No. 20-2142

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

SPECTRUM NORTHEAST, LLC; CHARTER COMMUNICATIONS, INC.,

Plaintiffs/Appellees

v.

AARON FREY, in His Official Capacity
as Attorney General for the State of Maine,

Defendant/Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE,
JUDGE JON LEVY, PRESIDING
(DISTRICT OF MAINE CASE NO. 1:20-cv-00168-JDL)

BRIEF OF DEFENDANT/APPELLANT AARON M. FREY

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INTRODUCTION

The question facing the Court is purely legal. Does a provision in the Cable Communications Policy Act of 1984 ("Cable Act") prohibiting states from regulating "rates for the provision of cable services" preempt a Maine law (referred to here as the "Pro Rata Law") that prevents cable operators from charging customers for services they never received? The answer is simple: No.

When customers cancel cable service in the middle of a billing period after having prepaid, Maine's Pro Rata Law requires cable companies to issue a refund for the unused portion of the billing period. This can hardly be considered the regulation of "rates for the provision of cable services." Rather, Maine's Pro Rata Law is a basic consumer protection measure intended to stop cable companies from nickel-and-diming customers, which is not prohibited by the Cable Act.

Accordingly, the Court should vacate the district court's judgment.

JURISDICTIONAL STATEMENT

Below, Plaintiff-Appellees Spectrum Northeast, LLC and Charter Communications, Inc. (collectively "Charter") brought claims against Maine's Attorney General seeking a declaration that the Pro Rata Law is preempted by the Cable Act via the United States Constitution's Supremacy Clause and an order enjoining the Attorney General from enforcing the law. App. 10-11. The district court had jurisdiction pursuant to 28 U.S.C. § 1331.

On November 2, 2020, the district court (Levy, J.) entered an order issuing final judgment in favor of Charter. Add. 18. On December 1, the Attorney General filed a timely notice of appeal to obtain review of the district court's order. App. 6. This Court has jurisdiction over the appeal pursuant to 28 U.S.C. §1291.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. When the FCC finds that cable providers are subject to "effective competition"—as it has determined for providers in the State of Maine—the Cable Act prohibits states from regulating "rates for the provision of cable service." Maine's Pro Rata Law places no restrictions on what providers may charge their customers, and companies are free to charge whatever rate they wish. The Pro Rata Law merely requires a cable company to issue a pro rata refund when a customer cancels service in the middle of a billing period but has prepaid for the entire period. Did the district court err when it nevertheless concluded that Maine's Pro Rata Law is preempted by the Cable Act?

STATEMENT OF THE CASE

The Cable Act

To settle the "fluid and ever-changing balance between state and federal authority over cable television," Congress passed the Cable Act, with the goal to "provide and delineate within Federal legislation the authority of Federal, state and local governments to regulate cable systems." *Cable Television Ass'n of New York,*

Inc. v. Finneran, 954 F.2d 91, 97 (2d Cir. 1992) (quoting H. Rep. No. 98-934, at 22 (1984)). The Cable Act sets forth a comprehensive regulatory regime, detailing the powers of states and localities on one hand, and the FCC on the other.

For example, the Cable Act delegates to states and localities the ability to pass consumer protection measures. 47 U.S.C. § 552(d)(1) ("Nothing 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."). Moreover, the Cable Act permits states to regulate requirements related to customer service. *See id.* § 552(d)(2) ("Nothing in this subchapter shall be construed to prevent the establishment or enforcement of . . . 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."). Conversely, the Cable Act reserves to the FCC the ability to adjudicate complaints against cable operators' failure or refusal to make channel capacity available. *Id.* § 532 (e)(1).

In other areas, the Cable Act strikes a deregulatory tone, divesting both states and the FCC of regulatory authority. One such area is ratemaking for the provision of cable service, so long as cable companies are subject to "effective competition" as determined by the FCC. *See id.* § 543(a)(2) ("If the Commission finds that a cable system is subject to effective competition, 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.") (emphasis added).[1]

Charter's Shifting Pro-Rata Policies

Charter is a cable operator that claims to sell cable programing solely—except in "limited circumstances"—in whole-month increments. App. at 13. These whole-month blocks of cable service are purportedly "integral" to Charter's rate-setting and pricing model. *Id.* Charter's Terms and Conditions do not provide—and purportedly did not previously provide—for pro-rated monthly services. *Id.*

Nevertheless, Charter admittedly ignored this "integral" aspect of its pricing model "upon subscriber request" as recently as June 2019 by applying pro-rata credit to subscribers' final month of cable service after disconnection. *Id.* But on June 23, 2019, Charter ceased its pro-rating practice and began requiring customers to pay for their entire final scheduled month of cable, regardless of when customers' actual service is disconnected.[2] *Id.*

[1] For purposes of this litigation, the Attorney General does not dispute that cable systems in Maine are subject to effective competition. *See* 47 C.F.R. § 76.906 (establishing presumption of effective competition).

[2] As the Attorney General noted below, Charter's Terms of Service continue to provide for the proration of its customers' initial bill.

Maine's Pro-Rata Law

After fielding complaints from a number of constituents, Representative Seth Berry introduced L.D. 2031 (the "Pro Rata Law") in January of 2020. The purpose of the bill was to "reform unfair cable company billing practices," to "clarify Maine law to ensure that cable providers must pro-rate charges when a customer disconnects service," and to "protect cable customers." *An Act To Require a Cable System Operator To Provide a Pro Rata Credit When Service Is Cancelled by a Subscriber: Hearing on L.D. 2031 Before J. Standing Comm. on Energy, Utils. & Tech.*, 129th Legis. (2019) (test. of Rep. Berry) (App. at 24). On March 10, 2020, the Maine House of Representatives voted 131-6 in favor of the bill, and two days later the Maine Senate approved the bill by a unanimous roll call vote.[3] On March 18, Governor Mills signed the bill into law.[4]

Maine's Pro Rata Law amends 30-A M.R.S. § 3010, which governs non-exclusive franchises for cable television service, to state 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." 30-A M.R.S.

[3] The voting record is available at: http://legislature.maine.gov/LawMakerWeb/rollcall.asp?ID=280075961&chamber=House&serialnumber=366.

[4] *See* http://legislature.maine.gov/LawMakerWeb/summary.asp?ID=280075961.

§ 3010 (2-A). The Pro Rata Law regulates only what companies must pay back to customers after disconnecting service and does not alter the rates that cable companies may charge when cable is flowing to customers' homes. Maine's Pro Rata Law took effect on June 16, 2020. Me. Const. art. IV, pt. 3, § 16.

The District Court's Decision

On May 11, 2020, Charter filed a Complaint and Motion for Preliminary Injunction in the United States District Court for the District of Maine, seeking 1) a declaration stating that Maine's Pro Rata Law is preempted by the Cable Act; and 2) an injunction barring enforcement of the Pro Rata Law. App. at 3, 7-23. On June 6, the Attorney General filed a Motion to Dismiss the Complaint for failure to state a claim upon which relief could be granted and an Opposition to the Motion for a Preliminary Injunction. *Id.* at 4. The district court paused briefing on the Motion for Preliminary Injunction and held a hearing on the Motion to Dismiss on July 21. *Id.* at 5. It then asked the parties for supplemental briefing, which was completed in August. *Id.*

On October 7, 2020, the district court denied the Attorney General's Motion to Dismiss, concluding that Maine's Pro Rata Law is preempted by the Cable Act. Add. at 1-17. Both Charter and the Attorney General agreed that the purely legal question of preemption is the only disputed issue in this case and that no factual findings were necessary. In light of the district court's preemption analysis, Charter

and the Attorney General agreed to file a Joint Motion asking the court to issue Final Judgment. App. at 6. The Attorney General noted his disagreement with the district court's legal analysis, but conceded that its "ruling on his motion to dismiss [made] any further proceedings in [the district court] unnecessary." *Id.* He further noted that he joined the "motion solely to facilitate appeal, and [the Attorney General] expressly and unequivocally reserve[d] his right to appeal from the [district court's] final judgment and all associated orders." *Id.*

On November 2, 2020, the district court granted the Joint Motion and entered Final Judgment in favor of Charter, specifically noting that the Attorney General had "preserved his right to appeal [the] judgment and associated orders, and [that the] judgment is intended to be appealable." Add. at 18. The Attorney General subsequently filed a timely Notice of Appeal. App. at 6.

SUMMARY OF THE ARGUMENT

As this court has noted, federal preemption of state police powers is strong medicine not to be taken lightly. Consistent with these principles of federalism, courts presume congressional statutes do not preempt state laws, especially when it relates to the exercise of states' police powers. This presumption applies to express preemption provisions and mandates that such provisions be construed narrowly. State laws are preempted only when Congress' intent to do so is unequivocal. The presumption against preemption applies to the review of Maine's Pro Rata Law.

The federal statute at issue here prohibits states from regulating "rates for the provision of cable service." Maine's Pro Rata Law does not regulate cable rates at all, much less rates for the provision of cable service. Rather, it allows cable companies to charge whatever rates they desire, so long as customers are receiving cable service. Upon cancellation, Maine's Pro Rata Law does nothing to alter rates charged to customers. It merely requires cable companies to refund customers—at whatever rates the cable companies have decided to charge—for the portion of their final billing cycle for which they paid for but did not receive cable service.

Even if the effect of Maine's Pro Rata Law could be deemed "rate regulation," it nevertheless does not constitute a regulation of "rates for the provision of cable service" as proscribed by the Cable Act. The Cable Act prohibits states from regulating cable rates so long as signals are flowing to customers' cable boxes. But nothing in the Cable Act prohibits states from requiring cable companies to provide refunds for the period of time after service is terminated.

Either of these two reasons, independently, is enough for Maine's Pro Rata to survive scrutiny. But if there are any lingering doubts as to the scope of the Cable Act's preemptive sweep, other provisions of that statute—and its legislative history—indicate that Congress did not intend to prohibit the type of state consumer protection law that Maine has enacted.

Because Maine's Pro Rata Law is not preempted by the Cable Act, the Court should vacate the district court's entry of judgment and order it to dismiss this suit.

STANDARD OF REVIEW

This Court reviews a "district court's grant of summary judgment de novo." *Lennon v. Rubin*, 166 F.3d 6, 8 (1st Cir. 1999). In this case, the district court incorporated its reasoning from its denial of the Attorney General's Motion to Dismiss in its order entering judgment in favor of Charter. Similarly, this Court reviews "the disposition of a motion to dismiss de novo." *Id.*

Consistent with bedrock federalist principles, the Supreme Court has long recognized a presumption against federal preemption of state law. *N.Y.S. Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995); *see also Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). As this Court has noted, "Preemption is strong medicine, not casually to be dispensed." *Grant's Dairy--Maine, LLC v. Comm'r of Maine Dept. of Agric., Food & Rural Res.*, 232 F.3d 8, 18 (1st Cir. 2000). "Consideration of issues arising under the Supremacy Clause 'start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress." *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). That presumption is strongest "in fields of traditional state regulation," and it applies regardless of whether

preemption is alleged to be explicit, implied, or a result of conflict between state and federal law. *Travelers Ins.*, 514 U.S. at 655; *see also Philip Morris v. Harshbarger*, 122 F.3d 58, 68 (1st Cir. 1997).

