Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Updating the Commission's Rule for	)	WT Docket No. 19-71
Over-the-Air Reception Devices (OTARD)	)	

Motion for Stay by Children's Health Defense

Children's Health Defense is a 501(c)(3) nonprofit advocacy organization dedicated to ending children's chronic health conditions by eliminating harmful toxic exposures. Wireless technology radiation is a toxin and a major contributory factor to increased sickness in children. Children's Health Defense (CHD) is a membership-based organization. Many of CHD's members, or their children, have already been harmed. CHD advocates on children's behalf and seeks science-based safeguards and substantive and procedural protections for and on behalf of those who have already been injured and those who will be harmed in the future. This Motion for Stay is submitted pursuant to that mission, and in representation of CHD's members who will suffer irreparable injury if the rule adopted on January 7, 2021[1] goes into effect on March 29, 2021.

CHD and four individuals have filed a Petition for Review of the *OTARD Order*.[2] All of the CHD Petitioners join in this motion for administrative stay. This Motion is supported through the Affidavit of Dafna Tachover, attached hereto.

I. SUMMARY

The *OTARD Order* and amendments to the OTARD rule[3] allow fixed wireless service providers to place eligible fixed wireless antennas on one property and "serve" "multiple customer

[1] Report and Order, *In the Matter of Updating the Commission's Rule for Over-the-Air Reception Devices*, FCC 21-10, WT Docket No. 19-71, __ FCC Rcd ___ (January 7, 2021) ("*OTARD Order*"). The order and adopted rules were published in the Federal Register on February 25, 2021. 86 Fed. Reg. 1132.

[2] *CHD, et al v. FCC and USA*, No. 21-1075, D.C. Cir. (filed February 27, 2021).

[3] This Motion for Stay addresses the OTARD rule, as amended by the *OTARD Order*. We will refer to the entirety of the rule as amended as the "amended rule."

locations" or users on entirely different properties using a "hub" or "relay." This equipment, however, will not just "serve" properties with "users" who want the service. The wireless hubs and switches that make service expansion possible will necessarily also provide radio coverage that affects people that do not want, and affirmatively object, to the additional radiation that will touch their bodies and intrude on their property.

The *OTARD Order* proclaims this new opportunity will be widely used to service neighborhoods and other areas using a variety of air interfaces and licensed and unlicensed frequencies, including "private 5G."[4] In other words, the amendment will lead to significant and widespread new wireless deployment and thus emissions in both urban and rural areas but especially in rural parts of the country. The amended rule operates in large part by expanding the list and type of installations that are exempt from local zoning and state-level laws enforcing deed restrictions that would otherwise slow or deter newly eligible projects. But this is not the *only* impact: the rule amendment lacks any requirement of advance notice to nearby properties, so people will not even know a property owner intends to employ a hub or relay and wirelessly extend the fixed wireless communications capabilities to a much wider area. Those who would object to being irradiated in their own home will now have no notice and no means to object or seek relief or accommodations.

The amended rule will therefore expressly authorize pulsed and modulated radiofrequency and microwave electromagnetic radiation ("wireless radiation") over and through properties of owners that affirmatively **do not want** any such intrusion – and, indeed, without informing them at any time that this intrusion will occur.[5] It will irradiate adults and children who have already become sick from this

[4] *See, e.g., OTARD Order* ¶11 and n. 30.

[5] CHD contests the amendment – which allows installation and use of wireless hubs and relays that will extend the connectivity gained from a fixed antenna by sending emissions past the property line of the tract containing the fixed wireless antenna. CHD is not herein directly opposing installation of the fixed wireless antennas despite misgivings about those as well. The fixed antenna itself does not lead to irradiation of adjoining properties, although the base station to which it connects can do so, especially if it is omnidirectional or sectorized.

radiation and will cause them further and irreparable harm. It will irradiate people who have not consented to exposure and **do not want** to be irradiated. It will frustrate the desires and expectations of people who chose their home location precisely because it had little to no wireless radiation extending from adjacent or nearby properties.

As a result, if implemented, the amended rule will violate the U.S. Constitution and upend long-standing common law vested personal and property rights. The Commission does not have the power or authority to override people's right to bodily autonomy or their property-based right to "exclude" wireless radiation emitted by third parties. The FCC does not have the power to allow a person to send noxious emissions past his or her property line and "serve" a property where the owner does not want to be "served" with toxic wireless radiation. Wireless radiation is a public and private nuisance in this context. The FCC cannot preempt state, common law or constitutional rights protecting those who seek to avoid harmful wireless radiation in their own homes.

Among those who wish to be left alone and to exclude involuntary irradiation in their own homes is a significant population that has developed cancer or other ailments as a result of exposure. Many have developed and suffer from "Microwave Sickness," also known as "Radiation Sickness," or "Electromagnetic Hypersensitivity Syndrome" ("EHS"). These individuals, including children, experience adverse health effects when exposed to wireless radiation. Exposure makes them sick and often exacerbates other underlying conditions. Radiation Sickness is a recognized disability under the federal ADA and a handicap under the federal FHA. The adopted rule will eliminate disabled individuals' legal rights under the Constitution, federal law and many state equivalent laws that protect disabled and handicapped individuals from discrimination and ensure access to housing.

The fact is that many and a growing number of people, for various reasons, do not want a wireless hub or relay next door or nearby emitting radiation that intrudes on their own property and invades their bodies against their will. They have the right to oppose this invasion, but the amended

rule allows involuntary exposure without any notice or meaningful and fair procedures through which to object and obtain relief.

