A University of Tennessee

Technical Bulletin

Municipal Technical Advisory Service

Aug. 16, 1993

Cable TV: Cities must act to control rates and set consumer protection standards

By Jim Finane, MTAS Special Projects Coordinator

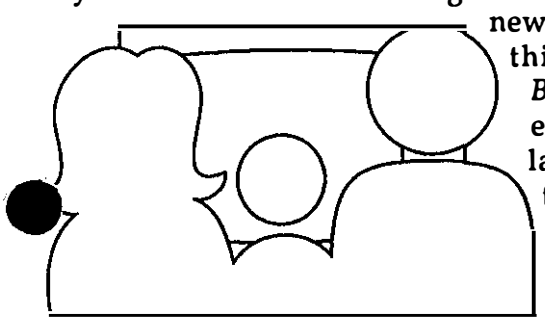
A new federal law strengthening regulation of the cable television industry and its competitors can mean significant changes for Tennessee cities and towns.

- It allows local governments to regulate the rates charged for basic cable service, as well as the equipment and installation charges for basic service.
- Optional consumer protection and customer service standards can be implemented without amending your current franchise.

Congress enacted the Cable Television Consumer Protection and Competition Act of 1992 on Oct. 5. The Federal Communications Commission (FCC) just finished its rulemaking and the new regulations will take effect soon.

To take advantage of these new provisions, your city or town must act: The new regulatory system requires the active participation of "local franchising authorities" — cities and counties — or no cable regulation or consumer protection will occur.

If you intend to take advantage of either of these new provisions, this *Technical Bulletin* will explain the law and how to implement it.



OTHER HIGHLIGHTS

Other provisions of the new law that will affect your city's franchise include:

- language making it difficult to deny a request for a second franchise;
- limitations on re-tiering by cable operators;
- limitations on the ability of an operator to sell or transfer a franchise;
- limitations on the city's ability to withhold approval for a franchise transfer;
- limits on the city's liability for damages for cable regulatory actions;
- more explicit language authorizing municipally owned cable systems;
- new "must-carry" rules for local broadcast stations;
- a requirement for emergency broadcast capabilities on all cable systems; and
- improved technical standards for signal quality.

RATE REGULATION

On May 3, the FCC released rules for implementing the rate regulation provisions of the new cable act. These regulations, effective on Sept. 1, will affect every city and town in Tennessee that wants to ensure the rates charged by their cable operator — including monthly service rates, installation, and equipment rental — will be regulated.

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Rate Regulation: A Brief Summary

When the rulemaking process began, the FCC froze cable rates to prevent cable operators from hiking prices before the new rules could take effect. Accordingly, beginning April 5, rates for cable services other than premium channels and pay-per-view were frozen until Nov. 15, 1993. This is an important date to keep in mind: If your city isn't prepared to begin regulating basic service rates somewhere close to Nov. 15, it's possible your basic rate could be legally increased after Nov. 15.

Cable services are split into two parts for the purposes of regulation:

1. **Basic Service** - Basic service is defined as the first tier of cable service, which now must include all local broadcast stations, including at least one PBS station and, in most cases, all public/educational/governmental (PEG) channels. Basic service isn't limited to these channels; other services can be included. Cities, *if they're certified by the FCC,* may regulate the basic tier. If your city pleads hardship, the FCC may agree to regulate basic service for you. But if your city doesn't seek certification or hardship status, your basic service rates won't be regulated.

   In other words, if you want your city's basic rates to be regulated, you must file something with the FCC. Keep reading to learn more about certification, how to file, and how to regulate.

2. **Cable Programming Service** - Cable programming service is all service other than basic, such as service bought per channel (like Home Box Office) and pay-per-view. Cable programming service in all cities will be regulated only by the FCC, using the same standards and rate benchmarks as basic service.

If your city's cable system isn't subject to "effective competition" (defined in the next section) and it meets the FCC requirements to regulate basic service, it *may* be possible for you to reduce current basic service rates by up to 10 percent. The rate the cable operator may charge will be derived from a set of FCC benchmark rates based on:

- the system's channel capacity,
- the number of customers of the cable system, and
- how many satellite-based signals it receives and broadcasts.

