1 violation of the new ordinance, and perhaps others that I
2 haven't thought of; but each of those is clearly easy to
3 ascertain in dollar damages and would never provide the basis
4 for irreparable harm.
5 This morning, this afternoon, rather, this
6 evening, whatever day this is, the hat out of the box as I
7 call it -- I have lost my note. I have lost a page. There
8 is a single sheet that must have torn off on my desk. Would
9 you get that for me? We will take a moment while I drink
10 some water.
11 I understood Mr. Callander to say that,
12 almost the first thing that he said when I asked him about
13 irreparable harm, was that the franchise of his client could
14 be forfeited and its assets seized. That is the language of
15 course, that kind of language; that kind of statement is the
16 stuff of which irreparable harm is made and not the earlier
17 things that I talked about, about spending money for
18 equipment, secretaries, or fines.
19 As he developed his argument, he called my
20 attention to Section 41-82 of the new ordinance which is
21 entitled "Evaluation of Violations," and that was also argued
22 by the city of Kalamazoo; and the argument of the plaintiff
23 is that he has an irreparable injury under 41-82 even though
24 he will not have to comply with anything before 1993 at the
25 earliest and 1996 at the latest with regard to its renewal

1 application.

2 The city argued, and I think not only argued

3 but rather persuasively bound its own client, by saying there

4 is nothing that it can do under the ordinance to terminate

5 the current franchise agreement -- causing me to look back to

6 the contract itself, or the franchise agreement which I

7 prefer to call it; and there is of course in the agreement

8 itself a termination clause. The termination clause found on

9 page 31 of the agreement, not argued today by any of the

10 lawyers, permits the city commission to terminate the

11 agreement if there is a material breach of any provision of

12 the contract.

13 I suppose a question one should ask, but I

14 answer it: Is there any possibility that section 41-82 of

15 the ordinance grants the city a greater power under the

16 termination provisions of the contract than it already had,

17 and I answer the question, if I stated it correctly, with an

18 absolutely no. There is no possible way that one can

19 interpret Section 41-82 of the new ordinance as providing the

20 substance of a material breach because by its own language it

21 relates only to renewal of consent agreements.

22 How could one argue that the city had a

23 stronger termination arrangement under its previous contract,

24 its only contract with Fetzer -- and then the current

25 plaintiff -- by 41-82? And the answer is it cannot. Section

1 41-82 I find, as a matter of law, relates to renewal only.
2 That is clear by the language of 41-82, and it is also clear
3 by the section of the act which Mr. Morris read to me and
4 which I reread. It does not provide causal grounds for a
5 city to claim a material breach of the agreement.
6 Therefore, I do not see any way that the
7 franchise can be forfeited and the assets seized as
8 originally argued; and I, therefore, do not find that
9 Cablevision has met its burden of demonstrating to me the
10 irreparable harm.
11 The plaintiff's support for irreparable harm
12 are the statements that, this is in the brief, quote: "There
13 is no legal measure of damage which would compensate
14 plaintiff," and, quote, "the injury is contractual,
15 constitutional and economic." Those quotes I lifted from the
16 plaintiff's brief at page 4.
17 Cablevision in its brief offers no further
18 discussion of and no laws for defining irreparable injury.
19 Assuming that the ordinance would constitute a violation of
20 the contract clause, which I will address later, or taking of
21 property without due process, a 14th Amendment claim, this
22 Court can find no case law determining that either of the
23 alleged constitutional violations constitute irreparable
24 injury for the purposes of imposing a court ordered
25 injunction.

1 A constitutional violation itself is not
2 necessarily an injury that money cannot fully compensate.
3 However, the main thrust of Cablevision's complaint is that
4 the ordinance will impose huge financial obligations on it
5 beyond those required under the agreement. That is not the
6 stuff by which this court or any other court can find
7 irreparable injury.
8 Moreover, 41-82 dealing with renewal of the
9 franchise, or what what it calls a consent agreement, is
10 speculative and in futuro; that is to say, that you don't
11 grant injunctions based upon irreparable injury because some
12 day in the future some argument might be made that the
13 franchisee is not in compliance with the ordinance or with
14 its own agreement. That may be a good argument for
15 declaratory judgment, and it may even be a good argument for
16 a permanent injunction. It is no argument at all for a
17 preliminary injunction or for a temporary restraining order.
18 In short, in summarizing the reasons that I
19 think there is no irreparable harm shown is, first, that
20 41-82 deals only with renewal of consent agreements; and,
21 secondly, that it is by its own language it is speculative,
22 remembering that the language was drafted right out of the
23 statute, lifted out of the statute basically.
24 The Court would have satisfied itself at
25 that stage were this is a motion for a temporary restraining

