

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of

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Second Periodic Review of the
Commission's Rules and Policies
Affecting the Conversion
To Digital Television

) MB Docket No. 03-15
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) RM 9832
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To: Office of Secretary
Attention: The Commissioners

Federal Communications Commission
Office of Secretary

PETITION FOR RECONSIDERATION

The Paxson Licensees¹ by their attorneys and pursuant to section 1.429 of the Commission's Rules, hereby petition for reconsideration of the Commission's above-referenced Report and Order in MB Docket No. 03-15 (the "Order").²

The Commission should reconsider its treatment of two discrete issues that it mentioned but left largely unresolved in the *Order* and direct that (1) single channel analog broadcasters

¹ Each of the Paxson Licensees are subsidiaries of Paxson Communications Corporation ("PCC") and affiliated with the PAXTV network. The Paxson Licensees include: (1) Paxson San Antonio License, Inc., licensee of television station KPXL(TV), Uvalde, Texas; (2) Paxson Buffalo License, Inc., licensee of television station WPXJ-TV, Batavia, New York; (3) Paxson Akron License, Inc., licensee of television station WVPX(TV), Akron, Ohio; (4) Paxson Communications License Company, LLC, licensee of television station WPXD(TV), Ann Arbor, Michigan; (5) Paxson Des Moines License, Inc., licensee of television station KFPX(TV), Newton, Iowa; (6) Paxson Spokane License, Inc., licensee of television station KGPX(TV), Spokane, Washington; (7) Paxson Greenville License, Inc., licensee of television station WEPX(TV), Greenville, North Carolina; and (8) Paxson Syracuse License, Inc., licensee of television station WSPX-TV, Syracuse, New York.

² Second Periodic Review of the Commission Rules and Policies Affecting the Transition to Digital Television, *Report and Order*, MB Docket No. 03-15, FCC 04-192 (rel. Sept. 7, 2004). This Petition is timely filed under Sections 1.4(b)(1) and 1.429(b) of the Commission's Rules. 47 C.F.R. §§ 1.4(b)(1), 1.429.(b).

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may obtain paired DTV channels on a primary basis; and (2) the U.S.-Canadian Letter of Understanding (“LOU”) will not impair stations’ ability to replicate and maximize their analog service area. These issues are crucial to many stations’ full participation in the DTV transition and to their ability to provide continuous service to their communities of license as television broadcasting moves into the digital age.

I. THE COMMISSION SHOULD PROVIDE PROCEDURES FOR SINGLE-CHANNEL ANALOG BROADCASTERS TO OBTAIN DTV ALLOTMENTS.

The Commission should reverse it’s apparent view that single-channel broadcasters like Paxson Licensee stations KPXL(TV), KFPX(TV), KGPX(TV), WSPX-TV, and WEPX(TV) are permanently ineligible to receive a paired DTV channel.³ The Commission addressed this issue only in passing during its discussion of the channel election process, belying the importance of an issue that has disenfranchised numerous broadcasters from full participation in the DTV transition. The Commission’s brief discussion in the *Order* is an inappropriate extension of its initial DTV allocation policy granting paired channels only to stations holding an NTSC license or construction permit as of April 3, 1997.⁴ On reconsideration, the Commission should reverse this course and announce procedures by which single-channel broadcasters that wish to commence dual operations may obtain paired DTV channels.

The Commission first indicated that it was extending the initial policy against granting paired DTV channels in its decision in *Muskogee, Oklahoma*.⁵ The policy change indicated in that case also was applied against a petition for rulemaking requesting a paired DTV channel for

³ *Order*, ¶ 51 & n.101

⁴ Advanced Television services and Their Impact Upon the Existing Television Broadcast Service, *Fifth Report and Order*, 12 FCC Rcd 12809, 12816-16a (1997) (“*Fifth DTV Report and Order*”).

Paxson Licensee station WSPX-TV, Syracuse, New York.⁶ Paxson Syracuse License, Inc. has filed an Application for Review with the Commission challenging both the *Syracuse Letter Ruling* and the *Muskogee* decision.⁷ In that Application, Paxson Syracuse argues that the Commission's extension of its channel allotment policies to deprive single-channel analog broadcasters of paired allotments (1) violated fundamental principles of administrative law; and (2) unfairly excludes single-channel analog broadcasters from full participation in the DTV transition and endangers continuity of service to viewers as the DTV transition progresses. Because this infringement on single-channel broadcasters' substantive and procedural rights must be reversed as quickly as possible, and because this forum is equally appropriate to addressing Paxson Syracuse's application, the Paxson Licensees will briefly summarize the relevant arguments below.

