

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

In the Matter of:)	
)	
Brunson Communications Inc.)	
)	CSR-5580-M
v.)	
)	
Service Electric Cable TV, Inc. and)	
Service Electric Cablevision, Inc.)	
)	
Channel Positioning Complaint)	

MEMORANDUM OPINION AND ORDER

Adopted: December 11, 2000

Released: December 13, 2000

By the Chief, Consumer Protection and Competition Division, Cable Services Bureau:

I. INTRODUCTION

1. Brunson Communications, Inc. (“Brunson”), licensee of Television Broadcast Station WGTW (Channel 48), Burlington, New Jersey (the “Station” or “WGTW”), filed the above-captioned complaint against Service Electric Cable TV, Inc. (“Service Electric”)¹ for its failure to carry WGTW at channel position 48 on its cable system serving communities in Lehigh, Northampton, Bucks, and Berks Chester Counties, Pennsylvania (the “cable communities”).² Service Electric Cable TV, Inc. filed an Opposition to this complaint, to which Brunson replied.

II. BACKGROUND

2. Pursuant to Section 614 of the Telecommunications Act and implementing rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Broadcast Signal Carriage Issues (“*Must Carry Order*”), commercial television broadcast stations are entitled to assert mandatory carriage rights, including certain mandatory carriage rights, on cable systems located within the station’s market.³

¹ The instant complaint was filed originally against both Service Electric Cablevision, Inc. and Service Electric Cable TV, Inc. However, on September 19, 2000, the parties informed the Commission that they had reached an agreement concerning the carriage of WGTW, and requested that the complaint against Service Electric Cablevision, Inc. be dismissed.

² See Appendix I.

³ 8 FCC Rcd 2965, 2976-2977 (1993).

3. Section 614(b)(6) of the Act and Section 76.57 of the Commission's rules provide commercial television stations with three channel positioning options.⁴ The station may elect to be carried on: (1) the channel number on which the station is broadcast over-the-air; (2) the channel number on which the station was carried on July 19, 1985; or (3) the channel number on which the station was carried on January 1, 1992.⁵ The Act and the rules also provide that a broadcast station may be carried on any other channel number mutually agreed upon by the station and the cable operator.⁶

III. DISCUSSION

4. In support of its request, Brunson states that WGTW is a full service commercial television station licensed to Burlington, New Jersey which is in the Philadelphia DMA.⁷ WGTW is currently carried on channel 64 on Service Electric's cable system. Brunson indicates that on June 2, 2000, it notified Service Electric that WGTW was entitled to carriage on channel 48, the channel number on which the Station broadcasts over-the-air, on Service Electric's cable system serving the cable communities.⁸ Brunson asserts that Service Electric failed to reply to the June 2, 2000 letter in violation of Section 76.61(a)(2) of the Commission's rules, which requires cable operators to respond in writing to requests for carriage within 30 days of such requests.⁹ Consequently, Brunson filed the instant complaint.

5. In its opposition, Service Electric states that it serves 125,000 subscribers, with 3,400 of those subscribers receiving service on the system's limited basic tier on channels 2-13, 50-65, 97, 98 and 99.¹⁰ Service Electric indicates that WGTW has been carried on channel 64 since November 7, 1996, and is available to all of Service Electric's customers regardless of the service package to which they subscribe.¹¹ Service Electric states that it employs a system of traps blocking programming offered on channels 14-20, 28-49 and 66-96.¹² Service Electric asserts that as a result, channel 48 is not available to its limited basic tier.¹³

⁴ 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57.

⁵ 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57(a).

⁶ 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57(c).

⁷ Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. See 47 U.S.C. § 534(h)(1)(C). Until January 1, 2000, Section 76.55(e) of the Commission's rules provided that Arbitron's "Areas of Dominant Influence," or ADIs, published in the "1991-1992 Television Market Guide," be used to implement the mandatory carriage rules. Effective January 1, 2000, however, Section 76.55(e) requires that a commercial broadcast television station's market be defined using Nielsen Media Research's Designated Market Areas ("DMAs"). For the must carry/retransmission consent elections that took effect on October 1, 1999, commercial television stations were required to make their elections based on DMAs. See *Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, Order on Reconsideration and Second Report and Order, 14 FCC Rcd 8366 (1999) ("Modification Final Report and Order").

⁸ Complaint at 2; Exhibit B.

