

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Case No: 05-2265

KCCP TRUST, d/b/a TIME WARNER CABLE,

Plaintiff-Appellant

v.

THE CITY OF NORTH KANSAS CITY, MISSOURI,

Defendant-Appellee

**Appeal from the United States District Court
for the Western District of Missouri
Case No. 04-1119-CV-W-ODS**

BRIEF FOR DEFENDANT-APPELLEE

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JURISDICTIONAL STATEMENT

The City contends that the District Court did not have jurisdiction over Time Warner's claims. Diversity jurisdiction under 28 U.S.C. § 1332(a)(1) is not appropriate because Time Warner did not allege facts sufficient to establish that the jurisdictional amount is satisfied. Moreover, Time Warner failed to state any viable federal claim to establish jurisdiction pursuant to 28 U.S.C. § 1331 or 42 U.S.C. § 1983. Additionally, the City contends that Time Warner lacks standing under state or federal law to pursue its claims. The District Court made no ruling on these issues.

Rather, the District Court appropriately held it did not have jurisdiction because Time Warner's claims are not ripe for adjudication. The City acknowledges that the District Court's Order is a final appealable order pursuant to 28 U.S.C. § 1291.

STATEMENT ON ORAL ARGUMENT

Pursuant to the Court's June 6, 2005 Order, the Clerk of Court has been instructed to set the case for oral argument on the week of September 12-16, 2005.

The City agrees that twenty (20) minutes per side is appropriate for oral argument.

STATEMENT OF THE ISSUES

The sole issue is whether the District Court properly dismissed Time Warner's action to enjoin the City of North Kansas City from designing and constructing a multi-use fiber optic cable network for the benefit of its citizens, and whether the basis for the Court's ruling – that Time Warner faced no certainly-impending injury, that its allegations were contingent future events which might never occur, and that its claims were therefore unripe for consideration – should be affirmed because of the following facts which are apparent on the face of the Complaint:

- (1) Time Warner's only basis for an injunction is an alleged violation of a Missouri statute which requires a public vote before a third class city such as North Kansas City can own or operate cable television facilities and services.
- (2) The City's proposed fiber optic network is multi-use infrastructure designed to provide internet-type services to the City's businesses and residents -- services that the City is authorized to provide without the referendum requirement of § 71.970;
- (3) The City Council has not voted to offer cable television over the network, has not authorized the construction of, or connection to, a "head end" facility necessary to offer cable television over the

- network, and has not entered into any contract to disseminate a cable television signal over the network;
- (4) The City's expenditures on its fiber optic network will occur to the same degree whether or not cable television is ever offered over the network; and
- (5) The constitutional challenges asserted by Time Warner are based entirely on its statutory claim.

Most Apposite Cases:

Pub. Water Supply Dist. No. 8 v. City of Kearney, 401 F.3d 930 (8th Cir. 2005)

Texas v. United States, 523 U.S. 296 (1998)

Kaylor v. Fields, 661 F.2d 1177 (8th Cir. 1981)

Nat'l Solid Waste Mgmt. Ass'n v. Dir. Of Dept. of Nat. Res., 964 S.W.2d 818 (Mo. 1998)

Most Apposite Statutes:

Mo. Rev. Stat. § 71.970(1)

Mo. Rev. Stat. § 392.410(7)

STATEMENT OF THE CASE

Time Warner's Complaint, filed on or about December 9, 2004, asserted two counts against the City: (1) a claim for an injunction prohibiting the City from constructing a fiber optic network because of the alleged violation of Mo. Rev. Stat. § 71.970; and (2) claims for constitutional violations of Equal Protection, Due Process, and the First Amendment.

On January 11, 2004, the City filed Defendant's Motion to Dismiss or, in the Alternative, for Summary Judgment. The City's Motion contended that the District Court lacked jurisdiction over Time Warner's claims because Time Warner: (1) failed to adequately plead diversity jurisdiction; (2) did not have standing under either state or federal law; (3) failed to state claims that were ripe for adjudication; and, (4) failed to assert cognizable constitutional claims.

On April 4, 2005, the District Court granted the City's Motion to Dismiss holding that Time Warner's Complaint was not ripe for adjudication because the City did not own or operate a cable television facility implicating the referendum requirement of § 71.970, and that Time Warner's constitutional claims were dependant on its statutory claim, thus making those claims also unripe.

STATEMENT OF FACTS

KCCP Trust, d/b/a Time Warner Cable (“Time Warner”) is a cable television and high-speed internet service provider to residential and some business customers in North Kansas City. (Compl., ¶¶ 2, 3; PA 6)¹. Time Warner has chosen not to make its service available to all North Kansas City businesses. (Affidavit of Mayor Gene Bruns, ¶ 7; R. 13, Ex. 1; DA 1). Time Warner Cable does not now provide any high-speed internet services to the majority of the business community south of Armour Road, where almost all of the businesses in the City are located. Time Warner seemingly had no interest in providing internet service to the business community until the City decided to act. (Pl’s Opposition to Motion to Dismiss, p. 3; R. 16; DA 4). Whether services will be available in 2005 as claimed by Time Warner in its Complaint is unknown.

