

FILE

Subject

Miscellaneous
Community Antenna
Service (CATV)

Copy to



STATE OF KANSAS

Office of the Attorney General

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

VERN MILLER
Attorney General

April 29, 1974

Opinion No. 74- 129

Jack L. Lively
Coffeyville City Attorney
Coffeyville, Kansas 67337

Dear Mr. Lively:

You advise that on November 22, 1965, the City of Coffeyville, pursuant to Ordinance No. 5274, granted to Coffeyville Cable Construction, Inc., now Coffeyville Cable TV, Inc.,

"the non-exclusive right, privilege and permission for a period of 10 years from the effective date of this franchise, to construct, maintain and operate in the present and future streets, avenues, alleys and public grounds and places of the City of Coffeyville, Kansas, and its successors, towers, poles, lines, cables, necessary wiring and other apparatus and appurtenances for the purpose of receiving, amplifying and distributing television signals and signals on a closed circuit channel to the said City and the inhabitants thereof, and to use and occupy such present and future streets, avenues, alleys and public grounds and places for such purposes."

Under section 9, the grantee is entitled to charge each subscriber sums not to exceed prescribed amounts for installation, and for monthly service. Under section 6, the grantee is required to pay annually during the life of this franchise

"a sum equal to three (3) per centum of the gross revenue, or \$1,000.00, whichever is the greater, received by the Grantee during the preceding year for the services sold to its customers within said City of Coffeyville, and all connection charges and fees received by Grantee shall be considered as revenue."

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In Community Antenna TV of Wichita, Inc., v. City of Wichita, 205 Kan. 537, 471 P.2d 360 (1970), the court considered an ordinance of the City of Wichita which prescribed the terms and conditions under which a CATV franchise would be, and indeed was, granted by the City. Relying upon the conclusion of the district court that "[c]ommunity antenna television service is a commercial enterprise of nonpublic utility character," which the parties on appeal did not challenge, the court concluded that "if the ordinance is to be sustained as a valid exercise of the police power, it must be in the regulation of the use and management of the public streets." The court objections were essentially fourfold, and stated as follows:

"We do not believe that the requirements and provisions in the ordinance heretofore summarized have any rational relationship to the use and rightful regulation of the city streets. They deal more with the management of the internal affairs of a CATV system which for our review here must be considered as a commercial enterprise.

"We are also of the opinion that the ordinance puts it in the power of the city commission to grant or refuse a franchise at will. It assumes to clothe such officers with arbitrary power to be exercised merely at their will or caprice. It would appear that the city commission has chosen to so exercise such power because of the first four applicants a franchise was granted to the highest bidder and the applications of the other three were denied."

* * *

"We must also agree with the trial court that the provision in the ordinance requiring the payment of a percentage of the income as a franchise privilege and the provision requiring free service to all hospitals, public and parochial schools located within the city and to municipal buildings are unreasonable and void. The measure of the charge and the cost of the free services is not reasonably apportioned to the business carried on measured by the expense to the city in supervising the use of the streets by a CATV system.

"We are forced to agree with the appellant's suggestion that the ordinance attempts to force those desiring a CATV system franchise, to subject themselves to regulation as a public utility and be subject to criminal prosecution for noncompliance."
205 Kan. at 543.

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In Capitol Cable, Inc., v. City of Topeka, 209 Kan. 152, 495 P.2d 885 (1972), the court considered two Topeka ordinances, one a CATV enabling ordinance, known as the "Topeka Cable Television Systems Franchise Ordinance," and one an ordinance granting a franchise thereunder.