Consumer protection laws are no exception. *See, e.g. Medtronic v. Lohr*, 518 U.S. 470, 475 (1996) ("[T]he States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."); *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 43 (1st Cir. 2005) (noting "consumer protection" is a "subject over which the states have traditionally exercised their police powers") (quoting *Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 828 (1st Cir. 1992)). Maine's Pro Rata Law is therefore entitled to the strongest presumption against preemption, one that can only be overcome by a "clear and manifest" preemptive purpose. *Rice*, 331 U.S. at 230; *see also Medtronic, Inc.*, 518 U.S. at 485; *Harshbarger*, 122 F.3d at 68.

Federal law may supersede state law in three different ways: 1) Congress can include language in the law that expressly preempts certain state laws; 2) the law can create a scheme of regulation that is so comprehensive that it essentially "occupies the field" and leaves no room for state regulation; or 3) the state law actually conflicts with federal law. *See, e.g., Hillsborough County, Fla. v. Automated Medical Labs., Inc.*, 471 U.S. 707, 713 (1985). Charter argued below that express preemption applies here.

"Express preemption occurs when Congress states in the text of legislation that it intends to preempt state legislation in the area." *EEOC v. Massachusetts*, 987 F.2d 64, 67-68 (1st Cir. 1993); *see also Grant's Dairy--Maine,* 232 F.3d at 15 ("Express preemption occurs only when a federal statute explicitly confirms Congress's intention to preempt state law and defines the extent of that preclusion.").

> Two presumptions inform the process of determining the scope of an express preemption clause. First, the familiar assumption that preemption will not lie absent evidence of a clear and manifest congressional purpose must be applied not only when answering the threshold question of whether Congress intended any preemption to occur, but also when measuring the reach of an explicit preemption clause. Second, while the scope determination must be anchored in the text of the express preemption clause, congressional intent is not to be derived solely from that language but from context as well.

Mass. Ass'n of Health Maint. Orgs. v. Ruthardt, 194 F.3d 176, 179 (1st Cir. 1999) (emphasis in original). Because of the presumption against preemption, express preemption provisions must be narrowly construed. *Medtronic*, 518 U.S. 470 at 485; *see also Air Conditioning & Refrigeration Inst. v. Energy Res. Conservation & Dev. Comm'n*, 410 F.3d 492, 496 (9th Cir. 2005) ("This presumption against preemption leads us to the principle that express preemption statutory provisions should be given a narrow interpretation.").

The Supreme Court has been unmistakably clear that in areas of historic state regulation, such as consumer welfare, the presumption against preemption applies even under an express preemption analysis. *See Altria Group, Inc. v. Good*, 555 U.S.

70, 77 (2008) ("When addressing questions of express or implied pre-emption, we begin our analysis 'with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'") (emphasis added) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

The Court has been equally straightforward that this presumption means that express preemption provisions must be narrowly construed. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("In all pre-emption cases, and particularly in those in which Congress has legislated ... in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.") (internal quotation marks omitted); *Cipollone v. Ligget Group, Inc.*, 505 U.S. 504, 518 (1992) (noting that express preemption provisions must be construed "in light of the presumption against the pre-emption of state police power regulations" and "[t]his presumption reinforces the appropriateness of a narrow reading of [the express preemption provision at issue]").

Below, Charter asserted that in *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016), the Supreme Court silently overruled these longstanding interpretive principles regarding express preemption. But that is wrong. In *Franklin,*

the Court found that the preemption language at issue was "plain."[5] *Id.* at 1946. There was thus no need for the Court to invoke the presumption to choose among different constructions. Underscoring the presumption's validity in express preemption cases, the Court in *Franklin* cited directly to a line of cases that traces back to *Cipollone*, which described the presumption's proper applicability in express preemption cases. *Id.* (citing *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 594 (2011).

As the Supreme Court noted during the same term as *Franklin*, courts are not free to assume that the Supreme Court has overruled binding precedent by implication. *Bosse v. Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.") (quoting *Hohn v. United States*, 524 U.S. 236, 252-53 (1998)). Moreover, the presumption against preemption in express preemption claims remains binding First Circuit precedent. *See Phillip Morris Inc. v. Harshbarger*, 122 F.3d 58, 68 (1st Cir. 1997) (holding that the "presumption applies in both express and implied preemption analysis."). To the

[5] One Court of Appeals has distinguished *Franklin* on another ground: "[W]e have determined that, because [the *Franklin*] decision, dealing with a Bankruptcy Code provision, did not address claims involving areas historically regulated by states, we would continue to apply the presumption against preemption to express preemption claims." *Lupian v. Joesph Cory Holdings LLC*, 905 F.3d 127, 132 n.5 (3d Cir. 2018); *see also Shuker v. Smith & Nephew, PLC*, 885 F.3d 760, 771 n.9 (3d Cir. 2018).

extent that there is any doubt about the meaning of § 543(a) of the Cable Act, the Court should narrowly construe the provision to avoid preemption.

ARGUMENT

I. Maine's Pro Rata Law Is Not Preempted by the Cable Act Because It Does Not Regulate Rates for the Provision of Cable Service.

Faced with the burden of overcoming the presumption against preemption, Charter offered in the district court a simple—but misguided—argument. It asserted that 47 U.S.C. § 543 specifically prohibits the regulation of "rates" for cable service where the FCC has found that cable service is subject to effective competition. It further argued that Maine's Pro Rata Law constitutes a form of "rate" regulation under the Cable Act and therefore is expressly preempted.

But Charter's argument is doubly flawed. First, Maine's Pro Rata Law does not constitute a form of "rate" regulation, even under Charter's definition of the term. Second, even if a pro rata requirement could be construed as a rate regulation in the generic sense, Maine's Pro Rata Law is still not a regulation on "rates for the provision of cable service," as proscribed by the Cable Act. Finally, if there is any lingering doubt about § 543's preemptive reach, other sections of the Cable Act Indicate that § 543 should be read narrowly.

A. Maine's Pro Rata Law is not a form of rate regulation, because even using Charter's definition, the Law does nothing to alter cable rates.

As Charter pointed out below, the singular term "rate" or "rates" is not defined anywhere in the Cable Act, and it therefore urged the district court to adopt the word's ordinary, plain English meaning. To distill the meaning of "rates," Charter directed the district court to the Oxford English Dictionary and the Merriam-Webster Online Dictionary, both of which provide definitions of "rate" to include 1) the amount charged for a particular product; 2) as defined by a particular unit of measurement in relation to the product. From there, Charter argued that one can only derive a "rate" from the price charged for the quantity of a product or service, which, in the context of cable television service, is measured in time.[6]

The above definition is one plausible reading of the term "rate" under 47 U.S.C. § 543(a)(2). But the reasoning Charter extrapolates from this definition—adopted by the district court, Add. at 7-9—stretches too far. Charter argued that any requirement to prorate a subscriber's bill is rate regulation because it forbids providers from offering their services on a monthly basis, rather than on a daily basis.

But that is a sleight-of-hand. Below, Charter pressed upon the district court that a "rate" cannot rely solely upon price, but it must also include a unit of time for

[6] In its decision, the district court acknowledged Charter's definitions of "rate," as well as several others, including two provided by Black's Law Dictionary: "[p]roportional or relative value; the proportion by which quantity or value is adjusted," and "[a]n amount paid or charged for a good or service." Add. at 7.

which that price is charged. As an example, Charter argued that $30 is not a rate, but instead $30 per month is a rate. But just as $30 is not a "rate" under Charter's proposed definition, neither is charging for cable by the month, absent any price. In other words, Charter argued that a "rate" is comprised by the ratio between price and unit of service.

A simple example demonstrates why Charter's definition of "rate" depends on the ratio between price and units sold, rather than price or units individually. If a customer at a supermarket encounters a sign advertising loaves of bread at "4 for $12," the customer may in fact choose to purchase four loaves for that price. Alternatively, a customer might elect to purchase two loaves of bread (at a cost of $6) or just one loaf of bread (at a cost of $3). In each example, the "rate" for loaves of bread has stayed the same, even though both the overall cost and units sold have changed. But because the ratio of loaves to dollars remains constant, the "rate" is unchanged, even though the customer purchases a different quantity of the product than the supermarket advertised.

So too with cable service. Charter bills customers for cable subscription services based on what it charges for a full month of service. App. 13. Maine's Pro Rata Law does nothing to alter the ratio between price and the unit of service provided to customers. In fact, the opposite is true: Maine's Pro Rata Law simply

requires that cable companies maintain the ratio of price to unit—i.e. their rates—for the final partial month of cable service.

If the hypothetical supermarket customers above wish to purchase only two loaves of bread, the supermarket would not charge them $12. Likewise, if cable subscribers cancel their subscription halfway through a monthly billing period, Maine's Pro Rata Law simply requires those customers to pay the same monthly rate that Charter has charged all along, based on the 50% of the month for which customers actually receive service.

Furthermore, Charter's assertion that Maine's Pro Rata Law forces it to sell its product by "daily" rates rather than a "monthly" rate is simply false. Again, basic math bears this out. Imagine a hypothetical customer who purchases cable at $100 per month and whose monthly service begins on the first of each month. If that customer were to cancel service on April 15, 2021, Maine's Pro Rata Law would require the cable provider to refund the final month's bill by 50%—because April has thirty days—and the customer would receive a $50 pro rata credit. But if a different customer canceled service on February 15, 2021, that customer would only be entitled to a refund of 46.43%—because February 2021 has twenty-eight days—and the customer would receive a $46.43 credit. (To receive a 50% credit, the second customer would have had to cancel after fourteen days of service in February.)

The customers in these two hypothetical scenarios do not receive the same pro rata refund based on a daily rate. Because April 2021 has two more days than February 2021, the first customer is charged $3.33 per day in April, while the second customer pays $3.57 per day in February. But because both customers pay $100 per month, their monthly rates are the same. Maine's Pro Rata Law does not dictate what Charter may charge for its monthly rate—or for that matter its daily rate—it merely requires Charter to refund customers for the portion of their final monthly billing cycle, at the rate charged by Charter, in which they did not receive cable service.

Dictionary definitions aside, the caselaw relied upon by Charter below provides little support for its cause. Charter's challenge to Maine's Pro Rata Law represents only the second time a cable company has contested a state pro rata provision as preempted by 47 U.S.C. § 543. In the district court, Charter pointed repeatedly to a recent case where the District of New Jersey concluded in an unpublished opinion that New Jersey's similar pro rata law is preempted by the Cable Act. *See Altice USA, Inc. v. N.J. Bd. Of Pub. Utils.*, No. 3:19-cv-21371-BRM-ZNQ, 2020 WL 359398 (D.N.J. Jan. 22, 2020)). However, the *Altice* defendants never had the opportunity to properly brief the merits of their case.[7]

[7] In fact, the *Altice* defendants appealed the trial court's order granting the cable company a preliminary injunction. But rather than resolving the interlocutory appeal, the Third Circuit agreed to hold the appeal in abeyance as the litigants brief *Altice* on the merits of a permanent injunction before the district court. *See Altice USA, Inc. v. N.J. Bd. Of Pub. Utils*, No. 20-1733 (3d Cir. 2020) (ECF No. 29).

The posture of *Altice* was—and remains—peculiar. The *Altice* court initially determined that the complaint contained fatal procedural flaws and dismissed the case for lack of subject matter jurisdiction. *See Altice*, ECF No. 14. Nevertheless, the court permitted plaintiffs to file a new complaint and a motion to reconsider. *Id.*, ECF No. 16. The state defendants then submitted a brief in opposition to the motion to reconsider, arguing only on procedural grounds that plaintiffs failed to meet the standard for such a motion. *Id.*, ECF No. 19. Finally, in the order relied upon by both Charter and the district court, the *Altice* court simultaneously granted plaintiffs' motion to reconsider and their request for injunctive relief. *Id.* ECF No. 25.

