

BACKGROUND:

By a verified petition dated July 2, 2015, and filed on July 7, 2015, under BPU Docket Number CM15070770, Charter Communications, Inc. ("Charter"), Time Warner Cable, Inc. ("TWC") and Time Warner Cable New York City, LLC ("TWCNYC") initiated a proceeding before the Board, pursuant to N.J.S.A. 48:5A-38 and N.J.A.C. 14:17-6.18, seeking approval for Charter to acquire control of TWCNYC. By separate verified petition also dated July 2, 2015 and filed on July 7, 2015, under BPU Docket Number TM15070772, Charter, TWC, and Time Warner Cable Information Services (New Jersey), LLC ("TWCIS")² initiated a related proceeding pursuant to N.J.S.A. 48:2-51.1 and N.J.A.C. 14:1-5.14, requesting approval of the proposed transfer of control of TWCIS, an indirect subsidiary of TWC, to CCHI, LLC ("New Charter"), a subsidiary of Charter. In both matters referenced above, Charter, TWC, TWCNYC, and TWCIS also requested approval from the Board, pursuant to N.J.S.A. 48:3-9, N.J.S.A. 48:5A-42, N.J.A.C. 14:1-5.9, and N.J.A.C. 14:17-6.13 for approval of financing arrangements related to the proposed transfers of control ("Merger").³ Detailed descriptions of Petitioners, the Merger structure, and financing transactions are set forth in the March 31, 2016 Order.

The filings were publicly noticed. On July 22, 2015, notice was published in The Record, a newspaper of general circulation in Bergen and Hudson Counties, New Jersey, TWCNYC's service area. The newspaper notice advised that upon approval of the Merger, Charter would indirectly own 100% of TWCNYC and further advised that copies of the petitions were available for inspection at TWCNYC's office and at the Board, and indicated the addresses of both. The notice also invited the filing of written comments with the Secretary of the Board. No comments were filed.

As set forth in the March 31, 2016 Order, the parties to the proceeding were the New Jersey Division of Rate Counsel ("Rate Counsel"), Board Staff, and Petitioners (collectively, "Parties"). From the time the petitions were filed to February 2016, the Parties engaged in extensive discovery, meetings, and settlement negotiations. During the proceeding, Rate Counsel submitted comments to the Board on December 7, 2015, recommending approval of the petitions with conditions. The Parties executed a unanimous stipulation of settlement on February 22, 2016.

The Board then voted and unanimously approved the stipulation of settlement at its agenda meeting on February 24, 2016.

Afterwards, on March 3, 2016, Movants submitted a letter, addressed to the California Public Utilities Commission, Hawaii Public Utilities Commission, and the Board regarding "Case NO.2:15-cv-01239-TJH-MAN: Entertainment Studios Networks, Inc., et al. v. Charter Communications, et al." According to the letter, "ES is a multi-channel/programming production company in the television/media business. It is the only one hundred percent African-American owned media company of its kind in the United States. NAAAOM was formed as an African-American media advocacy organization. ES is a member of NAAAOM." (Letter at 1.)

² Charter, TWC, TWCNYC, and TWCIS are hereinafter referred to jointly as "Petitioners."

³ Petitioners also simultaneously filed with the Board an FCC Form 394 – Application for Franchise Authority Consent to Assignment or Transfer of Control of Cable Television Franchise, setting forth pertinent information concerning the Transaction.

The letter also referenced the Board's approval of the Merger and requested that California and Hawaii disapprove the merger applications pending before them.⁴ Attached to the letter was a complaint filed by Movants on January 27, 2016 in United States District Court for the Central District of California, alleging racial bias by Charter.

In the March 31, 2016 Order, which became effective April 1, 2016, the Board accepted the Parties' stipulation, finding that the Merger is in the public interest as required by N.J.S.A. 48:5A-38. The Board also found that the Merger would not adversely affect competition, rates, employees, or the provision of safe, adequate, and proper service at just and reasonable rates as required by N.J.S.A. 48:2-51.1. The March 31, 2016 Order set forth numerous commitments by Petitioners supporting these findings. It also authorized Petitioners' participation in financing transactions associated with the Merger.

THE MOTION

Movants' Application

On May 4, 2016,⁵ Movants submitted a request for a stay of the Merger to the Board, including a brief in support thereof; certification of Byron Allen, founder, chairman, and CEO of ESI; and proposed form of order.⁶ Movants state that they are requesting a stay of the March 31, 2016 Order so that a hearing may be held and the Board can consider public comments on the Merger.

