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FILED/ACCEPTED

DEC 26 2012

Federal Communications Commission
Office of the Secretary

December 26, 2012

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

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Re: *Time Warner Cable; Emergency Petition for Declaratory Ruling and Enforcement Order and for Injunctive Relief for Violation of 47 C.F.R. § 76.1603 (no CSR number or docket number assigned) (filed Dec. 19, 2012).*

Dear Ms. Dortch:

Please find enclosed an original and two copies of the Opposition of Time Warner Cable Inc. to the "Emergency Petition for Declaratory Ruling and Enforcement Order and for Injunctive Relief" filed by Ovation LLC on December 19, 2012.

Sincerely,



Matthew A. Brill
Counsel for Time Warner Cable Inc.

Enclosures

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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Federal Communications Commission
Office of the Secretary

In the Matter of)
)
Time Warner Cable)
)
Emergency Petition for Declaratory Ruling and)
Enforcement Order and for Injunctive Relief for)
Violation of 47 C.F.R. § 76.1603)

CSR- 8758
MB Docket No. 13-15

OPPOSITION OF TIME WARNER CABLE INC. TO EMERGENCY PETITION

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December 26, 2012

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OPPOSITION OF TIME WARNER CABLE INC. TO EMERGENCY PETITION

Time Warner Cable Inc. (“TWC”) hereby opposes the “Emergency Petition for Declaratory Ruling and Enforcement Order and for Injunctive Relief” (“Petition”) filed on December 19, 2012, by Ovation LLC (“Ovation”). The Petition attempts to manufacture a notice violation in an effort to force the continued carriage of Ovation’s programming service on terms that Ovation was unable to obtain through commercial negotiation. But TWC has not violated any applicable rule with respect to Ovation’s programming service. The rule on which Ovation relies, 47 C.F.R. § 76.1603, did not require 30 days’ advance notice in these circumstances but in any event was completely satisfied by TWC’s timely notifications to its subscribers regarding the upcoming expiration of the parties’ carriage agreement. Even apart from the absence of any rule violation, Ovation’s Petition utterly fails to justify the extraordinary relief it seeks. An injunction requiring TWC to carry Ovation’s programming service on TWC’s systems following the expiration of the parties’ carriage agreement would be a disproportionate remedy for an asserted notice violation and would present serious constitutional issues that Ovation fails even to address in its Petition. The Commission therefore should dismiss or deny the Petition.

BACKGROUND

TWC has carried Ovation's programming service since the late 1990s, based on a carriage agreement that has been extended and amended by the parties on several occasions. The current agreement is set to expire on December 31, 2012, and the parties have negotiated over the past eight months regarding the terms of a possible extension. In April 2012, Ovation submitted a proposed term sheet to TWC, and the parties were in regular communication thereafter. Given the network's extremely low ratings and lack of distinctive programming, TWC consistently expressed skepticism about the prospects for renewal at anything close to Ovation's proposed terms. Nevertheless, TWC left open the possibility of continued carriage on substantially revised terms that better reflect Ovation's minimal viewership.

In October 2012, Ovation proposed a new offer that, like its previous offer, would have expanded its carriage on TWC's systems in spite of the network's significant limitations, and TWC responded by explaining that such a proposal would not be in the interests of TWC or its subscribers. Informal discussions continued in the weeks that followed, including during the week of December 17, 2012 with Ovation's Chief Executive Officer, Charles Segars, and with other Ovation representatives. On December 19, 2012—the same day Ovation filed its Petition—Ovation communicated a more formal presentation of an offer to TWC, which led TWC to undertake a detailed economic analysis of the proposed terms. On December 20, 2012, TWC made a good-faith counteroffer to Ovation for continued carriage on terms that would be acceptable for TWC and its subscribers. Ovation rejected that offer the same day. While TWC has indicated to Ovation that it remains willing to listen to any new offers Ovation may make, TWC concluded as of December 20, 2012 that deletion of the network from TWC's systems in all likelihood would occur on December 31, 2012.

While the parties were in discussions in November 2012, TWC provided notice of the potential deletion of Ovation from its systems pursuant to TWC's standard policies. Before 2006, consistent with industry custom and the company's good-faith interpretation of Section 76.1603 of the Commission's rules, TWC's practice was to notify subscribers and local franchise authorities ("LFAs") regarding the impending loss of a programming service only when that eventuality became reasonably certain—typically much less than 30 days in advance of a drop. However, in the wake of the Media Bureau's order addressing TWC's provision of notice in the *NFL Network* proceeding,¹ as well as in response to arguments raised by broadcasters in retransmission consent disputes, TWC substantially revised its notice policy. In particular, TWC determined that, under the Bureau's analysis, it had no choice but to provide 30 days' advance notice in connection with *any* programming service whose carriage agreement was set to expire, despite the fact that the vast majority of expiring carriage agreements are renewed without any deletion of the service from TWC's systems.

TWC undertook an extensive analysis of how best to accomplish that objective, taking into account the large number of carriage agreements up for renewal at any given time, together with the large size of TWC's 29-state footprint. TWC instituted new procedures to ensure that no cable system would carry out the deletion of a programming service without certifying to senior corporate officials that it had provided the requisite advance notice to customers and LFAs, via a combination of newspaper publication, information on subscribers' bills, letters to franchising authorities, and advisories on TWC's website. For both its newspaper notices and online advisories, TWC generally developed different categories into which expiring agreements or other changes would fall: one for service changes where the outcome cannot reasonably be

¹ See *Time Warner Cable, Order on Reconsideration*, 21 FCC Rcd 9016 (MB 2006) ("*NFL Network Reconsideration Order*").

determined at the 30-day mark, and one for situations where TWC or the programming vendor has more definitively concluded that a change will occur 30 days later.² Based on the down-to-the-wire nature of most negotiations to extend a programming agreement, almost all expiring agreements fall within the first (uncertain) category. For those instances, TWC's standard notice indicates that TWC "may be required to cease carriage" of the service,³ as a more definitive assertion that carriage "will" cease would turn out to be false in most instances and thus would mislead, rather than helpfully inform, TWC's customers. Based on its careful consideration of the legal and practical issues involved, TWC determined in good faith that this bifurcated notice policy offered the best way for TWC to provide as concrete a notification as it reasonably can, consistent with the Bureau's ruling and arguments advanced by broadcasters that Section 76.1603 requires written notice in virtually all cases at least 30 days before the expiration of a carriage agreement.

