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*to 8/21 06-151*

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**Subject:** In re: Time Warner Cable, MB Docket No. 06-151

Please find attached a copy of Time Warner Cable's Petition for Reconsideration of the Media Bureau's August 3, 2006 order in the above-captioned proceeding, as well as an accompanying stay application. Thank you.

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BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

In the Matter of )  
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TIME WARNER CABLE, )  
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 )

MB Docket No. 06-151

**TIME WARNER CABLE'S PETITION FOR RECONSIDERATION AND REQUEST  
FOR REFERRAL TO THE FULL COMMISSION**

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MB Docket No. 06-151

To: The Media Bureau

**TIME WARNER CABLE'S PETITION FOR RECONSIDERATION AND REQUEST  
FOR REFERRAL TO THE FULL COMMISSION**

**EXECUTIVE SUMMARY**

Pursuant to 47 C.F.R. § 1.106, Time Warner Cable ("Time Warner"), by its attorneys, hereby moves for reconsideration, and (by accompanying application) a stay of the August 3, 2006, Order of the Media Bureau in DA 06-1587, MB Docket No. 06-151 (rel. Aug. 3, 2006) ("Order"). That Order requires Time Warner to "reinstate carriage of the NFL Network on all systems newly acquired from Adelphia Communications and Comcast Corporation" on the carriage terms proposed by NFL Enterprises LLC ("NFL"), until the Bureau completes adjudication of NFL's complaint. Because of the urgency and the importance of the request, and because of the unusual procedural posture of this case in which Time Warner is subject to a mandatory injunction granting petitioner NFL full relief without Time Warner's having been allowed to file a response, Time Warner requests that the Bureau refer this petition directly to the full Commission for consideration. *See* 47 C.F.R. §§ 1.1.06(a)(1); 1.104(b).

The Bureau issued the Order today on an *ex parte* basis, less than two days after receiving NFL's petition, without giving Time Warner any opportunity to respond. The injunction issued by the Bureau is truly extraordinary and unprecedented. It does not preserve the status quo, but affirmatively orders Time Warner to carry the NFL Network ("NFLN") despite the complete absence of any contractual or statutory requirement that Time Warner do so, and despite the fact that Time Warner has *never* carried NFLN. And the Bureau issued the order without providing Time Warner with even the rudiments of due process.

Time Warner respectfully contends that the Order should be vacated immediately for three reasons. *First*, the injunction exceeds the Commission's authority because it imposes mandatory carriage obligations and dictates the terms and conditions of carriage without any statutory basis. Indeed, it does so in the face of Commission orders that affirmatively disclaim authority to enforce violations such as the one-time termination of a single network at issue here. *Second*, the injunction inflicts severe, immediate, and irreparable harm on Time Warner and its subscribers by sowing confusion among the many thousands of new Time Warner customers; potentially requiring Time Warner to remove or reposition *other* programming in order to accommodate the carriage obligations imposed by the injunction; and potentially forcing Time Warner to pay to NFLN money that it can never recoup for carriage of a channel on terms that it does not want and would not voluntarily accept. *Third*, the legal basis of the injunction -- the Bureau's tentative conclusion that the decision not to carry NFLN after July 31, 2006 was within Time Warner's "control" within the meaning of Section 76.1603(b) of the Commission's rules -- is flatly wrong.

Given the extraordinary nature of the injunction and the immediate harm it will cause if not lifted immediately, Time Warner will have no choice but to obtain judicial relief to protect its

interest and those of its customers, if the Bureau or the Commission has not acted by 10 a.m. eastern time on Monday, August 7, 2006.

## INTRODUCTION

Section 76.1603(b) of the Commission's rules calls for cable operators to give their customers notice of changes in programming or channel positions "as soon as possible," and 30 days in advance of the change when the change is "within the control" of the operator in time for it to provide the 30-day notice.<sup>1</sup> NFL filed an emergency petition claiming that Time Warner violated this rule because it failed to give its new customers, recently acquired as a result of the closing of a set of complex transactions with Adelphia and Comcast, 30 days advance notice that they would no longer be receiving the NFL's programming. Neither this provision nor the statutory requirement upon which it is based has anything to do with compelled carriage of programming. Yet to remedy an alleged violation of this provision, the Bureau has taken the extraordinary step of compelling Time Warner not only to carry NFL's programming, but to do so on terms dictated solely by the NFL.