Defendant City of North Kansas City (“City”) is a third class municipality located in Clay County, Missouri. (Compl., ¶ 8; PA 7). In 2003 the City began studying ways in which it could improve its telecommunications infrastructure in order to make the City more attractive to both residents and businesses. (Affidavit of Mayor Gene Bruns, ¶ 2; R. 13, Ex. 1; DA 1). In June 2003, the North Kansas City City Council (“City Council”) passed Resolution 664, a Resolution

¹ Citations to “DA” reference Defendant-Appellee’s Appendix filed with this brief. Citations to “PA” reference Plaintiff-Appellant’s Appendix filed with Time Warner’s brief on appeal.

concerning “the City of North Kansas City’s High Tech/Telecommunications Infrastructure, Including Fiber Optics, Cable, Wireless, and Other Technologies.”

(Compl., ¶ 15; Affidavit of Mayor Gene Bruns, ¶ 2; PA 8; R. 13, Ex. 1; DA 1).

Pursuant to the Resolution, the City commissioned a review and analysis of the City’s communications infrastructure, service, costs, and operations. In order to complete the analysis, in September 2003, the City Council approved a contract between the City and Black & Veatch Corp. to conduct a study. (Compl., ¶¶ 16, 17; Affidavit of Mayor Gene Bruns, ¶ 2; PA 8; R. 13, Ex. 1; DA 1).

As part of its services under the contract, Black & Veatch presented a preliminary report to the City Council in January 2004. In its preliminary report, Black & Veatch informed the City Council that the final study would include discussions of the “existing area service providers” of cable television, including Time Warner Cable. (Compl., ¶¶ 24, 25; PA 9). The study indicated that a fiber optic network could provide what is known in the industry as “triple play” services, which are voice, data, and video, and that the proposed network could serve every home and business in the City. (Compl., ¶ 40; Affidavit of Mayor Gene Bruns, ¶ 2; PA 11; R. 13, Ex. 1; DA 1). The City Council has never stated that the improvements in the City’s telecommunication infrastructure must be, or should be, self-supporting.

In June 2004, the City adopted a “Strategic Action Plan.” As part of the Strategic Action Plan, the City Council contracted with Black & Veatch to evaluate providing fiber optics to the City, including the “triple play.” (Compl., ¶ 40; PA 11). The City has not yet decided and has never voted on the issue of whether to provide cable television service on the proposed fiber optic network.² (Compl., ¶ 53; Affidavit of Mayor Gene Bruns, ¶¶ 4-6; PA 13; R. 13, Ex. 1; DA 1). The City Council is aware that Missouri law requires a vote of the people before it owns or operates cable television facilities and services. (Affidavit of Mayor Gene Bruns, ¶ 5; R. 13, Ex. 1; DA 1). In the view of the Mayor and the City Council, however, such a vote is premature and inappropriate prior to the City’s decision to own or operate cable television facilities, and prior to developing a plan for such facilities that could be taken to the voters. (Affidavit of Mayor Gene Bruns, ¶ 5; R. 13, Ex. 1; DA 1).

In order to provide cable television service on the proposed fiber optic network, the City would need either to construct a “head end” facility, which contains the satellite dishes and other equipment necessary to supply television programming to the fiber optic network, or connect to an existing head end.

² Time Warner’s Statement of Facts says that Mayor Bruns admitted in his deposition that the City “has affirmatively decided to build the cable network,” (Appellants Brief, p. 11). What the Mayor actually said was that the City Council had decided to build the fiber optic network, but had not decided whether to offer cable television services over that network. (PA 26; Depo., p. 13, ll. 13-25; PA 27; Depo., p. 21, ll. 6-23).

(Affidavit of John Toccalino, ¶¶ 3-5; R. 13, Ex. 3; DA 8). The contract with Black & Veatch does not call for the preparation of plans for the design or construction of a head end facility or for the connection to an existing head end facility. (Affidavit of John Toccalino, ¶¶ 3-4; R. 13, Ex. 3; DA 8). To the contrary, North Kansas City's purpose in building a fiber optic system is to provide internet connections for the businesses of the City. Whether the City will eventually decide to provide cable television programming is unknown. (Ex. A, pp. 12, 13, 21; R. 18, Ex. A; Toccalino depo, p. 28, ll 2-20, DC75).

The City receives a percentage of the state tax revenues generated from a riverboat casino located in the City. That revenue is segregated from other City tax and revenue funds. All of the money used for the study, design, and construction of the proposed fiber optic network has come from Gaming Revenue. (Affidavit of Shirley Land, ¶¶ 9-10; R. 13, Ex. 2; DA 6). No taxes paid by Time Warner have been or will be used in the design or construction of the City's fiber optic network. (Id.)

