

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

In the Matter of:	)	
	)	
Brunson Communications, Inc. v.	)	
RCN Telecom Services, Inc.	)	CSR-5496-M
	)	
Application for Review	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: November 28, 2001**

**Released: December 5, 2001**

By the Commission:

**I. INTRODUCTION**

1. RCN Telecom Services, Inc. (“RCN”), operator of a cable television system serving communities in Lehigh and Northampton Counties, Pennsylvania, filed an application for review of the Cable Services Bureau’s decision which granted the must carry complaint filed by Brunson Communications, Inc., licensee of Television Broadcast Station WGTW (Ch. 48), Burlington, New Jersey (“WGTW”).<sup>1</sup> An opposition to this petition was filed on behalf of WGTW to which RCN has replied. After examining the record, we affirm the Bureau’s decision and deny the application for review filed by RCN.

**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.<sup>2</sup>

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.<sup>3</sup> 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

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<sup>1</sup>*Brunson Communications, Inc. v. RCN Telecom Services, Inc.*, 15 FCC Rcd 8992 (2000)(“Bureau Order”).

<sup>2</sup>8 FCC Rcd 2965, 2976-2977 (1993).

<sup>3</sup>47 U.S.C. §534(b)(6); 47 C.F.R. §76.57.

January 1, 1992.<sup>4</sup> 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.<sup>5</sup>

4. On December 27, 1999, WGTW filed a must carry complaint against RCN following the cable operator's refusal to carry WGTW at channel position 48, its over-the-air channel, on RCN's Lehigh/Northampton County cable system. RCN argued in opposition that it was unable to accommodate WGTW's request because cable channel 48 was being used to transmit eight channels of digital programming and was therefore trapped from use on the limited basic tier of its cable system. RCN asserted that WGTW's channel positioning complaint should be denied because WGTW and RCN had previously agreed to continued carriage of the station on cable channel 12; the enormous costs required to move WGTW to cable channel 48 would substantially impact RCN and its subscribers; and to avoid an unconstitutional taking without just compensation in violation of the Fifth Amendment. It therefore requested a waiver of the channel positioning requirements or, in the alternative, 18 months in which to accomplish the reconfiguration of its system. In response, WGTW maintained that its agreement with RCN for carriage at channel 12 was effective only through the must-carry election period ending December 31, 1999. It argued that RCN's alleged costs of compliance were greatly inflated and an insufficient reason for RCN's refusal to carry WGTW on its requested channel, especially when compared with other Bureau decisions where channel positioning costs were considered more excessive but the cable operator was still ordered to comply.<sup>6</sup> In addition, WGTW pointed out that the Commission had already addressed the Fifth Amendment issue in its reconsideration of *WXTV License Partnership, G.P.* ("WXTV"), and declined to consider arguments questioning the constitutionality of the statute.<sup>7</sup> The Bureau granted WGTW's channel positioning request and ordered RCN to reposition WGTW to cable channel 48 within 180 days, the same amount of time granted in the *WXTV* decision.

### III. DISCUSSION

5. In its application for review, RCN argues that the Bureau's analysis of the arguments presented by RCN in opposition to WGTW's complaint conflicts with established Commission precedent and was based on erroneous findings of fact. RCN asks that the Commission find that the Bureau improperly failed to conclude that RCN's compliance costs justified a waiver of the Commission's channel positioning requirements. Second, it requests that the Commission find that the Bureau erroneously compared the "per affected subscriber" compliance cost of *WXTV* with the "per subscriber" costs of RCN, rather than with its "per affected subscriber" costs. Third, RCN asks that the Commission find that the Bureau erroneously failed to consider the record evidence presented by RCN regarding the impact of WGTW's channel positioning request on the cable system subscribers and the financial impact on RCN. Fourth, RCN asks that the Commission find that, in light of the compliance costs and other factors, grant of WGTW's complaint would result in a taking of RCN's property without compensation, in violation of the Fifth Amendment. RCN maintains that the policy cited by the Bureau of refusing to address the merits of the constitutional issue should be overturned. Finally, RCN asks that the Commission find that the Bureau erred in refusing to grant RCN's request for 18 months to reconfigure its system.

