

not wait as long as the City's process would require.³³ (See, e.g., Tr. at 10-11, 45-46).

Due to this intervening change in circumstances, it is apparent that Liberty's due process claims are not ripe. Unlike the situation when the action was filed, a procedure is in place through which Liberty can apply for a franchise. It has not done so, and, of course, it cannot be said at this point how long that process will take or what the substantive outcome will be. Rather than ruling in a vacuum on issues that might never arise, considerations of ripeness require that the process be permitted to go forward, both because certain issues might never arise and because a more fully developed factual record is required for reasoned adjudication of Liberty's claims. In short, the franchising process is ongoing; there has not been any final agency action taken. See Weissman v. Fruchtmann, 700 F. Supp. 746, 755-57 (S.D.N.Y. 1988) (explaining that plaintiffs' procedural due

³³ This claim is raised in the eighth cause of action.

With the exception of its clear inapplicability to the Non-Common Systems, Resolution 1639 . . . is vague, and vests the City and DOITT with normless and unfettered discretion to grant or deny cable television franchises. Resolution 1639 purports to grant the City and DOITT normless and unfettered discretion to prevent and burden protected speech activity and is therefore facially invalid as violative of the due process clause of the Fourteenth Amendment.

(Second Amd. Compl. ¶ 96).

process claims were premature where city agency had not yet made a "sufficiently final decision").

In addition, as the City pointed out at argument, the Cable Act requires DOITT to act reasonably. 47 U.S.C. § 541(a)(1).³⁴ If DOITT acts unreasonably at some point in the future, either by unreasonably prolonging the proceedings or by imposing unreasonable burdens, Liberty has ready means to address the situation then on a more fully developed record of actual facts from which it may argue that a due process violation occurred rather than arguing from the possibilities and likelihoods relied on today.

With respect to the question of hardship to the parties of withholding decision, the same analysis applies here as applied to Liberty's First Amendment claim.

Thus, Liberty's Due Process claims are not ripe for adjudication.

B. Sixty Sutton's and Veerman's Claims

Plaintiffs Veerman and Sixty Sutton (the "Subscribers") assert, inter alia, that the requirements of the Cable Act

³⁴ This section provides that:

A franchising authority may award, in accordance with the provisions of this subchapter, 1 or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise.

47 U.S.C. § 541(a)(1) (emphasis added).

interfere with their right to engage in protected speech activity on private property in violation of their First Amendment rights (Second Amd. Compl. ¶¶ 75, 78) and that defendants' conduct violates their due process rights (Second Amd. Compl. ¶¶ 90, 96). Defendants have also moved to dismiss these claims on, inter alia, the ground that they are not ripe. For the reasons set forth below, that motion is granted with respect to the Subscribers' First Amendment and due process claims.

1. First Amendment Claims

In asserting their various First Amendment claims, the Subscribers urge that they have a First Amendment right to receive information that is separate from Liberty's right to broadcast that information. In support of their position they cite, inter alia, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756-57 (1976) ("[T]he protection afforded is to the communication, to its source and to its recipients both. . . . [F]reedom of speech necessarily protects the right to receive.") (citations and internal quotations omitted); Lamont v. Postmaster General of United States, 381 U.S. 301, 308 (1965) ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.") (Brennan, J., concurring); Westmoreland v. Columbia Broadcasting System, Inc., 752 F.2d 16, 22 (2d Cir. 1984) ("[T]he public . . . has First Amendment interests that are independent of the First Amendment

interests of speakers.") See also Board of Educ., Island Trees Union Free Schl. Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982) (noting that "the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom"); Sheryl A. Bjork, "Indirect Gag Orders and the Doctrine of Prior Restraint", 44 U. Miami L. Rev. 165, 187 (Sept. 1989) (arguing that the right to receive information exists "apart from the right to speak"); Rene L. Todd, "A Prior Restraint by Any Other Name: The Judicial Response to Media Challenges of Gag Orders Directed at Trial Participants", 88 Mich. L. Rev. 1171, 1190-91 (April 1990) (noting that "the [Supreme] Court has given little guidance as to the scope of a right to receive information").

