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E-FILED 8/23/04

NOT FOR CITATION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

COMCAST OF CALIFORNIA II, L.L.C.,

Plaintiff,

v.

CITY OF SAN JOSE, CALIFORNIA,

Defendant.

NO. 5:03-cv-02532-RS

**ORDER GRANTING CITY'S
MOTION TO DISMISS BASED
ON LACK OF JURISDICTION
UNDER FED. R. CIV. PRO.
12(h)(3)**

I. INTRODUCTION

Plaintiff Comcast of California II, L.L.C. ("Comcast") filed this action to challenge the constitutionality of the formal renewal procedures which have been established by the Defendant City of San Jose ("City") under the Cable Communications Policy Act of 1984 (referred to herein as the "FCA"). 47 U.S.C. § 521 *et seq.* Comcast contends that the City's formal renewal process violates: (1) the First Amendment to the U.S. Constitution; (2) the Fourteenth Amendment to the U.S. Constitution; (3) the FCA; (4) Article XIII of the California Constitution; and, (5) Chapter 15.28 of the San Jose Municipal Code.

The City responds that the renewal process it has established fulfills the requirements set forth by Congress in the FCA and adequately safeguards all of Comcast's constitutional rights. The City argues that

1 Comcast's complaint for relief is not ripe since the FCA permits judicial review only *after* final denial of a
2 renewal application or where a cable operator *has been* adversely affected by a failure of the franchising
3 authority to follow the FCA's procedural requirements. In this instance, the City contends that all of
4 Comcast's concerns are solely prospective and, therefore, Comcast must await denial of its renewal
5 application, if such denial should occur, before seeking judicial review. Accordingly, the City moves to
6 dismiss this action without prejudice until the conclusion of the renewal process.

7 The City's motion to dismiss was fully briefed and heard by the Court on June 23, 2004. At the
8 hearing, the Court permitted the parties to file supplemental papers further addressing Comcast's contention
9 that its First Amendment rights are presently "chilled" by the City. Based on all papers filed to date,
10 including the supplemental briefs and declarations, as well as on the oral argument of counsel, the Court
11 grants the City's motion to dismiss for the reasons set forth below.

12 II. BACKGROUND

13 In December, 1985, Comcast's predecessor cable operator obtained a fifteen year cable franchise
14 from the City. Under the terms of that agreement, the franchise was set to expire on December 31, 2000.
15 On February 25, 1998, the cable operator submitted a letter to the City requesting that it initiate formal
16 renewal procedures pursuant to 47 U.S.C. § 546 of the FCA. Section 546(a)(1) requires that a
17 franchising authority conduct a proceeding to identify future cable-related needs and interests and to review
18 past performances of cable operators. The cable operator also requested that the City conduct informal
19 renewal procedures, as contemplated by § 546(h).

20 Based on the cable operator's request, as well as on the requirements of § 546(a)(1), the City
21 conducted a study, identified its future needs and interests, reviewed the operator's past performance and
22 issued a draft 84-page "Needs and Interest Report" in June, 2001. The City sought comments on the
23 Report and Comcast's predecessor, AT&T, submitted a response. The City considered the response and
24 addressed it in a Final Report, issued on June 11, 2002. The San Jose City Council ("Council"), the
25 franchising authority in this instance, adopted the needs and interests findings in the Final Report, concluded
26 the first stage of the formal renewal process, and issued a Request For a Renewal Proposal ("RFRP"), as
27 required under 47 U.S.C. § 546(b). The RFRP describes a model that would satisfy all the needs and

1 interests identified by the City. The City contends that, although a cable operator is not required to follow
2 the model, an operator is required to satisfy certain needs and interests identified by the City.

3 On September 11, 2002, AT&T submitted its "Formal Proposal for Renewal of Cable Television
4 Franchise." The City contends that the proposal did not provide all of the information required. On
5 November 18, 2002, Comcast and AT&T merged to form Comcast. Shortly before the Council was to
6 act regarding AT&T's proposal, Comcast asked the City to delay action. On December 10, 2002, the
7 Council adopted a resolution of preliminary denial, but provided that the effective date of the denial could
8 be deferred by agreement until January 31, 2003.

