

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

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| In the Matter of: |) | |
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| Time Warner Cable, |) | |
| A Division of Time Warner Entertainment |) | MB Docket No. 06-151 |
| Company, L.P. |) | |
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ORDER

Adopted: August 3, 2006

Released: August 3, 2006

By the Chief, Media Bureau:

I. INTRODUCTION

1. NFL Enterprises LLC (“the NFL”), operator of the NFL Network, has filed an Emergency Petition for Declaratory Ruling and Enforcement Order, or in the Alternative, for Immediate Injunctive Relief (“Petition”). In its Petition, the NFL alleges that Time Warner Cable (“Time Warner”) has violated section 76.1603 of the Commission’s rules by dropping the NFL Network from cable systems that Time Warner recently acquired from Adelphia Communications and Comcast Corporation without providing subscribers thirty-days notice. For the reasons stated herein, we order Time Warner, on a temporary basis, to reinstate carriage of the NFL Network on all of its newly acquired systems on previously applicable terms until we are able to resolve the NFL’s Petition on the merits. We also establish an expedited pleading cycle to afford the Commission the ability to promptly resolve this dispute.

II. BACKGROUND

2. In an Order released on July 21, 2006, the Commission approved a transaction that, among other things, resulted in Time Warner acquiring control of cable systems serving millions of customers from Adelphia Communications.¹ As part of this transaction, Time Warner also gained control of cable systems from Comcast Corporation through system swaps between the two companies. The NFL alleges that on August 1, 2006, Time Warner discontinued carriage of the NFL Network on the systems that Time Warner had acquired from Adelphia and Comcast. The NFL Network is a cable channel that provides in-depth coverage of the NFL and is scheduled, among other programming, to show 54 NFL preseason games and eight NFL regular-season primetime games this season. The NFL further alleges that Time Warner did not provide subscribers with thirty-days notice before dropping the NFL Network from its newly acquired systems and therefore violated section 76.1603 of the Commission’s rules.

¹ See *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., et al.*, Memorandum Opinion and Order, MB Docket No. 05-192, FCC 06-105 (rel. July 21, 2006)

3. Section 76.1603(b) provides, as part of the Commission's customer service standards, that notice of a change in programming services offered by a cable operator "must be given to subscribers a minimum of thirty (30) days in advance of such changes if the change is within the control of the cable operator." Moreover, section 76.1603(c) separately requires cable operators to "give 30 days written notice to both subscribers and local franchising authorities before implementing any rate or service change" and states that, "When the change involves the addition or deletion of channels, each channel added or deleted must be separately identified." Here, the NFL argues that Time Warner's decision to drop the NFL Network from its newly acquired systems without providing thirty-days notice was entirely within Time Warner's control and thus violated section 76.1603. Moreover, the NFL claims that Time Warner's violation of the Commission's rule prevented subscribers from expressing their dissatisfaction with the removal of the NFL Network and/or arranging for service from another video provider to avoid a disruption in their access to the NFL Network.

4. In its Petition, the NFL therefore asks the Commission immediately to issue a Declaratory Ruling and Enforcement Order finding that Time Warner has violated section 76.1603 and directing Time Warner to reinstate carriage of the NFL Network on its newly acquired systems until it provides subscribers with thirty-days notice of any decision to drop the NFL Network. Alternatively, in the event that the Commission is unable to issue such an order immediately, the NFL urges the Commission to issue "prompt injunctive relief" that would restore the *status quo ante* until its Petition is resolved.

III. DISCUSSION

5. At this stage of the proceedings, we are unable to issue a final decision on the NFL's Petition. Based on the current state of the record, however, we conclude that the NFL is entitled to appropriate interim relief. Specifically, we direct that Time Warner reinstate carriage of the NFL Network on all of its newly acquired systems on the same terms under which it was carried prior to August 1, 2006, until we are able to resolve the NFL's Petition on the merits. In addition, due to the time-sensitive nature of the NFL's request, we direct Time Warner to file its response to the NFL's Petition on or before August 15, 2006. The NFL may file a reply to Time Warner's response on or before August 20, 2006. This expedited pleading cycle will afford the Commission the ability to promptly resolve this dispute.

6. In evaluating whether to grant interim relief of this nature, we generally consider the four criteria used by federal courts to evaluate a request for a preliminary injunction: (1) the likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of preliminary relief; (3) the degree of injury to other parties if relief is granted; and (4) whether the preliminary relief will further the public interest.² We have also recognized that in a situation such as this, involving "administration of regulatory statutes designed to promote the public interest," the public interest factor "necessarily becomes crucial."³ Moreover, "a compelling demonstration that the public interest would be irreparably harmed lessens the level of certainty required of a moving party to show that it will prevail on the merits."⁴

7. Our conclusion that the NFL is entitled to interim relief is principally based on our determination that such relief will further the public interest. The rule requiring cable operators to provide subscribers with thirty-days notice before dropping a channel serves at least two important purposes. First, it provides customers with the opportunity to make their voices heard before any programming changes are made. Second, it allows customers to make arrangements to secure dropped

² See *In re AT&T Corp., et al.*, 13 FCC Rcd 14508, 14515-16 (1998).

