

Application for Renewal of Cable Franchise
Applicant's Name: Time Warner Entertainment Company, L.P.
Through its Hawaii Division, Oceanic Time Warner Cable
Date of Application: July 21, 2009

EXHIBIT B

FCC SDV NALs and Orders
(Filed 01/19/09 and 06/26/09)

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of	)	File Number EB-07-SE-352
)	
Oceanic Time Warner Cable, a division of Time Warner Cable, Inc.	)	NAL/Acct. No. 200932100022
)	
Oceanic Kauai Cable System	)	FRN 0018049841
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: January 19, 2009

Released: January 19, 2009

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”), we find that Time Warner Cable, Inc. (“TWC”) apparently willfully violated a Commission Order and Section 76.939 of the Commission’s Rules (“Rules”)¹ by failing to comply with a Bureau directive to describe the methodology it planned to use to refund money to subscribers harmed by the company’s apparent violation of various Commission Rules.² We conclude, pursuant to Section 503(b) of the Communications Act of 1934, as amended (“Act”),³ that TWC is apparently liable for a forfeiture in the amount of twenty-five thousand dollars (\$25,000).

II. BACKGROUND

2. On November 8, 2007, the Spectrum Enforcement Division of the Enforcement Bureau (“Bureau”) issued a Letter of Inquiry (“LOI”)⁴ to TWC based on complaints that the company had moved certain cable channels that previously had been accessible to subscribers using CableCARD-equipped UDCPs, such as digital cable ready television sets and digital video recorders, to a switched digital video (“SDV”) platform. In doing so, TWC made the affected channels inaccessible to subscribers unless they leased a set top box from the company. The LOI sought information on a number of issues, and asked the company to explain how its implementation of SDV was consistent with various statutory and regulatory provisions and orders.

3. TWC responded to the LOI on November 30, 2007,⁵ and subsequently provided additional information to the Bureau in response to supplemental LOIs and information requests. On October 15, 2008, the Enforcement Bureau issued the *Oceanic Kauai NAL and Order*, finding that the

¹ 47 C.F.R. §76.939 (“Cable operators shall comply with ... the Commission’s requests for information, orders, and decisions.”).

² See *Oceanic Time Warner Cable, Kauai Cable System*, Notice of Apparent Liability for Forfeiture and Order, 23 FCC Rcd 14962, 14976-77, paras. 39-40, 43 (Enf. Bur. 2008) (“*Oceanic Kauai NAL and Order*”) (response received).

³ 47 U.S.C. § 503(b).

⁴ See Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission to Mark Lawrence-Apfelbaum, Esq., Executive Vice President and General Counsel, Time Warner Cable, Inc. (Nov. 8, 2007) (“Nov. 8 LOI”).

⁵ See Letter from Arthur H. Harding, Fleischman and Harding LLP and Matthew A. Brill, Latham & Watkins LLP, Counsel for Time Warner Cable, to Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (Nov. 30, 2007) (“Nov. 30 LOI Response”).

company's migration of programming to an SDV platform had apparently violated various Commission Rules and orders. Consequently, the *Oceanic Kauai NAL and Order* proposed a forfeiture against the company in the amount of \$20,000 for the company's apparent violations.

4. Additionally, the *Oceanic Kauai NAL and Order* directed the company to provide refunds to subscribers harmed by the implementation and to provide us with an outline of the company's planned methodology for issuing those refunds.⁶ Specifically, the *Oceanic Kauai NAL and Order* ordered TWC, within ninety (90) days of release of the *Oceanic Kauai NAL and Order*, to take the following steps:

- (a) For former CableCARD customers that began to lease any set-top boxes from TWC following notice of a possible SDV deployment, TWC must refund the difference in cost (if any) between the charges for the TWC set-top boxes and the CableCARDs previously leased by such customers; and
- (b) For CableCARD customers that kept their CableCARDs even after notice of the SDV deployment, TWC must refund the customers' subscriber fees based on the diminished value of their service following the movement of linear programming to an SDV platform and reduce their rates on a going-forward basis accordingly.

5. The *Oceanic Kauai NAL and Order* also required TWC to submit to the Enforcement Bureau an explanation of the method the company plans to use to determine the appropriate amount of refunds, the number of customers receiving refunds, the total value of such refunds, and the planned timing of such refunds. The *Oceanic Kauai NAL and Order* directed TWC to submit this information to the Enforcement Bureau for review and approval within thirty (30) days of the release of this decision and to proceed with its proposed refund plan within sixty (60) days of such submission provided the Enforcement Bureau approves TWC's proposed refund plan within thirty (30) days of TWC's submission.⁷

6. TWC responded to the NAL on November 14, 2008.⁸ The company also filed a Petition for Reconsideration and a Request for Stay of the *Oceanic Kauai NAL and Order*.⁹ TWC did not provide any information about its methodology for issuing refunds to subscribers harmed by its apparent violations of Commission Rules, instead arguing that the *Oceanic Kauai NAL and Order* was unlawful. Nor has the company taken any other steps to comply with the *Oceanic Kauai NAL and Order*. Instead, TWC requests that the *Oceanic Kauai NAL and Order* either be stayed, pending final resolution of the issues in this matter, or be cancelled in its entirety.¹⁰

III. DISCUSSION

A. TWC Apparently Has Violated a Commission Order And Section 76.939

7. We find that TWC apparently willfully¹¹ violated a Commission order and Section

⁶ *Oceanic Kauai NAL and Order*, 23 FCC Rcd at 14976, para. 39-40, 43.

⁷ *Id.* at 14976, paras. 39-40.

⁸ *Time Warner Cable, Inc.'s Response to Notices of Apparent Liability and Request for Cancellation of Proposed Forfeitures*, File No. EB-07-SE-352 (filed Nov. 14, 2008) ("TWC NAL Response").

⁹ *Petition for Reconsideration of Time Warner Cable, Inc.*, File No. EB-07-SE-352 (filed Nov. 14, 2008) ("TWC Petition for Reconsideration"); *Time Warner Cable, Inc. Request for Stay Pending Resolution of Petition for Reconsideration and Request for Cancellation of Proposed Forfeitures*, File No. EB-07-SE-352 (filed Nov. 14, 2008) ("TWC Request for Stay").

¹⁰ We will address those filings by separate order.

¹¹ Section 312(f)(1) of the Act defines willful as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act indicates that this definition of willful applies to both Sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the Section 503(b) context.

76.939 of the Rules. The Commission has broad investigatory authority under Sections 4(i), 4(j), and 403 of the Act, its Rules, and relevant precedent. Section 4(i) authorizes the Commission to “issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”¹² Section 4(j) states that “the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.”¹³ Section 403 grants the Commission “full authority and power to institute an inquiry, on its own motion ... relating to the enforcement of any of the provisions of this Act.”¹⁴ Pursuant to Section 76.939 of the Rules, a cable operator must comply with FCC requests for information, orders, and decisions.¹⁵

8. The *Oceanic Kauai NAL and Order* expressly directed TWC to provide the Bureau with an outline of its intended refund methodology. We reject any contention that TWC was not obligated to comply fully with the Bureau’s order because of the pendency of its Petition for Reconsideration and Request for Stay.¹⁶ The filing of such pleadings does not trigger an automatic stay of such order.¹⁷ Neither the Bureau nor the Commission has granted TWC’s Request for Stay or Petition for Reconsideration. Thus, TWC should have submitted its proposed refund methodology by November 14, 2008, in compliance with the terms of the *Oceanic Kauai NAL and Order*. As the Commission has stated, “parties are required to comply with Commission orders even if they believe them to be outside the Commission’s authority.”¹⁸ TWC failed to do so. We find, therefore, that TWC apparently willfully¹⁹ violated a Commission order and Section 76.939 of the Rules.

B. Proposed Forfeiture

9. Under Section 503(b)(1)(B) of the Act, any person who is determined by the Commission

See, e.g., Southern California Broadcasting Co., Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-88 ¶ 5 (1991) (“*Southern California Broadcasting*”).

¹² 47 U.S.C. § 154(i).

¹³ 47 U.S.C. § 154(j).

¹⁴ 47 U.S.C. § 403.

¹⁵ 47 C.F.R. § 76.939 (“Cable operators shall comply with ... the Commission’s requests for information, orders, and decisions.”). In carrying out this obligation, a cable operator also must provide truthful and accurate statements to the Commission or its staff in any investigatory or adjudicatory matter within the Commission’s jurisdiction. *Id.*

¹⁶ We further note that although TWC posits several arguments related to the refund provision, those arguments do not address that portion of the *Oceanic Kauai NAL and Order* that requires TWC to submit its proposed refund methodology to the Bureau within 30 days. Instead, TWC’s arguments decry the *issuance* of the refund to the subscribers harmed by its acts, a distinct and separate act required under the *Oceanic Kauai NAL and Order*.

¹⁷ *See* 47 C.F.R. §§ 1.102(b), 1.106(n), 1.429(k).

¹⁸ *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 para. 5 (2002) (“*SBC Forfeiture Order*”); *see also* 47 U.S.C. § 408 (Commission orders “shall continue in force for the period of time specified in the order or until the Commission or a court of competent jurisdiction issues a superseding order.”); 47 U.S.C. § 416(c) (“It shall be the duty of every person, its agent and employees ... to observe and comply with such orders so long as the same shall remain in effect”); *Peninsula Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 2832, 2834 para. 5 (2002) (subsequent history omitted) (a regulatee “cannot ignore a Commission order simply because it believes such order to be unlawful”); *World Communications Forfeiture Order*, 19 FCC Rcd at 2719-2720 (issuing forfeiture against regulatee who failed to respond to an LOI because it believed the LOI to be beyond the Commission’s jurisdiction).

¹⁹ Section 312(f)(1) of the Act defines willful as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act indicates that this definition of willful applies to both Sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the Section 503(b) context. *See, e.g., Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-88 ¶ 5 (1991) (“*Southern California Broadcasting*”).

to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.²⁰ To impose such a forfeiture penalty, the Commission must issue a notice of apparent liability and the person against whom such notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.²¹ The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.²² We conclude under this standard that TWC is apparently liable for forfeiture for its apparent willful violation of a Commission Order and Section 76.939 of the Rules.

10. Under Section 503(b)(2)(A) of the Act,²³ we may assess a cable operator a forfeiture of up to \$37,500 for each violation, or for each day of a continuing violation up to a maximum of \$375,000 for a single act or failure to act. In exercising such authority, we are required to take into account “the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”²⁴

11. Section 1.80 of the Rules and the Commission’s *Forfeiture Policy Statement* do not establish a base forfeiture amount for violations of Section 76.939, although they do establish four thousand dollars (\$4,000) as the base amount for failure to respond to Commission communications.²⁵ We find that TWC’s apparent failure to comply with the *Oceanic Kauai NAL and Order* warrants a substantially larger forfeiture. Misconduct of this type exhibits contempt for the Commission’s authority and threatens to compromise the Commission’s ability to carry out its obligations under the Act. In this case, TWC’s apparent violations have impeded our efforts to carry out the statutory dictates of Section 629 of the Act and perpetuated harm to affected subscribers.

12. We therefore propose a forfeiture of twenty-five thousand dollars (\$25,000) against TWC for its apparent violations of the *Oceanic Kauai NAL and Order* and Section 76.939. This forfeiture amount is consistent with precedent in similar cases, where companies failed to provide responses to

²⁰ 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

²¹ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

²² See, e.g., *SBC Forfeiture Order*, 17 FCC Rcd at 7591.

²³ 47 U.S.C. § 503(b)(2)(A). The Commission has amended Section 1.80(b)(3) of the Rules, 47 C.F.R. § 1.80(b)(3), three times to increase the maximum forfeiture amounts, in accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461. See *Amendment of Section 1.80 of the Commission’s Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 23 FCC Rcd 9845 (2008) (adjusting the maximum statutory amounts for broadcasters and cable operators from \$32,500/\$325,000 to \$37,500/\$375,000); *Amendment of Section 1.80 of the Commission’s Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 19 FCC Rcd 10945 (2004) (adjusting the maximum statutory amounts for broadcasters and cable operators from \$27,500/\$300,000 to \$32,500/\$325,000); *Amendment of Section 1.80 of the Commission’s Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 15 FCC Rcd 18221 (2000) (adjusting the maximum statutory amounts for broadcasters and cable operators from \$25,000/\$250,000 to \$27,500/\$300,000). The most recent inflation adjustment took effect September 2, 2008 and applies to violations that occur after that date. See 73 Fed. Reg. 44663-5. TWC’s apparent violations occurred after September 2, 2008 and are therefore subject to the higher forfeiture limits.

²⁴ 47 U.S.C. § 503(b)(2)(E). See also 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures.

²⁵ See 47 C.F.R. § 1.80(b)(4); *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd. 17087 (1997), recon. denied, 15 FCC Rcd. 303 (1999).

Bureau inquiries concerning compliance with the Commission's rules despite evidence that the LOIs had been received.²⁶

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Section 1.80 of the Rules, and the authority delegated by Sections 0.111 and 0.311 of the Commissions Rules, Time Warner Cable, Inc. is **NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of twenty-five thousand dollars (\$25,000) for its willful violation of a Commission Order and Section 76.939 of the Rules.

14. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Rules, within thirty (30) days of the release date of this *Notice of Apparent Liability for Forfeiture*, TWC **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

15. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. TWC will also send electronic notification on the date said payment is made to JoAnn.Lucanik@fcc.gov and Kevin.Pittman@fcc.gov.

16. The response, if any, must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Enforcement Bureau – Spectrum Enforcement Division, and must include the NAL/Acct. No. referenced in the caption. The response should also be e-mailed to JoAnn Lucanik, Deputy Chief, Spectrum Enforcement Division, Enforcement Bureau, FCC, at JoAnn.Lucanik@fcc.gov and Kevin M. Pittman, Esq., Spectrum Enforcement Division, FCC, at Kevin.Pittman@fcc.gov.

17. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

18. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by first class mail and certified mail return receipt requested to counsel for Time

²⁶ See e.g., *SBC Forfeiture Order*, 17 FCC Rcd at 7599-7600 ¶¶ 23-28 (ordering \$100,000 forfeiture for egregious and intentional failure to certify the response to a Bureau inquiry) (“*SBC Forfeiture Order*”); *Digital Antenna, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 23 FCC Rcd 7600, 7602 (Spectr. Enf. Div., Enf. Bur. 2008) (proposing \$11,000 forfeiture for failure to provide a complete response to an LOI); *BigZoo.Com Corporation*, Forfeiture Order, 20 FCC Rcd 3954 (Enf. Bur. 2005) (ordering \$20,000 forfeiture for failure to respond to an LOI).

Warner Cable, Inc., Matthew A. Brill, Esq., Latham & Watkins LLP, 555 11th Street, NW, Suite 1000, Washington, DC, 20004.

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink that reads "Kris A Monteith". The signature is written in a cursive, flowing style.

Kris Anne Monteith
Chief, Enforcement Bureau

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of	)	File Number EB-07-SE-352
)	
Oceanic Time Warner Cable, a division of Time Warner Cable, Inc.	)	NAL/Acct. No. 200932100002
Oceanic Kauai Cable System	)	FRN 0018049841

FORFEITURE ORDER

Adopted: January 19, 2009

Released: January 19, 2009

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order*, we find that Oceanic Time Warner Cable, a division of Time Warner Cable, Inc., Oceanic Kauai Cable System (collectively, "TWC"), willfully and repeatedly violated Section 76.1201 of the Commission's Rules ("Rules") in its Oceanic Kauai Cable System.¹ Specifically, TWC violated Section 76.1201 by moving certain channels to a Switched Digital Video ("SDV") platform on November 6, 2007, thereby preventing subscribers with CableCARD-equipped unidirectional digital cable products ("UDCPs") from using their navigation devices to access these channels.² Further, in its deployment of SDV on November 6, 2007, TWC violated Section 76.640(b)(1) by failing to provide a virtual channel table which conforms to the standards required under Sections 76.640(b)(1)(i) and 76.640(b)(1)(v). We conclude, pursuant to Section 503(b) of the Communications Act of 1934, as amended ("Act"),³ that TWC is liable for a forfeiture in the amount of twenty thousand dollars (\$20,000). As discussed below, we further direct TWC to comply with the Bureau's Order to make appropriate refund of fees charged to customers affected by TWC's movement of linear channels to the SDV platform on November 6, 2007.⁴

¹ 47 C.F.R. § 76.1201.

² Navigation devices refer to "converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems." 47 C.F.R. § 76.1200(c). UDCPs refer to devices that have the ability to receive encrypted digital cable programming, but do not have any upstream, or bidirectional, capabilities. For example, such devices cannot support two-way services such as Electronic Programming Guides (EPGs), Voice on Demand (VOD), Pay Per View (PPV), and other interactive capabilities. See *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 12024, 12025-26 (2007) ("*Third Further Notice of Proposed Rulemaking*"). See also 47 C.F.R. § 15.123(a).

³ 47 U.S.C. § 503(b). This *Forfeiture Order* is issued through the coordinated effort of the Commission's Enforcement Bureau and Media Bureau. See 47 C.F.R. §§ 0.61(f)(5), 0.111(15).

⁴ TWC's notice to its customers, as well as technical papers submitted by the company to the Bureau, support our (continued...)

II. BACKGROUND

2. Congress and the Commission have long recognized the importance of allowing consumers the freedom to purchase their own navigation devices from sources other than their cable operator, satellite provider, or other multichannel video programming distributor (“MVPD”). Thus, Congress adopted Section 629 of the Act,⁵ which requires the Commission to ensure the commercial availability of navigation devices. By separating the security and navigation functions of equipment used to receive MVPD programming, Congress hoped to spur competition and expand consumer choice. As the House Report accompanying Section 629 noted, “competition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality. Clearly, consumers will benefit from having more choices among telecommunications subscription services available through various distribution sources.”⁶ At the same time, Congress recognized that MVPDs have “a valid interest, which the Commission should continue to protect, in system or signal security and in preventing theft of service.”⁷

3. In its order proposing rules implementing Section 629, the Commission stated that its overarching goal was to assure competition in the availability of set-top boxes and other customer premises equipment.⁸ “As navigation devices are the means to deliver analog and digital communications, competition in the navigation equipment market is central toward encouraging innovation in equipment and services, and toward bringing more choice to a broader range of consumers at better prices.”⁹

4. Thus, in adopting Section 76.1201 of the Commission’s Rules,¹⁰ which allows subscribers to acquire, attach, and use any compatible navigation device with an MVPD’s system, subject to the proviso that such equipment not cause harmful interference or facilitate theft of service, the Commission likened its actions to the *Carterfone* principle it previously adopted in the telephone environment.¹¹ In *Carterfone*, the Commission allowed consumers to attach legal devices to the telephone network unless that equipment would damage the network. “As a result of *Carterfone* and other Commission actions, ownership of telephones moved from the network operator to the consumer. As a result, the choice of features and functions incorporated into a telephone has increased substantially, while the cost of equipment has

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characterization of TWC’s actions as “moving” or “migrating” linear programming to a SDV platform.

⁵ 47 U.S.C. § 549. Section 629 was adopted as part of the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56 (1996).

⁶ H.R. REP. NO. 104-204, at 112 (1995).

⁷ *Id.*

⁸ *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Devices*, Notice of Proposed Rulemaking, 12 FCC Rcd 5639, 5641 (1997).

⁹ *See Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Report and Order, 13 FCC Rcd 14775, 14776, para. 2 (1998) (“*Navigation Devices Order*”).

¹⁰ 47 C.F.R. § 76.1201.

¹¹ *See Navigation Devices Order*, 13 FCC Rcd at 14478 (citing *Use of the Carterfone Device in Message Toll Service*, Decision, 13 FCC 2d 420, 424-25 (1968), *recon. denied*, 14 FCC 2d 571(1968)).

decreased.”¹² The Commission emphasized that “[f]ollowing the *Carterfone* principle adopted in the telephone context would allow subscribers the option of owning their own navigation devices and would facilitate the commercial availability of equipment.”¹³ The Commission stated that “[t]he steps taken in this Report and Order, if implemented promptly and in good faith, should result in an evolution of the market for navigation devices so that they become generally and competitively available.”¹⁴

5. The Commission recognized that its work on these issues was not complete and reiterated its commitment to monitoring developments regarding the compatibility of set-top boxes and digital televisions.¹⁵ Five years later, in the *Plug and Play Order*,¹⁶ the Commission took further steps to facilitate the direct connection of digital navigation devices (including commercially available UDCPs) to MVPD systems. Specifically, the Commission considered standards agreed upon by the cable and consumer electronics (“CE”) industries¹⁷ and adopted a cable compatibility standard for integrated, unidirectional digital cable television receivers, as well as other UDCPs, to ensure the compatibility and commercial availability of UDCPs with cable television systems.

6. Generally, the *Plug and Play Order* required MVPDs to support operation of UDCPs and ensure the utilization of such navigation devices in connection with their cable systems. In addition, the Commission required MVPDs to make available a security element separate from the basic navigation device. Under this framework, the Commission sought to enable unaffiliated manufacturers, retailers, and other vendors to commercially market UDCPs while allowing MVPDs to retain control over their system security.

7. Consumers with UDCPs access MVPD programming by using a CableCARD leased from the cable operator.¹⁸ UDCPs, and certain related CE equipment, employ a standard

¹² *Navigation Devices Order Id.* at 14780, para. 11.

¹³ *Id.* at 14786.

¹⁴ *Id.* The Commission recognized that “the parallel to the telephone has limitations” and specifically stated that the rules it adopted in implementing Section 629 of the Act sought to accommodate the differences from the telephone model.

¹⁵ *Id.* at 14781.

¹⁶ *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 20885 (2003) (“*Plug and Play Order*”). “The term ‘plug and play’ refers to a device’s ability to plug into a cable system and receive digital cable programming without a cable-operator provided set-top box.” *Third Further Notice of Proposed Rulemaking*, 22 FCC Rcd at n.9.

¹⁷ *See December 2002 Memorandum of Understanding Among Cable MSOs and Consumer Electronics Manufacturers.* *Id.* at note 3 (citing Letter from Carl E. Vogel, President and CEO, Charter Communications, *et al.*, to Michael K. Powell, Chairman, FCC (Dec. 19, 2002) (“2002 MOU”). The MOU “reflects a compromise agreement among the parties [cable and consumer electronics industries] on a specification that will permit the manufacture of unidirectional cable television receivers that include [the same] ... navigation functionality [that currently exists for set-top boxes].”

¹⁸ In most cases, the MVPDs have employed CableCARDS as their separate-security solution to enable non-integrated conditional access. *But see Cablevision Systems Corporation’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, Memorandum Opinion and Order, 22 FCC Rcd 220, 221-222 (2007). The Commission granted Cablevision a waiver of the ban on cable operator deployment of set-top boxes with integrated security to allow Cablevision to use a Smart-Card-based separate-security solution, which is CableCARD-

(continued....)

interface that permits them to negotiate with the CableCARD. The CableCARD descrambles the MVPD's encoded digital signal and allows the subscriber to view the programming. Thus, commercially available UDCPs can be compatible with cable systems nationwide, while cable operators maintain their ability to secure programming content from unauthorized viewing. In theory, this arrangement allows consumers access to all of a cable operator's linear programming¹⁹ without the need of a separate set-top box leased from their cable operator, while protecting the cable operator from theft of its programming services.²⁰

8. But recent events have demonstrated the limits of this theory. Traditionally, cable systems have used broadcast-type technologies that deliver all programs to all subscribers whether the subscribers view the programs or not. The programs not viewed nonetheless occupy system bandwidth (which prevents the use of that bandwidth for any other purpose). Many cable operators, however, have begun to test and deploy SDV technology in their cable systems. In an SDV system, a subset of programming is delivered in the traditional way to all subscribers whether they are viewing the programs or not. For those channels, the CableCARD-equipped UDCP will work as described above, allowing the subscriber to view the channels delivered in the traditional broadcast manner. The remaining channels are switched through the use of SDV network equipment located at a "hub" (where signals are converted and placed onto the "last mile" coaxial portion of the network). These switched channels do not occupy bandwidth, and are not available to subscribers until a subscriber tunes to that channel by sending a request, using a remote or program guide, upstream through the use of a set-top box to the hub. At the hub, the SDV equipment directly receives and processes set-top channel change requests for switched content and responds to that set-top with the frequency and program number where that content can be found. Once the hub receives the request, it immediately begins to transmit the channel. A customer who uses a CableCARD-equipped UDCP to receive programming must have additional equipment with the necessary upstream signaling capability to obtain the switched (i.e., bi-directional) channels. The UDCP cannot perform the bi-directional functions necessary to request that a channel be delivered via SDV. Nor can the CableCARD, which is designed only to provide the separate security element, provide the necessary interface needed to send the signal to the SDV server. Thus, in essence, in an SDV system, all subscribers must have a cable-operator supplied set-top box to view channels placed on the SDV platform.

