

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

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

ORDER

Adopted: September 29, 2009

Released: September 29, 2009

By the Deputy Chief, Enforcement Bureau:

1. In this Order, we adopt the attached Consent Decree entered into between the Enforcement Bureau (“Bureau”) and Time Warner Cable, Inc. (“TWC”). The Consent Decree terminates an investigation by the Bureau into TWC’s possible violations of Section 76.1603(c) of the Commission’s Rules, regarding provision of advanced written notice to subscribers and local franchise authorities prior to implementing any service change.¹

2. The Bureau and TWC have negotiated the terms of the Consent Decree that resolve this matter. A copy of the Consent Decree is attached hereto and incorporated by reference.

3. After reviewing the terms of the Consent Decree and evaluating the facts before us, we find that the public interest would be served by adopting the Consent Decree which terminates the investigation.

4. In the absence of material new evidence relating to this matter, we conclude that our investigation raises no substantial or material questions of fact as to whether TWC possesses the basic qualifications, including those related to character, to hold or obtain any Commission license or authorization.

5. Accordingly, **IT IS ORDERED** that, pursuant to Sections 4(i) and 503(b) of the Communications Act of 1934, as amended,² and Sections 0.111 and 0.311 of the Commission’s Rules,³ the Consent Decree attached to this Order **IS ADOPTED**.

6. **IT IS FURTHER ORDERED** that the above-captioned investigation **IS TERMINATED**.

¹ 47 C.F.R. § 76.1603(c).

² 47 U.S.C. §§ 154(i), 503(b).

³ 47 C.F.R. §§ 0.111, 0.311.

7. **IT IS FURTHER ORDERED** that a copy of this Order and Consent Decree shall be sent by first class mail and certified mail, return receipt requested, to counsel for Time Warner Cable, Inc.: Matthew A. Brill, Latham & Watkins LLP, 555 11th Street, N.W., Suite 1000, Washington, DC 20004, and Arthur H. Harding, Fleischman & Harding LLP, 1255 23rd Street, N.W., Eighth Floor, Washington, DC 20037.

FEDERAL COMMUNICATIONS COMMISSION

Suzanne M. Tetreault
Deputy Chief, Enforcement Bureau

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CONSENT DECREE

The Enforcement Bureau (“Bureau”) and Time Warner Cable Inc. (“TWC”), by their authorized representatives, hereby enter into this Consent Decree for the purpose of terminating the Bureau’s investigation into whether TWC violated Section 76.1603(c) of the Commission’s Rules (“Rules”)¹ by failing to provide advance written notice to local franchising authorities (“LFAs”) prior to the deployment of switched digital video (“SDV”) technology throughout various cable systems.

I. DEFINITIONS

1. For the purposes of this Consent Decree, the following definitions shall apply:

- (a) “Act” means the Communications Act of 1934, as amended, 47 U.S.C. §151 *et seq.*
- (b) “Adopting Order” means an Order of the Bureau adopting the terms of this Consent Decree without change, addition, deletion, or modification.
- (c) “Bureau” means the Enforcement Bureau of the Federal Communications Commission.
- (d) “Commission” and “FCC” mean the Federal Communications Commission and all of its bureaus and offices.
- (e) “Effective Date” means the date on which the Bureau releases the Adopting Order.
- (f) “Hawaii LFA” means the Hawaii Department of Commerce and Consumer Affairs, Cable Television Division.
- (g) “Investigation” means the investigation regarding whether TWC may have violated Section 76.1603 of the Rules by failing to provide timely written notice to LFAs where TWC deployed SDV technology during the period between September 26, 2005 and the Effective Date.

¹ 47 C.F.R. § 76.1603(c).

- (h) “Oceanic” means the Oceanic Time Warner Cable division of TWC.
- (i) “Parties” means TWC and the Bureau.
- (j) “Rules” means the Commission’s regulations found in Title 47 of the Code of Federal Regulations.
- (k) “TWC” means Time Warner Cable Inc., its predecessors-in-interest and corporate successors-in-interest.
- (l) “UDCPs” are unidirectional digital cable products.

