



reasonable jury could resolve the point in favor of the nonmoving party . . . .” *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party’s case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, “the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue.” *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). “This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof.” *International Ass’n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

The mere fact that both parties seek summary judgment does not render summary judgment inappropriate. 10A Charles Wright, Arthur Miller & Mary Kane, *Federal Practice and Procedure* (“Wright, Miller & Kane”) § 2720 at 327-28 (3d ed. 1998). For those issues subject to cross-motions for summary judgment, the court must draw all reasonable inferences against granting summary judgment to determine whether there are genuine issues of material fact to be tried. *Continental Grain Co. v. Puerto Rico Maritime Shipping Auth.*, 972 F.2d 426, 429 (1st Cir. 1992). If there are any genuine issues of material fact, both motions must be denied as to the affected issue or issues of law; if not, one party is entitled to judgment as a matter of law. 10A Wright, Miller & Kane § 2720.

## II. Factual Background

The parties' statements of material facts, submitted pursuant to this court's Local Rule 56 and to the extent appropriately admitted or supported by citations to the summary judgment record, set forth the following material facts.

The plaintiff, Dorothy Lafortune, is the producer and host of "The Maine Forum," a weekly show broadcast on a public access channel provided by the defendant City of Biddeford ("the city") as a cable television franchisee. Defendants' Supporting Statement of Material Facts Pursuant to Fed.R.Civ.P. 56(b) ("Defendants' SMF") (Docket No. 13) ¶ 1; Plaintiff's Opposing Statement of Material Facts Pursuant to Local Rule 56(c) ("Plaintiff's Responsive SMF") (Docket No. 15) ¶ 1. "The Maine Forum" is usually originally broadcast as a live call-in program. Plaintiff's Statement of Material Facts Pursuant to Local Rule 56(b) ("Plaintiff's SMF") (Docket No. 17) ¶ 1; Defendants' Response to Plaintiff's Statement of Material Facts Pursuant to Local Rule 56(b) ("Defendants' Responsive SMF") (Docket No. 26) ¶ 1. The practice of the city in July 2001 was to replay all public access programs equally, as many times as the capacity of Channel 2 permitted. *Id.* ¶ 2.

On July 4, 2001 "The Maine Forum" featured Philip Castora, who spoke for one hour regarding various allegations involving numerous state and local government officials as well as private business entities. Defendants' SMF ¶ 2; Plaintiff's Responsive SMF ¶ 2. This particular broadcast was apparently titled "What Price Justice?" *Id.* ¶ 3. Following the original broadcast, this program was rebroadcast on the public access channel six times. *Id.* After receiving complaints from a private business entity, the public access director ceased automatic replay of "What Price Justice?" on orders from defendant Donna Dion, mayor of the city. *Id.* ¶ 4; Plaintiff's SMF ¶ 3; Defendants' Responsive SMF ¶ 3. At this time the plaintiff was told that she could not longer broadcast live and must submit tapes of "The Maine Forum" in advance of broadcast for preview by the mayor.

Plaintiff's SMF ¶ 3; Defendants' Responsive SMF ¶ 3. The prescreening requirement continued through the month of July 2001. *Id.*

The city has adopted a cable television ordinance which provides that any dispute regarding use of the city's public access studio is first appealed to the access director, then to the cable television committee. Defendants' SMF ¶ 9; Plaintiff's Responsive SMF ¶ 9. The ordinance provides that "any further appeal will be before the City Council if the dispute remains unresolved." *Id.* At a city council workshop on July 17, 2001, defendant Dion stated:

I had to be concerned about the public in the fact that there was an agreement that said slander was not allowed to the people in the community. On that basis, and on that basis only, is why I pulled the tape. Second, because I knew that there was extreme anger and the desire to continue doing that, that on Wednesday I had no intentions of editing their Wednesday tape, my intentions was to make sure that no one in the public was again mentioned.

