

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

July 6, 1995

IN REPLY REFER TO:

DA 95-1527

Released: July 7, 1995

Mr. Charles S. Walsh
Fleischman and Walsh, L.L.P.
1400 Sixteenth Street, N.W.
Washington, DC 20036

Dear Mr. Walsh:

This is in response to your letter of May 11, 1995, in which Time Warner Cable ("Time Warner") requests confirmation that certain rate and service restructurings by it on its Florida Division cable systems do not violate the negative option billing provision of federal law. In addition, Time Warner requests confirmation that, insofar as Florida law would have required it to seek affirmative consent from subscribers to accomplish such restructurings, Florida law is inconsistent with federal regulation and is, therefore, preempted.

Time Warner alleges that it restructured its channel offerings on its Florida Division cable systems on September 1, 1993, the effective date of cable rate regulation. As an example, Time Warner asserts that prior to that date, a subscriber served by its Winter Park, Florida, headend who received both the basic and standard tiers, known as "Preferred" service, was provided with 38 channels at a monthly charge of \$21.74. Time Warner alleges that on September 1, 1993, it moved two channels, WTBS and WGN, from the basic tier and one channel, American Movie Classics, from the cable programming services tier and began offering the three channels to its subscribers on an individual or "a la carte" basis for \$1.50 each per month. Time Warner asserts that it also began offering the three channels on a package basis for \$2.97 per month. According to Time Warner, effective September 1, 1993, existing Preferred service subscribers received a 14 channel basic tier and a 21 channel cable programming services tier for \$20.74, and were automatically subscribed to the new three channel package for \$2.97, for a total monthly charge of \$23.71.

Time Warner explains that a class action lawsuit now pending against it in Florida state court claims that Time Warner's restructuring constituted an unfair and deceptive trade

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practice prohibited by the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.204. Time Warner states that the primary basis for the claim is the allegation that it violated the prohibition against negative option billing contained in Section 623(f) of the Communications Act, 47 U.S.C. § 543(f), and Section 76.981 of our rules, 47 C.F.R. § 76.981. Time Warner requests confirmation that (1) the restructuring by Time Warner on September 1, 1993, described above is specifically permitted by these provisions and (2) in the event that Florida law would have required Time Warner to seek affirmative subscriber consent to accomplish this restructuring, Florida law is inconsistent with federal regulation and is preempted thereby.

Counsel for the plaintiffs in the Florida class action lawsuit sent a letter to the Bureau dated May 25, 1995 that objected to any clarification by the Commission pursuant to Time Warner's request and alleged that the facts asserted by Time Warner do not accurately reflect its activities. Specifically, plaintiffs' counsel alleged that on the Time Warner system in Geneva, Florida, the American Movie Classics channel was not part of an existing tier "but was initially offered on an *a la carte* basis after the passage of the 1992 Cable Act." Plaintiffs' counsel asserted that the Commission does not have personal jurisdiction over the plaintiffs and that the 1992 Cable Act does not delegate to the Commission any rulemaking or enforcement authority over negative option billing. Plaintiffs' counsel alleged that Time Warner has previously asserted in the court action that the Commission has primary jurisdiction in this lawsuit. He stated that the trial court rejected this assertion and enclosed copies of the briefs filed in Time Warner's interlocutory appeal of that ruling. He alleged that Time Warner's request to us is a "surreptitious attempt to circumvent the issues on appeal and the jurisdiction of the state court." Plaintiffs' counsel argued that because the 1992 Cable Act does not create a private cause of action for enforcement of the negative option billing prohibition, he has sued for relief in state court. He asserted that since the states have concurrent jurisdiction with the Commission on this issue, there is no basis for the "clarification" sought by Time Warner. He also challenged the authority of the Bureau to clarify something on behalf of the Commission and suggests that if the Commission desires to become involved in this case, it seek to intervene. Plaintiffs' counsel stated that the Commission is not the appropriate forum for resolving contract or state consumer protection issues.

Section 623(f) of the Communications Act, 47 U.S.C. § 543(f), states that "[a] cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name." It further specifies that "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." This prohibited billing practice is commonly referred to as negative option billing. In the *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Docket 92-266, *Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631 (1993), the Commission explained that the prohibition against negative option billing

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applies to "additions of a new tier of service or a new single channel service without the affirmative assent of a subscriber." *Id.* at ¶ 440. It added, however, that the negative option billing provision does not apply to "a change in the mix of channels in a tier, including additions or deletions of channels . . . unless they change the fundamental nature of the tier" or to rate increases unless the price change is accompanied by a fundamental change in service, such as the addition of a new tier. *See id.* Further, it stated that restructuring of tiers and equipment will not bring the prohibition into play if the subscribers continue to receive the same number of channels and the same equipment unless the restructuring effects a fundamental change in the nature of the service. *Id.* at ¶¶ 440-441 & n.1105. The Commission's rule on negative option billing is set forth in Section 76.981, 47 C.F.R. § 76.981.

In a Memorandum Opinion and Order released in *Warner Cable Communications, Milwaukee, Wisconsin*, LOI-93-14, 10 FCC Rcd 2103 (1995) ("*Warner-Milwaukee*"), we determined that the negative option billing prohibition was not violated in the context of a restructuring similar to the facts that Time Warner alleges. In that case, the cable operator moved two channels from the basic tier and two channels from a cable programming service tier to create a four channel a la carte package on September 1, 1993, the effective date of our rate regulations. The operator also automatically subscribed its customers to individual a la carte channels and the a la carte package of four channels so that they received the same channels they had prior to the restructuring. We found that, under the circumstances of that case, no negative option billing had occurred. We reached the same result in two other orders: *Comcast Cablevision, Tallahassee, Florida*, LOI-93-2, 10 FCC Rcd 2106 (1995) and *In the Matter of Letters of Inquiry on Negative Option Billing, LOI-93-1, et al.*, 10 FCC Rcd 2139 (1995). Copies of the orders in all of these cases are attached.

With regard to the issue of preemption, in *Warner Milwaukee* we noted that in the *Going Forward Order* the Commission stated that it specifically contemplated that, as part of the process of complying with the initial introduction of rate regulation, cable operators would have the flexibility and in some cases be required to retier, divide, or unbundle their service offerings on a faster than usual schedule without complying, for example, with notice or other requirements generally applicable. *Warner-Milwaukee* at ¶12 (citing *Sixth Order on Reconsideration and Seventh Notice of Proposed Rulemaking ("Going Forward Order")*, Docket Nos. 92-266 and 93-215, 10 FCC Rcd 1226 at ¶ 119 (1994)). Therefore, we signaled our belief in *Warner-Milwaukee* that state negative option billing rules would be preempted in that case by stating that it was "one of those situations that the Commission has previously referenced where state and local officials 'may not enforce negative option billing rules that would obstruct the accomplishment of the objectives of Congress's cable rate provisions.'" *Id.*

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Based on the letters before us, there appears to be a dispute about the underlying facts. However, if the facts are as Time Warner has described in its letter, then the attached orders would be dispositive of the Bureau's view on this issue and, in particular, the conclusions reached in our *Warner-Milwaukee* decision would apply.

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

cc: Ted B. Edwards, Esq., attorney for
Margo Mauldin & Brian Cooley