ATTORNEY GENERAL OPINION NO. 94-5

TO: Mr. Scott B. McDonald, Executive Director
Association of Idaho Cities
3314 Grace Street
Boise, ID 83703

Per Request for Attorney General's Opinion

Dear Mr. McDonald:

QUESTIONS PRESENTED

1. Without further enabling legislation, do cities and counties have authority under Idaho and federal law to regulate the basic cable television service rate for cable television franchisees?

2. Without further enabling legislation, do cities and counties in Idaho have a right to charge a franchise fee to cable television operators?

CONCLUSION

1. Cities in Idaho almost certainly have authority under current state law to franchise cable television companies. With general franchising authority under state law, federal law allows cities to regulate the basic cable television service rate and charge a franchise fee, both subject to the conditions of federal law.

2. Counties in Idaho probably have authority under current state law to franchise cable television companies. With general franchising authority under state law, federal law allows counties to regulate the basic cable television service rate and charge a franchise fee, both subject to the conditions of federal law.

ANALYSIS

I.

AUTHORITY OF CITIES UNDER STATE LAW

The first step in determining a city's authority under state law is to examine the statutes addressing the power and authority of cities. No statute of the State of Idaho or reported appellate decision specifically addresses whether cities have authority to regulate cable television service rates or to charge a franchise fee to cable television operators. Accordingly, the analysis must fall back upon the general statutes addressing

the powers and duties of cities. This analysis must be made against the backdrop of art. 12, sec. 2 of the Idaho Constitution, which provides:

> **§ 2. Local police regulations authorized.--**Any county or incorporated city or town may make and enforce, within its limits, all such local police, sanitary and other regulations as are not in conflict with its charter or with the general laws.

A. General Municipal Franchising Authority

Title 50 of the Idaho Code is entitled "Municipal Corporations." Chapter 3 of title 50 is entitled "Powers." The initial two sections of that chapter and title provide cities with the following general authority:

> **50-301. Corporate and local self-government powers.--**Cities governed by this act shall be bodies corporate and politic; may sue and be sued; contract and be contracted with; . . . and exercise all powers and perform all functions of local self-government in city affairs as are not specifically prohibited by or in conflict with the general laws or the constitution of the state of Idaho.

> **50-302. Promotion of general welfare--Prescribing penalties.--** (1) Cities shall make all such ordinances, by-laws, rules, regulations and resolutions not inconsistent with the laws of the state of Idaho as may be expedient, in addition to the special powers in this act granted, to maintain the peace, good government and welfare of the corporation and its trade, commerce and industry . . . .

Idaho Code §§ 50-328 through 50-330, three other sections in the same chapter, address municipal franchising and rates of municipal franchisees with more particularity:

> **50-328. Utility transmission systems--Regulations.--**All cities shall have power to permit, authorize, provide for and regulate the erection, maintenance and removal of utility transmission systems, and the laying and use of underground conduits or subways for the same in, under, upon or over the streets, alleys, public parks and public places of said city; and in, under, over and upon any lands owned or under the control of such city, whether they may be within or without the city limits.

> **50-329. Franchise ordinances--Regulations.--** . . . No franchise shall be created or granted by the city council otherwise than by ordinance . . . .

> **50-330. Rates of franchise holders--Regulations.--**Cities shall have power to regulate the fares, rates, rentals or charges made for the service rendered under any franchise granted in such city, except such as are subject to regulation by the public utilities commission.

Title 50 of the Idaho Code does not define "utility" or list what businesses (be they utilities or other businesses like common carriers) may be franchised under these sections. The term "public utility" as defined in Idaho Code § 61-129, one of the sections defining the jurisdiction and authority of the Idaho Public Utilities Commission (PUC), does not include cable television within its definition of public utilities subject to state regulation by the PUC. The question becomes whether cities may franchise utilities or other businesses under the sections quoted if those businesses are not public utilities subject to the jurisdiction of the PUC. The answer is yes.

