

ANN BAVENDER\*  
JOHN C. BUTCHER\*  
HARRY F. COLE  
ANNE GOODWIN CRUMP  
VINCENT J. CURTIS, JR.  
PAUL J. FELDMAN  
FRANK R. JAZZO  
M. SCOTT JOHNSON\*  
MITCHELL LAZARUS  
STEPHEN T. LOVELADY\*  
SUSAN A. MARSHALL  
HARRY C. MARTIN  
ALISON J. MILLER  
FRANCISCO R. MONTERO  
LEE G. PETRO\*  
RAYMOND J. QUIANZON  
MICHAEL W. RICHARDS\*  
JAMES P. RILEY  
KATHLEEN VICTORY  
HOWARD M. WEISS

\* NOT ADMITTED IN VIRGINIA

FLETCHER, HEALD & HILDRETH, P.L.C.

ATTORNEYS AT LAW

11th FLOOR, 1300 NORTH 17th STREET

ARLINGTON, VIRGINIA 22209

OFFICE: (703) 812-0400

FAX: (703) 812-0486

www.fhhlaw.com

RETIRED MEMBERS  
RICHARD HILDRETH  
GEORGE PETRUTSAS  
CONSULTANT FOR INTERNATIONAL AND  
INTERGOVERNMENTAL AFFAIRS  
SHELDON J. KRYS  
U. S. AMBASSADOR (ret.)  
OF COUNSEL  
DONALD J. EVANS  
EDWARD S. O'NEILL\*  
ROBERT M. GURSS\*  
EUGENE M. LAWSON, JR.  
WRITER'S DIRECT

March 15, 2005

**By Electronic Comment Filing System**

Marlene H. Dortch, Esquire  
Secretary  
Federal Communications Commission  
445 12th Street, S.W., Room TW-B204  
Washington, D.C. 20554

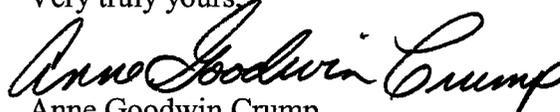
Re: MB Docket 03-15  
File No. BFRECT-20050210AUC

Dear Ms. Dortch:

Attached hereto on behalf of Caroline K. Powley are her Comments in Opposition to Negotiated Channel Election Arrangement with regard to the above-referenced Digital Channel Election Form - First Round Election.

Should any questions arise concerning this matter, please communicate with this office.

Very truly yours,



Anne Goodwin Crump  
Counsel for Caroline K. Powley

Enclosure

cc: Ms. Nazifa Sawez (w/enc.) **By Hand Delivery**  
Paxson Des Moines License, Inc. (w/enc.) **By FedEx**  
David D. Burns, Counsel for Capital Communications Company (w/enc.) **By FedEx**  
Mark J. Prak, Counsel for Des Moines Hearst-Argyle TV (w/enc.) **By FedEx**  
Todd D. Gray, Counsel for Iowa Public Broadcasting Board (w/enc.) **By FedEx**  
David A. O'Connor, Counsel for New York Times Management Services (w/enc.)  
**By FedEx**  
Kathryn Schmeltzer, Counsel for KDSM Licensee, LLC (w/enc.) **By FedEx**  
John G. Johnson, Jr., Counsel for Pappas Telecasting of Iowa (w/enc.) **By FedEx**  
David Tillotson, Counsel for Second Generation of Iowa (w/enc.) **By FedEx**  
Meredith S. Senter, Counsel for KCWE-TV, Inc. (w/enc.) **By FedEx**

BEFORE THE

**Federal Communications Commission**

WASHINGTON, D.C. 20554

In the Matter of ) MB Docket 03-15  
)  
Negotiated Channel Arrangement for ) File No. BFRECT-20050210AUC  
KFPX(TV), Facility Identification No. 81509, )  
Newton, Iowa )

Directed to: Chief, Media Bureau

**COMMENTS IN OPPOSITION TO  
NEGOTIATED CHANNEL ELECTION ARRANGEMENT**

Caroline K. Powley (“Powley”), permittee of KDMI-DT, Facility Identification Number 78915, Des Moines, Iowa, by her attorneys, hereby submits her Comments in opposition to the above-captioned “Negotiated Channel Election Arrangement” for which Paxson Des Moines License, Inc. (“Paxson”), licensee of KFPX(TV), Newton, Iowa, has sought Commission approval. With respect thereto, the following is stated:

1. As indicated in its Digital Channel Election Form - First Round Election on FCC Form 382, KFPX(TV) is currently licensed for analog operation on Channel 39 and has no paired digital channel. Through the device of claiming on its First Round Election Form to have entered into a negotiated channel election arrangement, Paxson is now seeking to exchange its currently assigned, in-core channel for a different in-core channel, Channel 29. The Form 382 filing lists a number of stations in the Des Moines/Ames area with which it is stated that KFPX(TV) has entered into the negotiated channel election arrangement.

2. Powley’s station KDMI-DT, on the other hand, is a digital-only station with no paired

analog channel. Moreover, KDMI-DT's sole channel is Channel 56, outside the core.

Consequently, KDMI-DT was unable to participate in the first round of channel elections, and it is vitally interested in the pool of channels that will be available for election in the second round. Powley is, therefore, clearly a party in interest with regard to the KFPX(TV) channel election.

