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

In the Matter of	)	File No. EB-08-SE-1068
	)	NAL/Acct. No. 2008321000009
Bright House Networks, LLC	)	FRN 0018103622
	)	

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*"), we find that Bright House Networks, LLC ("Bright House") apparently willfully violated a Commission Order and Section 76.939 of the Commission's Rules ("Rules") in failing to respond fully to an Enforcement Bureau Letter of Inquiry.[1] We conclude, pursuant to Section 503(b) of the Communications Act of 1934, as amended ("Act"),[2] that Bright House is apparently liable for a forfeiture in the amount of twenty-five thousand dollars ($25,000). We also order Bright House to respond fully to the LOI within ten (10) days of release of this *NAL*. If Bright House again fails to submit a complete response, it will be subject to further enforcement action.

II. BACKGROUND

2. In response to consumer complaints against Bright House, on October 30, 2008, the Enforcement Bureau ("Bureau") issued a Letter of Inquiry ("LOI") regarding the company's migration of analog programming to digital tiers.[3] The LOI sought information concerning instances in which Bright House had migrated analog channels to a digital tier, including the channels affected, whether and how the company notified customers of the change, whether, in light of the change in service, the company permitted customers to change their service tier without charge, and the rates charged customers before and after the channel migration. The LOI also asked about Bright House's charges for digital set-top boxes as well as information regarding Bright House's subscriber rates and the rates it pays to video programmers.

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[1] 47 C.F.R. § 76.939.

[2] 47 U.S.C. § 503(b).

[3] Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission to Micah M. Caldwell, Esq., Counsel for Bright House Networks, LLC (Oct. 30, 2008) ("LOI").

3. Although Bright House filed a response to the LOI,[4] many of Bright House's answers to questions in the LOI are non-responsive or incomplete. For example, Bright House's response to Question 1.g. (whether Bright House implemented a rate reduction in connection with any analog-to-digital channel changes) simply states that "all rates have been set in accordance with applicable rate regulations..." without addressing the specific question of whether any rate reductions were implemented to reflect the reduction in the number of channels accessible to analog-only subscribers.[5] In response to Question 3.a. (whether Bright House provided written notice to subscribers of the analog-to-digital channel change), Bright House provides copies of the notices but not the date on which each notice was provided to subscribers.[6] In response to Question 4 (regarding notices to Local Franchising Authorities of the analog-to-digital migration), Bright House provides only a sampling of the documents requested,[7] and in response to Question 5.b. (documents furnished to customer service personnel in responding to subscriber questions about the analog-to-digital channel change(s)), Bright House fails to provide any of the requested documents.[8] In response to Questions 6 (complaints regarding analog-to-digital channel change(s)), Bright House identifies two complaints but fails to provide copies of these complaints.[9] In response to Question 7 (oral complaints regarding analog-to-digital channel changes), Bright House admits to receiving oral complaints but fails to identify the number of such complaints or the existence of any records relating to these complaints.[10] Bright House claims that the 14-day time period allowed in which to respond to these questions and the failure of the LOI to cite specific rule sections interfered with its ability to respond fully to these questions.[11]

4. In addition and more troubling, Bright House simply evades Questions 8.b (the per-subscriber fees it pays to video programming distributors for those channels subject of the inquiry) by responding that there are no channels to which this question would apply because channels are not provided to its customers on a fee-per-channel basis.[12] While Bright House may not price specific channels on a per-subscriber basis, the question asks for the fees it pays to video programming distributors on a per-subscriber fee basis. Bright House's response is non-responsive and misleading to the extent it does pay such fees to video programming distributors.

III. DISCUSSION

A. Failure to Respond Fully to the LOI

5. We find that Bright House's failure to fully respond to the Bureau's inquiry constitutes an

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[4] Letter from Kristi S. Kramersmeier, Vice President, New Product Development, Bright House Networks, LLC to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 13, 2008) ("LOI Response"). We note that Bright House seeks confidential treatment of the entirety of its LOI Response. *See* Letter from Paul B. Hudson, Counsel for Bright House Networks, LLC, Davis, Wright, Tremaine LLP to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 13, 2008). We do not rule on Bright House's request for confidentiality at this time.

[5] LOI Response at 4.

[6] The notification dates generally are not discernible from the notices themselves. *See* LOI at 3 (requiring Bright House to provide the notice dates to the extent that information is not available on each notice itself).

[7] LOI Response at 6.

[8] *Id.* at 7.

[9] *Id.* at 7-8.

[10] *Id.* at 8.

[11] *Id.* at 3.

[12] *Id.* at 8.

apparent willful[13] violation of a Commission order and Section 76.939 of the Rules. The Bureau directed Bright House to provide certain information related to the movement of analog channels to digital tiers. This information was necessary to enable the Commission to perform its enforcement function and evaluate whether Bright House violated Commission rules. There is no question that Bright House received the LOI. To date, however, Bright House has failed to provide a full and complete response.

