

**EXHIBIT 42 – REQUEST FOR WAIVER OF § 73.622(c)(1)**

Paxson Greenville License, Inc. (“Paxson”), licensee of television station WEPX(TV), Greenville, North Carolina (the “Station”), hereby requests waiver of Section 73.622(c)(1) of the Commission’s Rules<sup>1</sup> and other rules and policies as may be necessary for the Commission to accept and process the instant application for a construction permit for WEPX-DT on Channel 51 at Greenville, North Carolina.<sup>2</sup> The Station operates in analog on Channel 38 and is a “singleton” without a paired DTV allotment. The Commission has approved the Station’s digital election, but of Channel 51 instead of Channel 38.<sup>3</sup> The Station wishes to commence digital operations, but flash-cutting on Channel 38 when ultimate and post-transition operations will be on Channel 51 not only would be impractical and costly but would squander significant public interest benefits. Accordingly, Paxson seeks a waiver to allow the Station to construct its DTV Channel 51 facilities now rather than waiting until the close of the DTV transition.

Paxson requests a waiver of Section 73.622(c)(1) of the Commission’s Rules, which provides that DTV construction permit applications may specify only channels set forth in the DTV Table of Allotments. The Commission may waive any provision of its rules or orders if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.<sup>4</sup> The Court of Appeals for the D.C. Circuit has stated that a waiver may permit a more rigorous adherence to an effective regulation by allowing the agency to take into account considerations of hardship, equity, or more effective implementation of overall policy on an individualized basis.<sup>5</sup> A rule may be waived where the particular facts make strict compliance inconsistent with the public interest.<sup>6</sup> Under the *WAIT Radio* doctrine, the Commission is bound to consider waiver requests.<sup>7</sup> Paxson’s request for a waiver satisfies this familiar standard.

The instant application requests authority for the Station to construct DTV facilities on a channel that the Commission already has approved but has not yet allotted. As a procedural matter, the Commission has granted “flash-cut” applications without amendment of the DTV

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<sup>1</sup> 47 C.F.R. § 73.622(c)(1).

<sup>2</sup> The Commission should treat this as a minor change application under Section 73.3572 of the Commission’s Rules. *See* Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order*, 13 FCC Rcd 6860, ¶¶ 53-55 (1998) (concluding that DTV-related applications would be treated as minor change applications).

<sup>3</sup> FCC File No. BFRECT-20050210AWK; *see also* Tentative Digital Channel Designations for Stations Participating in the First Round of DTV Channel Elections and Second Round Election Filing Deadline, *Public Notice*, DA 05-2649 (rel. Oct. 4, 2005).

<sup>4</sup> *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (“*Northeast Cellular*”) citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972) (“*WAIT Radio*”).

<sup>5</sup> *WAIT Radio*, 418 F.2d at 1157.

<sup>6</sup> *Northeast Cellular*, 897 F. 2d at 1166.

<sup>7</sup> *WAIT Radio*, 418 F.2d at 1159.

Table of Allotments,<sup>8</sup> so formal amendment of the DTV Table in practice is unnecessary prior to the commencement of operations so long as, just as here, amendment will occur. Moreover, Station operation on DTV Channel 51 prior to the close of the DTV transition would not impede the Commission's channel election process but in fact would facilitate the development of a new DTV Table of Allotments. The Station may operate on DTV Channel 51 now without causing impermissible interference. Proposed operation on Channel 51 complies with the Commission's existing interference rules, and the Station would not harm any other television station – either during the DTV transition or after it.

As a policy matter, grant of this waiver request and the instant application would serve the public interest in numerous ways. Grant would allow the Station to participate fully in the DTV transition and would hasten the delivery of digital broadcasting to the Station's viewers. For this singleton Station to participate in the DTV transition without a paired channel, it would have to flash-cut to a channel that it ultimately must surrender – and disenfranchise the Station's analog viewers in the process.<sup>9</sup> Investments necessary to implement digital operation on Channel 38 would be stranded. Operation on Channel 51 during the remainder of the DTV transition is the only practical way in which the Station can participate in the Commission's implementation of digital television, which would help accelerate DTV adoption by viewers and promote an orderly transition to digital television.

To the extent necessary, Paxson also requests waiver of the freeze announced in the *Freeze on the Filing of Certain TV and DTV Requests for Allotment or Service Area Changes, Public Notice*, DA 04-2446 (rel. Aug. 3, 2004) (the "Freeze").<sup>10</sup> The Commission indicated therein that it would consider Freeze waiver requests when "necessary or otherwise in the public interest for technical or other reasons to maintain quality service to the public."<sup>11</sup> Waiver of the Freeze would allow the Station to maintain existing quality service to the public while participating in the DTV transition. Paxson filed its Petition for Rulemaking to add Channel 51

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<sup>8</sup> See, e.g., Letter from Robert Ratcliffe, Deputy Chief, Media Bureau, to Paxson Batavia License, Inc., DA 05-2224 (Aug. 1, 2005).

<sup>9</sup> Paxson notes that the Station is uniquely situated in that it currently is the only "singleton" station to have received a tentative channel designation on any channel other than their current analog channel. It is therefore highly unlikely that grant of this application would have any precedential consequence or lead to the filing of applications from other parties seeking similar treatment.

<sup>10</sup> The Application Freeze stated that the Commission would not accept any "[p]etitions for rulemaking for new DTV allotment proceedings" or any "[t]elevision modification applications that would increase a station's DTV service area in channels 2-51 in one or more directions beyond the combined area resulting from the station's parameters as defined in the following: (1) Commission authorizations (license and/or construction permit) and (2) applications on file with the Commission prior to release of this Public Notice."

<sup>11</sup> *Id.*

to the DTV Table prior to the Freeze,<sup>12</sup> so a waiver of the Freeze arguably is unnecessary but would, in any event, satisfy the showing required under the *WAIT Radio* doctrine.

For these reasons, Paxson believes that grant of the instant application would serve the public interest. There is no doubt that the Station will operate in digital on Channel 51 – the only question is when such operation will commence. Paxson seeks Commission approval to allow DTV operation now instead after the close of the transition. Such operation would be permissible under the Commission's practices and would comply with the Commission's interference rules.

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<sup>12</sup> See FCC File No. BPRM-20040322AHL. Although Paxson believes that a specific Rulemaking is unnecessary at this time for the Commission to process the instant construction permit application, Paxson concurrently is amending this Petition to allow the Commission to proceed with a Rulemaking should it conclude one is necessary.