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WASHINGTON, D.C. 20554

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Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Petition for Declaratory Ruling)
Regarding Negative Option)
Billing Restrictions)
)

MB Docket No. _____
CSR- _____

To: Chief, Media Bureau

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~~Federal Communications Commission
Bureau / Office~~

PETITION FOR DECLARATORY RULING

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SUMMARY

Time Warner Cable Inc. (“TWC”) is the defendant in a putative class action lawsuit pending in state court in California.¹ The suit is brought pursuant to a California statute that allows claims to be brought based on, among other things, alleged violations of Commission rules. Plaintiffs contend that TWC’s California cable systems have violated the prohibition on negative option billing contained in Section 623(f) of the Communications Act, as well as Section 76.981, the Commission rule implementing that provision.

Based on developments in the case to date, the California litigation is focused on whether the California trial court accepts plaintiffs’ extreme view of what Section 623(f) requires cable operators to do in order not to run afoul of the negative option prohibition. As set out below, plaintiffs’ strained reading is not compelled by the language of the statute or rule. In addition, plaintiffs’ reading is inconsistent with the purpose of the statute and rule, is contrary to constructions of the rule provided by the Commission and federal courts that have previously considered it, and would inconvenience cable customers by requiring an unwieldy ordering process for cable services while not providing any additional consumer protections.

Because the meaning of the Commission’s rule is a central issue in the California litigation, TWC has filed in that case a motion asking the trial court to stay the litigation on primary jurisdiction grounds, and is concurrently filing this petition for Declaratory Ruling. Granting the petition will allow, as Congress intended, the Commission, and not a state court, to determine the meaning of its own rule and will ensure that cable operators are not subject to inconsistent obligations in different areas of the country in running their businesses. In addition, construing the rule in accordance with previous Commission rulings and TWC’s understanding

¹ *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.

of it will ensure that consumers obtain the full protection of the rule without being saddled with additional and unnecessary obligations in ordering services they have clearly indicated their desire to obtain.

As set out more fully below, although the facts can and do vary significantly with respect to different customers, TWC's general recommended practices for its employees in the California systems at issue in this case in responding to customers wishing to order cable services was 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 them the operation of that equipment.

In TWC's view, the facts above fully comport with the Section 623(f)'s requirement that "a cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name." Indeed, in numerous prior rulings, the Commission has made clear that the rule is satisfied so long as the cable operator obtains consent, assent or agreement from the customer to the provision of services and equipment. In the plaintiffs' view, however, Section 623(f) can be complied with only if, in addition to the above, TWC insists before accepting an order that customers recite back to TWC a list of each item of equipment contained in the order and state that they affirmatively want to order it.

TWC submits that plaintiffs' proposed reading of the rule, in addition to being contrary to its purpose and previous constructions of it by the Commission and federal courts, would serve only to add complexity and burdens to the process consumers must use in ordering cable services

they have already indicated their desire to obtain, while not providing any additional protection against obtaining undesired services or equipment. Under plaintiffs' interpretation, customers could knowingly order services and equipment and agree to pay for them, sign a work order listing the services and equipment and their prices, enjoy use of the services and equipment for many years, and yet at the same time be entitled to partial or total refunds for those ordered services and equipment because the cable operator did not elicit the "correct" language from the customer during the ordering process.

For these reasons, and in order to make sure that the California litigation is determined by the Commission's expert view of what its own rule requires, TWC is submitting this request for a Declaratory Ruling that TWC's understanding of Section 623(f) is correct, and that, contrary to plaintiffs' position, that rule does not require cable operators after taking the steps set out above to also require customers to redundantly recite all the equipment they have selected and then request it again before proceeding with an order.

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To: Chief, Media Bureau

PETITION FOR DECLARATORY RULING

Time Warner Cable Inc. (“TWC”), pursuant to Sections 1.2 and 76.7 of the Commission’s Rules,² hereby petitions the Federal Communications Commission (“FCC” or “Commission”) to issue a declaratory ruling providing guidance on the proper interpretation of the prohibition on negative option billing contained in Section 623(f) of the Communications Act, as well as Section 76.981, the Commission rule implementing that provision.³ As will be explained herein, the Commission’s negative option billing prohibition is designed to prevent consumers from being billed for cable services or equipment they never ordered. However, when a customer affirmatively places an order for cable services and equipment, having selected their desired mix of programming service tiers, equipment packages (*e.g.*, converters and remote control units) and stand-alone offerings (*e.g.*, HBO) and having been told the total price of the order, the negative option billing restriction is inapplicable, because the customer has in fact affirmatively requested by name the desired mix of services and equipment. It is unnecessary for the cable operator then to engage in a redundant extra step of going back and having the

² 47 C.F.R. §§ 1.2, 76.7.

³ 47 U.S.C. § 543(f); 47 C.F.R. § 76.981.

customer repeat the request for various services and equipment. Thus, TWC requests the Commission to confirm that its ordering process, as more fully described below, fully comports with the negative option billing restriction of Section 623(f).