9 The parties signed an agreement of deferral. However, the informal renewal negotiations which had
10 been commenced in 1999 failed to resolve the renewal issues. Therefore, the preliminary denial of the
11 Council became effective on January 31, 2003. The preliminary denial resolution authorized the City
12 Manager to commence the formal administrative hearing required by 47 U.S.C. § 546(c). Pursuant to the
13 resolution, a hearing officer was selected and appointed. A set of Rules and Procedures ("Rules") was
14 developed and sent to Comcast for comment. Comcast returned its comments to the Rules, noting its
15 objections to the proposed procedure. The Rules provide that the hearing officer will make a
16 recommendation to the Council, a procedure which Comcast contends is unconstitutional.

17 After unsuccessfully attempting to negotiate with the City and change the Rules, Comcast filed a
18 complaint against the City in this Court, seeking declaratory and injunctive relief.¹ In its complaint,
19 Comcast seeks a declaration that the City's RFRP, Model Ordinances and Rules violate the FCA, as well
20 as both the federal and state constitutions. The City moves to dismiss Comcast's complaint without
21 prejudice since the administrative process is on-going and no final decision has been reached with respect
22 to Comcast's renewal application. Accordingly, the City argues that this action is not ripe for judicial
23 intervention and notes that, once the renewal process is complete, *if* the City denies Comcast's renewal
24 application, Comcast may then raise all of its objections before this Court.

25 III. STANDARDS

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27 ¹ Comcast's motion for entry of a preliminary injunction was denied by the Court in September, 2003.

1 Federal Rule of Civil Procedure 12(h)(3) requires that the court dismiss any action over which it
2 lacks subject matter jurisdiction. The question of ripeness goes to the court's subject matter jurisdiction to
3 hear the case. Hawaii Newspaper Agency v. Bronster, 103 F.3d 742, 746 (9th Cir. 1996). "The ripeness
4 doctrine prevents courts, through avoidance of premature adjudication, from entanglement in theoretical or
5 abstract disagreements that do not yet have a concrete impact on the parties." 18 Unnamed "John Smith"
6 Prisoners v. Meese, 871 F.2d 881, 883 (9th Cir. 1989). The ripeness inquiry contains both a
7 constitutional and a prudential component. Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d 1134,
8 1138 (9th Cir. 2000) (en banc).

9 A. Constitutional Component

10 To satisfy the constitutional component there must exist a constitutional case or controversy; the
11 issues must be "definite and concrete, not hypothetical or abstract." Thomas v. Anchorage Equal Rights
12 Comm'n, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc)(quoting Railway Mail Ass'n v. Corsi, 326 U.S.
13 88, 93 (1945)). Indeed, ripeness may be characterized as "standing on a timeline." Id.

14 When a statute is challenged, the court considers whether the plaintiffs face a realistic danger of
15 sustaining a direct injury from the statute's operation or enforcement. Id. An alleged injury which is too
16 imaginary or speculative will not support jurisdiction. Id. The mere existence of a proscriptive statute or a
17 generalized threat of prosecution does not satisfy the "case or controversy" requirement. Id. There must
18 be a "genuine threat of imminent prosecution." Id. (quoting San Diego County Gun Rights Comm. v. Reno,
19 98 F.3d 1121, 1126 (9th Cir. 1996). In evaluating the genuineness of a claimed threat of prosecution, the
20 court looks to (1) whether the plaintiffs have a concrete plan to violate the law in question; (2) whether the
21 prosecuting authorities have communicated a specific warning or threat to initiate proceedings; and, (3) the
22 history of past prosecutions or enforcement actions. Id.

