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Rate regulation and the Cable Television Consumer Protection and Competition Act of 1992

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In October, 1992, Congress responded to consumer complaints about their cable rates and services by passing the Cable Television Consumer Protection and Competition Act of 1992. The numerous provisions of the new act were the subject of two, day-long workshops held in Portland and Orono last fall that were targeted to municipal officials. The workshops were jointly sponsored by the Margaret Chase Smith Center for Public Policy, the Maine Municipal Association and the Community Television Network of Portland. The following articles were excerpted from those presentations in an effort to both communicate and explain the important changes wrought by the new cable act. In the first article, Lisa Gelb and Frederick Ellrod offer an overview of the recent changes effecting cable rate regulation. Portland attorney Barbara Krause follows with a discussion of the new consumer protection and consumer services provisions of the 1992 Cable Act. Finally, Portland attorney George Burns describes two of his experiences with local cable franchise renewals.

The 1992 Cable Act: Consumer protection and customer service

by Barbara Krause, Drummond, Woodsum, Plimpton and MacMahon.

Following the enactment of the Cable Television Consumer Protection and Competition Act of 1992, much attention has been focused on the provisions related to rate regulation. In terms of day-to-day cable viewing, however, provisions related to customer service and other aspects of consumer protection may actually have a more significant impact on the public than rate regulation. This article will review the customer service standards that have been adopted by the Federal Communications Commission (FCC) under the 1992 Act, discuss the impact of these standards on franchising authorities and the general public, and review similar provisions in Maine law.

Background

The federal statutory provisions governing cable television are part of the Communications Act of 1934. Because the 1934 Act was enacted well before the existence of cable television, federal law did not address the cable industry in any comprehensive way until many years after the industry was established. The 1984 Cable Communications Policy Act changed that situation by defining the rights and responsibilities of the cable operators and the franchising authorities more clearly. A "franchising authority" is any governmental entity empowered by federal, state or local law to grant a cable television franchise.

The 1984 Cable Act authorized franchising authorities to establish customer service requirements. Although many franchising authorities responded by writing customer service standards into their franchise agreements, service continued to be a problem. In 1990, the

National Cable Television Association (NCTA) adopted voluntary standards which it urged the industry as a whole to implement by July 1991.

Two years later, the Senate Committee studying the proposed 1992 Cable Act found that many cable operators provided poor service to their customers. Among the problems cited were a failure to answer phones promptly; service offices were open for a minimal number of hours; and response to service calls took far too long. Accordingly, the Committee Report concluded that "[p]roblems with customer service have been at the heart of complaints about cable television, and strong mandatory requirements are necessary" (Senate Report 1992).

Consistent with these findings, Section 8 of the 1992 Cable Act required the FCC to establish mandatory customer service requirements. The standards were required to include, at a minimum, requirements governing:

- cable system office hours and telephone availability;
- installations, outages, and service calls; and
- communications between the cable operator and the subscriber (including standards governing bills and refunds).

The 1992 Cable Act further provided that states or franchising authorities may provide stricter customer service standards than those established by the FCC, and that stricter provisions may be agreed to by the cable operator and the franchising authority and incorporated in the franchise agreement.

FCC customer service standards

In implementing the provisions of the new mandate, the FCC announced on March 11, 1993 customer service standards for the cable television industry. The Commission began by defining key terms, and then established standards based on those definitions.

Definitions

The following terms were defined by the FCC:

Normal business hours: Those hours during which most similar businesses in the community are open to serve customers. In all cases, "normal business hours" must include some evening hours at least one night per week and/or some weekend hours.

Normal operating conditions: Those conditions which are within the control of the cable operator, including special promotions, pay-per-view events, rate increases, and maintenance or upgrade of the cable system. Conditions which are not within the control of the cable operator include, but are not limited to, natural disasters, civil disturbances, power outages, telephone network outages, and severe weather.

Service interruption: Loss of picture or sound on one or more channels.

