BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
TIME WARNER CABLE,	)	
A Division of	)	
TIME WARNER	)	
ENTERTAINMENT COMPANY, L.P.	)	MB Docket No. 06-151
	)	
Emergency Petition for	)	
Declaratory Ruling and Enforcement Order	)	
For Violation of Section 76.1603 of the	)	
Commission's Rules, or in the Alternative	)	
For Immediate Injunctive Relief	)	

To: Chief, Media Bureau

TIME WARNER CABLE'S RESPONSE TO EMERGENCY PETITION

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INTRODUCTION AND EXECUTIVE SUMMARY

Pursuant to the August 3, 2006 order of the Media Bureau, Time Warner Cable Inc. ("TWC")[1] files the following response to the Emergency Petition filed by the NFL Network ("NFLN") in the above-captioned proceeding.[2]

The Emergency Petition should be denied. NFLN has sought an order declaring that, as a consequence of TWC's alleged failure to provide adequate notice that it would not carry NFLN, TWC must carry content that TWC has never previously carried and has not currently agreed to carry, and do so on terms dictated by NFLN. Although the Bureau has already imposed an

[1] TWC, a subsidiary of Time Warner Inc., is no longer a division of Time Warner Entertainment Company, L.P.

[2] *See* Order of the Commission's Media Bureau in MB Docket No. 06-151, DA 06-1587 (rel. Aug. 3, 2006) ("Initial Order"), *petition for stay and reconsideration denied by* Media Bureau Order on Reconsideration in MB Docket No. 06-151, DA 06-1594 (rel. Aug. 7, 2006) ("Reconsideration Order").

injunction requiring the carriage of NFLN pending final disposition of this petition (and TWC has complied, notwithstanding that the injunction was imposed before TWC even had an opportunity to respond), TWC respectfully submits that the Bureau lacks any basis for granting the relief NFLN seeks. The Bureau should thus dispose of this matter as promptly as possible by (i) rescinding the injunction and (ii) denying NFLN's petition. The relief sought in the Emergency Petition is unlawful and unprecedented, and it tramples TWC's First and Fifth Amendment rights in response to little more than a plea for the Bureau to strengthen the hand of a well-financed cable network embroiled in a routine business dispute.

As will be shown *infra*, NFLN's petition must be denied for at least four reasons. *First*, TWC committed no violation of 47 C.F.R. § 76.1603. TWC did not violate Section 76.1603(b) because TWC gave notice as soon as possible that NFLN would not be carried on TWC's systems after July 31, 2006, when TWC assumed ownership of former Adelphia and Comcast systems that had previously carried NFLN. TWC was not required to give 30 days notice of that change because it was not within TWC's control. TWC had no contractual or statutory right to carry NFLN (before or) after July 31, 2006. The fact that NFLN made a last-minute offer to allow TWC to continue carriage for 30 days on the terms of NFLN's prior carriage (which it refused to disclose to TWC) cannot possibly confer on TWC the requisite control within the meaning of Section 76.1603(b). Such an approach – in which control "springs" to life at the whim of the network – would empower the network to create a retroactive regulatory violation on the part of a cable operator that failed to anticipate that a "reasonable" offer from the network would eventually be forthcoming. That is at odds with notions of fundamental fairness, and it serves principally to give networks an added weapon in carriage negotiations.

Nor can the Bureau rely on Section 76.1603(c) – a provision NFLN did not even invoke in its petition – to provide relief. The text and history of that provision make indisputably clear that it was intended to apply only to a cable operator's rate-regulated cable programming services tier ("CPST") and related equipment, an area where Congress has expressly divested the Commission's jurisdiction. There simply was no regulatory obligation to provide 30 days notice on the facts of this case.

Indeed, any contrary conclusion would cause chaos in the marketplace. In the Initial Order imposing the injunction, and in the Reconsideration Order, the Bureau approached the issue as though it involved an obligation to provide notice with respect to only one cable network. That is incorrect. On July 1 – the date on which NFLN claims TWC should have sent notice – TWC was in carriage negotiations with nearly 150 networks and broadcast stations. Under NFLN's reading of Section 76.1603 (which the Bureau has tentatively adopted), TWC would have had to notify Adelphia and Comcast subscribers that it was in negotiations with all of these networks and that some might not be carried after July 31, and then list all programmers with open negotiations. Such a notice does nothing to advance the consumer protection purposes of Section 76.1603. To the contrary, it simply sows unnecessary and counterproductive consumer confusion. Contrary to NFLN's argument, the Commission's regulatory scheme is much more sensible: notice is generally required "as soon as possible," with 30-day notice required only when the cable operator has unilateral control of the changes.

Second, the Commission (and hence the Bureau) lacks statutory authority to enforce Section 76.1603(b) against TWC in the circumstances presented here. The relevant statutory language and legislative history make clear that Congress gave the Commission authority only to promulgate rules governing consumer notice, delegating to local franchising authorities

("LFAs") exclusive power to enforce those rules. Moreover, the Commission itself has acknowledged its limited role, while recognizing Congress' intent to vest LFAs with enforcement authority. Assuming *arguendo* that the Commission acted lawfully in reserving to itself the power to enforce Section 76.1603(b) against systemic abuses, the present case does not qualify as a systemic abuse. The instant dispute is a one-time occurrence that arises out of unique circumstances. And it is manifestly inappropriate to characterize TWC's conduct as an "abuse" when there is absolutely no Commission or Bureau precedent even remotely suggesting that Section 76.1603(b)'s 30 days notice requirement would apply to a situation in which a cable operator lacks any right to carry programming.

Third, the relief NFLN sought (and that the Bureau has granted on an interim basis) is both in excess of the Commission's statutory authority and unconstitutional. A mandatory carriage remedy is expressly foreclosed by 47 U.S.C. § 544(f), which provides that the Commission "may not impose requirements regarding the provision or content of cable service, except as expressly provided in this subchapter." Mandatory carriage is plainly a requirement regarding "the provision or content of cable service," and no provision of the Communications Act expressly provides for carriage in circumstances like those present here. It is therefore flatly unlawful. Moreover, mandatory carriage is compelled speech, which cannot be required here consistent with the First Amendment. The First Amendment violation is all the more acute because the Bureau's carriage order is plainly a content-based decision that triggers (and cannot possibly survive) the most exacting First Amendment scrutiny. The injunction expressly rests on a judgment by the Bureau that the preseason coverage of NFL training camps is particularly valuable to viewers, and thus must be carried irrespective of whether it displaces other programming – even though TWC never had a contract with NFLN and never carried it on any

of its systems. Indeed, the First Amendment concerns are particularly severe because NFLN is using its mandatory carriage to urge TWC's own customers to call TWC to voice complaints.

Fourth, granting the relief NFLN requested even on an interim basis was a sharp deviation from prior practice, as there is no Commission precedent that remotely supports NFLN's contentions here. The Commission has *never* applied Section 76.1603(b)'s notice obligations to a situation in which there was no prior contractual or statutory right to carriage. The Commission has *never* held that a violation of the notice obligation in Section 76.1603(b) constitutes a "systemic abuse." The Commission has *never* applied Section 76.1603(c) to services not subject to rate regulation. And the Commission has *never* imposed mandatory carriage as a remedy for Section 76.1603(b). The very fact that the Bureau has had to break new ground in so many areas, particularly when First Amendment rights are at stake, is an eloquent refutation of NFLN's claims.

Of course, TWC recognizes that the Bureau's interim order has already imposed a carriage obligation and that the irreparable harm of forced carriage has therefore already largely been incurred and (given the briefing schedule set by the Bureau) is unlikely to be alleviated by a final decision on the part of the Bureau until the 30-day carriage period has expired. Nevertheless, TWC requests that the Bureau act with dispatch. If, as the law plainly requires, the Bureau reverses its present course and denies relief, a prompt ruling will eliminate at least some of the irreparable harm TWC is suffering. Even if the Bureau grants the petition and affirms its present unlawful course, a prompt ruling remains a matter of great importance. Imposing a 30-day notice requirement on the rationale set forth by the Bureau will have severe consequences in the marketplace across a range of situations, and expeditious further review of any such decision by the full Commission and the federal courts is imperative.

BACKGROUND

Factual Background. The instant matter arises out of a commercial dispute between TWC, which is a cable operator, and NFL Enterprises LLC, which operates NFLN.[3] In connection with the bankruptcy proceedings of Adelphia Communications Corporation, TWC and Comcast each agreed to purchase certain Adelphia cable systems, which was then followed by system swaps between TWC and Comcast.[4] As part of these transactions, TWC obtained cable facilities, licenses, and customers that formerly belonged to Adelphia and Comcast – it did not, however, assume the contracts for the cable network programming that Adelphia and Comcast had previously provided.[5] To ensure the full range of programming for its new cable assets, TWC thus had to negotiate new agreements with a host of cable programmers and broadcast stations that had been carried on the Adelphia and Comcast systems.[6]

Those negotiations were successful, as TWC entered into almost 200 new programming and retransmission consent agreements. Most of these agreements, however, were reached late in the process – as of June 30, 2006, TWC still was negotiating with almost 150 cable networks

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[3] *See* Declaration of Michelle Kim, attached to Time Warner Cable's Petition for Reconsideration and Referral to the Full Commission, MB Docket No. 06-151, ¶¶ 2, 8-9 (filed Aug. 3, 2006) ("Kim Initial Decl.") (attached hereto as Exhibit 1).

[4] *Id.* ¶ 3. These transactions are described more fully in the Commission's Memorandum Opinion and Order approving the license transfer applications related thereto. *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees; Adelphia Communications Corporation, (and subsidiaries, debtors-in-possession), Assignors and Transferors, to Comcast Corporation (subsidiaries), Assignees and Transferees; Comcast Corporation, Transferor, to Time Warner Inc., Transferee; Time Warner Inc., Transferor, to Comcast Corporation, Transferee*, MB Docket No. 05-192, FCC 06-105 (rel. July 21, 2006).

[5] Kim Initial Decl. ¶ 4.

[6] *See id.* ¶ 5. For many of the cable networks that had been carried by Adelphia and Comcast, TWC had existing agreements that gave it the right to carry those networks on newly acquired systems. TWC thus did not need new carriage agreements with those networks. *See id.* ¶ 4.

and broadcast television stations.[7] Despite the down-to-the-wire nature of the negotiations, TWC reached agreement with all but two providers, one of which was NFLN.[8]

The negotiations between TWC and the cable programmers took place in an environment of considerable uncertainty. Not only was it unclear when or whether the parties might come to an agreement, but it also was uncertain precisely when the Adelphia-Comcast-TWC transactions would become final. Those transactions required approval from multiple authorities and regulatory bodies, including the Bankruptcy Court, the Federal Trade Commission, local franchising authorities, and this Commission.[9] The Commission ultimately issued an order late in the afternoon on Friday, July 21, 2006 that imposed several conditions. After reviewing the conditions over the weekend, TWC concluded by Monday, July 24, 2006 that the transactions likely would close (as they ultimately did) on July 31, 2006.[10] In this regard, the assumption in the Bureau's Reconsideration Order that TWC had reason to know that the requisite approvals would occur and the deals would close on July 31 is erroneous. To be sure, TWC was aware that the parties had a right to walk away if the deals did not close by July 31, and TWC strongly urged the Commission to rule in time for closing to occur on that date. But that is far different

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[7] *See id.* ¶ 6. ESPNU was the other programmer with which TWC did not reach agreement. TWC had been engaged in negotiations with ESPNU for carriage of the network across all of TWC's systems, as well as the soon-to-be acquired systems. Shortly before August 1, when it became clear that the parties would not be able to reach mutual agreement on terms for carriage in advance of the closing, ESPNU confirmed with TWC that, upon closing, those acquired systems carrying the network would no longer have the right to carry the network. *See* Supplemental Declaration of Michelle Kim, ¶ 10 ("Kim Supplemental Decl") (attached hereto as Exhibit 2).

[8] Kim Initial Decl. ¶ 8.

[9] *Id.* ¶ 10; *see also* Declaration of Steven Teplitz, ¶ 2 ("Teplitz Decl") (attached hereto as Exhibit 3).

