

service area replications will be affected.^{23/} However, processing only those applications already on file -- applications made without notice of a potential change in the approval process would not have adversely affected the Commission's goals. The number of pending applications is finite; once approved they will not affect the service area replications any more than the applications approved prior to April 3, 1997.^{24/} In sum, the minimal benefits that may accrue from application of the DTV Impact policy **do not** outweigh the substantial adverse impact such an action would have on TV broadcasters.

B. The DTV Impact Policy Defeats the Commission's Goals. Longstanding goals of broadcast regulation have been to increase competition and diversity in programming,^{25/} as well as to further economic growth and employment opportunities in the telecommunications industry.^{26/} The Petitioners are planning to spend between \$1.2 million and \$2.7 million to upgrade the television transmission facilities of individual stations. With perhaps only FCC conditional approval, broadcasters like the Petitioners will be reluctant to invest this amount of capital to improve their facilities when the modifications may later be curtailed or eliminated. By contrast,

^{23/} *Sixth Further Notice* ¶63.

^{24/} The Commission recognizes that the current DTV allotment will "unavoidably result in some degree of interference to both NTSC and DTV stations. *Id.* ¶40.

^{25/} See, e.g., *Multiple-Ownership of Standard, FM, and Television Stations*, 45 FCC 1476-77, *reconsideration denied*, 45 FCC 1728 (1964); *Telecommunications Act of 1996 Conference Report*, S. Rep. 104-230 at 172, 177-78 (Feb. 1, 1996).

^{26/} *Sixth Further Notice* ¶3.

with an unconditional modification approval, broadcasters would be more willing to make the kinds of capital improvements described above. Local economies would benefit from the investment of millions of dollars in upgrading transmission equipment. Improved transmission facilities also will allow broadcasters to serve larger audiences and allow for an increase in competition for local advertising revenue. By adopting its DTV Impact policy, communities where the Petitioners have modifications pending will be deprived of the benefits of improved facilities. It is counter-intuitive for the Commission to implement its DTV Impact policy based on the effect it has on the Commission's goals and the local communities where the Petitioners have pending modification applications.

C. Retroactive Application of the DTV Impact Policy Is Unconstitutional.

Federal agencies such as the FCC are precluded from issuing a rule or policy that has a retroactive and unequal effect unless Congress has explicitly conferred the power on the agency to do so.^{27/} The Commission's decision to apply its DTV Impact policy retroactively violates this prohibition.

The D.C. Circuit and the Commission have established five factors to be balanced in determining whether a new rule is being applied retroactively in violation of constitutional requirements:^{28/} (1) whether the case is one of first impression; (2) whether the new rule is an abrupt departure from past practices or just an attempt to

^{27/} *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204 (1988).

^{28/} *E.g., Retail, Wholesale and Dep't Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972); *Adelphia Cable Partners, L.P.*, 2 CR 76, 82 (1995).

fill in a void in the law; (3) the extent of reliance on the former rule; (4) the burden retroactivity would impose; and (5) the statutory interest in applying the new rule despite reliance on the old one.

Under these factors the Commission's decision was retroactively applied. This is not a case of first impression because the Commission has long-established procedures for processing TV modification applications. The DTV Impact policy also is a significant departure from the Commission's past practices. As discussed above, the Commission had not previously conditioned approval of modifications on any DTV proceedings, nor had it given any notice until July 25, 1996 that it intended to alter the modification approval process in a way that would treat pending applications differently. In addition, the Commission commonly grandfathered applicants and licensees not in compliance with the newly announced rules. With regard to the third and fourth factors, broadcasters including PCC relied heavily on the Commission's previous practices and procedures, going to great expense to prepare for the approval of its pending applications. Finally, there is no statutory provision that directs the Commission to apply its DTV Impact policy to applications pending as of July 25, 1996 that were not granted as of April 3, 1997. Under this test retroactive application of the DTV Impact policy to pending applications is unconstitutional and must not be adopted.

Although the Commission may deny an application if it changes the substantive standards for approving an application such that the applicant is no

longer qualified,^{29/} qualification is not at issue here. The DTV Impact policy is a procedural mechanism only.^{30/} The Commission's proposal in the *Further Notice* did not change the substantive standards for approving or disapproving modification applications nor did it disqualify any of the applicants. In short, the Commission does not have the authority to apply its conditional approval policy on a retroactive basis.

The Commission must process all construction permit applications pending as of July 25, 1996 and grant them with full DTV replication of the requested NTSC facilities. This means protection for the power and coordinates specified in those applications. This application has already been followed with a number of pre-July 25, 1996 applications and should be followed for all such similarly-situated applications.

D. The Commission's Decision Violates *Melody Music, Inc.* The Commission's decision in its *Sixth R&O* to treat some modification applications pending as of July 25, 1996 differently from other modification applications pending on that same date violates the Court of Appeals directive in *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965). In the thirty years since *Melody Music*, the D.C. Circuit consistently has upheld the basic premise of similar treatment for similarly situated parties. See, e.g., *New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361,

^{29/} E.g., *United States v. Storer Broad. Co.*, 351 U.S. 192 (1956); *Hispanic Info. and Telecomm. Network, Inc. v. FCC*, 865 F.2d 1289 (D.C. Cir. 1989).

