Before the
Federal Communications Commission
Washington, D.C.

In the Matter of:	)	
	)	
Omnicom Cablevision of Illinois d/b/a Post-Newsweek Cable	)	DA No. 96-66
	)	
Request for Clarification	)	
	)	
Negative Option Billing and the Preemption of State Consumer Protection Laws	)	

MEMORANDUM OPINION AND ORDER

Adopted: August 20, 2003 **Released: September 17, 2003**

By the Commission:

I. INTRODUCTION

1. In this Memorandum Opinion and Order, we consider an application for review filed by an Omnicom Cablevision of Illinois ("Omnicom") subscriber, Jeffrey Greenberg ("Greenberg"), with respect to an opinion letter issued by the former Cable Services Bureau ("Bureau") at the request of Omnicom.[1] The *Opinion Letter* concluded that certain of Omnicom's billing practices were consistent with the requirements of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") and the Commission's implementing regulations thereunder.[2] As discussed below, we affirm the *Opinion Letter* and deny Greenberg's application for review.

II. BACKGROUND

2. Greenberg filed a class-action complaint against Omnicom in the Circuit Court for Cook County, Illinois alleging that the cable operator violated an Illinois state law prohibition on negative option billing when it: (1) transferred ownership of in-home cable wiring to residential subscribers and unbundled service charges related thereto, and (2) unbundled charges for its programming guide magazine.[3] Omnicom moved to dismiss Greenberg's complaint on several grounds, including federal

[1] Letter from Meredith J. Jones, Chief, Cable Service Bureau, to Omnicom Cablevision of Illinois, Inc. c/o Stuart F. Feldstein, Esq., Fleischman and Walsh, L.L.P., 11 FCC Rcd 2492 (1996) ("*Opinion Letter"*).

[2] *See* 47 U.S.C. § 543 *et seq.*; 47 C.F.R. 76.901 *et seq.*

[3] *See Greenberg v. Post Newsweek Cable*, 95 CH 1212 (Cir. Ct. Cook Co., IL Feb. 8, 1995). The applicable Illinois statute is the Consumer Fraud and Deceptive Business Practices Act, 815 ILCS 505/1 *et seq.*

preemption of state law.[4] Omnicom independently submitted a "Request for Clarification" to the Bureau seeking confirmation that the operator's unbundling of its in-home wiring maintenance and cable guide magazine charges complied with Section 623(f) of the Communications Act and Section 76.981 of the Commission's rules and that "insofar as Illinois law would have required Omnicom to seek affirmative subscriber consent to accomplish the . . . restructurings . . . Illinois law is inconsistent with federal regulation and is preempted thereby."[5] The Bureau opined that Omnicom's unbundling of charges was permitted by federal law and regulations and that Illinois state law was preempted to the extent that the two were inconsistent.[6]

III. DISCUSSION

3. The Bureau's *Opinion Letter* made three findings that are disputed by Greenberg on review: (i) Omnicom's unbundling of in-home wiring service charges for its Highland Park, Illinois cable system was consistent with the 1992 Cable Act and the Commission's regulations prohibiting negative option billing; (ii) Omnicom's unbundling of charges for its programming guide was consistent with federal law and regulations; and (iii) to the extent that Illinois consumer protection law imposes requirements for rate and service restructurings that are different than federal law, Illinois state law is preempted.[7]

4. ***Transfer of Ownership of Internal Cable Wiring & Unbundling of Wire Maintenance Charges.*** The effective date of the Commission's cable rate regulations implementing the 1992 Cable Act was September 1, 1993.[8] Omnicom asserts that, prior to its rate restructuring, subscribers were charged a set monthly fee for basic cable television service that included the maintenance of internal wiring.[9] In anticipation of the September 1st date, Omnicom, in August 1993, transferred ownership of internal wiring to its subscribers and, effective September 1, 1993, began to itemize a separate monthly charge on subscriber bills for internal wiring maintenance.[10] In lieu of the monthly internal wiring maintenance charge, Omnicom states that subscribers could elect to pay hourly service charges in the event that a service visit was necessary.[11]

5. The Bureau determined that Omnicom's transfer of ownership of inside cable wiring and its unbundling of wire maintenance services did not violate the Commission's prohibition against

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[4] Opposition to Application for Review at 4 ("Omnicom Opposition").