[10] Kim Initial Decl. ¶ 11; Teplitz Decl. ¶ 4.

from knowing that the deals would close on that date. The only thing TWC had any measure of control over respecting the July 31 date was whether it would abandon the deals at that point.[11]

Right up until the time of closing, TWC was in negotiations with NFLN regarding possible carriage. At the crux of those negotiations was NFLN's demand that TWC carry NFLN on all of TWC's systems, both newly acquired and existing, on a highly-penetrated expanded basic tier.[12] Such carriage would require virtually all of TWC's customers to pay for a sports programming service in which many customers would have little or no interest – over the course of the entire season, NFLN will show only eight live regular season NFL games, all of which will be available locally in the markets of the competing teams.[13] Thus, TWC proposed to carry NFLN as part of a sports-themed tier of service, so that those customers with a particular interest in football-related programming outside of live regular season games of their home team could elect to receive the network.[14] By late July, however, after TWC concluded that the Adelphia

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[11] The parties knew as of July 6 (when the Sunshine Notice was released) that the transactions were scheduled for a vote at the Commission on July 13. The resulting Order that approved the transaction was not released until late on July 21, and it contained several complex conditions that will govern various aspects of TWC's business operations. Under the terms of the Adelphia transaction, TWC had the right to terminate it or delay the closing in the event that regulators imposed conditions meeting certain thresholds. As a result, TWC worked carefully during the weekend to review the Order and did not make a final decision until Monday, July 24 to go forward with the closing on July 31. As of that point, TWC made a determination that closing was likely (although, as noted, there were still other potential obstacles). TWC also concluded that, in light of where the discussions with NFLN were (TWC had by then been able to reach agreements as to almost all of the programming it needed), it was becoming doubtful that an agreement could be reached with that network by closing. Accordingly, TWC took steps to place newspaper ads to alert customers of the Adelphia and Comcast systems being acquired by TWC that NFLN might no longer be available as of the closing. *See* Teplitz Decl. ¶¶ 3-4; Kim Initial Decl. ¶¶ 11-13.

[12] Kim Initial Decl. ¶ 9.

[13] Emergency Petition for Declaratory Ruling and Enforcement Order, Or, In the Alternative, for Immediate Injunctive Relief, MB Docket No. 06-151 at 3 (filed Aug. 1, 2006) ("NFLN Emergency Petition").

[14] Kim Initial Decl. ¶ 9.

transaction would likely close by July 31 and that TWC and NFLN would not be able to conclude a carriage agreement before then, TWC informed NFLN that it would notify customers that the network might not be available as of August 1.[15]

In response, on July 24, 2006, NFLN sent TWC a letter demanding that TWC carry NFLN on the same tier of the acquired system for 30 days under the terms of NFLN's agreements with Adelphia and Comcast. NFLN's letter did not disclose or otherwise describe those terms.[16]

On July 27, 2006, TWC published notices in local newspapers informing its soon-to-be new customers of channel line-up changes it expected to make as of August 1, 2006.[17] The notice accurately informed Adelphia and Comcast subscribers that NFLN was one of a few channels that TWC "does not have the rights to currently carry and, therefore, may not be available" as of August 1.[18] After publishing this notice, TWC continued to negotiate with the NFLN.[19] On July 28, TWC offered to launch NFLN on all of TWC's systems, and it even offered to carry NFLN on the same tier that it had been on pre-acquisition, except where the acquired systems had carried NFLN on the expanded basic tier; for those systems, TWC agreed that it would carry NFLN on the digital basic tier (which is the most widely distributed digital tier) rather than on a sports tier.[20] Despite TWC's commercially reasonable proposals, TWC and

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[15] Kim Supplemental Decl. ¶ 9.

[16] *Id.* ¶ 11.

[17] Kim Initial Decl. ¶ 13.

[18] *Id.*

[19] *Id.*

[20] *Id.* The Bureau suggested in its Reconsideration Order that TWC's desire to place NFLN on a sports tier is somehow at odds with its advocacy before the Commission in the "a la carte" proceedings. Reconsideration Order ¶ 25 n.43. That is incorrect. TWC's consistent view has been that a *government-imposed* requirement that all services must be offered a la carte would be

NFLN did not reach agreement. Accordingly, once TWC took over from Adelphia and Comcast on August 1, 2006, TWC had no legal right to carry NFLN on the acquired systems and, indeed, would have faced substantial copyright liability had it carried NFLN in the absence of an agreement to do so.[21]

Initial Bureau Order and Its Aftermath. On August 1, NFLN filed an "Emergency Petition" with the Commission asserting that TWC's refusal to carry NFLN violated 47 C.F.R. § 76.1603(b). NFLN argued that TWC violated the regulation when it did not provide the subscribers it acquired from Adelphia and Comcast with 30 days notice that TWC would not have the right to carry NFLN after August 1.

Less than 48 hours later, and without informing TWC that it would be acting immediately on the petition or otherwise offering TWC an opportunity to respond, the Bureau issued an order requiring TWC to "reinstate carriage of the NFL network on all systems newly acquired from Adelphia Communications and Comcast Corporation on the same terms under which the NFL Network was carried prior to August 1, 2006."[22] Neither the Bureau nor NFLN divulged to TWC – which was not a party to those prior agreements – exactly what those terms were.[23]

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bad for consumers and that such issues should be left to the marketplace. The fact that TWC tried to obtain sports-tier carriage in marketplace negotiations as to this particular network is by no means inconsistent with its position that the marketplace, and not government regulation, can best address these issues.

[21] *See* Kim Initial Decl. ¶ 13.

[22] Initial Order ¶ 11; *see also id.* ¶ 5.

[23] Even after the Bureau's orders, NFLN refused to share those agreements with TWC on the ground that the agreements are confidential. TWC has received a copy of Adelphia's agreement with NFLN from Adelphia, but it still has not received a copy of the Comcast agreement. *See* Kim Initial Decl. ¶ 15. Although the Bureau states that TWC has been provided with "the substance" of the agreements, Reconsideration Order ¶ 17 n.30, with respect to the Comcast agreement TWC has in fact been provided with only two terms – even as to those terms, TWC has been forced to accept NFLN's characterizations of what the agreement provides. Kim Supplemental Decl. ¶ 12. This history also makes clear that the Bureau was wrong to suggest

In awarding preliminary relief, the Bureau did not suggest that TWC currently had – or ever had – a contractual or statutory obligation to carry NFLN, and the Bureau did not dispute that TWC would be able to drop NFLN 30 days after providing appropriate notice. The Bureau nonetheless placed on TWC an obligation to carry NFLN through the 30-day notice period "principally based on our determination that such relief will further the public interest."[24] That Order deemed the terms of carriage to be reasonable, even though at that juncture TWC had no idea what those terms were, and (presumably) the Bureau was similarly in the dark because NFLN had not disclosed the substance of the terms in its Emergency Petition.

The Initial Order did not, however, definitively resolve the merits. Instead, citing Sections 76.1603(b) and (c), the Bureau offered its tentative conclusion that it "appears" NFLN would prevail on the merits, principally because "the termination of the NFL Network" was "within the control of the cable operator," in the sense that it "did not result from any uncontrollable external event, such as a natural disaster."[25] The order was "effective immediately," and it did not provide any mechanism for staying the order pending further consideration by the Bureau, the Commission, or a Court.[26] The Bureau then set a schedule for further briefing so it could provide a definitive resolution of the merits.[27]

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that TWC may have been able to obtain the terms of NFLN's carriage when NFLN's offer was made, since even after the Bureau order mandating carriage NFLN has resisted release of these carriage agreements.

[24] Initial Order ¶ 7.

[25] *Id.* ¶ 9.

[26] *Id.* ¶ 11.

[27] *Id.* ¶ 12.

Faced with an unambiguous injunction, TWC complied, adding NFLN to its newly acquired systems by midnight on the day the Initial Order was issued.[28] This required TWC, in at least one instance, to delete programming that it had put in place for its new customers on August 1. In the Syracuse/Binghamton New York area covering 68,000 viewers, TWC had replaced Adelphia's NFLN offering with a local origination channel containing programming of local interest, including coverage of such sporting events as Syracuse University basketball, football, and lacrosse. That channel had to be dropped to accommodate NFLN.[29]

Bureau Reconsideration Order. At the same time, TWC sought to protect its rights. On August 3 – within hours of the Bureau's decision – TWC sought immediate relief from the Initial Order by seeking reconsideration and a stay, and it asked that its request be referred to the full Commission for resolution, as FCC rules permit.[30]

On August 7, the Bureau issued its decision on TWC's Application for Stay and Petition for Reconsideration, denying both in their entirety. First, the Bureau concluded that TWC had the "control" required by Section 76.1603(b) because it could have accepted NFLN's unilateral, last-minute offer to allow TWC to carry the network on the terms and conditions that had governed NFLN's carriage on Adelphia and Comcast.[31] The Bureau did not appear to find it relevant that NFLN never in fact disclosed those terms and conditions. Nor did the Bureau acknowledge that the relevant offer had come long after July 1, the date on which (under the Bureau's theory) notice to customers should have been provided. The Bureau likewise treated as

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[28] Kim Supplemental Decl. ¶ 13.

[29] *Id.*

[30] Time Warner Cable's Application for Stay, MB Docket 06-151 (filed Aug. 3, 2006); Time Warner Cable's Petition for Reconsideration and Request for Referral to the Full Commission, MB Docket 06-151 (filed Aug. 3, 2006) ("Reconsideration Petition") (both incorporated herein by reference).

[31] Reconsideration Order ¶ 17.

irrelevant the fact that TWC had made its own commercially reasonable offers to NFLN, which NFLN had refused to accept.

Second, after citing Section 76.1603(c) only in passing in the Initial Order, the Bureau advanced that provision as an "independent ground" for upholding the sanction,[32] even though (as noted) NFLN had not discussed or even cited to that provision in its Emergency Petition. Although contending that TWC had "apparently violated" Section 76.1603(c), the Bureau did not cite any instance in which the Bureau or the Commission had ever applied that provision to services not subject to rate regulation, nor did it seek to explain how its decision could be reconciled with the text and history of the provision, which demonstrate that it is applicable only to rate-regulated services. The Reconsideration Order made no mention of the fact that this was the first time the Commission had ever suggested that Section 76.1603(c) applied outside the regulated CPST tier.

Finally, after reiterating its previous conclusion that the balance of the equities favored its mandatory carriage remedy, the Bureau reaffirmed its authority to issue the mandatory carriage injunction. In so doing, the Bureau apparently deemed it irrelevant that its remedy here was unprecedented, as TWC had contended in its papers. Indeed, the Bureau cited no case in which the Bureau or the Commission had imposed a mandatory carriage remedy for a violation of Section 76.1603. The Bureau also rejected TWC's arguments on the equities, concluding that the smattering of preseason reports, largely pre-recorded preseason games, and statistics that NFLN offers is such valuable content that the harm to the public from its loss – in combination

[32] *Id.* ¶¶ 21, 30.

with the asserted harm to NFLN's economic interests – greatly outweighed any harm to TWC's First Amendment rights.[33]

ARGUMENT

The Emergency Petition for a Declaratory Ruling and Enforcement Order should be denied. NFLN asks the Bureau to compel TWC to carry programming that it lacks the right to carry, on terms it finds unacceptable, all at a time that is critical for TWC as it seeks to build relationships with its new customers, and all to remedy an alleged violation of the Commission's subscriber notification rules. That relief is entirely inappropriate here for four reasons. First, TWC has not violated the Commission's subscriber notification requirements. Second, Congress granted the LFAs, not the Commission, authority to enforce the subscriber notification provisions at issue. Third, imposition of a mandatory carriage obligation as a remedy for any alleged notice violation is barred by the Communications Act and the First and Fifth Amendments. And fourth, granting the requested relief would be an arbitrary and capricious departure from past Commission precedent.

I. TWC Did Not Violate Section 76.1603.

A. TWC Provided Prior Customer Notice in Full Compliance with Section 76.1603(b).

Section 76.1603(b) – the only regulation NFLN has invoked – generally requires that when cable operators make changes to their channel line-up, they must provide their subscribers written notice of changes "as soon as possible."[34] The regulation imposes a heightened burden of 30 days advance notice only when "the change is within the control of the cable operator."[35]

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[33] Reconsideration Order ¶¶ 23, 25.

[34] 47 C.F.R. § 76.1603(b).

[35] *Id.*

The Bureau's orders tentatively – and incorrectly – concluded that TWC's decision not to carry NFLN on its new systems was "within the control" of TWC.

