

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

In the Matter of )  
 )  
Time Warner Cable Inc. )  
Petition for Declaratory Ruling ) MB Docket No. 10-215  
Regarding Negative Option )  
Billing Restrictions )  
  
To: Chief, Media Bureau

**REPLY**

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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 alleging that TWC violated California’s Unfair Competition Law (the “UCL”) by engaging in “unlawful” negative option billing in contravention of Section 623(f). The substance of the litigation turns on a question of statutory construction: whether a cable operator complies with Section 623(f) when it charges a subscriber for equipment (converter boxes and remote control units) after obtaining that subscriber’s affirmative consent. As set out in the Petition and elaborated herein, the Commission’s guidance on this question is necessary to ensure that the California litigation is determined in conformity with the Commission’s expert view of what its own rule requires. Plaintiffs’ interpretation of Section 623(f), as presented in their Opposition, 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 and equipment while not providing any additional consumer protections.

Contrary to the assertions of Plaintiffs in their Opposition, Section 623(f) is best interpreted and enforced by the Commission, the expert agency in which Congress has vested authority to implement and enforce all of the provisions of the Communications Act, including Section 623(f). Furthermore, Commission interpretation of Section 623(f) is necessary and appropriate because how that provision is applied has broad ranging implications impacting other aspects of the Cable Act, the Commission’s cable rules and the broader multichannel video industry as a whole – aspects that are well beyond the expertise and jurisdiction of state courts. Interpreting and implementing the statutory language in a balanced manner, consistent with

Congressional intent, respecting the practicalities of the industry, and with a full understanding of potential impacts on other related regulations, is a role that is most suited to the Commission.

A Commission ruling granting TWC's Petition would also serve the public interest for many reasons. First, a favorable ruling will advance important Congressional objectives with respect to minimizing the impact of regulation and promoting competition. Plaintiffs' rigid and inflexible interpretation of the negative option billing provision would undermine these goals, disadvantaging cable operators vis-à-vis their competitors, while providing no additional protective benefit to consumers who have clearly agreed to purchase the applicable services and equipment.

Second, a grant will allow, as Congress intended, the Commission to determine the meaning of its own rule, ensuring that cable operators are not subject to varying and conflicting state court interpretations of Section 623(f). Allowing each of the fifty states to come up with their own interpretations of Section 623(f) would undermine important national policy goals.

Finally, a grant of TWC's Petition will avoid the aggravation to cable subscribers that would result from plaintiffs' view of what Section 623(f) requires cable operators to do in order not to run afoul of the negative option billing rule. If plaintiffs' interpretation prevails, the consumer would be required to recite back to the cable operator each specific component of service or equipment included in a given order, thereby rendering the process unnecessarily cumbersome and time consuming. Construing the rule in accordance with TWC's understanding 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.

For these reasons, and in order to make sure that the California litigation proceeds in accordance with the Commission's expert view of what its own rule requires, the Commission

should promptly issue the requested order confirming TWC's understanding of Section 623(f). The need for prompt Commission resolution of this matter is highlighted by today's order from Judge Highberger denying TWC's request that the court stay the case pending the Commission's resolution of this declaratory ruling request. The Commission can advance the goals of judicial economy by issuing its ruling on an expedited basis.

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**REPLY**

Time Warner Cable Inc. (“TWC”) hereby submits its Reply with respect to TWC’s petition for a declaratory ruling (“Petition”)<sup>1</sup> regarding the prohibition on negative option billing found in Section 623(f) of the Communications Act<sup>2</sup> and implemented by the Commission in Section 76.981 of its rules.<sup>3</sup> As TWC’s Petition indicated, its request for a declaratory ruling arises from a class-action lawsuit brought against TWC in California Superior Court<sup>4</sup> alleging that TWC violated California’s Unfair Competition Law (the “UCL”)<sup>5</sup> by engaging in “unlawful” negative option billing in contravention of Section 623(f). The substance of the litigation turns on a question of statutory construction: whether a cable operator complies with Section 623(f) when it charges a subscriber for equipment (converter boxes and remote control units) after obtaining that subscriber’s affirmative consent. As described below, the

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<sup>1</sup> See “Media Bureau Action: 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,” Public Notice, MB Docket 10-215, DA 10-2013 (rel. October 20, 2010).

<sup>2</sup> 47 U.S.C. § 543(f).

<sup>3</sup> 47 C.F.R. § 76.981.

<sup>4</sup> *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.

<sup>5</sup> 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”).

Commission's guidance on this question is necessary to ensure that the California litigation is determined in conformity with the Commission's expert view of what its organic statute and its own rule require. Thus, TWC's Petition, as summarized in the Commission's Public Notice, requests the Commission to confirm that Section 623(f) is satisfied by a subscriber's "affirmative assent" and that TWC's recommended ordering process (as outlined in the Petition at ii) complies with the negative option billing restriction of Section 623(f).

