

under the facts of that case, then necessarily it does not exist here, where several alternative frequencies for WLLS's operation have been positively identified.

Nor do Petitioner's protestations that WLLS would be required to move to one of the available alternate channels "at its peril" show irreparable injury. The Engineering Statement submitted by Pittsburgh Television shows that predicted interference to other stations from a WLLS operation on either substitute channel could readily be kept within the 0.5 percent rounding tolerance allowed by the Commission.<sup>34</sup> And while it is of course true that Petitioner would be required to respond to any complaints of actual interference that it received by taking corrective action (for instance, by providing viewers with antennas capable of better discrimination between desired and undesired

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<sup>34</sup> *Reconsideration Opposition* at Exhibit A, Engineering Statement of Joseph M. Davis. In his *Petition for Reconsideration*, Schrecongost asserted that the Commission does not allow a 0.5 percent rounding allowance when using Longley-Rice analysis to evaluate interference that may be caused by a Class A facility change. This is simply wrong. In the *Class A Report and Order*, the Commission stated:

Where analysis is based on OET Bulletin 69 methods, we will allow a "service population" rounding tolerance of 0.5%, which is also allowed for NTSC applicants protecting DTV service.

*Class A Report and Order*, *supra*, 15 FCC Rcd at 6386. Schrecongost also claimed that the Channel 36 operation originally described in Pittsburgh Television's *Reply Comments* would exceed 0.5 percent predicted interference to the service area population. However, the results cited did not indicate the analysis cell or step size which was employed in the computer analysis. As the Engineering Statement submitted with Pittsburgh Television's *Reconsideration Opposition* made clear, its analysis of the Channel 36 operation that it discussed was based on a 1 km cell size analysis, which is a finer resolution than the standard 2 km cell size. The Commission has expressly stated that a finer resolution may be employed at the request of the proponent. *Public Notice, Additional Application Processing Guidelines for Digital Television (DTV)*, (released August 10, 1998).

signal directions, or merely by making adjustments in the orientation of an existing antenna), the necessity of doing so would involve precisely the kind of expenditure of “money, time and energy” that the Commission has expressly held does *not* amount to irreparable injury.

In short, Petitioner’s concerns about his possible responsibility to correct any actual interference that might result from WLLS’s operation on the available alternate channels falls far short of what is required to justify a stay. As the Media Bureau’s decision in *LocalOne Texas* makes clear, speculation about difficulties that *may* be encountered in the future, as to which solutions may *then* have to be found, does not amount to a demonstration of irreparable harm.

C. **A Stay Would Cause Significant Harm to WPCW and Pittsburgh Television**

Almost seven years after Pittsburgh Television made its initial request to change WPCW’s digital allotment to Channel 49 – in order to avoid the constraint on service to its community of license that would have been required on its Channel 30 assignment to avoid adjacent channel interference to another full power station – Schrecongost claims that Pittsburgh Television would not be injured by an indefinite delay in receiving authorization to construct the station’s digital facilities. That assertion is risible.

A review of the history leading up to the Commission’s *Report and Order* is instructive. On August 25, 1999, Pittsburgh Television filed a Petition for Rulemaking to amend the DTV Table of Allotments to substitute Channel 49 for Channel 30 as the station’s DTV frequency.<sup>35</sup> The petition explained that, because of its co-location with

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<sup>35</sup> See, *Petition for Rulemaking and Request for Expedited Action of Paramount*

the first adjacent allotment of WWCP-DT on Channel 29, WNPA could not move its transmitting site from its existing location – approximately 42 kilometers from Jeannette with significant intervening terrain – to one closer to its community of license. The petition urged that a channel change would eliminate this obstacle to improved service to Jeannette, and demonstrated that the proposed WNPA facilities would not create new interference to any station in excess of the Commission's *de minimis* standard.

On October 23, 2001, the Commission released a Notice of Proposed Rulemaking proposing to adopt the requested channel change, and also to approve a requested relocation of Station's transmitter site.<sup>36</sup> That rulemaking, however, was never completed, apparently because the Federal Register declined to publish it, which in turn was due to an earlier administrative error by the Commission.<sup>37</sup> It was not until February 17, 2005 that a new rulemaking proceeding proposing to approve the channel change was instituted.

The Commission finally issued its *Report and Order* substituting channel 49 for Channel 30 as WPCW's digital allotment on February 15, 2006. Now, more than four months later, Pittsburgh Television finds itself in the middle of pleading cycle about

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*Stations Group of Pittsburgh Inc.*, filed August 25, 1999.

<sup>36</sup> See, *Notice of Proposed Rulemaking, In the Matter of Amendment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations. (Jeannette, Pennsylvania)*, 16 FCC Rcd 18746 (2001).

<sup>37</sup> The Federal Register declined to publish the October 23, 2001 *Notice of Proposed Rulemaking* because of an earlier error that had caused the Federal Register to fail to publish the change in WPCW's allotment from Johnstown, Pennsylvania to Jeannette. (The above is based on an explanation given by Video Division personnel to Pittsburgh Television's representatives in response to queries as to the status of the channel-change rulemaking.)

whether the construction of WPCW's digital facilities should be put on indefinite hold – a fact wholly attributable to Schrecongost's leisurely pace in making its demand for further delay.

