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

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

FORFEITURE ORDER

Adopted: January 19, 2009 **Released: January 19, 2009**

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order*, we find that Oceanic Time Warner Cable, a division of Time Warner Cable, Inc., Oceanic Kauai Cable System (collectively, "TWC"), willfully and repeatedly violated Section 76.1201 of the Commission's Rules ("Rules") in its Oceanic Kauai Cable System.[1] Specifically, TWC 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 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 liable for a forfeiture in the amount of twenty thousand dollars ($20,000). As discussed below, we further direct TWC to comply with the Bureau's Order 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]

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[1] 47 C.F.R. § 76.1201.

[2] Navigation devices refer 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). UDCPs refer to devices that have the ability to receive encrypted digital cable programming, but do not have any upstream, or bidirectional, capabilities. For example, such devices cannot support two-way services such as Electronic Programming Guides (EPGs), Voice on Demand (VOD), Pay Per View (PPV), and other interactive capabilities. *See Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 12024, 12025-26 (2007) ("*Third Further Notice of Proposed Rulemaking*"). *See also* 47 C.F.R. § 15.123(a).

[3] 47 U.S.C. § 503(b). This *Forfeiture 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 (continued....)

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 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] "As 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, subject to the proviso that such equipment not cause harmful interference or facilitate theft of service, the Commission likened its actions to the *Carterfone* principle it previously adopted in the telephone environment.[11] In *Carterfone,* the Commission allowed consumers to attach legal devices to the telephone network unless that equipment would damage the network. "As 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

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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).

[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, para. 2 (1998) ("*Navigation Devices Order*").

[10] 47 C.F.R. § 76.1201.

[11] *See Navigation Devices Order*, 13 FCC Rcd at 14478 (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)).

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]

5. The Commission recognized that its work on these issues was not complete and reiterated its commitment to monitoring developments regarding the compatibility of set-top boxes and digital televisions.[15] 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") industries[17] 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.

6. Generally, the *Plug and Play Order* required MVPDs to support operation of UDCPs and 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 retail control over their system security.

7. Consumers with UDCPs access MVPD programming by using a CableCARD leased from the cable operator.[18] UDCPs, and certain related CE equipment, employ a standard

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[12] *Navigation Devices Order Id.* at 14780, para. 11.

[13] *Id.* at 14786.

[14] *Id.* The Commission recognized 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.

[15] *Id.* at 14781.

[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 n.9.

[17] *See December 2002 Memorandum of Understanding Among Cable MSOs and Consumer Electronics Manufacturers. Id.* at note 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]."

[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-

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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 programming[19] 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]

8. 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). Many cable operators, however, have begun to test and deploy SDV technology in their cable systems. In an SDV system, a subset of programming is delivered in the traditional way to all subscribers whether they are viewing the programs or not. For those channels, the CableCARD-equipped UDCP will work 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 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. A customer who uses a CableCARD-equipped UDCP to receive programming 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 that a channel be delivered 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. On November 8, 2007, the Spectrum Enforcement Division of the Enforcement Bureau ("Bureau") issued a Letter of Inquiry ("LOI")[21] 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 Oceanic had deployed SDV and moved a large number of channels to an SDV platform, including popular high

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

definition ("HD") sports and entertainment channels.[22] According to the complaints, Oceanic's implementation of SDV necessarily required customers using a CableCARD to obtain additional equipment, *i.e.*, a set-top box, from the cable company to continue to receive all cable channels available to them prior to the change to the SDV platform.[23] 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,[24] the 2002 MOU,[25] and in particular, the policies and rules established by Commission in the *Plug and Play Order*[26] The Bureau issued a Supplemental LOI to TWC on August 25, 2008 to obtain additional information concerning the company's deployment of SDV.[27]

10. TWC responded to the LOI on November 30, 2007,[28] and responded in part to the Supplemental LOI on September 12, 2008[29] and in full on September 23, 2008.[30] In its response, TWC admits that its Oceanic and Kauai cable systems deployed SDV for customers on the islands of Oahu and Kauai on November 6, 2007, moving 62 linear channels to an SDV platform.[31] TWC reports that its Hawaii Division, which includes the cable systems at issue

[22] *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 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 ("Initial Supplemental LOI Response") at Exhibit A.

