STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
NEWCHANNELS CORPORATION	:	
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Fiscal Years Ended July 31, 1989 through July 31, 1992.	:	DECISION
	:	DTA NOS. 815139 and 815140
In the Matter of the Petition	:	
of	:	
UPSTATE COMMUNITY ANTENNA, INC.	:	
for Redetermination of a Deficiency or for Refund of Corporation Franchise Tax under Article 9-A of the Tax Law for the Period January 1, 1991 through December 31, 1992.	:	
	:	

Petitioners NewChannels Corporation, P.O. Box 4872, Syracuse, New York 13221-4872, and Upstate Community Antenna, Inc., c/o Morrison and Foerster LLP, 1290 Avenue of the Americas, New York, New York 10104-0050, filed exceptions to the determination of the Administrative Law Judge issued on April 2, 1998. Petitioners appeared by Morrison and Foerster LLP (Hollis L. Hyans, Esq. and Paul H. Frankel, Esq., of counsel). The Division of Taxation appeared by Terrence M. Boyle, Esq. (Kevin R. Law, Esq., of counsel).

Petitioners filed a brief in support of their exceptions. The Division of Taxation filed a brief in opposition and petitioners filed a reply brief. Oral argument, at petitioners' request, was heard on February 2, 1999 in Troy, New York.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUE

Whether, during the period in issue, petitioners were principally engaged in the conduct of a transmission business within the meaning of sections 183 and 184 of the Tax Law.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "1," "16" and "26" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

We modify finding of fact "1" of the Administrative Law Judge's determination to read as follows:

> Petitioner, NewChannels Corporation ("NewChannels"), filed corporation tax returns pursuant to Article 9 of the Tax Law for the fiscal years ended July 31, 1989 through July 31, 1991. Following a desk audit of those returns, the Division of Taxation ("Division") determined that NewChannels should have filed business corporation franchise tax returns pursuant to Article 9-A of the Tax Law and calculated its tax liability accordingly. As a result, the Division issued a Notice of Deficiency to NewChannels, dated January 28, 1994, asserting a corporation franchise tax deficiency of $4,216,307.00 plus penalty and interest for the fiscal years 1989, 1990 and 1991 (Notice No. L008428977). On May 9, 1994, the Division issued a Statement of Proposed Audit Changes to NewChannels, incorporating the period August 1, 1991 through July 31, 1992 into the audited period. The Division issued to NewChannels a Notice of Deficiency, dated June 20, 1994,

asserting a corporation franchise tax deficiency of $2,928,599.00 for the 1992 fiscal year (Notice No. L008768672).[1]

The Division conducted a desk audit of the corporation tax returns filed by Upstate Community Antenna ("Upstate") for the period January 1, 1991 through December 31, 1992. The Division determined that Upstate had erroneously filed its returns as a transmission company pursuant to Article 9 of the Tax Law and recalculated Upstate's tax liability pursuant to Article 9-A of the Tax Law. Consequently, it issued a Notice of Deficiency to Upstate, dated February 21, 1995, asserting a deficiency in corporation franchise tax for the audit period in the amount of $299,536.00 plus interest.

On July 12, 1995, a conciliation conference was conducted in the Bureau of Conciliation and Mediation Services ("BCMS") for both NewChannels and Upstate. At that conference, NewChannels and Upstate submitted business corporation franchise tax returns, calculating their tax liability for the audit years under Article 9-A of the Tax Law. These returns had been requested by the Audit Division during the course of the audit so that each petitioner could be given credit against the Article 9-A deficiencies determined by the Division for tax payments made by each petitioner under Article 9. As a result of the filing of those returns, the Division adjusted the asserted tax deficiencies, and those adjustments are reflected in the conciliation orders which were issued subsequently.

On March 22, 1996, BCMS issued a Conciliation Order to NewChannels reducing the total Article 9-A tax deficiencies asserted on both notices of deficiency (L008428977 and

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[1]We modified finding of fact "1" to correctly state the amount of franchise tax assessed on the Notice of Deficiency (L008428977) as $4,216,307.00 not $4,816,307.00. In addition, we deleted the language "plus penalty and interest" in the last sentence as the Notice of Deficiency (L008768672) did not assess penalty.

