

RECEIVED

JAN 28 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of)
)
 Implementation of Section 3 of)
 the Cable Television Consumer)
 Protection and Competition Act)
 of 1992)
)
 Tier Buy-Through Prohibitions)

MM Docket No. 92-262

**REPLY COMMENTS OF
TIME WARNER ENTERTAINMENT COMPANY, L.P.**

Fleischman and Walsh
1400 16th Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 939-7900

Its Attorneys

Date: January 28, 1993

No. of Copies rec'd
List A B C D E

0+9

TABLE OF CONTENTS

	<u>PAGE</u>
SUMMARY	i
I. INTRODUCTION	2
II. ONLY FULLY ADDRESSABLE SYSTEMS SHOULD BE REQUIRED TO COMPLY IMMEDIATELY	3
III. THE TEN-YEAR EXEMPTION SHOULD APPLY TO ALL SYSTEMS THAT USE SOME NON-ADDRESSABLE TECHNOLOGY	4
A. Hybrid Systems Fall Within The Exception To The Tier Buy-Through Prohibition	5
B. New Technologies May Yield Better Solutions For Hybrid Systems	8
IV. DISCRIMINATION RULES SHOULD NOT INHIBIT DISCOUNTS AVAILABLE TO ALL SUBSCRIBERS	10
V. CONCLUSION	10

SUMMARY

Time Warner urges the FCC to formulate rules for the tier buy-through prohibitions that will promote subscriber choice and avoid exorbitant compliance costs to cable systems. To accomplish this, the tier buy-through provisions should be applied only to fully addressable systems. Any system facing more than nominal compliance costs should be entitled to the full ten-year grace period, so that compliance can be achieved through a natural technological evolution without unwarranted expense. An exemption for hybrid systems from the tier buy-through prohibitions will allow those systems to incorporate newer technologies, such as digital compression, as business judgment warrants. Lastly, programming discounts and subscriber incentives are pro-consumer; the nondiscrimination provision should not be applied so as to inhibit these subscriber choices.

RECEIVED

JAN 28 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of:)
)
Implementation of Section 3 of)
the Cable Television Consumer)
Protection and Competition Act)
of 1992)
)
Tier Buy-Through Prohibitions)

MM Docket No. 92-262

**REPLY COMMENTS OF
TIME WARNER ENTERTAINMENT COMPANY, L.P.**

Time Warner Entertainment Company, L.P. ("Time Warner") hereby submits these reply comments in response to the above-captioned Notice of Proposed Rule Making¹ ("Notice") regarding the tier buy-through prohibitions contained in section 3 of the Cable Television Consumer Protection and Competition Act of 1992² ("1992 Cable Act"). Time Warner is a partnership, which is primarily owned (through subsidiaries) and fully managed by Time Warner Inc., a publicly traded Delaware corporation.³ Time

¹Notice of Proposed Rule Making, in MM Docket No. 92-262, FCC 92-540, ___ FCC Rcd ___ (adopted December 10, 1992).

²Pub. L. 102-385, 106 Stat. 1460 (1992).

³In its pending action against the Commission, Time Warner Entertainment Company, L.P. v. F.C.C., Civil Action No. 92-2494 (D.D.C. filed Nov. 5, 1992), Time Warner takes the position that the rate regulation requirements of the 1992 Cable Act, which include the provision at issue in this proceeding, are unconstitutional, inter alia, in that they impose speech restrictions on cable operators which directly contravene the fundamental precepts of the First Amendment. In submitting these reply comments, Time Warner specifically reserves and it does not waive its constitutional rights, and these reply comments are

Warner is comprised of three unincorporated divisions: Time Warner Cable, the second largest operator of cable systems nationwide; Home Box Office, which operates pay television programming services; and Warner Bros., which is a major producer of theatrical motion pictures and television programs.

I. INTRODUCTION.

Time Warner submits these reply comments to underscore the many potential problems that premature implementation of the tier buy-through provision could have on cable operators and consumers. Although various commenters addressed a number of different concerns, the emphasis of the majority of comments submitted in response to the FCC's Notice reveals that this provision, if improperly defined or implemented, could harm cable operators,⁴ small cable systems,⁵ consumers of cable television,⁶ video programming distributors,⁷ the consumer electronics

filed without prejudice to Time Warner's constitutional challenges.