As we demonstrate below, the Bureau's *ex parte* Order should be vacated for the following reasons:

*First*, the relief ordered is unlawful. The Commission lacks authority to enforce the customer service standards on which this Order relies. Moreover, the Commission's authority to impose carriage requirements on cable providers must have some statutory basis. NFL has no "must carry" right to carriage on Time Warner's systems, and certainly no right to be carried on terms unilaterally dictated by NFL. Nothing in the Communications Act remotely gives the Commission the authority to require Time Warner to contract with NFL on NFL's terms, or to order Time Warner potentially to violate other contractual commitments and remove or reposition existing programming from its offerings to make room for the NFLN.

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<sup>1</sup> The rule states in relevant part that "Customers will be notified of any changes in rates, programming services or channel positions as soon as possible in writing. Notice must be given to subscribers a minimum of thirty (30) days in advance of such changes if the change is within the control of the cable operator." 47 C.F.R. § 76.1603(b).

*Second*, as would have been clear if Time Warner had been given the opportunity to *present the facts as they actually occurred*, NFL has satisfied none of the prerequisites for injunctive relief. The NFL cannot and does not allege that it has suffered any harm at all that relates to the consumer notice provision or its underlying purposes. Time Warner, in stark contrast, will suffer immediate irreparable harm if the injunction is left in place, harm that includes violation of its First Amendment rights, payment of programming fees to NFL that will not be recoverable when Time Warner prevails, and harm to its relationships with its new customers. Moreover, though the injunction was entered allegedly to protect the public's interest, the Order will result in wholly unnecessary confusion to the public and advances no public purpose at all.

*Finally*, NFL has virtually no chance of prevailing on the merits. NFL claims that Time Warner violated a provision requiring it to provide 30 days notice to its customers of programming changes "if the change is within the control of the cable operator." 47 C.F.R. § 76.1603(b). When Time Warner became the cable provider to the former Adelphia and Comcast cable customers, none of Adelphia's or Comcast's cable network programming agreements were transferred to Time Warner. Time Warner therefore was required to negotiate all new agreements with cable networks (or extend its existing agreements to its new properties). NFL's merits claim is that while Time Warner was in the middle of negotiating over one hundred of these new arrangements, 30 days before the bankruptcy court and the FCC granted final approval of the Adelphia transaction, all "programming services or channel positions" for the new customers were "within the control of [Time Warner]." The claim is preposterous. Time Warner did not even know 30 days in advance when the deals would be approved by the court and the FCC, and therefore when it would assume operation of the Adelphia and Comcast

systems. It most certainly did not have within its control the fate of the NFL programming on the former Adelphia and Comcast systems. To the contrary, as it was with many other programmers, Time Warner was negotiating with NFL throughout that 30 day period.

That the Bureau's assessments were one-sided is not a surprise. It ruled almost immediately after receiving NFL's petition, without even giving Time Warner the opportunity to file a response. Indeed -- again unsurprisingly -- much of the language of the Bureau's decision is adopted directly from NFL's papers. That egregious violation of Time Warner's due process rights alone should lead the Bureau or the full Commission promptly to lift the injunction simply to allow Time Warner to present its case for the first time.

#### **BACKGROUND**

The facts underlying this dispute, which are set out in more detail in the attached declaration of Michelle Kim, are as follows:

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.<sup>2</sup>

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

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<sup>2</sup> Kim Decl. ¶ 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*, FCC 06-105 (rel. July 21, 2006).

other party. Where Time Warner had an existing contract with a cable network that was being carried on an acquired system, that contract typically gave Time Warner the right to carry the network on the acquired system. 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. Kim Decl. ¶ 4.

Prior to the closing of the transaction, Time Warner entered into discussions with approximately 175 program networks and broadcast television stations whose services were carried on systems Time Warner was acquiring, but with whom Time Warner did not have an existing contractual relationship. Kim Decl. ¶ 5. In most instances, Time Warner and these program networks were able to come to a meeting of the minds and enter into a new agreement for the carriage of the network following the close of the transactions. But most of these agreements occurred late in the transaction process. As late as June 30, 2006 (the date when NFL now claims that Time Warner's NFLN programming was "within its control"), Time Warner still was negotiating with almost 150 program networks and broadcast television stations. *Id.* ¶ 6. Time Warner ultimately was able to reach agreement with all but two programmers. *Id.* ¶ 8. One of them was the NFL, which had affiliation agreements with Comcast and Adelphia but, as noted above, had never entered into any carriage agreement with Time Warner. *Id.*

One of the central disagreements in the negotiations between Time Warner and the NFL involved the issue of tier placement. Time Warner, responding to concerns voiced by consumers and policy makers, and in light of the fact that NFLN programming is particularly expensive, proposed carrying NFLN on a sports tier. The NFL, however, rejected this approach and insisted

that the channel be placed on a highly-penetrated expanded basic tier – an outcome that Time Warner believed would force virtually all of its customers to pay for programming in which a great many of them have little or no interest. Kim Decl. ¶ 9.