L008768672) to $4,163,994.00 plus interest. On the same date, a Conciliation Order was issued to Upstate reducing the Article 9-A tax deficiency asserted against it to $291,150.00 plus interest.

The only issue in this proceeding is whether NewChannels and Upstate are principally engaged in a transmission business and properly taxed under sections 183 and 184 of Article 9 of the Tax Law, as petitioners assert. Although NewChannels and Upstate (or "petitioners") are affiliated corporations, Upstate is operated and managed as a division of NewChannels, rather than a separate affiliated corporation. Petitioners' witnesses consistently used the name NewChannels to refer to both corporations. To be consistent with their testimony, the name "NewChannels" will be used in this determination to describe the business operations of both petitioners.

Until the Tax Appeals Tribunal (hereinafter "Tribunal") issued its decision in ***Matter of Capitol Cablevision Sys.*** (Tax Appeals Tribunal, June 9, 1988), all cable television companies doing business in New York were taxed as transmission companies pursuant to Article 9. In that decision, the Tribunal held the petitioner, a cable television company, was properly taxed under the business corporation franchise tax provisions of Article 9-A because it was principally engaged in the business of selling television entertainment to its subscribers and merely utilized transmission as a means of delivering its product (***see, Matter of Capitol Cablevision Sys., supra***). Thereafter, the Division changed its long-standing policy of classifying cable television companies as transmission companies subject to the taxes imposed under Article 9 and began classifying them as business corporations subject to the tax imposed under Article 9-A. This change in classification brought about the assertion of the tax deficiencies in issue. To establish that they properly filed tax returns under Article 9 of the Tax Law because they were, in fact,

transmission companies during the audit period, petitioners presented a brief history of the cable television industry; a simplified technical explanation of cable transmission; a description of petitioners' own business operations and the testimony of expert witnesses regarding the nature of NewChannels' business operations.

Legend has it that an appliance salesman in a mountainous region of Pennsylvania invented cable television in the late 1940s. Potential customers were showing little interest in purchasing television sets from him because television reception in the area near his store was poor. The salesman overcame this problem by installing on top of a nearby mountain an antenna that picked up the signals of local television broadcast stations. The signals were then delivered by cable to television sets displayed in his store, and he offered cable connections to customers who purchased televisions from him. This was the first cable television system, but soon similar cable systems sprouted up in communities throughout America. The only business of these early cable systems was the receipt of broadcast television signals by antenna and the retransmission of these signals to subscribers within a community, thus they acquired the name Community Antenna Television and were generally known by the acronym, CATV.

As this history suggests, the first cable systems were installed in rural or mountainous areas where reception of broadcast television signals was poor, and the primary purpose of those systems was to transmit clear signals of local television broadcast stations. As microwave technology developed it became possible to transmit a television signal across a 40-mile path and a straight line of sight. This enabled cable companies to receive broadcast signals from cities at a further distance from their receiving antennas and to offer the additional channels to their customers. Cable companies proliferated and grew throughout the 1950s creating markets for

their services in New York City (where an antenna was placed atop the Empire State Building) and other metropolitan areas.

In 1965, the Federal Communications Commission ("FCC") began asserting jurisdiction over the cable television industry with the issuance of its First Report and Order by which it adopted rules which required microwave-served CATV systems to carry the signals of all local television stations and to refrain from duplicating the programs of local commercial stations, either simultaneously or within 15 days before or after local broadcasting. These became known as the "must carry rules", and they remain in effect. The FCC Rules were designed to protect local broadcast stations from what was perceived as unfair competition from cable operators. In 1966, the FCC issued its Second Report and Order which imposed uniform regulations on all cable systems, whether microwave fed or not.

With the advent of satellite transmission, cable operators began transmitting the signals of distant television stations. For example, Ted Turner began transmitting the signal of an independent Atlanta, Georgia television station to a satellite where the signal could be received and retransmitted by cable companies on the other side of the continent. These technological advances provided cable television companies with the potential to receive and distribute a large number of channels and stimulated the growth of specialty programming (channels devoted to news, weather, sports, etc.), "premium" television services (such as Home Box Office and the Disney Channel) and "pay per view". There are presently about 100 companies which were formed to produce programs exclusively for cable television, including CNN, USA, Nickelodeon, C-Span, Cinemax, Showtime, MTV, A&E and the Discovery Channel. These companies are known in the cable industry as cable programmers.

