Decl.”) at ¶ 11.

<sup>5</sup> See *infra* at 20-27, which contains a more detailed list of unlawful requirements included in San Jose’s RFRP.

1 assessment stating that the Company’s franchise should not be renewed effective December 18,  
2 2002. Behan Decl. ¶ 10 & Exh. F. Resolution No. 71331 also provided for an additional six-week  
3 “negotiating” period to see whether the Company, faced with the prospect of a formal  
4 administrative renewal proceeding, would give in to the City’s demands. *Id.*

5 In the memorandum opinion accompanying Resolution No. 71331 (the “Preliminary  
6 Assessment Memorandum”), San Jose indicated that its determination was based upon all four  
7 statutory grounds for denial set forth in the Federal Cable Act, including the Company’s: (1)  
8 failure to comply with the material terms of its franchise; (2) service record; (3) failure to  
9 demonstrate the necessary financial, legal and technical qualifications; and (4) failure to  
10 demonstrate that its proposal was reasonable to meet San Jose’s future cable-related needs and  
11 interests, taking into account the cost of meeting those needs. Behan Decl. ¶ 11 & Exh. F.

12 However, in the Preliminary Assessment Memorandum, San Jose also contended that under  
13 the Federal Cable Act, it was not “required to detail the grounds for its preliminary assessment”  
14 and that the Memorandum did “not list in detail all of the shortcomings of [the Company]’s  
15 proposal, nor all of the problems associated with [the Company]’s past performance.” *Id.*

16 In Resolution No. 71331, San Jose also authorized the City Manager to commence an  
17 administrative proceeding on renewal under 47 U.S.C. § 546(c). *Id.* Following the issuance of  
18 Resolution No. 71331, the administrative proceeding was commenced with the City’s initial filing  
19 of the Rules of Procedure, a Record of Ascertainment and the Preliminary Assessment  
20 Memorandum with the City Clerk on January 31, 2003. Behan Decl. ¶ 14. Since commencing  
21 that proceeding, San Jose has never filed a complaint, notice, or any other document to provide  
22 Comcast with notice of the bases of the claims it intends to set forth in the proceeding.

23 The Rules of Procedure established by the City provide procedures to govern the  
24 administrative renewal proceeding. Behan Decl. ¶ 15 & Exh. G. Although the City contends that  
25 these procedures are in compliance with the Federal Cable Act, contrary to Section 546 of the Act,  
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1 they unlawfully take the franchise renewal decision out of the hands of the franchising authority,  
2 the San Jose City Council, and place it in the hands of a third party hearing officer who is granted  
3 the full and unfettered authority to make a Recommended Decision regarding renewal. The  
4 procedures are unlawful for a host of reasons:

- 5 • San Jose’s Rules of Procedure have no provision that would allow the parties the  
6 opportunity to participate in a full and fair proceeding on renewal before the City  
7 Council and the public that would be subject to the checks and balances of public  
8 opinion, as required by the Federal Cable Act;
- 9 • San Jose’s Rules of Procedure permit San Jose to appoint a hearing officer (who is not  
10 contemplated or constrained by the Federal Cable Act) to govern the administrative  
11 renewal proceedings and delegate to the officer the power to make recommendations to  
12 the franchising authority.
- 13 • San Jose’s Rules of Procedure violate the Federal Cable Act by failing to constrain the  
14 authority of the hearing officer by providing that she make findings of fact, conclusions  
15 of law, or even consider the evidence in reaching her Recommended Decision on  
16 renewal based on a preponderance of the evidence as required by the Federal Cable Act  
17 or even that the hearing officer apply the substantive standards required by the Federal  
18 Cable Act;
- 19 • San Jose’s Rules of Procedure do not require San Jose to file a complaint outlining the  
20 bases for conducting the administrative renewal proceeding, and setting forth its *prima*  
21 *facie* case;
- 22 • San Jose has required Comcast to file its factual and legal defense before San Jose  
23 articulates any specific claims it would present at the formal administrative renewal  
24 proceeding; and
- 25 • San Jose has precluded the appointed hearing officer from modifying any of the City’s  
26 Rules of Procedure, even if necessary to satisfy the requirements of the United States  
27 Constitution or the Federal Cable Act.

28 Despite Comcast’s expressed objections to these procedures, San Jose has refused to  
modify them, and on March 15, 2003, the City appointed a hearing officer to conduct the  
administrative proceeding between the City and Comcast, and make a renewal recommendation to  
the City.<sup>6</sup> Behan Decl. ¶ 16 & Exh. J.

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<sup>6</sup> There are even irregularities with respect to the appointment of the hearing officer. *See infra*  
fn. 16.

1 Faced with a hearing before a hearing officer who is not contemplated by or constrained by  
2 the Federal Cable Act, and who has been granted unfettered discretion by the San Jose Rules of  
3 Procedure, under a procedure fraught with statutory and constitutional irregularities, Comcast has  
4 raised multiple objections at the administrative level.<sup>7</sup> Obtaining no relief, Comcast now invokes  
5 this Court’s authority under 47 U.S.C. § 546, which provides that “Any cable operator whose  
6 proposal for renewal . . . has been adversely affected by a failure of the franchising authority to act  
7 in accordance with the procedural requirements of this section, may appeal such . . . failure  
8 pursuant to the provisions of section 555 of this title.” 47 U.S.C. § 546(e)(1).<sup>8</sup>

9 **ARGUMENT**

10 Comcast has sought this preliminary injunction as a last resort to proceeding as a party in a  
11 cable franchise renewal proceeding that is rife with constitutional and statutory error. The Ninth  
12 Circuit set forth the current standard for obtaining preliminary injunctive relief to prevent  
13 irreparable harm in *Senate of California v. Mosbacher*, 968 F.2d at 977 (9th Cir. 1992) as follows:  
14 “the moving party shows either (1) a combination of probable success on the merits and the  
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20 <sup>7</sup> Behan Decl. ¶¶ 18, 21, & 23 & Exhs. H, K, & M.

21 <sup>8</sup> Section 555 provides that a cable operator “adversely affected by any final determination made  
22 by a franchise authority under section . . . 546 . . . may commence an action within 120 days after  
23 receiving notice of such a determination in either the federal district court in which the cable  
24 system is located or any competent state court of general jurisdiction.” 47 U.S.C. § 555. While  
25 Section 555 does not by its terms reference non-final adverse procedural actions by the franchising  
26 authority, Section 546, which does provide for such appeals, specifically directs parties to the  
27 above provision for judicial review. Under Section 546, “The court *shall* grant appropriate relief if  
28 the court finds that – (A) any action of the franchising authority, other than harmless error, is not in  
compliance with the procedural requirements.” (emphasis added.)

Comcast also invokes the Court’s authority under the Constitution of the United States through  
42 U.S.C. § 1983.

1 possibility of irreparable harm, or (2) the existence of serious questions going to the merits, the  
2 balance of hardships tipping sharply in its favor, and at least a fair chance of success on the  
3 merits.”<sup>9</sup>

4 Here, San Jose is not only causing ongoing irreparable injury to Comcast – including First  
5 Amendment injuries – but it is also burdening Comcast’s subscribers, and even the taxpaying  
6 public. Comcast can demonstrate on multiple grounds that San Jose’s renewal process violates the  
7 law, and that Comcast requires immediate preliminary injunctive relief from this Court.

8 **I. COMCAST IS LIKELY TO PREVAIL ON THE MERITS.**

9 The history of the Federal Cable Act demonstrates that Congress enacted the renewal  
10 provisions to control the unfettered discretion of local franchise authorities by establishing a  
11 uniform formal renewal process specifying the sole grounds on which renewal can be denied,  
12 heightening the evidentiary standard required in making franchise renewal decisions, establishing  
13 minimum due process and providing that any denial would be reviewable by the federal courts.  
14 Accordingly, Congress included procedural protections in the Act to limit the actions of franchise  
15 authorities in franchise renewal proceedings. As set forth below, the procedural protections  
16 established in the Federal Cable Act have not been afforded to Comcast in this case.

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17  
18 <sup>9</sup> Notably, under the current standard set forth in *Mosbacher*, the Ninth Circuit has recognized  
19 that the analysis of these factors represent a “single continuum” so that “[i]f the balance of harm  
20 tips decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of success  
21 on the merits when the balance tips less decidedly.” *State of Alaska v. Native Vill. of Venetie*, 856  
22 F.2d 1384, 1389 (9th Cir. 1988). “At an irreducible minimum, however, plaintiff must demonstrate  
23 a fair chance of success on the merits or questions serious enough to require litigation. Moreover,  
24 under any formulation of the test, the plaintiff must demonstrate a significant threat of irreparable  
25 injury.” *James P. v. Lemahieu*, 84 F. Supp. 2d 1113, 1118 (D. Haw. 2000) (citing *Arcamuzi v.*  
26 *Cont’l Air Lines, Inc.*, 819 F.2d 935, 937 (9th Cir. 1987) and *Oakland Tribune Inc. v. Chronicle*  
27 *Publ’g Co., Inc.*, 762 F.2d 1374, 1376 (9th Cir. 1985)).

28 Prior to identifying the more simplified current preliminary injunction standard, the Ninth  
Circuit applied the traditional standard in which it considered:  
(1) the likelihood of the moving party’s success on the merits; (2) the possibility of irreparable  
injury to the moving party if relief is not granted; (3) the extent to which the balance of hardships  
favors the respective parties; and (4) in certain cases, whether the public interest will be advanced  
by granting the preliminary relief. *United States v. Odessa Union Warehouse Co-op*, 833 F.2d  
172, 174 (9th Cir. 1987).

