

Liberty engaged in various actions that gave it an unfair competitive advantage over TWC, which also participated in the trial as a programmer. These facts demonstrate that the Commission should carefully scrutinize proposed VDT ventures, and the procedures for ~~evaluating such requests~~ should not be "streamlined".

As Liberty recognizes, telephone companies who were exploring VDT have chosen to reject that business structure in favor of the cable model. See Liberty Comments at 19 n.39. Notwithstanding complaints about Commission approval processes, such decisions clearly have been primarily based on the economics of the video delivery business. Here again, Liberty is merely seeking unwarranted competitive advantages for itself. The Commission should reject Liberty's overreaching tactics.

III. THE COMMISSION SHOULD REJECT THE WIRELESS CABLE ASSOCIATION'S PROPOSALS ON UNIFORM PRICING AND THE PRIVATE CABLE EXEMPTION.

The Wireless Cable Association International, Inc. ("WCAI") submitted Comments in response to the NOI requesting, inter alia, that the Commission recommend certain legislative changes. WCAI's proposals should be rejected.

A. Cable Operators Should Not Be Subject to Uniform Pricing Requirements Where They Face Effective Competition.

WCAI urges the Commission to recommend an amendment to the Communications Act that ~~would require~~ uniform pricing by cable operators even in areas where effective competition exists. That, of course, is contrary to the rate regulation provisions Congress enacted in 1992, which clearly forbid any and all rate regulation where effective competition exists. Congress has concluded that cable operators cannot exercise market power in such areas, so that rate regulation is unnecessary. Rate regulation in such areas would be flatly unconstitutional under the First Amendment. Thus, WCAI's proposal should be rejected, because it would create a competitive disadvantage for cable operators.

WCAI, like Liberty, is seeking a competitive advantage vis-à-vis cable operators. WCAI insinuates that the recent decision of the United States Court of Appeals for the D.C. Circuit in Time Warner Entertainment, L.P. v. FCC permits "discriminatory" marketing practices by cable operators, but offers no evidence to support its position. The effect of WCAI's proposal would be to insulate non-cable multichannel video programming distributors from price

competition, by making it practically impossible for cable operators to compete with them on rates.

As WCAI points out, the purpose of the 1992 Cable Act was to assure that consumers enjoy the benefits of competition. ~~Uniform pricing can only be justified--if at all--where effective competition does not exist.~~ To require uniform pricing in areas where effective competition does exist would deprive consumers of the principal benefit of competition--the ability to constrain price increases. If cable operators were unable to lower their prices in areas where they face competition from both a wireless operator and one or more other cable operators, a potentially powerful constraint on the wireless operator's ability to charge supracompetitive prices would be eliminated. That result would lessen, not promote, competition.

B. The Private Cable Exemption Should Not Be Expanded.

The Communications Act has long included the so-called private cable exemption, which excuses wireless operators and others from the franchise requirement if their operations are limited to areas that are commonly owned, controlled or managed. Unsurprisingly, WCAI urges the Commission to expand that exemption so that wireless

operators can operate cable systems without being subject to the franchise requirement.

Although WCAI argues that the scope of the private cable exemption is a "patent flaw" in the Communications Act (see WCAI Comments at 26), ~~Congress and the Supreme Court~~ have upheld the exemption consistently. 9/ The policy underpinnings of the exemption are sound with respect to the types of systems covered--but they would not justify expanding the scope of the exemption to cover more extensive systems. 10/ Moreover, making the expanded exemption proposed by WCAI available to wireless operators but not to similarly situated cable operators would raise serious constitutional problems. WCAI insinuates that the scope of the exemption is inappropriate because it does not include some wireless operators whose systems "use wiring, even if strung over private property, to interconnect individual buildings". WCAI Comments 26. The "private property" argument is a red herring, as the District Court pointed out recently in dismissing Liberty's First Amendment claims in

9/ See FCC v. Beach Communications, Inc., 113 S. Ct. 2096, 2103-04 (1993).