These benchmarks will be adjusted annually using a gross national product inflation index. So, once an initial rate for basic service is set, that price will increase only at the rate of inflation, except for a few external costs the operator is allowed to pass through. Turn to page 5 for more on "pass-through" costs.

Effective Competition Standard

Only cities and towns with cable systems that don't have effective competition may regulate basic rates. Effective competition exists if:

1. less than 30 percent of the households in the city subscribe to a cable system; or,
2. the city is served by at least two unaffiliated "multi-channel video programming distributors," both are available to at least 50 percent of the city's households, and at least 15 percent of the households subscribe to a multi-channel video programming distributor other than the largest multi-channel video programming distributor; or
3. the city itself operates a cable system available to 50 percent of the households in the city.

A "multi-channel video programming distributor" includes:

- cable television systems,
- wireless cable services,
- satellite master antenna television (SMATV) systems, and
- any "video dial tone" service offered by a telephone company.

For a cable system to be "available," a cable must physically pass the household in question.

Let's look at a couple of examples of effective competition so this definition will be easier to understand:

1. **Two Competing Cable Systems** - A small city has 1,000 households. All could get cable service from the first franchised cable operator, which has the largest number of subscrib-

ers. There's a second cable system (it could also be a "wireless" system) available to at least 500 of those households (50 percent). The second system actually has more than 150 households as customers (15 percent of the total households). This city has "effective competition" and can't regulate rates.

2. **Low Penetration by One Cable System** - A suburban city with 3,000 households is in a major metropolitan area, which has a large number of broadcast TV stations, and has only one cable system. The cable system has 700 household subscribers. Everyone else is satisfied with just the broadcast stations. The city has "effective competition" because less than 900 households (30 percent) subscribe to the cable service. Rates can't be regulated.

The FCC rules allow your city to assume there's no effective competition. It then becomes the responsibility of the cable operator to prove there is. There probably isn't a Tennessee city or town with effective competition. But if you think your city falls under one of the definitions above (two cable systems, a competing wireless system, or low penetration by one cable system), it would be appropriate, regardless of the FCC presumption, to carefully study your local situation before trying to file with the FCC.

Certification Process

1. **FCC Certification Form** - If your city wants to regulate basic service rates, then you must file FCC Form 328, "Local Franchising Authority Certification." Form 328 hasn't been released by the FCC, but MTAS will mail you a copy as soon as it's available. It requires the city to certify that:
   - The city will adopt, within 120 days of filing the certification request, regulations consistent with the FCC's regulations on basic cable service. (In September, MTAS will have a set of model regulations your city can adopt by ordinance.)
   - The city has the legal authority to adopt the regulations. In Tennessee, this isn't a problem, since our cities and towns have the legal authority to regulate cable rates.
   - The city has the resources — personnel or funds to hire personnel — to administer the regulations.
   - The procedures to regulate rates allow for consideration of the views of the cable operator, the public, etc.
   - To the best of the city's knowledge, the cable system to be regulated isn't subject to effective competition. When FCC Form 328 is mailed to your city, MTAS will also include a resolution for your governing board's use to authorize the city to file for FCC certification.

2. **Preemption of Franchise Language Prohibiting Rate Regulation** - The FCC, in its rulemaking, was asked to resolve whether the cable act, in allowing local rate regulation, preempts any local franchises with language prohibiting the city from regulating rates. Most franchises like that were signed from 1984 to 1992, when rate regulation was prohibited. *The FCC decided the new law DOES preempt any local law or contract prohibiting a city from regulating cable rates.*

3. **Mailing the Form** - Your city may file its certification form with the FCC beginning on the effective date of the regulations — Sept. 1, 1993. The form must be sent *by registered mail, return receipt requested,* to the FCC at the address on the form. No later than the same date the form is sent to the FCC, you must send a copy of the completed form by first class mail to your city's cable operator(s).

4. **Effective Date of Certification** - Certification by the FCC will occur automatically 30 days after the date on the return receipt. You won't hear from the FCC unless there's a problem.