1           **A.     SAN JOSE’S RULES OF PROCEDURE VIOLATE**  
2           **SECTION 546 OF THE FEDERAL CABLE ACT AND**  
3           **CONSTITUTIONAL DUE PROCESS.**

4           Section 546(c)(2)-(3) of the Federal Cable Act provides that:

5                     (2) In any proceeding under paragraph (1), the cable operator  
6                     shall be afforded adequate notice and the cable operator and the  
7                     franchise authority, or its designee, shall be afforded fair opportunity  
8                     for full participation, including the right to introduce evidence  
9                     (including evidence related to issues raised in the proceeding under  
10                    subsection (a) of this section), to require the production of evidence,  
11                    and to question witnesses. A transcript shall be made of any such  
12                    proceeding.

13                    (3) At the completion of a proceeding under this subsection,  
14                    the franchising authority shall issue a written decision granting or  
15                    denying the proposal for renewal based upon the record of such  
16                    proceeding, and transmit a copy of such decision to the cable  
17                    operator. Such decision shall state the reasons therefor.

18           Section 546 was specifically added to the Federal Cable Act to set uniform national standards  
19           limiting the discretion of municipal franchising authorities, which were improperly using their powers  
20           to administer franchising processes that were arbitrary and capricious in nature.<sup>10</sup> The fundamental  
21           aspects of Section 546 that serve to accomplish this goal include: (1) a requirement that the franchise  
22           authority provide the cable operator with adequate notice; (2) a requirement that the franchise authority  
23           provide the cable operator the opportunity for full and fair participation in the administrative renewal  
24           proceeding; (3) a mandate that the franchise authority issue a written decision regarding renewal based  
25           upon the preponderance of the evidence presented in the administrative renewal proceeding; and (4)

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26           <sup>10</sup> The renewal provisions were explicitly referenced in the stated Purposes of the Federal Cable Act,  
27           to protect operators “against unfair denials of renewal . . .” 47 U.S.C. § 521(4). Similarly, the  
28           legislative history states that the procedures and standards in Section 626 “are also designed to assure  
                  that the renewal process does not impose unreasonable requirements on the operator.” H.R. Rep. No.  
                  98-934, at 25 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4663. (“1984 House Report”). The  
                  legislative history also notes that the Act was passed to prevent franchising authorities from seeking  
                  “state of the art systems” with “greater system capacity, more public access facilities and support, and  
                  one- and two-way communications systems for schools and municipal offices, often at minimal or no  
                  direct charge to the government,” which were “unrealistic” and “economically unviable.” *Id.* at 21.



1 provisions that allow for federal court review of cable operators’ claims that the franchise authority  
2 failed to act in accordance with the provisions of the Federal Cable Act.

3 **1. San Jose’s Rules of Procedure Violate the Federal Cable**  
4 **Act and the Due Process Clause by Delegating Franchising**  
5 **Authority to a Hearing Officer and Entrusting that Hearing**  
6 **Officer with Unfettered Discretion.**

7 San Jose has violated the Federal Cable Act by impermissibly delegating to a hearing officer  
8 the authority to make a recommendation whether to renew Comcast’s franchise. In order to limit the  
9 franchise authority’s discretion, the Act requires that “the franchising authority,” and not a designee  
10 or hearing officer, “shall issue a written decision granting or denying the proposal for renewal based  
11 upon the record of such proceeding . . . .” 47 U.S.C. § 546(c)(3). The Act does not permit a  
12 franchising authority’s hearing officer to serve in the capacity of a judge during the administrative  
13 renewal proceeding. 47 U.S.C. § 546(c)(2).<sup>11</sup> San Jose, in violation of the plain language of the  
14 Federal Cable Act, delegated its authority to the hearing officer and granted her unbridled authority  
15 to make a Recommended Decision regarding the renewal of Comcast’s franchise. *See* Behan Decl. ¶  
16 16 & Exh. G.

17 As written, San Jose’s procedures do not permit Comcast to participate before the ultimate  
18 decisionmaker, the San Jose City Council, or even to directly address the City Council. *See id.*  
19 There is no opportunity for the City Council to evaluate witnesses, weigh the parties’ contradictory  
20 evidence, or hear arguments on substantive issues. *See id.* By removing these activities from the  
21 decisionmaker, and placing them under the jurisdiction of the hearing officer, Comcast is  
22 effectively denied full participation under the Federal Cable Act. Moreover, it is virtually  
23 impossible for the City Council, since it will not have engaged in these trial-type activities, to

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25 <sup>11</sup> The legislative history contemplated that a franchising authority could appoint a “designee” to act  
26 as an advocate for the franchising authority, in those states where a franchising authority would be  
27 precluded from serving as both judge and advocate. 1984 House Report at 73. That language does not  
28 suggest that a designee could assume the fundamental responsibilities of the franchising authority in its  
role as judge.

1 render a renewal decision that is based on its evaluation of the presentation of evidence. This  
2 denies Comcast full participation under the Federal Cable Act. *See* 47 U.S.C. § 546(c)(3).

3 Even if the Company is eventually invited to make a presentation at a City Council  
4 meeting, it will not be a fair and full substitute for weeks of hearings with live testimony.  
5 Furthermore, under the City’s procedures, even if the San Jose City Council eventually considers  
6 the evidence presented at the renewal hearing, and issues a decision regarding renewal, it is only  
7 afforded the opportunity to do so after the evidence has been filtered through its appointed hearing  
8 officer. It is clear that San Jose’s removal of the City Council from the administrative renewal  
9 proceeding, and the delegation of authority to the hearing officer to govern that hearing, violate the  
10 Federal Cable Act.

11 Comcast has sought, unsuccessfully, to have the hearing officer revise the City’s unlawful  
12 Rules of Procedure so that they conform to the requirements of the Federal Cable Act and other  
13 applicable laws. Behan Decl. ¶ 21 & Exh. K. The City responded by informing the hearing officer  
14 that she “is not empowered to change the Rules or to unilaterally require the City to do so.” Behan  
15 Decl. ¶ 22 & Exh. L. Thus, the City has not only refused to revise its procedures, but has also  
16 precluded the hearing officer from doing so, even if necessary to comply with the Federal Cable  
17 Act, the United States and California Constitutions and other laws. And in the same letter, the City  
18 states “[i]f Comcast feels the Rules are unlawful, they can request an appropriate Court to so rule.”  
19 *Id.*

20 While the City’s Rules of Procedure limit the hearing officer’s authority to alter the City’s  
21 procedures, they also improperly grant her *unfettered discretion* to ultimately decide whether to  
22 recommend renewal or denial of Comcast’s cable franchise. *See* Behan Decl. ¶ 16 & Exh. G at  
23 Sections VII(B) & (C). Specifically, the Rules do not provide any charge that requires the hearing  
24 officer to (1) listen to, or consider any evidence; (2) issue any findings of facts based upon any of  
25 the evidence presented; (3) base her Recommended Decision on any standard of proof; or (4) even  
26 take into account the Federal Cable Act standards of denial. *See id.* In fact, San Jose’s Rules of  
27 Procedure do not contain *any limits whatsoever* on the hearing officer’s decision to recommend the  
28

grant or denial of Comcast's cable proposal – a decision that is of significant importance to Comcast and implicates fundamental First Amendment rights. *See id.*

The unfettered discretion provided to the hearing officer in the City's Rules of Procedure also is problematic because the officer is not subject to the procedural constraints of the Federal Cable Act. Nowhere does the Act provide for a hearing officer like the one at issue here – who functions as a judicial official rather than a designated advocate for the City. Furthermore, even though the Federal Cable Act requires that the San Jose City Council make the final decision on renewal, based on the Section 546 criteria, in this case, the damage will have been done, because the City Council will have to make its decision using evidence that has been filtered through the hearing officer who is not bound by any standards.

The doctrine against unfettered discretion requires that limits on the authority of judicial officials implicit in laws “be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice.” *See, e.g., City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 770 (1988) (citations omitted). The courts will not presume that the official will adhere to standards that are absent from the face of the law, nor will it write nonbinding limits into an otherwise silent statute. *Id.* (citations omitted). Accordingly, the Ninth Circuit has held that a regulatory scheme that permits officials “unfettered discretion” to “act in an arbitrary and discriminatory manner in granting . . . permits . . . is patently offensive to the notion of due process.” *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 514 (9th Cir. 1988) (internal citations omitted).<sup>12</sup> The unfettered discretion granted to the hearing officer in this case not only violates due process, but also renders her Recommended Decision virtually unreviewable.<sup>13</sup>

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<sup>12</sup> *See also City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. at 770 (holding statute giving mayor unbridled discretion over whether to permit newsracks unconstitutional); *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) (finding that delegation of basic policy matters to judges and juries for resolution on a subjective *ad hoc* basis presents the danger of arbitrary and discriminatory application); *Outdoor Systems, Inc. v. City of Mesa*, 997 F.2d 604, 613 (9th Cir. 1993) (same) (citations omitted).

<sup>13</sup> Compounding the problems that arise due to the unbridled discretion granted to the hearing officer in San Jose's Rules of Procedure are several other procedures which deny Comcast the full and fair opportunity to participate under the Federal Cable Act including, but not limited to: (1) the

[Footnote continued on next page]

1 In this case, the hearing officer's unbridled discretion is of particular concern because  
2 Comcast's ability to remain a First Amendment speaker in the City of San Jose is at issue.<sup>14</sup> If  
3 Comcast's franchise renewal proposal is denied, the Company will be denied the ability to  
4 continue to exercise its First Amendment rights as a cable operator in San Jose. The Supreme  
5 Court has found that when fundamental First Amendment rights are at issue, due process standards  
6 are to be "strictly" applied. *Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1992).  
7 Here, strict application of due process requires that the City be required to revise its Rules of  
8 Procedure to comply with the procedural requirements of the Federal Cable Act.<sup>15</sup>

9 \_\_\_\_\_  
10 [Footnote continued from previous page]

11 lack of any clearly defined standards for admitting or excluding "evidence," and (2) arbitrary limits  
12 on the type and quantum of discovery of evidence.

