

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-001524-OA

TCI/TKR CABLE OF NORTHERN KENTUCKY,  
INC., D/B/A TKR CABLE OF NORTHERN  
KENTUCKY, INC.; TCI/TKR CABLE OF SOUTHERN  
KENTUCKY, INC., D/B/A TKR CABLE OF  
SOUTHERN KENTUCKY, INC.; TCI CABLEVISION OF  
NORTH CENTRAL KENTUCKY, INC.;  
TCI CABLEVISION OF KENTUCKY, INC.;  
INTERMEDIA PARTNERS OF KENTUCKY, A LIMITED  
PARTNERSHIP

PETITIONERS

v. ORIGINAL ACTION  
REGARDING FRANKLIN CIRCUIT COURT

HON. WILLIAM L. GRAHAM  
JUDGE, FRANKLIN CIRCUIT COURT

RESPONDENT

AND

CHARLES SHAW;  
LORETTA SHAW

REAL PARTIES IN INTEREST

AND; NO. 2000-CA-001621-OA

INTERMEDIA PARTNERS OF KENTUCKY, L.P.;  
TCI/TKR OF JEFFERSON COUNTY, INC.;

PETITIONERS

v. ORIGINAL ACTION  
REGARDING JEFFERSON CIRCUIT COURT

HON. LISABETH H. ABRAMSON  
JUDGE, JEFFERSON CIRCUIT COURT,  
DIVISION THREE

RESPONDENT

AND

JAMES F. DOOLEY;  
ALFRED P. SYKES JR.;  
CHARLES PEARL, AND  
LINDA PEARL

REAL PARTIES IN INTEREST

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OPINION AND ORDER  
DENYING CR 76.36 RELIEF

BEFORE: DYCHE, GUIDUGLI, AND TACKETT, JUDGES.

TACKETT, JUDGE: These two original actions are being reviewed together because they raise the same issue and seek the same relief. Each was prompted by the denial of petitioners' motion to dismiss action for lack of subject matter jurisdiction. The controversy in both cases centers around petitioners' "pass-through" of a pro rata share of the Kentucky Public Service Corporation Tax (hereinafter KPSC Tax)<sup>1</sup> to their customers through separate line itemization, rather than embedded in the basic monthly cable rate. The query addressed below, and now presented to this Court, relates to whether the pending complaints challenging the lawfulness of that practice establish the actions as cable television rate regulation cases, an area over which the United States Congress has delegated exclusive jurisdiction to the Federal Communications Commission (FCC) and to the local franchising authorities (LFA's). Petitioners contend that they do and, consequently, ask this Court to require the respondent trial courts to dismiss the actions.

In Franklin County, the litigation pending before the Honorable William L. Graham was initiated by Charles Shaw and

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<sup>1</sup> The tax is imposed on cable companies' tangible and intangible business property. Kentucky Revised Statute (KRS) 136.120.

Loretta Shaw (hereinafter the Shaws). The gravamen of their complaint is that petitioners are including the KPSC Tax as a separate charge in their monthly cable service bills under the line item designation "State/Local Tax" and/or "Prop/Facility Tax". They contend that this billing practice "is calculated to mislead the defendants' subscribers into believing that said charge is "permitted and authorized" and "is a condition precedent to the customers' continued receipt of cable television services." The complaint includes counts for violation of the Kentucky Consumer Protection Act; fraudulent misrepresentation; concealment and nondisclosure; and breach of contract. Relief sought includes monetary damages and injunctive relief.

In denying petitioners' motion to dismiss for lack of subject matter jurisdiction, Judge Graham rejected their argument that the Shaws' fraud claim regarding the cable companies' treatment of a state property tax relates to regulation for purposes of federal preemption. The court found that Congress did not, expressly or by virtue of its intent spelled out in the Cable Television Consumer Protection and Competition Act of 1992 (hereinafter The Cable Act), 47 United States Code (U.S.C.) § 521 et seq., totally preempt state court action over the treatment of state taxes by cable companies. The Franklin Circuit Court determined that, although said treatment affects the rates as charged, it does not compromise the intent of Congress to make rate regulation uniform. Judge Graham concluded that the Shaws' claims were properly before him because his review will be limited to the resolution of state statutory and common law

questions.

In Jefferson County, the consolidated litigation pending before the Honorable Lisabeth H. Abramson was initiated by the real parties in interest, James F. Dooley, et al., and its substantive content is essentially the same as that set forth in the Franklin County action.<sup>2</sup> An amended complaint added a count for violation of the Cable Act and 47 Code of Federal Regulations (CFR) 76.985 and, further, invoked KRS 446.070 in support of a private cause of action for violation of the federal statute and regulation.

Judge Abramson dismissed the claims brought under the Cable Act and under KRS 446.070 but otherwise denied petitioners' motion to dismiss for lack of subject matter jurisdiction. She refused to label the case as being "rate" or "not rate". Rather, she answered in the affirmative the question as to whether the plaintiffs have made claims not affecting cable rate structure and that a state court could consider under state consumer protection, contract and tax laws without invading the FCC's exclusive jurisdiction to regulate cable television rates. Judge Abramson distinguished Time Warner Cable v. Doyle, 66 F.3d 867 (7th Cir. 1995), a case on which petitioners rely. She found that, while Time Warner involved a challenge to a provider's

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<sup>2</sup>Petitioners sought to remove the pending actions to federal court. The United States District Court, Western District of Kentucky, stated that it did not "find that Congress manifested the clear intent to completely preempt the area of cable television billing practices." It concluded that, in the absence of complete preemption, it lacked the subject matter jurisdiction to address the merits of petitioners' defense. Therefore, the court remanded the actions to state court "to decide the preemption issues and other defenses. 28 U.S.C. § 1447(c)."

negative option billing practice, thereby putting cable rates at issue, the case sub judice involves "whether a particular state property tax can be passed through to the subscriber on a separate line item" and "is not about the rate for services."

