

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

THE PHILADELPHIA COMMUNITY	:	CIVIL ACTION
ACCESS COALITION, et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	NO. 02-1415
	:	
THE HONORABLE JOHN STREET,	:	
Mayor, city of Philadelphia, et al.,	:	
	:	
Defendants.	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J.

JULY 23, 2002

Presently pending before this Court is the Motion to Dismiss the Plaintiffs' Complaint based upon Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) filed by the Defendants the Honorable John Street, the Mayor of Philadelphia; The Honorable Anna C. Verna, the Counsel President of Philadelphia; and the City of Philadelphia ("the Defendants"). The twenty-seven Plaintiffs who filed this action are: The Philadelphia Community Access Coalition; Kensington Welfare Rights Union; Citizens for Consumer Justice; Philadelphia Coalition of Labor Union Women; Pennsylvania NOW; PhilaPOSH; Philadelphia Green Party; Critical Path AIDS Project; Philadelphia Unemployment Project; Crossroads Women's Center; Philadelphia Lesbian and Gay Task Force; Philadelphia NOW Chapter; New Liberty Productions; International Committee of Offensive Microwave Weapons; YHEP (Youth Health Empowerment Project); National People's Campaign; Keith Brand; Ed Cummings; Jeanne Allen; Ed Herman; Harold Boihem; John Jonik; Rebecca Smith; Joseph Powell; Charles

Sherrouse; Chris Emmanouilides; and Louis Massiah (“the Plaintiffs”). The Plaintiffs claim that the Defendants have violated their First and Fourteenth Amendment rights by failing to enforce a city Ordinance which would establish a Public Access Corporation, which in turn would oversee the development of public access cable television channels in Philadelphia. Therefore, the Plaintiffs argue that they have been denied a public forum in which to engage in protected speech. For the reasons that follow, the Motion to Dismiss will be granted.

I. BACKGROUND

The Plaintiffs consist of various organizations and individuals who allege that they are Philadelphia residents, are involved in issues of importance to Philadelphia, and wish to participate and speak on public access television. The Plaintiffs further allege that the Defendants have denied them their right to participate in public access television.

The Plaintiffs’ Complaint alleges that on December 28, 1983, the Defendants adopted an Ordinance, Bill Number 1963, (“the Ordinance”) which states that “The Mayor of Philadelphia, and the President of the Council of the City of Philadelphia are hereby authorized and directed to file, as incorporators, articles of incorporation for the Philadelphia Public Access Corporation.” (Compl., Ex. A). The Public Access Corporation is to be an “independent, not-for-profit corporation, that shall be responsible for the administration, promotion and development of non-discriminatory public access” television channels within the Cable Community Systems established in the City of Philadelphia. (Id.). In the Summer of 1998, the Defendants also entered into Cable Franchise Renewal Agreements (“the Agreements”) with various area cable companies which provide for five cable channels worth of bandwidth to be set aside for use as public access channels. The Agreements also state that the cable companies “shall provide

access production facilities and equipment for users of the” public access channels and shall “contribute to the funding of the [Public] Access Corporation.” (Id., Ex. B). Under the Agreements, the cable companies are to provide the public access channels, the facilities, and the equipment at no cost to the City or the users of the public access channels. The Plaintiffs also allege that the Defendants continue to receive money from the cable companies pursuant to the Agreements.

The Plaintiffs argue that the Defendants have failed to comply with the Ordinance by not filing articles of incorporation for the Pubic Access Corporation or appointing board members for the Corporation. The Plaintiffs further allege that the available bandwidths are a public forum which they should be able to utilize in exercising their right to free speech. By failing to establish the Public Access Corporation, the Plaintiffs allege that the Defendants are denying them access to a public forum, specifically public access television, in violation of their First and Fourteenth Amendment rights. Counts I and II of the Complaint, brought pursuant to 42 U.S.C. § 1983, demand declaratory and injunctive relief based upon the above theory, while Count III demands state law mandamus relief requiring the Defendants to comply with the Ordinance.

II. STANDARDS

A. Federal Rule of Civil Procedure 12(b)(6)

A motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), tests the legal sufficiency of the complaint. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). A court must determine whether the party making the claim would be entitled to relief under any set of facts that could be established in support of his or her claim. Hishon v. King & Spalding, 467

U.S. 69, 73 (1984)(citing Conley, 355 U.S. at 45-46); see also Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 273 (3d Cir. 1985). In considering a Motion to Dismiss, the Court “must take all the well pleaded allegations as true, [and] construe the complaint in the light most favorable to the plaintiff.” Colburn v. Upper Darby Tp., 838 F.2d 663, 665 (3d Cir. 1988)(internal quotations omitted). However, “a court need not credit a complaint’s ‘bald assertions’ or ‘legal conclusions’ when deciding a motion to dismiss.” Morse v. Lower Merion School Dist., 132 F.3d 902, 906 (3d Cir. 1997).