I. Introduction

A. Factual Background.

TWC is the defendant in a class-action lawsuit brought in California Superior Court⁴ alleging that TWC violated California's Unfair Competition Law (the "UCL")⁵ by engaging in "unlawful" negative option billing in contravention of Section 623(f) of the Communications Act. The litigation turns on a question of statutory construction: whether TWC complied with Section 623(f) when it charged subscribers for converter boxes and remote controls after TWC obtained the affirmative consent of subscribers ordering certain cable services and associated equipment. The California Superior Court recently denied TWC's Motion for Summary Judgment and ruled that Section 623(f) was not satisfied by a subscriber's affirmative assent.⁶

The Superior Court's ruling came after TWC provided a detailed description of its sales practices in the context of its Motion for Summary Judgment. With respect to the procedure that TWC's customer service representatives ("CSRs") in the California systems at issue in this case followed when taking an order for cable services over the phone, TWC explained that CSRs were trained to ask probing questions to discover each customer's needs and interests in order to

⁴ *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.

⁵ 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").

⁶ *Swinegar et al. v. Time Warner Cable, Inc.*, Case No. BC 389755, Order Re Defendant Time Warner Cable Inc.'s Motion for Summary Judgment, July 29, 2010, at 7 ("Summary Judgment Order") ("An interpretation of affirmative request to 'assent' would directly contradict the words of the statute and the clear purpose of the Act") (quoting *Swinegar et al. v. Time Warner Cable, Inc.*, Case No. BC 389755, Order Overruling Demurrer to Second Amended Complaint, Feb. 23, 2009, at 5) ("Demurrer Order"). In addition, the Superior Court concluded that construing a subscriber's signature on TWC's work orders was "tantamount to [] negative option billing" (Summary Judgment Order at 10), particularly in the absence of separate initials on a request for extra hardware.

help the customer select the appropriate mix of programming service tiers, equipment and stand-alone offerings. When making suggestions, CSRs have been trained to advise customers of all applicable charges, including the additional charges for equipment such as digital receiver packages, DVR service fees, or additional digital tiers, so that customers can make informed choices. TWC also described its on-line ordering process, which required customers who order digital cable service to choose the type of equipment package they want (digital, HD or HD-DVR) from a drop down menu in order to complete their order (the website indicates the price of each equipment package). Finally, TWC described how a subscriber could order cable service and equipment in person at a TWC office or retail outlet.⁷

In the course of discovery, the California Superior Court ordered TWC to produce customer call recordings. These calls demonstrate that, while actual conversations can and do vary significantly with respect to different customers, CSRs in the ordinary course followed the practices TWC described in its Motion for Summary Judgment. In particular, CSRs told subscribers about the different equipment options (whether required or optional for their level of cable service), allowed subscribers their choice of equipment after informing them that a monthly fee applies,⁸ and subscribers who proceed with their order affirmatively consented to the

⁷ See *Swinegar et al. v. Time Warner Cable, Inc.*, Case No. BC 389755, Memorandum of Points and Authorities in Support of Defendant Time Warner Cable's Motion for Summary Judgment, Apr. 28, 2008, at 3-5 ("TWC's Motion for Summary Judgment"); see also Declaration of David Su filed in support of TWC's Motion for Summary Judgment at ¶¶ 8-20, 23.

⁸ As with most modern electronic video products, TWC typically markets its leased set-top boxes together with the associated remote control unit for a stated package price. TWC's offer of an optional digital equipment package with a single stated price for the converter and remote for marketing purposes, while establishing prices separately in accordance with FCC rate regulations, is fully consistent with Commission requirements. See 47 C.F.R. § 76.923(c).

charges.⁹ In addition, TWC would then present a work order to subscribers at the time of installation that sets out all of the services and equipment that the subscriber ordered, and the applicable charges. TWC's installers have been trained to review the work order with subscribers at the time of installation to confirm that it accurately lists the services and equipment the subscriber ordered. They were also trained to demonstrate the use of the converter and remote. During the installation, the subscriber is asked to sign the work order.

As more fully explained below, TWC submits that its recommended practices described above fully comply with the negative option billing rule, and in this declaratory ruling request, TWC is seeking confirmation from the Commission to that effect.

B. Legal Background.

In 1992, as part of a sweeping revision of Title VI of the Communications Act, Congress substantially rewrote Section 623 of the Act, which governs the regulation of basic cable service rates and related installation and equipment charges.¹⁰ Subsection (f) of Section 623, as amended, specifically addresses so-called "negative option billing" practices, as follows:

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.¹¹

⁹ It should be emphasized that TWC is not asking the Commission to determine that each of the countless interactions between its CSRs and customers are the same, or that all of those interactions by themselves comply fully with Section 623(f). For example, the named plaintiffs in *Swinegar* testified that they were not informed of the equipment charges in their conversations with CSRs, but did sign work orders that separately set out the equipment and charges therefor. *See, e.g.*, Summary Judgment Order at 16-17. Indeed, each conversation is unique, and TWC trains its CSRs to respond to the specific interests and questions expressed by the customer, rather than to adhere to a wooden script. TWC is simply asking the Commission to confirm that transactions following TWC's recommended practices outlined herein satisfy Section 623(f).

