Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
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DA 96-66

Omnicom Cablevision of Illinois, Inc.
c/o Stuart F. Feldstein, Esq.
Fleischman and Walsh, L.L.P.
1400 Sixteenth Street, N.W.
Washington, DC 20036

Dear Mr. Feldstein:

This is in response to your letter of November 7, 1995, on behalf of Omnicom Cablevision of Illinois, Inc., d/b/a Post Newsweek Cable ("Omnicom"), requesting confirmation that certain rate and service restructurings implemented by Omnicom on its cable system serving Highland Park, Illinois do not violate the Commission's prohibition against negative option billing. In addition, Omnicom requests confirmation that, to the extent Illinois law would have required it to seek affirmative consent from subscribers to accomplish such restructurings, Illinois law is inconsistent with federal regulation and is, therefore, preempted. Omnicom indicates that a copy of its letter was also sent to counsel for the plaintiffs in a class action lawsuit currently pending against Omnicom in Illinois state court concerning alleged negative option billing practices (*Greenberg et al. v. Post Newsweek Cable*). Counsel for plantiffs filed a reply, dated December 4, 1995, responding to arguments raised in Omnicom's request for clarification.

Omnicom alleges that it restructured its service offerings on its cable system serving Highland Park, Illinois on or about September 1, 1993, the effective date of cable rate regulation rules adopted by the Commission pursuant to the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). These restructurings included specific line item charges for a wire maintenance service plan and a monthly programming guide. According to Omnicom, prior to September 1, 1993, the operator charged subscribers a set monthly rate for basic cable television service. This basic monthly charge included provision of the following services: basic cable programming, lease of a converter, maintenance of wiring and equipment on the subscriber's premises, and a monthly programming guide. Omnicom seeks clarification of the federal rule prohibiting negative option billing only in connection with its provision of two services -- maintenance of internal wiring and a programming guide. Omnicom states that both of these services were included in the monthly charge for basic cable service prior to September 1, 1993 and that subscribers received these services as part of the basic service package. In August of 1993, Omnicom transferred ownership of the internal wiring from the cable system to the subscribers at no cost to the subscribers. On September 1, 1993, Omnicom began separately itemizing monthly charges on the bill for wire maintenance and the cable guide as well as for basic service programming and lease of equipment. Omnicom charged subscribers $1.75 per month for wire maintenance and $.75 per month for the cable guide. According to Omnicom, subscribers were informed that they could choose to decline the monthly wire maintenance charge and elect, instead, to pay an hourly service charge for actual visits to their home. Omnicom states that subscribers were also informed that they had the option to decline to receive the monthly programming guide. Previously, subscribers had at least twice been given the option, through a check-off box on billing statements and through individual telemarketer contacts, of not receiving the cable guide. On those occasions, however, subscribers who declined to receive the program guide did not receive a reduction in the overall service charge. As of September 1, 1993, subscribers who chose not to receive the cable guide were given a $.75 discount.

Omnicom explains that it is the defendant in a class action lawsuit now pending in Illinois state court, *Greenberg et al. v. Post Newsweek Cable*. Plaintiffs in the *Greenberg* suit allege that Omnicom's imposition of charges for wire maintenance and a programming guide after September 1, 1993 violates Illinois consumer protection law because the plaintiffs did not affirmatively consent to continue to receive those services following restructuring. In its letter, Omnicom contends that it correctly interpreted federal rules and policies concerning negative option billing. Omnicom relies on the Commission's Letter of Inquiry Orders (*Comcast Cablevision, Tallahassee, Florida*, LOI-93-2, 10 FCC Rcd 2106 (1995) and *Paragon Cable, Irving, Texas*, LOI-93-25, 10 FCC Rcd 6012 (1995)) to support its claim that its restructurings do not violate the prohibition against negative option billing and comply with Commission regulations regarding the unbundling of offerings and charges. Omnicom argues that subscribers continued to receive on September 1, 1993 the same services and equipment that they had ordered and received prior to restructuring. Omnicom seeks confirmation that its unbundling of wire maintenance and programming guide charges beginning in September of 1993 is permitted by 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. Omnicom seeks further confirmation that insofar as Illinois law would have required Omnicom to seek affirmative subscriber consent to accomplish the September 1, 1993 restructurings described above, Illinois law is inconsistent with federal regulation and is preempted thereby.

In its reply to Omnicom's clarification request, counsel for the plaintiffs in the *Greenberg* suit argues that Omnicom has violated the federal prohibition against negative option billing by charging for a wire maintenance plan and program magazine not affirmatively requested by subscribers. Specifically, plaintiffs' counsel disputes Omnicom's claim that the itemization of the wire maintenance charge on consumer bills is unbundling in compliance with Commission requirements. Plaintiffs' counsel contends that Omnicom did not simply begin itemizing for previously provided maintenance service on subscriber owned equipment but, instead, transferred ownership of the inside wiring. Plaintiffs' counsel argues that a transfer of ownership is "fundamentally different from a mere unbundling". Plaintiffs' counsel likens the case at hand to *Monmouth Cablevision, Monmouth County, New Jersey*, LOI-94-1, 10 FCC Rcd 9438 (1995) in which the Commis-