The City is proceeding cautiously and deliberately with its fiber optic network project. After it commissioned Black & Veatch to perform a feasibility study in 2003, the City presented the proposal to the public in early 2004. (*See* City Council Minutes, 1-20-04; City Council Minutes, 1-31-04; and City Council Minutes, 4-13-04; R. 18, Exs. 4-6; DA 50). At the City Council meeting in April

2004, representatives from twelve businesses in the City spoke in favor of the proposal. No one requested cable television services. (City Council Minutes 4-13-04, pp. 3-9; R. 18, Ex. 6; DA 50). In addition, twenty-six persons representing North Kansas City businesses signed in and indicated they favored the proposal. City Council Minutes, 4-13-04, pp. 25, 28; DA 50) A Time Warner representative was given the opportunity to speak and did so. (City Council Minutes, 4-13-04, p. 9; R. 18, Ex. 6; DA 50).

SUMMARY OF THE ARGUMENT

Time Warner's Complaint challenges the City's planned expenditures to design and construct a fiber optic broadband network to provide internet data service to its businesses and residents, which it is permitted to do under Mo. Rev. Stat. § 392.410(7). Time Warner's challenge is based upon Mo. Rev. Stat. § 71.970, which addresses a city's ability to provide cable television services and requires that before a city can own or operate cable television facilities and services, the City must hold a referendum. The City Council, however, has never voted or made any decision to offer cable television over the planned network.

Moreover, the network, as currently planned and designed, does not include the construction of, or connection to, a "head end" facility necessary to provide cable television, nor has the City made any effort to secure the rights to disseminate a cable television signal over its network. The fiber optic network cannot provide cable television unless the City decides to take the above steps. The fiber optic network is the infrastructure necessary to provide internet-type services to City businesses and residents. State law authorizes, and places no limitations on the City's ability to own facilities necessary to offer internet-type services.

Despite these uncontested facts, Time Warner contends that planning and designing the fiber optic network, even without the ability to provide cable

television service, somehow triggers the referendum requirement of § 71.970 simply because the network is capable of being upgraded to provide cable television service in the future. Time Warner also contends the City Council “intends” to offer cable television services in the future and “intends” to have the public vote on the issue only after the funds have been spent to build the network and voter approval will be an economic necessity.

Time Warner’s Complaint is not ripe for adjudication. In order for a case to be ripe within the jurisdictional limits of Article III of the Constitution, courts are limited to deciding actual “cases” and “controversies” and cannot issue advisory opinions. Claims that rest upon contingent future events that may not occur as anticipated, or may not occur at all, are not ripe for adjudication. Similarly, cases that are based upon hypothetical facts are not ripe. Moreover, before a claim is ripe, a party must face an injury that is certainly impending and must seek a remedy that will redress the injury that is alleged.

Time Warner’s Complaint is based entirely upon contingent events. Until and unless the City Council votes to offer cable television, authorizes the construction of the required connection, and/or contracts with a cable television signal provider, no cable television could be provided and the City’s fiber optic network is nothing more than a network to provide internet-type services for which no vote of the people is required.

Additionally, the injury Time Warner alleges is not direct or certainly impending and will not be redressed by the remedy it seeks. The City's expenditures on the network will occur in the same manner whether or not cable television is offered over the network, and Time Warner's allegations regarding injury based on its feared competition from the City's network is based on nothing more than conjecture and speculation and is in no way "certainly impending." Time Warner's claims are not ripe for adjudication.

ARGUMENT

I. STANDARD OF REVIEW.

It is unclear from the District Court’s decision whether it considered evidence outside of Time Warner’s Complaint, although the District Court indicates that it assumed the truth of the Complaint’s factual allegations. (Order, p. 1). Because the issue of ripeness is a challenge to jurisdiction, it is appropriate for a district court to consider not only the Complaint and the undisputed facts outside of the Complaint; it also has the power to resolve disputed facts in determining jurisdictional issues. *Osborn v. U.S.*, 918 F.2d 724, 728-730 (8th Cir. 1990).

Moreover, contrary to Time Warner’s assertion, even if the District Court were assumed the truth of the factual allegations of the Complaint, it was not bound by Time Warner’s conclusory allegations. *See Papasan v. Allian*, 478 U.S. 265, 286 (1986) (court not bound to accept as true a legal conclusion couched as a factual allegation). For example, Time Warner argues that the Court is bound by its allegation that the City “clearly intend[s]” to offer cable television over its fiber optic network. (Appellant’s Brief, p. 28). This is not a factual allegation, but is merely Time Warner’s argued conclusion to which the Court is not bound.