⁴ Although this letter suggests that Hawaii regulators had yet to approve the merger, Hawaii had in fact approved it on December 17, 2015. See I/M/O the Joint Application of Time Warner Cable Inc. and Charter Communications, Inc. for Approval of the Transfer of Control of Oceanic Time Warner Cable LLC's Cable Television Franchises for the Island of O'ahu, Island of Kaua'i, East Hawai'i (Hilo), West Hawai'i (Kona), County of Maui (excluding Lahaina), and Lahaina from Time Warner Cable Inc. to Charter Communications, Inc., Decision and Order No. 366, Cable Television Division, Department of Commerce and Consumer Affairs, State of Hawaii, Order dated December 17, 2015.

California subsequently approved the merger on May 12, 2016. See I/M/O Joint Application of Charter Communications, Inc.; Charter Fiberlink CA-CCO, LLC (U6878C); Time Warner Cable Inc.; Time Warner Cable Information Services (California), LLC (U6874C); Advance/Newhouse Partnership; Bright House Networks, LLC; and Bright House Networks Information Services (California), LLC (U6955C) Pursuant to California Public Utilities Code Section 854 for Expedited Approval of the Transfer of Control of both Time Warner Cable information Services (California), LLC (U6874C) and Bright House Networks Information Services (California), LLC (U6955C) to Charter Communications, Inc., and for Expedited Approval of a Pro Forma Transfer of Control of Charter Fiberlink CA-CCO, LLC (U6878C), Decision 16-05-007, Public Utilities Comms'n of the State of California, Order dated May 12, 2016.

⁵ Although Movants submitted this application on May 4, 2016, Movants failed to submit the required filing fee. The Board notified Movants of this deficiency and the filing fee was subsequently tendered on May 12, 2016. Their application is therefore considered filed as of this date.

Also on May 4, 2016, Movants filed an Application for Permission to File an Emergent Motion with the Superior Court of New Jersey, Appellate Division. In this application, Movants sought permission to file an application for a stay of the Board's March 31, 2016 Order. The Appellate Division denied this application on May 5, 2015 because Movants had not first obtained an order from the Board addressing the stay application.

Movants filed a Notice of Appeal of the March 31, 2016 Order on May 6, 2016.

⁶ Although the brief and proposed form of order submitted with Movants' May 4, 2016 application for a stay directed to the Board were captioned for the Appellate Division, the Board nevertheless considers them in this proceeding.

Movants argue that they satisfy the requirements for injunctive relief set forth in Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982). First, Movants argue that they are likely to succeed on the merits. They allege that Charter engages in discriminatory conduct by refusing to carry channels owned by 100% African American owned media corporations, specifically, ESI, and that allowing Charter to expand its footprint through the Merger, these practices will become more widespread. Movants assert that they will be able to establish that the Merger will be detrimental to 100% African American owned media companies and they are therefore likely to succeed on the merits to a challenge of the Merger.

Secondly, Movants assert that they will be irreparably harmed absent a stay, which they claim is necessary to prevent lost business opportunities. Movants argue that unrecoverable economic loss constitutes irreparable harm. They argue that if the Merger is consummated, their challenge to the Merger will become moot and a court will be unable to grant relief to them.

Third, Movants assert that a balancing of the hardships that will be suffered by Movants and Petitioners in granting the stay favors Movants. They argue that Time Warner and Charter will not be harmed by the stay, which would merely delay consummation of the Merger, but that if a stay is denied, the Merger will be implemented and Movants will be shut out in yet another jurisdiction.

Petitioners' Opposition

On May 12, 2016, Petitioners filed a brief in opposition to Movants' application. In their opposition, Petitioners argue that Movants' application should be denied for several reasons.

First, Petitioners argue that Movants lack standing to seek a stay as Movants are neither parties nor intervenors to the underlying proceeding, and never sought to participate as such. Secondly, Petitioners assert that Movants' request for a stay is tantamount to a motion for reconsideration of the March 31, 2016 Order, which, pursuant to N.J.A.C. 14:1-8.6(a) (applicable to telecommunications proceedings) and N.J.A.C. 14:17-9.6(a) (applicable to cable television proceedings), must be made by a party to the underlying proceeding within 15 days of the Board's issuance of a final order. Petitioners argue Movants' request must be denied because they were not parties and their request is time-barred. Third, Petitioners argue that the relief sought by Movants is barred by the doctrine of laches. Specifically, because Movants failed to act while the Parties engaged in discovery, negotiated, executed the stipulation, and the Board entered an order approving the Merger, Movants are barred from enforcing any right they might have had to the relief they now seek.

Petitioners argue that Movants fail to satisfy all requirements necessary for injunctive relief. Petitioners assert that Movants are unlikely to succeed on the merits because Movants' claims are baseless and lack nexus to the Merger. Additionally, Petitioner asserts that Charter's decisions concerning which channels to carry are constitutionally protected under the First Amendment and that the Board lacks jurisdiction to regulate which channels Charter carries pursuant to federal law, citing 47 U.S.C. § 544.

