

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

In the Matter of:)	
)	
WXTV License Partnership, G.P.)	
)	CSR-6251-M
v.)	
)	
Patriot Media and Communications, LLC)	
)	
Channel Positioning Complaint)	

MEMORANDUM OPINION AND ORDER

Adopted: March 12, 2004

Released: March 16, 2004

By the Deputy Chief, Media Bureau, Policy Division:

I. INTRODUCTION

1. WXTV License Partnership, G.P. (“WXTV License”), licensee of commercial television station WXTV(TV) (Channel 41), Paterson, New Jersey, (“WXTV” or the “Station”) filed a must carry complaint with the Commission, pursuant to Section 534(a) of the Communications Act of 1934, asking that the Commission require Patriot Media and Communications, LLC (“Patriot”) to carry WXTV on its over-the-air channel position on Patriot’s cable system serving Belle Mead, Flemington and Passaic, New Jersey (the “system”).¹ Patriot filed an opposition to which WXTV license replied.²

II. BACKGROUND

2. Pursuant to Section 614 of the Communications 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 channel position rights, on cable systems located within the station’s market.³

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

¹ 47 U.S.C. § 534(a); *see* 47 C.F.R. §§ 76.7 and 76.61.

² Patriot is the successor in interest of C-Tec Cable Systems. C-Tec Cable Systems began carriage of WXTV on Channel 21 beginning on November 26, 1993. Patriot’s Opposition to Complaint at Exhibit 1.

³ 8 FCC Rcd 2965, 2976-2977 (1993).

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

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 complaint, WXTV maintains that contrary to its September 20, 2002 channel assignment request, Patriot is carrying it on Channel 21 on its cable system serving Belle Mead, Flemington and Passaic, New Jersey.⁷ WXTV states that on that date, it informed Patriot that it had elected must carry status on its cable system for the election period beginning January 1, 2003, and requested carriage of WXTV on Channel 41, its over-the-air channel.⁸ WXTV asserts further that after the new election period began, Patriot continued carriage of the Station on Channel 21 on the system at issue, without WXTV's acquiescence; and that as a result, on August 1, 2003, it informed Patriot that carriage of WXTV on Channel 21 on the system did not conform to the Commission's must carry requirements, and requested Patriot to relocate the Station to Channel 41.⁹ WXTV maintains that Patriot failed to relocate the Station as requested.¹⁰ WXTV asks that Patriot be ordered to commence carriage of WXTV on Channel 41, its over-the-air channel.¹¹

5. In opposition, Patriot maintains that WXTV's complaint should be dismissed because it is procedurally defective. Patriot contends that WXTV's complaint was not filed within 60 days after Patriot's predecessor, RCN, denied WXTV's request to be carried on Channel 41 by letter dated December 13, 2002. Further, Patriot asserts that WXTV again failed to file a complaint within 60 days after a denial of its September 20, 2002 request for carriage.¹² Patriot states that WXTV has been carried on Channel 21 since November 26, 1993 when WXTV and the cable operator at that time mutually agreed to that cable channel assignment.¹³ Patriot states further that on December 13, 2002, in response to its most recent election letter, RCN, informed WXTV of its intention to retain the Station on its "historical channel assignment."¹⁴ Patriot maintains that WXTV "effectively agreed to continued carriage" on Channel 21 when the Station failed to respond to RCN's December 13, 2002 letter and that, as a result of WXTV's "implicit consent," Patriot undertook a general channel realignment leaving WXTV on cable Channel 21 of the system in question.¹⁵ Patriot contends that even if WXTV's complaint was timely filed, the Commission's underlying policy of balancing the interests of the parties should

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 Complaint at 2.

⁸ *Id.*

⁹ *Id.* at 2.

¹⁰ *Id.*

¹¹ *Id.* at 5.

¹² Opposition at 4-5.

¹³ *Id.* at 1-2.

¹⁴ *Id.* at 2 and Exhibit 2.