9. On November 8, 2007, the Spectrum Enforcement Division of the Enforcement Bureau ("Bureau") issued a Letter of Inquiry ("LOI")²¹ to TWC based on complaints that the company had moved certain cable channels that previously had been accessible to subscribers using CableCARD-equipped UDCPs, such as digital cable ready television sets and digital video recorders, to an SDV platform. Specifically, one complainant alleged that Oceanic had deployed SDV and moved a large number of channels to an SDV platform, including popular high

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compatible with the use of an adaptor.

¹⁹ The term "linear programming" is generally understood to refer to video programming that is prescheduled by the programming provider. Cf. 47 U.S.C. § 522(12) (defining "interactive on-demand services" to exclude "services providing video programming prescheduled by the programming provider").

²⁰ *Third Further Notice of Proposed Rulemaking*, 22 FCC Red at 12025 ¶¶3-4.

²¹ See Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission to Mark Lawrence-Apfelbaum, Esq., Executive Vice President and General Counsel, Time Warner Cable, Inc. (Nov. 8, 2007) ("LOI").

definition (“HD”) sports and entertainment channels.²² According to the complaints, Oceanic’s implementation of SDV necessarily required customers using a CableCARD to obtain additional equipment, *i.e.*, a set-top box, from the cable company to continue to receive all cable channels available to them prior to the change to the SDV platform.²³ The LOI sought information on a number of issues, and asked the company to explain how its implementation of SDV was consistent with Section 629 of the Act, Commission rules implementing that statute,²⁴ the 2002 MOU,²⁵ and in particular, the policies and rules established by Commission in the *Plug and Play Order*.²⁶ The Bureau issued a Supplemental LOI to TWC on August 25, 2008 to obtain additional information concerning the company’s deployment of SDV.²⁷

10. TWC responded to the LOI on November 30, 2007,²⁸ and responded in part to the Supplemental LOI on September 12, 2008²⁹ and in full on September 23, 2008.³⁰ In its response, TWC admits that its Oceanic and Kauai cable systems deployed SDV for customers on the islands of Oahu and Kauai on November 6, 2007, moving 62 linear channels to an SDV platform.³¹ TWC reports that its Hawaii Division, which includes the cable systems at issue

²² See Letter from Robert A. Flatt to Kevin J. Martin, Chairman, Federal Communications Commission dated Nov. 7, 2007 (available as a comment in CS Docket No. 97-08) (“*Flatt Complaint*”). According to the August 21, 2007 notice that TWC sent to its Hawaii subscribers, Oceanic planned to move certain channels to a two-way switched digital platform on September 24, 2007. TWC ultimately delayed its deployment of SDV until November 6, 2007. See Letter from Arthur H. Harding, Fleischman and Harding LLP and Matthew A. Brill, Latham & Watkins LLP, counsel for TWC, dated September 12, 2008 (“Initial Supplemental LOI Response”) at Exhibit A.

²³ *Id.* at 1. In addition to the *Flatt Complaint*, the Commission has received several other complaints from TWC customers about Oceanic’s SDV deployment. We provided relevant excerpts and identifying information for those complaints in Attachment A to the *Oceanic Time Warner Cable, a subsidiary of Time Warner Cable, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 23 FCC Rcd 14962 (Enf. Bur. 2008) (“*TWC NAL and Order*”). Unlike the *Flatt Complaint*, these complaints were not filed in a public Commission docket, so we will treat the complainants’ names as confidential for privacy reasons.

²⁴ The LOI stated we were investigating possible violations of Section 629 of the Act, 47 U.S.C. § 549, and Sections 76.640, 76.980(f), 76.984, 76.1204, 76.1206, and 76.1603 of the Commission’s rules, 47 C.F.R. §§ 76.640, 76.980(f), 76.984, 76.1204, 76.1206, and 76.1603.

²⁵ See *Plug and Play Order*, 18 FCC Rcd at 20885 n.3.

²⁶ *Id.* at 20885.

²⁷ See Letter from JoAnn Lucanik, Deputy Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission to Arthur H. Harding, Fleischman and Harding LLP and Matthew A. Brill, Latham & Watkins LLP, counsel for TWC, (Aug. 25, 2008) (“Supplemental LOI”). The Supplemental LOI noted that the investigation now included possible violations by TWC of Sections 76.1201 and 76.1202 of the Rules. 47 C.F.R. §§ 76.1201, 76.1202. *Id.*, at note 3.

²⁸ See Letter from Arthur H. Harding, Fleischman and Harding LLP and Matthew A. Brill, Latham & Watkins LLP, Counsel for Time Warner Cable, to Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (Nov. 30, 2007) (“LOI Response”).

²⁹ See Letter from Arthur H. Harding, Fleischman and Harding LLP and Matthew A. Brill, Latham & Watkins LLP, Counsel for Time Warner Cable, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 12, 2008) (“Initial Supplemental LOI Response”).

³⁰ See Letter from Arthur H. Harding, Fleischman and Harding LLP and Matthew A. Brill, Latham & Watkins LLP, Counsel for Time Warner Cable, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 23, 2008) (“Final Supplemental LOI Response”).

³¹ Initial Supplemental LOI Response, Exhibit A.

here, had 415,534 subscribers at the time of SDV deployment.³² The company does not have a precise estimate of the number of CableCARD-using UDCPs affected by its SDV deployment, but believes it to be less than 583.³³ For CableCARD customers affected by its SDV deployment, TWC offered set-top boxes at the same price as the customers' CableCARDS for two years from the date of SDV deployment.³⁴ TWC states that it had planned to deploy SDV on several other Hawaiian islands, but has deferred that action until it has provided 30 days notice to the relevant Local Franchising Authority ("LFA").³⁵

11. On October 14, 2008, after reviewing the evidence and TWC's arguments, the Bureau issued a *Notice of Apparent Liability for Forfeiture and Order*,³⁶ finding that TWC apparently had willfully violated Sections 76.1201 and 76.640(b)(1) of the Rules by moving certain channels to a SDV platform on November 6, 2007, thereby preventing subscribers with CableCARD-equipped UDCPs from using their navigation devices to access these channels and by failing to provide a virtual channel table which conforms to the standards required under Sections 76.640(b)(1)(i) and 76.640.(b)(1)(v).

12. TWC responded to the NAL on November 14, 2008.³⁷ With respect to the NAL's finding of apparent liability under Section 76.1201, TWC makes three principal arguments. First, TWC asserts that the NAL's finding of apparent liability violates the plain meaning of the rule. According to TWC, the language "prevent the connection or use" of a navigation device means that a cable operator can be held liable only where it has made it impossible for a customer to connect or use the device.³⁸ Second, TWC asserts that the NAL's "overly expansive reading" of the rule violates important public policy objectives.³⁹ Third, TWC argues that the NAL intrudes upon its First Amendment rights.⁴⁰ TWC similarly asserts that the Bureau's finding that TWC apparently violated Section 76.640 is flawed.⁴¹ Finally, TWC asserts that the

³² *Id.*

³³ TWC reported 583 UDCP CableCARD subscribers at the time of deployment for its entire Hawaii Division, which includes not only the Oceanic and Kauai cable system, but also several other systems. Although some subscribers may have more than one UDCP, this number probably overstates the number of affected devices. *Id.*

³⁴ *Id.*

³⁵ In its most recent offer, TWC limited the period for affected CableCARD customers to receive a free set-top box to six months. *Id.*

³⁶ *Oceanic Time Warner Cable, a subsidiary of Time Warner Cable, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 23 FCC Rcd 14962 (Enf. Bur. Oct. 15, 2008) ("*TWC NAL and Order*").

³⁷ *Time Warner Cable Inc. Response to Notices of Apparent Liability and Request for Cancellation of Proposed Forfeitures*, File No. EB-07-SE-352 (filed Nov. 14, 2008) (TWC NAL Response). Together with its NAL Response, TWC also filed *Time Warner Cable Inc. Request for Stay Pending Resolution of Petition for Reconsideration and Request for Cancellation of Proposed Forfeitures*, EB-07-SE-352 (filed Nov. 14, 2008) and *Petition for Reconsideration of Time Warner Cable Inc.*, EB-07-SE-352 (filed Nov. 14, 2008). TWC's *Request for Stay* and *Petition for Reconsideration* will be addressed in subsequent orders.

³⁸ *TWC NAL Response* at 15-20.

³⁹ *Id.* at 20-28.

⁴⁰ *Id.* at 32-37.

⁴¹ *Id.* at 37-42.

NAL findings present novel interpretations of the rules at issue and thereby exceed the bounds of the Bureau's delegated authority.⁴²

III. DISCUSSION

A. TWC Willfully and Repeatedly Violated Section 76.1201 By Requiring Subscribers To Obtain A Set-Top Box To View Previously Accessible Linear Programming

13. Section 76.1201 of the Rules prohibits an MVPD from “prevent[ing] the connection or use of navigation devices to or with its system” unless such devices would cause electronic or physical harm or allow the unauthorized receipt of service.⁴³ Based on the record before us, we find that TWC willfully and repeatedly⁴⁴ violated Section 76.1201 by moving certain linear channels to an SDV platform in its Kauai and Oceanic cable systems⁴⁵ on November 6, 2007.⁴⁶ In so doing, TWC prevented subscribers with UDCPs, such as “digital cable ready” televisions and TiVo recorders, from viewing the switched linear channels that were already part of their subscription package without the use of a TWC-supplied set-top box, thus effectively impairing the use of those UDCPs within each affected cable system. Additionally, because a TWC-leased set-top box now is required to view many TWC channels, even on UDCP devices, TWC's migration of channels to an SDV platform has prevented the use of some functions available on those UDCPs, such as the capacity to view picture-in-picture and record content.⁴⁷

1. The NAL's Findings Are Not Foreclosed by the Plain Language of Section 76.1201

14. Notwithstanding its effect on CableCARD users, TWC contends that the language “prevent the connection or use of navigation devices,” as used in Section 76.1201, makes clear that a cable operator can be held liable only where it has stopped or made it impossible for a customer to connect or use the device.⁴⁸ According to TWC, its implementation of SDV does not *stop* a subscriber from doing so or “make[it] impossible” for a customer to do so.⁴⁹ TWC

⁴² *Id.* at 43.

⁴³ 47 C.F.R. § 76.1201.

⁴⁴ See 47 U.S.C. § 312(f)(1) & (2) (defining a “willful” violation as the “conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission,” and defining “repeated” as “the commission or omission of such act more than once.”). The definition of willful and the definition of repeated apply to violations for which forfeitures are assessed under Section 503(b) of the Act. See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387 (1991), *recon. denied* 7 FCC Rcd 3454 (1992).

⁴⁵ As noted earlier, TWC states that its Oceanic and Kauai cable systems deployed SDV for the islands of Oahu and Kauai. Initial Supplemental LOI Response, Exhibit A.

⁴⁶ We are aware that other TWC cable systems have implemented SDV and will address the legality of those actions in future proceedings.

⁴⁷ As enacted, Section 624A of the Act expressly mandates that the Commission “minimize interference with or nullification of the special functions of subscriber's television receivers or video cassette recorders,” and thus ensure the full compatibility of these devices with the cable system. 47 U.S.C. § 544a(c)(1)(B).

⁴⁸ *TWC NAL Response* at 15.

⁴⁹ *Id.*

asserts that the Bureau found only that the company's implementation of SDV "impairs," rather than prevents, the use of such devices and thus the Bureau's finding is insufficient for purposes of finding a violation of the standard set forth in the rule.⁵⁰

15. We do not agree that a violation of Section 76.1201 occurs only where a cable operator "stops" or "makes it impossible" for a customer to connect or use a navigation device. At its core, TWC would have us find that unless a cable operator prevents access to each and every program and service that constitutes the customer's subscribed programming tier, no violation of Section 76.1201 has occurred. Under TWC's interpretation of Section 76.1201, a cable operator may prevent (non-cable operator-supplied) UDCPs from accessing any portion of a programming service (or transport stream) — such as closed captioning or content advisory information — or may prevent these devices from accessing any linear video programming— such as select channels within a subscriber's purchased programming tier — and nonetheless act consistently with the Commission's mandate to support CableCARD-equipped devices. As we stated in the *TWC NAL and Order*, taken to its logical conclusion, TWC's reasoning would permit an MVPD to move *all* of its programming to an SDV platform without regard for the impact its actions would have on customers using or wishing to use CableCARD-equipped UDCPs. TWC's interpretation would eviscerate the rule, is inconsistent with the operative text of Section 76.1201— "use of navigation devices," and the Commission's goal to ensure commercial compatibility of such devices. Considering that the primary objective of Section 629 of the Act and Sections 76.1200-76.1210 of the Rules is to maximize the commercial availability of navigation devices, we decline to adopt a view of our Rule that ignores the plain text and the purpose of these sections.⁵¹

16. Moreover, TWC's strained interpretation of the Rule would be fundamentally at odds with the Commission's goal of protecting cable subscribers' ability to view signals through the use of commercially available navigation devices offered in a competitive market. TWC's movement of linear channels that were previously accessible with a CableCARD-equipped UDCP to a switched digital platform that can only be accessed with a TWC-provided set-top box conflicts with the Commission's rules and policies designed to promote competition and consumer choice of navigation devices. Our conclusion is not affected by the fact that customers can still attach and use navigation devices to receive cable services, and that customers may access switched digital programming by obtaining a set top box from TWC. In the *Plug and Play Order*, the Commission sought to enable *unaffiliated* manufacturers, retailers, and other vendors to compete with MVPD-provided equipment by facilitating the direct connection of digital navigation devices to MVPD systems.

17. TWC further argues that the rule was historically intended to do no more than provide a right to attach commercially available equipment and does not include an obligation that an operator carry any service used by such equipment.⁵² We concur that in adopting this rule, the Commission agreed that the 'right to attach' must be subject to the limitation that the equipment does not harm the MVPD network.⁵³ Thus, the Commission adopted rules that would

⁵⁰ *Id.*

⁵¹ See *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994) (agency's interpretation of its own rule must be given controlling weight unless clearly erroneous).

⁵² *TWC Response at 15-16.*

⁵³ See *Navigation Devices Order*, 13 FCC Rcd at 14789.

permit MVPDs to restrict the attachment or use of equipment to their systems where electronic or physical harm would be caused by the attachment or operation of such equipment.⁵⁴ The Commission was clear however, that “[t]hese standards [set forth in Section 76.1203] shall be used only to prevent attachment of navigation devices that raise reasonable and legitimate concerns of electronic or physical harm or theft of service, and *not as a means to unreasonably restrict the use of navigation devices obtained from a source other than the MVPD.*”⁵⁵ The Commission was equally clear that it expected the cable industry to dedicate the resources necessary to ensure that commercially available CableCARD-enabled devices continue to interoperate properly with cable systems.⁵⁶ The equipment at issue does not raise concerns of electronic or physical harm or theft of service.

18. Finally, we disagree with TWC’s claims that there is no record support for the allegation that as a result of the deployment of SDV, UDCPs lose certain functions, such as picture-in-picture, and that the NAL does not take the balanced approach to equipment compatibility that is required by Section 624A.⁵⁷ Section 624A of the Act expressly mandates that the Commission “minimize interference with or nullification of the special functions of subscriber’s television receivers or video cassette recorders,”⁵⁸ and thus ensures the full compatibility of these devices with the cable system. The deployment of SDV and the requirement that a customer use a company-supplied set top box to view the now switched channels, negates whatever functionalities were available in the UDCP for those of the company-supplied set-top box. Unless the complaints referenced below are TW complaints don’t know that we need the rest of this paragraph]The Commission received numerous complaints from affected consumers. For instance, some cable operators have migrated linear HD programming to an SDV format, thus rendering useless the high definition capability of the navigation device. In addition, many complaints from consumers indicate that SDV deployment has affected their use of TiVo. One of TiVo’s main features is the ability to watch one program while recording another (*i.e.*, TiVo Series 3 was designed with two CableCARD slots – one single-stream CableCARD (“S-Card”) to decrypt the programming that the TiVo is recording, and another S-card to decrypt the programming that the TiVo is displaying). The functionality of TiVo is lost with the use of the company-supplied set-top box, which has its own built-in functionality.

2. The NAL’s Findings Are Fully Consistent with the Public Policy Underlying the Commission’s Rules and Orders on “*Plug and Play*”

19. TWC next argues that its manner of implementing SDV is not inconsistent with the *Plug and Play Order*.⁵⁹ Specifically, it contends that the interactive or advanced two-way capabilities envisioned by that order are not limited to video on demand (VOD), electronic programming guides (EPG), and impulse pay per view (IPPV); are essentially without limit; and thus include SDV within its auspices.⁶⁰ TWC impliedly states that it may move all of its programming to an SDV format because *Plug and Play* provided for this eventuality by

⁵⁴ 47 § C.F.R. 76.1203.

⁵⁵ *Id.* (emphasis added).

⁵⁶ *But see 2005 Deferral Order*, 20 FCC Rcd at 6814.

⁵⁷ *TWC Response* at 17-20.

⁵⁸ 47 U.S.C. § 544a(c)(1)(B).

⁵⁹ *TWC Response* at 21.

⁶⁰ *Id.* at 22.

mandating DVI/HDMI connections, which allow for connection of UDCPs with two-way navigation devices. According to TWC, such an action is also supported by Rules that permit cable operators to move any programming for any reason -- no law provides subscribers with an entitlement to receive any particular service.⁶¹

20. The Bureau previously considered, and rejected, the arguments raised by TWC. As we have previously found, TWC's arguments are inconsistent with the language and the intent of the Commission's Rules and orders.⁶² We do not believe that, in adopting the *Plug and Play Order*, the Commission intended to permit an MVPD move *all* of its programming to an SDV platform "without regard" for the impact such a move would have on its UDCP-owning customers. Such an outcome would be fundamentally inconsistent with the Commission's goal of protecting cable subscribers' ability to view signals through the use of commercially available navigation devices offered in a competitive market. TWC's movement of linear channels that were previously accessible with a CableCARD-equipped UDCP to a switched digital platform that can only be accessed with a TWC-provided set-top box is clearly at odds with the Commission's Rules and policies designed to promote competition and consumer choice of navigation devices.

21. While we recognize that the *Plug and Play Order* does not prohibit cable operators from developing and deploying new technology and services, we conclude that it does not permit TWC's actions here. By moving linear programming to an SDV platform, TWC prevents CableCARD-equipped UDCPs from receiving previously available channels and negates the usefulness of competitive commercially available navigation devices, in violation of the intent of Section 629 and the Commission's Rules.⁶³ The Commission recognized that devices made pursuant to the standard adopted in the *Plug and Play Order* lacked upstream or bi-directional capabilities and therefore could not receive certain programming or services, but that recognition did not extend to services that consumers traditionally experienced as one-way services.⁶⁴ At no point did the Commission authorize MVPDs to modify their transmission of linear programming such that UDCP devices could no longer receive such programming without a cable operator-provided set-top box.⁶⁵ Such an outcome is fundamentally at odds with the policy and regulatory objectives of the *Plug and Play Order*.

⁶¹ *Id.* at 23-25.

⁶² See *Oceanic Kauai NAL*, 23 FCC Rcd at 14967. TWC also argues that "curtailing TWC's ability to deliver its programming of choice based on its selection of the most efficient technology available would likely run afoul of the First Amendment." See *Oct. 14 Supplemental LOI Response* at 5 (citation omitted). We reject this argument. The requirements at issue are content neutral and are narrowly tailored to further the substantial federal interest of maximizing commercial availability of navigation devices to the consumer. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994).

⁶³ See 47 U.S.C. § 549; 47 C.F.R. § 76.1201.

⁶⁴ "Due to the unidirectional nature of this receiver specification, an external navigation device would still be needed to receive advanced features such as cable operator-enhanced electronic programming guides ('EPGs'), impulse pay per view ('IPPV') or video on demand ('VOD')." *Plug and Play Order*, 18 FCC Rcd at 20890, ¶7. See also *Third Further Notice of Proposed Rulemaking*, 22 FCC Rcd at 12025-26, ¶4 ("Devices made pursuant to this standard have the ability to receive encrypted digital cable programming, but do not have any upstream, or bidirectional, capabilities (*i.e.*, consumer electronics manufacturers can only make unidirectional devices under the technical standard adopted in the *Plug and Play Order*). For example, such devices cannot support two-way services such as EPGs, VOD, PPV, and other ITV [Interactive Television] capabilities.").

⁶⁵ TWC's LOI Response cites an *ex parte* letter it filed in the *Plug and Play* docket in 2006. In that letter, TWC states that it informed staff from the Commission's Media Bureau "that SDV would impact some subscribers using

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22. Section 76.1201 was adopted to achieve the statutory requirement of alternative sources of navigation devices and to ensure the commercial availability of navigation devices.⁶⁶ The *Plug and Play Order* sought to provide further assurance of the commercial availability of navigation devices by requiring that cable operators support the operation of UDCP in connection with their cable systems. TWC's implementation of SDV in this case clearly negates the use of CableCARD-equipped UDCPs and fundamentally limits the commercial and competitive viability of those devices in cable systems where SDV has been deployed. In the instant case, customers who used CableCARD-equipped UDCPs are unable to receive dozens of linear channels after the deployment of SDV.⁶⁷ As such, TWC is effectively preventing CableCARD-equipped UDCPs from receiving channels previously available and undermining the underlying policy goals of the Act and the Commission's Rules to ensure the commercial availability and use of navigation devices. Thus, we find TWC's November 6, 2007 migration of linear channels to an SDV platform in its Oceanic Kauai Cable System constitutes a willful and repeated violation of Section 76.1201 of the Rules.

23. TWC again reasserts that it cannot achieve the efficiencies enabled by SDV without moving linear channels.⁶⁸ According to TWC, a finding of liability as a consequence for such migration would undermine "vital public policy interests," such as additional HD programming and other digital content for all customers.⁶⁹ TWC also asserts that a restriction on SDV would harm the Commission's own policy objectives, such as the digital transition, increased programming diversity, MVPD competition, and enhanced broadband capabilities.⁷⁰

24. As we stated in the *TWC NAL and Order*, we do not dispute that the deployment of SDV technology may provide significant public benefits. It is not TWC's deployment of SDV technology that violates Section 76.1201, but TWC's migration of existing linear programming to an SDV tier that we find inconsistent with Commission Rules. As we noted in the *TWC NAL*

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[UDCPs], but noted that *these subscribers would continue to receive nearly all the same channels as subscribers using digital set top boxes*. Contrary to the suggestions of the Consumer Electronics Association in its March 23, 2006 *ex parte*, the use of SDV by TWC in no way contravenes our support of UDCPs." Letter from Steven N. Teplitz, Time Warner Cable, Inc. to Marlene Dortch, Secretary, Federal Communications Commission dated May 11, 2006 (filed in CS Docket 97-80) ("*TWC Ex Parte Letter*") (emphasis added). As the facts of this case demonstrate, TWC's removal of more than 60 channels, including popular HD channels, is inconsistent with the company's *ex parte* letter more than a year beforehand.

⁶⁶ See *Navigation Devices Order*, 13 FCC Rcd at 14786.

⁶⁷ According to the TWC notice announcing the deployment that ultimately took place on November 6, 2007, more than 40 channels would be moved to the SDV platform and no longer available without the use of a TWC-supplied set-top box: Digital Cable Service: (CSPAN-3, CSPAN-2, CNBC World, Bloomberg TV, The Weather Channel, AZN TV, Imaginasian, The Outdoor Channel, Country Music TV, VH1 Classic, BET On Jazz, Ovation), Sports Pak: (Fuel, NBA TV, The Tennis Channel, Fox College Sports-Atlantic, Fox College Sports-Central, Fox College Sports-Pacific, College Sports TV), Encore Service: (Fuse), Spanish Pak: (Galavision, Fox Sports World Espanol, CNN Espanol, Discovery en Espanol, CNN Espanol, ESPN Deportes), Premium: (Chinese Channel), HD Entertainment Pak: (HD Golf/HD Versus, HD Versus & Golf, HD Fsn, HD National Geographic, HD Net, HD Net Movies, iNDemand HD, ESPN HD, ESPN2HD, HD Universal), Jewelry Channel, Pentagon Channel, KOAM, Ocean Network, and Inspirational TV. See also TWC Initial Supplemental LOI Response, Exhibit A (stating that 62 channels ultimately were moved to SDV platform).

⁶⁸ *TWC Response* at 28-32.

⁶⁹ *Id.* at 30.

