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**First Circuit Wrongly Concludes Maine's Prorated Billing Requirement Is
Not Unlawful**

by

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On January 4, 2022, the Court of Appeals for the First Circuit [reversed](#) the U.S. District Court for the District of Maine's October 2020 [decision](#) that a Maine law requiring that cable operators, and cable operators only, prorate subscribers' final month bills is "[unambiguously preempted](#)." The Maine law mandates that cable operators charge for service on a per-day basis, and thus it conflicts with Section 623(a)(2) of the 1984 Cable Act's express prohibition of rate regulation. And, aside from its legal infirmity, it interferes with the efficient operation of competitive forces in a marketplace teeming with consumer choice.

Many cable operators market multichannel video programming service to subscribers in monthly increments. So, too, do some number of their competitors, which include Direct Broadcast Satellite (DBS) operators, telco TV providers, and virtual Multichannel Video Programming Distributors (vMVPDs) – as well as streaming services such as Netflix, Hulu, Disney+, and Amazon Prime Video, to name only a few.

In other words, purchasers of video programming are able to choose from a vast array of options in a vibrantly competitive marketplace, and one of the ways that rivals differentiate their

offerings in the marketplace is on the basis of billing practices. No single provider, or distribution technology, has an undue ability to impose unreasonable terms on empowered consumers.

Nevertheless, in March 2020, Maine Governor Janet Mills signed 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 Pro Rata Act). In relevant part, the Pro Rata Act compels cable operators, but no other providers, to "grant a subscriber a pro rata credit or rebate for the days of the monthly billing period after the cancellation of service."

As I described in a [June 2020 post](#) to the Free State Foundation blog, Charter Communications, Inc. (Charter) challenged the Pro Rata Act in the Maine District Court, arguing that it violates [Section 623\(a\)\(2\) of the 1984 Cable Act](#) – which states in relevant part that "the rates for the provision of cable service by such system shall not be subject to regulation by ... a State" – and therefore triggers the express preemption language found in [Section 636\(c\)](#): "any provision of law ... which is inconsistent with this chapter shall be deemed to be preempted and superseded."

One of the arguments that Maine Attorney General Aaron Frey offered in defense of the Pro Rata Act was that it does not regulate rates, but rather is merely a consumer protection law. [Section 632\(d\)\(1\)](#) of the 1984 Cable Act states that "[n]othing in this subchapter shall be construed to prohibit any State ... from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this subchapter."

As I noted in an [October 2020 *Perspectives from FSF Scholars*](#), the Maine District Court agreed with Charter, [holding](#) that the Pro Rata Act "is unambiguously preempted." In addition, and as I highlighted in the April 2021 *FSF Perspectives* "[State Cable Bills Prorating Requirements Clearly Are Preempted](#)," the New Jersey District Court relied heavily on the Maine decision in [finding](#) a "virtually identical" New Jersey Board of Public Utilities' [rule](#) to be preempted. And in October 2021, a New Jersey state court [concurred](#).

In evaluating the Maine law, the First Circuit began by highlighting the parties' agreement, as well as the FCC's earlier assertion (albeit in a different context), that "a 'rate' depends not only on the price charged, but also on the type and *amount of service provided*" (emphasis added). In other words, the rate isn't simply the dollar amount viewed in isolation, but that amount applied to a defined billing period: in this case, X dollars per Y unit of time (that is, a month).

Accordingly, the Maine District Court concluded that:

[D]escribing the Pro Rata Law as a consumer protection law does not aid in determining whether the Pro Rata Law is preempted by [Section 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 [Section 623(a)(2)], [Section 632(d)(1)] does not change the result. (Emphasis added).

By contrast, the First Circuit concluded that the better reading of the Pro Rata Act is not as a law regulating "the rates for the provision of cable service," but rather as one that requires a "termination rebate" that "falls outside the 'provision of cable service.'"

Notably, the court offered what I consider to be a logically suspect hypothetical to justify its "narrow reading of the scope of [Section 623(a)(1)'s] expressly preemptive ban" on rate regulation. Positing the existence of a state law that caps the amount a cable operator can charge at \$50 per month, it acknowledges that Section 623(a)(1) clearly would apply in that instance. That certainly, and not controversially, is true.

Crucially, however, that fact does not preclude a finding that the Pro Rata Act *also* is preempted. Nor, for that matter, does it necessarily compel the court's conclusion that the law "regulates only the charge that the cable operator may impose on a customer for the month in which that customer has terminated – i.e., *when the cable operator no longer provides* – 'cable service'" (emphasis added).

To the contrary, a cable operator indeed does provide service during that final month. And the inevitable practical impact of the Maine Law is that a cable operator must determine the rate it charges on a daily, rather than monthly, basis. In other words, the Pro Rata Act dictates the rate – specifically, the "amount of service provided" component of that rate described above – "for the provision of cable service."

Significantly, the decision by the Maine District Court – which emphasized that, "in enacting [Section 623(a)(2)], Congress intended to ensure that 'market forces,' and not state governments, 'control the rates charged by cable companies'" – also aligns far better with sound competition policy.

The reality of the video programming marketplace, at the time the Pro Rata Act was passed in 2020 and even more so today, is that cable operators enjoy no undue advantage over their rivals. For proof, one need look no further than the following recent blog post and *FSF Perspectives*: [link](#), [link](#), [link](#).

It is indisputable that consumers are able to choose from an ever-growing list of options, and the best way to maximize the benefits they receive is to reject one-sided regulations— like Maine's cable-only prorated billing law – that not only are most likely unlawful but that also unjustifiably interfere with the efficient operation of marketplace forces.

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Further Readings

["Virtual Video Programming Services Continue to Gain Ground,"](#) *FSF Blog* (December 30, 2021).

["NJ State Court Concur: Requirement to Prorate Cable Bills Equals Preempted Rate Regulation,"](#) *FSF Blog* (October 18, 2021).

["Pixel by Pixel, Video Streaming's Ascension Comes Into Focus,"](#) *Perspectives from FSF Scholars*, Vol. 16, No. 52 (September 29, 2021).

["Streaming Continues to Redefine the Video Landscape: It's Past Time to Eliminate Legacy Regulations,"](#) *Perspectives from FSF Scholars*, Vol. 16, No. 30 (June 11, 2021).

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

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

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