[5] *Opinion Letter,* 11 FCC Rcd at 2492; *see* 47 U.S.C. § 543(f); 47 C.F.R. § 76.821.

[6] *Opinion Letter,* 11 FCC Rcd at 2493-94. The Circuit Court for Cook County dismissed Greenberg's class action suit in part based upon the findings made in the *Opinion Letter*. *See Greenberg v. Post Newsweek Cable*, 95 CH 1212 (Cir. Ct. Cook Co., IL Feb. 14, 1996). An appeal of the Circuit Court's dismissal is pending before the Appellate Court of Illinois. *See Greenberg v. Post Newsweek Cable*, No. 96-0903 (App. Ct. Ill., 1st Dist., 2d Div.).

[7] *Opinion Letter,* 11 FCC Rcd at 2493-94.

[8] *See* 58 Fed. Reg. 41,042 (1993).

[9] Omnicom Opposition at 3.

[10] *Id*. at 3, 11.

[11] *Id*. at 3.

negative option billing and were consistent with its rules concerning the unbundling of cable services.[12] The Bureau reasoned that since the prohibition on negative option billing applies to changes in the mix of programming services, the unbundling of related charges would not run afoul of the prohibition if subscribers continued to receive the same mix of programming services.[13] The Bureau cautioned, however, that the prohibition on negative option billing would apply to rate restructurings "effect[ing] a fundamental change in the nature of the service."[14]

6. Following these principles, the Bureau concluded that Omnicom had simply unbundled its existing internal wire maintenance service, rendering the negative option billing prohibition inapplicable.[15] The Bureau found Omnicom's situation to be similar to that in the *Comcast – Tallahassee* case, where Comcast's itemization of an internal wire maintenance plan on subscriber bills following September 1, 1993, was characterized as "simply compliance with Commission rules requiring unbundling" and did not implicate negative option billing.[16] In addition, the Bureau found that the "fact that Omnicom transferred ownership of the inside wiring to subscribers [was] not relevant for the purposes of our negative option billing analysis" because the transfer did not impose any cost upon subscribers.[17] Rather than focusing on the ownership of the inside wiring, the Bureau's analysis concentrated on the wire maintenance service itself.[18] Because Omnicom subscribers paid for the same maintenance service before and after September 1, 1993, the only difference being the itemization of the charge, the Bureau concluded that negative option billing had not occurred.[19]

7. In his application for review, Greenberg contends that Omnicom's unbundling of its wire maintenance plan violates the federal prohibition against negative option billing found in Section 623(f) of the Communications Act and its implementing regulations.[20] Although Greenberg recognizes that the negative option billing prohibition does not apply in a variety of circumstances, enumerated as exceptions in Section 76.981(b) of the Commission's rules, he argues that these exceptions are limited by a requirement that billing changes must not result from "a fundamental change in the nature of an existing service."[21] Greenberg argues that the Bureau impermissibly characterized Omnicom's unbundling of its

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[12] *Opinion Letter,* 11 FCC Rcd at 2493-94; *see* 47 U.S.C. § 543(f) ("[a] cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name"); 47 C.F.R. § 76.981; *see* 47 C.F.R. § 76.923.

[13] *Opinion Letter,* 11 FCC Rcd at 2493.

[14] *Id.*; *see also Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 FCC Rcd 5631, 5905-08 n.1105 (1993) ("*Rate Order*").

[15] *Opinion Letter*, 11 FCC Rcd at 2493.

[16] *Id.,* citing *Comcast - Tallahassee, Florida*, 10 FCC Rcd 2106, 2108-09 (1995) ("*Comcast - Tallahassee*").

[17] *Id.*

[18] *Id*.

[19] *Id*.

[20] Application for Review at 2-3; *see* 47 U.S.C. § 543(f); 47 C.F.R. § 76.981.

