

EXHIBIT 41 – APPLICATION FREEZE WAIVER REQUEST

Paxson Denver License, Inc. (“ION”), permittee of television station KPXC-DT, Denver, Colorado (the “Station”), hereby requests waiver of the freeze on the processing of applications that propose a service area increase.¹ In light of ongoing legal proceedings regarding zoning approval for the broadcast tower at the site specified in the Station’s existing construction permit,² it is extremely unlikely that ION can construct the facilities authorized in that permit by the time analog service is statutorily scheduled to end in February 2009. ION accordingly seeks authority in this instant application to construct the Station at a new site. This shift in location would have a corresponding shift of service area, which in turn would have the effect of increasing the Station’s service area in the direction of the site move. For these reasons, which are beyond the Station’s control, ION hereby seeks waiver of the freeze on applications that propose increases in service area. The Commission indicated that it would consider such waiver requests “for technical or other reasons to maintain quality service to the public, such as when...unforeseen events...require relocation to a new tower site.”³ ION submits that its waiver request meets this standard and that grant would serve the public interest.

IMPOSSIBILITY OF TIMELY CONSTRUCTION AT EXISTING SITE

On September 23, 1999, ION filed an application for an initial DTV construction permit for the Station. The Commission granted this application on November 29, 2004. ION has been unable to construct in accordance with this permit, however, due to ongoing legal proceedings regarding construction at the proposed site. The owner of the proposed tower has been unable to commence tower construction due to these lengthy legal proceedings and the long-standing oppositions of a local citizen’s group. Although the would-be tower owner received initial local zoning board approval from the Board of Commissioners of Jefferson County in 2003, a citizen’s group appealed this decision to Jefferson County District Court, which affirmed the Board of Commissioners. In 2006, however, the intermediate Colorado Appeals Court overturned the District Court’s decision and ordered the case sent back to the Board of Commissioners for additional public hearings and evaluation. Rather than comply, the Board of Commissioners and the would-be tower owner sought certiorari from the Colorado Supreme Court, effectively postponing finality of whatever underlying substantive decision ultimately is reached.

¹ *Freeze on the Filing of Certain TV and DTV Requests for Allotment or Service Area Changes, Public Notice*, 19 FCC Rcd 14810 (2004) (“*Public Notice*”). The *Public Notice* stated that the Commission would not accept any “[t]elevision modification applications that would increase a station’s analog 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.” *Public Notice*, 19 FCC Rcd at 14810.

² FCC File No. BPCDT-19990923AAM.

³ *Public Notice*, 19 FCC Rcd at 14811.

In light of the ongoing legal proceedings surrounding the Mount Morrison site, final zoning approval will not occur in time to allow for construction of the Station before the statutory termination of analog television service. Accordingly, to avoid the loss of broadcast service to the public, ION has begun terminating its lease at the Mt. Morrison site.

RELOCATION TO NEW TOWER SITE

The only practical alternative allowing for the expeditious completion of the Station before February 2009 is to construct at a different site, as is proposed here. The contour map in Exhibit 44⁴ demonstrates, however, that this move would shift the Station's service area to the northeast, consequently resulting in a service area increase. ION has explored other arrangements that would avoid this service area increase, but these alternatives all would create significant (and additional) service area losses. Indeed, to avoid creating a service area increase from the proposed site, ION would need to reduce the Station's effective radiated power (ERP) substantially from the proposed ERP of 1000 kW to 5 kW. Moreover, as described in Exhibit 44,⁵ operation at this reduced ERP would fail to place the required field strength contour over the community of license. Operation at 5 kW ERP in fact would serve a population of 2,625,074 persons and an area of only 10,990 square kilometers, which would represent a loss of over nine percent of the population and over 60 percent of the area served by the facilities proposed in this application. Accordingly, to minimize service area and population losses and to serve the community of license as required, ION seeks waiver of the freeze on expansion applications to allow construction as proposed.

WAIVER JUSTIFICATION

ION believes grant of the requested waiver is in the public interest as it would enable the Station to commence DTV service before the scheduled termination of analog service and in a manner that would minimize service losses. No one knows at this point if or when the Mt. Morrison tower might be completed, but ION has no expectation that it could construct the Station on Mt. Morrison before the statutory termination of analog service. ION accordingly is proposing the instant facilities at an alternative site that would result in an increase to the Station's service area in the direction of the move, necessitating waiver of the Commission's current freeze on processing such applications.

The Commission, of course, 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.⁶ The Court of Appeals for the D.C. Circuit has stated that a waiver may permit a more

⁴ Exhibit 44, Figure 2.

⁵ Exhibit 44, p. 1.

⁶ *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*").

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.⁷ A rule may be waived where the particular facts make strict compliance inconsistent with the public interest.⁸ Under the *WAIT Radio* doctrine, the Commission is bound to consider waiver requests.⁹

Grant of the instant waiver request would not undermine the purposes of the freeze, as the Commission already has released its proposed DTV Table of Allotments for post-transition operation.¹⁰ Moreover, the facilities proposed in this application would not create impermissible interference to the existing tentative channel designation of any licensee. If the waiver is not granted, the purposes of the DTV transition would be frustrated and ION would be forced to reduce the Station's service area significantly further than already proposed here. Accordingly, ION believes this request squarely fits within the Commission's articulated standard for granting freeze waivers "to maintain quality service to the public, such as when...unforeseen events...require relocation to a new tower site."¹¹ As such, ION respectfully requests that the Commission grant this waiver request.

⁷ *WAIT Radio*, 418 F.2d at 1157.

⁸ *Northeast Cellular*, 897 F. 2d at 1166.

⁹ *WAIT Radio*, 418 F.2d at 1159.

¹⁰ *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, Seventh Further Notice of Proposed Rulemaking*, 21 FCC Rcd 12100 (2006).

¹¹ *Public Notice*, 19 FCC Rcd at 14811.