10/ Liberty has argued forcefully that the private cable exemption is properly limited. See Ex parte presentation of Liberty Cable Company, Inc., submitted by W. James McNaughton, Esq. to Ms. Donna R. Searcy, April 7, 1992.

its litigation against the New York authorities. See Exh. A at 46-47.

IV. THE COMMISSION SHOULD REJECT THE PROPOSALS OF LIBERTY AND WCAI CONCERNING CABLE HOME WIRING.

The comments of both Liberty and WCAI include proposals concerning home wiring that at best bear only the faintest connection with the issues raised in the NOI, and relate to the subject of a pending proceeding before the Commission. Those issues should not be addressed in the context of the Commission's report to Congress on competition. In particular, Liberty and WCAI urge the Commission to change the demarcation point for cable home wiring in MDUs. 11/ The Commission should reject that proposal.

As we have pointed out in numerous submissions, the Commission does not have authority to grant MDU residents control over wiring located outside their units. Although WCAI claims "[t]hat argument has been effectively refuted" (WCAI Comments at 24), the Commission--not WCAI--must decide whether it has such authority. WCAI has not demonstrated any need for the change it proposes. Its

11/ Optel, Inc. also requests a change in the demarcation point. That request should be denied for the reasons set forth above.

assertions that there is a "defect" in the Communications Act and that the Commission is "permitting continued abuse by wired cable of inside cabling in MDUs" (id.) are baseless, and its proposal should be rejected for that reason alone.

Liberty's Comments continue Liberty's campaign, now two years old, to have the Commission alter the definition of cable home wiring, both by moving the demarcation point further from the dwelling, and by applying the definition regardless of whether a subscriber terminates service. According to Liberty,

"The definition of home wiring (for MDUs) does not, in many cases, permit would-be competitors of cable to connect subscribers to their systems without destroying the subscriber's premises--in many MDUs, the wiring is embedded in walls--which is a significant disincentive for subscribers to switch to these providers." 12/

Liberty also accuses TWC, without any evidence, of "complicat[ing] the switch to an alternate provider's service." 13/ TWC's views regarding Liberty's requests to amend the home wiring definition have been set forth at length in various pleadings and letters. 14/ Accordingly,

12/ Liberty Comments at 17 (footnote omitted).

13/ Id. at 18.

14/ See, e.g., Comments and Reply Comments of Time Warner in In re Joint Petition for Rulemaking to Establish Rules of Subscriber Access to Cable Home Wiring for the Delivery of Competing and Complementary Video Services,

TWC respectfully refers the Commission to such pleadings and letters for a detailed discussion of the issue.

Briefly, the current home wiring rules are appropriate, and indeed are the only way to ensure that true competition develops between MVPDs. TWC has ~~previously~~ demonstrated that, in New York City, where Liberty competes with TWC, it is not true that "in many MDUs, the wiring is imbedded in walls". In lower Manhattan, only about 1.8% of the MDU buildings served by TWC employ a conduit architecture of the type described by Liberty. In upper Manhattan, the figure is even lower--about 1.5%. 15/ Moreover, TWC has explained that, even in these buildings, the wiring can be accessed "at the wall plate or other point where the wiring enters the dwelling unit". 16/ Thus, Liberty has raised this extraneous issue to request an unnecessary rule change that would benefit only Liberty, and only in a handful of cases.

RM-8380, filed December 21, 1993 and January 19, 1994, respectively; Reply Comments of Time Warner in CS Docket No. 94-48, filed July 29, 1994; see also ex parte Response of Time Warner to Liberty Cable, submitted by Arthur H. Harding, Esq., to Mr. William F. Caton, December 16, 1993.

15/ Ex parte comments of Time Warner, submitted by Arthur H. Harding, Esq. to Mr. William F. Caton, December 5, 1994, at 6.

16/ Ex parte comments of Time Warner, submitted by Arthur H. Harding, Esq. to Mr. William F. Caton, December 16, 1993, at 2.