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. Kim Decl. ¶ 10. It was not until the Commission released its order approving the transaction late in the afternoon on Friday, July 21, 2006 that it became possible for the transactions to close on July 31, 2006. *Id.* ¶ 11.

On July 27, Time Warner published notices in local newspapers informing its newly acquired customers of channel line-up changes it expected to make as of August 1, 2006. Kim Decl. ¶ 13. Even at that late date, the negotiations with the NFL were still underway. *Id.* The notice therefore 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. After publishing this notice, Time Warner continued to negotiate with the NFL in hopes of reaching mutual agreement on a contract that would allow Time Warner to carry NFLN on the acquired systems. However, 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 NFLN on the same tier on the acquired systems on which it had been carried, or to move the service to the digital basic tier). There being no meeting of the minds, Time Warner never obtained authorization to carry NFLN. Accordingly, once Time Warner took over from Adelphia starting on August 1, 2006, the NFLN could not be carried on the acquired systems. Kim Decl. ¶ 13.

*On August 1st, NFL filed a Petition with the Commission asserting that Time Warner had violated Section 76.1603(b), because the dropping of NFLN was a change within Time Warner's control 30 days in advance of the closing. Two days later, without waiting for a response from Time Warner, the Media Bureau acting on delegated authority issued an ex parte order requiring Time Warner 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." The order was "effective immediately and shall remain in effect until the NFL's petition is resolved on the merits."*

## **ARGUMENT**

### **I. The Commission Lacks Authority To Require Time Warner to Carry NFLN.**

The Commission lacks authority to impose a requirement that Time Warner carry specified programming at mandated contractual terms and conditions as a remedy for the alleged isolated violation of a 47 C.F.R. § 76.1603, the consumer notice regulation at issue here. In effect, the Bureau's injunction unlawfully converts a consumer notice regulation into a substantive must-carry requirement. This remedy is not grounded in the statutory authority cited by the Bureau, nor in the regulation itself, and it exceeds any lawful authority the Commission has to impose a carriage requirement. Indeed, forcing Time Warner to carry certain programming raises serious First Amendment concerns and is unlikely to survive scrutiny.

At the outset, the Commission lacks authority to exercise enforcement powers in respect of the violation alleged here.<sup>3</sup> The Commission has previously stated that "it does not appear that Congress intended for the Commission to bear the responsibility of enforcing" customer

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<sup>3</sup> Indeed, and in addition, NFL lacks standing to make the claim that the Commission has no authority to adjudicate. Section 76.1603 is a consumers' rights provision, not a provision protecting programmers. *Compare, e.g.,* 47 C.F.R. § 76.1601 (operator notice requirement directed at both subscribers *and* affected broadcast stations).

service standards (such as §76.1603), and that these standards “should be enforced by local franchise authorities.” *In re Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992; Consumer Protection and Customer Service*, 8 F.C.C.R. 2892, 2897 (1993). The Commission has reserved to itself only the narrow role of policing “systemic abuses that undermine the statutory objectives.” *Id.*; *see also In re Complaint Against Comcast Corporation*, 19 F.C.C.R. 702, 706 (2004) (denying relief when complainant had “not demonstrated that Comcast’s actions constitute ‘systemic abuses that undermine the statutory objectives’ in order to invoke our direct enforcement authority”). And, indeed, NFL concedes that it must meet that exacting standard. *See* Petition at 10.