5. **Cable Operator Challenge to a City's Certification** - The cable operator may challenge your city's certification by filing a petition for reconsideration with the FCC. The 30-day filing period begins on the effective date of certification. (As a practical matter, the operator can file a challenge after that date, but it would be a petition for *revocation* rather than a petition for *reconsideration*.)

6. **What If a City Can't Meet the Conditions of Certification?** - If your city can't certify that it has the legal authority or staff to regulate

basic service rates, and you still want those rates regulated, you must file a detailed explanation with the certification form. In the case of inadequate staffing, explain why the franchise fees collected from the cable operator aren't enough to cover the costs of rate regulation. In the case of a legal authority problem, explain the specific legal problem. If the FCC agrees with your explanation, then it will regulate basic service rates for you until the problem can be resolved.

The FCC will also assume basic service regulation responsibilities for a city whose certification has been revoked or denied.

7. **What If a City Doesn't File With the FCC?** - If you don't file a completed certification form, or a form explaining either your legal problem or a lack of resources, neither your city nor the FCC will be able to regulate the city's basic cable service rates.

8. **Joint Certification** - The FCC rules allow multiple jurisdictions to be jointly certified to regulate one or more cable operators. This will be a useful provision in some Tennessee communities where a cable authority administers a franchise for one or more cities and/or counties.

9. **Deadline for Certification** - There isn't a deadline for certification. It's available to a city at any time. However, if you wait more than 12 months (beyond Sept. 1, 1994), it's possible only part of any excessive rate charges can be recovered through refunds to customers. Refunds and limitations on refunds are explained below.

RATE REGULATION PROCEDURES

The regulation process begins after your city is certified by the FCC as outlined above. The process requires the cable operator to complete a set of FCC forms, collectively known as FCC Form 393, "Determination of Maximum Initial Permitted Rates for Regulated Cable Services and Actual Cost of Equipment." It's a multi-part form with instructions used by cable operators to give information to cities for regulating basic service and to the FCC for regulating cable programming service. FCC Form 393, like the certification form, isn't available yet. MTAS will mail your city a copy of the form as soon as it's available.

1. **Beginning the Rate Regulation Process** - You begin the regulation process by notifying your cable operator that the city has been certified by the FCC and adopted rules and regulations on the process. The operator then has 30 days to complete Form 393 and return it to the city.

2. **Small Cable Systems Exemption** - An important provision for many of the smaller cities and towns in Tennessee is the small systems exemption clause in the act. In cities and towns where the cable system has less than 1,000 subscribers, and the system's rates are within the benchmark standards, the city may exempt the system from having to complete an initial rate schedule form (FCC Form 393). The small system would then only need to certify to the city that its rates for services and equipment are reasonable and within the appropriate benchmarks.

   However, a small system isn't exempted if:
   - its rates exceed the benchmarks,
   - it wants to raise its rates, or
   - it's the subject of a rate complaint to the FCC.

3. **FCC Benchmark Rates** - As part of the act's regulatory process, the FCC surveyed cable systems and compared the rates of systems with and without effective competition. It found that non-competitive cable systems charge an average of 10 percent more than those with competition. Using this information, benchmark rates were developed (included in FCC Form 393) that classify cable systems by number of customers, number of channels offered, and number of satellite signals received. All of the benchmark rates are set for a specific date: Sept. 30, 1992. The rates apply to all channels of service, both basic service regulated by cities and cable programming service regulated directly by the FCC.

   It is these benchmark rates that the cable operator and the city must use to determine

whether the current rate is appropriate. The operator is entitled to the benchmark rate, plus calculated inflation on that rate since Sept. 30, 1992, plus certain pass-through costs (explained in Number 7 below) that fall outside of the benchmark rate.

The benchmark rates aren't absolute: If the operator believes its current rates are justified by unusual cost factors, the operator can submit a "cost-of-service showing" to the city detailing its costs. Evaluating a cost-of-service showing could be potentially expensive and time-consuming for the city. The operator justifies its costs by submitting detailed accounting information in much the same way telephone companies justify their rates to state public service commissions. The expense to the city would come in evaluating these figures and then deciding what the appropriate rate should be.

