

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

In the Matter of)	File Number EB-07-SE-352
)	
Oceanic Time Warner Cable, a division of Time Warner Cable, Inc.)	NAL/Acct. No. 200932100002
Oceanic Kauai Cable System)	FRN 0018049841
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

Adopted: October 15, 2008

Released: October 15, 2008

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture and Order* (“*NAL and Order*”), we find that Oceanic Time Warner Cable (“Oceanic Kauai”), a division of Time Warner Cable, Inc. (together with Oceanic Kauai, “TWC”) apparently willfully violated Sections 76.1201 and 76.640(b)(1) of the Commission's Rules (“Rules”) in its Oceanic Kauai cable system.¹ Specifically, Oceanic Kauai apparently violated Section 76.1201 by moving certain channels to a Switched Digital Video (“SDV”) platform on November 6, 2007, thereby preventing subscribers with CableCARD-equipped unidirectional digital cable products (“UDCPs”) from using their navigation devices to access these channels.² Further, in its deployment of SDV on November 6, 2007, TWC apparently violated Section 76.640(b)(1) by failing to provide a virtual channel table which conforms to the standards required under Sections 76.640(b)(1)(i) and 76.640(b)(1)(v). We conclude, pursuant to Section 503(b) of the Communications Act of 1934, as amended (“Act”),³ that TWC is apparently liable for a forfeiture in the amount of twenty thousand dollars (\$20,000). We also require TWC to make appropriate refund of fees charged to customers affected by TWC’s movement of linear channels to the SDV platform on November 6, 2007.⁴

II. BACKGROUND

2. Congress and the Commission have long recognized the importance of allowing consumers the freedom to purchase their own navigation devices from sources other than their cable operator, satellite provider, or other multichannel video programming distributor (“MVPD”). Thus, Congress adopted Section 629 of the Act,⁵ which requires the Commission to ensure the commercial availability of navigation devices. By separating the security and navigation functions of equipment used to receive MVPD programming, Congress hoped to spur competition and expand consumer choice. As

¹ 47 C.F.R. §§ 76.1201, 76.640(b)(1).

² The term “navigation devices” refers to “converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems.” 47 C.F.R. § 76.1200(c). The UDCPs at issue in this proceeding include certain “digital cable ready” televisions and TiVo digital video recorders.

³ 47 U.S.C. § 503(b). This *NAL and Order* is issued through the coordinated effort of the Commission’s Enforcement Bureau and Media Bureau. See 47 C.F.R. §§ 0.61(f)(5), 0.111(15).

⁴ TWC’s notice to its customers, as well as technical papers submitted by the company to the Bureau, support our characterization of TWC’s actions as “moving” or “migrating” linear programming to a SDV platform.

⁵ 47 U.S.C. § 549. Section 629 was adopted as part of the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56 (1996).

the House Report accompanying Section 629 noted, “competition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality. Clearly, consumers will benefit from having more choices among telecommunications subscription services available through various distribution sources.”⁶ At the same time, Congress recognized that MVPDs have “a valid interest, which the Commission should continue to protect, in system or signal security and in preventing theft of service.”⁷

3. In its order proposing rules implementing Section 629, the Commission stated that its overarching goal was to assure competition in the availability of set-top boxes and other customer premises equipment.⁸ The Commission explained that “[a]s navigation devices are the means to deliver analog and digital communications, competition in the navigation equipment market is central toward encouraging innovation in equipment and services, and toward bringing more choice to a broader range of consumers at better prices.”⁹

4. Thus, in adopting Section 76.1201 of the Commission’s Rules,¹⁰ which allows subscribers to acquire, attach, and use any compatible navigation device with an MVPD’s system, as long as that equipment does not cause harmful interference or facilitate theft of service, the Commission likened its actions to its *Carterfone* decision in the telephone environment.¹¹ In *Carterfone*, the Commission allowed consumers to attach legal devices to the telephone network unless that equipment would harm the network. The Commission stated that “[a]s a result of *Carterfone* and other Commission actions, ownership of telephones moved from the network operator to the consumer. As a result, the choice of features and functions incorporated into a telephone has increased substantially, while the cost of equipment has decreased.”¹² The Commission emphasized that “[f]ollowing the *Carterfone* principle adopted in the telephone context would allow subscribers the option of owning their own navigation devices and would facilitate the commercial availability of equipment.”¹³ The Commission stated that “[t]he steps taken in this Report and Order, if implemented promptly and in good faith, should result in an evolution of the market for navigation devices so that they become generally and competitively available.”¹⁴ The Commission recognized that its work on these issues was not complete, however, and reiterated its commitment to monitoring developments regarding the compatibility of set-top boxes and digital televisions.¹⁵

⁶ H.R. REP. NO. 104-204, at 112 (1995).

⁷ *Id.*

⁸ *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Devices*, Notice of Proposed Rulemaking, 12 FCC Rcd 5639, 5641 (1997).

⁹ *See Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Report and Order, 13 FCC Rcd 14775, 14776, ¶ 2 (1998) (“*Navigation Devices Order*”).

¹⁰ 47 C.F.R. § 76.1201.

¹¹ *See Navigation Devices Order*, 13 FCC Rcd at 14778 (citing *Use of the Carterfone Device in Message Toll Service*, Decision, 13 FCC 2d 420, 424-25 (1968), *recon. denied*, 14 FCC 2d 571(1968)).

¹² *Navigation Devices Order*, 13 FCC Rcd at 14780, ¶ 11.

¹³ *Id.* at 14786.

¹⁴ *Id.* at 14780, ¶ 11. The Commission acknowledged that “the parallel to the telephone has limitations” and specifically stated that the rules it adopted in implementing Section 629 of the Act sought to accommodate the differences from the telephone model. *Id.* at 14780, ¶ 12.

¹⁵ *Id.* at 14781.

5. Five years later, in the *Plug and Play Order*,¹⁶ the Commission took further steps to facilitate the direct connection of digital navigation devices (including commercially available UDCPs) to MVPD systems. Specifically, the Commission considered standards agreed upon by the cable and consumer electronics (“CE”) industries¹⁷ and adopted a cable compatibility standard for integrated, unidirectional digital cable television receivers, as well as other UDCPs, to ensure the compatibility and commercial availability of UDCPs with cable television systems. Generally, the *Plug and Play Order* required MVPDs to support operation of UDCPs and to ensure the utilization of such navigation devices in connection with their cable systems. In addition, the Commission required MVPDs to make available a security element separate from the basic navigation device. Under this framework, the Commission sought to enable unaffiliated manufacturers, retailers, and other vendors to commercially market UDCPs while allowing MVPDs to retain control over their system security.

6. Consumers with UDCPs access MVPD programming by using a CableCARD leased from the cable operator.¹⁸ UDCPs employ a standard interface that permits them to negotiate with the CableCARD. The CableCARD descrambles the MVPD’s encoded digital signal and allows the subscriber to view the programming. Thus, commercially available UDCPs can be compatible with cable systems nationwide, while cable operators maintain their ability to secure programming content from unauthorized viewing. In theory, this arrangement allows consumers access to all of a cable operator’s linear programming¹⁹ without the need of a separate set-top box leased from their cable operator, while protecting the cable operator from theft of its programming services.²⁰

7. But recent events have demonstrated the limits of this theory. Traditionally, cable systems have used broadcast-type technologies that deliver all programs to all subscribers whether the subscribers view the programs or not. The programs not viewed nonetheless occupy system bandwidth, which prevents the use of that bandwidth for any other purpose. Because of ever-increasing constraints on bandwidth, many cable operators have begun to test and deploy SDV technology in their cable systems.²¹ In

¹⁶ *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 20885 (2003) (“*Plug and Play Order*”). “The term ‘plug and play’ refers to a device’s ability to plug into a cable system and receive digital cable programming without a cable-operator provided set-top box.” *Third Further Notice of Proposed Rulemaking*, 22 FCC Rcd at 12025, n.9.

