

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. 93-1319. Filing of a new Petition for Review in the United States Court of Appeals for the District of Columbia Circuit
DATE: May 18, 1993

Docket No(s). MM Docket 92-259, MM 90-4 and
MM 92-295

File No(s).

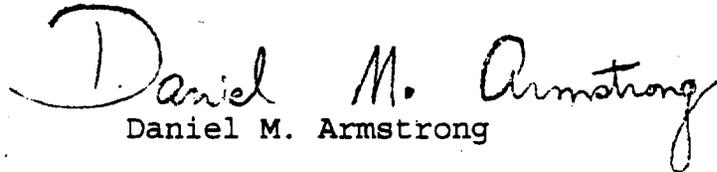
This is to advise you that on May 14, 1993, Time Warner Entertainment Company, L.P., filed with the United States Court of Appeals for the District of Columbia Circuit a:

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

of the following FCC decision: In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, et al., FCC 93-144, released March 29, 1993. Challenges to rules needed to implement the mandatory television broadcast signal carriage (must-carry) and retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992.

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. 93-1319 and the attorney assigned to handle the litigation of this case is C. Grey Pash, Jr.


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. 93-1319

FILED 5/14/93

PETITION OF
TIME WARNER ENTERTAINMENT COMPANY, L.P.,
FOR REVIEW OF AGENCY ACTION

On March 29, 1993, the Federal Communications Commission ("the FCC") released a Report and Order ("the Order"), In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992-- Broadcast Carriage Issues, MM Docket 92-259 (1993), promulgating rules implementing the must-carry and retransmission-consent provisions of §§ 4, 5 and 6 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Pub. L. No. 102-385, 106 Stat. 1460, 1471-83, codified at 47 U.S.C. §§ 325(b), 534 & 535. A copy of the Order is attached to this Petition as Exhibit A. The Order is contrary to constitutional right,

arbitrary and capricious, in excess of statutory authority, and otherwise not in accordance with law. Pursuant to 47 U.S.C. § 402(a), Chapter 158 of Title 28 of the United States Code, 5 U.S.C. § 706, and Fed. R. App. P. 15, Time Warner Entertainment Company, L.P. ("TWE"), therefore now petitions this Court for review.

Venue

Venue in this Court is proper under 28 U.S.C. § 2343.

Petitioner

TWE, a Delaware limited partnership in which Time Warner Inc., a publicly traded Delaware corporation, indirectly holds a majority interest, is comprised principally of three unincorporated divisions: Time Warner Cable, which is the second largest operator of cable-television systems in the United States, operating systems in approximately 1,600 franchise areas throughout the Nation; Home Box Office, which owns and operates pay-television programming services, including the Home Box Office Service and Cinemax; and Warner Bros., which produces and distributes motion pictures and television programs.

Background

On October 5, 1992, Congress enacted the 1992 Cable Act over the President's veto. Section 4 of that Act requires the vast majority of cable systems (those with more than 12 channels) to reserve up to one-third of their channel capacity for local commercial broadcast stations. 47 U.S.C. § 534(b)(1)(B); see also id. § 534(c)(1)(A)-(B). Section 5 provides that most cable systems (those with more than 36 channels) must carry all qualifying local noncommercial educational ("NCE") stations and, in certain cases, import distant signals. Id. § 535(b)(1); §§ 535(b)(2)(B)(i) and (b)(3)(B). Both §§ 4 and 5 require cable operators to carry the signal of a must-carry station in its entirety and on the channel of the station's choice, even if that channel is already occupied by another programmer. Id. §§ 534(b)(3)(A) and (b)(6); §§ 535(g)(1) and (g)(5). Section 6 provides that, starting October 6, 1993, cable systems may no longer retransmit the signal of a commercial station without its consent, unless that station elects to exercise its must-carry rights under § 4. Id. § 325(b)(1). Section 5 does not by its terms call for FCC regulations, but §§ 4 and 6 required the FCC to issue

regulations by April 3, 1993, 47 U.S.C. §§ 534(f),
325(b)(3)(A). 1/

On November 5, 1992, the FCC adopted a notice of
proposed rulemaking ("NPRM") concerning §§ 4, 5 and 6. In

March 19, 1993, the FCC released the Order, a summary of which was published in the Federal Register on April 2, 1993, Cable Act of 1992--Must-Carry and Retransmission Consent Provisions, 58 Fed. Reg. 17,350 (1993).

