



ARTHUR H. HARDING
(202) 939-7900
AHARDING@FH-LAW.COM

November 15, 2007

VIA ELECTRONIC FILING

EX PARTE NOTICE

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

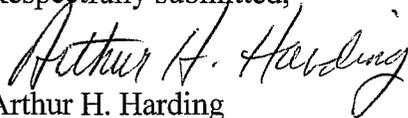
Re: *In the Matter of Leased Commercial Access, Development of Competition and Diversity in Video Programming Distribution and Carriage, MB Docket No. 07-42; In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, MB Docket No. 06-189*

Dear Ms. Dortch:

On November 14, 2007, Steven N. Teplitz and Susan A. Mort of Time Warner Inc., and Gary R. Matz of Time Warner Cable Inc. ("TWC"), met separately with Rick Chessen, Legal Advisor to Commissioner Copps, and Christina Pauzé, Legal Advisor to Commissioner McDowell. These meetings addressed TWC's position with respect to certain issues raised in the Commission's *Notice of Proposed Rulemaking* in MB Docket No. 07-42, as set forth in TWC's Comments and Reply Comments in the proceeding. In addition, the participants discussed certain issues raised by the National Cable & Telecommunications Association in its filings in response to the Commission's *Notice of Inquiry* in MB Docket No. 06-189. At the request of Ms. Pauzé, we are also attaching a copy of the legislative history associated with the enactment of Section 612(g) by the 1984 Cable Act.

In accordance with Section 1.1206(b)(2)-(3) of the Commission's rules, an electronic copy of this notice (and corresponding attachment) is being submitted for inclusion in the record of the above-captioned proceedings.¹

Respectfully submitted,


Arthur H. Harding
Counsel for Time Warner Cable Inc.

Attachment
196795_1

cc: Rick Chessen
Christina Pauzé

¹ 47 C.F.R. §§ 1.1206(b)(2)-(3).

D. Miscellaneous provisions related to leased access.—The Committee recognizes that the cable industry, and in particular the programming sector of the industry, is still in a developmental stage.

It is clear that as the cable industry more fully develops, and programming industry desires for pursuing leased access opportunities more fully emerge, new and different requirements relating to leased access may be necessary in order that a nationally mandated leased access scheme fully meet the First Amendment goal of assuring diversity. Thus, subsection 612(g) provides a mechanism to assure there is adequate flexibility to develop new rules and procedures with respect to the use of leased access channels as the cable industry develops and serves more citizens in the future.

At such time as cable systems with 36 or more activated channels are available (*i.e.*, households that are passed by cable) to 70 percent of households in the country, and as these cable systems are actually subscribed to by 70 percent of those households which have availability to them, the FCC is granted authority to promulgate any additional rules necessary to assure that leased access channels provide as wide as possible a diversity of information sources to the public. Along these lines, the Commission may develop additional procedures for the resolution of disputes between cable operators and unaffiliated programmers, and may provide rules or new standards for the establishment of rates, terms and conditions of access for such programmers.

In terms of developing any new regulations relating to the price charged programmers for the commercial use of channel capacity designated under this section, prohibitions contained in 621(c) and 623(a) relating to rate regulations and other regulatory authority do not operate as constraints on the possible options available to the Commission in adopting any new rules. However, the Commission should not see its role as that of a traditional common carrier regulator. In any case, the Commission may not increase the number of channels required to be set aside under this section or preempt any authority expressly granted to franchising authorities under the title.

The Committee recognizes the concerns that have been raised with respect to actions that might be taken by a cable operator that could frustrate the purpose underlying this section. Paragraph 612(b)(3) deals with one such potential problem by prohibiting a cable operator from classifying programming services already being provided by the cable operator as commercial use of designated capacity by persons unaffiliated with the operator and as thus satisfying the requirements of this section. There may be circumstances

under which it would be permissible to enable a service presently being carried to gain access pursuant to this section. For instance, the cable operator might terminate his contract with the service for reasons other than this section, and only through recourse to these provisions would that programmer be able to provide that service to the system's cable subscribers.

The potential for problems posed by how an operator classifies services which he is not presently carrying is even greater, since policing such practices becomes more difficult. For instance, a cable operator may begin to carry a number of program services he has previously not carried by utilizing channels that were previously unused or by the activation of additional channel capacity. These new services being carried would very likely be provided by parties unaffiliated with the cable operator. An operator might claim that he is only considering the content of these new services insofar as the establishment of a reasonable price, that beyond that he is exercising no editorial control over the content of the service, that the programmer in effect selected him, and he did not seek out and select the programmer. Thus, a cable operator might claim that the carriage of cable service not previously carried by the system and provided by an unaffiliated party satisfies the obligations of the operator under this section, and classify such a service as a leased access service.

In order to avoid such claims which, if not scrutinized, could lead to frustrating the intent of these provisions, the Committee expects the courts and the Commission in any case brought by an aggrieved party to examine the factual circumstances relating to the operator's relationship with other programmers and whether their services might have obtained access to the cable system without recourse to the provisions of this section. The courts and the FCC cannot allow the purposes of these provisions to be abused by the conduct of sham transactions.

Subsection 612(h) addresses an issue of particular concern to the Committee—the potential availability of obscene or otherwise Constitutionally unprotected programming over cable systems. (This issue is discussed in greater length in connection with subsection 624(d), *infra*.) Since leased access channels are not subject to the editorial control of the operator, the Committee believed it necessary to assure that the franchising authority have the ability to restrict the availability of obscene or otherwise unprotected programming over channels designated for use under this section. Thus, this subsection empowers franchising authorities to prohibit or condition the provision of cable services which are obscene or otherwise unprotected by the Constitution. By its express terms, 612(h) adopts the Supreme Court's formulation which permits the issue of obscenity to be determined by resort to local community standards.