Defendants, on the other hand, argue that the Subscribers' rights are wholly derivative from Liberty's rights and, thus, that the Subscribers do not have any greater First Amendment rights to receive cable programming than Liberty has to transmit it. See, e.g., Board of Educ., Island Trees Union Free Schl. Dist. No. 26 v. Pico, supra, at 867 (stating that the "right to receive ideas follows ineluctably from the sender's First Amendment right to send them"); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., supra, 425 U.S. at 757 (stating that there is a First Amendment right to receive information and that "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising) (emphasis added); In re Dow Jones & Co., 842 F.2d 603 (2d Cir.), cert. denied, 488

U.S. 946 (1988); Bicknell v. Vergennes Union High Schl. Bd. of Directors, 475 F. Supp. 615, 620-21 (D. Vt. 1979) (holding that a school board's decision to ban certain books from a high school library did not infringe students' First Amendment rights and explaining that "The right to receive information in the free speech context is merely the reciprocal of the right of the speaker. . . . The students' right to review those works through the school library, expressed as the Constitutional right to receive information, is no broader [than the rights of works purchased by the school library or retained on the shelves]"), aff'd, 638 F.2d 438 (2d Cir. 1980); George J. Baldasty & Roger A. Simpson, "The Deceptive 'Right to Know': How Pessimism Rewrote the First Amendment", 56 Wash. L. Rev. 365, 374-75, 393-95 (July 1981) (arguing that the "right to receive information" is "a derivative right appropriately encompassed by the first amendment").³⁵

³⁵ In League of Women Voters of California v. Federal Communications Comm'n., 489 F. Supp. 517 (C.D. Calif. 1980), the Court did not distinguish broadcasters and recipients of speech with respect to the threshold question of ripeness. Plaintiffs there sought declaratory and injunctive relief that 47 U.S.C. § 399(a), forbidding noncommercial broadcast licensees from editorializing, endorsing, or opposing candidates for public office, violated the First Amendment. Id. at 518. The plaintiffs included both broadcasters and would-be recipients of speech. Id. at 519-520. The non-broadcasters challenged the statute as interfering with their right to receive the free speech of broadcasters. Id. at 520. The Court dismissed the case, in part on ripeness grounds. Id. at 521. The Court noted that there was "a distinct likelihood" that the FCC would not seek to penalize the broadcaster, and that the hardship to the parties could not yet be determined. Id. at 520.

For example, in In re Dow Jones & Co., 842 F.2d 603, several news agencies appealed a "gag order" directed at prosecutors, defendants and defense counsel (but not the press) which was designed to prohibit all extrajudicial speech relating to the pending "Wedtech" case. The Court of Appeals explained that the right of the media to receive speech was derivative of the rights of the trial participants to speak and did not enlarge the would-be speakers' First Amendment rights. As the Court stated:

[W]hen considering the merits, the press' right to receive speech does not enlarge the rights of those directly subject to the restraining order. Success on the merits for the news agencies is entirely derivative of the rights of the trial participants to speak.

Id. at 608.³⁶

³⁶ Similarly, in United States v. Simon, 664 F.Supp. 780 (S.D.N.Y. 1987), in which a number of news agencies asked the District Court to vacate an earlier version of the "gag order" at issue in Dow Jones, the Court stated that the news agencies' right to receive information was "entirely derivative" of the rights of the speaker. Id. at 786. As the Court explained:

a potential recipient of speech faces a two-step hurdle before he may successfully challenge, on First Amendment grounds, a restraint on the right of others to speak. First, his right to receive speech becomes cognizable only when an individual has indicated a willingness to speak and is being restrained from doing so. See Virginia State Board, 425 U.S. at 756, 96 S.Ct. at 1822. Under such circumstances, the potential recipient would have standing to challenge the restraint. Even then, however, the challenge may be defeated if the restraints imposed upon the putative speaker are within the limits permitted by the Constitution. Thus, the potential recipient's rights are entirely derivative of those of the speaker.

Id. (emphasis added).

Assuming arguendo that the Subscribers' First Amendment rights are not derivative of Liberty's, the Subscribers do recognize that the government may regulate speech activity undertaken in the privacy of one's own home to protect third parties from injury. (E.g., Sixty Sutton's and Veerman's Reply Mem. at 3).³⁷ For example, as the Subscribers correctly note, a person may read pornography in the privacy of his or her own home. Stanley v. Georgia, 394 U.S. 557 (1969). In Stanley, the Supreme Court held that Georgia's asserted interest in preventing the poisoning of the minds of a reader of pornography was clearly insufficient to justify encroaching upon the right to be free from "unwanted governmental intrusions into one's privacy" -- a right which is of particularly great significance in the context of one's home. Id. at 564-66. However, this right is not absolute; in Osborne v. Ohio, 495 U.S. 103, 111 (1990), the Supreme Court held that states may proscribe the possession of child pornography. The difference between Stanley and Osborne, the Court explained, was that the statute challenged in Osborne was enacted in order to protect third parties, namely, the victim of child of pornography. Id. at 109.

