

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

In re:)	
)	
Cablevision Systems Corporation)	CSR-3873-A
)	
Time Warner New York City Cable Group)	CSR-4413-A
)	CSR-4538-M
)	
Petitions for Stay)	
Pending Reconsideration)	

MEMORANDUM OPINION AND ORDER

Adopted: August 1, 1996

Released: August 2, 1996

By the Deputy Chief, Cable Services Bureau:

INTRODUCTION

1. Cablevision Systems Corporation ("Cablevision"), an operator of cable television systems serving portions of New York, New Jersey, and Connecticut, has filed a request to stay those portions of a *Memorandum Opinion and Order* ("Cablevision Order") released by the Cable Services Bureau on May 31, 1996 that declined to delete a number of communities served by Cablevision from the markets of certain television broadcast stations until such time as the Commission has acted on its petition for reconsideration of that Order.¹ Cablevision asks the Bureau to stay those portions of the decision in CSR 3873-A that deny the request to delete WRNN (Ch. 62-Kingston, NY) and WTBY (Ch. 54-Poughkeepsie, NY), for must carry purposes, from certain communities located in the New York Area of Dominant Influence ("ADI"). Cablevision specifically requests that its cable systems in Westchester and Portchester, NY, Bergen County, NJ, and Norwalk and Bridgeport, CT, not be required to carry the signals of WRNN and WTBY during consideration of its petition for reconsideration of the Cablevision Order in CSR 3873-A. WRNN filed an opposition to the petition for stay. WRNN notes that it sent a written carriage request and channel position election to Cablevision on May 31, 1996. According to WRNN, Cablevision becomes subject to the requirement to carry WRNN on the five relevant cable systems no later than July 30, 1996, unless the Bureau grants the requested stay.

¹*Cablevision Systems Corporation*, DA 96-826 (Cab. Serv. Bur., rel. May 31, 1996) (Hereinafter "Cablevision Order").

2. Time Warner New York City Cable Group ("Time Warner"), an operator of cable television systems serving Manhattan, Staten Island, Queens, and Brooklyn, NY, has also filed a request to stay the effects of certain provisions of a separate, but related, *Memorandum Opinion and Order* ("Time Warner Order") also released by the Bureau on May 31, 1996.² Time Warner asks the Bureau to stay those portions of the decision in CSR 4413-A which deny the request to delete WMBC-TV (Ch. 63-Newton, NJ), for must carry purposes, from certain communities also located in the New York ADI. Time Warner specifically requests that its cable systems serving Manhattan and Staten Island not be required to carry WMBC's signal during consideration of its petition for reconsideration of the Time Warner Order in CSR 4413-A. Time Warner notes that it received a written carriage request and channel position election from WMBC-TV on June 27, 1996 and states that the obligation regarding carriage of WMBC-TV commences no later than August 26, 1996, unless the Bureau grants the requested stay. WMBC-TV filed an opposition to the stay. The Faith & Values Channel and the International Channel filed in support of Time Warner's request for a stay.

3. Both Cablevision and Time Warner rely on the four prong test for the issuance of a stay set forth by the U.S. Court of Appeals for the District of Columbia in *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*³ Under this test, a stay is warranted if the movant can demonstrate that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent a stay; (3) interested parties will not be harmed if the stay is granted; and (4) the public interest would favor a grant of the stay.

SUMMARY OF FACTS AND ARGUMENTS OF THE PARTIES

4. In the Cablevision Order, the Bureau granted the operator's request to delete from WTBY and WRNN's television market several communities served by its cable systems in New York and New Jersey.⁴ The Cablevision Order, however, also denied Cablevision's request for deletion of the cable communities served by its Westchester, Portchester, Bergen, Norwalk, and Bridgeport cable systems and ordered Cablevision to come into compliance with the rules in those communities within a prescribed time-frame. Cablevision argues that the Bureau gave disproportionate emphasis on distance and Grade B contour coverage when it decided to deny the request to delete WTBY and WRNN from the communities served by the above-referenced

²Time Warner New York City Cable Group, DA 96-828 (Cab. Serv. Bur., rel. May 31, 1996) (Hereinafter "Time Warner Order").

³559 F.2d 841 (D.C. Cir. 1977); see also, *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958).