Taxis, buses, garbage collection and cable television are among the services historically franchised by cities even though none of these businesses are subject to regulation by the PUC. *E.g.*, Yellow Cab Taxi Service v. City of Twin Falls, 68 Idaho 145, 190 P.2d 681 (1948) (City of Twin Falls franchised taxi service); Tarr v. Amalgamated Association of Street Electric Railway and Motor Coach Employees of America, Division 1055, 73 Idaho 223, 250 P.2d 904 (1952) (City of Pocatello franchised bus service); Coeur d'Alene Garbage Service v. City of Coeur d'Alene, 114 Idaho 588, 759 P.2d 879 (1988) (City of Coeur d'Alene franchised garbage collection service); Bush v. Upper Valley Telecable Company, 96 Idaho 83, 524 P.2d 1055 (1974) (City of Idaho Falls franchised cable television and regulated its rates). *See also* Idaho Code § 61-801(k)(2), which exempts from PUC regulation under the Motor Carrier Act "taxicabs . . . performing a licensed or franchised taxicab service."

The appellate courts of Idaho have never specifically addressed whether cities have authority to franchise cable television. In KTVB, Inc. v. Boise City, 94 Idaho 279, 486 P.2d 992 (1971), the losing applicants in the award of a franchise for cable television services within the City of Boise challenged the city council decision awarding the franchise to other persons. One of their challenges, which the Idaho Supreme Court did not reach, contended that the Boise City Council had not properly followed the procedures of Idaho Code § 50-329 regarding the award of franchises. 94 Idaho at 280-81, n.1, 486 P.2d at 992-94, n.1. But neither Bush nor KTVB reached the issue of city authority to franchise cable television.

Justice Holmes once wisely observed: "[A] page of history is worth a volume of logic." New York Trust Company v. Eisner, 256 U.S. 345, 349, 41 S. Ct. 506, 507, 65 L. Ed. 963, 983 (1921). History and current practice suggest that cable television franchising is within the general authority of municipalities in Idaho and other states:

> In connection with the law relating to franchises, the term "public utilities" is often used. One of the distinguishing characteristics of a public utility is the devotion of private property by the owner to a service that is useful to the public, and that the public has a right to have rendered with reasonable efficiency and at proper charges, so long as it is continued. The term implies public use and the duty to serve the public without discrimination, as distinguished from private service . . . .
>
> Specifically, the term "public utility" is understood to refer to such things as steam and street railways, telegraphs and telephones, waterworks, gasworks, electric light plants, public utility wharves, cable television systems,[11] and other public conveniences and activities of the city.

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[11] **Michigan** *Charter Tp. of Meridian v. Roberts*, 114 Mich. App. 803, 319 NW2d 678 [1982].

12 McQuillan Mun. Corp., Franchises § 34.08 (3d ed. 1986), pp. 29-31 (footnotes unrelated to cable television omitted).

This franchising authority does not depend upon whether cable television is considered a "public utility" for purposes of state utility commission regulatory authority. Roberts, which was cited in McQuillan, held that cable television was not a "utility" within the definition of a provision of the Michigan Constitution addressing specific kinds of utilities (light, heat and power), but was nevertheless a utility within the meaning of a different section of the Michigan Constitution generally defining local franchising authority. 319 N.W.2d at 680-82. It was the latter, more general definition that determined what businesses were subject to municipal franchising; cable television fell under this broad category of services subject to municipal control under general franchising provisions of the state constitution. *Accord:* Sacramento Orange County Cable Communications Company v. City of San Clemente, 59 Cal. App. 3d 165, 170-72, 130 Cal. Rptr. 429, 432-34 (1976) (although cable television is not a public utility subject to regulation by California Public Utilities Commission, it is subject to general municipal franchising statute and rate regulation); Community Tele-Communications, Inc. v. the Heather Corporation, 677 P.2d 330, 338-39 (Colo. 1986) (cable television is a proper subject for city franchising under generally worded constitutional provision); City of Owensboro v. Top Vision Cable Company of Kentucky, 487 S.W.2d 283, 287 (Ky. 1972) (under generally worded constitutional provision city may franchise kinds of businesses in addition to utility services specifically listed in the constitution, *e.g.*, garbage collection, taxis, buses, and cable television); Shaw v. City of Asheville, 152 S.E.2d 139, 145-46 (N.C. 1967) (municipal franchising authority under generally worded statute is not limited to public utilities regulated by North Carolina Utilities Commission, but includes cable television); Board of Supervisors of New Britain Township, 492 A.2d

