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Ms. Mary Collins
Executive Secretary
West Virginia Cable Television
Advisory Board
Post Office Box 812
Charleston, West Virginia 25323-0812

Dear Ms. Collins:

In your letter of June 4, 1993, you requested our opinion "as to who is the cable television rate regulatory authority in West Virginia." More specifically, you inquired whether rate regulation is the responsibility of the West Virginia Cable Television Advisory Board (hereinafter the "Board") or the local franchising authorities? For the reasons discussed herein, it is our opinion that the Board is the sole instrumentality of the State of West Virginia authorized to regulate rates for cable television.

The conclusion stated above is the result of an analysis of both federal and state law. Federal law must be analyzed due to the fact that it is preeminent in the area of telecommunication policy including cable television.

The federal government has reserved to itself control of the regulation of the cable television industry. This is accomplished through the Cable Communications Policy Act of 1984, as amended. 47 U.S.C. §§ 521 et seq. (Supp. 1993). In enacting this legislation, Congress declared, in § 521, its purposes are to:

> (1) establish a national policy concerning cable communications;
>
> (2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;
>
> (3) establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems;

> (4) assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public;
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> (5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this title; and
>
> (6) promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems.

(Emphasis added.)

Congress was concerned that there be a coordination of federal, state, and local authority:

> Except as provided in section 637 [47 U.S.C. § 557], any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded.

47 U.S.C. § 556(c) (Supp. 1993) (bracketed material in original). The federal courts have interpreted this provision to mean that only those state laws and regulations inconsistent with the federal regulatory scheme are preempted. See West Virginia Cable Television Association v. State of West Virginia, Civil Action No. 2:90-0493, United States District Court for the Southern District of West Virginia, Order of January 7, 1991, holding provisions of West Virginia Cable Television Systems Act, West Virginia Code § 5-18-1 et seq. (Supp. 1992), in conflict with federal law to be preempted.

Thus, federal law must be examined to determine whether any regulation of the rates of cable systems by state and/or local governments is allowed. Examination of the federal legislation reveals in 47 U.S.C. § 543(a)(1) (Supp. 1993) that:

> No Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and section 612 [47 U.S.C. § 532]. Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section.

It is further stated in 47 U.S.C. § 543(a)(2)(a) (Supp. 1993) that rates for basic cable service may be regulated by a franchising authority in accordance with regulations prescribed by the Federal Communications Commission. These regulations include a provision that the franchising authority have the legal authority to adopt regulations to regulate cable television rates. 47 U.S.C. § 543(a)(3)(b) (Supp. 1993).

In developing and adopting regulations to implement the provision of the Act, the Federal Communications Commission addressed the issue of whether a state may be a franchising authority for purposes of exclusively regulating rates for basic cable service. In determining that a state may be the franchising authority for exclusive rate regulation, the Federal Communications Commission engaged in the following discussion In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation, MM Docket 92-266, Report and Order and Further Notice of Proposed Rulemaking:

> BB. Preemption of State Law
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> 62. The second preemption issue raised in the Notice is whether a franchising authority in a state that bars rate regulation at the state or local level would have the "legal authority" necessary to be certified to regulate basic cable rates. There are two types of state statutory schemes potentially at issue. The first arises where rate regulation is barred at the state level, i.e. where neither the state nor the locality may regulate rates. The second arises where the state retains rate regulatory authority at the state level but provides localities the legal authority to enter into franchise agreements. We will discuss each of these issues in turn.
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> (ii) Rate Regulation Authority Exercised at State Level
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> 69. The second preemption issue raised by the commenters concerns state laws that prohibit local franchising authorities, but not state government entities, from regulating rates. We believe that, for the same reasons discussed in the preceding section, such state laws are not preempted by the 1992 Cable Act.

These laws do not prevent state regulation of cable rates; rather, they simply define which governmental entity in the state is empowered to regulate rates. Since local franchising authorities receive their power to grant franchises and regulate rates from the state, there is no reason why the state cannot retain that power and exercise it at the state level. Thus, although local governments may be barred by state law from regulating rates, the state itself may engage in such activities. In these instances, the state would file a certification with the Commission as the franchising authority.

70. The application of these principles is illustrated by the regulatory scheme constructed by the Commonwealth of Massachusetts. In this regard, the Massachusetts Community Antenna Television Commission ("MCATC") requests clarification of its role and the role of localities in regulating basic cable service. (footnote omitted) Under Massachusetts law, local governments issue franchises.[196] They thus arguably would be considered "franchising authorities" under the Act's definition.[197] The right to regulate rates, however, is explicitly given under state law to MCATC.[198] Therefore, under the Cable Act, franchising authorities in Massachusetts would be unable to certify that they have the "legal authority" to regulate rates; yet, MCATC is concerned that under a narrow reading of the Act's definition, it would not be a "franchising authority" authorized by the Act to regulate rates.