The need for prompt Commission resolution of this matter is highlighted by today's order from Judge Highberger denying TWC's request that the court stay the case pending the Commission's resolution of this declaratory ruling request, clearing a path for possible class certification in the next 90 days.<sup>6</sup> As explained by Judge Highberger in the denial order, although he is denying the stay, the FCC's input on the key issue remains valuable to the proper resolution of the case: "The motion for class certification is scheduled for February 14, 2011, and the FCC should be able to provide its input by then if defendant is correct."<sup>7</sup> Furthermore, in stating that "If this case was set for trial next week, the Court probably would stay the case to await FCC input," the court has acknowledged the value of the Commission's input to the proper resolution of the case.<sup>8</sup> The Commission can avoid much unnecessary pleading and court proceedings if it issues its ruling on an expedited basis.

Three parties filed initial comments in response to TWC's Petition. Two of those commenters, Cox Communications, Inc. ("Cox") and the National Cable & Telecommunications Association ("NCTA"), supported the grant of the requested declaratory ruling. The only

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<sup>6</sup> *Order, Swinegar v. Time Warner Cable Inc.*, No. BC389755 (Super. Ct. L.A., Nov. 19, 2010).

<sup>7</sup> *Id.*

<sup>8</sup> Indeed, although the transcript is not yet available, TWC understands that, at today's hearing relating to TWC's stay request, Judge Highberger stated that he is interested in what the Commission has to say about the statute, and that in denying the stay, the Commission may be prompted to act faster.

comments in opposition to the Petition were filed by the plaintiffs in the California litigation. In this Reply, TWC responds to plaintiffs' opposition and renews its request for the Commission to promptly grant its Petition.

**I. Plaintiffs' Proposed Interpretation Conflicts With All Prior Administrative And Judicial Interpretations Regarding Negative Option Billing.**

Plaintiffs' proposed interpretation of Section 623(f) must be rejected as it conflicts with all prior Commission and judicial interpretations of the statute. 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 such as that proposed by plaintiffs. The Commission has instead consistently opted for a flexible, common-sense approach to Section 623(f) that considers whether particular practices would impede, rather than advance, the pro-consumer, pro-competition goals underlying the Cable Act. Plaintiffs offer no justification for departure from the Commission's long-standing policies.

The intent of Section 623(f) is clear: to prevent a subscriber from being charged for services or equipment that have not been ordered, or from being "duped" into thinking a service or piece of equipment is free, only later to be charged unless the subscriber acts to cancel or reject the offer.<sup>9</sup> 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.

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<sup>9</sup> See 138 Cong. Rec. S568 (daily ed. Jan. 29, 1992) (statement of Sen. Gorton).

The Commission's implementation of Section 623(f) in Section 76.981 of its rules faithfully reflects this intent. 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.<sup>10</sup>

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.<sup>11</sup>

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:

- "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."<sup>12</sup>

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<sup>10</sup> 47 C.F.R. § 76.981(a).

<sup>11</sup> 47 C.F.R. §§ 76.981(b)-(c).

<sup>12</sup> *ML Media Partners*, 11 FCC Rcd 9216, ¶ 10 (Cab. Serv. Bur. 1996).

- “[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.”<sup>13</sup>
- “Negative option billing is a practice in which customers are charged for new services without their *explicit consent*.”<sup>14</sup>

Courts also have construed the negative option billing ban consistently to prohibit offers which customers have never consented to and must take affirmative steps to reject.

- “[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.”<sup>15</sup>
- “A negative option plan requires a consumer to take affirmative action to reject the offer.”<sup>16</sup>
- [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.”<sup>17</sup>

In interpreting and applying Section 623(f), the Commission has properly focused on whether customers received the channels and ancillary equipment occasioned by their desired level of service, and were not automatically charged for services or equipment without their *affirmative assent*. Nothing in any of the Commission’s rulings or statements regarding Section 623(f) suggests, as plaintiffs would, that a cable operator must do anything more than bill subscribers only for the mix of programming service tiers, equipment and stand-alone offerings that the subscriber has ordered.

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<sup>13</sup> *Paragon Cable, Irving, TX*, 10 FCC Rcd 6012, ¶ 5 (Cab. Serv. Bur. 1995) (citing 1993 Order at ¶ 440).

<sup>14</sup> *In re Omnicom Cablevision of Illinois*, 18 FCC Rcd 18807, ¶ 8 (2003).

<sup>15</sup> *Time Warner Cable v. Doyle*, 66 F.3d 867, 871 (7th Cir. 1995) (“*Doyle*”).