Similarly, the Supreme Court has ruled in City of Ladue v. Gilleo, ___ U.S. ___, 114 S. Ct. 2038, 2041, 2047 (1994) that a statute which prevented homeowners from putting signs in their windows was unconstitutional. However, in Metromedia v. City of

³⁷ Reference is made to the Reply Memorandum of Plaintiffs Sixty Sutton Corp. and Jack A. Veerman in Support of Motion for a Preliminary Injunction.

San Diego, 453 U.S. 490 (1981), in which the Court struck down a San Diego ordinance that imposed "substantial prohibitions on the erection of outdoor advertising displays within the city", id. at 493, the Court stated unequivocally that, "at times First Amendment values must yield to other societal interests." Id. at 501. The Court explained that in order to evaluate the constitutionality of an ordinance such as this, a court must "[assess] the First Amendment interest at stake and [weigh] it against the public interest allegedly served by the regulation." Id. at 502. In order to do this, the Court continued, there need be "a particularized inquiry into the nature of the conflicting interests at stake . . . beginning with a precise appraisal of the character of the ordinance as it affects communication." Id. at 503. In the context of billboards, for example, the Court noted that the city's interest in traffic safety and its aesthetic interest in preventing "visual clutter" could prohibit commercial billboards in certain circumstances. Id. at 511-12. Thus, the lesson of City of Ladeo and Metromedia, as Subscribers so succinctly put it, is that "[h]omeowners can place signs in their windows . . . but not billboards on their front lawns because community interests in aesthetics are affected." (Reply Mem. of Pls. Sixty Sutton and Veerman in Support of Mot. for Prelim. Inj. at 3).

The relevant lesson of these two examples, pornography and billboards, is that the government may regulate speech activity, even speech activity taking place in a person's home,

in order to protect the interests of third parties. Applying this principle to the case at hand makes it apparent that the Subscribers' claims are not yet ripe.

As to the first prong of the Abbott Laboratories test, one may posit certain social interests justifying the imposition of regulatory burdens on Liberty which burdens would affect cable service to the Subscribers. However, those interests can only be debated in the abstract at this point; there is no record from which I can "[assess] the First Amendment interest at stake and [weigh] it against the public interest allegedly served by the regulation." Metromedia, 453 U.S. at 502 (citations omitted).

For example, the concern has been raised that Liberty, if unrestrained by regulation, would "cherry pick" the most desirable buildings for its cable service. An informative discussion of the perils of cherry picking can be found, ironically enough, in a letter dated April 7, 1992 written on behalf of Liberty to the FCC by W. James MacNaughton, counsel to the Subscribers here, urging the FCC to defend the definition of "cable system" in the Cable Act in the Beach litigation. (Jacobs Aff. ¶ 9, Ex. T at 1). As counsel stated:

Stated metaphorically, the Commission has always encouraged "cherry picking" by MDS and SMATV operators to promote competition with cable companies. . . . But once the "cherries" start getting plucked in bunches, then the interests of the local regulators and competing cable companies take on greater importance because more people and buildings in the community are affected. It is quite reasonable for Congress and the Commission to tell Petitioners that they must pick the "cherries" one at a time. This may be unpal-

atable to Petitioners but it is not unconstitutional.

(Jacobs Aff., Ex. T at 12-13). Thus, as Subscribers must agree, cherry picking, at some point, affects the public interest, and thus the interests of local regulators become more important. However, the facts are not yet developed which would permit me to evaluate the competing interests implicated by the cherry harvest. In any event, there is no final agency action on the issue. In re Combustion Equip. Assocs., Inc., supra, 838 F.2d at 37-38 (quoting Gardner & Toilet Goods Assoc., supra, 387 U.S. at 171).