NewChannels is a multiple system operator which means that it is able to pick up television signals transmitted in three different ways. It can pick up signals transmitted through the airwaves, known as off-the-air broadcast signals; microwave signals; and external satellite signals. NewChannels had the capacity to receive all three signals during the audit period.

NewChannels, like most cable companies, collects television signals (off-the-air, microwave and satellite) by receiving antennas at what is known as a headend. The signals are processed and assigned a channel frequency by NewChannels. The video signals are carried from the headend to a series of distribution points by trunk cable. Amplifiers are placed along the trunks at specific intervals to maintain or boost the signal strength. A series of coaxial feeder cables branch out from the trunk cable into local neighborhoods. The feeder cable is tapped by a coaxial drop cable which enters directly into the customer's home or other premises. The drop cables are connected directly to either a converter box or the customer's television set. During the audit period NewChannels transmitted television signals from the headend to the premises of its customers primarily through a system of coaxial cables. This system of coaxial cables is now being replaced by fiber optic cables. NewChannels serves the Syracuse, New York area and its vicinity.

The world of television generally can be divided into two groups: broadcasters (like ABC, Fox, and CBS) and their local affiliates which either produce or purchase television shows for transmission over the air and cable channel companies (like HBO, Lifetime and CNN) that produce or purchase television shows, primarily for transmission by cable. Within the cable industry, a cable company that produces programming is known as a cable programmer. A cable

company that transmits broadcast and cable programs to its subscribers by cable is known as a cable operator. NewChannels and Upstate Antenna are cable operators.

During the audit period, NewChannels offered several levels of service to its subscribers. The lowest level of service was known as "Broadcast Basic". This entitled the subscribers to transmission of a small number of channels, most of which NewChannels was required to transmit under the FCC's must carry rules, including: local broadcast stations; public, educational and government access stations, known by the acronym PEGS; and the local public television station. Every subscriber was required to purchase Broadcast Basic service at a charge of approximately $2.00 per month. NewChannels also offered Basic service, sometimes known as extended or expanded basic. This service consisted of the transmission of cable television programming, known more familiarly as cable channels (such as, CNN, ESPN, USA Network, and VH-1), for a charge of $16.75 per month. Finally, NewChannels sold Premium (Pay) TV service, offering HBO, the Movie Channel, the Disney Channel, Showtime and Cinemax at various rates depending on the number of premium channels selected. The total number of channels offered by NewChannels in 1992 was 42.

FCC regulations prevented NewChannels from setting charges by the length of the transmission. Whether its customer was 300 miles from the headend, or 1,600 miles, it was required to charge the same amount for service.

We modify finding of fact "16" of the Administrative Law Judge's determination to read as follows:

> During the audit period, approximately 75 percent of NewChannels' revenues was from subscription fees for extended basic and premium TV service. The remainder of its revenues was

> from a variety of sources. NewChannels collected a separate charge for providing converter boxes, with and without remote controls, installation of cable service and for service to additional outlets within the same premises. It had a small amount of advertising revenue. NewChannels negotiated a contract term with some of the cable channels which allowed it to sell advertising time on that channel. It could not sell advertising on the local broadcast stations, the premium stations or the public television stations. There was little market for the sale of advertising on the PEG channel or the local origination channel produced by NewChannels. Approximately, two percent of NewChannels' revenues was from advertising in the audit years. Through its coaxial cable system, NewChannels provided interbuilding telephone services to a small number of companies in the Syracuse and Binghamton, New York areas for a fee. It rented space on some of its antenna towers, primarily to cellular telephone companies, and it received commissions from the Home Shopping Network and QVC.[2]

NewChannels did not collect sales tax on subscriber fees.

As a cable operator, NewChannels' largest single capital investment is in its cable plant. This includes the coaxial cables that carry the signals, amplifiers, line extenders and various other devices in the cable lines that run along the streets. Its second largest capital investment is in the cable converter boxes supplied to customers. Its third largest capital investment is in the headends. Currently, NewChannels' largest capital investments are for the conversion of the system from coaxial cable to fiber optic cables.