6. RCN states that it serves a total of 85,273 subscribers on its cable system and offers

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<sup>4</sup>47 U.S.C. §534(b)(6); 47 C.F.R. §76.57(a).

<sup>5</sup>47 U.S.C. §534(b)(6); 47 C.F.R. §76.57(c).

<sup>6</sup>*See Sonshine Family Television, Inc. v. RCN Telecom Services of Pennsylvania*, 13 FCC Rcd 10323 (1998).

<sup>7</sup>15 FCC Rcd 3308 (2000) ("WXTV Reconsideration").

analog and digital programming on a multi-tiered basis.<sup>8</sup> RCN also states that, as required by the Act, its analog limited basic tier is comprised of those broadcast signals constituting “local commercial television station[s]” which are entitled to mandatory carriage on the system.<sup>9</sup> RCN states that there are 3,866 subscribers who solely receive its limited basic tier and receive programming on analog channels 2-13, 19-22, 57-64 and 97.<sup>10</sup> RCN indicates that WGTW’s signal is currently offered on channel 12 of its limited basic tier and has been positioned there since September 1, 1997.<sup>11</sup> With regard to the limited basic tier, RCN points out that there are currently three traps in place which block the programming offered on the bandwidth associated with channels 14-18, 23-56, and 65-88. As a result, RCN states that WGTW’s over-the-air channel of 48 is trapped and unable to be used on the limited basic tier. RCN asserts that the trapping of channel 48 was necessitated by a prior reconfiguration of its system as part of its launch of its digital tier in the latter part of 1999.<sup>12</sup>

7. RCN argues that a cable operator is not required to carry a broadcast signal on its over-the-air channel if “the compliance costs incurred . . . would be so compelling as to warrant a waiver [of such channel positioning requirements].”<sup>13</sup> Moreover, “to obtain such a waiver, a petitioner must first submit detailed evidence demonstrating the compliance costs [and] . . . demonstrate how such costs would substantially impact the cable system.”<sup>14</sup> RCN asserts that it presented a comprehensive demonstration of the factors supporting a channel positioning waiver in its opposition to WGTW’s must carry complaint, including its substantial compliance costs and the impact the requested repositioning would have on RCN and its subscribers. Despite this, however, RCN maintains that the Bureau ignored the evidence presented and denied the requested waiver.

8. RCN states that it demonstrated that it would cost \$92.36 per limited basic tier subscriber (“per affected subscriber”) to reposition WGTW.<sup>15</sup> RCN states that in *WXTV*, for which the Bureau granted a waiver, the “per affected subscriber” cost was \$39.50. RCN argues that by comparison its “per affected subscriber” costs are nearly three times larger than those described in *WXTV*. RCN points out that, in denying its channel positioning waiver, the *Bureau Order* focused on the amount of \$4.19, the cost of repositioning WGTW averaged over the total number of system subscribers (“per subscriber” cost) instead of the “per affected subscriber” cost of \$92.36. Moreover, RCN states, the *Bureau Order* then erroneously compared the \$4.19 figure to *WXTV*’s \$39.30 “per affected subscriber” cost and concluded that RCN’s repositioning costs were “substantially less” than those described in *WXTV*.<sup>16</sup> RCN asserts that had the Bureau made an accurate comparison, it would have concluded that RCN was entitled to a waiver of the channel positioning requirements.

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<sup>8</sup>Petition for Review at 2.

<sup>9</sup>47 U.S.C. §534(b)(7)(A)(i). *See also* 47 C.F.R. §76.55(c).

<sup>10</sup>Petition for Review at 2.

<sup>11</sup>*Id.* at 3.

<sup>12</sup>*Id.* As part of this process, the 6 MHz of bandwidth previously associated with analog channel 48 was converted to 8 channels of digital programming associated with the STARZ! cable network.

