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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Sections of the)
Cable Television Consumer)
Protection and Competition Act of)
1992)

MM Docket
No. 92-266

Rate Regulation)

REQUEST OF TIME WARNER ENTERTAINMENT COMPANY, L.P.,
FOR A STAY PENDING REVIEW IN THE COURT OF APPEALS

April 5, 1993

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Preliminary Statement

On April 1, 1993, the Commission adopted an order freezing for a period of 120 days the rates that cable operators may charge their subscribers for regulated cable services. See In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992--Rate Regulation (April 1, 1993) (hereinafter "the Freeze Order"). As more fully explained below, the Freeze Order prevents subscribers from upgrading services and it prevents cable operators from adding channels. Thus, the Freeze Order is arbitrary and capricious and violates the First Amendment.

Time Warner Entertainment Company, L.P. ("TWE"), is the Nation's second largest operator of cable television

systems. TWE participated in the Commission's rulemaking on rate regulation by submitting comments and reply comments. TWE will incur irreparable injury if the Freeze Order remains in effect. Pursuant to 47 C.F.R. §§ 1.43, 1.44 and 1.45, TWE therefore now requests that the Commission stay the Freeze Order while TWE seeks review in the Court of Appeals. 1/

Background

The Freeze Order amends title 47 of the Code of Federal Regulations by adding § 76.1090, which reads:

"§ 76.1090 Temporary Freeze of Cable Rates

"(a) The average monthly subscriber bill for services provided by cable operators subject to regulation under Section 623 of the Communications Act shall not increase above the average monthly subscriber bill determined under rates in effect on [insert date of F.R. publication] for a period of 120 days.

"(b) The average monthly subscriber bill shall be calculated by determining for a monthly billing cycle the sum of all billed monthly charges for all cable services subject to regulation under Section 623 of the Communications Act and dividing that sum by the number of subscribers receiving any of those services. The average monthly subscriber bill determined under rates in effect on [insert date of F.R. publication]

ending prior to [insert date of F.R. publication]".

Thus, subsection (a) prohibits a cable operator from increasing "the average monthly subscriber bill" ("AMSB") for 120 days. Under subsection (b), AMSB equals revenue received from all regulated services divided by subscribers to any regulated service.

On its face, the Freeze Order will lead to anomalous results creating irreparable injury in at least two sets of circumstances. First, if a subscriber switches from a less expensive to a more expensive regulated service (for example, by going from basic to standard), the numerator of the AMSB fraction would increase if the cable operator were to charge that subscriber a higher rate, but the denominator would remain the same. By its terms, then, the Freeze Order prohibits a cable operator from charging that subscriber a higher rate even though the subscriber is getting more channels. TWE's subscribers continuously upgrade their services. Only by refusing to allow this or

service. However, the nature or value of the regulated service is not a parameter in the AMSB definition. Accordingly, the Freeze Order, by its terms, prohibits a cable operator from increasing rates after enhancing the value of a regulated service. In several of its systems, TWE is now in the midst of a rebuild. Only by ceasing the rebuild or by not charging subscribers for enhanced services could TWE avoid being in violation under the language of the Freeze Order.

TWE considers these anomalous results all the more unfortunate because they may have been unintended, see Freeze Order ¶ 4 ("[t]his freeze does not preclude adding subscribers, retiering, or the providing of additional equipment and services as long as the average monthly subscriber bill for these services does not increase"), and could have easily been avoided. For example, the Commission could have added to 47 C.F.R. § 76.1090 a provision as follows:

"(c) Any increase in the average monthly subscriber bill shall not constitute a violation of subsection (a) to the extent that it results from:

"(1) subscribers' ordering additional regulated services (by for example upgrading from the basic to the standard tier), or

"(2) a cable operator's enhancing the value of any regulated service (by for

example adding a programming service to a tier)".

However, the Commission has not done so, and because it has not, TWE must now seek review in the Court of Appeals to protect its rights. 2/

Argument

I. TWE IS ENTITLED TO A STAY PENDING REVIEW IN THE COURT OF APPEALS.

To be entitled to a stay, TWE need show only that (1) it is likely to prevail in the Court of Appeals; (2) without relief, it will incur irreparable injury; (3) a stay would not substantially harm other interested parties, and (4) the public interest favors a stay. In the Matter of Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co., 8 FCC Rcd. 373, 374 n.27 (1993); In the Matter of Parts 73 and 76 of the Comm'n's Rules Relating to Program Exclusivity in the Cable and Broadcast Indus., 4 FCC Rcd. 6476, 6476-77 (1989); Washington Metro. Area Transit Comm'n v. Holiday Tours. Inc., 559 F.2d 841, 843 (D.C. Cir. 1977);

substantial case on the merits. See Program Exclusivity, 4 FCC Rcd. at 6477 (citing Washington Metro. Area Transit Comm'n, 559 F.2d at 843). TWE's stay request satisfies each of the four requirements set out above, and TWE is therefore entitled to a stay pending review in the Court of Appeals.

A. TWE is Likely to Prevail on the Merits.

TWE is likely to prevail on review in the Court of Appeals because the Freeze Order is arbitrary and capricious and violates the First Amendment.

1. The Freeze Order, as Currently Phrased, is Arbitrary and Capricious.

A reviewing court must set aside agency action that is arbitrary and capricious. 5 U.S.C. § 706(2)(A). An agency rule is arbitrary and capricious if:

"the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before it, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise".

Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Auto. Ins.

Co., 463 U.S. 29, 43 (1983). Moreover, an agency is required to examine the relevant data before it and articulate a satisfactory explanation for its action. The connection between the facts found and the choice made must

be rational. Id. (citing Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)).

The Freeze Order is arbitrary and capricious. The Commission has indicated that its reason for issuing the Freeze Order was its concern that cable operators might raise their rates before the Commission can complete adoption of the rules implementing rate regulation. See Freeze Order ¶ 3. But quite apart from whatever infirmities

valuable tier or to add channels. Thus, the Freeze Order completely prevents TWE from "speaking" to its subscribers in these ways, and therefore violates TWE's rights under First Amendment. See, e.g., Riley v. National Fed'n of the Blind, 487 U.S. 781, 791 (1988); Buckley v. Valeo, 424 U.S. 1, 19 (1976) (per curiam).

B. TWE Will Be Irreparably Injured Unless The Commission Issues A Stay.

A deprivation of First Amendment rights, however temporary, constitutes irreparable injury. See Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion) ("[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); Stewart v. District of Columbia Armory Bd., 789 F. Supp. 402, 406 (D.D.C. 1992) (potential deprivation of plaintiffs' First Amendment rights constitutes irreparable harm and justifies temporary restraining order); Student Press Law Center v. Alexander, 778 F. Supp. 1227, 1234 (D.D.C. 1991) ("[t]he Court presumes that irreparable harm will flow . . . from a continuing constitutional violation"). TWE's stay request therefore satisfies this requirement.

C. The Public Interest Favors A Stay and Other

Interested Parties Will Not Incur Substantial Harm As A

not be able to accommodate subscribers' requests for increased cable services or to add programming services.

Conclusion

Because the Freeze Order is arbitrary and capricious and violates the First Amendment, the Commission should grant a stay while TWE seeks review in the Court of Appeals.

April 5, 1993

Respectfully submitted,

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