461, 463-64 (Pa. Commw. 1985) (borough's right to regulate cable television implied from its general powers to make ordinances "expedient or necessary for the proper management, care and control of the borough . . . and the maintenance of peace, good government, safety and welfare of the borough and its trade, commerce and manufactures"); Aberdeen Cable TV Service, Inc. v. City of Aberdeen, 176 N.W.2d 738, 740-42 (S.D. 1970) (cable television is a public utility within the meaning of generally worded municipal franchising statutes); City of Issaquah v. Teleprompter Corporation, 611 P.2d 741, 745-47 (Wash. 1980) (although cable television is not a public utility under specific code provisions addressing municipal ownership of public utilities, it was properly subject to terms of more general municipal franchising ordinance). *But see* Devon-Aire Villas Homeowners Association No. 4, Inc. v. Americable Associates, Ltd., 490 So.2d 60 (Fla. App. 1985).

After applying the constitutional rule of art. 12, sec. 2, that cities may enact local regulations not in conflict with general laws, examining Idaho's general laws, and reviewing these cases, I conclude that cities in Idaho almost certainly have authority under state law to franchise cable television service within their city limits. From this, the next questions are: Under state law, does the right to franchise include a right to set rates? Under state law, does the right to franchise include a right to collect a franchise fee?

B. Rate Regulation Under Franchising Authority

Idaho Code § 50-330 specifically provides that "cities shall have the right to regulate the fares, rates, rentals or charges made for the service rendered under any franchise granted in such city, except such as are subject to regulation by the public utilities commission." Thus, there is no question under state law that cities have the right to regulate the rates of franchisees. *See, e.g.,* City of Pocatello v. Murray, 21 Idaho 180, 120 P. 812 (1912) (before passage of Public Utilities Commission Act in 1913 preempted city regulation of water franchisee's rates, city had authority to regulate rates of water franchisee, although it had not properly exercised that authority). Moreover, the authorities cited previously strongly suggest that, even without explicit rate authority in the franchising statutes, rate authority is an incident of the franchising authority itself. As another commentator says:

> In granting franchises, local governments can ordinarily condition the grant as the governing body deems proper. . . .
>
> . . . .
>
> Local governments have been able to include conditions in franchises, which:

(a) set rates, fares, and charges to be levied by the party accepting the franchise;[4] . . . .

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[4] *Struble v. Nelson*, 217 Minn. 610, 15 N.W.2d 101 (1944); *City of Allegheny v. Millvale, E. & S. St. Ry. Co.*, 159 Pa. 411, 28 A. 202 (1893); *Helicon Corp. v. Borough of Brownsville*, 68 Pa. Commw. 375, 449 A.2d 118 (1982).

3 Antien Municipal Corporation Law, Franchises: Public Utility Regulation § 29.03, pp. 29-14 and 29-15 (1993) (footnotes unrelated to rate regulation omitted).