3. The Commission has specifically stated that negotiated channel election arrangements are subject to Commission approval, and that it will particularly consider "the effect on the channel election rights of, and interference impact on, any licensee not a party to the negotiated channel election agreement." *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, FCC 04-192, released September 7, 2004, at ¶45. In this instance, as set forth below, approval of the KFPX(TV) channel election would have substantial negative, and inequitable, effects on Powley's channel election rights.

4. Powley objects to KFPX(TV)'s channel election on the basis that it appears that there is, in fact, no negotiated channel arrangement at all, but rather only a unilateral attempt by Paxson to change the allotted channel for KFPX(TV). The Commission has stated that it will require "[e]vidence of a signed negotiated channel election arrangement..." (*id.*) in order to consider the negotiated channel election request. Normally, that evidentiary requirement is satisfied by providing the names and call signs of the other licensees and stations involved, but the Commission has specifically stated that it may require licensees to provide a copy of the signed agreement. *Id.*, n. 93. Clearly, this is a case in which such a request to Paxson is warranted.

5. While, as indicated above, Paxson has listed a number of stations with which it states it has entered into a negotiated channel election arrangement, it is far from clear that the listed

stations actually agreed to anything. Powley has been informed that at least one of those stations, KPWB-TV, Ames, Iowa, did not enter into any agreement, or even any negotiation, with Paxson with regard to channel elections. Indeed, Pappas Telecasting of Iowa, LLC, the licensee of KPWB-TV has indicated that it received no communications from Paxson prior to the filing of the First Round Election Form and knew nothing about any claimed agreement at the time of its filing, or, for that matter, prior to the issuance of the Commission's March 1, 2005, *Public Notice*, DA 05-519. Rather, after inquiry, it appears that Paxson claims to have sent a form letter to the listed parties with a request for consent and a statement that no response would be presumed to indicate consent. In this instance, however, Powley understands that silence indicated only lack of receipt of the communication in question.<sup>1</sup> In any event, it is quite clear that there were neither negotiations nor agreement with at least one of the licensees named as a party to a negotiated channel election arrangement, and it appears likely that the same pattern of behavior would extend to other licensees as well.

6. Further supporting the conclusion that there is no actual agreement among the various named parties is the fact that none of the other stations listed indicated on its Form 382 that it was a party to any negotiated channel election arrangement. Rather, all of the other stations selected response A, and each of those stations picked one of its currently allotted channels. It is therefore clear that there is no negotiated agreement among the parties for a better arrangement of channels to benefit the public interest, as contemplated by the Commission.

7. Instead, Paxson is acting unilaterally in an attempt, presumably, to improve its channel

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<sup>1</sup> Counsel for Powley is also aware of another, similar instance involving a Paxson-related entity in a different market in which a party which had registered an objection was listed as a party to a negotiated channel election arrangement.

allotment while circumventing the rule making process normally used for channel changes. To allow such an attempt to be successful would be grossly unfair and prejudicial to Powley.

According to the Commission's Consolidated Data Base System ("CDBS"), Paxson has been the licensee of KFPX since July 11, 2001. If Paxson believed that there was any difficulty with its currently assigned in-core channel, or if it thought its facilities could be improved by changing channels, it had a period of over three years in which to submit a petition for proposed rule making prior to the freeze imposed on petitions for DTV channel changes. *See Public Notice*, DA 04-2446, released August 3, 2004. Paxson elected not to make any such filing, however. It cannot now at this late date suddenly decide on its own, without any stated public interest rationale, that it wishes to change channels and go around the rule making process to do so. Once again, this is not a situation in which various parties within a market or geographic area get together to improve the channel arrangements among them. Powley does not contest that, as the Commission has concluded, such agreements can serve the public interest. Here, however, Paxson is acting unilaterally, and apparently to serve only its own interests.

8. Moreover, allowing such a circumvention of the normal processes would be especially inequitable to parties situated as Powley is. As noted above, both Paxson and Powley hold authorizations for stations with single channels only. Paxson's sole channel happens to be an in-core channel, while Powley's sole channel is out-of-core. Powley therefore must find an in-core channel to serve as its final, post-transition channel. Paxson is seeking to use the first round channel election process merely to move from one in-core channel to another. Powley, on the other hand, was precluded from participation in the first round by virtue of not having an in-core channel. Thus, if Paxson's election is allowed to stand, one single-channel station would be

allowed unilaterally to decide it wants a different channel and pick the best available channel, while another single-channel station would be excluded from the election process altogether at this point. Such a result is particularly egregious where, as here, the excluded station has no post-transition channel on which it can operate, while the station allowed to choose a different channel already has a channel on which it could operate permanently. This different treatment of similarly situated parties would be fundamentally unfair.

WHEREFORE, the premises considered, Powley respectfully requests that the Commission disapprove Paxson's above-captioned First Round Channel Election.

Respectfully submitted,

CAROLINE K. POWLEY

By:   
Vincent J. Curtis, Jr.  
Anne Goodwin Crump

Her Attorneys

FLETCHER, HEALD & HILDRETH, P.L.C.  
1300 North 17th Street  
Eleventh Floor  
Arlington, Virginia 22209  
(703) 812-0400

March 15, 2005