Plaintiff's SMF ¶ 4; Defendants' Responsive SMF ¶ 4. The plaintiff complained to the cable television committee, which held a hearing on August 20, 2001. *Id.* ¶¶ 6-7; Defendants' SMF ¶ 10; Plaintiff's Responsive SMF ¶ 10. The committee decided that "What Price Justice?" should be re-broadcast three additional times to make up for the times it had been withheld from automatic replay in comparison to all other public access programs. Plaintiff's SMF ¶ 7; Defendants' Responsive SMF ¶ 7.

On or about August 31, 2001 defendant Dion placed Order #2001.80, entitled "Authorization/Upholding Mayor's Directive/Maine Forum Program" on the city council agenda for September 4, 2001. *Id.* ¶ 9. This order stated: "Mayor Dion's directive not to broadcast the videotape of the Maine Forum program as originally aired on July 4, 2001 at 7:00 p.m. be upheld." *Id.* The plaintiff was not notified that Order #2001.80 would be considered by the city council and learned of the proceeding from Councilor Castora. *Id.* ¶ 10. When the council took up Order

#2001.80, defendant Dion spoke in favor of the order. *Id.* ¶ 11. The city council did not review the tape or a transcript of the tape of “What Price Justice?” *Id.* ¶ 12. The only evidence presented to the city council by the mayor was the unapproved minutes of the August 20, 2001 meeting of the cable television committee prepared by the public access director. *Id.* The mayor did not identify any particular statement made during the program as libelous or slanderous. *Id.* The plaintiff and her attorney were permitted to speak only for limited periods pursuant to council rules governing public comment. *Id.* ¶ 13. The council voted 6-3 to pass Order #2001.80. *Id.* ¶ 15. The council made no findings of fact orally or in writing. *Id.*

The plaintiff included excerpts from “What Price Justice?” in a September 2001 Maine Forum broadcast, which resulted in an attempt by the city council to ban her from the public access channel through Order #2001.94. *Id.* ¶ 16. Order #2001.94, entitled “Forfeiture of Use of Cable Access Facilities,” was placed on the agenda for the council’s meeting on October 2, 2001 without formal notice to the plaintiff. *Id.* ¶ 17. The plaintiff learned of the proceeding from Councilor Castora and attended the meeting. *Id.* ¶ 20. The mayor presided at the October 2, 2001 council meeting and allowed the plaintiff and her attorney to speak as members of the public. *Id.* ¶ 21.<sup>2</sup> The mayor refused the plaintiff’s requests to cross-examine witnesses, present rebuttal evidence and question members of the council as to whether they had watched either of the Maine Forum programs in question or for bias. *Id.* The order was passed, *id.* ¶ 20, on a 5-4 vote with the mayor casting the deciding vote, *id.* ¶ 26.

The position of defendant Dion as of October 5, 2001 and thereafter has been that the Access User’s Agreement<sup>3</sup> signed by the plaintiff requires that the producer obtain a written release from any

---

<sup>2</sup> The defendants deny this paragraph of the plaintiff’s statement of material facts, Defendants’ Responsive SMF ¶ 21, but provide no citation to the summary judgment record in support of their denial. Accordingly, the allegations in this paragraph are deemed admitted to the extent they are supported by the citations given to the summary judgment record. Local Rule 56(c), (e).

<sup>3</sup> All parties refer to this document as the Cable User Agreement, but the document in fact is titled “Access User’s Agreement.” *See* exhibit to First Request for Admissions From Plaintiff to Defendants, attached to Affidavit of David A. Lourie (“Lourie Aff.”) (Docket *(continued on next page)*)

person mentioned on the public access channel, unless that person is a public official. *Id.* ¶¶ 23, 27. All of the actions taken by Dion and the city council concerning “What Price Justice?” on or after October 5, 2001 were predicated on the assumption that the Access User’s Agreement requires the producer to obtain a written release from any person mentioned on the public access channel unless that person is a public official. *Id.* ¶ 24.

