

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

In re the Application of

GENERAL  
TELEPHONE  
COMPANY OF  
CALIFORNIA

File No. W-P-C-5927

For authority pursuant to Section 214 of the Communications Act of 1934, and Sections 63.01 and 63.57 of the Commission's rules and regulations, to construct and maintain broadband transport facilities in Cerritos, California.

**ORDER**

Adopted: June 13, 1988;

Released: June 15, 1988

By the Chief, Common Carrier Bureau:

1. Colony Communications, Inc. (Colony) has filed a petition to stay the effectiveness of the *Memorandum Opinion, Order and Certificate*, File No. W-P-C-5927, DA 88-504 (released April 12, 1988), (*Order*) issued by the Chief, Common Carrier Bureau (Bureau) pending Commission action on Colony's application for review. By its *Order*, the Bureau granted authority pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. § 214, and Part 63 of the rules, 47 C.F.R. Part 63, to General Telephone Company of California (General) to construct and maintain broadband coaxial cable transport facilities in Cerritos, California. The Bureau found that General's proposal included a contractual relationship between General and Apollo Cablevision (Apollo), the franchisee and primary customer of the service, through Apollo's principal, T.L. Robak, that violated the affiliation prohibition of the Commission's telephone/cable television company cross-ownership rules, 47 C.F.R. §§ 63.54 and 63.55. The Bureau also found that, for purposes of the Cable Communications Policy Act of 1984 and the Commission's rules, absent General's proposal, cable video programming service as specified by the City of Cerritos' RFP (request for proposals) could not exist in Cerritos. It therefore granted waiver of the cross-ownership rules. In order to assure that any cross-subsidization between General and its customers would be readily revealed, the Bureau conditioned its grant on General's compliance with the accounting rule adopted in CC Docket No. 86-111: No costs associated with the construction, operation or use of the Cerritos cable system may appear in any General or GTE Service Company service rate base or as a regulated expense without prior authority from the Commission. The Bureau also authorized GTE to conduct tests and ordered it to submit annual reports on the progress of those tests and experiments. Oppositions to Colony's motion were filed by

United States Telephone Association (USTA) and GTE California (GTE), formerly General Telephone Company of California. A further opposition was late filed by the City of Cerritos.

2. Colony argues that a stay should be granted under the grounds set forth in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977), (*WMATC*) and *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C. Cir. 1958), (*Virginia*). It urges that the Bureau's action was procedurally defective because it failed to comply with the statutorily mandated procedures for waiver of the cross-ownership rules and was substantively defective because it erroneously concluded that cable service demonstrably could not exist unless provided by a common carrier "even though Colony had clearly expressed its interest and ability to provide such service." Colony Motion, p. 6. Colony concludes that there is a great probability that, on review, the Commission will reverse the Bureau's decision. Colony also urges that unless the Bureau's ruling is stayed General will construct the Cerritos system and cause irreparable economic harm to Colony by foreclosing its opportunity to expand its cable television service into Cerritos. *Id.*, p. 7. It further argues that because the proceedings associated with cable television service in Cerritos have been ongoing for over three years the additional delay during the Commission's consideration of its application for review "is a small matter in comparison to the disruption that will result if construction commences and the Commission subsequently orders General to cease and desist." *Id.*, p. 9. Finally, Colony avers that the public interest requires that the Bureau's decision be stayed in order to prevent a redefinition of the conditions under which a waiver of the cross-ownership rules may be granted. Such redefinition, Colony argues, constitutes "an exception that swallows the rule contrary to the public interest as defined by the Cable Act and the Commission's own prior rulings." *Id.*, pp. 10-11.

3. USTA argues that grant of a stay is a matter of discretion and represents an extraordinary form of re-rieve not warranted in this case. It states that Colony's allegation of irreparable harm is without foundation. It also states that Colony is not precluded from seeking a franchise in Cerritos, and Colony's proximity to Cerritos is not material to this proceeding. USTA argues that Colony's "harm" stems from the prospect of having to seek a franchise and competing in the cable television marketplace. Finally, USTA states that Colony's arguments in its motion do not meet the standard of "likely to prevail on the merits."

