

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

RECEIVED

MAR 15 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Review of the Commission's)
Rules and Policies)
Affecting the Conversion)
To Digital Television)
)

MM Docket No. 00-39

To: The Commission

PETITION FOR RECONSIDERATION AND CLARIFICATION

Paxson Communications Corporation ("Paxson"), by its attorneys and pursuant to 47 C.F.R. § 1.429(a) (1999), hereby files this Petition for Reconsideration and Clarification ("Petition") of a portion of the Commission's *Report and Order* in the above captioned proceeding.¹ Directly and through wholly-owned subsidiaries, Paxson owns the largest group of full power television stations in the country and has numerous DTV construction permit applications pending before the Commission. By its Petition, Paxson respectfully requests the Commission to reconsider its decisions to apply first-come, first-served processing cut-off procedures only to DTV applications filed after January 18, 2001, to create a replication incentive whereby DTV stations will lose interference protection to their unreplicated service areas after December 31, 2004, and to impose increased city grade coverage requirements on DTV stations.

¹Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, *Report and Order and Further Notice of Proposed Rulemaking*, MM Docket No. 00-39 (rel. Jan. 19, 2001); 66 Fed. Reg. 9973 (Feb. 13, 2001) ("*Report and Order*"). This petition is timely filed within thirty days of the date of publication of the *Report and Order* in the *Federal Register*. See 47 C.F.R. §§ 1.429(d), 1.4(b) (1999).

No. of Copies rec'd at 11
GDE

I. THE COMMISSION SHOULD APPLY FIRST-COME, FIRST-SERVED CUT-OFF PROCEDURES TO ALL DTV APPLICATIONS.

The Commission should reconsider its decision not to apply its first-come, first-served processing procedures to all DTV applications whether they were filed before or after January 18, 2001. The Commission did not inform DTV applicants that they would not receive protection for their pending construction permit applications, and the Commission never indicated that DTV applicants would have no processing protection until after January 18, 2001. DTV applicants reasonably anticipated that, based on past FCC experience, their construction permit applications would be protected upon filing, and it is legally wrong for the FCC to now attempt to deny such protection to any application filed prior to January 18, 2001. Prior to the *Report and Order*, the FCC had not indicated that it would not utilize a first-come, first-served processing procedure for DTV. The Commission issued numerous decisions in establishing the DTV assignment, service and application rules and never gave any indication that it would not employ its normal processing procedures until long after DTV construction permit applications were filed by all television stations. Paxson believes that this is a totally indefensible and unfair position that should be promptly remedied by the FCC. If relief from this wrong policy is not obtained from the agency, Paxson believes that it presents a compelling case for judicial review.

In the *Report and Order*, the Commission adopted its reasonable and often utilized cut-off procedures for DTV construction permit applications filed after the adoption date.² These applications will be cut-off as of the close of business on the day filed and later-filed applications must protect earlier-filed, cut-off DTV applications. Paxson supports the Commission's

² Report and Order at ¶ 39.

reasoned decision to apply first in time priority to DTV construction permit applications because it is fair to the applicants and consistent with what the Commission has done in the past.

The Commission, however, must extend this reasoning to resolving conflicts **among all pending DTV construction permit applications**, and it is wrong and inconsistent with past Commission practices not to afford such first-come, first-served protection to all DTV construction permit applications.³ The Commission incorrectly decided to treat equally any pending DTV applications filed before the adoption of the *Report and Order*, no matter when they were filed.⁴ If two applications filed before that date are mutually exclusive, the licensees must resolve the interference during a ninety-day period following notification or both applications will be dismissed. Accordingly, a party who submitted a fully compliant application on January 1, 1999, could nevertheless find its application mutually exclusive with an application filed, say, two years later, whose applicant need not have taken any measures to protect the previously filed application. This is patently unfair. The Commission must apply first-come, first-served processing procedures to these applications so that the January 1, 1999, applicant can protect its investment in time and expense against later-in-time applicants that have possibly exploited Commission procedures.

