

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

In the Matter of:	)	
	)	
WXTV LICENSE PARTNERSHIP, G.P.	)	
	)	CSR No. 5327-M
Petition for Special Relief Concerning	)	
Carriage of Television Station	)	
WXTV, Paterson, New Jersey on	)	
Channel 41 on Certain Cablevision Cable	)	
Systems in the New York Television Market	)	

**ORDER ON RECONSIDERATION**

**Adopted: February 10, 2000**

**Released: February 16, 2000**

By the Commission: Commissioner Furchtgott-Roth concurring and issuing a statement.

**I. INTRODUCTION**

1. CSC Holdings, Inc. (hereinafter "Cablevision"), pursuant to Section 1.106 of the Commission's rules, has requested reconsideration of the Cable Services Bureau's Memorandum Opinion and Order, DA 99-733 (rel. April 16, 1999) (the "Order"), granting in part and denying in part a Petition for Special Relief filed by WXTV License Partnership, G.P. ("WXTV"). WXTV filed an Opposition to the Petition for Reconsideration,<sup>1</sup> to which Cablevision filed a Reply. Pursuant to Section 1.106(a)(1) of the Commission's rules, the matter has been referred to the Commission.<sup>2</sup>

2. This proceeding concerns WXTV's requests for carriage on Channel 41 on several Cablevision cable systems in the New York television market. After several attempts to gain carriage on channel 41, the station filed a channel positioning complaint with the Commission. The Cable Services

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<sup>1</sup>WXTV states that the Bureau's Order correctly disposed of the matters before the Bureau and Cablevision has presented no new information requiring alteration of the Order. WXTV's Opposition at 1.

<sup>2</sup>See 47 C.F.R. §1.106(a)(1) ("Petitions requesting reconsideration of other final actions taken pursuant to delegated authority will be acted on by the designated authority or referred by such authority to the Commission.") See also Section 1.429 of the Commission's rules similarly empowers a designated authority to refer a Petition for Reconsideration to the Commission in a rulemaking proceeding. 47 C.F.R. §1.429(a).

Bureau, acting under delegated authority, granted WXTV's complaint with regard to virtually all of Cablevision's systems involved and mandated carriage of the station's signal on channel 41 according to a set time schedule.

3. Cablevision seeks reconsideration of the Bureau's Order on three discrete issues. Cablevision first states that it has initiated efforts to carry WXTV on channel 41 in 17 of the 21 systems in which on-channel carriage was required within 45 days from release of the Order, but certain technical difficulties render literal compliance with the terms of the Order impracticable with respect to four cable systems.<sup>3</sup> Cablevision seeks relief from the Commission with regard to the terms under which those systems must comply with the Order. Second, Cablevision states that it seeks reconsideration of the Bureau's determination that institution of a forfeiture proceeding is warranted for its failure to position WXTV on channel 41 in 21 of the cable systems at issue.<sup>4</sup> While Cablevision acknowledges that there are few engineering costs associated with repositioning WXTV in those systems, it states that the Bureau's finding does not adequately appreciate the fact that the parties were focused on actively negotiating an alternative uniform channel position for WXTV on all of Cablevision's cable systems throughout the market. Finally, Cablevision asserts that the Bureau has the full authority to rule on Cablevision's claim that the must carry rules violate the Takings Clause and requests that the Bureau reconsider its initial Order and find the rules unconstitutional.<sup>5</sup> After examining the record, we grant in part and deny in part Cablevision's Petition for Reconsideration of the Bureau's Order. We grant the requested relief with regard to the terms under which those systems must comply with the Order, find that the Bureau was correct in initiating a forfeiture proceeding, and refrain from issuing a decision on the merits of the Fifth Amendment matter presented.

## II. BACKGROUND

### A. *The Law*

4. Pursuant to Section 614 of the Communications Act of 1934 ("Act"), as amended, 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 in MM Docket 92-259 ("*Must Carry Order*"),<sup>6</sup> 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 currently its Designated Market Area ("DMA"), as defined by the Nielsen audience research organization.

5. With respect to the channel number on which stations asserting must carry rights are to be carried, Section 614(b)(6) of the Act<sup>7</sup> and Section 76.57 of the Commission's rules provide that commercial

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<sup>3</sup>Cablevision's Petition for Reconsideration at 1.

