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

In the Matter of	)	File No. EB-08-SE-1078
	)	NAL/Acct. No. 200932100010
Time Warner Cable, Inc.	)	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*"), we find that Time Warner Cable, Inc. ("TWC") 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 TWC is apparently liable for a forfeiture in the amount of twenty-five thousand dollars ($25,000). We also order TWC to respond fully to the LOI within ten (10) days of release of this *NAL*. If TWC again fails to submit a complete response, it will be subject to further enforcement action.

II. BACKGROUND

2. In response to consumer complaints against TWC, 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 TWC 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 TWC's charges for digital set-top boxes as well as information regarding TWC's subscriber rates and the rates it pays to video programmers.

3. Although TWC states that it "always strives to cooperate fully with Commission inquiries," it claims that the two week time period allowed in which to respond to these questions was inadequate.[4] TWC cites this explanation for its LOI Response, which provides some of the information requested but fails to answer most of the LOI's questions except in the most general terms. For example, TWC notes that it generally does not track its analog-to-digital conversions at the national level.[5] With

[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 Matthew A. Brill, Counsel for Time Warner Cable, Inc. (Oct. 30, 2008) ("LOI").

[4] Letter from Matthew A. Brill, Counsel for Time Warner Cable, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission at 2 (Nov. 13, 2008) ("LOI Response").

[5] *Id.* at 2.

respect to Question 1, therefore, TWC identifies some but not all of the channels migrated from the analog to the digital tier. Nor does the company explain when those migrations took place or the specific cable systems involved.[6] The company also explains that it has migrated all of its cable programming services tier ("CPST") channels to digital in certain markets, and provides examples of its movement of some basic service tier programming ("BST") to digital in those markets and others, but fails to provide any specifics about these actions.[7] TWC identifies the manufacturers of the digital set-top boxes it distributes (Question 2), but does not provide pricing information or details about each box's features.[8] TWC generally describes its customer and local franchise authority notification policies (Question 3-5), but does not give any details about specific notices.[9] Regarding Question 6 and 7, which seek information about consumer complaints, the company describes some of the complaints it has received about the migration of analog programming to a digital tier, but fails to provide them, as required by the LOI.[10]

4. Finally, with respect to Question 8, which seeks per-subscriber pricing and cost information for each migrated channel, TWC claims it does not charge its customers on a per-channel basis. TWC states that it is unable to respond to Question 8.b. of the Bureau's LOI—which seeks information about cable programming fees—as doing so would violate confidentiality agreements made between TWC and its programmers.[11] According to TWC, the LOI is unenforceable because it does not comply with the Paperwork Reduction Act ("PRA").[12] TWC contends that the LOI directed to the company "is manifestly not an individualized inquiry directed to TWC based on any particular complaints or allegations."[13] In its view, the LOIs issued by the Bureau to several cable companies "do not set forth any compelling legal justification for an investigation in this context, as the services about which the LOIs seek information are beyond the Commission's authority to regulate in any event."[14] Because TWC takes the position that the LOI is unenforceable, it contends that it would be without any defense to a claim of "unauthorized disclosure" of confidential information.[15]

III. DISCUSSION

A. Failure to Respond Fully to the LOI

5. We find that TWC's failure to fully respond to the Bureau's inquiry constitutes an apparent willful[16] violation of a Commission order and Section 76.939 of the Rules. The Bureau directed

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[6] *Id.* at 5.

[7] *Id.* at 5-6.

[8] *Id.* at 6-7.

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

[10] *Id.* at 8.

[11] *Id.* at 9.

[12] *Id.* at 10.

[13] *Id.* at 11.

[14] *Id.*

[15] *Id.* at 9-10.

[16] 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*").

TWC 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 TWC violated Commission rules. TWC received the LOI but 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."[17] 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."[18] 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."[19] Pursuant to Section 76.939 of the Rules, a cable operator must comply with FCC requests for information, orders, and decisions.[20] 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.[21] Lastly, numerous FCC decisions have reaffirmed the Commission's authority to investigate potential misconduct and punish those that disregard FCC inquiries.[22] The Commission delegated this authority to the Enforcement Bureau in Section 0.111(a)(16) of the Rules.[23]

7. We reject TWC's contentions that it was not obligated to respond fully and completely to the Bureau's inquiry because it believes the LOI violates the PRA and is therefore unenforceable.[24] According to TWC and a letter submitted by the National Cable & Telecommunications Association, the Commission has violated the PRA by sending similar inquiries to 10 or more persons without first seeking notice and comment and approval by the Office of Management and Budget.[25] We disagree. The LOI complies with the Paperwork Reduction Act because it is part of a targeted investigation of "specific

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[17] 47 U.S.C. § 154(i).

[18] 47 U.S.C. § 154(j).

[19] 47 U.S.C. § 403.

