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

In the Matter of		
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Review of the Commission's	)	
Rules and Policies Affecting the	)	
Conversion to Digital Television	)	MM Docket No. 00-39
(Miami, Florida)	)	
	)	
	)	

To: The Secretary

EX PARTE PRESENTATION

Barry Telecommunications, Inc. submits this memo and incorporated summary for inclusion in the record of the above-referenced rulemaking proceeding. This presentation was made by undersigned counsel to Rick Chessen, Esq. on October 18, 2001.

Summary of Oral Ex Parte Presentation MM Docket No. 00-125

The issue is what type of cut-off mechanism should be established for DTV minor modification applications.

Among the stations affected are WTVJ and WPXM, Miami, Florida and WXEL-TV, West Palm Beach, Florida. WXEL-TV is a non-commercial educational broadcasting station controlled by Barry University. WTVJ is an NBC owned and operated station. WPXM is ultimately owned by Paxson Communications Corp. ("Paxson"). NBC owns a substantial portion of Paxson and has the right to purchase control of Paxson.[1] Many of the operations of WTVJ and WPXM are

[1] The exercise of the option is now complicated due to the recent announcement that NBC will acquire Telemundo. Telemundo owns WSCV, Channel 51, in the Miami market. Thus, NBC must avoid an interest in this television station that would contravene the FCC multiple ownership rule.

integrated under a joint sales agreement, including sales, research, collections and inventory management.

Analog (NTSC) stations WTVJ, Channel 6 and WPXM, Channel 35, are located substantially south of Miami Florida due to spacing problems. The antenna sites for most other television stations in the Miami-Ft. Lauderdale market are located at the Hallandale antenna farm north of Miami between Miami and Fort Lauderdale.[2] Station WXEL-TV is located in Palm Beach County, north of Boynton Beach and south of Lake Worth.

Under the staggered filing system developed in the digital television rulemaking, different filing deadlines applied to the WTVJ, WPXM and WXEL-TV digital construction permit applications. WTVJ, a network affiliate in the top 30 markets, was required to apply for its construction permit by August 1, 1998. WPXM, an unaffiliated station in the top 30 markets, had until November 1, 1999 to apply. WXEL-TV, a non-commercial educational television station had until May 1, 2000 to apply for its DTV construction permit.[3]

Stations WTVJ-DT, WPXM-DT and WXEL-DT were assigned digital channels 30, 26 and

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WTVJ's antenna is located more than 30 miles south of the Hallandale antenna farm. WPXM's antenna is located approximately 15 miles south of the Hallandale antenna farm.

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WXEL-TV filed its application, BPEDT-20000403AAT on April 3, 2000. WPXM filed its application, BPCDT-19991020AAC, on October 20, 1999. WTVJ has not yet filed a DTV application because of a proposal to change its digital allotment.

*27, respectively. Each of these channels worked well at the stations' existing analog transmitter sites. WXEL-DT filed for its digital facilities at the existing WXEL-TV transmitter site. WTVJ-DT and WPXM-DT did not apply for digital facilities at their NTSC transmitter sites.

NBC and Paxson viewed the conversion to digital television as an opportunity to move the transmitter location of WTVJ and WPXM. The best available channel for digital operations from the Hallandale antenna farm was DTV Channel 31. Paxson first proposed that WPXM be assigned DTV Channel 31 in its May 26, 1998 supplement to petition for partial reconsideration filed in MM Docket No. 87-268. In August 1998, NBC filed a petition for rulemaking proposing that DTV Channel 31 be assigned for use by WTVJ. In December 1999, NBC and Paxson settled their DTV Channel 31 impasse by agreeing that WPXM-DT would prosecute its pending application for digital Channel 26 facilities at the Hallandale antenna farm and, if the WPXM-DT application were granted, WPXM would not prosecute a DTV Channel 31 rulemaking proposal.[4] WPXM-DT would then dismiss its expression of interest in the DTV Channel 31 rulemaking.