13 <sup>14</sup> See generally, *Outdoor Sys, Inc. v. City of Mesa*, 997 F.2d 604, 613 (9th Cir. 1993) ("a law  
14 cannot condition the free exercise of First Amendment rights on the unbridled discretion of  
15 government officials") (citations and internal quotations omitted); *Napa Valley Publ'g Co. v. City  
16 of Calistoga*, 225 F. Supp. 2d 1176, 1197 (N.D. Cal. 2002) ("the mere existence of the licensor's  
17 unfettered discretion coupled with the power of prior restraint, intimidates parties into censoring  
18 their own speech even if the discretion and power are never actually abused") (citations and  
19 internal quotations omitted).

20 <sup>15</sup> Procedural due process in an administrative setting requires "the right to respond to the  
21 authority initially imposing the discipline 'before a reasonably impartial non-involved reviewer.'" *Williams v. County of Los Angeles*, 22 Cal. 3d 731, 736-737 (Cal. 1978). The unfettered discretion  
22 granted to Hearing Officer Damasco is especially concerning in this case because, based upon Ms.  
23 Damasco's professional background, it appears that she may be neither impartial nor non-involved.

24 Prior to accepting the position of Hearing Officer in this matter, Hearing Officer Damasco  
25 worked in the City Attorney's Office for the City of Santa Clara in a matter directly adverse to  
26 Tele-Communications, Inc., which is now Comcast, and as counsel with Joseph Van Eaton of the  
27 law firm of Miller & Van Eaton, who has represented the City of San Jose in relation to these cable  
28 matters. See Behan Decl. ¶ 23 & Exh. M. Comcast believes Hearing Officer Damasco's previous  
business relationships in matters and with counsel that are directly adverse to Comcast create the  
probability of actual bias, which required her recusal in the administrative proceeding. See *Gai v.  
City of Selma*, 79 Cal. Rptr. 2d 910 (Cal. Ct. App. 1998) (concluding that disqualification of an  
administrative decision-maker is required not only in cases where the decision-maker is actually  
biased, but also in cases in which the probability of actual bias exists). Shortly after the City  
appointed Hearing Officer Damasco, Comcast raised its concerns about her impartiality, and  
requested her recusal. Behan Decl. ¶ 23 & Exh. M. On April 15, 2003, Hearing Officer Damasco  
issued an opinion denying Comcast's recusal request. Behan Decl. ¶ 23 & Exh. N. Comcast  
believes that the Hearing Officer's refusal to recuse herself in the administrative proceeding  
between the parties, despite her prior business dealings, further impairs Comcast's constitutional  
rights to due process.

1                   **2. San Jose’s Rules of Procedure Violate the Federal Cable**  
2                   **Act and Due Process by Failing To Require that the City**  
3                   **Provide Comcast with Adequate Notice of the Bases for**  
4                   **Its Claims in Support of Denial in Advance of the**  
5                   **Administrative Renewal Proceeding.**

6                   Notice and an opportunity to be heard are the hallmarks of due process. San Jose’s renewal  
7                   procedures also fail to require the City to provide Comcast with adequate notice of the bases for its  
8                   claims in support of denial of Comcast’s franchise proposal. On November 25, 2002, the City  
9                   produced a Preliminary Assessment Memorandum for the purpose of supporting the franchising  
10                  authority’s preliminary decision to deny renewal which contained vague allegations that failed to  
11                  provide Comcast with sufficient notice to defend its proposal for renewal at an administrative  
12                  renewal proceeding.<sup>16</sup> Despite Comcast’s numerous requests for a complaint to commence the  
13                  administrative proceeding, or a more definite statement of the grounds upon which the City intends  
14                  to rely to support its claims for denial in the administrative renewal proceeding, San Jose has  
15                  refused to provide *any* such documents. *See* Behan Decl. ¶ 12. By failing to do so, San Jose has  
16                  denied Comcast the due process rights guaranteed by the Constitution, and has effectively  
17                  prevented Comcast from “full[y] participat[ing]” in the administrative proceeding provided by the  
18                  Federal Cable Act. 47 U.S.C. § 546(c)(2).

19                  In administrative proceedings, due process “requires that interested parties be given a reasonable  
20                  opportunity to know the claims of adverse parties and an opportunity to meet them.” *North Ala.*  
21                  *Express, Inc. v. United States*, 585 F.2d 783, 786 (5th Cir. 1978) (citing *FCC v. Pottsville Broad. Co.*,  
22                  309 U.S. 134, 143 (1940)).<sup>17</sup> In addition, the Supreme Court has held that “[p]art of the function of

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<sup>16</sup> *See* Behan Decl. ¶ 10 & Exh. F.

24                  <sup>17</sup> *See, e.g., Matthews v. Eldridge*, 424 U.S. 319, 345-46 (1976) (finding that the information relevant  
25                  to an individual’s application for Social Security disability insurance payments should be identified to  
26                  the applicant with particularity and that the applicant’s representative should be allowed full access to  
27                  all information relied upon by the state agency); *Billington v. Underwood*, 613 F.2d 91, 94 (5th Cir.  
28                  1980) (finding that notice “must be sufficiently specific for it to enable [the plaintiff] to prepare rebuttal  
evidence to introduce at his [administrative] hearing”); *Gai v. Selma*, 79 Cal. Rptr. 2d 910 (1998)  
(finding that “[p]rocedural due process in an administrative setting requires notice of the proposed  
action, the reasons therefor, a copy of the charges and materials on which the action is based, and the  
right to respond to the authority initially imposing the discipline”) (quoting *Williams v. County of Los  
Angeles*, 22 Cal 3d 731, 736-37 (1978) (internal quotations omitted)).

1 notice is to give the charged party a chance to marshal the facts in his defense and to clarify what the  
2 charges are, in fact.” See *Wolff v. McDonnell*, 418 U.S. 539, 564 (1974).

3 The Supreme Court has required that a party be notified *in advance* of the *precise* issues to be  
4 raised at an administrative hearing.<sup>18</sup> See *In re Ruffalo*, 390 U.S. 544 (1968). In *Ruffalo*, an attorney  
5 received notice of thirteen charges that would be raised at his disbarment hearing, but failed to receive  
6 notice of one newly discovered charge that was discussed during the hearing, and was relied upon in the  
7 disbarment order. The Court, upon review, held that the “absence of fair notice as to . . . the precise  
8 nature of the charges deprived petitioner of procedural due process.” *Id.* at 552.<sup>19</sup>

9 Furthermore, in *Rolla Cable System, Inc. v. City of Rolla*, 761 F. Supp. 1398, 1409 (E.D. Mo.  
10 1991) a federal court specifically held that in the context of cable franchise renewal proceedings, the  
11 notice provision of 47 U.S.C. § 546 requires that “the franchising authority express its views directly,  
12 [and] . . . also be specific in its explanation of the problem or problems which it believes warrant  
13 nonrenewal.” The court in *Rolla* explained that the cable operator was entitled to specificity in the  
14 notice of the franchising authority’s grounds for denial because “[i]f the explanation of the problem is  
15 not specific enough, the opportunity to cure becomes meaningless.” *Id.*

16 The notice provided to Comcast in this case has failed to provide Comcast with the minimum  
17 requirements of constitutional due process, thus denying Comcast a “fair opportunity for full  
18 participation” under the Federal Cable Act. 47 U.S.C. § 546(c)(2). Moreover, because of the

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19 <sup>18</sup> In addition, courts have found that the advance notice provided to a respondent in an administrative  
20 context should “*speciflly*” the nature of the facts and evidence on which the agency proposes to take  
21 action. Such notice enables the affected party to prepare an informed response which places all relevant  
22 data before the agency.” *Hess & Clark, Div. of Rhodia, Inc. v. FDA*, 495 F.2d 975, 983 (D.C. Cir.  
23 1974) (emphasis added). The Supreme Court has held that a “full hearing - a fair and open hearing . . .  
embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of  
the opposing party.” *Morgan v. United States*, 30 U.S. 1, 18 (1938).

24 <sup>19</sup> The Eighth Circuit reached a similar conclusion in *Navato v. Sletten*, 560 F.2d 340 (8th Cir. 1977).  
25 *Navato* involved a disciplinary review of a hospital intern. At the disciplinary hearing the committee  
26 inquired into charges that had not been previously disclosed to the intern. The Court of Appeals found  
27 that the intern’s procedural due process rights were violated by the committee’s failure to disclose all of  
the charges against him. Moreover, the Court noted that “since the right to be heard is of little value  
unless one is informed as to the matter which is pending, procedural due process requires that some kind  
of prior notice be given.” *Id.* at 345.

1 inadequacies of the notice, Comcast’s interests are likely to be arbitrarily and unlawfully deprived,  
2 despite no showing on the part of the City that such a deprivation is justified by some extraordinary  
3 administrative burden in providing constitutional procedures. *Matthews v. Eldridge*, 424 U.S. 319 at  
4 334-35.<sup>20</sup>

5 San Jose’s failure to provide Comcast with adequate notice is particularly egregious given  
6 the fact that the City’s Rules of Procedure also fail to provide Comcast with other procedural  
7 safeguards to ensure that its due process rights are protected, or that it has the opportunity for full  
8 participation under the Federal Cable Act. Under the City’s Procedures, although Comcast is not  
9 provided with adequate notice of the bases for the City’s claims in support of denial, the Company  
10 is required to submit a brief showing that it met the standards set forth in the Federal Cable Act, 47  
11 U.S.C. § 546(c)(1), and explaining why renewal is warranted, within thirty days after the parties  
12 exchange documents that may support their claims. *See* Behan Decl. ¶ 15 & Exh. G, Section V(B).

13  
14 <sup>20</sup> In *Matthews v. Eldridge*, the Supreme Court observed that “due process is flexible and calls for  
15 such procedural protections as the particular situation demands.” To assist lower courts in  
16 determining the amount of due process applicable in an administrative setting, the Court suggested  
that the lower courts consider three factors:

17 *First*, the private interest that will be affected by the official action;  
18 *second*, the risk of an erroneous deprivation of such interest through  
19 the procedures used, and the probable value, if any, of additional or  
20 substitute procedural safeguards; and *finally*, the Government’s  
interest, including the function involved and the fiscal and  
administrative burdens that the additional or substitute procedural  
requirement would entail.