### **III. Discussion**

The operative version of the plaintiff’s complaint alleges that the requirement of the Access User’s Agreement that a producer obtain releases from all persons mentioned in a program violates 47 U.S.C. § 544(f) and the First and Fourteenth Amendments to the United States Constitution (Count I); that the city council’s Order #2001.94 constitutes an unconstitutional bill of attainder (Count III); and that the city council proceeding on October 16, 2001 deprived the plaintiff of procedural and substantive due process of law (Count IV). Third Amended Complaint (Docket No. 10) ¶¶ 6-34, 42-73. It also includes an appeal from the city council’s passage of Order #2001.80 pursuant to M. R. Civ. P. 80B (Count II). *Id.* ¶¶ 35-41. The defendants seek summary judgment on Counts I, III and IV and remand of Count II to state court. The plaintiff seeks summary judgment on all counts.

#### **A. Prior Restraint and Statutory Claim**

The defendants’ motion for summary judgment on Count I concentrates on the allegation in the third amended complaint that defendant Dion’s requirement that she preview all broadcasts of “The Maine Forum,” in effect only during July 2001, constituted an unconstitutional prior restraint on speech. Defendants’ Motion for Summary Judgment (“Defendants’ Motion”) (Docket No. 12) at 10-12. The plaintiff responds that Dion’s prohibition of replays of “What Price Justice?” after the first six replays, her July 2001 preview requirement and her interpretation of the Access User’s Agreement

---

No. 20).

to require written releases from all private individuals to be mentioned in a program are all instances of unconstitutional prior restraint and violation of 47 U.S.C. § 544(f)(1). Plaintiff's Objections to Defendants' Motion for Summary Judgment ("Plaintiff's Opposition") (Docket No. 14) at 8-11. The plaintiff's own motion for summary judgment mentions only the defendants' interpretation of the Access User's Agreement as a prior restraint. Plaintiff's Motion for Summary Judgment ("Plaintiff's Motion") (Docket No. 16) at 3-4.

The Access User's Agreement signed by the plaintiff includes the following relevant terms:

2. I will be responsible for the content of program material to be taped and/or cablecast by me and agree that such program material not include:

\* \* \*

f. any material which constitutes libel, slander, invasion of privacy or publicity rights, violation of trademark or copyright or which might violate any local, state or federal law.

3. Before cablecasting materials for which I am responsible, I will obtain all approvals, clearances, licenses, etc. for the use of those program materials; including, but not limited to approvals by broadcast stations, networks, sponsors, music licensing organizations, copyright owners, performer's representatives, persons appearing in the program material and any other approvals that might be necessary in order to cablecast the program on Biddeford Community Access Television.

4. I indemnify and hold harmless the City of Biddeford and the cable tv franchisee from any and all claims . . . arising from any and all claims of any kind whatsoever concerning the failure to comply with any applicable law, rule, regulation or other requirement as well as any claim for liable [sic], slander, invasion of privacy, infringement of common law or statutory copyrights or trademarks, breach of contract or other obligations owing to third parties, civil rights violations or any other injury or damage in law or equity which may arise out of the use of the Community Access equipment or facilities.

\* \* \*

I understand that violation of the terms of this statement is grounds for forfeiture of the right to use Biddeford Community Access Television Channel 22 equipment, facilities or channel time.

Biddeford Community Television — Channel 22 Access User’s Agreement, dated April 17, 2001, exhibit attached to First Request for Admissions from Plaintiff to Defendants, attached to Lourie Affidavit.

The statutory language invoked by the plaintiff in connection with Count I provides:

Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter.

47 U.S.C. § 544(f)(1). There is apparently no question that the defendant city is a franchising authority. *See* 47 U.S.C. § 522(9). The defendants do not identify any provision of subchapter V-A of Chapter 5 of Title 47 that expressly provides a franchising authority with the power to require a public access user to obtain written releases from all individuals other than public figures who might be mentioned during a broadcast.

The concept of a prior restraint arises in the context of the First Amendment right of free speech. “The term ‘prior restraint’ is used to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur.” *Alexander v. United States*, 509 U.S. 544, 550 (1993) (internal quotation marks and citation omitted; emphasis in original).

