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March 12, 2001

Statement of Commissioner Harold W. Furchtgott-Roth

In the Matter of Time Warner Cable Emergency Petition of ABC, Inc. for Declaratory Ruling and Enforcement Order for Violation of Section 76.58 of the Commission's Rules, or in the Alternative For Immediate Injunctive Relief

Consent Decree Order

I am disappointed with the action taken by the Cable Services Bureau for several reasons.

At the outset, I must express my dissatisfaction that the Commission involved itself in the ABC-Time Warner controversy in the first place. Of course, I am troubled when consumers are held hostage by major media corporations. The Commission, however, should not react to every problem in the world as if it is the sole source of a legal solution. All too often the Commission is not the only source of a remedy, and in this case, the Commission does not have the legal authority to act. In any instance, I am confident that any harm suffered by ABC, Inc., would have been more effectively remedied in court.

The dispute between the parties arose out of retransmission consent contract negotiations and should have been adjudicated in the state court system. Notwithstanding this point, the Commission felt compelled to intervene in this private battle between media giants.¹ The ABC television stations at issue in this proceeding have all elected retransmission consent under Section 325, rather than mandatory carriage under Section 614, as a means of accessing cable television households in Time Warner's franchise areas. When crafting Section 325, Congress did not instruct the Commission to adopt notification rules for stations that enter into voluntary carriage arrangements.² Rather, it directed the

¹Assuming arguendo, that the Commission has the ultimate responsibility to settle retransmission consent disputes of the type implicated here, a cloud of doubt remains whether the notification and deletion rules contained in Section 76.58 are at all applicable. *Cf. Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 295, 3004 (1993); *Memorandum Opinion and Order*, 9 FCC Rcd 6723, 6745-46 (1994) (Holding, without analysis, that the notification and deletion rules apply to stations electing retransmission consent in addition to stations electing mandatory carriage.)

²It is important to note that Congress specifically bifurcated retransmission consent from mandatory carriage in the Act. See 47 U.S.C. §325(b)(4) ("If an originating television station elects under paragraph

Commission to implement such requirements only for television stations choosing mandatory carriage under Section 614.³

In addition, I continue to find it extremely troubling that the Commission, or the Cable Services Bureau in this case, has labeled its Order as a “consent decree” and that the company has made a “voluntary contribution” to the U.S. treasury. While it is now 17 years since 1984, it is no less Orwellian to use such phrases when the long shadow of the government hangs over the head of the firm at issue. This matter becomes even more sordid when Time Warner “volunteers” to participate in the structure and substance of its own penalization.

Finally, I find that the action at issue should have been scrutinized by the Commission, not the Cable Services Bureau. I do not believe the Bureau should have the power to act on delegated authority when the penalty imposed by a Notice of Apparent Liability or consent decree is higher than \$20,000. In this case, the forfeited amount is \$72,000. To add insult to injury, it appears that the Bureau has failed to adhere to the requirement that a Notice of Apparent Liability presuppose the issuance of an apparent forfeiture Order.⁴ These rules should apply to consent decrees as well, whether signed voluntarily or under duress. Once again, it appears that the Commission has declined to follow its own rules.

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(3)(B) to exercise its right to grant retransmission consent under this subsection with respect to a cable system, the provisions of section 614 shall not apply to the carriage of the signal of such station by such cable system.”)

³See 47 U.S.C. §534(b)(9)(“A cable operator shall provide written notice to a local commercial television station at least 30 days prior to either deleting from carriage or repositioning that station. No deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations.”)

⁴See 47 C.F.R. §1.80(f).