¹⁷ See *December 2002 Memorandum of Understanding Among Cable MSOs and Consumer Electronics Manufacturers. Plug and Play Order*, 18 FCC Rcd at 20887, n. 3 (citing Letter from Carl E. Vogel, President and CEO, Charter Communications, et al., to Michael K. Powell, Chairman, FCC (Dec. 19, 2002) (“2002 MOU”)). The MOU “reflects a compromise agreement among the parties [cable and consumer electronics industries] on a specification that will permit the manufacture of unidirectional cable television receivers that include [the same] ... navigation functionality [that currently exists for set-top boxes].” *Plug and Play Order*, 18 FCC Rcd at 20890, ¶ 7.

¹⁸ In most cases, the MVPDs have employed CableCARDS as their separate-security solution to enable non-integrated conditional access. *But see Cablevision Systems Corporation’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, Memorandum Opinion and Order, 22 FCC Rcd 220, 221-222 (2007). The Commission granted Cablevision a waiver of the ban on cable operator deployment of set-top boxes with integrated security to allow Cablevision to use a Smart-Card-based separate-security solution, which is CableCARD-compatible with the use of an adaptor.

¹⁹ The term “linear programming” is generally understood to refer to video programming that is prescheduled by the programming provider. Cf. 47 U.S.C. § 522(12) (defining “interactive on-demand services” to exclude “services providing video programming prescheduled by the programming provider”).

²⁰ *Third Further Notice of Proposed Rulemaking*, 22 FCC Rcd at 12025 ¶¶ 3-4.

²¹ 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, 21095, ¶ 60 (2007) (“*Viewability Order*”) (“Cable operators continue to develop ways to use their available capacity more efficiently. For example, cable operators, in order to keep pace with their competitors, are beginning to deploy ‘switched digital’-capability in their networks. In a switched digital environment, a channel is transmitted via coaxial cable to a subscriber’s premises only when the subscriber tunes to that channel.”).

an SDV system, a subset of programming is delivered in the traditional way to all subscribers regardless of whether they are viewing the programs. For those channels, the CableCARD-equipped UDCP works as described above, allowing the subscriber to view the channels delivered in the traditional broadcast manner. The remaining channels are switched through the use of SDV network equipment located at a “hub” (where signals are converted and placed onto the “last mile” coaxial portion of the network). These switched channels do not occupy bandwidth, and are not available to subscribers until a subscriber tunes to that channel by sending a request, using a remote control or program guide, upstream through the use of a set-top box to the hub. At the hub, the SDV equipment directly receives and processes set-top channel change requests for switched content and responds to that set-top with the frequency and program number where that content can be found. Once the hub receives the request, it immediately begins to transmit the channel.

8. A customer who uses a CableCARD-equipped UDCP to receive programming, however, must have additional equipment with the necessary upstream signaling capability to obtain the switched (*i.e.*, bi-directional) channels. The UDCP cannot perform the bi-directional functions necessary to request delivery of a channel via SDV. Nor can the CableCARD, which is designed only to provide the separate security element, provide the necessary interface needed to send the signal to the SDV server. Thus, in essence, in an SDV system, all subscribers must have a cable-operator supplied set-top box to view channels placed on the SDV platform.

9. As noted above, the *Plug and Play Order* not only adopted standards to allow commercially available navigation devices to work with MVPD systems, but also adopted technical rules to ensure that cable subscribers would be able to view digital cable services while still enjoying full functionality of their UDCPs.²² The Commission did so pursuant to Section 624A of the Act,²³ which requires the agency to ensure that cable subscribers enjoy the full benefit of available cable programming as well as the features and functions of their televisions. To that end, the Commission adopted Section 76.640(b) of the Rules, which obligates cable operators to support UDCPs through compliance with certain Program System Information Protocol (“PSIP”) standards put forth by the Advanced Television Systems Committee (“ATSC”). The standards referenced in Section 76.640 were proposed as part of the *2002 MOU* reached between cable operators and consumer electronics manufacturers to ensure compatibility between consumer electronics devices and cable systems.

10. The deployment of SDV technology has implications for cable operators’ compliance with certain subparts of Section 76.640(b). First, Section 76.640(b)(1)(i) provides, in relevant part:

(b) No later than July 1, 2004 cable operators shall support unidirectional digital cable products, as defined in §15.123 of this chapter, through the provision of Point of Deployment modules (PODs) and services, as follows:

(1) Digital cable systems with an activated channel capacity of 750 MHz or greater shall comply with the following technical standards and requirements:

(i) SCTE 40 2003 (formerly DVS 313): “Digital Cable Network Interface Standard” . . . , provided however that with respect to Table B.11, the Phase Noise requirement shall be -86 dB/Hz, and also provided that the “transit delay for most distant customer” requirement in Table B.3 is not mandatory.

SCTE 40 2003, Section 5.5 states that “[w]hen one or more scrambled services are offered on the cable system, System and Service Information for all services (both scrambled and in-the-clear) shall be carried in

²² See *Plug and Play Order*, 18 FCC Rcd at 20892.

²³ 47 U.S.C. § 544a.

an out-of-band Forward Data Channel, as defined in section 3.3.3 above, using the formats described in SCTE DVS/234 (rev.2).”²⁴ ...

11. In essence, Section 76.640(b)(1)(i) requires cable operators to send UDCPs a one-way stream of data that is separate from the video programming (the “out of band Forward Data Channel”). That data stream includes channel lineups and other programming information otherwise known as “service information tables.” This requirement applies to *all* services, both scrambled and in the clear.

12. Second, Section 76.640(b)(1)(v) further provides, in relevant part:

(v) When service information tables are transmitted out-of-band for scrambled services:

(A) The data shall, at minimum, describe services carried within the transport stream carrying the PSIP data itself;

(B) A virtual channel table shall be provided via the extended channel interface from the POD module. Tables to be included shall conform to ANSI/SCTE 65 2002 ... “Service Information Delivered Out-of-Band for Digital Cable Television”....²⁵

13. Together, Section 76.640(b)(1)(i) and Section 76.640(b)(1)(v) require a cable operator to provide information to UDCPs allowing them to find and display a scrambled programming service on a particular channel. Section 76.640(b)(1)(i) is the basic requirement regarding service information tables, and Section 76.640(b)(1)(v) provides the more detailed specifications for how cable operators should format and transmit a particular service information table -- the “virtual channel table.” That table acts as a legend for the UDCP. When a cable operator transmits its digital cable services, those services are not necessarily transmitted on the channels listed on a subscriber’s programming guide. The virtual channel table enables a UDCP to display the programming services on the channels on which the subscriber expects to see them. As noted above, virtual channel table information is sent on a data channel separate from the video programming (“out-of-band”) via a communication path agreed upon by cable operators and CE manufacturers (the “extended channel interface”).

