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

In the Matter of	)	File Number EB-09-SE-005
	)	
Time Warner Cable, Inc.	)	NAL/Acct. No.200932100027
	)	
	)	FRN 0016618670
	)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE AND ORDER

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

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture and Order* ("*NAL and Order*"), we find that the Time Warner Cable Inc.'s cable system, serving San Diego, California ("Time Warner") apparently willfully violated Section 76.1603(b) of the Commission's Rules ("Rules").[1] Specifically, Time Warner failed to provide the requisite thirty (30) days advance written notice to its customers, before implementing a change in rates, programming services or channel positions as required under the Rules. We conclude, pursuant to Section 503(b) of the Communications Act of 1934, as amended ("Act"),[2] that Time Warner is apparently liable for a forfeiture in the amount of seven thousand five hundred dollars ($7,500). We also order Time Warner, within ninety (90) days of this *NAL and Order*, to issue refunds to the customers affected by the change in rates, programming services or channel position as explained more fully below.

II. BACKGROUND

2. On May 17, 2006, the Commission received a complaint from a customer in San Diego, California asserting that Time Warner had moved channel 69, the National Geographic Channel, from complainant's basic cable service to channel 218, in a premium digital package.[3] According to the complainant, this change was made without any notice.

III. DISCUSSION

A. Time Warner Apparently Violated Section 76.1603(b) By Failing To Provide Proper Notice to its Customers.

3. Based on the record before us, we find that Time Warner apparently willfully violated Section 76.1603(b) by failing to notify its customers before implementing a change in rates, programming services or channel positions as required under the Rules.

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[1] 47 C.F.R. § 76.1603(b).

[2] 47 U.S.C. § 503(b).

[3] See CIMS00000234502.

4. Section 76.1603(b) of the Rules provides, in relevant part, as follows:

> Customers will be notified of any changes in rates, programming services or channel positions as soon as possible in writing. Notice must be given to subscribers a minimum of thirty (30) days in advance of such changes if the change is within the control of the cable operator. In addition, the cable operator shall notify subscribers 30 days in advance of any significant changes in the other information required by § 76.1602.[4]

5. We find that the migration of the National Geogrphic channel constitutes a change in rates, programming services or channel positions under the Rules. We also find that the migration was a change within the control of the Time Warner because we are unaware of external forces that would have required the Time Warner to make such a change, particularly without giving 30 days notice. In our Letter of Inquiry issued to Time Warner on October 30, 2008,[5] we asked for a range of information related to the migration of channels, including evidence that consumers were provided with the notice required under our rules. Unfortunately, Time Warner failed to produce any evidence on this point in response to our request, including any evidence that the requisite notice was provided of the migration that is the subject of this *NAL and Order*.

6. Therefore, for the reasons stated above, we find that Time Warner apparently violated Section 76.1603(b) by failing to provide the complainant at least thirty (30) days notice of a change in rates, programming services or channel positions.

B. Forfeiture Calculation

7. 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.[6] 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.[7] 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.[8] Based on the analysis set forth below, we conclude that Time Warner is apparently liable for a forfeiture in the amount of seven thousand five hundred dollars ($7,500) for its willful violation of Section 76.1603(b) of the Rules.

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[4] 47 C.F.R. § 76.1603(b).

[5] [5] Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission to Matthew A. Brill, Counsel for Time Warner Cable, Inc. (Oct. 30, 2008) ("LOI").

[6] 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

[7] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

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

8. Under Section 503(b)(2)(A) and Section 1.80(b)(1) of the Commission's Rules,[9] 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."[10]

9. The Commission's *Forfeiture Policy Statement*[11] and Section 1.80 of the Rules do not establish a specific base forfeiture for violation of Section 76.1603's notice requirements.[12] Based on the totality of circumstances here and the Commission's past precedent, we find that $7,500 is an appropriate base forfeiture for the failure to notify its customers of Time Warner's change in service.[13] Accordingly, we conclude that Time Warner is apparently liable for a $7,500 forfeiture for its willful violation of Section 76.1603(b) of the Rules.

C. Time Warner Must Issue Refunds To Customers Harmed By Its Failure To Provide Notice.

10. Time Warner's change in rates, programming services or channel positions without the required notice has harmed its customers who purchased services based on the reasonable assumption that Time Warner would not be moving programming from standard service tiers to digital cable tiers without providing the notice required under our Rules. In effect, Time Warner's movement of programming to a digital tier without any reduction in subscriber fees has diminished the value of the programming Complainant receives. The Complainant must now pay the same monthly rate for cable service even though Complainant can view fewer channels.

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[9] 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 a continuing violation. *See* Inflation Adjustment of Maximum Forfeiture Penalties, 73 Fed. Reg. 44663, 44664 (July 31, 2008). The new forfeiture limits will take effect September 2, 2008 and do not apply to this case.

[10] 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] *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), *recon. denied,* 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

[12] The Commission has substantial discretion, however, 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).

[13] *See also Northland Cable Television, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 7865 (Media Bur. 2008) (proposing $20,000 forfeiture for apparent violations of Section 76.1603 and other rules); *Northland Cable Television, Inc.,* Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 7872 (Media Bur. 2008) (same).

11. Thus, we order Time Warner, within ninety (90) days of this NAL and Order, to issue refunds to all affected subscribers who did not receive the requisite notice as of the date of the programming change. Specifically, Time Warner must provide refunds as follows:

> Time Warner must refund the customer's subscriber fees of all affected customers who did not receive the required notice based on the diminished value of their service following the movement of programming without proper notice by $0.10 per channel moved per month and reduce complainant's rates on a going-forward basis accordingly until the notice required under our rules has been provided.[14]

12. In addition, we order Time Warner to submit to the Bureau within 30 days of the issuance of refunds a report in the form of a letter advising the Bureau that such refunds have been paid and that affected subcribers' fees have been reduced as directed.

IV. ORDERING CLAUSES

13. **Accordingly, IT IS ORDERED**, pursuant to section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. S: 503(b)(5), and section 1.80 of the Commission's rules, 47 C.F.R. S: 1.80, 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, Time Warner is NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of seven thousand five hundred dollars ($7,500.00) for willful violation of Section 76.1603(b) of the Rules.

14. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Rules, within thirty days of the release date of this Notice of Apparent Liability for Forfeiture and Order, Time Warner **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

15. 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 must take the steps set forth in paragraphs 10, 11, and 12 of this Notice of Apparent Liability for Forfeiture and Order.

16. 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,

[14] Thus, for example, if the Time Warner migrated a channel and did not provide proper notice for nine months, it must refund $0.90 to each affected customer. $0.10 is our best estimate of the relevant license fee per channel. We note that Time Warner did not provide actual per channel license fees as required by the LOI. The Bureau will reconsider the appropriate license fee per channel should Time Warner submit a petition for reconsideration that includes evidence that the license fees of the affected channels are lower than $0.10 per month.

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. Time Warner will also send electronic notification on the date said payment is made to Kathy.Berthot@fcc.gov and to JoAnnLucanik@fcc.gov.

17. The response, if any, must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Enforcement Bureau – Spectrum Enforcement Division, and must include the NAL/Acct. No. referenced in the caption.

18. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

19. **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 Cable, Inc., Matthew A. Brill, Esq., Latham & Watkins LLP, 555 11th Street, NW, Suite 1000, Washington, DC, 20004.

FEDERAL COMMUNICATIONS COMMISSION

Kris A Monteith

Kris Anne Monteith
Chief, Enforcement Bureau