Those who have been injured from existing wireless radiation and developed Radiation Sickness, cancer or seizures, suffer other ailments or their ailments are aggravated by exposure, demand that they not be exposed to emissions that will make them even sicker, experience tortuous pain or even kill them. The amended rule will lead to massive suffering, extensive litigation and likely public protest. It will expose providers and the public treasury to potential liability.

The amended rule entirely lacks meaningful and fair due process procedures. Due process requires notice and an opportunity to object and/or seek accommodations. The *OTARD Order* and amended rule, however, make no provisions for notice and offer no opportunity to meaningfully challenge the activity. Indeed, the rule operates to preempt state-level remedies, such as local zoning processes and even state-level disability/civil rights remedies. There is no means by which a person with a disability can seek accommodations under federal or state law.

The *OTARD Order* dismisses CHD's April 17, 2020 comments in one brief and terse paragraph that mischaracterizes, misstates and misconstrues several of the points CHD made. The Commission failed to meaningfully address the comments, and the short one-paragraph discussion is entirely inadequate given their importance to the 15,090 people who joined CHD's comments and share the same concerns. Of those, 6,231 declared that they and/or their child already have been injured from exposure to wireless radiation. The rule amendments will violate substantive and procedural due process.

CHD has sought judicial review[6] and requests that the Commission stay the effectiveness of the amended rule pending such review. Each and every criterion for an administrative stay is clearly met, as shown below.

[6] *CHD, et al v. FCC and USA*, No. 21-1075, D.C. Cir. (filed February 27, 2021).

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III. LEGAL STANDARD

To qualify for a stay, a movant must show: (1) it is likely to succeed on the merits; (2) it will suffer irreparable injury absent a stay; (3) other interested parties will not be harmed by a stay; and (4) the public interest supports a stay.[7] "[A] stronger showing of one element may offset a weaker showing of another."[8] "The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiffs will suffer absent the stay. Consideration of each factor is weighed against the others, with no single factor dispositive. Thus, "injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits."[9] Simply stated, more of one excuses less of the other.[10]

IV. MOVANTS MEET THE STANDARDS FOR GRANTING A STAY

A. Movants Are Likely to Succeed on Their Claims That the *OTARD Order* Violates the U.S. Constitution, other Substantive Federal Law and the APA.

"The first showing a stay petitioner must make is 'a strong showing that he is likely to succeed on the merits.'"[11] "The standard does not require the petitioners to show that 'it is more likely than not that they will win on the merits.'"[12] Rather, "a petitioner must show, at a

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

[8] *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011); *Mohamed v. Uber Technologies, et al.,* 115 F.Supp.3d 1024, 1028 (N.D. Cal. 2015).

[9] *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (CD Cir. 1958); *Holidav Tours*, 559 F.2d at 844).

[10] *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

[11] *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (quoting *Nken*, 556 U.S. at 434).

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

minimum, that she has a substantial case for relief on the merits."[13] A substantial case is one that "raises serious legal questions, or has a reasonable probability or fair prospect of success."[14]

B. Movants' Constitutional Claims Are Serious and Have a Fair Prospect of Success.

1. Movants' Substantive Constitutional Claims are Significant.

The Constitution preserves individual rights through the First, Fourth, Fifth, and Ninth Amendments and guarantees due process of law. The amended rule violates these protections in several ways.

Among those who wish to be left alone and to exclude involuntary irradiation in their own homes is a significant and growing population that suffers from "Radiation Sickness" also known as "Microwave Sickness," or "Electromagnetic Hypersensitivity Syndrome" or "EHS." These individuals, including children, have developed and suffer from a recognized disability (or handicap), one which has been acknowledged by the Architectural and Transportation Barriers Compliance Board. *See* Architectural and Transportation Barriers Compliance Board, ADA Accessibility Guidelines for Recreation Facilities, 68 FR 56351 (Sept. 3, 2002) ("The Board recognizes that …electromagnetic sensitivities may be considered disabilities under the ADA if they so severely impair the neurological, respiratory or other functions of an individual that it substantially limits one or more of the individual's major life activities."). The amended rule will violate radiation disabled/handicapped persons' vested legal rights under federal law and many state equivalent laws that protect disabled and handicapped individuals from discrimination and ensure access to housing. More generally, the amended rule denies procedural and substantive due process and is therefore unconstitutional.

[13] *Id.* at 968.

[14] *Id.* at 971.

The Commission was directly informed by many people that they object to forced irradiation and the invasion of their rights. They do not want a wireless hub or relay next door or somewhere nearby that emits radiation that intrudes on their own property and invades their bodies against their will.[15] Quite a few directly objected because of the adverse health effects of wireless radiation, and specifically mentioned the adverse impact on disabled individuals.[16] The Children's Health Defense record submission was joined by 15,090 people who expressly object to intrusions on their property, consider non-consensual irradiation to be a battery on them and their family and a form of child endangerment. Of those who joined CHD's submission, 6,231 declared that they and/or their child already have been injured from wireless radiation. Many added substantive personal comments and detail Radiation Sickness, cancer, epileptic seizures and even death. They all demand that they not be subjected to emissions that will make them and/or their children and/or other family members even sicker and may even kill them.