23 B. Prudential Component

24 In evaluating the prudential component of ripeness, the court considers the fitness of the issue for
25 judicial decision and any hardship to the parties that would result from withholding court review. Thomas v.
26 Anchorage Equal Rights Comm'n, 220 F.3d at 1138 (citing Abbott Laboratories v. Gardner, 387 U.S.
27 136, 149 (1967). "A claim is 'fit for decision if the issues raised are primarily legal, do not require further
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1 factual development, and the challenged action is final." Exxon Corp. v. Heinze, 32 F.3d 1399, 1404 (9th
2 Cir. 1994) (citations omitted); see, e.g., Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F.3d 1486, 1495
3 (9th Cir. 1996) (as-applied vagueness challenge not ripe because of insufficient facts; plaintiffs did not
4 identify any case in which helmet law had been applied in challenged way). An issue is not ripe for
5 adjudication if it depends on "contingent future events that may not occur as anticipated, or indeed not
6 occur at all." 18 Unnamed John Smith Prisoners, 871 F.2d at 883 (quoting Thomas v. Union Carbide
7 Agriculture Products, 473 U.S. 568, 580-81 (1985)); see, e.g., United States v. Braren, 338 F.3d 971,
8 975-76 (9th Cir. 2003) (case not ripe because agency action not final; factual development needed to
9 determine what standard agency would ultimately apply); Lee v. Oregon, 107 F.3d 1382, 1391-92 (9th
10 Cir. 1997) (challenge to statute not ripe because plaintiffs failed to identify any hardship that would befall
11 them if claims not considered at this time; noncompliance with statute would lead, at worst, to civil
12 enforcement action, at which time plaintiffs could more appropriately challenge statute's validity).

13 However, one need not wait for the consummation of threatened injury: "[i]f the injury is certainly
14 impending, that is enough." 18 Unnamed John Smith Prisoners, 871 F.2d at 883; see also Fireman's Fund
15 Insurance Co. v. Quackenbush, 87 F.3d 290, 294 (9th Cir. 1996) (review may be proper where plaintiff
16 alleges that challenged provision will inevitably have an unconstitutional effect, even though impermissible
17 consequences have not yet occurred).

18 IV. DISCUSSION

19 As noted above, the City argues that Comcast's challenge to its formal renewal process, including
20 the hearing procedure, is not ripe for judicial determination at this time because the City has not reached a
21 final determination regarding Comcast's application for renewal of its cable franchise. The City posits that
22 neither the FCA, nor the federal or state constitutions, prohibit it from appointing a hearing officer to make
23 a recommendation to the City Council - the local franchising authority empowered to grant or deny
24 Comcast's renewal application. The City contends that all of Comcast's constitutional rights are preserved
25 through the rules and procedures it has adopted. Therefore, the City urges the Court to dismiss this action
26 without prejudice until such time as a final decision is rendered regarding Comcast's application for renewal.
27 Assuming such final decision is adverse to Comcast, the City notes that judicial relief would then be proper

1 and timely under the FCA, as well as under the federal and state constitutions.

2 Comcast opposes the motion to dismiss and argues that its case is ripe for judicial review as to all
3 of its claims since it contends that its constitutional rights are presently being violated. By imposing various
4 unconstitutional requirements and restrictions *during* the renewal process, Comcast contends that the City
5 is in the process of violating the FCA and other federal and state laws by "chilling" its free speech rights.
6 Therefore, Comcast asks the Court to allow its claims to proceed to adjudication on the merits so that it
7 will not be subjected to an unconstitutional renewal process.