II. BACKGROUND

2. Section 76.1603(c) of the Rules requires cable systems to provide thirty (30) days written notice to both subscribers and LFAs before implementing any rate or service change.² In late 2007, the Bureau began investigating TWC’s use of SDV technology to deliver certain cable programming, including the extent to which TWC provided advance notice to subscribers and LFAs where its use of SDV technology to deliver programming that was previously transmitted in a one-way format rendered such programming inaccessible via unidirectional digital cable products (“UDCPs”) absent additional equipment. In its responses to Bureau inquiries, TWC indicated that it had not provided advance written notice to each LFA in areas where subscribers with UDCPs were affected by such SDV deployments.³

3. On August 22, 2008, the Bureau issued a Notice of Apparent Liability for Forfeiture against TWC for its apparent violation of Section 76.1603(c), in failing to provide the Hawaii LFA with at least 30 days’ advance written notice before deploying SDV technology in the Oceanic cable system on September 24, 2007.⁴ According to TWC, on or about September 3, 2008, it began notifying LFAs throughout its service areas in advance of using SDV technology to deliver programming that was previously transmitted in a one-way format. On September 14, 2008, TWC filed a response to the *LFA Notice NAL* contesting the Bureau’s finding of apparent liability.⁵

4. On January 19, 2009, the Bureau issued a Forfeiture Order finding TWC liable for violating Section 76.1603(c) with respect to the Hawaii LFA, concluding that TWC’s use of SDV technology to deliver programming that was previously transmitted in a one-way format constitutes a “change in service” within the meaning of the rule.⁶ Pursuant to Section 503(b)(1)(B) of the Act,⁷ the

² *Id.*

³ See, e.g., Letter from Arthur H. Harding, Fleischman and Harding LLP and Matthew A. Brill, Latham & Watkins LLP, Counsel for Time Warner Cable, Inc. to Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (Nov. 30, 2007) (“LOI Response”).

⁴ *Oceanic Time Warner Cable, a subsidiary of Time Warner Cable, Inc.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 12804 (Enf. Bur. 2008) (“*LFA Notice NAL*”).

⁵ Time Warner Cable Inc. Response to NAL and Request for Cancellation of Forfeiture, File No. EB-07-SE-352 (filed Sept. 14, 2008).

⁶ *Oceanic Time Warner Cable, a subsidiary of Time Warner Cable, Inc.*, Forfeiture Order, 24 FCC Rcd 960 (2009) (“*Forfeiture Order*”).

⁷ 47 U.S.C. § 503(b)(1)(B).

Bureau ordered TWC to pay a forfeiture in the amount of seven thousand five hundred dollars (\$7,500).⁸ TWC filed a Petition for Reconsideration and a Request for Stay of the *Forfeiture Order* on February 18, 2009.⁹ On March 9, 2009, the Parties entered into a Tolling Agreement to provide additional time for discussions regarding the facts surrounding possible violations of Section 76.1603(c) without expiration of the applicable statute of limitations.¹⁰

5. On June 26, 2009, the Commission issued the *SDV Order on Review*, which affirmed the Bureau's finding that TWC violated Section 76.1603(c) and its imposition of a forfeiture, while vacating the other findings of liability arising from TWC's use of SDV technology.¹¹ On July 27, 2009, TWC filed a Petition for Reconsideration and a Request for Stay of the *SDV Order on Review* with respect to the finding of liability under Section 76.1603(c) and the associated forfeiture.¹² On August 5, 2009, the Parties extended the Tolling Agreement to allow for further discussions regarding a consensual resolution of this proceeding.¹³

III. TERMS OF AGREEMENT

6. **Adopting Order.** The Parties agree that the provisions of this Consent Decree shall be subject to final approval by the Bureau by incorporation of such provisions by reference in the Adopting Order without change, addition, modification, or deletion.

7. **Jurisdiction.** TWC agrees that the Bureau has jurisdiction over it and the matters contained in this Consent Decree and has the authority to enter into and adopt this Consent Decree.

8. **Effective Date; Violations.** The Parties agree that this Consent Decree shall become effective on the date on which the Bureau releases the Adopting Order. Upon release, the Adopting Order and this Consent Decree shall have the same force and effect as any other Order of the Bureau. Any violation of the Adopting Order or of the terms of this Consent Decree shall constitute a separate violation of a Bureau Order, entitling the Bureau to exercise any rights and remedies attendant to the enforcement of a Commission Order.

