

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

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

Plaintiff,)

vs.)

Case No. 04-1119-CV-W-ODS

THE CITY OF NORTH KANSAS CITY,)

Defendant.)

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Pending is Defendant's Motion to Dismiss or, in the Alternative for Summary Judgment. After considering the parties' arguments the Court concludes it lacks jurisdiction in this matter. Accordingly, the motion (Doc. # 13) is granted and the case is dismissed without prejudice.

I. BACKGROUND

For purposes of this Order, the Court will assume the truth of the Complaint's allegations. Plaintiff is in the business of providing cable television services. Pursuant to a franchise agreement with Defendant, Plaintiff provides cable television services to citizens in North Kansas City, Missouri ("the City"). In June 2003, the City Council initiated efforts to review the City's cable fiberoptic infrastructure. With the aid of an engineering firm, the City analyzed telephone, internet and television service. The analysis included suggestions regarding the cost and logistics involved in the City providing these services to its citizens. In March 2004, the engineering firm proposed the City construct and operate a broadband network to provide telephone, internet and television service to every business and home in the City. In August 2004, the City

Council approved a contract with the engineering firm for the design and planning of a fiber optic network.

Missouri law provides that “[n]o municipality may own or operate cable television facilities and services unless approved by a vote of the people.” Mo. Rev. Stat. § 71.970.1. In September 2004, Plaintiff wrote the City and advised that it believed “the City’s deployment of the video facilities described in the Black & Veatch Agreement falls within the scope of activity addressed by Section 71.970. Accordingly, the City’s efforts to develop and construct a fiber-optic cable system without a prior vote of the people violates Missouri law and is prohibited.” The City’s attorney responded, conceding the system was “capable” of providing cable television services but the City had not yet decided whether to offer such services over the network.

II. DISCUSSION

Plaintiff filed this suit in December 2004, contending the City’s actions violate Missouri law (Count I) and its rights under the United States Constitution (Count II). The City has asserted a variety of jurisdictional and other arguments. The Court is obligated to consider jurisdiction before considering any other issues, Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998), but there is no requirement that any particular standing doctrine be considered before any of the others. Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574 (1999).

The Court concludes Count I is not ripe for judicial consideration. “The ripeness doctrine flows both from the Article III ‘cases’ and ‘controversies’ limitations and also from prudential considerations for refusing to exercise jurisdiction.” Nebraska Pub. Power Dist. v. MidAmerican Energy Co., 234 F.3d 1032, 1037 (8th Cir. 2000). “To be ripe for decision, the harm asserted must have matured enough to warrant judicial intervention. The plaintiff[] need not wait until the threatened injury occurs, but the injury must be certainly impending.” Paraquod, Inc. v. St. Louis Housing Auth., 259 F.3d 956, 958-59 (8th Cir. 2000) (quotation omitted).

The primary factor supporting the Court's conclusion the present dispute is not ripe is the City's failure to own cable television facilities or offer cable television services. It may do some day in the future, but then again it might not. In the meantime, the City is authorized to provide "internet-type services." Mo. Rev. Stat. § 450.7(5).¹ A public vote must be held prior to offering cable television services, but unless and until the City offers cable television services without holding a vote there is nothing for the Court to enjoin.

Plaintiff argues the controversy is ripe by contending the City has made the internal decision to offer cable television services, and further complains the City will "tilt the balance" in favor of voter approval by constructing much of the necessary infrastructure in advance. This, Plaintiff theorizes, will make voter approval more likely because much of the capital expenditure will have already occurred. Assuming the truth of these allegations, they cannot help Plaintiff avoid the ripeness problem because the statute has not been violated. The statute does not prohibit a city from thinking about, contemplating, studying or even discussing providing cable television services. The statute does not prohibit a city from engaging in activities that might make offering cable television more appealing to voters. Most significantly, the statute does not require a public vote before engaging in activities that might make offering cable television services more plausible. Accepting Plaintiff's interpretation of the statute would not only require adding terms to it, but would create impossible interpretation problems (specifically, exactly *when* would Plaintiff contend a public vote is required? Before a trench is dug? Before the idea is studied? The point in time a public vote is required is established in the statute – before services are offered or facilities are owned – and that point has not been reached yet.

The crux of the Plaintiff's problem is this: (1) much of the equipment used to transmit cable television can also be used to provide internet services and (2) while

¹Although this statute was discussed in the City's Suggestions in Support, the Court will nonetheless consider Plaintiff's surreply. Having done so, the Court does not find Plaintiff's arguments compelling.

providing the former service requires a public vote, providing the latter service does not. Missouri law does not restrict a city's ability to construct a fiber optic network capable of providing broadband services; by the terms of the statute, the only existing restriction comes into play before cable television services are offered. There is simply no restriction on the City's ability to construct multipurpose facilities or infrastructure. Inasmuch as the City is not offering cable television services to its citizens, Count I is not ripe for judicial consideration and the Court lacks jurisdiction over it.

Count II asserts a variety of constitutional violations, all of which stem from the City's alleged violation of the statute. Count II is thus dependent on Count I, so it is not ripe for consideration for the same reasons Count I is not ripe for consideration.

III. CONCLUSION

The City has not offered cable television services, nor does it own cable television facilities. Therefore, Plaintiff's claim that the City must hold a public vote before engaging in these actions is not ripe for judicial consideration. The case is dismissed without prejudice for lack of jurisdiction.

IT IS SO ORDERED.

DATE: April 4, 2005

/s/ Ortrie D. Smith
ORTRIE D. SMITH, JUDGE
UNITED STATES DISTRICT COURT