Petitioners claim entitlement to the extraordinary remedy of a writ based on the argument that, the state courts being without jurisdiction, it is desirable to terminate litigation early to economize resources and to prevent unlawful assumption of judicial authority.

On the merits, petitioners contend the tax is a charge that comes within the federal regulatory rate structure and that allowing individual subscribers to seek redress in state court regarding previously paid rates would interfere with the uniform federal scheme of rate regulation and would be a subversion of the regulatory balance intended by Congress. They advance the conclusion that, because the Cable Act expressly preempts state regulation of cable rates, the pending state law claims, which are about federally regulated cable rates, are not within state court jurisdiction.

Having thoroughly reviewed the arguments and the appended record, the Court determines that these original actions are not well taken. Therefore, it is ORDERED that the petitions for writ of prohibition and the motions for oral argument be DENIED.

The Court is mindful that the Cable Act includes an explicit and expansive provision for the federal preemption of the regulation of cable rates. The statute provides as follows:

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 532 of this title. 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 . . . .

47 U.S.C. §543(a)(1). As correctly determined by both Judge Abramson and Judge Graham, this provision is to be read in conjunction with that set forth in 47 U.S.C. §552 (d)(1) which provides:

Nothing in this title shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this title.

Clearly, this statute recognizes the continued viability of state consumer protection laws unless "specifically preempted" and petitioners have failed to advance any federal authority which would specifically preempt state action over the state law claims asserted by the plaintiffs below. Neither do they point us to any authority that would support an argument that state action thereon is preempted impliedly or by conflict.

Our review of the case law on which petitioners rely only bolsters the conclusion that Congress did not intend complete federal preemption of state regulation connected to cable television billing practices, and that concurrent jurisdiction exists with state courts where the state law does not conflict with the operation of the cable rate structure, and where the issues raised in the state claims do not jeopardize the stability of the rate structure and, we might add, do not appear

to require agency expertise for resolution.

We shall quote the United States Court of Appeals for the Second Circuit:

[The] structure of the Cable Act is wholly inconsistent with the claim that Congress intended to pre-empt all state regulations with an affect on the rates cable companies charge for the provision of cable services . . . .

. . . .

[W]e think Congress meant to pre-empt only those state rules that regulate rates charged by cable companies for providing services to customers.

Cable Television Ass'n v. Finneran, 954 F.2d 91, 101-02 (2<sup>nd</sup> Cir. 1992).

We shall also quote the United States Court of Appeals for the Seventh Circuit:

Each version of the statute, but especially the new version, applicable in this case, suggests that Congress envisioned a regulatory regimen in which cable regulators would be subject both to the federal requirements of the 1992 Cable Act with respect to matters of rate regulation and, at the same time, to the requirements of certain state consumer protection laws.

Time Warner Cable v. Doyle, 66 F.3d 867, 878 (7th. Cir. 1994).

The plaintiffs below are not challenging the legality of a rate for the provision of cable services. They are not even challenging the amount of a charge appearing on their bills. What they are challenging is the legality of a billing practice they allege is "calculated to mislead" them into thinking the charge has been "authorized"<sup>3</sup> and is a "condition

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<sup>3</sup> It must be noted that petitioners sought an opinion from the FCC. The FCC responded with a letter which is not a final pronouncement on the matter. In fact, the document concludes

precedent" to maintaining cable service. Both trial courts correctly recognized that the FCC would have exclusive jurisdiction were the charge the plaintiffs are challenging one that is embedded in the basic cable rate. Judge Graham specifically found that "pass-through fees per se may be subject to exclusive federal jurisdiction, but that is not what is before this Court." Judge Abramson stated that "clearly, if the present case required this Court to determine whether the KPSC Tax should have been embedded in Defendant's rates and approved by the franchising authorities in the first instance, the rate for services would be at issue." We agree with the trial courts that the controlling element is not that the addition of the state tax to customer bills is affecting the rates as charged. Rather, we see it as being rooted into petitioners' chosen method of passing it to their customers and the nature of the claims made against it.

In conclusion, this Court is of the opinion that state court adjudication of the state law claims at issue does not invade the expressly preempted realm of rate regulation even though, as noted by Judge Graham, "these state law claims concern underlying collateral federal issues . . . ."

ALL CONCUR.

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with the statement: "[i]f the subject matter in question is covered by the Commission's rules, issues relating thereto should be resolved in accordance with our regulatory procedures." We understand that certain administrative proceedings in Northern Kentucky and in Jefferson County preceded the initiation of the litigation discussed herein. While they remain pending at this time in Northern Kentucky, petitioners have settled with the FCC and the LFA's in Jefferson County.



ENTERED: September 29, 2000

/s/ Julia K. Tackett  
JUDGE, COURT OF APPEALS

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