⁹ 47 C.F.R. § 76.61(a)(2).

¹⁰ Opposition at 1.

¹¹ *Id.* at 2.

¹² *Id.*

¹³ *Id.*

6. Service Electric states that it does not dispute WGTW's right to carriage on its system.¹⁴ However, it asserts that WGTW's must carry status does not, in and of itself, justify WGTW's request for placement of its signal on channel 48. Service Electric maintains that Brunson's request for the channel position of WGTW should be denied for three reasons: 1) the enormous costs required to reconfigure the system to move WGTW to channel 48 would substantially impact Service Electric and its subscribers;¹⁵ 2) WGTW and Service Electric had agreed that the Station would be carried permanently on channel 64;¹⁶ and 3) the request for channel positioning would involve an unconstitutional taking of property without just compensation in violation of the Fifth Amendment.¹⁷

7. Service Electric contends that it is entitled to a waiver of the channel positioning requirements based on the substantial costs it would incur if it were required to reposition WGTW.¹⁸ Service Electric acknowledges that in order "[t]o obtain a waiver of the channel positioning requirements, [a] cable operator must first 'submit detailed evidence demonstrating the compliance costs' and second 'demonstrate how such costs would substantially impact the cable system.'"¹⁹ Service Electric maintains that, although the need to reconfigure the basic tier "does not establish grounds for a waiver" of the channel positioning requirements, the Commission has nevertheless recognized that the high costs associated with implementing a particular channel request can justify its denial.²⁰ Service Electric states that it is well aware that it cannot simply assert that such costs exist, but rather must demonstrate how such costs impact the system. Service Electric points out that in *WXTV License Partnership*, ("WXTV") the Cable Services Bureau (the "Bureau") granted a waiver of the channel positioning rules where the documented costs of compliance were \$39.50 per affected subscriber and the expenditure of such costs would cause the operator to suffer a loss through disruption of budgets and business plans.²¹ Service Electric states that in order to move WGTW to channel 48, it would incur costs equal to \$120.00 per limited basic tier subscriber.²² Service Electric points out that such cost is nearly three times higher than the amount allowed in *WXTV*, and illustrates the magnitude of the impact on Service Electric and its subscribers.²³ Service Electric points out that the equipment and labor costs associated with making channel 48 available to WGTW and re-trapping the limited basic tier would be \$ 596,979, which would result in an expense of \$119.40 "per Broadcast Basic Package customer."²⁴ Service Electric also notes that it is a small cable operator, and argues that the expense to accommodate WGTW's channel positioning request would constitute an unreasonable financial burden.²⁵

¹⁴ *Id.*

¹⁵ *Id.* at 2-7.

¹⁶ *Id.* at 7-10.

¹⁷ *Id.* at 10-12.

¹⁸ *Id.* at 3.

¹⁹ *Id.*, citing *Greater Dayton Public Television*, 10 FCC Rcd 1048, 1049 (1995) ("Greater Dayton").

²⁰ Opposition at 3.

²¹ 14 FCC Rcd 6482 (1999), *recon. granted in part*, 15 FCC Rcd 3308 (2000); Opposition at 4.

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 6. According to Service Electric, this amount does not include the collateral administrative costs that it would incur. *Id.*

²⁵ *Id.* at 8.

8. Service Electric argues that WGTW is precluded from requesting a new channel position because by having consented to be carried on channel 64, it agreed to permanently be carried on that channel.²⁶ Service Electric maintains that it relied on WGTW's acceptance to be carried on channel 64 and "justifiably assumed" that no channel positioning issues existed, and that the channel positioning election was a one-time election.²⁷ Service Electric contends that it would be penalized for its reliance on WGTW's earlier channel positioning acceptance if it were required to spend money to relocate WGTW. Further, it contends that when Congress adopted the must carry statutory language, it did not intend to allow broadcasters to "triennially pick and choose" a channel position.²⁸

9. Service Electric also argues that granting WGTW's channel positioning request would constitute an uncompensated taking of private property in violation of the Fifth Amendment. Service Electric argues that even a "minor but permanent physical occupation of an owner's property authorized by government constitutes a 'taking' of property for which just compensation is due" under the Fifth Amendment.²⁹ Service Electric maintains that allowing WGTW to permanently occupy the channel position it seeks would not only constitute an impermissible taking, but would deprive Service Electric of the opportunity to "possess, use and dispose" of its property.³⁰