This Commission – like all governmental entities – is bound by the federal Constitution and Supreme Court precedent on constitutional issues. There are limits to the FCC's authority and the amended rule exceeds those limits.

a. Property rights

The amended rule contemplates authorizes a taking, by giving color of law to denial of property rights. The Supreme Court has consistently recognized common law property rights

[15] A few examples are Roberta Anthes June 17, 2019 comment, https://www.fcc.gov/ecfs/filing/10618852930266; Alexis Schroeder June 17, 2019 comment, https://www.fcc.gov/ecfs/filing/10618618300992; Community Associations Institute Reply Comments, June 17, 2019 https://ecfsapi.fcc.gov/file/10618133852975/Community%20Associations%20Institute_WT%20Docket%20No.%2019-71%20Reply%20Comments.pdf; Larry Trivieri, Jr. June 17, 2019 comment, https://www.fcc.gov/ecfs/filing/10617773608127; John Frink June 3, 2019 comment https://www.fcc.gov/ecfs/filing/106040853928052; Virginia Cottone June 3, 2019 comment, https://www.fcc.gov/ecfs/filing/10603183726745.

[16] This can be verified through an ECFS search for "disability" using this proceeding as a filter.

when assessing whether "property" has been taken. "The hallmark of a protected property interest is the right to exclude others. That is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673, 119 S. Ct. 2219, 2224 (1999), *citing Kaiser Aetna v. United States*, 444 U.S. 164, 176, 62 L. Ed. 2d 332, 100 S. Ct. 383 (1979).

Government-authorized interference with enjoyment and use of the land is a compensable taking. *United States v. Causby*, 328 U.S. 256, 66 S. Ct. 1062 (1946) (non-physical intrusion of airport noise).[17] *Kyllo v. United States*, 533 U.S. 27, 32 (2001), involved government agents who directed thermal energy at the defendant's home to obtain heat signatures allowing them to discern activity inside the home. The Court held this was a search for Fourth Amendment purposes. It so held because the energy waves intruded on the defendant's property.[18] Although the method used in that case merely detected heat emitted from outside walls the Court observed that more modern directed beam surveillance could penetrate walls,[19] thereby becoming an illegal invasion of people's most protected spaces. 533 U.S. at 34-40.

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[17] RF intrusion on property is akin to the release of loud noises. It may not be aural but it still has a biological effect. There are some who can, in effect, "hear" emissions or at least sense them. Others may not sense the constant impact of these emissions, but their body does. The effect is qualitatively similar to loud noises that prevent someone from getting a good night's rest.

[18] The intrusion will not be physical, so it could be deemed a "nuisance" rather than a "trespass" under most state property laws. For example, California. Civ. Code §3479 defines a "nuisance" as "[a]nything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance." (emphasis added). Sections 3480, 3481 and 3493 go on to distinguish between a public nuisance and private nuisance, and address when a private action can be maintained. The amended rule would preempt this statute as it relates to non-consensual RF intrusions over an objecting person's property.

[19] *See* 533 U.S. at 36, n. 3, describing radar, ultrasound and "devices emitting 'low levels of radiation' (presumably within FCC "safe" limits) that can travel 'through-the-wall.'" There are already systems that can detect activities inside a home by sending Wi-Fi signals through external walls and interpreting the reflected signals. *See* Using WiFi to see through walls, Anthony, Extreme Tech (Aug. 3, 2012), available at https://www.extremetech.com/extreme/133936-using-wifi-to-see-through-walls. This is exactly the type of "through-the-walls" technology the *Kyllo* court held violated the defendant's property rights and his right to privacy.

The Commission does not have the power to override the property rights protected by the Constitution by purporting to allow others to intrude on someone's land and send noxious radiation into their home. This rule is not merely about a "viewer's ability to receive video programming" on their own property so it does not derive from §207 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. Nor is this particular rule mandated by §303 or reasonably necessary to the effective performance of the FCC's various responsibilities. But even if the Communications Act can somehow be read to authorize this rule amendment, it cannot override fundamental rights guaranteed by other Federal laws and by the Constitution.

These property rights violations will lead to an extraordinary amount of litigation and a potential huge drain on the federal budget due to claims under the Tucker Act (28 U.S.C §1346). Every homeowner whose property is "served" through a wireless hub or relay attached to an antenna located on someone else's property could potentially have a claim. The D.C. Circuit has already twice found that FCC action can lead to potential Tucker Act liability. One such decision related to a previous OTARD decision. *Bldg. Owners & Managers Ass'n Int'l v. FCC*, 254 F.3d 89, 99 (D.C. Cir. 2001), denying facial challenge to Second Report and Order, *In the Matter of Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast, Multichannel Multipoint Distribution and Direct Broadcast Satellite Services*, 13 FCC Rcd 23874 (Oct. 1998) ("*Second OTARD Order*"). *See also* Randolph Concurrence, 254 F.3d at 99-102 and *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1445-1446 (D.C. Cir. 1994). This Commission should not run roughshod over non-consenting landowners' constitutionally-protected property rights. If the amended rule goes into effect, a flood of Tucker Act claims will follow. Congress likely did not intend that the Commission would impose enormous liabilities on the treasury. *Bell Atlantic*, 24 F.3d at 1445.

b. The rule amendment will violate individuals' right to bodily autonomy and purport to authorize battery on non-consenting citizens. The rule amendment will lend color of law to activity that is cruel and inhumane.