21 *Id.* at 334-35.

22 The three *Matthews v. Eldridge* factors strongly support Comcast’s claim that due process  
23 considerations require that San Jose provide Comcast with more adequate notice of the bases of the  
24 claims it intends to raise at the formal denial hearing.

25 First, the private interest Comcast has in having its franchise renewed in San Jose is great,  
26 especially considering the large financial investment the company has made, and continues to  
27 make, to upgrade the City’s cable system. Second, the risk that Comcast will be unlawfully  
28 deprived of its franchise, and the right to continue to exercise its First Amendment rights in San  
Jose, is high should an injunction not issue. Finally, the City’s interest weighs in favor of  
Comcast’s request for a detailed notice or complaint. The City of San Jose will have to expend  
little, if any, resources to draft a complete list of the grounds upon which it based its decision to  
preliminarily deny Comcast’s renewal request.

1 This improperly shifts the burden of proof to Comcast by requiring the Company to submit its  
2 defense before it receives adequate notice of San Jose’s denial claims. Shifting the initial burden  
3 of proof to Comcast flies in the face of established due process protections and the Federal Cable  
4 Act.

5 In total, San Jose’s Rules of Procedure deny Comcast the right to fully participate in the  
6 administrative renewal proceeding and violate the Company’s basic rights to due process of law.  
7 The Court should stay the proceeding and require that San Jose revise these Rules of Procedure in  
8 accordance with the Federal Cable Act to provide Comcast with the due process protection  
9 guaranteed by the Constitution.

10 **B. THE MINIMUM REQUIREMENTS OF THE RFRP AND MODEL**  
11 **ORDINANCES SIGNIFICANTLY BURDEN SPEECH AND**  
12 **VIOLATE THE FIRST AMENDMENT RIGHTS OF COMCAST.**

13 It is well-settled that cable operators are engaged in speech entitled to the full scope of First  
14 Amendment protections.<sup>21</sup> It is equally clear that the measure of scrutiny to be applied to  
15 governmental intrusions on cable speech depends on whether such intrusion is characterized as  
16 content based or content neutral.<sup>22</sup> However, “[d]eciding whether a particular regulation is content  
17 based or content neutral is not always a simple task” and can involve distinctions that are quite  
18 subtle.<sup>23</sup> It is not necessary for this Court to address those subtleties here. Even applying the more  
19 lenient standard of review applicable to content neutral regulations – which is a standard more  
20 favorable to the City – compels the conclusion that the City’s renewal process violates Comcast’s  
21 fundamental First Amendment rights.

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22 <sup>21</sup> *Leathers v. Medlock*, 499 U.S. 439, 444 (1991) (cable television “is engaged in ‘speech’ under  
23 the First Amendment and is, in much of its operation, part of the ‘press’”); *City of Los Angeles v.*  
24 *Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) (“Through original programming or by  
25 exercising editorial discretion over which stations or programs to include in its repertoire, [a cable  
operator] seeks to communicate messages on a wide variety of topics and in a wide variety of  
formats”).

26 <sup>22</sup> *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641-43 (1994) (discussing the range of  
First Amendment scrutiny applicable to newspapers, broadcasters and cable).

27 <sup>23</sup> *Id.* at 642.



1 A content neutral cable regulation withstands First Amendment challenge only “if it  
2 furthers an important or substantial government interest; if the government interest is unrelated  
3 to the suppression of free expression; and if the incidental restriction on alleged First  
4 Amendment freedoms is no greater than is essential to the furtherance of that interest.”  
5 *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (quoting *United States v. O’Brien*,  
6 391 U.S. 367, 377 (1968)). Although the regulation in question need not be the least restrictive  
7 approach possible, the regulation must be “narrowly tailored” such that it does “not ‘burden  
8 substantially more speech than is necessary to further the government’s legitimate interests.’”  
9 *Id.* at 662 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

10 The burden of proof is on the government to demonstrate that a particular regulation is  
11 constitutional. *Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1406  
12 n.9 (9th Cir. 1985). In this case, San Jose’s RFRP, the Model Ordinances which embody the  
13 RFRP’s requirements, and the Preliminary Assessment Memorandum raise serious First  
14 Amendment infirmities under a *Turner/O’Brien* analysis. Those documents contain  
15 requirements that, because they are either illegal under the Federal Cable Act or are otherwise  
16 unlawful, cannot constitute an important or substantial interest that the City can legitimately  
17 advance. Moreover, the constraints and conditions mandated by the City are far more  
18 restrictive and burdensome than necessary, even assuming the City were to have an important  
19 or substantial interest. These deficiencies render the RFRP, the Model Ordinances and the  
20 preliminary denial based thereon constitutionally invalid under the First Amendment.

21 **1. The City Cannot Show That It Has an Important or Substantial**  
22 **Interest in the Illegal Requirements of the RFRP and the Model**  
23 **Ordinances.**

24 In *Group W Cable, Inc. v. City of Santa Cruz*, 669 F. Supp. 954 (N.D. Cal. 1987), this  
25 Court struck down on First Amendment grounds numerous government-mandated conditions in  
26  
27  
28

1 the context of a city’s decision not to renew a cable franchise.<sup>24</sup> Here, the City has imposed many  
2 of the same restrictions that were held invalid in *Group W*. Moreover, as in *Group W*, the City’s  
3 justifications for its renewal requirements are neither substantial, nor important, and they do not  
4 meet the *Turner/O’Brien* test.

5 As discussed more fully below, the RFRP and Model Ordinances reach far beyond the  
6 bounds of permissible local authority under the Federal Cable Act and are patently unlawful. The  
7 City cannot possibly have any legitimate interest – much less an interest that is substantial or  
8 important – in advancing illegal requirements.

9 **a. The RFRP Dictates Transmission Technology**  
10 **in Violation of 47 U.S.C. § 544(e).**

11 Section 544(e) of the Federal Cable Act directs the FCC to establish technical standards  
12 governing cable systems and specifies that local franchising authorities may not “prohibit,  
13 condition or restrict a cable system’s use of any type of subscriber equipment or any  
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15 <sup>24</sup> In *Group W*, this Court invalidated renewal requirements for public access channel capacity,  
16 facilities and equipment; reserved capacity on an institutional network; universal service  
17 obligations; state-of-the-art requirements; and franchisee fees in excess of the fair market value of  
18 the franchise interest conveyed. While the Court applied a strict scrutiny standard to those  
19 requirements that it found were content-based, the reasoning articulated by the Court would lead to  
20 the same conclusion using a *Turner/O’Brien* analysis, since the Court also found that the access  
21 and technical requirements were not narrowly drawn to advance the governmental interest of  
22 minimizing disruption to the streets. *Group W*, 669 F. Supp. at 969-71.

23 Similar results were reached in *Century Federal*, 710 F. Supp. 1552, 1555 (striking down a  
24 local ordinance requiring cable operators to set aside eight leased access channels, three public and  
25 educational channels and two governmental channels. “The access channels forced upon plaintiff  
26 by the Cities carry the inherent risk that a franchisee’s speech will be chilled and the direct,  
27 undeniable impact of intruding into the franchisee’s editorial control and judgment of what to  
28 cablecast and what not to cablecast.”), and *Preferred Communications, Inc. v. City of Los Angeles*,  
CV 83-5846, 1990 U.S. Dist. LEXIS 20205 (C.D. Cal. Jan. 5, 1990) *aff’d in part, vacated and  
remanded in part on other grounds*, 13 F.3d 1327 (9th Cir. 1994) (finding that although the city has  
a compelling interest, city has not shown requirements for mandatory leased access and public  
access are precisely drawn; no compelling or substantial interest for state of the art requirements).  
*See also Pac. W. Cable Co. v. City of Sacramento*, 672 F. Supp. 1322, 1338 (E.D. Cal 1987) (city’s  
interests in public access, universal service and a technically and financially qualified operator are  
not sufficiently substantial to justify exclusion of all but one operator; nature of interests can be  
promoted through means which are less restrictive of First Amendment rights).

1 transmission technology.”<sup>25</sup> The FCC interpreted the ban on local regulation of subscriber  
2 equipment and “transmission technology” to mean that, among other things, local franchising  
3 authorities at a minimum “may not control whether a cable operator uses digital or analog  
4 transmissions nor determine whether its transmission plant is composed of coaxial cable, fiber  
5 optic cable, or microwave radio facilities.”<sup>26</sup>

6 The RFRP specifies the City’s facilities and equipment demands in extreme detail in  
7 violation of Section 544(e). For example, the RFRP requires that an 860 MHz system be  
8 constructed in all parts of the City and even specifies the maximum “node size.”<sup>27</sup> The RFRP  
9 not only mandates the specific ratings of all active and passive components on the subscriber  
10 network, but also requires “a fiber to the node design.”<sup>28</sup> This specific transmission technology  
11 – fiber – must be “fully two-way activated,” and must be able to support “broadband interactive  
12 cable services through the cable system.”<sup>29</sup> The RFRP goes into even greater technical  
13 specificity with respect to the Institutional Network mandated by the City.<sup>30</sup> Each of these  
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16 <sup>25</sup> Local franchising authorities are preempted from establishing technical standards that are more  
17 stringent or broader than the FCC technical standards. *City of New York v. FCC*, 486 U.S. 57  
(1988).

18 <sup>26</sup> *Report and Order*, 14 FCC Rcd 5296 at ¶ 141, *recon. denied*, 17 FCC Rcd 7609 (2002).

19 <sup>27</sup> *See* Behan Decl. ¶ 8 & Exh. B at 19.

20 <sup>28</sup> *See* Behan Decl. ¶ 8 & Exh. B at 21.

