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. 200932100022
a division of Time Warner Cable, Inc.	)	
Oceanic Kauai Cable System	)	FRN 0018049841
	)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

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

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* ("*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")[1] by failing to comply with a Bureau directive to describe the methodology it planned to use to refund money to subscribers harmed by the company's apparent violation of various Commission Rules.[2] We conclude, pursuant to Section 503(b) of the Communications Act of 1934, as amended ("Act"),[3] that TWC is apparently liable for a forfeiture in the amount of twenty-five thousand dollars ($25,000).

II. BACKGROUND

2. On November 8, 2007, the Spectrum Enforcement Division of the Enforcement Bureau ("Bureau") issued a Letter of Inquiry ("LOI")[4] 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 a switched digital video ("SDV") platform. In doing so, TWC made the affected channels inaccessible to subscribers unless they leased a set top box from the company. The LOI sought information on a number of issues, and asked the company to explain how its implementation of SDV was consistent with various statutory and regulatory provisions and orders.

3. TWC responded to the LOI on November 30, 2007,[5] and subsequently provided additional information to the Bureau in response to supplemental LOIs and information requests. On October 15, 2008, the Enforcement Bureau issued the *Oceanic Kauai NAL and Order*, finding that the

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[1] 47 C.F.R. §76.939 ("Cable operators shall comply with … the Commission's requests for information, orders, and decisions.").

[2] *See Oceanic Time Warner Cable, Kauai Cable System,* Notice of Apparent Liability for Forfeiture and Order, 23 FCC Rcd 14962, 14976-77, paras. 39-40, 43 (Enf. Bur. 2008) ("*Oceanic Kauai NAL and Order*") (response received).

[3] 47 U.S.C. § 503(b).

[4] *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) ("Nov. 8 LOI").

[5] *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) ("Nov. 30 LOI Response").

company's migration of programming to an SDV platform had apparently violated various Commission Rules and orders. Consequently, the *Oceanic Kauai NAL and Order* proposed a forfeiture against the company in the amount of $20,000 for the company's apparent violations.

4. Additionally, the *Oceanic Kauai NAL and Order* directed the company to provide refunds to subscribers harmed by the implementation and to provide us with an outline of the company's planned methodology for issuing those refunds.[6] Specifically, the *Oceanic Kauai NAL and Order* ordered TWC, within ninety (90) days of release of the *Oceanic Kauai NAL and Order,* to take the following steps:

(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 CableCARDs 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 and reduce their rates on a going-forward basis accordingly.

5. The *Oceanic Kauai NAL and Order* also required TWC to submit to the Enforcement Bureau an explanation of the method the company plans 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. The *Oceanic Kauai NAL and Order* directed TWC to submit this information to the Enforcement Bureau for review and approval within thirty (30) days of the release of this decision and to proceed with its proposed refund plan within sixty (60) days of such submission provided the Enforcement Bureau approves TWC's proposed refund plan within thirty (30) days of TWC's submission.[7]

6. TWC responded to the NAL on November 14, 2008.[8] The company also filed a Petition for Reconsideration and a Request for Stay of the *Oceanic Kauai NAL and Order.*[9] TWC did not provide any information about its methodology for issuing refunds to subscribers harmed by its apparent violations of Commission Rules, instead arguing that the *Oceanic Kauai NAL and Order* was unlawful. Nor has the company taken any other steps to comply with the *Oceanic Kauai NAL and Order.* Instead, TWC requests that the *Oceanic Kauai NAL and Order* either be stayed, pending final resolution of the issues in this matter, or be cancelled in its entirety.[10]

III. DISCUSSION

A. TWC Apparently Has Violated a Commission Order And Section 76.939

7. We find that TWC apparently willfully[11] violated a Commission order and Section

[6] *Oceanic Kauai NAL and Order,*23 FCC Rcd at 14976, para. 39-40, 43.

[7] *Id.* at 14976, paras. 39-40.

[8] *Time Warner Cable, Inc.'s 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").

[9] *Petition for Reconsideration of Time Warner Cable, Inc.,* File No. EB-07-SE-352 (filed Nov. 14, 2008) ("TWC Petition for Reconsideration"); *Time Warner Cable, Inc. Request for Stay Pending Resolution of Petition for Reconsideration and Request for Cancellation of Proposed Forfeitures,* File No. EB-07-SE-352 (filed Nov. 14, 2008) ("TWC Request for Stay").

[10] We will address those filings by separate order.

[11] 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.

