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Office of the Attorney General

T. TRAVIS MEDLOCK
ATTORNEY GENERAL

REMBERT C. DENNIS BUILDING
POST OFFICE BOX 11549
COLUMBIA, S.C. 29211
TELEPHONE 803-734-3970

OPINION NO. _____ April 28, 1989

SYLLABI: (1) The answer to whether the statute authorizing the ten dollar ($10.00) per mile fee for use of State rights-of-way by cable operators is constitutional, is as follows:

(a) if there is no discrimination against cable operators by charging them higher fees for use of the State's rights-of-way than utilities, then a court would probably uphold the charge as constitutionally valid;

(b) however, if such charge against cable operators is not similar to that charged to utilities and others who use the same rights-of-way, then the ten dollar ($10.00) charge is constitutionally suspect under the First Amendment of the United States Constitution;

(c) the determination of whether such discriminatory treatment exists is a factual one, beyond the province of an Attorney General's opinion.

(2) Generally, express statutory authorization must be given for an administrative officer or department to excuse or waive payment of taxes or fees due and owing.

(3) Absent constitutional prohibitions, the General Assembly may, by statute, waive or excuse taxes or fees due and owing.

TO: The Honorable John C. Lindsay
Senator, District No. 28

The Honorable Michael T. Rose
Senator, District No. 38

FROM: Robert D. Cook RDC
Executive Assistant for Opinions

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The Honorable John C. Lindsay
Senator, District No. 28
203 Gressette Building
Columbia, South Carolina 29202

The Honorable Michael T. Rose
Senator, District No. 38
606 Gressette Building
Columbia, South Carolina 29202

Dear Senators Lindsay and Rose:

You have separately requested an opinion concerning the following. You wish to know whether the State may impose a ten dollar ($10.00) fee per mile upon cable television companies in order to use the easement or right-of-way belonging to the State. You have asked that your request be expedited and we are providing the following information in the brief time given to research the questions.

Section 58-12-130 (a) provides as follows:

> (a) Cable television companies operating in this State shall pay an annual fee of ten dollars per mile of State of South Carolina right-of-way usage. The net revenue derived therefrom, after payment of the administrative expenses of the South Carolina Department of Highways and Public Transportation as specified in subsection (b) below, shall be designated and used for primary and secondary educational purposes. All such cable television companies shall make available one six megahertz channel for the transmissions of the South Carolina Educational Television Commission.

> (b) The Department is authorized to administer the provisions of this section and to collect from such cable television companies the annual fees required to be paid and to retain five percent of the amount so collected to the credit of its accounts. The Department shall deposit the balance remaining with the State Treasurer to the credit of the general fund.

The legal basis for states and localities charging fees to cable companies for the right to operate is found in United States Public Law 98-549, known as the Cable Communications Policy Act of 1984. This Act is best described in an opinion issued by the South Dakota Attorney General and thus we quote from that opinion in pertinent part:

> In 1984 the Congress adopted Public Law 98-549 known as the Cable Communications Policy Act of 1984. The purpose of this enactment, now codified in 47 U.S.C. is to establish a national policy that clarifies the current system of local, state and federal regulation of cable television. As noted in the legislative history, U. S. Code Congressional Administrative News 10A, December, 1984, the National Policy continues reliance on the local franchising processes, the primary means of cable television regulation while defining and limiting the authority that a franchising authority may exercise through the franchise process. Franchise fees are addressed in Section 622 of Public Law 98-549. The law permits the imposition of a fee or tax of no more than five percent of the cable operator's gross revenues derived in any twelve-month period from the operation of the cable system. The prior maximum as set by the Federal Communications Commission (FCC) was established at three percent. This statute, however, grants authority to collect franchise fees up to five percent without any FCC waiver and prohibits the franchising authority from requiring fees in excess of five percent.
>
> Section 622(c) provides that "a cable operator may pass through to subscribers the amount of any increase in a franchise fee, unless the franchising authority demonstrates that the rate structure specified in the franchise reflects

> all costs of franchise fees and so notifies the cable operator in writing." Franchise fee is defined in subsection 622(g) to include any tax, fee or assessment imposed on a cable operator or subscriber solely because of their status as such. Also, franchise fee is defined so as not to include any bonds, security funds or any other incidental requirements or costs necessary to enforcement of the franchise. Such charges or requirements may be imposed by the franchising authority in the franchise ordinance or the request for proposals. A tax of general applicability is not a franchise fee and is not subject to the five percent limitation. This would include such payments as a general sales tax, an entertainment tax imposed on other entertainment businesses as well as the cable operator and utility taxes or utility user taxes which, while they may differentiate the rates charged to different types of utilities, cannot unduly discriminate against the cable operator so as to effectively constitute a tax directed at the cable system.

South Dakota Attorney General Opinion No. 86-08 (March 27, 1986).

