Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition for a Declaratory Ruling Regarding	)	
Negative Option Billing Restrictions of Section	)	MB Docket No. 10-215
623(f) of the Communications Act and the FCC's	)	
Rules and Policies	)	

DECLARATORY RULING

Adopted: February 28, 2011 **Released: March 1, 2011**

By the Chief, Media Bureau:

I. INTRODUCTION

1. In this Declaratory Ruling, we consider a Petition for Declaratory Ruling ("Petition") filed by Time Warner Cable Inc. ("TWC") seeking guidance on the prohibition of negative option billing by cable operators contained in Section 623(f) of the Communications Act of 1934, as amended ("the Act"), and Section 76.981 of the Commission's Rules.[1] After review of the record, we issue this declaratory ruling to clarify that Section 623(f) is satisfied if, during the exchange of information between the cable operator and the consumer regarding cable services, equipment, and prices, the consumer, by affirmative statements or actions, knowingly accepts the offered services and equipment. We conclude that neither the statute nor our rule requires the customer to recite back to the cable operator's customer service representative ("CSR") the names of the particular services or equipment being purchased.

II. BACKGROUND

2. TWC is the defendant in a putative class-action lawsuit brought in California Superior Court alleging that TWC violated California's Unfair Competition Law by engaging in "unlawful" negative option billing.[2] The putative class includes those persons who at any time during the period from April 28, 2004, to the complaint's filing, "paid a rental fee to TWC for the use of a cable television converter box and/or remote control device which they did not affirmatively request by name in

[1] 47 U.S.C. § 543(f); 47 C.F.R. § 76.981. On October 20, 2010, the Media Bureau issued a Public Notice seeking comment on TWC's Petition. *Comment Dates Established for Time Warner Cable Inc. Petition for a Declaratory Ruling Regarding Negative Option Billing Restrictions of Section 623(f) of the Communications Act and the FCC's Rules and Policies,* MB Docket No. 10-215, Public Notice, 25 FCC Rcd 14562 (MB 2010). Comments were filed by Cox Communications, Inc., the National Cable & Telecommunications Association, and attorneys on behalf of Mark Swinegar, Michele Ozzello-Dezes, and the putative class.

[2] TWC Petition at 2; *Swinegar et al. v. Time Warner Cable Inc*., filed April 28, 2008 in the Superior Court of the State of California, County of Los Angeles, Central Civil West, Case No. BC 389755; *see* Cal. Bus. & Prof. Code §§ 17200, *et seq.* (providing, in relevant part: "As used in this chapter, unfair competition shall mean and include any unlawful, unfair, or fraudulent business act or practice"). Plaintiffs allege that TWC engaged in unlawful business acts and practices because it systematically violated the Section 623(f) prohibition against negative option billing.

connection with cable television service they received within the state of California."[3] According to the complaint, "Plaintiffs and all class members are entitled to restitution for all amounts paid by such persons to TWC throughout the relevant class period."[4]

3. TWC requests that the Commission, as the expert agency charged by Congress with interpreting and implementing provisions of the Communications Act,[5] including Section 623(f), issue a declaratory ruling to clarify the requirements of Section 623(f) and determine whether TWC's ordering practices are compliant.[6] TWC states that issuing the requested declaratory ruling will serve the public interest by reducing the risk of multiple varying and conflicting state interpretations of Section 623(f) and providing authoritative guidance to cable operators, consumers, and local officials regarding the meaning of that provision.[7]

A. The Statute and Commission Precedent.

4. Section 623(f) of the Act provides:

> 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.[8]

This provision was enacted in the Cable Television Consumer Protection and Competition Act of 1992[9] in response to a marketing plan that Tele-Communications Inc. ("TCI") (the largest cable operator at the time) employed in order to launch its new pay movie service, Encore.[10] TCI added Encore to its program package and notified its subscribers in a billing insert that they would be charged $1 per month for the new service.[11] Customers who did not wish to receive Encore had to contact TCI and tell the company not to charge them for a program channel that they had never ordered.[12] Implementation of this plan resulted in some consumers either not realizing that they were subscribed to Encore or not taking steps to prevent charges from accruing to their accounts.[13] States' attorneys general sued and pressured TCI to abandon the practice.[14] To address this practice, Congress enacted Section 623(f), which was intended to ensure that consumers are not "duped" into paying for cable service programs, service, or equipment without making a decision to do so.[15] The provision prevents any cable company from offering services

[3] *See* Second Amended Complaint at 5. The Plaintiff's complaint was filed April 28, 2008.