Under no reasonable view does the purported violation at issue here suffice. NFL alleges just an isolated instance of a single termination of a single channel – no systemic violation is even suggested. Moreover, the circumstances here are highly unusual. NFL does not contend, nor could it, that it can force Time Warner to carry NFLN beyond the 30-day period notice period, and it certainly has no right to carriage on Time Warner’s system for any period of time. In addition, the dispute arises directly out of the unique circumstances of Time Warner’s purchase of Adelphia assets in bankruptcy and the associated transfer of Comcast assets. As a result: (1) Time Warner acquired systems that had formerly carried a network, NFLN, with which Time Warner never had a contract; (2) Time Warner had been expressly relieved of the Adelphia contracts to carry NFLN by the Bankruptcy Court; and (3) Time Warner was in the midst of wholesale negotiations with over one hundred programmers at a time when the moment that Time Warner would take control of the Adelphia assets was entirely uncertain. There is simply no basis to conclude that Time Warner’s failure to provide a 30-day notice qualified as “systemic abuses that undermine statutory objectives” so as to give the FCC jurisdiction,

especially given that Time Warner gave notice “as soon as possible” after ascertaining that it would not likely continue carriage of NFLN after July 31, 2006.

Moreover, even assuming *arguendo* that the Commission has authority to enforce a notice violation such as the one alleged here, doing so through the remedy of forced carriage simply goes too far. The result of the Bureau’s action here is to impose on Time Warner the obligation to carry a network with which Time Warner does not have – and never had – a contractual relationship, and with respect to which it has no statutory obligation to provide carriage. Moreover, it may well force Time Warner to move or reposition other networks – with which it does have contractual relationships – to make room for the NFLN. That action is, so far as Time Warner is aware, unprecedented.

Indeed, it could hardly be otherwise. The Commission has no general authority to impose a carriage requirement on Time Warner. It is clear that the FCC must rely on “specific statutory authority” rather than “general inherent equity power” to impose obligations on providers. *E.g., American Tel. & Tel. Co. v. FCC*, 487 F.2d 865, 872 (2nd Cir. 1973). The specific statutes the Bureau invoked in its order do not provide that authority. *See* Order at ¶ 11 (citing 47 U.S.C. §§ 154(i) and 543). Section 543 concerns regulation of rates, not regulation of programming, and section 154(i) confers no independent substantive authority on the Commission. *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.”).

Given the absence of any substantive statutory authority on the Commission's part to impose mandatory carriage obligations for cable programming of the kind at issue here, or to dictate the terms and conditions on which such carriage will be provided, the Commission's interim remedial authority under 47 U.S.C. § 154(i) simply cannot be stretched to impose such requirements as part of the exercise of its authority to enforce Section 76.1603.

The lack of any statutory authority is only exacerbated by serious First Amendment and Takings concerns raised by the mandatory carriage requirement. It is clear, for example, that cable operators' First Amendment rights are at issue when they are forced to carry certain programming -- i.e., forced to speak. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 185-86 (1997). In *Turner*, the government identified three legitimate 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. *Turner*, 520 U.S. at 189-90. The Order here serves none of those interests, nor are there factual findings remotely close to the Congressional findings that the Court relied upon in upholding the must-carry requirements in *Turner*. In that context, it is particularly unwise to extend such obligations when the Commission's authority *under its own regulations and orders* is dubious at best.<sup>4</sup>

Given that backdrop, it is unsurprising that there is no case that imposes a remedy in circumstances such as these. The only case cited by NFL as being on point is in fact irrelevant. In *In re Time Warner Cable*, 15 FCC Rcd 7882 (2000), the Commission ordered Time Warner to reinstate carriage of certain broadcast stations for which Time Warner no longer had retransmission consent rights. Critically, the Commission relied upon an explicit statutory

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<sup>4</sup> The Bureau's Order is all the more suspect under the First Amendment because it appears to be content-based, showing a preference for this particular programming over other programming.

carriage requirement -- Section 614 of the Communications Act -- as establishing Time Warner'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." *Id.* at 7885. Moreover, unlike the regulations at issue here, the mandatory carriage obligations have always been at the core of the Commission's enforcement authority and have never been left to local enforcement. And finally, the Supreme Court had already resolved the First Amendment issues in a manner that offers no support for the Bureau's actions here.

Much more relevant is the Commission's decision in *In re Complaint of WFXV-TV Against United Cablevision of Southern Illinois, Inc.*, 13 F.C.C.R. 1870, 1873 (1997). In that case, the Cable Services Bureau found that the cable provider Cablevision (1) was not obligated to carry the complainant's station under the Commission regulations but that (2) indisputably dropped the station without 30 days of notice. The Bureau ruled against the complainant (because there was no obligation to carry) and required Cablevision merely "to provide a written explanation of its actions in this matter to the Commission." Compared to that minor sanction, the Bureau's drastic, unprecedented, and constitutionally troubling action here cannot be sustained.