⁴In the Cablevision Order, the Bureau granted Cablevision's request to delete WTBY and WRNN from the New York ADI with regard to the communities served by the operator's Long Island systems (Great Neck, Woodbury, Lynbrook, Islip, V-Cable-Suffolk, Riverhead, East Hampton, V-Cable-Shelter Island), the majority of the New Jersey systems (Bayonne, Newark, Monmouth and Riverview) and the New York City systems (The Bronx and Brooklyn).

systems.⁵ The operator states that this and other issues are fully addressed in its petition for reconsideration filed along with its stay request.

5. Cablevision argues that a stay will avoid the irreparable harm that will flow from the enforcement of the *Order*. In this regard it maintains that the successful assertion of must carry demands by WRNN and WTBY on its Westchester, Portchester, Bergen, Norwalk, and Bridgeport cable systems would require it to delete other programming as these systems that have reached, or soon will reach, channel capacity limits. Cablevision argues that the deletion of such programming will result in substantial financial losses, subscriber confusion, and loss of customer goodwill. Cablevision asserts that any service restructurings will confuse and frustrate subscribers as the systems' channel line-ups might change twice: once for the addition of the stations pursuant to the *Order*, and again if the petition for reconsideration is granted. Moreover, Cablevision asserts that it will suffer harm to its rights of free speech unless the Bureau acts expeditiously in granting the requested stay to preserve the *status quo*. Finally, a stay would not harm the two stations as they have never been carried on the systems at issue.

6. In its opposition, WRNN argues that Cablevision has not met its burden for the issuance of a stay. WRNN argues that Cablevision's injuries with regard to the cost of re-aligning its channel line-up as well as loss of goodwill are speculative and theoretical, and are not adequate grounds to justify a stay. WRNN also adds that maintenance of the status quo relates only to the time during the pendency of the ADI modification petitions themselves and not to any subsequent Commission proceedings in the same matter such as Cablevision's petition for reconsideration. WRNN also states there is little likelihood that Cablevision will succeed on the merits given the factual record supporting WRNN's case against deletion in the initial proceeding. WRNN argues that a stay will harm its ability to serve Cablevision's subscribers and would deny those viewers access to its targeted local programming.

7. In the Time Warner *Order*, the Bureau granted the operator's request to delete from WMBC-TV's television market the cable communities of Brooklyn and Queens. The Time Warner *Order*, however, also denied Time Warner's request for deletion of Manhattan and Staten Island from WMBC-TV's ADI and ordered Time Warner to begin carriage of the station's signal in those communities within a prescribed time-frame. Time Warner summarily argues that the Bureau improperly relied on geographic distance and Grade B contour coverage to deny its request with respect to Manhattan and Staten Island and adds that WMBC-TV is not local to any of the New York City cable communities. The operator states that these and other issues are fully addressed in its petition for partial reconsideration simultaneously filed along with the instant stay request.

8. Time Warner argues that a stay will prevent injury to itself, its subscribers, and third party cable programmers. The Bureau's grant of a stay would: (1) avoid undue disruption to the Manhattan and Staten Island cable channel line-up; (2) maintain subscriber satisfaction and

⁵Cablevision also asserts that WRNN's programming is not local to the cable communities at issue.

goodwill; and (3) mitigate the expense of notifying subscribers about the change in programming. Time Warner also asserts that another cable programmer will have to be dropped to accommodate WMBC-TV as there are no vacant cable channels on either the Manhattan or Staten Island cable systems. Finally, a stay would not harm WMBC-TV, in terms of loss of goodwill or viewers, because the station has never been carried on the Manhattan and Staten Island systems.

9. The Faith & Values Channel and the International Channel (hereinafter, "the Channels"),⁶ submitted a filing to demonstrate the irreparable injury to themselves that would result from temporary deletion if Time Warner's requested stay is not granted. The Channels explain that each has been identified by Time Warner as cable programmers that might have to be deleted if WMBC-TV is to be carried on the Manhattan and Staten Island cable systems. The Channels argue that temporary deletion would cause financial harm and severely affect their relationship with Time Warner's subscribers as well as nullify prior marketing and promotional efforts. They essentially argue that the benefits of four years of carriage on Time Warner's systems would be irretrievably lost during the few months of temporary deletion as subscribers would no longer find the deleted channel "to be a reliable viewing destination." The Channels also argue that loss of carriage in Manhattan will significantly decrease advertising revenues and may undermine the long-term viability of either service.