NewChannels' right to transmit cable programming is subject to the terms of contracts with the cable programmers. William Futera who was NewChannels' chief financial officer in 1992 testified that in that year almost all of NewChannels' operating expenses related to either

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[2]We modified this finding to more accurately reflect the record.

the physical transmission of television signals or the cost of obtaining programming (copyright and licensing payments).

In all cases, NewChannels is obligated to transmit cable programming exactly as it receives it.[3] It cannot, for example, tape a movie transmitted by HBO for replay at another time or on a different channel. NewChannels' relationship with broadcasters is governed by law rather than contract, but for some purposes the result is the same. Under the FCC must carry rules, it must carry certain local broadcast stations, and it cannot control or interfere in any way with the programming transmitted by those stations.

In addition to the signals of commercial broadcast stations, NewChannels is required to carry the signal of the local Public Broadcast Station ("PBS"). It is prohibited by law from censoring or otherwise interfering with the programming of the local PBS. When NewChannels began operations in the Syracuse area, it was difficult to receive the PBS signal even with a UHF antenna (at the time, PBS transmitted its programming on a UHF frequency). PBS's audience increased by 30 to 60 percent after NewChannels began transmitting its programming.

During the audit period, the FCC required cable operators to provide channel capacity and some equipment to any member of the public who wanted to take advantage of the opportunity to address the cable television audience. These are the so-called "PEGS" referred to above. NewChannels carried PEG programming on channel 13. There was little public demand for the use of the PEG channel, however. NewChannels began to originate programming itself and carried that programming on channel 13 as well. These programs included local high school,

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[3] It does not transmit television signals exactly as it receives them. It may, and does, amplify those signals, remove ghosts and otherwise improve the quality of those signals as it transmits them through its system.

college and university athletic competitions and related programming (e.g., Coaches Corner, Syracuse Sports Hall of Fame Dinner), Town Board meetings and events of interest to local residents (e.g., North Syracuse Memorial Day Parade). NewChannels carried PEG programming and local origination programming on channel 13 for 12 hours per day, and the remainder of the time, channel 13 was used by NewChannels to carry The Travel Station. Channel 13 is referred to as a "local origination channel", although it was not used exclusively for that purpose. The local origination programming was an expense not a source of revenue for NewChannels. It was carried as a service to the community.

During the audit period, residents of the Syracuse area were able to receive the signals of only two local broadcast stations clearly and reliably. When NewChannels began doing business in that area, its advertising stressed the clarity of the reception provided by its cable system. The advertising now stresses the variety of choices that a viewer can obtain through cable. During the audit period, cable programs could be obtained in only two ways in the Syracuse area — by a subscription to NewChannels or by purchase and installation of a satellite dish at a cost of approximately $2,000.00.

NewChannels advertises through traditional methods: newspaper advertisements, billboards, direct mail and television advertisements. Sometimes, the logo of a cable channel, ESPN for example, appears in the advertising.

Petitioners' witnesses all agreed that during the audit period NewChannels was a transmission company. Edward Kearse, a former Executive Director of the New York State Commission on Cable Television testified that NewChannels' customers had two reasons to pay for NewChannels' services — to receive clear television signals and to receive a greater number

of channels. William Futera, a former vice-president of finance and chief financial officer of NewChannels, testified that "NewChannels was a transmitter of programming and quality clear signals to its subscribers" (tr., p. 135).

We modify finding of fact "26" of the Administrative Law Judge's determination to read as follows:

> In his testimony, Mr. Kearse expressed the opinion that cable operators are beginning to compete with telephone companies in the area of voice, data and image transmission. There is no evidence that NewChannels was in direct competition with any telephone company during the audit period except its provision of interbuilding cable leasing to corporations called "bypass." However, this service constituted an insignificant percentage of petitioners' business operations (0.9% of total operating revenues for fiscal year ending 7/31/92) and it was not established if this operation presented competition to any telephone company.[4]

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge noted the applicable sections of the Tax Law which impose tax on corporations for the privilege of exercising their corporate franchises in New York (Tax Law § 209[1]) and the exception carved out for transmission businesses (Tax Law §§ 183 and 184). The Administrative Law Judge noted the Division's policy, founded on an Opinion of Counsel, dated October 8, 1953, which taxed cable operators like petitioners under Article 9 of the Tax Law as transmission businesses, which was reversed by the decision of this Tribunal in ***Matter of Capitol Cablevision Sys.*** (***supra***). The Administrative Law Judge further noted that we reaffirmed our opinion on this issue in ***Matter of NewChannels Corp.*** (Tax Appeals Tribunal, September 23, 1993).

