

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of

Monmouth Cablevision,  
Monmouth County, New Jersey

LOI-94-1

Letter of Inquiry - Negative  
Option Billing Issue

**MEMORANDUM OPINION AND ORDER**

Adopted: August 11, 1995 Released: August 22, 1995

By the Chief, Cable Services Bureau

**I. Introduction**

1. In a letter dated October 20, 1993, the Commission received a complaint alleging violations by Monmouth Cablevision ("Monmouth") of Commission regulations governing the provision of cable television service.<sup>1</sup> In response to this complaint, the Commission issued Letter of Inquiry 94-1 ("LOI") to Monmouth on February 22, 1994.<sup>2</sup> The LOI requested Monmouth to provide information concerning compliance with the Communications Act's prohibition on negative option billing.

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<sup>1</sup> The Commission received a letter, dated October 20, 1993, from Congressman John D. Dingell, with an attachment from a subscriber to Monmouth Cablevision. The Congressman wrote on behalf of a subscriber to Monmouth Cablevision who had complained about being billed for the purchase of the remote control unit which the subscriber previously leased.

<sup>2</sup> Letter from Alexandra M. Wilson, Acting Chief, Cable Services Bureau, FCC, to Monmouth Cablevision, LOI-94-1 (February 22, 1994).

2. We conclude that Monmouth's conduct with regard to automatically billing its customers for the sale price of a remote control unit which had been previously leased to the customers violated the negative option billing provisions of federal law.

**II. Facts**

3. Beginning September 1, 1993, the effective date of our rate regulations, Monmouth ceased leasing remote control units to customers of its cable system in Monmouth County, New Jersey. Prior to September 1, Monmouth customers could lease a remote control unit at the monthly rate of \$1.00 per unit. After September 1, the bills of subscribers who had been leasing remote control units contained a \$5.00 charge denominated "used remote control sale." These bills stated that "[m]onthly charges for remote control units are being eliminated and Monmouth Cablevision is providing customers with the option to purchase the remote control units they currently have in their homes as well as additional new remote control units. Existing remotes will be billed at \$5.00 each on our October statement. Customers wishing to assume ownership of their remotes need only pay that charge. Customers who do not wish to purchase their remotes need only return them to have that charge removed. Additional new remotes are available at our customer service locations for just \$15.00." Monmouth states, in its response to this LOI, that customers who did not wish to purchase their remote control units could return them by December 15, 1994 and receive a credit to their account. Monmouth also states that the price charged for the purchase of the remotes was derived by taking the depreciated gross book value of all remote control units and apportioning it on a per remote basis.<sup>3</sup>

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<sup>3</sup> We do not address in this Order the reasonableness of the sale price of the remote control units.

4. Monmouth states that it advertised the sales price of the remote control units and that it would no longer provide or maintain such units in The Asbury Park Press on August 31, 1993; on Monmouth Cable Live!, a cable television show, from August 27, 1993 through October 14, 1993; in cable television messages during September and October, 1993; and in telephone messages played throughout the month of October 1993 when calls to the operator were placed on hold. Customers also received information on this change in leasing policy in an insert with their October, 1993 bills.

### III. Background

5. In the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"), Congress created a process for regulating cable programming and equipment rates. Section 3(f) of the Cable Act adds a new provision to the Communications Act which states that "[a] cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name."<sup>4</sup> 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."<sup>5</sup> This prohibited billing practice is commonly referred to as negative option billing.

6. 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")*<sup>6</sup> implementing this Section of the 1992 Cable Act, the Commission explained that the 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>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

7. The Commission rule, with respect to negative option billing states, in relevant part:

(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>

<sup>4</sup> Communications Act of 1934 § 623(f), 47 U.S.C. § 543(f).

<sup>5</sup> *Id.*

<sup>6</sup> 8 FCC Rcd 5631 (1993).

<sup>7</sup> *Rate Order*, ¶ 440.

<sup>8</sup> *Id.*

<sup>9</sup> *See Id.* at ¶¶ 440-441 & n. 1105 (the Commission recognized that the 1992 Cable Act did not restrict movement of channels to deregulated status but it doubted that such changes would occur frequently).

<sup>10</sup> 47 C.F.R. § 76.981(a).

8. With respect to sales of customer equipment, the Commission rule states:

A cable operator may sell customer premises equipment to a subscriber. The equipment price shall recover the operator's cost of the equipment, including costs associated with storing and preparing the equipment for sale up to the time it is sold to the customer, plus a reasonable profit.<sup>11</sup>

#### IV. Discussion

9. The 1992 Cable Act provides that "[a] cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name."<sup>12</sup> Monmouth asserts that those subscribers who were leasing remote control units had affirmatively requested them. Although we agree that, in a literal sense, this is the same equipment that the customer previously rented, we cannot find that these customers affirmatively requested to purchase these remotes rather than renting them. The issue here is whether changing the way in which existing service and equipment is offered, *i.e.*, from leasing to selling, constitutes a fundamental change of service so as to invoke the prohibition against negative option billing. After careful review, we conclude that Monmouth's act of billing customers for the sales price of the remote control units without their affirmative request violates the negative option billing provisions of the statute and the Commission's rules.