<sup>16</sup> *Storer Communications, Inc. v. State, Dept. of Legal Affairs*, 591 So. 2d 238, 239, n. 1 (Fla. Dist. Ct. App. 1991).

<sup>17</sup> *Deitz v. Comcast Corp.*, No. C 06-06352 WHA, 2007 U.S. Dist. LEXIS 53188, at \*4 (N.D. Cal. July 11, 2007).

## **II. There Is No Need To Expand The Scope of the Proceeding Beyond The Fundamental Question Presented In TWC's Declaratory Ruling Request**

As an initial matter, it is important to recognize the limited scope of TWC's Petition. It is TWC's position that a cable operator complies with the negative option billing rule by not charging a subscriber for cable services and equipment unless that subscriber has first agreed to receive and pay for such services and/or equipment. Conversely, plaintiffs in the pending class action litigation contend that after the subscriber affirmatively orders specific cable services and equipment – even in circumstances in which the customer has full knowledge of the associated charges – it is still necessary under Section 623(f) for the subscriber to specifically “ask for” each and every one of 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 separate service and item of equipment, to further confirm that the subscriber has “affirmatively requested by name” each of the services and equipment that the customer has already ordered.<sup>18</sup> TWC's Petition simply asks the Commission to resolve these conflicting interpretations of Section 623(f), and thus clarify the scope of the federal prohibition on negative option billing for the California court.

In their comments, plaintiffs attempt to cloud the record and confuse the issue by arguing that the Commission has no authority to examine questions regarding the scope of Section 623(f) and advancing their skewed interpretation of what the “evidence” in the California lawsuit allegedly shows. None of plaintiffs' arguments has any merit, as demonstrated below, and the Commission should not be distracted from the question at hand. Rather, the Commission should focus on addressing the question of statutory interpretation before it: whether Section 623(f) is

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<sup>18</sup> *Swinegar et al. v. Time Warner Cable Inc.*, Case No. BC 389755, May 14, 2010 Hearing Transcript at 48:19-28. See also Plaintiffs' Opposition at 28-33.

satisfied when customers are billed for the cable services and/or equipment they have ordered, whether by phone, online, or in person.

The Commission's answer to this question will save time and resources in the two pending California class actions. If TWC's interpretation is correct, the Commission's declaratory ruling should serve to resolve the litigation. Alternatively, if plaintiffs' interpretation is correct, the guidance provided will greatly clarify the legal framework and narrow the factual issues before the court. Either way, the issues in the litigation will be focused and the case can proceed in a more efficient manner, thereby promoting judicial economy and serving the ends of justice.

**III. Commission Clarification of the Requirements of Section 623(f) is Warranted and Proper.**

**A. The Commission is the Expert Agency Best Positioned to Construe Section 623(f).**

Plaintiffs argue that Section 623(f) is best interpreted and enforced not by the Commission, but by local courts. But this argument ignores the basic fact that the purported violation of state law here is premised solely on an alleged violation of Section 623(f) of the federal Cable Act and the Commission's rules implementing that provision. Therefore, it is the Commission -- the expert agency in which Congress has vested authority to implement and enforce all of the provisions of the Communications Act,<sup>19</sup> including Section 623(f) -- that has the primary, if not sole responsibility for construing it, and not a state court.<sup>20</sup> Indeed, one of the

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<sup>19</sup> 47 U.S.C. §§ 154(i), 303(r).

<sup>20</sup> *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation Buy-Through Prohibition*, 9 FCC Rcd 4316, Third Order on Reconsideration, n. 82 (1994) ("Of course the Commission has authority to adopt rules to implement the negative option billing provision of the 1992 Cable Act under its general rulemaking power under Sections 303(r) and 4(i) of the Communications Act").

ways in which the Commission can and does carry out its implementation and enforcement responsibilities under the Communications Act is by issuing informal and formal rulings addressing the meaning of provisions of the Act that are the subject of disputes in state courts. TWC's Petition described in detail how, on numerous occasions, the Commission has exercised such authority to issue rulings regarding the meaning of various provisions of Section 623, and indeed of Section 623(f) in particular.<sup>21</sup>

Furthermore, Commission interpretation of Section 623(f) is necessary and appropriate because how that provision is interpreted has broad ranging implications impacting other aspects of the Cable Act, the Commission's cable rules and the broader multichannel video industry as a whole – aspects that are well beyond the expertise and jurisdiction of state courts. The Commission has a duty to ensure that Section 623(f) is interpreted in a way that avoids conflict with Congressional intent and the purpose of other Commission rules. For example, the interplay between Section 623(f) of the Act, Section 76.981 of the rules, and other Commission regulations, including rules concerning unbundling, bill itemization, and equipment compatibility, is complex and requires a national perspective.<sup>22</sup> Interpreting and implementing the statutory language in a balanced manner, consistent with Congressional intent, respecting the

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<sup>21</sup> See, e.g., Letter from Daniel M. Armstrong, Associate General Counsel, FCC, to Peter H. Feinberg, Esq., Dow, Lohnes & Albertson, Counsel for Cox Communications, Inc., *in re Putnam, et al. v. Cox Communications, Inc., et al.*, Case No. 714772 (California Superior Court) (dated Jan. 30, 1998).