21 <sup>29</sup> *Id.*

22 <sup>30</sup> The I-NET must “be designed and constructed to support standard interfaces such as  
23 conventional NTSC analog, M-peg, and J-peg digital video, telephone “T” carrier services (DS1,  
24 DS3), Ethernet interconnection (10 Mbps, 100 Mbps, and Gigabit platforms), and other similar  
25 commonly used interfaces.” *Id.* at 12, 34. These standards in effect define the types of content that  
26 can be downloaded off the Internet and/or carried between terminals on the I-NET. The RFRP  
27 states further that the I-NET should have the “characteristics” that were identified in the CTC I-  
28 NET Report and the Buske Group Report (the “Reports”). *See* Behan Decl. ¶ 8 & Exh. B at 13,  
32. Realizing that the technical specificity in those Reports violates the Federal Cable Act, the City  
adds a footnote: “To the extent the reports may be read to require a particular transmission  
technology in violation of the Federal Cable Act, the City clarifies that the requirement adopted  
here is to provide an I-NET that will function equivalently.” *See* Behan Decl. ¶ 8 & Exh. B at 13,  
n.5.

1 exceedingly specific technical standards are preempted under the Cable Act. *See City of New*  
2 *York v. FCC*, 486 U.S. 57 (1988).

3 Section 544(e) is not satisfied if a franchising entity like San Jose provides extremely detailed  
4 technical parameters of the system that it requires, under threat of non-renewal, and then says that it is  
5 simply asking for a system that has the ability to “function equivalently.” In fact, the engineering  
6 parameters the City has set are so specific that they can as a practical matter be met only by using fiber  
7 technology and specific subscriber equipment.<sup>31</sup> Such City mandates fall squarely within the  
8 prohibitions of Section 544(e).

9 **b. City Demands for an Institutional Network Exceed the City’s**  
10 **Authority Under the Federal Cable Act and State Law.**

11 The RFRP unlawfully seeks to force Comcast to construct free of charge a full-service  
12 telecommunications network that is interconnected with other communications networks,  
13 including the Internet and possibly the public switched telephone network.<sup>32</sup> The network  
14 described in the RFRP would enable the City to obtain Internet access, cable modem service and  
15 telecommunications services (such as telephone service) and provide those services to the public.<sup>33</sup>  
16 The City calls this an “Institutional Network” to try to bring its demands within the confines of  
17 Section 531 of the Federal Cable Act. But the RFRP’s “I-NET” is a fundamentally different  
18 creature than the “closed-loop” system envisioned by Section 531 that would connect a specific  
19 number of governmental buildings  
20

21 \_\_\_\_\_  
22 <sup>31</sup> Gould Decl. ¶¶ 4, 6. Further, there is a fine line between the establishment of local technical  
23 standards, which is prohibited, and the City’s specification of technical requirements that are so detailed  
24 that they impact the technical standards which the cable system must meet.

25 <sup>32</sup> The RFRP states, “The City may require the I-NET to be constructed to points within the City  
26 where it can be connected to other networks, including the Internet.” Behan Decl. ¶ 8 & Exh. B at 12,  
27 23, 33, 35.

28 <sup>33</sup> The Preliminary Assessment states that Comcast is unreasonably restricting the use of the I-NET by  
refusing to allow the City to “place connections to the I-NET at libraries, community centers and access  
centers, where they could be accessed by members of the public.” *See* Behan Decl. ¶¶ 8, 10 & Exhs. F at  
6, B at 10.

1 solely for transmissions between and among those locations.<sup>34</sup> Once the system is connected to outside  
2 networks, this transforms the “closed-loop” into a telecommunications network that is functionally  
3 equivalent to the facilities that a commercial telecommunications provider might build in order to  
4 provide telecommunications services to a business or other third party, or to the City, which is often a  
5 very large user of telecommunication services that it buys in the marketplace.<sup>35</sup> The Federal Cable Act  
6 expressly forbids local franchising authorities, like San Jose, from conditioning renewal on the  
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14 <sup>34</sup> The legislative history of Section 541(b)(3)(D), added by the Telecommunications Act of  
15 1996, indicates that institutional networks are intended for “intergovernmental services.” S. Conf.  
16 Rep. No. 104-230, at 180 (1996). The context in which Section 531 was enacted is also  
17 instructive. When Congress enacted the Federal Cable Act in 1984, it wanted to ensure that public,  
18 educational and governmental users would have access to the cable operator’s video entertainment  
19 system, serving primarily residential subscribers, and that governmental and educational users  
20 would have access to the new communications networks or “institutional networks” that some  
21 cable operators were building for nonresidential users, such as banks and other businesses that  
22 manipulate large amounts of data. In 1984, Congress envisioned that cable institutional networks  
23 could soon be in direct competition with telephone companies and wanted to secure capacity on  
24 these new competitive systems for governmental and educational users analogous to the PEG  
25 channel capacity set aside on the residential subscriber system. *See generally* the discussion  
26 entitled “Cable’s Provision of Noncable Communications Services” in 1984 House Report at 27-  
27 29. Thus, Section 531 “authorizes franchising authorities to require that a cable operator’s  
28 proposal for renewal includes a specified number of PEG channels and, as to *any* institutional  
network, a specified number of educational or governmental channels.” 1984 House Report at 46  
(emphasis added). Congress never intended to empower local franchising authorities like San Jose  
to turn Section 531 into a renewal weapon to force cable operators to build a full service  
telecommunications network under the control of the local franchising authority connected to other  
telecommunications networks. If there ever was any doubt about this proposition, it was  
eliminated in 1966 when Congress explicitly barred franchising authorities from requiring cable  
operators to provide telecommunications services. *See infra* note 37.

<sup>35</sup> Gould Decl. ¶ 11.

1 provision of telecommunications services or facilities and does not authorize local franchising  
2 authorities to provide such services to the public.<sup>36</sup>

3 Even assuming the City’s anticipated uses of the I-NET were permissible, under the  
4 Federal Cable Act, a local franchising authority is expressly limited to requesting *capacity* on an  
5 institutional network that an operator has built or is intending to build for its own commercial  
6 purposes.<sup>37</sup> San Jose may not rely on the Federal Cable Act for authority that it can require an  
7 operator to build – solely for the City’s use and benefit – a full service telecommunications  
8 network that could compete with other communications systems, including the cable system.<sup>38</sup>

9 Furthermore, the City’s proposed I-NET requirements constitute an unlawful tax on  
10 subscribers in violation of state law. The Federal Cable Act and the FCC rate rules of which the  
11 City is aware, since it is industry practice nationwide,<sup>39</sup> contemplate Comcast charging subscribers

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13 <sup>36</sup> Section 541(b)(3)(D) provides:

14 Except as otherwise permitted by sections 531 and 532, a franchising authority  
15 may not require a cable operator to provide any telecommunications service or  
16 facilities other than institutional networks, as a condition of . . . a franchise renewal  
. . . .

17 As discussed above, the reference to “institutional networks” does not save the City’s I-NET,  
18 which goes far beyond the “closed-loop” system contemplated by the Federal Cable Act. *See*  
19 *Gould Decl.* ¶ 11. Indeed, the RFRP requires that Comcast make the I-NET available to the public  
at various libraries and other locations in the City. Such a requirement is fundamentally  
inconsistent with the definition of an institutional network, which is a system “generally available  
only to subscribers who are not residential subscribers.” 47 U.S.C. § 531(f).

20 <sup>37</sup> Section 531(b) provides, in relevant part, that a local franchising authority “may require as part  
21 of a cable operator’s proposal for a franchise renewal, subject to Section 626, that channel capacity  
on institutional networks be designated for educational or governmental use”

22 <sup>38</sup> *See City of Dallas v. FCC*, 165 F.3d 341, 351 (5th Cir. 1999) (stating agreement with the  
23 FCC’s conclusion that Section 531(b) does not authorize local franchising authorities to require  
24 cable operators to construct I-NETs, because otherwise the “other than institutional networks”  
25 language in Section 541(b)(3)(D) would be “surplusage”); *In re Implementation of Section 302 of*  
26 *the Telecommunications Act of 1996 – Open Video Sys.*, Third Report & Order and Second Order  
27 on Reconsideration, 11 FCC Rcd 20,227, 20,290-91, ¶ 146 (1996) (holding that local franchising  
28 authorities cannot require OVS providers to construct I-NETs but that if an OVS provider  
constructs an I-NET by choice, the OVS providers’ obligations with respect to the capacity on the  
I-NET must be no greater than or less than those of the cable operator).

<sup>39</sup> Declaration of Sanford O. Ames (“Ames Decl.”) at 4.

1 for the costs associated with franchise requirements like the City’s I-NET.<sup>40</sup> This will result in an  
2 unlawful tax on a subset of the City’s citizens, *i.e.*, those who wish to receive cable television  
3 service will be forced to pay for a benefit for all of the City’s residents. The City’s attempt to fund  
4 its I-NET in this manner violates Article XIII of the California Constitution, which provides, in  
5 part, that before a city may directly or indirectly impose a tax intended to raise revenues for  
6 specific purposes, that tax must first be approved by two-thirds of the city’s qualified voters.<sup>41</sup>

7 Finally, the RFRP unlawfully attempts to prevent Comcast from deducting the cost of  
8 constructing the I-NET from the franchise fee otherwise paid to the City – a deduction that is  
9 expressly authorized by federal law.<sup>42</sup> Federal law establishes a ceiling on franchise fees of 5% of  
10 gross revenues derived from the provision of cable services.<sup>43</sup> To prevent local franchising  
11 authorities from devising ways to avoid the federal cap, Section 542(g)(1) of the Federal Cable Act  
12 defines franchise fees as “any tax, fee or assessment of any kind imposed by a franchising  
13 authority . . . on a cable operator or cable subscriber, or both, solely because of their status as  
14 such.” The statute expressly excludes “capital costs” for “public, educational, or governmental  
15 access facilities.” Section 542(g)(2)(C) (emphasis added). Section 531 makes clear that there is a  
16 distinction between PEG access and institutional networks, and institutional networks are not  
17 mentioned in the capital cost exemption. Thus, the capital costs associated with institutional  
18 networks – as opposed to PEG access facilities – are not exempt from the 5% cap, and are a “tax,  
19 fee or assessment” within the meaning of the term “franchise fee.” San Jose violates federal law

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21 <sup>40</sup> 47 U.S.C. § 543(b)(4); 47 C.F.R. § 76.922(f).

