



ARTHUR H. HARDING  
(202) 939-7900  
AHARDING@FH-LAW.COM

December 10, 2010

VIA ECFS

*EX PARTE NOTICE*

Ms. Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

**Re: MB Docket No. 10-215**

Dear Ms. Dortch:

On December 9, 2010, Cristina Pauzé, Vice President, Federal Regulatory Affairs of Time Warner Cable Inc. ("TWC"), Michael Quinn, Associate Counsel, Corporate of TWC, and the undersigned met with the following Media Bureau staff to discuss TWC's petition for declaratory ruling regarding negative option billing restrictions in the above-referenced proceeding: Michelle Carey, Mary Beth Murphy, Steve Broeckaert, Sonia Greenaway, John Norton and Nancy Murphy. The issues discussed at this meeting are set forth on the attached summary.

Please feel free to contact me with any questions regarding this letter.

Respectfully submitted,

A handwritten signature in black ink that reads 'Arthur H. Harding'.

Arthur H. Harding  
*Counsel for Time Warner Cable Inc.*

cc: Michelle Carey  
Mary Beth Murphy  
Steve Broeckaert  
Sonia Greenaway  
John Norton  
Nancy Murphy

212672\_2

## **Time Warner Cable Inc. Petition for Declaratory Ruling Regarding Negative Option Billing Restrictions - MB Docket No. 10-215**

### **Background**

- Time Warner Cable (“TWC”) is the defendant in a class action lawsuit in California asserting that TWC has engaged in “unlawful” negative option billing.
- Plaintiff’s claim is premised on an alleged violation of Section 623(f) of the 1992 Cable Act, which is incorporated by reference under California’s Unfair Competition Law.
- Thus, the case involves an interpretation of the Communications Act, not California law.

### **Substantive Issue Presented**

- A central issue in the litigation is 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.
  - It is TWC’s position that the negative option rule is complied with so long as the customer has ordered a particular service or piece of equipment, and has been advised of the charges applicable to such service and equipment.
  - The plaintiffs, on the other hand, contend that even after the customer has ordered the desired cable services and equipment, it is still necessary for the customer to recite back each specific component of service or equipment.
  - Plaintiffs’ proposed interpretation would inconvenience cable customers by imposing an unwieldy, cumbersome and time consuming ordering process while not providing any additional consumer protections.
- The FCC has never required the inflexible, formulaic, and impractical approach advocated by plaintiffs.
  - The negative option billing rule was designed to prevent situations where consumers are informed that they will automatically receive and be billed for unordered services unless they act to reject the offer.
  - But where, as here, it is clear that the consumer has ordered the desired services and/or equipment, the Commission has applied a flexible, common-sense approach to Section 623(f).
  - Thus, the Commission has construed the “affirmative request by name” language in Section 623(f) to be synonymous with “affirmative assent,” explicit consent,” “affirmative consent” or “prior consent.”

## **The Public Interest Warrants A Grant of TWC's Request**

- The Commission's guidance on this question will ensure that the California litigation is determined in conformity with the Commission's expert view of what its own rule requires.
  - Congress intended for 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.
- A grant of TWC's Petition will avoid the aggravation to cable subscribers that would result from plaintiffs' view of Section 623(f).

## **Prompt Commission Action is Imperative**

- The need for prompt Commission resolution of this matter is highlighted by Judge Highberger's November 19<sup>th</sup> order denying TWC's request that the court stay the case pending the Commission's resolution of this declaratory ruling request.
  - As explained by Judge Highberger in the order denying the requested 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."
  - 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 views on the proper interpretation of the statute.
  - In denying TWC's stay request, Judge Highberger stated as follows:

The good news is we are going to get the FCC's interpretation. I do wait with interest to see what they are going to say, and, candidly, by not giving you a stay I think it's going to motivate you as their petitioner and them as an agency, to speak with dispatch and not to park this on some corner of the desk.
- This order clears a path for likely class certification as soon as February 14, 2011.
- The Commission can avoid much unnecessary pleading and court proceedings if it issues its ruling on an expedited basis before February 14, 2011.
- The clarity provided by the Commission will also be useful in the resolution of similar proceedings pending in California and elsewhere.