IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

No. 80-1882

COMMUNITY COMMUNICATIONS COMPANY, INC. Plaintiff-Appellee, v. CITY OF BOULDER, COLORADO, et al., Defendant-Appellant.	)	Appeal from the United States District Court for the District of Colorado

BRIEF OF THE COLORADO MUNICIPAL LEAGUE
AS AMICUS CURIAE

BLAKE T. JORDAN
Reg. No. 009786
Staff Attorney

COLORADO MUNICIPAL LEAGUE
4800 Wadsworth Blvd., Suite 204
Wheat Ridge, Colorado 80033

Telephone: 421-8630

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes:

INTEREST OF THE COLORADO MUNICIPAL LEAGUE AS AMICUS CURIAE

The Colorado Municipal League (League) is a nonprofit association of two hundred thirty Colorado municipalities. The primary objective of the League is to aid in the improvement of municipal government for the benefit of Colorado municipalities and their citizens.

The ability to serve the public interest by regulating the use of streets, utility poles and public ways is a matter of great concern to Colorado municipalities, whether those ways are used by cable television companies or any other enterprise. Colorado statutes grant regulatory power over the use of such areas to all municipalities. §31-15-702(1)(a)(VI), C.R.S. 1973, provides that governing bodies of municipalities have the power "to regulate and prevent the use of streets, parks and public grounds for...power and communication poles...." In addition, home rule municipalities such as Boulder derive regulatory power over local and municipal matters from Article XX, §6, Colo. Const.; this Court has held that regulation of the cable television business is a local and municipal matter. Community Communications Co. v. City of Boulder, 630 F.2d 704 (10th Cir. 1980). Ordinances in the League's files, dating from the early 1960's to the present, indicate that at least twenty-six Colorado municipalities have regulated cable television in some manner during that time period. This collection of ordinances is in no way comprehensive, and the number of Colorado municipalities involved in cable television regulation may in fact be much higher. It is important to municipalities that they retain regulatory power over the use of their public ways by an enterprise.

The District Court's Memorandum Opinion and Order of September 5, 1980 (496 F.Supp. 823) places the above interests in jeopardy. Insofar as the District Court's order was based on antitrust law, it contravenes this Court's earlier opinion in this case, and calls into question the state of the law with respect to antitrust liability. Insofar as the order was based on the First Amendment, it

places strict, and as yet undefined limits on the long-established ability of municipalities to regulate the use of their public ways. At a minimum, the order totally prohibits a municipality from restraining monopolization of its public ways by districting the city. The districting approach, which is designed to make diverse cable communications possible, is a reasonable means of achieving such diversity, and is in use in at least eight major cities, i. e., Houston, Oklahoma City, New York, Seattle, San Diego, Columbus, Los Angeles and Philadelphia. *See*, Supplemental Amicus Curiae Memorandum of the Colorado Attorney General In Support of Appellee CCC's Petition For Reconsideration *En Banc*, Appendix D, filed August 5, 1980.

For the above reasons, the League appears as amicus curiae in this case on behalf of the City of Boulder and its other member municipalities.

ISSUES PRESENTED FOR REVIEW

1. Does the First Amendment prevent municipalities from regulating the use of their public ways by cable television operators?

2. Are the antitrust laws applicable to Boulder's action of regulating cable television operations?

STATEMENT OF THE CASE

The League adopts the statement of the case as set forth in the brief of the City of Boulder.

ARGUMENT

I. THE BOULDER ORDINANCE IS A REASONABLE REGULATION OF NONSPEECH ACTION WHICH ONLY INCIDENTALLY AFFECTS SPEECH.

For purposes of the First Amendment, the operation of cable television facilities can be divided into two distinct elements. One is the choice of what programs to transmit, a choice arguably involving protected speech. The other is the erection and continual maintenance of a permanent cable in the public way. This latter action, which is the subject of the Boulder ordinance (Ordinance No. 4515, reprinted in Appellant's Appendix C), is not speech at all. Rather, it is the nonspeech element of a course of conduct leading to what is arguably speech, i.e., cable television transmissions.

