

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RCN CORPORATION and RCN TELECOM : CIVIL ACTION  
SERVICES OF PHILADELPHIA, INC., :  
Plaintiffs :  
 :  
v. :  
 :  
NEWTOWN TOWNSHIP, BUCKS COUNTY, :  
COMMONWEALTH OF PENNSYLVANIA, :  
Defendants. : No. 02-CV-9361

**MEMORANDUM AND ORDER**

**J. M. KELLY, J.** **MAY** , 2003

Presently before the Court is a Motion to Dismiss filed by Defendant Newtown Township, located in Bucks County, Pennsylvania (the "Township") requesting dismissal of claims under the Cable Communications Policy Act of 1984 (the "Act"), 47 U.S.C. § 521 et seq., filed by Plaintiffs RCN Corporation and RCN Telecom Services of Philadelphia, Inc. (collectively, the "RCN"). RCN, a cable television operator, seeks, inter alia, modification of the "Non-Exclusive Cable Television Franchise Agreement" (the "Franchise Agreement") it entered into with the Township, the franchising authority, claiming that its provisions are commercially impracticable within the purview of the Act. Although the Act authorizes modifications of franchise agreements, the Township contends that RCN's proposed modifications are beyond the scope of the Act, and claims that RCN, instead, seeks to terminate the Franchise Agreement. The Township also asks that this Court should not stay the related

state court proceedings pending in the Court of Common Pleas of Bucks County, Pennsylvania, as RCN suggests, since neither the Act nor any binding caselaw supports this request. For the following reasons, the Township's Motion to Dismiss is **DENIED**.

#### I. BACKGROUND

On December 16, 1998, the Township and RCN entered into the Franchise Agreement that granted RCN a 15-year non-exclusive franchise right to construct and maintain a cable television system for the Township. In August 2001, RCN met with Township officials and verbally requested modification of the Franchise Agreement. On October 16, 2001, RCN sent the Township a written request to modify the Franchise Agreement and included a draft franchise agreement to that effect. (RCN's Compl. Ex. A.) This draft proposes several modifications, including the creation of a regional franchising entity comprised of multiple townships and a larger geographic scope wherein RCN would install and operate a cable television system, as opposed to the purely local system agreed upon in the original Franchise Agreement. The Township rejected RCN's proposed modifications, and, in turn, served RCN with a notice of default under the Franchise Agreement. The Township also drew down on RCN's \$250,000.00 letter of credit and made a claim against a \$100,000.00 performance bond RCN posted pursuant to the Franchise Agreement terms in reaction to RCN's

perceived default. In a letter to the Township dated December 20, 2001, RCN objected to the notice of default and to the Township's allegation that it was in non-compliance with the Franchise Agreement. (RCN's Compl. Ex. E.)

On February 28, 2002, the Township's Board of Supervisors (the "Board") held a public hearing to determine whether RCN breached the Franchise Agreement. On that same day, before the hearing convened, RCN hand-delivered a written request to the Township seeking the same modifications of the Franchise Agreement as set forth in RCN's October 16, 2001 proposal, and restoration of the \$250,000.00 letter of credit drawn down by the Township in November 2001. (RCN's Compl. Ex. F.) The Board did not address RCN's modification request during that hearing. On March 14, 2002, the Board issued an opinion stating that RCN committed anticipatory material breach of the Franchise Agreement and entered judgment against RCN for \$2,192,000.00 in liquidated damages. (RCN's Compl. Ex. G.) On April 12, 2002, RCN appealed the Board's decision to the Bucks County Court of Common Pleas, where it is currently pending.

Since RCN's February 28, 2002 request for modification was not addressed at the earlier hearing, the Board held a public hearing addressing that request on August 14, 2002. On August 28, 2002, the Board denied RCN's petition for modification, prompting RCN to file the instant action for declaratory and

injunctive relief pursuant to Section 545 of the Act. Section 545 provides that: "any cable operator whose request for modification under subsection (a) of this section has been denied by a final decision of a franchising authority may obtain modification of such franchise requirements pursuant to the provisions of section 555 of this title." 47 U.S.C. § 545(b)(1). RCN contends that the requirements of the Franchise Agreement are commercially impracticable to perform and that the Township's refusal to modify its provisions violates Section 545, which permits modification of franchise facilities, equipment, or services in the event the agreement provisions become commercially impracticable for the cable operator to comply. See 47 U.S.C. § 545(a)(1). RCN petitions this Court to conduct a trial de novo, modify the Franchise Agreement's commercially impracticable provisions, vacate the \$2,192,000.00 judgment rendered by the Board, and order the Township to restore RCN's \$250,000.00 letter of credit. Further, RCN requests an order staying the Township's claim against the \$100,000.00 performance bond and the pending action in the Bucks County Court of Common Pleas. In its instant Motion to Dismiss, the Township argues that, pursuant to Federal Rule of Civil Procedure 12(b)(6), neither RCN's request for modification nor petition for a stay is permissible under the Act, and that dismissal of RCN's claims is warranted.