In the meantime, Congress has set February 17, 2009 as the date for the final digital transition. After that date, if WPCW has no digital signal, it will have no signal at all. In short, it will be out of business.

Under these circumstances, Schrecongost says that Pittsburgh Television will not be harmed if it is prevented from building WPCW's digital facilities until his ability to litigate this matter has been fully exhausted -- that is, until the Media Bureau has written its decision, the full Commission has disposed of the Application for Review that will surely follow, Schrecongost's appeal to the D.C. Circuit has been briefed and argued, and a judicial opinion has been written. Schrecongost's assertion may most politely be described as audacious.

**D. A Stay Would be Manifestly Contrary to the Public Interest.**

In arguing that the public interest requires a grant of a stay, Schrecongost expresses concern about "14,895 residents of the borough of Indiana, Pennsylvania, and the thousands of residents of the surrounding area, losing their only television station – a station that provides programming that is not otherwise available to those residents."<sup>38</sup>

As we have shown, there is no need for anyone to lose access to WLLS's programming, if only Schrecongost will avail himself of the Commission's liberal displacement procedures to move to either of the two alternate channels that are available to him. It is nonetheless instructive to compare what would be lost to the public should

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<sup>38</sup> Motion for Stay at 10.

Schrecongost decide to take WLLS off the air, and what the public will lose as a result of WPCW's being prevented from constructing its digital facilities.

While the number of viewers receiving WLLS's signal is, by Petitioner's own account, measured in the thousands, the service area population of the digital facilities approved for WPCW by the *Report and Order* includes 2,851,000 persons.<sup>39</sup> Further, WPCW is currently an affiliate of the UPN television network, which presents five hours of prime time programming per week in high definition. In September, WPCW will become an affiliate of the new CW Network, which presently plans to present nine hours of high definition prime time programming each week.

Moreover, WPCW broadcasts thirteen and a half hours per week of local news; a weekly thirty minute, locally-produced public affairs program, focusing particularly on the local African-American community; a daily half hour local sports talk show; approximately nine Pittsburgh Penguins hockey games per season; and videotaped replays of all Pittsburgh Steelers pre-season games. By contrast, while WLLS carries a half hour of national news each day from the America One Network,<sup>40</sup> it broadcasts no programming readily-identifiable as being locally produced.<sup>41</sup>

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<sup>39</sup> *Report and Order, supra*, 21 FCC Rcd 1350.

<sup>40</sup> WLLS is affiliated with the America One Network, which presents a half hour news program from Independent Network News on weeknights. *See*, <http://www.americaone.com/home.htm>. Information concerning WLLS's schedule is derived from [http://tvlistings.zap2it.com/partners/grid\\_one.asp?station\\_num=33074&partner\\_id=papipg](http://tvlistings.zap2it.com/partners/grid_one.asp?station_num=33074&partner_id=papipg), a Web-based service of Tribune Media, one of the principal suppliers of TV listings in the United States.

<sup>41</sup> We note that the Commission's rules require a Class A station to broadcast an

Indeed, the Commission has had occasion to note the dearth of locally-produced programming on WLLS. Thus, in a 2004 decision denying Schrecongost's Application for Review of a Media Bureau ruling that WLLS was not a "qualified" low power station entitled to must carry status, the Commission upheld the Bureau's determination that Schrecongost had failed to show that WLLS "provided non-entertainment programming that addressed the local news and informational needs of the systems' subscribers."<sup>42</sup> The Bureau had been correct, the Commission held, in finding "unsupported by the record" Schrecongost's contention that WLLS's programming was "locally-oriented and addressed local programming needs not covered by a full power station."

In sum, there is no question as to where the public interest lies in this case. It is clear that the public would be grossly disserved by granting the stay sought by Petitioner.

**III. PITTSBURGH TELEVISION HAS DILIGENTLY PURSUED THE OBJECTIVE OF CONSTRUCTING WPCW's DIGITAL FACILITIES.**

Petitioner asserts that the instant application for construction permit cannot be granted – and indeed that Pittsburgh Television should forfeit its digital authorization – because it filed its ultimately successful petition for rulemaking seeking a change in its DTV allotment (with supporting engineering data) on August 25, 1999, rather than having filed a *pro forma* "checklist" application, for a facility that it hoped not to build, by November 1, 1999. This contention flies in the face of rationality, and the way in which the Commission has previously treated such situations.

Thus, as far back as its *Notice of Proposed Rulemaking* commencing the First

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average of three hours of "locally produced" programming per week. 47 CFR § 73.6001.

<sup>42</sup> *In re Larry L. Schrecongost v. TCI of Pennsylvania, Inc., et al.*, 19 FCC Rcd 5779 (2004).

Periodic Review of the digital transition, the Commission noted that approximately three percent of stations that were to file construction permit applications by November 1, 1999 had not yet done so, in many cases because they had channel change petitions pending.<sup>43</sup> There was no suggestion that these stations were in violation of the Commission's rules, or that any purpose would be served by requiring them to file construction permit applications for facilities they did not plan to build.