<sup>22</sup> See 47 C.F.R. §§ 76.923(b), 76.1619(a), 76.1622. For example, Plaintiffs argue that TWC must obtain a separate affirmative request for a remote control because TWC breaks out the portion of the equipment fee that is attributable to remote controls on some bills, even though the price Customer Service Representatives (“CSRs”) quote to customers for converters includes the price of remotes. Such an interpretation arguably implicates several different Commission rules. The same can be said for plaintiffs’ argument that TWC cannot charge a digital programming fee for additional outlets. See, e.g., *Warner Cable Communications, Milwaukee, Wisconsin*, 10 FCC Rcd 2103, ¶¶ 10-11 (1995) (“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. . . . 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.”).

practicalities of the industry, and with a full understanding of potential impacts on other related regulations, is a role that is most suited to the Commission. Ultimately, an important way for the Commission to try to ensure that its goals are not obstructed by inconsistent state court interpretations of Section 623(f) is for the Commission to expressly address the meaning and scope of the statute, as it has done on numerous prior occasions.

**B. A Declaratory Ruling is Necessary Because Section 623(f) is Ambiguous and Open to Multiple Interpretations.**

The Commission's expertise on the proper interpretation of Section 623(f) is necessary given the ambiguities of the statute. While Congress specified that a subscriber's silence cannot be interpreted as an affirmative request by name for services or equipment, it did not otherwise describe what would constitute an affirmative request by name. The Commission's rulemaking orders implementing Section 623(f) explained and clarified the ambiguity of the statutory language, holding that an affirmative request can be made orally, in writing, or electronically.<sup>23</sup> The Commission also implicitly acknowledged the ambiguity inherent in Section 623(f) when, subsequent to its initial order implementing the statutory provision, it promulgated Section 76.981(b), which specifies that changes made as a result of unbundling do not violate the affirmative request by name requirement even though the statute could be read in that manner.<sup>24</sup> The Commission has continued to expand upon and further clarify the scope of the Section 623(f) prohibition in a variety of contexts, including clarifying on several occasions that the statutory phrase "affirmative request by name" is synonymous with affirmative "consent" or

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<sup>23</sup> *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5905 & n. 1092 (1993) ("1993 Order"); *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 7393, 7399 (1994) ("1994 Order").

<sup>24</sup> 47 C.F.R. § 76.981(b).

“assent.”<sup>25</sup> Finally, the Seventh Circuit’s decision in *Time Warner Cable v. Doyle* confirms that the language of Section 623(f) is ambiguous, and that the Commission’s interpretation of Section 623(f) is entitled to great deference.<sup>26</sup>

**C. Plaintiffs Are Incorrect that the 1996 Act Took Away the Commission’s Jurisdiction or Authority Over Section 623(f).**

Plaintiffs’ contention that the 1996 Act “terminated” the Commission’s jurisdiction to interpret and implement Section 623(f) reflects a fundamental misunderstanding of the Commission’s authority under the 1992 Act and the impact on that authority of the 1996 Act. As noted above, Congress has conferred broad authority on the Commission to take such actions as are necessary to carry out the provisions of the Communications Act, including implementing, interpreting, and enforcing Section 623(f).<sup>27</sup> As amended by the 1992 Act, Section 623 generally established a regulatory regime under which the Commission was expressly delegated responsibility for promulgating the substantive and procedural rules governing the regulation of both the basic service tier and related equipment and cable programming service tiers. The only role that the 1992 Act carved out for local authorities was to enforce the standards promulgated by the Commission for the establishment of the maximum permitted rates for the basic service tier and equipment, subject to federal certification and oversight; regulation of the cable programming service tier remained the sole province of the Commission.

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<sup>25</sup> See *supra* notes 12-14.

<sup>26</sup> See *Doyle*, 66 F.3d at 871 (“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.”). Contrary to Plaintiffs’ assertion, the FCC’s rule implementing 623(f) did not expressly address the restructuring question at issue in *Doyle* when the case first arose in 1993; the FCC did not amend Section 76.981 to add subsection (b) until November 1994, after oral argument in the *Doyle* appeal.

<sup>27</sup> See *supra* note 19.