Having never briefed the merits of the New Jersey pro rata provision and its relationship to the Cable Act, the New Jersey defendants next filed their own motion for reconsideration, arguing that it was improper to convert plaintiffs' motion for reconsideration into a renewed motion for injunctive relief. *Id.* ECF No. 33. But the *Altice* court rejected the state defendants' argument, noting both that they could have argued the merits of the case in their motion to reconsider—but failed to do so—and that they had already briefed the question of a preliminary injunction in their original opposition. *Id.*, ECF No. 36 at 4-5. Yet even in their successful original opposition, the defendants argued against a preliminary injunction based only on the complaint's procedural defects, not the merits of New Jersey's pro rata statute. Because the *Altice*

defendants never briefed the preemption question, that court's unpublished decision should not be read as an endorsement of Charter's position here.

A second case Charter relied upon below, *Windstream Nebraska, Inc. v. Nebraska Public Service Commission*, provides even flimsier support to its cause. No. CI-10-2399, 2011 WL 13359491 (Neb. Dist. Ct. June 9, 2011). *Windstream* was a 2011 unpublished Nebraska state trial court decision where the court was required to determine whether a state agency's regulation requiring proration of wireless telecommunication services exceeded its authority to regulate under the Nebraska Telecommunications Regulation Act. *Id.* at *2. Adding to the case's complexity, the court was also required to interpret a series of Nebraska statutes, the Nebraska Constitution, and a Nebraska Supreme Court decision that had been codified into state law.[8] *Id.* at *4-6. The facts and circumstances in *Windstream* are so far afield from Charter's challenge to Maine's Pro Rata Law that they provide no precedential value or support. *Windstream* addressed a clash between a Nebraska regulation and a Nebraska statute, where the court reviewed different statutory language, targeting a different industry, whose product is regulated and sold in a different manner from cable in Maine. *Windstream* should not be considered.

[8] The relevant Nebraska statutory text reads: "[T]elecommunications companies shall not be subject to rate regulation by the commission and shall not be subject to provisions as to rates and charges prescribed in sections 75-101 to 75-158." Neb. Rev. Stat. § 86-139.

B. Even if Maine's Pro Rata Law constituted a form of "rate regulation," it is nevertheless permissible under the Cable Act because it does not regulate rates "for the provision of cable service."

As noted above, Maine's Pro Rata Law does not constitute a form of "rate" regulation, even under the definition set forth by Charter. But Charter's textual theory pressed in the district court suffers from a second fatal flaw: When reading the Cable Act's rate regulation provision, Charter homed in on the word "rates" without reading the full context of the statutory provision. Consequently, Charter overlooked the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA. v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133 (2000) (quoting *Davis v. Mich. Dept. of Treasury*, 489, U.S. 803, 809 (1989)); *see also King v. Burwell*, 135 S.Ct. 2480, 2489 (2015) ("Our duty, after all, is 'to construe statutes, not isolated provisions.'" (quoting *Graham County Soil and Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010))); *United States v. Sepulveda-Hernandez*, 752 F.3d 22, 27 (1st Cir. 2014) ("A statute ought to be read as a whole." (citing *Brown & Williamson*, 529 U.S. at 120)).

Importantly, the Cable Act does not bar states from regulating cable television "rates." Instead, the two provisions at issue read "No . . . State may regulate the rates for the provision of cable service except to the extent provided under this section . . ." and "If the Commission finds that a cable system is subject to effective

competition, the rates for the provision of cable service by such system shall not be subject to regulation by . . . a State . . . under this section." 47 U.S.C. § 543(a)(1), (2) (emphasis added). By consistently using the phrase "for the provision of cable service" in conjunction with "rates," Congress intended to set limits on states' regulatory authority only during the period when signals are flowing to customers' cable boxes. Simply put, although the Cable Act prohibits states from setting rates for the provision of cable service, the statute does not prohibit states from protecting citizens from being charged for cable services that are never provided.

Below, Charter could not point to a case where a federal court closely analyzed the meaning of these provisions of the Cable Act. But such a case does exist, and the court's analysis accords with the Attorney General's reading of the Cable Act. In *Cable Television Ass'n of New York, Inc. v. Finneran*, 954 F.2d 91 (2d Cir. 1992), the Second Circuit faced a similar question to the issue this Court must decide. Cable companies regularly offer special deals to entice customers to purchase "top tier" bundles of channels. *Finneran*, 954 F.2d at 93. In order to deter customers from moving to a lower, cheaper tier of cable service, cable companies routinely charge customers "downgrade fees." *Id.* Pursuant to its police powers to protect consumer welfare, New York issued a regulation banning cable companies from charging downgrade fees greater than the actual cost of completing a customer downgrade. *Id.* New York cable companies subsequently sued, alleging that the

regulation was an impermissible "rate for the provision of cable services" proscribed by the Cable Act. *Id.* at 98-99.

In analyzing the Cable Act, the Second Circuit noted that "cable services" is not merely limited to "cable programming." *Id.* at 99. But the court further held that it is crucial to read the entirety of the provision at issue, not just cherry-pick terms in isolation:

> It is axiomatic that in interpreting a statute the court must "give effect, if possible, to every clause and word of [the] statute." Section 543(a) pre-empts all "rates for the provision of cable services," not "all rates for cable services." Thus, [plaintiff cable companies] must still establish the linguistically unlikely proposition that the customer is "provided" with cable service when services (defined as both facilities and programming) are removed.

Id. (emphasis in original) (quoting *United States v. Menasche*, 348 U.S. 528, 538–39 (1955)). In an attempt to overcome its "linguistically unlikely proposition," the New York cable companies vaguely gestured to the Cable Act's deregulatory purpose. *Id.* at 100. But as the Second Circuit pointed out, "Congress' purpose in section 543 was not to curtail regulation in the abstract but rather to do so in order to allow market forces to control the rates charged by cable companies. Downgrade charges, however, insulate cable companies from market forces." *Id.* at 100 (citations omitted).

Charter stands in the same shoes as the cable companies in *Finneran*. As with *Finneran*, it would be linguistically unreasonable to deem the termination of cable

service as a form of "provision of cable service." In fact, the regulation in *Finneran* was held to be permissible, even though customers continued to receive cable services. Here, Maine's Pro Rata Law kicks in only after customers cancel their cable service entirely. Moreover, Charter's own gesturing toward the Cable Act's deregulatory purpose falls flat. As with the downgrade charges in *Finneran*, Charter's desire to withhold proration for the final month of cable service only serves to lock customers into a full month of cable service, "insulat[ing Charter] from market forces." *Id.* Since termination of service—as with downgrading service—does not constitute a "provision of cable service" under § 543, the Cable Act does not preempt Maine's Pro Rata Law.

The district court concluded that *Finneran* is distinguishable from this suit because the downgrade fees there "were akin to deinstallation fees, charged in addition to the cable provider's monthly rates for the provision of cable services." Add. at 10. While it is true that the content of the New York statute at issue in *Finneran* was slightly different from Maine's Pro Rata Law, the legal reasoning of that case still applies. The district court rejected the analysis in *Finneran* because "Maine's Pro Rata Law does not regulate a one-time cancellation or deinstallation fee." *Id.* But Maine's Pro Rata Law does exactly that: It seeks to prevent customers from having to pay a one-time penalty to cable providers for services never rendered after termination of their contracts. If anything, the reasoning in *Finneran* is even

more applicable under Maine's Pro Rata Law where the customer is not merely downgrading cable service, but cancelling service altogether.

Below, Charter, encouraged the district court to ignore *Finneran* and to instead focus on an FCC administrative ruling in *In re Southwestern Bell Mobile Systems, Inc.*, 14 FCC Rcd 19898 (1999). In *Southwestern Bell*, the FCC interpreted the term "rates" as it appears in the Communications Act. But *Finneran* highlights precisely why *Southwestern Bell* is unpersuasive. Aside from regulating an entirely different industry (cellular phone service) with entirely different billing structures, the Communications Act provision cited by the FCC in *Southwestern Bell* states that "No State . . . shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service . . . ." [9] 47 U.S.C. § 332 (c)(3)(A). Despite Charter's assertion to the contrary, this provision is not "virtually identical" to the Cable Act. When Congress drafted the Communications Act, it did not incorporate the "provision for service" language from the Cable Act, indicating that the two statutes should not be read in tandem.

[9] In *Southwestern Bell*, the FCC found that states were precluded from interfering with telecommunications companies' ongoing practice of billing in full-minute increments. But regulating companies' ongoing billing structures is entirely different from protecting consumers from being charged for cable after termination of service. *See In re Southwestern Bell Mobile Systems, Inc*., Memorandum Opinion and Order, 14 FCC Rcd 19898, 19906-07 ¶¶ 18-20 (1999).

But even if the language regarding "rates" was deemed to be similar across the two statutes, it is inappropriate to read separate statutes pertaining to separate subject matter *in pari materia*, absent some indication of Congressional intent to do so. *Compare Wachovia Bank v. Schmidt*, 546 U.S. 303, 315-16 (2006) ("[U]nder the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read "as if they were one law.") (emphasis added) (quoting *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972)), *with Grunley Walsh Int'l, LLC v. United States*, 78 Fed. Cl. 35, 42 (Fed. Cl. 2007) ("[T]he statutory canon of *in pari materia* does not apply when the similar provisions deal with different subject matters."). To the extent that Charter nevertheless seeks to conflate the phrase "rates charged" in the Communications Act to the phrase "rates for the provision of cable service" in the Cable Act, "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another." *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015).[10]

[10] Even if the FCC were to interpret "rates for provision of cable service" in the Cable Act to prohibit states from passing pro rata consumer protection laws, it is unclear that the agency would have the authority to do so. Preemption cannot be a "mere byproduct of self-made agency policy," but rather must be achieved through power delegated by Congress. *Mozilla Corp. v. FCC*, 940 F.3d 1, 81 (D.C. Cir. 2019); *see also id.* at 83 ("No matter how desirous of protecting their policy judgments, agency officials cannot invest themselves with power that Congress has not conferred."); *Finneran*, 954 F.2d at 100 ("[I]n order for an FCC determination to have pre-emptive force, we must find (1) that the Commission intends its pronouncement to pre-empt state law and (2) that the Commission is acting within the scope of its delegated authority.").

C. Other provisions of the Cable Act indicate that Maine's Pro Rata Law is permissible.

Because Charter cannot demonstrate that the Cable Act preempts Maine's Pro Rata Law, especially in light of the presumption against preemption as discussed above, the Court could reverse the district court's decision without further analysis. But the Cable Act is not merely silent when it comes to Maine's Pro Rata Law. Rather, the Cable Act endorses these types of consumer protection measures—twice. Section 552(d)(1) of the Cable Act states:

> "Nothing 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 chapter."

Furthermore, section 552(d)(2) provides:

> Nothing in this subchapter shall be construed to prevent the establishment or enforcement of . . . 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."

While the Attorney General concedes that these two sections could not save Maine's Pro Rata Law if the statute were expressly preempted—which it is not—these sections should inform the Court's analysis of how narrowly the scope of § 543's preemption provision is meant to sweep. There is no question that Maine's Pro Rata Law constitutes both a "consumer protection law" and a "customer service requirement" explicitly envisioned and permitted by 47 U.S.C. § 552(d).

Below, Charter's only rebuttal to the Cable Act's consumer protection provision was to rest on its preemption argument. But as detailed above, that is simply not good enough. And if there is any lingering doubt as to Congress's intent, the statute permits states to enact consumer protection laws so long as they are not "specifically" preempted by the Cable Act. Congress could have written the provision without the modifier "specifically," but it chose not to. "The canon against surplusage teaches that "[w]e must read statutes, whenever possible, to give effect to every word and phrase." *City of Providence v. Barr*, 954 F.3d 23, 37 (1st Cir. 2020) (quoting *Narragansett Indian Tribe v. Rhode Island* 449 F.3d 16, 26 (1st Cir. 2006)); *see also Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992) "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there."). Because the Cable Act does not preempt—much less "specifically" preempt—Maine's Pro Rata Law, it should stand as a valid consumer protection measure.

Moreover, the customer service provision in section 552(d)(2) grants even greater latitude to states than the consumer protection provision in section 552(d)(1) because the customer service provision includes no caveat regarding preemption. "'It is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another,' and that presumption is even stronger when the omission entails the replacement of

standard legal terminology with a neologism." *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) (quoting *Chicago v. Environmental Defense Fund*, 511 U.S. 328, 338 (1994)); *see also Lopez-Soto v. Hawayek*, 175 F.3d 170, 173 (1st Cir. 1999) (same). Because Congress did not create a carveout for preemption in section 552(d)(2), it must be presumed that it intended to grant states maximum latitude to regulate customer service requirements.

Although the Cable Act does not define or delineate the "consumer protection" or "customer service requirement" provisions that it reserves to the purview of states and localities, the available legislative history indicates what Congress had in mind when it passed the provisions. Section 632 of the Report issued by the House Committee on Energy and Commerce is titled "Consumer Protection." There, the Committee stated:

> In general, customer service means the direct business relation between a cable operator and a subscriber. Customer service requirements include requirements related to interruption of service; disconnection; rebates and credits to consumers; deadlines to respond to consumer requests or complaints; the location of the cable operator's consumer service offices; and the provision to customers (or potential customers of information on billing or services."

H. Rep. 98-934 at 79 (emphasis added). By including both "requirements. . .related to disconnection" and "requirements. . .related to rebates and credits to consumers," the Report indicates that Congress intended to permit states to enact precisely the type of legislation exemplified by Maine's Pro Rata Law. Indeed, the Second Circuit

agrees: "Similarly, as [the cable company plaintiffs] conceded at oral argument, the states may regulate charges associated with complete disconnections of service . . . ." *Finneran*, 954 F.2d at 101. Not only do the text and legislative history of the Cable Act permit Maine's Pro Rata Law, they encourage it.

CONCLUSION

The Maine Legislature passed the Pro Rata Law to prevent cable companies from charging their customers for services never received. Here, Charter argues that it only sells cable in "whole month" parcels and that the Cable Act preempts Maine from stepping in to protect consumers from post-termination charges. According to Charter's logic, it could decide tomorrow to sell cable in "whole year" or even "whole decade" parcels, exposing customers to astronomical predatory fees. Fortunately for Mainers, the Cable Act merely provides that states may not regulate the rates of cable services—as measured by the ratio between price and amount—while such services are being provided. It does not preempt Maine's Pro Rata Law.

For the reasons discussed above, the Attorney General respectfully requests that the Court vacate the district court's judgment and order it to dismiss this suit.

Dated: February 24, 2021
Augusta, Maine

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Appellant's Brief is submitted under Federal Rule of Appellate Procedure 32(a)(7)(B). I hereby certify that the brief complies with the type-volume limitation prescribed by Rule 32(a)(7)(B)(i). For this Certification, I relied on the word count function of the word-processing software used to prepare this brief (Microsoft Word 365), which has counted 7,526 words in this brief. I further certify that all text in this brief is in proportionally spaced Times New Roman Font and is 14 point in size.

/s/ Paul E. Suitter
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CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d), I, Paul E. Suitter, Assistant Attorney General for the State of Maine, hereby certify that on this, the 24th day of February, 2021, I filed the above brief electronically via the ECF system. I further certify that on this, the 24th day of February, 2021, I served the above brief electronically on the following parties, who are ECF Filers, via the Notice of Docket Activity:

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ADDENDUM

ADDENDUM

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UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SPECTRUM NORTHEAST LLC, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**1:20-cv-00168-JDL**
	)	
AARON FREY, in his official Capacity as Attorney General of the State of Maine,	)	
	)	
Defendant.	)	

ORDER ON MOTION TO DISMISS

On March 18, 2020, the Maine Legislature enacted Public Law 2020, 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 Law"). Spectrum Northeast, LLC, and Charter Communications, Inc. (collectively, "Charter"), assert in their complaint filed May 11, 2020 that the Pro Rata Law is preempted by federal law and seek a declaratory judgment and an injunction prohibiting Maine Attorney General Aaron Frey from enforcing the law against them (ECF No. 1). The Attorney General contends that the Pro Rata Law is not preempted and moves to dismiss Charter's complaint (ECF No. 12). A hearing on the motion to dismiss was held on July 21, 2020. For the reasons explained below, I deny the motion.

I. FACTUAL BACKGROUND

The complaint alleges the following facts, which I treat as true on a motion to dismiss. Spectrum Northeast, LLC, is a franchised cable operator that provides cable television, internet, and telephone services to customers in Maine. Charter

Communications, Inc., is the parent company of Spectrum Northeast and provides certain billing and other services to Spectrum Northeast in support of its provision of cable service. Charter offers cable service to subscribers for a fixed dollar amount on a monthly basis and requires subscribers to pay in advance for the ensuing month's cable service. This is known as a "whole-month billing" policy. Consistent with this policy and with Charter's Terms of Service, a subscriber who chooses to cancel service in the middle of the billing period does not receive a rebate, but may continue to receive service for the balance of the month if he or she so elects.

On March 18, 2020, Maine's Pro Rata Law was enacted. *See* P.L. 2020, ch. 657. Section 1 of the Pro Rata Law provides that when a cable subscriber cancels her cable service more than three working days before the end of a monthly billing period, her cable provider must grant her "a pro rata credit or rebate for the days of the monthly billing period after the cancellation of service." P.L. 2020, ch. 657, § 1 (to be codified at 30-A M.R.S.A. § 3010(1-A)). Section 2 of the Pro Rata Law requires that cable providers notify consumers of the right to proration as set forth in section 1. *Id.* § 2 (to be codified at 30-A M.R.S.A. § 3010(2-A)). Charter's whole-month billing policy does not provide for pro rata credits or rebates and is therefore incompatible with the Pro Rata Law.[1]

II. LEGAL STANDARD

To survive a motion to dismiss, the complaint "must contain sufficient factual matter to state a claim to relief that is plausible on its face." *Rodríguez-Reyes v.*

[1] The Attorney General agreed to postpone enforcement of the Pro Rata Law pending resolution of the motion to dismiss and Charter's motion for a preliminary injunction (ECF No. 4). ECF No. 16.

Molina-Rodríguez, 711 F.3d 49, 53 (1st Cir. 2013) (quoting *Grajales v. P.R. Ports Auth.*, 682 F.3d 40, 44 (1st Cir. 2012)). Courts apply a "two-pronged approach" to resolve a motion to dismiss. *Ocasio-Hernandez v. Fortuño-Burset*, 640 F.3d 1, 12 (1st Cir. 2011). First, the court must identify and disregard statements in the complaint that merely offer legal conclusions couched as factual allegations. *Id.* (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Second, the court "must determine whether the remaining factual content allows a reasonable inference that the defendant is liable for the misconduct alleged." *A.G. ex rel. Maddox v. Elsevier, Inc.*, 732 F.3d 77, 80 (1st Cir. 2013) (quotation marks omitted). The court must accept all well-pleaded facts as true and draw all reasonable inferences in the plaintiff's favor. *Rodríguez-Reyes*, 711 F.3d at 52-53. Determining the plausibility of a claim is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 53 (quoting *Iqbal*, 556 U.S. at 679).

III. DISCUSSION

Charter's complaint asserts that Maine's Pro Rata Law is preempted by the Cable Communications Policy Act of 1984, 47 U.S.C.A. §§ 521-573 (West 2020) (the "Cable Act"). The Attorney General contends that Charter's complaint does not state a plausible claim for relief because Maine's Pro Rata Law is not preempted by the Cable Act. Any preemption inquiry begins with the Supremacy Clause of the United States Constitution, which "mandates that federal law is the 'supreme Law of the Land.'" *Tobin v. Fed. Exp. Corp.*, 775 F.3d 448, 452 (1st Cir. 2014) (quoting U.S. Const. art. VI, cl. 2). Under the Supremacy Clause, "[a]ny state law that contravenes a federal law is null and void." *Id.* (citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1,

210-11 (1824), and *Brown v. United Airlines, Inc.*, 720 F.3d 60, 63 (1st Cir. 2013)). "Preemption may be express or implied." *Id.* (citing *Brown*, 720 F.3d at 63). "Express preemption occurs when congressional intent to preempt state law is made explicit in the language of a federal statute." *Id.* (citing *Grant's Dairy-Me., LLC v. Comm'r of Me. Dep't of Agric., Food & Rural Res.*, 232 F.3d 8, 15 (1st Cir. 2000)).

The Cable Act contains two express preemption provisions relevant here. Title 47 U.S.C.A. § 556(c) states that "any provision of law of any State . . . which is inconsistent with this chapter shall be deemed to be preempted and superseded." Additionally, 47 U.S.C.A. § 543(a)(2) provides that "rates for the provision of cable service . . . shall not be subject to regulation . . . by a State," so long as the Federal Communications Commission ("FCC") has found that the cable system providing the service is subject to effective competition. In 2015, the FCC promulgated a regulation presuming that all cable systems are subject to effective competition. 47 C.F.R. § 76.906 (West 2020). It is undisputed that, pursuant to this regulation, the FCC has found that Charter is subject to effective competition in Maine. Thus, under § 543(a)(2) of the Cable Act, Maine may not regulate the rates that Charter charges for the provision of cable service. Accordingly, under § 556(c), any Maine statute that attempts to regulate rates for the provision of cable service is preempted by the Cable Act.

The parties dispute whether Maine's Pro Rata Law falls within the scope of the Cable Act's express preemption provisions. Specifically, they dispute whether the Pro Rata Law regulates "rates for the provision of cable service" within the meaning

of § 543(a)(2) of the Cable Act. I begin by explaining the legal standards that guide my analysis of the parties' arguments.

A. Standards Governing the Analysis of Express Preemption Provisions

"Congressional intent is the touchstone of any effort to map the boundaries of an express preemption provision." *Tobin*, 775 F.3d at 452 (citing *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516 (1992), and *Grant's Dairy-Me.*, 232 F.3d at 14). To determine Congress's intent, a court must begin "with the text and context of the provision itself." *Id.* at 452-53 (citing *Mass. Ass'n of Health Maint. Orgs. v. Ruthardt*, 194 F.3d 176, 179-80 (1st Cir. 1999)). The inquiry into congressional intent is also "informed by the statutory structure, purpose, and history." *Id.* at 453 (citing *Brown*, 720 F.3d at 63, and *DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 86 (1st Cir. 2011)). However, the text remains "the best evidence" of congressional intent. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1946 (2016) (quoting *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 594 (2011)). Accordingly, where the text is sufficiently clear, the analysis begins and ends there. *See id.*

Additionally, when Congress has "legislated in a field traditionally occupied by the States," such as consumer protection, courts apply a presumption against preemption. *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008) (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)); *see also N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654-55 (1995) (collecting authorities). Accordingly, if an express preemption clause "is susceptible of more than one plausible reading" after an analysis of the statutory text, context, and purpose,

"courts ordinarily 'accept the reading that disfavors pre-emption.'"[2] *Altria Grp.*, 555 U.S. at 77, 80 (quoting *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)); *see also Coventry Health Care of Mo., Inc. v. Nevils*, 137 S. Ct. 1190, 1197-98 & n.3 (2017) (indicating that the presumption against preemption does not apply where Congress's intent is apparent from the statutory text, context, and purpose); *CSX Transp., Inc. v. Healey*, 861 F.3d 276, 286 (1st Cir. 2017) (same). The presumption against preemption applies not only when determining whether Congress generally intended to preempt state law but also when delineating the scope of an express preemption provision.[3] *See Medtronic*, 518 U.S. at 485; *accord Brown*, 720 F.3d at 63 (citing *Medtronic*, 518 U.S. at 484, and *Ruthardt*, 194 F.3d at 179).

B. Maine's Pro Rata Law and the Cable Act's Express Preemption Provisions

As noted above, § 543(a)(2) of the Cable Act provides, in pertinent part, that "rates for the provision of cable service . . . shall not be subject to regulation . . . by a State," and § 556(c) provides that "any provision of law of any State . . . which is inconsistent with this chapter shall be deemed to be preempted and suspended." The Attorney General contends that Maine's Pro Rata Law is not preempted for three reasons. First, he argues that the Pro Rata Law does not regulate any "rates" charged by Charter. Second, even if the Pro Rata Law regulates rates charged by Charter, he asserts that it does not regulate rates "for the provision of cable service." Finally, he

[2] Because I conclude that the Pro Rata Law is unambiguously preempted by the Cable Act, I need not and, therefore, do not address Charter's arguments questioning the continuing vitality of the presumption against preemption.

[3] Consistent with this framework, § 552(d)(1) of the Cable Act specifically permits states to enact and enforce consumer protection laws, so long as they are not "specifically preempted" by the Cable Act's other provisions.

contends that the Pro Rata Law does not fall within the scope of the Cable Act's preemption of state-imposed rate regulations because it is a consumer protection and customer service law permitted by § 552(d). I address each argument in turn.

1. "Rate[] . . . Regulation"

The Cable Act does not explicitly define the word "rate" or the phrase "rate regulation." Accordingly, I assume that these words carry their plain and ordinary meaning. *City of Providence v. Barr*, 954 F.3d 23, 31 (1st Cir. 2020). As relevant here, the Oxford English Dictionary defines "rate" as "[a] fixed charge or payment applicable to each individual instance of a set of similar cases" or "the amount paid or asked for a certain quantity of a particular commodity, service, etc." *Rate*, Oxford English Dictionary Online, https://www.oed.com/view/Entry/158412?rskey=6N3pIG&result=2&isAdvanced=false#eid (last visited Oct. 6, 2020); *see also Me. Pooled Disability Tr. v. Hamilton*, 927 F.3d 52, 57 (1st Cir. 2019) (using dictionary definitions to illuminate the "ordinary meaning" of statutory language). Similarly, Merriam-Webster defines "rate" as "a charge, payment, or price fixed according to a ratio, scale, or standard," such as "a charge per unit of a public-service commodity." *Rate*, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/rate (last visited Oct. 6, 2020). Consistent with these definitions, Black's Law Dictionary defines "rate" as a "[p]roportional or relative value; the proportion by which quantity or value is adjusted," or as "[a]n amount paid or charged for a good or service." *Rate*, Black's Law Dictionary (11th ed. 2019). All three dictionary definitions indicate that the word "rate" refers to the price charged for a particular quantity of a product or service.

Charter alleges that, under its whole-month billing policy, it charges subscribers a specific price per month for cable service. In other words, Charter asserts that it provides cable service at a monthly, not daily, rate. If a subscriber cancels her cable service in the middle of a monthly billing period, she does not receive a credit, rebate, or other form of refund for the rest of that billing period. Thus, Charter's alleged whole-month billing policy effectively charges a higher daily rate to subscribers who cancel their service mid-month than to subscribers who do not cancel, because Charter sells cable service in monthly increments. Maine's Pro Rata Law prohibits this outcome. Under the Pro Rata Law, if a subscriber cancels her cable service in the middle of a monthly billing period, her cable provider must grant her "a pro rata credit or rebate for the days of the monthly billing period after the cancellation of service." P.L. 2020, ch. 657, § 1. The Pro Rata Law therefore alters the rates that Charter charges, at least for the subset of subscribers who cancel their service in the middle of any given month.

The Attorney General points out that the Pro Rata Law does not require Charter to adopt a fixed daily rate. However, the Pro Rata Law does require Charter to calculate rebates based on the number of days remaining in the monthly billing period after cancellation—or, as the Attorney General puts it, "on a daily basis." ECF No. 21 at 3 n.4. Thus, in order to comply with the Pro Rata Law, Charter must measure the quantity of service it provides in daily increments, rather than monthly increments. Further, under the Pro Rata Law, Charter must grant post-cancellation rebates or credits to ensure that subscribers who cancel their service in the middle of a monthly billing period are charged the same daily rate as subscribers who do not

cancel. In other words, the Pro Rata Law forces Charter to depart from its usual monthly rate in order to ensure that all subscribers are charged the same daily rate during any given billing cycle.[4] Thus, Charter's complaint sufficiently alleges that the Pro Rata Law regulates Charter's "rates," as that term is used in § 543(a)(2) of the Cable Act.[5] The only other court that has considered a similar law reached the same conclusion. *See Altice USA, Inc. v. N.J. Bd. of Pub. Utils.*, No. 3:19-cv-21371-BRM-ZNQ, 2020 WL 359398, at *8 (D.N.J. Jan. 22, 2020) ("A requirement that service providers prorate bills is a type of rate regulation.").[6]

2. "Rates for the Provision of Cable Service"

The Attorney General contends that even if Maine's Pro Rata Law regulates rates, it does not regulate rates "for the provision of cable service" under § 543(a)(2) of the Cable Act because the Pro Rata Law only regulates Charter's rates after service is terminated—that is, the rates for service that is never provided. To support this argument, the Attorney General relies on *Cable Television Ass'n of N.Y., Inc. v. Finneran*, 954 F.2d 91 (2d Cir. 1992). In that case, the court considered a state law

[4] The Attorney General puts this point differently, arguing that the Pro Rata Law simply requires Charter to maintain the ratio between the amount charged and the quantity of service provided by requiring subscribers who cancel mid-month to pay only for the percentage of the month during which they received service. However, this percentage is calculated on a daily basis, as mentioned above; the Pro Rata Law prohibits Charter from calculating its "rates" by the monthly increment it has chosen. *See, e.g.*, *Rate*, Oxford English Dictionary Online ("[a] fixed charge or payment applicable to each individual instance of a set of similar cases"). Thus, the Attorney General's argument only reinforces the conclusion that the Pro Rata Law is a rate regulation within the meaning of § 543(a)(2).

[5] Because I conclude that the Pro Rata Law plainly regulates Charter's rates, I need not address Charter's related argument that the Pro Rata Law regulates its "rate structure."

[6] The Attorney General contends that *Altice* "should not be read as an endorsement of Charter's position" because the defendants in that case did not brief the merits of the preemption issue. ECF No. 12 at 11. This point is well taken, but it does not substantively undermine the court's logic in *Altice*. Accordingly, I treat the court's decision in *Altice* as supportive authority and rely on it only for the limited proposition for which it is cited.

prohibiting certain "downgrade fees" imposed upon subscribers who wished to move from a more expensive tier of channels to a lower, cheaper tier of cable service. *Id.* at 93. The court held that the state's prohibition on downgrade fees did not regulate rates "for the provision of services" under § 543(a)(2) because it is "linguistically unlikely . . . that the customer is 'provided' with cable service when services . . . are removed." *Id.* at 99. Further, the court found that prohibiting downgrade fees was consistent with the Cable Act's purpose of "allow[ing] market forces to control the rates charged by cable companies" because downgrade fees "insulate cable companies from market forces." *Id.* at 100. Thus, the court concluded that the Cable Act did not preempt the state's prohibition on downgrade fees. *See id.*

However, as Charter asserts, *Finneran* is distinguishable. The downgrade fees at issue in *Finneran* were akin to deinstallation fees, charged in addition to the cable provider's monthly rates for the provision of cable service. *See id.* at 93. Because the downgrade fees and the rates for the ongoing provision of cable service were independent, the state's prohibition on downgrade fees did not directly regulate the rates charged by the cable provider at any time, whether before or after the downgrade request was made. *See id.* at 98-100. Unlike the state law at issue in *Finneran*, Maine's Pro Rata 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, as discussed above. Although the Pro Rata Law applies only to the month in which a subscriber cancels her cable service, its prohibition on charges for service that was not provided have the effect of prescribing a daily rate for the service that was

provided before the cancellation. Thus, the complaint states a claim that the Pro Rata Law regulates the rates that Charter charges "for the provision of cable service" under § 543(a)(2).

3. "Consumer Protection" and "Customer Service"

The Attorney General contends that the scope of § 543(a)(2)'s prohibition on rate regulation is narrower than its plain language suggests when it is read in the context of the Cable Act as a whole. Because paragraphs 552(d)(1) and (2) of the Cable Act expressly permit states to enact "consumer protection" and "customer service" laws, the Attorney General argues, § 543(a)(2) was not intended to preempt state laws relating to consumer protection or customer service. I address his arguments under each statutory provision in turn.

a. "Consumer Protection"

First, the Attorney General contends that Maine's Pro Rata Law is a consumer protection law and that, as such, it does not fall within the intended scope of § 543(a)(2)'s prohibition on rate regulation. The Attorney General points out that § 552(d)(1) of the Cable Act expressly permits states to enact and enforce certain "consumer protection law[s]." However, the entire text of § 552(d)(1) provides that states may enact and enforce "any consumer protection law, *to the extent not specifically preempted*" by other provisions of the Cable Act. *Id.* (emphasis added). Thus, describing the Pro Rata Law as a consumer protection law does not aid in determining whether the Pro Rata Law is preempted by § 543(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 § 543(a)(2), § 552(d)(1) does not change the result.

b. "Customer Service"

Second, the Attorney General argues that Maine's Pro Rata Law is a "law[] concerning customer service" within the meaning of § 552(d)(2) and that, as such, it is not preempted by § 543(a)(2). Section 552(d)(2) provides that "[n]othing in [the Cable Act] shall be construed to prevent the establishment or enforcement of . . . any State law[] concerning customer service," so long as the state law either "imposes customer service requirements that exceed the standards set by the [FCC]" pursuant to § 552(b) or "addresses matters not addressed" by those standards. Because § 552(d)(2) does not include the same preemption clause that appears in § 552(d)(1), it is conceivable that a law could be valid under § 552(d)(2) even if it constitutes rate regulation for purposes of § 543(a)(2).[7]

The problem is that the Pro Rata Law cannot be characterized as a "law concerning customer service" for purposes of § 552(d)(2) because it does not "impose[] customer service requirements" on cable operators. Section 552(b) indicates that "customer service requirements . . . include, at a minimum, requirements governing (1) cable system office hours and telephone availability; (2) installations, outages, and service calls; and (3) communications between the cable operator and the subscriber (including standards governing bills and refunds)." The only one of these requirements that might plausibly allow a state to impose a proration requirement is

[7] Because, as described below, I find that the Pro Rata Law is not a "law concerning customer service" under § 552(d)(2), I do not address the scope of any potential conflict between these two sections.

paragraph 552(b)(3), which addresses "communications between the cable operator and the subscriber (including standards governing bills and refunds)." Although paragraph 552(b)(3) includes the phrase, "standards governing bills and refunds," it uses the phrase only as a parenthetical modifier of the primary term, "communications between the cable operator and the subscriber." *Id.* Thus, when read in context, § 552(b)(3) is limited to customer service requirements governing communications implicating bills and refunds, such as the time within which operators must issue refunds. *See* 47 C.F.R. 76.309(c)(3) (2020). It does not suggest that requirements governing the availability or structure of refunds qualify as "customer service requirements."[8]

Of course, as the Attorney General contends, the meaning of "customer service requirements" is not limited by the examples set forth in §§ 552(b)(1)-(3). Indeed, the phrase "at a minimum" in § 552(b) makes it plain that those examples are non-exhaustive. In the absence of further guidance from the statute, I assume that the phrase "customer service requirements" carries its plain and ordinary meaning. *City of Providence*, 954 F.3d at 31 (citing *Stornawaye Fin. Corp.*, 562 F.3d at 32). The Oxford English Dictionary defines "customer service" as "assistance and advice provided by a company to those people who buy or use its products or services." *Customer service*, Oxford English Dictionary Online,

[8] The regulations promulgated by the FCC pursuant to § 552(b)(3) support this view. In a subsection entitled "Communications between cable operators and cable subscribers," the FCC regulations prescribe the time within which cable operators must issue refund checks and credits for service. *See* 47 C.F.R. § 76.309(c)(3) (2020). Similarly, in a related context, the FCC has stated that customer service obligations under § 552 "are regulatory standards that govern how cable operators are available to and communicate with customers." Local Franchising Authorities' Regulation of Cable Operators and Cable Television Services, 84 Fed. Reg. 44725, 44737 (Aug. 27, 2019).

https://www.oed.com/view/Entry/46319?redirectedFrom=%22customer+service%22#eid1212284660 (last visited Oct. 6, 2020). Under this definition, a state law requiring cable operators to provide certain forms of assistance or advice to subscribers would "impose[] customer service requirements" and therefore would fall within the scope of § 552(d)(2). It is possible that some laws requiring cable operators to grant credits, rebates, or refunds might meet this definition.

Further, as the Attorney General points out, the legislative history of the Cable Act supports the view that "customer service requirements" may encompass some requirements that cable operators provide rebates and credits to subscribers. Specifically, a House Report recommending the passage of the Cable Act defines "customer service requirements" as including "requirements related to . . . disconnection" of cable service as well as requirements related to "rebates and credits to consumers." H. Rep. 98-934, at 79 (1984). Because the Pro Rata Law imposes requirements related to rebates and credits upon disconnection, the Attorney General argues that it is a customer service law permitted by § 552(d)(2).

The Attorney General might prevail on this argument if the Pro Rata Law regulated cancellation fees charged in addition to Charter's ordinary rates, *see Finneran*, 954 F.2d at 1010, or if it imposed mandatory rebates and credits in a manner that did not control the rates that Charter charges for cable service, such as when subscribers are accidentally overcharged or experience a lengthy service interruption. *Cf.* 30-A M.R.S.A. § 3010(1)(A) (West 2020) (requiring a cable operator to issue a pro rata credit or rebate for a service interruption of more than six hours). However, the Pro Rata Law goes well beyond these examples and directly regulates

the rates that Charter may charge subscribers who cancel in the middle of a monthly billing period, as discussed above. Although the Pro Rata Law's method of regulation—a mandatory rebate—may be contemplated or authorized by § 552(d)(2), the substance that the Pro Rata Law regulates—the increment by which a cable operator must bill for cable service—is unambiguously prohibited by § 543(a)(2), and nothing in the statutory text or legislative history of § 552(d)(2) suggests that it creates an exception to that prohibition. *See Finneran*, 954 F.2d at 101-02 (suggesting that state laws are only permitted by § 552 if they are not "rate regulations" within the meaning of § 543(a)(2)); H. Rep. 98-934 at 79.

Furthermore, the Attorney General's interpretation is at odds with the overarching purposes of the Cable Act, which was intended to "establish a national policy concerning cable communications" and to "establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems." 47 U.S.C.A. § 521(1), (3). If the Pro Rata Law were interpreted as a "customer service" law that is permitted under § 552(d)(2) of the Cable Act, rather than a rate regulation that is prohibited by § 543(a)(2), those purposes would be undermined. States could regulate cable service rates under the guise of imposing customer service requirements, for instance, by requiring rebates and credits for different bundling and subscription selections, creating a risk of inconsistent local and regional policies and increasing the potential for confusion regarding the relationship between federal, state, and local authorities.

Accordingly, I conclude that the credit and rebate requirements imposed by the Pro Rata Law are "rate regulations" under § 543(a)(2) and not "customer service requirements" within the meaning of § 552(d)(2).

C. Summary

Maine's Pro Rata Law seeks to align cable operators' billing practices with reasonable public expectations regarding the way cable system operators should charge for cable service. *See An Act To Require a Cable System Operator To Provide a Pro Rata Credit When Service Is Cancelled by a Subscriber: Hearing on L.D. 2031 Before the J. Standing Comm. on Energy, Utils. & Tech.*, 129th Legis. (2020) (testimony of Rep. Seth Berry, House Chair, J. Standing Comm. on Energy, Utils. & Tech.). However, in enacting § 543(a)(2) of the Cable Act, Congress intended to ensure that "market forces," and not state governments, "control the rates charged by cable companies." *Finneran*, 954 F.2d at 100; *see also* 47 U.S.C.A. § 521(6). The Pro Rata Law runs afoul of this intent by dictating the units of time by which cable operators such as Charter may sell cable service. *See Time Warner Entm't Co. v. FCC*, 56 F.3d 151, 191 (D.C. Cir. 1995) (describing Congress' intention to have market forces control rates as a "hallmark purpose" of the Cable Act). It therefore regulates "rates for the provision of cable service," which is prohibited by § 543(a)(2) of the Cable Act.

Having considered the relevant statutory text, context, and purposes, and treating the facts alleged by Charter as true as I must on a motion to dismiss, I conclude that Maine's Pro Rata Law is unambiguously preempted by §§ 543(a)(2) and 556(c) of the Cable Act. Because I do not find § 543(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.

IV. CONCLUSION

For the foregoing reasons, the Attorney General's motion to dismiss (ECF No. 12) is **DENIED**.

SO ORDERED.

Dated: October 7, 2020

/s/ JON D. LEVY
CHIEF U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

SPECTRUM NORTHEAST, LLC, et al., Plaintiffs, v. AARON FREY, in his official capacity as Attorney General for the State of Maine, Defendant.	Case No. 1:20-cv-00168-JDL

FINAL JUDGMENT

This matter is before the Court on the parties' Joint Motion to Grant Summary Judgment to Plaintiffs and Enter Final Judgment ("Joint Motion"), ECF No. 33. For the reasons stated in the Joint Motion, as well as the Court's order denying Defendant's Motion to Dismiss, ECF No. 28, the Court hereby declares that Public Law 2020, ch. 657, "An Act To Require a Cable System Provider To Provide a Pro Rata Credit When Service Is Cancelled by a Subscriber," is preempted by the Cable Communications Policy Act of 1984, 47 U.S.C. §§ 521-573. Accordingly, the parties' Joint Motion (ECF No. 33) is **GRANTED**, and it is **ORDERED** that judgment be entered in favor of Plaintiffs in this matter.

Defendant has preserved his right to appeal this judgment and associated orders, and this judgment is intended to be appealable. Defendant agrees that he will not seek to enforce, directly or indirectly, the Pro Rata Law absent vacatur or reversal of this Court's judgment.

SO ORDERED.

Dated: November 2, 2020

/s/ Jon D. Levy
CHIEF U.S. DISTRICT JUDGE

KeyCite Yellow Flag - Negative Treatment
Proposed Legislation

United States Code Annotated
Title 47. Telecommunications (Refs & Annos)
Chapter 5. Wire or Radio Communication (Refs & Annos)
Subchapter V-A. Cable Communications
Part III. Franchising and Regulation

47 U.S.C.A. § 543

§ 543. Regulation of rates

Effective: March 23, 2018
Currentness

(a) Competition preference; local and Federal regulation

(1) In general

No Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and section 532 of this title. Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section. No Federal agency, State, or franchising authority may regulate the rates for cable service of a cable system that is owned or operated by a local government or franchising authority within whose jurisdiction that cable system is located and that is the only cable system located within such jurisdiction.

(2) Preference for competition

If the Commission finds that a cable system is subject to effective competition, 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. If the Commission finds that a cable system is not subject to effective competition--

(A) the rates for the provision of basic cable service shall be subject to regulation by a franchising authority, or by the Commission if the Commission exercises jurisdiction pursuant to paragraph (6), in accordance with the regulations prescribed by the Commission under subsection (b); and

(B) the rates for cable programming services shall be subject to regulation by the Commission under subsection (c).

(3) Qualification of franchising authority

A franchising authority that seeks to exercise the regulatory jurisdiction permitted under paragraph (2)(A) shall file with the Commission a written certification that--

(A) the franchising authority will adopt and administer regulations with respect to the rates subject to regulation under this section that are consistent with the regulations prescribed by the Commission under subsection (b);

(B) the franchising authority has the legal authority to adopt, and the personnel to administer, such regulations; and

(C) procedural laws and regulations applicable to rate regulation proceedings by such authority provide a reasonable opportunity for consideration of the views of interested parties.

(4) Approval by Commission

A certification filed by a franchising authority under paragraph (3) shall be effective 30 days after the date on which it is filed unless the Commission finds, after notice to the authority and a reasonable opportunity for the authority to comment, that--

(A) the franchising authority has adopted or is administering regulations with respect to the rates subject to regulation under this section that are not consistent with the regulations prescribed by the Commission under subsection (b);

(B) the franchising authority does not have the legal authority to adopt, or the personnel to administer, such regulations; or

(C) procedural laws and regulations applicable to rate regulation proceedings by such authority do not provide a reasonable opportunity for consideration of the views of interested parties.

If the Commission disapproves a franchising authority's certification, the Commission shall notify the franchising authority of any revisions or modifications necessary to obtain approval.

(5) Revocation of jurisdiction

Upon petition by a cable operator or other interested party, the Commission shall review the regulation of cable system rates by a franchising authority under this subsection. A copy of the petition shall be provided to the franchising authority by the person filing the petition. If the Commission finds that the franchising authority has acted inconsistently with the requirements of this subsection, the Commission shall grant appropriate relief. If the Commission, after the franchising authority has had a reasonable opportunity to comment, determines that the State and local laws and regulations are not in conformance with the regulations prescribed by the Commission under subsection (b), the Commission shall revoke the jurisdiction of such authority.

(6) Exercise of jurisdiction by Commission

If the Commission disapproves a franchising authority's certification under paragraph (4), or revokes such authority's jurisdiction under paragraph (5), the Commission shall exercise the franchising authority's regulatory jurisdiction under paragraph (2)(A) until the franchising authority has qualified to exercise that jurisdiction by filing a new certification that meets the requirements of paragraph (3). Such new certification shall be effective upon approval by the Commission. The Commission shall act to approve or disapprove any such new certification within 90 days after the date it is filed.

(7) Aggregation of equipment costs

(A) In general

The Commission shall allow cable operators, pursuant to any rules promulgated under subsection (b)(3), to aggregate, on a franchise, system, regional, or company level, their equipment costs into broad categories, such as converter boxes, regardless of the varying levels of functionality of the equipment within each such broad category. Such aggregation shall not be permitted with respect to equipment used by subscribers who receive only a rate regulated basic service tier.

(B) Revision to Commission rules; forms

Within 120 days of February 8, 1996, the Commission shall issue revisions to the appropriate rules and forms necessary to implement subparagraph (A).

(b) Establishment of basic service tier rate regulations

(1) Commission obligation to subscribers

The Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable. Such regulations shall be designed to achieve the goal of protecting subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed the rates that would be charged for the basic service tier if such cable system were subject to effective competition.

(2) Commission regulations

Within 180 days after October 5, 1992, the Commission shall prescribe, and periodically thereafter revise, regulations to carry out its obligations under paragraph (1). In prescribing such regulations, the Commission--

(A) shall seek to reduce the administrative burdens on subscribers, cable operators, franchising authorities, and the Commission;

(B) may adopt formulas or other mechanisms and procedures in complying with the requirements of subparagraph (A); and

(C) shall take into account the following factors:

(i) the rates for cable systems, if any, that are subject to effective competition;

(ii) the direct costs (if any) of obtaining, transmitting, and otherwise providing signals carried on the basic service tier, including signals and services carried on the basic service tier pursuant to paragraph (7)(B), and changes in such costs;

(iii) only such portion of the joint and common costs (if any) of obtaining, transmitting, and otherwise providing such signals as is determined, in accordance with regulations prescribed by the Commission, to be reasonably and properly allocable to the basic service tier, and changes in such costs;

(iv) the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the basic service tier or from other consideration obtained in connection with the basic service tier;

(v) the reasonably and properly allocable portion of any amount assessed as a franchise fee, tax, or charge of any kind imposed by any State or local authority on the transactions between cable operators and cable subscribers or any other fee, tax, or assessment of general applicability imposed by a governmental entity applied against cable operators or cable subscribers;

(vi) any amount required, in accordance with paragraph (4), to satisfy franchise requirements to support public, educational, or governmental channels or the use of such channels or any other services required under the franchise; and

(vii) a reasonable profit, as defined by the Commission consistent with the Commission's obligations to subscribers under paragraph (1).

(3) Equipment

The regulations prescribed by the Commission under this subsection shall include standards to establish, on the basis of actual cost, the price or rate for--

(A) installation and lease of the equipment used by subscribers to receive the basic service tier, including a converter box and a remote control unit and, if requested by the subscriber, such addressable converter box or other equipment as is required to access programming described in paragraph (8); and

(B) installation and monthly use of connections for additional television receivers.

(4) Costs of franchise requirements

The regulations prescribed by the Commission under this subsection shall include standards to identify costs attributable to satisfying franchise requirements to support public, educational, and governmental channels or the use of such channels or any other services required under the franchise.

(5) Implementation and enforcement

The regulations prescribed by the Commission under this subsection shall include additional standards, guidelines, and procedures concerning the implementation and enforcement of such regulations, which shall include--

(A) procedures by which cable operators may implement and franchising authorities may enforce the regulations prescribed by the Commission under this subsection;

(B) procedures for the expeditious resolution of disputes between cable operators and franchising authorities concerning the administration of such regulations;

(C) standards and procedures to prevent unreasonable charges for changes in the subscriber's selection of services or equipment subject to regulation under this section, which standards shall require that charges for changing the service tier selected shall be based on the cost of such change and shall not exceed nominal amounts when the system's configuration permits changes in service tier selection to be effected solely by coded entry on a computer terminal or by other similarly simple method; and

(D) standards and procedures to assure that subscribers receive notice of the availability of the basic service tier required under this section.

(6) Notice

The procedures prescribed by the Commission pursuant to paragraph (5)(A) shall require a cable operator to provide 30 days' advance notice to a franchising authority of any increase proposed in the price to be charged for the basic service tier.

(7) Components of basic tier subject to rate regulation

(A) Minimum contents

Each cable operator of a cable system shall provide its subscribers a separately available basic service tier to which subscription is required for access to any other tier of service. Such basic service tier shall, at a minimum, consist of the following:

(i) All signals carried in fulfillment of the requirements of sections 534 and 535 of this title.

(ii) Any public, educational, and governmental access programming required by the franchise of the cable system to be provided to subscribers.

(iii) Any signal of any television broadcast station that is provided by the cable operator to any subscriber, except a signal which is secondarily transmitted by a satellite carrier beyond the local service area of such station.

(B) Permitted additions to basic tier

A cable operator may add additional video programming signals or services to the basic service tier. Any such additional signals or services provided on the basic service tier shall be provided to subscribers at rates determined under the regulations prescribed by the Commission under this subsection.

(8) Buy-through of other tiers prohibited

(A) Prohibition

A cable operator may not require the subscription to any tier other than the basic service tier required by paragraph (7) as a condition of access to video programming offered on a per channel or per program basis. A cable operator may not discriminate between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per channel or per program basis.

(B) Exception; limitation

The prohibition in subparagraph (A) shall not apply to a cable system that, by reason of the lack of addressable converter boxes or other technological limitations, does not permit the operator to offer programming on a per channel or per program basis in the same manner required by subparagraph (A). This subparagraph shall not be available to any cable operator after--

(i) the technology utilized by the cable system is modified or improved in a way that eliminates such technological limitation; or

(ii) 10 years after October 5, 1992, subject to subparagraph (C).

(C) Waiver

If, in any proceeding initiated at the request of any cable operator, the Commission determines that compliance with the requirements of subparagraph (A) would require the cable operator to increase its rates, the Commission may, to the extent consistent with the public interest, grant such cable operator a waiver from such requirements for such specified period as the Commission determines reasonable and appropriate.

(c) Regulation of unreasonable rates

(1) Commission regulations

Within 180 days after October 5, 1992, the Commission shall, by regulation, establish the following:

(A) criteria prescribed in accordance with paragraph (2) for identifying, in individual cases, rates for cable programming services that are unreasonable;

(B) fair and expeditious procedures for the receipt, consideration, and resolution of complaints from any franchising authority (in accordance with paragraph (3)) alleging that a rate for cable programming services charged by a cable operator violates the criteria prescribed under subparagraph (A), which procedures shall include the minimum showing that shall be

required for a complaint to obtain Commission consideration and resolution of whether the rate in question is unreasonable; and

(C) the procedures to be used to reduce rates for cable programming services that are determined by the Commission to be unreasonable and to refund such portion of the rates or charges that were paid by subscribers after the filing of the first complaint filed with the franchising authority under paragraph (3) and that are determined to be unreasonable.

(2) Factors to be considered

In establishing the criteria for determining in individual cases whether rates for cable programming services are unreasonable under paragraph (1)(A), the Commission shall consider, among other factors--

(A) the rates for similarly situated cable systems offering comparable cable programming services, taking into account similarities in facilities, regulatory and governmental costs, the number of subscribers, and other relevant factors;

(B) the rates for cable systems, if any, that are subject to effective competition;

(C) the history of the rates for cable programming services of the system, including the relationship of such rates to changes in general consumer prices;

(D) the rates, as a whole, for all the cable programming, cable equipment, and cable services provided by the system, other than programming provided on a per channel or per program basis;

(E) capital and operating costs of the cable system, including the quality and costs of the customer service provided by the cable system; and

(F) the revenues (if any) received by a cable operator from advertising from programming that is carried as part of the service for which a rate is being established, and changes in such revenues, or from other consideration obtained in connection with the cable programming services concerned.

(3) Review of rate changes

The Commission shall review any complaint submitted by a franchising authority after February 8, 1996, concerning an increase in rates for cable programming services and issue a final order within 90 days after it receives such a complaint, unless the parties agree to extend the period for such review. A franchising authority may not file a complaint under this paragraph unless, within 90 days after such increase becomes effective it receives subscriber complaints.

(4) Sunset of upper tier rate regulation

This subsection shall not apply to cable programming services provided after March 31, 1999.

(d) Uniform rate structure required

A cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout the geographic area in which cable service is provided over its cable system. This subsection does not apply to (1) a cable operator with respect to the provision of cable service over its cable system in any geographic area in which the video programming services offered by the operator in that area are subject to effective competition, or (2) any video programming offered on a per channel or per program basis. Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit. Upon a prima facie showing by a complainant that there are reasonable grounds to believe that the discounted price is predatory, the cable system shall have the burden of showing that its discounted price is not predatory.

(e) Discrimination; services for the hearing impaired

Nothing in this subchapter shall be construed as prohibiting any Federal agency, State, or a franchising authority from--

(1) prohibiting discrimination among subscribers and potential subscribers to cable service, except that no Federal agency, State, or franchising authority may prohibit a cable operator from offering reasonable discounts to senior citizens or other economically disadvantaged group discounts; or

(2) requiring and regulating the installation or rental of equipment which facilitates the reception of cable service by hearing impaired individuals.

(f) Negative option billing prohibited

A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. For purposes of this subsection, a subscriber's failure to refuse a cable operator's proposal to provide such service or equipment shall not be deemed to be an affirmative request for such service or equipment.

(g) Collection of information

The Commission shall, by regulation, require cable operators to file with the Commission or a franchising authority, as appropriate, within one year after October 5, 1992, and annually thereafter, such financial information as may be needed for purposes of administering and enforcing this section.

(h) Prevention of evasions

Within 180 days after October 5, 1992, the Commission shall, by regulation, establish standards, guidelines, and procedures to prevent evasions, including evasions that result from retiering, of the requirements of this section and shall, thereafter, periodically review and revise such standards, guidelines, and procedures.

(i) Small system burdens

In developing and prescribing regulations pursuant to this section, the Commission shall design such regulations to reduce the administrative burdens and cost of compliance for cable systems that have 1,000 or fewer subscribers.

(j) Rate regulation agreements

During the term of an agreement made before July 1, 1990, by a franchising authority and a cable operator providing for the regulation of basic cable service rates, where there was not effective competition under Commission rules in effect on that date, nothing in this section (or the regulations thereunder) shall abridge the ability of such franchising authority to regulate rates in accordance with such an agreement.

(k) Reports on average prices

(1) In general

The Commission shall publish with its report under section 163 of this title statistical reports on the average rates for basic cable service and other cable programming, and for converter boxes, remote control units, and other equipment of cable systems that the Commission has found are subject to effective competition under subsection (a)(2) compared with cable systems that the Commission has found are not subject to such effective competition.

(2) Inclusion in report

(A) In general

The Commission shall include in its report under paragraph (1) the aggregate average total amount paid by cable systems in compensation under section 325 of this title.

(B) Form

The Commission shall publish information under this paragraph in a manner substantially similar to the way other comparable information is published in such report.

(l) Definitions

As used in this section--

(1) The term “effective competition” means that--

(A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system;

(B) the franchise area is--

(i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and

(ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area;

(C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area; or

(D) a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.

(2) The term "cable programming service" means any video programming provided over a cable system, regardless of service tier, including installation or rental of equipment used for the receipt of such video programming, other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis.

(m) Special rules for small companies

(1) In general

Subsections (a), (b), and (c) do not apply to a small cable operator with respect to--

(A) cable programming services, or

(B) a basic service tier that was the only service tier subject to regulation as of December 31, 1994,

in any franchise area in which that operator services 50,000 or fewer subscribers.

(2) "Small cable operator" defined

For purposes of this subsection, the term "small cable operator" means a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000.

(n) Treatment of prior year losses

Notwithstanding any other provision of this section or of section 532 of this title, losses associated with a cable system (including losses associated with the grant or award of a franchise) that were incurred prior to September 4, 1992, with respect to a cable system that is owned and operated by the original franchisee of such system shall not be disallowed, in whole or in part, in the determination of whether the rates for any tier of service or any type of equipment that is subject to regulation under this section are lawful.

(o) Streamlined petition process for small cable operators

(1) In general

Not later than 180 days after December 4, 2014, the Commission shall complete a rulemaking to establish a streamlined process for filing of an effective competition petition pursuant to this section for small cable operators, particularly those who serve primarily rural areas.

(2) Construction

Nothing in this subsection shall be construed to have any effect on the duty of a small cable operator to prove the existence of effective competition under this section.

(3) Definition of small cable operator

In this subsection, the term "small cable operator" has the meaning given the term in subsection (m)(2).

CREDIT(S)

(June 19, 1934, c. 652, Title VI, § 623, as added Pub.L. 98-549, § 2, Oct. 30, 1984, 98 Stat. 2788; amended Pub.L. 102-385, § 3(a), Oct. 5, 1992, 106 Stat. 1464; Pub.L. 104-104, Title III, § 301(b), (c), (j), (k)(1), Feb. 8, 1996, 110 Stat. 114, 116, 118; Pub.L. 113-200, Title I, §§ 110, 111, Dec. 4, 2014, 128 Stat. 2065; Pub.L. 115-141, Div. P, Title IV, § 402(e), Mar. 23, 2018, 132 Stat. 1089.)

Notes of Decisions (38)

47 U.S.C.A. § 543, 47 USCA § 543
Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

Maine Revised Statutes Annotated
Title 30–a. Municipalities and Counties (Refs & Annos)
Part 2. Municipalities
Subpart 4. Ordinance Authority and Limitations
Chapter 141. Ordinances

30–A M.R.S.A. § 3010

§ 3010. Consumer rights and protection relating to cable television service

Effective: June 16, 2020
Currentness

This section applies to every franchisee. For purposes of this section, "franchisee" means a cable system operator that is granted a franchise by a municipality in accordance with section 3008. For purposes of this section, "cable system operator" and "cable television service" have the same meanings as in section 3008, except that "cable system operator" includes a multichannel video programming distributor as defined in 47 United States Code, Section 522(13). For purposes of this section, "originator" means a local unit of government or the entity to which a local unit of government has assigned responsibility for managing public, educational and governmental access channels.

1. Credits and refunds for interruption of service. Credits and refunds for interruption of cable television service of a franchisee must be as follows.

A. In the event service to any subscriber is interrupted for 6 or more consecutive hours in a 30–day period, the franchisee will, upon request, grant that subscriber a pro rata credit or rebate.

B. An office of the franchisee must be open during usual business hours, have a listed toll-free telephone and be capable of receiving complaints, requests for adjustments and service calls.

C. The franchisee shall provide subscribers with 30 days' advance written notice of an increase in rates, changes in billing practices or the deletion of a channel.

1–A. Service cancellation. A franchisee must discontinue billing a subscriber for a service within 2 working days after the subscriber requests to cancel that service unless the subscriber unreasonably hinders access by the franchisee to equipment of the franchisee on the premises of the subscriber to which the franchisee must have access to complete the requested cancellation of service. 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.

2. Notice to subscribers regarding quality of service. Notice to subscribers regarding quality of service must be as follows.

A. For each new subscriber, and annually thereafter, every franchisee shall cause to be mailed to each of its subscribers a notice that:

(1) Informs subscribers of how to communicate their views and complaints to the cable system operator, the proper municipal official and the Attorney General;

(2) States the responsibility of the Department of the Attorney General to receive consumer complaints concerning matters other than channel selection and rates;

(3) States the policy regarding and method by which subscribers may request rebates or pro rata credits as described in subsection 1, paragraph A; and

(4) Informs subscribers of their right to request basic-tier, nonpremium programming service and the cost of that service.

B. The notice must be in nontechnical language, understandable by the general public and in a convenient format. On or before January 30th of each year, the franchisee shall certify to the franchising authority and to the Department of the Attorney General that it has distributed the notice during the previous calendar year as required by this section.

2–A. Notice on subscriber bills; credits and refunds. Every franchisee shall include on each subscriber bill for service a notice regarding the subscriber's right to a pro rata credit or rebate for interruption of service upon request in accordance with subsection 1 or cancellation of service in accordance with subsection 1–A. The notice must include a toll-free telephone number and a telephone number accessible by a teletypewriter device or TTY for contacting the franchisee to request the pro rata credit or rebate for service interruption or service cancellation. The notice must be in nontechnical language, understandable by the general public and printed in a prominent location on the bill in boldface type.

3. Repealed. Laws 1999, c. 581, § 2.

4. Recording subscriber complaints. Recording subscriber complaints must be as follows.

A. Every franchisee shall keep a record or log of all written complaints received regarding quality of service, equipment malfunctions, billing procedure, employee attitude and similar matters. These records must be maintained for a period of 2 years.

B. The record must contain the following information for each complaint received:

(1) Date, time and nature of the complaint;

(2) Name, address and telephone number of the person complaining;

(3) Investigation of the complaint;

(4) Manner and time of resolution of the complaint;

(5) If the complaint regards equipment malfunction or the quality of reception, a report indicating corrective steps taken, with the nature of the problem stated; and

(6) Consistent with subscriber privacy provisions contained in the Cable Communications Policy Act of 1984, Public Law 98–549, [1] every franchisee shall make the logs or records of complaints available to any authorized agent of any franchising authority having a franchise with that franchisee or any authorized agent of a municipality considering a franchise with that franchisee upon request during normal business hours for on-site review.

5. Franchises. All franchises must be nonexclusive. All franchises must include provision for access to, and facilities to make use of, one or more local public, educational and governmental access channels subject to the definitions and requirements of the Cable Communications Policy Act of 1984, Public Law 98–549 or related requirements or regulations of the Federal Communications Commission.

5–A. Public, educational and governmental access channels. A cable system operator shall carry public, educational and governmental access channels on the cable system operator's basic cable or video service offerings or tiers. A cable system operator may not separate public, educational and governmental access channels numerically from other local broadcast channels carried on the cable system operator's basic cable or video service offerings or tiers and, in the event of a franchise license transfer, shall use the same channel numbers for the public, educational and governmental access channels as used for those channels by the incumbent cable system operator, unless prohibited by federal law. After the initial designation of public, educational and governmental access channel numbers, a cable system operator may not change the channel numbers without the agreement of the originator, unless the change is required by federal law.

A cable system operator shall restore a public, educational or governmental access channel that has been moved without the consent of the originator within the 24 months preceding the effective date of this subsection to its original location and channel number within 60 days after the effective date of this subsection.

5–B. Transmission. A cable system operator shall retransmit public, educational and governmental access channel signals in the format in which they are received from the originator and at the same signal quality as that provided to all subscribers of the cable television service for local broadcast channels. A cable system operator may not diminish, down convert or otherwise tamper with the signal quality or format provided by the originator. A cable system operator shall deliver a public, educational or governmental access channel signal to the subscriber in a quality and format equivalent to the quality and format of local broadcast channel signals carried on the cable television service if provided as such by the originator. A cable system operator shall carry each public, educational or governmental access channel in both a high definition format and a standard digital format in the same manner as that in which local broadcast channels are provided, unless prohibited by federal law.

A cable system operator, when requested, shall assist in providing the originator with access to the entity that controls the cable television service's electronic program guide so that subscribers may view, select and record public, educational and governmental access channels in the same manner as that in which they view, select and record local broadcast channels. In addition, a cable system operator shall identify public, educational and governmental access channels on the electronic program guide in the same manner as that in which local broadcast channels are identified. This subsection does not obligate a cable

system operator to list public, educational and governmental access channel content on channel cards and channel listings. If channels are selected by a viewer through a menu system, the cable system operator shall display the public, educational and governmental access channels' designations in a similar manner as that in which local broadcast channel designations are displayed.

A cable system operator shall make available to the originator a toll-free telephone number with a direct line to a service technician who is familiar with the signal path and equipment associated with public, educational and governmental access channels on the cable television system for resolution of a signal quality problem.

5–C. Franchise renewals. The franchise renewal process must be conducted in compliance with 47 United States Code, Section 546 and this subsection.

A. A cable system operator shall maintain adequate personnel and resources to respond to municipal requests for renewal information in a timely manner. Failure to respond in a timely manner is a violation of the Maine Unfair Trade Practices Act. [2]

B. If an automatic renewal provision exists in a franchise agreement on the effective date of this subsection, the automatic renewal provision remains in effect until that franchise agreement expires. The cable system operator shall notify the franchising authority of the automatic renewal no later than 36 months in advance of the expiration of the franchise.

C. A municipality may require maps, diagrams, annual reports and franchise fee statements at renewal, which the cable system operator shall make available upon reasonable notice. If information is proprietary, the municipality may execute a nondisclosure agreement with the cable system operator.

6. Rights of individuals. A cable system operator may not deny service, deny access or otherwise discriminate against subscribers, channel users or general citizens on the basis of age, race, religion, sex, physical handicap or country of natural origin.

6–A. Subscriber privacy. A cable system operator may not intrude upon the privacy of a subscriber by installing or using any equipment that allows the cable system operator to observe or to listen to what is occurring in an individual subscriber's household or to monitor the viewing habits of the subscriber without express, prior written consent of the subscriber. A cable system operator may not sell, disclose or otherwise make available, or permit the use of, lists of the names or addresses of its subscribers, or any list or other information that identifies by name or address subscribers or subscriber viewing habits, to any person or agency for any purpose whatsoever without the prior written consent of the subscriber except that the cable system operator may make such lists available to persons performing services for the cable system operator in connection with its business or operations, such as a billing service, when the availability of such lists is necessary to the performance of such services if, in either case, the persons or entity receiving such lists agree in writing that they will not permit them to be made available to any other party.

6–B. Late fees. A cable system operator may not charge a late fee or other penalty or charge for late payment of any bill that exceeds 1.5% per month of the amount due in the bill. If the bill includes separate charges for different levels of service, a late fee or other penalty or charge must be calculated on the total amount overdue for all levels of service and may not be calculated separately for each level of service. A payment is not late under this subsection until at least 30 days after those services to which the late fee applies have been received by the consumer.

7. Penalty. A violation of any provision of this section is a violation of Title 5, chapter 10. [2]

8. Filing of franchise agreements. A cable system operator that maintains a publicly accessible website shall post on that website a copy of the most recently executed franchise agreement for each franchise that it has been granted by a municipality in the State.

Credits

1989, c. 352; 1991, c. 358; 1991, c. 657, § 1; 1993, c. 219, § 1, eff. June 2, 1993; L.1993, c. 513, § 1; 1993, c. 676, §§ 1, 2; 1999, c. 581, § 2; 2007, c. 104, § 1; 2007, c. 548, § 2; 2019, c. 245, §§ 5, 6, eff. Sept. 19, 2019; 2019, c. 657, §§ 1, 2, eff. June 16, 2020.

Notes of Decisions (7)

Footnotes

1 See Short Title note under 47 U.S.C.A. § 609.

2 5 M.R.S.A. § 205–A et seq.

30–A M. R. S. A. § 3010, ME ST T. 30–A § 3010

Current with legislation through the 2019 Second Regular Session of the 129th Legislature. The Second Regular Session convened January 8, 2020 and adjourned sine die March 17, 2020.

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