

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

In the Matter of:)	
)	
KSLS, Inc.)	
)	CSR 4738-M
vs.)	
)	
Continental Cablevision, Inc.)	
)	
Request for Carriage of KSCI(TV))	
San Bernardino, California)	

ORDER ON RECONSIDERATION

Adopted: December 20, 1999

Released: December 27, 1999

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Joseph W. Aidlin, Thomas M. Frew, IV, and William D. Frew ("landowners/lessors"), owners of the land which Continental Cablevision, Inc. ("Continental" or "Operator") occupies as successor lessee, filed a Petition for Reconsideration in the above-captioned proceeding in which Continental was ordered to commence carriage of KSCI(TV) ("KSCI" or the "Station"), San Bernardino, California.¹ KSLS, Inc. ("KSLS"), licensee of KSCI, filed an opposition to the Petition.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act of 1934, as amended by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"),² and implementing rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues Report and Order* ("Must Carry Order"),³ commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market. A station's market for this purpose is its "area of dominant influence," or ADI, as defined by the Arbitron audience research organization.⁴ An ADI is a geographic

¹ KSLS, Inc. v. Continental Cablevision, Inc., 11 FCC Rcd 12718 (1996).

² Pub. L. No. 102-385, 106 Stat. 1460 (1992).

³ 8 FCC Rcd 2965, 2976-2977 (1993).

⁴ Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market shall be determined by the Commission by regulation or order using, where (continued....)

market designation that defines each television market exclusively of others, based on measured viewing patterns.

3. In its initial filing in this proceeding, KSCI requested that the Commission order Continental to carry its signal on Continental's cable system serving Valencia and Newhall, California.⁵ In opposition, landowners/lessors argued that KSCI had neither negotiated with nor obtained their consent regarding the use of their land, nor made any provision for payment of the consideration required to be paid under the lease in question for any alteration of the use of their land. In its comments, Continental indicated that even if it was willing to carry KSCI on the system in question, it could not do so because the landowners/lessors objected to the use of their real property without any variation or amendment to the terms of the lease agreement. In its decision, the Bureau concluded:

We do not agree with Continental that the lease as introduced into the record prevents KSCI's carriage. According to the lease, Continental is required to pay a monthly rental based on the number of subscribers it serves multiplied by five cents. ... There is nothing in the lease which requires either Continental or KSCI to pay the property owner anything as condition to locating KSCI's antenna on the premises. The only limiting factor in the lease is the requirement that Continental's use of the property does not interfere with other users.⁶

III. SUMMARY OF ARGUMENTS

4. Landowners/lessors argue that the *Bureau Order* granting KSCI's mandatory carriage rights on Continental should be modified to require Continental to obtain "the consent and agreement of the landowners" before any additional equipment is placed on the cable Operator's tower.⁷ Landowners/lessors contend that reconsideration of the *Bureau Order* is also needed because the directives in the *Bureau Order* constitute a violation of the landowners/lessors' Fifth Amendment rights. Landowners/lessors maintain that the *Bureau Order* violates their property rights by requiring Continental to carry KSCI, thus allowing the placement of KSCI's equipment on their property, without additional compensation or prior approval.⁸ Landowners/lessors maintain further that they will suffer economic losses as a result of the *Bureau Order* because it limits the size of the available area that landowners/lessors may lease to others. Also, landowners/lessors contend that it was not their intention

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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 provides that the ADIs used to implement the mandatory carriage rules are those published in Arbitron's 1992-1992 *Television Market Guide*. Effective January 1, 2000, Section 76.55(e) will require that a commercial broadcast station's market be defined by Nielsen Media Research's designated market areas ("DMAs"). For the must carry/retransmission consent elections that took place 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 Rcs 8366 (1999) ("Market Modification Final Report and Order").

⁵ *KSLs, Inc. v. Continental Cablevision, Inc.*, 11 FCC Rcd 12718 (1996) ("Bureau Order").

⁶ *Id.*

⁷ Petition at 4.