As noted above, as part of its responsibilities in carrying out the 1992 Act, the Commission adopted rules interpreting and implementing various provisions of Section 623, including the negative option billing provision in Section 623(f). Those provisions were unaffected when, as part of the 1996 Act, Congress established a “sunset” date of March 31, 1999 for Commission regulation of the rates charged for cable programming service tiers. Indeed, the 1996 Act did not mention, much less in any way modify, the negative option billing provision or the Commission’s rules implementing that provision, thereby confirming that the Commission has acted well within its authority to interpret and enforce Section 623(f). In short, absolutely nothing in the 1996 Act changed the Commission’s jurisdiction or authority to implement or enforce Section 623(f), and there is no bar to the Commission issuing the requested declaratory ruling.

**D. Plaintiffs Are Incorrect that State Ability to Enforce More Stringent Consumer Protection Laws Trumps the Commission’s Interpretation of Section 623(f).**

Plaintiffs incorrectly claim that the Commission must defer to a state court’s interpretation of Section 623(f) because the court is enforcing a state consumer protection law. But rather than being based on a more stringent state or local consumer protection statute, plaintiffs’ claim is premised entirely on an alleged violation of Section 623(f) itself, without which plaintiffs would have no claim under California’s UCL.<sup>28</sup> In fact, what plaintiffs are

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<sup>28</sup> Although California law purports to allow claims to be brought under its UCL based on violations of other statutes and rules, doing so on the basis of Section 623(f) is not permissible and is preempted by federal law pursuant to 47 C.F.R. § 76.981(c) and other bases. That issue need not be reached if the FCC determines that TWC’s understanding of Section 623(f) is correct and if the California trial court’s subsequent decisions are consistent with the FCC’s determination, but TWC reserves its rights to argue preemption if its petition is not granted or if the California trial court’s decisions are not consistent with it. Indeed, in the pending California litigation, TWC has preserved the argument that California’s UCL is invalid to the extent that it conflicts or is inconsistent with FCC rules. *See, e.g.*, TWC’s answer to SAC affirmative defenses no. 3 (primary jurisdiction) and no. 4 (preemption).

attempting is to enforce Section 623(f) and the Commission's rule in state court, albeit in a manner inconsistent with the Commission's past rulings.<sup>29</sup>

Plaintiffs also confuse the distinction between the Commission's role with respect to the implementation of the negative option billing provision under Section 623(f) and the Commission's role with respect to the establishment of customer service standards under Section 632. Section 632 expressly directs the Commission to adopt customer service standards, including standards governing information provided on customer bills. Standards adopted pursuant to Section 632 are enforced by local franchising authorities and are, by the express terms of the statute, not preemptive of more stringent local standards. However, negative option billing does not fall under Section 632. Rather, it is included in the section of the 1992 Act addressing rate regulation.<sup>30</sup> For this reason, the Commission has made clear in Section 76.981(c) that "state and local governments may not enforce state and local consumer protection laws that conflict with or undermine" the Commission's responsibilities relating to negative option billing.<sup>31</sup>

**E. TWC's Lease of Bundled Equipment Packages Does Not Violate Section 623(f).**

Plaintiffs fail to comprehend the difference between § 623(f) and the unbundling requirements of Section 76.923(b),<sup>32</sup> and falsely claim that TWC customers "pay extra" for

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<sup>29</sup> See, e.g., Petition at 9-12; *infra* at 19.

<sup>30</sup> Plaintiffs' references to the FCC Fact Sheet discussion of the regulation of bills and billing thus must be understood as a reference to the customer service standards adopted pursuant to Section 632, not to the negative option provision.

<sup>31</sup> 47 C.F.R. § 76.981(c). Notably, this is not a situation where a state has adopted consumer protection laws covering issues not addressed by, or otherwise not in conflict with, federal law. But because the California UCL incorporates Section 623(f) in its entirety by reference, state courts may not adopt an interpretation that is inconsistent with the Commission's construction and implementation of that provision.

<sup>32</sup> 47 C.F.R. § 76.923(b).

remote controls that they have not requested. On receipt of oral consent and confirmation by execution of the Work Orders, TWC leases to its customers an equipment package that includes converter boxes, remote controls, and in the case of additional outlets, a digital programming fee.<sup>33</sup> During the ordering process, it is TWC's policy to inform customers of the price of the equipment package individually and/or as part of the total cost of their order.<sup>34</sup> Section 76.923(b), however, requires TWC to "unbundle" the cost of the remote from the converter box so that the relevant regulatory body can verify whether the price charged by cable companies is reasonable and comports with the "equipment basket" calculation method for pricing in areas that are not subject to effective competition.<sup>35</sup>

Consistent with the unbundling requirement, TWC is entitled to break out the portion of the equipment fee that is attributable to remote controls on its customer bills. But customers are not "paying extra" for the remotes. Those charges are subsumed in the equipment package fee that customers affirmatively consent to in the ordering process.<sup>36</sup> Nothing in the Cable Act prohibits TWC from leasing converters with remotes that operate them, for one package price, so long as the package has been affirmatively requested by the subscriber, either orally or in writing.<sup>37</sup> Plaintiffs' new focus on the "digital programming" fee that applies to additional

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<sup>33</sup> See Pemberton Dep. at 134-35.