B. Federal Rule of Civil Procedure 12(b)(1)

A motion challenging standing implicates the Court’s jurisdiction and therefore falls under Federal Rule of Civil Procedure 12(b)(1). City of Philadelphia, et al. v. Beretta U.S.A. Corp, et al., 126 F. Supp.2d 882, 887 (E.D. Pa. 2000), aff’d 277 F.3d 415, 420 n.3 (3d Cir. 2002). This standard is similar to that used for Rule of Civil Procedure 12(b)(6) and thus “[t]he court must accept all material allegations of the complaint as true, and construe facts in favor of the complaining party.” Id.

In order “to satisfy Article III’s standing requirements, a plaintiff must show (1) it has suffered an ‘injury in fact’ that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” Friends of the Earth, Inc. v. Laidlaw Environ. Servs. (TOC), Inc., 528 U.S. 167, 180-181 (2000); Pryor v. Nat’l Collegiate Athletic Ass’n., 288 F.3d 548, (3d Cir. 2002).

III. DISCUSSION

A. The Plaintiffs Lack Standing

As stated, in order to have standing in this action, the Plaintiffs must show an injury in fact “that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.” Id. In this case, the Plaintiffs claim that they wish to engage in public access cable television at some point after the Public Access Corporation is established, the board of directors is elected, the public access channels are designated, and the cable companies provide the required equipment and facilities. The Plaintiffs further allege that their injury arises from the Defendants’ failure to comply with the Ordinance and take the first step of filing the articles of incorporation for the Public Access Corporation.

The Plaintiffs have failed to establish an injury in fact. None of the Plaintiffs have alleged that they once participated in public access television, but now they cannot because of the Defendants’ inaction. Instead, the Plaintiffs allege a speculative injury with intentions to “some day” use the facilities after all of the steps to establish the public access channels are completed. The Plaintiffs are similar to those in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), where the Court held that the Plaintiffs who had plans to “some day” visit sites to view endangered animals did not have standing to challenge a regulation which could affect the populations of such animals. 504 U.S. at 562-564. However, the Plaintiffs are dissimilar to those in Laidlaw where the Court held that the plaintiffs alleged sufficient injury from environmental pollution to establish standing because, *inter alia*, they were previous users of the now polluted land and thus their particular interests were directly affected. 528 U.S. at 181.

It is true that “at the pleading stage, general factual allegations of injury resulting

from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim'" Defenders of Wildlife, 504 U.S. at 561 (quoting Lujan v. Natl' Wildlife Fed'n, 497 U.S. 871, 889 (1990)). However, regardless of the amount of discovery allowed, the Plaintiffs will not be able to show they were injured, as nothing has been taken away from them. Simply because the Plaintiffs desire to engage in an activity that they have not, and could not have engaged in the past, does not mean that they are injured because they still cannot engage in that activity. We also agree with the Defendants that the Plaintiffs' alleged injury borders on a generalized injury that could be alleged by anyone in Philadelphia. There have never been public access channels and facilities in Philadelphia and if and when they are established, the channels and facilities will be open for public use. Therefore, anyone in Philadelphia could claim the same injury as the Plaintiffs by simply stating that they wish to participate in public access television. We agree with the Defendants that "[s]imply having city residence and involvement in city issues does not translate into current, perceptible harm of a denied or lost opportunity for access to" public access television. (Mot. to Dismiss, 13).

The Plaintiffs must also show that "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Laidlaw, 528 U.S. at 181. When a plaintiff seeks injunctive or declaratory relief only, that plaintiff will not establish the redressability component of standing if a favorable adjudication rests upon contingent future events that may not occur as anticipated or may not occur at all. Pryor, 288 F.3d at 561. Even if we were to order the Defendants to comply with the Ordinance and file the articles of incorporation, the Plaintiffs' ability to use the public access channels, equipment and facilities

would still be contingent on many other factors outside of the Defendants' control. Such contingencies include: whether the cable companies will meet the deadlines for installing and making operational the public access equipment and facilities; whether the Public Access Corporation will allocate channel space or programming facilities or equipment to any of the Plaintiffs; or whether the Plaintiffs will qualify to participate.

