

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

In the Matter of) File Number EB-07-SE-352
)
Oceanic Time Warner Cable,) NAL/Acct. No. 200832100074
a subsidiary of Time Warner Cable, Inc.)
) FRN 0018049841
)

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: August 22, 2008**Released: August 22, 2008**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”), we find that Oceanic Time Warner Cable (“Oceanic”), a subsidiary of Time Warner Cable, Inc. (collectively, “TWC”) apparently willfully violated Section 76.1603(c) of the Commission’s Rules (“Rules”).¹ Specifically, Oceanic failed to provide the requisite thirty (30) day advanced written notice to the Hawaii Department of Commerce and Consumer Affairs, Cable Television Division, which serves as the local franchise authority (“LFA”) for the State of Hawaii, before implementing a service change caused by the migration of certain channels to its Switched Digital Video (“SDV”) platform on September 24, 2007. We conclude, pursuant to Section 503(b) of the Communications Act of 1934, as amended (“Act”),² that Oceanic is apparently liable for a forfeiture in the amount of seven thousand five hundred dollars (\$7,500).

II. BACKGROUND

2. On November 8, 2007, the Spectrum Enforcement Division of the Enforcement Bureau (“Bureau”) issued a Letter of Inquiry (“LOI”)³ to TWC based on complaints that the company had moved certain cable channels, which previously had been accessible to subscribers using CableCARD-equipped unidirectional digital cable products (“UDCPs”), including digital cable ready sets, to an SDV platform. CableCARDs permit the reception of secured digital cable services without the addition of a set-top box. Specifically, one complainant alleged that Oceanic had deployed SDV in late September 2007 and moved a large number of channels to an SDV platform, including popular high definition sports and entertainment channels.⁴ According to the complaints, however, TWC’s implementation of SDV necessarily required customers using a CableCARD to obtain additional equipment, *i.e.*, a set top box, from the cable company to continue to receive all cable channels available to them prior to the change to

¹ 47 C.F.R. § 76.1603(c).

² 47 U.S.C. § 503(b).

³ See Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission to Mark Lawrence-Apfelbaum, Esq., Executive Vice President and General Counsel, Time Warner Cable, Inc. (Nov. 8, 2007) (“LOI”).

⁴ See Letter from Robert A. Flatt to Kevin J. Martin, Chairman, Federal Communications Commission dated Nov. 7, 2007 (available as a comment in CS Docket No. 97-08) (“*Flatt Complaint*”).

the two-way SDV platform.⁵ The LOI sought information on a number of issues, including whether the company had complied with Section 76.1603 of the Commission's Rules by providing written notice to local franchising authorities at least thirty (30) days before implementing any rate or service change.

3. TWC responded to the LOI on November 30, 2007.⁶ In its LOI Response, TWC does not claim that Oceanic notified the relevant LFA of its plans to move certain channels to an SDV platform. Rather, TWC states, among other things, that the notification provisions of Section 76.1603 do not apply because the "provision of SDV services does not involve a change in rates or service packages."⁷ Specifically, TWC states that its "decision to begin transmitting certain channels using SDV technology does not constitute a 'rate or service change' for which TWC is required to give specific advance notice to franchising authorities pursuant to Section 76.1603(c) of the Commission's rules."⁸ TWC contends that it offers the same service tiers to subscribers at the same prices before and after deployment of SDV technology – customers simply need a set top box to view any two-way services.⁹ Moreover, according to TWC, "any customer needing a set-top box to receive the same channels received before the activation of SDV, can obtain such a box without an upgrade or downgrade charge"¹⁰ (which is usually required when customers make changes to their service). TWC further notes that it has taken steps to keep subscribers apprised of its plans with respect to its SDV deployment,¹¹ and notes that Oceanic took additional steps to mitigate the impact of its movement of channels to SDV technology by offering subscribers with CableCARDS an opportunity to lease an interactive set-top box for two years for the same monthly charge as a CableCARD.¹²

4. TWC further contends that the only applicable notice requirement is Section 76.1622 of the Commission Rules, which requires that cable operators provide annual equipment compatibility notices to advise consumers that "some models of TV receivers ... may not be able to receive all of the channels offered by the cable system when connected directly to the cable system."¹³ According to TWC, it complied with Section 76.1622 in its June 2007 annual equipment compatibility notice, which specifically informs subscribers that "due to device limitations, devices using CableCARD technology only receive what is known as 'one-way' cable services, and such devices will not receive 'two-way' cable services, such as TWC's electronic program guide, Pay-Per-View, Video-on-Demand or switched digital video services."¹⁴

⁵ *Id.* at 1. See also Letter from Richard C. Brooks, Jr. to Kevin J. Martin, Chairman Federal Communications Commission dated Aug. 27, 2008 (available as a comment in CS Docket No. 97-08) ("*Brooks Complaint*").

