REGULATION OF CATV

Community antenna or cable television (CATV) originally brought television to the rural fringe areas of the country, which were otherwise out of range of network broadcasting. Today, city residents are increasingly attracted to CATV because it improves their reception and offers them many more channels. Subscribers pay about $5 per month for the service plus a $10 to $20 cable installation fee. Unlike network television, which is advertiser-supported, CATV must satisfy the viewing appetite of its subscribers. Based on the phenomenal growth rate of the CATV industry, which will serve an estimated 30 million viewers within the next ten years, it appears that this appetite is growing and healthy.[1]

Every level of government has asserted some jurisdiction over the operation of CATV systems,[2] but in *Wonderland Ventures, Inc., v. City of Sandusky*[3] the U. S. Court of Appeals for the Sixth Circuit struck down city ordinances franchising CATV in Sandusky and Fremont, Ohio. The court held that the ordinances were invalid:

> 1) because they impose a gross receipts tax upon proceeds from interstate commerce in violation of the commerce clause of the Constitution of the United States, art. I, § 8, Clause 3 . . . and 2) because they do not contain definite standards for regulation and administration.[4]

Plaintiffs in the district court actions[5] were Greater Fremont, Inc., and Greater Sandusky, Inc., both CATV companies which in 1966

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1. Note, *Who's Afraid of CATV?*, 16 N.Y.L.F. 187 n.3 (1970).

2. The FCC has after years of non-involvement, stepped in and asserted its jurisdiction over CATV but has only regulated two areas of the industry, distant signal importation and operation in the top 100 U.S. markets. 47 C.F.R. §§ 74.1103, 74.1107 (1971). In T.V. Pix, Inc., v. Taylor, 304 F. Supp. 459 D. Nev. 1968), *aff'd*, 396 U.S. 556 (1970), the Supreme Court affirmed the District Court of Nevada, holding that the FCC had not preempted the entire area of CATV operation and that regulation and taxation of CATV by a state agency was therefore permissible. Illinois, on the other hand, has by statute delegated the power to license, franchise, and tax CATV to its municipalities. ILL. REV. STAT. ch. 24, § 11-42-11 (Supp. 1967).

3. 423 F.2d 548 (6th Cir. 1970).

4. *Id.* at 551.

5. Greater Fremont, Inc., v. City of Fremont, 302 F. Supp. 652 (N.D. Ohio 1968).

merged into Wonderland Ventures, Inc., a Michigan corporation licensed to do business in Ohio. They sought to enjoin the enforcement of city ordinances which regulated their business by way of a franchise system. The planned CATV systems would have taken television signals from Pennsylvania, Michigan, Ohio, and Ontario, Canada, and transmitted them to subscribers in the two cities. Through arrangements with Ohio Bell Telephone, both companies were to utilize Bell facilities in distributing the cable transmissions from the local "head-end"[6] facilities to the subscriber. Subsequent to these arrangements, the cities passed the ordinances under attack. The district court, after concluding that the FCC had not preempted the particular area with which the ordinances dealt,[7] found that the cities lacked authority by statute or constitution to regulate these CATV businesses. The court reasoned that since the ordinances were premised on control of the use of city streets,[8] the cities were without power to regulate, because the increased use of Bell's existing facilities imposed no further burden on the use of public streets.[9] The district court further held that it could be a denial of equal protection under the fourteenth amendment to allow regulation under the general police power when similar modes of communication were not likewise regulated or subject to regulation.[10] Enforcement of the ordinances was enjoined.

The cities appealed the district court decision but, on grounds entirely different than those used by the lower court, the court of appeals found the ordinances invalid in their entirety and upheld the result reached in the lower court. The court of appeals decision cited *Fischer's Blend Station, Inc., v. State Tax Commission,*[11] a 1935 case dealing with a gross receipts tax on a radio broadcaster, as supporting the holding that the tax here was a burden on interstate commerce. In relying on *Fischer's Blend* the court overlooked the fact that the direct burden concept applied in that case had been substantially

6. The term "head-end" refers to the equipment located in the vicinity of rebroadcast which filters, translates, and otherwise modifies the signal received over the air into the necessary form for transmission through the cable to the subscriber.

7. 302 F. Supp. at 660.

8. *Id.* at 656-57 n.4, 662-63.

9. *Id.* For other cases dealing with local power to regulate, see cases cited note 28 *infra.*

10. 302 F. Supp. at 662.