Four weeks before the noncommercial educational television deadline for DTV applications, WXEL-DT applied for its Channel *27 DTV facilities. WXEL proposed to continue to operate its digital television station from WXEL-TV's existing tower site. This minor mod application protected the allotted WPXM-DT facilities south of Miami, but was mutually exclusive with WPXM's minor mod to locate WPXM-DT at the Hallandale antenna farm, 15 miles north of NTSC station WPXM's antenna site.

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This settlement followed quickly on the heels of NBC's September 1999 investment of $415,000,000 in Paxson.

When WXEL-DT and WPXM-DT filed their minor modification applications to implement digital television, the cut-off procedures then in place for DTV minor mod applications were identical to those for NTSC TV minor mod applications. Thus, no procedures existed to cut off their applications, prior to grant, from the filing of mutually exclusive applications.

DTV Cut-off Procedures

In MM Docket No. 00-39, the FCC for the first time proposed to adopt cut-off procedures for DTV minor mod applications. WPXM's licensee, Paxson, did not file any comments on this proposal. The FCC released its January 19, 2001 Report and Order and Further Notice of Proposed Rulemaking, FCC 01-24 (the "Report and Order"), adopting a January 18, 2001 cut-off for all pending DTV minor mod applications. Paxson petitioned for reconsideration, alleging that first come-first serve cut-off procedures should have been adopted.

Paxson's reconsideration was a collection of unsupported arguments. For example, Paxson argued that the Commission did not inform DTV applicants filing minor mods before 1/19/01 that they would not receive cut off protection for pending applications. However, the Commission had not adopted any DTV cut-off procedures at the time WPXM-DT filed its minor mod. The Rulemaking was to consider and adopt cut-off procedures for the first time.

Paxson argued that DTV minor mod applicants reasonably expected cut-off protection upon filing, based on past FCC experience. However, past experience with NTSC television applications would not lead to an expectation of first come/first serve cut-off procedures. Minor change analog TV applications are cut-off when they are granted, not when they are filed. Paxson's arguments were based on radio and LPTV procedures, not TV procedures.

Paxson argued that applicants were not informed that the FCC would not utilize first come,

first served cut-off procedures for DTV prior to 1/19/01. However, as acknowledged in the Rulemaking, there were no cut-off procedures prior to 1/19/01.

Paxson argued that if the first come, first serve cut-off procedures were reasonable for applications filed after adoption of the Report and Order, they should also be applied to applications filed before the Report an Order was adopted. Any other result would, in Paxson's view, be arbitrary.

However, applying rules prospectively is always more fair than applying them retroactively. Moreover, the FCC's existing staggered DTV filing deadlines tended to produce MX applications filed on the same day. Therefore, retroactive application of the new cut-off procedures would not likely provide great benefits. More importantly, these same staggered deadlines would unfairly favor large market commercial stations over smaller adjacent markets and commercial stations over non-commercial stations under the first filed cut-off scheme advocated by Paxson.

Finally, in the case of WPXM, the licensee is seeking to move its transmitter site 15 miles North, in the direction of WXEL-TV, to serve areas never before served by the station. This compares to a West Palm Beach digital television station locating its facilities at its existing analog site. WPXM was purchased with a site restriction limiting the station to transmitter sites well South of Miami. It seeks to capitalize on DTV "maximization" to relocate its facility 15 miles north of its original NTSC service area.

In Paxson's Reply to WXEL's opposition to the petition for reconsideration, Paxson argued that all DTV applicants knew that minor mod applications were subject to first come, first serve processing, i.e., they would be processed in the order in which they were filed. Therefore Paxson concludes they knew and expected first come, first serve cut-off procedures. This is simply not true.

All analog TV minor mod applicants know they receive first come, first serve processing but they do not receive first come, first serve cut-off protection. The cut-off process for DTV minor mods was the same as that for NTSC minor mods. It was a well known process and was not the cut-off process described by Paxson. The FCC adopted its new cut-off procedures for DTV minor mods in a fair manner and was correct to apply them prospectively. Paxson's request for retroactive application of cut-off procedures unfairly prejudices those noncommercial educational broadcasters relying on the staggered filing procedures established for DTV applications.

Respectfully submitted,

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