"Bodily autonomy" and "autonomy privacy" derive from the "negative" individual liberty rights embodied in the Constitution. U.S. Supreme Court decisions starting in the 1950s held that the people have a right to privacy relating to personal choice, personal access to information and to associate with others. *United States v. Rumely*, 345 U.S. 41 (1953); *NAACP v. Patterson*, 357 U.S. 449 (1958); *Stanley v. Georgia*, 394 U.S. 557 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405) U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973). In each of these instances the Court interpreted multiple parts of the "individual liberty" provisions in the Bill of Rights to collectively provide a "penumbral" constitutional right to privacy and bodily autonomy as against federal and state government action. Citizens have a "right to be let alone" but the rule denies them that right.

In common law and most state statutes, non-consensual irradiation is a "battery." The basic elements are: (1the defendant touched the plaintiff, or caused the plaintiff to be touched, with the intent to harm or offend the plaintiff; (2) the plaintiff did not consent to the touching; (3) the plaintiff was harmed or offended by the defendant's conduct; and (4) a reasonable person in the plaintiff's position would have been offended by the touching. *See, e.g., Carlsen v. Koivumaki*, 227 Cal. App. 4th 879, 890, 174 Cal. Rptr. 3d 339, 351 (2014). RF radiation "touches" the body and penetrates the skin. The people who are touched and suffer penetration after enunciating a lack of consent will be both harmed and offended. The defendant will or should know there is or will be an objection to the touching and that adverse health effects may result from the touching, but will still intentionally cause the touching. The defendant who unleashes non-consensual touching will be committing a battery. Non-consensual irradiation of

children can also constitute "child endangerment" under the criminal and civil laws,[20] and there is usually a civil action for those who suffer at the hands of the criminal.[21]

> At common law, even the touching of one person by another without consent and without legal justification was a battery. See W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 9, pp. 39-42 (5th ed. 1984). Before the turn of the century, this Court observed that "no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251, 35 L. Ed. 734, 11 S. Ct. 1000 (1891). This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment.... The logical corollary of the doctrine of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment.

Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269-70 (1990).

Every person and every parent has the constitutional right of "informed consent" prior to any lawful bodily intrusion, and they can absolutely refuse any effort to cause a bodily insult. In *Jacobson v. Massachusetts*, 197 U.S. 11, 25 S. Ct. 358 (1905) (involving an individual's assertion of a variety of liberty interests, including substantive due process, in the context of a public emergency), the Court ruled that a state may require vaccines, even over an individual's conscience or religious objection. Individual rights must by necessity sometimes yield to a state's

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[20] For example, California Penal Code §2073a(a) and (b) provide:

> (a) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, ... or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment in a county jail not exceeding one year, or in the state prison for two, four, or six years.
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> (b) Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, ... or willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor.

[21] ... [U]nder *Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1224 (*Angie M.*), any injured member of the public for whose benefit a criminal statute has been enacted may bring a civil suit. In *Angie M.*, the court found that "[v]iolation of a criminal statute embodying a public policy is generally actionable even though no specific civil remedy is provided in the criminal statute." (*Id.* at p. 1224.) A presumption of negligence may arise from a statutory violation if (1) the defendant violated a statute; (2) the violation proximately caused injury to the plaintiff; (3) the injury resulted from an occurrence which the statute was designed to prevent; and (4) the plaintiff was one of the class of persons for whose protection the statute was adopted. (Evid. Code, § 669; *Nowlon v. Koram Ins. Center, Inc.* (1991) 1 Cal.App.4th 1437, 1444-1445.)

Pagarian v. Greater Valley Med. Grp., B172642, 2006 Cal. App. Unpub. LEXIS 7445, at *52 (Aug. 23, 2006).

police power, subject to the general requirements of equal protection and nondiscrimination. The Court closed its opinion, however, with an important caveat: if the individual can show a *special sensitivity due to a medical condition* because the immunization may be unduly hazardous, there **must** be a process for case-by-case exceptions. Further, the Court held that *judicial* relief is and must be available when the requirement would lead to "wrong or oppression." This is necessary to avoid the ultimate liberty deprivations – denial of life itself or cruelty. 197 U.S. at 38-39, 25 S. Ct. at 366-67.

Jacobson involved a state's exercise of police power in the context of a medical emergency. This proposed rule is not related to or justified by any claim of a medical emergency, and the federal government does not have "police powers" in any event.[22] But even if the effort to force radiation on non-consenting citizens can be sourced to some power granted to the federal government, as a general matter the Court's ultimate limitation has direct application here. With the growing exposure to RF and Microwave radiation, more and more people, including children, are directly harmed by non-consensual RF emissions. The Commission may prefer science denial and purposeful evasion of facts, but no reasonable person can insist that RF radiation, even within the Commission's guidelines, never has and never will cause severe medical problems to anyone. It has, it does and it will. Fetuses and children in particular are uniquely affected by exposure. Some children have pre-existing conditions such as cancer, and epilepsy that are exacerbated by exposure. The FCC may not yet be persuaded Radiation Sickness is a real condition, but the Commissioners are not doctors, and this agency is incompetent to

[22] *United States v. Lopez*, 514 U.S. 549, 566, 115 S. Ct. 1624, 1633 (1995) (Constitution withheld from Congress a plenary police power); *id.*, at 584-585; (Thomas concurrence) ("We always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power").

determine by *fiat* the condition does not exist. Radiation Sickness is a horrible and impossible reality for far too many adults and children and its prevalence is growing.