Furthermore, Liberty's requested rule changes directly contravene the clear language of the statute and Congressional intent, and are thus beyond the Commission's authority. Section 16(d) of the 1992 Cable Act adds new subsection 624(i) to the Communications Act, providing that:

"Within 120 days after the date of enactment of this subsection, the Commission shall prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber."

This language could not be more clear on the two issues raised by Liberty. Moreover, according to the legislative history of the 1992 Cable Act, the home wiring provision

"applies only to internal wiring contained within the home and does not apply to . . . any wiring, equipment or property located outside of the home or dwelling unit." 17/

Thus, Congress clearly did not intend the Commission to expand the home wiring rules either to cover wiring that is outside the subscriber's individual dwelling unit, or to apply to situations before the subscriber terminates service.

There is no policy reason for Congress to change the home wiring provision. The current FCC definition of the point of demarcation promotes facilities-based competition by requiring each competitor to construct and

17/ H.R. Rep. No. 628, 102d Cong., 2d Sess. 118 (1992).

maintain an independent internal distribution infrastructure in the MDU building. Thus, consumers can choose between competing providers simultaneously. Drastic alteration of the point of demarcation would stifle such competition by limiting consumer choice to ~~one broadband provider~~ at a time. It would also risk increased signal leakage and service piracy, 18/ and could well have the effect of cutting off service to a neighbor (since "homerun" cable is often used to provide service to multiple residents).

What Liberty really wants is to be a "free rider" on TWC's internal wiring, even before a cable subscriber has terminated its cable service, without undertaking the large capital costs that TWC has incurred in installing such wiring in many buildings. Such a result would be patently unfair. Liberty's goal helps one company, Liberty, to the detriment of millions of consumers.

18/ The legislative history to the 1992 Cable Act shows that Congress was particularly concerned that service theft in apartment buildings be avoided where possible. See House Report at 118 ("The Committee is concerned especially about the potential for theft of service within apartment buildings. Therefore, this section limits the right to acquire home wiring to the cable installed within the interior premises of a subscriber's dwelling unit").

Conclusion

TWC urges the Commission to reject the outrageous and unfounded Comments of Liberty. TWC also urges the Commission to reject on the merits the proposals of Liberty and WCAI, which are transparent attempts to gain unfair and anticompetitive advantages over TWC and other cable operators.

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Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

LIBERTY CABLE COMPANY, INC.,
SIXTY SUTTON CORP. and
JACK A. VEERMAN,

Plaintiffs,

-against-

THE CITY OF NEW YORK and RALPH A.
BALZANO, Commissioner of Department of
Information Technology and Tele-
communications, THE NEW YORK STATE
COMMISSION ON CABLE TELEVISION,
WILLIAM B. FINNERAN, GERARD D.
DI MARCO, BARBARA T. ROCHMAN, DAVID F.
WILBUR, and JOHN PASSIDOMO,

Defendants,

THE UNITED STATES OF AMERICA,
TIME WARNER CABLE OF NEW YORK CITY
and PARAGON CABLE MANHATTAN,

Defendants-Intervenors.

94 Civ. 8886 (LAP)

OPINION

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UNITED STATES DISTRICT COURT
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JACK A. VEERMAN,

Plaintiffs,

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Defendants-Intervenors.
-----X

94 Civ. 8886 (LAP)

OPINION

LORETTA A. PRESKA, District Judge:

Plaintiffs Liberty Cable Co., Inc. ("Liberty"), Sixty Sutton Corp. ("Sixty Sutton"), and Jack A. Veerman seek, inter alia, a declaratory judgment that 47 U.S.C. §§ 522(7) and 541(b) are unconstitutional. Before me now is their motion for a preliminary injunction against agencies and officials of New York State (the "State") and the City of New York (the "City") and defendants' motion to dismiss the complaint. For the reasons stated below, the complaint is dismissed as to certain claims and, as to the remainder, plaintiffs' motion for a preliminary injunction is denied.