<sup>13</sup>*See Greater Dayton Public Television v. TCI Cablevision of Ohio*, 10 FCC Rcd 1048, 1049 (1995).

<sup>14</sup>*Id.*

<sup>15</sup>Opposition to Complaint at 7-11 and Exhibit 2.

<sup>16</sup>*Bureau Order* at 8999.

9. RCN further alleges that the Bureau has repeatedly confirmed that evidence as to the impact of the repositioning request is more probative on the waiver issue than an operator's quantified compliance costs.<sup>17</sup> Indeed, RCN points out that in *WXTV*, the Bureau stated that “[g]iven 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, we find that Cablevision has sufficiently met its burden, even absent data on the costs to revenue ratio . . . .”<sup>18</sup> RCN contends that even though it submitted evidence beyond that submitted by Cablevision, the Bureau failed to address these material facts in its analysis. RCN states that it demonstrated that in order to reposition WGTW to channel 48, each of the existing 3,866 channel 23-56 traps would have to be removed and replaced with a new unit. RCN indicates that prior to taking this step, it would have to contact each limited basic tier subscriber to schedule 1 hour appointments to ensure that the re-trapping is completed successfully.<sup>19</sup> While RCN states that its digital subscribers' equipment will not have to be re-trapped, those subscribers will suffer at least 1 hour of interrupted service as a result of the reconfiguration. RCN maintains that the associated compliance costs of the reconfiguration impact RCN adversely. It states that for the 18-month period from August 1998 through January 2000, it has averaged a monthly loss of \$351,382.<sup>20</sup> In light of this, RCN argues that the imposition of an additional \$357,068.48 in compliance costs over the next 18 months is an unreasonable burden. RCN maintains that the Bureau's failure to analyze the impact on RCN in this case constitutes an independent basis for reversal of the *Bureau Order*.

10. RCN argues that the Bureau's policy in declining to address the must carry channel positioning requirements in a Fifth Amendment context is an abuse of the discretion afforded to the Commission. In addition, RCN asserts that such policy is based on a fundamental misunderstanding of the scope of prior Commission precedent as set forth in *Turner Broadcasting System v. FCC* pursuant to Section 1.115(b)(2)(i) of the Commission's rules.<sup>21</sup> RCN maintains that the Commission and its Bureaus have the discretion to consider the constitutionality of the must carry channel positioning requirements at issue in this case.<sup>22</sup> In the *Bureau Order*, however, RCN points out that the Bureau declined to exercise this discretion based on the earlier decision in the reconsideration of *WXTV*.<sup>23</sup> RCN asserts that the rationale underlying the *WXTV* policy is both inaccurate and inconsistent with applicable precedent and should be overturned.

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<sup>17</sup>See e.g., *KDTV v. TCI Cablevision of California, Inc.*, 13 FCC Rcd 10331, 10338 (“Regardless of what the actual costs of compliance with KDTV's request would be, TCI has failed to demonstrate how such costs would ‘substantially impact’ the cable system as required by Greater Dayton.”); and *WXTV v. Cablevision Systems Corporation*, 14 FCC Rcd 6482, 6501 (“More significantly [compared to Cablevision's compliance costs], almost 27,000 cable subscribers will be affected and will have to be inconvenienced. . .”).

<sup>18</sup>*WXTV*, 14 FCC Rcd at 6501.

<sup>19</sup>Petition for Review at 13. Although the re-trapping itself is done outside the home, RCN states that it will be necessary for the technician to confirm the results by monitoring each affected subscribers television set and possibly re-program the subscribers' sets so that channel 48 is accessible.

<sup>20</sup>*Id.* at 14.

<sup>21</sup>520 U.S. 180 (1997)(“*Turner*”)(“Except as provided . . . the application for review shall specify with particularity, from among the following, the factor(s) which warrant Commission consideration of the questions presented: (i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.”) See 47 C.F.R. §1.115(b)(2)(i).

<sup>22</sup>See *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994)(“[T]he Supreme Court has made clear that such a consideration [of constitutional issues] is at the discretion of the agency involved.”).