[4] *See* Second Amended Complaint at 5.

[5] TWC Petition at 22, citing 47 U.S.C. §§ 154 (i), 303(r).

[6] TWC Petition at 15, 21.

[7] *Id*. at 20-21.

[8] 47 U.S.C. § 543(f).

[9] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992).

[10] *See* 138 Cong. Rec. S567 (Jan. 29, 1992) (statement of Sen. Gorton).

[11] *Id.*

[12] *See* 138 Cong. Rec. S14248 (Sep. 21, 1992) (statement of Sen. Gorton).

[13] *See* 138 Cong. Rec. S567 (Jan. 29, 1992).

[14] *Id.*

[15] *Id.*; *see also Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992,* MM Docket 92-266, Third Order on Reconsideration, 9 FCC Rcd 4316, 4361-62 ¶ 128 n.83 (1994) (statement of Sen. Gorton).

or equipment by means of a "negative option," and this prohibited billing practice is thus commonly referred to as "negative option billing." Negative option billing is the practice of giving customers a service that was not previously provided and then charging them for the service unless they specifically decline it.[16] Section 623(f) protects "subscribers from having to take on the burden of identifying and negatively responding to charges for services that appear on a bill that are not desired and for which no request has been made."[17] It also protects subscribers both from inadvertent payment of such charges and from becoming contractually bound for them.[18]

5. The Commission has never suggested that the requirement in Section 623(f) that a cable operator may not charge for items the customer has not ordered "by name" means that a cable operator may never charge for anything if the customer has not uttered the name of the service or equipment. On the contrary, the Commission has explained that, while the prohibition applies to "additions of a new tier of service or a new single channel service without the affirmative assent of a subscriber," it does not apply to "a change in the mix of channels in a tier, including additions or deletions of channels … unless they change the fundamental nature of the tier" or to rate increases unless the price change is accompanied by a fundamental change in service, such as the addition of a new tier.[19] Further, the Commission has stated that restructuring or unbundling of tiers and equipment will not bring the prohibition into play if subscribers continue to receive the same number of channels and the same equipment unless the restructuring effects a fundamental change in the nature of the service.[20] This interpretation of the statute is reflected in the Commission's rules.[21] A more expansive reading of the statute would have required affirmative consent prior to any change in service, no matter how minor.[22] The Commission has concluded that, if the provision were read so expansively, it would thwart a primary purpose of the cable rate rules, which is to encourage the provision of new services that subscribers desire at reasonable rates.[23] Accordingly, the negative option billing prohibition in Section 623(f) of the Act and Section 76.981 of our rules does not require affirmative subscriber consent prior to a restructuring or division of existing tiers of service that does not result in a fundamental change in the nature of an existing service or tier of service.[24]

6. The Commission has further refined its interpretation of the negative option billing provision in a number of decisions. Commission rulings consistently have made clear that the requirement is satisfied when subscribers are aware that they are paying for cable programming and equipment, and make the decision to do so. Various terms have been used to describe what is necessary to ensure that subscribers are not billed for services that they never ordered. Specifically, the "affirmatively requested by name" provision in the statute has been construed as requiring "affirmative

[16] *See ML Media Partners, L.P.*, 11 FCC Rcd 9216, 9221 ¶ 10 (1996).

[17] *See Warner Cable Communications, Milwaukee, Wisconsin*, 10 FCC Rcd 2103, 2105 ¶ 13 (1995) ("*Warner Cable*").