[23] *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 provided relevant excerpts and identifying information for those complaints in Attachment A to the *Oceanic Time Warner Cable, a subsidiary of Time Warner Cable, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 23 FCC Rcd 14962 (Enf. Bur. 2008) (*"TWC NAL and Order"*). 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.

[24] The 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.

[25] *See Plug and Play Order*, 18 FCC Rcd at 20885 n.3.

[26] *Id.* at 20885.

[27] *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) ("Supplemental LOI"). The 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.

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

[29] *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. 12, 2008) ("Initial Supplemental LOI Response").

[30] *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) ("Final Supplemental LOI Response").

[31] Initial Supplemental LOI Response, Exhibit A.

here, had 415,534 subscribers at the time of SDV deployment.[32] The company does not have a precise estimate of the number of CableCARD-using UDCPs affected by its SDV deployment, but believes it to be less than 583.[33] For CableCARD customers affected by its SDV deployment, TWC offered set-top boxes at the same price as the customers' CableCARDs for two years from the date of SDV deployment.[34] 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").[35]

11. On October 14, 2008, after reviewing the evidence and TWC's arguments, the Bureau issued a *Notice of Apparent Liability for Forfeiture and Order,*[36] finding that TWC apparently had willfully violated Sections 76.1201 and 76.640(b)(1) of the Rules by moving certain channels to a SDV platform on November 6, 2007, thereby preventing subscribers with CableCARD-equipped UDCPs from using their navigation devices to access these channels and 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).

12. TWC responded to the NAL on November 14, 2008.[37] With respect to the NAL's finding of apparent liability under Section 76.1201, TWC makes three principal arguments. First, TWC asserts that the NAL's finding of apparent liability violates the plain meaning of the rule. According to TWC, the language "prevent the connection or use" of a navigation device means that a cable operator can be held liable only where it has made it impossible for a customer to connect or use the device.[38] Second, TWC asserts that the NAL's "overly expansive reading" of the rule violates important public policy objectives.[39] Third, TWC argues that the NAL intrudes upon its First Amendment rights.[40] TWC similarly asserts that the Bureau's finding that TWC apparently violated Section 76.640 is flawed.[41] Finally, TWC asserts that the

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[32] *Id.*

[33] TWC reported 583 UDCP CableCARD subscribers at the time of deployment for its entire Hawaii Division, which includes not only the Oceanic and Kauai cable system, but also several other systems. Although some subscribers may have more than one UDCP, this number probably overstates the number of affected devices. *Id.*

[34] *Id.*

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

[36] *Oceanic Time Warner Cable, a subsidiary of Time Warner Cable, Inc.,* Notice of Apparent Liability for Forfeiture and Order, 23 FCC Rcd 14962 (Enf. Bur. Oct. 15, 2008) (*"TWC NAL and Order"*).

[37] *Time Warner Cable Inc. Response to Notices of Apparent Liability and Request for Cancellation of Proposed Forfeitures*, File No. EB-07-SE-352 (filed Nov. 14, 2008) (TWC NAL Response). Together with its NAL Response, TWC also filed *Time Warner Cable Inc. Request for Stay Pending Resolution of Petition for Reconsideration and Request for Cancellation of Proposed Forfeitures,* EB-07-SE-352 (filed Nov. 14, 2008) and *Petition for Reconsideration of Time Warner Cable Inc.*, EB-07-SE-352 (filed Nov. 14, 2008). TWC's *Request for Stay* and *Petition for Reconsideration* will be addressed in subsequent orders.

[38] *TWC NAL Response* at 15-20.

[39] *Id.* at 20-28.

[40] *Id.* at 32-37.

[41] *Id.* at 37-42.

