

## OPINION NO. 75-066

**Syllabus:**

1. A noncharter municipality may grant a franchise to a cable television company, pursuant to the powers granted it by Article XVIII, Section 3 of the Ohio Constitution.

2. A franchise granted to a cable television company by a noncharter municipality is not a contract of the type for which specific performance is a clearly available remedy should the cable television company breach the contract.

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**To: Thomas E. Ferguson, Auditor of State, Columbus, Ohio**  
**By: William J. Brown, Attorney General, September 29, 1975**

I have before me your request for my opinion, which reads as follows:

"Does a noncharter municipality have the power to enter into a contract with a cable TV company to provide its residents cable TV services, the cost of such services being paid by the residents themselves? Can this contract be enforced by way of an action of specific performance instituted by the municipality or its residents?"

A noncharter municipality may grant a franchise to a cable television company. However, this franchise is not a contract of the type for which specific performance is an appropriate remedy available to the municipality.

The facts provided by you indicate that the type of agreement present in this case would grant to the cable television company a franchise with the right to string or run its cables and other necessary equipment in, over, and through the streets and alleys of the municipality. This franchise would be granted by a specific municipal ordinance and would contain rate and insurance provisions related to the operation of a cable television system in the municipality.

The grant of a franchise, when accepted by the grantee, constitutes a valid and binding contract. In East Ohio Gas Company v. City of Akron, 81 Ohio St. 33 (1909), the second branch of the syllabus reads as follows:

"When a municipal corporation, by ordinance, gives its consent that a natural gas company may enter the municipality, lay down its pipes therein and furnish gas to consumers upon terms and conditions imposed by the ordinance, which are accepted in writing by said company, such action by both parties constitutes a contract and the rights of the parties thereunder are to be determined by the contract itself."

For a more detailed analysis of the binding, contractual nature of franchises, see Board of County Commissioners v. Public Utilities Commission, 107 Ohio St. 442 (1923); Interurban Railway Co. v. Public Utilities Commission, 98 Ohio St. 287 (1918).

It is clear, therefore, that if a noncharter municipality has the authority to grant a franchise to a cable television company, the franchise would be a valid and binding contract between the company and the noncharter municipality.

The power and authority of a municipality is found in the Ohio Constitution. Prior to 1912 there was no express delegation of power to municipalities in the Ohio Constitution, and it was consistently held that municipalities possessed only such powers as were granted statutorily by the legislature. See Ravenna v. Pennsylvania Company, 45 Ohio St. 118 (1887).

In 1912, Article XVIII became part of the Ohio Constitution. This has come to be known as the "Home Rule" Amendment. The pertinent parts, Section 3 and 7, of Article XVIII, Ohio Constitution, read as follows:

"3. Powers.

"Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws."

"7. Local self-government.

"Any municipality may frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government."

Discussing the power granted to municipalities by Article XVIII, Section 3, the court in Billings v. Cleveland Railway Co., 92 Ohio St. 478 (1915) held, as stated in the first branch of the syllabus:

"The granting of permission and the making of a contract to construct and operate a street railway in the streets of a city or village is a matter that may be provided for in a charter adopted by a municipality under Article XVIII of the Constitution."

In that case, the court held that the making of such a con-

tract by a charter municipality was an exercise of the powers of local self-government granted to the municipality by Article XVIII, Sections 3 and 7 of the Ohio Constitution.

Similarly the granting of a franchise to a cable television company would also be an exercise of the powers of local self-government provided to municipalities. Accordingly, it would be permissible to allow such company to use the public streets to lay cables under, through or over for television purposes. Further, pursuant to its powers granted by Article XVIII, Sections 3 and 7, a charter municipality may include other regulations in the franchise pursuant to both its powers of local self-government and its power to exercise police power over matters of purely local concern, except that such police powers may not conflict with general state laws. As the court in Perrysburg v. Ridgway, 108 Ohio St. 245 (1923) stated, at 255:

"It would be a bold assertion to say that 'all powers of local self-government,' as used in the Ohio Constitution of 1912, did not include the power of complete regulation and control of the streets."

See also R.C. 723.01.

It is, therefore, clear that a charter municipality, pursuant to the power granted to it by Article XVIII, Sections 3 and 7, Ohio Constitution, may grant a franchise to a cable television company. The question then arises whether a noncharter municipality enjoys the same powers as the charter city pursuant to Article XVIII, Section 3, or whether Article XVIII, Section 3 applies only to municipalities which have adopted a charter pursuant to Article XVIII, Section 7 of the Ohio Constitution.