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[4]We modified this finding to more accurately reflect the record.

In order to better compare the ***Capitol Cablevision*** and ***NewChannels*** decisions with the instant matter, the Administrative Law Judge categorized the facts presented below into five groups:

a) The history of cable television;

b) An explanation of how television signals are received and transmitted;

c) The nature of petitioners' capital investments and operating expenses;

d) The source of petitioners' receipts; and

e) A description of the programs and services sold by petitioners.

She noted that the only area which received extensive discussion in the prior Tribunal cases was programming and that petitioners herein argued that they were not cable "programmers" but cable "operators" and that the evidence supports the distinction. Since this distinction was not drawn in the prior cases, petitioners argue that this case is distinguishable. In addition, petitioners argue that, when viewed from the perspective of customers, they must be classified as transmission businesses (***see, Quotron Sys. v. Gallman,*** 39 NY2d 428, 384 NYS2d 147).

The Administrative Law Judge determined that ***Capitol Cablevision*** and ***NewChannels*** clearly intended to categorize cable operators as business corporations as a general policy and that it clearly meant to include cable operators, not programmers in its use of the term "cable television companies." In fact, the Administrative Law Judge found that petitioners' own system of categorizing cable television companies defined petitioners' businesses as cable operators.

The Administrative Law Judge also determined that even though petitioners provided clear, reliable signals and a wide variety of program choices, the two services were so intertwined

that neither could be held dominant. Therefore, the Administrative Law Judge chose to follow the policy set forth in ***Capitol Cablevision*** and ***NewChannels***, which policy the Administrative Law Judge noted left no room for case-by-case adjudication.

Finally, given the broad impact on policy by ***Capitol Cablevision*** and ***NewChannels***, the Administrative Law Judge determined that it was appropriate to apply the doctrine of *stare decisis* and follow the rule set forth therein, and reserved for our review the issue of whether we should overrule our prior decisions.

ARGUMENTS ON EXCEPTION

Petitioners argue, as they did below, that they are each engaged in a transmission business and, therefore, are subject to tax under Article 9 of the Tax Law. Petitioners stress the importance and dominance in their business operations of the actual collection, dissemination and transmission of signals. Petitioners assert that Tax Law § 186-e supports their claim to be categorized as a transmission business because subsection (2)(b)(2) specifically found cable television companies did not constitute telecommunications service, rather, it defined them as companies providing the service of transmitting programs to subscribers. Petitioners claim that this must mean cable television companies would have been subject to the tax as telecommunication (telegraphy or telephony) companies but for the exclusion provided and, therefore, would have been subject to tax under Tax Law § 186-e.

Petitioners contend that neither ***Capitol Cablevision*** nor ***NewChannels*** ever addressed the issue of the proper categorization of cable operators vis-a-vis cable programmers. Petitioners argue that the failure to differentiate provides a significant factual difference between this case and the two previous cases, and can be distinguished from the instant matter based on same.

Petitioners also maintain that they do not provide entertainment, only a clear signal and a multitude of them. They argue that the customers are buying these aspects not entertainment (***Holmes Elec. Protective Co. v. McGoldrick,*** 262 AD 514, 30 NYS2d 589***, affd*** 288 NY 635). Petitioners argue that the Administrative Law Judge failed to distinguish between the cable programmers and the operators, the former producing the programs and the latter acting as the transmission conduit. They claim the customer is only buying transmission services from them and that there is nothing in the record to support any other conclusion.

Finally, petitioners argue that the ambiguity in the statute should be resolved in their favor because "taxing statutes when ambiguous or doubtful should be construed liberally in favor of the taxpayer" (***Bay View Towers Apts. v. State Tax Commn.,*** 48 AD2d 86, 367 NYS2d 856, 859, ***affd*** 40 NY2d 856, 387 NYS2d 1002).