NAL findings present novel interpretations of the rules at issue and thereby exceed the bounds of the Bureau's delegated authority.[42]

III. DISCUSSION

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

13. 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.[43] Based on the record before us, we find that TWC willfully and repeatedly[44] violated Section 76.1201 by moving certain linear channels to an SDV platform in its Kauai and Oceanic cable systems[45] on November 6, 2007.[46] 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 effectively impairing the use of those UDCPs within each affected cable system. Additionally, because a TWC-leased set-top box now is required to view many TWC 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 capacity to view picture-in-picture and record content.[47]

1. The NAL's Findings Are Not Foreclosed by the Plain Language of Section76.1201

14. Notwithstanding its effect on CableCARD users, TWC contends that the language "prevent the connection or use of navigation devices," as used in Section 76.1201, makes clear that a cable operator can be held liable only where it has stopped or made it impossible for a customer to connect or use the device.[48] According to TWC, its implementation of SDV does not *stop* a subscriber from doing so or "make[it] impossible" for a customer to do so.[49] TWC

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[42] *Id.* at 43.

[43] 47 C.F.R. § 76.1201.

[44] *See* 47 U.S.C. § 312(f)(1) & (2) (defining a "willful" violation as the "conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission," and defining "repeated" as "the commission or omission of such act more than once."). The definition of willful and the definition of repeated apply to violations for which forfeitures are assessed under Section 503(b) of the Act. *See Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387 (1991), *recon. denied* 7 FCC Rcd 3454 (1992).

[45] As noted earlier, TWC states that its Oceanic and Kauai cable systems deployed SDV for the islands of Oahu and Kauai. Initial Supplemental LOI Response, Exhibit A.

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

[47] As enacted, 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).

[48] *TWC NAL Response* at 15.

[49] *Id.*

asserts that the Bureau found only that the company's implementation of SDV "impairs," rather than prevents, the use of such devices and thus the Bureau's finding is insufficient for purposes of finding a violation of the standard set forth in the rule.[50]

15. We do not agree that a violation of Section 76.1201 occurs only where a cable operator "stops" or "makes it impossible" for a customer to connect or use a navigation device. At its core, TWC would have us find that unless a cable operator prevents access to each and every program and service that constitutes the customer's subscribed programming tier, no violation of Section 76.1201 has occurred. Under TWC's interpretation of Section 76.1201, a cable operator may prevent (non-cable operator-supplied) UDCPs from accessing any portion of a programming service (or transport stream) — such as closed captioning or content advisory information — or may prevent these devices from accessing any linear video programming— such as select channels within a subscriber's purchased programming tier — and nonetheless act consistently with the Commission's mandate to support CableCARD-equipped devices. As we stated in the *TWC NAL and Order,* taken to its logical conclusion, TWC's reasoning would permit an 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. TWC's interpretation would eviscerate the rule, is inconsistent with the operative text of Section 76.1201– "use of navigation devices," and the Commission's goal to ensure commercial compatibility of such devices. Considering that the primary objective of Section 629 of the Act and Sections 76.1200-76.1210 of the Rules is to maximize the commercial availability of navigation devices, we decline to adopt a view of our Rule that ignores the plain text and the purpose of these sections.[51]

16. Moreover, TWC's strained interpretation of the Rule 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. Our conclusion is not affected by the fact that customers can still attach and use navigation devices to receive cable services, and that customers may access switched digital programming by obtaining a set top box from TWC. In the *Plug and Play Order,* the Commission sought to enable *unaffiliated* manufacturers, retailers, and other vendors to compete with MVPD-provided equipment by facilitating the direct connection of digital navigation devices to MVPD systems.

17. TWC further argues that the rule was historically intended to do no more than provide a right to attach commercially available equipment and does not include an obligation that an operator carry any service used by such equipment.[52] We concur that in adopting this rule, the Commission agreed that the 'right to attach' must be subject to the limitation that the equipment does not harm the MVPD network.[53] Thus, the Commission adopted rules that would

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[50] *Id.*

[51] *See Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994) (agency's interpretation of its own rule must be given controlling weight unless clearly erroneous).

[52] *TWC Response at 15-16.*

[53] *See Navigation Devices Order*, 13 FCC Rcd at 14789.

permit MVPDs to restrict the attachment or use of equipment to their systems where electronic or physical harm would be caused by the attachment or operation of such equipment.[54] The Commission was clear however, that "[t]hese standards [set forth in Section 76.1203] shall be used only to prevent attachment of navigation devices that raise reasonable and legitimate concerns of electronic or physical harm or theft of service, and *not as a means to unreasonably restrict the use of navigation devices obtained from a source other than the MVPD*."[55] The Commission was equally clear that it expected the cable industry to dedicate the resources necessary to ensure that commercially available CableCARD-enabled devices continue to interoperate properly with cable systems.[56] The equipment at issue does not raise concerns of electronic or physical harm or theft of service.