TWC followed these established procedures to the letter in this case. TWC published notice about the possible deletion of Ovation in more than 130 local newspapers throughout its footprint in November 2012, more than 30 days in advance of the December 31, 2012 expiration date of its carriage agreement with Ovation.⁴ Because negotiations between TWC and Ovation were still ongoing at the time and it was unknown what the ultimate outcome of those negotiations would be, these notices identified Ovation as a programming service whose carriage was "due to expire soon" and for which TWC "may be required to cease carriage" absent a new

² The example cited in the Petition regarding the impending drop of TruTV from channel 779 illustrates this latter category. *See* Petition at 3-4.

³ *See, e.g.*, Petition, Exh. 3, 8.

⁴ The list of newspapers in which TWC published these notices is appended hereto as Exhibit 2.

agreement.⁵ Indeed, the language in these printed notices typically had to be finalized well in advance of publication—in many cases up to 10 days before publication, or 40 days before the possible expiration of Ovation’s carriage agreement—which further compounded the difficulty of predicting the outcome of future events. The notices also identified other programming services whose status was similarly uncertain, as well as a much smaller number of programming services for which the prospect of deletion or repositioning was more definite. In addition to these newspaper notices, TWC included in its subscribers’ bills a link to TWC’s website, which includes a section providing identical information about possible deletions.⁶

As noted above, after Ovation rejected TWC’s latest offer during the parties’ most recent discussions on December 20, 2012, it became clear to TWC that deletion of Ovation’s programming service on December 31 is all but certain (notwithstanding Ovation’s efforts to pressure TWC—both politically and publicly, including through this Petition—to delay this deletion). At that point, TWC made the decision to update its website. Although TWC could not rule out that Ovation would have a change of heart and agree to TWC’s proposed terms, it considered that likelihood sufficiently remote to warrant redesignating Ovation as a programming service that would be deleted as of December 31. An example of this updated notice is attached hereto as Exhibit 3. TWC regularly provides such updates in connection with other programming networks in an effort to provide consumers and LFAs with the most up-to-date and accurate information available.

⁵ See, e.g., Petition, Exh. 8.

⁶ Upon receiving the Petition, TWC learned that one regional link to this programming notice had become disabled as a result of unrelated changes to the website. See Petition at 3 (describing problem with New York City link). TWC corrected the error after becoming aware of it.

DISCUSSION

I. OVATION CANNOT PREVAIL ON ITS CLAIM UNDER SECTION 76.1603

Ovation bases its claim for declaratory and injunctive relief on Section 76.1603 of the Commission's rules, which requires cable operators to provide notice to customers (and local franchising authorities) under certain circumstances.⁷ The rule provides, in relevant part, that cable operators must provide notice to customers of "any changes in rates, programming services or channel positions" at least "thirty (30) days in advance of such changes if the change is within the control of the cable operator."⁸ The rule also specifies that, "[w]hen the change involves the addition or deletion of channels, each channel added or deleted must be separately identified."⁹ And the rule clarifies that, "[t]o the extent the operator is required to provide notice of service and rate changes to subscribers, the operator may provide such notice using any reasonable written means at its sole discretion."¹⁰

Ovation's claim under Section 76.1603 fails for several reasons. As a threshold matter, the Commission lacks jurisdiction to consider Ovation's Petition; Ovation does not have standing to seek relief for alleged notice deficiencies under a rule designed to protect *subscribers*, and its claim is not ripe for review because the trigger for such notice—the deletion of Ovation's service from TWC's systems—has not occurred and ultimately may not occur if the parties reach agreement. Moreover, Section 76.1603 in these circumstances should be read to require TWC to notify subscribers "as soon as possible"—not "a minimum of 30 days in advance"—because any renewal or failure to renew Ovation's carriage agreement is not solely "within the control of the

⁷ 47 C.F.R. § 76.1603.

⁸ *Id.* § 76.1603(b).

⁹ *Id.* § 76.1603(c).

¹⁰ *Id.* § 76.1603(e).

cable operator,” but instead will be the product of bilateral negotiations. But even if the Commission concludes that 30 days’ advance notice was required here, TWC satisfied that requirement through its timely publication of notifications about the possible deletion of Ovation both in local newspapers of record and online. Although Ovation quibbles with the level of specificity and certainty TWC chose to include in those notices, nothing in the Commission’s rules mandates the sort of definitive notice that Ovation claims is necessary. To the contrary, construing Section 76.1603 to require cable operators to state in absolute terms that a programming service with an expiring agreement “will be deleted,” as Ovation proposes,¹¹ would undermine the intended purpose of the rule and disserve the public interest. Because most impending expirations of carriage agreements result in renewals, rather than deletions, a wooden requirement to state that any service with any expiring agreement *will* be dropped, well in advance of any basis to make such a claim, would force cable operators to issue statements that often prove false, and would result in significant harm to consumers and programming vendors alike.