The Order amends Title 47 of the Code of Federal Regulations, adding regulations restating and interpreting §§ 4, 5 and 6 of the 1992 Cable Act. Among a host of other things, the Order and the regulations:

- require cable operators to begin carrying all must-carry-eligible commercial stations on June 2, 1993;
- give must-carry electors until June 17, 1993, to designate the channel on which they wish to be carried after October 6, 1993;
- provide that a commercial station that is not currently must-carry eligible may attempt to become must-carry eligible by offering to reimburse a cable system for additional copyright liability, by enhancing the quality of its signal, or by requesting the FCC to adjust its area of dominant influence ("ADI"), but do not set a deadline for any such attempts;
- permit must-carry stations to insist on carriage on the channel of their choice even if that channel is not part of what is currently a cable system's basic tier;
- fail to provide priority rules resolving conflicting claims by two or more stations to the same channel;
- provide for a definition of "substantial duplication" that is inconsistent with the Commission's syndicated-exclusivity and network-nonduplication rules;

• require a cable operator to provide all must-carry signals to all subscribers, even if such subscribers are sophisticated

1. The Order is contrary to TWE's rights under the First 2/ and Fifth Amendments. Must-carry rules force TWE as a cable operator to speak in ways in which it would prefer not to speak, promote broadcasters' speech at the

2. The Order is arbitrary and capricious in that it causes must-carry obligations with respect to commercial stations to go into effect as early as June 2, 1993, even though the retransmission-consent rules do not go into effect until October 6, 1993. In this way, the Order will cause twice the amount of disruption necessary: Cable operators will have to disrupt their line-ups on June 2 by adding must-carry-eligible broadcast stations, and again on October 6 by deleting retransmission-consent electors with whom no agreement can be reached. Under any sensible regime, the disruption resulting from the implementation of §§ 4 and 6 of the 1992 Cable Act should be confined to a single day. Even though commenters urged the FCC to adopt such a regime, it refused to do so, mistakenly saying that it lacked authority to postpone the effective date of the must-carry rules until October 6. The Order is therefore

3. The Order is arbitrary and capricious in that it causes must-carry obligations to go into effect on June 2, but does not require must-carry electors to specify the channel on which they wish to be carried after October 6 until June 17. Because, under the channel-positioning rules, commercial stations have four different options, it is impossible for a cable system accurately to predict on which channel a station may wish to be carried after October 6. Thus, it is inevitable that there will be instances in which cable systems must disrupt their line-up on June 2 by adding a must-carry-eligible broadcast station, and again on October 6 by moving the same station to a different channel. The Order is therefore irrational and, in any event, fails adequately to explain its result. Accordingly, this Court must set aside the Order pursuant to 5 U.S.C. § 706(2)(A) as arbitrary and capricious.

4. The Order is arbitrary and capricious in that, in addition to June 2 and October 6, it arguably creates a third disruption date (or, rather, series of disruption dates) between June 2 and October 6 by allowing stations to become must-carry eligible by (a) seeking and obtaining an ADI adjustment; (b) offering to reimburse a cable system for increased copyright liability; or (c) by enhancing the quality of their signal, and by failing to set any deadline

by which stations must do so. The Order is therefore irrational and, in any event, fails adequately to explain its result. Accordingly, this Court must set aside the Order pursuant to 5 U.S.C. § 706(2)(A) as arbitrary and capricious. 4/

5. The Order is arbitrary and capricious in that it allows commercial stations to insist on being carried on a channel that is outside what is currently a cable system's basic tier. Carriage outside that basic tier in most cases imposes significant hardships on cable systems and in some cases may, as a practical matter, be impossible. The Order is therefore irrational and, in any event, does not adequately explain its result. Accordingly, this Court must set aside the Order pursuant to 5 U.S.C. § 706(2)(A) as

arbitrary and capricious.

it is therefore inevitable that, in certain instances, commercial stations will stake conflicting claims to channel positions. Such conflicting claims will inevitably lead to more uncertainty, disruption, and confusion. The Order is therefore irrational and, in any event, fails adequately to explain its result. Accordingly, this Court must set aside the Order pursuant to 5 U.S.C. § 706(2)(A) as arbitrary and capricious.

7. The Order is arbitrary and capricious in that it defines the term "substantial duplication" (as used in § 534(b)(5)) in a way that is inconsistent with the FCC's syndicated-exclusivity and network-nonduplication rules. The effect of these inconsistencies is that a cable system can be forced to carry a station that has a significant amount of "black-out holes" in it. The Order is therefore irrational and, in any event, fails adequately to explain its result. Accordingly, this Court must set aside the Order pursuant to 5 U.S.C. § 706(2)(A) as arbitrary and capricious.