It is established First Amendment law that when speech and nonspeech elements are combined in the same course of conduct, an important governmental interest in regulating the nonspeech element justifies incidental limitations on First Amendment freedoms. U.S. v. O'Brien, 391 U.S. 367, 376 (1968)). *See also*, Cameron v. Johnson, 390 U.S. 611, 617 (1968); Cox v. State of Louisiana, 379 U.S. 559, 563 (1965). As stated in Cox, nonspeech conduct "is subject to regulation even though intertwined with expression...." *Id.* at 563.

Even assuming that there are First Amendment freedoms involved in erecting and maintaining cable television lines in public ways, it is clear that such conduct consists solely of nonspeech action. Consequently, a municipality may regulate that conduct, in spite of an incidental limitation on speech, where it has an important governmental interest.

A. The *U.S. v. O'Brien* Case.

The U.S. v. O'Brien, *supra*, case involved the validity of a statutory provision making it unlawful to knowingly destroy a draft registration certificate. O'Brien was convicted of violating this statute when he publicly burned his

draft card as a protest against the Vietnam War. O'Brien argued that since his conduct was intended to express disagreement with the war, it was communicative speech protected by the First Amendment, and thus his conviction was invalid.

The Supreme Court characterized O'Brien's conduct as nonspeech action combined with protected speech. The Court then proceeded "on the assumption that the alleged communicative element in O'Brien's conduct" merited First Amendment protection, and set down a four-part test for regulation of such conduct:

> [W]hen "speech and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. ****[W]e think it clear that a governmental regulation is sufficiently justified if it is within the constitutional powers 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.

Id. at 376-377. The Court found that the statute met the above requirements and affirmed O'Brien's conviction.

B. The Boulder Ordinance Is Valid Under the *O'Brien* Test

The Boulder ordinance regulates only the nonspeech actions of Community Communications Co. (CCC), i.e., the erection and maintenance of cable television lines. It does so pursuant to an important governmental interest in preventing monopolization of a First Amendment forum, and any alleged effect on First Amendment speech is purely incidental. Under such circumstances it is clear that Boulder's ordinance is a valid regulation of nonspeech conduct under the four-part O'Brien test.

First, regulating the use of its streets and public ways by cable televi-

sion operators is clearly within the constitutional power of the City of Boulder. §31-15-702(1)(a)(VI), C.R.S. 1973 gives all Colorado municipalities the power to "regulate and prevent the use of streets, parks and public grounds for... power and communication poles...." In addition, home rule municipalities like Boulder derive plenary regulatory power over local and municipal matters from Article XX, §6, Colo. Const. The regulation of cable televison operations is a local and municipal matter. Community Communications Co. v. City of Boulder, 630 F.2d 704 (10th Cir. 1980).

Second, the Boulder ordinance furthers an important governmental interest, i.e., the interest of the public in avoiding monopolization of its public ways, and thus of an important First Amendment forum, by a single cable television operator.

To the extent that there are First Amendment freedoms involved in the erection and maintenance of cable television lines, the public way in which this activity takes place is a First Amendment forum. The nature of cable television technology is such that, to send programs to individual receivers, a physical cable must be erected between that receiver and the facility from which programs are transmitted. Consequently, the only way a cable television operator can transmit programs within a municipality is by using the public ways. If it is assumed that there are First Amendment implications in regulating the use of public ways by cable television operators, then First Amendment activity is taking place in those public ways. That being the case, the public ways have become a First Amendment forum.

The economics of the cable television business are such that it is very unlikely that even two different operators could or would choose to compete in the same geographic area. In the District Court and in its brief, Boulder has fully substantiated the historic and economic fact that cable television

is a natural economic monopoly; no purpose would be served by repeating that evidence here. *See,* Statement of the Case, Brief of City of Boulder. In any case, regardless of whether cable television is or has been a natural monopoly in other locations, the fact remains that in Boulder, cable television was and is developing as a monopoly. In the preamble to Boulder's districting ordinance, the City found that "each of the cable communications applicants" which the City had solicited to compete with CCC "declined such a permit on any terms and requested a permit covering areas within the City from which [CCC] would be excluded...." Consequently, in the absence of governmental action, Boulder's public ways will be monopolized by a single cable television operator.