The Plaintiffs have not shown that they have suffered a concrete and particularized and actual or imminent injury in fact, nor have they shown that the alleged injury would be redressed by a favorable decision. Therefore, the Plaintiffs have not established standing in this action. Regardless, however, the Plaintiffs have also not established a First Amendment violation.

B. The Plaintiffs Have Not Established a First Amendment Violation

The Plaintiffs argue that public access channels are public forums.¹ They further argue that such a public forum was created when the Ordinance went into effect in December 28, 1983 and that the Defendants are prohibiting them from accessing the public forum by failing to comply with the Ordinance. The Defendants argue that no public forum has been created because the public access channels, facilities and equipment do not yet exist. The Defendants claim that the Plaintiffs are asserting a First Amendment deprivation that has not yet occurred and which relies on many contingencies. The Defendants further argue that government inaction does not create a public forum. Cornelius v. NAACP Legal Def. Educ. Fund, Inc., 473 U.S. 788, 802 (1985)(stating that “the government does not create a public forum by inaction or by

¹ We note that after the Supreme Court's decision in Denver Area Educational Telecommunications Consortium Inc. v. FCC, 518 U.S. 727 (1996), it is unclear whether a public access channel should be considered a public forum.

permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.”). The Plaintiffs claim that this is not a case of government inaction, because adopting the Ordinance was the action which created the public forum.

The Defendants further argue that under The Cable Communications Policy Act, as amended, 47 U.S.C. § 521, et. seq. (“CCPA”), they may choose, but do not have a duty, to provide public access channels and thus the Plaintiffs’ rights have not been violated by their failure to provide the channels. See 47 U.S.C. § 531 (granting authority to establish public access). In support of their argument, the Defendants cite City of Dallas v. FCC, 165 F.3d 341 (5th Cir. 1999). In City of Dallas, the court found that the City, through its franchise authority, could require the cable company to set aside bandwidth on the cable system, but could not require the cable company to construct facilities. 165 F.3d at 350. The Defendants argue that if the city cannot require cable companies to construct facilities, then the Plaintiffs lack the right to demand that the city provide such facilities. The Plaintiffs counter that, regardless of the CCPA, the Defendants themselves created the duty and the Plaintiffs’ right to public access when they adopted the Ordinance which states that the Mayor and the President of City Council “are hereby authorized and directed to file” the articles of incorporation. (Compl., Ex. A).

We agree with the Defendants that the Ordinance did not create a public forum and the Defendants have not taken any action which has created a public forum. Therefore, the Plaintiffs’ First Amendment claim is premature. However, even if we were to assume that public access channels are public forums and that one was established through the Ordinance, the Plaintiffs’ claim still must fail. If a public forum was created by the Ordinance, then the Defendants’ failure to comply with the Ordinance would be akin to closing down the public

forum. “Basic First Amendment principles do not prevent a city from closing or selling a [public forum].” Rhames v. City of Biddeford, 204 F. Supp.2d 45, 50 (D. Me. 2002); Intl’ Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 699-700 (1992)(Kennedy, J. concurring). “Likewise, the First Amendment does not prevent a city from deciding not to open a public access channel in the first place or to close it later.” Id. It should also be noted that the Plaintiffs have not alleged that the Defendants have failed to implement the Ordinance based upon a desire to regulate the content of speech. All speech through public access television is affected, regardless of the content. Therefore, whether it is argued that the Defendants have failed to create a public forum or have, *de facto*, closed down a public forum, the Plaintiffs cannot show that their First Amendment rights have been violated. This is especially true where, as in this case, there are no allegations that the Defendants are attempting to favor certain speech over other speech and all other avenues for speech remain available to the Plaintiffs. It is surely unfortunate that the Defendants have failed to comply with the Ordinance for almost nineteen years, without a reason or explanation. However, their failure does not give rise to a First Amendment violation.

Because the Plaintiffs have failed to show that they have standing or that they have a viable First Amendment claim, the Motion to Dismiss must be granted. An appropriate Order follows.

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Defendants.	:	
	:	

ORDER

AND NOW, this 23rd day of July, 2002, upon consideration of the Defendants' Motion to Dismiss (Dkt. No. 4), and the Plaintiffs' Response thereto, it is hereby ORDERED that the Motion is GRANTED and the case is dismissed with prejudice. The Clerk of Courts is hereby directed to mark this case as closed.

BY THE COURT:

Robert F. Kelly,

Sr. J.