8. The Order is arbitrary and capricious or otherwise not in accordance with law in that it requires cable systems to provide all must-carry stations to all subscribers, even if those subscribers are sophisticated institutions (such as hotels and hospitals) that inform

their cable system that they do not wish to receive all must-carry stations. 5/ The Order states that the Commission is without authority to create an exemption for such institutions, which is mistaken as a matter of law. Thus, the Order is irrational and, in any event, fails adequately to explain its result. Accordingly, this Court must set aside the Order pursuant to 5 U.S.C. § 706(2)(A) as arbitrary and capricious or otherwise not in accordance with law.

9. The Order is arbitrary and capricious, in excess of statutory authority, or otherwise not in accordance with law in that it provides that retransmission-consent electors are entitled to certain privileges pursuant to § 4, including the right to insist on carriage of their entire signal. This is directly at odds with § 6, which provides that "the provisions of section [4] shall not apply" to retransmission-consent electors. Thus, the Order is irrational and, in any event, fails adequately to explain its result. Accordingly, this Court must set aside the Order pursuant to 5 U.S.C. § 706(2)(A), (2)(C), or both, as

5/ Indeed, not only do the FCC rules interpreting §§ 4 and 5 require a cable operator to provide all must-carry signals to all basic-tier subscribers, FCC rules interpreting § 3 require a cable operator to sell the basic tier to all subscribers. See 47 C.F.R. § 76.920.

being in excess of statutory authority, arbitrary and capricious, or otherwise not in accordance with law.

10. The Order is in excess of statutory authority, arbitrary and capricious, or otherwise not in accordance with law in that it prohibits a cable system from entering into an exclusive carriage agreement with a retransmission-consent elector. Neither § 6 nor any other statute gives the Commission authority to prohibit such agreements. Moreover, the Order is irrational and, in any event, fails adequately to explain its result. Accordingly, this Court must set aside the Order pursuant to 5 U.S.C. § 706(2)(A), (2)(C), or both, as being in excess of statutory authority, arbitrary and capricious, or otherwise not in accordance with law.

11. The Order is contrary to constitutional right and arbitrary and capricious in that it provides that stations that fail to make an election between must-carry and retransmission-consent status will be deemed to have opted for must-carry status. The Order thus gives must-carry privileges to stations that do not even care enough about carriage to ask for it, thereby infringing upon cable systems' First Amendment rights well beyond what the statute requires. Moreover, the Order fails adequately to explain why, as commenters suggested, the default election should

not be retransmission-consent status, with the station being deemed to have given consent. Accordingly, this Court must set aside the Order pursuant to 5 U.S.C. § 706(2)(A), (2)(B), or both, as contrary to constitutional right and arbitrary and capricious.

12. The Order is arbitrary and capricious in that the FCC refused to rule, as commenters had suggested it should, that retransmission-consent electors lose what rights they might have under the FCC's syndicated-exclusivity or network-nonduplication rules. The Order thus gives rise to absurd results. For example, if a cable system is unsuccessful in securing a network affiliate's retransmission consent, it will be unable to carry another affiliate of that same network because the nonconsenting affiliate would be able to require that the cable system black out substantially all of that other affiliate's programming. The Order is therefore irrational and, in any event, fails adequately to explain its result. Accordingly, this Court must set aside the Order pursuant to 5 U.S.C. § 706(2)(A) as arbitrary and capricious.

13. The Order is arbitrary and capricious in that it provides that a cable system may not retransmit the signal of a superstation that it directly receives by terrestrial microwave unless the superstation consents to

carriage. Section 6 provides that the retransmission-consent requirement does not apply to the signal of a superstation "if such signal was obtained from a satellite carrier". By using the passive voice, the statute makes clear that it does not require that a particular cable system obtain the superstation's signal from a satellite carrier, so long as any cable system obtains the signal from a satellite carrier. The Order leads to the absurd result that, to be able to retransmit a superstation, some cable systems will have to switch from microwave to satellite reception. The Order is therefore irrational and, in any event, fails adequately to explain its result. Accordingly, this Court must set aside the Order pursuant to 5 U.S.C. § 706(2)(A) as arbitrary and capricious and otherwise not in accordance with law.

Conclusion

For the foregoing reasons, this Court must set aside the Order.

WHEREFORE, TWE, being aggrieved by and suffering injury as a result of the Order, respectfully requests that this Court set aside the Order and grant such other and further relief as may be just and proper.

Respectfully submitted,

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