10. In opposition to Time Warner's request, WMBC-TV argues that the operator has not provided sufficient evidence to justify a stay. WMBC-TV contends that Time Warner has not demonstrated that it will suffer irreparable harm if the stay is denied. WMBC-TV asserts that the operator's alleged injuries are speculative at best and that mere economic loss does not constitute irreparable injury. WMBC-TV also asserts that when the mandatory signal carriage rules were first adopted, the full Commission rejected arguments about changes in channel line-ups as a justification for stay of the rules. WMBC-TV further argues that it will be harmed if the stay is granted because advertisers will not buy air time on the station if it is still unable to reach viewers in portions of New York City. WMBC-TV also alleges that the public interest will be harmed if the stay is granted because the ethnic and foreign language programming migrating from WNYC, a public television station recently sold by the City of New York to a private partnership, to WMBC-TV will not be available to viewers in Manhattan and Staten Island. Finally, the station argues that Time Warner is not likely to prevail on the merits as the operator did not sufficiently show that the Bureau erred in including Manhattan and Staten Island in WMBC-TV's market.

⁶According to their filing, the Faith & Values Network is a 24 hour per day cable programming service containing a mix of religious, moral, and values-based programming. The International Channel is a multilingual video programming service providing educational and entertainment programming appealing to a variety of minority and ethnic groups.

DISCUSSION

11. After examining the requests for stay and the oppositions filed thereto, we find that the showings made by Time Warner and Cablevision are repetitive of matters specifically considered and rejected by the full Commission previously,⁷ and that the cable operators have failed to meet the burden of the established four-prong test described above. We note that while the cable operators' arguments concerning economic harms were sufficient bases to establish a policy of maintaining the status quo during the pendency of a market modification request, the similar arguments raised in the instant petitions following an actual decision do not rise to the level of harm to justify a stay. Moreover, if we were to accept the general arguments for granting the stay raised by Time Warner and Cablevision, every initial market modification decision adverse to any cable operator would be postponed while either the Bureau or Commission acts on the petition for reconsideration or application for review. Such a result would unduly delay qualified television stations from realizing their statutory cable carriage rights. Accordingly, we deny the cable operators' requests.

12. **Likelihood of Success on the Merits.** The cable operators have neither made a strong showing that they are likely to prevail on appeal nor a substantial case on the merits. In this case, Time Warner and Cablevision have not raised any new legal arguments on reconsideration that are sufficiently strong in the context of a stay request to meet the "likelihood of success on appeal" test. Such issues as the stations' Grade B contour coverage and distance from the cable communities, have already been addressed in the proceedings below and considered by the Bureau in the first instance. In any event, an evaluation of the stay requests under the three remaining factors of the *Virginia Petroleum/Holiday Tours* test reveals that the balance of the equities tip against granting a stay.

13. **Irreparable Injury.** The cable operators assert that they will be irreparably harmed because changes in their channel line-ups will result in substantial financial losses, subscriber confusion, and loss of customer goodwill. The Faith & Values Network and The International Channel essentially repeat these arguments from the point of view of specific cable programming services. While we do not doubt that there will be costs associated with carrying the subject stations, the cable operators have failed to demonstrate that these costs **rise to the level** of an irreparable injury sufficient to justify a stay. The Commission has **previously addressed** similar channel line-up arguments advanced by the cable operators when the Commission first implemented 1992 Cable Act's must carry provisions. In denying the cable industry's request for a stay of the rules during the pendency of petitions for reconsideration of the first must carry *Report and Order*, the Commission was aware that one consequence of its implementation schedule might be that a cable operator could be required to change its system's channel line-up

⁷The Commission, in both its Report and Order and Memorandum Opinion and Order, dealt extensively with the administrative, constitutional and procedural challenges which Time Warner and Cablevision briefly discuss in their request for stay, and the Commission found these challenges unconvincing. *Report and Order* in MM Docket No. 92-259, Broadcast Signal Carriage Issues, 8 FCC Rcd 2965 (1993); *Stay Order*, 8 FCC Rcd 3938 (1993).

more than once in less than a year.⁸ The Commission held that the possibility of multiple channel line-up changes was an insufficient basis for granting the stay request. Recognizing that there is fundamentally no difference between the arguments raised three years ago and those raised today, we find against the cable operators on this issue.

