Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
TIME WARNER CABLE,	)	MB Docket No. 06-151
A Division of	)	
TIME WARNER	)	
ENTERTAINMENT COMPANY, L.P.	)	
	)	
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

NFL ENTERPRISES LLC'S REPLY TO
TIME WARNER CABLE'S RESPONSE TO EMERGENCY PETITION

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INTRODUCTION AND SUMMARY

Time Warner Cable ("Time Warner") violated Section 76.1603 of the Commission's rules when, without providing subscribers the notice required by the rule, it dropped NFL Network ("NFLN") from the cable systems it had recently acquired from Adelphia Communications and Comcast Corporation (the "newly acquired systems").

Time Warner could have complied with Section 76.1603 by giving subscribers, on or before July 1, 2006, notice of its intention to drop NFLN, or by accepting NFL Enterprises LLC's ("NFL") offer to carry NFLN for an additional 30 days on the newly acquired systems. Time Warner did neither. Instead, it spurned the rule. Now, in challenging the Bureau's order that it comply with the rule, Time Warner argues that the

rule is inapplicable, unwise and unconstitutional.[1] These are the same arguments that Time Warner presented to the Media Bureau in its Petition for Reconsideration, and the Bureau properly rejected them.[2]

The Media Bureau should again find that Time Warner's failure to provide thirty days' notice of the programming change violated Section 76.1603(b) because the change was within Time Warner's control, and also violated Section 76.1603(c), which imposes an independent subscriber notice requirement. Likewise, it should reject Time Warner's fallback position – that the local franchising authorities, rather than the Commission, have exclusive jurisdiction over a dispute of this type – as contrary to the Communications Act and the Commission's rules. Finally, the Bureau should reject Time Warner's argument that the notice rule is unconstitutional. If accepted, this argument would render *every* notice requirement unconstitutional.[3]

FACTUAL BACKGROUND

In its Response, Time Warner offers a lengthy discussion of its ongoing carriage negotiations with the NFL. This discussion is both inaccurate, because it ignores the Bureau's definition of control, and irrelevant. The only facts relevant to Time Warner's conduct are these:

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[1] Time Warner Cable's Response to Emergency Petition, *In re Time Warner Cable*, MB Docket No. 06-151 (filed Aug. 15, 2006) ("Response").

[2] *In re Time Warner Cable*, Order, MB Docket No. 06-151 (rel. Aug. 3, 2006) ("Interim Order"); *In re Time Warner Cable*, Order on Recon., MB Docket No. 06-151 (rel. Aug. 7, 2006) ("Recon. Order").

[3] Our earlier submissions rebutting Time Warner's points are incorporated by reference. Emerg. Petition for Decl. Ruling & Enforcement Order, *In re Time Warner Cable*, MB Docket No. 06-151 (filed Aug. 1, 2006); NFL Enterprises LLC's Opposition to Time Warner Cable's Application for Stay, *In re Time Warner Cable*, MB Docket No. 06-151 (filed Aug. 4, 2006) ("NFL Stay Opp."); Supplement to NFL Enterprises LLC's Opposition to Time Warner Cable's Application for Stay (filed Aug. 6, 2006) ("NFL Supp. Stay Opp."), Supplemental Declaration of David Proper at ¶ 1 ("Proper Supp. Decl."). This Reply is submitted pursuant to paragraph 12 of the Interim Order, and is timely under Section 1.4 of the Commission's rules (providing that the next business day is applicable when a filing date falls on a weekend).

- In late May 2006, Time Warner met with the NFL to discuss carriage of NFLN, and in those discussions Time Warner raised carriage of NFLN on the 132 systems to be acquired as a separate event if a comprehensive agreement could not be reached.[4] These systems had long carried NFLN, and they collectively served 1.16 million NFLN subscribers.[5]

- During the May meeting, the NFL made a carriage offer for all of Time Warner's systems, and requested an offer for carriage of NFLN on the newly acquired systems. Despite repeated requests, Time Warner did not respond to the NFL's carriage offer or request for proposal regarding the newly acquired systems until July 19, just days before the Adelphia transaction was to close.[6]

- On July 27, NFL advised Time Warner of its notice obligations and offered to allow Time Warner to carry NFLN on the newly acquired systems on the same terms as NFLN had been carried before on those systems until subscriber notice could be accomplished. Time Warner informed NFL that it intended to drop NFLN from the newly acquired cable systems as of 12:01 a.m. on August 1.[7] The NFL again objected that Time Warner had not complied with Section 76.1603's notice requirements and again offered carriage of NFLN, on the same terms as it had on July 24.[8]