⁴Comments of the National Cable Television Association; Comments of Community Antenna Television Association; Comments of Jones Intercable; Comments of Continental Cablevision; Comments of Cox Cable Communications; Comments of Adelphia Communications Corporation et al.

⁵Comments of National Cable Television Cooperative, Inc.; Comments of the Consortium of Small Cable System Operators; Comments of the Coalition of Small System Operators.

⁶Commenters were concerned that addressability through scrambling would increase consumer electronics incompatibility and consumer dissatisfaction. See, Comments of Cox Cable Communications; Comments of Commonwealth of Massachusetts.

⁷Comments of USA Networks; Comments of Encore Media Corporation.

industry,⁸ or the success of emerging cable television technologies.⁹

The buy-through provision is intended, as the Notice points out, to increase consumer choice.¹⁰ Its application, however, should not force cable rates higher and it should not impede the growth and implementation of newer technologies, such as digital compression. In order to avoid these consequences, Congress wisely provided a ten-year grace period for those systems which are not currently technically capable of compliance. Time Warner and others support the Commission's conclusion that, given current technology generally deployed by the cable industry, only those systems that are fully addressable are technically capable of compliance.

II. ONLY FULLY ADDRESSABLE SYSTEMS SHOULD BE REQUIRED TO COMPLY IMMEDIATELY.

Time Warner recommends that a "fully addressable" system be defined as one that uses addressable technology to secure each of its non-basic channels without the use of non-addressable devices, such as traps. Fully addressable systems can comply with the buy-through provision because these systems have made the business judgment to adopt addressability. On the other hand, if a cable operator would face more than nominal costs to

⁸Comment of the Consumer Electronics Group of the Electronic Industries Association ("EIA/CEG").

⁹Comments of Adelphia Communications Corporation et al.

¹⁰Notice at ¶ 3.

comply presently, the full ten-year grace period should be available to avoid exerting additional pressure on cable rates.

The tier buy-through provision requires that systems which are technically able must provide basic-only subscribers with pay and pay-per-view channels upon request. In order to satisfy a basic subscriber's request for a change in its access to pay or pay-per-view programming the cable operator must alter the security system with respect to that subscriber. In a fully addressable system, the cable operator makes this change at the headend with nominal costs where the subscriber has an addressable unit located at the subscriber's premises. Addressable technology protects the signal from theft through scrambling and permits access through descrambling at the addressable box. All channels, except for the basic-only channels, must be scrambled so the operator can control all access to non-basic programming at the headend. If the security system includes the use of non-addressable technology, however, compliance is either technically impossible or extremely costly, and would lead to long-term adverse consequences in terms of consumer dissatisfaction and impediments to emerging technologies.

III. THE TEN-YEAR EXEMPTION SHOULD APPLY TO ALL SYSTEMS THAT USE SOME NON-ADDRESSABLE TECHNOLOGY.

Non-addressable systems do not permit the operator to make a change in programming access from the headend. Rather, the operator must change the equipment (e.g. traps) at the subscriber's location. This requires an individual service call

and a replacement of equipment. It would impose tremendous costs on operators in non-addressable systems to technically comply with the buy-through prohibition. The Notice correctly concludes that these systems need not immediately comply.¹¹

A. Hybrid Systems Fall Within The Exception To The Tier Buy-through Prohibition.

Systems that use a combination of addressable and non-addressable technology ("hybrid systems") cannot comply without significant cost burdens since hybrid systems cannot provide basic subscribers with access to premium channels from the headend. Hybrid systems typically only scramble some or all pay channels and use traps to block access of basic-only subscribers to the tiered programming.¹² To permit access by the basic-only subscriber to pay channels, the operator would need to remove any trap(s) blocking the signals between the basic channels and the pay channels. In addition, the operator would need to scramble all tiered channels, requiring installation of an addressable box for all non-basic subscribers, even those declining premium

¹¹Notice at ¶ 6. Without disclosing the mechanics, TCI claims it will comply with anti buy-through even in its non-addressable systems. As noted above, this approach assumes an essentially static basic lineup, that broadcasters do not obtain inconsistent channel positioning, and would severely limit, if not nullify, the ability to offer pay-per-view. In any event, TCI expressly cautions the FCC not to use its approach as a model in this proceeding and that it would require significant reconfiguration of "almost every system." Comments of Tele-Communications, Inc.

