

DOUGLAS CAIAFA
A PROFESSIONAL LAW CORPORATION
11845 WEST OLYMPIC BOULEVARD, SUITE 1245
LOS ANGELES, CALIFORNIA 90064-5095
(310) 444-5240 • FAX (310) 312-8260
dcaifa@caifalaw.com

Received & Inspected

FEB - 3 2011

FCC Mail Room

ORIGINAL

January 28, 2011

Ex Parte Notice

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

EX PARTE OR LATE FILED

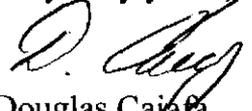
Re: MB Docket No. 10-215

Dear Ms. Dortch:

On January 25, 2011, Christopher Morosoff and I, legal counsel representing Plaintiff subscribers in a lawsuit filed in Los Angeles Superior Court against Defendant Time Warner Cable, Inc., *Swinegar, et al. v. Time Warner Cable, Inc.* (L.A.S.C. Case No. BC 389755), met with the following Media Bureau staff to discuss the Opposition of Mark Swinegar and the Plaintiffs to TWC's petition for declaratory ruling regarding negative option billing under 47 U.S.C. §543(f):

The issues discussed at the referenced meeting are set forth on the attached summary. Should you have any comments or questions regarding this letter or the attached summary, please contact me at your earliest convenience.

Very truly yours,


Douglas Caifa

cc: Michele Carey
Steve Broeckaert
Sonia Greenaway
John Norton
Nancy Murphy
Jim Carr
Nandam Joshi
Julie Veach
William Lake

Total Copies rec'd
10/13/08

0

**Summary of Issues Discussed At Meeting Re:
Plaintiffs' Opposition To TWC's Petition For Declaratory Ruling Re
Negative Option Billing Restrictions Under Section 543(f) - MB Docket No. 10-215**

Background:

- Plaintiffs brought a lawsuit in the Superior Court of Los Angeles against TWC which alleges that it has violated §543(f)'s prohibition against negative option billing by charging its customers for converter boxes and remote controls which its customers have not "affirmatively requested by name."
- In denying TWC's motion for summary judgment, the Court ruled: "The plain language of the statute [§543(f)] is unambiguous and . . . the statute unequivocally requires an 'affirmative request by name.' . . . An interpretation of affirmative request to 'assent' [as TWC proposes] 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." (Exh. 2, Order re MSJ at 7:3-10).
- Time Warner Cable, Inc. ("TWC") has sought the Commission's interpretation of 47 U.S.C. §543(f).
- TWC has also sought the Commission's opinion regarding whether TWC's ordering practices satisfy its statutory obligation under §543(f).

Issues Presented:

- Whether §543(f) requires that a customer affirmatively request his or her equipment, or whether TWC's statutory obligation is satisfied by some lesser standard such as "informed consent" or "affirmative consent."
- Whether TWC's ordering practices satisfy its statutory obligation under §543(f).
 - It is Plaintiffs' position that §543(f) requires a customer's "affirmative request," and that TWC's ordering practices do not solicit the required affirmative request (See *Time Warner Cable v. Doyle* (7th Cir. 1995) 66 F.3d 867, 877 ("*Doyle*") Cable operator [Time Warner] has a "statutory obligation to solicit an affirmative request by the customer."
 - Plaintiffs do not contend, as argued by TWC, that customers must "recite back each specific component of . . . equipment," in order for TWC to comply with the terms of the statute.
 - It is TWC's position that: It is not required to obtain a customer's affirmative request under the statute; That its ordering practices are not designed to and, in fact, do not solicit an affirmative request from its customers, as the statute

requires; and, that therefore TWC should be held to some lesser standard.

- The statute requires an “affirmative request.”
- 47 C.F.R. §76.981 requires an “affirmative request.”
- Case law requires an “affirmative request.”
- TWC’s Integration Clause Requires That Any Affirmative Request Be Found In Its Subscriber Agreement or Work Order
- TWC’s Subscriber Agreement and/or Work Order Does Not Contain or Solicit An Affirmative Request By Name

The Facts:

- The evidence in the Superior Court action establishes the following:
 - Remote Controls: TWC admits and the Court has found that: “Defendant’s customer service representatives are not trained to inform, and do not inform, customers that they will receive a remote with every converter, or that they will pay a separate monthly fee for each remote they receive. ([Undisputed Material Fact] UMF 94). (Exh. 2, Order re MSJ at 4:18-23., Exh. 3, Plaintiffs’ Separate Statement).
 - Converters: Johnson Declaration and attached sales script - Sole evidence submitted by TWC to the FCC.
 - TWC’s Sales Script fails to solicit affirmative request by name for equipment.

The Public Interest:

- The Public Interest Is Protected By Applying The Express Words of The Statute.
 - Applying a Lesser Standard Would Serve Only To Reduce The Consumer Protections Congress Intended.
 - Application of the express words of the statute established under 47 U.S.C. Section 534(f), rather than a different standard based on language not adopted by Congress or used in 47 C.F.R. §76.981, will avoid individual states from establishing their own differing interpretations of Section 543(f), would protect consumers and would promote national policy.