[20] 47 C.F.R. § 76.939 ("Cable operators shall comply with ... the Commission's requests for information, orders, and decisions.").

[21] *See* 47 C.F.R. § 1.17.

[22] *See, e.g., SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7599-7600 ¶¶ 23-28 (2002) (ordering $100,000 forfeiture for egregious and intentional failure to certify the response to a Bureau inquiry) ("*SBC Forfeiture Order*"); *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 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).

[23] 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).

[24] LOI Response at 11.

[25] *Id.* at 10 (citing 44 U.S.C. §3512); Letter from Kyle McSlarrow, President and CEO, National Cable & Telecommunications Association, to Chairman Kevin J. Martin and Commissioners Michael J. Copps, Jonathan S. Adelstein, Deborah Taylor Tate, and Robert M. McDowell, Federal Communications Commission at 5-7 (Nov. 12, 2008).

individuals or entities," namely those companies that have been the subject of consumer complaints filed with the Commission.[26]

8. TWC 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.[27] Certain complaints received by the Commission regarding the migration of analog programming to a digital tier, however, alleged 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. TWC does not dispute that this decision was within our discretion. Thus, TWC was obligated to provide the requested information by our deadline. Moreover, we note that since it submitted its LOI response and while this matter remains under investigation by the Bureau, TWC has neither contacted the Bureau about its response nor provided any supplemental information.

9. Finally, we reject TWC's contention that the confidential nature of some of the information responsive to the Bureau's LOI absolved TWC of its obligation to respond.[28] Though TWC did not request confidential treatment of such material pursuant to the Commission's well-established, long-standing rules regarding the treatment of material routinely considered confidential,[29] the Commission issued a Protective Order in this investigation specifically to address any concerns regarding the potentially confidential nature of certain information. Thus, TWC had the option, as set forth by the Commission's General Counsel in his letter directed to TWC,[30] of providing the information under that Protective Order.[31] We find therefore that TWC's failure to fully respond to the Bureau's inquiry constitutes an apparent willful[32] violation of a Commission order and Section 76.939 of the Rules.

B. Proposed Forfeiture

10. We conclude under applicable standards set forth in the Act, that TWC 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

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[26] *See* 44 U.S.C. §3518(c)(1)(B)(ii); 5 C.F.R. §1320.4(a)(2) (cited in Letter from Matthew Berry, General Counsel, Federal Communications Commission, to Matthew A. Brill, Counsel for Time Warner Cable, Inc. at 1 (Nov. 12, 2008) ("Berry Letter")). We do not intend to suggest that the Commission may only commence an investigation in response to consumer complaints. As Section 403 of the Act makes clear, the Commission also may institute an investigation on its own motion. *See* 47 U.S.C. §403 ("The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made....").

[27] LOI response at 2-3.

[28] *Id.* at 9.

[29] *See* LOI Attachment, *Request for Confidential Treatment*, referencing the Commission's Rules at 47 C.F.R. § 0.459.

[30] *See* Berry Letter at 2.

[31] *See Time Warner Cable, Inc.*, Protective Order, DA 08-2498 (Enf. Bur. rel. Nov. 13, 2008).

[32] 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*").

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.[33] 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.[34] 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.[35] We conclude under this standard that TWC is apparently liable for forfeiture for its apparent willful violation of a Commission Order and Section 76.939 of the Rules.

11. Under Section 503(b)(2)(A) of the Act,[36] 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 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."[37]

12. Section 1.80 of the Rules and the Commission's *Forfeiture Policy Statement* establish a base forfeiture amount of four thousand dollars ($4,000) for failure to respond to Commission communications.[38] We find that TWC'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, TWC's apparent violations have delayed our investigation and inhibited our ability to examine allegations raised in consumer complaints and also potentially touching on an area of critical importance -- the DTV transition. We note that TWC 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.[39]

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[33] 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

[34] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

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

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

[37] 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.

[38] *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).

[39] Berry Letter at 2.

13. Based on these facts, we therefore propose a twenty-five thousand dollar ($25,000) forfeiture against TWC for failing to respond fully to Commission communications. This forfeiture amount is consistent with precedent in similar cases, where companies failed to provide responses to Bureau inquiries concerning compliance with the Commission's Rules despite evidence that the LOIs had been received.[40]

14. We also direct TWC 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 TWC to further penalties, including potentially higher monetary forfeitures.[41]

IV. ORDERING CLAUSES

15. 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, Time Warner Cable, Inc. 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.

16. **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, TWC **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

17. **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, TWC 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.

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

19. 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,

[40] *See supra* note 21.

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

Enforcement Bureau, FCC, at JoAnn.Lucanik@fcc.gov and Kevin M. Pittman, Esq., Spectrum Enforcement Division, FCC, at Kevin.Pittman@fcc.gov.

20. 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.

21. **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