The noncarriage of NFLN cannot be within TWC's control for purposes of Section 76.1603(b) because TWC never had the legal right to carry NFLN on its systems. On August 1, when TWC took over the assets formerly owned by Adelphia and Comcast, TWC did not assume any programming contracts of the former Adelphia or Comcast systems and did not have its own agreement to carry NFLN. Thus, TWC had no contractual right to carry the programming. Nor did any statute or regulation even arguably give TWC the right, or impose an obligation, to carry NFLN without a contract. Carriage would thus have exposed TWC to liability under the copyright laws, as well as potential liability for theft of service and conversion of property. Under these circumstances, there cannot be "control" within the meaning of Section 76.1603(b) as a matter of law.

In the Reconsideration Order, the Bureau suggested that TWC nevertheless had control because NFLN offered, at the eleventh-hour, to allow TWC to carry the network on terms set by NFLN.[36] But that approach gives the programmer unilateral authority to force a cable operator to accept the proffered carriage terms despite the absence of any meeting of the minds and no matter how unreasonable those terms might be – a plainly untenable result. Moreover, when NFLN made the "offer" that purportedly vested TWC with control, NFLN was refusing to disclose those terms to TWC and claimed that they were confidential.[37] It cannot be correct that TWC had an obligation under Section 76.1603(b) to provide carriage on terms that it did not even know.

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[36] Reconsideration Order ¶ 17.

[37] Kim Supplemental Decl. ¶ 11.

Nor is it any answer to say that the terms NFLN offered in this instance were reasonable. The Bureau is in no position to predicate its carriage requirement on a conclusion that the terms are reasonable because the Bureau (like TWC) has no idea what those terms are. Similarly, a finding that TWC must accept these unknown terms simply because they were acceptable to Adelphia or Comcast would undermine TWC's express bargain to avoid assuming any of the sellers' programming contracts. Even more to the point, nothing in Section 76.1603(b) confers authority on the Bureau to determine that offered carriage terms are sufficiently reasonable that a cable operator's refusal to accept the offer demonstrates that the operator has unilateral control over the carriage decision. If that were the rule, then the question of whether a cable operator had "control" would always depend on a retroactive decision by the Commission as to whether the programmer's offered terms were "reasonable."

Moreover, the Bureau's interpretation of control cannot be correct as a matter of law or logic. First, as noted, TWC made its own commercially reasonable offer to NFLN, and that was rejected. Under the Bureau's logic, if TWC had control because NFLN made a commercially reasonable offer, then NFLN necessarily had control over its carriage when TWC made a commercially reasonable offer. In fact, as common sense suggests, when there are two sophisticated parties to a negotiation, neither "controls" the outcome unilaterally, and the Bureau cannot arbitrarily create an artificial and unrealistic presumption to the contrary.

Second, the Bureau erred in its tentative conclusion that "the relevant question is whether the change in programming services . . . was within the control of Time Warner" on August 1, 2006 and that the state of play on July 1 is simply irrelevant.[38] Reading the rule this way gives a programmer unilateral control over whether the 30-day notice provision will be imposed. That

[38] Reconsideration Order ¶ 18.

approach is an invitation to abuse, as the facts here show – NFLN did not even offer carriage on the terms of its Adelphia and Comcast deals until the eve of the July 31 termination date, yet under the Bureau's approach, TWC had no choice but to accept that offer and provide carriage or face consequences for failing to have anticipated on July 1 that NFLN would some day make an offer that the Bureau would later deem to be commercially reasonable. Indeed, if the Bureau were inclined to make refusal of a commercially reasonable offer the basis for a presumption of control, surely at the very least that offer must come 30 days before the expiration of carriage rights – here, by July 1. NFLN's "reasonable" offer thus came too late.

Third, the consequence of the position advanced by NFLN and tentatively embraced by the Bureau is that TWC should have given notice on July 1, 2006. But that result further underscores the error of the Bureau's tentative conclusion. Through 20-20 hindsight, July 1 proved to be 30 days before TWC's acquisition of the Adelphia and Comcast assets closed and TWC needed a contractual arrangement with NFLN to carry its programming. But on July 1, TWC had no way of knowing that fact. It did not know when or whether its application for FCC approval would be granted and, if so, with what conditions, and there were still unresolved issues before the bankruptcy court and the LFAs that could have precluded closing.[39] The timing of regulatory approvals was a contingent event that TWC did not control.[40]

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[39] *See* Kim Initial Decl. ¶¶ 3, 7; Teplitz Decl. ¶¶ 2-3.

[40] In similar contexts, courts and the Commission have consistently held that a party did not have control when the outcome was dependent on government approval. *See Roquet v. Arthur Andersen LLP*, 398 F.3d 585, 590-91 (7th Cir. 2005) (holding that employer was not required to give notice of possible layoffs to its employees at a time it suspected that it *could* be indicted but *before* the indictment because the timing of the indictment was "outside the employer's control" within the meaning of the relevant statute and thus exempt from the statutory notice requirement); *see also AT&T Corp. v. FCC*, 448 F.3d 426, 431-32 (D.C. Cir. 2006) (holding that under Commission ratemaking practices, "[c]osts imposed by regulation are categorically beyond the carrier's control, even if the carrier has the option of incurring the cost before a deadline rather at the deadline."); *In re 1993 Annual Access Tariff Filings Phase 1*, 20 FCC Rcd

Moreover, on July 1, TWC lacked certainty regarding future carriage of nearly 150 programmers carried by Adelphia and Comcast.[41] Under NFLN's theory, on July 1 (or some earlier date, since the FCC's approval could as easily have been granted before July 21, 2006 as after), TWC should have sent a notice to Adelphia and Comcast subscribers informing them that at some future date (which TWC could not have identified), some or all of a list of networks (that would necessarily have to include not only NFLN but every other network with which TWC had not come to terms at the time of the notice) might become unavailable to them. That notice would have served no purpose but to alarm viewers unnecessarily and cause a substantial burden for Comcast and Adelphia, the cable operators then serving those viewers. Moreover, because the period in which regulatory approvals might have occurred was months long, presumably TWC would have been obligated to repeat such notices over and over again, in anticipation of possible action by the FCC, the bankruptcy court, and the LFAs.[42] Section 76.1603(b) cannot be read to impose such an obligation. A notice of the kind urged by NFLN and seemingly favored by the Bureau would lead to repeated dissemination of "false alarms" and cause massive consumer confusion – exactly the opposite of what Section 76.1603(b) is supposed to achieve.

The Bureau dismisses these "customer confusion" concerns as "paternalistic."[43] However, the Bureau's assumption that customers would easily have understood the full implications of a notice stating that many networks might be dropped is untenable. The reality is that a notice of the kind the Bureau has tentatively required would disserve the consumer

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7672, 7684, ¶ 27 (2005) (holding that under same practices even control over the "level and timing" of a change does not mean that a carrier had "control" of a change if the change was itself "mandated by the Commission").

[41] Kim Initial Decl. ¶ 6.

[42] For example, under the FCC's informal 180-day merger review "shot clock," the Adelphia transaction was ripe for FCC approval any time after November 29, 2005.

[43] Reconsideration Order ¶ 20.

protection interests that Section 76.1603 is intended to advance. If cable operators must provide a steady stream of notices of possible drops and potential transactions whenever it is uncertain 30 days in advance whether the drop or the transaction will occur, consumers will be inundated with tentative channel change notices and are certain to become inured to them.[44] Thus, contrary to the Bureau's assertions in the Reconsideration Order, TWC's argument is not based on "paternalism" or a belief that subscribers are "better off being left in the dark."[45] To the contrary, it is grounded in the sound premise that the Bureau's interpretation of Section 76.1603 will undermine the provision's purpose by ensuring that actual service changes will be lost amid the torrent of potential but unlikely service changes, depriving subscribers of the notice of real service changes the rule is designed to ensure.

Also misplaced is the Bureau's related concern that TWC's interpretation of subsection (b) would "undermine the Commission's intent" because it would allow a cable operator to drop programming without notice any time a contract expired.[46]

First, the Bureau's concern reflects a reading of the regulation that is at odds with its plain text. The "norm" assumed by the regulation is not 30 days notice, but instead the notice that was given here – notice "as soon as possible." That is what the first sentence of subsection (b) provides. It is only in the limited circumstances set forth in the second sentence of subsection (b) – when the cable operator has control – that the heightened 30-day notice provision applies. Where there is an existing contractual relationship between a programmer and a cable operator that expires by its terms in the normal course, it is a foreseeable circumstance in which it is within the control of the cable operator to provide 30 days advance notice if the cable operator

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[44] Kim Initial Decl. ¶ 6.

[45] *Id.*

[46] Reconsideration Order ¶ 17.

has no desire to renew the agreement.[47] The instant situation – where cable systems are being sold, the closing date is contingent upon obtaining needed regulatory approvals, and programming contract negotiations are underway to allow the purchaser to obtain initial carriage rights – is entirely distinguishable and subject to the general rule of notice "as soon as possible."

Second, any concern about notice cannot justify the Bureau's reading of the rule, because even under that interpretation, consumers receive notice in advance of termination only when the network makes an offer that the Bureau deems "commercially reasonable." The Bureau's concern about consumer notice is thus addressed in only a minimal way by the interpretation it advances. Under the Bureau's logic, if NFLN had not made its unilateral offer on July 24th, and had insisted on being dropped on July 31st, TWC's July 27th notice would not have troubled the Bureau. But apparently when a programmer makes an offer that is later deemed by the Bureau to be "reasonable," a result that cable operators cannot possibly predict in advance, a full 30-day notice is required.

Finally, the Bureau's claim that a facial application of Section 76.1603(b) would allow programming to be dropped "without any notice" upon any contract expiration is incorrect.[48] TWC has never suggested that Section 76.1603(b) can be read to allow *no* advance notice, only that less than 30 days advance notice is permitted due to circumstances beyond the operator's control.

In its Initial Order, the Bureau took another approach, reading the phrase "within the control of the cable operator" to encompass every circumstance other than an "uncontrollable

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[47] Many cable contracts contain provisions that give the cable operator the right to discontinue carriage of programming unilaterally on a system by system basis. Those drops, of course, are subject to the 30-day notice because they are within the unilateral control of the cable operator.

[48] Reconsideration Order ¶ 17.

external event, such as a natural disaster."[49] The Bureau imported this definition of control from Section 76.309(c)(4)(ii) of the Commission's regulations, which provides "natural disasters, civil disturbances, [and] power outages" as non-exclusive examples of matters outside of an operator's "control."[50] Section 76.309(c)(4)(ii), however, deals with entirely unrelated customer service requirements such as service calls, installations, and customer representative telephone answer time, all obligations with which operators must comply under "normal operating conditions."[51] In those cases, delays outside of the operator's control typically involve such things as problems with the weather.

In contrast, changes in channel location and programming almost *never* have anything to do with events such as a natural disaster, making Section 76.309 a poor model and certainly not an exhaustive definition of events in an operator's "control" for purposes of Section 76.1603(b). Indeed, under such a restrictive reading, *every* change in programming would be under the operator's control. Moreover, Section 76.309(c)(4)(ii)'s definition is expressly "not limited to" events such as natural disasters – the list of examples is meant to be non-exhaustive.[52] Here, TWC's lack of control quite plainly *did* result from "uncontrollable external event[s],"[53] though events not having to do with the forces of nature. Nothing in Section 76.309(c)(4)(ii) remotely

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[49] Initial Order ¶ 9.

[50] NFLN Emergency Petition at 8.

[51] 47 C.F.R. §§ 76.309(c)(1)(ii), 76.309(c)(2).

[52] Notably, the Commission has found events – other than natural disasters – to be outside of a cable operator's control. *See, e.g.*, Letter from Meredith J. Jones, Cable Services Bureau, to Mark J. Palchick, Vorys, Sater, Seymore and Pease, DA 97-36 (rel. Jan. 10, 1997) (recognizing that a programming substitution made by a programmer without notice to the cable operator was outside of the operator's control).

[53] Initial Order ¶ 9.

suggests that TWC had "control" in the scenario presented here – which is not surprising given that Section 76.309(c)(4)(ii) addresses wholly different kinds of customer service requirements.[54]

TWC's only notice obligation under Section 76.1603(b) was to provide notice "as soon as possible." As noted, the FCC issued its conditional approval late on Friday, July 21, and TWC analyzed the FCC's conditions over the weekend. On July 24, TWC knew with reasonable certainty when the transactions were likely to close, and, within 72 hours – the quickest time possible to get advertisements in newspapers – TWC provided notice to its soon-to-be customers. TWC thus complied fully with Section 76.1603(b).