1 order and not proceed to discuss likelihood of success on the
2 merits; but because I think it would be wasteful of the
3 parties', the lawyers' time, and the Court's time, I will
4 move to the breach-of-the-agreement argument, the violation
5 of the Cable Communications Act, and the constitutional
6 arguments.
7 First, the issue of breach of agreement.
8 Breach of contract might be a better way to say it.
9 Cablevision in this hearing and in its supporting papers has
10 not shown that it is likely to be successful on the merits
11 from what has been submitted to me. Cablevision claims that
12 the ordinance is a breach of the agreement.
13 However, I am not convinced that this is so.
14 The agreement specifically provides that the city retains its
15 police powers. The ordinance represents legislation enacted
16 to benefit the public welfare, a subject that I will return
17 to later. Kalamazoo classifies the ordinance as consumer
18 protection. The plaintiff classifies it as customer service
19 standards. Moreover, Kalamazoo states that the, quote,
20 "ordinance was only passed after a public hearing, extensive
21 fact-finding, a series of meetings and discussions, and two
22 readings in public." I am quoting from the paper supplied,
23 but that argument was also made. That is more, it is agreed,
24 than is required under the city charter.
25 Cablevision argues, however, that the city

1 has not satisfied the requirements imposed by the charter.
2 Neither party has supplied a copy of the relevant charter
3 provisions, but I think I know what the argument is.
4 Joan Burke, who is the Kalamazoo Cable
5 Administrator, testifies by an affidavit of fact findings
6 regarding customer service calls to Cablevision. In 1989,
7 she testifies that there was an average of 16,792 calls per
8 month from a subscriber base that is 15,000 within the city
9 and approximately 42,000 in the whole area; that the city as
10 of the October report, the subscriber based moved to 18,491,
11 and in 1990 there had been an average of 17,146 calls per
12 month. From a base of 18,000, that would be extraordinary.
13 From a base of 42,000, I don't know.
14 It does not seem to me that Cablevision is
15 likely to succeed on its claim that the city has breached its
16 agreement.
17 Cablevision alleges that the ordinance was
18 adopted without complying with the city charter as I
19 mentioned before, but has provided no evidence that this is
20 so. However, in arguments today, I heard arguments about the
21 ordinance violating the Michigan Constitution because the
22 ordinance was not ratified by three-fifths of the voting
23 public. That was an interesting argument, not briefed by
24 anybody.
25 I found the relevant Michigan constitutional

1 provision, and I found the Michigan Court of Appeals case
2 that Mr. Callander cited to me, and it seems to me to be far
3 off the mark.
4 Article VII, Section 25, of the Michigan
5 Constitution requires that a city in acquiring the public
6 utility shall not do so unless the proposition has first been
7 approved by three-fifths of the electors voting thereon,
8 which think is what he argued.
9 However, the ordinance doesn't grant a
10 franchise. The franchise was granted by the contract. All
11 the ordinance does is regulate the franchise agreement as to
12 consumer protection. So it doesn't seem to me that the
13 Michigan Constitution is violated in the slightest. Nor do I
14 think much of the argument made by either side.
15 It is a franchise under federal law. That
16 is how I am looking at it, is under federal law, and it is a
17 franchise I suspect under state law. The plaintiff is
18 certainly not arguing, I don't think, that it has an invalid
19 franchise agreement with the city dating way back to 1981
20 because the city didn't put it to a vote of three-fifths of
21 the people; if it is, it has no agreement at all and
22 shouldn't be in court at all. I can't believe that is the
23 plaintiff's argument. I have to believe instead the
24 plaintiff's argument -- otherwise, if it is the argument,
25 both the city and the plaintiff are in trouble because there

1 is no franchise agreement whatsoever to Cablevision. I don't
2 think that that is the argument.
3 I think the argument is somehow the
4 ordinance created a franchise. The ordinance does not create
5 a franchise. It simply polices a franchise. That is all I
6 have to say about that. Much ado about nothing.
7 From the evidence before me, the ordinance
8 reads to me like a reasonable exercise of police powers in
9 response to dissatisfaction represented at the public hearing
10 and represented by the numbers of telephone calls, however
11 significant that might or might not be, to the customer
12 service department.
13 That is the argument and what I make of it
14 regarding breach of contract.
15 The argument regarding violation of the
16 Cable Communications Act, which because of my voice I will
17 call CCA, is that the ordinance is a violation of CCA because
18 Kalamazoo, and to use the plaintiff's own word,
19 "unilaterally" enacted regulations not contained in the
20 franchise agreement. Cablevision contends that its agreement
21 with Kalamazoo constitutes a franchise under 522(8) of the
22 CCA, and I agree with plaintiff Cablevision about that. For
23 reasons that I didn't originally understand but now do, the
24 city of Kalamazoo denies this.
25 The reason the city of Kalamazoo denies it