14. Because of the bi-directional nature of SDV technology, however, UDCPs cannot view programming provided on such a platform. If a cable operator transmits a virtual channel table that includes SDV programming to a UDCP, the UDCP will indicate that SDV programming should appear on certain channels but will be unable to display it. To avoid such a scenario, some cable operators may have unilaterally excluded SDV programming from the virtual channel tables transmitted to customers with CableCARD-equipped UDCPs.

15. On November 8, 2007, the Spectrum Enforcement Division of the Enforcement Bureau (“Bureau”) issued a Letter of Inquiry (“LOI”)²⁶ to TWC based on complaints that the company had moved certain cable channels that previously had been accessible to subscribers using CableCARD-equipped UDCPs, such as digital cable ready television sets and digital video recorders, to an SDV platform. Specifically, one complainant alleged that TWC had deployed SDV and moved a large number of channels to an SDV platform, including popular high definition (“HD”) sports and entertainment channels.²⁷ According to the complaints, TWC’s implementation of SDV necessarily required customers

²⁴ See SCTE 40 2003, Section 5.5, page 16.

²⁵ 47 C.F.R. § 76.640(b).

²⁶ 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) (“Nov. 8 LOI”).

²⁷ 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*”). According to the August 21, 2007

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 the SDV platform.²⁸ The LOI sought information on a number of issues, and asked the company to explain how its implementation of SDV was consistent with Section 629 of the Act, Commission rules implementing that statute,²⁹ the 2002 MOU,³⁰ and in particular, the policies and rules established by the Commission in the *Plug and Play Order*.³¹ The Bureau issued its first supplemental LOI on August 25, 2008³² and a second supplemental LOI on October 3, 2008³³ to TWC to obtain additional information concerning the company's deployment of SDV.

16. TWC responded to the LOI on November 30, 2007,³⁴ and responded in part to the first supplemental LOI on September 12, 2008³⁵ and in full on September 23, 2008.³⁶ TWC responded to the second supplemental LOI on October 14, 2008.³⁷ In its response, TWC admits that its Oceanic Kauai cable system deployed SDV for its Kauai customers on November 6, 2007, moving 62 linear channels to an SDV platform.³⁸ For CableCARD customers affected by its SDV deployment,³⁹ TWC offered set-top

notice that TWC sent to its Hawaii subscribers, Oceanic planned to move certain channels to a two-way switched digital platform on September 24, 2007. TWC ultimately delayed its deployment of SDV until November 6, 2007. See Letter from Arthur H. Harding, Fleischman and Harding LLP and Matthew A. Brill, Latham & Watkins LLP, counsel for TWC, dated September 12, 2008 ("Sept. 12 Supplemental LOI Response") at Exhibit A.

²⁸ *Id.* at 1. In addition to the *Flatt Complaint*, the Commission has received several other complaints from TWC customers about Oceanic's SDV deployment. We have provided relevant excerpts and identifying information for those complaints in Attachment A. Unlike the *Flatt Complaint*, these complaints were not filed in a public Commission docket, so we will treat the complainants' names as confidential for privacy reasons.

²⁹ The Nov. 8 LOI stated we were investigating possible violations of Section 629 of the Act, 47 U.S.C. § 549, and Sections 76.640, 76.980(f), 76.984, 76.1204, 76.1206, and 76.1603 of the Commission's rules, 47 C.F.R. §§ 76.640, 76.980(f), 76.984, 76.1204, 76.1206, and 76.1603.

³⁰ See *Plug and Play Order*, 18 FCC Rcd at 20885 n.3.

³¹ *Id.* at 20885.

³² See Letter from JoAnn Lucanik, Deputy Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission to Arthur H. Harding, Fleischman and Harding LLP and Matthew A. Brill, Latham & Watkins LLP, counsel for TWC, (Aug. 25, 2008) ("Aug. 25 Supplemental LOI"). The Aug. 25 Supplemental LOI noted that the investigation now included possible violations by TWC of Sections 76.1201 and 76.1202 of the Rules. 47 C.F.R. §§ 76.1201, 76.1202. *Id.*, at note 3.

³³ See Letter from JoAnn Lucanik, Deputy Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, to Arthur H. Harding, Fleischman and Harding LLP and Matthew A. Brill, Latham & Watkins LLP, counsel for TWC, (Oct. 3, 2008) ("Oct. 3 Supplemental LOI").

³⁴ 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) ("Nov. 30 LOI Response").

³⁵ See Sept. 12 Supplemental LOI Response.

³⁶ See Letter from Arthur H. Harding, Fleischman and Harding LLP and Matthew A. Brill, Latham & Watkins LLP, Counsel for Time Warner Cable, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 23, 2008) ("Sept 23 Supplemental LOI Response"). TWC provided clarification on the Hawaii cable systems affected by the November 6, 2007 SDV implementation on October 6, 2008. See e-mail from Matthew Brill to JoAnn Lucanik October 6, 2008 ("Oct. 6 E-mail").

³⁷ See Letter from Arthur H. Harding, Fleischman and Harding LLP and Matthew A. Brill, Latham & Watkins LLP, Counsel for Time Warner Cable, to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 14, 2008) ("Oct. 14 Supplemental LOI Response").

³⁸ Sept. 12 Supplemental LOI Response, Exhibit A.

³⁹ TWC reports that its Hawaii Division, which includes its Oceanic Kauai cable system, had 415,534 subscribers at the time of SDV deployment. The company does not have a precise estimate of the number of CableCARD-using

boxes at the same price as the customers' CableCARDs for two years from the date of SDV deployment.⁴⁰ TWC states that it had planned to deploy SDV on several other Hawaiian islands, but has deferred that action until it has provided 30 days notice to the relevant Local Franchising Authority ("LFA").⁴¹

17. With respect to the technical requirements described above, TWC admits that it does not provide its subscribers using CableCARD-equipped UDCPs with a virtual channel table that includes programming on its SDV platform.⁴² Rather, it enables its CableCARD subscribers to navigate only to "all one-way services *provided* to the UDCP."⁴³ TWC asserts that its actions are consistent with Section 76.640 of the Commission's Rules because – according to TWC – Section 76.640(b)(1)(v) does not require that UDCPs be able to navigate "two-way programming streams delivered using SDV technology."⁴⁴

III. DISCUSSION

A. TWC Apparently Willfully Violated Section 76.1201 By Requiring Subscribers To Obtain A Set-Top Box To View Previously Accessible Linear Programming

18. Section 76.1201 of the Rules prohibits an MVPD from "prevent[ing] the connection or use of navigation devices to or with its system" unless such devices would cause electronic or physical harm or allow the unauthorized receipt of service.⁴⁵ Based on the record before us, we find that TWC apparently willfully⁴⁶ violated Section 76.1201 by moving certain linear channels to an SDV platform in its Oceanic Kauai cable system⁴⁷ on November 6, 2007.⁴⁸ In so doing, TWC prevented subscribers with UDCPs, such as "digital cable ready" televisions and TiVo recorders, from viewing the switched linear channels that were already part of their subscription package without the use of a TWC-supplied set-top box, thus impairing the use of those UDCPs within the affected cable system. Additionally, because customers now must have a TWC-leased set-top box to view many of their channels, even on UDCP devices, TWC's migration of channels to an SDV platform has prevented the use of some functions available on those UDCPs, such as the abilities to view picture-in-picture and to record one channel while viewing another channel.⁴⁹

UDCPs affected by its SDV deployment, but believes it to be less than 583. *Id.*

⁴⁰ In its most recent offer, TWC limited the period for affected CableCARD customers to receive a free set-top box to six months. *Id.*

⁴¹ *Id.*

⁴² Oct. 14 Supplemental LOI Response at 7 (emphasis added).