A. Ovation’s Petition Is Jurisdictionally Defective

As a threshold matter, Ovation’s claim for relief is foreclosed by two distinct jurisdictional bars. First, Ovation lacks standing to invoke Section 76.1603, which governs the notice provided to “subscribers and local franchising authorities,” not to cable programmers.¹² Indeed, Ovation itself argues in its Petition that the rule exists to enable subscribers to be “heard before any programming changes are made” and to “make arrangements to secure dropped

¹¹ Petition at 7.

¹² *Id.* § 76.1603(c).

channels through alternative means”¹³—not to provide added notice (or added carriage) to programming vendors themselves. While it is no longer clear that a rigid notice rule serves any useful purpose—particularly given the thousands of programming choices available to consumers, the frequent changes in the carriage of those services, the manner in which such services are packaged and sold, and the fact that the rule irrationally applies only to cable operators—it certainly was never intended to give programming vendors the power to force continued carriage on cable systems. In contrast, Section 76.1601 of the Commission’s rules requires cable operators to provide notice directly to a broadcast station before “deleting from carriage or repositioning that station,”¹⁴ thus enabling the station to pursue a complaint for an asserted violation of that provision. Nor is there any basis for Ovation to claim third-party standing in this case; subscribers would be able to vindicate their own rights if there had been a violation of Section 76.1603.¹⁵

Second, Ovation’s asserted claim under Section 76.1603 is not ripe for review. TWC has yet to delete Ovation’s programming service, and so it is premature for Ovation to allege a notice violation tied to a programming change that has not occurred. Contrary to the suggestion in Ovation’s Petition, it remains possible that the parties could agree to a temporary or longer-term extension of the current agreement, thus delaying the trigger for any notice obligations under Section 76.1603. Indeed, these ripeness considerations only underscore the reasonableness of the notice that TWC has provided to its subscribers regarding the *possible* deletion of Ovation.

¹³ Petition at 7 (quoting *Time Warner Cable*, Order, 21 FCC Red 8808 ¶ 7 (MB 2006)).

¹⁴ 47 C.F.R. § 76.1601.

¹⁵ See *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (holding that a party “generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties”); *Kowalski v. Tesmer*, 543 U.S. 125, 130-31 (2004) (declining to allow third-party standing where there was no “hindrance” to the ability of the rights-holder “to protect his own interests”).

As discussed below, in cases where it is not certain 30 days ahead of time that the programming service will be deleted upon expiration of the carriage agreement (as often is the case), it is hardly reasonable—or, for that matter, helpful to subscribers—to expect a cable operator to tell subscribers that a deletion is inevitable.

B. Section 76.1603 Does Not Require 30 Days' Advance Notice in These Circumstances

Even apart from these standing and ripeness deficiencies, Ovation's Petition overlooks the fact that Section 76.1603, by its terms, does not require 30 days' notice where the programming change is not "within the control of the cable operator."¹⁶ There are various circumstances in which TWC makes a unilateral decision to drop or reposition a programming service—but that is not what has occurred in this case. Rather, as explained above, Ovation and TWC until very recently were actively discussing terms in an effort to reach a mutually acceptable agreement to continue carriage on TWC's systems beyond December 31, 2012. Indeed, TWC remains willing to carry Ovation in spite of its extremely low ratings and lack of distinctive programming, provided the economic terms make better sense for TWC and its customers. Where, as here, the outcome ultimately depends on *bilateral* negotiations requiring both parties to reach agreement, the possibility of a programming change is not "within the control of the cable operator" and thus does not trigger the 30-day notification requirement in Section 76.1603(b). In fact, given that TWC cannot carry Ovation without terms that are acceptable to Ovation as well as TWC, continued carriage is within *neither* party's unilateral control.¹⁷

¹⁶ *Id.* § 76.1603(b).

¹⁷ To the extent the Media Bureau's order in the 2006 case involving TWC and NFL Network suggests otherwise, TWC submits that it was wrongly decided and should not be adopted by the full Commission. There, the Bureau found that the deletion of NFL

C. In Any Event, TWC Has Satisfied Any Applicable Notice Requirements

Even if Section 76.1603 required 30 days' notice in these circumstances, TWC satisfied that obligation. Ovation acknowledges that Section 76.1603 contains three basic requirements: (1) that notice must be given 30 days in advance of a service change; (2) that the notice must "separately identif[y]" the programming service to be deleted; and (3) the cable operator may provide notice "using any reasonable written means at its sole discretion."¹⁸ The undisputed facts in this case demonstrate that TWC's subscriber notifications meet each requirement.

Ovation does not appear to dispute the fact that TWC provided notice to its subscribers at least 30 days before the current agreement's expiration date of December 31, 2012. Indeed, TWC provided notice about the possible deletion of Ovation in more than 130 local newspapers throughout its footprint in November 2012, more than 30 days in advance.¹⁹ Ovation also does not seriously dispute the fact that TWC's notifications "separately identif[y]" Ovation as a programming service subject to possible deletion. Indeed, every notification quoted in the Petition identifies Ovation by name as a programming service for which TWC "may be required to cease carriage . . . in the near future" absent a new agreement.²⁰

Network was within TWC's control because TWC had rejected an offer from NFL Network to "continue to carry the network on pre-existing terms and conditions for 30 days," and it even suggested that TWC could somehow time the closing of the multi-billion dollar acquisition of Adelphia (the trigger for the deletion of NFL Network from the cable systems acquired from Adelphia) to line up with the notice requirement. *NFL Network Reconsideration Order* ¶¶ 17, 19. But the prospect of deletion in that case still depended on the outcome of the parties' bilateral negotiations, and in any event, the Bureau entirely ignored the difficulty in projecting the closing date for a major transaction subject to regulatory review.

¹⁸ Petition at 6 (quoting 47 C.F.R. § 76.1603(c)).