<sup>23</sup>15 FCC Rcd at 3318-19.

11. Finally, RCN asserts that the *Bureau Order* erred in requiring RCN to comply within 180 days instead of the 18 months requested. Section 76.61(a)(4) of the Commission's rules allows the Commission to specify a time period for compliance with a channel positioning order which exceeds the standard 45 day period established by the rule.<sup>24</sup> RCN states that it demonstrated in detail that it would take 18 months to fully implement WGTW's channel positioning request. RCN states that despite the evidence it presented, the Bureau denied this request and ordered RCN to comply within only 6 months of the order. RCN contends that the Bureau's decision was based solely on the Bureau's prior decision in *WXTV*, which required Cablevision, the cable operator in that case, to reconfigure 17 of its cable systems within 180 days. However, RCN points out that subsequent to the *WXTV* decision, and pursuant to Cablevision's request, the Bureau granted a 170-day extension for Cablevision to reconfigure its New York systems in compliance with the order.<sup>25</sup> RCN states that this extension nearly doubled Cablevision's compliance to a period exceeding 11 months. RCN states that, unlike the detailed showing it provided to justify the requested 18 month period, Cablevision did not present any specific evidence or analysis regarding its need for an extended compliance period. RCN argues that the Bureau erroneously relied upon *WXTV* without regard to subsequent developments or the evidence presented by RCN. Therefore, in the event that WGTW's channel positioning request is not overturned, RCN requests that the Commission reverse that portion of the *Bureau Order* requiring compliance within 180 days.

12. In opposition, WGTW states that RCN's application for review only reiterates the arguments set forth in its response to the original must carry complaint. WGTW argues that the Bureau carefully weighed the evidence in light of the law and applicable precedent and correctly ordered RCN to comply with the channel positioning request. WGTW states that the *Bureau Order* correctly found that the 1997 agreement between RCN and WGTW for carriage on channel 12 was limited to the 1997-1999 election period.<sup>26</sup> WGTW also asserts that the *Bureau Order* was wholly consistent with its decisions in *Greater Dayton*, *KDTV* and *WXTV* and similar channel positioning cases.<sup>27</sup> WGTW states that the Bureau correctly concluded that there were no compelling technical or financial reasons to excuse RCN from compliance.

13. WGTW states that only in *WXTV* has the Bureau found a cable system's costs so high as to excuse compliance with a channel positioning request.<sup>28</sup> Yet even in that decision, WGTW notes that the Bureau ordered Cablevision to reconfigure 42 other area cable systems. WGTW states that in *WXTV*, as in previous cases, the Bureau considered the cost of compliance both in terms of cost per system subscriber and cost per affected subscriber. WGTW maintains that the Bureau has uniformly decided this type of dispute based on the overall effect on the cable system, rather than on any specific measure of the cost per subscriber. In *WXTV*, WGTW states that the Bureau found the cost of compliance for Cablevision's Hauppauge, New York system to be approximately \$10 per system subscriber and nearly \$40 per affected subscriber, as compared to Cablevision's Ramapo, New Jersey system's costs of \$31 and \$48.50, respectively. WGTW states that despite the apparently higher costs listed for the Ramapo system, the Bureau denied a channel positioning waiver for that system because the total cost of overall compliance was \$446,000. The Bureau granted a channel positioning waiver for the Hauppauge system, however, because in that situation the total overall cost of compliance was estimated to be \$1 million and 27,000

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<sup>24</sup>47 C.F.R. §76.61(a)(4).

<sup>25</sup>See *WXTV License Partnership, G.P.*, 15 FCC Rcd 823 (2000) ("WXTV Order").

<sup>26</sup>Opposition at 2.

<sup>27</sup>*Id.* at 3.

<sup>28</sup>14 FCC Rcd 6482 (1999).

homes would be directly affected. In the instant case, WGTW notes that RCN's estimated costs of overall compliance is \$357,000; an amount broken down to \$4.19 per system subscriber and \$92.36 per affected subscriber.<sup>29</sup> WGTW points out both RCN's total compliance cost and its per system subscriber cost are lower than the corresponding costs noted for Cablevision's Ramapo system in *WXTV*, for which waiver was denied.