BACKGROUND

I. The Statutory Scheme Governing Cable Television

"Cable operators" in the City of New York are regulated on the federal, state, and city level. On the federal level, the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521 et seq. (the "Cable Act") regulates "cable operators." A "cable operator" is defined in pertinent part as "any person or group of persons . . . who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system." 47 U.S.C. § 522(5). A "cable system" is defined in pertinent part as:

a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include . . . a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way.

47 U.S.C. § 522(7). The exclusion in the definition of a cable franchise has been referred to as the "private cable exemption."

Aside from exceptions not relevant here, "a cable operator may not provide cable service without a franchise."

47 U.S.C. § 541(b). A "franchise" is "an initial authorization, or renewal thereof . . . issued by a franchising authority . . . which authorizes the construction or operation of a cable system." 47 U.S.C. § 522(9). A "franchising authority" is defined as "any governmental entity empowered by Federal, State, or local

law to grant a franchise." 47 U.S.C. § 522(10). Thus, a cable operator must look to state and/or local authorities to obtain a franchise.

However, not all types of cable systems need comply with this regulatory scheme. Under the "private cable exemption" of the Cable Act, a cable system is exempt from these franchising requirements if it meets two tests. First, it must be a system confined to commonly owned, controlled, or managed multiple unit dwellings. 47 U.S.C. § 522(7). Second, the system must not use any public right-of-way, for example, by placing coaxial cable or hard wire above or under public streets or rights of way. *Id.* Traditional cable systems, which are subject to regulation, deliver programming by means of coaxial cables that physically connect the cable operator with the subscriber and that generally are laid under city streets or along utility lines.

Satellite master antenna television ("SMATV"), however, is a type of cable service that can fit within the private cable exemption and, when it does, need not obtain a franchise. See F.C.C. v. Beach Communications, 113 S.Ct. 2096, 2099-2100 (1993) (citing In re Definition of a Cable Television Sys., 5 F.C.C.Rcd. 7638 (1990)).¹ SMATV provides cable service by means of a satellite dish and reception facilities installed on the grounds of

¹ The litigation in the Beach case has been fairly protracted. For ease of reference, the decisions will be referred to as follows: Beach Communications v. F.C.C., 959 F.2d 975 (D.C. Cir. 1992) ("Beach I"), appeal after remand, 965 F.2d 1103 (D.C. Cir. 1992) ("Beach II"), rev'd, 113 S. Ct. 2096 (1993) ("Beach III"), on remand, 10 F.3d 811 (D.C. Cir. 1993) ("Beach IV").

private buildings. Under 47 U.S.C. § 522(7), a SMATV system that uses cable to link more than one multiple unit dwelling under common ownership, control, or management falls within the private cable exemption. However, a SMATV system that uses cable to link more than one multiple unit dwelling not under common ownership, control, or management does not fall within the private cable exemption and is subject to the regulation imposed by the Cable Act.

After the federal regulations, the next levels of regulation a would-be cable operator in the City of New York must look to are the State and then the City. New York law provides that a cable television system may not commence or expand its operations without a franchise from the municipality in which it proposes to provide or expand service. N.Y. Exec. Law § 819(1) (McKinney 1982). In New York, a "cable television system" is defined as:

any system which operates for hire the service of receiving and amplifying programs broadcast by one or more television or radio stations or any other programs originated by a cable television company or by any other party, and distributing such programs by wire, cable, microwave or other means, whether such means are owned or leased, to persons in one or more municipalities who subscribe to such service.

N.Y. Exec. Law § 812(2) (McKinney 1982 & Supp. 1995). New York law also authorizes municipalities to grant the franchises which are required of cable television systems:

A municipality shall have the power to require a franchise of any cable television system providing service within the municipi-

pality, notwithstanding that said cable television system does not occupy, use or in any way traverse a public street. The provision of any municipal charter or other law authorizing a municipality to require and grant franchises is hereby enlarged and expanded, to the extent necessary, to authorize such franchises.

N.Y. Exec. Law § 819(2). Once a franchise has been awarded by the municipality, it must be confirmed by the New York State Commission on Cable Television ("NYSCC") to be effective. N.Y. Exec. Law § 821(1) (McKinney 1982).