## **II. The Bureau's Equitable Considerations Were Incomplete and One-Sided**

The Bureau's analysis of the harms and the public interest is inadequate and one-sided. The result of the Bureau's order is to force Time Warner to carry programming that it lacks the right to carry, on terms it finds unacceptable, potentially displacing other programming that it does want (and is authorized) to carry, all at a time that is critical for Time Warner as it seeks to build relationships with its new customers. On the other side, what it is at issue is merely a 30-

day delay in the dropping of a network that all agree is entirely proper. In that circumstance, the equities cut decisively against NFLN's request for relief.

First, the Bureau entirely ignores the substantial First Amendment harms that its order imposes. The Bureau's order is forced speech plain and simple. As the Supreme Court has emphasized, mandatory carriage orders such as the one at issue here plainly "regulate cable speech" and directly implicate the First Amendment. *See Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 636-37 (1994). And as the Court has also made clear, "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *See, e.g. Elrod v. Burns*, 427 U.S. 347, 373 (1976). The Bureau's blithe dismissal of Time Warner's interests here on the ground that Time Warner has no "objection in principle" to carrying NFLN misses the point entirely. The speech that the First Amendment protects is speech on terms of the speaker's choosing, not on terms imposed by regulatory fiat. The incursion on First Amendment rights accomplished by the Bureau's injunctive order here plainly constitutes irreparable injury.

Nor is that the only irreparable harm that is relevant to the public interest analysis. If Time Warner is forced to pay NFLN for this service, there would be no opportunity to recover that money should the Commission or the D.C. Circuit ultimately conclude that there was no violation of the rule. And of course, there is no compensation for the Bureau's commandeering of Time Warner's property to provide carriage for NFLN. The Bureau Order thus effectively exacts a taking – requiring Time Warner to pay money and provide capacity without adequate compensation in return.

In addition, because Time Warner has little unused capacity on its systems, placing NFLN on the Time Warner system may well result in the bumping of other cable programmers,

resulting in both an abridgement of the First Amendment rights of that programmer and substantial economic loss. *See Turner I*, 512 U.S. at 637 (mandatory carriage obligations regulate speech because they “render it more difficult for cable programmers to compete for carriage on the limited channels remaining”). Moreover, dropping or repositioning that programmer now – by necessity, without any 30-day notice – will create all of the customer ill-will and confusion that the Bureau Order purportedly seeks to avoid. If NFLN is forcibly added, many customers have been sent new channel lineup cards that will be inconsistent with the actual lineups. Kim Decl. ¶ 16. That harm – unwelcome for Time Warner at any time – is particularly troubling now, when Time Warner is seeking to build relationships with its new customers from the former Adelphia system. Having invested millions of dollars to acquire these customers, Time Warner rather than the Bureau should determine how these new customers are best served, and every day that the Bureau order remains in effect exacerbates these harms.

The Bureau’s order ignores all of these harms. That is unsurprising, since the Bureau granted relief without even waiting for an initial response to the petition. But the Bureau’s haste cannot justify the deficiencies in its order – the failure to give these aspects of injury *any weight at all* in the analysis renders the order arbitrary and capricious.

Even as to the factors that the Bureau considered, the Bureau’s analysis cannot withstand analysis. First the Bureau asserts (without any citation to the record or to policy) that customers have been deprived of an “opportunity to make their voices heard before any programming changes are made. Order ¶ 7. But that interest is doubly flawed. Time Warner gave notice on July 27, 2006 and NFLN ceased being carried on August 1, yet Time Warner has received only minimal customer complaints. Moreover, the right of customers to voice complaints after a termination decision has been made but before it is implemented is surely a right of minimal

weight – whether or not Time Warner provides notice, customers have the absolute right to make their feelings known, and in either event the complaint comes too late, as the termination decision has been made.

Similarly unpersuasive is the suggestion that customers have not had sufficient time “to obtain alternative MVPD service so that they could continue to watch the NFL network.” There is not the slightest showing that customers have lacked that opportunity. As noted, Time Warner gave notice on July 27, and as NFLN itself notes the NFL schedule does not commence until August 11, 2006. There is no reason to doubt that customers could switch providers in that window if they so desired. Moreover, the notion that substantial numbers of customers will leave Time Warner for alternative networks simply to access NFLN’s coverage of preseason football camp is rank speculation – indeed, given the exhaustive coverage provided by other local and national outlets, it seems dubious at best.