Petitioners further assert that Movants will suffer no irreparable harm though denial of the stay. Petitioners argue that Movants' failure to raise their concerns before the Board in a timely manner demonstrates the lack of urgency in their claims. Furthermore, Petitioners assert that, even if Movants are entitled to relief, such relief is properly granted in federal court, where Movants have already filed a complaint.

Petitioners argue that a balance of the equities strongly favors denial of the stay. They assert that a stay of the March 31, 2016 Order would have the potential to delay the Merger, unsettling the expectations of marketplace investors and participants. Petitioners also assert that it would delay realization of the public benefits to which Charter has agreed, including provision of a low-cost broadband service for low-income individuals within its service territory in New Jersey.

Movants' Reply and Subsequent Submissions

On May 13, 2016, Movants submitted a letter in reply to Petitioners' opposition. In the letter, Movants assert that their request for relief should be considered timely. While they admit that they did not seek to participate in the matter earlier, they assert that they sent a letter to the Board in March 2016, notifying the Board of their concerns and providing the Board with a copy of a complaint filed in federal court in California. Movants explain that they were busy pursuing litigation in other venues in an effort to prevent the Merger, and were only able to contact the Board in March 2016 as a result.

A Board Secretary letter dated May 18, 2016 to Rocky L. Peterson, Esq., Movants' counsel, with copy to counsel of record, advised, among other things, that the filing fee and required copies of Movants' motion to stay were received on May 12, 2016 and therefore the matter was deemed docketed as of that date; specific deadlines were being thereby established to afford the responding parties due process; Movants may file a reply and make any additional argument in support of their motion to stay; and the Board will decide the motion to stay during a regular Board agenda meeting, which does not allow for oral argument by any party.

By letter dated May 19, 2016, Petitioners filed an opposition to Movants' May 12, 2016 request and stated that "[n]ot once during the pendency of the proceedings did NAAOM or ESI avail itself of the available channels to make its views known" and that it was "too late now." (Letter at 2.) In addition, Petitioners pointed out they had "now consummated the Transaction that was the subject of the Petitions" and they "are now under common ownership and control." *Id.* at footnote 1.

By letter dated June 1, 2016, attached to which is the Certification of Byron Allen, founder, chairman, CEO, and sole owner of ESI, Movants submitted their "reply to the opposition filed by the Joint Petitioners." (Letter at 1.) Among other things, Mr. Allen states that Charter Communications has engaged in a pattern of racial discrimination against "100% African American owned media companies, such as ESI"; "ESI has been, and continues to be, adversely impacted by Charter's discriminatory refusal to include 100% African American owned channels on its television platform"; and the Board in its March 31, 2016 Order failed to protect the public "from racial discrimination in violation of Federal laws." (Certification of Byron Allen at 2-6.)

DISCUSSION AND FINDINGS

The Board has carefully considered Movants' application, Petitioners' opposition, and Movants' reply. Movants seek injunctive relief in the form of a stay of the Board's March 31, 2016 Order. In considering Movants' application, the Board is mindful that a stay is an extraordinary equitable remedy which "will be granted only for good cause shown." N.J.A.C. 14:1-8.7(d). The criteria for reviewing an application for emergency relief pursuant to N.J.A.C. 1:1-12.6 are the same as those which apply to injunctive relief and are well settled. The moving party must demonstrate the following:

- (1) The movant will suffer immediate and irreparable harm if the emergency relief is not granted;
- (2) The legal right underlying the movant's claim is well-settled;
- (3) There is a reasonable probability that the moving party will succeed on the merits; and
- (4) The balance of the equities in granting or denying relief weighs in the movant's favor.

See generally, Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982); McKenzie v. Corzine, 396 N.J. Super. 405, 413 (App. Div. 2007). The factors cited above must be clearly and convincingly demonstrated. Waste Mgmt. of N.J. v. Union County Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008); see also, Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App. Div. 2012).

A stay is not a matter of right, even if irreparable harm may otherwise result. Yakus v. U.S., 321 U.S. 414, 440, 64 S. Ct. 660, 675, 88 L. Ed. 834, 857 (1944); Virginian Ry. Co. v. U.S., 272 U.S. 658, 672, 47 S. Ct. 222, 228, 71 L. Ed. 463, 471 (1926). Rather, it is an exercise of sound judicial discretion; the propriety of its issue is dependent upon the entire circumstances of a particular case, and "consideration of justice, equity and morality." Virginian Ry. Co., *supra*, 272 U.S. at 672-73; Coskey's Television & Radio Sales and Serv., Inc. v. Fotj, 253 N.J. Super. 626, 639 (App. Div. 1992) (quoting Zoning Bd. of Adjustment of Sparta Tp. v. Service Elec. Cable Television of N.J., Inc., 198 N.J. Super. 370, 379 (App. Div. 1985)).