In New York City, the municipal franchising agency authorized by the New York City Charter to grant franchises to cable television systems is the Department of Information Technology and Telecommunications ("DOITT"), formerly the Department of Telecommunications and Energy. Chapter 48, § 1072(c). On October 13, 1993, the New York City Council authorized Resolution No. 1639 ("Resolution 1639"), which states in pertinent part that:

The Council authorizes the Department of Telecommunications and Energy to grant non-exclusive franchises for the provision of cable television services and the installation of cable television facilities and associated equipment on, over, and under the inalienable property of the City of New York.

(Resolution 1639).²

² A copy of Resolution 1639 can be found annexed to the Affidavit of John Grow executed January 30, 1995 ("Grow Aff.") at exhibit 10 and to the First Amended Complaint dated December 13, 1994 ("First Amd. Compl.") as exhibit E.

On February 24, 1995, after the plaintiffs had commenced the instant action, DOITT issued a notice of rulemaking regarding solicitations for franchises for the provision of cable service in a manner that does not use the inalienable property of the City (the "New Rulemaking"). (Second Bronston Aff. ¶¶ 1-2, Ex. A).³ The notice stated, inter alia, that the public written comment period for the proposed rules will close on April 3, 1995, and a public hearing is scheduled for April 4, 1995. (Second Bronston Aff. ¶ 3, Ex. A). The proposed rules also include deadlines for the submission of franchise applications, DOITT's review of such applications, and the preparation of agreements. (Second Bronston Aff. ¶ 3, Ex. A). Agreements must be approved by the Franchise and Concession Review Committee and by the Mayor. (Second Bronston Aff., Ex. A, § 6-03).

II. The Cable Services Provided By Liberty

Liberty provides cable service in several different ways in the City, including the use of SMATV systems. (Price Aff. ¶ 3).⁴ Liberty receives satellite and broadcast television signals at its "head end" facility on East 95th Street in Manhattan. (Price Aff. ¶ 5). These signals are processed and transmitted by microwave to reception antennae located on multiple unit buildings located throughout the greater metropolitan area. (Price Aff. ¶ 5). Liberty's reception antennae deliver cable

³ Reference is to the Supplemental Affidavit of David Bronston executed February 27, 1995 ("Second Bronston Aff.").

⁴ Reference is to the Affidavit of Peter O. Price executed December 20, 1994 (the "Price Aff.").

service to building residents using one of three configurations. (Price Aff. ¶ 7).

The first type of system employed by Liberty is known as the "Stand Alone System" configuration. The Stand Alone System utilizes a single microwave reception antenna to deliver cable service to the residents of the single building where the antenna is located. (Price Aff. ¶ 8).

The second system used by Liberty, referred to as the "Common System" configuration, utilizes a single microwave reception antenna located on the roof of a multiple unit dwelling to deliver cable service to two or more proximate multiple unit buildings under common ownership, control or management. (Price Aff. ¶ 9). The building with the antenna is linked by coaxial cable to the other buildings, without using public property. (Price Aff. ¶ 9).

Under 47 U.S.C. § 522(7), Liberty's Stand Alone Systems and Common Systems are SMATV systems subject to the private cable exemption, not "cable systems." These two systems are classified as such because they meet the common ownership requirement set forth in that section and do not use the public right-of-way.

The third system used by Liberty, and the one in controversy here, is Liberty's "Non-Common System" configuration. With the Non-Common System, a single microwave reception antenna is located on the roof of a multiple unit dwelling to deliver service to two or more multiple unit dwellings. (Price Aff. ¶ 10). As with the Common Systems, the various buildings are

alongside the wire of a franchised cable company. (Grow Aff. ¶ 3, Ex. 3).