The standard of review is that “when the district court’s decision to dismiss for lack of subject matter jurisdiction is based on the complaint alone, or on the

complaint supplemented by undisputed facts evidenced in the record, the appellate court’s review is limited to determining whether the District Court’s application of the law is correct and, if the facts are indeed undisputed. Osborn, 918 F.2d at 730. Where the district court relied on its own determination to resolve disputed factual issues, the appellate court must sustain those finding unless such determinations are “clearly erroneous.” *Id* at 730.

Time Warner does not point to any disputed facts in the record. Rather, it argues that its conclusion regarding the City’s “intent” must be adopted by the Court. This is simply not correct. The District Court was not bound by Time Warner’s factual allegations, let alone its conclusions couched as factual allegations.

II. TIME WARNER’S CLAIM PURSUANT TO MO. REV. STAT. § 71.970 IS NOT RIPE FOR ADJUDICATION.

The standards for determining whether a case is ripe for judicial consideration are based on the jurisdictional limits of Article III of the Constitution and the policy considerations of maintaining effective court administration. *Pub. Water Supply Dist. No. 8 v. City of Kearney*, 401 F.3d 930, 932 (8th Cir. 2005). Courts are limited to deciding actual “Cases” and “Controversies,” and cannot issue advisory opinions. U.S. Const. Art. III, § 2; *City of Kearney*, 401 F.3d at 932. “A claim is not ripe for adjudication if it rests upon ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’” *Texas v. U.S.*,

523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 580-581 (1985)). Cases based on hypothetical facts are also not ripe for adjudication. *City of Kearney*, 401 F.3d at 932. Moreover, before a claim is ripe for adjudication, a party must face an injury that is “certainly impending.” *Id.* (quoting *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)).

The District Court properly dismissed Time Warner’s Complaint as unripe. Time Warner’s claims are based upon a mischaracterization of the City’s fiber optic network, a misunderstanding of the law, and a series of future contingent and speculative events that do not give rise to any certainly impending injury to Time Warner. Accordingly, the District Court’s opinion should be affirmed.

A. Time Warner’s Statutory Claim Is Based On Speculative Contingent Allegations, Which Are Insufficient To Create A “Case” Or “Controversy” That Can Be Decided By The Court.

The City of North Kansas City is designing a fiber optic network. Construction has not begun. The network will provide internet-type data services to the City’s businesses and residents. The City is authorized by state law to provide such services without a public vote pursuant to Mo. Rev. Stat. § 392.410(7).

The network could theoretically be upgraded to provide cable television services, but the City would first have to build its own “head end,” which would contain the satellite dishes and other equipment necessary to supply cable

television programming to the network, or construct a link to an exiting “head end.” (Affidavit of John Toccalino, ¶¶ 3-5; R. 13, Ex. 3; DA __). In addition, the City would have to contract with a service provider to obtain the necessary rights to disseminate the cable signal over the network. The fiber optic network as currently designed and planned makes no provision for the construction of, or connection to, a “head end.” (Affidavit of John Toccalino, ¶¶ 3-4; R. 13, Ex. 3; DA __).

The Missouri statute that Time Warner relies on for its Complaint does not place a referendum requirement on the City until it “own[s] or operate[s] cable television facilities and services.” Mo. Rev. Stat. § 71.970(1). Time Warner does not allege that the City Council has made any official enactment to offer cable television over its fiber optic network. Rather, Time Warner contends that the City “intends” to offer cable television and argues that such an intention is sufficient to establish the ripeness of its claims. Not so.

The City’s intention is evident only through the official enactments of the majority of its City Council members. Courts do not look behind legislative enactments to attempt to discern the “hidden (as distinguished from the stated) purpose of the legislation.” *St. Louis, County v. B.A.P., Inc.*, 18 S.W.3d 397, 412 (Mo. App. 2000). Accordingly, Time Warner’s allegation that the “hidden” purpose of the City’s enactments authorizing the development of a fiber optic

network is in reality to provide cable television is fatally flawed. The City's resolutions and ordinances do not provide for offering cable television and the network planned does not have the capability of providing that service without being upgraded – an option that would require additional official action through ordinance or resolution, and the expenditure of additional funds. Until some further official action by the City Council occurs, no one can know whether the City will or will not violate the statute by refusing to hold a public vote.

The Court recently determined that a similar case was not ripe for adjudication. *Pub. Water Supply Dist. No. 8 v. City of Kearney*, 401 F.3d 930 (8th Cir. 2005). There, the Court considered the ripeness of a water supply district's challenge to the City of Kearney's agreement to provide water service to some property owners in competition with the water district. *Id.* at 931-932. Under Missouri law, Kearney could provide water service to the property owners only if the property was detached from the water district. *Id.* The property owners sued for detachment, which the water district opposed, but no ruling had been received from the court. *Id.* at 932. In its suit against the City, the water district argued that, even if the property were detached, Kearney could not provide water service to the property owners because Missouri's detachment law was preempted by federal provisions designed to protect water districts with outstanding federal loans from competition. *Id.* at 931-932.