A. Permanent Denial of Paired Channels to Analog-Only Broadcasters Violates Fundamental Principles of Administrative Law.

The Commission's initial decision in the *Fifth DTV Report and Order* to issue paired DTV channels to all television stations holding an NTSC license or construction permit as of April 3, 1997, was in fulfillment of Congress's direction that if the Commission were to issue paired channels, it was required to award them to all NTSC licensees and permittees as of the date the channels were issued.⁸ But Congress did not require and the Commission never

⁵ Muskogee, Oklahoma, *Memorandum Opinion and Order*, 19 FCC Rcd 4120 (2004) ("*Muskogee*").

⁶ Letter from Barbara A. Kreisman to John R. Feore, Jr., dated February 17, 2004 (the "*Syracuse Letter Ruling*"). Each of the other Paxson Licensees also has pending a Petition for Rulemaking requesting a paired DTV channel.

⁷ Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Bath, New York); Amendment of Section 73.622(b), DTV Table of Allotments Digital Television Broadcast Stations (Syracuse, New York), Application for Review filed March 22, 2004.

⁸ 47 U.S.C.A. § 336(a).

indicated that paired DTV channels would only ever be issued to those licensees and permittees that initially were eligible.

The Commission now appears to have extended its “initial” eligibility decision to permanently deprive single-channel analog broadcasters like the Paxson Licensees of a paired DTV channel. This represents a fundamental expansion of and shift in Commission policy that properly could be accomplished only through notice and comment rulemaking. While agencies have a great deal of discretion whether to establish rules through legislative rulemaking or adjudication, that discretion is not unlimited.⁹ The District of Columbia Circuit has held that it is “a maxim of administrative law that if a second rule repudiates or is irreconcilable with [a prior legislative rule], the second rule must be an amendment of the first; and, of course, an amendment to a legislative rule must itself be legislative.”¹⁰ The Commission has violated this maxim by amending its rules through private adjudicatory proceedings without any notice or public comment whatsoever, to the detriment of all single-channel analog broadcasters.

The Commission’s conduct in this instance closely resembles *Sprint Corp. v. FCC*,¹¹ in which the D.C. Circuit reversed the Commission for adopting a rule through notice and comment rulemaking and then amending that rule through an order without first issuing notice of the proposed change. As the D.C. Circuit held in that case, the Commission’s need for procedural flexibility does not permit it to substantively alter the rights of regulated parties without

⁹ See *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 808 n.29 (1978) (agency possesses “substantial discretion”); *NLRB v. Bell-Aerospace Co.*, 416 U.S. 267 (1974) (agency acting through adjudication would abuse its discretion if affected parties to case are not given a full right to be heard).

¹⁰ *National Family Planning and Reproductive Health Association, Inc. v Sullivan*, 979 F.2d 227 (D.C. Cir. 1992) (citation omitted).

¹¹ 315 F.3d 369 (2003).

providing them sufficient notice and opportunity for comment.¹² The same result would obtain here, as the Commission now appears to have permanently barred single-channel analog broadcasters from full participation in the DTV transition through acquisition of a paired DTV channel.

The unexplained change in the Commission's rules is particularly inappropriate here because no record could have supported the Commission's action. When the Commission assigned the allotments contained in the DTV Table, it envisioned a highly accelerated DTV transition and accordingly adopted implementation policies designed to facilitate a rapid transition.¹³ Indeed, Congress itself subsequently codified the Commission's 2006 target date for ending the DTV transition.¹⁴ Thus, in 1997, the decision to leave certain stations without a paired allotment during an expectedly short transition period was not considered debilitating to single-channel broadcasters.

Unfortunately, that quick and smooth transition never was to be. Questions arose, for example, about the robustness of the DTV transmission format, the security of digital content,

¹² See *id.* at 377.

