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Maine Cable Law, Ignoring Competition, Is "Unambiguously Preempted"

by

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I. Introduction and Summary

Where Congress finds it necessary to intrude upon the operation of the marketplace, it may take deliberate steps to ensure that targeted regulation does not impede the preferred and superior corrective role that competitive forces perform. The Cable Communications Policy Act of 1984 (the "1984 Cable Act") is one such example. Crafted specifically to "promote competition," the law bars the FCC, states, and local political subdivisions from regulating "rates for the provision of cable service" wherever cable systems are subject to "effective competition" – and it expressly preempts inconsistent state law. Unleashed by this enabling legislative approach and fueled by technological progress, market forces without question have done their job. By any reasonable measure, the wealth of video distribution and programming options available today is more than sufficient to drive increases in efficiency, innovation, and overall consumer welfare.

Against – and despite – this factual background, Maine lawmakers earlier this year inexplicably enacted a so-called "pro rata" billing statute, one that requires cable operators – and cable operators only – to provide refunds to subscribers who terminate service prior to the end of a monthly billing cycle. Fortunately, the United States District Court of Maine has found that legislation to be "unambiguously preempted" by the 1984 Cable Act. In a recent decision, the

court rejected the Maine Attorney General's belabored attempts to recharacterize the regulation of "rates for the provision of cable service" as … something other than what it clearly is. Regulation, but not of "rates?" Regulation of rates, but not those regarding the "provision of cable service?" A consumer protection or customer service law expressly permitted by Congress?

As the court held, Maine's statute is none of the above. By its plain language, it attempts to do precisely what Section 623(a)(2) of the 1984 Cable Act prohibits – regulate "rates for the provision of cable service" – and thus is subject to express preemption under Section 636(c). More to the point, it ignores the fully competitive state of the video distribution marketplace. Direct Broadcast Satellite (DBS) offerings, telco TV, and Internet-based services serve a substantial portion of video customers, yet only cable operators are required by the Maine law to bill on a per-day basis. As a consequence, were the statute to go into effect, state residents would continue to purchase monthly video content subscriptions. The only practical impact would be that cable operators' ability to compete would be constrained.

II. Maine's Cable-Only Billing Restriction, Ignoring Competition, Is Expressly Preempted by the 1984 Cable Act

Lawmakers recognize that robust competition benefits consumers through, among other things, lower prices and greater innovation. That is why, even where Congress concludes that intervention is warranted, it often goes to great lengths to limit the extent to which regulation impedes the operation of market forces. Express preemption of incompatible state and local law is one way that it achieves that objective. Section 332(c)(3)(A) of the Communications Act, which, where sufficiently competitive market conditions exist, explicitly denies states and localities the "authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service,"[1] is one such example. Another is Section 623(a)(2) of the 1984 Cable Act.

One of the six stated purposes of the 1984 Cable Act is to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems."[2] Section 623(a)(2), the title of which is "[p]reference for competition," therefore states that "[i]f the Commission finds that a cable system is subject to effective competition, the rates for the provision of cable service by such system shall not be subject to regulation by the Commission or by a State or franchising authority under this section."[3] And Section 636(c) states in relevant part that "any provision of law of any State … which is inconsistent with this chapter shall be deemed to be preempted and superseded."[4]

It is a settled matter that "effective competition," a statutorily defined term,[5] exists. The Commission, through a series of community-specific decisions over three decades, came to that

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[1] 47 U.S.C. § 332(c)(3)(A).
[2] 47 U.S.C. § 521(6).
[3] 47 U.S.C. § 543(a)(2).
[4] 47 U.S.C. § 556(c).
[5] *See* 47 U.S.C. § 543(l)(1).

conclusion with respect to the vast majority of franchise areas, including those in Maine.[6] Then, in 2015, it adopted a rebuttable presumption that cable operators, as a general proposition, face "effective competition" in every franchise area.[7] Finally, a year ago, it held that the AT&T Now over-the-top service, which is available nationwide, satisfies the so-called "LEC Test," thereby putting this issue to rest once and for all.[8]

More importantly, aside from merely meeting the "effective competition" test as a matter of law, true and actual competition abounds. In addition to cable operators, other facilities-based multichannel video programming distributors (MVPDs) vie for subscribers: DBS operators, telco TV providers, and, increasingly, local broadcasters.[9] And both virtual MVPDs (vMVPDs), which offer packages similar to those of traditional MVPDs (including local broadcast stations and other linear channels, video-on-demand services, electronic programming guides, and more), and online video providers (OVDs), which primarily offer libraries of stored programming, leverage broadband connectivity to stream content over the Internet.

If it ever were, cable is no longer a bottleneck. The marketplace is rife with options – and, as a direct consequence, there can be no justification for government interference. Certainly not a restriction that applies only to one type of competitor.