I had occasion to discuss the powers of noncharter municipalities pursuant to article XVIII, Section 3 of the Ohio Constitution in 1974 Op. Att'y Gen. No. 74-086, wherein I stated, citing Leavers v. City of Canton, 1 Ohio St. 2d 33 (1964):

"Noncharter cities may exercise the same powers of local self-government as charter cities, so long as the exercise of such powers is not inconsistent with the general laws of the state."

Further, in Perrysburg v. Ridgway, supra, pertinent branches of the syllabus read as follows:

"1. Since the Constitution of 1912 became operative, all municipalities derive all their 'powers of local self-government' from the Constitution direct, by virtue of Section 3, Article XVIII, thereof.

"2. The power to establish, open, improve, maintain and repair public streets within the municipality, and fully control the use of them, is included within the term 'powers of local self-government.'

"5. The grant of power in Section 3, Article

XVIII, is equally applicable to municipalities that do adopt a charter as well as those that do not adopt a charter, the charter being only the mode provided by the Constitution for a new delegation or distribution of the powers already granted in the Constitution." (Emphasis added.)

Therefore, a noncharter municipality may exercise all powers available under Article XVIII, Section 3 of the Ohio Constitution so long as such exercise of power does not in any way contravene state law. The "powers of local self-government" are in no way dependent upon Article XVIII, Section 7, which provides that a municipality may adopt a charter.

I find no statute in Ohio which specifically addresses cable television or its operation, nor is cable television specifically defined as a public utility subject to regulation by the Public Utilities Commission of Ohio. See R.C. 4905.02. With the legislature having remained silent as to the granting and regulation of franchises for cable television I must conclude that a noncharter municipality may grant such a franchise without danger of inconsistency with general laws in Ohio. See also Greater Fremont Inc. v. Fremont, 302 F. Supp. 652 (N.D. Ohio, 1968) where the court found a clear right for municipal regulation of erection and maintenance of the distribution system of cable television.

You next inquire whether the municipality may enforce a cable television franchise by way of an action for specific performance, should the cable television company breach in its obligation to provide service to the municipality.

It should be remembered that specific performance is an extraordinary remedy in equity, generally granted when monetary damages are inadequate or irreparable harm would be done by not granting specific performance.

It must also be remembered that, because specific performance is an equitable remedy, the facts and circumstances of each particular case are important. Accordingly, it is not possible to consider whether specific performance would be granted in individual instances without considering all the facts and circumstances of each individual case.

The Court, in East Cleveland v. Cleveland Railway Company, 2 Ohio L. Abs. 649 (1924), in denying to grant specific performance to compel a street railway to operate according to a city ordinance, held:

"A court of equity will not affirmatively decree specific performance of a contract requiring continuous acts, neither will it affirmatively decree specific performance where the execution of the decree would require supervision of acts of either of the parties extending over a considerable period of time."

In Akron Milk Producers, Inc. v. Lawson Milk Company, 77 Ohio L. Abs. 275 (1958), the court, at p. 283, stated:

"[A]nd the Courts of Ohio have consistently refused to order specific performance of

contracts which would require continuing supervision by the Courts."

"If, in any case, it would be competent for a court to decree the specific performance of a contract to operate a railroad, requiring, as it would, personal acts, involving the continuous exercise of skill and judgment under varying circumstances and emergencies, it could only be in a cause where the demand for the exercise of such a power was stringent, and the circumstances such as to authorize the court in making an order to limit its duration as to time, and to define, to some proper and reasonable extent, the mode and manner in which it should be obeyed."

It can be stated that, unless the circumstances are very extraordinary, a court will not grant specific performance where such decree will involve the court in a task of constant supervision to insure that the party against whom the decree is issued is performing the contract. It appears that the instant situation is one where the court would become involved in a constant, continuing job of supervision if a decree of specific performance were granted. The day-to-day operation of a cable television company is analogous to the operation of a street railway in that both require skills and judgments be exercised while rendering their services. To compel the cable television company to continue its performance would indeed involve continuous supervision on the part of the court. Thus, I conclude that a franchise granted to a cable television company by a noncharter municipality, is not a contract of the type for which specific performance is an equitable remedy readily available to the municipality. The facts and circumstances of each case must be examined before such remedy is granted or denied.

In specific answer to your questions, it is my opinion and you are so advised that:

1. A noncharter municipality may grant a franchise to a cable television company, pursuant to the powers granted it by Article XVIII, Section 3 of the Ohio Constitution.
2. A franchise granted to a cable television company by a noncharter municipality is not a contract of the type for which specific performance is a clearly available remedy should the cable television company breach the contract.