In looking at the "hardship to the parties" prong of the Abbott Laboratories test, just as with Liberty, it cannot be said if and in what way the Subscribers' First Amendment rights might be impaired by the City or the State defendants. As was discussed above in Point IA1b, the assertion that cable service will soon be cut off is unsupported. Merely asserting that Liberty's cable service to Sixty Sutton is going to be disrupted does not make it so. The Standstill Order is not a final determination in the matter. (Grow Aff. ¶ 32). Also, in at least one prior case in which the NYSCC issued an Order to Show Cause, a "Cease and Desist Order" was not issued for a year. Id. In addition, that operator was permitted to apply for a franchise,

which was granted, and there was no interruption in service. Id.³⁸ Balanced against this speculative hardship is the same significant hardship on NYSCC and DOITT as was discussed above with respect to Liberty -- premature judicial meddling in their processes. Accordingly, the Subscribers' First Amendment claims are dismissed as not ripe.

2. Due Process

The Subscribers' due process claims are jointly pleaded with Liberty's in the sixth and eighth claims in the Second Amended Complaint (¶¶ 89-90, 93-96). Since the City's notice of rulemaking has been issued and contemplates comment by interested parties such as the Subscribers, the Subscribers' due process claims are not yet ripe for the same reasons as Liberty's. See section IA2, supra.

II. Equal Protection

All three plaintiffs assert equal protection claims. They challenge 47 U.S.C. § 522(7), alleging that:

The Common Ownership Requirement in 47 U.S.C. § 522(7)(B) discriminates between the Common

³⁸ The situation here can be distinguished from that in Patel and Patel v. City of South San Francisco, 606 F. Supp. 666 (N.D. Calif. 1985) when plaintiff operated a "adult hotel" in violation of the zoning ordinance, and part of plaintiff's activities involved the airing of "adult" programming in the motel rooms. Id. at 668-69. The plaintiff sought, inter alia, a declaration that the ordinance was unconstitutional. Id. at 669. The Court noted that the case was ripe for adjudication because it was "not disputed that the city will enforce the Ordinance against plaintiff" unless the Court prevented the enforcement. Id. The Court also noted that the city sought to enforce the Ordinance in the counterclaim in that very action. Id. It simply cannot be said with the same assurance here that the Subscribers face the loss of Liberty's cable service.

Systems and Non-Common Systems in requiring a "franchise" only for the Non-Common Systems. . . . This discrimination in 47 U.S.C. § 522(7)(B) violates equal protection principles of the due process clause of the Fifth Amendment to the United States Constitution . . . under the "strict scrutiny" standard because it adversely affects the fundamental right of Liberty to engage in a speech activity on private property using the Non-Common System at the Sutton Building.

(Second Amd. Compl. ¶¶ 83-84). (See also Second Amd. Compl. ¶ 88, 90).

A. Ripeness

Unlike the other claims raised by plaintiffs, their equal protection claims are ripe. As the Court of Appeals for the District of Columbia explained in Beach I:

Unlike petitioners' First Amendment claim, the "rational basis" claim does not depend on particular circumstances. First, the standard for evaluating that claim does not vary with local conditions. . . . Second, the application of that standard is also context-invariant. . . . Thus, the rational-basis claim is "purely legal" for the purposes of Abbott Laboratories, and we reach the merits.

959 F.2d 975, 986 (D.C. Cir. 1992). The Court of Appeals then directed the FCC to consider within sixty days whether there was some "conceivable basis" for requiring the local franchising of external, quasi-private SMATV facilities but not for wholly private or internal facilities. Id. at 987. The fact that the Supreme Court addressed the merits of the Beach petitioners' equal protection claims in Beach III further indicates that plaintiffs' equal protection claims are ripe. 113 S. Ct. 2096

(1993). Accordingly, the motion to dismiss these claims on the grounds of ripeness is denied.