<sup>34</sup> Plaintiffs' comments filed in opposition to TWC's Petition include numerous inaccurate and misleading assertions regarding TWC's ordering policies and procedures. Plaintiffs' inaccurate assertions are wholly irrelevant to the general issue of statutory interpretation raised in TWC's Petition and thus should be ignored by the Commission. TWC's focus on the narrow issues presented for Commission consideration in its Petition, however, is not an admission of the accuracy of plaintiffs' description of TWC's ordering policies and procedures.

<sup>35</sup> See 47 C.F.R. §§ 76.905(a), 76.923(c), (f)-(g).

<sup>36</sup> As noted in the Petition, the facts discussed in this proceeding relate solely to TWC's general practices regarding the systems at issue in the California litigation, during the relevant period. The specifics of the conversations and other dealings between TWC and its customers can and do vary greatly among individuals, in different systems and during different time periods.

<sup>37</sup> See *Belton v. Comcast Cable*, 151 Cal. App. 4th 1224, 1236-37 (2007) (ordering a package constitutes an order for all parts of that package).

receivers is not articulated in their pleadings and in any event is misplaced. On its price lists, TWC states that the price for additional converters is \$8.99 (includes remote control and digital programming fee). By ordering an additional converter, subscribers order everything that is included in the converter package at that price.<sup>38</sup> Under Commission rules, programming fees associated with additional outlets in the subscriber's home are allowable.<sup>39</sup>

**F. TWC Has Not Improperly Delayed Presenting This Question to the Commission.**

Plaintiffs' suggestion that TWC's declaratory ruling request is untimely is incorrect. An agency's primary jurisdiction is not diminished by a claim of untimeliness.<sup>40</sup> But even if that were not the case, and even though the litigation has been ongoing for over 2½ years, TWC did not unduly delay seeking the Commission's guidance. In the litigation, plaintiffs voluntarily withdrew their first two complaints after TWC challenged the sufficiency of their pleadings. Then, when the Court overruled TWC's demurrer to the Second Amended Complaint in February 2009, the Court explicitly declined to decide "in the hypothetical" whether TWC's practices complied with Section 623(f), or whether plaintiffs even had standing to pursue their

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<sup>38</sup> Customers are informed of the components of the additional outlet converter package in TWC's price lists and/or on their monthly statements which state "additional Digital Cable Receiver \$8.00 (includes Remote Control at \$.19) and Digital Programming fee." Su Decl. Ex. JJ at TWC\_SWIN 526; *see also* Supp. Su Decl. Ex. B at TWC\_SWIN 2159 (2007 price list showing "Digital Programming Fee (2nd and each additional Outlet) \$6.95 Includes Digital Converter and Remote"); *see Belton*, 151 Cal. App. 4th at 1236-37; *Deitz*, at \*12.

<sup>39</sup> *See* 47 C.F.R. §76.923(h).

<sup>40</sup> *See, e.g., Waldmann v. Cingular Wireless, LLC*, 2007 U.S. Dist. LEXIS 96461, 5-6 (C.D. Cal. Nov. 15, 2007). Plaintiffs in *Waldmann* argued that the electronic transfer fees ("ETFs") charged by defendant were improper and/or unreasonable. Three-and-a-half years after the action was filed, the defendant moved the district court to stay the action pending resolution by the FCC of the central issue in the case, namely, whether ETFs were "rates" under the Communications Act, in which case plaintiffs' claims would be preempted by 47 U.S.C. § 332(c)(3)(A). *Id.* The district court granted the motion, concluding that it would have to address the "very same issue" that was before the FCC before adjudicating plaintiffs' claims on the merits. *Id.* at 5-6. *Genry v. Cellco P'ship*, 2006 U.S. Dist. LEXIS 97876, \*18 n.3 (C.D. Cal., Mar. 22, 2006) similarly noted that equitable considerations such as delay "are not relevant to the ultimate question of whether an issue is within an agency's primary jurisdiction." The California Supreme Court implicitly concluded that delay was insufficient to overcome primary jurisdiction concerns in *Jonathan Neil & Assocs, Inc. v. Jones*, 33 Cal. 4th 917, 935 (2004), when it affirmed the reversal of entry of judgment, with direction to the trial court to refer the issue to an agency pursuant to the primary jurisdiction

claims. In its motion for summary judgment, which was just addressed by the court on July 29, 2010, TWC provided the court with independent state law arguments that would have mooted the need to ask the Commission to interpret Section 623(f), including the fact that the named plaintiffs have knowingly been paying for and enjoying the use of TWC's converter box and remote controls for years now and could not possibly show that they were harmed in any way shape or form by the alleged violation of Section 623(f) and thus have no standing to bring their claim. Only after the state court rejected TWC's arguments were the procedural issues in the litigation ripe for TWC to seek the Commission's input. The declaratory ruling request promptly followed. Thus, plaintiffs' claim that the request has been unduly delayed is meritless.