[T]he danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum’s use. Our distaste for censorship — reflecting the natural distaste of a free people — is deep-written in our law.

*Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). Systems that give public officials the power to deny use of a forum in advance of actual expression are generally held to be unconstitutional prior restraints. *Id. See generally Near v. Minnesota*, 283 U.S. 697, 703, 706, 713-23 (1931).

Governmental action constitutes a prior restraint when it is directed to suppressing speech because of its content before the speech is communicated. This may take the form of orders prohibiting the publication or broadcast of specific information, or systems of administrative preclearance that give public authorities the power to bar the publication or presentation of material.

*In re G. & A. Books, Inc.*, 770 F.2d 288, 296 (2d Cir. 1985) (citations omitted).

It is a fundamental principle of the first amendment that the press may not be required to justify or defend what it prints or says until after the expression has taken place. . . . The district court proceedings here intervened in the editorial process by ordering an official of the broadcasting company to produce a film just before its scheduled broadcast so that it could be examined for inaccuracies. A procedure thus aimed toward prepublication censorship is an inherent threat to expression, one that chills speech.

*Goldblum v. National Broad. Corp.*, 584 F.2d 904, 907 (9th Cir. 1978) (then-Circuit Judge Kennedy).

As the First Circuit has noted,

[o]f all the constitutional imperatives protecting a free press under the First Amendment, the most significant is the restriction against prior restraint upon publication. . . . The power to censor is the power to regulate the marketplace of ideas, to impoverish both the quantity and quality of debate, and to restrict the free flow of criticism against the government at all levels. It is plain now as it was to the framers of the Constitution and the Bill of Rights that the power of censorship is, in the absence of the strictest constraints, too great to be wielded by any individual or group of individuals.

If a publisher is to print a libelous, defamatory, or injurious story, an appropriate remedy, though not always totally effective, lies not in an injunction against that publication but in a damages or criminal action *after* publication. Although the threat of damages or criminal action may chill speech, a prior restraint “freezes” speech before the audience has the opportunity to hear the message.

*Matter of Providence Journal Co.*, 820 F.2d 1342, 1345-46 (1st Cir. 1986). Here, the defendants offer no reason why the plaintiff’s use of the public access cable television channel should be treated differently for First Amendment purposes from proposed publication by the organized press.

In light of this authority, defendant Dion's order that the plaintiff submit all programs to her for review before broadcast operated as a prior restraint on the plaintiff's speech. The defendants argue that no broadcast was edited or blocked from broadcast during the month when the requirement was in effect, Defendants' Motion at 10-11, but it is enough that the prior review was required. The only possible purpose of such a review would be to allow defendant Dion to edit the content of the program or to order that it not be broadcast. The defendants also contend that the plaintiff's claim on this point is moot because "no show of 'The Maine Forum' was ever edited, restrained or otherwise refused for broadcast." *Id.* at 11. That argument would allow any official of any franchising authority to preview all public-access programming, making live programming impossible, so long as no editing was done or broadcast ultimately denied. The case law makes clear that the chilling effect of such a requirement is itself enough to invoke constitutional protection. The defendants cite *Goldberg v. Cablevision Sys. Corp.*, 261 F.3d 318, 325 (2d Cir. 2001), as support for the proposition that "it is also not a violation of any kind for the City of Biddeford to pre-screen the Plaintiff's programs prior to airing those programs." Defendants' Objection to Plaintiff's Motion for Summary Judgment ("Defendants' Opposition") (Docket No. 25) at 3. The opinion in that case, which concerns a cable operator rather than a franchising authority, does not support that conclusion. The defendants also cite *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996), in which the Supreme Court said, in describing public access cable television channels:

This system of public, private, and mixed nonprofit elements, through its supervising boards and nonprofit or governmental access managers, can set programming policy and approve or disapprove particular programming services. And this system can police that policy by, for example, requiring indemnification by programmers, certification of compliance with local standards, time segregation, adult content advisories, or even by prescreening individual programs.