[18] *Id.*

[19] *Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5907 ¶ 440 (1993) (*Cable Order*).

[20] *See id.* at 5907 ¶ 440-41.

[21] *See* 47 C.F.R. § 76.981(b).

[22] *See Cable Order,* 8 FCC Rcd at 5907 ¶ 440.

[23] *Id. See also Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation,* Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, 10 FCC Rcd 1226, ¶ 118 (1994) ("*Sixth Order on Reconsideration")*.

[24] *Id*. *See also* 47 C.F.R. § 76.981.

assent,"[25] "affirmative consent,"[26] "explicit consent,"[27] or "prior consent."[28] The Commission also has held that, with regard to cable operators unilaterally providing their customers with restructured or unbundled programming and/or equipment offerings, when there has been no "fundamental change" in the services or equipment previously ordered and received, the negative option billing prohibition is not implicated.[29]

B. The Record.

7. TWC states in its Petition that its ordering practices for its customer service representatives in TWC's California systems, in responding to customers wishing to order cable services, are as follows:

> TWC's customer service representatives ("CSRs") review various available programming service tiers, equipment offerings and stand-alone programming offerings (*e.g.,* HBO) and provide pricing information. After customers choose their mix of services and equipment, the CSR reviews the individual prices and/or total monthly charges for customers' selections and processes the order. TWC then schedules an installation appointment, during which TWC's installers review a work order with customers to make sure that it accurately sets out the services and equipment they have ordered, obtain the customer's signature on the work order, receive instructions from customers regarding placement of any ordered equipment, and review with

[25] *See Cable Order,* 8 FCC Rcd at 5906, ¶ 440 (Section 623(f) applies to additions of a new tier of service or a new premium channel service without the affirmative assent of a subscriber. However, the negative option billing provision does not apply to a change in the mix of channels in a tier, including additions or deletions of channels, unless they change the fundamental nature of the tier.).

[26] *See Sixth Order on Reconsideration,* 10 FCC Rcd 1226, ¶ 13 (Commission affirmed that an operator's decision to add, delete or replace channels on any tier is outside the negative option billing prohibition of the 1992 Cable Act -- so that the cable operator does not have to obtain each subscriber's "affirmative consent" before making a change -- if the channel changes do not alter the fundamental nature of the tier).

[27] *See Omnicom Cablevision of Illinois D/B/A Post –Newsweek Cable,* Memorandum Opinion and Order, 18 FCC Rcd 18807, 18810, ¶ 8 (2003) (negative option billing is a practice by which customers are charged for new services without their "explicit consent"). In that case, customers were already receiving Omnicom's wire maintenance service as a bundled component of their basic cable service and after unbundling, these customers continued to receive the same service, only with a separate line item on their billing statement reflecting the specific charges for that service. The Bureau concluded that since the only difference was the itemization of the charge, negative option billing had not occurred.

[28] *See Monmouth Cablevision, Monmouth Count, New Jersey,* Memorandum Opinion and Order, 10 FCC Rcd 9438, 9440, ¶¶ 10-11 (1995). In that case, customers that leased remote controls were, without their consent, sold the remote that they leased and were billed the full price of the remote unit. The Bureau concluded that Monmouth violated the negative option billing restriction by automatically billing customers for the purchase of equipment they had previously leased without their "prior consent." The leasing subscriber had not affirmatively requested to purchase the remote and what consumers unilaterally were billed for (the purchase price) was fundamentally different from what they had previously requested and agreed to (the lease price).