<sup>4</sup>*Id.* at 2.

<sup>5</sup>*Id.*

<sup>6</sup>8 FCC Rcd 2965, 2976-2977 (1993).

<sup>7</sup>The legislative history of the 1992 Cable Act is replete with references concerning the need for channel  
(continued...)

television stations may elect to be carried on the channel number on which the station is broadcast over the air.<sup>8</sup> The Act also allows for another channel number to be selected by the broadcaster as long as that designation is mutually agreed upon by the station and the cable operator.<sup>9</sup> The Commission's rules provide that the broadcaster, not the cable operator, is entitled to select which of the channel positioning alternatives will apply in its case.<sup>10</sup>

6. The Commission found that inconvenience, marketing problems, the need to reconfigure the basic tier, the need to employ additional traps, or the need to make technical changes were not sufficient reasons for denying the channel positioning request of a qualified television station.<sup>11</sup> Only where placement of a signal on a chosen channel results in interference or degraded signal quality to the television station or an adjacent channel, or causes a substantial technical or signal security problem, did the Commission permit cable operators to carry a broadcast signal on a channel not chosen by the station.<sup>12</sup> The Commission recognized that most systems were able to configure their basic service tier to fulfill this requirement.<sup>13</sup> The Commission provided, however, that a cable operator claiming that it cannot meet a channel positioning request for technical reasons would have to provide evidence clearly demonstrating that it cannot meet its obligation.<sup>14</sup>

B. *The Case*

7. In its Order, the Bureau stated that it was not contested that WXTV is a qualified local commercial television station entitled to carriage pursuant to the must carry provisions of the Act, nor was it disputed that WXTV is entitled to elect its over-the-air channel as the channel it wishes to occupy on Cablevision's systems. According to the Bureau, the dispute centered on whether Cablevision was warranted

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positioning requirements. *See, e.g.*, Conf. Rep. No. 102-862, 102d Cong. 2d Sess. (1992) at 75 ("The conferees find that the must carry and channel positioning provisions in the bill are the only means to protect the federal system of television allocations, and to promote competition in local markets.") and H.R. Rep. No. 102-628, 102d Cong. 2d Sess. (1992) at 55 ("Channel position is important in ensuring the success of a signal carried on a cable system.")

<sup>8</sup>47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57.

<sup>9</sup>47 U.S.C. § 534(b)(6).

<sup>10</sup>47 C.F.R. § 76.57.

<sup>11</sup>8 FCC Rcd at 2988.

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>*Id.* As part of such a showing, a cable operator must present evidence as to the costs involved in remedying the technical problem. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order in MM Docket 92-259 ("Must Carry Recon"), 9 FCC Rcd 6723, 6735 (1994); *see also Greater Dayton Public Television*, 10 FCC Rcd 1048 (1995) and *KDTV License Partnership*, 13 FCC Rcd 10331 (1998).

in not complying with these requirements as a consequence of insurmountable technical difficulties and costs of compliance.

8. The Bureau found, with respect to 21 cable systems,<sup>15</sup> where it was documented that WXTV was not on Channel 41 already, that Cablevision had conceded that on-air channel positioning is feasible because it did not provide technical or financial justification for not carrying the station on the channel position it had elected. With respect to these systems Cablevision was ordered to comply with the statutory channel positioning requirements as soon as possible or within 45 days from the release of the Order, whichever was sooner. For these systems, the Bureau found that Cablevision's lack of compliance was such a serious matter that it warranted initiation of a forfeiture proceeding. The Bureau, however, stated that it would address the forfeiture matter separately to avoid further delay in issuing a timely Order.

9. With regard to 17 other cable systems,<sup>16</sup> where the documented costs of compliance with the station's channel positioning request were between \$4000 and \$500,000, the Bureau stated that the central issue was whether the technical and cost obstacles to carriage of WXTV's signal on channel 41 were of such magnitude as to excuse compliance from the on-channel requirement. The Bureau found that there was no dispute in the record that on-channel carriage as a technical matter could be accomplished on all of the systems at issue and that the Act requires cable operators to comply with a station's channel positioning request, absent a compelling technical reason for not doing so.