¹⁰ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385, 106 Stat. 1460 (1992) ("1992 Cable Act").

¹¹ 47 U.S.C. § 543(f).

As the legislative history of Section 623(f) makes clear, the motivating event behind Congress' enactment of the negative option billing prohibition was the practice by TCI (the largest cable operator at the time) of automatically providing the new Encore premium channel to its customers as a "free preview" and then subsequently billing them for it unless they called to cancel that service.¹² TCI did not ask customers if they wanted Encore, and TCI customers never expressly consented to the charge for Encore before it was imposed. Rather, TCI simply interpreted the silence of any customers who did not cancel Encore as acceptance of TCI's offer to bill customers that received the service.

In the period immediately preceding the passage of the 1992 Cable Act, a number of states' attorneys general sued TCI to enjoin the practice under various state laws.¹³ In enacting Section 623(f), Congress sought to avoid a plethora of varying and possibly conflicting state laws governing cable marketing practices by establishing a uniform, national rule defining what did and did not constitute negative option billing.

In particular, Section 623(f) makes clear that a cable operator cannot interpret a subscriber's silence regarding a service and/or equipment offer as assent to receive and be charged for such service and equipment. Thus, for example, with the enactment of Section 623(f), TCI could not just add Encore to subscribers' line-ups without their permission, and then start billing them for the service. Rather, in order to comply with Section 623(f), TCI would have needed to ask subscribers if they wanted the channel and could only charge those who actually ordered it. As noted by the author of this section, the intent of this provision was to "make it clear that Congress does not want the public duped into paying for any cable service program, service, equipment or anything else, without *consciously knowing* they are purchasing

¹² See 138 Cong. Rec. S14248 (daily ed. Sep. 21, 1992) (statement of Sen. Gorton).

¹³ See, e.g., "Wash. and Fla. Threaten Suits on TCI Marketing of Encore Network," Communications Daily, May 28, 1991 at 4.

that service and *making a decision* to do so.”¹⁴ The FCC has confirmed this legislative purpose, finding that:

The concern of Section 3(f) [codified as 47 U.S.C. § 543(f)] as a consumer protection mechanism is that subscribers not be billed for services that they never ordered. *The restrictions of this provision protect 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.*¹⁵

II. The Negative Option Billing Rule Is Satisfied So Long As Subscribers Are Not Billed For Cable Services Or Equipment They Did Not Order

As explained above, it is TWC’s position that the negative option billing rule, including the “affirmatively requested by name” clause, is complied with so long as the customer has knowingly ordered cable services and/or equipment, having selected the desired mix of programming service tiers, equipment and stand-alone offerings (*e.g.*, HBO), especially if the total price of the order has been disclosed.¹⁶ Significantly, TWC does not bill customers based on mere “silence” or “acquiescence” by the customer in response to the CSR’s offer. Rather, the consumer must affirmatively request the named cable service and/or equipment, having been told that charges will apply. Thus, TWC is asking the Commission to issue a declaratory ruling to confirm that TWC’s practices during the ordering process, as outlined in the introductory section, fully comport with Section 623(f).

¹⁴ 138 Cong. Rec. S568 (daily ed. Jan. 29, 1992) (statement of Sen. Gorton) (emphasis added).

¹⁵ *Warner Cable Communications, Milwaukee, Wisconsin*, 10 FCC Rcd 2103, ¶ 13 (Cab. Serv. Bur. 1995) (“*Warner Cable Communications*”) (emphasis added).

¹⁶ Nothing in the negative option billing rule requires the cable operator to disclose either the individual or total price of the service and equipment being ordered by the customer. Nevertheless, TWC trains its CSRs to disclose both the individual price of the equipment package and the total price of all requested services and equipment to the subscriber during the ordering process. The itemized prices are all disclosed in the on-line ordering process as well.

Plaintiffs, on the other hand, contend that even after the customer has affirmatively ordered specific cable services and equipment – even in circumstances in which the customer has knowledge of the associated charges – it is still necessary for the customer to specifically “ask for” the various components of such services and equipment, and/or orally recite some unknown verbal formulation (*e.g.*, “yes, I am asking for a converter and a remote”) and/or to initial boxes on a work order for each service and item of equipment, to further confirm that the customer has “affirmatively requested by name” each of the services and equipment that the customer has already ordered.¹⁷

The rigid approach proposed by plaintiffs would be terrible policy, making ordering cable service and equipment overly costly, cumbersome and confusing for cable operators and customers alike. For example, it would be unreasonable and wasteful to require, as plaintiffs would, that after affirmatively agreeing to subscribe to services provided by a cable operator, the subscriber must then go through useless and redundant steps to “affirmatively request by name” those same services and equipment that have just been ordered. Such an inflexible approach also would place cable operators at a significant disadvantage *vis-à-vis* their competitors not subject to such requirements and would be wholly divorced from the underlying purpose of the negative option provision, which is to prevent customers from being duped into paying for services they never ordered. Under plaintiffs’ interpretation, customers could knowingly order services and equipment and agree to pay for them, sign a work order listing the services and equipment and their prices, enjoy use of these services and equipment for many years, and yet at the same time be entitled to a complete or partial refund of their payments for those ordered services and equipment because the cable operator did not elicit the “correct” language from the customer

¹⁷ *Swinegar et al. v. Time Warner Cable Inc.*, Case No. BC 389755, May 14, 2010 Hearing Transcript at 48:19-28 (“May 14, 2010 Hg. Tr.”).

during the ordering process. In no sense is such a result consistent with the Commission's prior rulings or with the pro-consumer intent of the 1992 Cable Act.