For many adults and children government-sanctioned exposure to RF/EMF radiation can rise to the level of cruelty and inhumane treatment described in *Jacobson.* For some it is effectively a death sentence. Some have died or committed suicide because constant RF exposure was torturing them beyond their ability to survive or cope. The never-ending onslaught and elimination of safe spaces has caused them to lose hope of ever being able to participate in society or appear in public spaces because radiation is already pervasive. This rule amendment allowing further non-consensual exposure in peoples' homes – their last sanctuary – will sentence many to an impossible situation and turn their lives into a living hell from which there is no escape. The Communications Act simply cannot be read to grant the power to authorize death, cruelty or inhumane treatment to the Commission without any means for case-by-case exemptions or judicial recourse. Thus, *Jacobson* applies.

The amended rule does not allow for exceptions for those who need or want one and therefore violates both substantive and procedural due process.

2. The *OTARD Order* illegally purports to preempt state and local laws beyond just zoning and appears to even contend the FCC can overrule the federal ADA and FHHA.

The Commission's general regulatory authority over FM radio stations would not support a rule purporting to let licensees place loudspeakers outside peoples' homes that constantly play extremely loud obnoxious music from the radio all hours of the day. That would be a nuisance[23]

[23] For example, Cal. Civ. Code §3479 defines a "nuisance": "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance." Sections 3480, 3481 and 3493 go on to distinguish between public and private nuisances.

under most state laws and while the Act does contemplate some restriction on local zoning laws it cannot be stretched that far. The same limitation applies to RF emissions, which also squarely meet the common law (and most codified) definition of a public and private nuisance. The FCC cannot preempt state statutes, state common law, or federal and/or state statutory rights that protect those who object to and seek to avoid RF emissions in their own home.

a. Americans with Disabilities Act

The Americans with Disabilities Act, 42 U.S.C. §§12101 *et seq* protects persons with a disability[24] in the area of employment, public services and public accommodations operated by private entities. The "service" provided by the wireless hub or relay contemplated by the amended rule will be a "public accommodation" as defined by 43 U.S.C. §12131(7)(f) because it is a "service establishment." The Communications Act did not impliedly repeal the requirements of the ADA, and the Commission cannot repeal the ADA through a legislative rule.

As noted, the Architectural and Transportation Barriers Compliance Board ("Access Board") expressly recognizes that "electromagnetic sensitivities may be considered disabilities under the ADA if they so severely impair the neurological, respiratory or other functions of an individual that it substantially limits one or more of the individual's major life activities." The Commission lacks the power and medical expertise to decide the Access Board got it wrong,

[24] 42 U.S.C. §12102(1) defines "disability":

(1) Disability. The term "disability" means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment (as described in paragraph (3)).

Subsections (2) and (3) define "major life activities" and "Regarded as having such an impairment." Subsection (4) provides further rules of construction, and expressly requires a "broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter." It also prohibits consideration of potential mitigating measures like medication, assistive technology or adaptive neurological modifications when determining whether an impairment substantially limits a major life activity.

there is no such thing as Radiation Sickness, that its symptoms do not constitute a disability, or that the ADA does not require accommodations.

It is true those who developed Radiation Sickness *do not want* wireless service, so the issue will not be about "denial" of service or unequal services. They want the relentless advance of overwhelming exposure to end at least at their property line, and they most definitely want it to stop at the walls of their home. The cross-property radiation contemplated by the proposed rule will unnecessarily invade many homes with unwanted and harmful emissions and force homeowners to abandon their own abode. That is a form of discrimination. Those negatively affected want, and must be allowed, to avoid being constantly irradiated against their will and with dire consequences to their health, all without any notice or ability to get the accommodation required by civil rights laws. They have the right to have and enjoy life, peace and security in their home. They have every right to object to, and avoid, being tortured by radiation in their own home that interferes with their ability to think, breath and function and causes them torturous pains.

b. Fair Housing Act

The Fair Housing Act protects handicapped[25] individuals against discrimination in similar fashion to the ADA. Any person who exposes a handicapped individual against his or her will interferes with their "exercise or enjoyment of rights granted or protected by" 42 U.S.C. §3617. That is so because the placement of a hub or relay is a "residential real estate-related

[25] 42 U.S.C. §3602(h) defines a "handicap":

(h) "Handicap" means, with respect to a person—
(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,
(2) a record of having such an impairment, or
(3) being regarded as having such an impairment,
but such term does not include current, illegal use of or addiction to a controlled substance (as defined in section 802 of title 21).

transaction" under 42 U.S.C. §3605(b)(1)(A). Anyone placing a wireless hub or relay that irradiates handicapped persons in their own home will violate the Fair Housing Act.

The Communications Act did not impliedly repeal the requirements of the Fair Housing Act, and the Commission cannot repeal the FHA through a legislative rule. If a provider does not adhere to the FHA's proscriptions and requirements, the injured person can file a civil action and recover actual, punitive and injunctive relief, along with attorneys' fees. 42 U.S.C. §3613(c). 42 U.S.C. §3631(a) and (a)(1) provide that "whoever, whether or not acting under color of law, willfully injures, intimidates or interferes with, or attempts to injure, intimidate or interfere with" "any person because of his ... handicap ... and because he is "occupying ... any dwelling" is subject to a fine of up to $1,000 or up to one year imprisonment. If bodily injury results, the penalty increases to up to $10,000 or up to 10 years' imprisonment. Irradiating a handicapped person in his or her home will plainly lead to some bodily injury, since irradiation is what causes people to be sick or makes their conditions worse. It is a form of violence.