⁴³ *Id.* (emphasis in original).

⁴⁴ *Id.*

⁴⁵ 47 C.F.R. § 76.1201.

⁴⁶ Section 312(f)(1) of the Act defines "willful" as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the context of Section 503(b). *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991), *recon. denied*, 7 FCC Rcd 3454 (1992).

⁴⁷ TWC states that in its Hawaii Division, TWC deployed SDV for the islands of Oahu and Kauai on November 6, 2007; and that the Maui, Kona and Hilo SDV deployment, scheduled for September 2, 2008, was being delayed. Sept. 12 Supplemental LOI Response, Exhibit A.

⁴⁸ We are aware that other TWC cable systems have implemented SDV and will address the legality of those actions in future proceedings.

⁴⁹ Section 624A of the Act expressly mandates that the Commission "minimize interference with or nullification of the special functions of subscriber's television receivers or video cassette recorders," and thus ensure the full compatibility of these devices with the cable system. 47 U.S.C. § 544a(c)(1)(B).

19. Notwithstanding its effect on CableCARD-using UDCP owners, TWC contends that its movement of existing linear channels to an SDV platform is fully consistent with the Act and the Commission's rules and policies, including the *Plug and Play Order* and the 2002 MOU between the cable operators and the CE industry.⁵⁰ TWC states that the *Plug and Play Order*, which adopted specific provisions of the 2002 MOU with certain modifications, established a regulatory framework for the commercial introduction of unidirectional navigation devices, and explicitly recognized that *all* two-way services, including SDV service, would require a set-top box.⁵¹ TWC submits that the Commission fully anticipated and accounted for the deployment of new interactive services like SDV, and sought to ensure that the standards adopted in the *Plug and Play Order* would not freeze technology or stifle the innovation of new technology.⁵² According to TWC, neither the 2002 MOU nor the *Plug and Play Order* prohibit cable operators from deploying new services or restrict the development or deployment of SDV or other bi-directional technologies and services.⁵³ TWC argues that rather than prohibiting the deployment of new technology and services by cable operators, the Commission sought to safeguard consumers' interest by promoting outreach and consumer education.⁵⁴ TWC claims that it has fulfilled its responsibilities to subscribers with UDCPs by informing them of the need for a set-top box to receive two-way services, and, for the SDV deployment at issue here, has accommodated consumers using a CableCARD-equipped UDCP by offering to lease a set-top box at no additional charge for two years.⁵⁵ In short, TWC argues that the Commission's rules leave cable operators "free to innovate and introduce new products and services without regard to whether consumer electronics manufacturers are positioned to deploy substantially similar products and services."⁵⁶

20. We reject TWC's arguments as inconsistent with the language and the intent of the Commission's rules and orders.⁵⁷ Taken to its logical conclusion, TWC's reasoning would permit an

⁵⁰ Nov. 30 LOI Response at 1, 14-17.

⁵¹ Specifically, TWC states that "[j]ust as the *Plug & Play Order* expressly recognized that a set-top box would be required to receive any interactive services, the MOU made clear that the unidirectional products it covered 'do not utilize the return path of the cable system.' As a result the MOU recognizes that UDCPs would require a set-top box to access services such as VOD or IPPV. Since SDV – like VOD and IPPV – does utilize the return path of the cable system, it falls outside of the MOU's description of covered products and services." *Id.* at 16 (internal citations omitted).

⁵² *Id.* at 15. TWC cites to *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment*, Second Report and Order, 20 FCC Rcd 6794 (2005) ("2005 Deferral Order"). In the *2005 Deferral Order*, TWC states that the Commission explained its "objective ... has been 'to ensure that the goals of Section 629 are met without fixing into law the current state of technology.'" Nov. 30 LOI Response at 4-5 (citing to *2005 Deferral Order*, 20 FCC Rcd at 6812, ¶35).

⁵³ *Id.* at 14. Rather, TWC states, the Commission's *Plug and Play Order* explicitly recognized that all two-way services, including SDV, would require a set-top box.

⁵⁴ *Id.* at 5. According to TWC, the Commission "encouraged cable operators to 'ensure that subscribers and local retailers are both aware of the availability of digital cable service in their area and of the compatibility of unidirectional digital cable products with operators' systems,' and further called on the consumer electronics industry 'to collaborate with both their retail partners and the cable industry to develop consumer awareness campaigns about unidirectional digital cable televisions and their functionalities, particularly with regard to the need for set-top boxes in order to receive interactive services.'" *Id.* (citing *Plug and Play Order*, 18 FCC Rcd at 20904, at ¶41). Once again, we note that the Commission clearly indicated its understanding that UDCPs' problems were limited to "interactive services" and not linear programming.

⁵⁵ *Id.* at 15. As noted earlier, however, TWC has offered only six months of discounted fees for its set-top boxes for its upcoming planned deployment of SDV in Hawaii. See Sept. 12 Supplemental LOI Response at Exhibit A. Many other TWC divisions have not offered any discounts.

⁵⁶ Nov. 30 LOI Response at 5 (citing *2005 Deferral Order*, 20 FCC Rcd at 6809, ¶ 30.)

⁵⁷ TWC also argues that "curtailing TWC's ability to deliver its programming of choice based on its selection of the most efficient technology available would likely run afoul of the First Amendment." See Oct. 14 Supplemental LOI

MVPD to move *all* of its programming to an SDV platform without regard for the impact its actions would have on customers using or wishing to use CableCARD-equipped UDCPs. Such an outcome would be fundamentally at odds with the Commission's goal of protecting cable subscribers' ability to view signals through the use of commercially available navigation devices offered in a competitive market. TWC's movement of linear channels that were previously accessible with a CableCARD-equipped UDCP to a switched digital platform that can only be accessed with a TWC-provided set-top box conflicts with the Commission's rules and policies designed to promote competition and consumer choice of navigation devices.

21. While we recognize that the *Plug and Play Order* does not prohibit cable operators from developing and deploying new technology and services, it does not permit TWC's actions here. In recognizing that cable operators are free to innovate and introduce new products and services, the Commission cautioned that such development and deployment of new products and services should not interfere with the functioning of consumer electronics equipment or the introduction of such equipment into the commercial market for navigation devices.⁵⁸ Indeed, the Commission has continually emphasized that its navigation device rules are an important tool for promoting competition and bringing more choices to consumers.⁵⁹ Yet the manner in which TWC has opted to administer its SDV programming effectively negates the concerted efforts and advances made thus far to achieve a competitive pro-consumer environment for such equipment.

22. Specifically, by moving linear programming to an SDV platform, TWC has prevented CableCARD-equipped UDCPs from receiving previously available channels and impaired the usefulness of competitive commercially available navigation devices, in violation of the Commission's Rules and the intent of Section 629. The Commission recognized that devices made pursuant to the standard adopted in the *Plug and Play Order* lacked upstream or bi-directional capabilities and therefore could not receive certain programming or services, but that recognition did not extend to services that consumers traditionally experienced as one-way services or programming that was part of the package for which they were already paying.⁶⁰ At no point did the Commission authorize MVPDs to modify their transmission of linear programming such that UDCP devices could no longer receive such programming without a set-top box.⁶¹ TWC states that its activation of SDV technology did not prevent its customers with UDCPs from

Response at 5 (citation omitted). We reject this argument. The requirements at issue are content neutral and are narrowly tailored to further the substantial federal interest of maximizing commercial availability of navigation devices to the consumer. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994).