14. WGTW argues that while RCN alleges that the Bureau did not compare "apples to apples" when it evaluated its claimed costs of compliance, the consistency of the Bureau's decision can be demonstrated in a comparison with previous Bureau decisions as listed in the following table:

<u>Station</u>	<u>Per affected Subscriber</u>	<u>Per system Subscriber</u>	<u>Total cost of Compliance</u>	<u>Total Trapped*</u>	<u>Total Subs.*</u>	<u>Waiver</u>
KDTV <sup>30</sup>	\$12.23	\$2.38	\$1,500,000	123,024	673,953	denied
WXTV <sup>31</sup> (Monmouth)	\$39.50	\$14.14	\$170,000	4,304		denied
WXTV (Hauppauge)	\$40.00	\$9.78	\$1,061,642	27,000	108,505	granted
WXTV (Ramapo)	\$48.50	\$31.00	\$446,000	9,200		denied
WPTO <sup>32</sup>	\$11.37	\$4.52	\$307,000	27,000		denied
KCHF <sup>33</sup>	\$1.11	\$1.11	\$108,971		90,000	denied
WGTW	\$92.36	\$4.19	\$357,068	3,866	85,273	denied

\*where known

WGTW argues that the total compliance costs, the total trapped customers to be visited and the cost per system subscriber for RCN's system are well within the range of costs projected for other systems which the Bureau ordered to comply with on-channel carriage requests. WGTW asserts that RCN's figure for the anticipated cost per affected subscriber says little about the net effect of on-channel carriage of WGTW on the cable system. Rather, WGTW states that the apparent significance of that figure is to highlight the limited number of RCN subscribers who have opted for limited basic service (approximately 5 percent). WGTW notes that in the other systems analyzed above, there were proportionately more system subscribers who had elected limited service. As a result, WGTW contends that RCN's actual cost of compliance will be relatively minor in comparison to the overall size of the cable system.

15. WGTW argues that the cost of compliance will not harm RCN's cable system in a substantial way. WGTW states that RCN attempts to exaggerate its already inflated cost projections by dividing them by a limited number of affected subscribers, the implication being that the costs will exacerbate the precarious financial condition of the cable system.<sup>34</sup> WGTW points out that, according to

<sup>29</sup>Opposition at 6.

<sup>30</sup>*KDTV v. TCI Cablevision of California, Inc.*, 13 FCC Rcd 10331 (1998).

<sup>31</sup>*WXTV v. Cablevision Systems Corp.*, 14 FCC Rcd 6482 (1999).

<sup>32</sup>*Greater Dayton v. TCI*, 10 FCC Rcd 1048 (1995).

<sup>33</sup>*Son Broadcasting Company, Inc. v. Jones Intercable, Inc.*, 11 FCC Rcd 7634 (1996).

<sup>34</sup>Opposition at 7.

RCN's annual report, its assets at the end of 1999 exceeded \$3 billion dollars, including \$1.8 billion in cash equivalents.<sup>35</sup> RCN's net loss for 1999 was \$368,570,000, almost half of which consisted of depreciation and amortization.<sup>36</sup> WGTW states that the alleged costs to reconfigure RCN's system to carry WGTW on-channel amounts to less than 0.1 percent of RCN's 1999 losses.

16. WGTW argues that RCN has failed to prove any error in the Commission's decision in *WXTV* to defer to the courts with regard to the Fifth Amendment issue. With respect to the takings issue, WGTW notes that RCN did not object on constitutional grounds to initially carrying WGTW. Only when WGTW selected on-channel carriage did RCN raise this argument. Finally, WGTW argues that the 6 months granted to RCN to come into compliance was an appropriate period. WGTW states that in making this determination, the Bureau found no justification for granting RCN a longer time period to come into compliance than that granted to Cablevision in *WXTV*.

