

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

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

FORFEITURE ORDER

Adopted: January 19, 2009

Released: January 19, 2009

By the Chief, Enforcement Bureau:

I. INTRODUCTION

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

II. BACKGROUND

2. The facts and circumstances of this case are set forth in the Bureau's *Notice of Apparent Liability for Forfeiture*³ and need not be reiterated at length. Briefly, in response to complaints, the Enforcement Bureau (“Bureau”) initiated an investigation of TWC's movement to an SDV platform of certain cable channels that previously were accessible to subscribers using CableCARD-equipped unidirectional digital cable products (“UDCPs”), including digital cable ready television sets. TWC's implementation of SDV necessarily required such subscribers to obtain a set top box from the cable company to continue to view all cable channels available to them prior to the SDV migration. CableCARD subscribers that failed to lease a set top box from TWC lost access to those channels, even though TWC continued to charge them the same price. Our investigation sought information about TWC's SDV migrations, including whether the company had complied with Section 76.1603 of the Rules, which requires cable operators to notify subscribers and Local Franchising Authorities (“LFAs”) in writing at least thirty (30) days prior to making any changes to rates or services.⁴

¹ 47 C.F.R. § 76.1603(c).

² 47 U.S.C. § 503(b).

³ *Oceanic Time Warner Cable, a subsidiary of Time Warner Cable, Inc.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 12804 (Enf. Bur. 2008) (“*TWC NAL*”) (response received).

⁴ Section 76.1603(c) states, in relevant part:

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

3. One of the SDV migrations at issue occurred in Hawaii on September 24, 2007 (“the Hawaii SDV migration”). In response to our inquiry, TWC did not claim that it had provided thirty (30) days advance written notice of the Hawaii SDV migration to the Cable Television Division of the Hawaii Department of Commerce and Consumer Affairs (“the Hawaii LFA”). Instead, the company argued that the notification provisions of Section 76.1603 did not apply because the “provision of SDV services does not involve a change in rates or service packages.”⁵ According to TWC, the only change was that of equipment. As such, the applicable notice requirement was Section 76.1622 of the Commission Rules, which requires that cable operators provide annual equipment compatibility notices to advise subscribers - but not LFAs - that “some models of TV receivers ... may not be able to receive all of the channels offered by the cable system when connected directly to the cable system.”⁶ TWC contended that it had complied with all relevant Commission Rules because it had provided such notice to its subscribers.⁷

4. On August 22, 2008, after reviewing the evidence and TWC’s arguments, we issued the *NAL*, finding that TWC apparently had willfully violated Section 76.1603(c) by failing to notify the Hawaii LFA of its SDV deployment on September 24, 2007. TWC responded to the *NAL* on September 22, 2008.⁸

III. DISCUSSION

A. TWC Violated Section 76.1603(c) By Failing To Notify the Hawaii LFA of the Hawaii SDV Deployment

5. Based on the record before us, we find that TWC willfully violated Section 76.1603(c) by failing to provide the Hawaii LFA thirty (30) days advance written notice prior to the cable operator’s movement of certain channels to a SDV platform on September 24, 2007. As the Commission has stated, “it is crucial that local franchising authorities receive timely notice of a cable operator’s change to programming service.”⁹ TWC failed to provide such notice here, and is therefore subject to forfeiture.

6. In its *NAL Response*, TWC again argues that its movement of linear channels to an SDV platform did not involve a change in “rates” or “service” subject to Section 76.1603’s notice requirements. Specifically, TWC contends “there was no change in the number or placement of the channels that TWC delivered to its customers or in any other aspect of the service it provides.”¹⁰ But TWC did change the channels it delivered to its CableCARD-using subscribers when it moved those channels to an SDV platform. Such customers received one group of channels on September 23, 2007, and a smaller group of channels the next day. As we stated in the *NAL*, we judge whether there was a change in service from the “subscribers’ perspective – not that of the cable operator...”¹¹ From the perspective of the complainants, it is clear that they viewed the elimination of access to dozens of channels, including popular high-definition programming, as a “change in service.”

the change involves the addition or deletion of channels, each channel added or deleted must be separately identified.