⁵⁸ *2005 Deferral Order*, 20 FCC Rcd at 6809-10.

⁵⁹ *Id.*

⁶⁰ "Due to the unidirectional nature of this receiver specification, an external navigation device would still be needed to receive advanced features such as cable operator-enhanced electronic programming guides ('EPGs'), impulse pay per view ('IPPV') or video on demand ('VOD')." *Plug and Play Order*, 18 FCC Rcd at 20890, ¶7. See also *Third Further Notice of Proposed Rulemaking*, 22 FCC Rcd at 12025-26, ¶4 ("Devices made pursuant to this standard have the ability to receive encrypted digital cable programming, but do not have any upstream, or bi-directional, capabilities (*i.e.*, consumer electronics manufacturers can only make unidirectional devices under the technical standard adopted in the *Plug and Play Order*). For example, such devices cannot support two-way services such as EPGs, VOD, PPV, and other ITV [Interactive Television] capabilities.").

⁶¹ TWC's Nov. 30 LOI Response cites an *ex parte* letter it filed in the *Plug and Play* docket in 2006. In that letter, TWC states that it informed staff from the Commission's Media Bureau "that SDV would impact some subscribers using [UDCPs], but noted that *these subscribers would continue to receive nearly all the same channels as subscribers using digital set top boxes*. Contrary to the suggestions of the Consumer Electronics Association in its March 23, 2006 *ex parte*, the use of SDV by TWC in no way contravenes our support of UDCPs." Letter from Steven N. Teplitz, Time Warner Cable, Inc. to Marlene Dortch, Secretary, Federal Communications Commission dated May 11, 2006 (filed in CS Docket 97-80) ("*TWC Ex Parte Letter*") (emphasis added). As the facts of this case demonstrate, TWC's removal of more than 60 channels, including popular HD channels, is inconsistent with the company's *ex parte* letter more than a year beforehand.

receiving switched channels; but rather, these customers simply needed to obtain a set-top box to view such programming.⁶² Such a situation is fundamentally at odds with the policy and regulatory objectives of the *Plug and Play Order*.

23. Section 76.1201 was adopted to achieve the statutory requirement of alternative sources of navigation devices and to ensure the commercial availability of navigation devices.⁶³ The *Plug and Play Order* sought to provide further assurance of the commercial availability of navigation devices by requiring that cable operators support the operation of UDCPs in connection with their cable systems. TWC's movement of linear programming to an SDV platform clearly impairs the use of CableCARD-equipped UDCPs and fundamentally limits the commercial and competitive viability of those devices. After TWC's movement of linear programming to an SDV platform, customers who use CableCARD-equipped UDCPs can no longer receive that programming without leasing a set-top box from the company.⁶⁴ Those customers who choose to lease a set-top box not only must bear the additional cost, but also lose many features of their UDCPs, such as picture-in-picture viewing and the ability to record one channel while watching another. Accordingly, TWC is preventing its customers from using their UDCPs and undermining the policy goals of Congress and the Commission to ensure the commercial availability and use of navigation devices. Thus, we find TWC's November 6, 2007 migration of linear channels to an SDV platform in its Oceanic Kauai cable system apparently constitutes a willful violation of Section 76.1201 of the Rules.

24. TWC also stresses the importance of the development and deployment of SDV. TWC claims it is pro-competitive, pro-consumer, vital to the digital television transition (especially for carriage of broadcast signals in both analog and digital format as required by the Commission), and critical for expanding the number of HD programming and increasing broadband transmission speeds.⁶⁵ Finally, TWC claims that halting or reversing the migration of channels to SDV would harm not only TWC's legitimate business interests, but the public interest more broadly.⁶⁶

25. The deployment of SDV technology may provide public benefits. It is not TWC's deployment of SDV technology that violates Section 76.1201, but TWC's migration of existing linear programming to an SDV tier that we find inconsistent with the Commission's Rules.⁶⁷ For example,

⁶² See Nov. 30 LOI Response at 4, 9-10.

⁶³ See *Navigation Devices Order*, 13 FCC Rcd at 14786.

⁶⁴ According to the TWC notice announcing the deployment that ultimately took place on November 6, 2007, more than 40 channels would be moved to the SDV platform and no longer available without the use of a TWC-supplied set-top box: Digital Cable Service: (CSPAN-3, CSPAN-2, CNBC World, Bloomberg TV, The Weather Channel, AZN TV, Imaginasian, The Outdoor Channel, Country Music TV, VH1 Classic, BET On Jazz, Ovation), Sports Pak: (Fuel, NBA TV, The Tennis Channel, Fox College Sports-Atlantic, Fox College Sports-Central, Fox College Sports-Pacific, College Sports TV), Encore Service: (Fuse), Spanish Pak: (Galavision, Fox Sports World Espanol, CNN Espanol, Discovery en Espanol, CNN Espanol, ESPN Deportes), Premium: (Chinese Channel), HD Entertainment Pak: (HD Golf/HD Versus, HD Versus & Golf, HD FSN, HD National Geographic, HD Net, HD Net Movies, INDemand HD, ESPN HD, ESPN2HD, HD Universal), Jewelry Channel, Pentagon Channel, KOAM, Ocean Network, and Inspirational TV. See also TWC Sept. 12 Supplemental LOI Response, Exhibit A (stating that 62 channels ultimately were moved to SDV platform).

⁶⁵ Nov. 30 LOI Response at 1-2, 12-13.

⁶⁶ *Id.* at 12 & n.25.

⁶⁷ TWC argues that the only way it can create additional capacity using SDV is to move existing programming to an SDV platform. See Letter from Arthur H. Harding, Fleischman and Harding LLP, and Matthew A. Brill, Latham & Watkins LLP, Counsel for Time Warner Cable to William Davenport, Assistant Chief, Enforcement Bureau, Federal Communications Commission (Oct. 6, 2008) ("Oct. 6 Supplemental Response") at 1. Even if this point had some relevance to whether TWC has complied with Commission Rules, the company fails to provide any evidence to support its claim that it had no channel capacity available at the time of the SDV deployment in the Oceanic Oahu cable system such that it had no choice but to move existing linear programming to the SDV platform.

charging for channels not presently accessible to subscribers with CableCARD-equipped UDCPs undermines the policy and regulatory objectives of the *Plug and Play Order*. TWC's movement of linear programming to an SDV platform is particularly troubling because no bi-directional navigation devices are commercially available at this time. We understand that a major impediment to the availability of such devices is the cable industry's insistence on licensing conditions that go beyond the protection of the network from physical or electronic harm or theft or service. For example, limitations on the ability to integrate broadband capability into competitive navigation devices and the ability to integrate web-based or IP content with cable-provided programming are not related to Congress' recognition that MVPDs have "a valid interest, which the Commission should continue to protect, in system or signal security and in preventing theft of service."⁶⁸ We consider such restrictions to be contrary to Congress and the Commission's shared policy goal of expeditious commercial availability of bi-directional navigation devices.