⁷⁰ *Id.* at 31-32.

and Order, charging for channels not presently accessible to subscribers with CableCARD-equipped UDCPs undermines the policy and regulatory objectives of the *Plug and Play Order*. Moreover, we are not convinced that the only way TWC can create additional capacity using SDV is to move existing linear programming to an SDV platform. Regardless of the benefits touted, the manner in which TWC has migrated linear channels prevents certain UDCP customers the use and functionality of their navigation devices.⁷¹

3. The NAL's Reading of Section 76.1201 Does Not Conflict with the First Amendment

25. TWC's arguments that the NAL runs afoul of the First Amendment are insubstantial. As an initial matter, TWC's contention that the NAL renders the Commission's *Viewability Order* unconstitutional lacks any merit.⁷² In the *Viewability Order*, the Commission set forth a comprehensive analysis of why the requirement that all cable subscribers be able to view the signals of all must-carry stations after the digital transition was consistent with the First Amendment,⁷³ and the U.S. Court of Appeals for the District of Columbia Circuit recently dismissed a constitutional challenge to the *Viewability Order*.⁷⁴ The analysis contained in the *Viewability Order* in no way depended on the use of SDV under the circumstances present here, and the interpretation of our Rules set forth in the NAL neither alters the Commission's expectation that "cable capacity will continue to expand in future years, thus further decreasing the relative burden on cable operators" nor its observation that "because digital cable systems offer so much more capacity, the proportion of overall bandwidth devoted to must-carry signals is that much smaller than was the case at the time of the [U.S. Supreme Court decisions upholding the constitutionality of must-carry regulation]."⁷⁵

26. Neither is there any merit to TWC's contention that the NAL violates the First Amendment by "impermissibly curtail[ing] TWC's editorial discretion to deliver programming of its choice using the most efficient technology available to it."⁷⁶ Simply put, TWC has no First Amendment right to undermine the development of a competitive market for navigation devices by preventing consumers from accessing linear programming in their existing programming packages with a CableCARD-equipped UDCP and instead requiring the consumer to obtain a TWC-provided set-top box. To the extent that the rules at issue here implicate the First Amendment at all, the requirements are content neutral and narrowly tailored to further the substantial federal interest in developing and maintaining a competitive market for navigation devices, an interest whose importance has been recognized by both Congress and the courts.⁷⁷

⁷¹ We note TWC's claim that bi-directional navigation devices "are now becoming available at retail." *TWC Response* at 26. The development of bi-directional navigation devices without limitations on the ability to integrate broadband capability into competitive navigation devices and the ability to integrate web-based or IP content with cable-providing programming will further Congress and the Commission's shared policy goal of expeditious commercial availability of bi-directional navigation devices.

⁷² See *Carriage of Digital Television Broadcast Signals*, Third Report and Order, 22 FCC Rcd 21064 (2007) ("*Viewability Order*").

⁷³ See *Viewability Order* at ¶¶ 41-63.

⁷⁴ See *C-SPAN, Inc. v. FCC*, 545 F.3d 1051 (D.C. Cir. 2008).

⁷⁵ *Viewability Order* at ¶ 60.

⁷⁶ *TWC Response* at 33.

⁷⁷ See 47 U.S.C. § 549; *Comcast Corp. v. FCC*, 536 F.3d 763 (D.C. Cir. 2008); *Charter Communications, Inc. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006).

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Finally, while TWC complains that the First Amendment is implicated by the treatment of other MVPDs under the integration ban, the D.C. Circuit previously rejected the cable industry's attempt to raise the differential treatment of cable and DBS in another proceeding, noting the evidence set forth by the Commission of the distinctions in the navigation-device market for cable and DBS and observing that "the cable industry is 'perfectly capable of filing a petition tomorrow with the Commission' that will generate a record appropriate for consideration of those issues."⁷⁸ The same holds true here.

B. TWC Willfully Violated Section 76.640(b) by Failing to Comply with the Commission's Technical Rules Regarding the Provision of a Virtual Channel Table for SDV Programming

27. TWC contends that the *TWC NAL and Order*'s finding that the standard incorporated by reference in Section 76.640(b)(1)(i) applies to all services, including two-way services like SDV is wrong.⁷⁹ According to TWC, Section 76.640(b)(1)(i), through the incorporated standard SCTE 40 (2003), stands for the proposition that SCTE 65 tables must be presented only for services that are *offered* to the UDCP host device. Since two-way services are not offered, they need not be included.⁸⁰ TWC further asserts that because the text of the rule is limited to one-way products, it cannot reasonably be applied to two-way *services*.⁸¹ Issues relating to two-way services, TWC states, were not yet ripe for consideration during the Commission's consideration of its *Plug and Play Order*, and so were never intended to be encompassed by this rule. TWC also cites to the technical standard SCTE 65 to suggest that the standard was not intended to apply to two-way services, partly because hidden channels are skipped when the subscriber is channel surfing, and partly because the standards state that UDCPs may disregard virtual channel data associated with an application-type virtual channel. TWC argues that the virtual channel table is designed to present only channels that are accessible.⁸²

28. TWC's arguments are without merit. On its face, Section 76.640 applies only to unidirectional *products*.⁸³ Section 76.640(b)(1) makes no distinction between unidirectional and bi-directional *services*. Indeed, by its own terms, the standard incorporated by reference in Section 76.640(b)(1)(i) applies to *all services* – there is no exception for bi-directional services.⁸⁴

(...continued from previous page)

⁷⁸ *Charter*, 460 F.3d at 43 (quoting FCC counsel). Similarly, although TWC complains about a waiver given by the Media Bureau to Verizon, TWC never sought Commission review of that waiver, and this is not the appropriate proceeding for challenging its merits.

⁷⁹ *TWC Response* at 37.

⁸⁰ *Id.* at 37-38.

⁸¹ *Id.*

⁸² *TWC Response* at 38-40.

⁸³ See 47 C.F.R. §76.640 ("Support for unidirectional digital cable products on digital cable systems.").

⁸⁴ *Id.* at § 76.640(b)(1)(i) (incorporating by reference SCTE 40 2003, Section 5.5, which states that "[w]hen one or more scrambled services are offered on the cable system, System and Service Information for all services (both scrambled and in-the-clear) shall be carried in an out-of-band Forward Data Channel...").

Therefore, TWC is required to describe programming on an SDV platform in the out-of-band forward data channel and populate the virtual channel table with all of its programming services.

29. TWC next argues that, because Section 15.123 provides that a UDCP cannot be labeled as digital-ready unless it can navigate channels through the virtual channel table, the provision of SDV data to UDCPs would render them non-compliant since the devices would be unable to navigate to SDV programming.⁸⁵ According to TWC, as a result, the UDCP would be rendered noncompliant with the Part 15 rules, could not be marketed as digital cable ready, and cable operators would be relieved of any obligation to support these devices since they are required only to “support unidirectional digital cable products . . .”⁸⁶ TWC argues that rules are not to be interpreted in manner that would nullify corresponding rules. Lastly, TWC argues that there is no practical benefit to transmitting information for channels that cannot be viewed without a set-top box.⁸⁷

30. We disagree. Requiring compliance with Section 76.640(b) does not conflict with Section 15.123 and provides a significant practical benefit. As we stated in the *TWC NAL and Order*, including the SDV programming in the virtual channel table would make it clear to TWC subscribers using CableCARD-equipped UDCPs that their cable operator is charging them for programming that they cannot see.⁸⁸ We reiterate that if TWC believed it had a legitimate reason to exclude two-way programming from the virtual channel table provided to customers with CableCARD-equipped UDCPs, the company should have sought a waiver of the relevant rules.⁸⁹ Accordingly, based on the record before us, we find that TWC willfully violated Section 76.640(b) by failing to provide a virtual channel table as required by Section 76.640(1)(b)(i) and 76.640(b)(1)(v) in its Oceanic Kauai Cable System.

C. The Bureau Did Not Exceed Its Delegated Authority in Issuing the NAL

31. TWC argues that the Bureau’s expansive interpretations of the Rules and its decision to penalize the company present novel questions of policy and law; the issues, therefore, fall outside the scope of the Bureau’s delegated authority and must be submitted to the Commission for en banc disposition under Section 0.311(a)(1).⁹⁰

32. The Enforcement Bureau serves as the primary Commission entity responsible for enforcement of the Act, the Commission’s rules, and Commission orders.⁹¹ The Bureau has delegated authority to issue orders taking appropriate action in response to complaints or investigations, including issues notices of apparent liability and related orders.⁹² The Bureau has delegated authority to decide matters unless they “present novel questions of law, fact or policy

⁸⁵ *TWC Response* at 41-42.

⁸⁶ *TWC Response* at 41.

⁸⁷ *Id.* at 42.

⁸⁸ *TWC NAL and Order*, XXX at para. 27.

⁸⁹ 47 C.F.R. § 76.1207.

⁹⁰ *TWC Response* at 43.

⁹¹ 47 C.F.R. § 0.111.

⁹² 47 C.F.R. § 0.111(17).

that cannot be resolved under existing precedents and guidelines.”⁹³ The questions presented here are consistent with the Commission’s *Plug and Play Order*, the rules found in Section 76.1201 implementing that order, and the technical rules of Section 76.640(b). As such, the Bureau acted within its delegated authority in issuing the *TWC NAL and Order*. The Bureau is merely applying existing rules and case law to the instant facts.

D. Forfeiture Calculation

33. Under Section 503(b)(1)(B) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.⁹⁴ To impose such a forfeiture penalty, the Commission must issue a notice of apparent liability and the person against whom such notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.⁹⁵ The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.⁹⁶ We conclude that TWC is liable for a forfeiture in the amount of twenty thousand dollars (\$20,000) for its willful violation of Sections 76.1201, 76.640(b)(1)(i), and 76.640(b)(1)(v) of the Rules.

34. Under Section 503(b)(2)(A) and Section 1.80(b)(1) of the Commission’s Rules,⁹⁷ we may assess a cable television operator a forfeiture of up to \$32,000 for each violation or each day of a continuing violation, up to a statutory maximum forfeiture of \$325,000 for any single continuing violation. In exercising such authority, we are required to take into account “the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”⁹⁸

⁹³ 47 C.F.R. § 0.311(a)(3).

⁹⁴ 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

⁹⁵ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

⁹⁶ See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 (2002).

⁹⁷ 47 U.S.C. § 503(b)(2)(A); 47 C.F.R. § 1.80(b)(1). The Commission has repeatedly amended Section 1.80(b)(1) of the Rules to increase the maximum forfeiture amounts, in accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461. Most recently, the Commission raised the maximum forfeitures applicable to cable operators, broadcast licensees, and applicants for such authority from \$32,500 to \$37,500 for a single violation, and from \$325,000 to \$375,000 for continuing violation. See *Inflation Adjustment of Maximum Forfeiture Penalties*, 73 Fed. Reg. 44663, 44664 (July 31, 2008). The new forfeiture limits took effect September 2, 2008, apply to violations occurring after that date, and accordingly do not apply to this case.

⁹⁸ 47 U.S.C. § 503(b)(2)(E). See also 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures. We consider TWC’s apparent violations of Section 76.1201 to have begun on the date its cable system moved previously available linear programming to an SDV platform. TWC’s apparent violations continue each day that such programming remains unavailable to customers using CableCARD-equipped UDCPs.

35. The Commission's *Forfeiture Policy Statement*⁹⁹ and Section 1.80 of the Rules do not establish a specific base forfeiture for violation of Section 76.1201.¹⁰⁰ In a similar case, the Commission proposed forfeitures for each cable system involved in the violation.¹⁰¹ Thus, we establish a base forfeiture amount for each cable system in which linear programming has been moved to an SDV platform, thereby impairing customers' use of navigation devices such as UDCPs to view such programming. As noted above, this case involves one of TWC's Hawaii Division cable systems – Oceanic Kauai Cable System.

36. As we stated in the *TWC NAL and Order*, one analogous violation for which the Commission has already established a base forfeiture is violation of the cable broadcast signal carriage rule, which has a base forfeiture of \$7,500.¹⁰² Given the number of channels involved and the effect of actions like those here on the Commission's policy objectives, however, we conclude that a more significant penalty is appropriate. We conclude that \$10,000 per cable system in which linear programming is moved to an SDV platform is an appropriate base forfeiture for violation of Section 76.1201. In this case, TWC moved linear programming to an SDV platform in one cable system, Oceanic Kauai Cable System. Accordingly, we conclude that TWC is liable for a \$10,000 forfeiture for its willful violation of Section 76.1201 of the Rules.

37. Additionally, we conclude that TWC is liable for a forfeiture in the amount of \$5,000 for its willful violation of Section 76.640(b)(1)(i) of the Rules and \$5,000 for its willful violation of Section 76.640(b)(1)(v) of the Rules. The Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules do not establish a specific base forfeiture for violation of Section 76.640(b). However, we note that Section 1.80(b) establishes a base forfeiture of \$5,000 for unauthorized discontinuance of service.¹⁰³ We find that the actions of TWC effectively discontinue a portion of the services for each of its CableCARD subscribers who choose to view content via a UDCP. We also conclude that the amount of the forfeiture for each violation is commensurate with the harm imposed upon cable subscribers. Because the violation of Section 76.640(b)(1) coincides with the migration of linear channels to an SDV platform, we will also

⁹⁹ See *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17115 (1997) ("*Forfeiture Policy Statement*"), recon. denied, 15 FCC Rcd 303 (1999).

¹⁰⁰ The Bureau has substantial discretion in proposing forfeitures. See, e.g., *InPhonic, Inc.*, Order of Forfeiture and Further Notice of Apparent Liability, 22 FCC Rcd 8689, 8699 (2007); *Globcom, Inc. d/b/a Globcom Global Commun.*, Order of Forfeiture, 21 FCC Rcd 4710, 4723-24 (2006). We may apply the base forfeiture amounts described in the *Forfeiture Policy Statement* and the Commission's rules, or we may depart from them altogether as the circumstances demand. See 47 C.F.R. § 1.80(b)(4) ("The Commission and its staff may use these guidelines in particular cases[, and] retain the discretion to issue a higher or lower forfeiture than provided in the guidelines, to issue no forfeiture at all, or to apply alternative or additional sanctions as permitted by the statute.") (emphasis added).

¹⁰¹ See, e.g., *Cablevision Systems Corporation*, Forfeiture Order, 15 FCC Rcd 24298 (2000) ("*Cablevision Forfeiture Order*") (imposing forfeitures against Cablevision on a cable system basis). SDV is installed at separate hubs throughout the cable system, but generally the operator will implement the technology on a system-wide basis.

¹⁰² 47 C.F.R. § 1.80(b)(4)(Note). See also *Cablevision Forfeiture Order*, 15 FCC Rcd at 24298.

¹⁰³ 47 C.F.R. § 1.80(b)(4)(Note). Violation of the broadcast signal carriage rule is also analogous to TWC's failure to provide the SDV programming information in its virtual channel table. In contrast with violations of Section 76.1201, however, violations of Section 76.640(b)(1) do not affect the viewability of actual programming. Therefore, it is appropriate to impose a somewhat lesser penalty for such technical violations.

apply this base forfeiture amount of \$5,000 for each technical violation of Section 76.640(b)(1) on a per cable system basis. Accordingly, we conclude that TWC is liable for a forfeiture in the amount of \$10,000 for its willful violation of Sections 76.640(b)(1)(i) and 76.640(b)(1)(v) in its Oceanic Kauai Cable System.

38. TWC's implementation of SDV in its Oceanic Kauai Cable System, in which previously available linear programming was moved to an SDV platform, resulted in the removal of channel information and the loss of access to those switched channels for its subscribers using CableCARD-equipped UDCPs. Moreover, such implementation of SDV, without having in place standards to ensure bi-directional compatibility of cable television systems and CE equipment, effectively harms the Commission's policies to move navigation devices toward a fully competitive market. We note that TWC could have sought a waiver of these rules under Section 76.1207, but failed to do so.¹⁰⁴ Accordingly, we conclude that TWC is liable for a total forfeiture amount of twenty thousand (\$20,000) for its willful violation of Sections 76.1201 (\$10,000), 76.640(b)(1)(i) (\$5,000), and 76.640(b)(1)(v) (\$5,000) of the Commission's Rules.

E. TWC Must Issue Refunds to Customers Harmed by its SDV Implementation

39. As we noted in the *TWC NAL and Order*, TWC's implementation of SDV has harmed its customers who opted to purchase and use television receiving equipment that does not require a cable operator-supplied set-top device to receive cable service. Many consumers purchased expensive UDCPs, such as "cable ready" televisions and digital video recorders like TiVos, based on the reasonable assumption that no set-top box would be necessary to receive linear programming.¹⁰⁵ In effect, TWC's movement of linear programming to an SDV platform has substantially diminished the value of its customers' UDCP devices. Moreover, CableCARD customers affected by TWC's SDV deployment now must pay higher prices to lease set-top boxes than they would have paid for CableCARDs. Those CableCARD customers who chose not to obtain the TWC-supplied set-top boxes after the implementation of SDV nevertheless have paid the same monthly rate for their cable service even though they can view significantly fewer channels. Most importantly, however, TWC's movement of linear programming to an SDV platform set back the shared goal of Congress and the Commission of a competitive market for commercially available navigation devices, as required by Section 629 and the Commission's Rules.

40. In calculating the harm to TWC's customers who use UDCP equipment, we recognize that TWC has made offers to its CableCARD customers to offset the costs of obtaining a set-top box. While TWC's offer to provide a free set-top box to its CableCARD customers may

¹⁰⁴ Under Section 629(c) of the Act, 47 U.S.C. § 549(c) and Section 76.1207 of the Commission's Rules, 47 C.F.R. § 76.1207, the Commission may waive rules adopted under Section 629(a) of the Act for a limited time "upon an appropriate showing by a provider of multichannel video programming and other services offered over multichannel video programming systems, or an equipment provider, that such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products. See 47 U.S.C. § 549(c), 47 C.F.R. § 76.1207.

¹⁰⁵ For instance, one complainant stated that after talking to a customer service representative who stated that the CableCARDs would allow access to HD programming on a HD-Tivo DVR, the consumer spent \$300 for the HD-Tivo DVR and \$300 for a Tivo Service subscription package. Three weeks later, when the technician came to install the CableCARDs, the customer could not receive the HD package because TWC no longer "offered the cable cards with HD." See Complaint No. 07-R522759 at Attachment A.

provide temporary relief to its customers, it is not a permanent solution – the benefits promised by TWC are, at best, limited in duration. TWC’s offer does not address the critical problem concerning the company’s interference with its customers’ use of independently obtained UDCPs, *i.e.*, the loss of service to the extent customers can view fewer channels than they did before the movement of linear programming to an SDV platform, nor does it address the loss of functionality of the device in question.

41. In the *TWC NAL and Order*, we ordered TWC, within ninety (90) days of the *NAL and Order*, to issue refunds to CableCARD customers affected by the November 6, 2007 implementation of SDV in its Oceanic Kauai Cable System.¹⁰⁶ In addition, within thirty (30) days of the release of the *TWC NAL and Order*, we required TWC to submit to the Enforcement Bureau an explanation of the method the company planned to use to determine the appropriate amount of refunds, the number of customers receiving refunds, the total value of such refunds, and the planned timing of such refunds. TWC failed to comply with the Bureau’s Order and the Bureau is separately addressing that violation of the Commission’s Rules.

42. Thus, we order TWC, within ninety (90) days of this *Forfeiture Order*, to issue refunds to CableCARD customers affected by the November 6, 2007 implementation of SDV in its Oceanic Kauai Cable System. Specifically, TWC must provide refunds as follows:

- (a) For former CableCARD customers that began to lease any set-top boxes from TWC following notice of a possible SDV deployment, TWC must refund the difference in cost (if any) between the charges for the TWC set-top boxes and the CableCARD previously leased by such customers; and
- (b) For CableCARD customers that kept their CableCARDS even after notice of the SDV deployment, TWC must refund the customers’ subscriber fees based on the diminished value of their service following the movement of linear programming to an SDV platform by \$0.10 per month, per channel moved and reduce their rates on a going-forward basis accordingly.¹⁰⁷

IV. ORDERING CLAUSES

43. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, Section 1.80 of the Rules, and the authority delegated by Sections 0.111 and 0.311 of the Commission’s Rules, Oceanic Time Warner Cable, a division of Time Warner Cable, Inc., Oceanic Kauai Cable System **IS LIABLE FOR A FORFEITURE** in the amount of twenty thousand dollars (\$20,000) for willful violation of Sections 76.1201, 76.640(b)(1)(i) and 76.640(b)(1)(v) of the Rules.

¹⁰⁶ *TWC NAL and Order* at 39.

¹⁰⁷ \$0.10 is our best estimate of the relevant license fee per channel. We note that TWC did not provide an explanation of the method the company planned to use to determine the appropriate amount of refunds as required by the *TWC NAL and Order*. The Bureau will reconsider the appropriate license fee per channel should TWC submit a petition for reconsideration that includes evidence that the license fees of the affected channels are lower than \$0.10 per month.

44. **IT IS FURTHER ORDERED** that, pursuant to sections 1, 4(i), 4(j), 601, and 629 of the Communications Act of 1934, as amended 47 U.S.C. §151, 154(i), 154(j), 521, 549, Time Warner Cable, Inc. must take the steps set forth in paragraph 42 of this *Forfeiture Order*.

45. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission within thirty (30) days of the release of this Order. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. TWC will also send electronic notification on the date said payment is made to JoAnn.Lucanik@fcc.gov and Kevin.Pittman@fcc.gov.

46. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by first class mail and certified mail return receipt requested to counsel for Time Warner, Inc.: Arthur H. Harding, Esq., Fleischman and Harding LLP, 1255 23rd Street, N.W., Eighth Floor, Washington, D.C. 20037 and Matthew A. Brill, Esq., Latham & Watkins LLP, 555 Eleventh Street, N.W., Suite 1000, Washington, D.C. 20004-1304.

FEDERAL COMMUNICATIONS COMMISSION


Kris Anne Monteith
Chief, Enforcement Bureau

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of	)	File Number EB-07-SE-352
)	
Oceanic Time Warner Cable, a division of Time Warner Cable, Inc.	)	NAL/Acct. No. 200932100003
Oceanic Oahu Central Cable System	)	FRN 0018049841

FORFEITURE ORDER

Adopted: January 19, 2009

Released: January 19, 2009

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order*, we find that Oceanic Time Warner Cable, a division of Time Warner Cable, Inc., Oceanic Oaha Central Cable System (collectively, “TWC”), willfully and repeatedly violated Section 76.1201 of the Commission's Rules (“Rules”) in its Oceanic Oahu Central Cable System.¹ Specifically, TWC violated Section 76.1201 by moving certain channels to a Switched Digital Video (“SDV”) platform on November 6, 2007, thereby preventing subscribers with CableCARD-equipped unidirectional digital cable products (“UDCPs”) from using their navigation devices to access these channels.² Further, in its deployment of SDV on November 6, 2007, TWC violated Section 76.640(b)(1) by failing to provide a virtual channel table which conforms to the standards required under Sections 76.640(b)(1)(i) and 76.640(b)(1)(v). We conclude, pursuant to Section 503(b) of the Communications Act of 1934, as amended (“Act”),³ that TWC is liable for a forfeiture in the amount of twenty thousand dollars (\$20,000). As discussed below, we further direct TWC to comply with the Bureau’s Order to make appropriate refund of fees charged to customers affected by TWC’s movement of linear channels to the SDV platform on November 6, 2007.⁴

¹ 47 C.F.R. § 76.1201.

² Navigation devices refer to “converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems.” 47 C.F.R. § 76.1200(c). UDCPs refer to devices that have the ability to receive encrypted digital cable programming, but do not have any upstream, or bidirectional, capabilities. For example, such devices cannot support two-way services such as Electronic Programming Guides (EPGs), Voice on Demand (VOD), Pay Per View (PPV), and other interactive capabilities. *See Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 12024, 12025-26 (2007) (“*Third Further Notice of Proposed Rulemaking*”). *See also* 47 C.F.R. § 15.123(a).

³ 47 U.S.C. § 503(b). This *Forfeiture Order* is issued through the coordinated effort of the Commission’s Enforcement Bureau and Media Bureau. *See* 47 C.F.R. §§ 0.61(f)(5), 0.111(15).

⁴ TWC’s notice to its customers, as well as technical papers submitted by the company to the Bureau, support our (continued....)