In affirming the district court's dismissal, the Court found that the water district's claims were not ripe because it was unknown whether the property would be detached from the water district. The water district's claims were, therefore, dependent on contingent events. *Id.* at 933. If the property was not detached, Kearney would not provide water service to property owners. *Id.* The court held that the water district did not present evidence of a "certainly impending" injury and that it was essentially seeking an advisory opinion, which the Court found a waste of judicial resources. *Id.* The claims were not ripe for adjudication. *Id.*

Time Warner's claims are similarly based entirely on contingent events that may or may not occur. The City Council has never voted to offer cable television services, never authorized the expenditure of additional funds for the construction of, or connection to, a head end, and never contracted with a provider to secure a cable television signal. Absent some such action, there could be no violation of statute and Time Warner could not suffer the injury it claims. Moreover, Time Warner's claim is an even greater waste of judicial resources because Time Warner is essentially asking for a ruling that simply mimics the statute that is already in place; i.e. if the City constructs a connection to a head end and puts a cable television signal over its network without having a referendum, then it is in violation of Mo. Rev. Stat. § 71.970. This is precisely the type of question that is contingent and which is not ripe for adjudication.

1. The District Court properly construed Mo. Rev. Stat. § 71.970.

In its brief on appeal, Time Warner's primary argument is focused on its contention that the District Court did not properly consider whether the City "owned" a cable television facility, apparently conceding that the City is not "operating" cable television facilities or services. Time Warner's argument, however, misses the point. The statutory referendum requirement is completely dependent upon actual ownership of a cable television facility; not contemplated ownership, discussed ownership, studied ownership, plausible ownership, or even intended future ownership. As the District Court recognized, Time Warner's claims are not ripe because the City does not own cable television facilities and is not offering cable television services. "It may do (sic) some day in the future, but then again it might not." (Order, p. 3).

The District Court recognized that the City's fiber optic network is multi-use infrastructure because much of the equipment used to provide internet service could also be used to transmit cable television. (Order, p. 3). Because of the multi-use nature of the infrastructure, the City's fiber optic network could not become a cable television facility unless, and until, cable television is actually offered over the network. Accordingly, the District Court held that "the only existing restriction comes into play before cable television services are offered"

and that “there is simply no restriction on the City’s ability to construct multipurpose facilities or infrastructure.” (Order, p. 4).

As Time Warner acknowledged in its Surreply to the District Court, the statutory scheme adopted by the Missouri Legislature specifically allows the City to own and operate internet-type facilities without any of the limitations placed on telecommunications or cable television services. Mo. Rev. Stat. § 392.410(7); (*See also*, Time Warner Surreply, p. 3; R. 22; DA ____).

While the legislature denied municipalities the authority to provide “telecommunications services,” and placed a referendum requirement on owning or operating cable television services and facilities, it left a municipality’s authority to provide internet-type services unfettered. *See* Mo. Rev. Stat. §§ 71.970, 392.410.³ Accordingly, the mere fact that the City has designed and plans to construct a fiber optic network to provide internet-type services that is also capable of being upgraded to provide cable television service, is not a violation of state law even in the absence of a referendum.

³ The legislature has authorized municipalities to construct telecommunications systems of the type generally that could provide telephone, internet, cable television and other telecommunications services. The legislature then passed specific provisions limiting the use of the authorized telecommunications systems for particular services. [Mo. Rev. Stat. § 392.410\(7\)](#) excludes “internet-type” services from limitations imposed on other types of services like telephone and cable television.

2. Time Warner's claim that there is a realistic danger that the City will violate Mo. Rev. Stat. § 71.970 is without merit.

Time Warner contends that the District Court was required to accept its allegations that the City "clearly intends" to offer cable television services. (Appellant's Brief p. 28) Time Warner's claims concerning intent are conclusions, not fact. They are suspicions, not reality. The Court is not bound by these conclusions. *See Papasan v. Allian*, 478 U.S. 265, 286 (1986) (court not bound to accept as true a legal conclusion couched as a factual allegation). Moreover, action taken by the legislative body of a city is presumed to be valid and the courts should not examine the motive of the legislative body. *Schweig v. City of St. Louis*, 569 S.W.2d 215 (Mo. App. 1978). Time Warner cannot point to any official action by the City which commits the City to offer cable television services or expend the funds necessary to provide such services. The District Court was not required to accept Time Warner's conclusions.

In addition, it can hardly be said that a realistic danger exists that the City will ignore Missouri law and add cable television services to its fiber optic system without a public vote. The City is aware of the statutory requirement and has shown no intent to ignore it. Time Warner argues that the City will be forced to offer cable television because the revenue will be necessary to make the fiber optic network self-supporting. The City, however, has never stated that the network must be financially self-supporting. The fiber optic network, like other

infrastructure improvements such as roads, has value to the City beyond a mere balance sheet evaluation. Infrastructure improvements enhance City services and can attract new business development, which may increase the tax base and City revenue.