**G. TWC's Subscriber Agreement Does Not Govern Its Compliance With Section 623(f).**

Plaintiffs' most nonsensical argument, which has already been rejected by the trial court in the underlying litigation, is that TWC is somehow precluded from reliance on the conversations between its CSRs and customers to demonstrate compliance with the negative option billing rule due to the "integration clause" in its standardized subscriber agreement. According to plaintiffs, TWC's subscriber agreement constitutes the "entire agreement" between TWC and its customers and "supersedes any oral agreements between the parties."<sup>41</sup> What plaintiffs ignore, however, is that there is a difference between TWC's contractual relationship with its customers and its obligations under the Cable Act. The conversations between its CSR and customers evidences compliance with the latter, not modification of the former and are not "superseded" in any way. Indeed, the Commission's rules expressly provide that a "subscriber's

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doctrine.

<sup>41</sup> See, e.g., Plaintiffs' Opposition at 18, 20.

affirmative request for service or equipment may be made orally or in writing.” 47 C.F.R. § 76.981(a).

Plaintiffs are relying on this meritless contractual argument because they are desperately trying to impose uniformity on a question that by its nature requires particularized inquiries, namely whether a given customer knowingly ordered the services and equipment they were ultimately supplied with and billed for by the cable company. That question cannot be answered without an individual examination of the communications between that customer and its cable provider during the ordering process.

Under plaintiffs’ theory, even if a TWC customer called up and stated “I affirmatively request two digital cable boxes and two remotes,” TWC would be in violation of 623(f) in supplying that equipment because the affirmative request was not contained in the customer’s Subscriber Agreement. This argument demonstrates the extent to which plaintiffs’ claims are divorced from the underlying purpose of the Cable Act’s negative option billing provision.

#### **IV. Grant of TWC’s Petition Would Serve the Public Interest.**

A Commission ruling granting TWC’s Petition would serve the public interest. First, a favorable ruling will advance important Congressional objectives with respect to minimizing the impact of regulation and promoting competition. While plaintiffs stress that consumer protection was one of Congress’ objectives in adopting the Cable Act, they completely overlook the fact that Congress also sought to establish a “national policy” concerning cable communications and to “assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public.”<sup>42</sup> Another one of the Cable Act’s stated purposes is to “promote competition in cable communications and minimize unnecessary

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<sup>42</sup> See 47 U.S.C. § 521.

regulation that would impose an undue economic burden on cable systems.”<sup>43</sup> A rigid and inflexible interpretation of the negative option billing provision would undermine these goals, disadvantaging cable operators vis-à-vis their competitors, while providing no additional protective benefit to consumers who have clearly agreed to purchase all the services and equipment that plaintiffs want them to then affirmatively recite by name.

Second, a grant will allow, as Congress intended, the Commission to determine the meaning of its own rule, ensuring that cable operators are not subject to varying and conflicting state court interpretations of Section 623(f). Indeed, the risk of inconsistent state-by-state judicial interpretations of Section 623(f), evidenced by the copy cat litigation filed against Cox in southern California and referenced in its comments as well as other cases brought before numerous courts in other jurisdictions,<sup>44</sup> underscores the immediate need for uniformity that only the Commission can provide.

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.<sup>45</sup> 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, as long as those laws do not conflict with the Commission’s

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<sup>43</sup> *Id.* In addition, the “Statement of Policy” in Section 2(b) of the 1992 Act (not codified in Title VI), states that it is the policy of Congress in this Act to “ensure that cable operators continue to expand, where economically justified, their capacity and the programs offered over their cable systems.”

<sup>44</sup> *See, e.g., Deitz v. Comcast Corp.*, 2007 U.S. Dist. LEXIS 53188 (N.D. Cal. July 11, 2007); *Thibodeau v. Comcast Corp.*, 2010 Phila. Ct. Com. Pl. LEXIS 171, (C.P. Phil., June 21, 2010); *Brissenden v. Time Warner Cable of New York City*, 2009 N.Y. Misc. LEXIS 2473 (N.Y. Cty. Sup. Ct. Sept. 16, 2009).

<sup>45</sup> *See* Petition, Section IV.A.

interpretation.<sup>46</sup> However, it also is clear that allowing each of the fifty states to come up with their own interpretations of Section 623(f) would undermine important national policy goals.