B. TWC Apparently Willfully Violated Section 76.640(b) by Failing to Comply with the Commission's Technical Rules Regarding the Provision of a Virtual Channel Table for SDV Programming

26. TWC readily admits that it does not populate the virtual channel table with its two-way services.⁶⁹ In its defense, TWC claims that Section 76.640 only applies to unidirectional digital cable services; on its face, however, Section 76.640 applies only to unidirectional *products*.⁷⁰ Section 76.640(b)(1) makes no distinction between unidirectional and bi-directional *services*. Indeed, by its own terms, the standard incorporated by reference in Section 76.640(b)(1)(i) applies to *all services* – there is no exception for bi-directional services.⁷¹ Therefore, TWC is required to describe programming on an SDV platform in the out-of-band forward data channel and populate the virtual channel table with all of its programming services. As TWC did not provide a complete virtual channel table, TWC violated Sections 76.640(b)(1)(i) and 76.640(b)(1)(v) of the Commission's Rules.

27. Pointing to the inability of UDCPs to view two-way services, TWC claims that Section 76.640, by its "text and history," does not apply to SDV, which is a bi-directional service.⁷² But TWC fails to cite any language in the rule, the adopting order, or Commission precedent in which the Commission stated that 76.640 did not apply to such services, including SDV. Including the SDV programming in the virtual channel table would make it clear to TWC subscribers using CableCARD-equipped UDCPs that their cable operator is charging them for programming that they cannot see.

28. In any event, Commission regulatees may not pick and choose with which of the Commission's Rules they wish to comply. If TWC believed it had a legitimate reason to exclude two-way programming from the virtual channel table provided to customers with CableCARD-equipped UDCPs, the company should have sought a waiver of the relevant rules.⁷³ Accordingly, based on the record before us, we find that TWC apparently willfully violated Section 76.640(b) by failing to provide a virtual channel table as required by Section 76.640(1)(b)(i) and 76.640(b)(1)(v) in its Oceanic Kauai cable system.

⁶⁸ See *supra* note 2.

⁶⁹ *Id.* at 7.

⁷⁰ See 47 C.F.R. § 76.640 ("Support for unidirectional digital cable products on digital cable systems.").

⁷¹ *Id.* at § 76.640(b)(1)(i) (incorporating by reference SCTE 40 2003, Section 5.5, which states that "[w]hen one or more scrambled services are offered on the cable system, System and Service Information for all services (both scrambled and in-the-clear) shall be carried in an out-of-band Forward Data Channel...").

⁷² Oct. 14 Supplemental LOI Response at 2.

⁷³ 47 C.F.R. § 76.1207.

C. Forfeiture Calculation

29. 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.⁷⁴ 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.⁷⁵ 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.⁷⁶ We conclude that TWC is apparently liable for a forfeiture in the amount of twenty thousand dollars (\$20,000) for its willful violation of Sections 76.1201, 76.640(b)(1)(i), and 76.640(b)(1)(v) of the Rules.

30. Under Section 503(b)(2)(A) and Section 1.80(b)(1) of the Commission's Rules,⁷⁷ 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."⁷⁸

31. The Commission's *Forfeiture Policy Statement*⁷⁹ and Section 1.80 of the Rules do not establish a specific base forfeiture for violation of Section 76.1201.⁸⁰ In a similar case, the Commission proposed forfeitures for each cable system involved in the violation.⁸¹ Thus, we propose to establish a base forfeiture amount for each cable system in which linear programming has been moved to an SDV

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

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

⁷⁶ See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 (2002).

⁷⁷ 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 took effect September 2, 2008, apply to violations occurring after that date, and accordingly do not apply to this case.

⁷⁸ 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. We consider TWC's apparent violations of Section 76.1201 to have begun on the date its cable system moved previously available linear programming to an SDV platform. TWC's apparent violations continue each day that such programming remains unavailable to customers using CableCARD-equipped UDCPs.

⁷⁹ 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).

⁸⁰ The Bureau has substantial discretion in proposing forfeitures. See, e.g., *InPhonic, Inc.*, Order of 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).

⁸¹ See, e.g., *Cablevision Systems Corporation*, Forfeiture Order, 15 FCC Rcd 24298 (2000) ("*Cablevision Forfeiture Order*") (imposing forfeitures against Cablevision on a cable system basis).

platform, thereby impairing customers' use of navigation devices such as UDCPs to view such programming. As noted above, this case involves one of TWC's Hawaii Division cable systems – Oceanic Kauai.

32. TWC contends that enforcement action is inappropriate here because the number of subscribers that rely on CableCARD-equipped UDCPs is small. According to TWC, less than 0.3 percent of its subscriber base relies on UDCPs and more than 63 percent of those subscribers also utilize one or more set-top boxes.⁸² TWC contends that because a large percent of its subscribers benefit from the deployment of SDV, the Commission should encourage the deployment of SDV rather than conduct enforcement proceedings against operators for such deployment.

33. While the number of subscribers that were prevented from using their CableCARD-equipped UDCPs to access certain programming may be a relatively small percentage of all cable subscribers, we consider the consumer harm resulting from actions here, which frustrate the Commission's broader goal of achieving a competitive navigation device market, to be significant.⁸³ Moreover, it is impossible to determine the injury actions like those at issue here may have inflicted on the market for one-way devices such as UDCPs. The movement of linear programming to an SDV platform, without having in place standards to ensure bi-directional compatibility of cable television systems and consumer electronics equipment without unnecessary licensing conditions, significantly harms the Commission's policies to move navigation devices toward a fully competitive market.⁸⁴ Consumers have little incentive to purchase a UDCP and lease a CableCARD when their cable provider already has moved more than a dozen channels to a platform inaccessible to such equipment.

34. One analogous violation for which the Commission has already established a base forfeiture is violation of the cable broadcast signal carriage rule, which has a base forfeiture of \$7,500.⁸⁵ Given the number of channels involved and the effect of actions like those here on the Commission's policy objectives, however, we find that a more significant penalty is appropriate. We conclude that \$10,000 per cable system in which linear programming is moved to an SDV platform is an appropriate base forfeiture for violation of Section 76.1201. In this case, TWC moved linear programming to an SDV platform in one cable system, Oceanic Kauai. Accordingly, we conclude that TWC is apparently liable for a \$10,000 forfeiture for its willful violation of Section 76.1201 of the Rules.

35. Additionally, we conclude that TWC is apparently liable for a forfeiture in the amount of \$5,000 for its willful violation of Section 76.640(b)(1)(i) of the Rules and \$5,000 for its willful violation of Section 76.640(b)(1)(v) of the Rules. The Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules do not establish a specific base forfeiture for violation of Section 76.640(b). However, we note that Section 1.80(b) establishes a base forfeiture of \$5,000 for unauthorized discontinuance of service.⁸⁶ We find that the actions of TWC effectively discontinue a portion of the services for each of its

⁸² Nov. 30 LOI Response at 3.

⁸³ While the number of customers using CableCARD-equipped UDCPs may be a relatively small percentage of the overall number of MVPD customers nationwide, *see Third Further Notice of Proposed Rulemaking*, 22 FCC Rcd at 12025, the absolute number is significant – more than 374,000 among the ten largest incumbent cable operator as of September 22, 2008. *See* Letter from Neal Goldberg, General Counsel, National Cable & Telecommunications Association, to Marlene Dortch, Secretary, FCC dated Sept. 22, 2008 (filed in CS Docket No. 97-80) (compiling ten cable system reports on CableCARD usage).