And yet, as I described in a June 2020 post on the Free State Foundation's blog,[10] Maine nevertheless chose to restrict – in 2020, no less – the way that cable operators alone bill subscribers. Public Law Ch. 657, "An Act To Require a Cable System Operator To Provide a Pro Rata Credit When Service Is Cancelled by a Subscriber" (the Act),[11] was signed into law on March 18, 2020. Section 1-A states that "[a] franchisee shall grant a subscriber a pro rata credit or rebate for the days of the monthly billing period after the cancellation of service if that subscriber requests cancellation of service 3 or more working days before the end of the monthly billing period."[12]

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[6] *See, e.g.*, *Comcast Cable Communications, LLC, Time Warner Cable, Inc., Petitions for Determination of Effective Competition in various Franchise Areas in Maine*, CSR 7440-E, CSR 7558-E, CSR 7565-E, Memorandum Opinion and Order, DA 08-960 (2008). *See also Spectrum Northeast, LLC, et al. v. Aaron Frey*, 1:20-cv-00168-JDL (D. Me. October 7, 2020), at 4 (*Order on Motion to Dismiss*) ("It is undisputed that … the FCC has found that Charter is subject to effective competition in Maine.").

[7] *See Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, MB Docket No. 15-53, Report and Order, 30 FCC Rcd 6574 (2015), available at https://docs.fcc.gov/public/attachments/FCC-15-62A1.pdf.

[8] *See generally Petition for Determination of Effective Competition in 32 Massachusetts Communities and Kauai, HI (HI0011)*, MB Docket No. 18-283, CSR No. 8965-E, Memorandum Opinion and Order, FCC 19-110 (released October 25, 2019), available at https://docs.fcc.gov/public/attachments/FCC-19-110A1.pdf (concluding that AT&T Now satisfies the "LEC Test" set forth in 47 U.S.C. § 543(l)(1)(D)).

[9] *See* Andrew Long, "Multicasts, ATSC 3.0 Turn Broadcasting Into a Multichannel Platform," *Perspectives from FSF Scholars*, Vol. 15, No. 53 (October 12, 2020), available at https://freestatefoundation.org/wp-content/uploads/2020/10/Multicasts-ATSC-3.0-Turn-Broadcasting-Into-a-Multichannel-Platform-101220.pdf.

[10] Andrew Long, "Maine Cannot Require Cable Operators to Prorate Last-Month Bills," *FSF Blog* (June 25, 2020), available at https://freestatefoundation.blogspot.com/2020/06/maine-cannot-require-cable-operators-to.html.

[11] P.L. 2020, ch. 657, § 1-A (to be codified at 30-A M.R.S.A. § 3010(1-A)), available at http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP1441&item=3&snum=129.

[12] *Id*. Subsection 2-A requires cable franchisees to provide notice to subscribers of the availability of this credit/rebate on their bills.

Fortunately, the U.S. District Court of Maine has ruled.[13] In response to the state's motion to dismiss a challenge by Charter Communications, Inc., and its Spectrum Northeast, LLC, subsidiary ("Charter"), the court rejected tortured attempts to characterize this pro rata billing requirement as something – anything – other than what it clearly is: regulation of "rates for the provision of cable service."

The Maine Attorney General conceded that, if the Act does constitute regulation of "rates for the provision of cable services," it is preempted by Section 623(a)(2).[14] However, he argued that it does not, for three reasons:

> First, he argues that the [Act] does not regulate any "rates" charged by Charter. Second, even if the [Act] regulates rates charged by Charter, he asserts that it does not regulate rates "for the provision of cable service." Finally, he contends that the [Act] does not fall within the scope of the Cable Act's preemption of state-imposed rate regulations because it is a consumer protection and customer service law permitted by [Section 632(d)].[15]

The court rejected all three arguments. Briefly, it found that:

- The plain meaning of the term "rate" encompasses the "specific price per month for cable service" that Charter has chosen to charge its customers[16] – and that "in order to comply with the [Act], Charter must measure the quantity of service it provides in daily increments, rather than monthly increments."[17]
- In contrast to the New York state law at issue in the "downgrade fees" case cited by the Attorney General,[18] the Act "does not regulate a one-time cancellation or deinstallation fee but operates directly on the rate that Charter may charge for providing a certain quantity of cable service before a customer cancels service" – and therefore does indeed target "the provision of cable service."[19]
- Although Section 632(d)(1) and (2) "expressly permit states to enact 'consumer protection' and customer service' laws,"[20] neither applies to the Maine law. With respect to the former, a state may act only "to the extent not specifically preempted" – and

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[13] Although the Act was to become effective on June 16, 2020, "[t]he Attorney General agreed to postpone enforcement … pending resolution of the motion to dismiss and Charter's motion for a preliminary injunction …." *Order on Motion to Dismiss* at 2 n.1.
[14] *See id*. at 4-5 ("The parties dispute whether [the Act] falls within the scope of the Cable Act's express preemption provisions. Specifically, they dispute whether the [Act] regulates 'rates for the provision of cable service' within the meaning of" § 623(a)(2)).
[15] *Id*. at 6-7.
[16] *Id*. at 8.
[17] *Id*. at 9. *See also id*. at 8 ("Charter's alleged whole-month billing policy effectively charges a higher daily rate to subscribers who cancel their service mid-month than to subscribers who do not cancel, because Charter sells cable service in monthly increments. Maine's [Act] prohibits this outcome.").
[18] *See generally Cable Television Ass'n of N.Y., Inc. v. Finneran*, 954 F.2d 91 (2d Cir. 1992) (holding that deinstallation fees, charged in addition to and independent from service fees, are not "for the provision of cable service").
[19] *Order on Motion to Dismiss* at 10.
[20] *Id*. at 11.