Time Warner also contends that the City's plan has concrete present effects on Time Warner because delaying a public vote until construction has been completed is affecting "the political balance" in the City. (Appellant's Brief p. 32). As demonstrated in the argument on the constitutional issues below, Time Warner has no right to any particular "political balance" in the City, is not harmed by any particular public sentiment, and cannot possibly know how the City's actions affect the public mood.

3. Time Warner's attempt to mischaracterize the nature of the City's fiber optic network is without merit and does not create a justiciable issue.

In an attempt to get around the recognition that there is no referendum requirement on the City's ability to own and operate facilities to provide internet-type services, Time Warner attempts to characterize the City's fiber optic network as a cable television facility that is also "capable of offering internet services." (Appellant's Brief, pp. 38, 39). This argument is unsupported by the record in the case and is a blatant mischaracterization of reality. As established above, the proposed fiber optic network cannot even provide a cable television signal without

connecting to a head end facility either owned by the City or by some other party, and without obtaining the rights to disseminate such a cable television signal. Time Warner does not allege the needed connection currently exists, or is included in the current design for the project. In reality, the fiber optic network as designed would provide broadband internet and related services to business and residents in the City – a needed service that Time Warner has largely ignored until this point.

B. Time Warner Has Not Alleged Any “Certainly Impending” Direct Injury Resulting From The City’s Proposed Fiber Optic Network.

Time Warner’s Complaint is also not ripe for adjudication because the injury it alleges is remote and is not certainly impending. As stated above, in order to be ripe, Time Warner must be able to establish that it would suffer a direct injury that is immediately pending. *Kaylor v. Fields*, 661 F.2d 1177, 1181 (8th Cir. 1981); *City of Kearney*, 401 F.3d at 932. Time Warner has not alleged immediate financial harm from the City’s development of a fiber optic network. While Time Warner’s brief on appeal does not specify what immediate harm it will suffer from the City’s alleged conduct, its Complaint sets forth two general theories of financial injury: (1) conclusory and speculative allegations regarding lost profits caused by the City’s proposed network; and (2) the City’s expenditures to design, and contemplated future expenditures to construct, the proposed fiber optic network. (Compl. ¶¶ 62, 64; PA 14-15). These allegations are insufficient to establish that the case is ripe for adjudication.

Time Warner's allegation regarding lost profits is merely a possible remote consequence of any alleged act of the City. The City has not even decided whether to provide cable television on its network. Time Warner's alleged injury is contingent upon: (1) the City deciding to offer cable television; (2) the availability of necessary funds to own or operate such facilities and services; (3) the outcome of a yet unplanned referendum; (4) the unspecified price of cable television service if the City decides to offer cable television and prevails in the referendum; and (5) Time Warner's inability to stave off the feared competition by the City's yet unplanned cable television service. Time Warner's alleged economic damage cannot be said to be immediate or certainly impending. Because Time Warner's alleged injury is nothing more than a possible remote consequence of the City's decision to proceed with designing and constructing the proposed fiber optic network, its claims are not ripe. *City of Kearney*, 401 F.3d at 932 (ripeness is dependent upon a showing of a "certainly impending" injury).

Additionally, Time Warner's allegations regarding the expenditures on the design and future construction of the proposed fiber optic network are not direct injuries to Time Warner sufficient to support its claim. While Time Warner alleges that it pays taxes to the City, it does not, and cannot, allege that any of its tax dollars will be spent on the design or construction of the fiber optic network. (See Defendant's Statement of Uncontroverted Facts, ¶ 11; R. 13; Plaintiff's

Response to Defendant's Statement of Uncontroverted Facts, ¶ 11; R. 16; DA ____). The design and construction of the fiber optic network is being funded exclusively through the City's Gaming Revenue; a segregated fund that is the City's share of the riverboat casino revenue allocated by the State. (Affidavit of Shirley Land, ¶¶ 9-10; R. 13, Ex. 2; DA ____).

Missouri courts have recognized that direct injury based on taxpayer status does not occur unless taxes paid by the taxpayer have been, or will be, expended due to the challenged action. *Nat'l Solid Waste Mgmt. Ass'n v. Dir. Of Dept. of Nat. Res.*, 964 S.W.2d 818, 819 (Mo. 1998). No taxes paid by Time Warner will be used in designing or constructing the City's fiber optic network. Accordingly, Time Warner cannot establish a direct injury based upon the cost associated with designing and constructing the network.