If this amended rule goes into effect, the Commission will run afoul of the prohibition as well. It is acting under color of law, and encouraging and providing "color of law" authority under which countless horrible injuries will be inflicted on innocent people who just want to enjoy their God-given and constitutionally-protected right to enjoy life, peace and security in their home. These people have already been forced out of most public spaces. Many cannot go on the streets, access medical care, obtain public services, use public transportation, drive on the road, fly, stay at a hotel or have a job. Their children are ridiculed, forced out of schools and into social isolation. They must be home schooled in an environment that has less harmful radiation. Finding a home has become almost impossible: they cannot live in an apartment and most houses are already intolerable because of emissions from macro-cells and small cells.

People live in fear of waking up in the morning with a new antenna installed near their home or a booster in their neighbor's home. Many try to move to rural areas, but the amended rule now means that even rural areas will not be safe for them. These citizens literally have nowhere to go to have a tolerable existence, let alone peace and comfort. People live in their cars and are becoming refugees in their own country. The exponential increase in exposure in the past few years from the deployment of 5G and the inability to escape this radiation have driven many to leave the US in search of a place where they can exist with dignity and without torturing pain. The Commission's authorization of yet another invasion of disabled or handicapped people's homes through the amended rule will eliminate the last safe refuges sufferers have today.

c. State and local law (other than zoning).

The new encroachment on local zoning authority is bad, but is not the main focus of this Motion for Stay. What is more significant, and leads to irreparable injury, is the preemption of other state and local laws protecting against nuisances and battery. Even worse is the preemption of the state civil rights law equivalents to the ADA and FHHA.

For just a few examples, *see* N.H. RSA Ch. 354 and in particular Sections 354-A:10, 354-A:17, 354-A:27 (creating New Hampshire State Commission for Human Rights, prohibiting discrimination in fair housing and public accommodations and guaranteeing opportunity for public education without discrimination), New Hampshire RSA Ch. 353-B (Attorney General Civil Actions), Haw. Rev. Stat. Ch. 368 (creating Hawaii Civil Rights Commission), Ch. 489 (public accommodations discrimination) and Ch. 515 (prohibiting real property and housing discrimination). California has some of the strongest laws relating to equal and nondiscriminatory access to public accommodations and other places by those with a disability. *See* Cal. Civ. Code §§51 and 1296, 12926.1. It also strongly protects equal access to housing.

Cal. Civ. Stat. §2915(d), (g) and (k). Claims can be made under California law for the actions of private companies that are "business establishments," deny equal access and refuse reasonable accommodations.

A California intermediate court recently held that a plaintiff with "Electromagnetic Hypersensitivity" related symptoms properly pled a claim for disability under that state's law, independent of federal law. *Brown v. L.A. Unified Sch. Dist.*, 2021 Cal. App. LEXIS 138, *9-11 (Cal. Ct. App., Feb. 18, 2021). This was a government workplace related decision, but the definitions are the same in public accommodation cases, so that does not affect the outcome. The OTARD rule's apparent preemption in 1.4000(a) would on its face preempt relief under California's, Hawaii's and New Hampshire's laws, or at least require that the issue be resolved through the process described in 1.4000(e) rather than a state court. The Commission cannot lawfully hijack or overrule basic state-level civil rights laws and processes in this manner and it must stay the rule's effective date pending judicial review.

3. Movants' Procedural Due Process Claims are Significant.

The amended rule does not provide for any form of advance notice to those who would be exposed, provide a method for those who want to assert their rights to contest the invasion of their rights, or contemplate that there will be a *fair, affordable and unbiased* forum for resolving disputes.

The providers operating these facilities must at least be required to grant reasonable accommodations to those who request them. And that means everyone within reach of the emissions that will flow from the hub or relay must receive advance written notice so they can know to send a request for accommodation, and where to send it. Those who are disabled or handicapped from Radiation Sickness or have an existing condition that may be made worse

through additional exposure must be allowed a process for seeking and obtaining requested accommodations and a reasonable process and venue for dispute resolution.

Notice and opportunity to object is the bare minimum required by basic due process, but more is warranted here. People should not have to beg for security in their own home, or go through an arcane, expensive and extensive process in some distant, unfamiliar and hostile forum to protect their already-vested rights. If a provider fails to abide by an objection or request for accommodations, those who are injured cannot be required to suffer while the case winds its way through to "justice" at the FCC. For that reason, the Commission erred by not materially amending the current language in §1.400(a)(4). Maintaining that language pending judicial review will lead to irreparable injury.

Section 1.400(a)(4) was clearly written with the expectation that a local siting authority of homeowners' association would be the one trying to enforce a "restriction." But that is not what would happen if a homeowner or disabled person is contesting a provider's rejection of an objection or request for accommodation. These will be real people; human beings in fear of their life and opposing someone else's effort to deprive them of vested rights.

The Commission cannot require litigation of these individual rights issues only before the Commission.[26] The Commission's complaint process is impenetrable, complicated and full of traps for the unwary.[27] The unfairness of requiring simple homeowners to expend legal fees to protect their home and defend their rights only at the Commission in Washington, D.C. is flatly unreasonable. Disabled individuals already cannot travel or go in public, and they cannot fly or

[26] The ones likely to most need relief are RF sensitive, so they cannot physically go to the Commission since it is chock-full of wireless radiation from Wi-Fi, cellular transmitters and cell phones and probably many other kinds of emissions.