¹³ Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Fifth Report and Order*, 12 FCC Rcd 12809, ¶¶ 6 (“The more quickly that broadcasters and consumers move to digital, the more rapidly spectrum can be recovered”), 37 (explaining that decision to allow broadcasters flexibility to broadcast non-high definition digital signal designed to facilitate “rapid transition”), 97 (“One of our overarching goals in this proceeding is the rapid establishment of successful digital broadcast services that will attract viewers from analog to DTV technology, so that the analog spectrum can be recovered”) (1997) (“*Fifth Report and Order*”).

¹⁴ The Balanced Budget Act of 1997 added a new Section 309(j)(14) to the Communications Act. That section states that “[a] broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond December 31, 2006” unless the Commission grants an extension based on specific enumerated criteria. 47 U.S.C. Sec. 309(j)(14). See also *Fifth Report and Order*, ¶ 99 (setting 2006 target date for return of analog spectrum).

and the interoperability of cable and consumer electronic equipment that have hindered the transition.¹⁵ Even as the pace of the transition has slowed, however, spectrum recovery for public safety services – always a significant element of the Commission’s DTV policies – has become even more important as a result of the attacks of 9/11, further compelling the need for a rapid transition. In response, the Commission, hoping to accelerate market penetration and facilitate the close of the transition, embraced more aggressive policies to place DTV stations into operation as quickly as possible.¹⁶ Congress responded as well. Concerned about the pace of the transition and the acceptance by consumers of DTV technology, Congress required the Commission to assign paired allotments upon request to a number of single-channel stations to promote “the orderly transition to digital television, and to promote the equitable allocation and use of digital channels.”¹⁷

Now, after more than seven years and all these delays and developments; now that the hopes for a quick transition have been irrevocably dashed, it would be disingenuous to argue that the Congressional restriction on *initial* eligibility should prevent the assignment of a DTV allotment to the Paxson Licensees or other similarly situated single-channel broadcasters.

¹⁵ See, e.g., Review of the Commission’s Rules and Policies Affecting the Conversion To Digital Television, *Report and Order*, 16 FCC Rcd 5946, ¶¶ 98-105 (2001); Digital Broadcast Copy Protection, *Notice of Proposed Rulemaking*, MB Docket No. 02-230, FCC 02-231, ¶¶ 3-9 (rel. Aug. 9, 2002); Compatibility Between Cable Systems And Consumer Electronics Equipment, *Report and Order*, 15 FCC Rcd 17568 (2000).

¹⁶ See Remedial Steps For Failure to Comply With Digital Television Construction Schedule; Requests For Extension of the October 5, 2001, Digital Television Construction Deadline, *Order And Notice Of Proposed Rulemaking*, 17 FCC Rcd 9962, ¶ 16 (2002) (adopting sanctions for failure to timely construct DTV stations); Review of the Commission’s Rules and Policies Affecting the Conversion To Digital Television, *Memorandum Opinion and Order on Reconsideration*, 16 FCC Rcd 20594, ¶¶ 34-36 (allowing DTV stations to commence operations at low power).

¹⁷ The Public Health, Security, and Bioterrorism Preparedness and Response Act of 2002, § 531(a), Pub. L. No. 107-188, 116 Stat. 594, enacted June 12, 2002.

Accordingly, there is no basis for extending the Commission's policy of limiting such channel assignments to those that were eligible under the strict statutory criteria for initial recipients of channels.

B. Permanent Denial of a Paired Channel Unfairly Excludes Single-Channel DTV Broadcasters from Full Participation in the DTV Transition to Their Competitive Detriment.

As a result of this unnoticed and procedurally defective change in the Commission's rules, five of the Paxson Licensees are shut out of the DTV transition, and five markets will not receive PAXTV's unique brand of family friendly programming. The Commission never has explained how its restrictive new rule will advance the DTV transition or improve over-the-air service to existing television viewers. Indeed, the Paxson Licensees submit that the result will be the exact opposite: a retarded DTV transition and discontinued service to many viewers as they transition from analog television to DTV. This result will, in turn severely undermine the competitiveness of the affected stations.

With paired DTV allotments, on the other hand, the Paxson Licensees would ensure that existing service to viewers is preserved during the transition. Those viewers capable of receiving digital signals would receive the benefits of enhanced DTV programming from the Paxson Licensees. Viewers who have not purchased digital equipment would not be disenfranchised. Equally important, new DTV allotments would increase the amount of digital content available to viewers, thereby creating additional incentive for consumers to purchase digital equipment and facilitate the recovery of spectrum.

