

TOP OF THE WEEK

Cable: It can't lose for winning

For cable television, it was three-for-three in the courts last week. At the Supreme Court in Washington, justices upheld that medium's new hold on distant signals and freedom from syndicated exclusivity prohibitions. And, in the Boulder case, they opened cities to antitrust attack and may have weakened their hold on the franchising process. While in Utah, a federal judge struck a First and Fourteenth Amendment blow for the medium in enjoining an obscenity statute being used to keep sexual acts and nudity off cable. Those stories follow.

In Boulder-TCI case, Supreme Court rules that city's prohibition against wiring was illegal restraint of trade

The Supreme Court ruled last week that municipalities are vulnerable to antitrust suits filed by losing cable franchise applicants or any other private company denied the opportunity to operate in the municipality.

The court's 5-to-3 decision stemmed from a quarrel between Tele-Communications Inc., the nation's third largest MSO, and the city of Boulder, Colo., begun over two years ago. TCI, which operated a system serving about one-third of the city, sued the city after the city imposed an "emergency" 90-day moratorium on TCI's plans to expand and decided to entertain cable bids for the unwired portions of the city from other companies.

TCI won a preliminary injunction in the U.S. District Court, which held that Boulder unlawfully attempted to prevent TCI from obtaining new customers. The city's action, the court said, was an illegal restraint of trade. The court also rejected the city's argument that it could not be sued on antitrust grounds, an immunity inherent in the "home-rule" power it derived from the state.

But on appeal, the U.S. Court of Appeals for the 10th Circuit (Denver) lifted the injunction, ruling that the city was immune to antitrust suits.

The Supreme Court, however, chose to read narrowly the court's 1943 *Parker v. Brown* decision, which protects states from antitrust suits and which Boulder claimed also encompassed it and other home-rule cities. Justice William J. Brennan, who delivered the opinion, said the *Parker* exemption does not automatically extend to cities. "Ours is a 'dual system of government,'" Brennan said, "which has no place for sovereign cities." The city's moratorium cannot be immune "unless it

constitutes the action of the state itself . . . or municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy." The moratorium, Brennan said, failed to qualify on both counts.

Justice William H. Rehnquist, in his dissenting opinion, said the court's ruling will "impede, if not paralyze, local government's efforts to enact ordinances and regulations aimed at protecting public health, safety and welfare for fear of subjecting the local government to liability under the Sherman Act.

"As I read the court's opinion," Rehnquist said, "a municipality may be said to violate the antitrust laws by enacting legislation in conflict with the Sherman Act, unless the legislation is enacted pursuant to an affirmative state policy to supplant competitive market forces in the area of the economy to be regulated."

The decision, he continued, will "radically alter the relationship" between cities and states and destroy the "home-

rule" movement in the country.

Chief Justice Warren E. Burger and Justice Sandra Day O'Connor were the other dissenters.

In a concurring opinion, Justice John Paul Stevens said that "dissent's dire predictions . . . should . . . be viewed with skepticism." The ruling will not affect the merits of TCI's suit against the city, which "should be resolved in the first instance by the district court. . . . The violation is not nearly as simple as the dissenting opinion implies."

Procedurally, the case is remanded to the 10th Circuit Court, but most, like Justice Stevens, expect that it will ultimately wind up back at the district court where the case can be heard on its merits.

Cynthia Pols, of the National League of Cities, which has supported the city as the case has wended its way through the legal system, was hopeful that the appellate court would once again overturn the lower court's decision on other grounds. There are several good reasons for reversing the decision, she said. The appeals court could simply say: "'So what, the city is subject to antitrust; we have already found that it didn't violate it anyway,'" she said.

Since it encompasses all permits and franchises issued by "home-rule" cities, the court's decision reaches far beyond the confines of cable television. "It makes cities in home-rule states subject to a suit for any kind of governmental decision that is discretionary and . . . has any kind of exclusionary effect," Pols said. If the city permits only one vendor to sell hot dogs in the park, she said, every other vendor in

Spielvogel advises prudence in ad spending, says 'days of the annual double-digit increase in prices are over' for conventional TV.

Advertising agencies were urged last week to restudy their ways of conducting business this year because of recession and the squeeze on profits. So advised Carl Spielvogel, chairman and chief executive officer of Backer & Spielvogel, New York, at a meeting of the Eastern Region of the American Association of Advertising Agencies in New York. He warned that the media, particularly television, "are going to have to accept the fact that the days of the annual double-digit increase in prices are over."

Spielvogel said clients are seeking efficiencies in marketing budgets with the same intensity that they bring to other facets of their business, and added: "Traditionally, advertising agencies go through three-year cycles in which expense excesses and frill build up. With the economy getting weaker, now is the good time for agencies to go back to business basics."

Spielvogel observed that as a result of the inroads of cable, clients are "asking a great many questions about the changing dynamics of the network television audience." He added that agencies are asking these same questions too. "Clearly, it's not business as usual," Spielvogel commented.