## II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12 provides that a party may move to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). When reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept the non-movant's well-plead averments of fact as true and view all inferences in the light most favorable to the non-moving party. Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939, 944 (3d Cir. 1985); Society Hill Civic Assoc. v. Harris, 632 F.2d 1045, 1054 (3d Cir. 1980); Abdulaziz v. City of Philadelphia, No. Civ. A. 00-5672, 2001 U.S. Dist. LEXIS 16972, at \*4 (E.D. Pa. Oct. 18, 2001). In reviewing a motion to dismiss, the court must only consider the facts alleged in the pleadings and attachments thereto. Jordan v. Fox, Rothschild, O'Brien & Frankel, 20 F.3d 1250, 1261 (3d Cir. 1994); Douris v. Schweiker, No. Civ. A. 02-1749, 2002 U.S. Dist. LEXIS 21029, at \*6 (E.D. Pa. Oct. 23, 2002). A motion to dismiss is appropriate only when the movant establishes that he is entitled to judgment as a matter of law and there exists "no set of facts in support of his claims which would entitle him to relief." Ford v. Schering-Plough Corp., 145 F.3d 601, 604 (3d Cir. 1998); Schrob v. Catterson, 948 F.2d 1402, 1405 (3d Cir. 1991).

### III. DISCUSSION

Recognizing the various regulatory problems created by the rapid development of cable television operations, Congress enacted the Act to, in part, "establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community." 47 U.S.C. § 521(2). Franchise agreements, drafted in compliance with the Act, would be "modified so as to obtain a realistic and flexible regulatory framework" that recognizes the needs of local governments and cable operators as well as the needs of the local community they serve. Tribune-United Cable v. Montgomery County, 784 F.2d 1227, 1231 (4th Cir. 1986). To that end, Section 545 of the Act permits cable operators to seek modification of a franchise agreement if it becomes "commercially impracticable" to perform.<sup>1</sup> 47 U.S.C. § 545(a)(1). If a request for modification has been denied by the final decision of a franchising authority, a cable

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<sup>1</sup> A requirement in a franchise agreement becomes "commercially impracticable," as used in the Act, when it:

is commercially impracticable for the operator to comply with such requirement as a result of a change in conditions which is beyond the control of the operator and the nonoccurrence of which was a basic assumption on which the requirement was based.

47 U.S.C. § 544(f).

operator may petition a United States district court for relief under the Act. 47 U.S.C. § 555(a)(1). The Board issued a final decision when it denied RCN's request for modification, and, thus, this Court is now authorized to review RCN's modification petition. See Cablevision Systems Corp. v. Town of East Hampton, 862 F. Supp. 875, 887 (E.D.N.Y. 1994).

#### **A. Modification Request**

The Act provides only for modifications of franchise agreement provisions related to facilities or equipment, or services. Section 545 of the Act provides:

During the period a franchise is in effect, the cable operator may obtain from the franchising authority modifications of the requirements in such franchise-

(A) in the case of any such requirement for facilities or equipment, including public, education, or governmental access facilities or equipment, if the cable operator demonstrates that (i) it is commercially impracticable for the operator to comply with such requirement, and (ii) the proposal by the cable operator for modification of such requirement is appropriate because of commercial impracticability; or

(B) in the case of any such requirement for services, if the cable operator demonstrates that the mix, quality, and level of services required by the franchise at the time it was granted will be maintained after such modification.

47 U.S.C. § 545(a)(1) (emphasis added). The Township contends that RCN's claim pursuant to Section 545 of the Act fails because RCN is not requesting modifications relating to equipment, services or facilities, which are the only permissible grounds

for modification under the Act. Rather, the Township argues that RCN is, in effect, proposing to terminate the Franchise Agreement and replace it with an agreement that seeks to establish a larger regional franchising authority and expanded territorial limits of service, which are not authorized by Section 545. RCN, however, argues that its modification seeking the creation of a regional authority and greater geographic regions of service directly pertains to franchise facilities, equipment, and services, and, therefore the modifications are well within the Act's scope. Although the Township protests RCN characterization of its modification proposal, on a motion to dismiss, we do not assess the veracity of RCN's factual assertions and, instead, view all well-plead averments of fact in favor of the non-moving party. Without more, we cannot conclude, under this limited standard of review, that RCN fails to state a claim for modification within the purview of the Act to warrant dismissal.

#### **B. Stay Request**

The Township next argues that RCN's request for a stay of the litigation in Bucks County must fail since it is supported neither by the Act, or any other binding authority. Conceding that the Act does not expressly provide for this remedy, RCN relies on the Fourth Circuit case Tribune-United Cable of Montgomery County v. Montgomery County, 784 F.2d 1227 (4th Cir.

1986) to support its request for a stay. Although not binding on this Court, RCN claims that the court in Montgomery County determined that any action by a franchising authority to enforce the penalty provisions of a franchise agreement must be stayed while a modification request was still pending. Id. at 1231. The Township, however, contends that Montgomery County dealt with a modification proposal that fell within the scope of Section 545, and thus, is inapposite to the instant case, which involves a modification request not authorized by Section 545. Since we do not conclude that the modifications RCN requests fall outside the scope of Section 545, we deny the Township's request for dismissal on this ground, and conclude that, upon an appropriate motion to the appropriate court, a stay of the Bucks County litigation may be plausible pursuant to the Montgomery County decision.

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O R D E R

**AND NOW**, this            day of May 2003, in consideration of the Motion to Dismiss filed by Defendant Newtown Township, Bucks County, Commonwealth of Pennsylvania (the "Township") (Doc. No. 4) and the Response of Plaintiffs RCN Corporation and RCN Telecom Services of Philadelphia (Doc. No. 6) thereto, it is **ORDERED** that the Township's Motion to Dismiss is **DENIED**.

BY THE COURT:

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JAMES MCGIRR KELLY, J.