The First Amendment is intended "to preserve an uninhibited marketplace of ideas...rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969). It is established that government has a legitimate interest in promoting the purpose of the First Amendment by preventing the economic monopolization of an important First Amendment forum. In Associated Press v. U.S., 326 U.S. 1 (1945), the Court addressed the issue of the application of the Sherman Act to an association of newspaper publishers. In response to the argument that the First Amendment prohibited such an application, the Court stated:

> It would be strange indeed however if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. The Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society.

Id. at 20. The Court held that the First Amendment did not prevent application of the Sherman Act.

The Associated Press case establishes that government has a substantial and important interest in preventing the economic monopolization of a First Amendment forum.[1] It is significant that this rule was established in the context of regulations affecting the traditional press, which has historically enjoyed the strictest of First Amendment protections.

It is also significant that the First Amendment forum here at issue, i.e., streets and other municipal rights of way, is public property. It has long been established that "[t]he State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." Adderly v. State of Florida, 385 U.S. 39, 47 (1966). Thus, in Adderly, the State was allowed to totally prohibit demonstrations on property used as a jail. In spite of the fact that such conduct admittedly involved protected speech, it was inconsistent with the purposes to which the jail was dedicated, and could be prohibited. *See also*, Cox v. State of Louisiana, 379 U.S. 559 (1965) (statute prohibiting picketing in or near courthouse upheld).[2] Insofar as the public ways, which are held in trust for the public, are dedicated to the purpose of housing facilities such as cable television lines,

---

1 As pointed out in Section I(C) below, Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), is not inconsistent with this rule.

2 The interest of the government in controlling the use of its property is so significant that, in certain circumstances, it "may bar from its facilities certain speech" which, on the basis of its content, "would disrupt the legitimate governmental purpose for which the property has been dedicated." Consolidated Edison Co. v. Public Service Comm'n, 48 LW 4776, 4778 (June 20, 1980). *See also*, Greer v. Spock, 424 U.S. 828 (1976); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974). Since the Boulder ordinance is clearly content-neutral, a content regulation is not an issue in this case. However, the above decisions demonstrate the significance of the governmental interest in controlling the use of its property.

they should be used in a manner which will protect the interests of the public, i.e., in a manner which will avoid monopolization of that property and of an important First Amendment forum. As part of its right and obligation to preserve the use of its property, Boulder can limit activity which is inconsistent with these public interests.

Consequently, to the extent that the public ways are a First Amendment forum for cable television operations, the government has a substantial interest in preventing monopolization of that forum. That interest is enhanced by the fact that the forum in this case is property dedicated to the use of the public. Activity which monopolizes this property is clearly inconsistent with the public's First Amendment interest in a diverse use of an important First Amendment forum. Thus, government has a substantial interest in limiting such activity so as to make diversity possible.

The Boulder ordinance clearly furthers this important governmental interest by making it possible for other cable television operators to enter the market. As a result, diverse and varied programming will be made available to Boulder citizens, and an important First Amendment forum will not be monopolized by a single cable television operator.

The third part of the O'Brien test requires that the regulation be unrelated to the suppression of free speech. Boulder's districting ordinance also meets this essential criterion. The ordinance is directed solely at the non-speech actions of erecting and maintaining cable television lines and related appurtenances. It makes no reference to the content of CCC's programs, nor does its operation depend on such content. This is not a case where the governmental interest in regulating conduct arises "because the communication.... integral to the conduct is itself thought to be harmful." U.S. v. O'Brien, 391 U.S. at 382. There is no allegation or evidence that Boulder adopted the

ordinance as a method of suppressing CCC's "message." Indeed, the ordinance specifically provides for future "interconnection with other cable systems in the City of Boulder," so that CCC's message will be available throughout the City. Under such circumstances, it is clear that the districting ordinance relates only to the nonspeech actions of CCC, and any effect on alleged First Amendment freedoms is merely incidental.

Finally, the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of the governmental interest. The City has shown that the economics of the cable television business in Boulder have led to monopolization of an important First Amendment forum. It has been unable to get another cable operator to compete in the same territory with CCC. Given the fact that CCC had already established its plant in Boulder's public ways, the only way to prevent complete monopolization was by districting the City. Such an approach will make it economically possible for other cable television operators to enter the Boulder market, thus increasing the variety of information available to Boulder citizens. Such an approach, aimed solely at the nonspeech actions of CCC, was the minimum action the City could take to preserve a diverse use of an important First Amendment forum.