In a letter to the NYSCC dated June 28, 1994,⁵ Liberty acknowledged that Liberty was running cables among residential buildings on the same block. Liberty stated that many -- but not all -- of these buildings were under common ownership, management, or control. Liberty argued, however, that it was the City's policy that a franchise was unnecessary where cables did not use or cross public property and that because Liberty's cables did not use or cross public property, Liberty did not require a franchise. Liberty also stated that it wired its serviced buildings in such a fashion in reliance on the City's policy. (Grow Aff., Ex. 2).

By Order to Show Cause dated August 23, 1994 (the "Order to Show Cause"),⁶ the NYSCC directed Liberty to show cause by September 18, 1994, why it should not be determined to be a cable television system subject to the franchising and confirmation requirements of State law or, alternatively, why it should not be compelled to remove all interconnections by wire of buildings not commonly owned, controlled, or managed and be ordered to cease and desist from providing cable television services by means of such wires, until Liberty obtained a franchise and certificate of confirmation. The Order to Show Cause

⁵ A copy of this letter is annexed to the Grow Aff. as exhibit 2.

⁶ A copy of the Order to Show Cause is annexed to the Grow Aff. as exhibit 3.

also provided that Liberty was entitled to be heard and present evidence relating to the allegations stated. (Grow Aff. ¶ 7, Ex. 3).

Liberty requested two extensions of time in which to respond to the Order to Show Cause, the first for a period of thirty days, extending Liberty's time to respond to October 19, 1994. (Grow Aff. ¶ 8, Ex. 4). The request was granted. (Grow Aff. ¶ 8, Ex. 5). Liberty's second request, made in a letter dated October 18, 1994, was for an extension of one hundred-eighty days. (Grow Aff. ¶ 9, Ex. 6). Liberty explained that the reason for the extension was that Liberty was engaged in discussions with DOITT about obtaining a franchise and agreed not to construct any new Non-Common Systems during the one hundred-eighty day extension. Id. The NYSCC extended Liberty's time to respond to November 1, 1994. (Grow Aff. ¶ 9, Ex. 7). On October 31, 1994, Liberty filed its Answer and Appearance to the Order to Show Cause, again requesting an adjournment in order to negotiate with DOITT. (Grow Aff. ¶ 10, Ex. 9).

Liberty, meanwhile, sent a letter dated October 28, 1994, to DOITT expressing Liberty's interest in applying for a franchise pursuant to Resolution 1639. (Grow Aff. ¶ 10, Ex. 8). On October 31, 1994, DOITT informed the NYSCC that it was in receipt of Liberty's letter. (Grow Aff. ¶ 11, Ex. 10). DOITT

stated that it expected to issue a Request For Proposals ("RFP")⁷ within the next few months. Id.

On December 9, 1994, the first day of the administrative hearing, the NYSCC issued a standstill order (the "Standstill Order"). (Grow Aff. ¶ 12). The Standstill Order required that:

there be no additional cable or closed transmission interconnections of buildings not commonly owned, controlled or managed and that in buildings where service was not currently being provided, that no new subscribers could be serviced through such hardware. Finally, Liberty was enjoined from energizing services at those buildings not commonly owned, controlled or managed presently connected by hard wire connecting that were not already energized.

(Grow Aff. ¶ 12, Ex. 11).

IV. Proceedings In This Court

On December 8, 1994, before the Commission's hearing began, Liberty, Sixty Sutton, and Bud Holman⁸ filed a complaint in this Court which was subsequently amended on December 13,

⁷ An RFP is part of the standard minimum franchising procedures of 9 NYCRR, Part 594, promulgated by the NYSCC. (Grow Aff. ¶ 11).

⁸ Bud Holman, one of Liberty's subscribers and a resident of Sixty Sutton, (First Amd. Compl. ¶¶ 5-6), subsequently filed a notice of voluntary dismissal pursuant to Fed. R. Civ. P. 41(a) in this action.

Jack A. Veerman, another Liberty customer and a member of the Board of Directors of Sixty Sutton (Affidavit of Jack A. Veerman ("Veerman Aff.") executed February 17, 1995 at ¶¶ 1-2), later joined the litigation as a plaintiff.