By not applying first in time cut-off procedures to all DTV construction permit applications, the Commission would create an arbitrary system that is in conflict with the Commission's customary processing procedures. Under this arbitrary procedure, applications can be granted irrespective of the order in which they were filed at the Commission. As such,

³ See 47 C.F.R. §§ 73.3571(f); 73.3573(e), (f); 74.1233(b), (d); 1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, *Report and Order*, 14 FCC Rcd 5272, ¶ 6 (1999) (extending first-come, first-served processing to AM, noncommercial educational FM and FM translator minor change applications).

⁴ *Report and Order* at ¶ 39.

the applicant that filed an application on January 1, 1999, may discover that the Commission grants an application that was filed on January 1, 2001, before it grants his application. Not only is the 1999 applicant still waiting for his application to be granted; but it also may be required to modify the application at its own expense and likely to its detriment solely to protect the later-filed, but now granted application.

The Commission rejected first-come, first-served procedures for all pending DTV applications in its *Report and Order* because the Commission unreasonably concluded that it would be unfair to applicants to apply retroactively a first in time priority system.⁵ The Commission also stated that because so many applications were filed on the DTV deadlines, such an approach would not resolve the many mutually exclusive applications.⁶ Yet, as the aforementioned scenarios illustrate, such problems are dwarfed by the inequities of the procedures adopted by the FCC in the *Report and Order*. Furthermore, even if many of the applications filed on the same day remain mutually exclusive, application of cut-off procedures will resolve the remaining applications and reflect a more objective, fair system than the current policy. Clearly, the Commission has authority to grant Paxson's petition for reconsideration and modify its processing procedures for all pending DTV construction permit applications.⁷

For the foregoing reasons, Paxson urges the Commission to apply first in time cut-off procedures to all DTV construction permit applications whenever filed. In this manner, the Commission would alleviate the arbitrary and unfair circumstances that have resulted from the current policy and instead apply fair, objective criteria to the processing of DTV construction permit applications. Such relief is needed immediately. Paxson, along with many other DTV

⁵ *Id.* at ¶ 40.

⁶ *Id.*

⁷ See *Community Television, Inc. v. FCC*, 216 F.3d 1133, 1143 (D.C. Cir. 2000).

applicants, has pending DTV construction permit applications that are not being granted because of late-filed applications that made no effort to protect the first-filed application. Many of these applicants are holding up the grant of the earlier-filed applications by making unreasonable, and often monetary, demands. The FCC's ill-conceived processing procedure is permitting this type of behavior to occur. It must stop.

II. THE COMMISSION SHOULD NOT ADOPT AN INCREASED CITY GRADE COVERAGE REQUIREMENT.

In the *Report and Order*, the Commission imposed a stronger (7 dB) principal community coverage requirement than it initially adopted due to its concerns about the reliability of DTV service to the community of license.⁸ In its comments in response to the Commission's *Notice*, Paxson maintained that increasing the coverage requirement was not warranted because it addressed only speculative concerns while imposing very real burdens. Paxson provided details of three stations that would be adversely impacted by the coverage requirement.⁹ Although the Commission has adopted a less rigorous requirement than it had proposed, these three stations still could not comply with the new coverage obligations if operating with the currently authorized or proposed facilities.

For these three stations to comply with the new rule, the Commission would impose significant undesirable costs, the foremost being the likely loss of service in contradiction of the Commission's intention to improve DTV service reliability. These stations would have to abandon specifically designed structures, scrap expensive implementation plans, and possibly construct new towers –in addition to incurring the mandated DTV implementation costs. For

⁸ *Report and Order* at ¶ 27.

⁹ WPXH-DT (Gadsen, Alabama); KPXB-DT (Conroe, Texas); and KPXN-DT (San Bernardino, California).

example, WPXH-DT cannot comply with the coverage regulation if the station transmits from the allotted and authorized reference site. This is not a case where a station is, as the Commission speculated, seeking to move its DTV transmitter away from the existing NTSC site toward more centralized locations.¹⁰ In anticipation of dual operation during the transition period, Paxson specially constructed the station's tower structure to support both analog and digital facilities. The Commission apparently would now expect WPXH-DT to relocate from its allotted site and abandon its specially constructed tower solely to comply with the coverage regulation. For some of the station's viewers (both analog and digital), such a relocation inevitably would result in a loss of service – exactly what the Commission is attempting to prevent.