In short, the Commission's denial of paired allotments to single channel analog broadcasters violates every conceivable public interest and could not have been supported by a record developed in a notice and comment proceeding. Accordingly, the Commission should

reverse course and announce procedures by which single-channel analog broadcasters can obtain DTV channels at their option.

II. THE COMMISSION MUST CONFIRM THAT THE U.S.-CANADIAN LOU WILL NOT IMPAIR BROADCASTERS' ABILITY TO REPLICATE OR MAXIMIZE THEIR CURRENT ANALOG SERVICE AREA.

Three of the Paxson Licensees, WPXD(TV), WVPX(TV), and WPXJ(TV) have yet to be granted a DTV construction permit due to Canadian clearance issues. The Commission must clarify that these delays are temporary and that the Commission will not allow the LOU to interfere with post-transition DTV replication of stations' current analog service area regardless of whether a station elects to provide permanent DTV service on its analog or digital channel. The Commission's pronouncements on Canadian clearance issues in the *Order*, however, are neither clear nor encouraging.¹⁸

For example, the Commission states that "[w]ith respect to post-transition DTV replication of stations' current analog service, we must coordinate DTV use of NTSC channels in border areas."¹⁹ All broadcasters understand that operation in the border areas requires cooperation with Canada, but what broadcasters need to know is whether the Commission intends to insist that Canada allow stations to replicate and, in appropriate cases, to maximize their analog service area. That should be the Commission's position; the Paxson Licensees and other similarly situated broadcasters need to know whether that is the Commission's position.

Insisting upon full analog replication for existing border-zone broadcasters is the only policy that squares with the Commission's policies of (1) facilitating stations' full digital

¹⁸ *Order*, ¶¶ 70-71.

¹⁹ *Id.* at ¶ 71.

replication of their analog service area,²⁰ and (2) maintaining existing relied-upon broadcast service.²¹ Letting border-zone broadcasters know that this will be the Commission's policy in coordination negotiations with Canada will permit them to plan their channel election and post-transition business plans. Such planning remains impossible, however, so long as stations cannot determine their service areas with some certainty.

This issue has lingered long enough and the Commission has not shown the proper regard for the competitive handicaps that it is imposing upon stations that have yet to receive DTV construction permits due to international coordination. These stations already have been hamstrung by competitors that have been building up their DTV operations for a period of years. That competitive gap will be difficult to close in any case, but it will become impossible if the Commission has abandoned its commitment to ensuring that these stations are able to continue serving at least their present service area.

²⁰ See *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Sixth Report and Order*, 12 FCC Rcd 14588, ¶ 29.

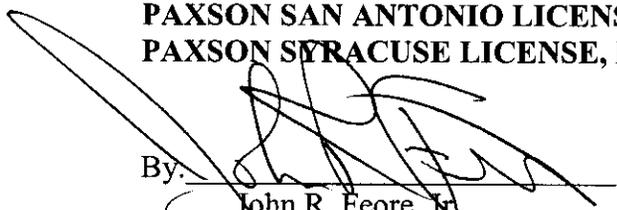
²¹ See *Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to Part 27 of the Commission's Rules; Carriage of the Transmissions of Digital Television Broadcast Stations; Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 16 FCC Rcd 2703, ¶ 16 (2001).

CONCLUSION

For the forgoing reasons, the Paxson Licensees respect that the Commission reconsider the *Order* to the extent requested herein.

Respectfully submitted,

**PAXSON BUFFALO LICENSE, INC.
PAXSON AKRON LICENSE, INC.
PAXSON COMMUNICATIONS LICENSE
COMPANY, LLC
PAXSON DES MOINES LICENSE, INC.
PAXSON SPOKANE LICENSE, INC.
PAXSON GREENVILLE LICENSE, INC.
PAXSON SAN ANTONIO LICENSE, INC.
PAXSON SYRACUSE LICENSE, INC.**

By. 

John R. Feore, Jr

Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W., Suite 800
Washington, D.C. 20036-6802
202-776-2000

Their Attorneys

November 3, 2004