[21] Application for Review at 2-3, quoting in part 47 C.F.R. § 76.981(b). The enumerated exceptions include the "adjustment of rates to reflect inflation, cost of living and other external costs, the addition or deletion of a specific

(continued….)

wire maintenance plan as falling within the Section 76.981(b) exceptions.[22] Greenberg cites the legislative history of the 1992 Cable Act and asserts that the scope of the exceptions is limited to "changes in the mix of programming services that are included in various tiers of cable services."[23] On this basis, Greenberg maintains that the wire maintenance charges resulting from Omnicom's unbundling falls outside the Section 76.981(b) exceptions and constitutes a violation of the prohibition on negative option billing.[24]

8. We disagree with Greenberg's interpretation of the *Opinion Letter.* The Bureau did not apply the Section 76.981(b) exceptions to Omnicom's unbundling charges, but rather found that the negative option billing prohibition did not apply to these charges in the first place.[25] Negative option billing is a practice in which customers are charged for new services without their explicit consent. In the instant situation, customers were already receiving Omnicom's wire maintenance service as a bundled component of their basic cable service.[26] 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.

9. Greenberg disputes the characterization of Omnicom's wire maintenance charges as the mere unbundling of a pre-existing service by arguing that "Omnicom had never previously provided any maintenance service on customer-owned equipment."[27] In effect, Greenberg attempts to distinguish wire maintenance service for cable operator-owned equipment from that for customer-owned equipment, simply by virtue of the change in ownership. Greenberg cites the *Monmouth* and *Paragon* cases for the proposition that a transfer in the ownership of equipment automatically constitutes more than the unbundling of services and implicates negative option billing issues.[28]

10. We disagree with Greenberg's assertion that a transfer in ownership necessarily involves negative option billing issues as well as his interpretation of the *Monmouth* and *Paragon* cases. In *Monmouth,* 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.[29] The Bureau found that, because the leasing subscriber had not affirmatively requested to purchase a remote, Monmouth Cablevision had violated the

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program from a service offering, the addition or deletion of specific channels from an existing tier or service, the restructuring or division of existing tiers of service, or the adjustment of rates as a result of the addition, deletion or substitution of channels pursuant to § 76.922. . . ." 47 C.F.R. § 76.981(b).

[22] Application for Review at 8-9.

[23] *Id*. at 9, citing H.R. Conf. Rep. No. 102-862, 102d Cong., 2d Sess. 65 (1992).

[24] *Id*. at 10.

[25] *Opinion Letter*, 11 FCC Rcd at 2493; *see* Omnicom Opposition at 8.

[26] *Opinion Letter*, 11 FCC Rcd at 2493; *see* Omnicom Opposition at 9.

[27] Application for Review at 11.

[28] Application for Review at 13-15; Greenberg Reply at 6-8; *see also Monmouth Cablevision*, 10 FCC Rcd 9438, 9440-41 (1995) ("*Monmouth"*); *Paragon Cable,* 10 FCC Rcd 6012, 6013 (1995) ("*Paragon*").

[29] *Monmouth*, 10 FCC Rcd at 9438-40.

negative option billing provision. This change was "more . . . than simply rearranging the way the same services and equipment were offered."[30] Rather, there was a change in the nature of the service (lease versus ownership) for which the cable operators imposed an additional charge. Greenberg contrasts the result in *Monmouth* to that in *Paragon* where no transfer of equipment ownership occurred and customers' existing leasing charges were billed as separate line items, rather than the preexisting practice of including such costs as part of the subscriber's bundled cable service charge.[31] Greenberg attributes the different results in the *Monmouth* and *Paragon* cases solely to the fact that the former case involved a transfer in equipment ownership while the latter did not.[32] However, a change in equipment ownership alone does not compel a change in the nature of the service at issue, particularly where there is no increase in associated service fees. In the instant proceeding, ownership of inside wiring was given to subscribers at no charge while the existing maintenance service cost was unbundled with the applicable service charges remaining the same, simply expressed as a line item on subscriber bills. The relevant service, wire management, in no way changed as a result of the transfer of ownership.