- Time Warner summarily rejected NFL's offer, without even asking what the pre-existing terms were. Time Warner sought such information only after the Media Bureau, on August 3, issued a standstill order requiring Time Warner to comply with Section 76.1603 and carry NFLN while notice was accomplished.[9]

- NFL was contractually barred from disclosing its specific contracts with Adelphia and Comcast, but it orally conveyed to Time Warner the key payment terms applicable to carriage during the subsequent thirty days.[10]

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[4] Time Warner Cable's Petition for Recon. ("Recon. Pet."), Declaration of Michelle Kim, *In re Time Warner Cable*, MB Docket No. 06-151, at ¶ 13 (filed Aug. 3, 2006) ("Kim Decl."); NFL Stay Opp., Declaration of David Proper at ¶ 15 ("Proper Decl.").

[5] *See* NFL Supp. Stay Opp., Supplemental Declaration of David Proper at ¶ 1 ("Proper Supp. Decl.").

[6] Proper Decl. at ¶ 15.

[7] Kim Decl. at ¶¶ 12, 13; Proper Decl. at ¶ 8.

[8] Kim Decl. at ¶¶ 14, 19; Response, Supplemental Declaration of Michelle Kim at ¶¶ 5, 6 ("Kim Supp. Decl."); Proper Decl. at ¶¶ 8, 9.

[9] Kim Supp. Decl. at ¶ 9; Proper Decl. at ¶ 15.

[10] Second Supplemental Declaration of David Proper, attached at Exhibit A, at ¶¶ 2-3 ("Proper 2d Supp. Decl."). Michelle Kim, who does not assert that she was part of the discussions between the NFL and Time Warner, inaccurately describes the license fee quoted by NFL to Time Warner. *See id.* NFL also disputes the assertion that Time Warner made "repeated requests" for details about the Adelphia and

(footnote continued . . .)

- During that same August 3 conversation, NFL also asked Time Warner to identify any additional contractual provisions the disclosure of which Time Warner believed would be necessary for compliance with the Bureau's Order or, alternatively, to propose other reasonable terms that could govern carriage of NFLN during the thirty-day notice period.[11] Time Warner never responded.[12]

ARGUMENT

I. TIME WARNER MUST COMPLY WITH SECTION 76.1603.

The gist of Time Warner's argument is that the Commission's rule is flawed because consumers are better served by not knowing about certain potential changes to the services to which they have subscribed.[13] These arguments may be appropriate for a rulemaking petition or waiver request, but they do not excuse Time Warner's clear and deliberate rule violation. As the Bureau observed:

> At the end of the day, Time Warner is really arguing that customers were better off being left in the dark because it was likely that carriage agreements would be reached with [programming suppliers]. However, Time Warner provides no reason . . . why it could not have explained this to consumers at the time, and we doubt that viewers of the NFL Network who awoke on August 1 to find that the network had been removed from their cable systems share Time Warner's view that the company was acting in the best interest of its subscribers.[14]

Time Warner could have avoided its violation of Section 76.1603 – and avoided the need to give notice altogether – simply by planning to conclude its negotiations 30 days before contract expiration. Time Warner also could have requested a waiver of

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Comcast deals. *Compare id.* at ¶ 3 *with* Kim Supp. Decl. at ¶ 12. Because Time Warner admits that it already has a copy of the Adelphia contract, *see* Response at 10, n.23, the issue is moot as to those systems.

[11] Proper 2d Supp. Decl. at ¶ 2.

[12] Proper 2d Supp. Decl. at ¶ 3.

[13] Response at 3, 18-19.

[14] Recon. Order at ¶ 20.

Section 76.1603 if it believed that compliance would not be in consumers' best interest.[15] Finally, Time Warner could have elected to give conditional notice prior to July 1. Instead, Time Warner kept consumers in the dark during negotiations until the last possible moment, apparently hoping that its brinksmanship in negotiations would serve its own self-interest. That may or may not be smart business practice, but Congress and the Commission rightly decided that it is bad consumer protection policy and prescribed a different consumer protection regime, which Time Warner ignored.

Even now, as the Bureau concluded, "it is not clear from the record whether an unspecified number of newspaper advertisements run by Time Warner on July 27, 2006, triggered the 30-day notice period. Time Warner provides no evidence as to how many newspapers these advertisements appeared in and does not assert that such advertisements were placed in each affected community across the country."[16]

Time Warner also claims that consumers would be hurt because compliance with Section 76.1603 and the Interim Order would require it to drop other programming that it used to replace NFLN. Even assuming this assertion were true,[17] Time Warner brought this problem upon itself by dropping NFLN in violation of Section 76.1603. Having painted itself into a corner, Time Warner cannot now complain that there is no way out.

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[15] Recon. Order at ¶ 14.