Petitioners believe that the doctrine of *stare decisis* should not have been invoked because the underlying facts are not similar to those in ***Capitol Cablevision***. Petitioners take issue with the failure of this Tribunal to distinguish between cable operators and programmers in the ***Capitol Cablevision*** case, which petitioners believe creates an entirely different factual scenario in the instant matter. In addition, petitioners note the more extensive record created herein.

Petitioners also urge that we overrule our decision in ***Capitol Cablevision*** because of our reliance on ***New York State Cable Television Assn. v. State Tax Commn.*** (59 AD2d 81, 397 NYS2d 205, ***affg*** 88 Misc 2d 601, 388 NYS2d 560). Petitioners argue that the ***Cable Television Assn***. case held that receipts received by cable television companies were not subject to sales tax because they were receipts from entertainment. The Court therein held that the telephony and telegraphy service provided to customers was merely incidental to the customers' purchase of

entertainment. Petitioners contend that our reliance was incorrect because the Court in ***Cable Television Assn.*** did not take into consideration that the cable operator's principal business is transmission or the distinction between cable operators and programmers.

The Division of Taxation maintains that the business must be viewed from the perspective of the customer and that cable company customers are buying entertainment, not transmission services. The Division notes petitioners' advertising of station logos and choice of packages available to customers as proof that customers are actually purchasing a variety of choices and additional channels. The Division also pointed out that the FCC had stated that it was the cable television companies that determined which stations would be available on their systems, not the customers.

The Division contends that petitioners receive signals from many sources, compile and amplify them, reduce noise, assign channels to the signals and package the channels in a variety of ways for their customers. This, the Division believes, is more than a mere transmission.

In response to petitioners' argument that Tax Law § 186-e supports their position that cable television service is a transmission service, the Division cited to a letter of the Commissioner of Taxation and Finance in support of the legislation creating the statute (L 1995, ch 2) which underscored "the classification of cable television as a voice not included in the classification of telephony or telegraphy."

The Division argues that ***Cable Television Assn.*** properly held that the nature of cable television service was entertainment and that it made no difference that this was determined in the context of sales tax. Therefore, the Division believes our reliance on that case in ***Capitol Cablevision*** was proper. Finally, the Division argues that the doctrine of *stare decisis* should

apply because of the similarity of the facts in this case and ***Capitol Cablevision*** and the inability of petitioners to distinguish the cases.

OPINION

We affirm the determination of the Administrative Law Judge, reaffirm our decision and pertinent analysis in ***Capitol Cablevision*** and find that petitioners were *not* principally engaged in the conduct of a transmission business within the meaning of sections 183 and 184 of the Tax Law.

As we stated in ***Matter of Capitol Cablevision Sys.*** (***supra***):

> It is well established that classification for corporation tax purposes is to be determined by the nature of the taxpayer's business and not by the words in its certificate of incorporation, nor by focusing on one aspect of its business operations. The business must be viewed in its entirety and from the perspective of its customers — what they buy and pay for (***Quotron Sys. v. Gallman***, ***supra***; ***Matter of Holmes Elec. Protective Co. v. McGoldrick***, ***supra***; ***Matter of McAllister Bros. v. Bates***, 272 AD 511, 72 NYS2d 532, ***lv denied*** 272 AD 979, 73 NYS2d 485).

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When an individual chooses to subscribe to cable television the choice is one based on a value judgment, i.e., there is a conscious decision to fill one's valuable leisure time with one form of entertainment over another. As we decided in ***Capitol Cablevision*** and reaffirmed in other cases (e.g., ***Matter of New Channels Corp.***, ***supra*** and ***Sprint Intl. Communications Corp.***, Tax Appeals Tribunal, July 27, 1995), the consumer's choice is one which has as its focus not the transmission of various signals but the provision of entertainment. Petitioners herein, like their predecessors in ***Capitol Cablevision*** and ***NewChannels,*** sell television entertainment to their subscribers, packaging television signals (programming) which it believes will attract and maintain subscribers. As we decided in ***Capitol Cablevision***, transmission is merely the means

by which petitioners convey their product to their customers, not their business. Notwithstanding the more fully developed record herein, we find no distinction between the nature of petitioners' business and that of Capitol Cablevision**,** regardless of the term used to describe their activity (cable operator or cable television company), and find petitioners' arguments to the contrary unpersuasive.[5] Consistent with this conclusion, and in response to the issue reserved for us by the Administrative Law Judge, we decline to overrule our decision in ***Capitol Cablevision.***