¹⁵ *Id.* at 2-3.

apply in this case.¹⁶

6. In reply, WXTV contends that it never agreed, implicitly or explicitly, to be carried on Channel 21 for this election cycle.¹⁷ WXTV maintains that its September 2002 election letter explicitly elected carriage on Channel 41, its over-the-air channel. WXTV argues that Patriot was obligated to honor that election because the Commission has determined that broadcast stations may assert their carriage and channel positioning rights at any time so long as they have not elected retransmission consent, which WXTV has not done in this instance.¹⁸ WXTV asserts that, contrary to what Patriot alleges, the instant complaint was timely filed, 60 days after Patriot failed to respond in writing to its August 1, 2003 demand for carriage, as required by Section 76.61(a)(2) of the Commission's rules.¹⁹

7. We disagree with Patriot's allegations that the Complaint is procedurally defective because it was untimely filed. In this regard, we note that WXTV's September 20, 2002 letter was clearly an election letter, filed pursuant to Section 76.64 of the Commission's rules, which requires commercial television stations to make a periodic election between retransmission consent and must carry status, but does not trigger any procedural deadlines in connection with filing a must carry complaint. In addition, because WXTV had not made a demand for carriage prior to RCN's December 13, 2002 letter, WXTV had no obligation to file a complaint 60 days thereafter pursuant to Section 76.61(a)(5)(i).²⁰ On August 1, 2003 WXTV made a demand for carriage on Channel 41 for the first time. Thus, we find that the instant complaint filed on October 30, 2003, was timely filed.

8. Patriot appears to believe that the 1993 channel assignment agreement between WXTV and Patriot's predecessor in interest binds the Station to be carried on Channel 21 in perpetuity. We disagree. Pursuant to Section 76.64(f)(2), a commercial television station, such as WXTV, is required to make an election between retransmission consent and must carry at three-year intervals. In that regard, the Commission has held that broadcast stations may assert their carriage and channel positioning rights at any time so long as they have not elected retransmission consent.²¹ In addition, Section 614(b)(6) of the Communications Act permits a commercial station to elect to be "carried on the cable system channel number on which the local commercial television station is broadcast over the air."²² On September 20, 2002, WXTV made an election request for carriage of its signal on Patriot's cable system on Channel 41, the channel number on which it broadcasts. Patriot, however, has failed to honor its obligation to comply with WXTV's request or to negotiate the positioning of WXTV on the system at issue. In this regard, the Commission has stated that cable operators must comply with channel positioning requirements absent

¹⁶ *Id.* Patriot contends that more than 8,200 subscribers would be affected, costing Patriot \$40.00 per subscriber. In addition, Patriot maintains that repositioning WXTV to cable Channel 41 would result in consumer confusion and viewing disruptions. It argues that because of unnecessary incremental costs, granting WXTV's complaint would be "perverse." *Id.* at 5-6.

¹⁷ Reply at 1-2.

¹⁸ *Id.* at 2-3. In support, WXTV cites the Commission's *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1996, Broadcast Signal Carriage Issues*, 8 FCC Rcd 4142, 4144 (1993) ("Clarification Order").

¹⁹ Reply at 3.

²⁰ 47 C.F.R. § 76.61(a)(5)(i).

²¹ *Clarification Order*, 8 FCC Rcd at 4144.

²² 47 U.S.C. § 534(b)(6). The channel selection provisions are set forth at 47 C.F.R. § 76.57.

compelling technical reasons.²³ The Commission specifically held that the need to employ additional traps, reconfigure the basic tier, or make technical changes are generally not sufficient grounds for denying the channel positioning request of a must carry station.²⁴ The Commission has also noted that “[a] cable system claiming that it cannot meet a channel positioning request for technical reasons will have to provide evidence that clearly demonstrates that the operator cannot meet this requirement.”²⁵ In the instant case, Patriot has not provided such evidence. We therefore grant WXTV License’s channel positioning complaint and conclude that Patriot is required to carry WXTV on Channel 41, the Station’s over-the-air position.

IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED**, pursuant to Section 614 of the Communications Act of 1934, as amended, 47 U.S.C. § 534(d)(3), that the complaint (CSR-6251-M) filed by WXTV License Partnership, G.P. against Patriot Media and Communications, LLC, seeking carriage of WXTV on its over-the-air channel **IS GRANTED**.

10. **IT IS FURTHER ORDERED** that Patriot Media and Communications, LLC **SHALL COMMENCE THE CARRIAGE** of WXTV on Channel 41 on its cable systems serving Belle Mead, Flemington and Passaic, New Jersey within sixty (60) days of the release of this *Memorandum Opinion and Order*.

11. This action is taken pursuant to authority delegated under Section 0.283 of the Commission’s rules.²⁶

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker
Deputy Chief, Policy Division
Media Bureau

²³ *Must Carry Order*, 8 FCC Rcd at 2988.

²⁴ *Id.*

²⁵ *Id.*

²⁶ 47 C.F.R. § 0.283.