10. The Bureau noted that a cable operator may present evidence as to the costs involved in remedying the technical problem; however, Cablevision did not provide any information that would help to place its cost calculations in the context of the financial capacity of the systems in question. The Bureau found that Cablevision did not meet the waiver standard, but allowed Cablevision 180 days from the release of the Memorandum Opinion and Order to come into compliance in the case of these 17 systems.<sup>17</sup>

11. The Bureau, however, did find that Cablevision satisfied the waiver standard with regard to

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<sup>15</sup>These systems include (1) East End East Hampton; (2) Rockville Center; (3) Malvern; (4) Islip; (5) Lynbrook; (6) East End Riverhead Optimum; (7) New York City; (8) Norwalk Optimum; (9) Bridgeport Optimum; (10) Cross River; (11) Yonkers-Optimum; (12) Yonkers-Essential; (13) Bayonne; (14) Bayonne-Optimum; (15) Bergen-Optimum; (16) Hudson-Optimum; (17) TCI-Hamilton; (18) TCI-Hamilton-Rebuild; (19) TCI-Oakland; (20) TCI-Rockland; and (21) TCI-Allamuchy. *See* Cablevision's Opposition at Exhibit A.

<sup>16</sup>These systems include: (1) Woodbury-Optimum-Syosset; (2) Woodbury-Optimum; (3) East End Riverhead-Old wire; (4) Monmouth Millstone; (5) Monmouth-Wall/Asbury; (6) Monmouth-Lakewood; (7) Monmouth-Seaside; (8) Monmouth-Optimum; (9) TCI-Elizabeth; (10) TCI-Morris; (11) TCI-Oakland; (12) TCI-Paterson; (13) TCI-Ramapo; (14) TCI-Warwick; (15) TCI Tri-System; (16) TCI Westchester; and (17) TCI Brookhaven. *See* Cablevision's Opposition at Exhibit A.

<sup>17</sup>We note that Cablevision recently filed a request for an extension of time to comply with the Bureau's Order for some of these systems until late Winter 2000 because of ongoing technical difficulties. The Bureau had recently granted Cablevision's request in an Order separate from this Reconsideration. *See Extension of Time Order*, CSR 5327-M, DA 00-97 (CSB-rel. Jan. 20, 2000).

its Hauppauge system, where it would cost the operator more than \$1 million in equipment and labor to fulfill the station's channel positioning request. The Bureau found it important that almost 27,000 cable subscribers would be affected and inconvenienced. Given the magnitude of the costs to the operator, the intensive labor involved to comply with the station's request, the harm to the public, and the fact that the costs to the system were not aggravated by Cablevision's action, the Bureau held that Cablevision had sufficiently met its burden and did not have to comply with WXTV's on-air channel positioning request with respect to this one system.

12. The Bureau also addressed Cablevision's concerns that an order by the Commission to carry WXTV on channel 41 would aggravate the alleged constitutional taking of Cablevision's property that a mandatory carriage obligation would impose. To the degree that Cablevision's arguments called into question the constitutionality of the on-channel carriage requirement of Section 614, the Bureau relied on the axiom that "regulatory agencies are not free to declare an act of Congress unconstitutional"<sup>18</sup> and that the Supreme Court had upheld the constitutionality of Section 614 in the only challenge to that provision.<sup>19</sup> The Bureau also stated that although the Commission may not have the authority to declare an act of Congress unconstitutional, it has the obligation to construe statutes it enforces in a constitutional manner, and had attempted to do that in the instant proceeding.

### III. ISSUES ON RECONSIDERATION

#### A. *Implementation of the Bureau's Order*

13. Cablevision asserts that it should be granted relief from certain limited aspects of the Bureau's Order where technical difficulties preclude strict compliance.<sup>20</sup> Cablevision states that in 17 of the 21 systems in which on-channel carriage was required within 45 days from release of the Order, it will be carrying WXTV on channel 41 by May 31, 1999, and has provided notice to its subscribers of its intent to reposition WXTV to channel 41. However, in four of the 21 systems -- Allamuchy, Bayonne, Yonkers, and Rockland -- Cablevision states that it has discovered there are technical difficulties that prevent or complicate strict compliance with the literal terms of the Order.<sup>21</sup>

14. In the Allamuchy, Yonkers, and Bayonne systems, Cablevision states that it has discovered, for technical reasons, these systems do not have a channel 41 in all or part of the systems.<sup>22</sup> Cablevision states that it is impracticable to comply with the Order to reposition WXTV to channel 41 in all parts of those systems. Specifically, the operator explains that:

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<sup>18</sup>See *Johnson v. Robinson*, 415 U.S. 361, 368 (1974) ("Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies").