Further, one of the express purposes of the Cable Act is to “establish a national policy concerning cable communications”<sup>47</sup> so as to prevent a “patchwork quilt of local, State, and Federal regulation” from “rob[bing] consumers of the chance to enjoy the full range of cable services.”<sup>48</sup> It makes no sense for there to be different state judicial proclamations regarding the scope and meaning of Section 623(f)’s basic dictates, especially when the statutory restriction applies equally everywhere in the country. It is precisely such a national regulatory hodge-podge that an expert federal agency such as the Commission can prevent. The risk for inconsistent judicial interpretation underscores the need for definitive Commission guidance on the interpretation of Section 623(f).<sup>49</sup>

Third, a grant of TWC’s Petition will avoid the aggravation to cable subscribers that would result from plaintiffs’ view of what Section 623(f) requires cable operators to do in order not to run afoul of the negative option billing rule. As described in the Petition, TWC’s policies are designed to ensure that the customers has agreed to the cable services, equipment and charges both at the time the order is placed and during installation. If plaintiffs prevail, the consumer

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<sup>46</sup> See 1994 Order at ¶ 114.

<sup>47</sup> 47 U.S.C. § 521(1).

<sup>48</sup> 130 Cong. Rec. H10444 (daily ed. Oct. 1, 1984) (statement of Cong. Markey).

<sup>49</sup> Courts have recognized the importance of the Commission’s input on complex regulatory issues involved in litigation: “Given the splintered case law, the Court will be better informed after the FCC interprets the [ ] language in the statute.” *Gentry v. Cellco P’ship*, 2006 U.S. Dist. LEXIS 97876, \*17 (C.D. Cal. Mar. 22, 2006) (staying case under primary jurisdiction doctrine pending FCC interpretation of “rates charged” language in statute to “avoid the possibility that the Court may issue an order that may conflict with the FCC’s ruling on the identical issue and add to the growing confusion” in the area). In *Gentry*, the plaintiffs also argued that the FCC’s interpretation would be meaningless because statutory interpretation ultimately fell within the court’s jurisdiction. The court rejected this argument: “Even if not controlling on the Court, it would at the very least greatly assist the Court in the interpretation of the FCA. Plaintiffs’ argument that somehow the agency’s determination of this issue – which is uniquely within the scope of issues it was created to interpret – is somehow completely superfluous to the questions

would be required to recite back to the cable operator each specific component of service or equipment included in a given order, thereby rendering the process unnecessarily cumbersome and time consuming. Such an inflexible reading of the negative option billing restriction runs contrary to the pro-consumer intent of the rule by placing additional burdens on the consumer — particularly when there is no evidence of any kind of that consumers are being misled.

Construing the rule in accordance with TWC’s understanding 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.

Plaintiffs’ opposition to the requested declaratory ruling fails to rebut any of the above arguments. For example, while plaintiffs contend that the pending California litigation presents “no risk of varying interpretations” of Section 623(f),<sup>50</sup> plaintiffs also concede that the trial court has ruled that the language of Section 623(f) is “unambiguous.”<sup>51</sup> That conclusion, which has been relied upon by the trial court to ignore clear Commission guidance on the proper application of the statute, is flatly inconsistent with the Seventh Circuit’s determination in *Doyle* that the statutory language is, in fact, ambiguous.<sup>52</sup> Prompt Commission action on TWC’s Petition thus will prevent further inconsistent interpretations, thereby achieving the national uniformity intended by Congress.

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this Court must ultimately decide, is wrong.” *Id.* at \*\*21-22; *see also Waldmann v. Cingular Wireless, LLC*, 2007 U.S. Dist. LEXIS 96461, \*7 (C.D. Cal. Nov. 15, 2007) (same).

<sup>50</sup> Plaintiffs’ Opposition at 21-22.

<sup>51</sup> *Id.* at note 5.

<sup>52</sup> *See supra* note 26.

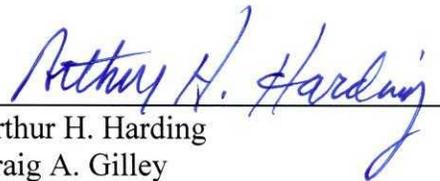
## CONCLUSION

For the reasons set forth above, TWC respectfully requests the issuance of a declaratory ruling addressing the issues raised herein on an expedited basis. Indeed, as explained above, the need for prompt Commission resolution of this matter is underscored by today's order from Judge Highberger denying TWC's request that the court stay the case pending the Commission's resolution of this declaratory ruling request.

Undersigned counsel has read the foregoing Reply, and to the best of such counsel's knowledge, information and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law, and is not interposed for any improper purpose.

Respectfully submitted,

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