The Commission should not impose this heightened DTV coverage requirement. At a minimum, the Commission should entertain a liberal waiver policy of the rule – at least until such time as facts develop to support what remains a speculative concern. If the Commission wishes, it can revisit the issue once broadcasters gain sufficient field experience that might justify an increased coverage requirement.

III. THE COMMISSION MUST CONTINUE TO PROTECT UNREPLICATED SERVICE AREAS AFTER DECEMBER 31, 2004.

Paxson respectfully urges the Commission to reconsider its decision that after December 31, 2004, DTV stations which do not replicate their NTSC Grade B service area will lose interference protection to their unreplicated service areas.¹¹ Although framing the loss of protection as an incentive to replicate analog service, because broadcasters still will have had

¹⁰ Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television, *Notice of Proposed Rule Making*, MM Docket No. 00-39, FCC 00-83, at ¶ 19 (rel. Mar. 8, 2000) (“*Notice*”).

¹¹ Report and Order at ¶ 22.

minimal practical experience with digital television service, the Commission is, in effect, imposing a replication requirement that it rejected in its *Report and Order*. As the Commission recognizes, broadcasters have sufficient market incentives to replicate their signal.¹²

Accordingly, the imposition of a replication incentive only two years after most broadcasters commence DTV service is premature given the speculative nature of a market failure.

The Commission adopted its replication incentive because it wished “to assure that viewers do not lose service” and took seriously its mandate “to speed the [DTV] transition.”¹³ Yet it is not reasonable that these concerns translate into what amounts to an implicit 2004 replication requirement. Already required to serve their communities of license, broadcasters are obliged to cover the great majority of their centrally located analog service population with digital signals. Accordingly, in all but a few markets, the absence of a replication requirement would not delay the date of 85% market penetration and, thereby, the close of the DTV transition period.¹⁴

Indeed, as the Commission itself notes in its *Report and Order*, a replication requirement will be harmful to the DTV transition:

[W]e will not require such replication because we want to give broadcasters a measure of flexibility as they build their DTV facilities to collocate their antennas at common sites, thus minimizing potential local difficulties locating towers and eliminating the cost of building new towers. Some broadcast commenters have taken advantage of these measures, which we suggested in the *Fifth Report and Order*, and it would be unfair to them and might delay

¹² See *id.* at ¶ 23.

¹³ *Id.* at ¶ 22.

¹⁴ Meeting the 2006 scheduled end of the DTV transition period appears unlikely. The Congressional Budget Office frankly has concluded that “[i]t now appears likely that the [DTV] transition will extend beyond [the scheduled] 2006 in most markets, with its ultimate end date uncertain.” *Completing the Transition to Digital Television*, Congressional Budget Office, Congress of the United States (Sept. 1999). See also 47 U.S.C. § 309(j)(14) (2000).

construction to require them to change these plans, if necessary, to achieve full replication.¹⁵

Paxson agrees with the Commission that it would be harmful to the overall implementation of digital television to impose a replication requirement on broadcasters at this time. A decision to replicate existing service requires experience with and analysis of actual DTV operations, and many broadcasters simply will not be able to collect all of the data they need by the proposed December 31, 2004, deadline. Moreover, with the recent addition of primary protection to low power Class A stations that are capable of shoe-horning new service,¹⁶ the cost of removing replication protection is very real. Ample time remains for the Commission later to impose a replication incentive of the type it adopted in the *Report and Order*.

As the Commission itself states, “most DTV licensees will replicate their NTSC service areas, and we have decided that an express requirement is unnecessary in this regard. DTV licensees have incentives to replicate to serve their established viewers.”¹⁷ The imposition of a premature, regulatory incentive for replication, however, is contrary to this recognition. As the December 31, 2004, replication deadline approaches, a station that does not replicate service will sacrifice protection of its coverage area, a consequence from which it may never recover as competitors seize the opportunity to stake a claim. Stations that cannot serve their entire area by December 31, 2004, would be stunted in the early stages of development as their coverage area is permanently reduced by anyone who wishes to claim the stations’ coverage area. Accordingly, in a very real sense, some viewers would lose access to the broadcast service upon which they

¹⁵ *Report and Order* at ¶ 21.