The Bureau claims that an inflexible application of the 30-day notice rule serves an important public interest because it allows consumers time to switch to an alternate provider that may offer the programming service being discontinued and ensures that "consumers actually receive the programming they were promised" since they pay for monthly service in advance.[55] This rationale is misplaced for several reasons. First, as noted above, providing a stream of notice of potential cancellations and changes will likely cause consumers to ignore the real upcoming cancellations, limiting the effectiveness of the notice in alerting consumers to upcoming service changes.[56] Second, providing sufficient time for consumers to switch to an alternate provider was never cited by the Commission as a rationale for the original adoption of

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[54] The Commission expressly stated that the definition of normal operating conditions in its customer service rules "is relevant in assessing compliance with telephone answer time, installations, service calls, and repair of service interruptions." Notably, this list does not mention the subscriber notice rule. *In re Implementation of Section 8 of the Cable Television Consumer Protection & Competition Act of 1992: Consumer Protection and Customer Service*, 8 FCC Rcd 2892, 2902, ¶ 41 (1993) ("*Cable Consumer Protection Order*").

[55] Reconsideration Order ¶ 26; *see also* Initial Order ¶ 7.

[56] Kim Supplemental Decl. ¶ 6.

the rule.[57] Indeed, these rules were adopted at a time when Congress had determined that direct competition to cable was rare. Third, the "pay in advance" argument ignores the fact that any customer who discontinues service mid-month receives a credit for the remainder of the month.[58] A 30-day notice has no magic in this context. Fourth, the Bureau's Order ignores that the "other provider" to whom subscribers can turn is not subject to notice requirements at all. That is, the notice requirements here apply only to cable operators and not to DBS providers. Thus, subscribers have the "right" under the rule to switch from cable operators, who must give notice "as soon as possible" in many circumstances and 30 days notice in others, to carriers that have to provide no notice at all, undermining the Bureau's contention that such a rigid application is essential for consumers and further underscoring the arbitrariness of the Bureau's unyielding application of the notice obligations.[59]

Finally, the Reconsideration Order accuses TWC of having disavowed in its initial filings a position that it took before the Bureau in connection with the Adelphia and Comcast transactions.[60] To the contrary, TWC's position with respect to compliance with the channel occupancy rules is entirely consistent with its position here. TWC has never claimed that the 30

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[57] *Cable Consumer Protection Order*, 8 FCC Rcd at 2906, ¶ 64.

[58] *See* Kim Supplemental Decl. ¶ 15.

[59] TWC recognizes that the statutory notice provisions and the FCC's rule apply only to cable operators and not satellite providers. The fact that NFLN is readily available from at least two nationwide MVPDs, as recognized by the Bureau, demonstrates that the current vibrant competitive marketplace is more than adequate to discipline any MVPD that provides inadequate customer service. *See, e.g.*, *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1137-39 (D.C. Cir. 2001) (40% cable vertical ownership limit remanded for failure to account for robust competition faced by cable operators from DBS); *Time Warner Entm't Co. v. FCC*, 56 F.3d 151, 190-92 (D.C. Cir. 1995) (FCC geographic rate uniformity and tier buy-through requirements inapplicable where cable system faces effective competition). If the Commission believes that competition is inadequate to protect consumers, it should recommend to Congress that the notice provisions be extended to all MVPDs, including satellite providers.

[60] *See* Reconsideration Order ¶¶ 11-13.

days notice is not required where the change is entirely within the cable operator's control. To the extent TWC discovers that any acquired systems carry programming services commonly-owned with TWC in excess of the remanded channel occupancy cap, TWC expects that discontinuation of carriage of any such services will be within TWC's control. Where, as here, TWC had no control over the ability to carry NFLN under acceptable terms and conditions, providing customer notice of carriage discontinuation "as soon as possible" and less than 30 days in advance was entirely consistent with the requirements of Section 76.1603(b).

Nor is there any inconsistency between TWC's prior advocacy and the contention raised in the Petition for Reconsideration and incorporated here that Section 76.1603(b) does not apply to the launch of the buyer's programming line-up on a newly acquired system, just as it does not apply to the commencement of new cable operations in a particular community, because there is no "change" in the service offered to any of the cable operator's subscribers under such circumstances.[61] Again, TWC's view that the 30 days notice requirement would apply when TWC was prepared to submit its channel occupancy rule certification (if the FCC agreed to postpone the certification date long enough for such notice to be given) – well after TWC had gained operational control of the affected cable systems – is entirely consistent with its position here that the rules do not apply at the time TWC first takes control.[62] Thus, TWC is not "estopped" from making the arguments regarding interpretation of Section 76.1603(b) advanced in this proceeding.[63]

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[61] Reconsideration Petition ¶ 18.

[62] Teplitz Decl. ¶¶ 7-8.

[63] Application of mandatory carriage on the unique facts of this case is all the more problematic because such carriage is at odds with the results in the Adelphia bankruptcy proceeding. There, TWC was permitted to assume assets of the debtor without having to assume the contracts for carriage. Yet the effect of the relief NFLN seeks would be to force TWC to assume certain contracts for 30 days. The requested remedy is thus at odds with the Commission's recognized

B. Section 76.1603(c) Is Inapplicable.

The Bureau's invocation of Section 76.1603(c) is likewise unsustainable.[64] That provision was not even cited in NFLN's Emergency Petition. And with good reason – it has no application here. Section 76.1603(c) was intended to apply to a cable operator's rate-regulated CPST tier and related equipment, an area where Congress has expressly divested the Commission's jurisdiction. *See* 47 U.S.C. § 543(c)(4).

Section 76.1603(c) – formerly designated as 47 C.F.R. § 76.964 – was first imposed as part of the FCC's cable rate regulation proceedings.[65] The sole purpose of the provision was to provide notice of CPST rate increases to LFAs to facilitate their ability to "file cable programming service [CPST] rate complaints pursuant to Section 623(c)(1)(B)."[66] Indeed, the Commission distinguished expressly between the notice required under the Commission's

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obligation to accommodate the policies of the Bankruptcy Code in its decisions, *see, e.g.*, *LaRose v. FCC*, 494 F.2d 1145, 1146 n.2 (D.C. Cir. 1974) (recognizing Commission's obligation to accommodate, and to minimize the conflict with, the policies of the Bankruptcy Code); *In re Applications of D. H. Overmyer Telecasting Co.*, 94 FCC 2d 117, ¶ 13 (1983) (noting the D.C. Circuit's emphasis of "the need for the Commission to reconcile its policies under the Communications Act with those of other federal laws and statutes"), and it cannot stand.

[64] 47 C.F.R. § 76.1603(c) provides as follows:

> In addition to the requirement of paragraph (b) of this section regarding advance notification to customers of any changes in rates, programming services or channel positions, cable systems shall give 30 days written notice to both subscribers and local franchising authorities before implementing any rate or service change. Such notice shall state the precise amount of any rate change and briefly explain in readily understandable fashion the cause of the rate change (e.g., inflation, change in external costs or the addition/deletion of channels). When the change involves the addition or deletion of channels, each channel added or deleted must be separately identified. For purposes of the carriage of digital broadcast signals, the operator need only identify for subscribers, the television signal added and not whether that signal may be multiplexed during certain dayparts.

[65] *See In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992:* Rate *Regulation*, 8 FCC Rcd 5631, 5713, ¶ 124 (1993).

[66] *Id.* at 5841, ¶ 333 n.819.

generally applicable "customer service standards" enforced by local franchising authorities – which became Section 76.1603(b) – and that required under the Commission's CPST rate regulations – which became Section 76.1603(c).[67]

Given that the FCC no longer has jurisdiction over CPST rates, Section 76.1603(c) is no longer valid.[68] Any attempt to impose sanctions under now defunct subsection (c) is beyond the Commission's authority under the Communications Act. Section 623(a) of the Act makes clear that the Commission's rate regulation powers are limited to those powers expressly granted in Sections 623 and 612 (the latter of which is plainly inapplicable).[69] Thus, the Commission lacks any continuing authority under Section 623(c) to enforce the notice requirements in Section 76.1603(c).[70]

The Bureau's apparent conclusion – stated for the first time in these orders – that Section 76.1603(c) applies to all services (and not just rate-regulated services) cannot be correct because subsection (c) imposes notice requirements that only make sense in the context of regulated services. Subsection (c) contains not only a 30 days notice provision for service changes, but

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[67] *See In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 9 FCC Rcd 4119, 4185, ¶ 139 (1994).

[68] When it adopted Section 76.964, the FCC simultaneously adopted a parallel provision, Section 76.932, requiring notice with respect to *basic* rate increases. That provision, now enumerated Section 76.1603(d), is of continuing vitality with respect to LFAs that have been certified to regulate basic cable rates in communities where the operator is not subject to effective competition. To the extent that Section 76.1603(c) might be read to have some continuing application to rate and service changes to the basic tier, that is a matter for LFA regulation, and the subscriber notices for basic service are fully addressed in Sections 76.1603(a) and (d).

[69] *See* 47 U.S.C. § 543(a) ("No Federal agency . . . may regulate the rates for the provision of cable service except to the extent provided under this section and section 532. . . .").

[70] Section 76.1603(c) was amended in 2001 to address subscriber notices relating to the addition of multiplexed digital broadcast signals. *In re Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598, 2638, ¶ 89 (2001). While that provision remains valid as unrelated to CPST rate regulation, it more appropriately should have been added to Section 76.1603(b), the customer service notice rule.

also a detailed provision for notice of rate changes: a cable operator contemplating a rate change must give a 30 days notice that not only states the amount of the rate change but also explains "the cause of the rate change (e.g., inflation, change in external costs or the addition/deletion of channels)."[71] The requirement to provide a detailed justification for any rate change is plainly applicable only in the context of rate regulation and does not apply to any unregulated tier where NFLN had been carried by Adelphia or Comcast. Applying Section 76.1603(c) as suggested in the Bureau's orders would be absurd – a cable operator would be forced to justify to regulators and the public its rate decisions on tiers that are no longer subject to regulation.

That reading is confirmed by the fact that an expansive reading of subsection (c) would render the "control" requirement in subsection (b) superfluous. Subsection (b)'s requirement that an operator give 30 days notice of a change only when it is "within the control" of the operator would be effectively written out of the regulation if, as the Bureau suggests, the operator must give the same notice under subsection (c) regardless of whether or not it had "control." The Bureau's broad reading of subsection (c), rendering it facially inconsistent with subsection (b), is arbitrary and capricious.

In light of these regulatory obstacles, it is unsurprising that there is no FCC order applying Section 76.1603(c) or its predecessor to unregulated services. For example, the issue in *In re Complaint of WFXV-TV, Inc. Against United Cablevision of Southern Illinois, Inc.*, cited in the Reconsideration Order,[72] was notice for a station claiming must-carry rights, which involves the rate-regulated basic services tier.[73]

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[71] 47 C.F.R. § 76.1603(c).

[72] 16 FCC Rcd 433 (2000) (involving notice for a broadcast station claiming must-carry rights, which must be carried on the basic service tier), *cited in* Reconsideration Order ¶ 30 n.53.

[73] *See* 47 U.S.C. § 543(b)(7)(A) (stations subject to mandatory carriage must be placed in basic service tier).

Similarly, *In re Social Contract for Time Warner Cable*, cited in the Reconsideration Order, is also inapposite.[74] As the Bureau correctly notes, TWC sought a waiver of Section 76.1603(c) to implement certain rate adjustments pursuant to the Time Warner Social Contract on less than 30 days notice when it acquired certain cable systems from Cablevision Industries Corporation in 1995.[75] However, the Bureau's suggestion that this somehow should have made TWC "aware" that Section 76.1603(c) might be applicable here ignores the purpose of that rule and subsequent changes in law. First, as explained above, CPST rate regulation remained in effect until March 31, 1999, and thus Section 76.1603(c) was still valid when TWC obtained the waiver in 1995. Second, because Section 76.1603(c) was intended to apply only to notices of CPST rate increases, a matter almost always within the cable operator's control, the more rigid 30 days notice requirement under that rule required TWC to obtain a waiver. Here, because Section 76.1603(b) expressly allows provision of less than 30 days notice where discontinuation of a programming service is beyond the operator's control, TWC was under no obligation to seek a waiver.