11. 297 U.S. 650 (1935).

modified by subsequent commerce clause cases.[12] The present test of validity of gross receipts taxes requires a separation of local from interstate business and a tax only on the former,[13] and a showing by the party opposing the gross receipts tax that there is in fact double taxation of the same revenue.[14] The revenues received in *Fischer's Blend* were derived from local and interstate advertisers, and the benefits from the advertising were local and interstate in nature. That ordinance made no effort to separate the local revenues from the entire receipts. In comparison, the revenues contemplated in *Wonderland Ventures* were totally local. The subscribers paid a monthly service charge and they all resided within Ohio.

The only interstate connection was that television transmissions from other states were picked up by the CATV companies and rebroadcast locally via the cable. In *T. V. Pix, Inc., v. Taylor*[15] the Supreme Court, in a memorandum affirmance of the Nevada District Court, held that a state could regulate CATV and impose a gross receipts tax on CATV revenue. The fact that transmissions came through interstate commerce posed no obstacle to the regulation or the tax.[16] In *Pacific Broadcasting Corp. v. Riddell*[17] the Ninth Circuit upheld a Guam privilege tax on the gross receipts of a radio station which were apportioned to the amount of advertising obtained in Guam.

Since the *Wonderland Ventures* decision, the FCC has indicated that it will continue a policy of allowing local regulation and taxation of CATV.[18] The FCC proposed policy rule states:

> In line with this analysis and the general approach noted in paragraph 6 [favoring federal minimum standards for local regulation], it seems to us that the question of setting a maximum percentage for local franchise fees is an area where we should set standards. Such a proposed maximum fee is no more than 2 percent of a

12. Note, *Gross Receipts Taxation of Interstate Mass Media,* 55 IOWA L. REV. 1268, 1273 (1970). *See* Spector Motor Service, Inc., v. O'Connor, 340 U.S. 602 (1951); Freeman v. Hewitt, 329 U.S. 249 (1946); Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938).

13. Note, *Gross Receipts Taxation of Interstate Mass Media,* 55 IOWA L. REV. 1268, 1275 (1970).

14. *Id.*

15. 396 U.S. 556 (1970), *aff'g* 304 F. Supp. 459 (D. Nev. 1968).

16. 304 F. Supp. at 463.

17. 427 F.2d 519 (9th Cir. 1970).

18. 35 Fed. Reg. 11,044 (1970).

> CATV system's gross revenues . . . . As to such CATV operations, we note that with this plan, we are greatly facilitating the expansion of the system, with resultant greater revenues; thus, 2 percent of this expanded system is far more valuable to the city than 7-9 percent of either no system or a much reduced one. We stress again that the proposal is not designed to withdraw revenues from franchising authorities but rather to strike a balance which permits the achievement of Federal goals and at the same time substantial revenues to the local entities.[19]

The earlier policy, while not dealing specifically with taxes, indicated that "local entities, either at the State or municipal level depending on State law, should—among other things—be concerned with various licensing considerations pertinent to the public interest, judgment to be made by the local authority . . . ."[20] Although the taxes involved in *Wonderland Ventures* were higher than the proposed maximum,[21] the principle that local government has the authority, at least as a matter of policy, to regulate and tax CATV is clear.[22]

As a second ground for invalidity, the court in *Wonderland Ventures* relied on *Interstate Circuit v. Dallas*[23] to hold that the ordinances lacked "definite standards for regulation and administration."[24] The Supreme Court in *Interstate Circuit* reviewed a city ordinance that classified motion pictures and established a board to review the movies to determine if they were suitable for young persons. If the board found them objectionable, it required a rating which restricted the audience to persons sixteen or over. The court struck down the ordinance as violative of first amendment rights because it lacked "narrowly drawn, reasonable and definite standards for officials to follow."[25] The distinction between *Interstate Circuit* and *Wonderland Ventures* is that the former sought to restrict expression itself, at least as to a certain group, while the latter merely imposed financial bur-

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19. *Id.* at 11,045.

20. *Id.* at 19,028, 19,031 (1968)

21. 423 F.2d at 550. The Sandusky ordinance imposed a 3% tax and the Fremont ordinance imposed a requirement of bidding, which would easily have pushed the percentage over 2% if more than one company were involved.