8 A. First Amendment Claim

9 The City moves to dismiss Comcast's First Amendment claim on the basis that it is not currently
10 violating Comcast's rights to free speech and argues, therefore, that any future action which might be taken
11 by the City is not presently ripe for judicial determination. In other words, the City argues that Comcast
12 fails to establish the existence of a "definite and concrete, not hypothetical or abstract" controversy between
13 the parties. Thomas v. Anchorage Equal Rights Comm'n, 220 F.3d at 1139. Comcast counters that a
14 definite controversy does indeed exist in the form of the City's unconstitutional requirements regarding such
15 items as, the number and location of public, educational or governmental ("PEG") channels and the creation
16 of an institutional network ("I-Net") that Comcast claims operates to hamper it from expressing itself in such
17 areas as program selections and content. Since these requirements and Rules are currently being imposed,
18 Comcast argues that its speech is currently being "chilled" and that its First Amendment claim is, therefore,
19 ripe for judicial determination under the law of this Circuit. See e.g., Porter v. Jones, 319 F.3d 483, 492-
20 493 (9th Cir. 2003) (delay that comes from abstention may itself chill the First Amendment rights at issue);
21 Ariz. Right to Life Political Action Comm. v. Bayless, 320 F.3d 1002, 1006 (9th Cir. 2003) (noting that
22 Supreme Court adopted a "hold your tongue and challenge now" approach to free speech issues); accord
23 Century Fed., Inc. v. Palo Alto, 710 F. Supp. 1559, 1563 (N.D. Cal. 1988) (recognizing cable operator's
24 free speech rights may depend upon the legalities of demands placed upon it by a City).

25 The City responds that the cases and arguments cited by Comcast overlook one critical fact,
26 namely, that Comcast is continuing to exercise its rights to free speech and that such rights have not been
27 abridged in any manner. Comcast is currently operating as the cable provider for the City of San Jose.

1 Although it complains that the City's identified "needs and interests" require more services than it wishes to
2 provide, such as additional public access channels and an I-Net, Comcast's renewal offer does not include
3 such provisions. Rather, Comcast's formal offer represents its view of what the City is constitutionally
4 entitled to require from a cable operator. While it argues that the City's involvement in such editorial
5 decisions "could force Comcast to alter its message in violation of the First Amendment and the Cable
6 Act," no such alteration has occurred. In fact, the City Council could accept Comcast's proposal for
7 renewal, in which case none of Comcast's First Amendment rights would be infringed. It is only in the event
8 of a rejection by the City Council of Comcast's offer to renew that the City's editorial requirements might be
9 deemed to suppress Comcast's rights to free speech.

10 The cases relied upon by Comcast to support its ripeness argument in the First Amendment context
11 confirm that courts generally resolve controversies only in situations where speakers are faced with *actual*
12 restrictions on the content and/or manner of their speech. See e.g., Porter v. Jones, 319 F.3d at 490-491
13 (case ripe since fair reading of plaintiff's complaint reflects that the past creation of website regarding 2000
14 election rather than the prospective 2004 election at issue); Ariz. Right to Life Political Action Comm. v.
15 Bayless, 320 F.3d at 1006 (case or controversy requirement fulfilled since plaintiff forced to modify its
16 speech and behavior to comply with statute). In this instance, Comcast has not "been forced to modify its
17 speech and behavior" in order to comply with the City's requirements. In fact, in full exercise of its First
18 Amendment rights, it has explicitly chosen not to comply with such requirements and has, instead, submitted
19 a proposal which does not fulfill all of the "needs and interests" identified by the City. Having adopted such
20 an approach, Comcast now seeks, however, to ensure acceptance of its proposal by asking the Court to
21 intervene and to find that the City cannot constitutionally require it to fulfill all of the needs and interests
22 identified by the City. However, since the City is not currently attempting to regulate or restrict Comcast's
23 free speech rights, it does not appear that an actual "case or controversy" is presented.

24 The one case cited by Comcast dealing with a cable renewal application bolsters this conclusion.
25 Century Fed., Inc. v. Palo Alto, 710 F. Supp. at 1563. In Century Federal, the cable operator was
26 actually prevented from exercising its free speech rights. In that case, Judge Lynch found that numerous
27 aspects of the City of Palo Alto's franchising scheme for cable television violated the First and Fourteenth
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1 Amendments by contemporaneously preventing cable operator Century Federal from exercising its rights to
2 speak. *Id.* at 1561. For example, Century Federal had been required by the City of Palo Alto to devote
3 eight of its "mandatory access channels" to the speech of others. Under such scenario, it is clear that the
4 operator's rights to free speech had been suppressed, contrary to the situation here where the operator can
5 show only that its rights might be impinged, if the City ultimately denies its application for renewal.