Thus, the federal act, cited above, permits a state or municipality or county or other public entity to assess a franchise fee or tax of no more than five percent of the cable operator's gross revenues derived in any twelve-month period from the operation of the cable system. Such assessments, in certain instances, have been held to be valid by the courts. See Group W. Cable, Inc. v. Santa Cruz, 679 F.Supp. 977 (N. D. Cal., 1988); Group W. Cable, Inc. v. City of Santa Cruz, 669 F.Supp. 954 (N. D. Cal., 1987); City of Ames, Iowa v. Heritage Communications, 861 F.2d 185 (8th Cir. 1988).

However, virtually all courts have concluded that a serious First Amendment question has been raised by the imposition of such fees, particularly where the assessment of such fee is discriminatory with regard to cable television operators as compared to other utilities or users of the governmental right-of-way. Of particular interest is the recent decision, Century Federal, Inc. v. City of Palo Alto, _____ F.Supp. _____, 1988 WL 150087 (N. D. Cal., October 12, 1988). In that case, the Court carefully analyzed the First Amendment issue with respect to the assessment of a franchise fee upon the cable company's right to operate and to use the public's right-of-way for such operation. The Court, in determining that the franchise fee impermissibly burdened the First Amendment rights of

cable operators, relied principally upon the United States Supreme Court decision, Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983). In Minneapolis Star, the United States Supreme Court earlier determined that the state tax on newsprint and ink used in publications of certain circulation value violated the First Amendment because such tax was "facially discriminatory" and had "singled out the press for special treatment." Pursuant to the Minneapolis Star case, the Court in Century Federal, supra, stated that the state possessed a heavy burden of justification if it attempted to single out or discriminate against the press in the area of taxation. The Court went on to say that such discrimination or disparate treatment could be justified only where the governmental interest asserted by the state outweighed the burden placed upon the press or the media and, in addition, where such unequal treatment could not be achieved by means that infringed First Amendment rights less intrusively.

Based upon this reasoning, 1/ the Court in Century Federal, supra, concluded that a franchise tax placed upon cable television

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1/ The Court, in Century Federal, also employed other First Amendment analysis in striking down the franchise fee, relying upon several other United States Supreme Court cases. See, United States v. O'Brien, 391 U.S. 367 (1968); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984); Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (1983). The Century Federal Court recognized that the two Group W. cases had relied upon United States v. O'Brien, to uphold a franchise fee, there choosing to view that fee as rent for use of a municipal right of way. However, Century Federal rejected such reasoning, concluding that the State of California had, by statute, deemed excess space on utility poles and other structures to have been dedicated for use by cable television operators. Moreover, California statutes gave local governments authority to authorize cable operators to use public rights-of-way. Thus, according to Century Federal, the cable operator was "entitled to more than the minimal protection of speech in a nonpublic forum." Slip Op. at 10. Since the Century Federal Court viewed the right-of-way as a public forum, the State could not discriminate in the use of that forum by charging the cable operator a greater fee for use than other entities such as telephone companies.

Likewise, § 58-12-10 et seq. appears to provide the State's lands, highways and roads for use by cable companies. Arguably therefore, the same public forum found in Century Federal would exist in South Carolina. If that is the case, decisions by the United States Supreme Court prohibit discrimination in the charging of fees to cable companies. Once a forum has been opened for speech, discrimination "may not be based on content alone, and may not be justified by reference to content alone." Police Dept. of Chicago v. Moseley, 408 U.S. 92, 96 (1972).

companies

> does not purport to provide for equal charges on all users of the Cities' public rights-of-way; ... on the contrary the program is aimed exclusively at cable television operators engaging in speech protected by the First Amendment. Moreover, it is uncontested that identical rights-of-way are occupied by other comparable users, including Pacific Bell, which defendants concede they do not charge at all for its use. _____ F.Supp. ____, supra, Slip Opinion at page 10.

The Court in both the Minneapolis Star case and the Century Federal case recognized that the State does possess a "critical" interest in obtaining revenue. However, such state interest was not sufficient to justify discriminatory or special treatment of the press or media or those engaging in protected speech. As the Court noted in Century Federal, with respect to the franchise fee being charged to cable companies, but not to any other entity,

> Of course, if the Cities' franchise fee in this case is viewed as the tax it appears to be on its face rather than as the rent for the use of property that defendants now assert the fee to be, ... it is without question unconstitutional under Minneapolis Star analysis. The purpose of the fee is concededly and exclusively to generate revenue, and the cities have alternative means of raising revenue that would not also raise First Amendment concerns. ... Defendants have not shown that cable television operators' use of the rights-of-way has any special characteristic that justifies the franchise fee; indeed the Cities concede that users with comparable characteristics exist and that they are charged less than Century Federal. Moreover defendants have offered no explanation for why government has chosen a special method to tax cable and even "speculation" does not suggest a permissible one. Slip Opinion at page 13. [emphasis added]

Thus the Court, went on to conclude that the franchise fee violated the First and Fourteenth Amendments.

