

CERTIFICATE OF SERVICE

I, Mark D. Schneider, hereby certify that on this 3rd day of August, 2006, I caused a copy of the foregoing Time Warner Cable's Petition for Reconsideration and Request for Referral to the Full Commission to be served upon:

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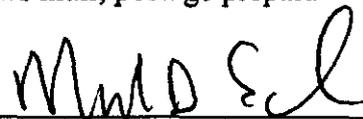
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Mark D. Schneider

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 took 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

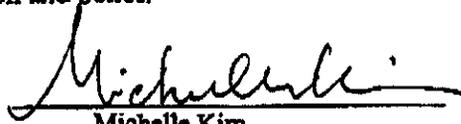

Michelle Kim

EXHIBIT 2

3. Section 76.1603(b) provides, as part of the Commission's customer service standards, that notice of a change in programming services offered by a cable operator "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." Moreover, section 76.1603(c) separately requires cable operators to "give 30 days written notice to both subscribers and local franchising authorities before implementing any rate or service change" and states that, "When the change involves the addition or deletion of channels, each channel added or deleted must be separately identified." Here, the NFL argues that Time Warner's decision to drop the NFL Network from its newly acquired systems without providing thirty-days notice was entirely within Time Warner's control and thus violated section 76.1603. Moreover, the NFL claims that Time Warner's violation of the Commission's rule prevented subscribers from expressing their dissatisfaction with the removal of the NFL Network and/or arranging for service from another video provider to avoid a disruption in their access to the NFL Network.

4. In its Petition, the NFL therefore asks the Commission immediately to issue a Declaratory Ruling and Enforcement Order finding that Time Warner has violated section 76.1603 and directing Time Warner to reinstate carriage of the NFL Network on its newly acquired systems until it provides subscribers with thirty-days notice of any decision to drop the NFL Network. Alternatively, in the event that the Commission is unable to issue such an order immediately, the NFL urges the Commission to issue "prompt injunctive relief" that would restore the *status quo ante* until its Petition is resolved.

III. DISCUSSION

5. At this stage of the proceedings, we are unable to issue a final decision on the NFL's Petition. Based on the current state of the record, however, we conclude that the NFL is entitled to appropriate interim relief. Specifically, we direct that Time Warner reinstate carriage of the NFL Network on all of its newly acquired systems on the same terms under which it was carried prior to August 1, 2006, until we are able to resolve the NFL's Petition on the merits. In addition, due to the time-sensitive nature of the NFL's request, we direct Time Warner to file its response to the NFL's Petition on or before August 15, 2006. The NFL may file a reply to Time Warner's response on or before August 20, 2006. This expedited pleading cycle will afford the Commission the ability to promptly resolve this dispute.

6. In evaluating whether to grant interim relief of this nature, we generally consider the four criteria used by federal courts to evaluate a request for a preliminary injunction: (1) the likelihood of success on the merits; (2) the threat of irreparable harm absent the grant of preliminary relief; (3) the degree of injury to other parties if relief is granted; and (4) whether the preliminary relief will further the public interest.² We have also recognized that in a situation such as this, involving "administration of regulatory statutes designed to promote the public interest," the public interest factor "necessarily becomes crucial."³ Moreover, "a compelling demonstration that the public interest would be irreparably harmed lessens the level of certainty required of a moving party to show that it will prevail on the merits."⁴

7. Our conclusion that the NFL is entitled to interim relief is principally based on our determination that such relief will further the public interest. The rule requiring cable operators to provide subscribers with thirty-days notice before dropping a channel serves at least two important purposes. First, it provides customers with the opportunity to make their voices heard before any programming changes are made. Second, it allows customers to make arrangements to secure dropped

² See *In re AT&T Corp., et al.*, 13 FCC Rcd 14508, 14515-16 (1998).

³ *Id.* at 14516.

