

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments

MB Docket No. 07-51

Reply to "Reply Comments of the New Jersey Division of Rate Counsel"

The New Jersey Division of Rate Counsel raises a number of points, but does not address the question of exclusive contracts on its merits. Instead, it primarily focuses on whether the question should be decided by the states or by the federal government.

As Rate Counsel admits, the Tenth Amendment reserves to the states only those "powers not delegated to the United States by the Constitution". The power "[t]o regulate Commerce with foreign Nations, and among the several States" is specifically delegated to the federal government in Article 1, Section 8, of the Constitution. Considering that the location of Rate Counsel's offices (Essex County, New Jersey) is normally served by six VHF stations from another state (New York) and only one from Rate Counsel's own state (New Jersey), it is shocking that Rate Counsel seems to be unaware that television transmissions cross state lines. The power to regulate interstate commerce applies to all stages of a product's movement from production in one state to consumption in another, and not merely those stages in which a border is crossed. For example, the Interstate Commerce Commission has regulated truck drivers transporting goods from a building to a railroad station in the same state, provided that the goods would eventually be transported to another state (by the railroad train), even if the truck drivers did not personally cross state lines. Merely the fact that some of the television programming (or even one of the television commercials) is produced in another state is sufficient to establish that the delivery to the final consumer is interstate commerce, which can be regulated under Article 1, and is not reserved to the states under Article 10.

Ironically, the New Jersey government was on the opposite side in the landmark case that established the standard that it now seeks to vitiate. This case involved the operation, in New York waters, of a vessel that was violation of an exclusivity provision. The exclusivity provision was legal under New York law, but New Jersey had passed a law that contradicted the New York law and allowed the vessel to operate in New York in violation of the provision, provided that it was traveling to or from New Jersey, and not merely within New York State. Not only did the United States Supreme Court find in favor of the operator, it held that it was repugnant to the Constitution for a state to decide to allow a company to be an exclusive operator in interstate commerce, even if the exclusivity applied only within its own borders. In any stage of interstate commerce, the federal government, not the states, decides whether to allow exclusivity. The case, of course, was *Gibbons v. Ogden*, 22 U.S. 1 (1824).

Recently, the federal government decided to regulate the information that must be provided to purchasers during the sale of non-digital televisions, even if the television is already in the state in which it will be used. This is not a violation of the Constitution, because the sale of the television is a part of the commerce that begins with its production (usually in a foreign nation) and includes its use to watch programming from another state or commercials advertising travel to another state. If Rate Counsel prevails in this proceeding, then those rules will need to be rescinded, and the decision of whether to allow analog television sales to continue indefinitely will need to be made at the state level, by each state individually. The planned transition to "DTV" will not be able to occur until every state consents.

In a world where the Internet is commonly called "the information superhighway", commerce through electronic means is entitled to the same protections afforded commerce by vessel. In 1824, it was possible for one vessel to carry goods or persons to the state line, and transfer them to another vessel for carriage to their final destination, with neither vessel crossing the border. In this way, commerce could have occurred even if no one vessel was allowed to operate in both states. However, it is both technically and practically unfeasible to stop atmospheric television signals precisely at a state line. Therefore, the case for federal jurisdiction in interstate broadcasting is even greater than it was in the decided case.