Fourth Circuit.[3] Or, to quote the Ninth Circuit, it implements the ''more speech-friendly plan that allows telephone companies ''to compete in the video programming market'' while ''requiring that a portion of their transport volume be set aside for sale to unaffiliated third parties on a common carrier basis.'' As a result of our construction of the waiver provision, telephone companies' free speech interests are not unduly burdened.

12. The fact that waiver of the cable-telco cross-ownership restriction obviates the constitutional difficulties identified by the courts of appeals supports our decision to construe our waiver authority to permit telephone companies to provide video programming over video dialtone systems. As the Supreme Court recently reiterated in *X–Citement Video,* ''a statute is to be construed where fairly possible so as to avoid constitutional questions,'' The Court also articulated this principle in *Jean* v. *Nelson,* 472 U.S. 846 (1985), when it found that ''[p]rior to reaching any constitutional questions federal courts must consider nonconstitutional grounds for decision.''

13. Several commenters opposed our reading of the wavier provision. Southwestern Bell argued that our proposal constitutes an evisceration of the rule. That is not so. It would eviscerate the statute if we were to waive Section 613(b) to allow telephone companies to provide video programming directly to subscribers in their service areas over video dialtone facilities *and*, as a general matter, to purchase cable systems in their telephone service areas that do not face competition. But we are not authorizing such waivers in this order. Instead, we conclude only that Section 613(b)(4) authorizes us to waive the cable-telco cross-ownership rule to permit a telephone company to provide video programming over video dialtone systems in its telephone service area in competition with existing cable operators, a result that *furthers* the purpose of the rule.[4]

14. Both the United States Telephone Association and US West invoke *Secretary of State of Maryland* v. *Munson,* 467 U.S. 947 (1984), to argue that the statute cannot be saved by its waiver provision. But this case is not at all similar to *Munson.* The *Munson* case involved a 25% limitation on the percentage of funds a charitable organization could keep, on the theory that a charity that used less than 75% of the funds that it raised on charitable purposes was engaged in fraud. The Court invalidated the state statute imposing the limitation upon concluding that ''[t]he flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on the fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud.'' Moreover, the Court concluded that the statute stifled speech and discriminated against certain viewpoints, explaining that ''the statute will restrict First Amendment activity that results in high costs but is itself a part of the charity's goal or that is simply attributable to the fact that the charity's cause proves to be unpopular.'' The Court went on to hold that the statute was not saved by a provision allowing for waivers of the limitation. The Court stated that ''[b]y placing discretion in the hands of an official to grant or deny a license, such a statute creates a threat of censorship that by its very existence chills free speech.'' ''Particularly where the percentage limitation is so poorly suited to accomplishing the State's goal,'' the Court added, ''and where there are alternative means to serve the same purpose, there is little justification for straining to salvage the statute by invoking the possibility of official dispensation to engage in protected activity.'' In this case, in contrast, permitting telephone companies to provide video programming over a video dailtone system plainly advances the goal of making programming for a variety of sources available to the public—a goal that furthers rather than hinders First Amendment interests. Unlike *Munson,* speech is not stifled and unpopular viewpoints are not disadvantaged. Moreover, no discretion remotely comparable to that in *Munson* would be lodged in any official to grant or deny particular waivers under our approach. Rather, as part of any decision under 47 U.S.C. § 214 authorizing a telephone company to construct facilities, we will routinely grant a waiver of Section 613(b) where the telephone company agrees to abide by the regulations we will establish governing its provision of video programming. Accordingly, there is no ''threat of censorship that by its very existence chills free speech.''

15. In light of our duty to interpret Section 613(b) in a fashion that renders the statute constitutional, there is no merit at all to the suggestion by some commenters that the Commission's interpretation of Section 613(b)(4) is barred by res judicata, collateral estoppel, or some unnamed principle that allegedly prevents the Commission from construing a statute that a court has held unconstitutional. In *X-Citement Video,* the Supreme Court read the federal child pornography statute in a manner that the Court acknowledged was not its ''most natural grammatical reading'' in order to avoid a serious constitutional issue after a court of appeals had held the statute unconstitutional. In particular, the Court held that the statute required the government to prove that the defendant in a child pornography case knew that the material on which the prosecution was based contained child pornography even though the statute did not appear to contain such a scienter requirement. In this case, in contrast, the language of the waiver provision is flexible, speaking of ''good cause'' and ''particular circumstances * * *, taking into account the policy of this subsection.'' Unlike the Court in *X-Citement Video,* we do not have to strain to construe the waiver provision so that it renders the statute constitutional. Rather, as we have explained, we believe that such an interpretation is fully consistent with both the language of the waiver provision and the policy underlying Section 613(b), and therefore is the best interpretation of Section 613(b)(4). For those reasons, and in light of the fact that such an interpretation also avoids a serious constitutional issue, we now adopt our tentative conclusion that the waiver provision should be interpreted to authorize us to consider and approve requests by telephone companies to provide video programming over video dialtone systems, subject to the rules we have enacted and any further rules we will enact to govern video dialtone systems.

16. Finally, we also conclude that our reading of Section 613(b)(4) is not foreclosed by the D.C. Circuit's 1990 decision in *NCTA* v. *FCC,* 914 F.2d 285 (D.C. Cir. 1990). That case did not involve video dialtone service and presented no constitutional issue. It instead involved a waiver of FCC cross-ownership rules authorizing a cable operator to provide cable service over a

[3] We recognize that the Fourth Circuit reserved judgment on the constitutionality of our recommended model. *C&P,* 42 F.3d at 202 n.34. However, if that recommended approach does not render the statute constitutional then, contrary to the court's holding it is not '' 'Kobvious less-burdensome alternative,' '' because it is no alternative at all. *Id.* at 202.

[4] We do not decide today whether we could grant a waiver authorizing a telephone company to build a traditional cable system in its telephone service area in competition with an existing cable system. Nor do we address the conditions under which a waiver might be warranted to allow a telephone company to purchase an in-region cable system.