⁶ See Letter from Arthur H. Harding, Fleischman and Harding LLP and Matthew A. Brill, Latham & Watkins LLP, Counsel for Time Warner Cable, to Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (Nov. 30, 2007) ("LOI Response").

⁷ *Id.* at 8.

⁸ *Id.* at 9.

⁹ *Id.*

¹⁰ *Id.* at 10.

¹¹ *Id.* at 6. For instance, TWC points out that it provided announcements of its plans for deployment of SDV to potentially affected CableCARD customers in a number of its Divisions. For certain customers in its Hawaii Division, Oceanic provided 30 day-advanced notice, dated August 20, 2007, about the planned deployment of SDV scheduled for September 24, 2007.

¹² *Id.* at 4.

¹³ 47 C.F.R. § 76.1622(b)(1).

¹⁴ LOI Response at 8 (emphasis added), and Attachment 4.

III. DISCUSSION

A. Oceanic Apparently Violated Section 76.1603(c) By Failing To Provide Proper Notice to the Hawaii LFA

5. Based on the record before us, we find that Oceanic apparently willfully violated Section 76.1603(c) by failing to provide the Hawaii Department of Commerce and Consumer Affairs, Cable Television Division,¹⁵ thirty (30) days advance notice prior to its movement of certain channels to a SDV platform on September 24, 2007.¹⁶

6. We disagree with TWC's assertion that its subsequent movement of linear channels to an SDV platform did not involve a change in rates or service subject to Section 76.1603's notice requirements.

7. Section 76.1603(c) of the Rules provides, in relevant part, as follows:

[C]able systems shall give 30 days written notice to both subscribers and local franchising authorities before implementing any rate or service change. Such notice shall state the precise amount of any rate change and briefly explain in readily understandable fashion the cause of the rate change (e.g., inflation, change in external costs or the addition/deletion of channels). When the change involves the addition or deletion of channels, each channel added or deleted must be separately identified.¹⁷

We find that migration of channels that were previously accessible with a CableCARD-equipped UDCP to a switched digital platform that can only be accessed with an operator-provided set-top box constitutes a change in services for those customers that use CableCARDs without a set-top box. Indeed, TWC's own notice to subscribers concedes this point by contrasting "what is known as 'one-way' services" (provided using CableCARD technology) with "'two-way' cable services" (which CableCARD technology cannot provide).¹⁸ Based upon TWC's own characterization, therefore, the migration to a switched digital platform can be likened to the deletion of channels, in that subscribers who accessed those channels with a CableCARD-equipped UDCP lost those channels unless they took some action. Thus, Oceanic's actions triggered the obligation to provide advance written notice to both customers and the appropriate LFA.

8. Oceanic's movement of programming to a SDV platform rendered inaccessible dozens of cable channels previously accessible on CableCARD-equipped UDCPs. Its offer to exchange each CableCARD for a digital cable box at no extra charge, and to discount the digital box in exchange for the CableCARD for a minimum of two years,¹⁹ does not negate the fact that CableCARD customers have experienced a service change. From the customer's perspective, on September 23, 2007, a CableCARD-

¹⁵ The Cable Television Division of the Hawaii Department of Commerce and Consumer Affairs regulates franchised wireline cable operators within the State of Hawaii. See <http://hawaii.gov/dcca/areas/catv/> (visited Aug. 21, 2008).

¹⁶ The record indicates that Oceanic implemented SDV in certain cable systems in its Hawaii Division on September 24, 2007 and on November 6, 2007. Our ruling here pertains only to the implementation of SDV on September 24, 2007.

¹⁷ 47 C.F.R. § 76.1603(c).

¹⁸ LOI Response at 8, and Attachment 4.