The Bureau also suggests that NFLN will suffer irreparable harm because “viewership patterns are . . . established” during this period before even the “pre-season” games have started. Order ¶ 8. But the only “evidence” for that proposition is a self-serving statement in the petition itself – there is no affidavit or other evidence to support it. That is because it is implausible. First, NFLN shows only eight regular season games, none of which are shown at the same time as a game on any other network. The notion that NFLN will lose viewers because of its absence during August is not credible. More important, all that is at issue here is the 30-day notice period – no one contends that Time Warner has any obligation to carry NFLN after that period. Thus, there are no viewership patterns to “establish” – once the 30-day period is up, NFLN will be unavailable over Time Warner regardless of the habits viewers developed during the preseason.

Moreover, to the extent that viewers are the focus of the Bureau's attention, it is noteworthy that the Bureau says nothing about the programming that its Order may preempt. If viewers lose access to programming they prefer simply to add to the abundant local coverage of NFL preseason training camp, it is hard to see that the interests of viewers will be well-served by the Bureau's Order.

Finally, and more broadly, if the Bureau's approach were to become law, customer confusion would be exacerbated, not avoided. In the talks leading up the Adelphia purchase, Time Warner was engaged in nearly two hundred negotiations with programmers, most of which result in agreements (if at all) in the last days before closing. Kim Decl. ¶¶ 5-6. Indeed, even outside of the unique circumstance of the Adelphia transaction, programming negotiations frequently take place in the very last days before existing contracts expire. *Id.* ¶ 13. Under the Bureau's approach, cable customers would receive an endless stream of confusing notices and retractions. Here, the Bureau's position is that Time Warner should have published notices regarding all programmers with whom it did not have an agreement on July 1 (or at some other unspecified date in advance of the then-unknown closing date) making clear the possibility that some programmers and some stations would no longer be available. That approach would itself have generated substantial customer confusion, and it was strongly opposed by most of the programmers with whom Time Warner negotiates who have made clear that they do not want Time Warner to give notice while discussions continue.

### **III. Time Warner Did Not Violate Section 76.1603(b).**

The Bureau's unprecedented order should be stayed for the additional reason that Time Warner's conduct plainly does not violate Section 76.1603(b), and thus the Bureau had no basis for concluding that NFLN had shown a probability of success on the merits. Section 76.1603(b)

generally requires that providers offer subscribers written notice of changes they are making to the channel line-up “as soon as possible,” and in particular within 30 days when “the change is within the control of the cable operator.”<sup>5</sup>

At the outset, this provision has no application because Time Warner has not “changed” the service it offers to any of its subscribers. Time Warner has never offered NFLN to any of its subscribers. The “change” here was a result of Time Warner’s purchase of the Adelphia/Comcast assets. It had nothing to do with Time Warner changing its offerings or channel positions. Thus, on its face the regulation is inapplicable.

Moreover, the Bureau’s tentative conclusion that the carriage decision was within Time Warner’s control lacks any basis in fact or law, and will generate starkly counterproductive and harmful public policy consequences.

The plain and undisputed fact is that Time Warner had no right to carry NFLN on the former Adelphia and Comcast systems or any other of its systems after July 31, 2006. Pursuant to the terms of the agreement approved by the Bankruptcy Court and this Commission, when the Adelphia and Comcast systems were transferred, Time Warner did not assume the cable network programming contracts. Had Time Warner continued carriage of NFLN, it would have violated the copyright laws and been subject to the charge that it was unlawfully expropriating NFLN’s property. Because Time Warner had no legal authority or practical ability to provide NFLN to its subscribers unilaterally, it is self-evident that Time Warner lacked “control” over the change in programming. This is not a situation in which Time Warner had a contractual right to decide whether to continue carriage, and exercised that right. Indeed, the situation is precisely the opposite.

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<sup>5</sup> 47 C.F.R. Sec. 76.1603(b).

In this situation, whether NFLN was carried after July 31, 2006 was not within the control of either NFLN or Time Warner. Carriage of NFLN on the acquired systems could have continued only if both parties agreed on a carriage proposal. Had NFLN accepted Time Warner's carriage proposal, it would have remained on the systems. Because it did not, Time Warner had no right to continue carriage after that date. It makes no difference that NFLN offered to allow Time Warner to continue to carry the network on the pre-existing terms and conditions. Time Warner was under no obligation to accept this offer; indeed, it does not even know the terms of Comcast's deal with NFL, and NFL has refused to reveal them deal to Time Warner. Kim Decl. ¶ 15. Indeed, NFL did not even offer this deal to Time Warner until late July, well after it now claims Time Warner was obligated to provide notice to its customers.

