

Before the
Federal Communications Commission
Washington, DC 20554

In re)	
)	
Paxson Communications License)	
Company, LLC and Univision)	File No. BALCT - 20020730ABO
Communications, Inc.; Application)	
for Assignment of License of)	
KPXF(TV), Porterville, California)	

TO: The Commission

REPLY TO OPPOSITIONS TO APPLICATION FOR REVIEW

Kimberly Mayhew (“Petitioner”) respectfully replies to oppositions to her March 10, 2003 *Application for Review* filed by Paxson Communications License Company (“Paxson”) and Univision Communications Inc. (“Univision”)¹ Petitioner seeks reversal of the staff’s action conditionally granting the assignment of license of KTFE(TV) (formerly KPXF(TV)), Porterville, CA. (1800E1-DB, Released February 7, 2003) (“*Staff Decision*”).

The basis of the *Application for Review* is that it was contrary to the Communications Act to grant the assignment, even conditionally, in light of the allegations presented in the *Petition to Deny*. There is no precedent to justify this action; Petitioner showed that the cases cited in the *Staff Decision* do not support the conditional grant in this case.

Standing

Paxson attempts to interpose a challenge to Petitioner’s standing. (Paxson Opp. at pp. 2-9) It is untimely and thus barred by 47 CFR §1.115(d). The staff unequivocally held that Ms. Mayhew has standing to appear in this proceeding. *Staff Decision*, at p. 1, fn. 1. Paxson did not seek reconsid-

¹This reply is timely filed pursuant to a request for extension of time to which all counsel consented.

eration or review of that determination, which is now final and the law of this case.² Moreover, the staff determination is indubitably correct. Ms. Mayhew's affidavit shows that she is a resident of the area of service and regularly views over-the-air television, and she explained at length in the *Petition to Deny* how the CNI Agreement would adversely affect the programming she would receive.

Paxson nonetheless argues that Ms. Mayhew has failed to demonstrate injury because she "has no connection to the CNI Agreement, is not injured by the CNI Agreement, and cannot benefit from the denial of the Assignment Application...." Pax Opp. at p. 2. Paxson's allegation rests on the implied assumption that viewers are not intended beneficiaries of the Commission's network affiliation rules.

While it is true that Ms. Mayhew is not a signatory to the CNI Agreement, it is hardly the case that she is unaffected by it. As she has explained, the CNI Agreement greatly and permanently delimits the range and source of programming she can receive. This is precisely what the network affiliation rules are designed to preclude. Moreover, it could not be more clear that the goal of the rules is primarily intended to protect viewers; licensees are better characterized as secondary beneficiaries because the rules are designed to give them the latitude to provide program service which is in the public interest. Even a cursory review of the Supreme Court's decision upholding the earlier, but substantially identical, radio network affiliation rules confirms that

The Commission's duty under the Communications Act of 1934, 47 U.S.C.A. §§151 *et seq.*, is not only to see that the public receives the advantages and benefits of chain broadcasting, but also, so far as its powers enable it, to see that practices which adversely affect the ability of licensees to operate in the public interest are eliminated.

²Standing is a jurisdictional matter in the federal courts, and thus can be raised at any time. Standing before the Commission is not governed by Article III of the Constitution. *California Association of the Physically Handicapped v. FCC*, 778 F.2d 823, 826 n. 8 (D.C. Cir. 1985). Therefore, even when "the Commission choose[s] to allow persons without Article III 'standing' to participate," *id.*, its action is subject to ordinary principles of finality.

NBC v. US, 319 U.S. 190, 198 (1943), quoting *Chain Broadcasting Report* at 4. The *NBC* decision goes through the rules *seriatim*, and in each case describes the provisions in terms of how they affect listeners. *See, e.g., id.*, 319 U.S. at 200 (quoting *Chain Broadcasting Report* at 59 to state that “It is not in the public interest for the listening audience in an area to be deprived of network programs not carried by one station where other stations in that area are ready and willing...”); *see also, id.*, 319 U.S. at 199; *id.*, 319 U.S. at 202; *id.*, 319 U.S. at 203.

Paxson also suggests that whatever injury Petitioner has incurred is somehow redressed by the staff’s decision to bifurcate this proceeding. It seems to believe that, so long as the staff has commenced an inquiry as to whether the CNI Agreement is in the public interest, the fact that the assignment was granted has no impact on Petitioner. It is hard to fathom just what Paxson means in this regard, as Univision currently operates its station subject to powerful limits on its programming discretion. Every day that these restrictions remain in effect, the programming available to Petitioner and others in the Fresno area is constrained, and Petitioner’s injury thereby continues and magnifies.