10. In reply, Brunson argues that contrary to Service Electric's claims, WGTW's channel positioning agreement to be carried on channel 64 was effective only through the must carry election period ending December 31, 1999.³¹ Brunson maintains that such an agreement would not bind WGTW to be carried on channel 64 in perpetuity.³² Brunson notes that in *Brunson Communications, Inc. v. RCN Telecom Services, Inc.*, the Bureau recently rejected a similar argument concerning an agreement that allegedly bound WGTW to a particular cable channel indefinitely.³³ It asserts that because a new three-year election period commenced on January 1, 2000, WGTW is not barred from seeking carriage on its over-the-air channel for the current election period.³⁴ Brunson notes further that on September 27, 1999, Service Electric agreed to carry WGTW on channel 48 as the Station had requested. According to Brunson, channel position changes would hurt the broadcaster more than the cable system.³⁵ Brunson maintains that Service Electric's alleged costs of compliance are insufficient to excuse Service Electric's refusal to relocate WGTW to channel 48.³⁶ Brunson points out that Service Electric's estimate to install and remove traps at \$119.40 per household is inaccurate because Service Electric has spread the total expenditure only to subscribers of its limited basic tier rather than to all system subscribers.³⁷ Brunson

²⁶ *Id.* at 9.

²⁷ *Id.* at 9 and 11.

²⁸ *Id.* at 9.

²⁹ *Id.* at 10, citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982).

³⁰ Opposition at 11.

³¹ Reply at 4.

³² *Id.*

³³ *Id.*, citing *Brunson Communications, Inc. v. RCN Telecom Services, Inc.*, 15 FCC Rcd 8992 (2000)(Application for Review pending).

³⁴ Reply at 4.

³⁵ *Id.*

³⁶ *Id.* at 6.

³⁷ *Id.* 6 – 13.

points out that once Service Electric's total expense is properly allocated to all subscribers in the system, consistent with precedent, Service Electric's estimated cost to reconfigure its systems is \$4.78 per subscriber.³⁸ Finally, Brunson states that it has agreed on an alternate channel, channel 18, in order to assuage the concerns of other cable operators who have difficulty putting WGTW on Channel 48.³⁹

11. With regard to the Fifth Amendment issue, Brunson notes that the Commission discussed the issue intensively in its decision on reconsideration in *WXTV*, and rejected arguments questioning the constitutionality of the statute.⁴⁰ Brunson states that there is no reason why the Commission should alter that stance herein since the mere fact that channel positioning requirements might exact some financial toll from cable operators does not render the requirements a taking.⁴¹

12. We will require Service Electric to carry WGTW on channel 48. Section 614(b)(6) of the Communications Act permits a commercial television to elect to be "carried on the cable system channel number on which the local commercial television station is broadcast over the air."⁴² Brunson made a valid request for carriage of WGTW on Service Electric's cable system on channel 48, the channel number on which it broadcasts. Under the Commission's rules, cable operators must comply with the channel positioning requirements absent a compelling technical reason for not doing so.⁴³ The Commission has specifically indicated that the need to replace traps, or to reconfigure the basic tier, or to make technological changes is generally not grounds for a waiver.⁴⁴ Nevertheless, in adopting the on-channel carriage rules, the Commission recognized that there might be certain circumstances where the costs incurred by a cable operator would be so compelling as to warrant a waiver.⁴⁵ The question in this instance is whether Service Electric has established such grounds. Service Electric argues that the costs required to reconfigure its system to accommodate WGTW's channel positioning request would substantially impact Service Electric and its subscribers. Service Electric claims that the cost per limited basic subscriber would be \$119.40 and it compares this amount to the \$39.50 per subscriber in *WXTV*, which the Bureau found to be sufficiently burdensome to justify the grant of a waiver of the channel positioning requirements.⁴⁶ Brunson disputes Service Electric's characterization of its costs.

13. We find that Service Electric's contentions that its reconfiguration costs should be allocated to its limited basic subscribers to be unjustified because the repositioning of WGTW from channel 64 to channel 48, its over-the-air channel position, affects every Service Electric subscriber without regard to which tier they subscribe. While admittedly the only subscribers for which traps would be necessary are those receiving limited basic service, all of Service Electric's 125,000 subscribers would

³⁸ *Id.* at 13.

³⁹ *Id.* at 3

⁴⁰ *Id.* at 13.

