

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

In the Matter of:)	
)	
Brunson Communications, Inc. v.)	
RCN Telecom Services, Inc.)	CSR-5496-M
)	
Motion for Stay)	
)	
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)	

MEMORANDUM OPINION AND ORDER

Adopted: July 18, 2000

Released: July 21, 2000

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. RCN Telecom Services, Inc. ("RCN"), operator of cable systems serving communities in Lehigh and Northampton Counties, Pennsylvania, filed a motion for stay of the Cable Services Bureau's decision granting the must carry complaint filed by Brunson Communications, Inc., licensee of Television Broadcast Station WGTW (Ch. 48), Burlington, New Jersey ("WGTW").¹ RCN seeks a stay pending resolution of its simultaneously-filed application for review of the above *Bureau Order*. In its must carry complaint, WGTW sought on-channel carriage on RCN's cable systems. In opposition, RCN requested a waiver of the on-channel carriage requirement due to the high cost involved in reconfiguring its systems. An opposition to the motion for stay was filed on behalf of WGTW.²

II. BACKGROUND

2. The Commission evaluates petitions for stay under well settled principles. To support a stay, a petitioner must demonstrate: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.³ The likelihood of success on the merits is an important element

¹*Brunson Communications, Inc. v. RCN Telecom Services, Inc.*, DA 00-1123 (released May 23, 2000)("Bureau Order").

²We note that RCN has filed a motion to strike WGTW's opposition, arguing that WGTW filed its opposition well after the 7 day filed period required by Section 1.45(d) of the Commission's rules. WGTW acknowledged that its pleading was late-filed in an associated Motion for Extension of Time to accept its opposition. WGTW states that due to its lead counsel's unavailability to prepare the opposition, additional time was necessary to finalize the opposition. In the interest of obtaining a complete record, we will accept WGTW's late-filed opposition.

³*Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F. 2d 921, 925 (D.C. Cir. 1958).

in a petitioner's showing. However, the degree to which a probability of success on the merits will be found varies according to the Commission's assessment of the other factors.⁴ When confronted with a case in which other elements strongly favor interim relief, the Commission may exercise its discretion in determining whether to grant a stay.

III. DISCUSSION

3. RCN argues that it has satisfied the relevant criteria for a stay to be issued.⁵ RCN argues that its application for review is likely to succeed on the merits because the Bureau erred in its analysis of the facts presented by RCN supporting its channel positioning waiver.⁶ RCN maintains that, absent a stay, it will suffer irreparable harm because it will be forced to commence repositioning WGTW's signal to meet the 6-month deadline imposed by the *Bureau Order*, incurring costs that will not be recoverable should it prevail on review.⁷ RCN asserts that grant of this stay will not harm the interested parties because the status quo will be maintained during the pendency of its application for review.⁸ Moreover, RCN argues that the public interest favors the requested relief because its subscribers will not be unnecessarily inconvenienced by a premature reconfiguration.⁹

4. WGTW argues in opposition that a stay is unnecessary because the Bureau's decision is consistent with the law and applicable Commission precedent. Moreover, it maintains that the Bureau fully considered RCN's pleadings, but after careful analysis found in WGTW's favor.¹⁰ WGTW asserts that RCN will not be irreparably harmed if a stay is not granted because the estimated cost of reconfiguration is miniscule in comparison to RCN's overall profits.¹¹ WGTW maintains that it would be harmed by a stay due to the confusion expressed by its viewers in trying to find its signal on RCN's cable systems.¹² WGTW asserts that minimizing the number of cable channels on which it is carried is an essential element in its ability to compete.¹³ Finally, WGTW argues that the public interest favors RCN's prompt compliance with applicable regulations rather than a continued avoidance of its legal responsibilities.¹⁴

5. We have reviewed RCN's motion for stay and will grant it pending resolution of its application for review before the Commission. Our action herein should not be construed as an indication of the eventual outcome of RCN's application. Rather, it is an acknowledgement that the issues raised by RCN bear further analysis.

⁴See *Cuomo v. NRC*, 772 F. 2d 972, 974 (D.C. Cir. 1985); *Wisconsin Gas Co. v. FERC*, 758 F. 2d 669, 674 (D.C. Cir. 1985); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F. 2d 841, 843-44 (D.C. Cir. 1977).

⁵*Id.*

⁶Petition at 6.

⁷*Id.* at 7.

⁸*Id.* at 12.

⁹*Id.* at 12-13.

¹⁰Opposition at 2.

¹¹*Id.* at 3.

¹²*Id.* at 5.

¹³*Id.*

¹⁴*Id.* at 6.

IV. ORDERING CLAUSES

6. Accordingly, **IT IS ORDERED**, pursuant to Sections 1.41, 1.43 and 1.202(b)(2) of the Commission's rules, that the motion for stay filed by RCN Telecom Services, Inc. **IS GRANTED**, pending the resolution of the application for review.¹⁵

7. This action is taken pursuant to authority delegated by Section 0.321 of the Commission's rules.¹⁶

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

¹⁵47 C.F.R. §§1.41, 1.43, 1.102(b)(2).

¹⁶47 C.F.R. §0.321.