[29] *See ML Media Partners, L.P.,* Memorandum Opinion and Order, 11 FCC Rcd 9216, 9221-22, ¶ 11 (CSB 1996) (after restructuring, subscribers received the same number of channels they had originally ordered and the same exact programming services; the Bureau concluded that the cable operator MultiVision did not violate the negative option billing provisions); *see also Paragon Cable,* Memorandum Opinion and Order, 10 FCC Rcd 6012, 6013, ¶¶ 7, 11 (CSB 1995) (eliminating the senior citizen discount and automatically subscribing senior customers to remote control units and monthly programming guides did not violate negative option billing provisions because the remote control and the programming guide were previously provided as part of Paragon's discount package for its senior subscribers and the senior subscribers continued to receive the same level of service they previously requested).

them the operation of that equipment.[30]

8. TWC argues that, when a customer agrees to subscribe to or orders various services or equipment offered by the cable operator, and is made aware of the charges that apply, the negative option billing restriction is not violated, regardless of the particular words or format used by the consumer in placing the order.[31] TWC states that its practice of fully informing the customer of the key features of its cable services and the total cost of such services and any associated equipment, and then obtaining the customer's affirmative assent as a standard step in the ordering process, is consistent with the Commission's pragmatic, common sense approach in implementing and applying the negative option billing rule.[32]

9. Douglas Caiafa, on behalf of the plaintiffs in the state court litigation, argues in his opposition to TWC's petition that Section 623(f) is not satisfied by "assent" or "consent" but requires "affirmative request by name."[33] Mr. Caiafa contends that Section 76.981 of the Commission's rules confirms this, and does not in any way alter or deviate from the requirement that a cable operator obtain a consumer's "affirmative request by name" for equipment before the operator may lawfully charge the consumer.[34] He argues that TWC merely requires that its customers "consent" or "assent" to the receipt of equipment.[35] Further, he asserts that the Commission has consistently stated that compliance with Section 623(f) requires nothing less that an "affirmative request by name."[36] Mr. Caiafa states that

[30] TWC Petition at ii. According to TWC, CSRs in the ordinary course of their calls help customers select a mix of programming tiers and stand-alone offerings, tell customers about the different equipment options, explain what equipment is required or optional for their levels of service, and allow customers their choice of equipment after informing them that monthly fees apply. Customers proceed with their order by affirmatively consenting to the charges. TWC then presents and reviews a work order with customers at the time of installation that sets out all of the services and equipment that the customer ordered, and the applicable charges. During the installation process the subscriber is asked to sign the work order. TWC Petition at 3-4. Similarly, Cox Communications, commenting on the petition, argues that its procedures comply with the negative option billing rules by requiring the customer to assent to the cable services, equipment, and charges not only once but twice during the ordering process -- once at the time of order and once at the time of installation. Cox Communications, Inc. ("Cox") Comments at 3. Cox is also a defendant in a class action lawsuit in California alleging that its routine ordering procedures violate the negative option billing prohibition. *Cottle-Banks v. Cox Commc'ns, Inc.,* filed Sept. 13, 2010 in the Superior Court of the State of California, County of San Diego, Case No. 37-2010-00100195-CU-BT-CTL. By order dated February 4, 2011, the Judicial Panel on Multidistrict Litigation transferred this case to the United States District Court for the Western District of Oklahoma. *See In re Cox Enterprises, Inc., Set-Top Cable Television Box Antitrust Litigation,* MDL No. 2048 (J.P.M.L. Feb. 4, 2011). The National Cable & Telecommunications Association states that many cable operators across the country use similar measures to those employed by TWC to ensure that customers are both informed of the options for subscription and receive the service they have requested. NCTA Comments at 3.

[31] TWC Reply at 3.

[32] TWC Petition at 8.

[33] Caiafa Opposition at 1, 9.

[34] *Id.,* 4. Mr. Caiafa notes that on July 29, 2010, the Superior Court denied TWC's motion for summary judgment asking the court to find that Section 623(f) merely requires "consent" as opposed to an "affirmative request by name." The court reaffirmed its prior ruling that the statute is unambiguous as it applies to the "affirmative request by name" requirement.

[35] Caiafa Opposition at 1-2.