C. Franchise Fees

The Idaho case law is clear that once the authority to franchise a business is established under state law, prescription of reasonable franchise fees is a necessary incident of that authority (unless franchise fees have been preempted by state law). In Alpert v. Boise Water Corporation, 118 Idaho 136, 795 P.2d 298 (1990), the court addressed the legality of cities charging franchise fees to its franchisees (both gas and water companies):

> The practice of charging franchise fees as consideration for the granting of a franchise was first noted in *Boise City v. Idaho Power Co.*, 37 Idaho 798, 220 P. 483 (1923), which involved the issue of cancellation of a franchise contract where Idaho Power had purchased two competing power plants and sought to consolidate the franchises. As consideration for the granting of the franchise, Boise City had charged a percentage of the utility's gross revenue collected from its Boise patrons. The court held that the commission had no authority to invalidate the franchise cancellation agreement entered into between Boise City and Idaho Power, and further held that the payments from the utility to the city constituted valid consideration for a valuable property right which the city surrendered.
>
> It is well established that Idaho cities have the right to own and operate utilities and provide these services to their residents. The cities contend that their surrender of this right is valid consideration for the franchise fee charged to the utilities. We agree. The franchise agreements in the present case are contracts and the franchise fees are simply payments for consideration for the rights granted by the cities to the utilities. Idaho Const. art. 15, § 2; I.C. § 40-2308.

118 Idaho at 144, 795 P.2d at 306. The final sentence quoted above cited art. 15, sec. 2, and Idaho Code § 40-2308, which are constitutional and statutory provisions dealing exclusively with water. But, the case of Boise City v. Idaho Power Company cited and

relied upon dealt with an electric utility and did not depend upon the specific constitutional or statutory provisions for water. Further, Alpert's holding also applied to the gas utilities that were party to that case. Therefore, Alpert's rule concerning the right to require municipal franchise fees applies generally to all franchisees, not just to water utilities.

Given the long history of municipal franchising, rate regulation and collection of franchise fees of cable television in Idaho, and the general approval by the appellate courts of other states of municipal franchising of cable television under general statutes not specifically addressing cable television, I conclude that cities in Idaho almost certainly have authority under Idaho law to franchise cable television, to regulate cable television service rates, and to charge a franchise fee to cable television operators.

II.

AUTHORITY OF COUNTIES UNDER STATE LAW

As with the cities, the first step in determining a county's authority under state law is to examine the statutes addressing the power and authority of counties. No statute of the State of Idaho or reported appellate decision specifically addresses whether counties have authority to regulate the basic cable television service rates or to charge a franchise fee to cable television operators. Accordingly, the analysis must fall back upon the general statutes addressing the powers and duties of counties. As was the case with the cities, this analysis must be made against the backdrop of art. 12, sec. 2.

Title 31 of the Idaho Code is entitled "Counties and County Law." Chapter 6 of title 31 is entitled "Counties as Bodies Corporate." Its initial section provides:

> **31-601. Every county a body corporate.--**Every county is a body politic and corporate, and as such has the powers specified in this title or in other statutes, and such powers as are necessarily implied from those expressed.

A number of statutes address county authority in a manner pertinent to the exercise of franchising authority:

> **31-805. Supervision of roads, bridges and ferries.--**To lay out, maintain, control and manage public roads, turnpikes, ferries and bridges within the county, and levy such tax therefor as authorized by law.

> **31-815. Licensing of toll roads, bridges and ferries.--**To grant licenses and franchises, as provided by law, for construction of, keeping and taking tolls on roads, bridges and ferries, and fix the tolls and licenses.

> **31-828. General and incidental powers and duties.--**To do and perform all other acts and things required by law not in this title enumerated, or which may be necessary to the full discharge of the duties of the chief executive authority of the county government.

An examination of these statutes in isolation could lead one to conclude the county franchising authority is restricted to the franchising of toll roads, bridges and ferries. However, the matter is not so simple.

Other statutes contemplate more extensive county franchising. For example, two sections in the Public Utilities Law, chapters 1 through 7 of title 61 of the Idaho Code, which were passed in 1913, were written against a backdrop of more extensive county franchising:

> **61-510. Railroad service--Physical connections.--**Whenever the commission . . . shall find that the public convenience and necessity would be subserved by having connections made between the tracks of any two (2) or more railroad or street railroad corporations . . ., the commission may order any two (2) or more such corporations . . . to make physical connections . . . . After the necessary franchise or permit has been secured from the city and county, or city or town, the commission may likewise order such physical connection, within such city and county, or city and town, between two (2) or more railroads which enter the limits of the same. . . . .