Even accepting *arguendo* that Section 76.1603(c) could be extended for the first time to cover the unregulated service tiers at issue here, it still cannot justify the Bureau's order because it can only reasonably apply when the cable operator has control over the change. Imposing a 30-day notice obligation in situations in which the operator lacks control over both the change and its timing presents substantial due process concerns and, indeed, in a variety of contexts courts have limited the power of the government to impose sanctions for actions that are not

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[74] 11 FCC Rcd 3099, 3101, ¶¶ 12-14 (Cable Services Bureau 1995), *cited in* Reconsideration Order ¶ 14 nn.26-27.

[75] Reconsideration Order ¶ 14.

within a party's control.[76] That is no doubt why the regulation that actually applies here – Section 76.1603(b) – requires 30 days notice only when the change is under the operator's control, and otherwise requires only that notice be given "as soon as possible." In short, Section 76.1603(c) does not apply here, and, even if it did, TWC was in full compliance because it lacked the relevant control.

II. The FCC Lacks Authority to Adjudicate NFLN's Complaint.

A. Congress Gave LFAs Exclusive Jurisdiction to Enforce Subscriber Notification Provisions.

TWC has demonstrated that it has fully complied with the customer notice requirements of Section 76.1603. Nevertheless, even if a violation had taken place, the Commission lacks any authority to remedy the notice violations asserted here. Congress has given LFAs, and not the Commission, the exclusive authority to enforce customer service standards, and the Communications Act itself precludes any free-ranging authority to remedy "systemic abuses." The Commission has only the power to promulgate customer service standards that LFAs exclusively may enforce.

Section 632 of the Act (47 U.S.C. § 552) is clear. Subsection (a) is entitled "Franchising authority enforcement," and it provides that "[a] franchising authority may establish and enforce . . . customer service requirements of the cable operator." Subsection (b) is entitled "Commission standards," and it provides that "[t]he Commission shall . . . establish standards by which cable operators may fulfill their customer service requirements." When contrasted with the grant of authority to LFAs to "establish and enforce," Congress' decision to omit the power to "enforce" from the authority granted to the Commission must be viewed as deliberate and

[76] *See, e.g.*, *United States v. Ashland, Inc.*, 356 F.3d 871, 874 (8th Cir. 2004) ("[I]t would be fundamentally unfair to hold [company] accountable on probation for actions beyond its control."); *United States v. Sumitomo Marine & Fire Insurance Co.*, 617 F.2d 1365, 1369 (9th Cir. 1980) (due process limits ability of courts to sanction party for events beyond its control).

dispositive.[77] The text means what it says: LFAs are given the power both to establish and to enforce customer service standards, but the Commission has the power *only* to establish standards. The legislative history reinforces this point. The Conference Report describes the section of the House amendment that was adopted and later became Section 632(b) as "requir[ing] the FCC . . . to establish federal customer service standards which may be required in local cable franchises and enforced by local franchising authorities."[78]

That conclusion is all the more evident when considered against the historical context in which the 1992 Cable Act (which added Section 632(b)) was passed. Prior to the passage of the Act, the Commission consistently deferred to LFAs for enforcement of cable customer service provisions. For example, when the Commission first addressed cable customer service in 1972, it adopted a rule (Section 76.31(a)(5)) requiring local franchise agreements to include customer service provisions, but the Commission declined to engage in enforcement.[79] When this rule was deleted in 1977, the Commission again concluded that "[t]he design and enforcement of

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[77] *See, e.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983) ("where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion") (quotation marks omitted); *AT&T Corp. v. FCC*, 323 F.3d 1081, 1086-87 (D.C. Cir. 2003) (holding Commission had no authority to impose "actual authorization" requirement where enabling statutory provision was silent but other provisions expressly addressed such requirements); *Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 802 (D. C. Cir. 2002) (holding Commission had no authority to impose video description requirements where relevant statutory provision omitted general grant of authority language but Congress included such language in parallel statutory provision).

[78] H.R. Conf. Rep. No. 102-862, at 78 (1992).

[79] *In re Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, 36 FCC 2d 143, ¶ 184 (1972); *see also id.* ¶ 177 ("Local authorities are also in a better position to follow up on service complaints").

complaint procedures are inherently matters for local resolution."[80] Similarly, when analogous provisions were enacted in the 1984 Cable Act, Congress again provided that "[a] franchising authority may enforce any provision, contained in any franchise, relating to [customer service] requirements."[81] When Congress legislates in an area of traditional state involvement, there must be particularly clear evidence of intent to grant federal authority. That is all the more true where, as here, the substance of the rule (customer service standards) is something that local authorities are well able to enforce.

Indeed, this is exactly how the Commission itself understood the statute when it adopted implementing regulations shortly after passage of the 1992 Cable Act. The Commission's tentative conclusion in the NPRM was that "following the historical pattern that customer service standards have not been imposed or enforced at the Federal level, the Cable Act of 1992 provides the Commission with *no role* in the enforcement of its own or any other customer service standards."[82] The Commission reached the same conclusion in the *Order*: "Section [632], in delineating the FCC's involvement in establishing customer service standards, provides this Commission with no specific enforcement role. As a result, it does not appear that Congress intended for the Commission to bear the responsibility of enforcing the new FCC standards."[83] The Commission also recognized that "as a practical matter, customer service requirements can

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[80] *In re Amendment of Subparts B and C of Part 76 of the Commission's Rule Pertaining to Applications for Certificates of Compliance and Federal-State/Local Regulatory Relationships*, 66 FCC 2d 380, ¶ 41 (1977).

[81] 47 U.S.C. § 552(b). As the FCC noted with respect to former Section 632, "because we believe that the local franchise authority is the best arbiter of the particular customer service requirements of its community, promulgation of such standards is best left to those local authorities, as is currently dictated by the Act." *In re Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, 5 FCC Rcd 4962, 5060, ¶ 209 (1990).

[82] *Cable Consumer Protection Order*, 8 FCC Rcd at 2896, ¶ 13 (emphasis added).

[83] *Id.* at 2897, ¶ 19.

be enforced most efficiently and appropriately on a local level where such enforcement historically has occurred."[84]

Unsurprisingly, this conclusion is reflected in the text itself of Section 76.1603, which sets forth the Commission's nationally applicable programming change notice standard in subsection (b), but separately specifies the enforcement mechanism: "[a] cable franchise authority may enforce the customer service standards set forth in paragraph (b) . . . against cable operators."[85]

The Commission's purported authority to enforce Section 76.1603(b) in this case rests entirely on a single statement in its *Cable Consumer Protection Order*, which states – without any citation to Section 632, to any other statute, or indeed to any authority at all – that "consistent with our overall obligation to effectuate the reforms mandated by the 1992 Cable Act, we retain the authority to address, as necessary, systemic abuses that undermine the statutory objectives."[86] But that assertion fails. To the extent that the Commission was "reserving" power to enforce violations of customer service requirements, the Commission simply had no power to "reserve." Section 632 gives it no power to enforce such standards at all.

Nor does the Communications Act grant the Commission free-ranging authority to correct "systemic abuses." It is clear that the Commission must rely on "specific statutory authority" rather than "general inherent equity power" to impose obligations on providers.[87] But,

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[84] *Id.* Further, the Commission declined to adopt specific remedies for local governments to enforce. *Id.* at 2898, ¶ 21. And it is noteworthy that the types of remedies discussed -- "ordering credits or refunds to the system's subscribers," "local actions to compel specific performance," "and performance evaluation at franchise renewal" – are dramatically far afield of the "must-carry" remedy imposed in this case. *Id.*

[85] 47 C.F.R. § 76.1603(a).

[86] *Cable Consumer Protection Order*, 8 FCC Rcd at 2897, ¶ 19.

[87] *E.g., American Tel. & Tel. Co. v. FCC*, 487 F.2d 865, 872 (2d Cir. 1973).

no statute provides that authority – indeed Section 632 expressly *denies* the Commission its asserted authority. Nor does it help the Bureau to invoke Section 154(i) – that section confers no independent substantive authority on the Commission.[88] The existence of systemic abuse does not alter the scheme Congress established.

B. TWC's Actions Do Not Constitute a "Systemic Abuse."

In any event, the purported violation at issue here does not qualify as "systemic abuse" under any reasonable construction of the term. NFLN alleges the lack of appropriate subscriber notice on a single occasion for a single channel – no systemic subscriber notice violations are even suggested. Moreover, the circumstances here are highly unusual. NFLN does not contend, nor could it, that it can force TWC to carry NFLN beyond the 30 days notice period on the newly acquired systems, and it certainly has no right to carriage on any of TWC's existing systems for any period of time. In addition, the dispute arises directly out of the unique circumstances of TWC's purchase of Adelphia assets in bankruptcy and the associated transfer of Comcast assets in which: (1) the acquired systems formerly carried a network, NFLN, with which TWC never had a contract; (2) TWC did not assume – and had no obligation to assume – the Adelphia or Comcast contracts to carry NFLN; and (3) TWC was in the midst of wholesale negotiations with over one hundred programmers at a time when the moment that TWC would take control of the Adelphia and Comcast assets was entirely uncertain.[89]

There is simply no basis to conclude that TWC's failure to provide 30 days notice qualified as "systemic abuses that undermine the statutory objectives" so as to give the

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[88] *See Southwestern Bell Tel. Co. v. FCC*, 168 F.3d 1344, 1350 (D.C. Cir. 1999) ("Section 154(i) provides the Commission no independent substantive authority; it merely provides that the Commission may issue orders that are necessary in the execution of its functions as described under other provisions of the Act, while not contravening any other provisions.").

[89] Kim Initial Decl. ¶¶ 4-5.

Commission jurisdiction, especially given that TWC gave notice "as soon as possible" after ascertaining that it would not likely continue carriage of NFLN after July 31, 2006.[90] "Systemic" implies more than just one occasion or incident, regardless of the scope of impact of that one incident. The essence of the word "systemic" – whether in common or technical parlance – is repeated action over time, which does not exist here.

Nor does this alleged violation constitute "abuse," which implies a flagrant disregard of a clear standard. The current situation is far from that. First, there is a dearth of case law generally discussing the provisions at issue, and none remotely similar to this case, which involves carriage of a network that had not previously been carried by the cable operator, when the operator had no right to carriage, and indeed the very ownership by the operator of the systems at issue was not clear until long after the 30 days notice time frame had passed. Second, this was not a situation in which notice was abandoned entirely. TWC gave notice as soon as it became clear that TWC would start providing service on August 1 and that NFLN would not be part of that service. Whether or not this complies with the rule – and as argued above it plainly does – it cannot be "abuse" to advance a reasonable interpretation the notice requirement.[91] If this is "systemic abuse," then the FCC can claim jurisdiction over *any* violation of Section

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[90] The objective of the notice provision is not to force cable operators to carry networks after a carriage agreement between the programmer and operator expires or, as it the case here, where the programmer and operator never had a carriage agreement. *See In re Comcast Corporation*, 19 FCC Rcd 702, 703-04, ¶¶ 8-11 (2004) (finding that complaint of violation of notice rule affecting multiple systems did not constitute a "systemic abuse [] that undermine[s] the statutory objectives").

[91] The term "abuse" implies not only a level of volition, but also requires an understanding that an action is in clear violation of a rule. In *In re Comcast Corporation*, 19 FCC Rcd 20813 (2004), for example, the Commission adopted a Consent Decree negotiated by the Enforcement Bureau and Comcast Corporation. There, in response to an inquiry from the Enforcement Bureau, Comcast reported multiple knowing violations of the Cable Public File Rule, including failing to make system public files available upon request.

76.1603, and the Commission's repeated concession that LFAs rather than the Commission have the primary enforcement role is empty rhetoric.

C. NFLN Lacks Standing to Assert the Rights of Subscribers.

Finally, even if the Commission had authority to adjudicate the notice issue as a general matter, it could not do so here because NFLN lacks standing – a violation of Section 76.1603 can only be raised by a subscriber, not by a network.

The notice obligations at issue here run to subscribers, not to networks, and thus any "harm" to NFLN is outside the protection of the rule. Section 76.1603(b) speaks of notice only to "customers" and "subscribers," and Section 76.1603(c) mentions only "subscribers" and "local franchising authorities." These sections stand in marked contrast to other notice provisions in the Commission's rules that require notice to the networks or stations themselves.[92] Moreover, the text of the relevant provisions is confirmed by the purpose of the rule. As the Bureau indicated in its Reconsideration Order, the purpose of the provision is to provide notice to *subscribers* so they can make informed decisions, not to give added notice (or added carriage) to the networks themselves. NFLN has no standing to complain when the rights at issue belong to third parties.[93]

Nor is this a situation in which it is necessary to give NFLN standing to complain in order to ensure the provision is enforced at all, since subscribers have the incentive and the wherewithal to complain about violations of their own rights.