therefore this argument "simply begs the question" at issue in this case.[21] With respect to the latter, while "it is conceivable that a law could be valid under [Section 632(d)(2)] even if it constitutes rate regulation for purposes of [Section 623(a)(2)]," the Act "cannot be characterized as a 'law concerning customer service' for purposes of [Section 632(d)(2)] because it does not 'impose[] customer service requirements' on cable operators."[22]

Accordingly, the court concluded that the Act is "unambiguously preempted."[23] This is the right outcome, for a host of reasons, including those set forth above. To recap:

- One, the purposes of the 1984 Cable Act include "establish[ing] a national policy concerning cable communications," "establish[ing] guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems," and "promot[ing] competition in cable communications and minimize[ing] unnecessary regulation that would impose an undue economic burden on cable systems."[24] The Act conflicts with these objectives. It constrains the billing practices of cable operators within one state, defies Congress' jurisdictional allocation of authority,[25] and imposes anticompetitive restrictions that burden cable operators, but not rival providers.

- Two, Section 623(a)(2) sets forth Congress' preference that "'market forces,' and not state governments, control the rates charged by cable companies."[26] Given the depth and breadth of competition described above, the video distribution marketplace in 2020 is more than capable of keeping rates in check. Thus there can be no justification for restrictions on how one – let alone only one – category of provider markets its services to consumers.

- Three, Congress expressly preempted state laws that regulate "the rates for the provision of cable service" by cable operators subject to effective competition. As the court made plain, a requirement that cable operators bill on a per-day basis attempts, in reality, to do exactly that – and therefore is preempted by Section 636(c).[27]

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[21] *Id*.
[22] *Id*. at 12.
[23] *Id*. at 16.
[24] 47 U.S.C. § 521.
[25] *See Cable Television Ass'n of N.Y., Inc. v. Finneran*, 954 F.2d 91, 102 (2d Cir. 1992) ("The Cable Act came on the heels of decades of uncertainty about the relative spheres of state and federal authority over cable television…. Congress attempted to free the cable industry from this confusion by clearly defining the relative spheres of state and federal authority, and by imposing deregulation so as to maximize the influence of the market on cable rates.").
[26] *See id*. at 100 (quoting H.Rep. at 25, *reprinted in* 1984 U.S.C.C.A.N. at 4662; S.Rep. No. 67, 98th Cong., 1st Sess. 11 (1983) ("the committee believes that marketplace forces, rather than Government regulation, should prevail"). *See also id*. ("Congress' purpose in section 543 was not to curtail regulation in the abstract but rather to do so in order to allow market forces to control the rates charged by cable companies."), *Time Warner Entm't Co. v. FCC*, 56 F.3d 151, 191 (D.C. Cir. 1995) (describing Congress' intention to have market forces control rates as a 'hallmark purpose' of the Cable Act).
[27] As the decision notes, the one other court to weigh in on this question came to the same conclusion: that "[a] requirement that service providers prorate bills is a type of rate regulation." *See Altice USA, Inc. v. N.J. Bd. Of Pub. Utils.*, No. 3:19-cv-21371-BRM-ZNQ, 2020 WL 359398, at *8 (D. N.J. January 22, 2020).

III. Conclusion

Consumers of video in 2020 reap the benefits of the 1984 Cable Act's prioritization of market forces. Competition abounds between and among cable operators, other traditional MVPDs, and an ever-increasing number of services that leverage broadband Internet connections to distribute content. Maine's misguided attempt to restrict the billing practices of cable operators – and cable operators only – conflicts with Congress's broader objectives, is expressly preempted by statutory provisions, and, if allowed to go into effect, would undermine competition and harm Maine's residents.

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Further Readings

Seth L. Cooper, "FCC Defends its Order on Effective Competition in the Video Services Market," *FSF Blog* (July 21, 2020).

Randolph J. May and Andrew Long, "Maine's Cable Unbundling Law Violates the First Amendment," *Perspectives from FSF Scholars*, Vol. 15, No. 39 (July 17, 2020).

Andrew Long, "Maine Cannot Require Cable Operators to Prorate Last-Month Bills," *FSF Blog* (June 25, 2020).

Comments of the Free State Foundation, *The State of Competition in the Communications Marketplace*, GN Docket No. 20-60 (April 27, 2020).

Seth L. Cooper, "FCC Action Would Finally Eliminate Local Cable Rate Regulation," *Perspectives from FSF Scholars*, Vol. 14, No. 31 (October 11, 2019).

Randolph J. May, "MEDIA ADVISORY: FCC Proposal Recognizes Video Streaming Service As Effective Competition," *FSF Blog* (October 4, 2019).