³ *Id.* at 14516.

⁴ *Id.*

channels through alternative means, such as by changing service providers. Here, it appears that Time Warner discontinued the NFL Network with essentially no warning to customers, thus not giving them sufficient time to obtain alternative MVPD service so that they could continue to watch the NFL Network without interruption. Such action by Time Warner was particularly harmful to customers given the time of year. With NFL training camps now underway and the NFL's pre-season schedule commencing on August 11, 2006, now is a time when many football fans have a particular desire to view the NFL Network's programming, which will include numerous pre-season games and extensive coverage of NFL training camps. Therefore, each day that Time Warner customers go without the NFL Network significantly and irreparably harms many of them, particularly those in Buffalo, Cleveland, and Dallas, each of which is home to an NFL team. By contrast, we do not believe that the interim relief sought by the NFL will cause any significant harm to the public.

8. We also conclude that the NFL has established a threat of irreparable harm to itself if interim relief is not granted. Given the number of affected households, Time Warner's decision threatens to have a substantial effect on the NFL Network's viewership. This is significant because August is an important month for the channel, both because of the many pre-season games shown and the fact that "viewership patterns for the coming season (where to watch pre-game and post-game shows) are established" in August.⁵ Therefore, denying the NFL Network access to viewers during this crucial time period would have not only a substantial short-term impact, but would also have long-term detrimental effects on the network. On the other hand, we do not think that requiring carriage of the NFL Network on a temporary basis on the same terms that it previously carried the network will cause significant harm to Time Warner. Based on the current record, it does not appear that Time Warner objects in principle to carrying the NFL Network. Rather, Time Warner merely wishes to carry it on different terms than those agreed to by the relevant cable systems' prior owner. In light of this fact, we have little difficulty concluding that the harm to the NFL and Time Warner's customers that would result in the absence of interim relief outweighs any harm that such interim relief will cause to Time Warner.

9. Finally, we examine the NFL's prospects for success on the merits. In light of our determination above with respect to the public interest as well as the balance of harms, we do not believe that the NFL is required to demonstrate an overwhelming likelihood of success on the merits in order to be entitled to interim relief. Rather, under these circumstances, we believe that the NFL need only demonstrate that it has a reasonable prospect of success on the merits, a showing that we conclude that the NFL has easily made here. Given the current state of the record, it appears that Time Warner discontinued carriage of the NFL Network without providing customers with the requisite 30-days notice under section 76.1603(b) and (c). Moreover, it appears that the decision made by Time Warner was "within the control of the cable operator" as that phrase is used in section 76.1603 since the termination of the NFL Network did not result from any uncontrollable external event, such as a natural disaster. Moreover, we find that the NFL has a reasonable prospect of showing that Time Warner's actions, which affected millions of customers across the nation residing within numerous franchising authorities' jurisdiction, constitute systemic abuses that undermine the statutory objectives.

IV. CONCLUSION

10. While we make no final decision on the merits of the NFL's Petition, we believe that the equities here favor directing Time Warner to reinstate carriage of the NFL Network on all of its newly acquired systems on the same terms under which it was carried prior to August 1, 2006, until we are able to resolve the NFL's Petition on the merits. In particular, we conclude that the public interest strongly weighs in favor of such interim relief and that the harms to the NFL and Time Warner customers of foregoing this relief outweigh any harm caused to Time Warner. We also conclude, that in light of the balance of the equities here, NFL has established a sufficient prospect of success on the merits to justify this relief.

⁵ Petition at 12.

V. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED**, that pursuant to Sections 4(i) and 623 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 543, and 47 C.F.R. §§ 0.283, 0.61, 76.7 and 76.1603, Time Warner Cable reinstate carriage of the NFL Network on all systems newly acquired from Adelphia Communications and Comcast Corporation on the same terms under which the NFL Network was carried prior to August 1, 2006. This order shall be effective immediately and shall remain in effect until the NFL's petition is resolved on the merits.

12. **IT IS FURTHER ORDERED**, that Time Warner SHALL FILE its response to the NFL's Petition on or before August 15, 2006, and the NFL MAY FILE a reply to Time Warner's response on or before August 20, 2006.

13. Finally, **IT IS FURTHER ORDERED**, that the Media Bureau SHALL IMMEDIATELY NOTIFY the NFL and Time Warner Cable of this Order and SHALL SEND it to the NFL and Time Warner Cable, by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna C. Gregg
Chief, Media Bureau