18. Finally, we disagree with TWC's claims that there is no record support for the allegation that as a result of the deployment of SDV, UDCPs lose certain functions, such as picture-in-picture, and that the NAL does not take the balanced approach to equipment compatibility that is required by Section 624A.[57] 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,"[58] and thus ensures the full compatibility of these devices with the cable system. The deployment of SDV and the requirement that a customer use a company-supplied set top box to view the now switched channels, negates whatever functionalities were available in the UDCP for those of the company-supplied set-top box. Unless the complaints referenced below are TW complaints don't know that we need the rest of this paragraph]The Commission received numerous complaints from affected consumers. For instance, some cable operators have migrated linear HD programming to an SDV format, thus rendering useless the high definition capability of the navigation device. In addition, many complaints from consumers indicate that SDV deployment has affected their use of TiVo. One of TiVo's main features is the ability to watch one program while recording another (*i.e.*, TiVo Series 3 was designed with two CableCARD slots – one single-stream CableCARD ("S-Card") to decrypt the programming that the TiVo is recording, and another S-card to decrypt the programming that the TiVo is displaying). The functionality of TiVo is lost with the use of the company-supplied set-top box, which has its own built-in functionality.

2. The NAL's Findings Are Fully Consistent with the Public Policy Underlying the Commission's Rules and Orders on "*Plug and Play*"

19. TWC next argues that its manner of implementing SDV is not inconsistent with the *Plug and Play Order*.[59] Specifically, it contends that the interactive or advanced two-way capabilities envisioned by that order are not limited to video on demand (VOD), electronic programming guides (EPG), and impulse pay per view (IPPV); are essentially without limit; and thus include SDV within its auspices.[60] TWC impliedly states that it may move all of its programming to an SDV format because *Plug and Play* provided for this eventuality by

[54] 47 § C.F.R. 76.1203.

[55] *Id.* (emphasis added).

[56] *But see 2005 Deferral Order,* 20 FCC Rcd at 6814.

[57] *TWC Response* at 17-20.

[58] 47 U.S.C. § 544a(c)(1)(B).

[59] *TWC Response* at 21.

[60] *Id.* at 22.

mandating DVI/HDMI connections, which allow for connection of UDCPs with two-way navigation devices. According to TWC, such an action is also supported by Rules that permit cable operators to move any programming for any reason -- no law provides subscribers with an entitlement to receive any particular service.[61]

20. The Bureau previously considered, and rejected, the arguments raised by TWC. As we have previously found, TWC's arguments are inconsistent with the language and the intent of the Commission's Rules and orders.[62] We do not believe that, in adopting the *Plug and Play Order*, the Commission intended to permit an MVPD move *all* of its programming to an SDV platform "without regard" for the impact such a move would have on its UDCP-owning customers. Such an outcome would be fundamentally inconsistent 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 is clearly at odds 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, we conclude that it does not permit TWC's actions here. By moving linear programming to an SDV platform, TWC prevents CableCARD-equipped UDCPs from receiving previously available channels and negates the usefulness of competitive commercially available navigation devices, in violation of the intent of Section 629 and the Commission's Rules.[63] 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.[64] 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 cable operator-provided set-top box.[65] Such an outcome is fundamentally at odds with the policy and regulatory objectives of the *Plug and Play Order*.

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[61] *Id.* at 23-25.

[62] *See Oceanic Kauai NAL*, 23 FCC Rcd at 14967. 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 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).

[63] *See* 47 U.S.C. § 549; 47 C.F.R. § 76.1201.

[64] "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 bidirectional, 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.").

[65] TWC's 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

(continued....)

22. 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.[66] 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 UDCP in connection with their cable systems. TWC's implementation of SDV in this case clearly negates the use of CableCARD-equipped UDCPs and fundamentally limits the commercial and competitive viability of those devices in cable systems where SDV has been deployed. In the instant case, customers who used CableCARD-equipped UDCPs are unable to receive dozens of linear channels after the deployment of SDV.[67] As such, TWC is effectively preventing CableCARD-equipped UDCPs from receiving channels previously available and undermining the underlying policy goals of the Act and the Commission's Rules 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 constitutes a willful and repeated violation of Section 76.1201 of the Rules.

