discover that he has the right to file a complaint, (2) to determine what the appropriate procedure is for filing a complaint, and (3) to gather information necessary to make the minimum showing that a rate is unreasonable. Moreover, allowing a subscriber 120 days to file a complaint is not unduly harmful to an operator, particularly because it will be able to implement the new rates, subject to refunds.

The Coalition also recommends that the operator be required to give 30 days advance notice to subscribers and franchising authorities of any rate changes as a matter of consumer protection.[56] This notice requirement would be a minimum, and a franchising agreement might require greater advance notice. In addition, any such notice to subscribers should include notification that subscribers have the right to file a complaint with the FCC. The operator should also be required to notify subscribers of this right at the time of installation and through a billing insert at least once a year.[57] This notice requirement is very important, because Congress' decision to allow subscribers to protest non-basic rate increases offers little protection unless subscribers are aware of the right. Certainly, existing subscribers accustomed to

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[56] Longer notice periods are not unusual even in smaller communities, and are often required because operators bill in advance for services.

[57] Such notice requirement is comparable to those imposed upon regulated utilities and telephone companies. See, e.g., 47 C.F.R. § 61.58(a)(4).

having their rate complaints fall upon deaf ears should be alerted to these new rights.

The Coalition also suggests that the FCC adopt a simple complaint form that a subscriber could submit, and this would satisfy the minimum showing that rates are unreasonable. An allegation that the per-channel rate established by the average cost of service methodology was exceeded either for the non-basic service, or for basic service collectively, would satisfy the necessary minimum showing. Such forms could be available from the FCC or the local franchising authority. A subscriber should be able to file a complaint on its own, without requiring an opinion or concurrence from the franchising authority or anyone else. Such independent filing was contemplated by the Act.[58] Nor does the Act contemplate imposing a more stringent standard upon franchising authorities or complainants represented by legal counsel.

B. Negative Option Billing

Summary of Coalition's Position

The FCC tentatively concludes that the prohibition on negative options precludes the operator from billing a subscriber for any service or equipment not affirmatively requested, orally or in writing. The FCC asks for comments on what types of retiering programming modifications and system upgrades are permissible in light of this prohibition, and how it should apply

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[58] House Conference Report at 64, 1992 U.S.C.C.A.N. at 1246.

to the initial implementation of the Act's basic service rate structure.

Subscribers must receive notice of all changes in service and equipment offerings, regardless of whether the overall amount paid by the subscriber is changed. Any changes to existing service made by negative option, and not affirmatively requested by all subscribers receiving the altered or new service or equipment, should be irrefutably presumed not to be a new service but rather should be deemed to be part of the existing service for regulatory purposes.

Discussion

The Coalition agrees with the FCC's tentative conclusion that the subscriber must have, at some point prior to receiving a service, affirmatively requested the particular programming service or equipment. Inaction or silence does not constitute an affirmative request. A request may be made either orally or in writing, as the FCC suggests.

The Coalition also agrees that an operator may not charge or seek payment for any service or equipment provided in violation of the Act's negative option prohibition or the FCC's implementing rules.

The Coalition also asks the FCC to recognize that, even where tier changes may be revenue-neutral, at least initially, they nevertheless may violate the prohibition on negative options. In Gillette, Wyoming, for example, the operator automatically switched all subscribers from basic to expanded basic service, requiring subscribers to notify the operator if they did not want to receive the "new" tier of service. While the expanded basic service (which included basic service) contained the identical programming and cost the same amount as the previous basic service, and thus was presumably revenue neutral, it nevertheless was a negative option, instituted to move subscribers from what TCI contended was a regulated tier to a deregulated tier, on which rates could rise rapidly. In such circumstances, where retiering actually disadvantages a subscriber, the company should be held to a strict market test if it wants to deregulate services by offering them as part of a separately marketed and priced tier (assuming it can in a particular case), then it must obtain the subscriber's permission in advance.

Subscribers must receive advance notice of all tiering changes, including any instance where an operator adds services or equipment and imposes a corresponding rate increase, and any instance where programming services or equipment are eliminated. Absent advance notice, implementing these alterations might otherwise constitute a negative option, and in any event, the changes might provide a basis for a complaint that the new rate is unreasonable in light of the change.