⁸⁴ In addition, complaints received by the Commission and comments filed in CS Docket No. 97-80 suggest that consumers have been extremely frustrated by a multitude of cable operator-related problems with CableCARDS, including availability, pricing, and service quality issues. *See also* Letter from Julie M. Kearney, Senior Director and Regulatory Counsel, Consumer Electronics Association to Marlene Dortch, Secretary, Federal Communications Commission dated March 23, 2006 (filed in CS Docket 97-80) (listing difficulties of manufacturers in producing UDCPs due to alleged cable operator actions).

⁸⁵ 47 C.F.R. § 1.80(b)(4)(Note). *See also Cablevision Forfeiture Order*, 15 FCC Rcd at 24298.

⁸⁶ 47 C.F.R. § 1.80(b)(4)(Note). Violation of the broadcast signal carriage rule is also analogous to TWC's failure

CableCARD subscribers who choose to view content via a UDCP. We also conclude that the amount of the proposed forfeiture for each violation is commensurate with the harm imposed upon cable subscribers. Because the violation of Section 76.640(b)(1) coincides with the migration of linear channels to an SDV platform, we will also apply this base forfeiture amount of \$5,000 for each technical violation of Section 76.640(b)(1) on a per cable system basis. Accordingly, we conclude that TWC is apparently liable for a forfeiture in the amount of \$10,000 for its willful violation of Sections 76.640(b)(1)(i) and 76.640(b)(1)(v) in its Oceanic Kauai cable system.

36. TWC's implementation of SDV in its Oceanic Kauai cable system, in which previously available linear programming was moved to an SDV platform, resulted in the removal of channel information and the loss of access to those switched channels for its subscribers using CableCARD-equipped UDCPs. Moreover, such implementation of SDV, without having in place standards to ensure bi-directional compatibility of cable television systems and CE equipment, effectively harms the Commission's policies to move navigation devices toward a fully competitive market. We note that TWC could have sought a waiver of these rules under Section 76.1207, but failed to do so.⁸⁷ Accordingly, we conclude that TWC is apparently liable for a total forfeiture amount of twenty thousand (\$20,000) for its willful violation of Sections 76.1201 (\$10,000), 76.640(b)(1)(i) (\$5,000), and 76.640(b)(1)(v) (\$5,000) of the Commission's Rules.

D. TWC Must Issue Refunds To Customers Harmed by its SDV Implementation

37. TWC's implementation of SDV has harmed its customers who opted to purchase and use television receiving equipment that does not require a cable operator-supplied set-top device to receive cable service. Many consumers purchased expensive UDCPs, such as "cable ready" televisions and digital video recorders like TiVos, based on the reasonable assumption that no set-top box would be necessary to receive linear programming.⁸⁸ In effect, TWC's movement of linear programming to an SDV platform has substantially diminished the value of its customers' UDCP devices. Moreover, CableCARD customers affected by TWC's SDV deployment now must pay higher prices to lease set-top boxes than they would have paid for CableCARDs. Those CableCARD customers who chose not to obtain the TWC-supplied set-top boxes after the implementation of SDV nevertheless have paid the same monthly rate for their cable service even though they can view significantly fewer channels. Most importantly, however, TWC's movement of linear programming to an SDV platform set back the shared goal of Congress and the Commission of a competitive market for commercially available navigation devices, as required by Section 629 and the Commission's rules.

38. In calculating the harm to TWC's customers who use UDCP equipment, we recognize that TWC has made offers to its CableCARD customers to offset the costs of obtaining a set-top box. TWC states that to mitigate the impact of its SDV deployment, it offered subscribers with UDCPs in its Hawaii Division the opportunity to lease an interactive set-top box for two years for the same monthly charge as a

to provide the SDV programming information in its virtual channel table. In contrast with violations of Section 76.1201, however, violations of Section 76.640(b)(1) do not affect the viewability of actual programming. Therefore, it is appropriate to impose a somewhat lesser penalty for such technical violations.

⁸⁷ Under Section 629(c) of the Act, 47 U.S.C. § 549(c) and Section 76.1207 of the Commission's Rules, 47 C.F.R. § 76.1207, the Commission may waive rules adopted under Section 629(a) of the Act for a limited time "upon an appropriate showing by a provider of multichannel video programming and other services offered over multichannel video programming systems, or an equipment provider, that such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products. *See* 47 U.S.C. § 549(c), 47 C.F.R. § 76.1207.

⁸⁸ For instance, one complainant stated that after talking to a customer service representative who stated that the CableCARDs would allow access to HD programming on a HD-Tivo DVR, the consumer spent \$300 for the HD-Tivo DVR and \$300 for a Tivo Service subscription package. Three weeks later, when the technician came to install the CableCARDs, the customer could not receive the HD package because TWC no longer "offered the cable cards with HD." *See* Complaint No. 07-R522759 at Attachment A.

CableCARD.⁸⁹ Specifically, TWC's notice to its customers states that the customer can exchange each CableCARD for a digital cable box at no extra charge and encourages customers to call to schedule a free visit. The notice also states that "[d]iscounting the digital box(es) in exchange for the cable card(s) will continue for a minimum of two years."⁹⁰ While TWC's offer to provide a free set-top box to its CableCARD customers may provide temporary relief to its customers, it is not a permanent solution – the benefits promised by TWC are, at best, limited in duration. TWC's offer does not address the critical problem concerning the company's interference with its customers' use of independently obtained UDCPs, *i.e.*, the loss of service to the extent customers can view fewer channels than they did before the movement of linear programming to an SDV platform, nor does it address the loss of functionality of the device in question.

39. Thus, we order TWC, within ninety (90) days of this *NAL and Order*, to issue refunds to CableCARD customers affected by the November 6, 2007 implementation of SDV in its Oceanic Kauai cable system. Specifically, TWC must provide refunds as follows:

- (a) For former CableCARD customers that began to lease any set-top boxes from TWC following notice of a possible SDV deployment, TWC must refund the difference in cost (if any) between the charges for the TWC set-top boxes and the CableCARDs previously leased by such customers; and
- (b) For CableCARD customers that kept their CableCARDs even after notice of the SDV deployment, TWC must refund the customers' subscriber fees based on the diminished value of their service following the movement of linear programming to an SDV platform and reduce their rates on a going-forward basis accordingly.

40. In addition, we require TWC to submit to the Enforcement Bureau an explanation of the method the company plans to use to determine the appropriate amount of refunds, the number of customers receiving refunds, the total value of such refunds, and the planned timing of such refunds. TWC must submit this information to the Enforcement Bureau for review and approval within thirty (30) days of the release of this decision and must proceed with its proposed refund plan within sixty (60) days of such submission provided the Enforcement Bureau approves TWC's proposed refund plan within thirty (30) days of TWC's submission.

IV. ORDERING CLAUSES

41. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, Section 1.80 of the Rules, and the authority delegated by Sections 0.111 and 0.311 of the Commission's Rules, Oceanic Time Warner Cable, a division of Time Warner Cable, Inc. is **NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of twenty thousand dollars (\$20,000) for willful violation of Sections 76.1201, 76.640(b)(1)(i) and 76.640(b)(1)(v) of the Rules.

42. **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 and Order, Time Warner Cable, Inc. **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

43. **IT IS FURTHER ORDERED** that, pursuant to sections 1, 4(i), 4(j), 601, and 629 of the Communications Act of 1934, as amended 47 U.S.C. §151, 154(i), 154(j), 521, 549, Time Warner Cable, Inc. must take the steps set forth in paragraphs 39 and 40 of this *NAL and Order*.