*Id.* at 762 (citing FCC Record). However, the defendants include no evidence in their statement of material facts that even suggests that the Biddeford public access cable television system required that any programs be prescreened before defendant Dion decided to prescreen only the plaintiff's programs. In addition, and more importantly, the Supreme Court in *Denver Area* did not address the constitutionality of such prescreening.

The plaintiff is not entitled to summary judgment on this aspect of Count I, however, because she seeks only injunctive relief. Third Amended Complaint at 8. The only evidence in the summary judgment record is that the policy at issue was discontinued after July 2001, and there is no evidence to support an argument that the defendants are likely to impose the policy again in the near future. *Lovell v. Brennan*, 728 F.2d 560, 562-63 (1st Cir. 1984). It is thus unnecessary to consider whether this policy violated 47 U.S.C. § 544(f)(1).

Contrary to the plaintiff's position, the concept of prior restraint is not applicable separately to each anticipated replay of "What Price Justice?" The audience had already had an opportunity to view the program seven times before the defendants halted the replays. Nor does the act of discontinuing replays of a single public-access television program before the anticipated total number of rebroadcasts is reached constitute a "requirement[] regarding the provision or content of cable services" within the meaning of section 544(f)(1). Other remedies are available to the plaintiff for this act by Dion, and indeed she has pursued them. The federal statute on which she relies does not provide the remedy she seeks.

Finally, the Access User's Agreement cannot reasonably be construed to include the requirement that a producer obtain written releases from any private citizen to be mentioned in a program before the program airs.<sup>4</sup> The defendants offer no citation to any rule, regulation or statute

---

<sup>4</sup> As a practical matter, such a requirement would prevent live programming.

that might require such releases. Nor do they cite any caselaw so holding. Private citizens mentioned by others during a live call-in television program do not by virtue of that mention “appear[] in the program material.” As the Access User’s Agreement anticipates, individuals who are libeled or slandered or whose privacy is invaded by such remarks have legal remedies available to them. The question thus becomes whether the imposition of such a requirement — and, for all that appears in the summary judgment record, the imposition of such a requirement only on the plaintiff — constitutes an unconstitutional prior restraint or violates 47 U.S.C. § 544(f)(1). The very fact that the plaintiff has brought this action generates the reasonable inference that she intends to continue to produce public-access programming, so she would be entitled to injunctive relief with respect to this interpretation of the Access User’s Agreement if either of these substantive allegations has merit. I conclude that they both have merit.

Requiring a written release from every person who is not a “public official” whose name may be mentioned during the broadcast of a local-access television program, assuming that the amateur producer of such a program would be able to determine accurately whether each such individual is properly characterized as either a “public official” or not, would give each such person veto power over some of the content of that program. Obviously, not every mention of such persons during a local-access broadcast will constitute a violation of the Access User’s Agreement or create potential legal liability; indeed, many such mentions may be expected to be positive. A franchising authority which endows such individuals with such a veto power has “impose[d] requirements regarding the . . . content of cable services,” in violation of 47 U.S.C. § 544(f)(1). It has also imposed an unconstitutional prior restraint on the plaintiff’s freedom of speech, by giving private individuals the effective power of censorship.

The plaintiff is entitled to summary judgment on that portion of Count I which is based on the defendants' interpretation of the Access User's Agreement to require the plaintiff to obtain written releases in advance from all persons who may be mentioned during a broadcast other than public officials.

### **B. Bill of Attainder**

Count III alleges that the Biddeford City Council's Order #2001.94 constituted an unconstitutional bill of attainder. Third Amended Complaint ¶¶ 42-69. The defendants' argument on this issue is directed at Order #2001.80, Defendants' Motion at 3-5, which is not the subject of the complaint. The plaintiff contends in conclusory fashion that Order #2001.94 was a bill of attainder, citing *Selective Serv. Sys. v. Minnesota Pub. Interest Research Group*, 468 U.S. 841 (1984). Plaintiff's Motion at 6. The defendants respond that Order #2001.94 was not a legislative act. Defendants' Opposition at 4.