47 C.F.R. §76.1603(c).

⁵ See *TWC NAL*, 23 FCC Rcd at 12805 para. 3.

⁶ 47 C.F.R. § 76.1622(b)(1).

⁷ See *TWC NAL*, 23 FCC Rcd at 12805 para. 4.

⁸ *Time Warner Cable Inc. Response to NAL and Request for Cancellation of Forfeiture*, File No. EB-07-SE-352 (filed Sept. 22, 2008) (“TWC NAL Response”).

⁹ *Time Warner Cable, a Division of Time Warner Entertainment Company, L.P.*, Order on Reconsideration, 21 FCC Rcd 9016, 9027 para. 30 (Media Bur.) (“*TWC Order on Reconsideration*”), consent decree adopted, Order, 21 FCC Rcd 11229 (Media Bur. 2006).

¹⁰ TWC NAL Response at 5.

¹¹ *TWC Order on Reconsideration*, 21 FCC Rcd at 9020 para. 15, quoted in *NAL*, 23 FCC Rcd at 12807 para. 8.

7. We disagree with TWC's assertion that no change in service occurred because the affected subscribers could receive the channels migrated to an SDV platform if they leased a set-top box from the company.¹² According to TWC, all that occurred was a change in the equipment necessary to receive the migrated programming and, as such, the only applicable notice requirement was Section 76.1622 of the Rules. The Commission addressed a similar situation in its decision addressing the responsibilities of cable operators that choose to cease providing programming in analog format and convert to all-digital systems. In that decision, the Commission advised cable operators that such actions were subject to the notice requirements in both the annual equipment notice rule (Section 76.1622) and Section 76.1603.¹³ We see no reason (and TWC offers none) why we should come to a different conclusion here.

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

B. Forfeiture Calculation

9. 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.¹⁴ 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.¹⁵ 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.¹⁶ As discussed below, we conclude that TWC is liable for a forfeiture in the amount of seven thousand five hundred dollars (\$7,500) for its willful violation of Section 76.1603(c) of the Rules.

10. At the time of the actions underlying this *Order*, under Section 503(b)(2)(A) and Section 1.80(b)(1) of the Commission's Rules, we could 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.¹⁷ In exercising such authority, we must 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."¹⁸

¹² TWC NAL Response at 7.

¹³ "We remind operators who transition their systems to all-digital that they must provide written notice to subscribers about the switch, containing any information they need or actions they will have to take to continue receiving service." *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, 21081 para. 38 & n.121 (2007) (citing both Sections 76.1603 and 76.1622). Although the Commission was discussing notice to subscribers in the relevant passage, it cited to Section 76.1603 as a whole, and did not distinguish the LFA notice language.

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

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

¹⁶ See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 (2002).

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

¹⁸ 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.

11. In the *TWC NAL*, based on these factors, we determined that \$7,500 was an appropriate base forfeiture for TWC's failure to notify the Hawaii LFA of the company's change in service, in apparent violation of Section 76.1630(c) of the Rules. TWC's NAL Response does not argue that this amount is excessive and we see no reason to reconsider that figure. Accordingly, we conclude that TWC is liable for a seven thousand five hundred dollar (\$7,500) forfeiture for its willful violation of Section 76.1603(c) of the Rules.

IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Section 1.80 of the Rules, and under the authority delegated by sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. S: 0.111, 0.311, Oceanic Time Warner Cable, a subsidiary of Time Warner Cable, Inc. is **LIABLE FOR A MONETARY FORFEITURE** in the amount of seven thousand five hundred dollars (\$7,500) for its willful violation of Section 76.1603(c) of the Rules.

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

14. **IT IS FURTHER ORDERED** that a copy of this Forfeiture Order shall be sent by first class mail and certified mail return receipt requested to counsel for Time Warner Cable, 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