44. 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

⁸⁹ See Nov. 30 LOI Response at 4.

⁹⁰ *Id.* at Attachment 1, Hawaii Division, Notice dated August 20, 2007.

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. TWC will also send electronic notification on the date said payment is made to JoAnn.Lucanik@fcc.gov and Kevin.Pittman@fcc.gov.

45. 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 and Kevin Pittman, Esq., Spectrum Enforcement Division, FCC, at Kevin.Pittman@fcc.gov.

46. 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) 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.

47. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order 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

ATTACHMENT A

Representative Customer Complaints Received by FCC
Concerning Time Warner Cable's Implementation of SDV
in its Hawaii Division

Date Received	Complaint Number	Consumer Complaint
08/13/2008	08-C00045550-1	Oceanic Time Warner is not providing equal access to "cable card" customers, as stated in the FCC act of 1996. Customers with cable cards can not access "switched video signals" which is the preferred method of broadcast for most digital channels by Oceanic. Other cable companies now provide "Tuning Adapters," "Tuning Resolvers," or "Dongles," to resolve this problem. However, Oceanic seems to continue to be above the law, and does not provide anything for it.
07/31/2008	08-C00042096-1	I signed up for service with Oceanic Time Warner Cable today, and told them I wanted a Cable Card so that I could use my Tivo to record programming. While they will provide a Cable Card, they limit the cable card in so many ways in order to limit it as a viable choice. There are many many channels that the Cable Card does not receive, including all high definition channels. Even basic channels such as the Weather channel are not available to Cable Card users. While they may be operating within the law by offering a Cable Card alternative, it's clear that they have limited the Cable Card in such a dramatic way such that it is unusable. This type of action should certainly be addressed by the FCC in order to protect consumer choice.
04/24/2008	08-C00016147-1	Oceanic Time Warner (OTW) cable is in violation of the spirit of the Telecommunications act of 1996. They are supposed to provide equal access to Cable Card users who do not wish to use OTW's cable boxes or DVR's. Currently, OTW provides something called "switched video" access to all users who wish to receive High Definition signals on their tv's. Unfortunately for Tivo users, this "switched video" signal does not allow for Tivo boxes to receive these signals and the Tivo is "locked out" of the High Definition service (30 Channels). I called OTW and their claim is that the "switched video" service is a benefit to its customers because it provides access to more channels at a lesser band width. I understand how this can be considered beneficial, however in doing this, they violate the Act being that the only customers who can receive these signals are customers WITHOUT Cable Cards only giving access to Customers using their boxes. This is a break down of what a non-Tivo use
12/26/2007	07-W13616500	Anticompetitive behaviour including, but not necessarily limited to, disabling of HDTV broadcast for CableCard customers, instead making these available only via Cable tuner boxes or Digital Video Recorders supplied by Oceanic Cable. Competing products such as TiVo Series3 are [sic] no longer able to receive the majority of HDTV broadcasts. I am concerned that this monopolistic behavior that may violate sections of the Telecommunications Act of 1996.
11/02/2007	07-W13507006	On November 6, 2007, Oceanic Time Warner Cable will change to Switched Digital Video (SDV), effectively making useless cable cards and my Tivo series 3 DVR in which the cards are installed. This change will shut off at least 15 channels of HD programming and at least 60 channels of digital programming that I currently receive. All new channels after the change, according to Oceanic TW, will only be available via SDV. About 6 months ago I decided to purchase a Tivo Series 3 after speaking

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		with at least 3 different Oceanic customer service representatives about Tivo's compatibility. They all assured me that the Tivo with Cable Cards would work, and that I'd receive all programming except pay per view and other limited content. Never did anyone mention that most programming received now would be blocked from cable cards when switching to SDV. I am aware that technology is in development to fix this situation, however, SDV should not be implemented until the technology catches up. If the FCC mandated that cable companies use cable cards, then how can the FCC allow these cable companies to indiscriminately shut off programming to cable card users – especially programming that we've been receiving up to this point? Could the FCC ask Oceanic Time Warner Cable to reconsider delaying this change until technology allows cable cards to function with SDV? I look forward to your response in this matter.
9/21/2007	07-W13394299	Oceanic Time Warner is ceasing to support CableCARD HD programming as of 9/24/07. This is clearly an antitrust issue, to force customers to rent their cable boxes if they want to receive HD programming. Is this not in clear violation of the FCC rulings over the past few years, which have been meant to uncouple decoding issues from access issues? Furthermore, this essentially eliminated TIVO as an alternative to the cable company's boxes, since TIVO works with cableCARDS. Help!
8/27/2007	07-R522759	At the beginning of August 2007, I called Oceanic Time Warner (located in Hawaii) to request cable cards that carried High Definition package to go along with a HD-Tivo DVR that I wanted to purchase. The customer service representative stated that the cable cards would allow me to watch and record HD programs on the HD-Tivo. I made an agreement with the customer service representative and I ordered the cards. Then I spent \$300 for the HD-Tivo DVR and \$300 for a Tivo Service subscription package and I made an appointment for an Oceanic cable technician to come out and install the cards. After three weeks, on August 24, 2007, the technician came out and tried to install the cards. Everything worked on the TV except the HD package. After two hours of making calls, the technician learned that over the last few weeks, Oceanic Cable (without telling their workers) decided to stop allowing the HD package available on the cable cards (it is available on their cable boxes). On the same day, I then made a call to the technician's supervisor who told me that there was nothing that he could do because it wasn't his decision. He said that he would try and work out an alternative solution, but there was no way that they were going to offer the cable cards with HD. My complaint is this: I entered into an agreement with Oceanic Cable to purchase cable cards with an HD package, and I ended up spending a great deal of money and time towards a product they never intended to honor. I need to know whether the standard cable packages (specifically HD programming) that cable companies offer on their cable boxes MUST also be offered on their cable cards (with the exception of interactive programming).
8/20/2007	07-W13296545	According to Oceanic Time Warner Cable's CSR I spoke to yesterday (after an installer was unable to provide access to HD programming via Cable Card) Oceanic is now going to a SDV (Switched Digital Video) system and requires the Cable Card to have two way communication. This type of Cable Card technology has not been created yet and is not available for any Cable Card device on the market today. Also that as of August 13, 2007, all of Oceanic's HD programming was moving to this SDV and I could no longer purchase it from them for use on my cable card device. They explained to me that cable card is less than 2% of the market. They needed the SDV upgrade to supply more channels and that cable card was in the way of that progress. Over the last 24 hours I have familiarized myself with only a small portion of the

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		Telecom Act of 1996. But I feel that Oceanic Cable/Time Warner is clearly disregarding the Federal Mandates by not including all programming via Cable Card especially HD programming.
7/20/2007	07-W13208259	Despite the July 1, 2007 effective date of the FCC's Order regarding cable card enabled (non integrated) digital set top TV cable boxes, Time Warner in Hawaii will only issue a cable card enabled box (1) as part of its PVR box and (2) if you agree to upgrade to HD. Despite the Order, Time Warner Hawaii will not issue any other cable card enabled (non integrated) set top box and will not allow cable cards to be used with non-HD service. Please investigate as I would like to use cable cards as soon as possible and Time Warner is clearly making up "rules" for its consumers in Hawaii that are at odds with both the letter and intent of the FCC's Order.