¹⁹ Oceanic's August 20, 2007 notice to CableCARD customers stated that customers could exchange their CableCARDS for a digital cable box(es) at no extra charge and could schedule a free visit by contacting the Customer Care Center. The notice further stated that discounting the digital box(es) in exchange for the CableCARD(s) would continue for a minimum of two years. See LOI Response, Attachment 1.

equipped UDCP without a set-top box received certain channels; on September 24, 2007, that same device received forty fewer channels. As the Commission stated in another case involving TWC, “it is the subscribers’ perspective – not that of the cable operator – that is relevant in determining whether a change in programming services has occurred.”²⁰ We doubt that Oceanic’s customers would view the loss of more than forty (40) channels -- including popular high definition programming -- as merely an “equipment compatibility” issue.²¹ Indeed, according to a channel listing from two months after Oceanic’s migration of channels to an SDV platform, 135 of 248 Oceanic Time Warner’s linear channels were unavailable to CableCARD users, including popular news and entertainment programming.²²

9. TWC’s interpretation of the Rules would have us find that cable operators apparently have no obligation to inform either their customers or LFAs about the movement of channels to a platform inaccessible to those customers without additional equipment. If we followed TWC’s construction of the Rules to its logical conclusion, cable operators could, with nothing more than an annual equipment compatibility notice, move all their channels to such platforms without further notice to customers and local governing bodies, and thereby render CableCARDs entirely useless. Regardless of the consequences, cable operators would violate no FCC rule if they abruptly moved channels to an SDV platform with no notice to anyone. Such an interpretation defies both precedent and common sense.

10. As the Commission reiterated in its recent decision²³ addressing the responsibilities of cable operators regarding the transition to digital broadcast television, cable operators must comply with certain notice requirements when they make changes in programming service, particularly ones that will affect the channels viewable by subscribers. In that decision, the Commission reminded operators that they must provide written notice to subscribers about transitions to all-digital systems, containing any information they need or actions they will have to take to continue receiving service.²⁴ As the Commission has stated, previously, “it is crucial that local franchising authorities receive timely notice of a cable operator’s change to programming services.”²⁵

²⁰ *Time Warner Cable, a Division of Time Warner Entertainment Company, L.P.*, Order on Reconsideration, 21 FCC Rcd 9016, 9020 ¶ 15 (Media Bur. 2006) (“*Time Warner Order on Reconsideration*”), *consent decree adopted*, Order, 21 FCC Rcd 11229 (Media Bur. 2006). We note that the Consent Decree adopted in that case contained an admission by TWC that “its discontinuation of its carriage of the NFL Network without notification of its subscribers violated Section 76.1603.” *Id.* at 11229 ¶ 2; *see also id.* at 11233 ¶ 14. The Consent Decree, however, also states that it “does not constitute an adjudication on the merits or a factual or legal finding or determination regarding compliance or noncompliance with the requirements of the Act or the Rules and the Commission’s orders.” *Id.*

²¹ We understand that many television sets equipped to utilize CableCARDs can display high-definition television programming. Thus, the unavailability of HD channels to CableCARD users has particular significance.

²² *Flatt Complaint*, Attachment 1 (“Digital Channel Lineup-Kona”). That channel listing also indicated that at least two broadcast stations, including the local NBC affiliate, were unavailable to CableCARD users. TWC has stated that this listing was an error and has been corrected. LOI Response at 10. The current channel lineup listed on Oceanic’s website now indicates that more than 100 linear programming channels (excluding pay-per-view, on-demand, and audio channels) remain unavailable to such subscribers.

²³ *See Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064 at ¶ 38 & n. 121 (2007). Although this decision came after Oceanic’s September 24, 2007 movement of channels to its SDV platform, the Commission was merely reminding cable operators of existing law, not changing its interpretation of the Rules. *Id.*

²⁴ *Id.* at ¶ 38.

²⁵ *Time Warner Order on Reconsideration*, 21 FCC Rcd at 9027 ¶ 30.

11. Therefore, for the reasons stated above, we find that Oceanic apparently violated Section 76.1603(c) by failing to provide at least thirty (30) days notice to the Hawaii LFA before moving certain linear channels to its SDV platform.²⁶

B. Forfeiture Calculation

12. Under Section 503(b)(1)(B) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.²⁷ To impose such a forfeiture penalty, the Commission must issue a notice of apparent liability and the person against whom such notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.²⁸ The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.²⁹ As discussed below, we conclude that Oceanic is apparently liable for a forfeiture in the amount of seven thousand five hundred dollars (\$7,500) for its willful violation of Section 76.1603(c) of the Rules.