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[92] *See, e.g.*, 47 C.F.R. § 76.1601 (requiring notice not only to subscribers, but to the "broadcast television station" at issue).

[93] *See In re Application of G&S Network, Inc., for Authority to Construct and Operate a Multichannel Multipoint Distribution Service Station on F-Group Channels at Phoenix, Arizona*, 7 FCC Rcd 4509, 4510, ¶ 7 & n.7 (1992) (no standing when cable company was asserting rights of third parties); *see generally Warth v. Seldin*, 422 U.S. 490 (1975) (limiting standing to invoke rights of third parties).

More broadly, these arguments underscore a basic flaw in NFLN's petition – it is seeking to convert a subscriber notice provision intended to improve customer service into a shield for sophisticated private enterprises such as NFLN from the normal rigors of the competitive MVPD programming marketplace. NFLN simply has no right to invoke the rights of its viewers, and the petition thus should be dismissed.

III. The Imposition of a Must-Carry Obligation for Non-Broadcast Programming as a Remedy for the Violation of Subscriber Notice Provisions Violates Both the Communications Act and TWC's Constitutional Rights.

A. The FCC Lacks Power to Impose a Mandatory Carriage Remedy for Non-Broadcast Programming Under Any Provision of the Communications Act.

Even if the Commission has authority to enforce Section 76.1603 (and thus to impose appropriate remedial measures), that authority does not extend to imposing a "must carry" obligation, even on an interim basis, by requiring TWC to carry a network with which TWC does not have – and never had – a contractual relationship. The Communications Act squarely forecloses the relief NFLN seeks. Section 624(f)(1) of the Communications Act provides that: a "Federal agency . . . may not impose requirements regarding the provision or content of cable services, except as expressly provided in this subchapter."[94] Under Section 624(f), the Commission simply has no authority to impose a content-based requirement that a cable operator carry a particular channel.[95] Yet that is exactly what NFLN asks the Bureau to impose here. Moreover, Congress clearly has not "expressly provided" mandatory carriage as a remedy for violation of the rule at issue here. And it is not as if Congress did not understand precisely how to weave such a remedy into the Communications Act if it wanted, as the must-carry provisions

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[94] 47 U.S.C. § 544(f)(1).

[95] *See United Video, Inc. v. FCC*, 890 F.2d 1173, 1189 (D.C. Cir. 1989); *see also id.* at 1188-89 (noting that one of the purposes of § 544(f) is to forbid regulating authorities from requiring carriage of certain channels).

of Section 614 and program carriage provisions of Section 616 make perfectly clear.[96] Thus, mandatory carriage cannot be a remedy (either interim or final) for a violation of Section 76.1603. Any such remedy exceeds the Commission's statutory authority.

Section 624(f) also precludes the Commission from invoking its general authority to justify a "must-carry" remedy. When Congress expressly limits the Commission's authority, the Commission may not use its general equitable power to circumvent that limitation. Thus, the D.C. Circuit has emphasized that the Commission has no general authority to regulate program content, noting that "Congress has been scrupulously clear when it intends to delegate authority to the FCC to address areas significantly implicating program content."[97] It is implausible that Congress meant to allow the Commission to *infer* a power to impose a must-carry requirement when it has separately delineated its statutory must-carry requirements.[98]

Indeed, the Commission itself has confirmed its basic lack of authority in this area, stating expressly with respect to an alleged violation of the notice requirement in Section 76.1603 that "a carriage remedy would be inappropriate in this instance, given that the underlying orders found that the station was not otherwise entitled to mandatory carriage."[99] That is precisely TWC's point here – because NFLN has no underlying right (statutory or contractual) to mandatory carriage, it was inappropriate for the Bureau to impose one to remedy an alleged violation of Section 76.1603.

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[96] 47 U.S.C. §§ 534, 536.

[97] *Motion Picture Ass'n*, 309 F.3d at 805.

[98] *See AT&T*, 323 F.3d at 1086 (holding that if Congress had meant to allow imposition of certain requirement on carrier in one section of Communications Act, it would have "expressly imposed" such a requirement as it had done in other sections of Act).

[99] *In re Complaint of WFXV-TV, Inc. Against United Cablevision of Southern Illinois, Inc.*, 18 FCC Rcd 22782, 22783, ¶ 4 (2003).

B. The Bureau's "Must Carry" Order Violates TWC's Constitutional Rights.

The relief NFLN seeks is plainly unlawful because it impinges upon TWC's First and Fifth Amendment rights by forcing it to carry certain programming that the Commission deems important.[100] In *Turner*, which upheld the mandatory carriage restrictions at issue there by the narrowest of margins, Congress made specific findings embodied in legislation regarding three government interests justifying must-carry provisions: preserving free, over-the-air local broadcast television; promoting widespread dissemination of information from a multiplicity of sources; and promoting fair competition in the market for television programming.[101] None of those interests are present in the instant situation, nor are there any factual findings remotely close to those cited by the Court in upholding the must-carry requirements in *Turner*.

Moreover, the First Amendment issues raised by the Bureau's ruling are particularly troubling given they involve a content-based restriction of speech.[102] The Bureau held that its ruling was based "principally" on its assessment of the public interest, which in turn was predicated on the content of the speech that TWC had declined to carry: "With NFL training camps now underway and the NFL's pre-season schedule commencing on August 11, 2006," an injunction was necessary because "many football fans have a particular desire to view . . . numerous pre-season games and extensive coverage of NFL training camps."[103] Evidently, if TWC had failed to give notice about its inability to carry other speech that was less valuable in the Bureau's judgment, a lesser penalty would have sufficed. Given that the only other case

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[100] *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 185-86 (1997).

[101] *Id.* at 189-90.

[102] *See Time Warner Entm't Co. v. FCC*, 93 F.3d 957, 966 (D.C. Cir. 1996) ("Laws that regulate speech based on its content or 'that compel speakers to ... distribute speech bearing a particular message' are subject to strict scrutiny.") (citation omitted).

[103] Initial Order ¶ 7.

involving a violation of a 30 days notice provision resulted in no penalty, much less mandatory carriage, it appears that the Bureau would impose a mandatory carriage requirement for some content but not for others.[104] Such content-based actions by the government are impermissible.

Making matters even worse, NFLN has used its privileged status here to broadcast messages to TWC's new customers urging them to call to complain about TWC's business decisions.[105] Forcing TWC to carry content is bad enough, but forcing it to carry content that casts it in a bad light, especially to customers with whom it is initiating a relationship, is beyond the pale.[106]

The Bureau's initial response to TWC's First Amendment arguments is puzzling. The Reconsideration Order contends, for example, that TWC's argument that the Bureau's Initial Order "harms [TWC's] First Amendment interests by compelling it to carry a programming service that it wishes to discontinue" is "a criticism not of the August 3 Order, but of section 76.1603 itself, which states that cable operators must provide 30 days notice before they discontinue a programming service."[107] To the contrary, TWC has no First Amendment objection to the notice provision itself because nothing in that provision – or in any prior Bureau or Commission order – suggests that mandatory carriage is a permissible remedy. The notice provision does not say that operators are *required* to carry programming unless they give 30 days notice that the programming will be discontinued. That would be an entirely different obligation than the mere obligation to give notice. TWC's complaint is thus not with the regulation, but

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[104] *WFXV-TV*, 18 FCC Rcd at 22783, ¶ 4.

[105] Kim Supplemental Decl. ¶ 14.

[106] *See, e.g., Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1 (1986) (plurality opinion) (First Amendment violation found where Pacific Gas & Electric was required to disseminate messages contrary to and critical of its views).

[107] Reconsideration Order ¶ 25.

with the Bureau's unprecedented interpretation of the regulation as granting it authority to impose a mandatory carriage requirement.

Similarly unpersuasive is the suggestion in the Reconsideration Order that TWC should have sought a waiver to alleviate any First Amendment concerns. An agency may not redeem its unlawful actions by permitting the victim to seek a waiver.[108] Further, there was no reason for TWC to believe that its First Amendment interests were at stake given that the regulation as written and consistently applied up until the present has never implicated mandatory carriage as an available remedy.

The Bureau suggests in both orders that First Amendment interests are not implicated because TWC "has no objection in principle to carrying the NFL Network's programming."[109] But the fact that a person salutes the flag at times of his own choosing is no license for the government to compel a salute at times of the government's choosing on the ground that the person has no "objection in principle" to saluting the flag. The speech that the First Amendment protects is that of the speaker's choice, not that imposed by regulatory fiat.

The constitutional violation inherent in the Bureau's mandatory carriage requirement is exacerbated by Takings concerns raised by the Bureau's action. The Bureau's imposition of a mandatory carriage requirement absent any statutory or other legal basis plainly effects a taking. The Bureau Order requires TWC to pay money and provide valuable capacity, without adequate compensation in return. NFLN's offer to allow TWC to escrow the license fees pending a final determination of this matter is unavailing since NFLN fails to offer recompense for TWC's inability to sell local advertising availabilities on this channel during the period of involuntary

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[108] *See, e.g.*, *Alltell Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988) ("[t]he FCC cannot save an irrational rule by tacking on a waiver procedure").

[109] Reconsideration Order ¶ 25.

carriage. Furthermore, as noted above, TWC was forced to bump other programming to reinstate carriage of NFLN.

The courts have recognized the Fifth Amendment concerns associated with forced programming carriage. For example, the Supreme Court in *Midwest Video*, while making no finding as to the plaintiff's Fifth Amendment claims, acknowledged that the FCC's leased access rules "might effect an unconstitutional taking of property."[110] Similarly, in the context of broadcast must-carry, Judge Stephen F. Williams in his dissenting opinion in *Turner I* noted that "[t]he creation of an entitlement in some parties to use the facilities of another, gratis, would seem on its face to implicate *Loretto v. Teleprompter Manhattan CATV Corp* . . . where the Court struck down a statute entitling cable companies to place equipment in an owner's building so that tenants could receive cable television."[111] While "*Loretto* is limited to 'physical' occupations of 'real property'... the insertion of local stations' programs into a cable operator's line-up presumably is not a metaphysical act, and presumably takes place on real property."[112]

The Bureau's unprecedented actions in requiring TWC to give up valuable capacity to deliver programming it has no legal right to carry is equivalent to a physical taking of property without just compensation and thus violates the Takings Clause.[113]

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[110] *FCC v. Midwest Video Corp.*, 440 U.S. 689, 709 n.19 (1979).

[111] *Turner Broadcasting System, Inc. v. FCC*, 819 F. Supp. 32, 67 n.10 (D.D.C. 1993) (Williams, J., dissenting), *vacated by*, 512 U.S. 622 (1994).

[112] *Id.*

[113] The temporary nature of the Bureau's remedy does not affect its status as a taking. *See, e.g., First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 318 (1987) (finding that temporary takings "are not different in kind from permanent takings, for which the Constitution clearly requires compensation"); *see also San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 657 (1981) (Brennan, J., dissenting) ("Nothing in the Just Compensation Clause suggests that 'takings' must be permanent and irrevocable").

IV. The Bureau's Action Was Arbitrary and Capricious.

The remedy sought by NFLN and granted at least temporarily by the Bureau – imposing a carriage remedy for a customer notice violation – deviates starkly from Commission precedent and standard practice and constitutes arbitrary and capricious agency action in violation of Section 706 the Administrative Procedures Act ("APA").[114]

A. The Bureau's Action Was Unprecedented.

Given the First Amendment difficulties with the Bureau's approach, it is not surprising that there is no Commission case that imposes such a sweeping carriage remedy in circumstances such as these. The only case cited by NFLN is irrelevant. In *In re Time Warner Cable*,[115] the Commission ordered a cable operator to reinstate carriage of certain broadcast stations for which the operator no longer had retransmission consent rights. Critically, the Commission relied upon an explicit statutory carriage requirement – Section 614 of the Communications Act – to establish the cable operator's obligation to carry the programming: the Commission made entirely clear that "the must-carry provisions of Section 614 provide the legal authority and procedural rules applicable to such carriage until the end of the sweeps period."[116] Moreover, unlike the regulations at issue here, the mandatory carriage obligations applicable to broadcast stations have always been at the core of the Commission's enforcement authority and have never been left to local enforcement. Finally, the Supreme Court had already resolved the First Amendment issues with respect to broadcast must-carry in a manner that offers no support for the Bureau here.

