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State Cable Bills Prorating Requirements Clearly Are Preempted

by

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I. Introduction and Summary

Nearly four decades ago, Congress expressed in unambiguous terms its preferred and exclusive approach to the governance of rates for cable video service. Where present, competition was to determine prices, not federal, state, or local regulation. The 1984 Cable Act (the Act) therefore makes clear that, where the Federal Communications Commission (FCC or Commission) has found "effective competition" to exist, (1) the efficient operation of market forces, not laws or rules dictating rates, are to govern, and (2) inconsistent laws and regulations expressly are preempted.

Thanks in large part to the emergence of high-speed Internet access networks as a viable distribution platform, the multichannel video programming marketplace is robustly competitive, far more so than Congress ever could have envisioned. Moreover, the FCC officially has recognized that cable operators nationwide are subject to "effective competition."

And yet, two states inexplicably have attempted to impose obligations to prorate the last-month bills of canceling subscribers exclusively upon cable operators, effectively mandating that they charge for service on a per-day basis. By contrast, the many rival distributors of video

programming with which they compete are free to bill in whatever manner they choose. A recent federal court decision finding the second such state requirement to be expressly preempted ought to put an end to misguided and fatally flawed efforts to recharacterize that which undeniably is impermissible rate regulation as ... something else, something that conceivably might survive judicial scrutiny.

In an October 2020 *Perspectives from FSF Scholars*, I discussed a Maine statute demanding that cable operators, and only cable operators, prorate the final monthly bills of customers who cancel their subscriptions. As a practical matter, the law dictates that cable operators charge their customers on a per-day basis, one that is determined, and capped, by the monthly rate. For those cable operators that prefer to offer service in monthly increments, a common practice embraced by many distributors of multichannel video programming, there can be no legitimate question that this infringes upon their billing autonomy and constitutes the regulation of rates. Charter Communications, Inc. (Charter) challenged the Maine statute, and the U.S. District Court of Maine found it to be "unambiguously preempted" by the Act. That case is now before the U.S. Court of Appeals for the First Circuit.

Late last month, a second federal court reached a similar conclusion. New Jersey regulators had attempted to enforce against Altice USA, Inc. (Altice) a rule that for all intents and purposes is identical to the Maine law, one mandating that "final bills shall be prorated as of the date of the ... final termination of service." Altice sued, and the U.S. District Court of New Jersey granted its Motion for Judgment on the Pleadings.

The legal analysis that compels the conclusion that these state efforts are preempted is straightforward and proceeds along the following three steps:

- One, the FCC has found "effective competition" to exist, not just specifically in the communities in Maine and New Jersey served by Charter and Altice, but also, as a broader matter, nationwide. Where cable operators are subject to "effective competition," the 1984 Cable Act bars the regulation of rates.
- Two, the Maine law and New Jersey rule both effectively and uniquely require cable operators to bill in a specific manner: on a per-day basis in an amount directly derived from the total monthly price. This dictates how cable operators bill their customers for the provision of cable service and therefore constitutes preempted rate regulation.
- Three, through the plain statutory text of the Act, Congress announced a "clear and manifest" intention to preempt inconsistent state attempts to regulate cable rates. Maine and New Jersey therefore are not entitled to a "presumption against preemption" – and, even if they are, the language and structure of the Act without question announce a "clear and manifest" congressional intent to preempt.

Two federal courts now have ruled decisively that requiring cable operators to prorate last-month bills is impermissible pursuant to the Act. Adherence to clear congressional intent, along with a recognition that vibrant video competition exists, demand that these decisions serve as the end, once and for all, of such ill-advised efforts by the states.

II. The Act Preempts Rate Regulation Where "Effective Competition" Exists

In an October 2020 *Perspectives from FSF Scholars*,¹ I pointed out that a primary goal of the 1984 Cable Act was to "promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems."² Accordingly, where the FCC determines "effective competition" to exist, Section 623(a)(2) of the Act declares in no uncertain terms that "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 Section 623(a)(1), meanwhile, makes plain that "[n]o Federal Agency or State may regulate the rates for the provision of cable service except to the extent provided under this section."⁴ And Section 636(c) states that "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter *shall be deemed to be preempted and suspended*."⁵

In other words, wherever cable operators face "effective competition," Congress expressly barred the FCC, states, and local franchising authorities from regulating the rates "for the provision of cable service" – and preempted any legal provisions that nevertheless attempted to do so.