II. BACKGROUND

2. Congress and the Commission have long recognized the importance of allowing consumers the freedom to purchase their own navigation devices from sources other than their cable operator, satellite provider, or other multichannel video programming distributor (“MVPD”). Thus, Congress adopted Section 629 of the Act,⁵ which requires the Commission to ensure the commercial availability of navigation devices. By separating the security and navigation functions of equipment used to receive MVPD programming, Congress hoped to spur competition and expand consumer choice. As the House Report accompanying Section 629 noted, “competition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality. Clearly, consumers will benefit from having more choices among telecommunications subscription services available through various distribution sources.”⁶ At the same time, Congress recognized that MVPDs have “a valid interest, which the Commission should continue to protect, in system or signal security and in preventing theft of service.”⁷

3. In its order proposing rules implementing Section 629, the Commission stated that its overarching goal was to assure competition in the availability of set-top boxes and other customer premises equipment.⁸ “As navigation devices are the means to deliver analog and digital communications, competition in the navigation equipment market is central toward encouraging innovation in equipment and services, and toward bringing more choice to a broader range of consumers at better prices.”⁹

4. Thus, in adopting Section 76.1201 of the Commission’s Rules,¹⁰ which allows subscribers to acquire, attach, and use any compatible navigation device with an MVPD’s system, subject to the proviso that such equipment not cause harmful interference or facilitate theft of service, the Commission likened its actions to the *Carterfone* principle it previously adopted in the telephone environment.¹¹ In *Carterfone*, the Commission allowed consumers to attach legal devices to the telephone network unless that equipment would damage the network. “As a result of *Carterfone* and other Commission actions, ownership of telephones moved from the network operator to the consumer. As a result, the choice of features and functions incorporated into a telephone has increased substantially, while the cost of equipment has

(...continued from previous page)

characterization of TWC’s actions as “moving” or “migrating” linear programming to a SDV platform.

⁵ 47 U.S.C. § 549. Section 629 was adopted as part of the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56 (1996).

⁶ H.R. REP. NO. 104-204, at 112 (1995).

⁷ *Id.*

⁸ *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Devices*, Notice of Proposed Rulemaking, 12 FCC Rcd 5639, 5641 (1997).

⁹ *See Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Report and Order, 13 FCC Rcd 14775, 14776, para. 2 (1998) (“*Navigation Devices Order*”).

¹⁰ 47 C.F.R. § 76.1201.

¹¹ *See Navigation Devices Order*, 13 FCC Rcd at 14478 (citing *Use of the Carterfone Device in Message Toll Service*, Decision, 13 FCC 2d 420, 424-25 (1968), *recon. denied*, 14 FCC 2d 571(1968)).

decreased.”¹² The Commission emphasized that “[f]ollowing the *Carterfone* principle adopted in the telephone context would allow subscribers the option of owning their own navigation devices and would facilitate the commercial availability of equipment.”¹³ The Commission stated that “[t]he steps taken in this Report and Order, if implemented promptly and in good faith, should result in an evolution of the market for navigation devices so that they become generally and competitively available.”¹⁴

5. The Commission recognized that its work on these issues was not complete and reiterated its commitment to monitoring developments regarding the compatibility of set-top boxes and digital televisions.¹⁵ Five years later, in the *Plug and Play Order*,¹⁶ the Commission took further steps to facilitate the direct connection of digital navigation devices (including commercially available UDCPs) to MVPD systems. Specifically, the Commission considered standards agreed upon by the cable and consumer electronics (“CE”) industries¹⁷ and adopted a cable compatibility standard for integrated, unidirectional digital cable television receivers, as well as other UDCPs, to ensure the compatibility and commercial availability of UDCPs with cable television systems.

6. Generally, the *Plug and Play Order* required MVPDs to support operation of UDCPs and ensure the utilization of such navigation devices in connection with their cable systems. In addition, the Commission required MVPDs to make available a security element separate from the basic navigation device. Under this framework, the Commission sought to enable unaffiliated manufacturers, retailers, and other vendors to commercially market UDCPs while allowing MVPDs to retain control over their system security.

7. Consumers with UDCPs access MVPD programming by using a CableCARD leased from the cable operator.¹⁸ UDCPs, and certain related CE equipment, employ a standard

¹² *Navigation Devices Order Id.* at 14780, para. 11.

¹³ *Id.* at 14786.

¹⁴ *Id.* The Commission recognized that “the parallel to the telephone has limitations” and specifically stated that the rules it adopted in implementing Section 629 of the Act sought to accommodate the differences from the telephone model.

¹⁵ *Id.* at 14781.

¹⁶ *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 20885 (2003) (“*Plug and Play Order*”). “The term ‘plug and play’ refers to a device’s ability to plug into a cable system and receive digital cable programming without a cable-operator provided set-top box.” *Third Further Notice of Proposed Rulemaking*, 22 FCC Rcd at n.9.

¹⁷ See *December 2002 Memorandum of Understanding Among Cable MSOs and Consumer Electronics Manufacturers*. *Id.* at note 3 (citing Letter from Carl E. Vogel, President and CEO, Charter Communications, *et al.*, to Michael K. Powell, Chairman, FCC (Dec. 19, 2002) (“2002 MOU”). The MOU “reflects a compromise agreement among the parties [cable and consumer electronics industries] on a specification that will permit the manufacture of unidirectional cable television receivers that include [the same] ... navigation functionality [that currently exists for set-top boxes].”

¹⁸ In most cases, the MVPDs have employed CableCARDS as their separate-security solution to enable non-integrated conditional access. *But see Cablevision Systems Corporation’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, Memorandum Opinion and Order, 22 FCC Rcd 220, 221-222 (2007). The Commission granted Cablevision a waiver of the ban on cable operator deployment of set-top boxes with integrated security to allow Cablevision to use a Smart-Card-based separate-security solution, which is CableCARD-

(continued...)

interface that permits them to negotiate with the CableCARD. The CableCARD descrambles the MVPD's encoded digital signal and allows the subscriber to view the programming. Thus, commercially available UDCPs can be compatible with cable systems nationwide, while cable operators maintain their ability to secure programming content from unauthorized viewing. In theory, this arrangement allows consumers access to all of a cable operator's linear programming¹⁹ without the need of a separate set-top box leased from their cable operator, while protecting the cable operator from theft of its programming services.²⁰

8. But recent events have demonstrated the limits of this theory. Traditionally, cable systems have used broadcast-type technologies that deliver all programs to all subscribers whether the subscribers view the programs or not. The programs not viewed nonetheless occupy system bandwidth (which prevents the use of that bandwidth for any other purpose). Many cable operators, however, have begun to test and deploy SDV technology in their cable systems. In an SDV system, a subset of programming is delivered in the traditional way to all subscribers whether they are viewing the programs or not. For those channels, the CableCARD-equipped UDCP will work as described above, allowing the subscriber to view the channels delivered in the traditional broadcast manner. The remaining channels are switched through the use of SDV network equipment located at a "hub" (where signals are converted and placed onto the "last mile" coaxial portion of the network). These switched channels do not occupy bandwidth, and are not available to subscribers until a subscriber tunes to that channel by sending a request, using a remote or program guide, upstream through the use of a set-top box to the hub. At the hub, the SDV equipment directly receives and processes set-top channel change requests for switched content and responds to that set-top with the frequency and program number where that content can be found. Once the hub receives the request, it immediately begins to transmit the channel. A customer who uses a CableCARD-equipped UDCP to receive programming must have additional equipment with the necessary upstream signaling capability to obtain the switched (i.e., bi-directional) channels. The UDCP cannot perform the bi-directional functions necessary to request that a channel be delivered via SDV. Nor can the CableCARD, which is designed only to provide the separate security element, provide the necessary interface needed to send the signal to the SDV server. Thus, in essence, in an SDV system, all subscribers must have a cable-operator supplied set-top box to view channels placed on the SDV platform.

9. On November 8, 2007, the Spectrum Enforcement Division of the Enforcement Bureau ("Bureau") issued a Letter of Inquiry ("LOI")²¹ to TWC based on complaints that the company had moved certain cable channels that previously had been accessible to subscribers using CableCARD-equipped UDCPs, such as digital cable ready television sets and digital video recorders, to an SDV platform. Specifically, one complainant alleged that Oceanic had deployed SDV and moved a large number of channels to an SDV platform, including popular high

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compatible with the use of an adaptor.

¹⁹ The term "linear programming" is generally understood to refer to video programming that is prescheduled by the programming provider. Cf. 47 U.S.C. § 522(12) (defining "interactive on-demand services" to exclude "services providing video programming prescheduled by the programming provider").

²⁰ *Third Further Notice of Proposed Rulemaking*, 22 FCC Rcd at 12025 ¶¶3-4.

²¹ See Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission to Mark Lawrence-Apfelbaum, Esq., Executive Vice President and General Counsel, Time Warner Cable, Inc. (Nov. 8, 2007) ("LOI").

definition (“HD”) sports and entertainment channels.²² According to the complaints, Oceanic’s implementation of SDV necessarily required customers using a CableCARD to obtain additional equipment, *i.e.*, a set-top box, from the cable company to continue to receive all cable channels available to them prior to the change to the SDV platform.²³ The LOI sought information on a number of issues, and asked the company to explain how its implementation of SDV was consistent with Section 629 of the Act, Commission rules implementing that statute,²⁴ the 2002 MOU,²⁵ and in particular, the policies and rules established by Commission in the *Plug and Play Order*.²⁶ The Bureau issued a Supplemental LOI to TWC on August 25, 2008 to obtain additional information concerning the company’s deployment of SDV.²⁷

10. TWC responded to the LOI on November 30, 2007,²⁸ and responded in part to the Supplemental LOI on September 12, 2008²⁹ and in full on September 23, 2008.³⁰ In its response, TWC admits that its Oceanic and Oahu Central cable systems deployed SDV for customers on the islands of Oahu and Oahu Central on November 6, 2007, moving 62 linear channels to an SDV platform.³¹ TWC reports that its Hawaii Division, which includes the cable systems at

²² See Letter from Robert A. Flatt to Kevin J. Martin, Chairman, Federal Communications Commission dated Nov. 7, 2007 (available as a comment in CS Docket No. 97-08) (“*Flatt Complaint*”). According to the August 21, 2007 notice that TWC sent to its Hawaii subscribers, Oceanic planned to move certain channels to a two-way switched digital platform on September 24, 2007. TWC ultimately delayed its deployment of SDV until November 6, 2007. See Letter from Arthur H. Harding, Fleischman and Harding LLP and Matthew A. Brill, Latham & Watkins LLP, counsel for TWC, dated September 12, 2008 (“Initial Supplemental LOI Response”) at Exhibit A.

²³ *Id.* at 1. In addition to the *Flatt Complaint*, the Commission has received several other complaints from TWC customers about Oceanic’s SDV deployment. We provided relevant excerpts and identifying information for those complaints in Attachment A to the *Oceanic Time Warner Cable, a subsidiary of Time Warner Cable, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 23 FCC Rcd 14981 (Enf. Bur. 2008) (“*TWC NAL and Order*”). Unlike the *Flatt Complaint*, these complaints were not filed in a public Commission docket, so we will treat the complainants’ names as confidential for privacy reasons.

²⁴ The LOI stated we were investigating possible violations of Section 629 of the Act, 47 U.S.C. § 549, and Sections 76.640, 76.980(f), 76.984, 76.1204, 76.1206, and 76.1603 of the Commission’s rules, 47 C.F.R. §§ 76.640, 76.980(f), 76.984, 76.1204, 76.1206, and 76.1603.

²⁵ See *Plug and Play Order*, 18 FCC Rcd at 20885 n.3.

²⁶ *Id.* at 20885.

²⁷ See Letter from JoAnn Lucanik, Deputy Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission to Arthur H. Harding, Fleischman and Harding LLP and Matthew A. Brill, Latham & Watkins LLP, counsel for TWC, (Aug. 25, 2008) (“Supplemental LOI”). The Supplemental LOI noted that the investigation now included possible violations by TWC of Sections 76.1201 and 76.1202 of the Rules. 47 C.F.R. §§ 76.1201, 76.1202. *Id.*, at note 3.

²⁸ See Letter from Arthur H. Harding, Fleischman and Harding LLP and Matthew A. Brill, Latham & Watkins LLP, Counsel for Time Warner Cable, to Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (Nov. 30, 2007) (“LOI Response”).

²⁹ See Letter from Arthur H. Harding, Fleischman and Harding LLP and Matthew A. Brill, Latham & Watkins LLP, Counsel for Time Warner Cable, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 12, 2008) (“Initial Supplemental LOI Response”).

³⁰ See Letter from Arthur H. Harding, Fleischman and Harding LLP and Matthew A. Brill, Latham & Watkins LLP, Counsel for Time Warner Cable, to Marlene H. Dortch, Secretary, Federal Communications Commission (Sept. 23, 2008) (“Final Supplemental LOI Response”).

³¹ Initial Supplemental LOI Response, Exhibit A.

issue here, had 415,534 subscribers at the time of SDV deployment.³² The company does not have a precise estimate of the number of CableCARD-using UDCPs affected by its SDV deployment, but believes it to be less than 583.³³ For CableCARD customers affected by its SDV deployment, TWC offered set-top boxes at the same price as the customers' CableCARDS for two years from the date of SDV deployment.³⁴ TWC states that it had planned to deploy SDV on several other Hawaiian islands, but has deferred that action until it has provided 30 days notice to the relevant Local Franchising Authority ("LFA").³⁵

11. On October 14, 2008, after reviewing the evidence and TWC's arguments, the Bureau issued a *Notice of Apparent Liability for Forfeiture and Order*,³⁶ finding that TWC apparently had willfully violated Sections 76.1201 and 76.640(b)(1) of the Rules by moving certain channels to a SDV platform on November 6, 2007, thereby preventing subscribers with CableCARD-equipped UDCPs from using their navigation devices to access these channels and by failing to provide a virtual channel table which conforms to the standards required under Sections 76.640(b)(1)(i) and 76.640.(b)(1)(v).

12. TWC responded to the NAL on November 14, 2008.³⁷ With respect to the NAL's finding of apparent liability under Section 76.1201, TWC makes three principal arguments. First, TWC asserts that the NAL's finding of apparent liability violates the plain meaning of the rule. According to TWC, the language "prevent the connection or use" of a navigation device means that a cable operator can be held liable only where it has made it impossible for a customer to connect or use the device.³⁸ Second, TWC asserts that the NAL's "overly expansive reading" of the rule violates important public policy objectives.³⁹ Third, TWC argues that the NAL intrudes upon its First Amendment rights.⁴⁰ TWC similarly asserts that the Bureau's finding that TWC apparently violated Section 76.640 is flawed.⁴¹ Finally, TWC asserts that the

³² *Id.*

³³ TWC reported 583 UDCP CableCARD subscribers at the time of deployment for its entire Hawaii Division, which includes not only the Oceanic and Oahu Central cable system, but also several other systems. Although some subscribers may have more than one UDCP, this number probably overstates the number of affected devices. *Id.*

³⁴ *Id.*

³⁵ In its most recent offer, TWC limited the period for affected CableCARD customers to receive a free set-top box to six months. *Id.*

³⁶ *Oceanic Time Warner Cable, a subsidiary of Time Warner Cable, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 23 FCC Rcd 14981 (Enf. Bur. Oct. 15, 2008) ("*TWC NAL and Order*").

³⁷ *Time Warner Cable Inc. Response to Notices of Apparent Liability and Request for Cancellation of Proposed Forfeitures*, File No. EB-07-SE-352 (filed Nov. 14, 2008) (TWC NAL Response). Together with its NAL Response, TWC also filed *Time Warner Cable Inc. Request for Stay Pending Resolution of Petition for Reconsideration and Request for Cancellation of Proposed Forfeitures*, EB-07-SE-352 (filed Nov. 14, 2008) and *Petition for Reconsideration of Time Warner Cable Inc.*, EB-07-SE-352 (filed Nov. 14, 2008). TWC's *Request for Stay* and *Petition for Reconsideration* will be addressed in subsequent orders.

³⁸ *TWC NAL Response* at 15-20.

³⁹ *Id.* at 20-28.

⁴⁰ *Id.* at 32-37.

⁴¹ *Id.* at 37-42.

NAL findings present novel interpretations of the rules at issue and thereby exceed the bounds of the Bureau's delegated authority.⁴²

III. DISCUSSION

A. TWC Willfully and Repeatedly Violated Section 76.1201 By Requiring Subscribers To Obtain A Set-Top Box To View Previously Accessible Linear Programming

13. Section 76.1201 of the Rules prohibits an MVPD from “prevent[ing] the connection or use of navigation devices to or with its system” unless such devices would cause electronic or physical harm or allow the unauthorized receipt of service.⁴³ Based on the record before us, we find that TWC willfully and repeatedly⁴⁴ violated Section 76.1201 by moving certain linear channels to an SDV platform in its Oahu Central and Oceanic cable systems⁴⁵ on November 6, 2007.⁴⁶ In so doing, TWC prevented subscribers with UDCPs, such as “digital cable ready” televisions and TiVo recorders, from viewing the switched linear channels that were already part of their subscription package without the use of a TWC-supplied set-top box, thus effectively impairing the use of those UDCPs within each affected cable system. Additionally, because a TWC-leased set-top box now is required to view many TWC channels, even on UDCP devices, TWC's migration of channels to an SDV platform has prevented the use of some functions available on those UDCPs, such as the capacity to view picture-in-picture and record content.⁴⁷

1. The NAL's Findings Are Not Foreclosed by the Plain Language of Section 76.1201

14. Notwithstanding its effect on CableCARD users, TWC contends that the language “prevent the connection or use of navigation devices,” as used in Section 76.1201, makes clear that a cable operator can be held liable only where it has stopped or made it impossible for a customer to connect or use the device.⁴⁸ According to TWC, its implementation of SDV does not *stop* a subscriber from doing so or “make[it] impossible” for a customer to do so.⁴⁹ TWC

⁴² *Id.* at 43.

⁴³ 47 C.F.R. § 76.1201.

⁴⁴ See 47 U.S.C. § 312(f)(1) & (2) (defining a “willful” violation as the “conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission,” and defining “repeated” as “the commission or omission of such act more than once.”). The definition of willful and the definition of repeated apply to violations for which forfeitures are assessed under Section 503(b) of the Act. See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387 (1991), *recon. denied* 7 FCC Rcd 3454 (1992).

⁴⁵ As noted earlier, TWC states that its Oceanic and Oahu Central cable systems deployed SDV for the islands of Oahu and Oahu Central. Initial Supplemental LOI Response, Exhibit A.

⁴⁶ We are aware that other TWC cable systems have implemented SDV and will address the legality of those actions in future proceedings.

⁴⁷ As enacted, Section 624A of the Act expressly mandates that the Commission “minimize interference with or nullification of the special functions of subscriber's television receivers or video cassette recorders,” and thus ensure the full compatibility of these devices with the cable system. 47 U.S.C. § 544a(c)(1)(B).

⁴⁸ *TWC NAL Response* at 15.

⁴⁹ *Id.*

asserts that the Bureau found only that the company's implementation of SDV "impairs," rather than prevents, the use of such devices and thus the Bureau's finding is insufficient for purposes of finding a violation of the standard set forth in the rule.⁵⁰

15. We do not agree that a violation of Section 76.1201 occurs only where a cable operator "stops" or "makes it impossible" for a customer to connect or use a navigation device. At its core, TWC would have us find that unless a cable operator prevents access to each and every program and service that constitutes the customer's subscribed programming tier, no violation of Section 76.1201 has occurred. Under TWC's interpretation of Section 76.1201, a cable operator may prevent (non-cable operator-supplied) UDCPs from accessing any portion of a programming service (or transport stream) — such as closed captioning or content advisory information — or may prevent these devices from accessing any linear video programming— such as select channels within a subscriber's purchased programming tier — and nonetheless act consistently with the Commission's mandate to support CableCARD-equipped devices. As we stated in the *TWC NAL and Order*, taken to its logical conclusion, TWC's reasoning would permit an MVPD to move *all* of its programming to an SDV platform without regard for the impact its actions would have on customers using or wishing to use CableCARD-equipped UDCPs. TWC's interpretation would eviscerate the rule, is inconsistent with the operative text of Section 76.1201— "use of navigation devices," and the Commission's goal to ensure commercial compatibility of such devices. Considering that the primary objective of Section 629 of the Act and Sections 76.1200-76.1210 of the Rules is to maximize the commercial availability of navigation devices, we decline to adopt a view of our Rule that ignores the plain text and the purpose of these sections.⁵¹

16. Moreover, TWC's strained interpretation of the Rule would be fundamentally at odds with the Commission's goal of protecting cable subscribers' ability to view signals through the use of commercially available navigation devices offered in a competitive market. TWC's movement of linear channels that were previously accessible with a CableCARD-equipped UDCP to a switched digital platform that can only be accessed with a TWC-provided set-top box conflicts with the Commission's rules and policies designed to promote competition and consumer choice of navigation devices. Our conclusion is not affected by the fact that customers can still attach and use navigation devices to receive cable services, and that customers may access switched digital programming by obtaining a set top box from TWC. In the *Plug and Play Order*, the Commission sought to enable *unaffiliated* manufacturers, retailers, and other vendors to compete with MVPD-provided equipment by facilitating the direct connection of digital navigation devices to MVPD systems.

17. TWC further argues that the rule was historically intended to do no more than provide a right to attach commercially available equipment and does not include an obligation that an operator carry any service used by such equipment.⁵² We concur that in adopting this rule, the Commission agreed that the 'right to attach' must be subject to the limitation that the equipment does not harm the MVPD network.⁵³ Thus, the Commission adopted rules that would

⁵⁰ *Id.*

⁵¹ See *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994) (agency's interpretation of its own rule must be given controlling weight unless clearly erroneous).

⁵² *TWC Response at 15-16.*

⁵³ See *Navigation Devices Order*, 13 FCC Rcd at 14789.

permit MVPDs to restrict the attachment or use of equipment to their systems where electronic or physical harm would be caused by the attachment or operation of such equipment.⁵⁴ The Commission was clear however, that “[t]hese standards [set forth in Section 76.1203] shall be used only to prevent attachment of navigation devices that raise reasonable and legitimate concerns of electronic or physical harm or theft of service, and *not as a means to unreasonably restrict the use of navigation devices obtained from a source other than the MVPD.*”⁵⁵ The Commission was equally clear that it expected the cable industry to dedicate the resources necessary to ensure that commercially available CableCARD-enabled devices continue to interoperate properly with cable systems.⁵⁶ The equipment at issue does not raise concerns of electronic or physical harm or theft of service.

18. Finally, we disagree with TWC’s claims that there is no record support for the allegation that as a result of the deployment of SDV, UDCPs lose certain functions, such as picture-in-picture, and that the NAL does not take the balanced approach to equipment compatibility that is required by Section 624A.⁵⁷ Section 624A of the Act expressly mandates that the Commission “minimize interference with or nullification of the special functions of subscriber’s television receivers or video cassette recorders,”⁵⁸ and thus ensures the full compatibility of these devices with the cable system. The deployment of SDV and the requirement that a customer use a company-supplied set top box to view the now switched channels, negates whatever functionalities were available in the UDCP for those of the company-supplied set-top box. The Commission received numerous complaints from affected consumers. For instance, some cable operators have migrated linear HD programming to an SDV format, thus rendering useless the high definition capability of the navigation device. In addition, many complaints from consumers indicate that SDV deployment has affected their use of TiVo. One of TiVo’s main features is the ability to watch one program while recording another (*i.e.*, TiVo Series 3 was designed with two CableCARD slots – one single-stream CableCARD (“S-Card”) to decrypt the programming that the TiVo is recording, and another S-card to decrypt the programming that the TiVo is displaying). The functionality of TiVo is lost with the use of the company-supplied set-top box, which has its own built-in functionality.

2. The NAL’s Findings Are Fully Consistent with the Public Policy Underlying the Commission’s Rules and Orders on “Plug and Play”

19. TWC next argues that its manner of implementing SDV is not inconsistent with the *Plug and Play Order*.⁵⁹ Specifically, it contends that the interactive or advanced two-way capabilities envisioned by that order are not limited to video on demand (VOD), electronic programming guides (EPG), and impulse pay per view (IPPV); are essentially without limit; and thus include SDV within its auspices.⁶⁰ TWC impliedly states that it may move all of its programming to an SDV format because *Plug and Play* provided for this eventuality by mandating DVI/HDMI connections, which allow for connection of UDCPs with two-way

⁵⁴ 47 § C.F.R. 76.1203.

⁵⁵ *Id.* (emphasis added).

⁵⁶ *But see 2005 Deferral Order*, 20 FCC Rcd at 6814.

⁵⁷ *TWC Response* at 17-20.

⁵⁸ 47 U.S.C. § 544a(c)(1)(B).

⁵⁹ *TWC Response* at 21.