1 is lost on me unless it is that same concern that I expressed
2 a minute ago, that somehow it can't have a franchise
3 agreement unless three-fifths of the people have voted on it.
4 Since it has a franchise in which three-fifths of the people
5 did not vote on, it would prefer to call this a consent and
6 a, or an agreement, whatever. It is, as far as I am
7 concerned, I am disinterested in it.
8 Section 552(8), which I am interested in,
9 defines a franchise as an initial authorization, or renewal
10 thereof, issued by a franchising authority, whether such
11 authorization is designated as a franchise, a permit, a
12 license, a resolution, a contract, a certificate, agreement,
13 or otherwise, which authorizes the construction or operation
14 of a cable system. That is mostly a quote from 552(8).
15 The agreement provides that Cablevision pay
16 a percent of its gross revenues to the city of Kalamazoo for
17 its right of access. The reason for Kalamazoo's denial that
18 its agreement with Cablevision is a franchise agreement, as I
19 said, is not clear except in the sense that I just enunciated
20 it.
21 Section 521 states that the primary purpose
22 of the CCA is to, quote, "establish franchise procedures and
23 standards which encourage the growth and development of cable
24 systems and which" -- and I would underscore this, although
25 it is not underscored -- "which assure that cable systems are

1 responsive to the needs and interests of the local
2 community." I would repeat that because that is the
3 operative language of the statute most interesting to me:
4 permit a franchise which assures that the cable systems are
5 responsive to the needs and the interests of the local
6 community. That comes from 42 U.S.C., section 521(2), and I
7 have read it verbatim.
8 Moreover, section 552(c), which has been
9 much argued today, says: "Nothing in this subchapter shall be
10 construed to prohibit any state or any franchising authority
11 from enacting or enforcing any consumer protection law to the
12 extent not inconsistent with this subchapter."
13 Cablevision argues that the ordinance is
14 inconsistent with CCA -- the argument that I find is not
15 meritorious. Under section 544(c), Cablevision argues,
16 Kalamazoo can only enforce the customer service provisions
17 contained in the franchise agreement.
18 Section 554(c) provides in relevant part --
19 and there is a ellipsis here -- quote: "The franchising
20 authority may -- ellipsis -- "enforce requirements contained
21 within the franchise for the provision of services,
22 facilities, and equipment, whether or not related to the
23 establishment or operation of a cable system."
24 That is, I was reading 554(c) I guess I
25 said. Cablevision construes this provision to mean that

1 Congress intended that, quote, "the sanctity of a franchise
2 could not be abrogated even by an ordinance enacted by the
3 franchising authority" -- end quote. That quote comes from
4 the plaintiff's brief at page 9. There is nothing in the act
5 or in the legislative history to support this conclusion when
6 it comes to the city using its valid police powers to enact
7 legislation intended to benefit consumers. See, particularly
8 the Cable Communications Policy Act of 1984.
9 See particularly the House of
10 Representatives number 98-934, page 79, reprinted in the 1984
11 U. S. Congressional Code of Administrative News at pages
12 4.655 and 4.716. I find nothing in the act that supports a
13 finding that this legislation is inconsistent with the act.
14 As a matter of fact, the act explicitly provides that the
15 city retains such power.
16 Those two claims, well, those two claims are
17 not the constitutional claims unless the argument is made
18 that the statute is unconstitutional. That argument has not
19 been made. I have not been asked to declare that the CCA is
20 unconstitutional as being an impairment of contract
21 obligation or taking without due process.
22 The two constitutional claims that are made
23 by Cablevision are based on the assumption, and argument,
24 that Kalamazoo City breached the agreement. As I have
25 discussed, it does not seem likely to me at this early stage

1 that there was in fact a breach of contract.

2 Because I find that Cablevision has not

3 satisfied that burden as to the breach of contract claim, or

4 as to the violation of the cable act, CCA, I easily find that

5 Cablevision has not demonstrated that it is likely to succeed

6 on the constitutional claims; and the reason among others

7 that -- I have already discussed some of them -- that I don't

8 think it could succeed on the constitutional claims, first of

9 all, there would have to be a breach of the contract, or an

10 impairment of the contract, for there to be a taking, looking

11 at two separate constitutional provisions; and I find in

12 section 552 this interesting language, from (a) to (c), (a)

13 entitled inclusion of enforcement provisions in the

14 franchise, and, (c), giving the, or leaving to the state the,

15 and/or any franchising authority the power to enforce

16 consumer protection laws.

17 Now much is made in this argument that there

18 ought to be some distinction between a consumer protection

19 legislation and a customer service standard. Let's analyze

20 that just for a second.