⁴ *Id.*

channels through alternative means, such as by changing service providers. Here, it appears that Time Warner discontinued the NFL Network with essentially no warning to customers, thus not giving them *sufficient time to obtain alternative MVPD service so that they could continue to watch the NFL Network* without interruption. Such action by Time Warner was particularly harmful to customers given the time of year. With NFL training camps now underway and the NFL's pre-season schedule commencing on August 11, 2006, now is a time when many football fans have a particular desire to view the NFL Network's programming, which will include numerous pre-season games and extensive coverage of NFL training camps. Therefore, each day that Time Warner customers go without the NFL Network significantly and irreparably harms many of them, particularly those in Buffalo, Cleveland, and Dallas, each of which is home to an NFL team. By contrast, we do not believe that the interim relief sought by the NFL will cause any significant harm to the public.

8. We also conclude that the NFL has established a threat of irreparable harm to itself if interim relief is not granted. Given the number of affected households, Time Warner's decision threatens to have a substantial effect on the NFL Network's viewership. This is significant because August is an important month for the channel, both because of the many pre-season games shown and the fact that "viewership patterns for the coming season (where to watch pre-game and post-game shows) are established" in August.⁵ Therefore, denying the NFL Network access to viewers during this crucial time period would have not only a substantial short-term impact, but would also have long-term detrimental effects on the network. On the other hand, we do not think that requiring carriage of the NFL Network on a temporary basis on the same terms that it previously carried the network will cause significant harm to Time Warner. Based on the current record, it does not appear that Time Warner objects in principle to carrying the NFL Network. Rather, Time Warner merely wishes to carry it on different terms than those agreed to by the relevant cable systems' prior owner. In light of this fact, we have little difficulty concluding that the harm to the NFL and Time Warner's customers that would result in the absence of interim relief outweighs any harm that such interim relief will cause to Time Warner.

9. Finally, we examine the NFL's prospects for success on the merits. In light of our determination above with respect to the public interest as well as the balance of harms, we do not believe that the NFL is required to demonstrate an overwhelming likelihood of success on the merits in order to be entitled to interim relief. Rather, under these circumstances, we believe that the NFL need only demonstrate that it has a reasonable prospect of success on the merits, a showing that we conclude that the NFL has easily made here. Given the current state of the record, it appears that Time Warner discontinued carriage of the NFL Network without providing customers with the requisite 30-days notice under section 76.1603(b) and (c). Moreover, it appears that the decision made by Time Warner was "within the control of the cable operator" as that phrase is used in section 76.1603 since the termination of the NFL Network did not result from any uncontrollable external event, such as a natural disaster. Moreover, we find that the NFL has a reasonable prospect of showing that Time Warner's actions, which affected millions of customers across the nation residing within numerous franchising authorities' jurisdiction, constitute systemic abuses that undermine the statutory objectives.

IV. CONCLUSION

10. While we make no final decision on the merits of the NFL's Petition, we believe that the equities here favor directing Time Warner to reinstate carriage of the NFL Network on all of its newly acquired systems on the same terms under which it was carried prior to August 1, 2006, until we are able to resolve the NFL's Petition on the merits. In particular, we conclude that the public interest strongly weighs in favor of such interim relief and that the harms to the NFL and Time Warner customers of foregoing this relief outweigh any harm caused to Time Warner. We also conclude, that in light of the balance of the equities here, NFL has established a sufficient prospect of success on the merits to justify this relief.

⁵ Petition at 12.

V. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED**, that pursuant to Sections 4(i) and 623 of the *Communications Act of 1934*, as amended, 47 U.S.C. §§ 154(i) and 543, and 47 C.F.R. §§ 0.283, 0.61, 76.7 and 76.1603, Time Warner Cable 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. This order shall be effective immediately and shall remain in effect until the NFL's petition is resolved on the merits.

12. **IT IS FURTHER ORDERED**, that Time Warner SHALL FILE its response to the NFL's Petition on or before August 15, 2006, and the NFL MAY FILE a reply to Time Warner's response on or before August 20, 2006.

13. Finally, **IT IS FURTHER ORDERED**, that the Media Bureau SHALL IMMEDIATELY NOTIFY the NFL and Time Warner Cable of this Order and SHALL SEND it to the NFL and Time Warner Cable, by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna C. Gregg
Chief, Media Bureau