⁶⁰ *Id.* at 22.

navigation devices. According to TWC, such an action is also supported by Rules that permit cable operators to move any programming for any reason -- no law provides subscribers with an entitlement to receive any particular service.⁶¹

20. The Bureau previously considered, and rejected, the arguments raised by TWC. As we have previously found, TWC's arguments are inconsistent with the language and the intent of the Commission's Rules and orders.⁶² We do not believe that, in adopting the *Plug and Play Order*, the Commission intended to permit an MVPD move *all* of its programming to an SDV platform "without regard" for the impact such a move would have on its UDCP-owning customers. Such an outcome would be fundamentally inconsistent with the Commission's goal of protecting cable subscribers' ability to view signals through the use of commercially available navigation devices offered in a competitive market. TWC's movement of linear channels that were previously accessible with a CableCARD-equipped UDCP to a switched digital platform that can only be accessed with a TWC-provided set-top box is clearly at odds with the Commission's Rules and policies designed to promote competition and consumer choice of navigation devices.

21. While we recognize that the *Plug and Play Order* does not prohibit cable operators from developing and deploying new technology and services, we conclude that it does not permit TWC's actions here. By moving linear programming to an SDV platform, TWC prevents CableCARD-equipped UDCPs from receiving previously available channels and negates the usefulness of competitive commercially available navigation devices, in violation of the intent of Section 629 and the Commission's Rules.⁶³ The Commission recognized that devices made pursuant to the standard adopted in the *Plug and Play Order* lacked upstream or bi-directional capabilities and therefore could not receive certain programming or services, but that recognition did not extend to services that consumers traditionally experienced as one-way services.⁶⁴ At no point did the Commission authorize MVPDs to modify their transmission of linear programming such that UDCP devices could no longer receive such programming without a cable operator-provided set-top box.⁶⁵ Such an outcome is fundamentally at odds with the policy and regulatory objectives of the *Plug and Play Order*.

⁶¹ *Id.* at 23-25.

⁶² See *Oceanic Oahu Central NAL*, 23 FCC Rcd at 14987. TWC also argues that "curtailing TWC's ability to deliver its programming of choice based on its selection of the most efficient technology available would likely run afoul of the First Amendment." See *Oct. 14 Supplemental LOI Response* at 5 (citation omitted). We reject this argument. The requirements at issue are content neutral and are narrowly tailored to further the substantial federal interest of maximizing commercial availability of navigation devices to the consumer. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662 (1994).

⁶³ See 47 U.S.C. § 549; 47 C.F.R. § 76.1201.

⁶⁴ "Due to the unidirectional nature of this receiver specification, an external navigation device would still be needed to receive advanced features such as cable operator-enhanced electronic programming guides ('EPGs'), impulse pay per view ('IPPV') or video on demand ('VOD')." *Plug and Play Order*, 18 FCC Rcd at 20890, ¶7. See also *Third Further Notice of Proposed Rulemaking*, 22 FCC Rcd at 12025-26, ¶ 4 ("Devices made pursuant to this standard have the ability to receive encrypted digital cable programming, but do not have any upstream, or bidirectional, capabilities (*i.e.*, consumer electronics manufacturers can only make unidirectional devices under the technical standard adopted in the *Plug and Play Order*). For example, such devices cannot support two-way services such as EPGs, VOD, PPV, and other ITV [Interactive Television] capabilities.").

⁶⁵ TWC's LOI Response cites an ex parte letter it filed in the *Plug and Play* docket in 2006. In that letter, TWC states that it informed staff from the Commission's Media Bureau "that SDV would impact some subscribers using [UDCPs], but noted that *these subscribers would continue to receive nearly all the same channels as subscribers using digital set top boxes*. Contrary to the suggestions of the Consumer Electronics Association in its March 23,

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22. Section 76.1201 was adopted to achieve the statutory requirement of alternative sources of navigation devices and to ensure the commercial availability of navigation devices.⁶⁶ The *Plug and Play Order* sought to provide further assurance of the commercial availability of navigation devices by requiring that cable operators support the operation of UDCP in connection with their cable systems. TWC's implementation of SDV in this case clearly negates the use of CableCARD-equipped UDCPs and fundamentally limits the commercial and competitive viability of those devices in cable systems where SDV has been deployed. In the instant case, customers who used CableCARD-equipped UDCPs are unable to receive dozens of linear channels after the deployment of SDV.⁶⁷ As such, TWC is effectively preventing CableCARD-equipped UDCPs from receiving channels previously available and undermining the underlying policy goals of the Act and the Commission's Rules to ensure the commercial availability and use of navigation devices. Thus, we find TWC's November 6, 2007 migration of linear channels to an SDV platform in its Oceanic Oahu Central Cable System constitutes a willful and repeated violation of Section 76.1201 of the Rules.

23. TWC again reasserts that it cannot achieve the efficiencies enabled by SDV without moving linear channels.⁶⁸ According to TWC, a finding of liability as a consequence for such migration would undermine "vital public policy interests," such as additional HD programming and other digital content for all customers.⁶⁹ TWC also asserts that a restriction on SDV would harm the Commission's own policy objectives, such as the digital transition, increased programming diversity, MVPD competition, and enhanced broadband capabilities.⁷⁰

24. As we stated in the *TWC NAL and Order*, we do not dispute that the deployment of SDV technology may provide significant public benefits. It is not TWC's deployment of SDV technology that violates Section 76.1201, but TWC's migration of existing linear programming to an SDV tier that we find inconsistent with Commission Rules. As we noted in the *TWC NAL and Order*, charging for channels not presently accessible to subscribers with CableCARD-equipped UDCPs undermines the policy and regulatory objectives of the *Plug and Play Order*.

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2006 *ex parte*, the use of SDV by TWC in no way contravenes our support of UDCPs." Letter from Steven N. Teplitz, Time Warner Cable, Inc. to Marlene Dortch, Secretary, Federal Communications Commission dated May 11, 2006 (filed in CS Docket 97-80) ("*TWC Ex Parte Letter*") (emphasis added). As the facts of this case demonstrate, TWC's removal of more than 60 channels, including popular HD channels, is inconsistent with the company's *ex parte* letter more than a year beforehand.

⁶⁶ See *Navigation Devices Order*, 13 FCC Rcd at 14786.

⁶⁷ According to the TWC notice announcing the deployment that ultimately took place on November 6, 2007, more than 40 channels would be moved to the SDV platform and no longer available without the use of a TWC-supplied set-top box: Digital Cable Service: (CSPAN-3, CSPAN-2, CNBC World, Bloomberg TV, The Weather Channel, AZN TV, Imaginasian, The Outdoor Channel, Country Music TV, VH1 Classic, BET On Jazz, Ovation), Sports Pak: (Fuel, NBA TV, The Tennis Channel, Fox College Sports-Atlantic, Fox College Sports-Central, Fox College Sports-Pacific, College Sports TV), Encore Service: (Fuse), Spanish Pak: (Galavision, Fox Sports World Espanol, CNN Espanol, Discovery en Espanol, CNN Espanol, ESPN Deportes), Premium: (Chinese Channel), HD Entertainment Pak: (HD Golf/HD Versus, HD Versus & Golf, HD Fsn, HD National Geographic, HD Net, HD Net Movies, iNDemand HD, ESPN HD, ESPN2HD, HD Universal), Jewelry Channel, Pentagon Channel, KOAM, Ocean Network, and Inspirational TV. See also TWC Initial Supplemental LOI Response, Exhibit A (stating that 62 channels ultimately were moved to SDV platform).

⁶⁸ *TWC Response* at 28-32.

⁶⁹ *Id.* at 30.

⁷⁰ *Id.* at 31-32.

Moreover, we are not convinced that the only way TWC can create additional capacity using SDV is to move existing linear programming to an SDV platform. Regardless of the benefits touted, the manner in which TWC has migrated linear channels prevents certain UDCP customers the use and functionality of their navigation devices.⁷¹

3. The NAL's Reading of Section 76.1201 Does Not Conflict with the First Amendment

25. TWC's arguments that the NAL runs afoul of the First Amendment are insubstantial. As an initial matter, TWC's contention that the NAL renders the Commission's *Viewability Order* unconstitutional lacks any merit.⁷² In the *Viewability Order*, the Commission set forth a comprehensive analysis of why the requirement that all cable subscribers be able to view the signals of all must-carry stations after the digital transition was consistent with the First Amendment,⁷³ and the U.S. Court of Appeals for the District of Columbia Circuit recently dismissed a constitutional challenge to the *Viewability Order*.⁷⁴ The analysis contained in the *Viewability Order* in no way depended on the use of SDV under the circumstances present here, and the interpretation of our Rules set forth in the NAL neither alters the Commission's expectation that "cable capacity will continue to expand in future years, thus further decreasing the relative burden on cable operators" nor its observation that "because digital cable systems offer so much more capacity, the proportion of overall bandwidth devoted to must-carry signals is that much smaller than was the case at the time of the [U.S. Supreme Court decisions upholding the constitutionality of must-carry regulation]."⁷⁵

26. Neither is there any merit to TWC's contention that the NAL violates the First Amendment by "impermissibly curtail[ing] TWC's editorial discretion to deliver programming of its choice using the most efficient technology available to it."⁷⁶ Simply put, TWC has no First Amendment right to undermine the development of a competitive market for navigation devices by preventing consumers from accessing linear programming in their existing programming packages with a CableCARD-equipped UDCP and instead requiring the consumer to obtain a TWC-provided set-top box. To the extent that the rules at issue here implicate the First Amendment at all, the requirements are content neutral and narrowly tailored to further the substantial federal interest in developing and maintaining a competitive market for navigation devices, an interest whose importance has been recognized by both Congress and the courts.⁷⁷ Finally, while TWC complains that the First Amendment is implicated by the treatment of other

⁷¹ We note TWC's claim that bi-directional navigation devices "are now becoming available at retail." *TWC Response* at 26. The development of bi-directional navigation devices without limitations on the ability to integrate broadband capability into competitive navigation devices and the ability to integrate web-based or IP content with cable-providing programming will further Congress and the Commission's shared policy goal of expeditious commercial availability of bi-directional navigation devices.

⁷² See *Carriage of Digital Television Broadcast Signals*, Third Report and Order, 22 FCC Rcd 21064 (2007) ("*Viewability Order*").

⁷³ See *Viewability Order* at ¶¶ 41-63.

⁷⁴ See *C-SPAN, Inc. v. FCC*, 545 F.3d 1051 (D.C. Cir. 2008).

⁷⁵ *Viewability Order* at ¶ 60.

⁷⁶ *TWC Response* at 33.

⁷⁷ See 47 U.S.C. § 549; *Comcast Corp. v. FCC*, 536 F.3d 763 (D.C. Cir. 2008); *Charter Communications, Inc. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006).

MVPDs under the integration ban, the D.C. Circuit previously rejected the cable industry's attempt to raise the differential treatment of cable and DBS in another proceeding, noting the evidence set forth by the Commission of the distinctions in the navigation-device market for cable and DBS and observing that "the cable industry is 'perfectly capable of filing a petition tomorrow with the Commission' that will generate a record appropriate for consideration of those issues."⁷⁸ The same holds true here.

B. TWC Willfully Violated Section 76.640(b) by Failing to Comply with the Commission's Technical Rules Regarding the Provision of a Virtual Channel Table for SDV Programming

27. TWC contends that the *TWC NAL and Order's* finding that the standard incorporated by reference in Section 76.640(b)(1)(i) applies to all services, including two-way services like SDV is wrong.⁷⁹ According to TWC, Section 76.640(b)(1)(i), through the incorporated standard SCTE 40 (2003), stands for the proposition that SCTE 65 tables must be presented only for services that are *offered* to the UDCP host device. Since two-way services are not offered, they need not be included.⁸⁰ TWC further asserts that because the text of the rule is limited to one-way products, it cannot reasonably be applied to two-way *services*.⁸¹ Issues relating to two-way services, TWC states, were not yet ripe for consideration during the Commission's consideration of its *Plug and Play Order*, and so were never intended to be encompassed by this rule. TWC also cites to the technical standard SCTE 65 to suggest that the standard was not intended to apply to two-way services, partly because hidden channels are skipped when the subscriber is channel surfing, and partly because the standards state that UDCPs may disregard virtual channel data associated with an application-type virtual channel. TWC argues that the virtual channel table is designed to present only channels that are accessible.⁸²

28. TWC's arguments are without merit. On its face, Section 76.640 applies only to unidirectional *products*.⁸³ Section 76.640(b)(1) makes no distinction between unidirectional and bi-directional *services*. Indeed, by its own terms, the standard incorporated by reference in Section 76.640(b)(1)(i) applies to *all services* – there is no exception for bi-directional services.⁸⁴ Therefore, TWC is required to describe programming on an SDV platform in the out-of-band forward data channel and populate the virtual channel table with all of its programming services.

⁷⁸ *Charter*, 460 F.3d at 43 (quoting FCC counsel). Similarly, although TWC complains about a waiver given by the Media Bureau to Verizon, TWC never sought Commission review of that waiver, and this is not the appropriate proceeding for challenging its merits.

⁷⁹ *TWC Response* at 37.

⁸⁰ *Id.* at 37-38.

⁸¹ *Id.*

⁸² *TWC Response* at 38-40.

⁸³ See 47 C.F.R. §76.640 ("Support for unidirectional digital cable products on digital cable systems.").

⁸⁴ *Id.* at § 76.640(b)(1)(i) (incorporating by reference SCTE 40 2003, Section 5.5, which states that "[w]hen one or more scrambled services are offered on the cable system, System and Service Information for all services (both scrambled and in-the-clear) shall be carried in an out-of-band Forward Data Channel...").

29. TWC next argues that, because Section 15.123 provides that a UDCP cannot be labeled as digital-ready unless it can navigate channels through the virtual channel table, the provision of SDV data to UDCPs would render them non-compliant since the devices would be unable to navigate to SDV programming.⁸⁵ According to TWC, as a result, the UDCP would be rendered noncompliant with the Part 15 rules, could not be marketed as digital cable ready, and cable operators would be relieved of any obligation to support these devices since they are required only to “support unidirectional digital cable products . . .”⁸⁶ TWC argues that rules are not to be interpreted in manner that would nullify corresponding rules. Lastly, TWC argues that there is no practical benefit to transmitting information for channels that cannot be viewed without a set-top box.⁸⁷

30. We disagree. Requiring compliance with Section 76.640(b) does not conflict with Section 15.123 and provides a significant practical benefit. As we stated in the *TWC NAL and Order*, including the SDV programming in the virtual channel table would make it clear to TWC subscribers using CableCARD-equipped UDCPs that their cable operator is charging them for programming that they cannot see.⁸⁸ We reiterate that if TWC believed it had a legitimate reason to exclude two-way programming from the virtual channel table provided to customers with CableCARD-equipped UDCPs, the company should have sought a waiver of the relevant rules.⁸⁹ Accordingly, based on the record before us, we find that TWC willfully violated Section 76.640(b) by failing to provide a virtual channel table as required by Section 76.640(1)(b)(i) and 76.640(b)(1)(v) in its Oceanic Oahu Central Cable System.

C. The Bureau Did Not Exceed Its Delegated Authority in Issuing the NAL

31. TWC argues that the Bureau’s expansive interpretations of the Rules and its decision to penalize the company present novel questions of policy and law; the issues, therefore, fall outside the scope of the Bureau’s delegated authority and must be submitted to the Commission for en banc disposition under Section 0.311(a)(1).⁹⁰

32. The Enforcement Bureau serves as the primary Commission entity responsible for enforcement of the Act, the Commission’s rules, and Commission orders.⁹¹ The Bureau has delegated authority to issue orders taking appropriate action in response to complaints or investigations, including issues notices of apparent liability and related orders.⁹² The Bureau has delegated authority to decide matters unless they “present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines.”⁹³ The questions presented here are consistent with the Commission’s *Plug and Play Order*, the rules found in Section

⁸⁵ *TWC Response* at 41-42.

⁸⁶ *TWC Response* at 41.

⁸⁷ *Id.* at 42.

⁸⁸ *TWC NAL and Order*, XXX at para. 27.

⁸⁹ 47 C.F.R. § 76.1207.

⁹⁰ *TWC Response* at 43.

⁹¹ 47 C.F.R. § 0.111.

⁹² 47 C.F.R. § 0.111(17).

⁹³ 47 C.F.R. § 0.311(a)(3).

76.1201 implementing that order, and the technical rules of Section 76.640(b). As such, the Bureau acted within its delegated authority in issuing the *TWC NAL and Order*. The Bureau is merely applying existing rules and case law to the instant facts.

D. Forfeiture Calculation

33. Under Section 503(b)(1)(B) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.⁹⁴ To impose such a forfeiture penalty, the Commission must issue a notice of apparent liability and the person against whom such notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.⁹⁵ The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.⁹⁶ We conclude that TWC is liable for a forfeiture in the amount of twenty thousand dollars (\$20,000) for its willful violation of Sections 76.1201, 76.640(b)(1)(i), and 76.640(b)(1)(v) of the Rules.

34. Under Section 503(b)(2)(A) and Section 1.80(b)(1) of the Commission's Rules,⁹⁷ we may assess a cable television operator a forfeiture of up to \$32,000 for each violation or each day of a continuing violation, up to a statutory maximum forfeiture of \$325,000 for any single continuing violation. In exercising such authority, we are required to take into account "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."⁹⁸

35. The Commission's *Forfeiture Policy Statement*⁹⁹ and Section 1.80 of the Rules do not establish a specific base forfeiture for violation of Section 76.1201.¹⁰⁰ In a similar case, the

⁹⁴ 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

⁹⁵ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

⁹⁶ See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 (2002).

⁹⁷ 47 U.S.C. § 503(b)(2)(A); 47 C.F.R. § 1.80(b)(1). The Commission has repeatedly amended Section 1.80(b)(1) of the Rules to increase the maximum forfeiture amounts, in accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461. Most recently, the Commission raised the maximum forfeitures applicable to cable operators, broadcast licensees, and applicants for such authority from \$32,500 to \$37,500 for a single violation, and from \$325,000 to \$375,000 for continuing violation. See *Inflation Adjustment of Maximum Forfeiture Penalties*, 73 Fed. Reg. 44663, 44664 (July 31, 2008). The new forfeiture limits took effect September 2, 2008, apply to violations occurring after that date, and accordingly do not apply to this case.

⁹⁸ 47 U.S.C. § 503(b)(2)(E). See also 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures. We consider TWC's apparent violations of Section 76.1201 to have begun on the date its cable system moved previously available linear programming to an SDV platform. TWC's apparent violations continue each day that such programming remains unavailable to customers using CableCARD-equipped UDCPs.

⁹⁹ See *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17115 (1997) ("*Forfeiture Policy Statement*"), recon. denied, 15 FCC Rcd 303 (1999).

¹⁰⁰ The Bureau has substantial discretion in proposing forfeitures. See, e.g., *InPhonic, Inc.*, Order of Forfeiture and Further Notice of Apparent Liability, 22 FCC Rcd 8689, 8699 (2007); *Globcom, Inc. d/b/a Globcom* (continued...)

Commission proposed forfeitures for each cable system involved in the violation.¹⁰¹ Thus, we establish a base forfeiture amount for each cable system in which linear programming has been moved to an SDV platform, thereby impairing customers' use of navigation devices such as UDCPs to view such programming. As noted above, this case involves one of TWC's Hawaii Division cable systems – Oceanic Oahu Central Cable System.

36. As we stated in the *TWC NAL and Order*, one analogous violation for which the Commission has already established a base forfeiture is violation of the cable broadcast signal carriage rule, which has a base forfeiture of \$7,500.¹⁰² Given the number of channels involved and the effect of actions like those here on the Commission's policy objectives, however, we conclude that a more significant penalty is appropriate. We conclude that \$10,000 per cable system in which linear programming is moved to an SDV platform is an appropriate base forfeiture for violation of Section 76.1201. In this case, TWC moved linear programming to an SDV platform in one cable system, Oceanic Oahu Central Cable System. Accordingly, we conclude that TWC is liable for a \$10,000 forfeiture for its willful violation of Section 76.1201 of the Rules.

37. Additionally, we conclude that TWC is liable for a forfeiture in the amount of \$5,000 for its willful violation of Section 76.640(b)(1)(i) of the Rules and \$5,000 for its willful violation of Section 76.640(b)(1)(v) of the Rules. The Commission's *Forfeiture Policy Statement* and Section 1.80 of the Rules do not establish a specific base forfeiture for violation of Section 76.640(b). However, we note that Section 1.80(b) establishes a base forfeiture of \$5,000 for unauthorized discontinuance of service.¹⁰³ We find that the actions of TWC effectively discontinue a portion of the services for each of its CableCARD subscribers who choose to view content via a UDCP. We also conclude that the amount of the forfeiture for each violation is commensurate with the harm imposed upon cable subscribers. Because the violation of Section 76.640(b)(1) coincides with the migration of linear channels to an SDV platform, we will also apply this base forfeiture amount of \$5,000 for each technical violation of Section 76.640(b)(1) on a per cable system basis. Accordingly, we conclude that TWC is liable for a forfeiture in the amount of \$10,000 for its willful violation of Sections 76.640(b)(1)(i) and 76.640(b)(1)(v) in its Oceanic Oahu Central Cable System.

(...continued from previous page)

Global Commun., Order of Forfeiture, 21 FCC Rcd 4710, 4723-24 (2006). We may apply the base forfeiture amounts described in the *Forfeiture Policy Statement* and the Commission's rules, or we may depart from them altogether as the circumstances demand. See 47 C.F.R. § 1.80(b)(4) ("The Commission and its staff *may* use these guidelines in particular cases[, and] *retain the discretion* to issue a higher or lower forfeiture than provided in the guidelines, to issue no forfeiture at all, or to apply alternative or additional sanctions as permitted by the statute.") (emphasis added).

¹⁰¹ See, e.g., *Cablevision Systems Corporation*, Forfeiture Order, 15 FCC Rcd 24298 (2000) ("*Cablevision Forfeiture Order*") (imposing forfeitures against Cablevision on a cable system basis). SDV is installed at separate hubs throughout the cable system, but generally the operator will implement the technology on a system-wide basis.

¹⁰² 47 C.F.R. § 1.80(b)(4)(Note). See also *Cablevision Forfeiture Order*, 15 FCC Rcd at 24298.

¹⁰³ 47 C.F.R. § 1.80(b)(4)(Note). Violation of the broadcast signal carriage rule is also analogous to TWC's failure to provide the SDV programming information in its virtual channel table. In contrast with violations of Section 76.1201, however, violations of Section 76.640(b)(1) do not affect the viewability of actual programming. Therefore, it is appropriate to impose a somewhat lesser penalty for such technical violations.

38. TWC's implementation of SDV in its Oceanic Oahu Central Cable System, in which previously available linear programming was moved to an SDV platform, resulted in the removal of channel information and the loss of access to those switched channels for its subscribers using CableCARD-equipped UDCPs. Moreover, such implementation of SDV, without having in place standards to ensure bi-directional compatibility of cable television systems and CE equipment, effectively harms the Commission's policies to move navigation devices toward a fully competitive market. We note that TWC could have sought a waiver of these rules under Section 76.1207, but failed to do so.¹⁰⁴ Accordingly, we conclude that TWC is liable for a total forfeiture amount of twenty thousand (\$20,000) for its willful violation of Sections 76.1201 (\$10,000), 76.640(b)(1)(i) (\$5,000), and 76.640(b)(1)(v) (\$5,000) of the Commission's Rules.

E. TWC Must Issue Refunds to Customers Harmed by its SDV Implementation

39. As we noted in the *TWC NAL and Order*, TWC's implementation of SDV has harmed its customers who opted to purchase and use television receiving equipment that does not require a cable operator-supplied set-top device to receive cable service. Many consumers purchased expensive UDCPs, such as "cable ready" televisions and digital video recorders like TiVos, based on the reasonable assumption that no set-top box would be necessary to receive linear programming.¹⁰⁵ In effect, TWC's movement of linear programming to an SDV platform has substantially diminished the value of its customers' UDCP devices. Moreover, CableCARD customers affected by TWC's SDV deployment now must pay higher prices to lease set-top boxes than they would have paid for CableCARDS. Those CableCARD customers who chose not to obtain the TWC-supplied set-top boxes after the implementation of SDV nevertheless have paid the same monthly rate for their cable service even though they can view significantly fewer channels. Most importantly, however, TWC's movement of linear programming to an SDV platform set back the shared goal of Congress and the Commission of a competitive market for commercially available navigation devices, as required by Section 629 and the Commission's Rules.

