

# MAINE STATE LEGISLATURE

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STATE OF MAINE  
DEPARTMENT OF THE ATTORNEY GENERAL  
STATE HOUSE STATION 6  
AUGUSTA, MAINE 04333

November 26, 1985

Honorable Patrick K. McGowan  
Box 57  
Route 2  
Canaan, Maine 04924

Dear Representative McGowan:

Together with the co-sponsors of Legislative Document 884, "AN ACT Relating to the Sales of Extended Cable Television Services," you have inquired whether the imposition of the state sales tax on extended cable television services by 36 M.R.S.A. §§ 1752(2-B), (11) and 1811 (Supp. 1985) is unconstitutional. In other words, you have asked whether the objective of that bill, which is the repeal of the tax as it applies to such services, is constitutionally required. Your letter of inquiry suggests that the tax may constitute a burden on communication or expression in violation of the protections of the First Amendment of the Federal Constitution, or may violate the Commerce Clause of the Federal Constitution.<sup>1/</sup>

Upon consideration of these views and the authorities offered in support thereof, it is the Opinion of this Department that the statutes imposing the standard Maine sales tax of 5 percent on the retail sale of extended cable television services does not violate any of these constitutional provisions.

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<sup>1/</sup> In addition, Attorney Severin Beliveau has provided this office with a memorandum suggesting that the same tax is a violation of the First Amendment and is also barred by the Supremacy Clause of the Federal Constitution by virtue of its conflict with the Cable Communications Policy Act of 1984.

### The Maine Statute

Chapter 211 of Title 36 of the Maine Revised Statutes establishes a sales and use tax broadly applicable to retail sales of tangible personal property for consumption or use, and to other specified business sale of intangibles, including "the sale of telephone or telegraph service and the sale of extended cable television service." 36 M.R.S.A. § 1752(11) and § 1811. "Extended cable television services" is defined to mean any cable television service in addition to the minimum service which a particular cable television supplier offers. 36 M.R.S.A. § 1752(2-B). The taxing statute does not affect either the quantity or the content of cable television services offered as "the minimum service which can be purchased from a cable television supplier," but applies to any additional service offered by that supplier. The tax is set at 5 percent of the value of the property or service sold subject to it, 36 M.R.S.A. § 1811, and is collected from the retailers, who are required to register with the State Tax Assessor. 36 M.R.S.A. § 1754 (Supp. 1985). Various classes of consumers and property are expressly exempted from the tax, by specific provisions found in 36 M.R.S.A. § 1760.

### The Commerce Clause

No basis is apparent for concluding that the State sales tax on extended cable television services runs afoul of the Commerce Clause of the Federal Constitution. The tax merely applies to the sale of such services in Maine, regardless of the origin or extent of the commerce engaged in by the cable service provider. Thus, there is no discrimination whatsoever tending to favor Maine programmers, Maine providers or Maine consumers, and therefore no breach of Commerce Clause principles. McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 47 (1940).

### The First Amendment

While it is clear that both the transmission and reception of ideas by means of cable television are subject to First Amendment protection,<sup>2/</sup> it does not follow that any and all burdens placed on that channel of communication are automatically unconstitutional. The protection afforded by the

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<sup>2/</sup> See, e.g., Quincy Cable TV, Inc. v. Federal Communications Commission, 768 F.2d 1434, 1447-50 (D.C.Cir. 1985); Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396 (9th Cir. 1985), cert. granted, --U.S.--, 54 U.S.L.W. 3322 (Nov. 12, 1985).

First Amendment is not absolute, and yields to a variety of legitimate governmental burdens or restrictions. Without surveying the variety of those burdens or restrictions that have been, or might be, upheld by the courts, the validity of the sales tax imposed by the Maine statute is readily confirmed.

First, the tax is imposed without regard to the content of the communication. Thus, the tax does not present the "hint of bias or censorship" that has been suggested as the indicator of a regulation that is "designed to suppress certain ideas that the [government] finds distasteful . . . ." Members of the City Council v. Taxpayers for Vincent, --U.S.--, 104 S.Ct. 2118, 2128 (1984). All extended cable television services are subject to the tax, and the supplier's programming judgment is unrestricted. Accordingly, judicial scrutiny under the First Amendment is substantially less rigorous than if the content of speech or communication were affected. Tribe, American Constitutional Law, 684 (1978).

Second, the tax does not actually bar or restrict the communication itself. The adverse impact is only indirect and incidental. The tax affects only the business aspects of cable television communication, rather than the communication aspect of the business. As the United States Supreme Court has recently said:

Clearly, the First Amendment does not prohibit all regulation of the press. It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems.

Minneapolis Star and Tribune v. Minnesota Commissioner of Revenue, 460 U.S. 575, 103 S.Ct. 1365, 1369-70 (1983).

The Minneapolis Star opinion goes on immediately to point out that:

Minnesota, however, has not chosen to apply its general sales and use tax to newspapers. Instead, it has created a special tax that applies only to certain publications protected by the First Amendment.