¹⁹ See Exhibit 2.

²⁰ See Petition at 3-5.

Moreover, it is clear that TWC provided notice using “reasonable written means.” Section 632(c) of the Communications Act, as implemented by Section 76.1603(e), grants cable operators “sole discretion” to determine what form of written notice is reasonable under the circumstances,²¹ and the statute’s legislative history reflects Congress’s determination that “[t]here is no need for intrusive regulations to dictate how cable operators communicate this 30-day advance notice to subscribers.”²² Here, TWC elected to provide notice to its subscribers regarding the possible deletion of Ovation by publishing notifications in local newspapers of general circulation—an approach that the Commission has consistently upheld as “reasonable” under Section 76.1603.²³

Ovation’s assertion that TWC’s notice consisted of a single announcement in “one regional newspaper” is patently false.²⁴ In fact, as noted, TWC published notices regarding the possible deletion of Ovation in more than 130 local newspapers of record throughout its footprint, at significant expense—a product of TWC’s well-developed internal mechanism for identifying programming services that are up for renewal and providing notice to all subscribers that may be affected by the loss of such programming services.²⁵ As discussed above, before the Media Bureau’s 2006 decision in the *NFL Network* case, TWC’s customary practice was *not* to

²¹ See 47 U.S.C. § 552(c), 47 C.F.R. § 76.1603(e).

²² H.R. Rep. No. 104-204, at 112 (1995); see also *id.* at 111 (signaling an intent to “provide cable operators with flexibility to use ‘reasonable’ written means”).

²³ See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, 14 FCC Rcd 5296 ¶ 156 (1999) (“[N]otices of rate changes provided to subscribers through written announcements on the cable system or in the newspaper will be presumed sufficient.”); *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Order and Notice of Proposed Rulemaking, 11 FCC Rcd 5937 ¶ 39 (1996) (same) (“*Cable Act Interim Order*”).

²⁴ Petition at 7; see also *id.* at 5 & nn. 7, 8.

²⁵ See Exhibit 2.

provide 30 days' notice regarding every programming service that was up for renewal; rather, TWC, like the rest of the cable industry, provided notice only when it was sufficiently certain that the programming service would in fact be subject to deletion upon expiration of the carriage agreement. In the wake of the *NFL Network* decision, however, TWC undertook a comprehensive review of its notification policies and developed its current procedure for publishing widespread notices in hundreds of local newspapers regarding *any* programming service that is up for renewal. TWC is not aware of any other cable operator that provides such widespread notices more than 30 days in advance of all expiring carriage agreements. Indeed, to the best of TWC's knowledge, most cable operators continue to refrain from providing any notice to subscribers unless and until they are reasonably certain that a programming service will be dropped. Far from causing "systemic abuses" or "serious widespread violation[s],"²⁶ the notification procedures TWC followed in this case represent the greatest degree of notice provided in the industry.

Moreover, out of an abundance of caution, TWC provided additional notice regarding the possible deletion of Ovation through its bills to subscribers, even though both Congress and the Commission have made clear that cable operators need not provide such notice.²⁷ As the Petition acknowledges, TWC's subscriber bills provided a link to a page on TWC's website that, like the newspaper notices, identifies Ovation as a programming service for which TWC "may be required to cease carriage" unless the parties renewed their agreement.²⁸ Regrettably, the link provided in one local area directed subscribers to the wrong page, but TWC has since corrected

²⁶ Petition at 9.

²⁷ See *Cable Act Interim Order* ¶ 39 ("Notice need not be inserted in the subscriber's bill.") (quoting S. Rep. No. 104-230, at 169 (1996)).

²⁸ See Petition at 4-5.

that error. Regardless, Ovation's complaints regarding TWC's online notifications are beside the point, since TWC's newspaper notices independently satisfy the requirement to inform customers of programming changes through "reasonable written means." Moreover, the rule cannot and should not be applied on a strict-liability basis; no system will be completely error-free, and where, as here, a party has devoted significant efforts to good-faith compliance, that is sufficient to satisfy the rule.

Unable to establish that TWC's notices violated any of the black-letter requirements of Section 76.1603, Ovation takes issue with the specificity of the notices, suggesting that TWC was obligated to "notify [its] subscribers that Ovation *will be deleted* as of December 31, 2012."²⁹ But the Commission has never required subscriber notices to be so definitive and specific—and with good reason: Such a requirement would be wholly unworkable and contrary to the interests of consumers, and in turn, arbitrary and capricious. In a marketplace where dozens of carriage agreements are up for renewal each year, and where cable operators and video programmers routinely agree to extensions of those agreements, often at the last minute, a rule requiring cable operators to state definitively, 30 days in advance, that a given programming service "will be deleted" on a date certain would be entirely unreasonable. Indeed, because the ultimate outcome is almost always unknown 30 days before a programming agreement is set to expire, Ovation's reading of Section 76.1603 would result in a blanket requirement to tell subscribers—counterfactually—that *all* expiring agreements will result in deletions.

Such statements would needlessly confuse and frustrate consumers, as such definitive predictions seldom would come to fruition. In some cases, consumers wishing to retain access to a given network might feel compelled to undergo the time and expense of switching video

²⁹ Petition at 7 (emphasis added).

providers in response to such a notice, only to find out later that the cable operator and the programming vendor reached a renewal agreement and that such switching was unnecessary.³⁰ In turn, the existence of such a requirement likely would enhance programming vendors' ability to use blackout threats as a ploy to drive up carriage fees, as they know that their threats would put cable operators at risk of losing customers simply because the programming at issue might be pulled. In other circumstances, where a programming vendor is eager to renew a carriage agreement, a cable operator's statement that the network "will be deleted" simply because the agreement is approaching an expiration date would risk harming the programmer's standing with viewers and advertisers. Indeed, despite the positions taken in the Petition, TWC is confident that Ovation would not have preferred for TWC to state in November 2012—while both sides remained in regular communication regarding potential new carriage terms—that there was no possibility of renewal. A cable operator could even expose itself to liability for making false statements by asserting that a programming service "will be deleted" in situations where a continued carriage remains possible (and especially where it remains likely).

