



Federal Communications Commission
Washington, D.C. 20554

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In Reply Refer To:
1800B3-KV

New River Community Church
c/o Christopher D. Imlay, Esq.
Booth, Freret & Imlay, LLC
14356 Cape May Road
Silver Spring, Maryland 20904-6011

Red Wolf Broadcasting Corporation
c/o Scott Woodworth, Esq.
Edinger Associates PLLC
1725 I Street, NW
Suite 300
Washington, DC 20006

Saga Communications of New England, LLC
c/o Gary S. Smithwick
Smithwick & Belendiuk
5028 Wisconsin Avenue, NW
Suite 301
Washington, DC 20016

In re: WYPH-LP, Manchester, Connecticut
New River Community Church
Facility ID No. 193136
File No. BLL-20170807AAT
Motion to Stay

Dear Counsel:

We have before us a “Motion to Stay” (Motion) filed on March 26, 2021, by Red Wolf Broadcasting Corporation (Red Wolf), licensee of WDRC-FM, Hartford, Connecticut (WDRC-FM).¹ The Motion seeks to stay the effectiveness of the Media Bureau’s (Bureau) letter decision (*Letter Decision*)² ordering Red Wolf and New River Community Church (New River) to, within 90 days of the *Letter Decision*, engage in on-off testing to determine if New River’s LPFM station, WYPH-LP,

¹ See Motion to Stay, File No. BLL-20170807AAT (rec’d Mar. 26, 2021). On March 31, 2021, New River opposed the Motion. See Opposition to Motion to Stay, File No. BLL-20170807AAT (rec’d Mar. 31, 2021). In reaching our decision herein, we did not rely on New River’s responsive pleading.

² See Letter from Albert Shuldiner, Chief, Audio Division, Media Bureau, to New River, *et. al.* (MB rel’d Mar. 11, 2021) (*Letter Decision*).

Manchester, Connecticut, is the source of the alleged interference to the over-the air reception of WDRC-FM. For the reasons discussed below, we deny the Motion.

Background. The Motion arises out of an interference complaint proceeding in which Red Wolf alleged that WYPH-LP was causing interference to the over-the-air reception of WDRC-FM.³ Currently, WYPH-LP is silent pursuant to the Bureau's order to cease operations until New River addressed the interference purportedly caused to WDRC-FM.⁴ Subsequently, New River petitioned for reconsideration of the Bureau's cease operations order and, alternatively, requested that the Bureau order on-off testing be conducted by a third party engineer to determine whether WYPH-LP is the source of the interference to WDRC-FM.⁵ Additionally, Red Wolf supplemented the Complaint to allege that New River had installed an "unauthorized" antenna at the WYPH-LP transmitter site which caused interference to WDRC-FM and that on-off testing would not be of any value "[u]ntil this violation is corrected."⁶

In the *Letter Decision*, Bureau affirmed that apart from brief transmissions for testing purposes,⁷ WYPH-LP cannot resume operations until New River has eliminated the interference or demonstrated that WYPH-LP is not the source the interference and denied Red Wolf's supplement to the Complaint as impermissible collateral attack of the now-final WYPH-LP license grant.⁸ The Bureau further ordered that within 90 days of the *Letter Decision*, New River and Red Wolf must jointly engage a third party engineer to perform on-off testing to determine the source of the interference caused to over-the-air reception of WDRC-FM.⁹

On March 26, 2021, Red Wolf filed the instant Motion, a petition for reconsideration¹⁰ of the *Letter Decision*, and a "complaint" with the Commission's Enforcement Bureau (EB).¹¹ In the Motion, Red Wolf requests that the Bureau's *Letter Decision* ordering on-off testing be stayed until Red Wolf's petition and EB complaint are acted on by the respective bureaus.¹² In support of the Motion, Red Wolf argues that it is undisputed that WYPH-LP installed what Red Wolf describes as an unauthorized antenna (Shivley Antenna) and claims this was in violation of the FCC's rules.¹³ Red Wolf also contends that if a stay is not issued it "would be irreparably harmed because it will expend resources that it cannot not get

³ See Interference Complaint, File No. BLL-20170807AAT (rec'd Jan. 10, 2020) (Complaint) and the parties' associated filings.