It's not clear at this point what procedures will be followed in cost-of-service showings. The FCC will set some rules over the next six months.

4. **Deadline for City to Act After Form 393 Completed** - After the operator completes Form 393, if the resulting calculations show the operator's rates are reasonable (at or below the appropriate benchmark rate), the city has 30 days to approve the current rates or they will go into effect automatically at the end of the 30-day period.

   If the operator's current rates are above the appropriate benchmark, the city may delay an additional 90 days (120 days total) if it needs more time to decide the rate.

   If the operator submits a cost-of-service showing to the city, then the city can delay a decision an additional 150 days beyond the initial 30-day period (180 days total).

   The city must issue a written statement within the initial 30-day period to invoke either of these extensions. If either the 90-day or the 150-day extension expires without a decision, then the current rates prevail (or if it's an increase, the increase takes effect). But, when the city eventually makes a decision, it may order a refund.

5. **Rate Reductions** - If the operator's current rates are higher than the benchmark rates, the city can order a reduction to the benchmark level, or 10 percent, whichever is less. This new rate becomes the "capped" rate used for future rate adjustments. Under certain conditions, the city can order a refund (see Number 6 below).

   If an operator's rate at the time of regulation is at or below the benchmark, *that* rate will be the "capped" rate, regardless of how far below the benchmark the rate is. In other words, the operator isn't automatically entitled to the benchmark rate. If an operator was charging below the benchmark rate on Sept. 30, 1992, regardless of later increases, the maximum legal rate at regulation — the "capped" rate — can be no higher than the benchmark rate plus inflation.

   If the operator submits a cost-of-service showing, and the city finds that the costs aren't justified or allowable, then the city can set a rate that matches the actual cost-of-service — even if that rate is below the benchmark rate.

6. **Refunds** - If the operator's rates at the time of regulation exceed the allowable benchmark rate, the city can order a refund of overcharges dating back to the FCC-prescribed effective date of the regulations (Sept. 1, 1993) or 12 months, whichever is the shorter period.

   For example, if a city was certified as of Feb. 1, 1994, and established a new "capped" rate (effective on April 1, 1994) that's $1 per month less for basic service, then the city could order the operator to refund the overcharges since Sept. 1, 1993 (less than 12 months back). The total refund would be $7 per customer.

7. **Pass-through Costs** - In addition to the benchmark rates, operators may add on the per-channel cost of providing PEG channels, any additional contributions to the city for PEG purposes, and franchise fees to the monthly cost of basic service. Certain other increased costs may be passed through, such as increased

programming costs, and, after Oct. 6, 1994, increases in re-transmission fees paid by cable operators to broadcast stations.

Re-transmission fees are a new feature available to broadcast stations who choose to sell their signal to a cable system, rather than have it carried as a "must-carry" signal. An explanation of the new "must-carry" rules is on page 8.

The FCC rules on this subject aren't complete, and the FCC said it will closely monitor this area to prevent illegal or unwarranted rate increases attributed to "increased programming costs."

8. **Equipment, Installation, and Wiring Charges** - The FCC has also issued regulations governing cable operators' charges for installation of new service, equipment rentals and leases, additional outlets, and inside cabling. To begin with, all of these services must be "unbundled" from the monthly cable rate and priced based upon the cost of the equipment and the average "hourly service charge" (the averaged cost of all of the labor hours spent on these functions by the operator), plus a reasonable profit. The operator can establish a standard rate for each type of service, or may charge actual labor hours per job.

   The unbundled equipment subject to these rules for basic service includes converter boxes, remote control units, additional outlets, and inside wiring. So, these items will appear separately on the monthly bill and their costs set and regulated by the operator's submission of FCC Form 393 (the same form used to justify monthly rates).

9. **What Happens Next: Future Rates** - After the initial rates are set, they may increase only at the rate of inflation or if there are changes in the factors that determine the benchmark — the number of satellite channels offered and/or the number of customers. (Since the benchmarks are on a per-channel basis, additional channels would increase the monthly bill, but wouldn't change the benchmark rate.) The index to be used to determine the inflation rate is the gross national product fixed-weight price index (GNP-PI). It's not the same thing as either the consumer or producer price indices, but it's available from the same source.