B. Abstention

Defendants have also moved to dismiss the complaint under various theories of abstention. The Supreme Court, however, has repeatedly emphasized that a federal court's obligation to adjudicate claims within its jurisdiction is "'virtually unflagging.'" New Orleans Public Service v. Council of the City of New Orleans, 491 U.S. 350, 359 (1989) (quoting Deakins v. Monaghan, 484 U.S. 193, 203 (1988)). Furthermore, "'the presence of a federal basis for jurisdiction,'" as in this case, "'may raise the level of justification needed for abstention.'" County of Suffolk v. Long Island Lighting Co., 907 F.2d 1295, 13009 (2d Cir. 1990) (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 815 n.21 (1976)). I also note that abstention "remains 'the exception, not the rule.'" New Orleans Public Service, 491 U.S. at 359 (quoting Colorado River, 424 U.S. at 813 (1976)). Indeed, the Court of Appeals has recently noted that a federal court would be remiss to abstain from resolving any constitutional challenge -- and certainly a constitutional challenge to a federal statute -- in the expectation that a state court might reach the issue. The Court explained that "[f]ederal courts do not need to wait for a state court's interpretation of federal constitutional law." Williams v. Lambert, No. 94-7290, 1995 WL 41434, at *6 (2d Cir. Feb. 1, 1995). In following these principles, I find that abstention with respect to plaintiffs'

equal protection challenge would be inappropriate. Accordingly, the motion to dismiss those claims on the grounds of abstention is denied.

C. Preliminary Injunction

Turning then to the Subscribers' motion for a preliminary injunction, the standard in this circuit for preliminary injunctive relief requires the moving party to demonstrate:

(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.

Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979).

Liberty's claim challenging the distinction drawn between Common Systems and Non-Common Systems is precisely the claim rejected by the Supreme Court in Beach III. The Subscribers' claim is virtually identical in that First Amendment considerations are involved in both claims, but Liberty's are as "speaker" and (assuming that the Subscribers' rights are not derivative of Liberty's), the Subscribers' rights are as "recipients".

In Beach III, the Supreme Court addressed the question of whether there was any rational basis justifying the distinction between facilities serving separately owned and managed buildings and those serving one or more buildings under common ownership or management. 113 S.Ct. at 2099. The Court reversed

the decision of the Court of Appeals for the District of Columbia Circuit, which had held that this portion of the Cable Act was unconstitutional, id. at 2100-01, and upheld the constitutionality of the common-ownership distinction in the Cable Act under the rational basis test. Id. at 2103. In part because the Court of Appeals had not considered petitioners' argument that heightened scrutiny was appropriate, the Supreme Court did not reach that argument either. On remand from the Supreme Court, however, the District of Columbia Circuit found that "there is no basis for application of a heightened scrutiny standard" to the question of whether the common-ownership requirement violates Equal Protection. Beach IV, 10 F.2d 811 (D.C. Cir. 1993). Thus, the Beach cases effectively preclude the equal protection claims in the instant case.

In its reply memorandum, Liberty attempts to distinguish Beach III from the instant case. It writes:

Both of the Circuit Court decisions and the Supreme Court decision in Beach were based on an equal protection analysis of the cross-ownership provisions of the Cable Act. There was never any consideration of the First Amendment burdens imposed by the challenged provisions.

(Liberty's Reply Mem. at 17). It is true that the Supreme Court's decision was limited to an equal protection analysis in Beach III. 113 S.Ct. at 2100 n. 3. However, the reason that the Supreme Court did not address the constitutionality of § 522(7) under the First Amendment was not, for example, because those claims had never been raised. The reason was, rather, that the

petitioners' First Amendment claims were found not yet ripe by the Court of Appeals. Id. As discussed supra, plaintiffs' First Amendment challenge here is, similarly, non-ripe.

Given the Beach Courts' holdings, supra, and Mr. MacNaughton's apparent admission that regulations designed to avoid cherry-picking "may be unpalatable . . . but . . . are not unconstitutional" (Jacobs Aff., Ex. T at 12-13), plaintiffs cannot demonstrate that they are entitled to a preliminary injunction. They show neither that they have a likelihood of success on the merits, nor that there are sufficiently serious questions going to the merits as to make them a fair ground for litigation. Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., supra, 596 F.2d at 72. In addition, for the reasons discussed at Point IA1b, plaintiffs have not demonstrated irreparable harm or a balance of hardships tipping decidedly in their favor. Thus, plaintiffs' motion for a preliminary injunction on their equal protection claims is denied.

III. Plaintiffs' Remaining Claims

The remaining miscellaneous claims asserted by plaintiffs, i.e., the seventh, ninth, tenth, eleventh, and twelfth causes of action, are not ripe, particularly in light of the City's recently-published notice of proposed rulemaking. For example, in plaintiffs' seventh cause of action, they assert that Resolution 1639 is unreasonable pursuant to 47 U.S.C. § 541(a)(1) because it imposes terms and conditions more burdensome than those allowed by 47 U.S.C. § 521 et seq. and by New York state law. However, Resolution 1639 does not impose any terms and conditions directly upon Liberty. See Resolution 1639. It is, rather, the terms of whatever franchise, if any, that is issued by DOITT which will establish what burdens Liberty may face. Since a franchise has not yet been issued but the notice of rulemaking has been published, it is premature to consider this claim for the reasons set forth above.