> **61-527. Certificate of convenience and necessity--Exercise of right or franchise.--**No public utility of a class specified in the foregoing section [street railroad corporation, gas corporation, electrical corporation, telephone corporation or water corporation] shall henceforth exercise any right or privilege, or obtain a franchise, or a permit, to exercise such right or privilege, from a municipality or county, without having first obtained from the commission a certificate that the public convenience and necessity require the exercise of such right and privilege: . . . .

The public utility statutes indicate that, at least as long ago as their 1913 enactments, counties had been franchising utilities other than toll roads, bridges and ferries. Indeed, given the counties' explicit statutory authority over roadways under Idaho Code § 31-805 and their authority under the "general and incidental powers" language of Idaho Code § 31-828, it would appear that the franchising authority must extend beyond toll roads, bridges and ferries because almost all utilities (and most common carriers) must use county roads or rights of way and obtain the county's permission to do so. History and established practice also support this view.

While there are a number of reported opinions from other states analyzing the question of city authority to grant franchises to cable television systems under generally worded statutes, we have not found any addressing the question of county authority to grant franchises to cable television systems under generally worded statutes. Nevertheless, there are numerous reported cases in which counties have franchised cable television systems, although the basis for the franchising authority is not discussed. *See, e.g.,* Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd., 678 F. Supp. 871, 872 (N.D. Ga. 1986); Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119, 121 (7th Cir. 1982); Town and Country Management Corp. v. Comcast Cablevision of Maryland, 520 A.2d 1129, 1129 (Md. Ct. Spec. App. 1987); Southwestern Bell Telephone Co. v. United Video Cablevision of St. Louis, Inc., 737 S.W.2d 474, 475 (Mo. App. 1987); Bylund v. Dept. of Revenue, 9 Or. Tax 76 (1981); Media General Cable of Fairfax [Va.], Inc. v. Sequoyah Condominium Council of Co-Owners, 991 F.2d 1169, 1170 (4th Cir. 1993).

Applying the constitutional rule of art. 12, sec. 2, that counties may enact local regulations not in conflict with the general laws, examining Idaho's general laws, and acknowledging the general acceptance of county franchising of cable television, I conclude that counties in Idaho probably have authority under state law to franchise cable television service within their county limits. From this, the next questions are: Under state law, does the right to franchise include a right to set rates? Under state law, does the right to franchise include a right to collect a franchise fee?

Based upon the analysis earlier done with regard to the municipal franchising authority, I conclude that counties in Idaho have authority under Idaho law to regulate the cable television service rates and to charge a franchise fee for cable television operators if they have authority to franchise cable television.

III.

FEDERAL PREEMPTION OF CITY AND COUNTY AUTHORITY UNDER STATE LAW

Art. I, § 8, cl. 3 of the United States Constitution (the Commerce Clause) provides that Congress has power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." In the past ten years, Congress has twice exercised its authority to regulate interstate commerce with regard to cable television, first in the Cable Communications Policy Act of 1984, Pub. L. 98-549, 98 Stat. 2779, and then more recently in the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460, 1477.[1]

Section 2 of the 1992 act, which was not codified in the United States Code, contained a number of congressional findings:

- Rates for cable television services have been deregulated in approximately 87% of all franchises since the passage of the 1984 act. Since this rate deregulation, monthly rates for the lowest priced basic cable service have increased by 40% or more for 20% of cable television subscribers and the average monthly cable rate has increased almost three times as much as the Consumer Price Index since rate deregulation. Section 2(a)(1).

- Most cable television subscribers have no opportunity to select between competing cable systems. When the cable system faces no local competition, the result is undue market power for the cable operator compared to consumers and video programmers. Section 2(a)(2).