⁴ See Letter from James D. Bradshaw, Senior Deputy Chief, Audio Division, Media Bureau, FCC, to New River, *et. al.*, File No. BLL-20170807AAT (MB Apr. 23, 2020) (*Cease Operations Letter*). See also Letter from James D. Bradshaw, Senior Deputy Chief, Audio Division, Media Bureau, FCC, to New River, *et. al.*, File No. BLL-20170807AAT (MB Sep. 28, 2020) (concluding that WYPH-LP could not resume operations until it had addressed the interference alleged in the Complaint).

⁵ See Petition for Reconsideration, File No. BLL-20170807AAT (rec'd Oct. 28, 2020) (New River Petition).

⁶ See *Letter Decision* at 9 (quoting Red Wolf's supplement).

⁷ *Id.* at 7 and n.59 (citing 47 CFR § 73.807(e)(2)(ii) ("Short test transmissions may be made during the period of suspended operation to check the efficacy of remedial measures.")).

⁸ *Id.* at 6.

⁹ *Id.* at 9.

¹⁰ See Petition for Reconsideration, File No. BLL-20170807AAT (rec'd Mar. 26, 2021) (Petition).

¹¹ Red Wolf does not attach a copy of the EB complaint or provide additional details on this filing.

¹² Motion at 1.

¹³ *Id.* at 2.

back if it succeeds on the merits and because WDRC-FM will continue to receive interference from WYPH-LP.”¹⁴ Red Wolf further claims that “[a] stay will not harm New River more than its decision to install the Shivley Antenna has already harmed it.”¹⁵ Lastly, Red Wolf declares that a stay is in the public interest as the *Letter Decision* “sets a dangerous precedent” which would “allow stations to disclose non-compliant facilities at the license application stage and, if such violation is not discovered . . . within the time for reconsideration and review, the station could operate such facilities indefinitely.”¹⁶

Discussion. In determining whether to grant a motion for stay, the Commission applies a four-factor test.¹⁷ To qualify for the extraordinary remedy of a stay, a movant must show that: (1) it is likely to prevail on the merits; (2) it will suffer irreparable harm absent the grant of preliminary relief; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest would favor grant of the stay.¹⁸ For the reasons below, we conclude that Red Wolf has failed to meet the test for this extraordinary equitable relief.

In applying the four factor test, a showing of irreparable injury is generally critical in justifying a request for stay.¹⁹ Specifically, the alleged injury “must be both certain and great; it must be actual and not theoretical.”²⁰ Additionally, the irreparable injury must also be “likely to occur.”²¹ Here, Red Wolf claims that it “would be irreparably harmed because it will expend resources that it cannot not get back if it succeeds on the merits and because WDRC-FM will continue to receive interference from WYPH-LP.”²² Regarding the loss of monetary resources, it is “well settled that economic loss does not, in and of itself, constitute irreparable harm.”²³ The only exceptions to this rule are when (1) the economic loss threatens the “very existence of the movant’s business,”²⁴ and (2) such loss is great, certain, and

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 2-3.

¹⁷ See, e.g., *In the Matter of Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions*, Order Denying Stay Motion, 31 FCC Rcd 1930, 1931 para. 4 and n.4 (MB 2016) (*Economic Opportunities Order*) (citing *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (*Washington Metro.*); and *Virginia Petroleum Jobbers Ass’n v. Federal Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (*Virginia Petroleum*)).

¹⁸ See *Washington Metro.* 559 F.2d at 843, and *Virginia Petroleum*, 259 F.2d at 925.