The wide gulf between the interpretation advanced by TWC and that of plaintiffs is perhaps best demonstrated by the deposition of one of TWC's CSRs by counsel for plaintiffs. As the transcript of that deposition reveals, even after a potential customer has expressly agreed to subscribe to a package of cable services along with two converter boxes, and has been advised as to the costs and the customer says "fine, sounds great" (or words to that effect), plaintiffs contend that the CSR would still need to tell the customer, "well, you need to ask me to rent the converter box."¹⁸ The extreme position proposed by plaintiffs is further highlighted by the following re-characterization of Section 623(f), taken from their legal briefing to the California Superior Court:

A cable operator shall not charge a subscriber for any equipment that the subscriber has not positively, categorically, emphatically, unequivocally, absolutely, expressly and explicitly declared his or her intent to receive by name.¹⁹

The Commission has never required the rigid, formulaic, and impractical interpretation advocated by plaintiffs. Rather, the Commission has taken a pragmatic, common-sense approach in implementing and applying the negative option billing rule, an approach that is reflected in TWC's practice of fully informing the subscriber 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.²⁰ The overly-narrow interpretation

¹⁸ See *Swinegar et al. v. Time Warner Cable, Inc.*, Deposition of CSR Mike Pemberton, 64:6 - 67:7, excerpts attached as Exhibit 1.

¹⁹ *Swinegar et al. v. Time Warner Cable, Inc.*, Case No. BC 389755, Plaintiffs' Opposition to Defendant's Demurrer to Second Amended Complaint, Memorandum of Points and Authorities, Jan. 30, 2009, at 5 ("Plaintiffs' Opposition to Demurrer").

²⁰ See, e.g., *Monmouth Cablevision*, 10 FCC Rcd 9438, ¶¶ 10-12 (Cab. Serv. Bur. 1995) ("*Monmouth*"); *Ms. Frances J. Chetwynd, Cole, Raywid & Braverman, L.L.P.*, 10 FCC Rcd 13224, ¶ 10 (Cab. Serv. Bur. 1995) ("*Chetwynd*"); *Omnicom Cablevision*, 18 FCC Rcd 18807, ¶ 8 (2003) ("*Omnicom*"); *Warner Cable*

of Section 623(f) proposed by plaintiffs would undermine the goals of the Commission and Congress to implement a practical and consumer-friendly approach in applying the prohibition on negative option billing practices.

Commission guidance as to the scope of the negative option billing prohibition is particularly essential given the Superior Court's preliminary indication that TWC's recommended ordering process may violate Section 623(f). Specifically, after the Superior Court rejected the notion that informed consent by a subscriber to TWC's offer of equipment satisfied Section 623(f), TWC filed its Motion to Stay based on the primary jurisdiction of the FCC.²¹ TWC supported this motion with the declaration of William H. Johnson, a former FCC official closely involved in the promulgation of Section 76.981 of the Commission's rules.²² In his declaration, Mr. Johnson generally described the history of the negative option billing prohibition and the FCC's regulatory approach. He also specifically commented on a sample ordering conversation that TWC uses to train its CSRs.²³

Mr. Johnson opined that "[a]ssuming that the potential customer responds affirmatively, e.g., 'yes' or 'ok,' in response to the final 'Ask For The Sale' question, it is my opinion based on my extensive experience at the FCC that the transaction contemplated by that discussion, or any substantially similar dialogue between a CSR and a potential customer, would comply fully with the FCC negative option billing requirements."²⁴ During a status conference on September 29, 2010, the Superior Court asked TWC:

Communications at ¶ 13; *ML Media Partners, L.P.*, 11 FCC Rcd 9216, ¶ 10 (Cab. Serv. Bur. 1996) ("*ML Media Partners*").

²¹ *Swinegar et al. v. Time Warner Cable, Inc.*, Case No. BC 389755, Memorandum of Points and Authorities in Support of Defendant Time Warner Cable's Motion to Stay, Sept. 22, 2010.

²² Declaration of William H. Johnson, attached as Exhibit 2.

²³ *Id.* at pp. 7-8 and Exhibit 1 thereto.