22 <sup>41</sup> California has a well-developed body of law to protect taxpayers from this sort of unfair  
23 taxation. As a general rule in California, as discussed below, cities may levy assessments, taxes,  
24 fees or charges only if either of two conditions is met: (a) the government-imposed fee has the  
25 support of the affected taxpayers as expressed in a vote, or (b) the government-imposed fee bears  
26 an appropriate relationship to the affected taxpayers. San Jose’s attempt to fund its I-NET meets  
27 neither of these conditions.

28 <sup>42</sup> The RFRP contemplates that Comcast will either build the institutional network for free or  
provide a capital grant to support construction of the institutional network “in addition to the  
franchise fee.” *See* Behan Decl. ¶ 8 & Exh. B at 37.

<sup>43</sup> 47 U.S.C. § 542(b).

1 by attempting to prevent Comcast from deducting from the franchise fee the cost of constructing  
2 the I-NET or making “grants” to the City to build the I-NET.

3 **c. The RFRP Demands Non-Cable Services**  
4 **in Contravention of Federal Law.**

5 San Jose’s RFRP also mandates that the cable system be capable of providing cable modem  
6 service, and that the I-NET be connected to the Internet so as to provide the City with cable  
7 modem service.<sup>44</sup> The Ninth Circuit concluded that cable modem service is a “telecommunications  
8 service.”<sup>45</sup> Subsequently, the FCC determined that cable modem service is an “information  
9 service.”<sup>46</sup> As stated above, the Federal Cable Act does not permit local franchising authorities to  
10 require cable operators to provide telecommunications services<sup>47</sup> or information services<sup>48</sup> as  
11 conditions of cable renewal. San Jose’s attempt to impose obligations, conditions or restrictions  
12 with respect to telecommunications services and other non-cable services violates the Federal  
13 Cable Act.<sup>49</sup>

14 **d. PEG Demands Exceed the Scope**  
15 **and Purpose of Section 531.**

16 The City’s PEG requirements seek facilities, equipment and capacity in areas never  
17 contemplated by Congress, such as the set-aside of capacity on digital tiers, the set-aside of  
18 capacity for PEG interactive services, and provisions for PEG video on demand, together with

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19 <sup>44</sup> Behan Decl. ¶ 8 & Exh. B at 33.

20 <sup>45</sup> *AT&T Corp. v. City of Portland*, 216 F.3d 871, 878-79 (9th Cir. 2000).

21 <sup>46</sup> *See In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other*  
22 *Facilities*, 17 FCC Rcd 4798 (2002) *appeal pending*. However, courts in California are still bound  
by the federal law as interpreted by the Ninth Circuit.

23 <sup>47</sup> 47 U.S.C. § 541(b)(3)(D).

24 <sup>48</sup> 47 U.S.C. § 544(b)(1) (“a franchising authority . . . may not . . . establish requirements for  
video programming or other information services”).

25 <sup>49</sup> *See In re TCI Cablevision of Oakland County, Inc.*, 13 FCC Rcd 16,400 ¶ 38 (1998), *aff’g*, 12  
26 FCC Rcd 21,396 (1997) (“*City of Troy Memorandum Opinion & Order*”). Provisions of San Jose’s  
27 Model Ordinances also violate this ban, including the provision to notify the City prior to offering  
noncable services (including telecommunications services) (Section 11.3 of Cable Franchise  
Ordinance) and the limits placed on the types of services the cable system may provide  
(Section 2.1.1 of Cable Franchise Ordinance).



1 associated equipment, facilities and resources needed to take advantage of such capacity and  
2 services.<sup>50</sup> Similarly, the RFRP requires that PEG capacity be configured in such a way as to  
3 permit the delivery of services – such as information service and voice and data signals – that are  
4 wholly outside the scope of the Federal Cable Act.<sup>51</sup>

5 Congress intended to require the set-aside of channel capacity for non-commercial *video*  
6 programming for public, educational and governmental purposes.<sup>52</sup> The City’s PEG demands  
7 transgress the lawful limits placed on local franchising authorities by the Federal Cable Act.<sup>53</sup>

8 **2. The Minimum Requirements Burden Substantially More**  
9 **Speech Than Necessary To Advance Any Legitimate**  
10 **Interests of the City and Are Overbroad.**

11 Even assuming *arguendo* that the City could point to any important or substantial interests,  
12 permissible governmental regulations must be “narrowly drawn” and the means chosen must “not  
13 ‘burden substantially more speech than is necessary’” to advance such interests. *Turner*, 512 U.S.

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15 <sup>50</sup> Behan Decl. ¶ 8 & Exh. B at 29.

16 <sup>51</sup> Behan Decl. ¶ 8 & Exh. B at 26-32. Indeed, as discussed above, the Federal Cable Act  
17 prohibits the City from conditioning renewal on the provision of telecommunications services and  
18 the City may not require information services. *See* nn. 46 and 47, *supra*. These restrictions are  
19 consistent with the scope of the Federal Cable Act, which is intended to cover “cable services.”

20 <sup>52</sup> Legislative history illustrates the scope and purpose of PEG requirements: “Public access  
21 channels are often the *video* equivalent of the speaker’s soap box or the electronic parallel to the  
22 printed leaflet. They provide groups and individuals who generally have not had access to the  
23 electronic media with the opportunity to become sources of information in the electronic  
24 marketplace of ideas. PEG channels also contribute to an informed citizenry by bringing local  
25 schools into the home, and by showing the public local government at work.” *See* 1984 House  
26 Report at 30 (emphasis added). *See also Time Warner Cable v. Bloomberg*, 118 F.3d 917, 926 (2d  
27 Cir.1997) (stating that while the examples in the legislative history do not necessarily define the  
28 limits of educational and governmental access programming, they “indicate the general nature of  
the programming that Congress expected would be carried” on PEG channels).

<sup>53</sup> Other examples of unlawful elements in the RFRP include, but are not limited to: (1) various  
requirements that violate the federal rate regulation regime by prohibiting Comcast from  
recovering the costs of providing parental control devices in violation of 47 U.S.C. § 543(a); and  
(2) the City’s unreasonable position that if the cable operator requests changes to the RFRP or the  
Model Ordinances – both of which contain illegal provisions – and the City finds the requests  
unacceptable, it may deny renewal on the basis that the operator is not “legally qualified” under  
Section 546. *See* Behan Decl. at ¶ 8 & Exh. B at 7, 9, 24.

1 at 662 (quoting *Ward*, 491 U.S. at 799). The City’s minimum requirements also fail this prong of  
2 the *Turner/O’Brien* test; the renewal criteria are broad, overburdensome and unreasonable.

3 For example, the City requires the cable operator to manage the PEG access channels for  
4 up to 24 months.<sup>54</sup> To manage the PEG channels, Comcast may have to exercise varying degrees  
5 of editorial control and judgment over the channels yet to be specified by the City, thereby forcing  
6 Comcast to alter its message and to possibly run afoul of 47 U.S.C. § 531(e) of the Federal Cable  
7 Act, which precludes cable operators from exercising editorial control over PEG channels. The  
8 City has not fashioned a solution that is no more restrictive than is essential to further any interest  
9 that it may have with respect to PEG channels<sup>55</sup> – the City itself could manage PEG access on an  
10 interim basis, or designate a person or entity for that purpose, rather than impose such a substantial  
11 unlawful burden on the cable operator.<sup>56</sup>

12 Another example of the City’s violation of the First Amendment is the requirement that  
13 Comcast obtain the City’s prior approval before changing any PEG channel location.<sup>57</sup> Requiring  
14 City approval for channel location changes could have an adverse impact on Comcast’s editorial  
15 decisions about what programming to carry on its system, and in what order those channels will be  
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17 <sup>54</sup> Behan Decl. ¶ 8 & Exh. B at 38.

18 <sup>55</sup> Recognizing that the D.C. Circuit upheld the Cable Act provision that permits municipalities to  
19 require cable operators to set aside channels for PEG use, *Time Warner Entertainment Co., L.P. v.*  
20 *FCC*, 93 F.3d 957 (D.C. Cir. 1996), Comcast does not suggest that any and all requirements to  
21 allocate PEG channels would violate its First Amendment rights. Rather, *Time Warner*, which  
22 involved a challenge to the facial validity of Section 531 of the Cable Act, should not control the  
23 resolution of the present case, which alleges First Amendment violations as the City has applied  
24 Section 531 to Comcast. *See id.* at 973 (“We can, of course, imagine PEG franchise conditions that  
25 would raise serious constitutional issues.”)

26 <sup>56</sup> It is common for a franchising authority to designate an independent entity to manage public  
27 access or to undertake the management of PEG access itself. Some cable operators may also  
28 voluntarily agree to manage PEG as part of the franchise negotiation process where they establish  
the specific requirements of such management activities. This is a far different situation than the  
facts presented here where the obligation to manage PEG access was a minimum requirement for  
renewal and the scope of such management is unclear.

<sup>57</sup> *See* Behan Decl. ¶ 8 & Exh. B at 38. Prior City approval must be sought unless the location  
change is required by law.

1 presented.<sup>58</sup> The City’s primary interest is to ensure that subscribers are able to view PEG  
2 programming. If a PEG channel location is changed, that interest can be met by requiring the  
3 operator to provide sufficient prior notice to subscribers. Thus, the restraint on Comcast’s speech  
4 is greater than necessary to serve the potential government interest.