<sup>19</sup>*Turner Broadcasting System v. FCC*, 117 S.Ct. 1174 (1997).

<sup>20</sup>Cablevision Petition for Reconsideration at 2.

<sup>21</sup>*Id.* at 3.

<sup>22</sup>*Id.*

- o In Allamuchy, which Cablevision acquired only recently, the system is a 300 MHz system. Since WXTV broadcasts on real frequency 325.25 MHz, Allamuchy does not extend to channel 41. WXTV is carried on channel 10 in Allamuchy, and Cablevision requests that the Bureau amend its Order to recognize that Cablevision is unable to reposition WXTV to channel 41 until such time as the system is rebuilt and the number of channels increased.<sup>23</sup>
- o The Yonkers system is a “dual trunk” system, meaning that subscribers may receive cable service either on a new cable wire (“Yonkers Optimum”), which requires subscribers to obtain a converter box, or on the old cable wire (“Yonkers Essential”), and Cablevision states that compliance with the Order is possible only with regard to the Yonkers Optimum subscribers. Cablevision states that it intends to fully comply with the Commission’s Order with regard to its Yonkers Optimum subscribers, which constitute approximately 68% of the system’s subscribers. Cablevision asserts that the old cable wire, however, is a 300 MHz system, and accordingly, cannot accommodate WXTV on real frequency 325.25 MHz. Cablevision believes that for this portion of the system, strict compliance with the Order is impracticable.<sup>24</sup>
- o The Bayonne system is a dual trunk 300 MHz system and does not extend to channel 41. Like the Yonkers system, 68% of the subscribers in Bayonne receive cable service through a new cable wire, and those “Bayonne Optimum” subscribers will receive WXTV on channel 41 in compliance with the Order. Accordingly, Cablevision requests that the Bureau amend its Order to recognize that Cablevision is unable to reposition WXTV to channel 41 in those portions of the Bayonne system and the Yonkers system operating on the older cable wire until such time as those systems operate fully on the new wire.<sup>25</sup>

15. Cablevision argues that the Rockland system (“TCI Rockland”) should not have been categorized as a “no cost” system, and strict immediate compliance would place a tremendous burden on Cablevision’s personnel and resources.<sup>26</sup> Cablevision explains that the TCI Rockland system must be significantly reconfigured in order to reposition WXTV to channel 41. Cablevision states that the substantial costs associated with reconfiguring the Rockland system were mistakenly combined and listed with those associated with reconfiguring the Ramapo system.<sup>27</sup> Cablevision adds that it treats the Rockland and Ramapo systems as a single system for operational purposes and mistakenly categorized all the costs for the two

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<sup>23</sup>*Id.*

<sup>24</sup>*Id.* at 4.

<sup>25</sup>*Id.*

<sup>26</sup>*Id.*

<sup>27</sup>*Id.*

systems under the "TCI- Ramapo" heading, rather than dividing the costs between the two systems.<sup>28</sup>

16. Cablevision states that it must undertake the significant effort to reconfigure its traps at thousands of subscriber homes in the Rockland system.<sup>29</sup> At each affected subscriber address, Cablevision asserts it will have to remove one trap, and replace it with three new traps in order to reposition WXTV to channel 41. Cablevision states that such an effort would require it to incur an unanticipated and unbudgeted expense of several hundred thousand dollars, for which resources have not been allocated.<sup>30</sup> Cablevision requests that the Bureau amend its Order to group Rockland together with those 17 other systems for which the Order granted Cablevision 180 days from the release date of the Order to come into compliance.<sup>31</sup>