   Operators will have to submit a rate increase request to their franchising authority to adjust their rates for inflation. *Rate increases aren't automatic.*

CONSUMER PROTECTION AND CUSTOMER SERVICE

The consumer protection and customer service standards of the act were issued April 19 by the FCC, but your city doesn't have to adopt the standards. They're optional. However, the regulations, which were effective July 1, are unique in at least one aspect that makes their adoption a simple matter:

1. **Preemption of Local Law and Franchise Language** - The consumer protection and customer service regulations are self-executing: Ninety days after written notice to the cable operator, the standards are in effect and the city may enforce them regardless of whether there's any language to allow it in the franchise between the city and the operator. *In short, the standards preempt local law and/or contract.*

2. **Cities to Enforce** - The FCC declined to take a role in enforcing the new standards, leaving that to the local franchising authority, including reporting, refund, and penalty requirements. Under the recently amended state law on the subject, cities could set fines of up to $500 for violations, require refunds, or take other appropriate action allowed by Tennessee law. Without some city action, there would be no penalty for violations of the standards.

3. **Cities May Set Higher Standards, or Exempt "Small Systems"** - If included in the franchise, cities may exceed the FCC standards. The FCC also will permit small systems (less than 1,000 subscribers) to seek waivers from the city on all or part of the standards.

4. Consumer Protection and Customer Service Standards

Cable System Office Hours and Telephone Availability - The cable operator must maintain a local, toll-free, or collect call telephone line, available 24 hours a day, seven days a week.

- Trained company representatives must be available to respond to customer telephone inquiries during normal business hours.
- After business hours, the system may be answered by an automated response system/answering machine. After-hours inquiries must be responded to on the next business day.
- Under normal conditions, wait time for an answer can't exceed 30 seconds. If a transfer is required, transfer time can't exceed 30 seconds. These standards must be met 90 percent of the time.
- The cable operator won't be required to use special equipment to monitor telephone performance unless there's a history of failing to comply with these standards.
- The customer should receive a busy signal less than 3 percent of the time.
- Customer service and bill payment locations must be open at least during normal business hours, defined as including evening hours at least one night per week and/or some weekend hours.

Installations, Outages, and Service Calls - Each of the following standards must be met 95 percent of the time:

- Standard installations will be performed within seven business days.
- Excluding conditions beyond the control of the operator, the operator will begin work on service interruptions promptly, and in no event later than 24 hours after notice. The operator must begin actions to correct other service problems the next business day after notification.
- The "appointment window" alternatives for installations and service calls will be either a specific time or, at a maximum, a four-hour time block during normal business hours.
- An operator can't cancel an appointment with a customer after the close of business on the business day prior to the scheduled appointment.
- If an operator is running late for an appointment, and won't be able to keep the appointment as scheduled, the customer will be contacted and the appointment rescheduled.

Communications Between Operators and Subscribers

- Notification to Subscribers - The operator shall provide written information on the following at installation of service, and at least annually to all subscribers, and at any time on request: products and services offered; prices and options for programming services and conditions of subscription; installation and service maintenance policies; instructions on how to use the cable service; channel positions of programming carried on the system; billing and complaint procedures, including the address and phone number of the local franchising authority's cable office.
- Customers will be notified of any changes in rates, programming services, or channel positions in writing and through announcements on the cable system. Notice must be given to subscribers a minimum of 30 days in advance of such changes, if the change is under the control of the operator. The operator also must give 30 days advance notice of any changes to the information in the preceding paragraph.
- Billing - Bills will be clear, concise, and understandable, and must fully itemize charges for basic and premium service, equipment charges, and other costs. Bills must also clearly delineate all activity during the billing period, including optional charges, rebates, and credits.
- In the case of a billing dispute, the operator must respond to a written complaint from a subscriber within 30 days.
- Refunds - Refund checks will be issued promptly, but no later than the customer's next billing cycle after the request is resolved or 30 days, whichever is earlier, or the date of the return of the equipment supplied by the operator, if service is terminated.