²⁴ *Id.*

How can [Mr. Johnson] possibly think that this sales script complies with the facial language of the statute? . . . I'm rather shocked to be honest . . . This is supposedly the perfectly compliant sales script uniformly used . . . and yet it seems to be in no way shape or form compliant with the statute that Congress adopted. It sounds like the FCC is just incredibly round-heeled and decided that if they enforce you know, some one off version of what Congress adopted that it's good enough, and if there's no federal private right of action they get the last word on it. So they don't really care to enforce Congress' language, that's their prerogative.²⁵

The Superior Court expressed its disinclination to grant TWC's Motion to Stay based on primary jurisdiction, but also stated that:

If the FCC wants to come in here and tell me the world is flat and the sun rises in the west and the language of Congress doesn't mean what it says, they are welcome to come and tell me that's their view . . . But if the FCC wants to come here and tell me the language of the statute means something other than what the plain meaning seems to suggest. The door is open²⁶

Other recent rulings and statements by the California Superior Court in the referenced litigation directly contradict the Commission's expressed stance on Section 623(f). Indeed, the Superior Court has consistently rejected Commission precedent interpreting Section 623(f), holding that prior Commission rulings were not sufficiently on point or were unpersuasive.²⁷ According to the Superior Court, the negative option billing prohibition was designed by Congress to prevent "nuisance charges" by cable operators²⁸ or "nickel and diming" customers with "add ons."²⁹

The views expressed by the California Superior Court are based on an unrealistically rigid interpretation of the "affirmatively requested by name" clause of Section 623(f). And while

²⁵ *Swinegar et al. v. Time Warner Cable Inc.*, Case No. BC 389755, Sept. 29, 2010 Hearing Transcript at 13:26 - 14:2 ("Sept. 29, 2010 Hg. Tr.").

²⁶ *Id.* at 16:2-19.

²⁷ Demurrer Order at 3-6 ("this case is different from those addressed in FCC opinions briefed by the parties").

²⁸ Sept. 29, 2010 Hg. Tr. at 5:2-16.

²⁹ May 14, 2010 Hg. Tr. at 12:8-27.

the Superior Court has quoted from the Commission's "*affirmative assent*" language in support of its own position,³⁰ it has nonetheless rejected the Commission's interpretation by stating that "[a]n interpretation of affirmative request to '*assent*' would directly contradict the words of the statute and the clear purpose of the Act, which was to protect consumers and promote competition through regulation of cable operators."³¹

In the instant case, the California Superior Court reached the preliminary conclusion that the interpretation proposed by plaintiffs is supported by the second sentence of the statute, which states that "a subscriber's failure to refuse a cable operator's proposal to provide . . . service or equipment shall not be deemed to be an affirmative request."³² The Superior Court is correct that the sentence clarifies that mere silence is not sufficient to constitute an "affirmative request by name." Indeed, a plain reading of the clarifying language is that a customer's silence or failure to say "no" (or a similar negative statement) in response to the cable operator's proposal cannot be construed as an affirmative request. Thus, the second sentence of Section 623(f) merely confirms that negative option billing results from a practice such as the TCI/Encore situation where the operator sends a notice that charges will begin to apply to a formerly "free" service unless the customer "cancels" the service within a prescribed period. This is consistent with the parallel FTC regulation which prohibits sellers from "interpret[ing]" inaction such as "the consumer's silence or failure to take an affirmative action to reject goods or services or to cancel the agreement . . . as acceptance of the offer."³³

³⁰ Demurrer Order at 5-6 (emphasis added) (quoting 59 Fed. Reg. 17,961, 17,970-71 ¶ 69 (Apr. 15, 1994)).

³¹ *Id.* at 5 (emphasis added).

³² 47 U.S.C. § 543(f).

³³ *See* 16 C.F.R. § 310.2(t).

But the clarifying language in the second sentence of Section 623(f), by providing that a “failure to refuse” is not an “affirmative request,” actually serves to confirm that a customer’s response of “yes” (or a similar positive statement or action) cannot rationally be viewed as a “failure to refuse” and thus must be seen as an “affirmative request.” Under TWC’s ordering practices described above, no order may be processed based on an “interpretation” of the customer’s inaction, and a customer will never be billed based on mere “acquiescence.”³⁴ Rather, the customer must affirmatively agree to order the chosen mix of services and equipment they desire to have. Thus, the plain statutory language is entirely consistent with the common-sense interpretation that the customer’s express consent to the cable operator’s offer, *e.g.*, by agreeing to order cable services and/or equipment (whether over the phone, on-line or in person), is sufficient under the negative option billing rules because the subscriber has “affirmatively requested by name” the selected services and equipment.

In contrast to TWC’s interpretation of the second sentence of Section 623(f), the plaintiffs in the pending California class action proceeding would equate “failure to refuse” with “consent,” which plaintiffs go on to define as “acquiescence”:

... the second sentence of Section 543(f) effectively says, without actually using the word “consent,” that mere “consent” is not enough. “Consent” is synonymous with “acquiescence.” “Acquiescence” is defined as, among other things, a failure to object. Therefore, to “consent” is, among other things, to fail to object.³⁵

³⁴ Significantly, while passive silence or acquiescence is insufficient, the negative option billing restriction can be satisfied through the affirmative actions of the consumer, as well as by an affirmative request expressed orally or in writing. Thus, the Superior Court improperly rejected TWC’s argument that Swinegar affirmatively requested an HD receiver when he (1) called TWC to inquire why his new HD TV was not working, (2) was told by the CSR that he needed to use an HD receiver, and could exchange his standard digital receiver for an HD receiver at a cable store; and (3) physically went to a TWC store to perform the exchange. *See* Summary Judgment Order at 9-10 (“these facts alone are not a prima facie showing that Swinegar affirmatively requested an HD receiver”).