[16] Recon. Order at ¶ 3, n.6. Despite this statement two weeks ago from the Bureau, Time Warner has still not established unequivocally that it gave effective notice to the affected subscribers. Time Warner's Response simply states that it has "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." Response at 9. It does not assert that advertisements were placed in newspapers in every affected market, that advertisements were placed in newspapers in a manner that would effectively reach all or substantially all affected subscribers, or that such advertisements satisfy the rule's requirement for written notice.

[17] Time Warner's only example of such programming is, in the Syracuse market, "a local origination channel . . . including coverage of such sporting events as Syracuse University basketball, football, and lacrosse." Response at 12. This is a curious example, since Syracuse University is in recess during August and we are not aware that any University sporting events are occurring.

II. TIME WARNER AT ALL TIMES MAINTAINED CONTROL OVER ITS ABILITY TO COMPLY WITH SECTION 76.1603.

A. Time Warner's Lack Of Certainty Concerning The Specific Date of the Commission's Transfer Approval Is Irrelevant.

Time Warner complains that it was unable to predict or manage the precise date of the Commission's action approving the Adelphia transaction. Given that the transaction was pending for thirteen months, it is hard to believe that the Commission's approval of the transaction took Time Warner by surprise. In any event, Time Warner's professed uncertainty and its inability to manage the timing does not immunize Time Warner from complying with these clear and longstanding requirements.[18] As the Bureau found:

> [W]hile Time Warner may explain why providing notice to customers in early July would not have been in Time Warner's private interest, it fails to advance a strong case that such notice would not have been in the interest of consumers. Time Warner adopts the paternalistic attitude that its soon-to-be customers were better off not knowing that Time Warner had yet to reach carriage agreements with certain networks and broadcast stations 30 days before the company was likely to assume control over those customers' cable systems and thus such networks and stations might soon be dropped.[19]

The Bureau correctly rejected Time Warner's argument in the Order on Reconsideration, and should do so again here.

The Bureau correctly held that "Time Warner's argument that it 'could not have possibly given effective notice 30 days prior to its decision to drop the NFL Network is

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[18] Time Warner's argument suggests that notice has to be given exactly at the 30-day mark, and that earlier notice is somehow inappropriate. The rule, however, states that subscribers must be given notice "*at least* 30 days" in advance of a programming change – not, as Time Warner seems to urge, "*no more than* 30 days." Time Warner therefore did not need absolute precision to give timely notice.

[19] Recon. Order at ¶ 20.

disingenuous."[20] Clearly, Time Warner saw late July 2006 as the key time frame in the Adelphia transaction. The only uncertainty was whether the 30-day notice might become moot because the Commission failed to approve the deal, causing the deal to be abandoned, or because the NFL and Time Warner reached agreement, allowing it to go forward. If the notice became moot for either reason, no harm would have been done. But denying subscribers notice was *not* harmless. It denied 1.16 million households their rights under the 1992 Cable Act and the Commission's consumer protection rules.[21]

B. Time Warner Knew That The Adelphia Transaction Would Likely Close or Be Abandoned in July 2006.

The Bureau has found that "multiple documents show that Time Warner was consistently planning over the course of a year for an orderly closing of the transaction by July 31, 2006, and that by late June, it was clear to the company that the closing would likely occur on or around that date."[22] Consider the evidence:

- On June 16, 2006, Time Warner sent a letter to certain NFL teams, including the Dallas Cowboys, concerning video-on-demand arrangements. The letter opens with a statement that Time Warner "expects to acquire cable television systems

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[20] *Id.* at ¶ 19.

[21] Time Warner's cases in support of its argument that compliance was not "within its control" are far afield. The cases relating to changes imposed by regulatory fiat are inapposite. *AT&T Corp. v. FCC*, 448 F.3d 426, 431-32 (D.C. Cir. 2006) (changes "imposed by regulation"); *In re 1993 Annual Access Tariff Filings Phase 1*, 20 FCC Rcd. 7672, 7684, ¶ 27 (2005) (changes "mandated by the Commission"). Its key case, *Roquet v. Arthur Andersen LLP*, 398 F.3d 585 (7th Cir. 2005), involved radically different facts. The claim in *Roquet* was that Arthur Andersen violated a pre-termination notice requirement by discharging its employees without notice after the firm imploded by virtue of federal indictment. As the Seventh Circuit found, Arthur Andersen "did not know if it would be indicted as a firm" or "when the indictment would be returned," and "it was not unreasonable for the company to think it could survive the carnage" beyond the indictment date. *Id.* at 590. By contrast, Time Warner's decision to drop NFLN on August 1 was entirely within its control because it did not depend on the actions of any third party (a prosecutor or a grand jury) or how others would respond to such third-party actions ("the carnage"). Instead, Time Warner had within its grasp all the elements it needed to comply, yet it chose not to.