[27] WISPA's August 27, 2018 letter that led to this proceeding correctly points out on page 4 that they are not telecommunications carriers, wo the complaint process in 47 C.F.R. Part 1, Subpart E does not apply. A new complaint process would be necessary, including one that allows interlocutory relief.

stay in hotels. Lawyers that can run the gauntlet of a Commission proceeding are not plentiful in many local areas, and their rates are often completely unaffordable to the average middle-class citizen. Many of those who developed this sickness are plainly poor. They do not have a job and financial means to pay for legal representation. Mandated venue at the Commission imposes an impossible burden.

Judicial remedies in a court near the location must be available. There must be a way to obtain fee-shifting if the objecting citizen prevails. Further, there must be a way to obtain interlocutory injunctive relief so a disabled or handicapped person can avoid being irradiated – and suffering torture or even dying from exposure – while the case proceeds. The challenge rules in 1.400(a)(4) are clearly unreasonable and deny due process in this context.

C. There Is a Substantial Question Whether the Order Is Arbitrary and Capricious and thus Violates the APA.

"The Administrative Procedure Act . . . permits . . . the setting aside of agency action that is 'arbitrary' or 'capricious.'"[28] "A decision is arbitrary and capricious if the agency 'has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[29]

In this case, the Order is arbitrary and capricious based on each of the flaws identified herein.

[28] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (citing 5 U.S.C. § 706(2)(A)).

[29] *O'Keeffe's, Inc. v. U.S. Consumer Product Safety Com'n*, 92 F.3d 940, 942 (9th Cir. 1996) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

OTARD Order ¶34 dismisses CHD's April 17, 2020 comments in one brief and terse paragraph that mischaracterizes, misstates and misconstrues several of the points CHD made in its comments and reiterates in this request for stay:

> 34. We also reject arguments premised on the generalized concerns about the Commission's RF safety limits and that incrementally revising the OTARD rule would somehow violate people's right to bodily autonomy or their property-based right to "exclude" wireless radiation emitted by third parties from their home or would violate the Americans with Disabilities Act or the Fair Housing Act by imposing radiation on individuals in their homes. Revising the OTARD rule does not change the applicability of the Commission's radio frequency exposure requirements, and fixed wireless providers must ensure that their equipment remains within the applicable exposure limits. What's more, in 2019, the Commission declined to initiate a rulemaking to revise its RF emission exposure limits. We therefore reject certain commenters' concerns that the OTARD rule revisions will generally lead to unsafe RF exposure levels. (footnotes omitted)

The Commission failed to meaningfully address the comments, and the small discussion that is there is entirely inadequate given the importance to those who share the same concerns. This incorrect and inadequate discussion fails muster under the APA's reasoned decisionmaking requirement.

The agency must show a "rational connection between the facts found and the choice made." *Brookings Mun. Tel.*, 822 F.2d at 1165. It must take a "hard look" at "all relevant issues" and engage in "reasoned decisionmaking." *Neighborhood TV. Co. v. FCC*, 742 F.2d 629, 639 (D.C. Cir. 1984). An agency cannot completely ignore evidence that it does not like. It must review the "whole record," including "whatever in the record fairly detracts from the evidence supporting the agency's decision" and "it may not minimize such evidence without adequate explanation." *Genuine Parts Co. v. EPA*, 890 F.3d 304, 312 (D.C. Cir. 2018). Second, the agency must respond substantively and meaningfully to all material public comments, especially those "relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule [because they] cast doubt on the reasonableness of a position taken by the agency."

Home Box Office, Inc. v. FCC, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977). "Conclusory explanations for matters involving a central factual dispute where there is considerable evidence in conflict do not suffice to meet the [Court's] deferential standards." *Genuine Parts*, 890 F.3d at 312. Rather, the agency has to "respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule." *Action on Smoking & Health v. Civil Aeronautics Bd.*, 699 F.2d 1209, 1216 (D.C. Cir. 1983).

The *OTARD Order* ¶34 fails every aspect of the arbitrary and capricious test, and thus Movants are likely to prevail on review.

V. MOVANTS WILL SUFFER IRREPARABLE INJURY ABSENT A STAY.

The inquiry under the second factor focuses on the likelihood of irreparable injury absent the issuance of the stay.[30] "But, in contrast to the first factor, we have interpreted *Nken* as requiring the applicant to show under the second factor that there is a probability of irreparable injury if the stay is not granted."[31] Parties must show that irreparable injury is not merely possible but probable.[32] "In analyzing whether there is a probability of irreparable injury, we also focus on the individualized nature of irreparable harm and not whether it is 'categorically irreparable.'"[33] However, despite this individualized analysis, harms to constitutional rights are assumed to constitute irreparable injury. "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'"[34]

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[30] *Nken v. Holder*, 556 U.S. at 434-35.

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

[32] *Id.*

[33] *Id.*

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

As explained above, the involuntary exposures contemplated by the amended rule will lead to nuisances and battery, even child endangerment. While a nuisance can be ameliorated through compensation (perhaps via the Tucker Act), one cannot undo a battery or the scars inflicted on vulnerable children. Similarly, the preemption and elimination of the substantive and procedural rights granted by the federal ADA and FHHA and the state equivalents is also not reparable later on through mere money damages. People will be forced to suffer pain and injury and irrevocably denied basic legal rights.

Further, the expansion of the involuntary exposure will cause irreparable harm to the health of the many who already have been injured by exposure to wireless radiation. It will certainly cause a further deterioration of their condition and harm to their health and may even lead to death. It will force them to leave their homes with nowhere to go and continued exposure which will cause further emotional stress that will undoubtedly aggravate their condition.