- The 1984 act limited the regulatory authority of state or local franchising authorities over cable operators. Franchising authorities are finding it difficult under the 1984 act to deny renewals to cable systems that are not adequately serving cable subscribers. Section 2(a)(20).

- It is the policy of Congress in the 1992 act where cable television systems are not subject to effective competition to ensure that consumers' interests are protected in receipt of cable service. Section 2(b)(4).

This congressional statement of purpose and concern about consumer interests is the backdrop against which the 1992 amendments should be analyzed.

With these statements of purpose in mind, one next turns to the definitions of terms found in section 602 of the Communications Act of 1934, 47 U.S.C. § 522, to understand the statutory provisions in the remaining sections. The relevant definitions are:

> (3) The term "basic cable service" means any service tier which includes the retransmission of local television broadcast signals;
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> . . . .
>
> (5) The term "cable operator" means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such cable system;
>
> . . . .

(7) The term "cable system" means a facility . . . designed to provide cable service . . . .

. . . .

(9) The term "franchise" means an initial authorization, or renewal thereof . . . issued by a franchising authority . . . which authorizes the construction or operation of a cable system;

(10) The term "franchising authority" means any governmental entity empowered by Federal, State or Local law to grant a franchise;

Under these definitions, when a city or county has authority under state or local law to franchise a cable television system, it meets the definition of a "franchising authority" under federal law. Nevertheless, federal law does constrain the exercise of that franchising authority. The heart of the statutory provisions prescribing how local units of government may exercise their franchising authority is found at sections 621 *et seq.* of the Communications Act of 1934, 47 U.S.C. §§ 541 *et seq.*

A. Federal Law Preserves Local Franchising Authority

Section 621 of the Communications Act of 1934, 47 U.S.C. § 541, addresses the local franchising authority. It provides:

§ 541. General franchise requirements

(a) Authority to award franchises; public rights-of-way and easements; equal access to service; . . .

(1) A franchising authority may award . . . one or more franchises within its jurisdiction; except that a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise . . . .

. . . .

(b) No cable service without a franchise; exception under prior law

(1) Except to the extent provided in paragraph (2) and subsection (f) of this section, a cable operator may not provide cable service without a franchise.

> **(2)** Paragraph (1) shall not require any person lawfully providing cable service without a franchise on July 1, 1984, to obtain a franchise unless the franchising authority so requires.

Under this section, when cities and counties have authority under state law to award franchises for cable television, they continue to have that authority under state law, although the exercise of their franchising authority is constrained by federal law.

B. Federal Law Authorizes and Caps Franchise Fees

Section 622 of the Communications Act of 1934, 47 U.S.C. § 542, addresses franchise fees that the local franchising authorities may assess. It provides:

> **§ 542. Franchise fees**
>
> **(a) Payment under terms of franchise**
>
> Subject to the limitation of subsection (b) of this section, any cable operator may be required under the terms of any franchise to pay a franchise fee.
>
> **(b) Amount of fees per annum**
>
> For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed five percent of such cable operator's revenues derived in such period from the operation of a cable system. For purposes of this section, the twelve-month period shall be the twelve-month period applicable under the franchise for accounting purposes.

Under sections 622(a) and (b) of the Communications Act of 1934, 47 U.S.C. §§ 542(a) and (b), when cities and counties have authority under state law to franchise cable television systems, they are not federally preempted from charging franchise fees, but they are federally preempted from charging franchise fees exceeding five percent of the cable television system's gross revenues. (The remaining subsections of this section flesh out the standards for franchise fees in considerable detail.)

C. Federal Law Authorizes Rate Regulation of Basic Cable Television Services

Section 623 of the Communications Act of 1934, 47 U.S.C. § 543, addresses the local franchising authorities' rate regulation. It provides:

§ 543. Regulation of rates

(a) Competition preference; local and federal regulation

(1) In general

. . . Any franchising authority may regulate the rates for the provision of cable service, or any other communication service provided over a cable system to cable subscribers, but only to the extent provided under this section. . . . .