OTHER IMPORTANT PROVISIONS

1. **New Franchises** - Cities are prohibited under the act from granting an exclusive franchise. Also, denying an application from a potential second franchisee can mean an appeal through the federal courts, as prescribed for other problems — such as denial of a franchise renewal — under the existing law. The language of the law makes it difficult to deny an application from a second operator.

2. **Re-tiering Restrictions** - Under the 1984 act, only channels in service tiers that weren't regulated could be re-tiered (moved to a different service level) without the city's consent. That language still exists in the law. With the new act's regulatory scheme, both the basic service tier and all other service tiers will be regulated in most cases. After a city begins regulation, re-tiering requires the city's consent. The FCC has tried to discourage re-tiering by setting the same benchmark rates for both basic service and "cable programming service."

3. **Restrictions on the Sale or Transfer of Franchises** - The new act prohibits the sale of a cable system to a new owner within the first 36 months after the acquisition or initial construction of the system. This should have the effect of ending the speculative trade in cable franchises existing since the 1984 act went into effect. It will also end the practice of so-called "second franchise blackmail," where a second franchise holder sells out to the existing first franchise before constructing a system or even going into business.

   To ensure that this provision works as intended, cities should include a requirement in any new franchise that system construction and/or re-construction must be completed before the 36-month period expires.

4. **Limitations on the City's Ability to Delay Franchise Sales or Transfers** - The new act limits municipalities that have the right under their franchise to approve or disapprove franchise sales or transfers. If a franchise transfer is submitted for approval to a municipality, it must either approve or disapprove the request within 120 days or the request will be deemed granted.

5. **Limitations on the City's Liability for Damages for Cable Regulatory Actions** - Under the new law, local governments are immune from monetary damages in suits challenging their regulation of cable systems. Relief is limited to injunctive and declaratory relief.

6. **Stronger Language Authorizing Municipal Ownership of Cable Systems** - An important addition to the law is a section authorizing cities to build and operate — without granting themselves a franchise — their own cable system, in competition with their existing franchised operator. Such a city would be subject to effective competition if its system is available to 50 percent of the households, and it would not be able to regulate any other cable operator's basic service.

7. **New "Must-Carry" Rules** - The new act modifies the must-carry rules controlling what stations must be available at the basic service level. The rule requires most systems to carry all the local, full-power broadcast stations and at least one non-commercial (PBS) station, local or distant. If there's a choice to be made between two broadcast stations carrying the same network (for example, the NBC affiliates in Nashville and Chattanooga), the cable system must carry the station closest to the cable system's "principal headend," or system origination point. All of the must-carry stations must be available on the basic tier of cable service.

   There are also rules that may preclude some operators from carrying duplicate network signals — even if the operator has the capacity and the desire to do so. An example would be a system which carries both the Jackson and Memphis stations of one network. Depending on the system's location, one of the stations could achieve must-carry status on a particular cable system and then force its competing station (one with the same network) off the local cable system.

A broadcast station that would otherwise be a must-carry station can opt to sell its signal to cable systems for a re-transmission fee. Any broadcast station exercising the re-transmission fee option doesn't have to be treated as a must-carry station by any cable operator.

8. **Emergency Broadcast Capability Requirement** - The FCC will prescribe standards that require cable systems to provide the same emergency broadcast capabilities as over-the-air radio and television stations.

9. **Technical Standards** - A long-standing problem with some cable operations has been the quality of the signal delivered to the customers. Under the new act, the FCC is required to set, and maintain regularly, signal quality standards for all cable operators. When the act passed, the FCC was already in the process of setting these new standards on its own initiative. If your system has signal quality problems, there's now an FCC-prescribed standard in place. Contact your local MTAS office if you need a copy of the FCC technical standards.

MTAS ASSISTANCE

If your city or town needs advice or help to meet the requirements of the 1992 cable act, contact Jim Finane, MTAS special projects consultant, in the Knoxville MTAS office or the MTAS management or finance consultant in your local MTAS office:

Knoxville: (615) 974-0411
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Authorization No. E14-1050-00-001-94