In an effort to bolster its claim, Ovation pretends that in this case TWC had "immediate plans to delete carriage" of the network at the time TWC published the legal notices around the country.³¹ That is simply not the case. TWC did not have any definitive "plans" regarding Ovation when it made arrangements to publish its newspaper notices some 40 days in advance of the agreement's expiration date. Moreover, while TWC was unwilling to extend carriage *on the terms proposed by Ovation*, TWC offered an alternative arrangement that Ovation declined to accept. The fact that Ovation could have accepted TWC's December 20 offer belies Ovation's

³⁰ Of course, this switching behavior is less likely where the programming service at issue has low ratings and undifferentiated content, like Ovation's, and where cable subscribers today have access to thousands of programming options.

³¹ Petition at 9.

claim that deletion of the network on December 31 was an inevitable outcome that TWC was bound to disclose with greater certainty.

Ovation's proposed construction of Section 76.1603 also would lead to the absurd result that an expiring agreement would invariably be subject to an extension at the unilateral option of the programming vendor. Under Ovation's view, a cable operator should be barred from deleting a programming service unless it made crystal clear that such deletion would occur at least 30 days in advance. But because a cable operator almost never "knows" to any degree of certainty what the outcome of ongoing negotiations will be 30 days later, it would be unable to provide the requisite notice in most instances. Only on the eve of an expiration would the cable operator be able to determine that the programming service "will be deleted,"³² but under Ovation's view, that determination would only trigger the start of a new 30-day notice period. And if the cable operator were to entertain renewed discussions during that 30-day period, thus calling into question the certainty of the expiration, it would risk triggering yet another 30-day period before it could drop the programming service. Thus, Ovation's proposed rule is not only unworkable, but it would give cable operators the perverse incentive *not* to consider such offers, in order to avoid any uncertainty and to preserve the ability to state definitively that deletion would occur by a date certain. Congress plainly did not intend that these customer notice requirements would be used as a sword by video programmers to guarantee continued carriage, or would serve as a vehicle to drive parties away from agreement by deterring cable operators from considering new offers.

For all these reasons, the Commission should reject Ovation's proposed reading of Section 76.1603 and find that TWC's notifications satisfied the rule.

³² *Id.* at 7.

II. OVATION HAS NOT DEMONSTRATED THAT IT IS ENTITLED TO INJUNCTIVE RELIEF

Even apart from the absence of any rule violations warranting Commission action of any kind, Ovation has plainly failed to demonstrate why it is entitled to the “immediate injunctive relief” it seeks.³³ An injunction forcing TWC to continue carrying Ovation absent a new agreement would be beyond the Commission’s statutory authority, represent a drastically disproportionate remedy for an asserted notice violation, and raise significant constitutional concerns. And even if compelled carriage were an appropriate remedy in the abstract, Ovation has failed to meet the Commission’s four-factor test for evaluating requests for preliminary injunctive relief. The Commission thus should deny Ovation’s request for injunctive relief.

A. Compelled Carriage Is an Inappropriate Remedy for Alleged Violations of Section 76.1603

As an initial matter, Ovation utterly fails to explain why the compelled-carriage remedy it seeks would be at all appropriate for an alleged violation of Section 76.1603. As noted above, Section 76.1603 is a rule designed the safeguard the interests of *customers*, not programming vendors; Ovation thus should not be permitted to use the rule as a sword to secure continued carriage on preferential terms that it could not secure through negotiations. Indeed, such a remedy would affirmatively harm TWC’s customers, as it would require continued payment for a service that very few customers are interested in obtaining. While TWC did not violate the Commission’s rules in this case, a far more appropriate response in the event of a violation of Section 76.1603 would be a Notice of Apparent Liability for Forfeiture, as the Commission almost invariably has agreed in analogous cases.³⁴

³³ *Id.* at 11.

³⁴ *See, e.g., Cablevision Sys. Corp.*, Notice of Apparent Liability for Forfeiture and Order, 24 FCC Rcd 1104 ¶ 1 (EB 2009) (finding that “Cablevision is apparently liable for a

More fundamentally, granting the requested relief would present significant statutory and constitutional concerns. From a statutory perspective, nothing in Title VI remotely authorizes the Commission to grant an injunction that would compel carriage on cable systems in order to address a potential notice violation. Nor does Section 4(i), on which Ovation relies, support issuance of an injunction, because compelling carriage is not reasonably necessary to the Commission's fulfillment of any statutory responsibility.³⁵ To the extent that requiring advance notice of programming changes even remains a legitimate goal in today's extraordinarily diverse programming marketplace, the Commission's forfeiture authority is more than adequate to address and deter violations of Section 76.1603.

Even assuming the Commission has statutory authority to issue injunctive relief here, an order compelling TWC to carry Ovation would usurp TWC's right as a speaker to decide whether and when it wishes to engage in speech.³⁶ Indeed, courts have applied a heightened standard to requests for preliminary injunctions where the relief sought entails a "significant risk" of infringing on a party's constitutional rights.³⁷ Ovation has not articulated any compelling or important governmental interest that would remotely justify such an intrusion into

forfeiture in the amount of seven thousand five hundred dollars (\$7,500)" for "violat[ing] Section 76.1603(b) of the Commission's Rules").

³⁵ See *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (striking down order imposing network neutrality requirements based on the Commission's failure to demonstrate a sufficient nexus with any concrete statutory responsibility).