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[114] 5 U.S.C. § 706.

[115] 15 FCC Rcd 7882 (2000).

[116] *Id.* at 7885, ¶ 7.

The one time that the Commission has adjudicated a claimed violation of the current Section 76.1603, it made clear that mandatory carriage would be an "inappropriate" remedy for a violation of a notice requirement where the programming itself was not subject to mandatory carriage.[117] In that case, the Commission ultimately concluded that the cable operator *had* violated its obligation to give 30 days notice to the complainant station that it was going to be dropped, but that the operator did not violate the requirement to give 30 days notice to its subscribers.[118] The Commission took no remedial action at all for the 30 days notice violation to the station, and as for the potential violation of what is now Section 76.1603, it held in the alternative that "a carriage remedy would be inappropriate in this instance, given that the underlying orders found that the station was not otherwise entitled to mandatory carriage."[119] The situation is no different here – NFLN is not entitled to mandatory carriage and a carriage remedy for a notice violation is both unprecedented and highly inappropriate.

The Bureau's efforts to distinguish this case in its Reconsideration Order are unavailing.[120] The Bureau's characterization of the Commission's statement as "dicta" is groundless – the Commission clearly articulated its view that mandatory carriage would not be an appropriate remedy in a case like this as part of its holding. Moreover, the Bureau has not addressed the fact the Commission declined to impose mandatory carriage – or any remedy at all – for the operator's failure to give 30 days notice to the station itself.

The Bureau's remaining discussion of the *WFXV-TV* Order consists of *post hoc* rationalizations for the holding that are missing from the Order itself. The Commission did not

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[117] *WFXV-TV*, 18 FCC Rcd 22782.

[118] 18 FCC Rcd at 22783, ¶ 4.

[119] *Id.*

[120] Reconsideration Order ¶ 37 & n.70.

cite at all the six years' lapse of time from the violation to its final decision as a reason for its decision, a factor that the Commission itself controlled.[121] Nor did its discussion of the carriage remedy turn on the fact that the operator apparently "attempt[ed]" to give its subscribers 30 days notice – that consideration is absent from the Commission's discussion of why mandatory carriage would be "inappropriate."[122]

B. The Bureau's Interim Relief Denied Due Process.

Finally, and as detailed in TWC's prior stay papers which are expressly incorporated by reference here, the procedures followed by the Bureau in granting interim relief also deviate starkly from standard Commission practice. The Commission routinely receives requests for emergency action and expedited treatment, yet is virtually unheard of to grant relief in less than 48 hours regarding an issue that did not involve health or safety without comment from the adversely affected party and without even the hint of consideration of the other party's arguments or the constitutional harms that the requested relief would impose. Due Process and the First Amendment certainly demand more.

Thus, the mandatory carriage sought by NFLN and granted at least temporarily by the Bureau is a clear departure from Commission precedent and standard practice and is arbitrary and capricious agency action in violation of Section 706 the APA.

CONCLUSION

For these reasons, the Emergency Petition should be denied and the relief granted in the Bureau's August 3, 2006 Order should be vacated.

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[121] *Id.*

[122] *Id.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Ian Heath Gershengorn, hereby certify that on this 15th day of August, 2006, I caused a copy of the foregoing Time Warner Cable's Response To Emergency Petition to be served via electronic mail and overnight delivery upon:

Jonathan D. Blake
Gerard J. Waldron
Robert M. Sherman
Covington & Burling LLP
1201 Pennsylvania Ave. NW
Washington, DC 20004-2401

Ian Heath Gershengorn

Exhibit 1

DECLARATION
OF MICHELLE KIM

I, Michelle Kim, declare and state under penalty of perjury as follows:

1. I am Vice President and Chief Counsel, Programming, for Time Warner Cable ("Time Warner" or the "Company"). I have held this position for 1 ½ years and have worked as a lawyer at Time Warner since September 2002.

2. My responsibilities include negotiating agreements for the carriage of cable networks and broadcast stations on Time Warner's cable systems. I am familiar with the course of negotiations that have occurred between Time Warner and various cable networks and broadcast stations for carriage on systems that Time Warner recently acquired from Adelphia Communications Corporation ("Adelphia") and Comcast Corporation ("Comcast"), including Time Warner's negotiations with NFL Enterprises LLC ("NFL") with respect to the carriage of the NFL Network ("NFLN").

3. In April 2005, Adelphia, Comcast, and Time Warner entered into a series of agreements whereby substantially all of the cable systems owned or operated by Adelphia would be acquired by Time Warner or Comcast, and Time Warner and Comcast would exchange certain other systems. Time Warner's acquisition of the systems in question was contingent, in whole or in part, on the review and approval of the transactions not only by the Federal Communications Commission (FCC), but also by the Federal Trade Commission, the United States Bankruptcy Court, and numerous local franchising authorities. Time Warner had no control over the timing of these approvals and thus could not predict when the transactions might close.

4. In addition to the uncertainty surrounding the date on which the transactions might close, there was uncertainty as to what channel line-up changes, if any, Time Warner

might have to make when the transfer of the systems became final. The agreements between and among Time Warner, Comcast, and Adelphia did not provide for the assumption of any of the parties' cable network programming agreements by any other party. Where Time Warner had an existing contract with a cable network being carried on an acquired system, those agreements generally gave Time Warner the right to carry the network on the acquired systems. However, where Time Warner had no pre-existing affiliation agreement with a cable network, Time Warner could not carry that network on an acquired system following the closing unless it first entered into an agreement authorizing such carriage.

5. While regulatory review of the transaction was still pending, Time Warner engaged in discussions for agreements to carry approximately 52 cable programming networks (including both linear services and video-on-demand services) and approximately 128 broadcast television stations whose programming was carried on Comcast and Adelphia systems that Time Warner was acquiring, but with which Time Warner did not have an existing carriage agreement. NFLN was one such network.

6. As of June 30, 2006 (one month before the date on which the transaction eventually closed), Time Warner had only completed carriage agreements for 12 cable programming networks and 25 broadcast stations. With respect to the remaining approximately 40 cable networks and 103 broadcast stations with which Time Warner had no carriage agreements, negotiations continued and, in many cases, were still ongoing when the FCC released its order approving the transactions on the evening of July 21, 2006 and up until just days before the transactions closed on August 1, 2006.

7. On July 1, 2006, Time Warner had no way of knowing when all of the necessary regulatory approvals would be granted, when the transactions would close, or what channel line-up changes might still need to be made when the closing did occur. In short, Time Warner not

only was in the dark as to the essential facts that it would need to know in order to accurately notify subscribers, it was even in the dark as to when these facts would become known to it. Any notice that Time Warner gave under these circumstances would have been of no value to consumers; in fact, giving consumers vague notice about the potential deletion of dozens of cable networks and hundreds of broadcast stations that might occur on an unknown date (most of which Time Warner was confident, but not certain, it probably would not have to drop) would have created alarm and confusion among our subscribers and caused the Company considerable and irreparable business harm by creating the impression, undoubtedly capitalized upon by our competitors, that subscribers to the systems being acquired would face substantial disruption of service and loss of programming when the transactions closed.

8. By late July 2006, all of the outstanding negotiations had been successfully completed with two exceptions. One of those exceptions was NFLN. Time Warner has never had a contractual relationship with the NFL and has never carried NFLN on any of its cable systems. The negotiations between the NFL and Time Warner addressed not only the carriage of NFLN on the systems being acquired from Comcast and Adelphia, but also on Time Warner's other systems.

9. One of the central issues in these negotiations, as to both the systems being acquired and Time Warner's other systems, involved tier placement. Time Warner, responding to concerns voiced by consumers and policy makers about programming choice, proposed carrying NFLN on a sports tier. The NFL, however, rejected this approach and insisted that the channel be carried on a highly-penetrated expanded basic tier – an outcome that Time Warner believed would force virtually all of its customers to pay for national sports programming in which a great many of them have little or no interest.

10. The negotiations between Time Warner and the NFL took place in an environment of considerable uncertainty. Not only was it unclear when or whether the parties might come to an agreement, but it also was uncertain as to precisely when all of the necessary regulatory approvals would be received. For example, although the Federal Trade Commission completed its review of the transactions on January 31, 2006, as of July 1, 2006, the FCC had still not made a final determination on the applications for approval of the license transfers related to the Adelphia/Comcast/Time Warner transactions, a necessary prerequisite to the closing of system acquisitions.

11. The FCC released the text of its order approving the transactions late in the afternoon of Friday, July 21, 2006. The text revealed, for the first time, two new conditions that Time Warner had not had prior opportunity to review. With the release of the text and in light of developments in the Bankruptcy Court and with the local franchising authorities, Time Warner believed as of Monday, July 24, that it could reasonably anticipate closing on July 31. (The agreements required month-end closings). However, there was still uncertainty even as of that date as to the closing, since there was still a motion pending in the Bankruptcy Court until July 28 to disallow the sale, and there were also several unresolved issues with certain local franchising authorities.

12. Once Time Warner reasonably believed closing would proceed on July 31, the Company too steps to give subscribers notice of the channel line-up changes that were likely to occur after the transactions closed.

13. Specifically, on July 27, 2006, Time Warner published notices in local newspapers identifying the channel line up changes it expected to make as of August 1, 2006. The notice clearly indicated that NFLN was one of a few channels that Time Warner "does not have the rights to currently carry and, therefore, may not be available" as of August 1.

Nevertheless, even after publishing this notice, Time Warner continued to negotiate in good faith with the NFL in hopes of reaching mutual agreement on a contract that would allow Time Warner to carry NFLN on the acquired systems. The NFL would not accept Time Warner's proposals (which included an offer to launch NFLN on all of Time Warner's systems and an offer to continue to carry the service on the same tier on acquired systems on which it has been carried (or to move it to the digital basic tier where the service was carried on the basic service tier or cable programming services tier). The NFL having rejected Time Warner's proposal and Time Warner thus having no agreement with the NFL to carry the network, the network was, consistent with the notice published on July 27, removed from the acquired systems as of midnight July 31, 2006.

14. The fact that negotiations with the NFL (and other programmers) were ongoing up until the last minute is not unusual. It is customary in the cable industry for parties to negotiate up to, and in many instances, after contract expiration dates. It also is the custom in the industry for cable operators not to give provisional or tentative channel deletion notices to subscribers upon entering the last 30 days of a carriage agreement. Indeed, were notices given on such a basis, subscribers would be inundated with a virtually endless stream of confusing notices and retractions. Not surprisingly, the networks themselves generally seek to dissuade cable operators from giving premature notice where the parties are negotiating in good faith. Rather, the custom in the industry, accepted by cable operators and programmer alike, is for cable operators to give notice to customers only when they know with reasonable certainty that, as of a particular date, they will not have the requisite authorization to carry the network. In the context of Time Warner's acquisition of systems from Adelphia and Comcast, where the date of the closing and, consequently, the date and details of any programming changes were even more uncertain, Time Warner's actions here were even more reasonable.

15. The reinstatement of carriage of NFLN on the acquired systems will create immediate, ongoing, and irreparable harm for Time Warner and its customers. Time Warner is not a party to the contracts under which NFLN was carried by Comcast and Adelphia. Since the closing, Time Warner has obtained the Adelphia agreement with NFLN, but still has no access to the NFL/Comcast agreement. In light of the FCC's Order, which apparently requires carriage according to that contract's terms, Time Warner today asked the NFL to provide us with a copy of the contract. The NFL refused to do so, saying that providing it would violate the contract's confidentiality provisions. Thus, Time Warner is apparently being required by the FCC to operate under the terms of an agreement to which it cannot even obtain access.

16. As a practical matter, to the extent the consideration provided for in the Adelphia and Comcast agreements with the NFL includes advertising availabilities, it is unlikely that Time Warner, which has not previously had authorization to carry the channel and thus has no arrangements in place to sell advertising on the channel, will be able to sell that time during the period the channel is carried. Moreover, if Time Warner is required to make cash payments to the NFL under those contracts, the terms of which are not even available to it in the case of the Comcast agreement, there will be no opportunity for Time Warner to recover any such monies paid should the FCC or the courts ultimately rule that Time Warner's July 27, 2006 newspaper announcements were sufficient to meet its obligations under the FCC's notice rules.