4. GTE states that under the *Virginia* and *WMATC* standards for a stay, "since Colony has failed to make the necessary showing for the second, third and fourth factors, not even a substantial showing on the first factor would justify a stay in this case." GTE Opposition, p. 3. GTE states that Colony is not likely to prevail on the merits because there was no procedural error in the Bureau's decision under either the Act or the rules, and there was nothing on the record to suggest the Bureau's decision is substantively defective or unreasonable. GTE further states that Colony fails to make even a minimal showing that it would prevail on the merits. GTE also states that harm must be shown to be concrete and specific, not vague or potential. *Cuomo v. U. S. Nuclear Regulatory Comm.*, 772 F.2d 972, 976 (D.C. Cir. 1985); *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). It

argues that Colony's inaction with regard to the Cerritos franchise "is not the behavior of a business about to be irreparably harmed." GTE Opposition, 8. GTE states that the further delays caused by grant of the stay would cause harm to the people of Cerritos, who have been waiting for four years for service, to the contractors and cable operator who will be further strained financially, and to GTE Service Corporation, GTE's other lessee of the facilities to be constructed. *Id.*, pp. 9-10. GTE concludes that Colony has made no showing that the public interest would be served by a stay, and that the matter of redefinition of the public interest is better argued to the Commission in the context of an application for review than as a ground for stay.

5. *Discussion.* In *Virginia*, the court stated that four factors must be satisfied in order to justify a stay: (1) the petitioner has made a strong showing that it is likely to prevail on the merits of its appeal; (2) the petitioner has shown that without a stay it will be irreparably injured; (3) the issuance of the stay would not substantially harm other parties interested in the proceeding; and (4) the stay would further the public interest. In *WMATC*, the court reasoned that these criteria should be balanced:

Under *Virginia Petroleum Jobbers*, a court, when confronted with a case in which the other three factors strongly favor interim relief, may exercise its discretion to grant a stay if the movant has made a *substantial* case on the merits. The court is not required to find that ultimate success by the movant is a mathematical probability . . . . The necessary level or degree of possibility of success will vary according to the court's assessment of the other factors.

*WMATC*, 559 F.2d at 843 (emphasis added). We will address Colony's motion for stay under the guidance offered by these decisions.

6. First, we are not persuaded that Colony will be irreparably harmed absent a stay. It has not demonstrated that the injury complained of presents the sort of clear and present need for injunctive relief to prevent irreparable harm that justifies grant of a stay. See *Wisconsin Gas Co. v. FERC*, *supra*. We disagree with Colony's assertion that unless the Bureau's ruling is stayed General's construction of the Cerritos system will cause irreparable economic harm to Colony by foreclosing its opportunity to expand its cable television service into Cerritos. To the contrary, the Bureau's decision to grant General's request for Section 214 construction authority, and General's initiation of construction of the cable system in Cerritos (should it choose to do so at this time), would in no way foreclose Colony from submitting a proposal to the City for cable service either now, or, if the Bureau's decision is reversed, in the future. And, in the event the Bureau's decision is ultimately reversed, the fact that that decision was not stayed here will have no effect on Colony's full and fair opportunity to compete for and provide cable service in Cerritos. In short, there is nothing final or irrevocably prejudicial to Colony about the action General or other parties may take in reliance on the Bureau order. Indeed, in a case such as this, General necessarily assumes the risk that if the Bureau's decision is reversed, it may have to undo, at some cost and inconvenience to itself, actions it took in reliance on that decision -- which in this case may involve the sale or

dismantling of partially constructed cable facilities. See *Teleprompter Corp.*, 50 Rad. Reg. 2d (P&F) 125, 127 (CATV Bur. 1981). Thus, we cannot conclude that denial of a stay will cause Colony any irreparable injury.

7. We also believe that denial of the stay request will not harm the public in any way, and indeed that grant of a stay could harm the public interest to the extent it resulted in additional delay in instituting cable television for the citizens of Cerritos. We note, moreover, that the Bureau has imposed, as a condition of the waiver, accounting safeguards that should protect the public against any potential economic harm. Those safeguards ensure that the costs associated with the risk that the Bureau's decision may be reversed will fall upon General's shareholders, and not on ratepayers or the public in general. Colony has not met its burden to support its contrary assertion that the stay it seeks would further the public interest.

8. In conclusion, there is no showing by Colony that granting the requested stay would further the public interest other than the suggestion that it expects to prevail on the merits. Colony alleges that the Bureau's action is substantively defective and that it is also procedurally flawed because the Bureau failed to comply with the statutorily mandated procedures for waiver of the cross-ownership rules. The Bureau order addressed these matters, and discussed the bases for its decision at some length. In light of the possible harm of a stay on the public interest and the absence of irreparable harm from denial of a stay, we do not believe that Colony's claims on the likelihood of succeeding on the merits justify a stay here. See *WMATC*, 559 F.2d at 843-44. We therefore conclude, without in any way deciding or prejudging the merits of Colony's application for review of the Bureau's *Order* pending before the Commission, that the request for stay of that *Order* should be denied.

9. In view of the foregoing, we find that Colony has failed to meet the standards required of a petition for stay. Therefore, IT IS ORDERED, That the motion for stay filed by Colony Communications, Inc. IS DENIED.

#### FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock  
Chief, Common Carrier Bureau