22. 35 Fed. Reg. 11,044 (1970) expressed the decision that the FCC had power to regulate in the entire area of CATV, but for policy reasons would not exercise this power. *See also* T.V. Pix, Inc., v. Taylor, 304 F. Supp. 459, 463 (D. Nev. 1968).

23. 390 U.S. 676 (1968).

24. 423 F.2d at 551.

25. 390 U.S. at 690.

dens on the means of expression. The burdens in *Wonderland Ventures* were totally unrelated to program content or any other aspect of free speech as defined in the first amendment. The fact that the various forms of the media are communicating does not give them immunity from obligations to support governmental functions. They, like other businesses, must assume this burden. However, taxes on the activities protected by the first amendment have been scrutinized by the courts to insure that the purpose of the tax is not to stifle or restrict the activity, especially when it is imposed on minority interests.[26]

The franchise ordinances imposed in *Wonderland Ventures* do not fall into the category of cases where first amendment rights are abridged either by a tax or by more direct means. Rather it would appear that a "deep pockets" theory motivated city officials to enact these ordinances. In 1969 the CATV industry generated $300 million in gross revenue.[27] A small portion of this revenue would seem substantial to our currently "bankrupt" cities.

CATV is already a big business and is growing rapidly. Regulation of the industry for the purpose of protecting network television interests, promoting CATV development, or protecting consumer interests is necessary. At present, the FCC has not totally occupied the field and, as indicated earlier, has left a large part of the regulatory process to state and local government, in spite of the decision in *Wonderland Ventures.* There is currently a great deal of controversy between city and state governments as to who has the power to regulate and tax CATV.[28] With the additional obstacle imposed by the court in *Wonderland Ventures,* regulation and taxation by state or local government seems, at best, doubtful. For these reasons and the

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26. This principle emerges in the context of cases dealing with unpopular religious groups where the tax burden was imposed on the preacher for delivering his sermon, Follett v. McCormick, 321 U.S. 573, 577 (1944); and where local newspapers were opposing the city officials who had by "deliberate and calculated device in the guise of a tax [sought] to limit the circulation of information . . . ." Grosjean v. American Press Co., 297 U.S. 233, 250 (1936), and Murdock v. Pennsylvania, 319 U.S. 105, 117, 127 (1943). This issue is raised in a racial discrimination context in Bates v. Little Rock, 361 U.S. 516 (1960).

27. 1969 BROADCASTING YEARBOOK 16, 20.

28. The district court in *Wonderland Ventures* relied primarily on lack of state delegation of authority to regulate and also focused on the problem of cable being strung on telephone company facilities which it additionally found to eliminate the city's interest in regulation. City of New York v. Comtel, Inc., 57 Misc. 2d 585, 293 N.Y.S.2d 599 (Sup. Ct. 1968), also relied on this distinction of ownership

fact that CATV could be a prime source of revenue for local governments, agreement with the result in *Wonderland Ventures* is untenable, much less supportable by any current precedent.

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of the distribution system in striking down a local ordinance in similar factual circumstances.

Other recent cases deal with traditional arguments involving municipal authority to act, public utility vs. private business and related problems. *See, e.g.,* Connecticut Television, Inc., v. Public Utilities Comm'n, 159 Conn. 317, 269 A.2d 276 (1970); Clear Vision CATV Services, Inc., v. Mayor of Jesup, 225 Ga. 757, 171 S.E.2d 505 (1969); Illinois Broadcasting Co. v. City of Decatur, 96 Ill. App. 2d 454, 238 N.E.2d 261 (1968); CATV Wichita, Inc., v. City of Wichita, 205 Kan. 537, 417 P.2d 360 (1970); KAOK-CATV, Inc., v. Louisiana Cable T.V., Inc., 195 So. 2d 297 (La. App. 1967); City of Waterville v. Bartell Telephone T.V. Systems, 233 A.2d 711 (Me. 1967); Staminski v. Romeo, 62 Misc. 2d 1051, 310 N.Y.S.2d 169 (Sup. Ct. 1970); DiBella v. Village of Ontario, 4 Ohio Misc. 120, 212 N.E.2d 679 (Ct. C.P. 1965); Nugent v. City of East Providence, 103 R.I. 518, 238 A.2d 758 (1968); Aberdeen Cable T.V. Service, Inc., v. City of Aberdeen, ——— S.D. ———, 176 N.W.2d 738 (1970); Rutland Cable T.V., Inc., v. City of Rutland, 122 Vt. 162, 166 A.2d 191 (1960).