17. In response to a Cable Services Bureau request for more information concerning the Rockland system, Cablevision provides more data on the implementation costs to place WXTV on channel 41. Cablevision states that in order to reposition WXTV to channel 41, engineers would have to visit approximately 7,360 subscriber homes.<sup>32</sup> At each affected address, the current trap will have to be replaced with a new, more expensive trap.<sup>33</sup> Cablevision states that the new traps will cost approximately \$33.00 each and labor costs per affected subscriber will be approximately \$15.50, for a total anticipated cost of \$356,960.<sup>34</sup>

18. Cablevision's request for relief with regard to these four systems is granted. The operator has met its burden in showing that, insofar as the Allamuchy, Bayonne, and Yonkers systems are concerned, it is technically impracticable to place WXTV on cable channel 41 at this point in time. WXTV has also conceded this point with regard to these three systems. For these reasons, on-channel carriage is not now required. We note, however, that once these systems are rebuilt, Cablevision will be under an obligation to carry the station on cable channel 41. As for the operator's Rockland system, we find that Cablevision has satisfied its burden that the system should not have been included in the "no cost" category requiring immediate compliance.

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<sup>28</sup>*Id.*

<sup>29</sup>*Id.* at 5.

<sup>30</sup>*Id.*

<sup>31</sup>*Id.*

<sup>32</sup>Cablevision's Response to Cable Services Bureau Request for Additional Information Concerning the Rockland System at 2.

<sup>33</sup>*Id.*

<sup>34</sup>*Id.* at 3.

B. *Forfeiture*

19. Cablevision asserts that the institution of a forfeiture proceeding is unwarranted. Cablevision claims that the Bureau did not adequately appreciate the nature of its negotiations with WXTV that were taking place almost until the Bureau issued its Order. The operator states that WXTV, throughout its negotiations with Cablevision, wanted a uniform channel position throughout the New York market in order to achieve certain marketing objectives.<sup>35</sup> Cablevision explains that it had marketing plans of its own and intended to establish thematic tiering so that groups of similar types of programming would be clustered together, notwithstanding the channel positioning rights held by broadcast stations.<sup>36</sup> Cablevision argues that granting WXTV a uniform channel position on channel 41 across the New York market is extremely burdensome and not economical under the systems' current technical configuration; as such, it spent a significant amount of time attempting to negotiate an alternative channel on which to carry WXTV.

20. Cablevision states that these discussions were taking place as part of a larger business relationship that Cablevision has with WXTV's parent, Univision, and involved not only WXTV's channel positioning requests, but also carriage of Galavision cable programming (Univision's cable programming arm) on Cablevision's cable systems.<sup>37</sup> Cablevision states that WXTV's channel position was presented as one of a number of items "on the table" that could be negotiated and it was not until late 1998 that WXTV clearly stated its desire to be carried only on channels 1-13 or 41, and then filed its complaint.<sup>38</sup>

21. Cablevision asserts that it would not have made sense, given WXTV's clearly stated objectives, for it to offer to carry WXTV on channel 41 only in the individual systems identified as "no cost" systems.<sup>39</sup> Cablevision argues that had it moved WXTV to channel 41 in those systems, and successfully negotiated an alternative channel position in the high-cost systems, the result would have been a fragmented channel position across the market for the station.<sup>40</sup> Cablevision urges the Bureau recognize that its delay in repositioning WXTV in those systems was due to its good-faith belief that the parties were engaged in potentially fruitful negotiations, not to a "cavalier approach" to its legal responsibilities, and that it should refrain from instituting a forfeiture proceeding.<sup>41</sup>

22. WXTV argues that the very fact that it was forced over the course of years to negotiate for a uniform channel position demonstrates Cablevision's "intractable refusal to comply" with the Commission's

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<sup>35</sup>*Id.*

<sup>36</sup>For example, all Spanish language programming would be found between cable channels 50-59.

<sup>37</sup>*Id.*

<sup>38</sup>*Id.*

<sup>39</sup>*Id.* at 7.

<sup>40</sup>*Id.* See also Cablevision's Reply at 2.