9. **Termination of Investigation.** In express reliance on the covenants and representations in this Consent Decree and to avoid further expenditure of public resources, the Bureau agrees to

⁸ *Forfeiture Order* at ¶ 11.

⁹ Petition for Reconsideration of Time Warner Cable Inc., File No. EB-07-SE-352 (filed Feb. 18, 2009); Time Warner Cable Inc. Request for Stay Pending Resolution of Petition for Reconsideration, File No. EB-07-SE-352 (filed Feb. 18, 2009).

¹⁰ Tolling Agreement, File No. EB-07-SE-352, executed by and between Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, and Jeffrey Zimmerman, Senior Vice-President and Deputy General Counsel, Time Warner Cable, Inc. (March 9, 2009) ("Tolling Agreement").

¹¹ See *Oceanic Time Warner Cable, a subsidiary of Time Warner Cable, Inc.*, Order on Review, 24 FCC Rcd 8716, ¶¶ 16-24 (2009) ("*SDV Order on Review*"), *petitions for recon. and stay pending*.

¹² Petition for Reconsideration of Time Warner Cable Inc., File No. EB-07-SE-352 (filed July 27, 2009) ("Petition for Reconsideration"); Time Warner Cable Inc. Request for Stay Pending Resolution of Petition for Reconsideration, File No. EB-07-SE-352 (filed July 27, 2009) ("Request for Stay").

¹³ Tolling Agreement, File No. EB-07-SE-352, executed by and between Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, and Steven N. Teplitz, Senior Vice-President, Government Affairs, Time Warner Cable, Inc. (August 5, 2009).

terminate the Investigation. In consideration for the termination of the Investigation, TWC agrees to the terms, conditions, and procedures contained herein. The Bureau further agrees that in the absence of new material evidence, the Bureau will not use the facts developed in this Investigation, or the existence of this Consent Decree, to institute, on its own motion, any new proceeding, formal or informal, or take any action on its own motion against TWC concerning the matters that were the subject of the Investigation. The Bureau also agrees that it will not use the facts developed in the Investigation, or the existence of this Consent Decree, to institute on its own motion any proceeding, formal or informal, or take any action on its own motion against TWC with respect to TWC's basic qualifications, including its character qualifications, to be a Commission licensee or to hold Commission licenses or authorizations.¹⁴

10. **Withdrawal of TWC Filings.** TWC agrees to withdraw its Petition for Reconsideration and its Request for Stay of the Commission's *SDV Order on Review* within ten (10) calendar days of the Effective Date.

11. **Future Compliance.** For purposes of settling the matters set forth herein, TWC agrees to make the following commitments regarding its compliance with Section 76.1603:

(a) **Compliance Measures.**

(1) TWC shall provide advance written notice pursuant to Section 76.1603 to each LFA where its use of SDV technology to deliver programming that was previously transmitted in a one-way format renders such programming inaccessible via UDCPs absent additional equipment.

(2) TWC has instituted internal compliance measures in each of its operating units in which deployment of SDV is contemplated to ensure that adequate procedures are implemented and executed in order to satisfy the notice requirements of Section 76.1603 of the Rules. Specifically, TWC has developed procedures to ensure that it notifies all affected subscribers and all relevant LFAs at least 30 days in advance of using SDV technology to deliver programming that was previously transmitted in a one-way format, including the following:

-- Before one of TWC's operating divisions or regions initiates a deployment of SDV technology, it must submit detailed plans to TWC's corporate SDV team for approval;

-- Where such planned SDV deployments involve the delivery of programming services previously made available in a one-way format, the division or region must prepare customized letters to UDCP subscribers and LFAs using letter templates prepared by TWC's Law Department;

-- The revised notice letters then must be submitted for approval by the Law Department, and final approval for the SDV deployment plan cannot be obtained until the updated notice letters have undergone this review.

-- Following approval of the notice letters, they must be distributed at least 30 days before the SDV deployment plan may be executed.