[22] Recon. Order at ¶ 19.

from [Adelphia and Comcast]," and closes with this statement: *"[W]e anticipate a closing of the acquisition in the next several weeks."*[23]

- "About four months" before July 31, Time Warner entered into negotiations to launch a new video-on-demand service covering the Los Angeles Dodgers, in a market where it had a few systems but would acquire many more when the transaction closed.[24]

- As the Bureau noted, Time Warner's asset purchase agreements included an escape clause if the transactions did not close by July 31, 2006 and the bankruptcy court had already approved the transactions.[25]

In sum, there is ample evidence for the Bureau to conclude that Time Warner should have given notice on or before July 1, 2006, or having failed to do that, should have accepted the offer to continue carriage for the 30-day notice period on the same terms as offered to the previous systems operators.

C. The Bureau Correctly Rejected Time Warner's Strained Arguments.

Time Warner has offered no principled justification for it failure to comply with the rule. Instead, it contends that the rule is bad public policy and that everyone *except* Time Warner is really responsible for its illegal conduct.[26] But Time Warner describes no circumstance sufficient to pass the high bar that the Commission has set for bringing

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[23] Proper 2d Supp. Decl. at ¶ 4 (discussing Letter from Lynne Costantini, Senior Vice President-Marketing to Robin Woith, Director-Marketing and Corporate Partnership, Dallas Cowboys, June 16, 2006).

[24] Larry Stewart, "Dodgers Cable TV Channel Launched," *Los Angeles Times* (Aug. 10, 2006), *available at* http://www.latimes.com/sports/la-sp-dodtv10 aug10,1,3815974.story.

[25] Recon. Order at ¶ 19.

[26] Time Warner's arguments about its lack of perfect knowledge on the transfer are no answer to enforcement of Section 76.1603. In any case, Time Warner's lawyers cannot even agree on what alternative standard the Bureau should have applied. Michelle Kim suggests that notice was required as soon as it was *"at least somewhat likely"* that Time Warner would drop NFLN. Kim Supp. Decl. at ¶ 6. Time Warner's Response claims that Time Warner need not have given notice until it was *"reasonably certain"* that the channel would be dropped. Response at 22. Certainty cannot be the rule, since Time Warner would always have the unilateral option of avoiding notice by claiming that it had some remote belief that it might reconsider its plan to drop the relevant programming.

compliance with the consumer protection rules outside of the cable operator's control.[27] Time Warner's claims of copyright exposure are equally unavailing. It could have avoided copyright liability by giving notice a month or more before August 1, by accepting NFL's thirty-day offer, or by seeking a waiver.

The Bureau correctly rejected Time Warner's various excuses for noncompliance as unpersuasive:

> Time Warner's understanding of control is untenable, as it would mean that any time a programming contract expired, the cable operator could drop the programming at issue without any notice to subscribers. That result would substantially undermine Congressional intent as well as the Commission's consumer protection purpose in adopting Section 76.1603.[28]

III. THE BUREAU'S ORDER WAS FIRMLY GROUNDED IN STATUTORY AUTHORITY.

A. The Unprecedented Nature of Time Warner's Violation Does Not Divest The Commission of Enforcement Authority.

Time Warner claims that, because the Bureau has not previously confronted these specific facts, it is not now authorized to require specific performance of Time Warner's obligations. This, too, is incorrect. The unprecedented act is Time Warner's massive and systemic violation, not the Commission's efforts to enforce its consumer protection rules. If Time Warner's argument is accepted, cable firms would be free to violate the subscriber notice rules on a widespread basis, as long as the companies each time find an innovative way to do so.

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[27] In an effort to lower this bar, Time Warner argues that the definition of "within the control" in Section 76.309 is inapplicable because that section is purportedly "unrelated" to notice. Response at 21. To the contrary, when it was first adopted, Section 76.309 included language that, with minor modification, became Section 76.1603(b). Even if Section 76.309 were not controlling, it reflects the Commission's contemporaneous intention that only severe and unpredictable circumstances excuse compliance. Under any measure, Time Warner's decision to drop NFLN does not qualify.

[28] Recon. Order at ¶ 17.

Time Warner's reliance on the Cable Service Bureau's decision in *WFXV-TV*[29] is misplaced. In that case, the Bureau declined to order specific performance by a cable operator that gave inadequate notice. As the Media Bureau noted on reconsideration, *WFXV* is not on point because the cable operator in *WFXV* had *complied* with its subscriber notice obligations.[30] Given the lack of public injury – and the fact that four years had passed since the violation – it is no surprise that the Cable Service Bureau did not order immediate compliance.