<sup>41</sup>*Id.*



rules.<sup>42</sup> WXTV adds that if Cablevision truly acted in good faith, it would have placed the station's signal on Channel 41 in compliance with the rules and then sought to negotiate a more mutually advantageous channel position; instead, Cablevision tried to use WXTV's lack of a uniform channel position as leverage to force WXTV to accept whatever channel the operator wished to make available on a system by system basis.<sup>43</sup>

23. WXTV adds that the timing of the negotiations belies Cablevision's claim that it acted in good faith. The station asserts that the operator ignored WXTV's attempts to secure carriage on Channel 41 for several years and only participated in negotiations when, in approximately May of 1997, Cablevision needed WXTV's cooperation in moving WXTV to channel 57 on the Norwalk system.<sup>44</sup> WXTV asserts that when Cablevision did not receive its consent to being repositioned to Channel 57 as part of a foreign-language programming tier, the operator ceased further contacts with the station and moved WXTV to Channel 57 on several systems without the station's knowledge or consent.<sup>45</sup> The station argues that while Cablevision alleges that negotiations were underway at higher corporate levels concerning carriage of WXTV and other matters, it was not until the station sent its March 1998 must carry demand letters that the operator participated in discussions addressing the channel positioning issue.<sup>46</sup>

24. WXTV states, assuming *arguendo*, that its discussions with Cablevision could be characterized as acting in good faith, the operator's conduct during the negotiations evidenced that it had no intention of honoring the station's channel positioning rights.<sup>47</sup> WXTV states, for example, that a written proposal from Cablevision was never completely drafted or transmitted to the station and did not, by its terms, provide the uniform channel position that Cablevision now claims it was anxious to provide to WXTV; instead, this agreement would have allowed the operator to place WXTV on any one of four channel positions on each of its individual cable systems.<sup>48</sup> WXTV further asserts that the station secured an oral commitment from Cablevision that it would commence carriage of the station on a specific channel on all systems by July 1, 1999, but Cablevision refused to commit to that arrangement in writing. WXTV argues that the existence of negotiations that commenced after the cable operator is already in noncompliance and during which no viable solution to the noncompliance is proffered cannot forestall enforcement of the Act's channel positioning provisions.<sup>49</sup>

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<sup>42</sup>*Id.*

<sup>43</sup>*Id.*

<sup>44</sup>*Id.*

<sup>45</sup>*Id.*

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*

<sup>48</sup>*Id.* at 4-5.

<sup>49</sup>*Id.* See 47 U.S.C. §534(b)(6).

25. We agree with the Cable Services Bureau that a forfeiture proceeding should commence.<sup>50</sup> The record indicates that Cablevision has willfully and repeatedly disregarded the station's channel positioning requests over the course of several years. While it may be true that the issue of WXTV's channel position was raised in the Univision-Cablevision discussions, the operator should have placed the station's signal on channel 41 on those systems where there was no additional cost of compliance during the pendency of the negotiations, as the Act and the Commission's rules require.<sup>51</sup> Moreover, Cablevision failed to accommodate the station's channel positioning requests in the period after negotiations broke down even on those systems where there were no compliance costs. Based on the circumstances set forth above, as well as the reasons set forth in the Notice of Apparent Liability released concurrently with this Order, we find that Cablevision willfully and repeatedly failed to comply with the must carry provisions of the Act and our rules. We therefore find that the initiation of a forfeiture proceeding is appropriate.

C. *The Fifth Amendment's Takings Clause*

26. Cablevision argues that the Bureau can, and should, find the must carry rules in violation of the Fifth Amendment to the United States Constitution.<sup>52</sup> The operator claims that forced carriage of WXTV amounts to a *per se* physical taking because the station is permitted, by government edict, to exclusively occupy valuable cable channel capacity without just compensation in return.<sup>53</sup> It contends that the station's unilateral right to choose its preferred channel position on the cable system further exacerbates the taking of its property.<sup>54</sup> Cablevision contends that the Bureau's reliance on the proposition of law that regulatory agencies are not free to declare an act of Congress unconstitutional, and its resulting refusal to find that the must carry rules constitute an uncompensated taking of private property, fails to recognize recent case law affirming the authority of federal agencies to rule on the constitutionality of statutes.<sup>55</sup> Cablevision believes that the Bureau, through its delegated authority from the Commission, has full authority to determine whether the must carry requirements constitute an unconstitutional taking of private property, and should issue a decision on the merits.<sup>56</sup>

27. Cablevision claims that the Supreme Court has held that while adjudication of the constitutionality of statutes "has generally been thought beyond the jurisdiction of administrative

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<sup>50</sup>See *Notice of Apparent Liability* released concurrently with this Order.