23. TWC again reasserts that it cannot achieve the efficiencies enabled by SDV without moving linear channels.[68] According to TWC, a finding of liability as a consequence for such migration would undermine "vital public policy interests," such as additional HD programming and other digital content for all customers.[69] TWC also asserts that a restriction on SDV would harm the Commission's own policy objectives, such as the digital transition, increased programming diversity, MVPD competition, and enhanced broadband capabilities.[70]

24. As we stated in the *TWC NAL and Order*, we do not dispute that the deployment of SDV technology may provide significant 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 Commission Rules. As we noted in the *TWC NAL*

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[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.

[66] *See Navigation Devices Order*, 13 FCC Rcd at 14786.

[67] 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 Initial Supplemental LOI Response, Exhibit A (stating that 62 channels ultimately were moved to SDV platform).

[68] *TWC Response* at 28-32.

[69] *Id.* at 30.

[70] *Id.* at 31-32.

and Order, charging for channels not presently accessible to subscribers with CableCARD-equipped UDCPs undermines the policy and regulatory objectives of the *Plug and Play Order*. Moreover, we are not convinced that the only way TWC can create additional capacity using SDV is to move existing linear programming to an SDV platform. Regardless of the benefits touted, the manner in which TWC has migrated linear channels prevents certain UDCP customers the use and functionality of their navigation devices.[71]

3. The NAL's Reading of Section 76.1201 Does Not Conflict with the First Amendment

25. TWC's arguments that the NAL runs afoul of the First Amendment are insubstantial. As an initial matter, TWC's contention that the NAL renders the Commission's *Viewability Order* unconstitutional lacks any merit.[72] In the *Viewability Order*, the Commission set forth a comprehensive analysis of why the requirement that all cable subscribers be able to view the signals of all must-carry stations after the digital transition was consistent with the First Amendment,[73] and the U.S. Court of Appeals for the District of Columbia Circuit recently dismissed a constitutional challenge to the *Viewability Order*.[74] The analysis contained in the *Viewability Order* in no way depended on the use of SDV under the circumstances present here, and the interpretation of our Rules set forth in the NAL neither alters the Commission's expectation that "cable capacity will continue to expand in future years, thus further decreasing the relative burden on cable operators" nor its observation that "because digital cable systems offer so much more capacity, the proportion of overall bandwidth devoted to must-carry signals is that much smaller than was the case at the time of the [U.S. Supreme Court decisions upholding the constitutionality of must-carry regulation]."[75]

26. Neither is there any merit to TWC's contention that the NAL violates the First Amendment by "impermissibly curtail[ing] TWC's editorial discretion to deliver programming of its choice using the most efficient technology available to it."[76] Simply put, TWC has no First Amendment right to undermine the development of a competitive market for navigation devices by preventing consumers from accessing linear programming in their existing programming packages with a CableCARD-equipped UDCP and instead requiring the consumer to obtain a TWC-provided set-top box. To the extent that the rules at issue here implicate the First Amendment at all, the requirements are content neutral and narrowly tailored to further the substantial federal interest in developing and maintaining a competitive market for navigation devices, an interest whose importance has been recognized by both Congress and the courts.[77]

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[71] We note TWC's claim that bi-directional navigation devices "are now becoming available at retail." *TWC Response* at 26. The development of bi-directional navigation devices without limitations on the ability to integrate broadband capability into competitive navigation devices and the ability to integrate web-based or IP content with cable-providing programming will further Congress and the Commission's shared policy goal of expeditious commercial availability of bi-directional navigation devices.

[72] See *Carriage of Digital Television Broadcast Signals*, Third Report and Order, 22 FCC Rcd 21064 (2007) ("*Viewability Order*").

[73] *See Viewability Order* at ¶¶ 41-63.

[74] *See C-SPAN, Inc. v. FCC*, 545 F.3d 1051 (D.C. Cir. 2008).

[75] *Viewability Order* at ¶ 60.