Specific standards

The specific standards adopted by the FCC include the following:

Telephone answering: Cable operators must maintain a local, toll-free, or collect call telephone access line which is available 24 hours a day, seven days per week, with a trained representative to answer the telephone during normal business hours. If an answering machine or answering service accepts a call after normal business hours, a trained representative must respond to the call on the next business day. Telephones must be answered within 30 seconds and call transfers must be made within another 30 seconds; callers are to receive a busy signal less than three percent of the time.

Bill payment centers: Bill payment centers must be open at least during normal business hours and must be conveniently located.

Standard installations: Standard installations (those that are up to 125 feet from the existing distribution centers) must be performed within seven business days after an order has been placed.

Service interruptions: Excluding conditions beyond the cable operator's control, the cable operator must begin working on service interruptions promptly and in no event later than 24 hours after the interruption becomes known. The cable operator must begin action to correct other service problems the next business day after notification of the service problem.

"Appointment windows": The cable operator may use "appointment windows" for service calls and installations, but the customer must be given either a specific time or, at a maximum, a four-hour "window" during normal business hours. The operator may schedule service or installation visits outside of normal business hours for the express convenience of the customer.

Cancellation of appointments: A cable operator may not cancel an appointment with a customer after the close of business on the business day prior to the scheduled appointment. If an installer or technician is running late or will not be able to keep a previously scheduled appointment, the customer must be contacted and the appointment rescheduled at time that is convenient for the customer.

Subscription information: At the time of installation and at least annually thereafter, a cable operator must provide written information to all subscribers on products and services, prices and options, installation and service maintenance policies, instructions on how to use the cable service, channel positions, and billing and compliant procedures. This information must also be provided at any time upon request.

Notification of changes: The cable operator must provide customers with at least 30 days notice of any changes in rates, programming or channel positions, if the change is within the control of the cable operator. The notice must be given "as soon as possible" in writing and through announcements on the cable system.

Bills: Bills must be clear, concise and understandable and must be fully itemized, including basic and premium service and equipment charges.

Billing disputes: In the case of a billing dispute, the cable operator must respond to a written complaint within 30 days. Refund checks must be issued promptly, but no later than (1) the next billing cycle or 30 days thereafter, or (2) upon the return of the equipment supplied by the cable operator if service is terminated. Credits for service must be issued no later than the customer's next billing cycle.

Other requirements

The customer service standards adopted by the FCC took effect on July 1, 1993. They are "self-executing" and apply to all cable operators throughout the country, regardless of size. "Small systems" (defined as those with 1,000 or fewer subscribers) may seek waivers from the FCC of any standards considered to be too onerous.

Some existing franchise agreements may contain customer service requirements that exceed the new FCC standards. Those existing requirements will be "grand-fathered" and remain enforceable through the end of the current franchise term.

Other existing franchise agreements may prohibit the franchising authority from enforcing customer service standards, or may provide less stringent standards than those adopted by the FCC. In such cases, the existing provisions are preempted by federal law, and the franchising authority may unilaterally modify the franchise agreement to the extent necessary to implement local enforcement of the FCC's customer service requirements.

Enforcement

The FCC's ruling confers authority on local franchising authorities to enforce the new customer service requirements. The franchising authority must provide affected cable operators 90 days written notice of its intent to enforce the standards.

The FCC determined that local governments should be free to avail themselves of all reasonable remedies to assure compliance with customer service requirements. As a result, the Commission declined to establish specific customer service reporting requirements, or to set refund or penalty guidelines applicable to all cable operators nationwide.

The new federal regulations finally provide franchising authorities with clear standards for customer service. By failing to include record-keeping requirements, however, the FCC regulations leave a gap that must be filled either by state legislation or by local franchise authorities. Fortunately, Maine's Legislature has already acted in a way that fills the gap.