6 Comcast concedes that the test for ripeness which must be applied in this instance is: (1) whether a
7 rational decision can come from the Court without further factual development, i.e., the case is not ripe if
8 the dispute hangs on a future factual contingency and (2) whether either of the parties would suffer judicially
9 cognizable harm if the matter were to be postponed. *Clinton v. Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir.
10 1996); *Exxon Corporation v. Heinze*, 32 F.3d 1399, 1404 (9th Cir. 1994). In this instance, Comcast fails
11 to point to any speech which is *presently* being suppressed or impinged. While its supplemental
12 declarations attempt to do so, in fact they only reflect that Comcast has "considered" but has not made
13 changes in its programs and proposal in response to the City's actions.² Therefore, it does not appear that
14 a rational decision could be issued by the Court without further factual development as to whether the City
15 *will attempt* impermissibly to regulate Comcast's speech. The current record, however, unequivocally
16 establishes that Comcast is exercising its rights to free speech, uninhibited by the City. Accordingly, it does
17 not appear that Comcast would suffer any harm if this case were postponed until the conclusion of the
18 formal renewal process. At that time, the Court could appropriately determine whether the City's
19 requirements related to the content and regulation of Comcast's First Amendment rights, such as the
20 number and location of PEG channels, violate the Constitution.

21 B. Procedural Due Process Claims

22 Comcast further argues that its federal and state constitutional rights to due process have been
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25 ² The City objects to the submission of these declarations, and Comcast's accompanying arguments regarding this
26 point, on the basis that the information contained therein occurred during settlement negotiations between the parties.
27 Pursuant to Fed R Evid 408, the City argues that such evidence is inadmissible in this proceeding. Comcast does not address
28 this point. However, even assuming such evidence were admissible, the Court finds that it does not establish that Comcast
is presently suffering harm or that its free speech rights are being chilled

1 violated by the hearing procedure and Rules implemented by the City.³ Specifically, Comcast contends that
2 the City's administrative process violates Comcast's due process rights by: (1) failing to provide Comcast
3 with notice of the basis for its preliminary decision to deny renewal; (2) appointing a hearing officer to
4 oversee the hearing process; (3) granting the hearing officer unfettered discretion to grant or deny
5 Comcast's renewal proposal; (4) reserving the right to permit the City Manager the ability to adopt
6 additional procedures; and, (5) placing arbitrary limits on the quantum and timing of evidence.

7 Review of the proposed administrative procedures reflect, to the contrary, that Comcast's due
8 process rights are protected under the process it has been accorded in this case. The City has informed
9 Comcast that it will require consideration of all four (4) FCA standards at the hearing. It has also provided
10 Comcast with a list of all past performance deficiencies; all needs and interests identified by the City; and
11 has identified specific issues of concern to Comcast. As the City points out, the FCA does not require that
12 the "franchising authority" in the form of the Council conduct the evidence gathering aspect of the
13 administrative process.

14 Comcast correctly notes that the lack of specific limitations on a hearing officer's authority has been
15 held to violate the "narrow tailoring" requirement imposed by First Amendment caselaw. See e.g.,
16 Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 760 (1987) (noting that a licensor must be bound
17 by standards); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (holding that reasonable
18 restrictions on protected speech must be: (1) content neutral; (2) narrowly tailored; and, (3) leave open
19 alternative channels for communication); Gaudiya Vaishnava Society v. City and County of San Francisco,
20 952 F.2d 1059, 1065 (9th Cir. 1990) (a law is not narrowly tailored if it "condition[s] the free exercise of
21 First Amendment rights on the 'unbridled discretion' of government officials"). However, Comcast fails to
22 establish that the hearing officer in this instance is bridled with "unfettered discretion." Although Comcast
23 vaguely complains that it does not know whether the Hearing Officer's decision will "simply be adopted by
24 the City Council," the Administrative Rules and Government Codes clearly provide that Comcast will be
25 afforded the right to appear before the City Council in a public, noticed hearing. The Council is then bound

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27 ³ Comcast also contends that the City's procedural requirements violate Chapter 15.28 of the San Jose Municipal
Code, which provides a right to a hearing before the City Council regarding an application for any franchise

1 by the requirements of 47 U.S.C. § 546 to grant or deny Comcast's application for renewal based solely
2 upon four specific provisions identified in the statute. See § 546(c)(1)(A)-(D). Clearly, therefore, the
3 hearing officer's decision may not simply be adopted by the Council with no notice or hearing afforded to
4 Comcast. In short, it appears that Comcast is being provided with notice and an opportunity to be heard,
5 both by a hearing officer and the City Council, prior either to the acceptance or denial of its application for
6 franchise renewal.