<sup>51</sup>47 U.S.C. §534(b)(6); 47 C.F.R. § 76.57.

<sup>52</sup>Cablevision Petition for Reconsideration at 7.

<sup>53</sup>See Cablevision's Opposition to WXTV's Petition for Special Relief at 14, 15.

<sup>54</sup>*Id.*

<sup>55</sup>*Id.* citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994); see also *Bonnichsen v. United States Dept. of Army*, 969 F. Supp. 628, 650 (D. Ore. 1997) (noting that "in recent years, the traditional doctrine – that an agency has no authority to declare a statute or regulation unconstitutional – has come under attack").

<sup>56</sup>*Id.* at 7-8.

agencies . . . [t]his rule is not mandatory.”<sup>57</sup> Cablevision further claims that, in reaching its determination, the Supreme Court in *Thunder Basin* found it significant that the agency decision at issue could be appealed to a federal court, and thus did not present the “serious constitutional question” that might arise if judicial review of the agency decision were precluded.<sup>58</sup> Cablevision believes it is significant that the Court found that the agency at issue had passed judgment on constitutional questions prior to the case at issue.<sup>59</sup>

28. Cablevision argues that the takings claim it presents is suitable for agency decisionmaking.<sup>60</sup> Cablevision states that it has presented a challenge to the must-carry rules, both facially and as applied, to the individual circumstances that are before the Bureau. Cablevision adds that a decision by the Commission is fully reviewable in federal court. Finally, Cablevision asserts that the Commission has, in fact, addressed constitutional challenges to statutes prior to this proceeding, albeit with the aim of rejecting such claims.<sup>61</sup> Cablevision therefore requests that the Bureau reconsider its Order, and issue a decision addressing the merits of its takings claim.

29. In response to Cablevision's constitutional claim, WXTV first disagrees with the operator's interpretation of the Supreme Court's *Thunder Basin* decision. The station argues that the case clearly does not stand for the proposition that federal agencies may freely declare portions of their implementing statutes unconstitutional.<sup>62</sup> Even if the case could be interpreted in the manner suggested by Cablevision, WXTV contends that the precedent set by the case has limited application because it involved health and safety mining regulations administered by the Department of Labor with regulatory challenges heard before a Commission independent of the Department and then by a U.S. District Court.<sup>63</sup> WXTV asserts, in any event, that the consideration of a constitutional claim by an administrative agency is the exception rather than the rule, and that even when such a unique set of facts presents itself, it is still entirely within the discretion of the agency to refrain from adjudicating the constitutional issue.<sup>64</sup>

30. We decline Cablevision's invitation to declare Section 614 of the Communications Act unconstitutional under the 5th Amendment's Takings Clause. We recognize that the decision in *Thunder Basin* may provide administrative agencies an opportunity to consider the constitutionality of implementing

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<sup>57</sup>*Id.* at 8 citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. at 215.

<sup>58</sup>*Id.* citing 510 U.S. at 215 n.20.

<sup>59</sup>Cablevision Petition for Reconsideration at 8.

<sup>60</sup>*Id.*

<sup>61</sup>*Id.* at 9 citing *Implementation of Telecommunications Act of 1996: Telemessaging, Electronic Publishing, And Alarm Monitoring Services*, 12 FCC Rcd. 5361, 5376-77 (1997).

<sup>62</sup>WXTV Opposition at 6.

<sup>63</sup>*Id.* at n.15.

<sup>64</sup>WXTV Opposition at 7. WXTV also disputes the substance of Cablevision's constitutional arguments. *Id.* at 8-9.

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.<sup>65</sup> In this case, we decline to do so. While Cablevision's takings challenge is to our rules as well as the statute, we believe that the challenge is fundamentally a statutory challenge since it is the statute that is the source of the must carry and channel positioning requirements that Cablevision challenges. In this case, the statutory scheme has been in place, and applicable to Cablevision, for at least seven years. Cablevision, however, did not raise its Fifth Amendment claim until 1999 and has not provided any legitimate reason for its delay. Given the clarity of the statutory carriage obligations imposed on cable operators and the settled expectations in this area, we do not address the Fifth Amendment takings claim here.