As Congress recognized, cable operators may attempt to retier services as a way to avoid or minimize the impact of rate regulation. CPCA § 623(b)(5)(C), 106 Stat. at 1467.[59] The

[59] See also Senate Report at 75, 1992 U.S.C.C.A.N. at 1208.

manner in which a service is marketed and priced remain determinative factors in deciding what is included as part of a service, and whether that service is subject to regulation. Thus, for example, where a programming service previously included as part of basic service is moved to a different tier and is provided by negative option, that should be conclusive evidence that the retiered programming remains subject to regulation as basic service. For example, negative option retiering like that undertaken in Gillette, Wyoming should have no impact for purposes of rate regulation; the new "expanded basic" service would be regulable as basic service, even if the operator did not describe it as containing over-the-air broadcast signals. This approach gives effect to congressional intent to limit evasion of rate regulation through such practices as retiering, and negative option sales, and recognizes Congress' concern that operators may not simply elude the limitation on evasive practices by implementing changes prior to the effective date of the FCC's regulation.[60]

The Coalition also recommends that any cable operator that violates the prohibition on negative options should be subject to damages and other sanctions, including non-renewal of the franchise. State attorney generals should be deemed to have concurrent, but not superseding, authority to protect subscribers

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[60] Letter to Chairman Sikes, Att. 4. See also 138 Cong. Rec. S567 (daily ed. Jan. 29, 1992) (statement of Sen. Metzenbaum) (supporting measures that would limit the impact of retiering done in anticipation of rate regulation).

against negative option marketing. This is consistent with current authority of the state to protect consumers against unfair trade practices.

C. Collection of Information

Summary of Coalition's Position

The FCC already issued a questionnaire seeking rate regulation from cable operators. It proposes to collect that information annually. The FCC asks for comments generally on what other information might be appropriate, and whether it should be collected from every cable system, or just a sampling.

In addition to the information specified in Appendix C of the Notice of Proposed Rulemaking and in the FCC's Order, MM Docket No. 92-266, FCC 92-545, released December 23, 1992, the FCC should obtain information from operators regarding their costs of providing service. This cost information should be provided through a uniform system of accounts, as developed by the FCC, and would be similar to, but simpler than, the system required in the telephone industry. This information, including the cost information, must be submitted to franchising authorities at regular intervals.

D. Prevention of Evasions

Summary of Coalition's Position

The FCC proposes to allow parties to use expedited procedures to seek redress of rate regulation evasions. The FCC proposes to prohibit an "unjustified increase in rates" resulting from retiering, but believes that the Act requires restructuring of service offerings in some cases. The FCC asks what specific evasive activities should be prohibited, and how best to address retiering and repricing that occurred after the effective date of the Act but prior to implementation of FCC regulations.

The FCC must take a broad view of its obligation to prevent evasion of rate regulation. Any services or equipment moved from basic service to non-basic service since the date of enactment of the 1992 Act should be ignored, for purposes of determining whether and to what extent a tier is subject to regulation. Thus, where an operator removed some services from a basic service tier after October 5, 1992, the tier to which those services were removed should be regulable as basic service.

In addition to allowing rollbacks in general, the FCC should order rollbacks of rate increases that occurred after the effective date of the 1992 Cable Act.

In addition, the FCC should make clear that the following practices undercut effective rate regulation: (1) a decrease in programming services without a decrease in rates; (2) a decrease in the quality of customer services or signals without a decrease in rates; (3) omission of other revenues or improper cost shifting between systems; and (4) retiering to avoid rate regulation.

Discussion

The Coalition agrees with the FCC's tentative conclusions that interested parties may take advantage of expedited procedures to redress evasive practices. The FCC should periodically review regulations intended to prevent evasive practices by operators.