14. Petitioners' claims regarding notification costs also do not constitute sufficient irreparable injury. Petitioners do not appear to have considered the substantial savings that could be made by using cost-effective means of providing such written notice (e.g., providing computerized notes with monthly billing statements, running notices in printed program guides or local newspapers, use of on-screen notices, etc.).⁹ We additionally note here that although loss of customer goodwill is a valid concern, such injury does not rise to the level of irreparable harm necessary to grant a stay.

15. Cablevision also argues that failure to grant a stay will abridge its First Amendment right of editorial discretion in selecting which programming is carried on its systems. With regard to this constitutional question, we note that neither the U.S. District Court for the District of Columbia nor the U.S. Supreme Court has issued a stay while the 1992 Cable Act's must carry provisions are being litigated.¹⁰ We cannot question the wisdom of the Courts in not granting a stay based on free speech grounds.

16. **Harm to Other Parties.** Contrary to the cable operators' assertions, staying the Bureau's Orders would cause harm to the subject stations as they would be denied the benefits given to them by the 1992 Cable Act. Congress determined that broadcast stations have experienced harm since the Commission's prior must carry rules were invalidated and that statutorily-mandated carriage provisions were a necessary remedy.¹¹ The Bureau's Orders, recognizing Congress' findings, re-affirmed the stations' statutory right to be carried on the afformentioned cable systems and to reach the subscribers served by those systems. While we recognize that certain cable programmers, such as the Faith & Values Channel or the International Channel, may have to be deleted to accommodate the stations on those cable systems that are now channel-locked, the 1992 Cable Act did not bestow mandatory carriage rights on cable programmers as it did for television stations.

⁸8 FCC Rcd at 3939.

⁹We note that Congress recently amended Section 632, the statutory section devoted to subscriber notification, to allow cable operators to notify subscribers of service changes by any reasonably written means. Telecommunications Act of 1996, Pub. L. No. 104-104, 100 Stat. 56 (1996) at Section 301(g), *to be codified at* 47 U.S.C. 552(c) ("SUBSCRIBER NOTICE.--A cable operator may provide notice of service and rate changes to subscribers using any reasonable written means at its sole discretion.")

¹⁰See *Turner Broadcasting System, Inc., et al. v. Federal Communications Commission*, 819 F.Supp. 32 (D.D.C. 1993), *vacated and remanded*, 114 S.Ct. 2445 (1994), *on remand*, 910 F. Supp. 734 (D.D.C. 1995).

¹¹See Section 2(a)(16) of the 1992 Cable Act. See also Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 92, 102 Cong., 1st Sess. (1991) (Senate Report) at 41-46.

17. **The Public Interest.** We also reject the cable operators' arguments under this factor. First, we find that the passage of the 1992 Cable Act, incorporating the must carry provisions, is *prima facie* evidence that carriage of WMBC-TV, WRNN, and WTBY, in those cable communities which are still part of their market, is in the public interest. We also believe that the channel line-up changes the cable operators will incur to add the stations to the systems at issue are not extraordinary and will not adversely affect subscribers to a heightened degree. We note that cable operators add and delete cable programming services from time to time, and at their own discretion, without imposing an undue burden on subscribers' viewing habits.

ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED**, pursuant to §§ 1.41, 1.43 and 1.102(b)(2) of the Commission's Rules, 47 C.F.R. §§ 1.41, 1.43 and 1.102(b)(2), that the "Request for Stay" filed July 1, 1996 by Time Warner New York City Cable Group and the "Petition for Stay Pending Reconsideration" filed July 1, 1996 by Cablevision Systems Corporation, **ARE DENIED**.

19. This action is taken pursuant to authority delegated by §0.321(a)(1) of the Commission's Rules, 47 C.F.R. §0.321(a)(1).

FEDERAL COMMUNICATIONS COMMISSION

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