Article 1, Section 10 of the United States Constitution provides, in relevant part, that "[n]o State shall . . . pass any Bill of Attainder." In general, a bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Minnesota PIRG*, 468 U.S. at 846-47. The plaintiff argues that Order #2001.94 meets the three requirements of this test: specification of the affected person, punishment and lack of a judicial trial, *id.* Plaintiff's Motion at 6. However, the plaintiff's argument ignores the initial condition that must precede consideration of these requirements: that the act complained of be legislative in nature. Under Maine law, the passage of a municipal ordinance is "equivalent to legislative action." *South Portland Civil Serv. Comm'n v. City of S. Portland*, 667 A.2d 599, 601 n.2 (Me. 1995). The municipal action at issue here was not an ordinance but rather an order imposing punishment for violation of another order of the city council. City of Biddeford [City Council Order

Number] 2001.94 (Exh. A to Affidavit of Richard Rhames, Docket No. 18). Like the municipal resolution of censure at issue in *Little v. City of N. Miami*, 805 F.2d 962, 966-67 (11th Cir. 1986), this order was not “enforceable as a local law,” nor was it “a continuing regulation [or a] permanent rule of government,” *id.* Accordingly, Order #2001.94 was not a bill of attainder, and the defendants are entitled to summary judgment on Count III.

### C. Due Process

The plaintiff alleges in Count IV that the defendants deprived her of her constitutional rights to procedural and substantive due process of law in connection with Order #2001.94. Third Amended Complaint ¶¶ 70-73. Similar allegations are included in Count I with respect to Order #2001.80. *Id.* ¶¶ 6-34. The defendants contend that relief under 42 U.S.C. § 1983, the only source of federal jurisdiction alleged in the complaint, Third Amended Complaint ¶ 4, is unavailable to the plaintiff because M. R. Civ. P. 80B provides an adequate remedy for her claims and that the plaintiff’s claims are barred by the “*Parratt-Hudson* doctrine,” Defendant’s Motion at 5-9. The plaintiff responds that Rule 80B was not available with respect to the city council orders, that the *Parratt-Hudson* doctrine is not applicable to claims of deprivation of a liberty interest and that Rule 80B does not provide a meaningful post-deprivation remedy for violations of the First Amendment. Plaintiff’s Opposition at 6-8.

The plaintiff’s second argument was rejected by the Supreme Court in *Zinermon v. Burch*, 494 U.S. 113, 132 (1990) (“[T]he fact that a deprivation of liberty is involved in this case does not automatically preclude application of the *Parratt* rule.”), and will not be considered further here.

Rule 80B of the Maine Rules of Civil Procedure provides, in relevant part:

**(a) Mode of Review.** When review by the Superior Court, whether by appeal or otherwise, of any action or failure or refusal to act by a governmental agency . . . is provided by statute or is otherwise available by

law, proceedings for such review shall . . . be governed by these Rules of Civil Procedure as modified by this rule.

The plaintiff's contention that Rule 80B relief may not be available with respect to Order #2001.80 , Plaintiff's Opposition at 6, is curious given her demand for such relief in Count II, Third Amended Complaint ¶¶ 35-41. She contends in her opposition to the defendants' motion that "the availability of a Rule 80B Appeal as to Count[] . . . II depends in part upon the legal issue of whether the *Mayor* had a right to take an appeal from the CTVC decision, and the twin factual issues of (1) whether she filed an appeal, and (2) whether the Council *treated* Order 2001-80 as an appeal." Plaintiff's Opposition at 6 (emphasis in original). She then asserts in conclusory fashion that "[w]hichever way the Court decides these issues," the defendants' motion "cannot be granted on the Record presently before the Court" and summary judgment can only be entered against the defendants "on the facts as they presently lie." *Id.*