C. The *Miami Herald* Case Is Inapplicable To The Present Controversy

The District Court relied upon the decision in Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) for the proposition that an economic monopoly of a First Amendment forum does not justify governmental regulation. Community Communications Co. v. City of Boulder, 496 F. Supp. 823, 830 (D.C. Colo. 1980). However, this case deals with a regulation which compelled speech and is thus inapplicable to the facts of the present controversy.

The issue in Miami Herald was the validity of Florida's "right to reply" statute. The statute granted a political candidate a right to equal space to

answer criticism and attacks on his record by a newspaper, and made it a misdemeanor for the newspaper to fail to comply. A publisher challenged this statute, contending that because it regulated the content of newspapers, it was invalid under the First Amendment.

The statute was defended on the ground that it was necessary to counteract the economic monopolization of the press. The Court cited numerous statistics and reports to the effect that economic factors had caused the "disappearance of vast numbers of metropolitan newspapers," leaving a national press which had become "noncompetitive." *Id.* at 249. The statute's proponents also cited Associated Press v. U.S., 326 U.S. 1 (1945) for the rule that government can take action to prevent monopolization of a First Amendment forum. That case, which holds that the government can use the antitrust laws to prevent action which will "restrain or monopolize" the sale of news to newspapers, is discussed in detail in section I(B) above.

The Supreme Court distinguished the Associated Press case and held that, because the Florida statute compelled editors "to publish that which 'reason' tells them should not be published" and exacted "a penalty on the content of the newspaper," it was impermissible under the First Amendment. *Id.* at 256.

With respect to the Associated Press case, the Court stated that there it had "carefully contrasted the private 'compulsion to print'" called for by the AP rules with the lower court decree which applied the antitrust laws to the association. *Id.* at 254. It found that the decree

> does not compel AP or its members to permit publication of anything which their "reason" tells them should not be published.

Id. at 254. It was this fact which distinguished Associated Press from the facts of Miami Herald.

> [B]eginning with *Associated Press, supra,* the

> Court has expressed sensitivity as to whether a restriction or requirement constituted the compulsion exerted by government on a newspaper to print that which it would not otherwise print, The clear implication has been that any such compulsion to publish that which "'reason' tells them should not be published" is unconstitutional.**** Compelling editors or publishers to publish that which "'reason' tells them should not be published" is what is at issue in this case.

Id. at 256.

The Boulder ordinance does not, of course, compel CCC to publish anything at all.

The Court in Miami Herald also found that the Florida statute "exacts a penalty on the basis of the content of a newspaper" in that it requires extra time and money to print the reply. *Id.* at 256. Rather than incur those extra costs, a newspaper "might well conclude that the safe course is to avoid controversy," thus inhibiting political reporting. *Id.* at 257. Finally, the statute was constitutionally invalid "because of its intrusion into the function of editors." *Id.* at 258.

It can be seen that the Miami Herald case is readily distinguishable from the present controversy. The essential factor in that case was the compelled publication, an element which is completely missing from the Boulder ordinance. The ordinance is totally content-neutral, and thus does not place a penalty on the publication of any views. Neither does it interfere with the editorial discretion of CCC. Rather, it serves the same purpose that the antitrust laws served in the Associated Press case, i.e., to prevent monopolization of an important First Amendment forum.

II. IN REGULATING THE USE OF ITS PUBLIC WAYS BY CABLE TELEVISION OPERATORS, BOULDER IS EXEMPT FROM ANTITRUST LIABILITY

In Community Communications Co. v. City of Boulder, 630 F.2d 704 (10th Cir. 1980), this Court addressed the issue of whether Boulder was exempt from antitrust liability in its enactment of a moratorium on the expansion of cable television within the City. The Court established the rule that where a Colorado home rule municipality is asserting a governmental (as opposed to proprietary) interest in the regulation of a "local and municipal matter" under Art. XX, §6, Colo. Const., its actions can be exempted from antitrust liability pursuant to the "state action" exemption doctrine of Parker v. Brown, 317 U.S. 341 (1943) and California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). The Court then held that the regulation of cable television was a local matter, that Boulder was acting in its governmental capacity, and that under the Parker-Midcal test,[3] Boulder was exempt from antitrust liability.