40. In calculating the harm to TWC's customers who use UDCP equipment, we recognize that TWC has made offers to its CableCARD customers to offset the costs of obtaining a set-top box. While TWC's offer to provide a free set-top box to its CableCARD customers may provide temporary relief to its customers, it is not a permanent solution – the benefits promised by TWC are, at best, limited in duration. TWC's offer does not address the critical problem concerning the company's interference with its customers' use of independently obtained UDCPs, *i.e.*, the loss of service to the extent customers can view fewer channels than they did before the

¹⁰⁴ Under Section 629(c) of the Act, 47 U.S.C. § 549(c) and Section 76.1207 of the Commission's Rules, 47 C.F.R. § 76.1207, the Commission may waive rules adopted under Section 629(a) of the Act for a limited time "upon an appropriate showing by a provider of multichannel video programming and other services offered over multichannel video programming systems, or an equipment provider, that such waiver is necessary to assist the development or introduction of a new or improved multichannel video programming or other service offered over multichannel video programming systems, technology, or products. *See* 47 U.S.C. § 549(c), 47 C.F.R. § 76.1207.

¹⁰⁵ For instance, one complainant stated that after talking to a customer service representative who stated that the CableCARDS would allow access to HD programming on a HD-Tivo DVR, the consumer spent \$300 for the HD-Tivo DVR and \$300 for a Tivo Service subscription package. Three weeks later, when the technician came to install the CableCARDS, the customer could not receive the HD package because TWC no longer "offered the cable cards with HD." *See* Complaint No. 07-R522759 at Attachment A.

movement of linear programming to an SDV platform, nor does it address the loss of functionality of the device in question.

41. In the *TWC NAL and Order*, we ordered TWC, within ninety (90) days of the *NAL and Order*, to issue refunds to CableCARD customers affected by the November 6, 2007 implementation of SDV in its Oceanic Oahu Central Cable System.¹⁰⁶ In addition, within thirty (30) days of the release of the *TWC NAL and Order*, we required TWC to submit to the Enforcement Bureau an explanation of the method the company planned to use to determine the appropriate amount of refunds, the number of customers receiving refunds, the total value of such refunds, and the planned timing of such refunds. TWC failed to comply with the Bureau's Order and the Bureau is separately addressing that violation of the Commission's Rules.

42. Thus, we order TWC, within ninety (90) days of this *Forfeiture Order*, to issue refunds to CableCARD customers affected by the November 6, 2007 implementation of SDV in its Oceanic Oahu Central Cable System. Specifically, TWC must provide refunds as follows:

- (a) For former CableCARD customers that began to lease any set-top boxes from TWC following notice of a possible SDV deployment, TWC must refund the difference in cost (if any) between the charges for the TWC set-top boxes and the CableCARD previously leased by such customers; and
- (b) For CableCARD customers that kept their CableCARDS even after notice of the SDV deployment, TWC must refund the customers' subscriber fees based on the diminished value of their service following the movement of linear programming to an SDV platform by \$0.10 per month, per channel moved and reduce their rates on a going-forward basis accordingly.¹⁰⁷

IV. ORDERING CLAUSES

43. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, Section 1.80 of the Rules, and the authority delegated by Sections 0.111 and 0.311 of the Commission's Rules, Oceanic Time Warner Cable, a division of Time Warner Cable, Inc., Oceanic Oahu Central Cable System **IS LIABLE FOR A FORFEITURE** in the amount of twenty thousand dollars (\$20,000) for willful violation of Sections 76.1201, 76.640(b)(1)(i) and 76.640(b)(1)(v) of the Rules.

44. **IT IS FURTHER ORDERED** that, pursuant to sections 1, 4(i), 4(j), 601, and 629 of the Communications Act of 1934, as amended 47 U.S.C. §151, 154(i), 154(j), 521, 549, Time Warner Cable, Inc. must take the steps set forth in paragraph 42 of this *Forfeiture Order*.

¹⁰⁶ *TWC NAL and Order* at 39.

¹⁰⁷ \$0.10 is our best estimate of the relevant license fee per channel. We note that TWC did not provide an explanation of the method the company planned to use to determine the appropriate amount of refunds as required by the *TWC NAL and Order*. The Bureau will reconsider the appropriate license fee per channel should TWC submit a petition for reconsideration that includes evidence that the license fees of the affected channels are lower than \$0.10 per month.

45. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission within thirty (30) days of the release of this Order. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters “FORF” in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. TWC will also send electronic notification on the date said payment is made to JoAnn.Lucanik@fcc.gov and Kevin.Pittman@fcc.gov.

46. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture and Order shall be sent by first class mail and certified mail return receipt requested to counsel for Time Warner, Inc.: Arthur H. Harding, Esq., Fleischman and Harding LLP, 1255 23rd Street, N.W., Eighth Floor, Washington, D.C. 20037 and Matthew A. Brill, Esq., Latham & Watkins LLP, 555 Eleventh Street, N.W., Suite 1000, Washington, D.C. 20004-1304.

FEDERAL COMMUNICATIONS COMMISSION


Kris Anne Monteith
Chief, Enforcement Bureau

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of	)	File Number EB-07-SE-352
)	
Oceanic Time Warner Cable, a division of Time Warner Cable, Inc.	)	NAL/Acct. No. 200932100023
)	
Oceanic Oahu Central Cable System	)	FRN 0018049841
)	

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: January 19, 2009

Released: January 19, 2009

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* (“NAL”), we find that Time Warner Cable, Inc. (“TWC”) apparently willfully violated a Commission Order and Section 76.939 of the Commission’s Rules (“Rules”)¹ by failing to comply with a Bureau directive to describe the methodology it planned to use to refund money to subscribers harmed by the company’s apparent violation of various Commission Rules.² We conclude, pursuant to Section 503(b) of the Communications Act of 1934, as amended (“Act”),³ that TWC is apparently liable for a forfeiture in the amount of twenty-five thousand dollars (\$25,000).

II. BACKGROUND

2. On November 8, 2007, the Spectrum Enforcement Division of the Enforcement Bureau (“Bureau”) issued a Letter of Inquiry (“LOI”)⁴ to TWC based on complaints that the company had moved certain cable channels that previously had been accessible to subscribers using CableCARD-equipped UDCPs, such as digital cable ready television sets and digital video recorders, to a switched digital video (“SDV”) platform. In doing so, TWC made the affected channels inaccessible to subscribers unless they leased a set top box from the company. The LOI sought information on a number of issues, and asked the company to explain how its implementation of SDV was consistent with various statutory and regulatory provisions and orders.

3. TWC responded to the LOI on November 30, 2007,⁵ and subsequently provided additional information to the Bureau in response to supplemental LOIs and information requests. On

¹ 47 C.F.R. §76.939 (“Cable operators shall comply with ... the Commission’s requests for information, orders, and decisions.”).

² See *Oceanic Time Warner Cable, Oahu Central Cable System*, Notice of Apparent Liability for Forfeiture and Order, 23 FCC Rcd 149995, paras. 39-40, 43 (Enf. Bur. 2008) (“*Oceanic Oahu Central NAL and Order*”) (response received).

³ 47 U.S.C. § 503(b).

⁴ See Letter from Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission to Mark Lawrence-Apfelbaum, Esq., Executive Vice President and General Counsel, Time Warner Cable, Inc. (Nov. 8, 2007) (“Nov. 8 LOI”).

⁵ See Letter from Arthur H. Harding, Fleischman and Harding LLP and Matthew A. Brill, Latham & Watkins LLP, Counsel for Time Warner Cable, to Kathryn S. Berthot, Chief, Spectrum Enforcement Division, Enforcement Bureau, Federal Communications Commission (Nov. 30, 2007) (“Nov. 30 LOI Response”).

October 15, 2008, the Enforcement Bureau issued the *Oceanic Oahu Central NAL and Order*, finding that the company's migration of programming to an SDV platform had apparently violated various Commission Rules and orders. Consequently, the *Oceanic Oahu Central NAL and Order* proposed a forfeiture against the company in the amount of \$20,000 for the company's apparent violations.

4. Additionally, the *Oceanic Oahu Central NAL and Order* directed the company to provide refunds to subscribers harmed by the implementation and to provide us with an outline of the company's planned methodology for issuing those refunds.⁶ Specifically, the *Oceanic Oahu Central NAL and Order* ordered TWC, within ninety (90) days of release of the *Oceanic Oahu Central NAL and Order*, to take the following steps:

- (a) For former CableCARD customers that began to lease any set-top boxes from TWC following notice of a possible SDV deployment, TWC must refund the difference in cost (if any) between the charges for the TWC set-top boxes and the CableCARDS previously leased by such customers; and
- (b) For CableCARD customers that kept their CableCARDS even after notice of the SDV deployment, TWC must refund the customers' subscriber fees based on the diminished value of their service following the movement of linear programming to an SDV platform and reduce their rates on a going-forward basis accordingly.

5. The *Oceanic Oahu Central NAL and Order* also required TWC to submit to the Enforcement Bureau an explanation of the method the company plans to use to determine the appropriate amount of refunds, the number of customers receiving refunds, the total value of such refunds, and the planned timing of such refunds. The *Oceanic Oahu Central NAL and Order* directed TWC to submit this information to the Enforcement Bureau for review and approval within thirty (30) days of the release of this decision and to proceed with its proposed refund plan within sixty (60) days of such submission provided the Enforcement Bureau approves TWC's proposed refund plan within thirty (30) days of TWC's submission.⁷

6. TWC responded to the NAL on November 14, 2008.⁸ The company also filed a Petition for Reconsideration and a Request for Stay of the *Oceanic Oahu Central NAL and Order*.⁹ TWC did not provide any information about its methodology for issuing refunds to subscribers harmed by its apparent violations of Commission Rules, instead arguing that the *Oceanic Oahu Central NAL and Order* was unlawful. Nor has the company taken any other steps to comply with the *Oceanic Oahu Central NAL and Order*. Instead, TWC requests that the *Oceanic Oahu Central NAL and Order* either be stayed, pending final resolution of the issues in this matter, or be cancelled in its entirety.¹⁰

⁶ *Oceanic Oahu Central NAL and Order*, 23 FCC Rcd at 14995, paras. 39-40, 43.

⁷ *Id.* at 14995, paras. 39-40.

⁸ *Time Warner Cable, Inc.'s Response to Notices of Apparent Liability and Request for Cancellation of Proposed Forfeitures*, File No. EB-07-SE-352 (filed Nov. 14, 2008) ("TWC NAL Response").

⁹ *Petition for Reconsideration of Time Warner Cable, Inc.*, File No. EB-07-SE-352 (filed Nov. 14, 2008) ("TWC Petition for Reconsideration"); *Time Warner Cable, Inc. Request for Stay Pending Resolution of Petition for Reconsideration and Request for Cancellation of Proposed Forfeitures*, File No. EB-07-SE-352 (filed Nov. 14, 2008) ("TWC Request for Stay").

¹⁰ We will address those filings by separate order.

III. DISCUSSION

A. TWC Apparently Has Violated a Commission Order And Section 76.939

7. We find that TWC apparently willfully¹¹ violated a Commission order and Section 76.939 of the Rules. The Commission has broad investigatory authority under Sections 4(i), 4(j), and 403 of the Act, its Rules, and relevant precedent. Section 4(i) authorizes the Commission to “issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.”¹² Section 4(j) states that “the Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.”¹³ Section 403 grants the Commission “full authority and power to institute an inquiry, on its own motion ... relating to the enforcement of any of the provisions of this Act.”¹⁴ Pursuant to Section 76.939 of the Rules, a cable operator must comply with FCC requests for information, orders, and decisions.¹⁵

8. The *Oceanic Oahu Central NAL and Order* expressly directed TWC to provide the Bureau with an outline of its intended refund methodology. We reject any contention that TWC was not obligated to comply fully with the Bureau’s order because of the pendency of its Petition for Reconsideration and Request for Stay.¹⁶ The filing of such pleadings does not trigger an automatic stay of such order.¹⁷ Neither the Bureau nor the Commission has granted TWC’s Request for Stay or Petition for Reconsideration. Thus, TWC should have submitted its proposed refund methodology by November 14, 2008, in compliance with the terms of the *Oceanic Oahu Central NAL and Order*. As the Commission has stated, “parties are required to comply with Commission orders even if they believe

¹¹ Section 312(f)(1) of the Act defines willful as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act indicates that this definition of willful applies to both Sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the Section 503(b) context. *See, e.g., Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-88 ¶ 5 (1991) (“*Southern California Broadcasting*”).

¹² 47 U.S.C. § 154(i).

¹³ 47 U.S.C. § 154(j).

¹⁴ 47 U.S.C. § 403.

¹⁵ 47 C.F.R. § 76.939 (“Cable operators shall comply with ... the Commission’s requests for information, orders, and decisions.”). In carrying out this obligation, a cable operator also must provide truthful and accurate statements to the Commission or its staff in any investigatory or adjudicatory matter within the Commission’s jurisdiction. *Id.*

¹⁶ We further note that although TWC posits several arguments related to the refund provision, those arguments do not address that portion of the *Oceanic Oahu Central NAL and Order* that requires TWC to submit its proposed refund methodology to the Bureau within 30 days. Instead, TWC’s arguments decry the *issuance* of the refund to the subscribers harmed by its acts, a distinct and separate act required under the *Oceanic Oahu Central NAL and Order*.

¹⁷ *See* 47 C.F.R. §§ 1.102(b), 1.106(n), 1.429(k).

them to be outside the Commission's authority."¹⁸ TWC failed to do so. We find, therefore, that TWC apparently willfully¹⁹ violated a Commission order and Section 76.939 of the Rules.

B. Proposed Forfeiture

9. Under Section 503(b)(1)(B) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.²⁰ To impose such a forfeiture penalty, the Commission must issue a notice of apparent liability and the person against whom such notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.²¹ The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.²² We conclude under this standard that TWC is apparently liable for forfeiture for its apparent willful violation of a Commission Order and Section 76.939 of the Rules.

10. Under Section 503(b)(2)(A) of the Act,²³ we may assess a cable operator a forfeiture of up to \$37,500 for each violation, or for each day of a continuing violation up to a maximum of \$375,000 for a single act or failure to act. In exercising such authority, we are required to take into account “the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”²⁴

¹⁸ *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 para. 5 (2002) (“*SBC Forfeiture Order*”); see also 47 U.S.C. § 408 (Commission orders “shall continue in force for the period of time specified in the order or until the Commission or a court of competent jurisdiction issues a superseding order.”); 47 U.S.C. § 416(c) (“It shall be the duty of every person, its agent and employees ... to observe and comply with such orders so long as the same shall remain in effect”); *Peninsula Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 2832, 2834 para. 5 (2002) (subsequent history omitted) (a regulatee “cannot ignore a Commission order simply because it believes such order to be unlawful”); *World Communications Forfeiture Order*, 19 FCC Rcd at 2719-2720 (issuing forfeiture against regulatee who failed to respond to an LOI because it believed the LOI to be beyond the Commission’s jurisdiction).

¹⁹ Section 312(f)(1) of the Act defines willful as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act indicates that this definition of willful applies to both Sections 312 and 503(b) of the Act, H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982), and the Commission has so interpreted the term in the Section 503(b) context. See, e.g., *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387-88 ¶ 5 (1991) (“*Southern California Broadcasting*”).

²⁰ 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

²¹ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

²² See, e.g., *SBC Forfeiture Order*, 17 FCC Rcd at 7591.

²³ 47 U.S.C. § 503(b)(2)(A). The Commission has amended Section 1.80(b)(3) of the Rules, 47 C.F.R. § 1.80(b)(3), three times to increase the maximum forfeiture amounts, in accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461. See *Amendment of Section 1.80 of the Commission’s Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, 23 FCC Rcd 9845 (2008) (adjusting the maximum statutory amounts for broadcasters and cable operators from \$32,500/\$325,000 to \$37,500/\$375,000); *Amendment of Section 1.80 of the Commission’s Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 19 FCC Rcd 10945 (2004) (adjusting the maximum statutory amounts for broadcasters and cable operators from \$27,500/\$300,000 to \$32,500/\$325,000); *Amendment of Section 1.80 of the Commission’s Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 15 FCC Rcd 18221 (2000) (adjusting the maximum statutory amounts for broadcasters and cable operators from \$25,000/\$250,000 to \$27,500/\$300,000). The most recent inflation adjustment took effect September 2, 2008 and applies to violations that occur after that date. See 73 Fed. Reg. 44663-5. TWC’s apparent violations occurred after September 2, 2008 and are therefore subject to the higher forfeiture limits.

²⁴ 47 U.S.C. § 503(b)(2)(E). See also 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures.

11. Section 1.80 of the Rules and the Commission's *Forfeiture Policy Statement* do not establish a base forfeiture amount for violations of Section 76.939, although they do establish four thousand dollars (\$4,000) as the base amount for failure to respond to Commission communications.²⁵ We find that TWC's apparent failure to comply with the *Oceanic Oahu Central NAL and Order* warrants a substantially larger forfeiture. Misconduct of this type exhibits contempt for the Commission's authority and threatens to compromise the Commission's ability to carry out its obligations under the Act. In this case, TWC's apparent violations have impeded our efforts to carry out the statutory dictates of Section 629 of the Act and perpetuated harm to affected subscribers.

12. We therefore propose a forfeiture of twenty-five thousand dollars (\$25,000) against TWC for its apparent violations of the *Oceanic Oahu Central NAL and Order* and Section 76.939. This forfeiture amount is consistent with precedent in similar cases, where companies failed to provide responses to Bureau inquiries concerning compliance with the Commission's rules despite evidence that the LOIs had been received.²⁶

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Section 1.80 of the Rules, and the authority delegated by Sections 0.111 and 0.311 of the Commissions Rules, Time Warner Cable, Inc. is **NOTIFIED** of its **APPARENT LIABILITY FOR A FORFEITURE** in the amount of twenty-five thousand dollars (\$25,000) for its willful violation of a Commission Order and Section 76.939 of the Rules.

14. **IT IS FURTHER ORDERED** that, pursuant to Section 1.80 of the Rules, within thirty (30) days of the release date of this *Notice of Apparent Liability for Forfeiture*, TWC **SHALL PAY** the full amount of the proposed forfeiture or **SHALL FILE** a written statement seeking reduction or cancellation of the proposed forfeiture.

15. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. TWC will also send electronic notification on the date said payment is made to JoAnn.Lucanik@fcc.gov and Kevin.Pittman@fcc.gov.

16. The response, if any, must be mailed to the Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554, ATTN: Enforcement

²⁵ See 47 C.F.R. § 1.80(b)(4); *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd. 17087 (1997), recon. denied, 15 FCC Rcd. 303 (1999).

²⁶ See e.g., *SBC Forfeiture Order*, 17 FCC Rcd at 7599-7600 ¶¶ 23-28 (ordering \$100,000 forfeiture for egregious and intentional failure to certify the response to a Bureau inquiry) ("*SBC Forfeiture Order*"); *Digital Antenna, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 23 FCC Rcd 7600, 7602 (Spectr. Enf. Div., Enf. Bur. 2008) (proposing \$11,000 forfeiture for failure to provide a complete response to an LOI); *BigZoo.Com Corporation*, Forfeiture Order, 20 FCC Rcd 3954 (Enf. Bur. 2005) (ordering \$20,000 forfeiture for failure to respond to an LOI).

Bureau – Spectrum Enforcement Division, and must include the NAL/Acct. No. referenced in the caption. The response should also be e-mailed to JoAnn Lucanik, Deputy Chief, Spectrum Enforcement Division, Enforcement Bureau, FCC, at JoAnn.Lucanik@fcc.gov and Kevin M. Pittman, Esq., Spectrum Enforcement Division, FCC, at Kevin.Pittman@fcc.gov.

17. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

18. **IT IS FURTHER ORDERED** that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by first class mail and certified mail return receipt requested to counsel for Time Warner Cable, Inc., Matthew A. Brill, Esq., Latham & Watkins LLP, 555 11th Street, NW, Suite 1000, Washington, DC, 20004.

FEDERAL COMMUNICATIONS COMMISSION



Kris Anne Monteith
Chief, Enforcement Bureau

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of	)	File Number EB-07-SE-352
)	
Oceanic Time Warner Cable, a subsidiary of Time Warner Cable, Inc.	)	NAL/Acct. No. 200832100074
)	
	)	FRN 0018049841
)	

FORFEITURE ORDER

Adopted: January 19, 2009

Released: January 19, 2009

By the Chief, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we find that Oceanic Time Warner Cable, a subsidiary of Time Warner Cable, Inc. (collectively, “TWC”) willfully violated Section 76.1603(c) of the Commission's Rules (“Rules”).¹ Specifically, TWC failed to provide the requisite thirty (30) day advance written notice to the Hawaii Department of Commerce and Consumer Affairs, Cable Television Division, which serves as the local franchise authority (“LFA”) for the State of Hawaii, before implementing a service change caused by the migration of certain channels to its Switched Digital Video (“SDV”) platform on September 24, 2007. We conclude, pursuant to Section 503(b) of the Communications Act of 1934, as amended (“Act”),² that TWC is liable for a forfeiture in the amount of seven thousand five hundred dollars (\$7,500).

II. BACKGROUND

2. The facts and circumstances of this case are set forth in the Bureau's *Notice of Apparent Liability for Forfeiture*³ and need not be reiterated at length. Briefly, in response to complaints, the Enforcement Bureau (“Bureau”) initiated an investigation of TWC's movement to an SDV platform of certain cable channels that previously were accessible to subscribers using CableCARD-equipped unidirectional digital cable products (“UDCPs”), including digital cable ready television sets. TWC's implementation of SDV necessarily required such subscribers to obtain a set top box from the cable company to continue to view all cable channels available to them prior to the SDV migration. CableCARD subscribers that failed to lease a set top box from TWC lost access to those channels, even though TWC continued to charge them the same price. Our investigation sought information about TWC's SDV migrations, including whether the company had complied with Section 76.1603 of the Rules, which requires cable operators to notify subscribers and Local Franchising Authorities (“LFAs”) in writing at least thirty (30) days prior to making any changes to rates or services.⁴

¹ 47 C.F.R. § 76.1603(c).

² 47 U.S.C. § 503(b).

³ *Oceanic Time Warner Cable, a subsidiary of Time Warner Cable, Inc.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 12804 (Enf. Bur. 2008) (“*TWC NAL*”) (response received).

⁴ Section 76.1603(c) states, in relevant part:

[C]able systems shall give 30 days written notice to both subscribers and local franchising authorities before implementing any rate or service change. Such notice shall state the precise amount of any rate change and briefly explain in readily understandable fashion the cause of the rate change (e.g., inflation, change in external costs or the addition/deletion of channels). When

3. One of the SDV migrations at issue occurred in Hawaii on September 24, 2007 (“the Hawaii SDV migration”). In response to our inquiry, TWC did not claim that it had provided thirty (30) days advance written notice of the Hawaii SDV migration to the Cable Television Division of the Hawaii Department of Commerce and Consumer Affairs (“the Hawaii LFA”). Instead, the company argued that the notification provisions of Section 76.1603 did not apply because the “provision of SDV services does not involve a change in rates or service packages.”⁵ According to TWC, the only change was that of equipment. As such, the applicable notice requirement was Section 76.1622 of the Commission Rules, which requires that cable operators provide annual equipment compatibility notices to advise subscribers - but not LFAs - that “some models of TV receivers ... may not be able to receive all of the channels offered by the cable system when connected directly to the cable system.”⁶ TWC contended that it had complied with all relevant Commission Rules because it had provided such notice to its subscribers.⁷

4. On August 22, 2008, after reviewing the evidence and TWC’s arguments, we issued the *NAL*, finding that TWC apparently had willfully violated Section 76.1603(c) by failing to notify the Hawaii LFA of its SDV deployment on September 24, 2007. TWC responded to the *NAL* on September 22, 2008.⁸

III. DISCUSSION

A. TWC Violated Section 76.1603(c) By Failing To Notify the Hawaii LFA of the Hawaii SDV Deployment

5. Based on the record before us, we find that TWC willfully violated Section 76.1603(c) by failing to provide the Hawaii LFA thirty (30) days advance written notice prior to the cable operator’s movement of certain channels to a SDV platform on September 24, 2007. As the Commission has stated, “it is crucial that local franchising authorities receive timely notice of a cable operator’s change to programming service.”⁹ TWC failed to provide such notice here, and is therefore subject to forfeiture.

6. In its *NAL Response*, TWC again argues that its movement of linear channels to an SDV platform did not involve a change in “rates” or “service” subject to Section 76.1603’s notice requirements. Specifically, TWC contends “there was no change in the number or placement of the channels that TWC delivered to its customers or in any other aspect of the service it provides.”¹⁰ But TWC did change the channels it delivered to its CableCARD-using subscribers when it moved those channels to an SDV platform. Such customers received one group of channels on September 23, 2007, and a smaller group of channels the next day. As we stated in the *NAL*, we judge whether there was a change in service from the “subscribers’ perspective – not that of the cable operator...”¹¹ From the perspective of the complainants, it is clear that they viewed the elimination of access to dozens of channels, including popular high-definition programming, as a “change in service.”

the change involves the addition or deletion of channels, each channel added or deleted must be separately identified.