6. The Commission has broad investigatory authority under Sections 4(i), 4(j), and 403 of the Act, its Rules, and relevant precedent. Section 4(i) authorizes the Commission to "issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[14] Section 4(j) states that "the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."[15] Section 403 grants the Commission "full authority and power to institute an inquiry, on its own motion ... relating to the enforcement of any of the provisions of this Act."[16] Pursuant to Section 76.939 of the Rules, a cable operator must comply with FCC requests for information, orders, and decisions.[17] In carrying out this obligation, a cable operator also must provide truthful and accurate statements to the Commission or its staff in any investigatory or adjudicatory matter within the Commission's jurisdiction.[18] Lastly, numerous FCC decisions have reaffirmed the Commission's authority to investigate potential misconduct and punish those that disregard FCC inquiries.[19] The Commission delegated this authority to the Enforcement Bureau in Section 0.111(a)(16) of the Rules.[20]

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[13] Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act indicates that this definition of willful applies to both Sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the Section 503(b) context. *See, e.g., Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-88 ¶ 5 (1991) ("*Southern California Broadcasting*").

[14] 47 U.S.C. § 154(i).

[15] 47 U.S.C. § 154(j).

[16] 47 U.S.C. § 403.

[17] 47 C.F.R. § 76.939 ("Cable operators shall comply with ... the Commission's requests for information, orders, and decisions.").

[18] *See* 47 C.F.R. § 1.17.

[19] *See, e.g., SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7599-7600 ¶¶ 23-28 (ordering $100,000 forfeiture for egregious and intentional failure to certify the response to a Bureau inquiry) ("*SBC Forfeiture Order*"); *Globcom, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 18 FCC Rcd 19893, 19898 n. 36 (2003) (noting delayed response to an LOI is considered dilatory behavior which may result in future sanctions) (subsequent history omitted); *Digital Antenna, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 23 FCC Rcd 7600, 7602 (Spectr. Enf. Div., Enf. Bur. 2008) (proposing $11,000 forfeiture for failure to respond to provide a complete response to an LOI); *BigZoo.Com Corporation*, Forfeiture Order, 20 FCC Rcd 3954 (Enf. Bur. 2005) (ordering $20,000 forfeiture for failure to respond to an LOI); *World Communications Satellite Systems, Inc.*, Forfeiture Order, 19 FCC Rcd 2718 (Enf. Bur. 2004) (ordering a $10,000 forfeiture for non-responsive reply to an LOI); *Donald W. Kaminski, Jr.*, Forfeiture Order, 18 FCC Rcd 26065 (Enf. Bur. 2003) (ordering $4,000 forfeiture for individual's failure to respond to an LOI).

[20] 47 C.F.R. §0.111(a)(16) (granting the Enforcement Bureau authority to "[i]dentify and analyze complaint information, conduct investigations, conduct external audits and collect information, including pursuant to sections 218, 220, 308(b), 403 and 409(e) through (k) of the Communications Act, in connection with complaints, on its own initiative or upon request of another Bureau or Office."). *See also* 47 C.F.R. §§0.111(a)(13) (Enforcement Bureau has authority to "[r]esolve complaints regarding multichannel video and cable television service under part 76 of the Commission's rules"); 0.311 (general delegated authority for Enforcement Bureau).

7. Bright House alleges that it could not have responded fully to the LOI because the amount of time allowed for the preparation of the company's LOI response was too brief.[21] Certain complaints received by the Commission regarding the migration of analog programming to a digital tier, however, allege that cable operators were falsely linking the programming changes with the digital television transition. Because of the strong public interest in avoiding confusion about the transition and the rapidly approaching transition date, the Bureau determined that two weeks was an appropriate deadline and we conclude that two weeks was a reasonable deadline. Bright House does not dispute that this decision was within our discretion. Thus, Bright House was obligated to respond by our deadline. Moreover, we note that since it submitted its LOI response and while this matter remains under investigation by the Bureau, Bright House has neither contacted the Bureau about its response nor provided any supplemental information. We find therefore that Bright House's failure to fully respond to the Bureau's inquiry constitutes an apparent willful[22] violation of a Commission order and Section 76.939 of the Rules.

B. Proposed Forfeiture

8. We conclude that Bright House is apparently liable for forfeiture for its apparent willful violation of a Commission Order and Section 76.939 of the Rules. 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.[23] 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.[24] 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.[25] We conclude under this standard that Bright House is apparently liable for forfeiture for its apparent willful violation of a Commission Order and Section 76.939 of the Rules.

9. Under Section 503(b)(2)(A) of the Act,[26] we may assess a cable operator a forfeiture of up to $37,500 for each violation, or for each day of a continuing violation up to a maximum of $375,000

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[21] *See* LOI response at 3, 6.

[22] Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act indicates that this definition of willful applies to both Sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the Section 503(b) context. *See, e.g., Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-88 ¶ 5 (1991) ("*Southern California Broadcasting*").

[23] 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

[24] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

[25] *See, e.g., SBC Forfeiture Order*, 17 FCC Rcd at 7591.