sion found that the automatic billing of subscribers for the sale of a previously leased remote control unit violated federal negative option billing provisions. Our finding in *Monmouth* was based on the belief that, in the circumstances present there, changing the way in which an existing service or equipment was offered, i.e., from leasing to selling, constituted a fundamental change in service so as to invoke the prohibition against negative option billing. Plaintiffs' counsel argues that "by transferring ownership of the wiring and then automatically enrolling its subscribers in a maintenance plan to cover subscriber-owned equipment, Omnicom did something far different from a mere unbundling' of a previously-provided service, in violation of the federal prohibition against negative option billing..." Plaintiffs' counsel distinguishes the instant case from *Comcast Cablevision, Tallahassee, Florida,* LOI-93-2, 10 FCC Rcd 2106 (1995), maintaining that in *Comcast* there was no change in equipment ownership. As to the programming magazine, counsel for plaintiffs contends that itemization of the guide charge was not unbundling required by Commission rules, specifically, Section 76.923, 47 C.F.R. § 76.923. Counsel for plaintiffs also points out that subscribers who elected not to receive the programming magazine prior to September of 1993, did not receive any reduction in their cable bill. Plaintiffs' counsel cites this fact to undermine Omnicom's claim that it was merely unbundling a previously included charge, as did the operator in *Paragon Cable, Irving, Texas,* LOI-93-25, 10 FCC Rcd 6012 (1995), rather than charging a new fee through negative option billing.

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* ("*Rate Order*"), 8 FCC Rcd 5631 (1993), the Commission explained how the prohibition against negative option billing applies to changes in the mix of programming services and further stated that restructuring of tiers and equipment, including restructuring appropriate for implementing the Cable Act's provisions, would not bring the prohibition into play if subscribers continued to receive the same number of channels and the same equipment unless the restructuring effects a fundamental change in the nature of the service. *Rate Order* 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 addition to the negative option billing prohibition, Commission rules adopted pursuant to the 1992 Cable Act required many changes in the way that cable operators charge subscribers for services, including the requirement that cable operators unbundle or separate equipment and installation rates from programming rates. *Rate Order* at ¶ 287. The 1992 Cable Act sets out certain standards for determining the reasonableness of equipment and installation rates and other criteria for evaluating basic service tier rates. *Id.* In order to apply the different standards for evaluating equipment and programming rates and to provide subscribers with additional service options, the Commission required that the rates for each must be unbundled from each other. *Id.* Section 76.923(b), 47 C.F.R. § 76.923(b), states that "[a] cable operator shall establish rates for remote control units, converter boxes, other customer equipment, installation, and additional connections separate from rates for basic tier service. In addition, the rates for such equipment and installations shall be unbundled one from the other." Section 76.923, 47 C.F.R. § 76.923, also describes the type of equipment which is subject to the unbundling requirement. The type of equipment operators are required to unbundle consists of "all equipment in a subscriber's home that is used to receive the basic service tier." Section 76.923, 47 C.F.R. § 76.923, states that such equipment includes converter boxes, remote control units, connections for additional television receivers, and other cable home wiring.

The Commission's unbundling requirements have been the basis for its previous resolution of a negative option billing issue in the context of a wire maintenance service plan. In *Comcast Cablevision, Tallahassee, Florida,* LOI-93-2, 10 FCC Rcd 2106 (1995), the Commission determined that the operator did not violate the prohibition against negative option billing when it began charging subscribers separately for a wire maintenance service plan. In *Comcast Cablevision, Tallahassee, Florida,* the cable operator claimed that prior to September 1, 1993 it included wire maintenance service in the charges for the basic service tier. The operator indicated that after September 1, 1993, it restructured and billed separately for this service plan. The Commission held that the operator's separate itemization of this charge on subscriber bills was "simply compliance with Commission rules requiring unbundling" and did not constitute negative option billing. The Commission pointed out that subscribers continued to receive the same level of service before and after the operator had unbundled its equipment rates. Our decision in *Comcast* is instructive with respect to the instant case. The fact that Omnicom transferred ownership of the inside wiring to subscribers is not relevant for the purposes of our negative option billing analysis. The transfer of ownership, accomplished at no cost to subscribers, was not a negative option billing practice. Furthermore, regardless of owns the inside wiring, subscribers paid for and received wire maintenance service prior to September of 1993 and continued to pay for and receive wire maintenance service after this date.

In *Paragon Cable, Irving, Texas,* LOI-93-25, 10 FCC Rcd 6012 (1995), the Commission addressed the negative option billing issue in connection with programming guide charges. In that case, the cable operator eliminated a senior citizen discount package which included, among other things, receipt of a programming guide and began charging senior citizens a separate fee each month for the guide. The Commission determined that the itemization of a separate programming guide charge on the monthly bills of subscribers who had previously received the guide as part of the discount package did not violate federal negative option billing requirements. The Commission concluded that "[a]lthough a program guide is not an item subject to the equipment or installation rate regulation, its unbundling from the regulated tier charge appears indistinguishable from such charges for purposes of our negative option billing analysis." That conclusion appears to be equally applicable here. Counsel for plaintiffs insists that the program guide was not simply an unbundled component of the package of services previously provided because subscribers who declined to receive the guide were not given a

rate reduction prior to 1993. That subscribers received no rate reduction if the guide was not accepted does not necessarily establish that it was provided for free or that it was not part of the package of services ordered when initially subscribing. The guide was, in fact, a component part of the service offering that subscribers were entitled to receive when they ordered cable service. Therefore, when Omnicom began unbundling its cable services, the operator was permitted to itemize all services previously contained in its package, including the provision of a programming guide, and recover associated costs.