⁴¹ *Id.*

⁴² 47 U.S.C. § 534(b)(6). As noted earlier, commercial stations are allowed to choose their cable channel position based on the cable channel on which it is broadcast over-the-air, or on the channel it was carried on July 19, 1985, or on the same channel it was carried on January 1, 1992, at the election of the station, or such other channel as mutually agreed upon by the station and the cable operator. *See* 47 C.F.R. § 76.57.

⁴³ *Must Carry Order*, 8 FCC Rcd 2965, 2988(1993).

⁴⁴ *Id.* at 2986.

⁴⁵ *Id.*

⁴⁶ 14 FCC Rcd 6482, 6501 (1999).

be affected by the change. Thus, the total cost of \$596,979.00 should be allocated among the system's total number of subscribers.⁴⁷ In this case, even accepting Service Electric's costs as correct, the total cost of reconfiguration when calculated using the total number of subscribers on its system is only \$4.775 per subscriber, an amount which is substantially less than that discussed in *WXTV*.

14. The Commission recently discussed the Fifth Amendment issue in *WXTV* and, after noting that the United States Supreme Court upheld the constitutionality of Section 614, stated:

We recognize that the decision in *Thunder Basin* may provide administrative agencies an opportunity to consider the constitutionality of implementing statutes under certain circumstances. We note, however, that the Supreme Court has made clear that such a consideration is at the discretion of the agency involved. In this case, we decline to do so. ... Given the clarity of the statutory carriage obligations imposed on cable operators and the settle expectations in this area, we do not address the Fifth Amendment taking claim here.⁴⁸

Given the Commission's recent decision on this issue declining to consider the Fifth Amendment implications of channel repositioning, we similarly decline in this matter to address Service Electric's arguments on this issue.

IV. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED**, pursuant to § 0.321 of the Commission's Rules (47 C.F.R. § 0.321), that the channel positioning complaint, Brunson Communications, Inc., filed on August 4, 2000, against Service Electric Cablevision, Inc., **IS DISMISSED** without prejudice.

16. **IT IS FURTHER ORDERED**, pursuant to Section 614 of the Communications Act of 1934, as amended (47 U.S.C. § 534), that the channel positioning complaint filed by Brunson Communications, Inc., against Service Electric Cable TV, Inc. **IS GRANTED**.

⁴⁷ See *KDTV License Partnership*, 13 FCC Rcd 10331 (1998)(\$6.84 per subscriber).

⁴⁸ *WXTV*, 15 FCC Rcd at 3318-19 (footnote omitted), citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994).

17. **IT IS FURTHER ORDERED**, that Service Electric Cable TV, Inc. **SHALL COMMENCE CARRIAGE** of WGTW on cable channel 48 throughout its system serving communities in Lehigh, Northampton, Bucks, and Berks Counties, Pennsylvania, within 90 days of the release of this *Order*.

18. This action is taken pursuant to authority delegated under Section 0.321 of the Commission's rules.⁴⁹

FEDERAL COMMUNICATIONS COMMISSION

Deborah E. Klein, Chief
Consumer Protection and Competition Division
Cable Services Bureau

⁴⁹ 47 C.F.R. § 0.321.

APPENDIX I

The Communities served by Service Electric Cable TV, Inc., are:

Lehigh County

Alburtis
Allentown
Catasauqua
Coopersburg
Coplay
Emmaus
Fountain Hill
Hanover
Low Hill
Lower Macungie
Lower Mildford
Lynn
Macungie
North Whitehall
Salisbury
South Whitehall
Upper Macungie
Upper Mildford
Upper Saucon
Weisenberg
Whitehall

Northampton County

Allen
Bangor
Bath
Bethlehem
Bushkill
Chapman
East Allen
East Bangor
Easton
Forks
Freemansburg
Glendon
Hanover
Hellertown
Lower Mt. Bethel
Lower Nazareth
Lower Saucon
Moore

Nazareth
North Catasauqua
Palmer
Pen Argyl
Plainfield
Portland
Roseto
Stockertown
Tatamy
Upper Mt. Bethel
Upper Nazareth
Washington
West Easton
Williams
Wilson
Wind Gap

Bucks County

Bridgeton
Durham
Haycock
Nockamixon
Richland
Riegelsville
Springfield
Tinicum

Berks County

Greenwich
Hereford
Longswamp