17. In reply, RCN argues that WGTW failed to contradict the primary basis for its seeking review of the *Bureau Order*, namely that the Bureau erroneously compared the "per affected subscriber" costs of Cablevision in *WXTV* with the "per subscriber" costs of RCN. RCN maintains that this comparison only serves to confirm that its "per affected subscriber" costs is substantially higher than the costs in any other previous Bureau decision.<sup>37</sup>

18. RCN argues that WGTW's attempt to characterize its compliance costs as "miniscule in comparison to RCN's operations" must be rejected.<sup>38</sup> RCN states that the financial showings it presented related to RCN Telecom Services, Inc., the particular subsidiary company of RCN Corporation which operates the subject cable system. In any event, RCN maintains that, by acknowledging that RCN Corporation had a net loss of over \$368 million in 1999, WGTW reaffirmed RCN's assertions that these additional uncompensable expenditures will have a substantial negative impact on the company and its operations.<sup>39</sup>

19. We reject RCN's contention that the Bureau did not fully analyze the facts presented in this case. We first address RCN's stated basis for seeking review, namely that the *Bureau Order* erroneously compared the "per affected subscriber" costs of Cablevision's Hauppauge system in *WXTV* with the "per subscriber" costs of RCN. Upon review, we agree that the Bureau inadvertently compared Cablevision's "per affected subscriber" cost of \$39.50 to RCN's total system "per subscriber" cost of \$4.19. However, we reject RCN's assertion that had the Bureau correctly compared Cablevision's \$39.50 cost to RCN's comparable cost of \$92.36 "per affected subscriber" the outcome would have been different. RCN ignores the fact that, regardless of the number of directly affected subscribers in a channel positioning case, the cost of compliance is amortized over the total number of subscribers in a system. As stated in the *Bureau Order*, while "the only subscribers for which traps would be necessary are those receiving limited basic service, all of RCN's 85,273 subscribers would be affected by the change" not only because the reconfiguration will alter the channel line-up of the cable system, but because the total cost of the reconfiguration will be spread across the system's total subscriber base.<sup>40</sup> Thus, the \$4.19 "per system

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<sup>35</sup>*Id.* at Exhibit 1.

<sup>36</sup>*Id.*

<sup>37</sup>RCN states that WGTW made several errors in its comparison. *See* Reply at 2.

<sup>38</sup>Opposition at 7.

<sup>39</sup>*Id.* at 8.

<sup>40</sup>*Bureau Order* at 8999.

subscriber” is the applicable measure in which to consider RCN’s overall costs and this amount should have been compared to Cablevision’s equivalent “per system subscriber” amount of \$9.78 for its Hauppauge cable system. RCN’s \$4.19 cost “per subscriber” is slightly less than one-half of Cablevision’s cost of \$9.78. RCN’s cost per system subscriber, therefore, is still considerably less than that experienced by Cablevision, particularly when one takes into account the total overall cost of compliance, the total number of subscribers for which traps would have to be replaced, and the overall number of subscribers on the system. In this instance, RCN’s total cost of compliance is \$357,068. The total number of subscribers for which it would have to replace traps is 3,866. Its total number of subscribers is 85,273. In *WXTV*, the total cost of compliance for Cablevision’s Hauppauge system was \$1,061,642, with 27,000 subscribers requiring re-trapping and a total number of subscribers of 108,505. Clearly, despite the greater overall number of system subscribers for Cablevision, its costs, amortized over the whole system, are still significantly greater than that experienced by RCN. Moreover, even in instances where the “per system subscriber” costs were greater than those experienced by RCN, the Bureau has found that a waiver was not warranted, based on the total cost of compliance in relation to the size of the system. For instance, in *WXTV*, the Bureau denied a waiver for Cablevision’s Monmouth and Ramapo cable systems, although the “per system subscriber” costs were greater than those for the Hauppauge system at \$14.14 and \$31.00, respectively.<sup>41</sup> The Bureau found that, despite these greater individual costs, the total overall cost of system compliance for each system was \$170,000 and \$446,000, respectively; amounts far less than the \$1,000,000 expected cost of compliance for the Hauppauge system.<sup>42</sup>