¹⁴ In this regard, TWC will not be obligated to report this matter, including as an adverse finding or adverse final action, on any Commission application or form.

-- As a further safeguard, TWC's divisions and regions are required to provide copies of LFA and customer notices to the corporate SDV team once they have been mailed out.

(3) TWC will file a compliance report with the Commission on October 1, 2010. The compliance report shall include a compliance certificate from an officer, as an agent of TWC, stating that the officer has personal knowledge that TWC has maintained operating procedures intended to ensure compliance with this Consent Decree, together with an accompanying statement explaining the basis for the officer's compliance certification. The compliance report shall be submitted to Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554.

(b) **Termination Date.** Unless otherwise stated, the requirements of this Consent Decree will expire twenty-four (24) months after the Effective Date. The termination of this Consent Decree shall not have any effect on TWC's independent obligation to comply with Section 76.1603, to the extent that it remains applicable.

12. **Voluntary Contribution.** TWC agrees that it will make a voluntary contribution to the United States Treasury in the amount of twenty-five thousand dollars (\$25,000). The payment shall be made within thirty (30) calendar days after the Effective Date. The payment must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the Account Number and FRN Number referenced in the caption to the Adopting Order. 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 02130004, 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 Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). TWC will also send electronic notification on the date said payment is made to JoAnn Lucanik at JoAnn.Lucanik@fcc.gov and Kevin M. Pittman at Kevin.Pittman@fcc.gov.

13. **Waivers.** TWC waives any and all rights it may have to seek administrative or judicial reconsideration, review, appeal or stay, or to otherwise challenge or contest the validity of this Consent Decree and the Adopting Order, provided the Bureau issues an Adopting Order adopting the Consent Decree without change, addition, modification or deletion. TWC shall retain the right to challenge Commission interpretation of the Consent Decree or any terms contained herein. If either Party (or the United States on behalf of the Commission) brings a judicial action to enforce the terms of the Adopting Order, neither TWC nor the Commission shall contest the validity of the Consent Decree or the Adopting Order, and TWC shall waive any statutory right to a trial *de novo*. TWC hereby agrees to waive any claims it may otherwise have under the Equal Access to Justice Act, 5 U.S.C. § 504 and 47 C.F.R. § 1.1501 *et seq.*, relating to the matters addressed in this Consent Decree.

14. **Invalidity.** In the event that this Consent Decree in its entirety is rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any manner in any legal proceeding.

15. **Subsequent Rule or Order.** The Parties agree that if any provision of the Consent Decree conflicts with any subsequent Rule or Order adopted by the Commission (except an Order specifically intended to revise the terms of this Consent Decree to which TWC does not expressly consent) that provision will be superseded by such Commission Rule or Order.

16. **Successors and Assigns.** TWC agrees that the provisions of this Consent Decree shall be binding on its successors, assigns, and transferees.

17. **Final Settlement.** The Parties agree and acknowledge that this Consent Decree shall constitute a final settlement between the Parties, and shall discharge any and all liability arising from the Investigation, including the forfeiture upheld by the *SDV Order on Review*. The Parties further agree that this Consent Decree is for settlement purposes only and does not constitute an adjudication on the merits or a factual or legal finding or determination regarding any compliance or noncompliance with the requirements of the Act or the Commission's Rules and Orders and that by agreeing to this Consent Decree, TWC does not admit or deny noncompliance, violation or liability for violating the Act or Rules in connection with the matters that are the subject of this Consent Decree.

18. **Modifications.** This Consent Decree cannot be modified without the advance written consent of both Parties.

19. **Paragraph Headings.** The headings of the Paragraphs in this Consent Decree are inserted for convenience only and are not intended to affect the meaning or interpretation of this Consent Decree.

20. **Authorized Representative.** Each Party represents and warrants to the other that it has full power and authority to enter into this Consent Decree.

21. **Counterparts.** This Consent Decree may be signed in any number of counterparts (including by facsimile), each of which, when executed and delivered, shall be an original, and all of which counterparts together shall constitute one and the same fully executed instrument.

Suzanne M. Tetreault
Deputy Chief, Enforcement Bureau

Date

Steven Teplitz
Senior Vice President, Government Relations
Time Warner Cable Inc.

Date