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News and Commentary

Developments in cable television

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by Barbara L. Krause

In October of 1992, in response to consumer complaints throughout the country, the United States Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act" or "the Act"). Among the more significant aspects of the Act were provisions subjecting the cable industry to rate regulation by franchising authorities and/or by the Federal Communications Commission (FCC); and "must carry" provisions, requiring the vast majority of cable operators to carry broadcast television programming.

This article will review the status of those provisions today, nearly one and one-half years after enactment of the 1992 Cable Act.

Rate regulation

Perhaps the biggest concern voiced by consumers was the increase in rates for cable television service experienced in many areas throughout the country. The 1992 Act attempted to address this concern by conferring authority on franchising authorities (in most cases, municipalities) to regulate rates for basic tier services and for equipment related to basic tier services. The FCC was given authority to regulate rates for other than basic tier services (except for premium or pay-per-view service), but only in response to consumer complaints. The FCC may also regulate basic tier service upon the request of a franchising authority which is able to establish that it lacks sufficient resources to act as regulator. While many municipalities (especially in Maine and other rural areas) may indeed lack the resources to regulate cable rates, the FCC is expected to exercise its regulatory capacity pursuant to this option in a narrow fashion.

In order for franchising authorities to regulate rates for basic tier services, they must first go through a certification process. That process involves, among other things, filing a form with the FCC and adopting an ordinance with certain specified provisions designed to ensure appropriate procedural mechanisms for the ratemaking process.

While the certification process itself is quite simple, it does not appear that many municipalities in Maine are availing themselves of the "opportunity" to regulate cable rates. Already burdened by extremely difficult budgetary times, few towns see the wisdom of committing themselves to a regulatory role that will require a great deal of technical and economic expertise. That expertise will either have to come from in-house personnel (whose time and attention will then be diverted from the other tasks), from outside consultants, or (most likely) from a combination of both. Stated simply, given the choice between spending time and money to fix potholes or to regulate cable television rates, many more towns appear to be opting for the potholes.

So what is happening to cable rates in the meantime? When Congress initially passed the 1992 Cable Act, cable television rates were frozen to allow the FCC time to promulgate appropriate regulations. The original rate freeze was to expire on November 15, 1993; it was later extended to February 15, 1994, and then to May 15, 1994. Because this rate freeze applied to average customer bills, many consumers saw an increase in cable rates despite the freeze. According to a survey conducted by the FCC and directed at the 25 largest multiple system operators in the country, some 30.5 percent of surveyed subscribers experienced increases in their cable bills, and most of those who did see rate reductions saw the reduction in decreased equipment charges.

During the rate freeze period, the FCC was working on many fronts to implement the new ratemaking authority. Among other things, the FCC has done the following:

- Defined the "competitive differential*" - i.e., the difference between actual rates and projected rates if effective competition existed. Initially, the FCC determined this differential to be ten percent; it was later revised to seventeen percent.
- Developed the "benchmark" formula to be used in setting basic tier rates. As a general rule, cable systems whose rates are above the FCC's benchmark will have to reduce average per channel rates to the benchmark or by seventeen percent (the competitive differential), whichever rate is higher.
- Developed "cost of service" rules. This option, which can be invoked only by the cable operator (not by the franchising authority), allows a rate higher than the benchmark if justified by a cost of service analysis. This approach allows a "reasonable" return on investment (defined as 11.25 percent), but allows only "prudent investment" costs to be included in the rate base. Notably, acquisition costs will be limited to the book value of the system at the time of acquisition.

It is still too early to tell what the real impact of this regulatory effort will be. One element of clarity, however, does seem to have emerged: rate regulation is not an easy fit for many municipalities, and further rulemaking adjustments will be necessary if the effort is to bring any real relief to consumers.

"Must-carry" provisions

During the fall of 1993, many television viewers in Maine watched with some anxiety as cable operators and broadcast stations engaged in a stand-off over carriage of broadcast signals. In at least one instance, an over-the-air television channel was off a cable system for a short period during an attempt by the broadcaster to obtain compensation for the use of the over-the-air signal. The source of the controversy was the "must carry" provisions in the 1992 Cable Act, which require essentially all cable systems to carry the signals of full-power broadcasters in the same viewing area. Broadcast stations have the option of requiring cable systems to carry their signal or of electing to negotiate a retransmission consent agreement under which the broadcast station would typically receive some form of compensation for its signal. The cable operator must carry the signal if the broadcaster elects the "must carry" option.

Although most of these disputes were resolved with little effect on viewers, the controversy over the must carry provisions continues to be waged in the courts. Shortly after enactment of the 1992 Act, cable operators filed suit challenging the constitutionality of the provisions. Must-

carry, they argued, infringed on their First Amendment rights of free speech by requiring the cable operators to carry certain messages.

The Supreme Court provided a partial answer to this dispute with its recent ruling in the case of *Turner Broadcasting System, Inc. v. FCC*, 62 U.S.L.W. 4647 (U.S. June 27, 1994). While the Supreme Court did not actually decide whether the must-carry provisions violate cable operators' First Amendment rights, the Court did clarify what standard should be used to make that determination.

The must-carry provisions, the Court ruled, are content-neutral restrictions on speech that demand only intermediate scrutiny under the First Amendment. The FCC had argued that the must-carry provisions should be analyzed under the standards for broadcast television which allow a more intrusive level of regulation. The Court rejected this argument, noting that the unique physical limitations of the broadcast medium justified a higher level of regulatory control than was appropriate for cable transmission. The Court, however, also rejected the cable operators' argument that the provisions compelled certain speech and should therefore be subject to a strict scrutiny test. Under this level of review, a content-neutral regulation will be sustained if (1) the regulation furthers an important governmental interest that is unrelated to the suppression of expression; and (2) the regulation's incidental restrictions on speech are no greater than is essential to further the governmental interest.

Justice Anthony Kennedy, who wrote the opinion of the Court, agreed that the government's asserted interests in adopting the must-carry provisions - including ensuring that citizens will have continued access to broadcast programming - were important in the abstract. He concluded, however, that the government had not yet demonstrated that the must-carry provisions will in fact advance those interests. Accordingly, the case was remanded to the lower court to make that determination.

Conclusion

As evidenced by the extensive FCC proceedings and litigation that have followed in the wake of the 1992 Cable Act, cable issues continue to be a hot topic of discussion among professional and "arm-chair" regulators. Observers can expect continued activity on both the regulatory and judicial forms as interested parties attempt to implement the purposes and define the limits of the 1992 Act. - Barbara L. Krause, Esq.'

Ms. Krause is a shareholder in the Portland law firm of Drummond Woodsum & MacMahon. She devotes a significant amount of her practice to the representation of municipalities and has assisted towns throughout the state with cable television issues.