^{30/} *Sixth Further Notice* ¶63.

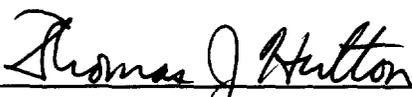
366 (D.C. Cir. 1987); *Public Media Center v. FCC*, 587 F.2d 1322, 1331 (D.C. Cir. 1978) and the Commission also has regularly recognized its obligations in this regard. See *Cosmopolitan Broadcasting Corp.*, 61 FCC 2d 257, 261-2 (1976); *KFPW Broadcasting Co.*, 47 FCC 2d 1090, 1095 (1974); *Channel 13 of Las Vegas, Inc.*, 37 FCC 2d 518, 522-23 (1972); *RCA Alaska Communications, Inc.*, 25 FCC 2d 939, 940 (1970); *Continental Broadcasting, Inc.*, 17 FCC 2d 485, 487-88 (1969), aff'd 439 F.2d 580 (1971).

V. Conclusion.

For the foregoing reasons, the Petitioners request that the Commission reconsider its decisions in the *Fifth R&O* and the *Sixth R&O* to the extent described above.

Respectfully submitted,

PAXSON COMMUNICATIONS CORPORATION
THE CHRISTIAN NETWORK, INC.
ROBERTS BROADCASTING COMPANY
MINORITY BROADCASTERS OF SANTA FE, INC.
COCOLA BROADCASTING COMPANIES
DP MEDIA OF MARTINSBURG, INC.

By: 
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June 13, 1997

ATTACHMENT NO. 1

ATTACHMENT 1

CALL SIGN	COMMUNITY OF LICENSE	CHANNEL OR FREQ. ASSIGN.
PAXSON TELEVISION STATIONS		
WHAI-TV	Bridgeport, CT	CH-43
KZKI(TV)	San Bernardino, CA	CH-30
WTGI-TV	Wilmington, DE	CH-61
KLXV-TV	San Jose, CA	CH-65
WGOT-TV	Merrimack, NH	CH-60
WTLK-TV	Rome, GA	CH-14
KTFH(TV)	Conroe, TX	CH-49
WAKC-TV	Akron, OH	CH-23
KXLI(TV)	St. Cloud, MN	CH-41
KWBF(TV)	Flagstaff, AZ	CH-13
KUBD(TV)	Denver, CO	CH-59
WCEE(TV)	Mt. Vernon, IL	CH-13
WHKE(TV)	Kenosha, WI	CH-55
KMNZ-TV	Oklahoma City, OK	CH-62
WPBF(TV)	Tequesta, FL	CH-25
WAAP(TV)	Burlington, NC	CH-16
W OCD(TV)	Amsterdam, NY	CH-55
WTJC(TV)	Springfield, OH	CH-26
WJUE(TV)	Battle Creek, MI	CH-43
WSJN-TV	San Juan, PR	CH-24
WKPV(TV)	Ponce, PR	CH-20
WJWN-TV	San Sebastian, PR	CH-38
KINZ(TV)	Arlington, TX	CH-68
KINB(TV)	Kansas City, MO	CH-50
PCC TELEVISION STATIONS (INTEREST ONLY)		
KAJW(TV) [49%]	Tolleson, AZ	CH-51
KVUT(TV) [49%]	Little Rock, AR	CH-42
KGLB-TV [49%]	Okmulgee, OK	CH-44
WSWB-TV [49%]	Scranton, PA	CH-64
WOST-TV [50%]	Block Island, RI	CH-69
CHRISTIAN NETWORK TELEVISION STATIONS		
WIRB(TV)	Melbourne, FL	CH-56
WFCT(TV)	Bradenton, FL	CH-66
WCTD(TV)	Miami, FL	CH-35
WHRC(TV)	Norwell, MA	CH-46
ROBERTS TELEVISION STATIONS		
KZAR-TV	Provo, UT	CH-16
WTWS(TV)	New London, CT	CH-26

CALL SIGN	COMMUNITY OF LICENSE	CHANNEL OR FREQ. ASSIGN.
KTVJ(TV)	Boulder, CO	CH-14
WKZX(TV)	Cookeville, TN	CH-28
WHSL(TV)	E. St. Louis, IL	CH-46
DP MEDIA TELEVISION STATIONS		
WSHE-TV	Martinsburg, WV	CH-60
WRMY(TV)	Rocky Mount, NC	CH-47
PENDING PCC TELEVISION ACQUISITIONS (UNDER CONTRACT)		
WVVI(TV)	Manassas, VA	CH-66
WBSX(TV)	Ann Arbor, MI	CH-31
KBCB(TV)	Bellingham, WA	CH-64
KCMY(TV)	Sacramento, CA	CH-29
KOOG-TV	Ogden, UT	CH-30
WNAL-TV	Gadsden, AL	CH-44
WEFC(TV)	Roanoke, VA	CH-38
WBIS(TV)	New York, NY	CH-31
WSCO(TV)	Suring, WI	CH-14
WPCB-TV	Greesburg, PA	CH-40
WAQF(TV)	Batavia, NY	CH-51
KTVC(TV)	Cedar Rapids, IA	CH-48
KKAG-TV	Porterville, CA	CH-61
COCOLA TELEVISION STATIONS		
KXVO(TV)	Omaha, NE	CH-15
KGMC(TV)	Clovis, CA	CH-43