The facts of this appeal differ from those in the above Boulder case only insofar as the moratorium on expansion has now become permanent. Yet, this difference led the District Court to hold that Boulder is now asserting a proprietary interest in cable television. 496 F. Supp. at 828.

The mere fact that the moratorium has become permanent does not transform Boulder's interest from governmental to proprietary. In the first Boulder case, this Court made it very clear that, in regulating the expansion of cable television "[t]he City is not in the television in any way...." and that consequently "[t]here is no element of proprietary interest of the City." 630 F.2d at 707. That fact has not changed. Boulder does not own or operate

---

[3] The test requires that the challenged restraint be "one clearly articulated and affirmatively expressed as State policy" and one which is "actively supervised by the State itself." Community Communications Co. v. City of Boulder, 630 F.2d at 708.

any cable television facility, it does not provide cable television service, and it is not competing with CCC in any way. Under such circumstances, it is clear that Boulder is asserting only a governmental interest in regulating the use of its public ways.

The District Court's conclusion that "through the mechanisms required by Midcal, the City must take control of the future of cable television in Boulder in a manner which is actually proprietary" betrays a basic misunderstanding of this Court's decision in the first Boulder case. 496 F. Supp. at 828. As pointed out above, that case held that where the governmental entity is asserting a governmental rather than a proprietary interest, the Parker-Midcal doctrine is applicable to exempt the entity from antitrust liability. This doctrine requires active supervision of an affirmatively expressed policy. However, under the District Court's decision, this "active supervision" automatically means that the governmental entity has taken "control" so that it is somehow asserting a proprietary interest. In effect, the District Court has nullified this Court's decision in the first Boulder case. Under the District Court's decision, a municipality will never be able to use the Parker-Midcal doctrine because the "active supervision" requirement of that doctrine transforms a governmental interest into a proprietary one. It is clear that such circuitous logic is inconsistent with this Court's decision in the first Boulder case.

Finally, the District Court has also questioned whether Boulder had the authority under Art. XX, §6, Colo. Const. to make the moratorium permanent. 496 F. Supp. at 828. However, in the first Boulder case, this Court clearly held that

> "[U]nder the Colorado Constitution and under the Manor Vail decision...the regulation of the business of cable TV is well within the power and authority of the City of Boulder.

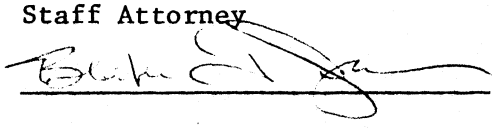
630 F.2d at 707. Boulder's action of making the moratorium permanent is simply

another, related method of regulating the cable television business. As such, it was clearly within Boulder's plenary power over "local and municipal matters" under Art. XX, §6, Colo. Const.

CONCLUSION

Based on the foregoing, it can be seen that (1) Boulder's ordinance is a valid regulation of nonspeech conduct under the O'Brien test, and (2) Boulder is exempt from antitrust liability for its actions of regulating cable television. Consequently, there is no likelihood that Appellees will succeed on the merits, and the preliminary injunction imposed by the District Court should be dissolved.

Blake T. Jordan
Reg. No. 009786
Staff Attorney



COLORADO MUNICIPAL LEAGUE
4800 Wadsworth Blvd., Suite 204
Wheat Ridge, Colorado 80033

Telephone: 421-8630

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief were served by depositing the same in the United States mail address to

Stephen M. Brett
Sherman & Howard
2900 First of Denver Plaza
633 Seventeenth Street
Denver, Colorado 80202

Harold R. Farrow
Farrow, Schildhause & Wilson
35 Embarcadero Cove
Oakland, California 94606

John A. Purvis
Hutchinson, Black, Hill,
Buchanan & Cook
P. O. Box 1770
Boulder, Colorado 80306

Dale R. Harris
Jeffrey H. Howard
Bruce T. Reese
Davis, Graham & Stubbs
2600 Colorado National Building
950 Seventeenth Street
Denver, Colorado 80202

Joseph N. de Raismes
Alan E. Boles, Jr.
Office of the City Attorney
Municipal Building
P. O. Box 791
Boulder, Colorado 80306

on this 24th day of December, 1980.

Shirley A. Wetrosky