[36] *Id.* at 12-13 (*Cable Order,* 8 FCC Rcd at 5904, ¶¶ 438, 440 ("We find that, under the 1992 Cable Act, to be billed for any cable service a subscriber must affirmatively request such service."); *Sixth Order on Reconsideration,* 10 FCC Rcd 1226, ¶ 99 ("Negative option billing occurs when a cable operator charges a subscriber for any service or equipment that the subscriber has not affirmatively requested by name")).

requiring adherence to the plain language of both the statute and the implementing regulation will not, as TWC argues, make the process of ordering cable service overly costly, cumbersome, or confusing.[37] He argues that the public interest is best served by adherence to the exact words of the statute.[38]

III. DISCUSSION

10. We find that Section 623(f) is satisfied if, during the exchange of information between the cable operator and the customer regarding cable services, equipment, and prices, the customer, by affirmative statements or actions, knowingly accepts the offered services and equipment. We clarify that we do not interpret the statute as requiring the customer to recite back to the cable operator's CSR the names of the particular services or equipment being purchased. Rather, in the context of Section 623(f), we find that the phrase "affirmatively requested by name" is ambiguous.[39] Indeed, we note that the U.S. Court of Appeals for the Seventh Circuit has concluded that this statutory provision is not clear.[40] An interpretation of this provision such as the one espoused by Mr. Caiafa could lead to the conclusion that a customer must parrot back to a CSR that it wishes to receive a particular service or piece of equipment by its trade name or model number. Although this may be a permissible reading, we do not find this to be the best reading of the statute. We find such an interpretation unduly restrictive, unnecessarily burdensome, and inconsistent with Commission precedent. Indeed, interpreting the statute in the manner suggested by Mr. Caiafa could result in significant customer confusion and unnecessary delay during the ordering process. The goal of the provision is to ensure that consumers are not duped into paying for services or equipment that they have not ordered and do not want.[41] As long as the offered services and equipment and their prices have been adequately explained and identified, we find that the requirement that the customer affirmatively request such by name is met by the customer's affirmative consent. While the statutory phrase "by name" clearly indicates that the requested service or equipment must be named, the statute does not unambiguously indicate who must "name" the requested item. We believe that the better reading of this ambiguous phrase is that it is sufficient under the statute if the CSR, rather than the customer, names the particular service or equipment and the customer affirmatively consents to receive it. It would be overly formalistic -- and not conducive to an efficient and productive business transaction -- to require customers to engage in a sort of Kabuki theater in which the customer is required to parrot back to the CSR a laundry list of the particular services and equipment being purchased before the CSR can place the order. A simple "yes" or "I agree" should suffice as long as the CSR has clearly described the particular services and equipment.

11. Our interpretation is consistent with Commission precedent. The Commission has previously interpreted the statutory phrase "affirmative request by name" as being synonymous with

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[37] Caiafa Opposition at 22.

[38] *Id.*

[39] With regard to the Commission's interpretation of the statute, the courts apply the rule of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*: if the statute is clear, then that is the end of the matter, for the courts must give effect to the unambiguously expressed intent of Congress. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council,* 467 U.S. 837, 843 (1984)("Chevron"). If, however, the statute is silent or ambiguous with regard to a specific issue, then the courts must accept the interpretation of the agency so long as it is reasonable. *Id. See Time Warner Cable v. Doyle,* 66 F.3d 867, 877 (7th Cir. 1995)("*Doyle")* (court could not conclude that the statutory language clearly addressed whether the unbundling or relabeling of existing service was intended to trigger the statutory obligation to solicit an affirmative request by a customer before the service could continue; based on its determination that the intent of Congress was not clear, the court looked to the Commission for a reasonable interpretation of the statute).

[40] *See Doyle,* 66 F.3d at 877.

[41] *See* 138 Cong. Rec. S567-68 (Jan. 29, 1992) (statement of Sen. Gorton); *See also Warner Cable,* 10 FCC Rcd at 2105.

affirmative "consent."[42] In addition, the Commission has made clear that negative option billing occurs only when the customer is charged for services without providing "consent." In *Monmouth Cablevision,* for example, the Commission concluded that changing the way in which existing service and equipment are offered, *i.e.*, from leasing to selling, is a fundamental change requiring "prior consent."[43] In *Omnicom*, the Commission concluded that negative option billing occurs when customers are charged for new services without their "explicit consent."[44] The second sentence of the statutory provision, which states that "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" supports this interpretation. This suggests that the required affirmative request may be something short of the customer repeating the cable operator's proposal word for word.

