

Bond Case Briefs

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TELECOM FRANCHISE FEES - KENTUCKY

Kentucky CATV Association, Inc. v. City of Florence

Supreme Court of Kentucky - June 15, 2017 - S.W.3d - 2017 WL 2591800

Cities filed petition for declaratory relief, alleging that multichannel video programming (MVP) and communications services tax violated their right to grant franchises and to collect franchise fees as provided for in the Kentucky Constitution.

The Circuit Court dismissed. Cities appealed. The Court of Appeals vacated and remanded with instructions to grant judgment in favor of cities. State officials appealed, and Supreme Court granted discretionary review.

The Supreme Court of Kentucky held that:

- Provision of MVP and communications services tax, prohibiting municipalities from levying franchise fees on MVP services, was unconstitutionally void as applied to cities seeking to collect franchise fees for use of their rights-of-way;
- General Assembly did not have the power under provision of Kentucky Constitution, which allowed General Assembly to confer upon municipalities the authority to collect franchise fees, to prohibit cities from collecting franchise fees in exchange for use of their rights-of-way; and
- Prohibition provision of MVP and communications services tax was severable from remainder of tax scheme.

Provision of multichannel video programming (MVP) and communications services tax, prohibiting municipalities from levying franchise fees on MVP services, was contrary to provisions of Kentucky Constitution requiring public utilities to obtain franchise to use city streets and stating requirements for municipalities to grant franchises, and thus was unconstitutionally void as applied to cities seeking to collect franchise fees for use of their rights-of-way. Framers of Constitution intended that municipalities had the power to grant franchises and collect franchise fees, guiding themes behind enactment of Constitution provisions were municipal control and municipal benefit via the sale of franchises, and assessment of franchise fee was indispensable part of granting franchise.

General Assembly did not have the power under provision of Kentucky Constitution, which allowed General Assembly to confer upon municipalities the authority to collect franchise fees, to prohibit cities from collecting franchise fees in exchange for use of their rights-of-way. Power of municipalities to collect franchise fees was granted in other provisions of Constitution, and founders did not intend Constitution provision to include franchise fees paid by private franchisees as consideration for use of municipality's rights-of-way.

Provision of multichannel video programming (MVP) and communications services tax, prohibiting municipalities from levying franchise fees on MVP services, which was unconstitutionally void as applied to cities seeking to collect franchise fees for use of their rights-of-way, was severable from remainder of the tax scheme. Severance did not render the remainder of the tax scheme incapable of being executed in accordance with intent of General Assembly, severance did not damage one of the intended purposes of the tax, which was to prevent double payment by non-satellite program

providers, and tax credit accomplished goal of alleviating perceived inequity among various types of program providers.