The focus of my scholarly attention last fall was Maine Public Law Ch. 657, which 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."⁶ On October 7, 2020, the Maine District Court found that law to be "unambiguously preempted."⁷ The Maine Attorney General has appealed to the First Circuit.

Earlier this month, the New Jersey District Court considered a legal challenge by Altice to what Charter has described as a "virtually identical" provision,⁸ Section 14:18-3.8 of the New Jersey BPU's rules, which specifies the method of billing for cable operators.⁹ Subsection (a) thereof states that "[b]ills for cable television service shall be rendered monthly, bi-monthly, quarterly, semi-annually or annually and shall be prorated upon establishment and termination of service."

¹ See generally Andrew Long, "Maine Cable Law, Ignoring Competition, Is 'Unambiguously Preempted,'" *Perspectives from FSF Scholars*, Vol. 15, No. 56 (October 26, 2020), available at <https://freestatefoundation.org/wp-content/uploads/2020/10/Maine-Cable-Law-Ignoring-Competition-Is-Unambiguously-Preempted-102620.pdf>.

² 47 U.S.C. § 521(6).

³ 47 U.S.C. § 543(a)(2).

⁴ 47 U.S.C. § 543(a)(1).

⁵ 47 U.S.C. § 556(c) (emphasis added).

⁶ 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>.

⁷ *Spectrum Northeast, LLC, et al. v. Aaron Frey*, 1:20-cv-00168-JDL (D. Me. October 7, 2020), at 16 (*Order on Motion to Dismiss*).

⁸ Brief of Plaintiffs/Appellees Spectrum Northeast, LLC and Charter Communications, Inc. at 23, *Spectrum Northeast, LLC and Charter Communications, Inc. v. Aaron Frey* (No. 20-2142) (filed March 30, 2021) (asserting that "New Jersey's rule does not differ from Maine's in any material way") (*Charter Brief*).

⁹ See New Jersey Administrative Code § 14:18-3.8, available at <https://casetext.com/regulation/new-jersey-administrative-code/title-14-public-utilities/chapter-18-regulations-of-cable-television/subchapter-3-customer-rights/section-1418-38-method-of-billing>.

Subsection (c) states that "initial and final bills shall be prorated as of the date of the initial establishment and final termination of service."

Reaching a similar conclusion as the Maine District Court – that the BPU's rule constituted preempted rate regulation – the New Jersey District Court granted Altice's Motion for Judgment on the Pleadings.¹⁰ As described below, the two courts grappled with similar arguments in defense of the Maine law and the BPU's rule. Perhaps that explains why the decision by the latter quotes so liberally from the opinion of the former.

In the following section I detail how the emergence of robust competition has rendered the question of "effective competition" moot. Section IV explains why the requirement that cable operators prorate final-month bills constitutes the regulation of rates. Section V describes how Congress' intent to preempt is sufficiently "clear and manifest" to overcome any "presumption against preemption" that might exist.

III. Video Distribution Competition – and "Effective Competition" – Abound

Both effective competition and "effective competition" in the distribution of multichannel video programming exist nationwide. For evidence of the former, look no further than the FCC's *2020 Communications Marketplace Report*.¹¹ Key findings include:

- "Continuing a downward trend that began in 2013," traditional, facilities-based Multichannel Video Programming Distributors (MVPDs), which include not only cable operators but also telco TV providers and Direct Broadcast Satellite (DBS) operators, "shed 6.4 million video subscribers between 2018 and 2019, ending 2019 with 83.4 million video subscribers." (¶ 151)
- The number of video subscribers served by cable operators decreased by 1.8 million during that time. (¶ 156)
- Virtual MVPDs (vMVPDs) – entities that utilize the Internet to distribute packages that rival cable, telco TV, and DBS offerings and include live linear channels, Video on Demand, Electronic Programming Guides, Digital Video Recording capabilities, and more – grew their subscriber totals by 31 percent between 2018 and 2019 and 16 percent in 2020. (¶ 198 Fig. II.D.12)
- vMVPDs added 856,000 subscribers just in the second quarter of 2020. (¶ 200)
- 70 million consumers subscribed to Amazon in 2019, 60 million to Netflix, 30 million to Hulu, and over 25 million to Disney+. (¶ 228)
- "MVPDs (Comcast, Charter, DIRECTV, and DISH) saw subscriber declines from 2015 to 2019, while [Online Video Distributors (OVDs)] (Amazon, Netflix, Hulu, and HBO) saw subscriber increases over the same period." (¶ 228)