5 Other requirements in the RFRP and Model Ordinances are so costly and/or unreasonable  
6 that they impose severe constraints on Comcast’s ability to operate its system. For example the  
7 PEG and I-NET package set out in the RFRP includes demands for up to 10% of the total system  
8 capacity, both analog and digital<sup>59</sup>; an initial payment to the City of \$2.25 million; annual  
9 payments in the range of \$3.1 million per year throughout the franchise term with future annual  
10 increases pegged to inflation; free fiber links among PEG production locations; and construction of  
11 an I-NET linking approximately 300 public buildings.<sup>60</sup> See Behan Decl. ¶ 8 & Exh. B at 26-38.  
12 These conditions are in addition to the obligation to upgrade the entire system to the City’s  
13 specifications and required capabilities, and free service, wiring and equipment for government  
14 buildings, schools and access centers. *Id.* at 19, 40. Comcast estimates that the foregoing  
15 requirements alone would cost in the range of \$93.5 million over the next two years. Gould Decl.  
16 ¶ 12. These numbers represent a huge increase in operator expenditures without any  
17 corresponding guaranteed increase in revenues.

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21 <sup>58</sup> See Binder Decl. ¶ 19.

22 <sup>59</sup> The amount of access channel capacity required in the RFRP must be considered in light of  
23 other programming obligations – must carry and leased access requirements – imposed by federal  
24 law. Binder Decl. ¶¶ 5-9.

25 <sup>60</sup> The RFRP requirements stand in sharp contrast to the requirement for 4.5 hours per week of  
26 local origination programming upheld in *Chicago Cable Communications v. Chicago Cable*  
27 *Comm’n*, 879 F.2d 1540, 1551 (7th Cir. 1989) (requirement is “sufficiently modest” to avoid First  
28 Amendment prohibition). Compare *Pac. W. Cable Co. v. City of Sacramento*, 672 F. Supp. at  
1322, 1338 (E.D. Cal. 1987) (“The jury also found that defendants used cable television’s allegedly  
naturally monopolistic nature as a pretext to obtain cash payments, in kind services and increased  
campaign contributions. This suggests that defendants sought to enhance the speech of some while  
burdening the expression of others – a result which is contrary to first amendment values.”).

1 Comcast is not arguing that there is no set of requirements that the City could propose that  
2 would be consistent with the First Amendment. Rather, the array of technical, contractual,  
3 financial and operational conditions imposed by the City, when considered in light of the First  
4 Amendment interests of the cable operator, are unreasonably burdensome and/or substantially  
5 overbroad. And here, these conditions are involuntarily being imposed under a process that  
6 threatens denial of renewal – a tactic used to try to force Comcast to agree to certain conditions at  
7 the cost of the Company’s First Amendment freedoms. This Court should require the City to  
8 undertake a new renewal process – including a new RFRP – consistent with First Amendment  
9 principles and other applicable law.

10 **II. COMCAST CAN DEMONSTRATE IRREPARABLE HARM.**

11 Section 546(e)(1) of the Federal Cable Act provides that “Any cable operator whose  
12 proposal for renewal . . . has been adversely affected by a failure of the franchising authority to act  
13 in accordance with the procedural requirements of this section, may appeal such . . . failure  
14 pursuant to the provisions of section 555 of this title.” 47 U.S.C. § 546(e)(1). In this provision,  
15 Congress intentionally provided a procedure to allow cable operators to seek immediate assistance  
16 from the federal judiciary when franchising authorities fail to act within the constraints of the Act.  
17 By allowing cable operators to immediately appeal franchising authorities’ failures to act in  
18 accordance with the Federal Cable Act, Congress effectively provided a mechanism for them to  
19 seek preliminary injunctive relief to stop unlawful renewal processes, and to prevent cable  
20 operators from being subjected to continued irreparable harm.

21 Preliminary injunctive relief of the kind anticipated by the Act is especially necessary in  
22 this case, where San Jose is unlawfully using the federal renewal process to gain leverage in its  
23 renewal negotiations with Comcast. In the best of circumstances, it is difficult for federal judges  
24 to conduct judicial review of administrative proceedings. Here, San Jose’s Federal Cable Act  
25 violations, in addition to the lack of procedural due process protections provided in the City’s  
26 Rules of Procedure, make it nearly impossible for Comcast to fully frame important statutory and  
27 constitutional issues in the administrative proceeding in a manner that will allow those issues to be

1 addressed and resolved on appeal. For these reasons, and the reasons set forth below, Comcast  
2 stands to suffer significant and immediate irreparable harm to its First Amendment rights and  
3 financial interests if the administrative process is not enjoined.<sup>61</sup>

4 **A. BASED ON SAN JOSE’S FIRST AMENDMENT VIOLATIONS, COMCAST**  
5 **IS ENTITLED TO A PRESUMPTION OF**  
6 **IRREPARABLE HARM.**

7 Alleged First Amendment violations are subject to a presumption of irreparable harm. The  
8 Supreme Court has made clear that “[t]he loss of First Amendment freedoms, for even minimal  
9 periods of time, unquestionably constitutes irreparable injury” for purposes of the issuance of a  
10 preliminary injunction. *Elrod v. Burns*, 427 U.S. 347, 373 (1976). But, in construing *Elrod* in the  
11 injunction context, Ninth Circuit courts have made clear that a party need not conclusively  
12 establish a First Amendment violation to be entitled to relief, but must show only a “colorable  
13 [First Amendment] claim.” *Sammartano v. First Judicial Dist. Court in and for the County of*  
14 *Carson City*, 303 F.3d 959, 973 (9th Cir. 2002) (“Under the law of this circuit, a party seeking

15 <sup>61</sup> In *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991), the Supreme Court,  
16 considering a similar issue, found that the provision of the Immigration Reform and Control Act of  
17 1986 that precluded direct review of INS demands of special agricultural workers’ status could not  
18 deprive the federal courts of their jurisdiction over collateral due process changes to the INS  
19 procedures. As the Court explained:

20 individual respondents would be unable to obtain meaningful  
21 judicial review of their application denials or of their objections to  
22 INS procedures . . . and a court of appeals . . . would most likely not  
23 have an adequate record as to a pattern of allegedly unconstitutional  
24 practice and would lack a district court’s factfinding and record  
25 developing capabilities.

26 *Id.* at 480.

27 Similarly, in *Varandani v. Bowen*, 824 F.2d 307, 310 (4th Cir. 1987), citing *Matthews v. Eldrige*,  
28 424 U.S. 319 (1976), the Fourth Circuit concluded that the request of a “final decision” may be  
waived where a plaintiff asserts a “collateral” constitutional claim because a “preliminary”  
administrative decision to deprive an individual of property may cause irreparable harm that cannot  
be rectified by a post-deprivation hearing. *See also Ram v. Heckler*, 792 F.2d 444, 446 (4th Cir.  
1986). In this case, Comcast is likely to suffer similar irreparable injury to that in *McNary* and  
*Varandani*, because under the illegal Rules of Procedure established by San Jose, Comcast will be  
denied the opportunity to fully frame important statutory and constitutional issues in the  
administrative proceeding in a way that will allow those issues to be addressed and resolved on  
appeal.

1 preliminary injunctive relief in a First Amendment context can establish irreparable injury  
2 sufficient to merit the grant of relief by demonstrating the existence of a colorable First  
3 Amendment claim.”) (internal citations and quotation marks omitted).<sup>62</sup>

4 In *Sammartano*, the Court held that the appellants did not have to “clearly establish[]” the  
5 merits of their First Amendment claims in order to be granted a preliminary injunction because “at  
6 this early stage in the litigation, the fact that a case raises serious First Amendment questions  
7 compels a finding that there exists ‘the potential for irreparable injury’” *Id.* at 973. Thus, the  
8 Court concluded that the appellants in *Sammartano* had made a sufficient showing to warrant a  
9 temporary restraining order pending the opportunity for a full hearing on a motion pending  
10 injunction. *Id.* at 974.

11 Similarly, Comcast has made a number of colorable claims under the First Amendment,  
12 several of which have already been recognized in this Circuit. *See supra* at 18 - 29. Under a  
13 similar fact situation, a cable operator alleging due process and First Amendment violations sought  
14 and obtained preliminary injunctive relief during a renewal process. *Group W*, 669 F. Supp. at  
15 957.

16 Moreover, Comcast not only can show the potential for irreparable First Amendment  
17 harms, but can demonstrate that such harms already have begun to occur. As the Declaration of  
18 Scott Binder describes, the possibility that the minimum requirements will be imposed upon  
19 Comcast as a condition of renewal already have begun to affect the programming decisions of the  
20 Company. Binder Decl. ¶ 18-19.

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22 <sup>62</sup> *See also Foti v. City of Menlo Park*, 146 F.3d 629, 643 (9th Cir. 1998) (finding that the fact  
23 that a case raises serious First Amendment questions compels a finding that there exists the  
24 potential for irreparable injury); *San Diego Comm. v. Governing Bd.*, 790 F.2d 1471, 1473 (9th Cir.  
25 1986), *distinguished on other grounds* (same); *Napa Valley Publ’g Co. v. City of Calistoga*, 225 F.  
26 Supp. 2d 1176, 1182 (C.D. Cal. 2002) (same); *Clear Channel Outdoor, Inc. v. City of Los Angeles*,  
27 234 F. Supp. 2d 1127, 1136 (C.D. Cal. 2002) (same); *Burkow v. City of Los Angeles*, 119 F. Supp.  
28 2d 1076, 1082 (C.D. Cal. 2000) (same); *Altmann v. Television Signal Corp.*, 849 F. Supp. 1335,  
1346 (N.D. Cal. 1994) (finding presumption of irreparable harm where plaintiff producers of public  
and leased access cable programs sued cable television service provider to enjoin provider from  
regulating indecent programming).