#### IV. ORDERING CLAUSES

31. Accordingly, **IT IS ORDERED**, pursuant to Section 614 of the Communications Act of 1934, as amended (47 U.S.C. § 534), that the Petition for Reconsideration filed by CSC Holdings, Inc. **IS GRANTED IN PART AND DENIED IN PART**.

32. **IT IS FURTHER ORDERED** that Cablevision is not required to carry WXTV on Channel 41 with regard to its Allamuchy, Bayonne, and Yonkers systems unless and until it upgrades these systems and has the technical capability to place the station's signal on Channel 41.

33. **IT IS FURTHER ORDERED** that Cablevision has 90 days, from the date this Order is released, to carry the station's signal on cable channel 41 with regard to its Rockland system.

34. This action is taken pursuant to statutory authority found in Sections 1, 4(i), 5(c), 405, and 614(b)(6) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 155(c), 405, 534(b)(6) and 47 C.F.R. §76.57 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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<sup>65</sup>See *Thunder Basin*, 510 U.S. at 215. (we note, however, that the reviewing body was not the agency itself but an independent Commission established exclusively to adjudicate Mine Act disputes).

**CONCURRING STATEMENT  
OF COMMISSIONER HAROLD W. FURCHTGOTT-ROTH**

In the Matter of WXTV License Partnership, G.P., Petition for Special Relief Concerning Carriage of  
Television Station WXTV, Paterson, New Jersey on Channel 41 on Certain Cablevision Cable Systems in  
the New York Television Market, Order on Reconsideration, CSR No. 5327-M

I concur in the Order on Reconsideration. I would like to say just a few words, however, about Cablevision's constitutional defense against application of the must-carry rules in this enforcement proceeding.

For starters, I would have addressed the merits of Cablevision's argument that application of the must-carry and subsidiary channel-positioning regulations works an uncompensated taking of its property in violation of the Fifth Amendment. Although it is true that Congress does not normally grant independent agencies statutory authority to "adjudicate" constitutional claims and to "declare" statutes invalid in the sense that Article III courts do, *see* Order on Reconsideration at paras. 27-30 (discussing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994)), the Commission certainly is entitled to consider the merits of constitutional arguments raised by parties in opposition to proposed agency action, whether in the context of a rulemaking or an adjudication, in deciding what action ultimately to take. Here, the agency's decision to avoid any substantive discussion of Cablevision's Takings claim pays silent tribute to the strength of the claim.

As just indicated, I believe the Takings claim to be well grounded in record fact and precedent. I will not repeat here the full argument made by Cablevision. *See Cablevision's Opposition to Petition for Special Relief* at 14-24 (filed Jan. 7, 1999). Suffice it to say that I find the argument, for the reasons that follow, to have considerable merit.

It is not unreasonable to argue that when a broadcast station's signal is mandatorily carried over a cable system, that carriage constitutes a permanent, physical occupation of the cable operator's private property – and thus a *per se* taking of that property. *See generally Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); *Bell Atlantic Tel. Co. v. FCC*, 24 F.3d 1441 (D.C.Cir. 1994); *Turner Broadcasting System, Inc. v. FCC*, 819 F.Supp. 32, 67 n.10 (D.D.C. 1993) (Williams, J., dissenting). And, to answer the Takings Clause question presented here requires no abstract debate about ownership of radio spectrum or possession of electromagnetic waves. Whatever one might say about such matters, there can be no question but that Cablevision's physical plant – *e.g.*, the actual transmission cables, whether fiber optic or metal, that form its delivery "pipe," as well as the headend equipment that routes the broadcaster's signal – are Cablevision's sole and private property. Moreover, the must-carry scheme does not just fail to provide compensation for this occupation, but affirmatively prohibits it. *See* 47 U.S.C. section 534 (b)(10); 47 CFR section 76.60.

In sum, this Order on Reconsideration presents a viable Takings challenge to the must-carry regime. As such, the merits of the challenge ought to have been discussed in the Order.