B. Time Warner's Standing Arguments Lack Merit.

Time Warner's claim that the NFL is without standing is similarly misplaced. The standing doctrine limits federal court jurisdiction to Article III cases or controversies. The doctrine does not apply to petitions for agency action.[31] Moreover, there can be no dispute that the NFL was aggrieved and, in addition, had standing to protect the rights of NFLN's viewers.[32] In any enforcement action, it is the Commission, not the informing party, that takes action to enforce the rules and protect the public interest. Time Warner does not explain why the Commission must turn a blind eye to violations of its rules simply because one party rather than another has brought the violation to its attention.

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[29] *Complaint of WFXV-TV Against United Cablevision of Southern Illinois, Inc.*, 16 FCC Rcd 433 (2000), *recon. denied*, 18 FCC Rcd, 22,782 (2003) ("*WFXV*").

[30] *See* Recon. Order at ¶ 37.

[31] *See Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002).

[32] *See, e.g.*, *Lepelletier v. FDIC*, 164 F.3d 37, 43 (D.C. Cir. 1998) (permitting a plaintiff to establish third-party standing where the plaintiff (1) has a concrete interest in the outcome of the litigation, (2) has a close relationship with the injured party, and (3) can show a hindrance that limits the injured party's ability to protect its own interest).

C. Time Warner Has Not Shown Sections 76.1603(b) and (c) To Be Inapplicable.

Time Warner argues that Section 76.1603 is inapplicable because its decision to drop NFLN was not a "change in programming services" for the purpose of that rule.[33] In support of its claim, Time Warner analogizes the present facts to the altogether distinguishable case of a cable operator launching an entirely new system. In the case of a "green-field" cable system, there is no "change" in *service*, because there is no preexisting service, nor any subscribers to notify. Applying the same analysis to a change in *ownership* would make the notice provision a nullity at the very point that consumers are most vulnerable – when a system is changing hands (without their consent), and their channel line-up is susceptible to change.[34] In short, Time Warner's argument denies consumers protection when they most need it.[35]

Time Warner also argues that Section 76.1603(c) does not apply because it views the rule as limited to informing franchise authorities only of changes in rates on the basic service tier. This argument altogether ignores the inescapable plain language of the rule: "cable systems shall give 30 days written notice to *both subscribers and* local franchising authorities before implementing any rate *or service* change."[36] The rule, on its face,

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[33] Response at 24.

[34] *See* Recon. Order at ¶ 15 ("Because [the notice requirement] is aimed at protecting subscribers, it is the subscribers' perspective – not that of the cable operator – that is relevant to determining whether a change in programming service has occurred. Here, it is undisputed that the programming provided to approximately 1.16 million households changed overnight, despite the lack of any action on the part of those consumers. Time Warner offers no basis . . . to support the conclusion that a change in programming services did not occur.").

[35] *See* Response at 24-25.

[36] 47 C.F.R. § 76.1603(c) (emphasis supplied). *See also Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Second Order on Recon., 9 FCC Rcd. 4119, ¶ 139 (1994) ("In order to better ensure that consumers have sufficient notice of rate and service changes and to clarify operators' notification requirements, we are modifying our rate regulations to

(footnote continued . . .)

provides an additional, independent support for the Bureau's action. Because Time Warner cannot refute the plain language (and its patent violation) of the rule, it instead argues that the rule is a misplaced artifact from implementation of the 1992 Cable Act.[37] This claim rewrites history.

The provision that became Section 76.1603(c) was amended by the Commission in 1994 to ensure consistency with Section 76.1603(b) and require subscriber notification of service and rate changes. It was renumbered, without modification, in 1999, three years after passage of the Telecommunications Act of 1996.[38] The Commission, again reflecting Section 76.1603's continuing vitality, amended the provision in 2001 – after the provision's supposed sunset date – to clarify application of the notice requirements to digital broadcast signal carriage.[39]

The cable industry was well-represented in these proceedings, and no cable entity challenged these rules. To the contrary, the reorganization of the notice rules was in fact proposed by the Cable Telecommunications Association ("CATA"), which provided the Commission with a detailed discussion of the interplay between the various notice rules.[40] The characterization of Section 76.1603(c) that Time Warner advances today,

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require that cable systems give 30 days notice to both subscribers and franchising authorities before implementing any rate or service changes.").

[37] Response at 25-27.

[38] *In re 1998 Biennial Regulatory Review – Streamlining of Cable Television Services Part 76 Public File and Notice Requirements*, Report & Order, 14 FCC Rcd. 4653 (rel. Mar. 26, 1999).