ATTACHMENT NO. 2

DTV Coverage Comparison

Stations with DTV ALLOCATION replications less than current NTSC					
Station	Market	NUMBER LOST		PERCENTAGE LOST	
		Pop.	HH	POP%	HH%
KAJW	PHOENIX	132,000	56,000	5.95	6.7
KINZ	DALLAS	425,000	146,000	9.18	8.46
KVUT	LITTLE ROCK	373,000	144,000	33.42	34.04
WAQF	ROCHESTER	356,000	147,000	15.77	17.05
WHAI	BRIDGEPORT	1,842,000	609,000	23.01	21.22
WHKE	MILWAUKEE	237,000	92,000	7.57	7.92
WNAL	BIRMINGHAM	473,000	176,000	30.2	29.67
WRMY	RALEIGH	93,000	35,000	5.35	5.32

ATTACHMENT NO. 3

DTV vs. NTSC Statistics

STATION	MARKET	DTV					NTSC					TYPE	DATE
		CH.	LATITUDE	LONGITUDE	HAAT	POWER	CH.	LATITUDE	LONGITUDE	HAAT	POWER		
KKAG	Fresno, CA	48	36-17-14	118-50-17	811.0	74.5	61	36-17-14	118-50-17	811.0	2,510.0	CP	7/17/90
KOOG	Salt Lake City, U	29	40-39-25	112-12-07	1190.0	57.7	30	40-39-25	112-12-07	1,190.0	1,550.0	CP	3/31/95
KTVC	Cedar Rapids, IA	47	42-17-17	091-52-54	323.0	79.8	48	42/17/17	091-52-54	323.0	2,950.0	CP	10/11/95
KVUT	Little Rock, AK	43	34-52-28	092-00-35	156.0	133.7	42	34-52-28	092-00-35	156.0	5,000.0	CP	9/27/93
KWCV	Wichita, KS	34	37-33-58	097-19-28	133.0	50.0	33	37-33-58	097-19-28	133.0	74.1	CP	6/10/92
KZAR	Salt Lake City, U	17	39-51-54	111-53-39	57	242.2	16	39-51-54	111-53-39	57.0	5,000.0	CP	5/19/89
								40-16-45	111-56-00	859.0		3/13/96	
WAAP	Greensboro, NC	14	35-56-22	079-25-47	256.0	50.1	16	35-56-22	079-25-47	256.0	1,910.0	LIC	8/15/84
WAKC	Cleveland, OH	59	41-03-51	081-34-59	293.0	429.9	23	41-03-51	081-34-59	293.0	1,290.0	LIC	
								41-03-51	081-34-59	293.0			
WAQF	Rochester, NY	53	42-53-42	078-00-56	124.0	50.0	51	42-53-42	078-00-56	124.0	708.0	CP	3/20/95
WBIS	New York, NY	30	40-42-43	074-00-49	475.0	99.6	31	40-42-43	074-00-49	475.0	2,820.0	LIC	7/3/86
								40-42-43	074-00-49	475.0		12/5/96	
WHBI	West Palm Bch,	36	26-43-35	080-04-53	60.0	50.0	67	26-43-35	080-04-53	60.0	501.0	CP	10/25/93
WKZX	Nashville, TN	39	36-07-44	085-20-47	279.0	50.0	28	36-07-33	085-17-33	265.0	229.0	LIC	3/2/89
WNAL	Birmingham, AL	45	33-57-20	086-12-53	303.0	50.0	44	33-57-20	086-12-53	303.0	1,700.0	LIC	1/12/95
WPCB	Pittsburgh, PA	50	40-23-30	079-46-51	299.0	50.0	40	40-23-30	079-46-51	299.0	1,170.0	LIC	4/10/79
WRMY	Raleigh, NC	15	36-06-11	078-11-29	371.0	90.5	47	36-06-11	078-11-29	371.0	5,000.0	CP	9/15/95
								36-06-11	078-11-29			7/16/96	
WSWB	Scranton, PA	32	41-26-09	075-43-33	374.0	50.0	64	41-26-09	075-43-33	374.0	7.9	CP	7/20/89
NEW	Santa Fe, NM	29	35-42-05	105-57-58	33.0	199.6	19	35-46-50	106-31-35	601.3	5,000.0	CP	2/10/97