¹²Time Warner estimates that over 85% of its subscribers are served by systems which use some combination of addressable and non-addressable technology. Further, Time Warner estimates that, of its non-addressable security, trapping devices are used approximately 95% of the time.

services. Time Warner estimated its costs for such boxes alone would be over \$400 million.

The comment of the National Association of Telecommunications Officers and Advisors ("NATOA") asserts that hybrid systems could possibly comply by scrambling pay channels and placing a mid-band negative trap for the tiered channels to prevent access by basic subscribers.¹³ This is a myopic solution which will not satisfy the intent of the buy-through provision. First, it is wholly unrealistic to expect that most cable operators could fit all of the channels on its intermediate tier or tiers on the mid-band. There are only eleven channels (A-2 to I) on the mid-band frequencies. In addition, channels A-2 and A-1 are sensitive aeronautical radionavigation frequencies and the FCC does not even permit HRC cable systems to use these channels.¹⁴ Second, a mid-band trap would limit the number of pay channels. The operator in a hybrid system must impose a system-wide non-addressable break between tiered and pay programming. This limits the number of additional channels of new premium services which may be offered without changing the trap. Thus, if the hybrid system operator wants to add a new premium service to an already full line-up, it must face the added cost of replacing all traps, typically requiring a service call by a technician to climb the pole outside each subscriber's residence. Applying the tier buy-through in this way would

¹³Comments of the National Association of Telecommunications Officers and Advisors, et al., at p. 8, n. 1.

¹⁴47 C.F.R. § 76.612.

reduce the demand for new programming and frustrate the 1992 Cable Act objective of increasing programming diversity.¹⁵ Moreover, it would reduce subscribers' available choices, which undermines the intent of the buy-through provision itself.

An alternative configuration -- where basic channels are at the low end, scrambled pay channels are in or around the mid-band channels, and then a trap separates the tiered channels at the high end of the channels -- does not eliminate the essential problems discussed above. With such a configuration, the ability to expand pay channels is likely to be curtailed. Under this configuration, due to changes in the ADI or shifts in a broadcaster's triennial election, the operator may face continual shifts in the number of must-carry stations required to be carried, which of course can affect the number of channels available for pay programming. Over time, this makes the operator reluctant to increase its pay channel offerings, and also diminishes the incentives to offer more programming on the basic tier. Again, such a result is completely contrary to the purpose of the tier buy-through requirement of providing more choice. If hybrid systems are forced to comply prematurely, then the basic subscriber may be faced with limited new programming options.

In addition, neither of the above-described alternative configurations take into consideration that many systems may not have grouped together the basic, tiered and pay programming in neat blocks as contemplated in those examples. Rather, premium

¹⁵1992 Cable Act, § 2(a)(6); 47 U.S.C. § 548(a).

services are often interspersed among basic and tiered cable programming services. Thus, a hybrid system that is forced to comply may have to incur costs of channel realignment and costs of changing the present traps for certain pay channels.¹⁶ Channel realignment will also cause subscriber confusion and dissatisfaction.¹⁷

B. New Technologies May Yield Better Solutions For Hybrid Systems.

The demand for newer technologies in cable television may well be shaped by the application of the buy-through prohibition to hybrid systems. If these systems are forced to implement the buy-through restriction immediately, then they would commit to current addressable technology and forego investment in technologies soon to be developed.

It must be stressed that the Commission should not consider interdiction technology as a viable solution to the contradictory goals of the buy-through requirements and consumer electronics compatibility.¹⁸ The comments of the EIA/CEG correctly point out

¹⁶For example, a hybrid system may position HBO on channel 2 and make it available to basic subscribers through a negative trap. If the cable operator must realign the channels, however, then this trap must be removed and HBO has to be repositioned into a higher channel.