(2) Preference for competition

If the [Federal Communications] Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority under this section. If the Commission finds that a cable system is not subject to effective competition--

(A) the rates for the provision of basic cable service shall be subject to regulation by a franchising authority, or by the Commission if the Commission exercises jurisdiction pursuant to paragraph (6), in accordance with the regulations prescribed by the Commission under subsection (b) of this section; and

(B) the rates for cable programming services shall be subject to regulation by the Commission under subsection (c) of this section.

(3) Qualification of franchising authority

A franchising authority that seeks to exercise the regulatory jurisdiction permitted under paragraph (2)(A) shall file with the Commission a written certification that--

(A) the franchising authority will adopt and administer regulations with respect to the rates subject

to regulation under this section that are consistent with the regulations prescribed by the Commission under subsection (b) of this section;

(B) the franchising authority has the legal authority to adopt, and the personnel to administer, such regulations; and

(C) procedural laws and regulations applicable to rate regulation proceedings by such authority provide a reasonable opportunity for consideration of the views of interested parties.

(4) Approval by Commission

A certification filed by a franchising authority under paragraph (3) should be effective 30 days after the date on which it is filed unless the Commission finds, after notice to the authority and a reasonable opportunity for the authority to comment, that--

(A) the franchising authority has adopted or is administering regulations with respect to the rates subject to regulation under this section that are not consistent with the regulations prescribed by the Commission under subjection (b) of this section;

(B) the franchising authority does not have the legal authority to adopt, or the personnel to administer, such regulations; or

(C) procedural laws and regulations applicable to rate regulation proceedings by such authority do not provide a reasonable opportunity for consideration of the views of interested parties.

(4) If the Commission disapproves the franchising authority's certification, the Commission shall notify the franchising authority of any revisions or modifications necessary to obtain approval.

. . . .

> **(b) Establishment of basic service tier rate regulations**
>
> **(1) Commission obligation to subscribers**
>
> The Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable. Such regulation shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition.
>
> . . . .
>
> **(d) Uniform rate structure required**
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> A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system.

Under section 623 of the Communications Act of 1934, 47 U.S.C. § 543, when cities and counties have authority under state law to regulate franchisees' rates upon approval by the Federal Communications Commission, they continue to have authority under federal law to regulate rates for basic cable service, but they are federally preempted from regulating rates for basic cable service in a manner inconsistent with regulations promulgated by the Federal Communications Commission. *See* remaining subsections of section 623, 47 U.S.C. § 543; 47 C.F.R. part 76--*Cable Television Service*; in particular, subpart N--*Cable Rate Regulations*, 47 C.F.R. §§76.900 *et seq.*[2]

AUTHORITIES CONSIDERED

1. United States Constitution:

Art. I, § 8, cl. 3.

2. Idaho Constitution:

Art. 12, sec. 2.

3. United States Code:

47 U.S.C. §§ 521 *et seq*.
47 U.S.C. § 522.
47 U.S.C. §§ 541 *et seq*.
47 U.S.C. § 542.
47 U.S.C. § 543.

4. Idaho Code:

§ 31-805.
§ 31-828.
§ 40-2308.
§ 50-328.
§ 50-329.
§ 50-330.
§ 61-129.
§ 61-801(k)(2).

5. Idaho Cases:

Alpert v. Boise Water Corporation, 118 Idaho 136, 795 P.2d 298 (1990).

Boise City v. Idaho Power Co., 37 Idaho 798, 220 P. 483 (1923).

Bush v. Upper Valley Telecable Company, 96 Idaho 83, 524 P.2d 1055 (1974).

City of Pocatello v. Murray, 21 Idaho 180, 120 P. 812 (1912).

Coeur d'Alene Garbage Service v. City of Coeur d'Alene, 114 Idaho 588, 759 P.2d 879 (1988).

KTVB, Inc. v. Boise City, 94 Idaho 279, 486 P.2d 992 (1971).