Because a stay is the exception rather than the rule, GTE Corp. v. Williams, 731 F. 2d 676, 678 (10th Cir. 1984), the party seeking such relief must clearly carry the burden of persuasion as to all of the prerequisites (emphasis added). U.S. v. Lambert, 695 F. 2d 536, 539 (11th Cir. 1983). Further, mere monetary loss alone does not constitute irreparable harm. Morton v. Beyers, 822 F. 2d 364, 372 (3d Cir. 1987).

One of the requirements for a temporary stay is that a movant must make a preliminary showing of "a reasonable probability of ultimate success on the merits." Crowe, *supra*, 90 N.J. at 133. Here, Movants have failed to make that showing.

Movants failed to act for approximately ten months in this matter, failing to bring their concerns to the Board during that time. The Petitions seeking approval of the Merger were filed in early July 2015. As set forth in the Background, above, public notice of the filing was made shortly thereafter, on July 22, 2015. The public notice contained a description of the Petition, provided information as to where the petition could be reviewed, and invited written comments. Movants failed to contact the Board until approximately eight months later, when they submitted a letter directed to regulatory bodies in Hawaii and California, asking those states to disapprove the Merger. Movants did not voice opposition to the Merger to the Board prior to this time.

Movants also took no formal action to present their concerns. Instead, while Movants failed to act, the Parties to the matter worked diligently to resolve the matter, exchanging discovery and engaging in extensive negotiations, which resulted in a stipulation resolving all issues in the case. The Board then approved that stipulation in a timely manner.

The Board is cognizant of New Jersey's strong public policy in favor of settlements. Pascarella v. Bruck, 190 N.J. Super. 118, 125 (App. Div. 1983), *certif. den.*, 94 N.J. 600 (1983). Essentially Movants are asking the Board to undo the parties' settlement and the consummation of the Transaction. The Board is convinced that Movants' request is greatly contradicted by the strong public policy in New Jersey in favor of settlements coupled with the particular facts of this case.

See Dep't of Public Advocate, Div. of Rate Counsel v. N.J. Bd. of Public Utils., 206 N.J. Super. 523, 531-532 (App. Div. 1985).

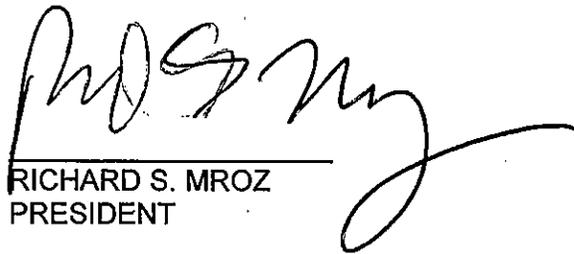
Movants' explanation that they were busy pursuing litigation in other venues does not excuse their failure to act. Because Movants have failed to meet one of the four prongs to obtain the extraordinary relief of a stay, the Board does not address the other prongs.

After carefully considering the arguments and submissions of Movants and Petitioners, and for other reasons set forth above, the Board **HEREBY FINDS** that Movants have not met their burden of proving a likelihood of success on the merits, one of the prerequisites for a motion for a stay. Therefore, the Board **HEREBY DENIES** Movants' application.

This Order shall be effective on July 9, 2016.

DATED: 6/29/16

BOARD OF PUBLIC UTILITIES
BY:


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PRESIDENT


JOSEPH L. FIORDALISO
COMMISSIONER


MARY-ANNA HOLDEN
COMMISSIONER

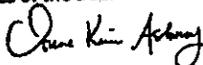

DIANNE SOLOMON
COMMISSIONER


UPENDRA J. CHIVUKULA
COMMISSIONER

ATTEST:

IRENE KIM ASBURY
SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities



IN THE MATTER OF THE PETITION OF TIME WARNER CABLE, INC., CHARTER COMMUNICATIONS, INC. AND TIME WARNER CABLE NEW YORK CITY LLC, FOR APPROVAL OF THE TRANSFER OF CONTROL OF TIME WARNER CABLE NEW YORK CITY, LLC AND APPROVAL OF TRANSACTION FINANCING

DOCKET NO. CM15070770

IN THE MATTER OF THE VERIFIED PETITION OF CHARTER COMMUNICATIONS, INC. AND TIME WARNER CABLE INC., FOR APPROVAL OF THE TRANSFER OF CONTROL OF TIME WARNER CABLE INFORMATION SERVICES (NEW JERSEY), LLC AND APPROVAL OF TRANSACTION FINANCING

DOCKET NO. TM15070772

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