11. Greenberg also questions the existence of a wire maintenance fee as a component in the Omnicom pre-September 1993 monthly charge for basic cable service.[33] Greenberg cites Commission language stating "[i]n the absence of any other understanding, subscriber payments for cable service typically have not been made for a specific part of the system operation."[34] However, the language cited by Greenberg relates to implementation of Section 16(d) of the 1992 Cable Act, which requires cable operators to provide subscribers the opportunity to acquire cable home wiring.[35] In this context, the language concerns the calculation of prices for inside wiring and the attribution of monthly charges thereto and provides no guidance in determining whether consumers paid for inside wiring maintenance service prior to implementation of the 1992 Cable Act.[36]

12. Finally, Greenberg asserts that Omnicom failed to unbundle the wire maintenance plan at cost.[37] Omnicom offered customers either a monthly charge of $1.75 or an hourly charge of $23.66, which Greenberg compares to Comcast's monthly wire maintenance charge of $0.45 and hourly charge of $25.66.[38] The reasonableness of Omnicom's wire maintenance fee is a matter within the province of the

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[30] *Id*. at 9441.

[31] *Paragon,* 10 FCC Rcd at 6013.

[32] Application for Review at 14-15.

[33] *Id*. at 11-13.

[34] *Id*. at 11, citing *Implementation of Cable Television Consumer Protection Act of 1992: Cable Home Wiring*, 8 FCC Rcd 1435, 1438 (1993) ("*Home Wiring Order"*).

[35] 47 U.S.C. § 544(i).

[36] The Commission indicated that it was attempting to identify a means of calculating the price of inside wiring where subscribers were given the option to purchase it. *Home Wiring Order*, 8 FCC Rcd at 1438.

[37] Application for Review at 15-16.

[38] *Id*. at 16.

local franchising authority.[39] As such, we decline to consider Greenberg's argument in this regard.[40]

13. ***Unbundling of Program Guide Magazine.*** In its *Opinion Letter*, the Bureau relied on its decision in *Paragon* in determining that Omnicom's unbundling of its program guide magazine did not implicate our negative option billing prohibition.[41] The Bureau observed that "[a]lthough a program guide is not an item subject to the equipment or installation rate regulation, its unbundling from the regulated tier charge appears indistinguishable from such charges for purposes of our negative option billing analysis."[42] Following the rationale of the *Paragon* case, the Bureau further reasoned that "the guide was, in fact, a component part of the service offering that subscribers were entitled to receive when they ordered cable service."[43]

14. Greenberg challenges the Bureau's decision and its reliance on *Paragon*.[44] At the outset, he questions the Bureau's decision in *Paragon* in so far as "it is not clear that the Commission has jurisdiction to regulate the marketing of the magazine."[45] However, *Paragon* did not involve regulation of the marketing of program guide magazines; it simply concluded that the unbundling of related charges does not violate the Commission's negative option billing prohibition.[46] Greenberg also disputes the outcome of the Bureau's negative option billing analysis since in his view programming guide magazines do not fall within the permitted exceptions in Section 76.981(b).[47] To the contrary, the Bureau's ruling that the charges for programming guide magazines did not contravene the negative option billing prohibition was premised upon the fact that the magazines were not new services, but rather had been a component of the subscriber's pre-existing basic cable service charge.[48]

15. ***Preemption.*** Omnicom asked the Commission to find that, under the specific facts of the present case, federal cable rate regulation preempts the Illinois consumer protection law invoked by Greenberg.[49] In its *Opinion Letter*, the Bureau concluded, "application of a state negative option billing

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[39] *See* 47 U.S.C. § 543(a); *Paragon*, 10 FCC Rcd. At 6013.

[40] We do not address here whether the changes in rates led to overall higher rates as this issue was not raised before the local franchising authority. If the overall rates were higher, this could be a violation of the Commission's rate rules.

[41] *Opinion Letter*, 11 FCC Rcd at 2493-94.

[42] *Id.* at 2493, quoting *Paragon Cable,* 10 FCC Rcd at 6013.

[43] *Id.* at 2494.

[44] Application for Review at 17-18.

[45] *Id*. at 17.

[46] *Paragon Cable,* 10 FCC Rcd at 6013.

[47] Application for Review at 17-18.

[48] *Opinion Letter*, 11 FCC Rcd at 2494 ("[W]hen Omnicom began unbundling its cable services, the operator was permitted to itemize all services previously contained in its package, including the provision of a programming guide, and recover associated costs.").