76.939 of the Rules. 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."[12] 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."[13] 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."[14] Pursuant to Section 76.939 of the Rules, a cable operator must comply with FCC requests for information, orders, and decisions.[15]

8. The *Oceanic Kauai NAL and Order* expressly directed TWC to provide the Bureau with an outline of its intended refund methodology. We reject any contention that TWC was not obligated to comply fully with the Bureau's order because of the pendency of its Petition for Reconsideration and Request for Stay.[16] The filing of such pleadings does not trigger an automatic stay of such order.[17] Neither the Bureau nor the Commission has granted TWC's Request for Stay or Petition for Reconsideration. Thus, TWC should have submitted its proposed refund methodology by November 14, 2008, in compliance with the terms of the *Oceanic Kauai NAL and Order*. As the Commission has stated, "parties are required to comply with Commission orders even if they believe them to be outside the Commission's authority."[18] TWC failed to do so. We find, therefore, that TWC apparently willfully violated a Commission order and Section 76.939 of the Rules.

B. Proposed Forfeiture

9. 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.[19] 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

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See, e.g., Southern California Broadcasting Co., Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-88 ¶ 5 (1991) ("*Southern California Broadcasting*").

[12] 47 U.S.C. § 154(i).

[13] 47 U.S.C. § 154(j).

[14] 47 U.S.C. § 403.

[15] 47 C.F.R. § 76.939 ("Cable operators shall comply with … the Commission's requests for information, orders, and decisions."). 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. *Id.*

[16] We further note that although TWC posits several arguments related to the refund provision, those arguments do not address that portion of the *Oceanic Kauai NAL and Order* that requires TWC to submit its proposed refund methodology to the Bureau within 30 days. Instead, TWC's arguments decry the *issuance* of the refund to the subscribers harmed by its acts, a distinct and separate act required under the *Oceanic Kauai NAL and Order*.

[17] *See* 47 C.F.R. §§ 1.102(b), 1.106(n), 1.429(k).

[18] *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 para. 5 (2002) ("*SBC Forfeiture Order*"); *see also* 47 U.S.C. § 408 (Commission orders "shall continue in force for the period of time specified in the order or until the Commission or a court of competent jurisdiction issues a superseding order."); 47 U.S.C. § 416(c) ("It shall be the duty of every person, its agent and employees … to observe and comply with such orders so long as the same shall remain in effect"); *Peninsula Communications, Inc.,* Forfeiture Order, 17 FCC Rcd 2832, 2834 para. 5 (2002) (subsequent history omitted) (a regulatee "cannot ignore a Commission order simply because it believes such order to be unlawful"); *World Communications Forfeiture Order,* 19 FCC Rcd at 2719-2720 (issuing forfeiture against regulatee who failed to respond to an LOI because it believed the LOI to be beyond the Commission's jurisdiction).

[19] 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

penalty should be imposed.[20] 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.[21] 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.

10. Under Section 503(b)(2)(A) of the Act,[22] 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."[23]

11. Section 1.80 of the Rules and the Commission's *Forfeiture Policy Statement* do not establish a base forfeiture amount for violations of Section 76.939, although they do establish four thousand dollars ($4,000) as the base amount for failure to respond to Commission communications.[24] We find that TWC's apparent failure to comply with the *Oceanic Kauai NAL and Order* warrants a substantially larger forfeiture. Misconduct of this type exhibits contempt for the Commission's authority and threatens to compromise the Commission's ability to carry out its obligations under the Act. In this case, TWC's apparent violations have impeded our efforts to carry out the statutory dictates of Section 629 of the Act and perpetuated harm to affected subscribers.

12. We therefore propose a forfeiture of twenty-five thousand dollars ($25,000) against TWC for its apparent violations of the *Oceanic Kauai NAL and Order* and Section 76.939. 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.[25].

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[20] 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

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

[22] 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.

[23] 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.

[24] *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).

[25] *See e.g., SBC Forfeiture Order*, 17 FCC Rcd at 7599-7600 ¶¶ 23-28 (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).

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, 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.

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

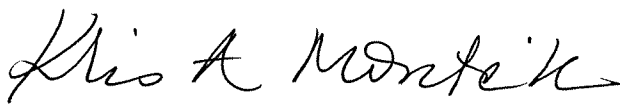
15. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, 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.

16. 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 Kevin M. Pittman, Esq., Spectrum Enforcement Division, FCC, at Kevin.Pittman@fcc.gov.

17. 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.

18. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture 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 Anne Monteith
Chief, Enforcement Bureau