Similarly, plaintiffs' ninth claim, that DOITT has violated 47 U.S.C. § 541(a) by refusing to grant Liberty a franchise, is also not yet ripe; DOITT has not so refused.

Plaintiffs' tenth claim asserts that the defendants have made a "final determination denying Liberty" a franchise. (Second Amd. Compl. ¶ 101). Clearly that is not the case, and thus it is not yet appropriate to address this claim.

Plaintiffs' eleventh claim for relief, that 47 U.S.C. § 521 et seq. and FCC decisions have preempted the regulatory authority of the City over the provision of "premium" cable

service to the Subscribers to the extent that the City may not prevent the receipt of Liberty's "premium" service by the Subscribers is not ripe. The City has not prevented the receipt of Liberty's "premium service", and it is not yet known what actions the City may take.

Finally, plaintiffs' twelfth claim alleges as a catch-all that the defendants deprived plaintiffs of their rights under the Supremacy Clause, the First Amendment, the equal protection and due process clauses of the United States Constitution and 47 U.S.C. § 521 et seq in violation of 42 U.S.C. § 1983. Except with respect to the equal protection claims discussed in II, supra, the twelfth claim is not ripe for the reasons discussed above.

CONCLUSION

Defendants' motion to dismiss on the ground of lack of ripeness is granted as to plaintiffs' first, second, third, seventh, eighth, ninth, tenth and eleventh claims, as to so much of plaintiffs' sixth claim as asserts a due process claim and as to all of plaintiffs' twelfth claim except that portion of it that asserts an equal protection claim.

With respect to plaintiffs' fourth and fifth claims and so much of their sixth and twelfth claims as assert an equal protection claim, defendants' motions to dismiss on the basis of

ripeness and abstention are denied, and plaintiffs' motion for a preliminary injunction is denied.

Dated: New York, New York

March 13, 1995


LORETTA A. PRESKA, U.S.D.J.

Exhibit B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 2034—August Term 1994

Argued: June 1, 1995 Decided: July 12, 1995

Docket No. 95-6041

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

Plaintiffs-Appellants.

—v.—

CITY OF NEW YORK; RALPH A. BALZANO,
Commissioner of Department of Information and
Telecommunications. NYS COMMISSION ON CABLE
TELEVISION, WILLIAM B. FINNERAN, GERARD D.
DIMARCO, BARBARA T. ROCHMAN, DAVID F.
WILBUR, and JOHN PASSIDOMO,

Defendants-Appellees.

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

*Defendants-Intervenors-
Appellees.*

B e f o r e :

NEWMAN, *Chief Judge*,
LUMBARD and JACOBS, *Circuit Judges*.

Appeal from the March 14, 1994, order of the United States District Court for the Southern District of New York (Loretta A. Preska, Judge) denying plaintiffs' motion for a preliminary injunction against the City of New York and various agencies or officials of the City to bar enforcement of certain provisions of the Cable Communications Policy Act of 1984 and a December 9, 1994, state agency stand-still order against Liberty Cable.

Affirmed.

LLOYD CONSTANTINE, New York, N.Y.
(Robert Begleiter, Leslie F. Spasser,
Eliot Spitzer, Constantine & Partners,
New York, N.Y., on the brief), *for*
defendant-appellant Liberty Cable Co.,
Inc.

W. JAMES MACNAUGHTON, Woodbridge,
N.J., submitted a brief *for defendants-*
appellants Sixty Sutton Corp. and
Veerman.

TIMOTHY J. O'SHAUGHNESSY, New York,
N.Y. (Paul A. Crotty, Corporation Coun-
sel of the City of N.Y., Kristin M. Hel-
mers, New York, N.Y., on the brief), *for*

defendants-appellees City of N.Y. and Balzano

MARILYN T. TRAUTFIELD, Asst. Atty. Gen. New York, N.Y. (Dennis C. Vacco, Atty. Gen., Jeanne Lahiff, Asst. Atty. Gen., on the brief), *for defendants-appellees N.Y.S. Comm'n on Cable Television, Finneran, Di Marco, Rochman, Wilbur, and Passidomo.*