12. The Commission has concluded that informed consent is adequate to meet the requirements of the provision. It is critical, however, that the customer's consent be meaningful and informed. Thus, a cable operator's CSR must specifically disclose the programming and equipment offered and the prices charged. Where packages are discussed, the CSR must disclose the nature of the included programming and whether equipment is included in the price of a particular programming package, and, if not, provide information on both the equipment and the price.[45] As the legislative history of this section suggests, "Congress did not want the public duped into paying for any cable service program, service, equipment, or anything else, without consciously knowing they are purchasing that service and making a decision to do so."[46] We believe that a customer's informed and knowing consent to the services and equipment described by the CSR is sufficient to comply with the negative option billing requirement of the statute and rule. In response to disclosures of the cable services and equipment being offered and their prices, customers, when asked to accept the offer, must respond affirmatively, either orally or in writing.[47] Thus, the fully informed exchange between the CSR and customer serves to fulfill the "affirmatively requested by name" element of the statutory provision.

13. For purposes of resolving this Petition, we will not opine, as requested by TWC, on whether its ordering process "fully comports with the negative option billing restriction."[48] Although the record includes information about TWC's ordering policies, we do not have before us a complete record regarding how those policies work in practice.[49] Instead, we take this opportunity to define more clearly what is required of cable operators in their ordering processes and practices to protect consumers from being duped into paying for any cable service or equipment without making an informed and conscious decision to do so. This should aid cable operators around the country in complying with the statute and our rules, and ensure that their subscribers and potential subscribers receive and pay only for the services that they affirmatively request. Where state or local laws regarding the negative option billing provision

[42] *See supra* nn. 26-28.

[43] *See Monmouth Cablevision*, 10 FCC Rcd 9438, 9440 (1995).

[44] *See Omnicom*, 18 FCC Rcd 18807, 18810 (2003); *Omnicom Cablevision of Illinois, Inc. c/o Stuart F. Feldstein, Esq.,* 11 FCC Rcd 2492 (1996).

[45] Each and every detail of the services and equipment offered (*e.g.*, each channel of programming in a tier or the make and model of the equipment offered) need not be stated for purposes of the negative option billing provision, but the customer should have enough information to know what services he is receiving and what equipment is involved. *See supra* ¶ 6.

[46] *See* 138 Cong. Rec. S567-68 (Jan. 29, 1992).

[47] *See* 47 C.F.R. § 76.981(a).

[48] TWC Petition at 2.

[49] If we were to receive a complaint alleging a specific violation of the negative option billing rule, we would, of course, act on the factual record developed in that complaint process.

conflict with federal regulations, federal regulations prevail.[50]

IV. CONCLUSION

14. As we have clarified, Section 623(f) and Section 76.981 are satisfied if, during the exchange of information between the cable operator and consumer regarding cable services, equipment, and prices, the consumer knowingly accepts the offered services and equipment by affirmative statements or actions. This practical and consumer-friendly approach will protect consumers from negative option billing, and minimize burdens on both cable operators and consumers during the ordering process.

V. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** pursuant to Sections 4(i) and 623(f) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 543(f), and Sections 1.2 and 76.981 of the Commission's rules, 47 C.F.R. §§ 1.2, 76.981, that Time Warner Cable Inc.'s **Petition** for **Declaratory Ruling IS GRANTED,** to the extent described herein**.**

16. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.[51]

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau

[50] 47 C.F.R. § 76.981(c). In adopting Section 76.981(c), the Commission recognized the importance of uniform application by preempting inconsistent state and local laws.

[51] 47 C.F.R. § 0.283.