³⁶ See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (striking down a rule compelling a newspaper to engage in speech as a blatant "intrusion into the function of editors"); *Riley v. Nat'l Fed. of the Blind, Inc.*, 487 U.S. 781, 790-91 (1988) (noting the presumption under the First Amendment that "speakers, not the government, know best both what they want to say and how to say it").

³⁷ See *Overstreet v. United Bhd. of Carpenters & Joiners of Am., Local Union No. 1506*, 409 F.3d 1199, 1208 n.13, 1209 (9th Cir. 2005); *McDermott ex rel. NLRB v. Ampersand Publ'g, LLC*, 593 F.3d 950, 958 (9th Cir. 2010) ("[T]hose seeking such injunctive relief must establish particularly strong showings of likelihood of success and irreparable harm if there is some risk of offending First Amendment rights in the process.").

TWC's speech rights. To the contrary, giving Ovation a right of compulsory carriage at the expense of competing programmers, solely because TWC published notices indicating that carriage "may be deleted" (instead of "will be deleted"), would be anathema to the First Amendment.

Moreover, because Section 76.1603 applies only to "cable operator[s],"³⁸ not to other competing multichannel video programming distributors ("MVPDs") or other programming distributors, granting an injunction (or any other relief under Section 76.1603) would entail the sort of "distin[ct]ions among different speakers" that courts usually find constitutionally invalid.³⁹ Such an order also would likely violate the Fifth Amendment's guarantee of equal protection; because Section 76.1603 is limited to cable operators, it "singles out one or a few for uniquely disfavored treatment," and in such cases, "[n]owhere are the protections of the Equal Protection Clause more critical."⁴⁰ In today's competitive marketplace, the Commission lacks any rational justification for enforcing notice requirements that single out cable operators for burdens, and it certainly cannot compel carriage on cable systems based on an irrational construction of a rule while leaving other MVPDs' notice practices entirely free from scrutiny. These significant constitutional issues suggest that, at the very least, the Commission should grant appropriate deference to a cable operator's "discretion" in providing "reasonable" notice

³⁸ See 47 C.F.R. §§ 76.1603(b), (c), (e).

³⁹ *Citizens United v. Fed. Elec. Comm'n*, 130 S. Ct. 876, 898 (2010).

⁴⁰ *News America Pub., Inc. v. FCC*, 844 F.2d 800, 813, 814 (D.C. Cir. 1988) (applying heightened scrutiny to strike down a statutory provision that prevented the Commission from extending any existing temporary waivers from the cross-ownership rules but permitted the Commission to grant new waivers, where News America was the only company with a preexisting waiver and thus received less favorable treatment under the Commission's rules than its competitors seeking new waivers).

under the rule, and should not engage in the sort of hyper-technical, *post hoc* second-guessing of customer notifications that the Petition seeks.

B. Ovation Has Not Met the Commission’s Four-Factor Test for Preliminary Injunctive Relief

Even if compelled carriage were an appropriate remedy for alleged violations of Section 76.1603 (and it is not), Ovation has failed to demonstrate that it is entitled to such relief. In determining whether interim injunctive or some other form of emergency relief should be granted, the Commission follows *Virginia Petroleum Jobbers Ass’n v. Federal Power Comm’n*, which provides the relevant standard.⁴¹ To justify emergency relief, a petitioner must demonstrate that (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if injunctive relief is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.⁴²

The Petition falls short on all four prongs. Apart from conclusory assertions that TWC’s conduct has violated Commission notice requirements—which, as set forth above, are demonstrably incorrect—Ovation has not shown that it is likely to prevail on the merits of its arguments. Nor has Ovation carried its burden on irreparable harm. Although the Petition claims that “irreparable injury will be suffered by Ovation,” the only harms actually asserted in

⁴¹ *Virginia Petroleum Jobbers Ass’n v. Federal Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified by *Washington Metropolitan Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977). *See, e.g., Regulation of Prepaid Calling Services*, Order, 22 FCC Rcd 5652 (WCB 2007); *Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use*, Third Order on Reconsideration, 19 FCC Rcd 10777 ¶ 25 (IB 2004); *Auction of Licenses for VHF Public Coast and Location and Monitoring Service Spectrum*, Order, 17 FCC Rcd 19746 ¶ 12 (WTB 2002).

⁴² *Virginia Petroleum Jobbers*, 259 F.2d at 925.

the Petition are harms to *viewers*, not to Ovation itself,⁴³ which again underscores Ovation’s lack of standing. In any event, Ovation does nothing to document or quantify any harms to itself. In light of TWC’s First Amendment rights, the Commission could not compel carriage absent a showing (at a bare minimum) that Ovation otherwise would be unable to reach viewers.⁴⁴ Any such claim would be wholly implausible here, given the other MVPD platforms available to Ovation, not to mention the Internet.

Ovation also glibly asserts that TWC “will not be harmed” by an injunction.⁴⁵ To the contrary, as discussed above, an injunction would do significant damage to TWC’s constitutional rights under the First and Fifth Amendments, would force TWC to devote valuable capacity on its cable systems throughout the country to the carriage of Ovation instead of more popular programming, and would require TWC—and, in turn, its customers—to pay licensing fees to Ovation above what is commercially reasonable for its low-rated, undifferentiated programming service.

Finally, Ovation has not demonstrated that an injunction would be in the public interest. As noted above, a ruling requiring TWC to tell its subscribers that a programming service “will be dropped” every time a carriage agreement comes up for renewal would substantially harm the public interest, as it would breed unnecessary confusion, frustration, and anxiety for viewers.

⁴³ See Petition at 11 (asserting that, without an injunction, viewers “will be deprived of their right to have the opportunity to voice their objections” and “will not have sufficient time to arrange for alternative means to receive Ovation”).

