

LATHAM & WATKINS LLP

FIRM / AFFILIATE OFFICES

Abu Dhabi	Moscow
Barcelona	Munich
Beijing	New Jersey
Boston	New York
Brussels	Orange County
Chicago	Paris
Doha	Riyadh
Dubai	Rome
Frankfurt	San Diego
Hamburg	San Francisco
Hong Kong	Shanghai
Houston	Silicon Valley
London	Singapore
Los Angeles	Tokyo
Madrid	Washington, D.C.
Milan	

June 28, 2012

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: Notification of Ex Parte Presentation of Time Warner Cable Inc.,
Amendment of the Commission's Rules Related to Retransmission Consent,
MB Docket No. 10-71**

Dear Ms. Dortch:

On June 26, 2012, Steven Teplitz and Cristina Pauzé of Time Warner Cable Inc. ("TWC"), along with the undersigned and Matthew Murchison, both of Latham & Watkins LLP, met with William Lake, Steven Broeckart, Nancy Murphy, Diana Sokolow, Robert Ratcliffe, Michelle Carey, and Rebecca Hanson of the Media Bureau regarding TWC's ongoing retransmission consent negotiations with Hearst Television, Inc. ("Hearst").

At the meeting, we discussed whether and to what extent Section 614(b)(9) of the Communications Act (the "Act"), which precludes deletion of any commercial television station during a "sweeps" period,¹ would require or permit TWC to carry Hearst's stations beyond the June 30 expiration date of the parties' current retransmission consent agreement and into the July sweeps period. The Notice of Proposed Rulemaking ("NPRM") in the above-mentioned proceeding expressly sought comment on the applicability of the sweeps rule under such circumstances.² TWC filed comments in response urging the Commission to clarify that the rule applies symmetrically to cable operators and broadcasters alike.³ We also noted at the meeting

¹ 47 U.S.C. § 534(b)(9) ("No deletion or repositioning of a local commercial television station shall occur during a period in which major television ratings services measure the size of audiences of local television stations."); *see also* 47 C.F.R. § 76.1601, note 1 (same).

² *See Amendment of the Commission's Rules Related to Retransmission Consent*, Notice of Proposed Rulemaking, 26 FCC Rcd 2718 ¶ 39 (2011) ("NPRM").

³ Reply Comments of Time Warner Cable Inc., MB Docket No. 10-71, at 36-37 (filed Jun. 27, 2011).

that Hearst has taken the position that the rule imposes obligations only on cable operators, and that it therefore may pull its signals during sweeps with unilateral control over the timing of such a decision.

As TWC has explained in the past, the sweeps rule is contained in Section 614 and, as part of the must-carry statute, should apply only to stations that have elected must-carry status.⁴ Accordingly, the rule should operate as an exception in instances where a cable operator otherwise would be permitted to delete a must-carry station. However, to the extent that the Commission determines that the sweeps rule *also* applies to stations that have elected retransmission consent—and thereby allows stations with lapsed retransmission consent agreements to insist on continued carriage during sweeps—the plain language of Section 614(b)(9) is best read to impose symmetrical obligations on cable operators and broadcasters, such that if cable operators are barred from taking down a signal during a sweeps period, then broadcasters likewise are required to maintain carriage throughout a sweeps period. We pointed out during the meeting that, while nearly every other requirement in Section 614 imposes an affirmative obligation on cable operators, the sweeps rule categorically states that “[n]o deletion . . . shall occur,”⁵ irrespective of whether the broadcast station consents to such deletion.

We also addressed the argument advanced by Hearst and others that Section 325(b)(1)(A) would preclude carriage during sweeps absent a renewed retransmission consent agreement. We noted that staff rulings have indicated that the requisite statutory authority for carriage during a sweeps period is grounded in the *must carry* regime under Section 614, not retransmission consent under Section 325.⁶ Accordingly, where a station has withdrawn retransmission consent immediately before or during a sweeps period, the sweeps rule would appear to authorize a cable operator to continue carrying the station as a must-carry station through the end of the sweeps period.⁷

⁴ See *Time Warner Cable; Emergency Petition of ABC, Inc. for Declaratory Ruling and Enforcement Order, or in the Alternative for Immediate Injunctive Relief*, Memorandum Opinion and Order, 15 FCC Rcd 7882 ¶ 5 (CSB 2000) (“*ABC Sweeps Order*”) (noting TWC’s arguments).

⁵ 47 U.S.C. § 534(b)(9).

⁶ See *ABC Sweeps Order* ¶ 7 (holding that the absence of express authorization under Section 325 does not relieve a cable operator of its duty to carry a broadcast signal during a sweeps period); see also *Northland Cable TV, Inc.*, 23 FCC Rcd 7865 ¶ 8 n.25 (MB 2008) (noting that “Northland would have been in violation for removing programming during a sweeps period, *even if* the retransmission consent agreement had lapsed *during* that period” (emphasis in original)).

⁷ We acknowledged that the NPRM sought comment on a differing interpretation of Section 614(b)(9), see NPRM ¶ 39, but pointed out that the NPRM’s tentative characterization of the law does not appear consistent with the statutory text and also fails to undercut the precedential weight of the *ABC* and *Northland* orders cited above.

Moreover, if the Commission determines (consistent with prior staff rulings) that the must-carry statute supplies the legal framework for carrying a station with a lapsed retransmission consent agreement during sweeps,⁸ then the Commission also should make clear that such carriage is governed by the provisions, rules, and orders applicable to must-carry stations. Accordingly, during the sweeps period, a cable operator would not owe any carriage fees to the station, would not be obligated to carry the station's multicast signals, would not be compelled to carry out-of-market stations, and, under the Commission's recent *Viewability Sunset Order*,⁹ would not be required to down-convert the station's signal.

Finally, under any interpretation of the Act, we explained that it would be untenable to permit broadcasters to make unilateral decisions about carriage without any obligation to divulge their intentions to cable operators and their subscribers. In comments filed in this proceeding, TWC has underscored the need for "effective subscriber notice" that balances "the need for consumers to make alternative viewing arrangements and the desire to avoid . . . confusion, frustration, [and] anxiety" for viewers.¹⁰ But giving a broadcaster unilateral control over a cable operator's carriage of its signal during sweeps periods—by allowing a station to pull its signal at any moment under Section 325 while also enabling it to insist on carriage under Section 614(b)(9)—would frustrate cable operators' ability to keep their customers informed about the status of carriage disputes. Such conduct also cannot be squared with a broadcast station's public interest obligations under Title III of the Act, and granting broadcasters the unilateral ability to compel carriage for a duration that lies within their sole discretion would impermissibly burden cable operators' First Amendment rights. Therefore, we urged the Commission at a minimum to require a broadcaster under these circumstances to declare whether it intends to require or allow carriage throughout the sweeps period, in order to prevent consumer confusion and to allow the cable operator and its subscribers to make the necessary preparations.

Please contact the undersigned if you have any questions regarding these issues.

Sincerely,

/s/ Matthew A. Brill

Matthew A. Brill
Counsel for Time Warner Cable Inc.

⁸ See *ABC Sweeps Order* ¶ 7 (noting 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").

⁹ See *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Fifth Report and Order, FCC 12-59, ¶ 1 (rel. Jun. 12, 2012).

¹⁰ Comments of Time Warner Cable Inc., MB Docket No. 10-71, at 45 (filed May 27, 2011).