Id. at 1370. By contrast, the Maine tax merely treats the retail sale of certain cable television services in the same fashion that it treats other retail sales. In Maine, a tax on retail sales to consumers is the rule; an exemption from that tax is the exception. The Minneapolis Star opinion strongly

suggests that application of a state's general sales tax to a particular medium of expression, such as newspapers (or cable television), would be upheld under the First Amendment. 103 S.Ct. at 1373, n. 9.

In any case, the Maine tax would appear to satisfy the reasonableness test of First Amendment analysis:

[A] government regulation [of protected expression] is sufficiently justified if it is within the constitutional power of the government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. O'Brien, 391 U.S. 367, 377 (1968). The necessity and legitimacy of the State's interest in raising general revenues is beyond question. The Minneapolis Star case stands, at least, for the proposition that application of a general sales tax is an incidental restriction on expression, and unrelated to its suppression. In fact, the tax is rather narrowly tailored in a fashion that would appear to avoid the suggestion that cable television is more than minimally burdened or the object of discrimination in comparison to other avenues of speech.<sup>1/</sup> By definition, the tax is not applied to "the minimum service which can be purchased from a cable television supplier." 36 M.R.S.A. § 1752(2-B) (Supp. 1985). Only "extended" cable television services are made subject to this tax, and only those customers choosing services beyond the basic subscription will be burdened by it. The tax cannot be said to burden cable television as a medium, and whatever services may be offered as a basic subscription are absolutely unburdened. If, as Minneapolis Star suggests, application of the state's general sales tax to the sale of all cable television services would be constitutional, it would be incongruous that the exemption of basic services from that tax

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<sup>1/</sup> Even determining the relevant comparison is problematic. Although cable television resembles broadcast television and radio in some respects, it is distinguished from those media in other respects, including, inter alia, the fact that it makes retail sales. In many respects, cable television more closely resembles telephone services, or the sale of video cassettes or books, all of which are subject to the general sales tax.

would be found to violate the First Amendment. In effect, the Maine tax affects only "luxury" communications, in the sense that they are communications made available by cable television suppliers only at a premium price.

Thus, the taxation of extended cable television services serves a legitimate governmental purpose, through a means of general applicability, which burdens expression protected by the First Amendment only in a manner that is both content neutral and incidental to its commercial sale. Under these circumstances, the actual burden of the tax on cable television services delivered in Maine would be found not to violate the First Amendment.

### Federal Preemption

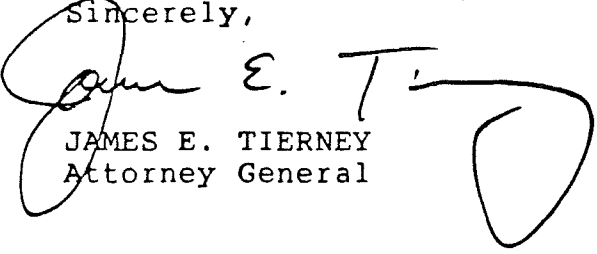
The determination whether a state statute is preempted by federal law under the Supremacy Clause ordinarily depends upon the intention of Congress, which in turn requires an analysis that is "largely one of statutory construction." Tribe, American Constitutional Law, 377 (1978). The Federal Communications Policy Act of 1984, 47 U.S.C. § 521 et seq (Supp. 1985) establishes various limitations on permissible state and local government regulation of the cable television industry, with expressly preemptive effect. 47 U.S.C. § 556(c). Among the provisions of that Act is one that prohibits the imposition of "any tax, fee or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such" which exceeds "5 percent of the cable operator's gross revenues." 47 U.S.C. § 542(b), (g)(1). It has been argued that a sales tax of 5 percent, added to a local franchise fee, will necessarily violate the Act by exceeding the 5 percent statutory cap in all communities where a franchise fee is imposed. No other basis for preemption is suggested.

The argument must fail, however, on several grounds. First, the federal statute expressly excludes from the 5 percent statutory cap "any tax, fee or assessment of general applicability," such as the general sales tax imposed by the Maine statute. 47 U.S.C. § 542(g)(2)(A). Second, as noted above, the tax applies only to extended cable television service, while the 5 percent cap refers to "the cable operator's gross revenues." Since Maine imposes no sales tax on minimum cable television services, which must be purchased before extended service may be obtained, it is not likely that the imposition of a 5 percent sales tax on extended services would even approach 5 percent of the cable operator's gross revenues. But even if the sales tax were to exhaust the

5 percent of gross revenues left vulnerable to taxation by the federal statute, the result of the application of the federal preemption provision would be to prevent the local franchising authority from imposing a franchise fee that would cause the cap to be exceeded, rather than to invalidate the state tax since, as a matter of state constitutional law, state statutes prevail over local ordinances. 30 M.R.S.A. § 1917.

Accordingly, it is the view of this Office that the state sales tax on extended cable television services now provided is consistent with the Commerce Clause and the First Amendment of the United States Constitution and with the Federal Cable Communication Policy Act. Please feel free to inquire further on this or other legislative matters.

Sincerely,



JAMES E. TIERNEY  
Attorney General

JET/ec

cc: Rep. H. Craig Higgins  
Rep. Norman E. Weymouth  
Sponsors, Legislative Document 884

Sen. Donald Twitchell  
Rep. John A. Cashman  
Chairmen, Joint Standing  
Committee on Taxation