Many will also suffer significant financial losses. Some will lose their ability to work and may lose their livelihood. The deterioration in their health will increased medical expenses. Those who try to stay in their home will have to invest money in shielding their homes to the extent possible. While financial loss is not normally considered an irreparable loss, for those who will be affected by the rule change it will since many courts have held that state law post-injury damages are preempted. There is no remedy afterwards and now no remedy before.

VI. A STAY WILL NOT HARM OTHER PARTIES AND IS IN THE PUBLIC INTEREST.

The inquiry under the third and fourth factors focuses on the opposing party's interests and the public interest.

A. Maintaining the *status quo* pending judicial review of the *OTARD Order* would serve the public interest and would not harm other parties.

The test for a stay assesses the relative interests, costs and burdens at stake during litigation. Will granting relief cause more injury than denying it? In this matter the balance is clear: the extraordinary and irreparable damage to those who must accept non-consensual and harmful exposure far outweighs any impact on those who would benefit from the rule.

The main proponents for and beneficiaries of the rule are wireless internet service providers and satellite data service providers. They are the ones providing the fixed services and using they antennas covered by the OTARD rule as it exists today. The rule amendment will expand their ability to provide service because they will be able to use hubs and relays to serve users instead of having to install a fixed antenna on each property like they do today. They will save some money and perhaps be able to reach some users that cannot at present connect to the base station or space station. These providers have no current vested rights or legitimate investment-backed expectations that would be withheld or denied under a stay; the *status quo* would remain, and they would simply have to continue their current business methods and practices. The rule amendment is the result of Commission largesse, not any affirmative statutory requirement.[35]

Those harmed by non-consensual exposure as a result of the rule, on the other hand, will suffer all the substantive and procedural harms and injuries described above, many of which involve far more than money or convenience. There is no means for any post-decision

[35] *OTARD Order* ¶¶1 and 12 contend the rule amendment will establish or increase competitive parity with common carrier services, *e.g.,* personal wireless service. That is incorrect. The rule change grants a competitive preference to the private providers, since they will have no state or local zoning or other burdens, whereas personal wireless service providers will still have to comply with local zoning and other state/local requirements not already preempted by §332(c).

recompense if Petitioners prevail in their merits challenge to the rule change. The harm to their currently-vested rights will therefore be irreparable.

Congress and the states have found that protecting the disabled from discrimination and suffering is in the public interest. The Commission similarly has a public interest mandate, and under that mandate public health and safety stands on equal, if not higher, ground, with advancing communications capability and utility. *KFKB Broad. Ass'n v. Fed. Radio Com.*, 47 F.2d 670, 671-672 (D.C. Cir. 1931); *see also Banzhaf v. FCC*, 405 F.2d 1082, 1096 (D.C. Cir. 1968) (public interest indisputably includes public health). The Communications Act does emphasize universal service, but nowhere does it hint that Congress intended to sacrifice the interests of thousands (if not millions) of people to obtain ubiquitous radio connectivity.

B. Other Parties Will Not Be Harmed by a Stay.

Granting a stay will maintain the current regulatory framework pending judicial review of the Order and would not harm either the Commission or other parties. A stay will maintain the status quo, allowing all parties – including the wireless industry – to avoid expending significant and potentially unnecessary costs implementing the rule despite the likelihood it will be overturned on judicial review.

If Movants prevail on judicial review the rule will be vacated and return to its present state. Any hubs and relays that were installed in the interim would have to be removed or the private provider will have to comply with the reinstated laws the amendment purports to preempt. If a stay is granted, the private providers will not install hubs or relays pending the decision, but if Movants do not prevail on the merits they will then be free to proceed. None of the providers' current rights will be denied, and their new rights under the amended rule will be merely delayed.

The balance of equities is clear. A stay is required.

CONCLUSION

The FCC must stay the effectiveness of the *OTARD Order* and amended rule pending judicial review. Failure to do so will only further exacerbate the almost already total elimination of people ability to be safe in their home and eliminate any and all places people that have developed or will develop Radiation Sickness, cancer or other wireless radiation associated conditions can go to avoid non-consensual exposure.

The amended rule will irreparably harm numerous adults and children that have already been chased from public spaces. Home is their last refuge. Do not take that away too, and consign them to misery, torture and perhaps even death with no possibility of avoidance or escape. Denial of a stay pending review will have severe consequences for society, the public treasury and the Commission.

For the foregoing reasons established herein, Movants respectfully request that the Commission stay the effective date of the amended rules until after the decision on review. As parties to that appeal, we fully expect that an expedited briefing schedule can be established that will protect the interest of all the participants, avoid unnecessary and misdirected compliance costs, and avoid uncertainty in the market.

Respectfully Submitted,

/s/ Robert F. Kennedy, Jr. Children's Health Defense 48 Dewitt Mills Road 1227 North Peachtree Pkwy, Suite 202 Peachtree City, Georgia 30269 NY Bar No. 1999994 rfk.fcc@childrenshealthdefense.org TEL: 774.239.4768 FAX: 512.692.2522	/s/ W. Scott McCollough McCollough Law Firm, P.C. 2290 Gatlin Creek Rd. Dripping Springs, TX 78620 Texas Bar No. 13434100 wsmc@dotlaw.biz TEL: 512.888.1112 FAX: 512.692.2522

Attorneys for Children's Health Defense, *et al*

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