³⁵ Plaintiffs’ Opposition to Demurrer at 9.

As noted above, TWC has never contended that mere passive acquiescence or silence can satisfy the negative option billing restriction.³⁶

The case of *Time Warner Cable v. Doyle* is closely analogous to the instant situation.³⁷ The fact pattern was somewhat different, in that the cable operator had been providing a package of programming services that subscribers had concededly ordered, and then the cable operator “unbundled” up to four channels and began offering them “*a la carte*” and billing for each separately. But the critical issue in that case, as it is in the present California litigation, was plaintiffs’ claim that the subscribers had not “affirmatively requested by name” the affected services or equipment, and thus that the negative option billing requirements of Section 623(f) had been violated.

The district court in *Doyle* adopted a position similar to that expressed by the Superior Court in the pending California litigation:³⁸

The express language of the statutory negative option prohibition requires a cable operator to obtain a request for a given service by name before the operator may charge for that service. It appears that the FCC would be permitted to construe 47 USC 543(f) in a manner consistent with plaintiff’s interpretation had Congress not specified that an “affirmative request” must be “by name.” Because Congress did so specify, the FCC is not free to ignore the “by name” requirement.³⁹

In its decision reversing the lower court, the Seventh Circuit described negative option billing as “a practice whereby a company places a charge for an unordered service on customers’ bills and

³⁶ Black’s Law Dictionary (8th ed. 2004) defines “consent” as “agreement, approval, or permission as to some act or purpose, esp. given voluntarily by a competent person; legally effective assent.” The definition for “assent” is virtually identical: “agreement, approval, or permission; esp., verbal or nonverbal conduct reasonably interpreted as willingness. See CONSENT.” Both definitions recognize the distinction between “express” and “implied” consent or assent. Acquiescence is defined as “a person’s tacit or passive acceptance; implied consent to an act.”

³⁷ *Time Warner Cable v. Doyle*, 847 F. Supp. 365 (W.D. Wis. 1994), rev’d 66 F.3d 867 (7th Cir. 1995) (“*Doyle*”).

³⁸ See Demurrer Order at 4-5; Summary Judgment Order at 6-7.

³⁹ *Doyle*, 847 F. Supp. 635 at 640.

requires those who do not want the service affirmatively to reject the charge.”⁴⁰ The Court of Appeals rejected the district court’s interpretation of Section 623(f) “that the terms of the section were unambiguous” and as requiring that each “service” be requested “by name,”⁴¹ finding instead that:

Upon examination of the statutory section in question, 47 U.S.C. § 543(f), we cannot conclude that the intent of the Congress is so unambiguously stated as to preclude further interpretation by the agency charged with the administration of the statute.⁴²

Noting further that the construction suggested by the lower court would be “inappropriate if it would lead to absurd results or would thwart the obvious purposes of the statute,”⁴³ the Seventh Circuit held that the district court’s “interpretation of the statute also would require affirmative marketing to the customer each time a station was substituted – a very burdensome requirement producing significant compliance costs that would be difficult to reconcile with the contemplated rate regulation scheme.”⁴⁴ Similar burdensome compliance costs would result from the rigid and inflexible application of the “affirmatively requested by name” clause proposed by the court in the pending California litigation.

The same factual situation presented in the *Doyle* case also has been directly addressed by the Commission. In *Warner Cable Communications*, the purpose of the negative option billing restriction was described as follows:

The concern of Section 3(f) [codified as 47 U.S.C. § 543(f)] as a consumer protection mechanism is that subscribers not be billed for services that they never ordered. The restrictions of this provision protect subscribers from having to take on the burden of identifying and negatively responding to

⁴⁰ *Doyle*, 66 F.3d 867 at 871.

⁴¹ *Id.* at 873, 877.

⁴² *Id.* at 877.

⁴³ *Id.* at 876 (citing *NuPulse, Inc. v. Schlueter Co.*, 853 F.2d 545, 549 (7th Cir. 1988)).

⁴⁴ *Id.* at 877.

charges for services that appear on a bill that are not desired and for which no request has been made.⁴⁵

As did the Seventh Circuit in *Doyle*, the Commission rejected an inflexible application of the “affirmatively requested by name” language:

Of course, the statute could be read to require affirmative consent prior to any change in service, no matter how minor. But in the Commission’s view, such an interpretation would contravene Congressional intent and the underlying purposes of the federal cable rate regulations.

* * *

. . . if Section 3(f) were read that broadly, it would thwart a primary purpose of the cable rate rules: “encourag[ing] the provision of new services that subscribers desire at the reasonable rates mandated by Congress.”