20. Second, we do not agree that the Bureau ignored the material evidence presented by RCN as to the impact of the repositioning on RCN and its subscribers. The Bureau’s review of this matter included a comprehensive analysis of all of the evidence provided. In its original opposition to the must carry complaint, RCN stated that the impact to its subscribers would result in the loss of at least an hour of service to both affected and non-affected subscribers alike.<sup>43</sup> With regard to the impact on RCN itself, RCN pointed to its recent adverse financial history and that, given its agreement to carry WGTW on channel 12, it could justifiably assume that the issue of channel carriage with regard to WGTW was closed. We are not persuaded that the justifications presented by RCN as to impact satisfy the requirements for a waiver under these circumstances. The disruption to RCN’s subscribers during the re-trapping process would be limited and is unlikely to cause RCN the loss of any subscribers. Moreover, it is quite likely that RCN’s previous configuration to a digital/analog system caused similar disruptions in service and without any apparent harm in subscribership. Indeed, given the constantly-evolving changes in technology and cable system ownership and the number of cable systems being reconfigured as a result, few cable system subscribers would be unfamiliar with the process. Although RCN cited financial difficulties with regard to the subject cable system in its original opposition to WGTW’s complaint, and again herein, it provided no specific financial information with regard to the cable system’s cash flow in support of this position. While RCN has contested WGTW’s reference to the financial information of the RCN Corporation as a whole, and not to the individual cable system represented, RCN has not provided proof that it is in any way unable to draw on corporate resources should it be necessary.

21. Third, we reject RCN’s argument that the Bureau’s decision not to address the must carry channel positioning requirements in a Fifth Amendment context was an abuse of discretion. As we noted in *WXTV Reconsideration*, while the Supreme Court’s decision in *Thunder Basin* may provide administrative agencies an opportunity to consider the constitutionality of implementing statutes under certain

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<sup>41</sup>*WXTV*, 14 FCC Rcd at 6500.

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

<sup>43</sup>Opposition to Must Carry Complaint at 11.



circumstances, the Supreme Court made clear that such consideration is at the discretion of the agency involved.<sup>44</sup> Given the limited record on this issue in this proceeding, we decline to address the Fifth Amendment Takings argument at this time.

22. Finally, we disagree with RCN that denial of its requested 18-month period in favor of a 6-month period in which to reconfigure its system was prejudicial merely because it was similar to the period of time granted for reconfiguration in *WXTV*. Cablevision was required by *WXTV* to reconfigure 17 cable systems within this period of time. RCN was only required to reconfigure its two systems serving Lehigh and Northampton Counties, Pennsylvania. It would seem, therefore, that the technical and logistical requirements in RCN's reconfiguration would be much less cumbersome than that experienced by Cablevision. RCN has provided no information that would alter this impression. While RCN points to the *WXTV Order's* extension of Cablevision's original 180 day compliance period by an additional 5 months as proof that its originally-requested 18 months is more reasonable, we do not agree.<sup>45</sup> There is no evidence that RCN's reconfiguration in this instance would necessitate a further length of time. In light of the above, we affirm the 6-month deadline mandated by the *Bureau Order* for RCN to comply with WGTW's channel positioning request. This 6-month period will commence from the release date of this *Order*.

#### IV. ORDERING CLAUSES

23. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communication's Act, as amended (47 U.S.C. §534) and Sections 76.5 and 1.115 of the Commission's rules (47 C.F.R. §§76.5 and 1.115), that the application for review filed by RCN Telecom Services, Inc. **IS DENIED**.

24. **IT IS FURTHER ORDERED**, that RCN Telecom Services, Inc. shall comply with WGTW's channel positioning request within 180 days of the release date of this *Order*.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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<sup>44</sup>*WXTV Reconsideration*, 15 FCC Rcd 3308 (2000), citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994).

<sup>45</sup>15 FCC Rcd 823 (2000).