

## **EXHIBIT 46 – APPLICATION FREEZE WAIVER REQUEST**

Paxson Denver License, Inc. (“Licensee”), permittee of television station KPXC-DT, Denver, Colorado (the “Station”), hereby respectfully requests waiver of the freeze as announced by the *Public Notice* entitled “Freeze on the Filing of Certain TV and DTV Requests for Allotment or Service Area Changes,”<sup>1</sup> and as most recently addressed by the *Third DTV Periodic Review* (the “Application Freeze”).<sup>2</sup> Until August 17, 2008, the Commission ordinarily will not accept applications that would expand service beyond that allotted.<sup>3</sup> Licensee is requesting waiver of the freeze in this particular case, however, as it would allow the Station to serve as much of its allotted population as possible while litigation regarding its allotted site continues.

The tower landlord at the Station’s allotted site has been unable to secure necessary zoning approvals and permits, and the site has been the subject of extensive litigation.<sup>4</sup> Licensee has no reasonable expectation that these issues will be resolved in time to permit completion of construction by February 18, 2009, so Licensee is proposing to operate from an existing tower northeast of the allotted site.<sup>5</sup> Because this relocation will result in a coverage shortfall, Licensee is seeking waiver of the freeze to minimize the number of persons that would lose service.

The Commission may waive any provision of its rules or orders for good cause shown.<sup>6</sup> A waiver is appropriate if special circumstances warrant a deviation from the general rule and such a deviation will serve the public interest.<sup>7</sup> The Court of Appeals for the D.C. Circuit has stated that waivers 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

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<sup>1</sup> *Public Notice*, DA 04-2446 (rel. Aug. 3, 2004).

<sup>2</sup> In the Matter of Third Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television, *Report and Order*, MM Docket No. 07-91, FCC 07-228 (rel. Dec. 31, 2007) (“*Third DTV Periodic Review*”).

<sup>3</sup> *Id.* ¶¶ 3, 148, 150; *id.* at n.461 (“We remind stations that applications for maximization filed before the freeze is lifted will not be accepted for filing.”); *see also* In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Memorandum Opinion and Order on Reconsideration of the Seventh Report and Order and Eighth Report and Order*, FCC 08-72, ¶ 2 (rel. Mar. 6, 2008) (“*Memorandum O&O*”) (“We also reiterate that requests for revisions to Appendix B in this docket, or for modifications in the application process, that are attempts to maximize beyond authorized post-transition facilities will not be granted at this time.”),

<sup>4</sup> *See Memorandum O&O*, ¶¶ 34-35.

<sup>5</sup> *See* BDSTA - 20080303AKT (requesting special temporary authority for operations at these facilities).

<sup>6</sup> 47 C.F.R. § 1.3 (2007).

<sup>7</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*”).

implementation of overall policy on an individualized basis.<sup>8</sup> Under the *WAIT Radio* doctrine, the Commission must take a “hard look” at waiver requests.<sup>9</sup>

Licensee’s request for the freeze waiver satisfies this familiar standard. Indeed, the Media Bureau has acknowledged that zoning issues requiring a relocation could constitute special circumstances warranting a waiver. The Bureau stated in the *Public Notice* that it would consider, “on a case-by-case basis, requests for waiver of th[e] freeze when a modification application is necessary or otherwise in the public interest . . . to maintain quality service to the public, such as when zoning restrictions preclude tower construction at a particular site.” Further, the Bureau has acknowledged the Station’s “atypical circumstances.”<sup>10</sup> The waiver request is consistent with the purposes of the Application Freeze, which the Commission has in place to “ensure that all stations can at least provide digital service to their analog viewers by the transition date.”<sup>11</sup>

For these reasons, Licensee believes it has shown good cause for waiver of the Application Freeze. Accordingly, Licensee respectfully requests waiver of the Application Freeze to permit acceptance and grant of this instant application.

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<sup>8</sup> *WAIT Radio*, 418 F.2d at 1157.

<sup>9</sup> *Id.*

<sup>10</sup> *Memorandum O&O*, at ¶ 32.

<sup>11</sup> *See Third DTV Periodic Review*, at ¶ 150.