¹⁰ See *Altice USA, Inc. v. Fiordaliso, et al.*, Case No. 3:19-cv-21371 (D. N.J. March 23, 2021) (*Altice Opinion*).

¹¹ 2020 Communications Marketplace Report, *Communications Marketplace Report*, GN Docket No. 20-60, FCC 20-188 (December 31, 2020), available at <https://docs.fcc.gov/public/attachments/FCC-20-188A1.pdf>. See also Randolph J. May, *et al.*, "The FCC's Marketplace Report Substantiates the Extent of Competition," *Perspectives from FSF Scholars*, Vol. 16, No. 4 (January 25, 2021), available at <https://freestatefoundation.org/wp-content/uploads/2021/02/The-Communications-Marketplace-Report-Highlights-Intramodal---but-Understates-Intermodal---Competition-012521.pdf>.

- " In the fourth quarter of 2019, there were 79 million MVPD subscriptions, 9 million vMVPD subscriptions, and 220 million [*Subscription Video on Demand*] subscriptions." (§ 228) (emphasis added).

"Effective competition," meanwhile, is a term of art defined in Section 623(l)(1) of the 1984 Cable Act.¹² The FCC on multiple occasions has determined that "effective competition" is present in these two states.

- It found Charter to be subject to "effective competition" in the communities it serves in Maine.¹³ Likewise, the Commission determined that Altice faces "effective competition" in its New Jersey communities.¹⁴
- In 2015, the Commission adopted a rebuttable presumption that "effective competition" is present nationwide.¹⁵
- In 2019, the FCC at long last put to rest the "effective competition" question when it determined that the nationally available AT&T Now streaming service satisfied the so-called "LEC Test" set forth in Section 623(l)(1)(D) of the Act.¹⁶

In both Maine and New Jersey – indeed, in all communities throughout the United States – the FCC has found "effective competition" to exist. As a consequence, the provision in Section 623(a)(2) stating that "the rates for the provision of cable service ... shall not be subject to regulation" has been triggered.

IV. Requirements to Prorate Last-Month Bills Constitute Preempted Rate Regulation

Provisions that compel cable operators to prorate customers' final bills in no uncertain terms regulate rates. Both Charter and Altice choose to bill their video subscribers monthly, in advance, and without proration – practices that are set forth with transparency in their terms of service.¹⁷ Maine and New Jersey instead would require them not only to make their offerings

¹² See 47 U.S.C. § 543(l)(1).

¹³ 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 *Order on Motion to Dismiss* at 4 ("It is undisputed that ... the FCC has found that Charter is subject to effective competition in Maine.").

¹⁴ See *Altice Opinion* at 8 ("Because the FCC found Cablevision was subject to effective competition, BPU may not regulate the rates of Cablevision's successor Altice, which Defendants do not dispute.") (citation omitted).

¹⁵ 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>.

¹⁶ 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>.

¹⁷ See Spectrum Residential General Terms and Conditions of Service, Section 1.b., Monthly Subscription Services, available at <https://www.spectrum.com/policies/residential-general-terms-and-conditions-of-service> ("Subscriber shall be responsible for the full monthly charge (without pro-ration) for those Services that are offered on a monthly subscription basis to which the Subscriber has subscribed, regardless of Subscriber's termination of such monthly Service prior to the conclusion of the current monthly subscription service period,"); Optimum General Terms and Conditions of Service (Residential), Section 1, Monthly Charges, available at <https://www.optimum.net/pages/terms/general-residential.html> ("PAYMENTS ARE NONREFUNDABLE AND

available in daily increments, but to charge a per-day rate that is based on, and constrained by, the monthly price.¹⁸ Without question that amounts to the very rate regulation that Section 623(a)(2) of the 1984 Cable Act prohibits in the presence of "effective competition."