Tarr v. Amalgamated Association of Street Electric Railway and Motor Coach Employees of America, Division 1055, 73 Idaho 223, 250 P.2d 904 (1952).

Yellow Cab Taxi Service v. City of Twin Falls, 68 Idaho 145, 190 P.2d 681 (1948).

6. Other Cases:

Aberdeen Cable TV Service, Inc. v. City of Aberdeen, 176 N.W.2d 738 (S.D. 1970).

Board of Supervisors of New Britain Township, 492 A.2d 461 (Pa. Commw. 1985).

Bylund v. Dept. of Revenue, 9 Or. Tax 76 (1981).

Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI, Ltd., 678 F. Supp. 871 (N.D. Ga. 1986).

City of Issaquah v. Teleprompter Corporation, 611 P.2d 741 (Wash. 1980).

City of Owensboro v. Top Vision Cable Company of Kentucky, 487 S.W.2d 283 (Ky. 1972).

Community Tele-Communications, Inc. v. the Heather Corporation, 677 P.2d 330 (Colo. 1986).

Devon-Aire Villas Homeowners Association No. 4, Inc. v. Americable Associates, Ltd., 490 So.2d 60 (Fla. App. 1985).

Las Cruces TV Cable v. New Mexico State Corporation Commission, 707 P.2d 1155 (N. Mex. 1985).

Media General Cable of Fairfax [Va.], Inc. v. Sequoyah Condominium Council of Co-Owners, 991 F.2d 1169 (4th Cir. 1993).

New York Trust Company v. Eisner, 256 U.S. 345, 41 S. Ct. 506, 65 L. Ed. 963 (1921).

Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982).

Sacramento Orange County Cable Communications Company v. City of San Clemente, 59 Cal. App. 3d 165, 130 Cal. Rptr. 429 (1976).

Shaw v. City of Asheville, 152 S.E.2d 139 (N.C. 1967).

Southwestern Bell Telephone Co. v. United Video Cablevision of St. Louis, Inc., 737 S.W.2d 474 (Mo. App. 1987).

Town and Country Management Corp. v. Comcast Cablevision of Maryland, 520 A.2d 1129 (Md. Ct. Spec. App. 1987).

7. Other Authorities:

3 Antien Municipal Corporation Law, Franchises: Public Utility Regulation § 29.03 (1993).

12 McQuillan Mun. Corp., Franchises § 34.08 (3d ed. 1986).

47 C.F.R. §§76.900 *et seq.*

58 Fed. Reg. 63091-92 (No. 228, November 30, 1993).

59 Fed. Reg. 6903 (No. 30, February 14, 1994).

59 Fed. Reg. 17957-61, 17972-75, and 17989-92 (No. 73, April 15, 1994).

DATED this 10th day of November, 1994.

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Analysis by:

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[1] These acts added or amended Title VI--Cable Communications, §§ 601 *et seq.*, to the Communications Act of 1934. They are codified at 47 U.S.C. §§ 521 *et seq.* This opinion gives parallel references to the sections of the Communications Act of 1934 and to the United States Code in discussing these acts because both are often used in the literature. Further, this opinion assumes that the cable television systems subject to local franchising are engaged in interstate commerce subject to regulation under those acts, *i.e.*, it does not address the unusual situation of a purely intrastate operation of transmission of a signal without any interstate origin. *Cf.* Las Cruces TV Cable v. New Mexico State Corporation Commission, 707 P.2d 1155 (N. Mex. 1985), suggesting there may not be federal preemption in such circumstances.

[2] Note the extensive revisions to these regulations in the last year: The rate regulations contained in the published codification of 47 C.F.R. parts 70 to 79, revised as of October 1, 1993, have been amended at 59 Fed. Reg. 17957-61, 17972-75, and 17989-92 (No. 73, April 15, 1994). *See also* 58 Fed. Reg. 63091-92 (No. 228, November 30, 1993), and 59 Fed. Reg. 6903 (No. 30, February 14, 1994).