At most, Time Warner had an *opportunity* to continue carriage if it was willing to accept NFL's terms. But an opportunity falls far short of the power of control. Indeed, by reading the regulation as applicable in such situations, the Bureau has given NFLN the unilateral right to dictate carriage terms. After all, NFLN could as readily have offered carriage at twice or three times current rates. In such a situation, the carriage decision would be no less in Time Warner's "control" than it is in the present situation. Yet it cannot be that Time Warner would violate Section 76.1603(b) merely because it declined a patently unreasonable offer. Plainly, without an agreement, then, the change that would happen when Time Warner took over the systems on August 1st was *not* "within the control" of Time Warner. The Time Warner therefore did not violate Section 1603(b) when it failed to give its prospective customers notice of this change on July 1st.

In its Petition, NFL argued that the Commission has given the term "within the control" an extraordinarily expansive definition. It relied on section 76.309, which referred to "natural

disasters, civil disturbances, [and] power outages” as matters outside of a provider’s control. Petition at 8. The Bureau accepted this argument, concluding that “it appears” that Time Warner violated section 76.1603. *See* ¶ 9 (lack of control “did not result from any uncontrollable external event, such as a natural disaster”). But the definition of 76.309 applies to an entirely different notice requirement concerning service calls and installations. It does not have anything to do with Section 1603(b). In any event, Time Warner’s lack of control quite plainly *did* result from an “uncontrollable external event,” though not one having to do with forces of nature. Its lack of control had to do with the fact that it could not know whether or not NFL programming would remain on its system until it completed negotiations with NFL, and it had no ability to dictate the terms or the timing of those negotiations, not to mention the timing of the FCC and Bankruptcy Court approval of the Adelphia/Comcast transaction.

NFL also insists that Time Warner could have given advance notice that NFLN was going to be dropped from the systems it was acquiring “at any time while Time Warner’s application was pending before the Commission.”<sup>6</sup> As the Commission is well aware, the referenced application was pending for more than a year; indeed, during that period, 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 Commission, but also by the Federal Trade Commission, the United States Bankruptcy Court, and numerous local franchising authorities. Given that Time Warner had no control over the timing of the approvals granted by any of these entities, and given that Time Warner had to negotiate literally hundreds of new agreements over that period, Time Warner could not possibly have given effective notice about changes “at any time” while its applications were pending. Any notice Time Warner might have

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<sup>6</sup> Pet. at 10.

given at that juncture would have been of no value to consumers because Time Warner had no way of knowing when all the necessary regulatory approvals would be granted, when the transactions would close, or what the channel lineup changes might still need to be made when the closing did occur. Time Warner thus neither knew what the ultimate channel lineup would be or when it would know that fact. Any notice provided under those circumstances would have been so indefinite that it would have done more harm than good. It can hardly be said that the line-up changes were within Time Warner's "control" under those circumstances. The relevant fact is that Time Warner was still negotiating in good faith in an effort to reach an agreement for the carriage of NFLN on mutually acceptable terms not only while the necessary regulatory approvals were pending, but even after the last of those approvals had been granted.

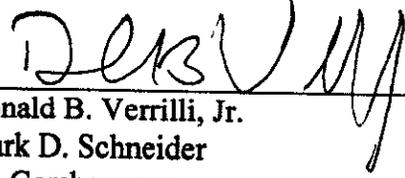
In short, until the last of the required approvals was granted, thereby allowing the parties to set a firm date to close the acquisition of the systems in question, Time Warner was in no position to notify subscribers regarding the post-transfer status of NFLN. It is common industry practice for programmers and cable operators to continue their negotiations up until the last minute; if Section 76.1603(b) is read as imposing a 30 day notice requirement even in such uncertain circumstances, subscribers would wind up receiving hundreds of false drop notifications, resulting in massive confusion and harm to operators and programmers alike. Applying Section 1603(b) in the present circumstances would thus harm precisely the consumer protection interests the provision is designed to advance. That cannot possibly be a correct reading of the provision.

### CONCLUSION

For these reasons, Time Warner respectfully requests that the Bureau's August 3, 2006 Order be vacated.

Respectfully submitted,

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