C. The Remedy Sought By Time Warner Would Not Redress The Injury It Alleges.

Another essential element for establishing a ripe claim is that the remedy sought will redress the alleged injury. *Kaylor v. Fields*, 661 F.2d 1177, 1181 (8th Cir. 1981) (for a claim to be ripe “we must be assured that the plaintiff will ‘sustain an immediate injury . . . and that such injury would be redressed by the relief requested . . .’” (quoting *Duke Power Co. v. Carolina Envtl. Study Group*, 438 U.S. 59, 81 (1978))). The only “immediate” financial injury that Time Warner alleges in its Complaint is the expenditure of City revenue on the proposed fiber

optic network. This alleged injury, however, would not be redressed by the remedy Time Warner seeks. Pursuant to the authority to provide internet-type services pursuant to Mo. Rev. Stat. § 392.410(7), the City would proceed with the proposed fiber optic network as designed to provide internet-type services to businesses and residents regardless of whether cable television was ever offered. Every cent that the City is currently planning to expend on the network would be expended regardless of whether cable television service is ever offered over the network and regardless of the outcome of Time Warner's claims.

D. The Cases Cited By Time Warner Involving Challenges To The Enforcement Of State Statutory Provisions Are Inapplicable To The Instant Case And Do Not Support The Argument That Its Claims Are Ripe.

The cases cited by Time Warner in support of its appeal do not support its argument because they are factually and legally dissimilar to the instant case. Time Warner cites several cases dealing with federal preemption of state law and adjudication of cases where the ripeness issued turned on whether allegedly preempted state law could be challenged prior to the law actually being enforced to the detriment of plaintiffs in the respective cases. (Appellant's Brief, pp. 33-35, citing *Employers Ass'n v. United Steelworkers*, 32 F.3d 1297 (8th Cir. 1994); *Pacific Gas & Elec. Co. v. State Energy Conservation & Dev. Comm'n.*, 461 U.S. 190 (1983); *Borden Co. v. Thomason*, 353 S.W.2d 735 (Mo. 1962)). However, in

each of these cases the harm asserted was far more certain and of a greater magnitude than the speculative harm asserted by Time Warner.

For example, Time Warner attempts to equate its alleged harm with the harm evaluated by the Supreme Court in the *Pacific Gas & Elec. Co.* case. In *Pacific Gas & Electric*, plaintiff faced the prospect of constructing a multi-million dollar nuclear energy plant with the knowledge that if it did not win on its preemption argument the plant would not be allowed to be brought online after it was constructed. *Pacific Gas & Elec. Co.*, 461 U.S. 190, 201 (1983). The Supreme Court held that plaintiff did not have to wait until construction was done before challenging the application of the state law. *Id.* at 201-202.

As shown above, whether the City will ever offer cable television, and whether Time Warner will be directly injured is speculative at best, and even the indirect harm asserted by Time Warner is not immediate nor does the City's current plans for its fiber optic network place any great harm on Time Warner.

In considering ripeness, courts balance the fitness of the issues for judicial decision with the hardship to the parties of withholding court consideration. *Abbott Laboratories v. Garnder*, 387 U.S. 136, 149 (1967). Unlike in the instant case, the issue of whether a state statutory scheme is preempted by federal law is purely a legal issue not dependant on the particular facts of a given case, and thus, is well suited for judicial decision. Similarly, unlike Time Warner's alleged injury

of some thousands of dollars of speculative lost profits, the harm faced by plaintiff in *Pacific Gas & Elec. Co* was of many millions of dollars of lost investment. The cases cited by Time Warner do not support its argument that its claims are ripe.

III. TIME WARNER'S CONSTITUTIONAL CLAIMS ARE COMPLETELY DEPENDENT ON ITS STATUTORY CLAIM AND ARE ALSO UNRIPE

The constitutional claims asserted by Time Warner are completely dependent on its statutory claim. Accordingly, even if Time Warner had asserted cognizable constitutional claims, which the City specifically denies, each of those claims would also be unripe.

A. Even If Time Warner's Due Process Claim Was Cognizable, It Is Completely Dependent On Its Statutory Claim And Is Not Ripe For Adjudication.

Time Warner asserts violations of its Due Process rights due to the City's alleged failure to have a referendum required by Mo. Rev. Stat. § 71.970. This claim is entirely dependant on Time Warner's statutory claim. Obviously, if the issue of the City's statutory obligation is not ripe for adjudication, any constitutional claim based on its failure to hold an election required by that statute is also not ripe. If no referendum is currently required by the statute, as the City has shown, then there could be no Due Process violation for not holding that referendum.

Moreover, in order to assert a valid due process claim, Plaintiff must establish governmental behavior that is “so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.” *Hawkins v. Holloway*, 316 F.3d 777, 780-81 (8th Cir. 2003). Due process only guards against the exercise of arbitrary and oppressive government power, not governmental action that is incorrect or ill advised. *Hawkins*, 316 F.3d at 780-81. In the election context, due process violations will only occur in extraordinary circumstances. *Shannon v. Jacobowitz*, 394 F.3d 90, 94 (2nd Cir. 2005).

Plaintiff does not allege any extraordinary circumstances that would warrant federal involvement in the state election process, particularly where no election is currently called for under state law. No Due Process rights are implicated by the facts of this case, even if such claims were ripe for adjudication.