Incidentally, billing customers on a monthly, rather than a daily, basis appears to be common in the MVPD marketplace. In its recently filed Brief to the First Circuit, Charter reports that the two DBS operators, DIRECTV and DISH Network, do not prorate last-month charges. Nor do streaming services such as Netflix, Amazon Prime, Sling TV, AT&T TV Now, and Hulu + Live TV.¹⁹

Both the Attorney General of Maine and the members of the New Jersey Bureau of Public Utilities, in arguing that their challenged provisions do not in fact regulate "rates for the provision of cable service,"²⁰ sought principally to rely upon *Cable Television Ass'n of N.Y., Inc. v. Finneran*,²¹ a 1992 decision by the Second Circuit. In that case, however, the focus was on downgrade fees imposed independently from monthly service charges. The Maine District Court therefore concluded that *Finneran* was "distinguishable" because the challenged Maine law "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,"²² The New Jersey District Court agreed, quoting the Maine decision at length.²³

Maine and New Jersey also sought to evade Section 623(a)(2) of the Act by claiming that their proration requirements, despite directly affecting cable operators' ability to establish the rates they assess for the provision of cable service, instead are "consumer protection laws" or "customer service requirements" otherwise permitted by the savings clauses found in Section 632(d).

As noted above, pursuant to Section 636(c) of the Act, "any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded."²⁴ However, Section 632(d)(1) states that "[n]othing in this subchapter shall be construed to prohibit any State or franchising authority from enacting or enforcing any consumer protection law, *to the extent not specifically preempted by this subchapter.*"²⁵

THERE ARE NO REFUNDS OR CREDITS FOR PARTIALLY USED SUBSCRIPTION PERIOD(S).") (emphasis in original).

¹⁸ See *Charter Brief* at 20 ("The Pro Rata Law is akin to a requirement that a supermarket take their \$6 six-packs of soda, sell the bottles individually, and do so for \$1 each (one-sixth of the price of a six-pack) rather than charge \$1.50 per bottle.").

¹⁹ See *id.* at 7.

²⁰ 47 U.S.C. § 543(a)(2).

²¹ *Cable Television Ass'n of N.Y., Inc. v. Finneran*, 954 F.2d 91 (2d Cir. 1992).

²² *Order on Motion to Dismiss* at 10.

²³ See *Altice Opinion* at 9.

²⁴ 47 U.S.C. § 556(c).

²⁵ 47 U.S.C. § 552(d)(1) (emphasis added).

The Maine decision, relying upon the italicized language above, made short work of this "consumer protection law" argument:

[D]escribing the Pro Rata Law as a consumer protection law does not aid in determining whether the Pro Rata Law is preempted by [§ 623(a)(2)] – it simply begs the question. Because I find that Charter has sufficiently stated a claim that the Pro Rata Law regulates Charter's rates, and is therefore "specifically preempted" by [§ 623(a)(2)], [§ 632(d)(1)] does not change the result.²⁶

Once again, the New Jersey court agreed – and, in doing so, quoted directly from this language.²⁷

Meanwhile, Section 632(d)(2) of the Act states that:

Nothing in this section shall be construed to preclude a franchising authority and a cable operator from agreeing to customer service requirements that exceed the standards established by the Commission under subsection (b). Nothing in this subchapter shall be construed to prevent the establishment or enforcement of any municipal law or regulation, or any State law, concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section.²⁸

While acknowledging that (1) permissible customer service requirements might address "*communications between the cable operator and the subscriber*" regarding "standards governing bills and refunds,"²⁹ and (2) the Act's legislative history arguably is consistent with the imposition of customer service requirements relating to rebates and credits in certain limited circumstances (such as in the case of overcharges or service interruptions), the Maine District Court concluded that the challenged state law:

[G]oes well beyond these examples and directly regulates the rates that Charter may charge subscribers who cancel in the middle of a monthly billing period, [T]he substance that the Pro Rata Law regulates – the increment by which a cable operator must bill for cable service – is unambiguously prohibited by [§ 623(a)(2)], and nothing in the statutory text or legislative history of [§ 632(d)(2)] suggests that it creates an exception to that prohibition.³⁰

As Charter explained in its recent Brief to the First Circuit, acceptance of the contrary argument "would render the Cable Act's preemption of rate regulation virtually meaningless."³¹

²⁶ *Order on Motion to Dismiss* at 11-12.

