

MAINE STATE LEGISLATURE

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December 11, 1973

Ms. Nancy Ross
Legislative Staff Assistant
State House
Augusta, Maine 04330

Dear Ms. Ross:

This will respond to your request of September 18, 1973 for an opinion regarding cable television systems.

I. Question: In view of a recent Rhode Island Supreme Court case, has the State delegated to the municipalities the right to grant franchises to cable television systems for uses of the public streets?

Answer:

Affirmative. By enacting 30 M.R.S.A. Sec. 2151, Paragraph 2H (Supp. 1973) the Legislature delegated to the municipal officers the authority to grant an exclusive franchise for a period not to exceed 10 years, for the placing and maintenance of community antennae television systems and appurtenances or parts thereof, along public ways. It is stated therein, "The municipal officers of towns shall have exclusive power to enact all ordinances authorized by this subsection."

Discussion:

The reference in this question to a recent Rhode Island case, Nugent v. City of East Providence, 103 R.I. 518, 238 A. 2d 758 (1968) is interpreted to put in issue the relevance of that decision to the Maine law.

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The holding in the Nugent case was that a municipality could not regulate, license or grant exclusive franchises to community antennae television systems without delegated authority from the State which is either express or necessarily implied. At the time this case was decided, Rhode Island did not have a statute which delegated to municipalities the authority to grant exclusive franchises for cable television systems.

In Maine, by the express wording of 30 M.R.S.A. Sec. 2151, Paragraph 2H (Supp. 1973):

"The municipal officers may contract on such terms and conditions and impose such fees, as are in the best interests of the municipality, including the grant of an exclusive franchise for a period not to exceed 10 years, for the placing and maintenance of community antennae television systems and appurtenances or parts thereof, along public ways and including contracts with operators of such systems which receive the services of television signal transmission offered by any public utilities using public ways for such transmission..." (Emphasis added)

It should be noted that an older version of 30 M.R.S.A. § 2151 was interpreted in the Maine case City of Waterville v. Bartell Telephone T V Systems, 233 A. 2d 711 (Me. 1967) to mean that the city by virtue of the statute had no power to grant exclusive contracts to cable television operators. This statute has, however, been amended to its present form which expressly confers that power.

The wording contained in 30 M.R.S.A. § 2151 (Supp. 1973) which describes the delegation to the municipal officers of the power to grant exclusive franchises to cable television systems and operators is now sufficiently expressed to overcome the problems presented in both the Rhode Island and Maine cases referred to above.

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II. Question:

Is it constitutionally permissible for the Legislature to set up by statute an agency of the State which would have the power to assist municipalities in formulating their policy with respect to cable television and which would have the power to limit the number of cable television operators?

Answer:

Affirmative, with the limitations and considerations as discussed below.

Discussion:

The General Rule

The general rule with respect to the delegation of legislative power to administrative agencies was stated in the recent Maine case Stuchi v. Plavin, 291 A. 2d 508 (Me. 1972) as follows at page 510:

"The governing rule, constitutionally mandated may be simply stated as that in delegating power to an administrative agency, the legislative body must spell out its policies in sufficient detail to furnish a guide which will enable those to whom the law is to be applied to reasonably determine their rights thereunder, and so that the determination of these rights will not be left to the purely arbitrary discretion of the administrator."

And in Opinion of the Justices, 261 A. 2d 58 (Me. 1970), it was said at page 76:

"The Legislature may not constitutionally delegate general legislative authority. State v. Prescott, 1930, 129 Me. 239, 151 A. 425. But it may delegate authority to a governmental agency charged with the duty of administering an act, provided the legislation sets up sufficient standards to guide the administrative body

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in the exercise of its discretionary functions
respecting implementation of the law to particular
situations, Smith v. Speers, 1969 Me., 253 A. 2d
..." (Emphasis added)

It is therefore suggested that adequate guidelines and standards be incorporated into the legislation proposed to satisfy the requirements stated above.

Effect of Home Rule

The applicable sections of the Maine Home Rule Statute are contained in 30 M.R.S.A. §§ 1911-1920 (Supp. 1973). Of particular importance are the following sections contained therein:

30 M.R.S.A. § 1917 (Supp. 1973) Ordinance, power limited.

"Any municipality may, by the adoption, amendment or repeal of ordinances or bylaws, exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution, general law or charter. No change in the composition, mode of election or terms of office of the legislative body, the mayor or the manager of any municipality may be accomplished by bylaw or ordinance."

30 M.R.S.A. § 1920. Liberal construction.

"This chapter [which includes Section 1917 above], being necessary for the welfare of the municipalities and their inhabitants, shall be liberally construed to effect the purposes thereof."

The above statutes purport to delegate broad home rule powers to municipalities in Maine. It is suggested that in a statutory scheme which includes a sharing of responsibility and power by a municipality and a state agency, the wording of the statute should expressly and clearly define the responsibilities of each

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keeping in mind that municipalities have all those powers which are not specifically denied.

Effect of Existing Legislation

It should be noted that the municipal officers have had the power by 30 M.R.S.A. § 2151 (Supp. 1973) to grant ten-year exclusive franchises to community antennae television systems and operators. These contracts should be honored by any legislation enacted with respect to cable television regulation. Impairment of such contracts would be a violation of the Maine Constitution. See First Nat. Bank of Boston v. Maine Turnpike Authority, 153 Me. 131, 136 A. 2d 699 (1958).

Since this statute in its original form was interpreted in City of Waterville v. Bartell Telephone T V Systems, 233 A. 2d 711 (1967), as not to confer the authority to grant an exclusive contract, any contracts granting exclusive franchises by municipalities would be invalid as to that part if they were entered into before the effective date of the 1967 amendment which expressly delegated this power. Although these operators may not have the authority to operate under an exclusive franchise, granting an exclusive franchise to another operator could be deemed a taking of their property in which case they would be entitled to just compensation.

Yours very truly,

JON A. LUND
Attorney General

JAL/jwp

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