It is noteworthy, however, that the Court in Century Federal, was careful to outline a permissible manner in which such a franchise fee could be assessed. The Court stated that

> As noted above, were the cities to charge comparable users of the public rights-of-way equally or to demonstrate that there is a difference between cable and other users that justifies imposing a greater rent on cable, the franchise fee would presumably be valid.

Slip Opinion at 14.

Thus, it appears that the constitutional validity of a fee or assessment upon cable operators for the use of public rights-of-way is dependent in large part upon whether or not such fees or assessments are charged to other nonmedia entities. The courts have stated that a fee charged for the use of the state's rights-of-way is constitutionally valid so long as the state does not single out cable operators or other forms of media out disparate treatment. In the alternative, if the state desires to single out such cable companies, it possesses a heavy burden of justifying such discrimination.

Accordingly, the answer to your question as to whether the State may validly impose a ten dollar ($10.00) per mile fee upon cable operators for the use of the State's right-of-way appears to be dependent upon whether or not the State is also equally assessing fees against other entities who use that same right-of-way. The State cannot simply target those who are exercising First Amendment rights for assessment of fees because such raises a strong presumption that the content of the speech is being punished. We note that Sections 58-27-130 and 58-9-2020 of the Code gives to regulated utilities the right to utilize public rights-of-way. Moreover, Section 57-5-350 of the Code allows public utilities to acquire easements from the Department of Highways and Public Transportation. It is not clear from these statutory provisions or other provisions of law concerning the acquisition of access to public rights-of-way by utilities or other entities whether the State is charging a similar fee to that under consideration here, or whether it is charging any fee at all. We have been informed by at least one source that no such fee is being charged. The determination of whether there is actual discrimination against cable companies by charging this ten dollar ($10.00) per mile fee thus becomes a factual one, which is beyond the province of an opinion of the Attorney General. See, Opinion Attorney General November 15, 1985.

Of course, in considering the constitutionality of an act of the General Assembly, it is presumed that the act is constitutional

in all respects. Moreover, such an act will not be considered void unless its unconstitutionality is clear beyond any reasonable doubt. Thomas v. Macklen, 186 S.C. 290, 195 S.E. 539 (1937); Townsend v. Richland County, 190 S.C. 270, 2 S.E.2d 777 (1939). All doubts of constitutionality are generally resolved in favor of constitutionality. While this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional.

Based upon the brief period of time we have had to research this matter, it appears that Section 58-12-130 could be subject to serious constitutional challenge. The State would be required in order to uphold the statute, to show that it was not singling out cable companies for disparate treatment by charging the ten dollar ($10.00) per mile fee. See, Group W. Cable, Inc. v. City of Santa Cruz, 669 F.Supp., supra at 974, ["Nor can Group W. argue that Santa Cruz has singled out cable operators from other similar users of public streets and facilities."] Or in the alternative, the State must show that such disparate treatment was justified by some legitimate governmental purpose beyond the mere collection of revenue. Century Federal, supra. The courts or the General Assembly as fact finders would be in the best position to determine the existence of such facts. Absent such facts, however, a court would probably view this statutory provision as constitutionally suspect.

You have also asked whether such fees or assessments may be excused absent statutory authority from the General Assembly. Typically, administrative officers or departments are not authorized to excuse or waive the payment of taxes or fees due and owing in the absence of express statutory authority or in the absence of common law powers as the chief legal officer of the state. See, 84 C.J.S. Taxation Section 630.

You have also asked whether or not the General Assembly possesses the authority to waive or excuse the payment of taxes due and owing. It is well recognized that while the power to tax does not necessarily include the power to compromise or remit taxes, it is generally held that the General Assembly in the absence of a constitutional prohibition possesses the authority to authorize the waiver or compromise of taxes. 84 C.J.S. Taxation § 630 supra. As was stated the in the opinion of the Arkansas Attorney General, Opinion No. 81-100 (June 15, 1981) in reliance upon the case of McClure v. Topf and Wright, 112 Ark. 342, 346, 166 S.W. 174 (1914), "inasmuch as the Constitution does not restrict the right of a legislature to waive the collection of taxes previously imposed by legislative directive, ... the legislature has the power to forgive or cancel

personal property taxes levied and assessed in a particular year." Thus, it would be a policy matter for the Legislature to determine whether or not it would be appropriate in a given instance to waive or excuse the payment of fees or taxes.

If we can be of further assistance, please do not hesitate to call. With kind personal regards, I remain

Very truly yours,

Robert D. Cook
Executive Assistant for Opinions

RDC/an