[39] *In re Carriage of Digital Television Broadcast Signals*, First Report & Order, 17 FCC Rcd. 6441 (2001).

[40] CATA styled its proposal as a draft notice of proposed rulemaking, which noted: "Section 76.309(c)(3)(i)(B) *[currently Section 76.1603(b)]* requires written subscriber notification of any changes in rates, programming services, or channel positions 'as soon as possible', and a minimum of 30 days in advance. Section 76.932 *[currently Section 76.1603(d)]* requires written subscriber notification of any increases in Basic rates or equipment rates at least 30 days in advance. Section [76.]964 *[currently Section 76.1603(c)]* requires 30-days written notice to both subscribers and local franchising authorities of any rate or service changes." Cable Telecommunication Ass'n, Suggested Notice of Proposed Rulemaking, CS

(footnote continued . . .)

like the limiting interpretation it would apply to Section 76.1603(b), is squarely at odds with the unambiguous language of these longstanding rules.

No party requested that the Commission reconsider its re-adoption of the notice rules. With the period for petitions for reconsideration and notices of appeal long since over, Time Warner is too late to challenge the applicability of Section 76.1603(c) to its actions.

D. The Bureau Has Ample Statutory Authority To Adopt A Standstill Order.

Time Warner argues that the Commission has no statutory authority to enforce the consumer protection rules. Under Time Warner's reading, the Commission is entitled to adopt consumer protection rules, receive complaints about those rules, and determine whether or not an abuse of those rules is systemic – but it cannot require a regulated entity to comply with them.[41]

Time Warner suggests that the Commission may not order compliance with the customer service rules, which Congress directed the agency to promulgate,[42] because Congress has not given the agency specific authority to enforce it. Time Warner never explains, however, why Congress would order an agency to promulgate an unenforceable rule. The Commission has broad authority to take enforcement and other actions in connection with the effective performance of its responsibilities.[43] With this inherent authority, Congress had no need to grant the Commission specific authority to enforce

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Docket No. 98-132 (filed Mar. 11, 1998). *See also* Reply Comments of the National Cable Television Ass'n, CS Docket No. 98-132 (filed Sep. 25, 1998) (supporting CATA proposal).

[41] *See* Response at 31-32.

[42] 47 U.S.C. § 552(b).

[43] *Id.* § 154(i); *Am. Library Ass'n v. FCC*, 406 F.3d 689, 692-93 (D.C. Cir. 2005) (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167 (1968)).

these particular rules. In contrast, because local governments generally do *not* have authority to compel compliance with Commission rules, it was necessary for Congress to instruct that "[a] franchising authority *may* establish and enforce" the customer service rules.[44] Importantly, Congress indicated that a franchising authority "may" establish and enforce customer service rules. Because Congress did not *require* local franchising authority enforcement, that compels the conclusion that another entity – *viz.*, the Commission – would have enforcement authority.[45]

The Commission's exercise of its enforcement authority is particularly critical where, as here, the violation is systemic and, if unremedied, would undermine the consumer protection rules at the most basic level. If the Commission lacked authority to enforce its own rules in the face of such a sweeping violation affecting franchise areas throughout the country, area-by-area enforcement by local governments would be required – a wholly impractical approach. Time Warner committed a national violation, which only the Commission can effectively remedy.

Time Warner seeks to avoid Commission jurisdiction by arguing that its violation of the notice rule is neither "systemic" nor an "abuse."[46] Time Warner argues that, in order to be systemic, a violation must happen on multiple occasions, but this argument confuses "repeated" with "systemic." The word "systemic," or "across systems,"

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[44] 47 U.S.C. § 552(a) (emphasis supplied).

[45] The Conference Report cited by Time Warner likewise provides no support for the proposition that Congress intended to divest the Commission of its inherent authority in this area. H.R. Conf. Rep. No. 102-862, at 78 (1992) (requiring "the FCC . . . to establish federal customer service standards which *may be* . . . enforced by local franchising authorities.") (emphasis supplied).

[46] Response at 34. This objection is inapplicable to Section 76.1603(c) because "the Commission has never limited its enforcement role with respect to section 76.1603(c) to systemic abuses." Recon. Order at ¶ 30.

perfectly describes Time Warner's behavior, which, in a single stroke, cut NFLN service to 1.16 million consumers in markets from Albany to Los Angeles.[47]

Likewise, Time Warner's assertion that its violation was not an "abuse" because it purportedly did not know it was violating the rule falls flat.[48] But the focus in an "abuse" inquiry must be on whether the violator intentionally engaged in conduct the effect of which was to seriously undermine the integrity of a rule of law, not whether the violator knew at the time of the specific rule of law that would be violated by the conduct. As the Bureau found, Time Warner's failure to give notice "undermine[d] one of the key objectives of the 1992 Cable Act,"[49] and Time Warner does not dispute the willfulness of its failure to provide subscribers with notice.