²⁷ *See Altice Opinion* at 10.

²⁸ 47 U.S.C. § 552(d)(2).

²⁹ *Order on Motion to Dismiss* at 13 (emphasis added). *See also* 47 U.S.C. § 552(b)(3).

³⁰ *Order on Motion to Dismiss* at 14-15.

³¹ *Charter Brief* at 12.

Once more, the New Jersey District Court agreed, citing the Maine District Court in part for the indisputable proposition that the BPU's rule "cannot be characterized as a 'law concerning customer service' for purposes of [§ 632(d)(2)] because it does not 'impose[] customer service requirements' on cable operators."³²

V. The Act Articulates a "Clear and Manifest" Intent to Preempt

As explained in the previous sections, cable operators face "effective competition" and final-month proration requirements constitute regulation of "the rates for the provision of cable service." Left with no other options, the Maine Attorney General and members of the New Jersey BPU both assert a "presumption against preemption." Unfortunately for them, the text of the 1984 Cable Act expresses plainly Congress' "clear and manifest" purpose: to preempt legal provisions that regulate cable rates.

In 2005's *Bates v. Dow Agrosciences, LLC*, the Supreme Court held that "[i]n areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention 'clear and manifest.'"³³ The New Jersey District Court, citing the Third Circuit's 2011 decision in *Roth v. Norfalco LLC*, noted that "[t]his is 'often referred to as a presumption against preemption,' which 'holds even where an express preemption provision is in play.'"³⁴

Neither the Maine nor New Jersey District Court was persuaded that a "presumption against preemption" could rescue a challenged last-month proration requirement. In the Maine case, Chief U.S. District Judge Jon D. Levy concluded that "[b]ecause I do not find [§ 623(a)(2)] to be susceptible of more than one plausible reading in the context of this case, I do not apply the presumption against preemption."³⁵ By contrast, the New Jersey court held that although "a presumption against preemption applies," it "concludes the language of the Cable Act is clear enough to overcome this presumption."³⁶

Thus, while diverging in their legal reasoning as to whether a "presumption against preemption" should apply, both courts ultimately agreed that Congress spoke with sufficient clarity to establish a "clear and manifest" intent to preempt.

VI. Conclusion

As Congress envisioned, robust competition amongst distributors of multichannel video programming abounds. Consumers reap the benefits thereof not just through efficiently low prices, but also non-monetary and voluntary product differentiation measures, including choices as to how they are billed. The 1984 Cable Act makes it plain that, where such marketplace conditions exist, states are to have no authority over the billing practices of cable operators. The

³² *Altice Opinion* at 11.

³³ *Bates v. Dow Agrosciences, LLC*, 544 U.S. 431, 449 (2005) (citation omitted). *See also Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (citation omitted).

³⁴ *Altice Opinion* at 6 (citing *Roth v. Norfalco LLC*, 651 F.3d 367, 375 (3d. Cir. 2011) (citations omitted)).

³⁵ *Order on Motion to Dismiss* at 16-17.

³⁶ *Altice Opinion* at 7.

Maine and New Jersey District Court decisions discussed herein appropriately reject efforts to defy congressional intent by regulating rates for the provision of cable service despite the existence of "effective competition" – and, hopefully, send a clear signal to others that might contemplate similarly preempted provisions.

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Further Readings

Randolph J. May, *et al.*, "[The FCC's Marketplace Report Substantiates the Extent of Competition](#)," *Perspectives from FSF Scholars*, Vol. 16, No. 4 (January 25, 2021).

Andrew Long, "[Maine's Attorney General Gives Up Cable Billing Law Fight for Now, Appeal May Follow](#)," *FSF Blog* (November 6, 2020).

Andrew Long, "[Maine Cable Law, Ignoring Competition, Is 'Unambiguously Preempted'](#)," *Perspectives from FSF Scholars*, Vol. 15, No. 56 (October 26, 2020).

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).

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).