* * *

The words of the section are fairly read as meaning that the purchaser receives what was ordered and not that the name of the service delivered remains unchanged. A different reading could well result in the abrupt withdrawal of service, a result that would be inconsistent with the rate regulation and consumer protection objectives of this section.⁴⁶

In light of the foregoing, TWC requests that the Commission, the expert agency charged by Congress with interpreting and implementing Section 623(f), issue a declaratory ruling confirming that TWC’s marketing and ordering practices, as described herein, do not violate the negative option billing prohibition. In so doing, the Commission should expressly reject the unreasonable extra step proposed by plaintiffs that would require a cable operator, after the customer has agreed to order the desired complement of services and equipment, to ask the customer to go back and repeat the request for each specific service or piece of equipment.

⁴⁵ *Warner Cable Communications* at ¶ 13.

⁴⁶ *Id.* at ¶¶ 10-11 (citing *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) (“1994 Order”)).

III. TWC's Ordering Practices Are Fully Consistent With Prior Administrative And Judicial Interpretations Regarding Negative Option Billing

Following Congress' 1992 revision of Title VI, the Commission undertook a comprehensive rulemaking proceeding to implement the amendments to Section 623, including Section 623(f). Section 76.981, the rule that the Commission adopted to implement Section 623(f), contains three paragraphs. The first paragraph largely tracks the language of Section 623(f) itself:

(a) A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. A subscriber's failure to refuse a cable operator's proposal to provide such service or equipment is not an affirmative request for service or equipment. A subscriber's affirmative request for service or equipment may be made orally or in writing.⁴⁷

The remaining two paragraphs of Section 76.981 provide additional guidance regarding the meaning and enforcement of the negative option billing prohibition:

(b) The requirements of paragraph (a) of this section shall not preclude the adjustment of rates to reflect inflation, cost of living and other external costs, the addition or deletion of a specific 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, provided that such changes do not constitute a fundamental change in the nature of an existing service or tier of service and are otherwise consistent with applicable regulations.

(c) State and local governments may not enforce state and local consumer protection laws that conflict with or undermine paragraph (a) or (b) of this section or any other sections of this Subpart that were established pursuant to Section 3 of the 1992 Cable Act, 47 U.S.C. 543.⁴⁸

In addition to adopting the regulation quoted above, the Commission has discussed the negative option billing prohibition in a number of formal and informal decisions:

⁴⁷ 47 C.F.R. § 76.981(a).

⁴⁸ C.F.R. §§ 76.981(b)-(c).

- “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.”⁴⁹
- “[T]he prohibition against negative option billing applies to ‘additions of a new tier of service or a new single channel service without the *affirmative assent* of a subscriber.’”⁵⁰
- “Negative option billing is a practice in which customers are charged for new services without their *explicit consent*.”⁵¹

Courts also have construed the negative option billing ban in a consistent fashion:

- “[N]egative option billing,’ a practice whereby a company places a charge for an unordered service on customers’ bills and requires those who do not want the service affirmatively to reject the charge.”⁵²
- “A negative option plan requires a consumer to take affirmative action to reject the offer.”⁵³
- [Section 623(f)] “prohibits ‘negative option billing,’ the practice of providing goods automatically and requiring the customer to either pay for the goods or affirmatively decline the goods.”⁵⁴

Moreover, the analogous regulation adopted by the Federal Trade Commission provides as follows:

- A “[n]egative option feature means, in an offer or agreement to sell or provide any goods or services, a provision under which the customer’s silence or failure to take an affirmative action to reject goods or services or to cancel the agreement is interpreted by the seller as acceptance of the offer.”⁵⁵

As consistently articulated by Congress, the courts and the Commission, the intent of Section 623(f) is clear: to prevent a subscriber from being charged for services or equipment that

⁴⁹ *ML Media Partners* at ¶ 10.

⁵⁰ *Paragon Cable, Irving, TX*, 10 FCC Rcd 6012, ¶ 5 (Cab. Serv. Bur. 1995) (“*Paragon Cable*”) (citing 1993 Order at ¶ 440).

⁵¹ *Omnicom* at ¶ 8.

⁵² *Doyle*, 66 F.3d at 871.

⁵³ *Storer Communications, Inc. v. State, Dept. of Legal Affairs*, 591 So. 2d 238, 239, n. 1 (Fla. Dist. Ct. App. 1991).

⁵⁴ *Deitz v. Comcast Corp.*, No. C 06-06352 WHA, 2007 U.S. Dist. LEXIS 53188, at *4 (N.D. Cal. July 11, 2007).

⁵⁵ 16 C.F.R. § 310.2(f).

have not been ordered, or from being “duped” into thinking a service or piece of equipment is free,⁵⁶ only later to be charged unless the subscriber acts to cancel or reject the offer. But it is equally clear that when a consumer agrees to subscribe or orders various services or equipment offered by the cable operator, and is made aware that charges will apply, then the negative option billing restriction is inapplicable, regardless of the particular words or format used by the consumer in placing the order.