It is difficult to discern how the plaintiff's asserted conclusion follows from the stated premises. In any event, the applicable Biddeford ordinance does not foreclose the Mayor's request that the city council overturn the cable television committee's decision to order three more broadcasts of "What Price Justice?," Biddeford City Charter, Article VI, § 2-413 (attached to Affidavit of Clairma Matherne, attached to Defendants' SMF), and the plaintiff has submitted no evidence through either her responsive statement of material facts or the statement of material facts accompanying her own motion for summary judgment that would allow a reasonable factfinder to conclude that the city council did not treat the docket item as an appeal from the committee's decision. The only Maine statute governing cable television franchising does not address the procedure for review of municipal decisions. 30-A M.R.S.A. § 3008. The defendants contend that review is "otherwise available by law," in the language of Rule 80B, in the form of the writs of *quo warranto* and *mandamus*.

Defendants' Opposition at 5. The plaintiff responds, unhelpfully, merely that the defendants' argument is "not supported." Plaintiff's Reply at 5 n.2.

Under Maine law, "mandamus lies to compel governmental performance of a strictly ministerial act, that the applicant, otherwise without remedy, is entitled to have performed." *Casco N. Bank, N.A. v. Board of Trustees of Van Buren Hosp. Dist.*, 601 A.2d 1085, 1087 (Me. 1992). The relief requested by the plaintiff in Count II, and in Count I as well, Third Amended Complaint at 8, 9, fits this definition. It is therefore unnecessary to consider whether the writ of *quo warranto* would also have been available under the circumstances of this case. *See generally State v. Elwell*, 163 A.2d 342, 344-48 (Me. 1960). With respect to Order #2001.80, Rule 80B provides an adequate post-deprivation remedy, because the only relief sought is an additional three broadcasts of "What Price Justice?" Several rebroadcasts of the program have already occurred. The speech at issue was not barred, only the repetition of that speech. Further repetition is available through a Rule 80B proceeding. With respect to Order #2001.94, while the question is closer because the order purports to deny the plaintiff access to broadcast facilities, the post-deprivation remedy also appears adequate. *See Pope v. Mississippi Real Estate Comm'n*, 872 F.2d 127, 132 (5th Cir. 1989) (letter of reprimand and six-month suspension of real estate license; post-deprivation remedy of appeal adequate due process; deprivation of First Amendment right to commercial speech alleged).

The plaintiff also questions the applicability of the *Parratt-Hudson* doctrine to her claims on the ground that the actions of the city council were not "random and unauthorized." Plaintiff's Reply at 2-4.<sup>5</sup> The *Parratt-Hudson* doctrine, arising from *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Hudson v. Palmer*, 468 U.S. 517 (1984), provides that there is no denial of procedural due process where the prerequisites of random and unauthorized conduct by the defendant and adequate post-

---

<sup>5</sup> In the same document, the plaintiff asserts that the actions of the city council were unauthorized. Plaintiff's Reply at 2.

deprivation remedies are met. *O’Neill v. Baker*, 210 F.3d 41, 50 (1st Cir. 2000). The plaintiff does not allege, nor has she submitted any evidence with her statements of material facts that would allow a reasonable factfinder to infer, that the actions of Dion and the city council at issue here were not random and unauthorized.

As a general matter, the Supreme Court has suggested three factors tending to indicate that conduct was *not* random and unauthorized: (1) the specific deprivation that occurred was foreseeable, (2) state officials ordinarily would have sufficient warning of the impending deprivation to conduct a predeprivation proceeding, and (3) the state delegated to the state officials the power and authority to effect the very deprivation complained of.

*Learnard v. Inhabitants of the Town of Van Buren*, 182 F.Supp.2d 115, 123 (D. Me. 2002) (citation and internal punctuation omitted). The summary judgment record contains no evidence to support any of these factors, let alone all three. *See also Cronin v. Town of Amesbury*, 81 F.3d 257, 260 n.2 (1st Cir. 1996) (allegations that town defendants “were out to get” plaintiff and that town manager was biased against plaintiff support conclusion that alleged acts were random and unauthorized).