¹⁷In addition, channel reconfiguration of premium services into the mid-band may require several months of labor to change out existing traps. In that time, the cable system would have to allocate two channels for each premium service; one channel for the set of subscribers whose security had been altered and one for the set of subscribers whose security had yet to be altered. Some hybrid system may not have the excess channel capacity to provide two channels for each premium service in order to implement such a reconfiguration.

¹⁸47 U.S.C. § 544.

that the Commission must fashion rules that take into account the problems of scrambling and it must seek alternative solutions.¹⁹ However, Time Warner strongly disagrees with the EIA/CEG suggestion that the use of interdiction is a feasible alternative.²⁰ Interdiction, in Time Warner's experience, has proven to be unreliable.²¹ Interdiction devices are too sensitive to their outdoor environment. In addition, as channels are added, the use of interdiction increases noise and interference in the system. Lastly, interdiction is incompatible with emerging digital compression technology, and thus would forego the potential explosion in additional channel capacity.

Hybrid systems should be permitted the full ten-year compliance period so that they may implement newer emerging technologies that are economically viable. Rapid advances in digital compression will permit systems to offer a much greater array of video on demand through an explosion of a la carte and pay-per-view programming options. Business judgment, rather than FCC rules, is the best mechanism for measuring when a reliable technology will meet consumer demand for the expansion of cable

¹⁹Comments of the EIA/CEG at pp. 4 - 6.

²⁰Id. at 6. The EIA/CEG also recommends the use of a national renewable security standard and point-of-entry addressable broadband descrambling. Time Warner submits that these proposed technologies are untested and should not be relied on by the FCC to bring hybrid systems into compliance with the anti buy-through provision. Rather, as Congress intended, the ten-year grace period will allow natural technological evolution to address this situation in a manner which maximizes consumer friendliness.

²¹For a more complete description of Time Warner's use of interdiction, see Comments of Time Warner Entertainment Co., L.P. at 29 and Appendix 1.

services. However, FCC rules can impede the progress of newer technologies by forcing cable systems to invest today in expensive addressable/scrambling technology which may soon be obsolete.

IV. DISCRIMINATION RULES SHOULD NOT INHIBIT DISCOUNTS AVAILABLE TO ALL SUBSCRIBERS.

Most commenters that addressed the application of the non-discrimination rules are in general agreement with Time Warner's position that the FCC should not discourage discounts or marketing options.²² Time Warner maintains that discounts and incentives to purchase additional pay and pay-per-view programming are not discriminatory so long as basic subscribers are afforded the same opportunity. Nondiscriminatory discounts are essentially pro-consumer because they give the subscriber more choices. FCC rules that would interfere with these nondiscriminatory options are not required by the buy-through prohibition and would be contrary to the public interest.

V. CONCLUSION.

The Commission should adopt tier buy-through rules that exempt all systems except fully addressable systems from immediate compliance with the tier buy-through prohibitions. The comments of Time Warner and many others have raised serious concerns that premature implementation of anti buy-through with the current state of technology would be a disservice to the

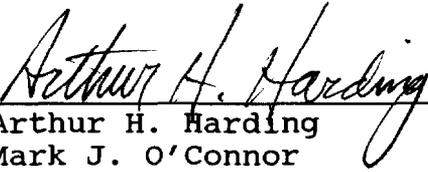
²²See, Comments of: National Association of Telecommunications Officers and Advisors; Tele-Communications, Inc.; Consortium of Small Cable System Operators; the National Cable Television Association; Intermedia Partners; USA Networks.

public interest. Additionally, the nondiscrimination provision should not needlessly burden cable operators from offering a variety of pay and pay-per-view rate options.

Respectfully submitted,

TIME WARNER ENTERTAINMENT COMPANY, L.P.

By:



Arthur H. Harding
Mark J. O'Connor
Its Attorneys

FLEISCHMAN AND WALSH
1400 Sixteenth Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 939-7900
Dated: January 28, 1993