Maine law and cable consumer rights

While the debate was raging at the national level over protection for cable television customers, the Maine Legislature was busy enacting its own statutory provision on the same subject. The

1992 Cable Act expressly permits states to establish stricter consumer protection provisions, so the Maine law supplements the FCC's regulations and provides greater protection to Maine consumers of cable television. The relevant portions of Maine's statute provide the following protections:

Recording subscriber complaints

Perhaps the most significant aspect of the Maine law is that cable operators are required to maintain a record or log of all written complaints received regarding service quality, equipment mal-functions, billing procedure, employee attitude, and similar matters. These records must be maintained for two years. The record must include, among other things, the date of the complaint and a report on how and when the complaint was resolved. These records must also be made available for inspection by any authorized agent of the franchising authority and to any authorized agent of a municipality considering a franchise with that cable operator.

Credits and refunds for interruption of services

Under Maine law, any subscriber whose service is interrupted for 24 or more consecutive hours is entitled, upon request, to a prorated credit or rebate. Consistent with the FCC regulations, cable operators must maintain an office that is open during "usual business hours," has a listed toll-free number, and is capable of receiving complaints, requests for adjustments, and service calls. The cable operator must provide subscribers with 30 days advance notice of any increase in rates or the deletion of a channel.

Notice to subscribers regarding service quality

Like the federal regulations, Maine's law requires cable operators to provide notice at the time of installation, and annually thereafter, that informs subscribers of how to make a complaint to the cable company. Maine's law goes further, however, to require notice of how to submit complaints to municipal officials and the Maine Attorney General's office. The notice must specifically state that the Attorney General's office is responsible for receiving consumer complaints about matters other than channel selection and rates. The notice must also state the policy regarding and method for requesting rebates or prorated credits for interruption of service. Finally, Maine's law requires each cable operator to certify to the franchising authority and to the Department of the Attorney General, on or before January 30th of each year, that it has distributed the notice as required by this section of the law.

Late fees

Maine law prohibits cable operators from charging a late fee on any bill for basic tier service (as defined by federal law) that exceeds the maximum amount established by Maine's Consumer Credit Code. The allowable fee is set on a sliding scale that depends on the out-standing balance, with a maximum fee of 18 percent per year. The Consumer Credit Code also allows the parties to contract for a minimum late fee on small amounts. (For example, parties may agree to a minimum late fee of \$5.00 where the amount financed was \$75.00 or less.) Presumably, when

applied in the context of cable television, this "contract" would have to be incorporated in the franchising agreement.

Penalties

As indicated above, the FCC did not establish any penalties as part of its customer service regulations, and chose instead to leave that issue to state or local authorities. Again, Maine's Legislature has filled this gap (at least with respect to the provisions of Maine's cable consumer protection laws): violations of any provision of the Maine law constitute a violation of Maine's Unfair Trade Practices Act and subjects the cable operator to the penalties of the Act. Those penalties include liability in a private lawsuit for actual damages, restitution, equitable relief including an injunction (*i.e.*, a court order requiring or prohibiting future conduct), and costs and fees associated with the lawsuit, including attorney's fees.

How to enforce customer service standards

The FCC regulations do not provide any specific guidance on how to enforce the service standards. Maine law offers one means, by ensuring franchising authorities access to subscriber complaint records. As a practical matter, franchising authorities might consider the following steps:

- Determine who will have responsibility for overseeing enforcement. In all likelihood, this will be the local cable television committee.
- Make sure that the enforcing entity is familiar with the customer service standards.
- Make sure that the public is aware of the importance of notifying the cable operator in writing of any complaints.
- Determine how information on compliance will be gathered. The cable operators' records will provide some information; municipalities may also want to conduct independent surveys on a periodic basis. The survey could be tailored directly to the standards described above.
- Submit a request annually to review the cable operator's complaint records. Consider negotiating a clause in the franchise agreement that would require the cable operator to provide copies of relevant records on an annual basis, at no cost to the franchising authority.
- Maintain good communications with the cable operator and keep it apprised of problems as they come up. Document the problems, and your communication of the problems to the cable operator, in writing.