In response to petitioners' criticism of our reliance upon ***Cable Television Assn.*** in ***Capitol Cablevision***, we do not believe that said reliance was misplaced. There, the Supreme Court and the Appellate Division by reference, held that cable television services were not telephony or telegraphy because the customer was purchasing entertainment and not the telecommunications service (***New York State Cable Television Assn***. ***v. Tax Commn.***, 88 Misc 2d 601, 388 NYS2d 560). We believe that analysis is equally applicable to the instant matter to the extent that those courts recognized the proper classification of cable television companies as determined by what the customer perceived as the product or service it was purchasing - - entertainment, as opposed to the medium through which it was transmitted.

Petitioners' argument that Tax Law § 186-e supports their position that their principal business is as a transmission or telecommunications service is not borne out by the terms of the statute or the legislative history revealed in the Governor's Bill Jacket for the Laws of 1995, Chapter 2. Tax Law § 186-e(2)(b)(2) provides that:

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[5]A review of the facts in ***Capitol Cablevision*** confirms this conclusion. Although there was no distinction drawn between cable operators and programmers in that case, the description of Capitol Cablevision's business operation is indistinguishable from petitioners' definition of a cable operator.

> Cable television service exclusion. The sale of cable television service shall in no event constitute a telecommunications service, and the receipts from the sale of such service are without the scope of the tax imposed by this section. The provision of such service shall mean the transmitting to subscribers of programs broadcast by one or more television or radio stations or any other programs originated by any person by means of wire, cable, microwave or any other means.

In a letter from the Commissioner of the Department of Taxation and Finance to the Governor, dated June 7, 1995, the Commissioner explained the reference to cable television service in the exclusion provided for in Tax Law § 186-e(2)(b)(2) as a mere reinforcement of "the classification of Cable TV as a service not included within the classification of telephony or telegraphy"[6] (Governor's Bill Jacket, pp. 28-29). This is supported by the definitions of "telecommunications service" and "cable television service" in the same section of the Tax Law (Tax Law § 186-e[1][g]; Tax Law § 186-e[2][b][2]).

Stare decisis is the doctrine "that, when [the] court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same" (Black's Law Dictionary 1261 [5th ed 1979]). The doctrine has been recognized as "an expression of the policy of the courts to stand by precedents and not disturb settled points" (Black's Law Dictionary 1261 [5th ed 1979]). Further, "[p]olicy considerations are inherent in the prudent, considered application of the doctrine" (29 NY Jur 2d, Courts and Judges, § 477).

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[6]The definition of telecommunication service set forth in Tax Law § 186-e(1)(g) specifically includes telephony and telegraphy, but not cable television. The definition of cable television service is found in Tax Law § 186-e(2)(b)(2).

We believe the businesses operated by petitioners are substantially similar to that operated by Capitol Cablevision and that the doctrine of *stare decisis* mandates that our rationale in ***Capitol Cablevision*** be followed herein. Further, as a matter of public policy, our decision in ***Capitol Cablevision*** changed a long-standing policy of the Department of Taxation and Finance. In response to our interpretation of a tax statute, the Department changed its policy of taxation of cable television companies like Capitol Cable, NewChannels and Upstate Antenna. This change impacted the entire cable industry in New York State and the new policy has been consistently followed and enforced for more than eleven years. Ignoring the relevant analysis in ***Capitol Cablevision,*** a case we have found to be substantially similar on the facts, would be contrary to the doctrine of *stare decisis*, public policy and sound judicial administration.

We have considered the remaining arguments raised by petitioners and found them to be without merit.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exceptions of NewChannels Corporation and Upstate Community Antenna, Inc. are denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of NewChannels Corporation is denied and the notices of deficiency (Notice Nos. L008428977 and L008768672), as adjusted by the Conciliation Order, dated March 22, 1996, are sustained; and

4. The petition of Upstate Community Antenna, Inc. is denied and the Notice of Deficiency (Notice No. L010079424), as adjusted by the Conciliation Order, dated March 22, 1996, is sustained.

DATED: Troy, New York
July 29, 1999

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner