

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY
CABLE TELEVISION DIVISION**

_____)	
In Re)	Docket No.: R-26
)	
Proposed Rulemaking:)	
207 C.M.R. § 11.00)	Released: June 28, 2000
_____)	

ORDER

I. INTRODUCTION

On February 10, 1998, the Department of Telecommunications and Energy's ("Department") Cable Television Division ("Cable Division")¹ issued a Notice of Proposed Rulemaking ("Notice") that sought comments from interested persons on a proposed additional section to our regulations, 207 C.M.R. § 11.00. The Cable Division issued the Notice to address concerns about customer service and consumer protections resulting from an increase in municipal and subscriber complaints. Under our enabling statute, the Cable Division is authorized to issue such standards and regulations as we deem appropriate to carry out the purpose of the statute. G.L. c. 166A, § 16.

Following the release of our Notice, the Cable Division held a public hearing at 100 Cambridge Street, 12th Floor, Boston on March 3, 1998. We received public comments at the hearing from municipal representatives, cable operators, and members of the general public.

¹ Formally, the "Massachusetts Community Antenna Television Division" under G.L. c. 166A, § 2.

In addition to the public hearing comments, the Cable Division received written comments from several interested persons. The Cable Division received a number of requests for an opportunity to submit written replies to the comments on the record, and we notified the interested persons that we would provide an opportunity to present reply comments in the proceeding. Several interested persons provided written replies to the comments on record.

After review of the oral and written comments, the Cable Division determined that more detailed information was needed before we issued a final order. The Cable Division reopened the proceeding and issued 21 questions in order to elicit more detailed information on the costs of compliance with the proposed rules and the resulting affect on subscriber rates. Several interested persons responded to the Cable Division's Information Requests.²

II. DISCUSSION AND ANALYSIS

A. Summary of Comments

Cable industry commenters generally expressed the view that some of the proposed customer service regulations would be burdensome and unnecessary given the increasingly competitive environment in the video programming marketplace in the Commonwealth. Further, several industry commenters suggested that the Federal Communications Commission's ("FCC") customer service standards adequately protect consumers of cable services. Several argued that to the extent the Cable Division's rules exceed the FCC standards, the associated costs of compliance might be passed through to subscribers. These commenters questioned whether the resulting increases in cable rates would be justified given their view that the FCC standards are sufficient to protect subscribers and in light of the increased competition in the

² Citations to these documents in this Order are referred to as "Response at ___."

video programming marketplace. Some commenters explained that the increase in consumer complaints was an aberration and not a sign of industry-wide poor performance. The Commonwealth's largest cable operator explained that it had some short-term customer service problems, but assured the Cable Division that it had rectified those problems.

Municipal representatives generally expressed support for our proposed rules. At the same time, however, they expressed concern to the extent that the proposed regulations infringed upon negotiated license provisions. Further, the municipal commenters indicated that they did not want the proposed regulations to be implemented if they would cause increases in subscriber rates.

B. Analysis and Findings

In evaluating whether to promulgate final regulations, the Cable Division is guided by Executive Order 384, which instructs agencies to ensure that the costs of new regulations do not exceed the benefits that would be affected by the regulations.³ Further, Executive Order 384 requires agencies to consider alternative, less restrictive means of achieving their goals. In striking the appropriate balance between the costs of the regulations and their potential benefits, we review the likely impact on subscriber rates and the affect of state-wide regulations.

Several commenters argued that, to the extent the Cable Division's customer service regulations imposed costs above the cost of complying with existing federal customer service requirements, cable operators would be entitled to pass through those costs to basic service tier

³ Governor William F. Weld issued Executive Order 384 on February 7, 1996. The purpose of the Order was to reduce unnecessary regulatory burdens on residents and businesses in the Commonwealth.

subscribers (Greater Media Response at 5; Cablevision Response at 2; Time Warner Response at 4; MediaOne Response at 8). Some operators indicated that as a result of the proposed regulations, they would be required to raise rates, passing through associated costs to subscribers (See, e.g., Tr. at 57; MediaOne Response at 9.) Other operators indicated that they would reconsider their rate structure to the extent that associated costs could be passed through to subscribers (See, e.g., Cablevision Response at 5-7.)

The FCC's rate regulation rules permit cable operators to pass through to subscribers increases in certain categories of external costs. In re Implementation of Sections of the Cable Television Consumer Protection Act and Competition Act of 1992, Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 92-266 (May 3, 1993); 47 C.F.R. § 76.922. Operators may include in the basic service tier rate as external costs the "costs of complying with franchise requirements." 47 C.F.R. § 76.922(f)(1)(iii). These franchise requirement costs include the costs of meeting technical and customer service standards, to the extent that they exceed federal standards. In re Implementation of Sections of the Cable Television Consumer Protection Act and Competition Act of 1992, Rate Regulation, Thirteenth Order on Reconsideration, MM Docket No. 92-266 (September 22, 1995) ¶ 132; 47 C.F.R. § 76.925(a)(3). The FCC allows operators to pass through these costs without a cost-of-service showing because "operators should be permitted to include increases in franchise requirement costs that the operator would not have incurred in the absence of the franchise requirement." Id. The Cable Division finds that, to the extent the proposed regulations exceed the FCC standards, cable operators would be entitled to pass through the associated costs to subscribers.

In comparing our proposed customer service standards with the FCC's customer service standards provided at 47 C.F.R. § 76.309, we note that our proposed regulations exceed the FCC standards in several areas. For example, proposed subsection 11.03(2) exceeds the FCC's standard by requiring operators to provide trained company representatives to respond to telephone inquiries 24 hours a day, 7 days a week. The FCC rules require that operators provide live representatives only during normal business hours, and an answering system at all other times. 47 C.F.R. § 76.309(c)(1)(i)(A) and (B). In addition, proposed subsection 11.04(2) exceeds the FCC regulations by reducing the time for operators to perform service installations from 7 days to 5 days. 47 C.F.R. § 76.309(c)(2)(i). Further, subsection 11.05(1) of the proposed rules exceeds the FCC's standards by requiring "systematic" measurement of compliance with the Cable Division's regulations, as opposed to a more limited sampling requirement. 47 C.F.R. § 76.309(c)(1)(iii). Finally, proposed Section 11.02 entitled "Marketing to Subscribers" does not have a counterpart in the FCC's customer service obligations. As such, every requirement proposed by the Cable Division in this section exceeds the FCC's standards and, in accordance with the above external cost pass through analysis, the associated costs of complying with this section could be passed on to subscribers on the basic service tier.

The costs of compliance are not insubstantial. NECTA estimated the aggregate industry cost of complying with proposed subsection 11.02 would be \$3.65 million annually with costs per subscriber estimated at \$2.60 annually (Response at 11). NECTA estimated the additional

costs involved with providing a separate written confirmation following the acceptance of a marketing offer at \$1.3 million, or \$.93 per subscriber annually (*id.* at 12).⁴

While the financial burden to cable operators as a result of the costs of regulatory compliance is diminished given that they may recover those costs from their basic service tier subscribers, all subscribers would bear the full financial burden of the proposed regulations. Meanwhile, it remains unclear that the benefits of the regulations in the form of improved customer service would be equally distributed. The record reflects that the issues that prompted, at least in part, this rulemaking proceeding primarily affected subscribers of just one operator, albeit one of the largest. Further, record reflects that the additional benefit, such as requiring operators to provide 24 hour a day, seven day a week, live customer service would only benefit a small fraction of subscribers, but the potential costs would be borne by all subscribers. Thus, the Cable Division is persuaded that the potential costs associated with the proposed regulations would have a negative impact on subscriber rates. Further, we find that the increases to subscribers' rates would be disproportionate to the potential benefits of the proposed regulations. Moreover, consistent with Executive Order 384, the Cable Division determines that there are alternative, less restrictive methods to ensure cable operators provide their subscribers with adequate customer service protections.

First, municipal issuing authorities already are authorized under federal law to include customer service standards in their franchise agreements with operators. When the FCC promulgated its customer service standards, it undertook a comprehensive proceeding and

⁴ These additional annual charges per subscriber represents a 30% percent increase in the average basic service tier rate in Massachusetts.

received comments from operators, experts and state and municipal officials from throughout the country. See generally, In re Implementation of the Cable Television Consumer Protection Act and Competition Act of 1992 Consumer Protection and Customer Service, Report and Order, MM Docket No. 92-263 (April 7, 1993) (“Consumer Protection Report”). As part of its rulemaking proceeding, the FCC balanced the burdens on operators with the benefits to subscribers on a national level and considered less restrictive alternatives, comparable to the analysis required by Executive Order 384. The FCC determined that it would not take an active role in enforcing the resulting standards, but instead left adoption and enforcement of the standards to state and local franchising authorities. Id.

Upon the release of the FCC’s customer service standards, the Cable Division did not incorporate them into our regulations, but rather determined that Issuing Authorities should implement the standards as they deemed appropriate. See Cable Bulletin 93-1 (May 3, 1993); Cable Bulletin 94-1 (May 16, 1994). The Cable Division notified all Issuing Authorities that they might adopt and enforce any of the FCC’s customer service standards after 90-day notice to the cable operator of intent to enforce those standards. Id. To date, these standards have been adopted, either in whole or in part, by a number of Issuing Authorities throughout the Commonwealth. Thus, many of our proposed customer service protections are already available to Issuing Authorities through the licensing process.

Second, as the cable industry becomes more competitive, operators’ success will be determined by market forces rather than by regulatory standards. Since the issuance of our Notice, the cable television market in Massachusetts has changed dramatically as a result of the consolidation of existing operators and the emergence of new competitive options. The trend in

consolidating operations is evidenced by the number of system transfers in recent months. The number of cable operators in the Commonwealth has decreased by nearly a third, and the top three cable companies in terms of subscribers have a combined market share of ninety percent. In addition, operators such as Adelphia and Charter have significantly increased their market share since the beginning of the rulemaking proceeding, while Time Warner and Cox have decreased their presence in Massachusetts. Moreover, AT&T, new to the Massachusetts cable market, has acquired MediaOne's Massachusetts franchises and is in the process of seeking approvals to acquire Cablevision's Massachusetts operations.

There has also been a rise in competitive activity in the Commonwealth since the rulemaking was first initiated. For example, in recent months the Commonwealth experienced unprecedented cable overbuilding activity. To date, the Cable Division has received 51 applications from a competitive cable provider, and over 60 municipalities are currently involved in various stages of the initial licensing process with a competitive provider.⁵ The recently amended Satellite Home Viewer Improvement Act⁶ is expected to further boost sales of Direct Broadcast Satellite systems, which have been steadily gaining market share in recent years despite obstacles preventing them from offering local broadcast channels.

⁵ These changes in the cable television landscape raise procedural due process concerns that further convince us to postpone promulgating final rules at this time. The record of this rulemaking proceeding includes comments of cable operators no longer doing business in Massachusetts. In addition, the record is void of comments from operators, including competitive providers, that will soon be entering, or have significantly increased their presence in, the cable television market in Massachusetts. We determine it more appropriate to monitor the new market and its participants closely and allow them the opportunity to participate in any further rulemaking proceedings.

⁶ Public Law 106-113 (November 29, 1999); 17 U.S.C. § 119 note.

With the change in the cable television marketplace, companies must focus on their performance in the customer service area to retain their existing customers and to enlist new ones. For example, many operators stated in their comments that in order to stay competitive they offer 24-hour/ 7-day service that exceed any state or federal standards.⁷ In such cases, the competitive market may replace government regulation to ensure adequate customer service.

Third, the Cable Division's existing consumer protection regulations may be applied to achieve some of the goals of the proposed regulations. For example, the emergence of a new market has increased marketing activities for advanced services, such as digital cable and Internet services. We may apply our existing regulations to address problems that arise from marketing these optional services. See 207 C.M.R. §§ 2.00, 6.00, and 10.00. Specifically, subsection 10.02(7) precludes cable operators from charging a fee for a service that the subscriber has not affirmatively requested by name, while subsection 10.01(4) requires that statements in marketing materials must be consistent with the cable operator's billing practices notice. We note that our current Billing and Termination of Service regulations also require a cable operator to provide notice of its rates, services, and charges at the time a subscription is reached (207 C.M.R. § 10.02(1)), notify the Cable Division, Issuing Authorities, and subscribers before rate increases or substantial changes in the number or type of programming

⁷ Importantly, to the extent that a cable operator voluntarily provides customer service that exceeds the levels required by federal standards, they may not pass through the associated costs as franchise-related costs unless the costs are justified under stricter cost-based rate reviews. See In Re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking, MM Docket No. 93-215, CS Docket No. 94-28, FCC 94-39 (Released March 30, 1994).

services are put into effect (207 C.M.R. § 10.02(2)), and disclose in writing all of its programming services, rates and equipment charges upon a subscriber's request (207 C.M.R. § 10.02(3) and (4)). Given this, we will closely scrutinize cable operators' marketing activities in a number of areas. We require all cable operators fully inform the Cable Division of major marketing initiatives introduced throughout the Commonwealth. This information combined with consumer and municipal feedback will allow us to monitor the industry's performance in this area and assess what regulatory protections, if any, are warranted in the future.

Thus, while we find that our goal of improved customer service may be achieved by means other than by promulgating additional regulations, the Cable Division determines that continued monitoring of the marketplace and its participants is required to ensure that all subscribers are treated fairly. We will pay particular attention to subscriber and municipal complaints about operators' marketing offers, problems with automated telephone systems, busy signals and lengthy call answering times. We will track complaints through the reports on our prescribed operator complaint form, the Form 500, and through individual complaints filed with the Department's Consumer Division.

Section 10 of G.L. c. 166A requires cable operators to report the complaints they receive to the Cable Division and to Issuing Authorities. The Cable Division revised the Form 500 in 1999 to provide better understanding of subscriber complaints and to provide more meaningful information to the Cable Division and to Issuing Authorities. The Form 500 now includes categories for reporting complaints concerning advertising and marketing, defective notice of rate increases and substantial programming changes, and customer service generally. The form also tracks complaints about installations, missed or late appointments and

service calls, billing, and unsuccessful attempts to contact a cable operator by telephone or writing.

Since the beginning of this rulemaking, the Cable Division has merged our consumer complaint function with the Department's Consumer Division. This administrative change has enabled the Department to more efficiently address cable-related consumer complaints. The Department's Cable and Consumer Divisions will continue to be available to subscribers, municipalities and cable operators to resolve disputes as they arise and to order appropriate remedies on a case-by-case basis, as necessary. The Department's Consumer Division will work to effectively resolve individual subscriber complaints on an on-going basis. In addition, the Cable Division will continue to monitor subscriber complaints to address persistent and pervasive customer service issues as they arise.

While we find it would be both unfair and overly burdensome to issue new regulations applicable to the all Massachusetts cable operators in an attempt to address problems affecting limited numbers of subscribers, or created by only one provider, we will re-evaluate the need for state-wide standards based on the results of our monitoring efforts and any comments we receive from interested persons.

C. Conclusion

We recognize that customer service and consumer protections are of great importance to subscribers in the Commonwealth. The issues raised and concerns expressed by several of the municipal representatives and cable subscribers participating in this proceeding present customer service challenges that operators, with Cable Division oversight, must address and

resolve. The Cable Division looks to Issuing Authorities and their Cable Advisory Committee members to inform us of customer service performance in their communities.

We find that, at this time, state-wide customer service rules are unnecessarily burdensome and inconsistent with the regulatory principals outlined in Executive Order 384. The Cable Division declines to adopt state-wide standards that could potentially raise the rates of subscribers throughout the state to address customer service problems that affect limited numbers of subscribers. However, as the cable market develops, the Cable Division will increase its monitoring of cable operators' customer service performance to better determine the application and extent of new customer service regulations.

III. ORDER

Accordingly, after due consideration and hearing, it is

ORDERED:

That the Cable Division's rule promulgation procedure to add Section 11.00 to our regulations at 207 C.M.R. is hereby closed and that the regulation is not adopted.

By Order of the Cable Television Division
of the Massachusetts Department of
Telecommunications & Energy

/s/ Alicia C. Matthews
Alicia C. Matthews
Director