1994.⁹ On December 22, 1994, the plaintiffs applied for a temporary restraining order and preliminary injunction enjoining the defendants from enforcing or attempting to enforce 47 U.S.C. §§ 522(7) and 541 so as to require Liberty either (i) to cease serving subscribers in Liberty cable systems which serve more than one multiple unit dwelling not under common ownership, control or management and which do not use any public property or rights-of-way, i.e., Liberty's Non-Common Systems, or (ii) to obtain a City franchise as a condition of continuing to serve such Non-Common Systems. Liberty and Sixty Sutton also sought to enjoin defendants from continuing to enforce the Standstill Order. A temporary restraining order was granted which, by consent of the parties, was extended to and including March 10, 1995.

In the meantime, Time Warner and Paragon moved to intervene in this action as defendants. The motion to intervene was granted on February 14, 1995.¹⁰

The defendants have moved to dismiss the complaint on a variety of grounds, including ripeness and abstention. Extensive

⁹ The First Amended Complaint was later amended. A Second Amended Complaint was filed on February 21, 1995 ("Second Amd. Compl.").

¹⁰ Those parties demonstrated both "an interest relating to the property or transaction which is the subject of th[is] action and [that they are] so situated that the disposition of the action may as a practical matter impede or impair [their] ability to protect that interest" and that their interest is not adequately represented by existing parties, (Fed. R. Civ. P. 24(a)) and that one or more of their "claim[s] or defense[s] and the main action have a question of law or fact in common." (Fed. R. Civ. P. 24(b)).

and useful oral argument was held on March 1, 1995 and March 3, 1995. For the reasons set forth below, defendants' motion to dismiss on the grounds of lack of ripeness is granted with respect to all of plaintiffs' claims except their equal protection claims; as to plaintiffs' equal protection claims, defendants' motions to dismiss are denied, and plaintiffs' motion for a preliminary injunction is denied."¹¹

¹¹ It is well-established that when considering a motion to dismiss based on lack of jurisdiction, a court may consider matters outside the pleadings. See, e.g., Land v. Dollar, 330 U.S. 731, 735 n.4 (1941) (stating that when a question of the district court's jurisdiction is raised, "the court may inquire by affidavits or otherwise, into the facts as they exist"); Theunissen v. Matthews, 935 F.2d 1454, 1459 (6th Cir. 1991) (noting that affidavits may be considered in deciding a motion pursuant to Fed. R. Civ. P. 12(b)(2)); McCarthy v. United States, 850 F.2d 558, 560 (9th Cir. 1988) (rejecting the argument that the district court's dismissal pursuant to Fed. R. Civ. P. 12(b)(1) should be treated as a summary judgment motion where the court considered matters outside the pleadings; "where considering a motion to dismiss pursuant to Rule 12(b)(1), the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction"), cert. denied, 489 U.S. 1052 (1989); Alfadda v. Fenn, 751 F. Supp. 1114, 1118 (S.D.N.Y. 1990) (stating that a court may resolve factual disputes when a party moves to dismiss for lack of subject matter jurisdiction), rev'd on other grounds, 935 F.2d 475 (2d Cir.), cert. denied, 502 U.S. 1005 (1991); L'Europeenne De Banque v. La Republica de Venezuela, 700 F. Supp. 114, 119 n.6 (S.D.N.Y. 1988) (stating that on a motion to dismiss for lack of jurisdiction, the court may look to affidavits as well as to the pleadings); Loria & Weinhaus, Inc. v. H. R. Kaminsky & Sons, Inc., 80 F.R.D. 494, 497-98 (S.D.N.Y. 1978) (noting that the pleadings and affidavits may be considered when determining whether to grant a motion to dismiss for lack of personal jurisdiction). Ripeness is a prerequisite to the exercise of jurisdiction by federal courts. See, e.g., Federal Election Comm'n v. Central Long Island Tax Reform Immediately Comm., 616 F.2d 45, 51 (2d Cir. 1980). Consequently, despite my consideration of the affidavits and various materials outside the pleadings submitted by the parties, this motion is properly considered as a motion to dismiss.