Furthermore, in its *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*,<sup>44</sup> the Commission announced that it would require DTV licensees that had not yet been issued a construction permit "to construct and operate 'checklist' facilities" within one year of the adoption of the *Second Periodic Review*. In so doing, the Commission expressly recognized that a number of stations in this category "have applied for new DTV allotments either to replace an initial out-of-core allotment with one in the core or to otherwise improve their potential DTV service." It is clear from the Commission's issuance of this requirement, in August 2004, that it placed no great moment on the fact that these stations – which were obviously actively pursuing a digital authorization – did not then have a construction permit based on their originally allotted facilities, either because they had not applied for one or because the Commission had not bothered to act on their applications.

Even at this point, the Commission stated that it would "continue to work with applicants to resolve outstanding issues" where modified facilities were being sought, and

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<sup>43</sup> See, *Notice of Proposed Rulemaking, In the Matter of Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 15 FCC Rcd 5257, 5260-61 (2000).

<sup>44</sup> 19 FCC Rcd 18,279 (2004).

indicated that it would consider requests for waiver of the "checklist application" requirement in appropriate circumstances. Pittsburgh Television duly filed such a waiver request, in which it noted Pittsburgh Television that (1) it had six years earlier filed a Petition for Rulemaking seeking a change in its digital allotment that it urged would permit significantly improved service to its community of license; (2) the Commission had found sufficient merit in its several petitions to twice issue NPRMs proposing that the suggested amendments to the DTV Table of Allotments be adopted; and (3) that the delay in acting on the proposal was almost wholly attributable to administrative errors by the Commission. In these circumstances, Pittsburgh Television urged, it would impose an undue hardship to require the construction of "checklist" facilities for WPCW-DT on Channel 30 before the Commission had acted on its request to change the station's allotment to Channel 49.<sup>45</sup> To date, the Commission has given no indication of dissatisfaction with the way in which Pittsburgh Television has proceeded.

Pittsburgh Television has diligently pursued the objective of constructing WPCW's digital facilities; the delays it has experienced are due to circumstances beyond its control. Petitioner's suggestion that the appropriate course for the Commission now is to deny Pittsburgh Television the use of the channel that the FCC has found will best

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<sup>45</sup> See, Letter dated August 1, 2005 from Howard F. Jaeckel to Barbara Kreisman, Request for Waiver of Checklist Facilities Requirement (WNPA-DT, Jeannette, Pennsylvania). In this regard, Pittsburgh Television noted that, because of the distance between the two frequencies, it was doubtful that any equipment acquired for a Channel 30 operation could then be used for broadcasting on Channel 49. Moreover, Pittsburgh Television explained that, whether WPCW's facilities were ultimately constructed to operate on Channel 30 or Channel 49, it would involve removing existing transmission lines and antennas from the tower. The costs of doing this twice, Pittsburgh Television noted, would be very significant.

serve the public by maximizing DTV service -- or to cancel its digital authorization altogether -- is manifestly inconsistent with the Commission's prior treatment of such situations, with fairness, and with common sense.

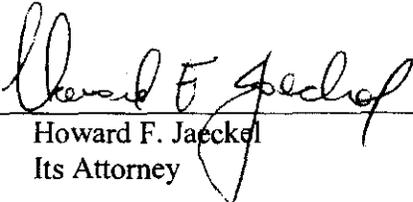
**CONCLUSION**

Petitioner can and is litigating the validity of the Commission's *Report and Order* amending the DTV Table of Allotments in the rulemaking proceeding. To allow it to delay the construction of WPCW's digital facilities by giving substantive consideration to the same contentions in this licensing proceeding would not only be wasteful of the Commission resources, but would directly contradict the policy judgment made by the Commission when it eliminate the automatic stay rule formerly applicable to these situations.

Both the Petition to Deny and the Motion for Stay should be dismissed without delay.

Respectfully submitted,

**PITTSBURGH TELEVISION STATION  
WPCW INC.**

By:   
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June 21, 2006

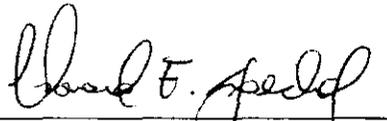
## CERTIFICATE OF SERVICE

I, Howard F. Jaeckel, hereby certify that on this 26th day of July, 2006, I caused a copy of the foregoing "Opposition of Pittsburgh Television Station WPCW Inc. to Motion for Stay" to be served by U.S. First Class Mail, postage prepaid, on:

John M. Pelkey, Esq.  
Garvey Schubert Barer  
1000 Potomac Street, NW  
Fifth Floor, Flour Mill Building  
Washington, D.C. 20007-3501

I also certify that, on the same day, I caused said Opposition to be filed with, and served on, the following by hand delivery:

Barbara Kreisman, Chief  
Video Division  
Federal Communications Commission  
445 12<sup>th</sup> Street, N.W.  
Washington, D.C. 20554



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Howard F. Jaeckel