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Cable television company may exercise eminent domain

by Judith Gorske

In *Cablevision of the Midwest, Inc. v. Gross*, 639 N.E.2d 1154 (Ohio 1994), the Ohio supreme court held that a cable television company is a "communications business" under state statute, and is therefore entitled to exercise the statutory power of eminent domain in erecting its cable lines over private property. The court further held that state statutes granting the power of eminent domain to cable television companies were not preempted by the federal Cable Communications Policy Act.

Ousted cable television company seeks access to existing cable

Gary Gross and his brother, Harley, separately own but jointly manage two residential apartment complexes in North Royalton, Ohio. Each brother has a beneficial interest in the properties. The brothers formed a partnership, I. & M. J. Gross Company, to manage the properties.

In December 1984, Gary Gross granted a cable television operator, now Cablevision of the Midwest ("Cablevision"), the exclusive right to operate its cable system on his property in exchange for ten percent of the subscription income. The contract also provided that, at the end of the contract term, Gross would own the underground cables and the cables installed in the walls of his apartment complex.

On August 26, 1988, I & M. J. Gross Company contracted with Philips Consumer Electronics Company ("Philips") for the installation of a satellite master antenna television system ("SMATV") that would provide cable TV service to the tenants of both properties. Under this agreement, the wiring and the equipment installed underground and in walls became the property of I & M. J. Gross. The company also received a percentage of the revenues generated by the SMATV. In

exchange, Phillips would be the exclusive provider of cable services at both properties.

In order to avoid any conflict between this arrangement and the earlier agreement with Cablevision, Gross sent a letter of cancellation to Cablevision. Cablevision then brought this action in the Cuyahoga County Court of Common Pleas, seeking a declaration that Cablevision was authorized by law to appropriate a limited interest in the apartment complexes. In effect, they asked the court to authorize their continued access to, as opposed to ownership of, the existing cable. Cablevision based its claim on local ordinances and local and federal communications statutes.

Trial court holds eminent domain power stems from municipal grant

The trial court denied Cablevision's motion for partial summary judgment and granted the Gross' motion for summary judgment on all issues. Cablevision appealed. The Eighth Ohio District Court of Appeals affirmed in part and reversed in part, concluding that Cablevision was not a "communications business" and therefore was not included in the local statute that granted the power of eminent domain to such businesses. The court also determined that even if the company were a "communications business," the local statute would be preempted by the federal Cable Communications Policy Act of 1984.

Nevertheless, the court of appeals held that Cablevision had a limited interest in the Gross' property. In effect, when North Royalton granted Cablevision a 12-year non-exclusive franchise to "construct, operate and maintain a cable television system in the streets of North Royalton," they validly delegated their municipal power of eminent domain to Cablevision.

Ohio statute labels cable television company a communications business

The Ohio supreme court first considered whether Cablevision was a “communications business” under Ohio’s communication statute. The statute provides in part that “[a]ny company organized at any time to transact a telegraph, telephone or communications business may construct, . . . operate, . . . and improve communications systems for the transmission of voices, sounds, . . . signals, pictures, visions, . . . or other forms of intelligence, as public utility services, by means of wire cable”

The court began by stating that it would enforce the literal language of the statute even if it resulted in an unfavorable outcome. The Ohio supreme court then noted that the statute failed to define “communications business.” The court concluded, however, that the inclusion of this broad term in the statute suggested a legislative intent to include forms of communication beyond the technology available at the time the statute was enacted. The court noted that “[t]he method of transmission employed by a cable television system is expressly mentioned” in the statute. Finally, the Ohio supreme court analogized the language used to other sections of the statute that define “cable television system,” noting the similar language in these sections. Thus, the court concluded that Cablevision was a communications business entitled to eminent domain authority.

Federal law prohibits regulation of cable television systems as a public utility

The court next turned to Section 541(c) of the Cable Communications Policy Act, which prohibits the regulation of a cable system as a public utility. The court considered whether the federal statute preempted state authority to label a cable television company a “communications business.” The court concluded that treating Cablevision as a communications business under the Ohio statute does not violate federal law because the statute does not require a communications business to be regulated as a public utility and the federal statute is aimed at regulation rather than terminology. Accordingly, the Ohio supreme court affirmed the judgment of the court of appeals.

Dissent argues cable television is not a public necessity

In his dissent, Justice Pfeifer argued that cable television companies should not be included in the term “communications business.” He stated that, under general rules of statutory construction, the examples of telegraph and telephone companies within the statute limited the term “communications business” to companies in the same general class. Justice Pfeifer also urged that the power of eminent domain ought to be conferred with special care and limited to items necessary to the public welfare. Cable television, unlike the telephone, is not a necessary means of communication. Therefore, courts should proceed with caution before including them within a statute that permits property to be taken from individual owners for the public welfare.

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