[76] *TWC Response* at 33.

[77] *See* 47 U.S.C. § 549; *Comcast Corp. v. FCC*, 536 F.3d 763 (D.C. Cir. 2008); *Charter Communications, Inc. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006).

(continued....)

Finally, while TWC complains that the First Amendment is implicated by the treatment of other MVPDs under the integration ban, the D.C. Circuit previously rejected the cable industry's attempt to raise the differential treatment of cable and DBS in another proceeding, noting the evidence set forth by the Commission of the distinctions in the navigation-device market for cable and DBS and observing that "the cable industry is 'perfectly capable of filing a petition tomorrow with the Commission' that will generate a record appropriate for consideration of those issues."[78] The same holds true here.

B. TWC 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

27. TWC contends that the *TWC NAL and Order*'s finding that the standard incorporated by reference in Section 76.640(b)(1)(i) applies to all services, including two-way services like SDV is wrong.[79] According to TWC, Section 76.640(b)(1)(i), through the incorporated standard SCTE 40 (2003), stands for the proposition that SCTE 65 tables must be presented only for services that are *offered* to the UDCP host device. Since two-way services are not offered, they need not be included.[80] TWC further asserts that because the text of the rule is limited to one-way products, it cannot reasonably be applied to two-way *services*.[81] Issues relating to two-way services, TWC states, were not yet ripe for consideration during the Commission's consideration of its *Plug and Play Order*, and so were never intended to be encompassed by this rule. TWC also cites to the technical standard SCTE 65 to suggest that the standard was not intended to apply to two-way services, partly because hidden channels are skipped when the subscriber is channel surfing, and partly because the standards state that UDCPs may disregard virtual channel data associated with an application-type virtual channel. TWC argues that the virtual channel table is designed to present only channels that are accessible.[82]

28. TWC's arguments are without merit. On its face, Section 76.640 applies only to unidirectional *products*.[83] 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.[84]

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[78] *Charter*, 460 F.3d at 43 (quoting FCC counsel). Similarly, although TWC complains about a waiver given by the Media Bureau to Verizon, TWC never sought Commission review of that waiver, and this is not the appropriate proceeding for challenging its merits.

[79] *TWC Response* at 37.

[80] *Id.* at 37-38.

[81] *Id.*

[82] *TWC Response* at 38-40.

[83] *See* 47 C.F.R. §76.640 ("Support for unidirectional digital cable products on digital cable systems.").

[84] *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...").

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.

29. TWC next argues that, because Section 15.123 provides that a UDCP cannot be labeled as digital-ready unless it can navigate channels through the virtual channel table, the provision of SDV data to UDCPs would render them non-compliant since the devices would be unable to navigate to SDV programming.[85] According to TWC, as a result, the UDCP would be rendered noncompliant with the Part 15 rules, could not be marketed as digital cable ready, and cable operators would be relieved of any obligation to support these devices since they are required only to "support unidirectional digital cable products . . ."[86] TWC argues that rules are not to be interpreted in manner that would nullify corresponding rules. Lastly, TWC argues that there is no practical benefit to transmitting information for channels that cannot be viewed without a set-top box.[87]

30. We disagree. Requiring compliance with Section 76.640(b) does not conflict with Section 15.123 and provides a significant practical benefit. As we stated in the *TWC NAL and Order*, 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.[88] We reiterate that 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.[89] Accordingly, based on the record before us, we find that TWC 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.

C. The Bureau Did Not Exceed Its Delegated Authority in Issuing the NAL

31. TWC argues that the Bureau's expansive interpretations of the Rules and its decision to penalize the company present novel questions of policy and law; the issues, therefore, fall outside the scope of the Bureau's delegated authority and must be submitted to the Commission for en banc disposition under Section 0.311(a)(1).[90]

32. The Enforcement Bureau serves as the primary Commission entity responsible for enforcement of the Act, the Commission's rules, and Commission orders.[91] The Bureau has delegated authority to issue orders taking appropriate action in response to complaints or investigations, including issues notices of apparent liability and related orders.[92] The Bureau has delegated authority to decide matters unless they "present novel questions of law, fact or policy

[85] *TWC Response* at 41-42.

[86] *TWC Response* at 41.