¹⁹ See *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S.7, at 22 (2008) (“Our frequently reiterated standard requires plaintiffs seeking an injunction to demonstrate that irreparable injury is *likely* in the absence of an injunction.”); see also *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (denying requests for stay after considering only the second factor) (*Wisconsin Gas*).

²⁰ *Wisconsin Gas*, 758 F.2d at 674.

²¹ *Id.*

²² Motion at 2.

²³ *Wisconsin Gas*, 758 F.2d at 674 (“mere injuries, however, substantial, in terms of money, time and energy expended do not constitute irreparable harm”).

²⁴ *Id.*

imminent.²⁵ Here, Red Wolf has made no such showing.²⁶ As for Red Wolf's claims of "suffering interference" if a stay is not granted, the Bureau affirmed that apart from brief transmissions for testing purposes, WYPH-LP cannot resume operations until New River has eliminated the interference or demonstrated that WYPH-LP is not the source the interference. The Bureau ordered on-off testing solely to evaluate the source of the interference to WDRC-FM. If the on-off testing shows that WYPH-LP's operations cause interference to WDRC-FM, then WYPH-LP will not be allowed to resume operations.

We further find that Red Wolf has failed to satisfy the remaining factors for grant of a stay. Specifically, Red Wolf has failed to demonstrate that it is likely to prevail on the merits. In evaluating whether Red Wolf is likely to succeed on the merits, Red Wolf must have made a substantial case.²⁷ Our review of the Motion, finds that Red Wolf has not provided sufficient evidence that it is likely to prevail on the merits, but rather merely reiterates arguments that were considered and rejected in the *Letter Decision*.²⁸ As for Red Wolf's claim that New River will not suffer additional harm if the stay is granted, we disagree. Currently, WYPH-LP is silent and must remain off the air until New River has addressed the interference purportedly caused to WDRC-FM. Under these circumstances, to grant Red Wolf's request for a stay of the *Letter Decision*'s order for on-off testing would harm New River because WYPH-LP would have to remain silent until Red Wolf's Petition and EB complaint have been addressed. We also disagree with Red Wolf's assertion that a stay is in the public interest to avoid setting what Red Wolf views as "a dangerous precedent."²⁹ A stay does not impact the pendency of Red Wolf's Petition; the Petition remains pending and will be addressed by the Bureau in a separate letter decision after the end of the pleading cycle for the Petition. We, therefore, find that Red Wolf has satisfied none of the four factors for grant of a stay.

Conclusion. Accordingly, IT IS ORDERED that pursuant to sections 1, (4)(i), and 4(j) of the Communications Act of 1934, as amended,³⁰ and section 1.43 of the Commission rules,³¹ and the

²⁵ See *Cardinal Health, Inc. v. Holder*, 846 (F.Supp. 2d 203, 211 (D.D. C. 2012)).

²⁶ See *KDEW-FM, DeWitt, Arkansas*, Memorandum Opinion and Order, 11 FCC Rcd 13683 (1996) (rejecting economic injury that was temporary in nature and for which adequate compensatory or other relief was available).

²⁷ *Washington Metro*, 559 F.2d at 843-844.

²⁸ See *Economic Opportunities Order*, 31 FCC Rcd at 1932 (success on the merits not likely where Commission responded to and refuted arguments). See also, e.g., *Lockheed Martin Global Telecommunications et. al*, Order, 17 FCC Rcd 1552, 1554 (IB 2002) (likelihood of success on the merits not found where the movant has made mere allegations).

²⁹ Motion at 2-3.

³⁰ 47 U.S.C. §§ 151, 154(i) and (j).

³¹ 47 CFR § 1.43.

authority delegated pursuant to sections 0.61 and 0.283 of the Commission's rules,³² the "Motion for Stay" filed on March 26, 2021, by Red Wolf Broadcasting Corporation IS DENIED.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau

³² 47 CFR §§ 0.61, 0.283.