[26] 47 U.S.C. § 503(b)(2)(A). The Commission has amended Section 1.80(b)(3) of the Rules, 47 C.F.R. § 1.80(b)(3), three times 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. *See Amendment of Section 1.80 of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 23 FCC Rcd 9845 (2008) (adjusting the maximum statutory amounts for broadcasters and cable operators from $32,500/$325,000 to $37,500/$375,000); *Amendment of Section 1.80 of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation,* Order, 19 FCC Rcd 10945 (2004) (adjusting the maximum statutory amounts for broadcasters and cable operators from $27,500/$300,000 to $32,500/$325,000); *Amendment of Section 1.80 of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation,* Order, 15 FCC Rcd 18221 (2000) (adjusting the maximum statutory amounts for broadcasters and cable operators from $25,000/$250,000 to $27,500/$300,000). The most recent inflation adjustment took effect September 2, 2008 and applies to violations that occur after that (continued ...)

for a single act or failure to act. 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."[27]

10. Section 1.80 of the Rules and the Commission's *Forfeiture Policy Statement* establish a base forfeiture amount of $4,000 for failure to respond to Commission communications.[28] We find that Bright House's failure to respond fully to the LOI in the circumstances presented here warrants a significant increase to this base amount. Misconduct of this type exhibits contempt for the Commission's authority and threatens to compromise the Commission's ability to adequately investigate violations of its rules. Prompt and full responses to Bureau inquiry letters are essential to the Commission's enforcement function. In this case, Bright House's apparent violations have delayed our investigation and inhibited our ability to examine allegations raised in consumer complaints and potentially touching on an area of critical importance -- the DTV transition. We further note that Bright House failed to provide a full and complete LOI response even after receiving a specific warning from the Commission's General Counsel that such actions could be subject to enforcement penalties.[29]

11. Based on these facts, we therefore propose a twenty-five thousand dollar ($25,000) forfeiture against Bright House for failing to respond fully to Commission communications. This forfeiture amount is consistent with precedent in similar cases, where companies failed to provide complete responses to Bureau inquiries concerning compliance with the Commission's Rules despite evidence that the LOIs had been received.[30]

12. We also direct Bright House to respond fully to the October 30, 2008 LOI within ten (10) days of the release of this Notice of Apparent Liability for Forfeiture and Order. Failure to do so may constitute an additional violation subjecting Bright House to further penalties, including potentially higher monetary forfeitures.[31]

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Section 1.80 of the Rules, and the authority delegated by Sections 0.111 and 0.311 of the Commissions Rules, **Bright House Networks, LLC** is **NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of twenty-five thousand dollars ($25,000) for its willful violation of a Commission Order and Section 76.939 of the Rules.

14. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Rules, within thirty (30) days of the release date of this Notice of Apparent Liability for Forfeiture and Order, Bright House **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking

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date. *See* 73 Fed. Reg. 44663-5. Bright House's apparent violations occurred after September 2, 2008 and are therefore subject to the higher forfeiture limits.

[27] 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.

[28] *See* 47 C.F.R. § 1.80(b)(4); *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 (1997), *recon. denied,* 15 FCC Rcd 303 (1999).

[29] *See* Letter from Matthew Berry, General Counsel, Federal Communications Commission, to Micah Caldwell, Esq., Counsel for Bright House Networks, LLC, Fleishman and Harding, LLP at 2 (Nov. 12, 2008).

[30] *See supra* note 17.

[31] We do not decide in this *NAL* whether the failure to respond to an LOI constitutes a continuing violation.

reduction or cancellation of the proposed forfeiture.

15. **IT IS FURTHER ORDERED** that, pursuant to sections 1, 4(i), 4(j), 403 of the Communications Act of 1934, as amended, 47 U.S.C. §151, 154(i), 154(j), 403, Bright House shall fully respond to the October 30, 2008 Letter of Inquiry sent by the Enforcement Bureau in the manner described by that Letter of Inquiry within ten (10) days of the release of this Notice of Apparent Liability 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, 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. Bright House will also send electronic notification on the date said payment is made to JoAnn.Lucanik@fcc.gov and nissa.laughner@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. The response should also be e-mailed to JoAnn Lucanik, Deputy Chief, Spectrum Enforcement Division, Enforcement Bureau, FCC, at JoAnn.Lucanik@fcc.gov and Nissa Laughner, Esq., Spectrum Enforcement Division, FCC, at nissa.laughner@fcc.gov.

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 Kristi S. Kramersmeier, Vice President, New Product Development, Bright House Networks, LLC, 5000 Campuswood Drive, East Syracuse, New York, 13057-1254, and to counsel for Bright House Networks, LLC, Paul Hudson, Esq., Davis Wright Tremaine LLP, 1919 Pennsylvania Avenue NW, Suite 200, Washington D.C. 20006.

FEDERAL COMMUNICATIONS COMMISSION

Kris A Monteith

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Chief, Enforcement Bureau