7 The City also relies on the Court's prior order, which concluded, in the context of a motion for
8 preliminary injunctive relief, that Comcast's due process rights were protected by the City's proposed
9 administrative procedures. Although such conclusions were not intended to adjudicate the merits of
10 Comcast's claims, there have been no further developments since that decision which would permit the
11 Court to conclude, without further factual development, that Comcast's procedural due process rights have
12 been violated. Again, it does not appear that Comcast will suffer any judicially cognizable harm if this
13 matter were to be postponed until the final resolution of Comcast's renewal application. See Clinton v.
14 Acequia, Inc., 94 F.3d 568, 572 (9th Cir. 1996); Exxon Corporation v. Heinze, 32 F.3d 1399, 1404 (9th
15 Cir. 1994). Accordingly, Comcast has failed to establish that a present controversy exists between the
16 parties in this action regarding the renewal procedures imposed by the City. The lack of the existence of
17 such controversy requires that the City's motion to dismiss Comcast's claims for relief based on violations of
18 both the federal and state Constitutions, as well as the Municipal Code, be granted.

19 C. Federal Cable Act Claim

20 Comcast argues that a present controversy exists between the parties as to whether or not the City
21 has failed to act in accordance with the procedural requirements of the FCA. In its prior order denying
22 Comcast's motion for entry of a preliminary injunction, the Court determined that Comcast's request for
23 judicial intervention pursuant to 47 U.S.C. §§ 546(e)(1) and 555 was not warranted since Comcast failed
24 to demonstrate that the franchising authority, the San Jose City Council, had either issued a final decision or
25 failed to act in accordance with the procedural requirements of the FCA.

26 The City now argues that nothing has changed since the issuance of the Court's prior decision.
27 Comcast submits no new facts, evidence, or legal authority which supports its position that the FCA claim

1 is ripe for review, other than its reliance on an Eleventh Circuit case, Southeast Fla. Cable, Inc. v. Martin
2 County, 173 F.3d 1332, 1338 (11th Cir. 1999). In Martin County, the Eleventh Circuit reversed a district
3 court's finding that a cable operator's case was not ripe since the operator had failed to submit a formal
4 application for renewal. The court found that the operator had the right to bring a claim for interlocutory
5 review based on the refusal of the franchising authority to hold a public hearing as required by the Cable
6 Act.

7 In this instance, however, the franchising authority has agreed to hold a public hearing. In fact,
8 Comcast fails to cite to any procedural requirement set forth in the FCA with which the City has refused to
9 comply. Although Comcast contends that the FCA does not permit the City Council to appoint a hearing
10 officer, nothing in the Act prevents such action. Nor does Comcast point to a single case in which any
11 Circuit has determined that a franchising authority is precluded from taking such action. Rather, a fair
12 reading of the FCA appears to require only that the City Council conduct an open, public hearing, affording
13 Comcast with notice and the right to be heard. Since these requirements are in place, Comcast cannot
14 point to a present violation of the FCA on the City's part. For these reasons, the City's motion to dismiss
15 Comcast's FCA claim is granted.

16 V. CONCLUSION

17 For the reasons set forth above, the Court grants the City's motion to dismiss this action without
18 prejudice. Depending upon the outcome of the ongoing administrative process, Comcast may then seek
19 further judicial relief once that process has been completed.

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21 Dated: August 23, 2004

/s/ Richard Seeborg
RICHARD SEEBORG
United States Magistrate Judge

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