Accordingly, the defendants are entitled to summary judgment on the plaintiff’s procedural due process claims.

The plaintiff asserts that her claims also encompass violation of her substantive due process rights. Plaintiff’s Opposition at 5; Plaintiff’s Motion at 9. With respect to this claim, she contends in a minimal argument that “[t]he actions of Defendants in this matter offend the community’s sense of justice, decency and fair play.” Plaintiff’s Motion at 9. Assuming that such a claim is available to the plaintiff under the circumstances of this case, *but see Rubin v. Ikenberry*, 933 F. Supp. 1425, 1432-33 (C.D. Ill. 1996) (substantive due process claim unavailable where Constitution directly addresses a subject), “[t]he dispositive question in such an analysis is whether the challenged conduct was so extreme as to shock the conscience,” *Cummings v. McIntire*, 271 F.3d 341, 344 (1st Cir. 2001). The conduct of the mayor and city council set forth in the summary judgment record cannot be said to

“offend even hardened sensibilities,” be “uncivilized and intolerable,” be “offensive to human dignity,” or be “brutal, inhumane, or vicious.” *Id.* Particularly given the fact that “the class of cases which meets the constitutional threshold is narrowly limited” when a license or permit denial is at issue, *Collins v. Nuzzo*, 244 F.3d 246, 250 (1st Cir. 2001), the plaintiff is not entitled to recover on a substantive due process claim.

#### **D. Rule 80B**

The defendants seek only remand of Count II, which seeks relief under Rule 80B, to state court. Defendants’ Motion at 12. This request is based only on the assertion that “there is no longer a federal issue as to the Plaintiff’s § 1983 claims.” Defendants’ Opposition at 2. I have recommended that the court grant summary judgment to the plaintiff on one aspect of one of her federal claims. Therefore, if the court adopts my recommendation, the only justification offered by the defendants for remand does not exist, and their motion should be denied.

In a telephone conference with me on April 30, 2002 counsel for the parties agreed that, should the defendants’ motion to remand this count to state court be denied, the plaintiff’s 80B appeal should be decided on the basis of a stipulated record that includes partial transcripts of proceedings before the Biddeford City Council, *see* Stipulation Re Transcripts of Council Meetings (Docket No. 23) and transcripts referenced therein, and requested an opportunity to brief this issue separately. Accordingly, I recommend that, should the court adopt my other recommendations, a procedural order issue establishing a briefing schedule with respect to this count and directing the parties to specify the agreed record on the basis of which Count II will be decided.

#### **IV. Conclusion**

For the foregoing reasons, I recommend that (i) the defendants' motion for summary judgment be **GRANTED** as to Counts III and IV of the Third Amended Complaint and as to so much of Count I as refers to events other than the defendants' interpretation of the Access User's Agreement, and otherwise **DENIED**; (ii) the defendants' motion to remand Count II be **DENIED**; and (iii) the plaintiff's motion for summary judgment be **GRANTED** as to the claim in Count I that any requirement that the plaintiff obtain written releases from all private individuals who may be mentioned during the broadcasts of her program on the Biddeford public-access cable television channel is unconstitutional and otherwise **DENIED**. If my recommendations are adopted by the court, this case should be removed from the trial list and a procedural order issued with respect to Count II as recommended above.

**NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

Dated this 30th day of April, 2002.

---

David M. Cohen  
United States Magistrate Judge

DOROTHY LAFORTUNE  
plaintiff

DAVID A LOURIE, ESQ  
[COR LD NTC]  
LAW OFFICE OF DAVID LOURIE  
189 SPURWINK AVENUE  
CAPE ELIZABETH, ME 04107  
207-799-4922

v.

BIDDEFORD, CITY OF  
defendant

HARRY B. CENTER, II, ESQ.  
[COR LD NTC]  
SMITH, ELLIOTT, SMITH & GARMEY,  
P.A.  
199 MAIN STREET  
PO BOX 1179  
SACO, ME 04072  
(207)282-1527