⁴⁴ Notably, the Supreme Court narrowly upheld the must-carry provisions of the 1992 Cable Act only because it found that monopoly conditions created a bottleneck that threatened the very viability of over-the-air broadcasting. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 220 (1997). Ovation has made no comparable assertion of a bottleneck and could not remotely show that its viability is threatened by the nuances of TWC’s printed notices.

⁴⁵ Petition at 11.

Moreover, issuing an injunction requiring TWC to continue carrying Ovation at the rates set forth in the expiring agreement would harm consumers by requiring continued payment for a service that very few customers are interested in obtaining. Such a remedy would only frustrate TWC's efforts to tailor its service offerings to its customers' needs and to constrain the prices that customers pay for those offerings.

CONCLUSION

For the foregoing reasons, TWC requests that the Commission dismiss or deny the Petition.

Respectfully submitted,

TIME WARNER CABLE INC.



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December 26, 2012

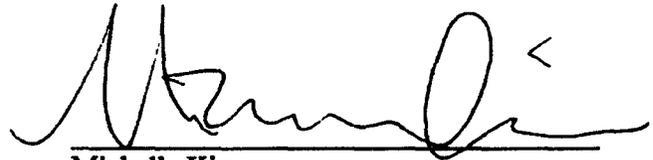
EXHIBIT 1

DECLARATION OF MICHELLE KIM

1. I, Michelle Kim, am Senior Vice President and Chief Counsel, Programming, for Time Warner Cable Inc. ("TWC"). I submit this Declaration in connection with TWC's Opposition to the Emergency Petition for Declaratory Ruling and Enforcement Order and for Injunctive Relief filed by Ovation LLC ("Opposition").

2. I have read the foregoing Opposition and the attached exhibits and am familiar with their contents.

3. I declare under penalty of perjury that the facts contained within the foregoing Opposition are true and correct to the best of my knowledge, information, and belief formed after reasonable inquiry, that the Opposition is well grounded in fact, that it is warranted by existing law or a good-faith argument for the extension, modification or reversal of existing law, and that it is not interposed for any improper purpose.

A handwritten signature in black ink, appearing to read 'Michelle Kim', written over a horizontal line. The signature is cursive and includes a small mark resembling a less-than sign (<) at the end.

Michelle Kim
Senior Vice President and
Chief Counsel, Programming
Time Warner Cable Inc.

EXHIBIT 2

Notices of Possible Ovation Deletion Published in November 2012

#	Name of Publication	Geographic Area
1	Albany Times Union	Albany
2	Berkshire Eagle	
3	Times of Ti	
4	The Charlotte Observer	Carolinas (Charlotte area)
5	Asheboro Courier Tribune	Carolinas (Greensboro area)
6	Burlington Times News	
7	Greensboro News & Record	
8	High Point Enterprise	
9	Mt. Airy News	
10	Winston Salem Journal	
11	The Florence Morning News	Carolinas (South Carolina)
12	The Island Packet	
13	The Post and Courier	
14	The State Newspaper	
15	The Sun News	
16	Carteret News Times	Carolinas (Wilmington/Fayetteville/Raleigh area)
17	Daily Advance	
18	Elizabeth City Daily Advance	
19	Fayetteville Observer	
20	Greenville Daily Reflector	
21	Jacksonville Daily News	
22	Murfreesboro Daily Herald	
23	Newport Carteret News Times	
24	Raleigh News and Observer	
25	The Robesonian	
26	Whiteville News	
27	Wilmington Star News	Central New York
28	Ithaca Journal	
29	Observer-Dispatch	
30	Post-Standard	
31	Press-Republican	
32	The Daily Star	
33	The Evening Sun	
34	The Evening Times	
35	The Evening Tribune	
36	The Leader	
37	The Post Journal	
38	The Press & Sun Bulletin	

#	Name of Publication	Geographic Area
39	The Star Gazette	Central Texas
40	Watertown Daily Times	
41	Austin American Statesman	
42	Killeen Daily Herald	
43	Waco Tribune Herald	
44	Bluefield Daily Telegraph (VA)	National division
45	Bristol Herald (VA)	
46	Coeur d'Alene Press (ID)	
47	Gunnison Country Times (CO)	
48	Telluride Daily Planet (CO)	
49	Moscow-Pullman Daily News (WA)	
50	Yuma Daily Sun (AZ)	
51	Dothan Eagle (AL)	
52	Enterprise Ledger (AL)	
53	Bowling Green Daily Times	Insight areas (OH, KY)
54	Columbus Dispatch	
55	Covington Kentucky Enquirer	
56	Evansville Courier & Press	
57	Lexington Herald Leader	
58	Louisville Courier Journal	
59	Barstow Desert Dispatch	Los Angeles
60	Imperial Valley Press	
61	Los Angeles Times	
62	Palm Springs Desert Sun	
63	San Diego Union Tribune	
64	Bellefontaine Examiner	Mid-Ohio
65	Fort Wayne Journal Gazette	
66	Lima News	
67	Marietta Times	
68	Portsmouth Daily Times	
69	The Daily Standard	
70	The Toledo Blade	
71	Zanesville Times Recorder	
72	Ashland Independent	Midwest (IL/IN/KS/KY/MO/NE/WV)
73	Clarksburg Telegram	
74	Evansville Courier	
75	Ironton Tribune	
76	Kansas City Star	
77	Lexington Herald	
78	Lincoln Journal	