The Commission’s implementation of Section 623(f) in Section 76.981 of its rules faithfully reflects this intent. In interpreting and applying Section 623(f), the Commission properly focused on whether customers received the channels and ancillary equipment occasioned by their desired level of service, and were not automatically charged for other services or equipment without their *affirmative assent*. Thus, as the Commission has stated, Section 623(f) prohibits cable operators from giving customers service or equipment “not previously provided” and “charging them” unless they “specifically decline it.”⁵⁷

The requested declaratory ruling does not require the Commission to break new ground or depart from any prior rulings. Indeed, the Commission has determined on numerous occasions that the negative option prohibition does not apply to various practices in which a customer is billed for services that he or she has not “affirmatively requested by name.” For example, the Commission has found that cable operators may add, delete, or replace channels provided as part of a previously ordered cable service without having to obtain the subscriber’s affirmative assent to be charged for the modified service (absent a finding that the modifications

⁵⁶ Significantly, a negative option billing violation arises under this scenario only when the cable operator actively misleads the customer, as was the case with TCI’s putative “free preview” of Encore. A violation cannot arise, for example, from an unreasonable, post-hoc claim that a subscriber “thought” his new HD converter was “free” when he traded in his old converter that he had been paying for all along. *Cf.* Summary Judgment Order at 9-10.

⁵⁷ *ML Media Partners* at ¶ 10.

constitute a “fundamental change” in the previously ordered service).⁵⁸ The Commission also has held that cable operators may repackage or unbundle *a la carte* channels or service packages and continue to provide the services to customers without their advance consent.⁵⁹ Of particular relevance to the specific issue presented in the California class action suit against TWC, the Commission has found that no negative option billing violation occurs when a cable operator – without specific customer consent – unbundles remote control charges and continues to bill for such equipment separately, even though the customer has never “affirmatively requested” such remote control units “by name.”⁶⁰

In sum, while the Commission has been clear that the negative option billing rule requires customers to affirmatively express their consent to receive and be billed for services and associated equipment provided by a cable operator, the Commission properly has eschewed overly formalistic readings of the provision. The Commission instead consistently has opted for a flexible, common-sense approach to Section 623(f) that considers whether particular practices would impede, rather than further, the pro-consumer, pro-competition goals underlying Title VI. Nothing in any of the Commission’s rulings or statements regarding Section 623(f) suggests that the provision requires a cable operator to do anything more than bill subscribers only for the mix of programming service tiers, equipment and stand-alone offerings that the subscriber has knowingly consented to receive. Indeed, the Commission has construed the “affirmatively requested by name” language as synonymous with the terms “affirmative consent,” “affirmative

⁵⁸ See 1994 Order at ¶ 13.

⁵⁹ See, e.g., *ML Media Partners* at ¶ 10; see also *Warner Cable Communications*, 10 FCC Rcd 2103; *Chetwynd*, 10 FCC Rcd 13224; *Mr. Charles S. Walsh, Fleischman & Walsh L.L.P.*, 11 FCC Rcd 2584 (Cab. Serv. Bur. 1997) (“*Walsh*”). The Commission also has ruled that cable operators may establish unbundled prices for ancillary services, such as “in-home wire maintenance” service or programming guides and impose such charges on customers who received such services as part of a “bundled” package without seeking the customers’ affirmative assent. *Omnicom*, 18 FCC Rcd 18807 (wire maintenance plan and programming guide); *Comcast Cablevision*, 10 FCC Rcd 11046 (Cab. Serv. Bur. 1995) (wire maintenance plan).

⁶⁰ *Paragon Cable*, 10 FCC Rcd 6012.

assent,” “prior consent,” and “explicit consent.”⁶¹ As explained above, TWC trains its CSRs to utilize ordering practices that are fully consistent with this approach.

IV. Issuance Of The Requested Declaratory Ruling By the Commission Will Serve The Public Interest By Furthering Important National Policy Goals

A. Uniform, national interpretation of Section 623(f) is essential.

Issuing the requested declaratory ruling will serve the public interest by avoiding the risk of a plethora of varying and conflicting interpretations of Section 623(f). Moreover, the requested declaratory ruling will ensure that courts do not apply Section 623(f) in a manner that conflicts with the pro-consumer intent of Section 623 by making the process of ordering cable service overly costly, cumbersome and confusing for cable operators and customers alike. The Commission should not allow the responsibilities delegated to it by Congress to be usurped by state courts.

Both the Commission and the courts consistently have recognized the need for uniformity in the interpretation and application of Section 623, and of Section 623(f) in particular. The Commission, not the courts, is the expert authority best equipped to decide the exact requirements, application and scope of Section 623(f). To be sure, Congress and the Commission have acknowledged that there is an appropriate role for non-federal enforcement of state and local consumer protection laws, including those addressing negative option billing.⁶² However, it also is clear that allowing the fifty states to come up with their own interpretations of Section 623(f) would undermine important national policy goals. Indeed, one of the express purposes of Title VI of the Communications Act is to “establish a national policy concerning

⁶¹ 1993 Order at ¶ 440; 1994 Order at ¶ 13; *Monmouth* at ¶¶ 10-12 *Chetwynd* at ¶ 10; *Omnicom* at ¶ 8.

⁶² See 1994 Order at ¶ 114.