10. Monmouth asserts that the sale of the remote control units was simply part of the company's rate restructuring. It argues that it followed Commission rules on restructuring which do not invoke the negative option billing restrictions unless the restructuring results in a fundamental change in the nature of existing service. However, when and if Monmouth's subscribers requested a remote control unit prior to restructuring, they presumably understood that the unit was company-owned equipment leased to them for use for a monthly fee. The nature of a lease or user's fee and the legal status of being a lessee or user is fundamentally different from a sale and the legal status of being an owner. It is reasonable to assume that the customers who were leasing the remotes never expected that Monmouth would (or could) unilaterally charge them for such a fundamental change in the nature of the service they requested and in their own legal status with respect to the equipment at issue by automatically billing them for the alleged "purchase" of the remotes without their prior consent to such sale. Accordingly, we find that Monmouth violated the negative option billing restriction by automatically billing customers for equipment without their prior consent.

11. This interpretation of Commission rules, we believe, protects the interests of subscribers in not being billed for services or equipment they have not requested or whose nature has been fundamentally changed. Section 3(f) of the 1992 Cable Act seeks to ensure that subscribers not be billed for services that they never ordered. The restrictions of this provision protect subscribers from having to take on the burden of identifying and negatively responding to charges for services that appear on a bill that are not desired and for which no request has been made. It protects subscribers both from inadvertent payment of such charges and from becoming contractually bound for them. The conclusion we reach here is consistent with this provision and its purposes. To change the way in which the equipment is offered from leasing to selling significantly changes the contractual relationship between Monmouth and its customers. Unlike other cases where we reached a contrary

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<sup>11</sup> 47. C.F.R. § 76.923(i); *See also* n. 3, *supra*.

<sup>12</sup> Communications Act of 1934 § 623(f), 47 U.S.C. § 543(f).

result,<sup>13</sup> here we believe that more occurred than simply rearranging the way the same services and equipment were offered. In this case, what consumers unilaterally were billed for (the purchase of a remote) is fundamentally different from what they had previously requested and agreed to (the lease of a remote). In light of this, we conclude that Monmouth, with respect to automatically billing its customers for the purchase price of their remote control units, violated the federal negative option billing restrictions, Section 3(f) of the 1992 Cable Act and our rules.<sup>14</sup>

12. Although we conclude that Monmouth Cablevision violated the negative option billing provisions of the rules and the statute, we find it unnecessary at this time to either seek a monetary forfeiture or to impose other remedial relief. In exercising this discretion, we take into account the *de minimis* difference between the \$5.00 purchase price and the total rental price that would be paid over a relatively brief period of time. We also note

that Monmouth Cablevision could have achieved the same result by charging the \$1.00 rental fee for five months and, thereafter, eliminating the rental option and charge. We are aware, as well, of the large number of regulatory requirements that became effective on September 1, 1993, and the associated compliance difficulties. Monmouth Cablevision should, however, be prepared, in accordance with the statutory provision on negative option billing, to address any remaining disputes with subscribers regarding the purchase requirement so that subscribers not wishing to purchase are not, without their positive consent, required to pay the purchase price.

13. Accordingly, IT IS ORDERED, that this proceeding is TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Meredith J. Jones  
Chief, Cable Service Bureau

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<sup>13</sup> See Comcast Cablevision, Tallahassee, FL, Letter of Inquiry 93-2, DA 95-61 (January 20, 1995); Warner Cable Communications, Milwaukee, WI, Letter of Inquiry 93-14, DA 95-60 (January 20, 1995); C-Tec Cable Systems, City of McBain and Zeeland Charter Township, MI, Letter of Inquiry 93-1, Comcast Cablevision, Howard County, MD, Letter of Inquiry 93-3, US Cable, Lake Forest and Lake Bluff, IL, Letter of Inquiry 93-13, Multivision Cable TV, Prince Georges County, MD, Letter of Inquiry 93-15, Time Warner Cable, Everett, Somerville and Winthrop, MA, Letter of Inquiry 93-16, Century Southwest Cable TV, Beverly Hills and Los Angeles, CA, Letter of Inquiry 93-17, Comcast Cablevision, Mount Clemens, MI, Letter of Inquiry 93-19, Nashoba Cable Services, Danvers, MA, Letter of Inquiry 93-23, Vision Cable of North Carolina, NC, Letter of Inquiry 93-24, Falcon Cable, Harrisonburg, VA, Letter of Inquiry 94-2, and Warner Cable, Harrisonburg, VA, Letter of Inquiry 94-5, DA 95-106 (January 25, 1995); and Paragon Cable, Irving, TX, Letter of Inquiry 93-25, DA 95-556 (March 21, 1995).

<sup>14</sup> Communications Act of 1934 § 632(f); 47 U.S.C. § 543(f); 47 C.F.R. § 76.981.