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OFFICE OF THE GENERAL COUNSEL

M E M O R A N D U M

TO: Chief, Dockets Division

FROM: Associate General Counsel, Litigation Division

SUBJECT: Time Warner Entertainment Company, L.P. v. FCC & USA, No. 93-1266. Filing of a new Petition for Review in the United States Court of Appeals for the D.C. Circuit.

DATE: April 20, 1993

Docket No(s). MM Docket 92-258

File No(s).

This is to advise you that on April 12, 1993, Time Warner Entertainment Company, L.P., filed with the United States Court of Appeals for the District of Columbia Circuit a:

X Section 402(a) Petition for Review
___ Section 402(b) Notice of Appeal

of the following FCC decision: In the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, 8 FCC Rcd 998 (1993). Petitioner challenges the rules that give cable operators the power to prohibit indecent programming on commercial leased access channels.

Due to a change in the Communications Act, it will not be necessary to notify the parties of this filing.

The Court has docketed this case as No. 93-1266 and the attorney assigned to handle the litigation of this case is Gregory M. Christopher.

Daniel M. Armstrong

cc: General Counsel
Office of Public Affairs
Shepard's Citations

In The
UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

TIME WARNER ENTERTAINMENT COMPANY, L.P., Petitioner, -against- FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	No. 93-1266 Filed: 4/12/93

PETITION FOR REVIEW

Pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342 and 2344, Time Warner Entertainment Company, L.P. ("TWE"), hereby petitions this Court for review of the First Report and Order of the Federal Communications Commission ("the Commission") in MM Docket No. 92-258. The First Report and Order, FCC No. 93-72 (the "Report and Order"), was adopted on February 1, 1993, released on February 3, 1993, and published in the Federal Register on February 11, 1993, in an abbreviated version.

A copy of the Commission's Report and Order is attached to this Petition as Exhibit A.

Venue

Venue in this Court is proper under 28 U.S.C. § 2343. This petition is timely filed under 28 U.S.C. § 2344.

Petitioner

TWE, majority owned by Time Warner Inc., a publicly traded Delaware corporation, is comprised principally of three unincorporated divisions: Time Warner Cable ("TWC"), which operates cable television systems; Home Box Office, which provides pay television programming services; and Warner Bros., which produces and distributes motion pictures and television programs.

TWC is the TWE division most affected by § 10 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"). TWE through TWC and affiliated companies owns and operates cable systems in approximately 1,600 franchise areas throughout the United States. As required by the Cable Communications Policy Act of 1984 (the "1984 Cable Act"), these systems make available leased access channels for commercial use. As a result, TWC and its divisions are directly impacted by the Commission's

Injury Caused by the First Report and Order

Petitioner seeks review of the Commission's First Report and Order in MM Docket No. 92-258 in which the Commission adopts rules and regulations that implement § 10(b) of the Act (indecent programming on leased access channels).

Petitioner is aggrieved by and suffers injury from the Commission's First Report and Order on several bases:

(1) Section 612 of the 1984 Cable Act, as modified by § 9 of the 1992 Cable Act (the "leased access" provisions), upon which § 10's requirements rest, impermissibly infringes on Petitioner's First Amendment rights. Specifically, the leased access provisions constitute a content-based restriction on cable operators' speech which is neither justified by a compelling governmental interest nor sufficiently tailored to achieve any such interest. Additionally, the leased access provisions are not narrowly tailored to further even a substantial governmental interest.

(2) Section 10(d) of the 1992 Act, which repeals TWE's immunity for obscene programming exhibited on leased access channels, is also unconstitutional since it places burdens upon TWE inconsistent with its First Amendment rights and the

Commission's regulations do not cure these unconstitutional burdens.

(3) Because the underlying and enabling legislation is unconstitutional ab initio, the FCC lacks the power to promulgate the regulations at issue.

(4) By establishing regulations pursuant to § 10(b), the Commission has furthered the injury to Petitioner's First Amendment rights under a patently impermissible regulatory scheme.

Relief Requested

On November 5, 1992, TWE filed an action against the Respondents, Time Warner Entertainment Company, L.P. v. FCC, Civil Action No. 92-2494, in the United States District Court for the District of Columbia, challenging various sections of the 1984 Cable Act and the 1992 Cable Act. In that action, TWE argues that Section 612 of the 1984 Cable Act, as amended by Section 9 of the 1992 Cable Act, and Section 10(d) of the 1992 Cable Act are unconstitutional. TWE's challenge in the District Court to those sections is now sub judice on pending motions for summary judgment and dismissal. The grounds for TWE's challenge in the District Court are the same that would be raised in this Petition for Review, since TWE in this Petition challenges the Report and Order (and the accompanying Regulations) based only on the

unconstitutionality of the underlying enabling legislation. TWE expects these constitutional issues will be raised on appeal from any final order entered by the District Court. 1/ TWE files this Petition as a protective appeal in view of the assertion by the defendants in Time Warner Entertainment Company, L.P. v. FCC that the appropriate method to challenge the unconstitutionality of sections involved in the FCC rulemaking process is by appeal from the FCC's Reports and Orders in those proceedings. See Telecommunications Research and Action Ctr. v. FCC, 750 F.2d 70, 74 (D.C. Cir. 1984). TWE disagrees with that view and believes the appropriate place for the constitutional challenge is the District Court, with appeal to this Court. This Petition is lodged as a protective appeal only for the purpose of protecting TWE should it ultimately be determined that the District Court was not the proper place to lodge the challenge.

1/ TWE's challenge to Sections 4, 5 and 6 of the 1992 Cable Act was decided by the three-judge court on April 8, 1993, upholding the constitutionality of Sections 4 and 5.

WHEREFORE, being aggrieved by the Commission's First Report and Order in MM Docket No. 92-258 implementing § 10(b), which rests on leased access statutory provisions unconstitutionally infringing Petitioner's First Amendment rights, Petitioner respectfully requests that this Court:

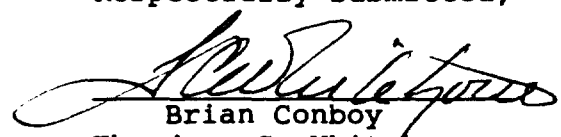
1. vacate and set aside the Commission's First Report and Order;

2. declare unconstitutional § 612 of the 1984 Cable Act, as amended by § 9 of the 1992 Cable Act, and § 10 of the 1992 Cable Act; and

3. grant such other and further relief as may be just and proper.

Dated: April 12, 1993

Respectfully submitted,



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