E. The Bureau's Order Did Not Violate The Constitution.

Time Warner alleges that it is the victim of First and Fifth Amendment violations. Time Warner lost this argument ten years ago in the D.C. Circuit.[50] The Commission does not violate the Constitution by recognizing that in order for consumers to "make an informed judgment about which course to follow, and when, they must have information in advance."[51] Time Warner claims that the "notice provision does not say that operators are *required* to carry programming unless they give 30 days notice that the programming

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47 *See also* Recon. Order at ¶¶ 31-33.

48 Response at 34. The decision cited by Time Warner in support of its "abuse" argument, *In re Comcast Corp.*, 19 FCC Rcd. 20,813 (2004), is a perfunctory order adopting a consent decree. It is inapplicable here because it did not address whether Comcast's conduct was an "abuse," nor did it even explicitly find Comcast at fault.

49 Recon. Order at ¶ 33.

50 *See, e.g.*, *Time Warner Entm't Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996) ("*Time Warner II*") (rejecting First Amendment challenge to requirement that cable operators give subscribers thirty days notice before offering free previews of premium channels).

51 *Id.* at 982.

will be discontinued."[52] That point proves too much. Under that reasoning, because the rule has no specific enforcement provision, it would be unenforceable. Neither Congress nor the Commission could countenance that absurd result. The Bureau took the only enforcement action that would vindicate the consumer protection interest that Congress intended: reinstating the programming until adequate notice could be given.

Time Warner asserts that the Bureau's Interim Order is "content-based." The Order, however, applies without regard to the content of speech.[53] The purpose of the Order is to prevent cable operators from abusing their economic power vis-à-vis consumers and programmers.[54] The Bureau's judgment was simply that Time Warner must honor its notification obligations and continue to carry programming for a 30-day period which the newly acquired systems had for years carried.[55] Because Section 76.1603 and the Bureau's order are content neutral, intermediate scrutiny applies.[56] Both the rule and the Bureau's order advance important interests unrelated to the suppression of free speech and do not burden substantially more speech than necessary to further those interests.

Among the important governmental interests protected by the notice rules and the standstill order are giving consumers adequate time in which to make their voices heard, giving them time to cancel subscriptions before they pay in advance for promised services that are then deleted, giving subscribers time to sign up with a different service

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52 Response at 39.

53 The Interim Order discusses the nature of NFLN programming. Interim Order at ¶ 7. However, that analysis was part of determining whether the public-interest element of the injunction standard had been met, and evinced no preference for particular type of programming.

54 *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 649 (1994) ("*Turner I*").

55 *WFXV* is inapposite because there was no subscriber notification violation.

56 *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) ("*Turner II*").

provider, avoiding consumer confusion, and giving local franchising authorities time in which to act.[57] "Protecting consumers" is plainly an important governmental interest, even when First Amendment interests are implicated.[58]

Nor is there any excessive or unnecessary burden on speech. The Interim Order temporarily restored the *status quo ante*[59] since widespread and significant harm to consumers already had occurred.[60] Time Warner's choice to drop the channel forced the Commission to act, and there is "no mismatch between the problem and the Commission's solution."[61] The burden imposed is congruent with the benefits achieved, and in any case, content-neutral regulations are not invalid simply because one could imagine some alternative that might be less burdensome.[62]

Likewise, the Order does not effect a Fifth Amendment taking. A *per se* taking occurs where an owner suffers a permanent physical invasion of property or the property is completely deprived of all economically beneficial use.[63] No such physical invasion or total deprivation has occurred here. Nor has a taking occurred under the *ad hoc* approach

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[57] *See* Recon. Order at ¶ 30 ("it is crucial that local franchising authorities receive timely notice of a cable operator's change in programming services").

[58] *See Time Warner I,* 56 F.3d at 184 (government has substantial interest in protecting consumers from cable operators' activity, even when the regulated entities engage in expressive activity).

[59] *See id.* at 185 (remedy "narrow enough" when triggered by a serious problem and terminated when the problem ends). Nor is a First Amendment violation shown by the fact that NFLN's content is not selected by or favorable to Time Warner. *See Turner II,* 56 F.3d at 183 (noting that cable operators must "transmit the programming the broadcasters selected").

[60] By dropping NFLN without notice, Time Warner silenced its subscribers before programming changes were made, and impaired subscribers from changing MVPDs in a timely manner. Interim Order at ¶ 7. It also deprived its subscribers the content of the service they pay for, *before* they write their monthly checks. Recon. Order at ¶ 26. It is not a satisfactory answer to say that Time Warner someday would refund the money at its own discretion and presumably without interest.