47 C.F.R. §76.1603(c).

⁵ See *TWC NAL*, 23 FCC Rcd at 12805 para. 3.

⁶ 47 C.F.R. § 76.1622(b)(1).

⁷ See *TWC NAL*, 23 FCC Rcd at 12805 para. 4.

⁸ *Time Warner Cable Inc. Response to NAL and Request for Cancellation of Forfeiture*, File No. EB-07-SE-352 (filed Sept. 22, 2008) (“TWC NAL Response”).

⁹ *Time Warner Cable, a Division of Time Warner Entertainment Company, L.P.*, Order on Reconsideration, 21 FCC Rcd 9016, 9027 para. 30 (Media Bur.) (“*TWC Order on Reconsideration*”), consent decree adopted, Order, 21 FCC Rcd 11229 (Media Bur. 2006).

¹⁰ TWC NAL Response at 5.

¹¹ *TWC Order on Reconsideration*, 21 FCC Rcd at 9020 para. 15, quoted in *NAL*, 23 FCC Rcd at 12807 para. 8.

7. We disagree with TWC's assertion that no change in service occurred because the affected subscribers could receive the channels migrated to an SDV platform if they leased a set-top box from the company.¹² According to TWC, all that occurred was a change in the equipment necessary to receive the migrated programming and, as such, the only applicable notice requirement was Section 76.1622 of the Rules. The Commission addressed a similar situation in its decision addressing the responsibilities of cable operators that choose to cease providing programming in analog format and convert to all-digital systems. In that decision, the Commission advised cable operators that such actions were subject to the notice requirements in both the annual equipment notice rule (Section 76.1622) and Section 76.1603.¹³ We see no reason (and TWC offers none) why we should come to a different conclusion here.

8. Therefore, for the reasons stated above, we find that TWC violated Section 76.1603(c) by failing to provide at least thirty (30) days notice to the Hawaii LFA before moving certain linear channels to its SDV platform.

B. Forfeiture Calculation

9. Under Section 503(b)(1)(B) of the Act, any person who is determined by the Commission to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.¹⁴ To impose such a forfeiture penalty, the Commission must issue a notice of apparent liability and the person against whom such notice has been issued must have an opportunity to show, in writing, why no such forfeiture penalty should be imposed.¹⁵ The Commission will then issue a forfeiture if it finds by a preponderance of the evidence that the person has violated the Act or a Commission rule.¹⁶ As discussed below, we conclude that TWC is liable for a forfeiture in the amount of seven thousand five hundred dollars (\$7,500) for its willful violation of Section 76.1603(c) of the Rules.

10. At the time of the actions underlying this *Order*, under Section 503(b)(2)(A) and Section 1.80(b)(1) of the Commission's Rules, we could assess a cable television operator a forfeiture of up to \$32,000 for each violation or each day of a continuing violation, up to a statutory maximum forfeiture of \$325,000 for any single continuing violation.¹⁷ In exercising such authority, we must take into account "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."¹⁸

¹² TWC NAL Response at 7.

¹³ "We remind operators who transition their systems to all-digital that they must provide written notice to subscribers about the switch, containing any information they need or actions they will have to take to continue receiving service." *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Third Report and Order, and Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 21064, 21081 para. 38 & n.121 (2007) (citing both Sections 76.1603 and 76.1622). Although the Commission was discussing notice to subscribers in the relevant passage, it cited to Section 76.1603 as a whole, and did not distinguish the LFA notice language.

¹⁴ 47 U.S.C. § 503(b)(1)(B); 47 C.F.R. § 1.80(a)(1).

¹⁵ 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(f).

¹⁶ See, e.g., *SBC Communications, Inc.*, Forfeiture Order, 17 FCC Rcd 7589, 7591 (2002).

¹⁷ 47 U.S.C. § 503(b)(2)(A), 47 C.F.R. § 1.80(b)(1). The Commission has repeatedly amended Section 1.80(b)(1) of the Rules to increase the maximum forfeiture amounts, in accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461. Most recently, the Commission raised the maximum forfeitures applicable to cable operators, broadcast licensees, and applicants for such authority from \$32,500 to \$37,500 for a single violation, and from \$325,000 to \$375,000 for continuing violation. See *Inflation Adjustment of Maximum Forfeiture Penalties*, 73 Fed. Reg. 44663, 44664 (July 31, 2008). The new forfeiture limits take effect September 2, 2008 and do not apply to this case.

¹⁸ 47 U.S.C. § 503(b)(2)(E). See also 47 C.F.R. § 1.80(b)(4), Note to paragraph (b)(4): Section II. Adjustment Criteria for Section 503 Forfeitures.

11. In the *TWC NAL*, based on these factors, we determined that \$7,500 was an appropriate base forfeiture for TWC's failure to notify the Hawaii LFA of the company's change in service, in apparent violation of Section 76.1630(c) of the Rules. TWC's NAL Response does not argue that this amount is excessive and we see no reason to reconsider that figure. Accordingly, we conclude that TWC is liable for a seven thousand five hundred dollar (\$7,500) forfeiture for its willful violation of Section 76.1603(c) of the Rules.

IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Act, and Section 1.80 of the Rules, and under the authority delegated by sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. S: 0.111, 0.311, Oceanic Time Warner Cable, a subsidiary of Time Warner Cable, Inc. is **LIABLE FOR A MONETARY FORFEITURE** in the amount of seven thousand five hundred dollars (\$7,500) for its willful violation of Section 76.1603(c) of the Rules.

13. Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Account Number and FRN Number referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. For payment by credit card, an FCC Form 159 (Remittance Advice) must be submitted. When completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Requests for full payment under an installment plan should be sent to: Chief Financial Officer -- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554. Please contact the Financial Operations Group Help Desk at 1-877-480-3201 or Email: ARINQUIRIES@fcc.gov with any questions regarding payment procedures. TWC will also send electronic notification on the date said payment is made to JoAnn.Lucanik@fcc.gov.

14. **IT IS FURTHER ORDERED** that a copy of this Forfeiture Order shall be sent by first class mail and certified mail return receipt requested to counsel for Time Warner Cable, Inc.: Arthur H. Harding, Esq., Fleischman and Harding LLP, 1255 23rd Street, N.W., Eighth Floor, Washington, D.C. 20037 and Matthew A. Brill, Esq., Latham & Watkins LLP, 555 Eleventh Street, N.W., Suite 1000, Washington, D.C. 20004-1304.

FEDERAL COMMUNICATIONS COMMISSION



Kris Anne Monteith
Chief, Enforcement Bureau

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Oceanic Time Warner Cable,	)	File Nos. EB-07-SE-351, EB-07-SE-352
A subsidiary of Time Warner Cable, Inc.)	
)	
Oceanic Time Warner Cable,	)	NAL/Acct. Nos. 200832100074,
a division of Time Warner Cable, Inc.	)	200932100001, 200932100002,
Oceanic Kauai Cable System	)	200932100003, 200932100008,
	)	200932100022, and 200932100023
)	
Oceanic Time Warner Cable,)	
a division of Time Warner Cable, Inc.)	
Oceanic Oahu Central Cable System)	
	)	FRN Nos. 0018049841, 0016034050
)	
Cox Communications, Inc.)	
Fairfax County, Virginia Cable System)	

ORDER ON REVIEW

Adopted: June 15, 2009

Released: June 26, 2009

By the Commission: Commissioner McDowell approving in part, concurring in part, and issuing a statement.

I. INTRODUCTION

1. The Enforcement Bureau (“Bureau”) initiated forfeiture proceedings in the above captioned matters against the cable operators Time Warner Cable, Inc. (“TWC”) and Cox Communications, Inc. (“Cox”) relating to their deployment of switched digital video (“SDV”) technology to deliver programming that previously was delivered in another format.¹ TWC and Cox have filed Petitions for Reconsideration of the Bureau’s Forfeiture Orders and Responses to the Bureau’s Notices of

¹ See *Oceanic Time Warner Cable, a subsidiary of Time Warner Cable, Inc.*, Forfeiture Order, 24 FCC Rcd 960 (Enf. Bur. 2009) (“*LFA Notice Forfeiture Order*”); *Oceanic Time Warner Cable, a division of Time Warner Cable, Inc., Oceanic Oahu Central Cable System*, Forfeiture Order, 24 FCC Rcd 994 (Enf. Bur. 2009) (“*Oceanic Oahu Central Forfeiture Order*”); *Oceanic Time Warner Cable, a division of Time Warner Cable, Inc., Oceanic Kauai Cable System*, Forfeiture Order, 24 FCC Rcd 1030 (Enf. Bur. 2009) (“*Oceanic Kauai Forfeiture Order*”); *Oceanic Time Warner Cable, a division of Time Warner Cable, Inc., Oceanic Oahu Central Cable System*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 964 (Enf. Bur. 2009) (“*Oceanic Oahu Refund Methodology NAL*”); *Oceanic Time Warner Cable, a division of Time Warner Cable, Inc., Oceanic Kauai Cable System*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 955 (Enf. Bur. 2009) (“*Oceanic Kauai Refund Methodology NAL*”); *Cox Communications, Inc., Fairfax County, Virginia Cable System*, Forfeiture Order, 24 FCC Rcd 1013 (Enf. Bur. 2009) (“*Cox Fairfax County Forfeiture Order*”); *Cox Communications, Inc., Fairfax County, Virginia Cable System*, Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 970 (Enf. Bur. 2009) (“*Cox Fairfax County Refund Methodology NAL*”).

Apparent Liability.² Upon review of the arguments presented by TWC and Cox, the Bureau has determined that these issues merit additional review and, accordingly, has referred these matters to the Commission *en banc* for disposition.³ As described below, based on our review of TWC and Cox's arguments and the facts presented, with one exception, we hereby vacate in their entirety the Bureau's previous Notices of Apparent Liability for Forfeiture and Forfeiture Orders relating to TWC and Cox's implementation of SDV.⁴ We base this decision on a plain reading of our rules, the potential consumer benefits of SDV deployment, and other factors that limit the potential scope of consumer disruption. We affirm, however, the Forfeiture Order against TWC relating to the Bureau's finding that the migration of programming to an SDV platform constitutes a "change in service" requiring 30-day advanced written notice to the relevant local franchise authority ("LFA") pursuant to Section 76.1603 of our rules.⁵

II. BACKGROUND

2. The Bureau's prior decisions discuss the facts of these cases in depth; therefore, we will provide only a brief summary here. In late 2007, based on consumer complaints, the Bureau initiated investigations of TWC and Cox regarding their movement of certain cable channels that previously had been viewable by subscribers using CableCARD-equipped unidirectional digital cable products ("UDCPs"), such as digital cable ready television sets and digital video recorders (such as TiVo recorders), to a switched digital video ("SDV") platform. SDV permits video programming providers to free up capacity by moving certain channels to the SDV platform and transmitting the content only to subscribers who actually request it. This increased capacity has been used to launch new and niche programming services for consumers and will facilitate the deployment of advanced broadband capabilities. It will also facilitate compliance with the Commission's mandate that cable operators ensure that broadcast signals are viewable by all subscribers on their systems, given the additional broadcast carriage obligation cable systems face in light of the digital television transition.⁶ Nevertheless, the movement of certain channels to SDV rendered the programming inaccessible to the relatively small percentage of subscribers using CableCARD-equipped UDCPs unless they leased a set-top box from the

² See *Petition for Reconsideration of Time Warner Cable, Inc.*, (filed Feb. 18, 2009) ("*TWC Petition for Recon of LFA Notice Forfeiture Order*"); *Time Warner Cable Inc. Request for Stay Pending Resolution of Petition for Reconsideration* ("*TWC Stay Request of LFA Notice Forfeiture Order*"); *Petition for Reconsideration of Time Warner Cable Inc.* (filed Feb. 18, 2009) ("*TWC Petition for Recon*"); *Time Warner Cable Inc. Request for Stay Pending Resolution of Petition for Reconsideration* (filed Feb. 18, 2009) ("*TWC Stay Request*"); *Response to Notices of Apparent Liability and Request for Cancellation of Proposed Forfeitures*, filed by Time Warner Cable Inc., on behalf its Oceanic Time Warner Cable division (filed Feb. 18, 2009) ("*TWC NAL Response*"); *Petition for Reconsideration of Forfeiture Order*, filed by Cox Communications, Inc. ("*Cox Petition for Recon*") (filed Feb. 18, 2009); *Request for Stay*, filed by Cox Communications, Inc. (filed Feb. 18, 2009) ("*Cox Stay Request*"); and *Statement in Response to Notice of Apparent Liability*, filed by Cox Communications, Inc. (filed Feb. 18, 2009) ("*Cox NAL Response*").

³ 47 C.F.R. § 1.106(a)(1).

⁴ This Order on Review relates only to the Bureau's SDV investigation, which is separate from the digital migration investigation initiated by the Bureau on October 30, 2008 regarding cable operators' migrations of analog programming to digital tiers. See generally Amy Schatz and Vishesh Kumar, *FCC Opens Investigation into Cable-TV Pricing*, Wall St. J., Nov. 5, 2008, at B3.

⁵ 47 C.F.R. § 76.1603. That rule requires cable operators to provide at least 30 days advance written notice to customers before making any "changes in rates, programming services or channel positions." *Id.* at §76.1603(b). Cable operators must give LFAs and customers at least 30 days advance written notice "before implementing any rate or service change." *Id.* at §76.1603(c).

⁶ *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Third Report and Order and Third Further Notice of Proposed Rulemaking, 22 FCC Red 21064, 21069-70 ¶¶ 15-16 (2007) ("*Viewability Order*").

cable operator or, in the case of TiVo customers, obtained a special tuning adapter.

3. On August 22, 2008, the Bureau issued a Notice of Apparent Liability for Forfeiture against TWC for its apparent failure to provide the Hawaii Department of Commerce and Consumer Affairs, Cable Television Division with at least 30 days advanced written notice before implementing a service change consisting of the migration of certain channels to an SDV platform on September 24, 2007.⁷ On October 15, 2008, the Bureau issued additional Notices of Apparent Liability for Forfeiture against TWC and Cox finding that their migration of programming to an SDV platform in certain cable systems apparently violated Sections 76.1201 and 76.640(b) of the Commission's rules.⁸ Section 76.1201 prohibits a Multichannel Video Programming Distributor ("MVPD") from preventing "the connection or use of navigation devices to or with its . . . system, except in those circumstances where electronic or physical harm would be caused by the attachment or operation of such devices or such devices may be used to assist or are intended or designed to assist in the unauthorized receipt of services."⁹ Section 76.640(b) sets forth technical specifications pursuant to which MVPDs must describe programming in the out-of-the-band forward data channel and provide a virtual channel table that conforms to certain standards set forth in Commission rules.¹⁰

4. In the *SDV NALs*, the Bureau proposed forfeitures against both companies, and ordered TWC and Cox to submit methodologies to the Bureau for the issuance of refunds to affected consumers. Once approved by the Bureau, the *SDV NALs* required TWC and Cox to use those methodologies to issue subscriber refunds.

5. TWC responded to the *LFA Notice NAL* contending that notice requirements under Section 76.1603(c) did not apply to its implementation of SDV because the movement of linear channels to an SDV platform did not involve a change in "service" or "rates" subject to the notice requirements under Section 76.1603.¹¹ TWC and Cox responded to the *SDV NALs*,¹² disputing the Bureau's interpretation of Section 629 of the Communications Act of 1934, as amended ("Act"),¹³ and its interpretation of the Commission's rules and orders, and sought reconsideration of the Bureau's refund orders.¹⁴ Both companies argued that neither Section 76.1201 nor Section 76.640(b) apply to the deployment of SDV technology, and that

⁷ See *Oceanic Time Warner Cable, a subsidiary of Time Warner Cable, Inc.*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 12804 (Enf. Bur. 2008) ("*LFA Notice NAL*") (subsequent history omitted).

⁸ See *Oceanic Time Warner Cable, a division of Time Warner Cable, Inc., Oceanic Oahu Central Cable System*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 14981 (Enf. Bur. 2008) (subsequent history omitted); *Oceanic Time Warner Cable, a division of Time Warner Cable, Inc., Oceanic Kauai Cable System*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 14962 (Enf. Bur. 2008) (subsequent history omitted); *Cox Communications, Inc., Fairfax County, Virginia Cable System*, Notice of Apparent Liability for Forfeiture, 23 FCC Rcd 14944 (Enf. Bur. 2008) (subsequent history omitted). We refer to these NALs collectively as the "*SDV NALs*."

⁹ 47 C.F.R. § 76.1201.

¹⁰ 47 C.F.R. § 76.640(b).

¹¹ See *Time Warner Cable, Inc. Response to NAL and Request for Cancellation of Forfeiture*, (filed Sept. 22, 2008) ("*Response to LFA Notice NAL*").

¹² See TWC Response to NAL and Request for Cancellation of Forfeiture (filed Nov. 14, 2008) ("*TWC SDV NAL Response*"); Cox Statement in Response to Notice of Apparent Liability and Order (filed Nov. 14, 2008) ("*Cox SDV NAL Response*").

¹³ 47 U.S.C. § 549. Section 629 was adopted as part of the Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56 (1996).

¹⁴ Petition for Reconsideration of Time Warner Cable, Inc. (filed Nov. 14, 2008) ("*TWC SDV Petition*"); Petition for Reconsideration of Cox Communications, Inc. (filed Nov. 14, 2008) ("*Cox SDV Petition*").

neither the Commission's rules nor the Commission's *Plug and Play Order*,¹⁵ which requires cable operators to support UDCPs and ensure the utilization of such navigation devices, prohibit cable operators from developing and deploying new technology and services.¹⁶ Both TWC and Cox stressed the importance of the deployment of SDV and its many public interest benefits, contending that use of this technology is pro-competitive and pro-consumer, allowing all customers to benefit from expanded program offerings, introduction of high-definition ("HD") programming and faster broadband service.¹⁷ Further, the companies stated that the number of customers affected by the deployment of SDV is relatively small compared to the companies' overall subscriber base¹⁸ and provided details on plans to deploy tuning adapters that would provide this small group of customers with access to the SDV platform.¹⁹

6. On January 19, 2009, the Bureau issued a Forfeiture Order against TWC for violating Section 76.1603(c) of the Commission rules by failing to provide timely notice to the LFA of the operator's change in service due to the movement of certain linear channels to the SDV platform.²⁰ The Bureau also issued Forfeiture Orders against TWC and Cox for violating Commission rules by migrating programming to an SDV platform in certain cable systems.²¹ In response to TWC and Cox's failure to propose a refund methodology, the Bureau established a formula and ordered the companies to issue refunds within a specified period.²² The Bureau proposed additional forfeitures against TWC and Cox for failing to comply with the Bureau's refund orders.²³

7. TWC and Cox responded to the Bureau's January 19, 2009 orders. Specifically, TWC filed a Petition for Reconsideration and Request for Stay of the Bureau's Forfeiture Order finding TWC liable for failure to give advanced written notice to the LFA of a change in service due to the deployment of SDV.²⁴ In addition, TWC and Cox filed Petitions for Reconsideration and Requests for Stay of the Bureau's

¹⁵ *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, Second Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd 20885 (2003) ("*Plug and Play Order*"). "The term 'plug and play' refers to a device's ability to plug into a cable system and receive digital cable programming without a cable-operator provided set-top box." *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, Third Further Notice of Proposed Rulemaking, 22 FCC Rcd 12024, 12025, n.9 (2007).

¹⁶ See, e.g., *TWC SDV NAL Response* at 3-4, 13, 20; *Cox SDV NAL Response* at 10-11.

¹⁷ See, e.g., *TWC SDV NAL Response* at 7-8; *Cox SDV NAL Response* at 2-4. TWC also noted the importance of SDV in allowing it to broadcast signals in both analog and digital format, thus minimizing the impact of the digital transition on many customers. *TWC SDV NAL Response* at 2, 7-8.

¹⁸ *TWC SDV NAL Response* at 9 (noting that the group of such customers in its Hawaii Division numbers 0.0004 percent of the overall subscriber base); *Cox SDV NAL Response* at 3 (noting that the percentage of subscribers using UDCPs with CableCARDs was 0.6% of its Fairfax County subscriber base).

¹⁹ *TWC SDV NAL Response* at 11; *Cox SDV NAL Response* at 15.

²⁰ See *Oceanic Time Warner Cable, a subsidiary of Time Warner Cable, Inc.*, Forfeiture Order, 24 FCC Rcd 960 (Enf. Bur. 2009) ("*LFA Notice Forfeiture Order*").

²¹ See *Oceanic Oahu Central Forfeiture Order*, 24 FCC Rcd 994; *Oceanic Kauai Forfeiture Order*, 24 FCC Rcd 1030; *Cox Fairfax County Forfeiture Order*, 24 FCC Rcd 1013.

²² See *Oceanic Oahu Central Forfeiture Order*, 24 FCC Rcd at 1011; *Oceanic Kauai Forfeiture Order*, 24 FCC Rcd at 1047; *Cox Fairfax County Forfeiture Order*, 24 FCC Rcd at 1027-28.

²³ See *Oceanic Oahu Refund Methodology NAL*, 24 FCC Rcd 964; *Oceanic Kauai Refund Methodology NAL*, 24 FCC Rcd 955; *Cox Fairfax County Refund Methodology NAL*, 24 FCC Rcd 970.

²⁴ See *TWC Petition for Recon of LFA Notice Forfeiture Order*; *TWC Stay Request of LFA Notice Forfeiture Order*.

Forfeiture Orders relating to the migration of programming to an SDV platform.²⁵ Both companies also requested, and the Bureau granted,²⁶ a stay of the effectiveness of the Bureau orders that TWC and Cox issue refunds to consumers affected by the companies' SDV deployments.²⁷ Finally, TWC and Cox challenged the Bureau's proposed forfeitures for failing to comply with the Bureau's order to submit a methodology for the issuance of refunds to consumers affected by the SDV deployments.²⁸

III. DISCUSSION

8. We have carefully reviewed the arguments proffered by the parties and the record developed in these proceedings. Upon review, we find that the deployment of SDV does not violate Section 76.1201 or Section 76.640(b) of our rules. We also find, however, that Section 76.1603(c) of our rules requires cable operators migrating existing programming to an SDV platform to provide 30 days advance written notice to affected LFAs and subscribers.

A. The Migration of Programming to a Switched Digital Video Platform Does Not Violate Section 76.1201 or Section 76.640(b) of the Commission's Rules

9. Section 76.1201 prohibits an MVPD from "prevent[ing] the connection or use of navigation devices to or with its system" unless such devices would cause electronic or physical harm or allow the unauthorized receipt of service.²⁹ In adopting this rule, the Commission sought to advance Congress' goal to assure the commercial availability of "converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor."³⁰ Subsequently, in the *Plug and Play Order*, the Commission adopted additional rules, including Section 76.640, requiring that cable operators support the operation of UDCPs in connection with their cable systems.³¹

10. The Bureau described SDV and the effect of its deployment on CableCARD-equipped UDCPs as follows:

Traditionally, cable systems have used broadcast-type technologies that deliver all programs to all subscribers whether the subscribers view the programs or not. The programs not viewed nonetheless occupy system bandwidth (which prevents the use of that bandwidth for any other purpose). Many cable operators, however, have begun to test and deploy SDV technology in their cable systems. In an SDV system, a subset of programming is delivered in the traditional way to all subscribers whether they are viewing the programs or not. For those channels, the CableCARD-equipped UDCP will work as described above, allowing the subscriber to view the channels delivered in the traditional broadcast manner. The remaining channels are switched through the use of SDV network equipment located at a "hub" (where signals are converted and placed onto the "last mile" coaxial portion of the network). These switched channels do not occupy bandwidth, and

²⁵ See *TWC Petition for Recon*; *TWC Stay Request*; *Cox Petition for Recon*; *Cox Stay Request*.

²⁶ See *Oceanic Time Warner Cable, a division of Time Warner Cable, Inc. et al.*, Order, DA 09-752 (Enf. Bur. rel. April 14, 2009).

²⁷ *TWC Stay Request* at 1-2; *Cox Stay Request* at 1.

²⁸ See *TWC NAL Response* at 2; *Cox NAL Response* at 2.

²⁹ 47 C.F.R. § 76.1201.

³⁰ 47 U.S.C. § 549(a); see also *Navigation Devices Order*, 13 FCC Rcd at 14777-78.