The Coalition disagrees with the FCC's suggestions that the Act permits and perhaps requires cable operators to retier. Nothing in the Act requires or endorses retiering. See discussion above to the contrary. Retiering is disfavored where it is intended to minimize or has the effect of minimizing rate regulation. At most, the Act requires operators to add some television broadcast signals to satisfy the must-carry requirements and allows operators to move PEG channels to basic service tiers; as a practical matter, however, any PEG channels provided are already included as part of basic (rather than non-basic) service. Moreover, Congress did not intend to require operators to remove PEG services from non-basic tiers.[61]

Congress made clear that it did not intend to allow cable operators to evade rate regulation simply by retiering

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[61] H.R. Rep. No. 628, 102d Cong., 1st Sess. 85 (1992).

prior to the date of FCC regulations restricting such retiering.[62] The massive retiering done by cable operators after the Act was enacted should have no effect for purposes of regulation. In addition, the FCC should recognize and prohibit certain operator practices that are designed to limit the impact of rate regulation. For instance, misallocating or omitting revenues from regulable tiers, decreasing programming services or reducing customer service without decreasing rates are some of the ways that cable operators seek to increase profits at the expense of subscribers. The FCC should prohibit such evasive practices.

E. Grandfathering of Rate Agreements

Summary of Coalition's Position

The Act provides that the statute and implementing FCC regulations do not supersede franchising agreements made before July 1, 1990 that authorize regulation of basic rates where effective competition did not exist at that time. CPCA §623(j), 106 Stat. at 1470. The FCC asks how to treat this "grandfather" provision in light of the certification requirements and other basic rate regulation provisions. It also asks what transition is necessary in communities now regulating rates but not subject to the grandfather clause.

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[62] Letter to Chairman Sikes, Att. 4. See also 138 Cong. Rec. S567 (daily ed. Jan. 29, 1992) (statement of Sen. Metzenbaum) (supporting measures that would limit the impact of retiering done in anticipation of rate regulation).

There is no need for franchising authorities that fall within the grandfather provision to notify the FCC of their intent to regulate rates. In addition, communities that are now regulating basic rates but which do not fall within the grandfather provision have no need to file a certification form, but instead need only notify the FCC of their intent to continue regulating. Pre-July 1, 1990 agreements for rates, including agreements to provide certain services (or a level of service), remain enforceable _in toto_, notwithstanding any provisions of the Cable Act that appear to permit operators to retier or restructure services. Agreements for rates tied to specific services are enforceable even if entered into after July 1, 1990. It is an accepted tenet of rate regulation that two parties may enter into a rate agreement which will be enforceable unless the rate is so high or so low to be against the public interest.

Discussion

The Coalition agrees with the FCC's tentative conclusion that franchising authorities that entered into franchise agreements before July 1, 1990 and that were regulating rates at that time may continue to regulate without filing a certification with the FCC.

The Coalition disagrees with the FCC's tentative conclusion that franchising authorities that fall within the grandfather provision of the Act must nevertheless notify the FCC of their intent to continue to regulate rates. No such action is necessary.

The Coalition also asks the FCC to recognize that the terms of rate agreements, whether entered into before or after July 1, 1990, are fully enforceable. See discussion supra. Franchising authorities that are now regulating rates but that are not subject to the grandfather provision may continue to regulate rates, without filing certification, but must notify the FCC of their intent to continue to regulate. This will avoid a potential gap between the date the old provisions of the Cable Act expires the date the new ones go into effect. Since systems already regulating rates clearly meet the effective competition test and are already regulating subject to FCC rules, certification delay is unnecessary and would be unfortunate.

F. Subscriber Bill Itemization

Summary of Coalition's Position

The Act permits cable operators to itemize amounts attributable to franchise fees, PEG requirements and governmental assessments on transactions between the operator and the subscriber. The FCC tentatively concludes that only direct and verifiable costs may be itemized. It also suggests that the costs may not be separately billed.

Only direct and verifiable costs may be itemized and they may not be sent forth in a manner that makes it appear that the charges represent separately billed service. Moreover, the regulations should prohibit any misleading statements on bills.

Discussion

The Coalition agrees with the FCC's tentative conclusions that only direct and verifiable costs may be itemized. Such itemized amounts may not be separately billed.[63]

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63 H.R. Rep. No. 628, 102d Cong., 1st Sess. 86 (1992).