[61] *Id.* at 186 n.10.

[62] *Turner II,* 520 U.S. at 215-17.

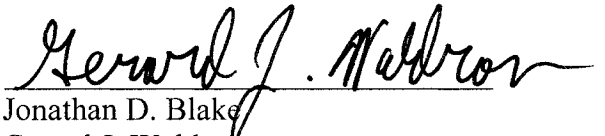
[63] *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005).

established in *Penn Central Transportation Co. v. New York City*.[64] The *Penn Central* approach considers such factors as "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations," as well as "the character of the governmental action," whether a physical invasion or not.[65] The impact here is minimal, especially given the Supreme Court's approval of rules that can take up to one-third of a cable system's capacity.[66] The Order invades no substantial property interests, and Time Warner could not have a reasonable expectation that it could flout the Commission's rules.

CONCLUSION

For these reasons, the Media Bureau should reaffirm the conclusions in its Interim Order and Order on Reconsideration, find Time Warner in violation of Section 76.1603 of the Commission's rules, and order Time Warner to continue carrying NFLN on all of its newly acquired systems until the expiration of the mandatory notice period.

Respectfully submitted,



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Counsel to NFL Enterprises LLC

DATED: August 21, 2006

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[64] 438 U.S. 104 (1978).

[65] *Id.* at 124.

[66] *See Turner I.*

CERTIFICATE OF SERVICE

I, Robert M. Sherman, hereby certify that on this twenty-first day of August, 2006, I caused a copy of the foregoing Reply to Time Warner Cable's Response to Emergency Petition to be served by electronic mail and first-class mail, postage prepaid, upon:

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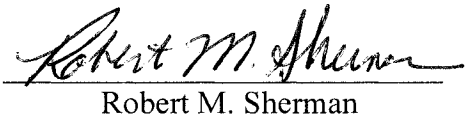


Robert M. Sherman

EXHIBIT A

SECOND SUPPLEMENTAL DECLARATION OF DAVID PROPER

I, David Proper, hereby declare:

1. On August 3, 2006, after the Media Bureau issued its Order compelling Time Warner to comply with Section 76.1603 of the Commission's rules, Adam Shaw, Senior Vice President of Distribution, and I spoke by telephone with Fred Dressler, Time Warner's Executive Vice President for Programming.

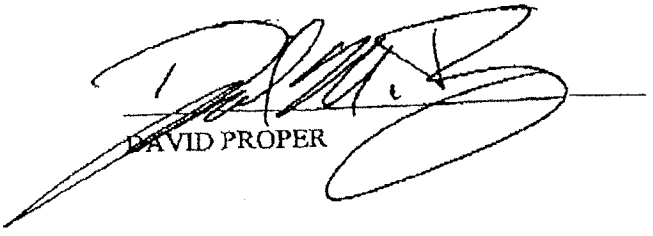
2. During this conversation, I conveyed to Mr. Dressler the key payment terms included in the NFL's carriage agreements for the newly acquired cable systems. Specifically, I advised Mr. Dressler that the Adelphia agreement included an eighteen (18) cent per subscriber, per month royalty payment. The assertion with respect to the payment terms made in the Supplemental Declaration of Michelle Kim, who (as far as I know) was not a party to the conversation, is therefore inaccurate. I explained to Mr. Dressler that confidentiality provisions prevented the NFL from disclosing the specific contracts, but asked Mr. Dressler to identify any additional terms the disclosure of which Time Warner believed was necessary to carriage of NFL Network ("NFLN") over the thirty days following the Bureau's Order. Alternatively, I invited Mr. Dressler to propose alternative terms that would be acceptable to Time Warner.

3. Despite my request that Time Warner respond to these inquiries quickly in order to settle this matter, I never received a response from Mr. Dressler or from any other Time Warner representative.

4. During June 2006, I learned that Time Warner had begun notifying programming providers in markets served by the newly acquired systems of the planned acquisition. For instance, I reviewed a copy of a letter sent by Lynne Costantini, Time

Warner's Senior Vice President - Marketing to Robin Woith, Director of Marketing and Corporate Partnership of the Dallas Cowboys, on June 16, 2006. Ms. Costantini's letter opened with a statement that Time Warner "expects to acquire cable television systems from [Adelphia and Comcast]"; the last paragraph of the letter contains this statement: "[W]e anticipate a closing of the acquisition in the next several weeks."

I declare under penalty of perjury under the laws of the United States of America that the foregoing declaration is true and correct. Executed on August 21, 2006.



DAVID PROPER