⁸ *Id.* at 2.

to give Continental unlimited use of the land. Landowners/lessors assert that, otherwise, their rental agreement with Continental would have included provisions for additional monthly consideration.⁹ Finally, landowners/lessors argue that neither Section 614 of the Communications Act of 1934 nor the Commission's rules authorize the Cable Services Bureau ("Bureau") to interfere with or limit the property rights of landowners.¹⁰

5. In opposition, KSLS points out that the Bureau granted the must carry complaint only after it concluded that the installation of the KSCI antenna on the Continental tower would not contravene the provisions of the Aidlin *et al.*-Continental lease. In fact, KSLS notes, the *Bureau Order* concluded that "[t]he only limiting factor in the lease is the requirement Continental's use of the property does not interfere with other users."¹¹ KSLS maintains that the landowners/lessors have not presented any evidence of such interference on the Aidlin property.¹² KSLS maintains further that the issues landowners/lessors are concerned with are contractual in nature rather than constitutional. KSLS argues that the Commission "has no jurisdiction to rewrite the terms of the Aidlin lease agreement or discern Aidlin's intent in drafting that document."¹³ Moreover, KSLS avers, "[t]he simple fact is that there is nothing in the agreement which prohibits placement of KSCI's antenna on [the] Aidlin property." Thus, it argues, the instant Petition should be denied.¹⁴

IV. DISCUSSION

6. Though the landowners/lessors have labeled their concerns as "constitutional issues," they only repeat the allegations and issues raised in the earlier proceeding. Those concerns and issues were discussed, analyzed, and fully addressed in the *Bureau Order* and, because no new issues or facts were presented here, they need not be discussed again. The Bureau's conclusion that KSCI could place an antenna on Continental's tower located on the landowner/lessors' property was clearly based on the provisions and language of the governing document, the Aidlin *et al.*-Continental lease agreement. Thus,

⁹ *Id.* at 2-3.

¹⁰ *Id.* at 3.

¹¹ Opposition at 1-2, citing *KSLS, Inc. v. Continental Cablevision, Inc.*, 11 FCC Rcd 12718 (1996), which reads in pertinent part:

Continental, in reply to KSCI's petition, maintains that it is willing to carry KSCI but cannot do so because it has been unable to obtain permission from the lessor of its antenna site to add the necessary equipment to carry KSCI. We do not agree with Continental that the lease as introduced into the record prevents KSCI's carriage. According to the lease, Continental is required to pay a monthly rental based on the number of subscribers it serves multiplied by five cents. Thus, we agree with KSCI that this provision only requires Continental to pay a per-subscriber fee for Continental's use of its landowners' property. There is nothing in the lease which requires either Continental or KSCI to pay the property owner anything as a condition to locating KSCI antenna on the premises. The only limiting factor in the lease is the requirement that Continental's use of the property does not interfere with other users.

¹² Opposition at 2.

¹³ *Id.*

¹⁴ *Id.*

we agree with KSLS that the issues raised by the landowners/lessors are contractual rather than constitutional in nature. As noted in the *Bureau Order*, the only limitation the Aidlin *et al.*-Continental lease agreement placed on Continental was the requirement that Continental's use of the property does not interfere with other users. No such interference or disruption to others has been shown to exist. Moreover, the Bureau's directive is neither a *per se* physical taking of private property nor a *per se* regulatory taking that deprives landowners/lessors of all the viable use of their property. Ownership of the property continues with landowners/lessors. Landowners/lessors invited Continental to take possession of property within the leasehold as long as two conditions are met. The first condition was that Continental's use of the property does not interfere with other users, and the second condition was that Continental "pay a monthly rental based on the number of subscribers it serves multiplied by five cents."¹⁵ It appears that Continental has complied with both. Finally, we note that regardless of any other problems that Continental may encounter, it is required to provide carriage of KSCI. The manner in which it provides KSCI to the communities in question is left to Continental's discretion.

V. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED**, that the Petition for Reconsideration filed by Joseph W. Aidlin, Thomas M. Frew, IV, and William D. Frew **IS DENIED**.

8. This action is taken pursuant to authority delegated under Section 0.321 of the Commission's rules.¹⁶

FEDERAL COMMUNICATION COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

¹⁵ *KSLS, Inc. v. Continental Cablevision, Inc.*, 11 FCC Rcd 12718 (1996).

¹⁶ 47 C.F.R. § 0.321.