71. We conclude that, under principles of municipal corporation law, MCATC can be considered a "franchising authority," which the Act defines as "any governmental entity empowered by Federal, State, or local law to grant a franchise." The power of a local government to grant franchises must be expressly granted or necessarily implied from an express grant of power.[199] Local governments have no inherent regulatory power.[200] That Massachusetts chose to delegate its franchising powers to municipalities does not mean that it gave up its power to grant franchises. Moreover, we must bear in mind that Congress certainly did not intend for "regulatory gridlock" to occur as a result of a state's statutory structure. We thus clarify that "franchising authority" means, for rate regulation purposes, the authority

empowered by state law to regulate rates. In Massachusetts' case, this entity is MCATC, even though it has delegated its authority to issue franchises to local governments. Massachusetts may, of course, delegate its rate regulating power to localities should it choose to amend its statutory scheme.

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[196] M.G.L. Ch. 166A, § 3.

[197] Communications Act, 47 U.S.C. § 522(9).

[198] M.G.L. Ch. 166A, § 15.

[199] See Antieau, Municipal Corporation Law, § 29.02.

[200] See Ferris, Lloyd, Casey, Cable Television Law, ¶ 13.14[1].

Accordingly, if West Virginia law grants exclusive rate-making authority to the Board, such delegation is not in conflict with and is, indeed, specifically allowed by federal law.

The West Virginia Cable Television Systems Act, W. Va. Code §§ 5-18-1 et seq. (Supp. 1992), establishes the Board, sets forth which entities may be a "franchising authority," and conveys exclusive authority to regulate cable service rates in West Virginia. A "franchising authority" is defined in W. Va. Code § 5-18-3(11) (Supp. 1992) as "a municipality, a county commission or the West Virginia cable television advisory board." However, the statute is unequivocal in granting exclusive authority to the Board to regulate rates. It states "[t]o the extent permitted by federal law, the board shall regulate rates to ensure that they are just and reasonable both to the public and to the cable operator and are not unduly discriminatory." W. Va. Code § 5-18-16(b) (Supp. 1992). The authority to regulates rates is not mentioned in the provision which describes the powers and duties of a franchising authority. W. Va. Code § 5-18-11 (Supp. 1992). Thus, clearly the Legislature made the determination that regulation of rates is vested in the Board and not in municipalities and county commissions which, like the Board, may also be franchising authorities. The fact of state law not granting to municipalities and county commissions the authority to regulate rates would also have the effect of not allowing municipalities and county commissions to qualify under federal law to regulate basic cable rates as they would lack the requisite legal authority necessary to meet federal certification standards under 47 U.S.C. § 543(a)(2)(a) (Supp. 1993).

Moreover, the Legislature's decision to delegate franchising authority to municipalities and county commissions while retaining rate regulation authority in a state agency such as the Board is well within the Legislature's authority:

> We begin with the traditional statement that municipal corporations are creatures of the State, Alderson v. City of Huntington, 132 W. Va. 421, 52 S.E.2d 243 (1949), and their powers are as stated in Syllabus Point 2 of Sharon Steel Corp. v. City of Fairmont, ___ W. Va. ___, 334 S.E.2d 616 (1985), appeal dismissed, 474 U.S. 1098, 106 S. Ct. 875, 88 L. Ed. 2d 912 (1986):
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> > "'"A municipal corporation has only the powers granted to it by the legislature, and any such power it possesses must be expressly granted or necessarily or fairly implied or essential and indispensable. If any reasonable doubt exists as to whether a municipal corporation has a power, the power must be denied." Syllabus Point 2, State ex rel. Charleston v. Hutchinson, 154 W. Va. 585, 176 S.E.2d 691 (1970).' Syllabus Point 1, City of Fairmont v. Investors Syndicate of America, Inc., ___ W. Va. ___, 307 S.E.2d 467 (1983)."
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> Furthermore, where both the State and a municipality enact legislation on the same subject matter, it is generally held that if there are inconsistencies, the municipal ordinance must yield. Justice Caplan spoke to this point in Syllabus Point 1 of Vector Co. v. Board of Zoning Appeals, 155 W. Va. 362, 184 S.E.2d 301 (1971):
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> > "When a provision of a municipal ordinance is inconsistent or in conflict with a statute enacted by the Legislature the statute prevails and the municipal ordinance is of no force and effect."

Davidson v. Shoney's Big Boy Restaurant, 181 W. Va. 65, 68, 380 S.E.2d 232, 235 (1989). See also, Bittinger v. Corporation of Bolivar, 183 W. Va. 310, 395 S.E.2d 554 (1990). Moreover, the same principle even more rigorously applies to county commissions. The public statutes confer on them all the powers they possess, prescribe all the duties they owe, and enforce the liabilities to which they are subject. Exchange Bank v. Lewis County, 28 W. Va. 273 (1886).

Accordingly, it is our opinion that the West Virginia Cable Television Advisory Board is vested by the Legislature with the sole authority to regulate cable television rates in West Virginia. Municipalities and county commissions, while granted the authority to issue franchises in accordance with the provisions of the West Virginia Cable Systems Act, have no authority under State law to regulate cable television rates.

Very truly yours,

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