[49] Omnicom Opposition at 4-5.

law against Omnicom would . . . undermine implementation of federal cable rate regulation."[50] Greenberg responds by pointing to court cases ruling that state consumer laws can coexist with, and do not necessarily preempt, federal regulation.[51] In addition, Greenberg recalls past Commission statements recognizing the concurrent enforcement of state and federal consumer protection measures where the state regulation does not interfere with federal rate regulation.[52] Finally, Greenberg argues that, as an alternative means of complying with both the federal and state laws, Omnicom "could have provided the guide and maintenance plan at no charge on an introductory basis until it could solicit affirmative consent."[53]

16. The Bureau stated that:

> [S]tate and local law relating to negative option billing are not preempted or displaced by the provisions of the 1992 Cable Act on a general basis. However, where there is a conflict between the rate regulation rules . . . and such state or local regulations, system operators are entitled to rely on the federal rules which must prevail over conflicting state or local requirements."[54]

We agree. Greenberg alleges that Omnicom's unbundling of the wire maintenance fees violates Section 10b of the Illinois Consumer Fraud Act and Section 4 of the Illinois Uniform Deceptive Trade Practices Act. Section 10b of the Illinois Consumer Fraud Act states that nothing in the Act "shall apply to … Actions or transactions specifically authorized by laws administered by any regulatory body or officer acting under statutory authority of this State or the United States.[55] Similarly, Section 4 of the Illinois Uniform Deceptive Trade Practices Act states that the Act does not apply to "conduct in compliance with the orders or rules of a statute administered by a Federal, state or local governmental agency."[56] Section 76.923 of the Commission's rules requires cable operators to unbundle wire maintenance fees. Therefore, by their own terms, neither state statute appears to apply to Omnicom's actions taken to comply with the Commission's rules.

17. Furthermore, we note that Greenberg has not referred to specific language from an

[50] *Opinion Letter*, 11 FCC Rcd at 2494.

[51] Application for Review at 19-21; *see also Total TV v. Palmer Communications*, 69 F.3d 298, 302-03 (9th Cir. 1995) ("*Total TV*"); *AMSAT Cable v. Cablevision of Conn.*, 6 F.3d 867, 875-76 (2d Cir. 1993) ("*AMSAT*"); *Cable Television Ass'n v. Finneran*, 954 F.2d 91 (2d Cir. 1992) ("*Finneran*"). Greenberg also distinguishes one federal case holding that the 1992 Cable Act preempted state law on the grounds that the cable operator's challenged action was a minor channel realignment specifically considered by the Commission. *Time Warner Cable v. Doyle*, 66 F.3d 867 (7th Cir. 1995) ("*Doyle*").

[52] Application for Review at 21; *see Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 10 FCC Rcd 1226, 1263 (1994) ("*Sixth Report and Order*").

[53] Greenberg Reply at 9-10.

[54] *Opinion Letter*, 11 FCC Rcd at 2494.

[55] Il. St. Ch. 815 Sec. 505/10b(1).

[56] Il. St. Ch. 815 Sec. 510/4(1).

Illinois statute or a decision from an Illinois state court that holds that unbundling of wire maintenance fees or the unbundling of a program guide magazine are violations of Illinois consumer protection laws.[57] Finally, we reject Greenberg's claim that Omnicom should have provided wire maintenance service and cable guide magazines temporarily free of charge until it could obtain affirmative subscriber consent. Our preemption analysis and rate regulation rules in no way compel such action where cable operators are properly unbundling existing customer charges.

IV. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED** that the captioned application for review **IS DENIED**.

19. This action is taken pursuant to statutory authority found in Sections 1, 4(i), 5(c), 405, and 614(h)(1)(C) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 405, 534(h)(1)(C).

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[57] As the D.C. Circuit observed in *Time Warner v. FCC*, under these circumstances, it is difficult to determine whether there is a conflict between state and federal law. *See* 56 F.3d 151, 195 (D.C. Cir. 1995) ("whether a state regulation unavoidably conflicts with national interests is an issue incapable of resolution in the abstract.").