The best way to prevent service problems will be to monitor the service provided on an on-going basis. Waiting until the time of franchise renewal, for example, will leave many citizen/subscribers frustrated, and will also run the risk of losing track of problems that have not been documented and communicated to the cable operator.

An additional reason for working with the cable operator to prevent problems is that other enforcement options will be costly and divisive. Denying a franchise renewal for unsatisfactory

performance, for example, will almost certainly prompt a vigorous legal challenge by the cable operator resulting in costly and time-consuming legal proceedings.

Although the FCC retained authority to address systemic abuses, it will almost certainly be the local franchising authority that is called upon to enforce customer service standards. The effort to work with the cable operator to solve problems as they come up should pay off in the long run.

Related issues

Two additional issues related to the broader topic of consumer protection, technical standards and privacy rights, are worthy of mention.

Technical standards

Section 16 of the 1992 Cable Act required the FCC to prescribe regulations that establish minimum technical standards relating to cable systems' technical operation and signal quality. The FCC has issued these regulations and is required to update the standards "periodically" to reflect changes in technology. Franchising authorities may require provisions for the enforcement of technical standards as part of a franchise agreement, including a modification, renewal or transfer of a franchise. A franchising authority may also apply to the FCC for a waiver to impose stricter technical standards than those established by the FCC.

Privacy right

Both federal and state law provide certain protection of the privacy rights of subscribers. Because the Maine law is arguably stricter than (and inconsistent with) the federal statute, the Maine law could be subject to challenge.

The 1984 Cable Act (federal law) required cable operators to provide notice to subscribers of the circumstances under which "personally identifiable information" would be collected and/or disclosed. This notice must be provided at the time of subscription and annually thereafter. Essentially, collection of personally identifiable information (without prior written or electronic consent from the subscriber) is limited to obtaining information necessary for the cable operator to provide service or to detect unauthorized reception of cable communications. Disclosure of personally identifiable information is similarly limited to disclosure for legitimate business activity related to the provision of cable service, and other situations where the subscriber authorizes disclosure or the cable operator obtains a court order pursuant to suspected criminal activity. The 1992 Cable Act goes further and imposes an affirmative obligation on the cable operator to "take such actions as are necessary to prevent unauthorized access to such information by a person other than the subscriber or cable operator."

The Maine law limits the collection of information from the subscriber's household as follows: "*A cable television system operator may not intrude upon the privacy of a subscriber by installing or using any equipment that allows the system operator to observe or to listen to what is occurring in an individual subscriber's household without express, prior written consent of the subscriber.*"

This provision is at odds with the federal statute, which authorizes collection of "personally identifiable information," without the subscriber's consent, in order to provide service and in order to detect unauthorized reception of cable communications. To the extent that Maine's provision is inconsistent with the authority granted by federal law (particularly with respect to detecting unauthorized cable reception), Maine's law could be susceptible to a challenge based on the doctrine of federal preemption. Under this doctrine, where the federal government has legislated exhaustively in a particular area, as it has with cable television, states may not enact inconsistent statutes.

Conclusion

The new regulations issued by the FCC in response to the 1992 Cable Act, together with provisions under Maine law governing consumer rights and consumer protection, establish clear standards for customer service that must be satisfied by cable operators. The burden will now be on franchising authorities to set up an enforcement mechanism to ensure that those standards are met.

Since Maine law requires cable operators to keep a record of complaints and to make that record available to authorized agents of the franchising authority, franchising authorities should take advantage of this requirement and request this information on an annual basis. Even if the records are edited (consistent with the privacy provisions of federal and state law) to delete information that would identify the complainant, the franchising authority should at least be able to determine whether its cable operator is complying with the service requirements. If the cable operator is falling short, the franchising authority should use all legal means available to ensure that the problems are remedied.

References:

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