B. Time Warner’s Equal Protection Claim, Even If Cognizable, Is Completely Dependent On Its Statutory Claim And Is, Therefore, Unripe.

For its Equal Protection Claim, Time Warner asserts that its constitutional rights are being violated by the City due to the City’s “circumventing the requirement for public approval of its planned expenditures.” (Appellant’s Brief, p. 42). Again, this claim is completely dependant on the ripeness of Time Warner’s statutory claim. If no election is currently required by § 71.970, then there could be no Equal Protection claim. Because, as shown above, its statutory

claim is not ripe, Time Warner's Equal Protection claim is also not ripe.

Even if it were ripe, Time Warner has not asserted a cognizable Equal Protection claim. An Equal Protection claim in an election context provides that a voter's right to participate in an election will be on an equal basis with other qualified voters. *N.A.A.C.P., Los Angeles v. Jones*, 131 F.3d 1317, 1324 (9th Cir. 1997). Time Warner has not made any allegation implicating this constitutional provision. Rather, Time Warner's claim revolves around its allegation that it will not be able to adequately influence voters to adopt its position in a future vote on the cable television issue. However, there is no constitutional interest in equalizing the relative ability of individuals and groups to influence the outcome of elections. *See Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). Additionally, the Equal Protection Clause does "not protect any 'political group' however defined, from electoral defeat." *Mobile v. Bolden*, 446 U.S. 55, 77 (1980) (superseded by statute on other grounds). Even if it were ripe for adjudication, Time Warner's Equal Protection claim is without merit.

C. Time Warner's First Amendment Claim Is Neither Cognizable Nor Ripe for Adjudication.

Time Warner's First Amendment claim is similarly not ripe and also fails to state a cognizable claim. As an initial matter, Time Warner has not identified any limitation whatsoever on its ability to speak whenever, whatever, and wherever it chooses. Its First Amendment claim makes no sense whatsoever. Time Warner

has the ability to speak out against the City's fiber optic network, and has even taken the opportunity to do so in public City Council meetings. (City Council Minutes, 4-13-04, p. 9; DA ____).

In reality, Time Warner's First Amendment claim is based upon its belief that it will not be able to influence voters to the extent it would like to. This belief, however, does not implicate any First Amendment rights. The Supreme Court has specifically recognized that there is no First Amendment interest in equalizing the relative ability of individuals or groups to influence the outcome of an election. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 790-791; *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976). The concept that the speech of some elements of society can be restricted in order to enhance the relative voice of others is "wholly foreign to the First Amendment." *Bellotti*, 435 U.S. at 790-791; *see also, Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 705 (1990) ("restricting the quantity of speech to equalize the relative influence of speakers on elections is antithetical to the First Amendment").

Even if Time Warner had a cognizable First Amendment claim, it is completely dependent on its unripe dispute regarding Mo. Rev. Stat. § 71.970. Again, if Time Warner's statutory claim is not ripe, the City's conduct with regard to the development of its fiber optic network could not possibly be the source of a ripe First Amendment violation.

CONCLUSION

Time Warner's claims are not ripe for adjudication. The City does not own or operate a cable television facility and service and Time Warner's claim regarding Mo. Rev. Stat. § 71.970 is contingent upon a series of events that may never occur. The City may never decide to offer cable television over its network, may never construct or connect to a head end facility, and may never contract with a service provider to disseminate a cable television signal on its network. Additionally, the City has specifically acknowledged the requirement to hold a referendum if it did take the above actions. Contingent, hypothetical disputes do not create a case or controversy sufficient for court adjudication.

Moreover, any injury alleged by Time Warner is speculative, indirect, and not certainly impending. If the City never offers cable television, which is a distinct possibility, Time Warner would never suffer any direct injury. Even if the City did decide to offer cable television, any direct injury would be contingent upon the City prevailing in a referendum and Time Warner's actions in response to competition from the City. Additionally, the money spent to design the fiber optic network, Time Warner's second alleged injury, will be spent regardless of whether cable television is or is not offered over the network. Indirect injury that is not certainly impending and that will not be redressed by the remedy sought, is not a basis for a ripe dispute.

Finally, Time Warner's constitutional claims, even if cognizable, are completely dependent on its unripe statutory claim, and are, therefore, also not ripe for adjudication. The District Court's opinion should be affirmed. Time Warner's claims are simply premature.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July, 2005, I caused an original and ten copies of the foregoing, as well as a copy on electronic diskette, to be served by Federal Express on the following:

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CERTIFICATE OF COMPLIANCE

Counsel for Defendant-Appellee, the City of North Kansas City, Missouri hereby certifies that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,131 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and they type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface using Microsoft Word, in Times New Roman font, 14 point size.
3. The diskettes filed with the Court and served on counsel for Appellant were scanned for virus, and found to be virus free.

Attorney