¹⁶ *See Establishment of a Class A Television Service, Report and Order*, 15 FCC Rcd 6355, ¶¶ 67-75 (2000).

¹⁷ *Report and Order* at ¶ 23.

rely – the same loss of service the Commission seeks to avoid in creating the replication incentive.

It is premature for the Commission to impose a regulatory replication incentive while the DTV transition is still in its early stages and there is no evidence of a market failure or a causal delay in implementing digital service. The removal of interference protection of unreplicated coverage areas at this time may result in unintended detrimental effects on the development of DTV stations. The Commission would better serve its goals of a successful DTV transition by continuing to protect DTV stations' unreplicated service areas and reconsider the matter in its next periodic review.

IV. THE COMMISSION SHOULD CLARIFY THAT IT WILL PROTECT BOTH THE ANALOG AND DIGITAL SERVICE AREAS OF THOSE STATIONS WHICH DO NOT HAVE A PAIRED CHANNEL.

In the *Report and Order*, the Commission acknowledged various complexities of refining its application processing software.¹⁸ Paxson is concerned that the current computer program may not adequately protect those broadcast stations which did not receive a paired allotment for dual analog and digital operation during the DTV transition or which relinquish the digital allotment as part of the 700 MHz band clearing. Particularly, with the foreknowledge that these stations must convert to digital operations on their single channel, the Commission should clarify that its evaluation software and underlying policies ensure that (1) these stations' NTSC operations are protected against interference for the duration of the transition in accordance with its rules; and (2) the ability of these stations to provide replicated digital service is protected. In this manner, these single-channel stations are assured that they can provide reliable analog service throughout the transition and that a loss of service would not occur upon conversion.

¹⁸ *Id.* at ¶¶64-66.

The Commission should apply this same approach to those stations which voluntarily convert to single channel operation during the course of the DTV transition.

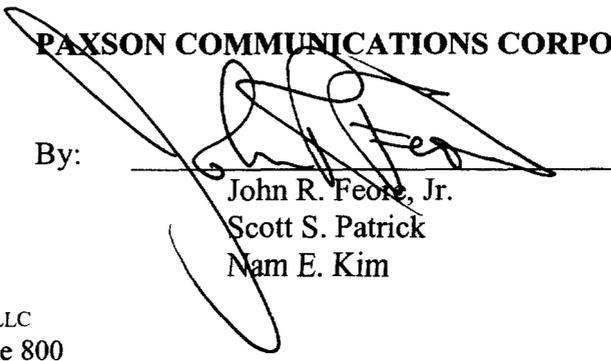
CONCLUSION

In light of the foregoing, Paxson respectfully urges the Commission to reconsider its decision not to apply first-come, first-served cut-off procedures to all DTV applications. By adopting first in time cut-off procedures for applications filed on or before January 18, 2001, the Commission would apply fair, objective criteria to the processing of all DTV applications in a manner consistent with the Commission's processing procedures and the fair expectations of DTV applicants. In addition, the Commission should not impose its heightened principal community coverage requirement because it will result in the loss of service the FCC intends to prevent. Paxson also urges the Commission to reconsider its decision to cease protection of a DTV station's unreplicated service area after December 31, 2004. As the Commission itself notes, broadcasters have sufficient incentives to replicate their analog service areas, and it is premature to remove protection of unreplicated areas while most broadcasters have yet to commence service. The Commission should afford broadcasters the flexibility that they need at this time to ensure a successful DTV transition.

Respectfully submitted,

PAXSON COMMUNICATIONS CORPORATION

By:



John R. Feore, Jr.
Scott S. Patrick
Nam E. Kim

DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Ave., NW, Suite 800
Washington, D.C. 20036
(202) 776-2000
Its Attorneys
Dated: March 15, 2001