21 The plaintiff argues that because the

22 contract has provisions already involving customer service

23 standards, and because Joan Burke referred to the term

24 "customer service standards" three times in her letter to

25 Liz, that this is a wool in sheep's clothing, or a lamb in

1 sheep's clothing, or a wolf in sheep's clothing, whatever the
2 metaphor might be: that, better stated, what the city is
3 attempting to do, the argument of the plaintiff goes, is to
4 dress up its legislation with the term "consumer protection
5 law" so as to fit within the statute where in fact it is
6 breaching the plaintiff's contract which already has customer
7 service standards.
8 By the way, the statute already permits the
9 contracts with the franchisees and the franchisors to contain
10 customer service standards. That poses this interesting
11 question which has not been argued: Supposing the franchise
12 agreement between now Cablevision and the city of Kalamazoo
13 gave the Cablevision franchisee one hour to answer a customer
14 complaint, and that the new ordinance only permits the
15 franchisee three minutes to answer a customer complaint.
16 That, Mr. Callander argues, would be a unilateral alteration
17 of a contract agreement.
18 That is a facially interesting argument I
19 think. With that argument the Court is satisfied, however,
20 that the legislation specifically has permitted not only for
21 the city to have in its franchise agreement customer service
22 standards, but left to the city or the franchising authority
23 the right to pass legislation for the purpose of protecting
24 the consumer; and one must remember the language that I
25 underscored earlier.

1 In short, the Court does not find that the
2 argument on the two constitutional provisions is much better
3 than the breach of contract or the violation of the CCA.
4 I am interested in the Article I, Section 10
5 argument because I am interested in constitutional law.
6 While I was looking through some of the materials that I
7 keep, I was interested in the Contract Clause interpretation
8 in a volume that I read sometimes, entitled
9 Constitutional Law, 2nd Edition by Nowak and others, which
10 retraces the constitutional history, kind of the Supreme
11 Court history of Article I, Section 10, and states, among
12 other things at page 461 of the edition that I am looking at,
13 that the Court has recognized that a state cannot, cannot
14 bargain away its police power. That is the most direct
15 answer to Mr. Callander's argument.
16 If in fact that is what happened, and I make
17 no finding that it did, that somehow the city of Kalamazoo,
18 in dealing with the franchisee Fetzer in 1981, by utilization
19 of some customer standards bargained away its right to pass
20 legislation protecting the consumer, then it won't pass
21 constitutional muster because the Supreme Court won't let it.
22 "If, however," goes Nowak, continues Nowak,
23 "If however, the state commits itself to a financial
24 obligation" -- to a franchise -- "the Court will review both
25 the reasonableness and the necessity of any legislation that

1 impairs the city's obligations or the municipality's
2 obligation." "If the court finds that the state law at issue
3 is unnecessary and unreasonable in the way that it alters the
4 state financial commitment. it may simply void the measure as
5 violation of the Contract Clause."
6 The Court's interest in Nowak is that the
7 city simply has no power to bargain away its police right to
8 protect the consumer.
9 For all of these reasons, I find that
10 Cablevision has failed to convince me at this early stage of
11 the litigation that the plaintiff is likely to succeed on the
12 merits of its complaint.
13 Without a finding of irreparable harm.
14 without a finding of likelihood of success on the merits,
15 this Court lacks the authority to issue either a temporary
16 restraining order or to issue a preliminary injunction.
17 Therefore, the motion for a temporary restraining order and
18 the motion for a preliminary injunction is denied.
19 That is not to say that if the plaintiff
20 believes that it is entitled to temporary relief under some
21 other factual material than what I have received in this
22 brief time that I wouldn't entertain a preliminary injunction
23 hearing. It is to say that if what the plaintiff seeks at
24 this moment is a temporary restraining order it is denied.
25 It is further to say that if what the city

1 seeks is a preliminary injunction it is equally denied.

2 He thinks I said "city" when I meant

3 Cablevision. I may well.

4 As to the difference, restating, the

5 Cablevision request for a temporary restraining order is

6 denied. The Cablevision request for a preliminary injunction

7 is denied. Not the city.

8 Anything more for me?

9 MR.CALLANDER: No, thank you, Your Honor.

10 MR. CINABRO: Thank you, Your Honor.

11 (Conclusion of proceedings.)

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2 REPORTER'S CERTIFICATE
3
4 I. Jarratt W. Martin, Official Court Reporter for
5 the United States District Court for the Western District of
6 Michigan, appointed pursuant to the provisions of Title 28,
7 United States Code, Section 753, do hereby certify that the
8 foregoing is a true and correct transcript of proceedings had
9 in the within-entitled and numbered cause on the date herein-
10 before set forth; and I do further certify that the foregoing
11 transcript has been prepared by me or under my direction.
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