17. In many cases, there is little available channel space on the tier of services on which Time Warner would be required to carry NFLN. Because Time Warner already has filled the space previously occupied by NFLN with other services, reinstatement of NFLN may result in the removal or repositioning of those services without notice to consumers and, in some instances, potentially in violation of the terms of the contract with newly added programming

service. Moreover, Time Warner has posted new channel line-ups for new customers, and in many areas has sent out new channel line-up cards to current customers.

18. The fact that NFLN is no longer being carried on the acquired systems has not triggered any significant response from the affected customers, notwithstanding extensive publicity regarding this action. For example, in acquired systems with more than 1.1 million subscribers receiving NFLN, Time Warner received 5338 (0.45% of subscribers) complaint calls, 2505 (0.21%) complaint e-mails, and only 88 (0.007%) disconnects through August 2.

19. The subscriber confusion that will be occasioned by the deletion, reinstatement, and then, after giving a new 30 days notice, the second deletion of NFLN (assuming that Time Warner and the NFL have not reached an agreement for carriage of NFLN prior to that point) will engender considerable consumer ill will at the very outset of Time Warner's relationship with these customers.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: August 3, 2006

Michelle Kim

Exhibit 2

DECLARATION
OF MICHELLE KIM

I, Michelle Kim, declare and state under penalty of perjury as follows:

1. I am Vice President and Chief Counsel, Programming, for Time Warner Cable ("TWC" or the "Company"). I have held this position for 1 1/2 years and have worked as a lawyer at TWC since September 2002.

2. My responsibilities include negotiating agreements for the carriage of cable networks and broadcast stations on TWC's cable systems. I am familiar with the negotiations that occur between TWC and various cable networks and broadcast stations for carriage on systems that TWC owns or manages, and industry practices regarding such negotiations generally.

3. TWC has thousands of programming and retransmission consent agreements with cable networks and broadcast stations. In any given month, agreements for dozens of these networks and stations may expire by their own terms.

4. TWC almost always seeks renewals of expiring agreements, but the terms of such renewals must be negotiated with each programmer or broadcaster. In many or even most instances, these renewal negotiations go down to the wire, frequently continuing up to the very last days or even hours before existing contracts expire.

5. Sometimes the parties reach only short term extensions, for an additional 30 days or even less, so that negotiations can continue. In almost all cases, the parties ultimately reach a longer term agreement, allowing continued carriage by TWC. Indeed, in the past three and a half years, I can recall only one situation where TWC was forced to discontinue carriage of a programmer due to an impasse in negotiations for a renewal carriage agreement.

6. If TWC were required to give 30 days notice of all programming contract expirations, customers could face a constant barrage of such notices, most of which relating to programming drops that never actually occur. If, on the other hand, notice were given as soon as possible only when it becomes clear that a drop was at least somewhat likely, I believe that such information would be more meaningful and useful to customers.

7. Based on my experience, most of the programmers with whom TWC negotiates strongly oppose providing premature notices while negotiations are ongoing because they do not want to unnecessarily alarm and confuse consumers and advertisers by giving the misimpression that their network or station will no longer be available on TWC's systems.

8. It is TWC's practice generally, consistent with fundamental tenants of contract law, not to carry programming services absent an agreement between TWC and the programmer with respect to certain terms and conditions of carriage, including the rate (if any) to be paid for the programming. Based on my experience, TWC would not agree to carry a network pursuant to an agreement that was known only to the programmer or where the programmer would keep the agreement secret and require that we operate according to its interpretation of selected terms that it chooses to provide to us.

9. By July 24, 2006, TWC had concluded that the negotiations between TWC and NFLN, which addressed NFLN's desire for carriage on TWC's existing systems, as well as on the systems being acquired from Comcast and Adelphia, had reached an impasse. As a courtesy, TWC informed NFLN that, while it desired to continue negotiations up until the closing of the Adelphia transactions, in the absence of agreement between the parties, it would begin providing notice to its soon-to-be acquired customers that NFLN may not be available to them as of TWC's

acquisition of the Adelphia and Comcast systems.

10. ESPNU was the only other programmer with which TWC did not reach agreement. TWC had been engaged in negotiations with ESPNU for carriage of the network across all of TWC's systems, as well as the soon-to-be acquired systems. Shortly before August 1, when it became clear that the parties would not be able to reach mutual agreement on terms for carriage in advance of the closing, ESPNU confirmed with TWC that, upon closing, those acquired systems carrying the network would no longer have the right to carry the network.

11. In response to the courtesy "heads up" that TWC had provided, as described in paragraph 9 above, on July 24, 2006, NFLN responded with a letter purporting to unilaterally "authorize" TWC to continue to carry the channel on the same tier of the acquired system as it was currently carried under the terms of the NFL's agreements with Adelphia and Comcast. The NFL did not disclose or otherwise describe those terms in the letter. TWC considered NFLN's July 24, 2006 "authorization" as a demand for mandatory carriage (under undisclosed terms and conditions) that was not supported by any applicable law or regulatory requirements. As such, under basic principles of contract law, NFLN could not unilaterally force TWC to assume the contracts of Adelphia or Comcast or otherwise compel TWC to accept a contract without there being a meeting of the minds.

12. Despite repeated requests, NFLN continues to refuse to provide complete copies of the contractual terms and conditions that it expects to unilaterally impose on TWC during the period of involuntary, forced carriage pursuant to the FCC's August 3, 2006 Order in this proceeding. On the afternoon following the release the FCC's Order, which required TWC to "reinstate carriage of the NFL Network on all of its newly acquired systems <u>on previously</u>

applicable terms" (emphasis added), TWC asked NFLN for a copy of the Comcast and Adelphia contracts. NFLN refused to do so, saying that providing it would violate those contracts' confidentiality provisions. NFLN has since only been willing to verbally provide the following summary information to TWC: (a) that the rate for NFLN is 19 cents per subscriber receiving the service on systems acquired from Adelphia and "somewhere around" 19 cents on systems acquired from Comcast and (b) that TWC is entitled to two minutes per hour in commercial announcement time. These are only two of a multitude of terms that typically govern the carriage of programming services. Absent any context or relevant additional information related to the substance of the agreements, TWC has been forced to accept NFLN's characterizations regarding what the agreements provide. Thus, to the extent that the FCC's Order is interpreted to require TWC to distribute NFLN under the terms of those agreements, it puts TWC in the unworkable situation of operating under agreements to which it has been denied access.

13. TWC promptly complied with the Bureau's injunction by adding NFLN to the approximately 132 affected systems by midnight on August 3, 2006. This required TWC, in at least one instance, to delete programming that it had put in place for its new customers on August 1. In the Syracuse/Binghamton New York area covering 68,000 viewers, TWC had replaced Adelphia's NFLN offering with a local origination channel containing programming of local interest, including coverage of such sporting events as Syracuse University basketball, football and lacrosse. That channel had to be dropped to accommodate NFLN.

14. After TWC commenced carriage of NFLN in compliance with the FCC's Order, NFLN commenced running and has continued to run a "crawl" message bulletin over NFLN programming and viewable to TWC subscribers urging those subscribers to call TWC, giving the

misleading impression that TWC alone is responsible for there being no agreement between NFLN and TWC.

15. While TWC bills subscribers one month in advance for its services, it is TWC's practice to provide a credit to customers for any pre-paid portion of the monthly fee after termination of service.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: August 15, 2006

Michelle Kim

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Exhibit 3

DECLARATION
OF STEVEN TEPLITZ

I, Steven Teplitz, declare and state under penalty of perjury as follows:

1. I am Vice President and Associate General Counsel for Time Warner Inc. ("Time Warner"). I have held this position for 5½ years. My responsibilities include representing Time Warner and its business units, including Time Warner Cable ("TWC"), before the Federal Communications Commission. As such, I was directly involved over the past eighteen months in numerous discussions with Commission staff regarding the recently approved and completed transactions between Time Warner, Comcast Corporation ("Comcast") and Adelphia Communications Corp. ("Adelphia") (MB Docket 05-192).

2. There was no way for Time Warner to know on July 1, 2006 whether the transactions with Adelphia and Comcast would close on July 31, 2006. Closing was conditioned on numerous acts outside the direct control of any of the parties, including obtaining approval from the Bankruptcy Court and the Federal Communications Commission ("Commission"), neither of which had been obtained as of July 1.

3. With regard to obtaining Commission approval, the parties knew as of July 6, 2006 (when the Sunshine Notice was released) that the transactions were scheduled for a vote at the Commission's open meeting on July 13, 2006. The Public Notice (PN) released after the meeting on July 13 made clear that the PN describing the vote to approve the transactions was an unofficial announcement, and only release of the full text of a Commission order constitutes official action. Although the parties urged the Commission to act expeditiously following the vote, the timing of the release of the full text was uncertain at that time. The resulting Memorandum Opinion and Order ("Order") (FCC 06-105) approving the transactions was ultimately released late on July 21 and

contained several complex conditions that will govern various aspects of TWC's and Comcast's future business operations. Under the terms of the Adelphia transaction, TWC had the right to terminate it or delay the closing in the event that regulators imposed conditions meeting certain thresholds.

4. Time Warner and Comcast executives worked carefully but quickly during weekend after July 21 to review the Order and the conditions and did not make a final decision to go ahead with closing until Monday, July 24. Thus, it was only on July 24, and not anytime earlier, that Time Warner and Comcast determined that closing would occur on July 31.

5. In paragraphs 54 and 315 of the Order approving the transactions, the Commission directed Time Warner and Comcast to certify pre-closing and "without qualification" that the parties would be in compliance with the Commission's cap on the percentage of affiliated networks that may be carried by any cable operator (the "channel occupancy rules"), despite the fact that these rules were overturned by the D.C. Circuit in 2001. *See Time Warner Entertainment Co. v. FCC,* 240 F.3d 1126, 1136, 1139 (D.C. Cir. 2001), *reversing and remanding* 14 FCC Rcd 19098, 19101 (1999).

6. Prior to closing, TWC would have to rely on information provided to it from Adelphia and Comcast with respect to system capacity and channel line-ups in order to assess compliance with the channel occupancy rules. As a result, I was informed by TWC field operations personnel that the only way to certify "without qualification" that the newly acquired systems were in compliance would be for TWC to conduct its own thorough, independent reviews of each system's channel capacity and channel line-up after the transactions closed and TWC had taken operational control of the systems.

7. On July 24, 2006, along with Art Harding of Fleischman and Walsh LLP representing Time Warner Inc., Jim Coltharp of Comcast, Helgi Walker, Wayne Johnsen and Martha Heller of Wiley Rein and Fielding, LLP representing Comcast, and Michael Hammer of Wilkie Farr and Gallagher LLP representing Adelphia, I participated in an *ex parte* telephone conversation with Sarah Whitesell, Royce Sherlock, Mania Baghdadi and Julie Salovaara of the Media Bureau to request certain changes to the Order both to correct minor inaccuracies and to facilitate the parties' ability to fully comply with the Order and its conditions.

8. During this call, Time Warner and Comcast requested alteration of the certification requirement described in paragraphs 54 and 315 of the Order requiring both companies to certify without qualification, prior to closing that their systems would be in compliance with the channel occupancy rules. Specifically, we requested that the Commission extend the deadline for the companies to make the ordered certification to 90 days after closing.

9. We never argued or suggested to Commission staff during this call that the notice provisions of Section 76.1603(b) prevented the parties from making immediate programming service changes to the newly acquired cable systems where we had no contractual right to carry particular programming. Instead, we stated that the request to delay certification until post-closing was being made to allow sufficient time for both Time Warner and Comcast to gain operational control of the scores of newly-acquired cable systems involved in the transactions and carefully review system capacity and channel line-ups to determine whether any changes were needed to bring the systems into compliance with the channel occupancy rules. We explained that extra time was needed due both to the sheer number of cable systems involved, as well as the limited contact the

companies were able to have with the acquired cable systems pre-closing, especially those formerly operated by the bankrupt Adelphia.

10. To the extent that we discussed the notice provisions of Section 76.1603(b) with Commission staff, it was solely in the context of a timeframe after TWC had gained full operational control of the cable systems acquired in the transactions and after the compliance reviews had been fully completed. In this timeframe, TWC considered any necessary channel line-up changes to be within TWC's control for purposes of the notification provisions of Section 76.1603(b).

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: August 15, 2006

Steven Teplitz

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