



STATE OF KANSAS

Office of the Attorney General

1st Floor, State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

Curt T. Schneider
Attorney General

February 22, 1978

ATTORNEY GENERAL OPINION NO. 78- 86

Mr. David E. Retter
City Attorney
613 Washington
Post Office Box 327
Concordia, Kansas 66901

Re: Cities--Cable Television Franchises--Ordinances

Synopsis: A municipal ordinance granting a cable television franchise becomes effective pursuant to K.S.A. 12-2007 rather than K.S.A. 12-2001.

* * *

Dear Mr. Retter:

You inquire whether the effective date of a cable television franchise ordinance is governed by K.S.A. 12-2001 or by -2007.

K.S.A. 12-2001, first enacted in 1945, governs the granting of franchises, and enumerates several express conditions upon which, and only upon which, the governing body may permit the conduct of certain businesses enumerated therein, as well as "any business which is not prohibited by law wherein said business is primarily conducted on the streets of any city of the state of Kansas." Paragraph *Sixth* provides in pertinent part thus:

"No such right, privilege or franchise shall ever be granted until the ordinance granting the same shall have been read in full at three (3) regular meetings of the governing body, and immediately after the final passage it shall be published in the

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official city paper once a week for three (3) consecutive weeks; and such ordinance shall not take effect and be in force until after the expiration of sixty (60) days from the date of its final passage."

If a sufficient petition is filed pending either the passage or effective date of the ordinance asking that the franchise ordinance be submitted to a popular vote for adoption, a special election must be called for that purpose. In addition, paragraph Seventh provides in pertinent part thus:

"All contracts, grants, rights, privileges or franchises for the use of the streets and alleys of such city, not herein mentioned, shall be governed by all the provisions of this act. . . ."

In 1972, the Kansas legislature adopted an enactment, now found at K.S.A. 12-2006 through -2014, governing municipal regulation of cable television service. Section 2 thereof, now K.S.A. 12-2007, authorized the granting of franchises for that purpose. Rather than an enumeration of express conditions therefor found at K.S.A. 12-2001, the city was authorized to grant the franchise "under such reasonable conditions as the circumstances may require" Moreover, rather than the somewhat protracted procedure prescribed for adoption of a franchise ordinance in K.S.A. 12-2001, § 12-2007 prescribes merely that "[n]o franchise shall be granted or extended unless a public hearing shall be held following at least one week's notice in the official city newspaper."

The 1972 enactment was a legislative response to the 1970 decision of the Kansas Supreme Court in *Community Antenna Television of Wichita, Inc. v. City of Wichita*, 205 Kan. 537, 471 P.2d 360, holding an ordinance of that city providing for the granting of franchises for cable television operations to constitute an unreasonable and arbitrary exercise of the municipal police power. Although the ordinance was criticized on a number of points, the court emphasized its view that the cable television business was a private commercial enterprise, the regulation of which could not be justified on the basis of the municipal police power to promote the "health, morals, security and welfare" of the people. The court reasoned that "if the ordinance is to be sustained as

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a valid exercise of the police power, it must be in the regulation of the use and management of the public streets." 205 Kan. at 542. It held, however, that the provisions of the ordinance did not "have any rational relationship to the use and rightful regulation of the city streets." 205 Kan. at 543.

The statutory basis for the granting of franchises under K.S.A. 12-2001 is that the grantee conducts a business which is operated to some important extent over, along, under or upon the streets, alleys and public ways of the city. The 1972 legislature responded to the 1970 decision by a legislative declaration that the

"furnishing of cable television service by means of facilities in place in the public ways, street and alleys is hereby declared to be a private interest by reason of its use of the public ways, alleys and streets so as to require that it be reasonably regulated by cities."

The entire 1972 enactment provided a separate and independent statutory basis for municipal regulation of cable television service, unrelated to K.S.A. 12-2001. (The act became effective March 24, 1972, just prior to a further decision of the Kansas Supreme Court on April 8, 1972, in *Community Antenna Television of Wichita, Inc. v. City of Wichita*, 209 Kan. 191, 495 P.2d 939, in which the court appears to have abandoned its prior holding that regulation of cable television service bore no rational relationship to the use of the streets of the city.) The 1972 act is complete unto itself, and neither expressly nor impliedly incorporates any portion of K.S.A. 12-2001.

It is a commonplace rule of statutory construction that a later act dealing specially with a subject will ordinarily be deemed to control over an earlier act dealing generally with that subject. That rule is particularly applicable here. The 1970 decision of the Kansas Supreme Court placed cable television service beyond the reach of municipal regulation under K.S.A. 12-2001. The 1972 legislature sought to overrule that decision by providing an independent statutory basis for municipal regulation. That 1972 enactment, now K.S.A. 12-2006 through -2014, is now solely and exclusively applicable to municipal ordinances granting franchises for cable television operation. Accordingly, in my

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judgment, the ordinance in question becomes effective pursuant to K.S.A. 12-2007 rather than -2001.

Yours truly,

A handwritten signature in cursive script that reads "Curt Schneider".

CURT T. SCHNEIDER
Attorney General

CTS:JRM:kj