#	Name of Publication	Geographic Area
79	Louisville Courier	
80	Madison Courier	
81	Owensboro Messenger	
82	Terre Haute Tribune	
83	Athol Daily News	New England
84	Bangor Daily News	
85	Berlin Daily Sun	
86	Conway Daily Sun	
87	Keene Sentinel	
88	Kennebec Journal	
89	Portland Press Herald	
90	Waterville Morning Sentinel	New York City (Hudson Valley area)
91	Poughkeepsie Journal	
92	Middletown Times Herald Record	New York City (NYC/NJ area)
93	The Daily News	
94	The Record	
95	The Staten Island Advance	North Texas
96	Dallas Morning News	
97	El Paso Times	
98	Wichita Falls Times Record News	Northeast Ohio
99	Akron Beacon Journal	
100	Ashland Times	
101	Ashtabula Star Beacon	
102	Canton Repository	
103	Cleveland Plain Dealer	
104	Elyria Chronicle	
105	Erie Times	
106	Franklin News Herald	
107	Lorain Morning Journal	
108	Mansfield News Journal	
109	New Philadelphia Times	
110	Norwalk Reflector	
111	Port Clinton News Herald Dover	
112	Sharon Herald	
113	Steubenville Herald Star	
114	Warren Tribune	
115	Youngstown Vindicator	Hawaii
116	Honolulu Star-Advertiser	South Texas
117	Corpus Christi Caller Times	
118	Del Rio News Herald	

#	Name of Publication	Geographic Area
119	Laredo Morning News	
120	San Antonio Express & News	
121	Cincinnati Enquirer	
122	Dayton Daily News	
123	Greenville Daily Advocate	
124	Hillsboro Time Gazette	Southwest Ohio
125	Richmond Palladium Item	Southwest Ohio
126	Springfield News Sun	Southwest Ohio
127	Wilmington News Journal	Southwest Ohio
128	Batavia	
129	Chronicle	
130	Democrat and Chronicle	Western New York (Rochester Area)
131	FL Times	
132	Green Bay Press-Gazette	
133	Milwaukee Journal Sentinel	Wisconsin

EXHIBIT 3

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Southern California

Including: Los Angeles, Orange County, parts of Riverside County, parts of San Bernardino County, Ventura.

Time Warner Cable's agreements with programmers and broadcasters to carry their services and stations routinely expire from time to time. We are usually able to obtain renewals or extensions of such agreements, but in order to comply with applicable regulations, we must inform you when an agreement is about to expire. The following agreements are due to expire soon, and we may be required to cease carriage of one or more of these services/stations in the near future.

Africa Channel, AYM Sports, Bandamax, CBTV Michoacan, Current TV, De Pelicula, De Pelicula Clasico, E!, E! HD, Ecuavisa, Encore, Encore Drama, Encore Love, Encore Mystery, Encore WAM, Encore Action, Encore Westerns, Go!TV, Go!TV HD, Hallmark, Hallmark HD, Hallmark Movie Channel, Hallmark Movie Channel HD, Halogen TV, IFC, IFC HD, Latinoamerica TV, Lifetime, Lifetime HD, Lifetime Movie Network, Lifetime Movie Network HD, Lifetime Real Women, Mexico 22, Movieplex, Music Choice Channels, NHL Center Ice, NHL Network, NHL Network HD, Once Mexico, ShopNBC, Smithsonian Channel HD, Sprout, STARZ!, STARZ HD, STARZ East, STARZ East HD, STARZ Edge, STARZ Cinema, STARZ in Black, STARZ Kids & Family, Skylink, Style, Style HD, WE, WE HD, Youtoo and KEYT.

In addition, from time to time we make certain changes in the services that we offer in order to better serve our customers. The following changes are planned:

On or about January 1, 2013, Ovation and Ovation HD will no longer be available as part of our service offering.

Time Warner Cable will offer a Free Preview of Showtime and The Movie Channel 1/11/13 - 1/13/13. It is available to all Digital subscribers and may contain PG, PG-13, TV-14, TVMA and R rated programs. If you wish to have this Preview blocked, and for parental control information, visit [twc.com](#) or call 1-800-TWCABLE. Programming is subject to change. Not all services available in all areas. Restrictions may apply.

On or after January 3, 2013, KCET (Kids & Family DT2), channel 192, will be rebranded to KCET (KCETLink DT2).

On or after January 7, 2013, Telefutera will be rebranded to UniMas.

On or after January 16, 2013, Golf Channel will be made available to customers with subscriptions to Premium International Korean Packages.

The below services may launch on or after January 16, 2013. The new services listed below will require two-way capable digital cable ready equipment, such as a Time Warner Cable-provided set-top box or a CableCARD-equipped Unidirectional Digital Cable Product (UDCP) used in conjunction with a Tuning Adapter. Other UDCPs may not be able to access these services without additional equipment, such as a set-top box: Destination America HD, Disney Jr HD, ESPN Deportes HD, MTV 2 HD, OWN HD, The Military Channel HD, TruTV HD, TV Land HD, TWC Sports Special Programming, and TWC Sports Special Programming HD.

On or after January 23, 2013, Nuvo will be moving from Variety Tier to Espanol Tier.

Products	Services	Support	Contact Us	Other Sites	Follow Us
Packages	Pay Your Bill Online	Browse Support Topics	Live Chat	TWC Conversations	Facebook
TV	Ways to Pay Your Bill	Program Your Remote Tool	Contact Us	Cable Media Sales	Twitter
Internet	Moving?	Channel Lineup	Investor Relations	Connect a Million Minds	YouTube
Phone	MyServices Login	Closed Captioning	TWC Stores	Mi Cultura	Untangled Blog
IntelligentHome	TWC Apps	Welcome to TWC		TV Commercials	

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of December, 2012, I caused a true and correct copy of the foregoing Opposition of Time Warner Cable Inc. to Emergency Petition to be served by hand-delivery (except where e-mail delivery is indicated) on the following:

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