1           **B.       COMCAST STANDS TO SUFFER IRREPARABLE INJURY**  
2           **TO ITS FINANCIAL INTERESTS IF THE ADMINISTRATIVE**  
3           **PROCEEDING IS NOT ENJOINED.**

4           While the presumption of First Amendment irreparable harm is sufficient to establish  
5           Comcast’s entitlement to preliminary injunctive relief, Comcast also can establish that it has been  
6           harmed economically in a manner that will preclude subsequent repair. 47 U.S.C. § 555a(a)  
7           provides that:

8                       In any court proceeding pending on or initiated after October 5,  
9                       1992, involving any claim against a franchising authority or other  
10                      governmental entity, or any official, member, employee, or agent of  
11                      such authority or entity, arising from the regulation of cable service  
12                      or from a decision of approval or disapproval with respect to a grant,  
13                      renewal, transfer, or amendment of a franchise, any relief, to the  
14                      extent such relief is required by any other provision of Federal, State,  
15                      or local law, shall be limited to injunctive relief and declaratory  
16                      relief.

17           To the extent that this Section is constitutional, it appears to preclude cable operators like  
18           Comcast from seeking money damages in order to be compensated for damage in a cable renewal  
19           proceeding.<sup>63</sup> Thus, while attorneys’ fees may be available, damage to the company as a result of  
20           San Jose’s violations of law could well be noncompensable.<sup>64</sup> As set forth in the Declaration of  
21           Donald Gould, Comcast expects to continue to engage in extensive investment in the San Jose  
22           cable system over the next two years. Gould Decl. ¶ 12.

23           Furthermore, Chapter 15.28 of the San Jose Municipal Code appears to permit the City to  
24           order Comcast to remove its cable system from the streets of San Jose upon a denial of renewal.  
25           Neither the City Code, nor the cable franchise agreement, contains provisions permitting Comcast  
26           to sell the system to a third party in the event that its franchise agreement with San Jose is  
27           terminated. Consequently, if Comcast’s franchise renewal proposal is denied, the Company stands

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<sup>63</sup> This memorandum does not address the constitutionality of the provision, which has been  
subject to some question. See *Jones Intercable of San Diego, Inc. v. City of Chula Vista*, 80 F.3d  
320 (9th Cir. 1996).

<sup>64</sup> This section would not preclude Comcast from obtaining an award of attorney’s fees under 42  
U.S.C. § 1988.

1 to be irreparably injured by being forced to remove its cable system from the streets of San Jose  
2 without being able to recoup the fair market value of the system.<sup>65</sup> See Gould Decl. ¶ 13.

3 Because Comcast has invested substantial sums in the San Jose cable system, is continuing  
4 to rebuild the cable system in San Jose while this matter continues, is potentially limited by statute  
5 from recovering monetary damages, and may be required to remove its cable system from the  
6 streets of San Jose, it will be unlikely to receive financial compensation to fully compensate it for  
7 the damages it will incur as a result of a unlawful denial of renewal. Although monetary damages  
8 alone do not generally constitute irreparable harm, in cases such as this, where monetary remedies  
9 will be inadequate, the Ninth Circuit has found irreparable harm justifying injunctive relief. See  
10 generally *Chalk v. U.S. Dist. Court Cent. Dist. of Cal.*, 840 F.2d 701, 709 (9th Cir. 1988) (finding  
11 that a claim for monetary damages does not preclude temporary or injunctive relief if monetary  
12 damages will be inadequate to compensate the movant for his or her damages). Ninth Circuit  
13 courts have also found irreparable harm in cases where monetary damages were not an adequate  
14 remedy at law because the alleged damage was unconstitutional and unrecoverable. See *Perez-*  
15 *Funez v. District Dir., INS*, 611 F. Supp. 990, 1003 (C.D. Cal. 1984) (citing *Ry. Labor Executives'*  
16 *Ass'n v. Gibbons*, 448 U.S. 1301, 1305 (1980)).<sup>66</sup>

17 **III. THE PUBLIC INTEREST AND BALANCE OF HARMS FAVOR**  
18 **GRANTING COMCAST AN INJUNCTION.**

19 While courts in this Circuit have ended the preliminary injunction inquiry by presuming  
20 irreparable injury upon a showing of colorable First Amendment claims, in this case Comcast can

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21 <sup>65</sup> Paragraph 3.4.B. of the Settlement Agreement Between the City of San Jose and Heritage  
22 Cablevision of California, Inc., now Comcast, which appears to provide Comcast the opportunity to  
23 sell a portion of the San Jose Cable System, does not alter the fact that the Company stands to be  
24 irreparably harmed if its franchise is denied, since it may have no right to sell the entire system for  
25 fair market value as a going concern.

26 <sup>66</sup> Cf. *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197 (2d Cir. 1970) (granting injunction  
27 and finding that monetary damages would not compensate automobile dealer for irreparable injury  
28 he would suffer as a result of the termination of his automobile dealership); *Associated Producers*  
*Co. v. City of Independence, Mo.*, 648 F. Supp. 1255 (W.D. Mo. 1986) (finding that coal supplier  
would suffer irreparable harm if preliminary injunction was not granted directing the City to abide  
by the parties' coal contract pending the outcome of the litigation).



also show that the balance of harms, and the public interest, both favor imposition of a preliminary injunction. First, there is no real harm to San Jose if this injunction were to issue. Comcast is continuing to provide services to more than 159,000 households unabated while this matter proceeds. Behan Decl. ¶ 3. Not only will San Jose continue to receive cable services during the pendency of this proceeding, it will also continue to enjoy all other benefits of its existing agreements with Comcast. Indeed, even the rebuild timetable will not be affected if an injunction is entered, and thus benefits of that rebuild for the City and Comcast subscribers will not be delayed. *See* Gould Decl. ¶ 12.

Moreover, all parties could well benefit financially from this Court entering an injunction. By granting a preliminary injunction, this Court could cure the constitutional and statutory inadequacies in the procedures, and decide certain threshold questions of law, and thereby save the City of San Jose and Comcast substantial sums of money in avoiding a second hearing process upon remand. In any event, the ongoing First Amendment harms that Comcast is being subject to outweigh any alleged harms to the City. *See Sammartano*, 303 F.3d at 973 (“[T]he fact that a case raises serious First Amendment questions compels a finding that . . . at the very least the balance of hardships tips in the [movant’s] favor.”) (citations and internal quotations omitted).

Finally, the public interest strongly favors an injunction. *See generally Demarest v. Athol/Orange Cmty. Television, Inc.*, 188 F. Supp. 2d 82, 95-96 (D. Mass. 2002) (finding that the public interest in protecting First Amendment freedoms was served by enjoining governmental PEG cable channel from requiring cable programmers to obtain releases from every person appearing on programs). The public suffers when First Amendment protected speech is limited or restrained. *See Sammartano*, 303 F.3d at 974 (“Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles.”) (citations omitted).<sup>67</sup> Here the public is suffering not only those First

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<sup>67</sup> *See also Napa Valley Publ’g Co. v. City of Calistoga*, 225 F. Supp. 2d 1176, 1197 (N.D. Cal. 2002) (finding that public interest weighed in favor of granting preliminary injunction to newspaper publisher who brought First Amendment challenge to municipal ordinance which required permits to install newsracks, and which limited number of newsracks available at various

[Footnote continued on next page]

1 Amendment related harms, but potentially, harms to the public purse as well. All of those harms  
2 should be considered by the Court in entering the appropriate injunctive relief.

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*[Footnote continued from previous page]*

18 locations); *Welker v. Cicerone*, 174 F. Supp. 2d 1055, 1067 (C.D. Cal. 2001) (“Vindicating First  
19 Amendment rights is surely in the public interest.”); *Howard v. City of Jacksonville*, 109 F. Supp.  
20 2d 1360, 1365 (M.D. Fla. 2000) (“The public interest is served by the maintenance of First  
21 Amendment freedoms and could not possibly be served by the enforcement of an unconstitutional  
22 Ordinance.”); *Firecross Ministries v. Municipality of Ponce*, 204 F. Supp. 2d 244, 251 (D.P.R.  
23 2000) (“suppressing protected speech innately harms the public interest as a whole”); *Univ.*  
24 *Books & Videos, Inc. v. Metro. Dade County*, 33 F. Supp. 2d 1364, 1374 (S.D. Fla. 1999) (finding  
25 that the public interest is served when constitutional rights, especially free speech, are vindicated  
26 (citations omitted); *Ayers v. City of Chicago*, 966 F. Supp. 701, 717 (N.D. Ill. 1997) (same); *One*  
27 *World One Family Now, Inc. v. State of Nevada*, 860 F. Supp. 1457, 1464 (D. Nev. 1994) (“the  
28 public’s interest in safeguarding the fundamental rights of the First Amendment outweighs any  
competing public interest in the . . . maintenance of the public walkways”) (citations omitted);  
*Bloom v. O’Brien*, 841 F. Supp. 277, 283 (D. Minn. 1993) (recognizing that protecting  
constitutionally protected First Amendment freedoms is itself in the public interest).

Moreover, the public is entitled to the “fettered” discretion of its public officials. *Bullfrog Films, Inc. v. Wick*, 847 F.2d 502, 514 (9th Cir. 1988). An injunction will protect the public from the results of such unfettered decisionmaking as that contemplated under the current procedures.

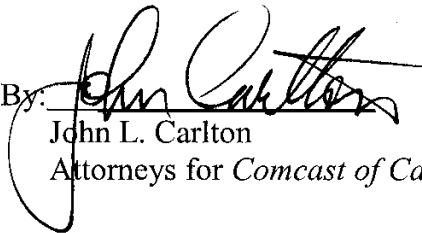
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CONCLUSION

For the reasons set forth herein, this Court should enter a preliminary injunction prohibiting San Jose, through its City Council, City Manager and designees, from proceeding with the administrative renewal proceeding under 47 U.S.C. § 546 until San Jose issues a new RFRP and new Model Ordinances, and reforms its Rules of Procedure to comply with the Federal Cable Act and the United States and California Constitutions.

Dated: June 5, 2003

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