KATHY S. MARKS, Asst. U.S. Atty., New York, N.Y. (Mary Jo White, U.S. Atty., Steven M. Haber, Asst. U.S. Atty., William E. Kennard, Gen. Counsel, Fed. Commun. Comm'n, Wash., D.C., on the brief), *for defendant-intervenor-appellee U.S.A.*

ROWAN D. WILSON, New York, N.Y. (Stuart W. Gold, Cravath, Swaine & Moore, New York, N.Y.; Martin L. Schwartz, Richard G. Primoff, Rubin Baum Levin, Constant & Friedman, N.Y., N.Y., on the brief), *for defendants-intervenors-appellees Time Warner Cable of N.Y.C., and Paragon Cable Manhattan.*

JON O. NEWMAN, *Chief Judge:*

This appeal by a television cable company from the denial of a motion for a preliminary injunction primarily concerns the extent of governmental obligations to develop franchising regulations for activities required to be licensed. Plaintiffs appellants Liberty Cable Com-

pany, Inc. ("Liberty"), Sixty Sutton Corporation, and Jack A. Veerman appeal from the March 14, 1995, order of the District Court for the Southern District of New York (Loretta A. Preska, Judge), dismissing their complaint in part and denying their motion for a preliminary injunction. Defendants-appellees are the City of New York (the "City") and agencies and officials of the City and of the State of New York. Because we agree with the District Court that a governmental entity satisfies its licensing obligations by acting with reasonable expedition to develop rules for obtaining licenses in a specialized, technical field, we affirm the denial of a preliminary injunction on the basis of the comprehensive and carefully reasoned opinion of Judge Preska. *See* ___ F. Supp. ___ (S.D.N.Y. 1995).

Liberty operates what are known as "non-common" cable systems in New York City. A non-common cable system is a Satellite Master Antenna Television ("SMATV") facility that does not use public property or rights of way to provide cable services but connects by hard wire two or more multi-unit dwellings that are not commonly owned, controlled, or managed. Non-common systems fall within the definition of a "cable system," *see* 47 U.S.C. § 522(7), and are thus subject to all the requirements that the Cable Communications Policy Act of 1984, 47 U.S.C. § 521 *et seq.* (1988 & Supp. V 1993) (the "Cable Act") imposes on cable operators.¹ The plaintiffs-appellants' complaint sought a declaratory judgment that certain provisions of the Cable Act were

¹ "Non-common" cable systems are to be distinguished from "common" cable systems, which are SMATV facilities that connect by wire only buildings under common ownership, control, or management. Common cable systems are not cable systems within the meaning of the Cable Act and are not subject to any of the requirements imposed under that statute.

unconstitutional on their face and as applied. Their motion for a preliminary injunction sought to enjoin appellees from enforcing the Cable Act so as to require Liberty either to cease providing service to subscribers in its non-common systems or to obtain a franchise from the City. Appellants also attempted to enjoin a December 9, 1994, standstill order issued by appellee New York State Commission on Cable Television ("NYSCCT"), prohibiting Liberty from hooking up any new non-common systems

Appellants alleged that 47 U.S.C. § 522(7) (defining "cable system") and 47 U.S.C. § 541(b)(1) (stating that cable operators may not provide cable services without a franchise) as well as the state standstill order violated their First Amendment, due process, and equal protection rights. Time Warner Cable of New York City and Paragon Cable Manhattan, franchised competitors of Liberty, intervened seeking dismissal of the complaint. Judge Preska held that appellants' First Amendment claims were unripe under *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967), and *Beach Communications, Inc. v. F.C.C.*, 959 F.2d 975 (D.C. Cir. 1992) (finding petitioners' facial challenge to the same provisions of the Cable Act at issue here not ripe for adjudication). She further held that their due process claims were unripe. Though the District Court found that appellants' equal protection challenges were ripe, it nonetheless denied the preliminary injunction, concluding that Liberty and its subscribers could not demonstrate either a "likelihood of success on the merits" or "irreparable harm." see *Jackson Dairy, Inc. v. H. P. Hood & Sons, Inc.*, 596 F.2d 70, 72 (2d Cir. 1979).

We affirm on Judge Preska's opinion and write only to add a few additional words of clarification on the issue