At the outset, the Court was called upon once again to determine the nature of CATV. The district court had specifically found that it was a "private commercial enterprise." The court regarded its 1970 decision in Community Antenna TV of Wichita, supra, as little precedent in the later case, because the parties on appeal in 1970 had not challenged the conclusion of the district court that the business was one of commercial enterprise of nonpublic utility character. The Court stated thus:

"In view of the record and recent developments in the CATV business, we think the nature of a CATV business is to be resolved, not as a question of fact, but as a question of law. Accordingly, we conclude CATV is a private business affected with such a public interest as to require reasonable regulation by the City. This determination is based not only on the record, but in part on the action of the state legislature in 1972 in adopting Senate Bill No. 499, upon regulations adopted by the Federal Communications Commission effective March 31, 1972, and proceedings conducted by the FCC prior thereto as reported in the Federal Register (Feb. 12, 1972, Vol. 37, No. 30), hereinafter discussed." 209 Kan. at 160-161.

Section 1 of 1972 Senate Bill 499, see K.S.A. 12-2006, states in part as follows:

"The furnishing of cable television service by means of facilities in place in the public ways, streets and alleys is hereby declared to be a private business affected with such a public interest by reason of its use of the public ways, alleys and streets so as to require that it be reasonably regulated by cities. Every city is hereby authorized and empowered by ordinance to permit or prohibit the operation of all businesses furnishing cable television service within its corporate limits."

The fact remains that by the spring of 1972, it had been declared both legislatively and judicially that the furnishing of cable television service in a community was a business affected with a public interest, and properly subject to reasonable regulation.

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Indeed, in Community Antenna Television of Wichita, Inc. v. City of Wichita, 209 Kan. 191, 495 P.2d 939 (1972), the 1970 decision in that case was reversed.

Between the 1970 decision and 1972, specifically on August 1, 1972, Coffeyville Cable TV increased its rates, under the impression, you indicate, "that they were no longer subject to municipal regulation." The question you now pose is whether the grantee was required first to obtain city approval of its August 1, 1971, rate increase. At that time, both the City and the grantee had, presumably, every reason to believe that the ordinance was unenforceable, based upon Community Antenna Television of Wichita, supra. Certainly, although the Coffeyville ordinance is distinguishable in various respects from that at issue in the first Wichita case, given the breadth and basis of the 1970 decision, these distinctions might justifiably have been viewed as unsubstantial. However, during this period, the ordinance was not repealed, so far as we are advised. There is no reason for giving the 1972 decisions in Community Antenna TV of Wichita, Inc., supra, and Capitol Cable, Inc., prospective effect only. Reversing its 1970 decision, and following the 1972 legislation on the matter, the court characterized CATV as a private business affected with a public interest. This being so, the regulation sought to be effected by the 1965 ordinance here in question was within the competence of the city, and the grantee must be deemed to have been subject thereto at all times after its enactment, including August, 1971, when it raised subscribers' charges without city approval. As you point out, in the 1972 legislation concerning municipal CATV regulation, § 12, now K.S.A. 12-2012, states thus:

"All ordinances and existing franchises purporting to authorize persons or entities to provide cable television service in said cities shall hereinafter be deemed to be authorized and operative under the provisions of this act."

The purpose of this act was to enunciate a public policy of the state that the operation of CATV systems is a business affected with a public interest and to thereby confer upon cities reasonable regulatory power. The quoted portion of the act expresses the legislative policy and direction that the act shall be given retroactive application to authorize any previously enacted ordinance deemed to have been jeopardized by the 1970 decision. Accordingly, we cannot but conclude that at the time of the August 1, 1971, rate increase, it was properly subject to review and revision by the city governing body, pursuant to section 9 of the ordinance.

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In view of this conclusion, the question arises what legal consequences flow from the grantee having unilaterally increased its rates, and from the absence of city regulation. If rates were increased beyond those maxima expressed in section 9, the City Commission may now review those rates to determine if they were "fair and reasonable" based upon all facts and circumstances existing at the time of the increase. Other courses of action may be open to the Commission. If, after further consideration of the matter, further questions are raised concerning which we may be of assistance, please do not hesitate to call upon us.

Yours very truly,



VERN MILLER
Attorney General

VM:JRM:jsm