[87] *Id.* at 42.

[88] *TWC NAL and Order*, XXX at para. 27.

[89] 47 C.F.R. § 76.1207.

[90] *TWC Response* at 43.

[91] 47 C.F.R. § 0.111.

[92] 47 C.F.R. § 0.111(17).

that cannot be resolved under existing precedents and guidelines."[93] The questions presented here are consistent with the Commission's *Plug and Play Order*, the rules found in Section 76.1201 implementing that order, and the technical rules of Section 76.640(b). As such, the Bureau acted within its delegated authority in issuing the *TWC NAL and Order*. The Bureau is merely applying existing rules and case law to the instant facts.

D. Forfeiture Calculation

33. 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.[94] 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.[95] 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.[96] We conclude that TWC is 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.

34. Under Section 503(b)(2)(A) and Section 1.80(b)(1) of the Commission's Rules,[97] 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."[98]

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[93] 47 C.F.R. § 0.311(a)(3).

[94] 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

[95] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

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

[97] 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.

[98] 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.

35. The Commission's *Forfeiture Policy Statement*[99] and Section 1.80 of the Rules do not establish a specific base forfeiture for violation of Section 76.1201.[100] In a similar case, the Commission proposed forfeitures for each cable system involved in the violation.[101] Thus, we establish a base forfeiture amount for each cable system in which linear programming has been moved to an SDV 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 Cable System.

36. As we stated in the *TWC NAL and Order,* 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.[102] Given the number of channels involved and the effect of actions like those here on the Commission's policy objectives, however, we conclude 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 Cable System. Accordingly, we conclude that TWC is liable for a $10,000 forfeiture for its willful violation of Section 76.1201 of the Rules.

37. Additionally, we conclude that TWC is 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.[103] We find that the actions of TWC effectively discontinue a portion of the services for each of its CableCARD subscribers who choose to view content via a UDCP. We also conclude that the amount of the 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

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[99] *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).

[100] 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).

[101] *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). SDV is installed at separate hubs throughout the cable system, but generally the operator will implement the technology on a system-wide basis.

[102] 47 C.F.R. § 1.80(b)(4)(Note). *See also Cablevision Forfeiture Order,* 15 FCC Rcd at 24298.

[103] 47 C.F.R. § 1.80(b)(4)(Note). Violation of the broadcast signal carriage rule is also analogous to TWC's failure 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.

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 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.

38. 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.[104] Accordingly, we conclude that TWC is 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.

E. TWC Must Issue Refunds to Customers Harmed by its SDV Implementation

39. As we noted in the *TWC NAL and Order,* 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.[105] 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.

40. 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. While TWC's offer to provide a free set-top box to its CableCARD customers may

[104] 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.

[105] 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.

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.

41. In the *TWC NAL and Order*, we ordered TWC, within ninety (90) days of the *NAL and Order,* to issue refunds to CableCARD customers affected by the November 6, 2007 implementation of SDV in its Oceanic Kauai Cable System.[106] In addition, within thirty (30) days of the release of the *TWC NAL and Order,* we required TWC to submit to the Enforcement Bureau an explanation of the method the company planned 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 failed to comply with the Bureau's Order and the Bureau is separately addressing that violation of the Commission's Rules.

42. Thus, we order TWC, within ninety (90) days of this *Forfeiture 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 CableCARD 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 by $0.10 per month, per channel moved and reduce their rates on a going-forward basis accordingly.[107]

IV. ORDERING CLAUSES

43. 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., Oceanic Kauai Cable System **IS LIABLE 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.

[106] *TWC NAL and Order* at 39.

[107] $0.10 is our best estimate of the relevant license fee per channel. We note that TWC did not provide an explanation of the method the company planned to use to determine the appropriate amount of refunds as required by the *TWC NAL and Order*. The Bureau will reconsider the appropriate license fee per channel should TWC submit a petition for reconsideration that includes evidence that the license fees of the affected channels are lower than $0.10 per month.

44. **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 paragraph 42 of this *Forfeiture Order*.

45. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission within thirty (30) days of the release of this Order. 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 and Kevin.Pittman@fcc.gov.

46. **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 A Monteith

Kris Anne Monteith
Chief, Enforcement Bureau