Omnicom urges the Commission to find that the enforcement of Illinois consumer protection law against Omnicom under the facts of this case is preempted by federal cable rate regulation. In its reply to Omnicom's letter, counsel for plaintiffs in the *Greenberg* suit points out that there is concurrent state and federal jurisdiction to regulate negative option billing and argues that state consumer protection law that is stricter than federal rules should not be preempted where it "does not interfere with the federal prohibition against local rate regulation." Plaintiffs' counsel also attempts to distinguish the present case from *Doyle*, asserting that *Doyle* involved only a minor adjustment in programming.

With regard to the issue of preemption, the Commission has made it clear that state and local laws relating to negative option billing are not preempted or displaced by the provisions of the 1992 Cable Act on a general basis. *Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking ("Going Forward Order")*, Docket Nos. 92-266 and 93-215, 10 FCC Rcd 1226 at ¶ 111 (1994); Section 632(c)(1) of the Communications Act. However, where there is a conflict between the rate regulation rules implementing the 1992 Cable Act and such state or local regulations, system operators are entitled to rely on the federal rules which must prevail over conflicting state or local requirements. *Going Forward Order* at ¶ ¶ 112-119 (1994). *See also Warner Cable Communications, Milwaukee, Wisconsin*, LOI-93-14, 10 FCC Rcd 2103 (1995); *Time Warner Cable v. Doyle*, 66 F.3d 867 (7th Cir. Sept. 25, 1995); Letter to Charles S. Walsh (DA 95-1527, released July 7, 1995 and Letter to Frances J. Chetwynd (DA 95-2203, released October 20, 1995). The objective of cable rate regulation is to ensure that cable rates are reasonable. Federal rules established pursuant to the 1992 Cable Act seek to achieve this objective, in part, by requiring operators to unbundle the rates charged for cable services. The unbundling and rate restructuring that took place in this situation was undertaken by Omnicom in an effort to bring its service offerings into compliance with the structure of the federal rate rules. We believe that the act of unbundling to comply with the federal cable rate regulatory scheme cannot be a basis for a state or local consumer protection law claim. We do not agree, as plaintiffs' counsel suggests, that Omnicom's restructurings, described above, are less related to compliance with the federal rate rules than were the restructurings at issue in the *Doyle* case. In *Doyle*, the operator implemented a channel restructuring not specifically required by our rules. In the instant case, Omnicom itemized wire maintenance and program guide charges in an effort to comply with the federal unbundling requirements. Additionally, in *Doyle*, the court determined that a Wisconsin consumer protection statute was preempted because its enforcement would interfere with the execution of the Commission's rate rules. We believe that, in the instant case, application of a state negative option billing law against Omnicom would similarly undermine implementation of federal cable rate regulation.

We note, in addition, that the expeditious introduction of federal rate regulation and the consequent rate and service changes implemented by cable operators did not allow for the more normal interaction with subscribers that might ordinarily take place when marketing, billing, and service offerings are revised. On July 27, 1993, the Commission, pursuant to Congressional directives, issued an *Order* that moved the effective date of cable service rate regulation from October 1, 1993 to September 1, 1993. To support the transition to this new effective date, the Commission's July 27 *Order* also preempted state or local notice requirements and waived the Commission's own notice requirements contained in 47 C.F.R. Sections 76.932, 76.964, and 76.309(c)(3)(i)(B) until September 1, 1993 to permit cable operators to restructure rates and services up until September 1, 1993 without prior notice to subscribers. The July 27 Order is reflective of a unique episode in the implementation phase of the rate regulation provisions of the 1992 Cable Act. Congress was concerned that system operators had been and were continuing to charge rates that were not subject to appropriate regulatory controls and found it imperative that such controls be introduced without delay. As reflected in the July 27 *Order*, administrative resource issues first delayed and then accelerated the effective date of the rules. Changes in billing practices associated with the introduction of regulation and in particular with the restructuring and unbundling of service offerings, imposed heavy compliance burdens. To facilitate this unique implementation phase of the regulatory process, the July 27 Order of necessity suspended certain notice and billing practice requirements that would otherwise have been associated with these changes. State or local requirements in conflict were necessarily preempted to make compliance with the introduction of both federal and local rate regulation possible. We recognize that the efforts described by Omnicom were associated with the effective date of the new rules.

Sincerely,

Meredith J. Jones
Chief, Cable Services Bureau

cc: M.H. Berns (counsel for plaintiffs in *Greenberg et al. v. Post Newsweek Cable)*