13. Under Section 503(b)(2)(A) and Section 1.80(b)(1) of the Commission's Rules,³⁰ we may assess a cable television operator a forfeiture of up to \$32,000 for each violation or each day of a continuing violation, up to a statutory maximum forfeiture of \$325,000 for any single continuing violation. In exercising such authority, we are required to take into account "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."³¹

14. The Commission's *Forfeiture Policy Statement*³² and Section 1.80 of the Rules do not establish a specific base forfeiture for violation of Section 76.1603's notice requirements.³³ Based on the

²⁶ To the extent that Section 76.1622 of our Rules applies in this context, we would not find TWC to be in violation of the requirement that cable operators at least annually provide subscribers the relevant equipment compatibility notices. Also, though we do not address here whether Oceanic's movement of channels to a SDV platform is consistent with the Commission's "plug and play" policies, we note that this movement might further discourage consumers from the use of CableCARDS as an alternative to TWC-supplied set top boxes. *See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, Report and Order, 13 FCC Rcd 14775, 14786-7, ¶¶ 28-32 (1998) ("Manufacturers will have substantial incentive to develop and distribute new products in response to consumer demands for equipment and features, provided that the MVPD system for which the equipment is designed is accessible."). *See also* 47 C.F.R. §§ 76.1201, 1202, 1204(c). We will consider those concerns and complaints separately. *See e.g., Flatt Complaint* at 1-2; *Brooks Complaint* at 2-3.

²⁷ 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

²⁸ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

²⁹ *See, e.g., SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 (2002).

³⁰ 47 U.S.C. § 503(b)(2)(A), 47 C.F.R. § 1.80(b)(1). The Commission has repeatedly amended Section 1.80(b)(1) of the Rules to increase the maximum forfeiture amounts, in accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461. Most recently, the Commission raised the maximum forfeitures applicable to cable operators, broadcast licensees, and applicants for such authority from \$32,500 to \$37,500 for a single violation, and from \$325,000 to \$375,000 for continuing violation. *See Inflation Adjustment of Maximum Forfeiture Penalties*, 73 Fed. Reg. 44663, 44664 (July 31, 2008). The new forfeiture limits take effect September 2, 2008 and do not apply to this case.

³¹ 47 U.S.C. § 503(b)(2)(E). *See also* 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures.

³² *See The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17115 (1997) ("*Forfeiture Policy Statement*"), *recon. denied*, 15 FCC Rcd 303 (1999).

³³ The Bureau has substantial discretion, however, in proposing forfeitures. *See, e.g., InPhonic, Inc.*, Order of

totality of circumstances here and the Commission's past precedent,³⁴ we find that \$7,500 is an appropriate base forfeiture for the failure to notify the Hawaii LFA of Oceanic's change in service. Accordingly, we conclude that Oceanic is apparently liable for a \$7,500 forfeiture for its willful violation of Section 76.1603(c) of the Rules.

IV. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Section 1.80 of the Rules, Oceanic Time Warner Cable, a subsidiary of Time Warner Cable, Inc. is **NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of seven thousand five hundred dollars (\$7,500) for willful violation of Section 76.1603(c) of the Rules.

16. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Rules, within thirty days of the release date of this Notice of Apparent Liability for Forfeiture, Oceanic **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

17. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. Oceanic will also send electronic notification on the date said payment is made to JoAnn.Lucanik@fcc.gov.

18. The response, if any, must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Enforcement Bureau – Spectrum Enforcement Division, and must include the NAL/Acct. No. referenced in the caption. The response should also be e-mailed to JoAnn Lucanik, Deputy Chief, Spectrum Enforcement Division, Enforcement Bureau, FCC, at JoAnn.Lucanik@fcc.gov.

19. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3)

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Forfeiture and Further Notice of Apparent Liability, 22 FCC Rcd 8689, 8699 (2007); *Globcom, Inc. d/b/a Globcom Global Commun.*, Order of Forfeiture, 21 FCC Rcd 4710, 4723-24 (2006). We may apply the base forfeiture amounts described in the *Forfeiture Policy Statement* and the Commission's rules, or we may depart from them altogether as the circumstances demand. See 47 C.F.R. §1.80(b)(4) ("The Commission and its staff *may* use these guidelines in particular cases [, and] *retain the discretion* to issue a higher or lower forfeiture than provided in the guidelines, to issue no forfeiture at all, or to apply alternative or additional sanctions as permitted by the statute.") (emphasis added).

³⁴ See, e.g., *Northland Cable Television, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 7865 (Media Bur. 2008) (proposing \$20,000 forfeiture for apparent violations of Section 76.1603 and other rules); *Northland Cable Television, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 7872 (Media Bur. 2008) (same).

some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

20. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by first class mail and certified mail return receipt requested to counsel for Time Warner, Inc.: Arthur H. Harding, Esq., Fleischman and Harding LLP, 1255 23rd Street, N.W., Eighth Floor, Washington, D.C. 20037 and Matthew A. Brill, Esq., Latham & Watkins LLP, 555 Eleventh Street, N.W., Suite 1000, Washington, D.C. 20004-1304.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief, Enforcement Bureau