³¹ See *Plug and Play Order*, 18 FCC Rcd at 20891.

are not available to subscribers until a subscriber tunes to that channel by sending a request, using a remote or program guide, upstream through the use of a set-top box to the hub. At the hub, the SDV equipment directly receives and processes set-top channel change requests for switched content and responds to that set-top with the frequency and program number where that content can be found. Once the hub receives the request, it immediately begins to transmit the channel. A customer who uses a CableCARD-equipped UDCP to receive programming must have additional equipment with the necessary upstream signaling capability to obtain the switched (*i.e.*, bi-directional) channels. The UDCP cannot perform the bi-directional functions necessary to request that a channel be delivered via SDV. Nor can the CableCARD, which is designed only to provide the separate security element, provide the necessary interface needed to send the signal to the SDV server. Thus, in essence, in an SDV system, all subscribers must have a cable-operator supplied set-top box to view channels placed on the SDV platform.³²

11. We find that the plain language of Section 76.1201 is not consistent with the Bureau's finding that the deployment of SDV by TWC and Cox "prevented" subscribers with CableCARD-equipped UDCPs from connecting or using their navigation devices on their systems. CableCARD-equipped UDCP customers are still able to access unidirectional programming services in an SDV system. Our UDCP rules were not intended to provide access to bi-directional services or to freeze all one-way cable programming services in perpetuity.³³ CableCARD-equipped UDCP customers may continue to use their UDCPs to receive unidirectional programming services without an additional set-top box. Thus, we find that the migration of cable programming services to an SDV platform does not "prevent" the use of UDCP devices as that term is used in Section 76.1201. We emphasize, however, that while one-way cable programming may be converted to a two-way platform without violating our plug-and-play rules, these rules continue to require cable systems to provide any one-way programming in a format compatible with UDCP devices.

12. Similarly, with respect to the Bureau's findings regarding the application of Section 76.640(b) to TWC and Cox's SDV deployments, we conclude that the technical standards incorporated by reference into that rule do not apply to two-way services like SDV. Rather, they apply only to services that are "offered" to the unidirectional host – not every channel or service on a network.³⁴ Those technical specifications also provide for channels that are not made available to a host to be hidden from a user. Because two-way services like SDV are not "offered" to UDCPs, information regarding such services need not be included in the virtual channel table. Thus, failing to provide virtual channel table data for channels that are not offered to or supported by UDCPs is not a violation of Section 76.640(b).³⁵

13. While we find that the plain language of Sections 76.1201 and 76.640(b) is determinative, we also find that there are significant consumer benefits of SDV deployment that weigh

³² *Oceanic Oahu Central Forfeiture Order*, 24 FCC Rcd at 997; *Oceanic Kauai Forfeiture Order*, 24 FCC Rcd at 1033; *Cox Fairfax County Forfeiture Order*, 24 FCC Rcd at 1016.

³³ Indeed, the Commission requires that cable system operators inform consumers, at the time they subscribe and annually thereafter, "that some models of TV receivers and videocassette recorders may not be able to receive all of the channels offered by the cable system when connected directly to the cable system," and further, that "the use of a cable system terminal device such as a set-top channel converter" could be needed to resolve an incompatibility. 47 C.F.R. § 76.1622(a)(1).

³⁴ ANSI/SCTE 40(2003); see *TWC Petition for Recon* at 17.

³⁵ Sec. 76.640(b) and the standards incorporated by reference therein address technical transmission requirements for UDCP devices. Our conclusions herein are limited to that issue alone and do not reflect a view on other issues pending before the Commission (*e.g.*, the definition of a "digital cable system").

against a broader reading of our rules.³⁶ As noted earlier, the increased capacity enabled by SDV will facilitate cable operator compliance with the Commission's "viewability" rules—which require cable operators to transmit both analog and digital versions of broadcast channels—without displacing substantial amounts of existing programming.³⁷ SDV has also permitted the launch of new HD channels and the introduction of diverse and niche programming options, including foreign-language content and other diverse programming.³⁸ In addition, the additional capacity will facilitate the deployment of advanced broadband technologies such as DOCSIS 3.0, as well as expand broadband capabilities.³⁹ Indeed, many of cable's competitors currently rely on SDV to provide expanded offerings to consumers.⁴⁰ The Bureau's expansive reading of Sections 76.1201 and 76.640(b) failed to adequately account for these significant consumer benefits.⁴¹

14. We do recognize, as the Bureau found, that implementation of SDV may have a disruptive effect on the relatively small percentage of consumers who use CableCARD-equipped UDCPs.⁴² Again, however, that negative impact must be considered in the context of our rules and the consumer benefits of SDV described above. In addition, the potential disruption may be limited because: (1) the more popular cable channels are not prime candidates for SDV migration because cable operators only free up capacity to the extent that subscribers do not request a particular channel at a particular time; (2) market demand for UDCPs is not strong and consumers with TiVo UDCP devices can use the tuning adapter to access SDV programming;⁴³ and (3) bi-directional devices that will work with SDV content are

³⁶ *TWC Petition for Recon* at 2-3; *Cox Petition for Recon* at 6.

³⁷ See *TWC Petition for Recon* at 2-3 (citing *Viewability Order*, 22 FCC Rcd 21064). Individual Commissioners have recognized the benefits that SDV technology may provide to consumers and encouraged the development of new technologies that would bring about expansion and improvements in services. See Separate Statement of Commissioner Jonathan S. Adelstein, Approving in Part, Dissenting in Part, *id.* at 21128 (“We encourage cable operators to upgrade their systems and deploy solutions, such as switched digital, QAM or IPTV, to increase system capacity for more channels, enhanced services and faster broadband speeds. Such technological innovations promote efficient network management and the greater diversity of programming.”); Separate Statement of Commissioner Deborah Taylor Tate, *id.* at 21130 (“Developments in new compression technology, such as switched digital, allow cable operators to conserve valuable spectrum while providing quality video service.”); Separate Statement of Commissioner Robert M. McDowell, *id.* at 21131 (“The standard we reaffirm today will permit cable operators to take advantage of technological innovations, such as switched digital and advanced compression technologies, to continue providing service to consumers with greater efficiency.”).

³⁸ For instance, as a result of bandwidth capacity reclaimed by the implementation of SDV, Cox recently added 24 new HD channels and 27 new SD channels to its Fairfax, Virginia lineup. See *Cox Petition for Recon* at 6. In the year since it introduced SDV in the Hawaii divisions at issue here, TWC has added nine HD linear channels, including one broadcast HD channel. In addition TWC states in other divisions across the country it has now launched ESPN2 HD, the Food Channel HD, and HGTV HD. See *TWC SDV NAL Response* at 18-19. In its Austin, Texas cable system, TWC added Canal24, DocuTVE, Toon Disney Spanish, Cartoon Spanish, Boomerang Spanish, ESPN Deportes, TVE International, La Familia, Infinito, and Deutsche Welle to its cable lineup. See Time Warner Cable LOI Response at 12 (filed November 30, 2007).

³⁹ See, e.g., *TWC Petition for Recon* at 2-3; *Cox Petition for Recon* at 4, 6-7.

⁴⁰ AT&T's U-Verse platform, for instance, uses SDV to provide a range of programming and other digital services. See Alan Breznick, *Cable Technologists Fear Bell IPTV, Web Video, Peer-to-Peer*, COMMUNICATIONS DAILY, Jan. 17, 2006, at 6 (stating that “telco IPTV is switched digital by nature”).

⁴¹ See, e.g., *TWC Petition for Recon* at 2-3; *Cox Petition for Recon* at 6-7.

⁴² See *supra* note 17.

⁴³ Todd Spangler, *Set-Tops Break Free*, MULTICHANNEL NEWS, April 27, 2009 at 8 (“[C]onsumers have been able to buy TiVo DVRs and plug in cable company-supplied CableCards to get their standard cable lineup. But to date, CableCard-based retail devices have proven to be very unpopular in the market.”).

beginning to be introduced in the marketplace.⁴⁴ We further note that TWC and Cox have sought to minimize the inconvenience associated with SDV migrations by offering set-top boxes to subscribers with UDCP devices at reduced rates for a limited period.⁴⁵ In addition, TWC has offered customers free tuning adapters, which allow TiVo UDCPs to access SDV programming without a set-top box.⁴⁶

15. For the above reasons, we find that TWC's and Cox's migration of programming to an SDV platform did not violate Sections 76.1201 and 76.640(b) of the Commission's rules, and we vacate the Bureau's previous decisions proposing and instituting forfeitures against TWC and Cox related to their deployment of SDV.⁴⁷

B. Cable Operators Must Provide 30 Days Advance Written Notice to Relevant Local Franchising Authorities Before Migrating Programming to a Switched Digital Video Platform

16. We also have before us TWC's Petition for Reconsideration of the Bureau's *LFA Notice Forfeiture Order* finding that TWC failed to provide the requisite 30-day advance written notice required under Section 76.1603(c) of the Commission's rules to the Hawaii LFA before implementing a service change caused by the migration of certain channels to its SDV platform.⁴⁸ Section 76.1603(c) requires cable systems to "give 30 days written notice to both subscribers and local franchising authorities before implementing any rate or service change."⁴⁹ As in its *Response to LFA Notice NAL*, TWC challenges the Bureau's finding that the migration of programming to an SDV platform constitutes a service change that triggers the notice requirements of Section 76.1603(c) of the rules.⁵⁰ TWC argues that the Bureau erred in its assertion that the deployment of SDV resulted in the elimination of channels from the subscribers' perspective, contending that "the introduction of SDV was transparent to all but a tiny portion of TWC's subscriber base" and that "[t]his cannot reasonably be characterized as a change in service or the 'elimination' of channels 'from the subscribers' perspective.'"⁵¹ TWC maintains this is a situation where a particular category of individual subscribers are required to obtain additional equipment to access particular channels, and argues there is no Commission support for the Bureau's application of Section 76.1603(c) to such a situation.⁵² TWC contends that the case cited by the Bureau – where TWC

⁴⁴ Bi-directional navigation devices that will work with SDV content are beginning to be introduced in the marketplace. See Jeff Baumgartner, "Denver, Chicago First to Get Tru2Way TVs, Light Reading's Cable Digital News, Oct. 15, 2008 available at http://www.lightreading.com/document.asp?doc_id=166014&site=cdn. In addition, TWC states that it has already begun rolling out tru2way technology at headends throughout its digital base. See Letter from Matthew A. Brill, Esq., Counsel for Time Warner Cable, Inc., to Kris Monteith, Chief, Enforcement Bureau, Federal Communications Commission, dated March 6, 2009 at 2 ("*Brill Letter*").

⁴⁵ See *Brill Letter* at 1-2; *TWC Petition for Recon* at 9; *Cox Petition for Recon* at 6.

⁴⁶ *Brill Letter* at 1.

⁴⁷ Because we vacate our previous orders for the reasons stated above, we need not reach the parties' other arguments.

⁴⁸ *TWC Petition for Recon of LFA Notice Forfeiture Order*.

⁴⁹ 47 C.F.R. §76.1603(c).

⁵⁰ *TWC Petition for Recon of LFA Notice Forfeiture Order* at 6; see also *Response to LFA Notice NAL* at 5.

⁵¹ *TWC Petition for Recon of LFA Notice Forfeiture Order* at 7; see also *Response to LFA Notice NAL* at 7. TWC argues that the "deployment of SDV had no effect on the number or placement of channels that TWC delivered to its subscribers or on any other aspect of the service TWC provides." *TWC Petition for Recon of LFA Notice Forfeiture Order* at 6. Rather, TWC contends "the same channels continue to be part of the same service tiers, available on the same channel numbers and at the same prices, both before and after the introduction of SDV." *Id.*; see also *Response to LFA Notice NAL* at 5.

⁵² *TWC Petition for Recon of LFA Notice Forfeiture Order* at 7-8; see also *Response to LFA Notice NAL* at 6.

discontinued carriage of the NFL Network resulting in the deletion of a channel from its lineup⁵³ – is not on point because the change in service in that case affected “not . . . a mere handful of customers, but . . . TWC’s overall subscriber base.”⁵⁴

17. Further, TWC claims that in a Commission decision addressing the notice obligations of cable operators in transitioning to all-digital systems,⁵⁵ which would require all analog customers to obtain a set-top box to view all former analog services, and in subsequent related decisions granting waivers of Section 76.1204(a)(1) to cable operators to transition their system to all-digital operations,⁵⁶ the Commission required operators to give notice to subscribers but “conspicuously omitted any suggestion that notice to LFAs was required.”⁵⁷ TWC states that it routinely shares information with LFAs, particularly with respect to developments like SDV, and argues that the notice requirements in Section 76.1603(c) were adopted to implement the rate provisions under Section 623 of the Act. Given that there are no rate change issues here, according to TWC, the LFA has no need to receive notice.

18. TWC contends that, pursuant to 47 U.S.C. § 544(e), LFAs do not have authority to regulate deployment of SDV technology, and thus finds it “unclear what could be gained by formal written notice to the LFA.”⁵⁸ Finally, TWC asserts that the Bureau cannot bootstrap from the consumer interest in receiving notice to impose a requirement on the operator that LFAs receive notice.⁵⁹ In this respect, TWC argues that if the Commission believes there is good reason to impose on cable operators (and other MVPDs) a requirement that LFAs be notified about the implementation of a new technology, the proper course is to initiate a rulemaking proceeding so all interested parties can be heard, rather than initiating enforcement proceedings that are inappropriate, arbitrary and capricious.⁶⁰

19. TWC presents no new arguments and we find no reason to reverse the Bureau’s finding that 30-day advance written notice to the relevant LFA was required in this case. The notice requirements in Section 76.1603(c) are designed to protect subscribers.⁶¹ Providing advance notice to LFAs furthers this

⁵³ *Time Warner Cable, a Division of Time Warner Entertainment Company, L.P.*, Order on Reconsideration, 21 FCC Rcd 9016 (Media Bur.) (“*Time Warner Reconsideration Order*”), consent decree adopted, Order, 21 FCC Rcd 11229 (Media Bur. 2006).

⁵⁴ *TWC Petition for Recon of LFA Notice Forfeiture Order* at 7; see also *Response to LFA Notice NAL* at 6.

⁵⁵ *Viewability Order*, 22 FCC Rcd 21064.

⁵⁶ See, e.g., *Mediacom Communications Corp. and Bresnan Communications, LLC, Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, Memorandum Opinion and Order, 23 FCC Rec 6506 ¶ 1 (Media Bur. 2008); *Millennium Telcom LLC d/b/a OneSource Communications, Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, Memorandum Opinion and Order, 22 FCC Rcd 8567 ¶ 18 (Media Bur. 2007); *TWC Petition for Recon of LFA Notice Forfeiture Order* at 8 (citing *Bend Cable Communications LLC d/b/a BendBroadband Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules; Implementation of Section 304 of the Telecommunications Act of 1996 Commercial Availability of Navigation Devices*, Memorandum Opinion and Order, 22 FCC Rcd 209 ¶ 21 (Media Bur. 2007); see also *Response to LFA Notice NAL* at 10.

⁵⁷ *TWC Petition for Recon of LFA Notice Forfeiture Order* at 8-9; see also *Response to LFA Notice NAL* at 10.

⁵⁸ *TWC Petition for Recon of LFA Notice Forfeiture Order* at 9-10; see also *Response to LFA Notice NAL* at 9.

⁵⁹ *TWC Petition for Recon of LFA Notice Forfeiture Order* at 10; see also *Response to LFA Notice NAL* at 9.

⁶⁰ *TWC Petition for Recon of LFA Notice Forfeiture Order* at 11; see also *Response to LFA Notice NAL* at 10-11.

⁶¹ See *Time Warner Reconsideration Order*, 21 FCC Rcd at 9020 (“[W]e also reject the company’s interpretation of section 76.1603(b) on the merits. Because section 76.1603(b) is aimed at protecting subscribers, it is the subscribers’ perspective -- not that of the cable operator -- that is relevant to determining whether a change in programming services has occurred.”). Although the Media

objective by enabling LFAs to respond to any questions or complaints from subscribers in an informed manner. The rule on its face applies to “any changes” in service; it requires advance written notice to the LFA and affected subscribers without regard to the number or ratio of subscribers affected by the service change.⁶²

20. Moreover, as the Bureau previously held, TWC’s argument that the deployment of SDV does not constitute a service change is contradicted by both the facts and the company’s description of the practical effect of SDV deployment on CableCARD-equipped UDCP customers. As the *LFA Notice NAL* pointedly observes, TWC’s deployment of SDV “rendered inaccessible dozens of cable channels previously available on CableCARD-equipped UDCPs.”⁶³ Similarly, the *LFA Notice Forfeiture Order* concludes that “[f]rom the perspective of the complainants, it is clear that they viewed the elimination of access to dozens of channels, including popular high-definition programming, as a ‘change in service.’”⁶⁴ Furthermore, the Bureau previously noted that TWC’s own characterization of SDV deployment expressly acknowledged that CableCARD-equipped UDCPs receive one-way cable services and will not receive two-way cable services such as switched digital services.⁶⁵ Thus, deployment of SDV was a service change that triggered the notice rule. We disagree with TWC that notification to subscribers through an after-the-fact annual equipment compatibility notice would suffice here.

21. We disagree with TWC’s claim that, because the *Viewability Order* failed to specify the subsection of the applicable LFA notice rule in a decision relating to the operator’s obligation to provide notice in advance of transitioning to an all digital system, the LFA notice requirements do not apply to SDV deployments. As the Bureau properly recognized, “[i]n that decision, the Commission advised cable operators that such actions were subject to the notice requirements in both the annual equipment notice rule (Section 76.1622) and Section 76.1603,” noting that “although the Commission was discussing notice to subscribers in the relevant passage, it cited to Section 76.1603 as a whole, and did not distinguish the LFA notice language.”⁶⁶ Nor do we find merit in TWC’s argument that the absence of a condition to notify the LFA in a waiver grant indicates that the LFA notice rule requirement for changes in service is inapplicable here. To the contrary, we find TWC’s reading of these decisions in this manner at odds with the most natural interpretation of the rule itself. None of the examples cited by TWC exempted cable operators from complying with the LFA notice requirement in Section 76.1603(c).

22. We also reject TWC’s contention that Section 76.1603(c) does not apply because it was implemented pursuant to the rate provisions of Section 623 of the Act. According to TWC, in the absence of rate regulation or a rate change, there is no reason why the LFA should receive notice. That interpretation is contrary to the express language of the rule, which is not limited to rate changes. Regardless of whether a cable system is subject to rate regulation, Section 76.1603(c) requires a cable operator to provide “30 days written notice to both subscribers and local franchising authorities before

Bureau was discussing Section 76.1603(b) in this decision, the same reasoning applies to Section 76.1603(c).

⁶² In any event, TWC deprived more than 350 of its Hawaii customers of access to dozens of channels by switching to the SDV platform without providing notice to the affected LFA. See Time Warner Cable Supplemental LOI Response, dated September 12, 2008, at Exhibit A. That is not a trivial number of adversely affected customers.

⁶³ *LFA Notice NAL*, 23 FCC Rcd at 12806.

⁶⁴ *LFA Notice Forfeiture Order*, 24 FCC Rcd at 961. We note that defining a change in service solely from the perspective of a cable operator would permit such entities to deliver all programming services via a transmission technology that is incompatible with subscriber equipment without providing the 30-day notice to subscribers required by Section 76.1603(b).

⁶⁵ *LFA Notice NAL*, 23 FCC Rcd at 12806.

⁶⁶ *LFA Notice Forfeiture Order* 24 FCC Rcd at 961, n.13.

implementing any rate *or service change*.⁶⁷ As noted by the Bureau, TWC's preferred construction of the rule would obviate notice to both LFAs *and* consumers in non rate-regulated areas and, furthermore, would do so in an ever-increasing number of areas across the nation.⁶⁸ Moreover, requiring notice to LFAs serves a broader purpose than facilitating their rate regulation responsibilities.

23. Finally, we find no merit in TWC's argument that nothing can be gained from requiring Section 76.1603(c) notice to LFAs in this instance because 47 U.S.C. § 544(e) provides that no LFA may "prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology." TWC fails to demonstrate how the notice requirement of Section 76.1603 (c) affects a prohibition, condition, or restriction on its use of the SDV platform. Rather, notice to LFAs enables these jurisdictions to not only respond to customer complaints in a more informed manner, but also enables them to consider other methods of responding that are expressly reserved under the Act.⁶⁹ Section 76.1603 in no way contravenes the prohibition set forth in 47 U.S.C. § 544(e).

24. Based on the foregoing, we affirm the Bureau's previous decision instituting a forfeiture against TWC for failure to provide the requisite thirty (30) day advance written notice to the Hawaii LFA before implementing a service change caused by the migration of certain channels to its SDV platform.⁷⁰ The Bureau should continue to investigate complaints from consumers and local franchising authorities alleging that cable operators have not complied with the applicable notice requirements. Where it determines that those requirements have been violated, the Bureau should take appropriate enforcement action.

IV. ORDERING CLAUSES

25. ACCORDINGLY, IT IS ORDERED, that pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that the *Oceanic Oahu Central Forfeiture Order*, *Oceanic Kauai Forfeiture Order*, *Oceanic Oahu Refund Methodology NAL*, *Oceanic Kauai Refund Methodology NAL*, *Cox Fairfax County Forfeiture Order*, and *Cox Fairfax County Refund Methodology NAL* as cited in Footnote 1 of this Order on Review are VACATED and the *TWC Petition for Recon*, *TWC NAL Response*, *Cox Petition for Recon* and *Cox NAL Response* filed on February 18, 2009, as cited in Footnote 2 of this Order on Review are GRANTED.

26. IT IS FURTHER ORDERED, that pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that the *LFA Notice Forfeiture Order* as cited in Footnote 1 of this Order on Review is AFFIRMED and the *TWC Petition for Recon of LFA Notice Forfeiture Order* and *TWC Stay Request of LFA Notice Forfeiture Order* filed on February 18, 2009, as cited in Footnote 2 of the Order on Review are DENIED.

27. IT IS FURTHER ORDERED that a copy of this Order on Review shall be sent Certified Mail, Return Receipt Requested, to Matthew A. Brill, Latham & Watkins LLP, 555 11th Street, N.W., Suite 1000, Washington, DC 20004 and Arthur H. Harding, Fleischman & Harding LLP, 1255 23rd Street, N.W., Eighth Floor, Washington, DC 20037, counsel for Time Warner Cable, Inc., and Kathleen

⁶⁷ 47 C.F.R. §76.1603(c) (emphasis added).

⁶⁸ In the instant cases, both TWC and Cox provided appropriate 30-day advance written notice to their customers about the changes in service due to the deployment of SDV.

⁶⁹ See, e.g., 47 U.S.C. § 552 (d)(1) ("Nothing in this title shall be construed to prevent any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this title.")

⁷⁰ Because we affirm the Bureau's *LFA Notice Forfeiture Order*, we deny the *TWC Stay Request of LFA Notice Forfeiture Order*.

Q. Abernathy, Wilkinson Barker Knauer, LLP, 2300 N Street, N.W., Suite 700, Washington, DC 20037, counsel for Cox Communications, Inc.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**STATEMENT OF
COMMISSIONER ROBERT M. MCDOWELL
APPROVING IN PART AND CONCURRING IN PART**

Re: In the Matter of Oceanic Time Warner Cable, a subsidiary of Time Warner Cable, Inc.; Oceanic Time Warner Cable, a division of Time Warner Cable, Inc., Oceanic Kauai Cable System; Oceanic Time Warner Cable, a division of Time Warner Cable, Inc., Oceanic Oahu Central Cable System; Cox Communications, Inc., Fairfax County, Virginia Cable System; File Nos. EB-07-SE-351, EB-07-SE-352; NAL/Acct. Nos. 200832100074, 200932100001, 200932100002, 200932100003, 200932100008, 200932100022, and 200932100023; *Order on Review*

The Commission through this Order appropriately determines that the migration of programming to a switched digital video (“SDV”) platform does not violate Sections 76.1201 or 76.640(b) of our rules. Deployment of SDV technology to deliver video programming is consistent with the plain language of the regulations. It also can serve the public interest by allowing cable operators to comply with the Commission’s “viewability” rules and deliver more programming options, including HD channels and niche programming, without displacing significant numbers of existing channels.

I only concur, however, with respect to the determination that the SDV deployment requires notification to local franchising authorities and customers. Whether the SDV deployment here – because of its effect on the channels accessible to certain subscribers who purchased unidirectional digital cable devices on their own in the retail market – constitutes a “change in service” requiring notice under Section 76.1603(c) is not without some doubt. Nevertheless, the broader ramifications of our decision here for the industry’s deployment of SDV technology, which has largely been on hold since the enforcement proceedings became public, justify resolution of these issues now.