For the same reason, Univision misses the point in stating that “The CNI Agreement would have continued to exist whether the assignment application was granted or denied.” (Univision Opp. at p. 3) While the ultimate issue is the enforceability of the CNI Agreement, the immediate impact is that the CNI Agreement limits Univision’s programming discretion. That injury is immediate and ongoing. The Commission can take notice of the fact that the Telefutera programming Univision now carries is broadcast 24 hours per day, and that other Univision-owned stations carry the Telefutera feed during the overnight hours governed by the CNI Agreement.³

³That Paxson operated subject to the CNI Agreement does not change the adverse impact of continuing it in effect. Viewers are entitled to the programming of whatever licensee is incumbent at the moment. Nor is it relevant to this case that Petitioner has made the Commission aware of the CNI Agreement and forced it to consider whether it is in the public interest. The viewers of the

The Merits

Paxson's defense on the merits is no more convincing than its standing challenge. It starts by misattributing the Bureau Chief's holding (in the *Staff Decision*) to the full Commission, Pax Opp. at p. 4. This does nothing to improve its validity, as Paxson adopts the misperception that this is a mere enforcement matter, and hence, can be bifurcated subject to subsequent resolution, for example, through a forfeiture.

Paxson's argument is rooted in the improper premise that, once an applicant's basic qualifications are demonstrated, the Commission is free to grant an application.⁴ It maintains that, "with no qualifications issues before the Bureau, the Bureau acted consistently with long-standing Commission policy..." (Paxson Opp. at p. 4).⁵

It is hard to imagine a more fundamental misunderstanding of the Communications Act than that. The Commission has always held that it "has an independent obligation to consider whether" transactions which do not violate particular rules nonetheless "would be inconsistent with the public interest." *CHET-5 Broadcasting, LP*, 14 FCCRcd 13041, 13043 (1999). The recent *EchoStar*

Fresno area are entitled to service which Univision considers to best meet their needs, and whatever additional steps the Commission may take as to Paxson's remaining stations is beyond the scope of this case and does not justify an action which lacks the requisite public interest finding.

⁴Univision appears to share this misapprehension in inferring that "the Application appears to imply, while never stating, that Paxson's entry into the CNI Agreement...adversely impacts Paxson's qualifications." (Univision Opp. at 5). This case is about whether a particular programming arrangement is contrary to the public interest regardless of the qualifications of the parties.

⁵Univision makes a somewhat similar argument that "[s]ince the Bureau has now reviewed the qualifications of the parties [and] made a public interest determination favoring grant of the Application,...it appears that the Petitioner's only complaint is that the Commission may not move...expeditiously..." (Univision Opp. at 4). The first statement is wrong for the reasons explained in the text. The second is circular, since the gravamen of the *Application for Review* is that the staff improperly found that grant was in the public interest.

decision is only one of the hundreds or thousands of cases to the contrary, but it is an especially relevant precedent here, since Paxson was one of the parties. In *EchoStar*, the Commission rejected character and other challenges to the applicant's basic qualifications. *EchoStar Communications Corporation*, 27 FCCRcd 20559, 20577-80 (2002). Although the application did not violate any FCC ownership or other rules which would have absolutely barred grant of the assignment, the Commission found that "[t]he Applicants have failed to meet their burden of proof to show that, on balance, the proposed merger is in the public interest..." *id.*, 27 FCCRcd 20662, and designated the matter for hearing. None of the designated hearing issues related to the applicants' qualifications. *Id.*, 27 FCCRcd at 20666-68.

In response to Petitioner's demonstration that the three cases cited in the *Staff Decision* are inapposite because the bifurcation involved disputed practices of assignees and not assignors, Paxson first makes the somewhat confusing claim that it was improper to make such an argument in an *Application for Review*. (Paxson Opp. at 4, n. 12) Since these authorities were first invoked in the *Staff Decision* by the staff, it is impossible to understand how Petitioner could have explained why they were inapposite prior to the filing of the *Application for Review*.

Paxson and Univision do nothing to refute Petitioner's showing that there is no authority to support the staff action in granting the application pending the outcome of an inquiry as to whether the CNI Agreement is in the public interest. With one important exception, the cases Paxson cites involve Commission approval of assignments notwithstanding the pendency of an enforcement proceeding against the assignor. *See Application for Review* at pp. 3-4. Univision cites a number of cases in which temporary waivers were granted pending the outcome of rulemaking proceedings. If anything, these cases, support Petitioner, for they show that the Commission left no outstanding public interest issue; a temporary waiver is based on a finding that, under the particular circumstances,

grant of the application notwithstanding its non-compliance with a particular rule is, on balance, in the public interest. The Applicants neither sought nor received a waiver of the network affiliation rules, and the staff conducted no public interest balancing.

One case Paxson cites bears brief discussion, as it strongly supports Petitioner, and not Paxson. In *Ackerley Group, Inc.*, 17 FCCRcd 10828 (2002), the full Commission granted an assignment conditioned upon the reformation of an LMA agreement which was found to be inconsistent with Commission policies. In that case, the Commission did just what the staff failed to do in this case, *i.e.*, the Commission reviewed the disputed agreement, reached a final conclusion as to its defects, and directed that it be reformed *prior* to consummation of the transfer.⁶

CONCLUSION

Accordingly, Petitioner asks that the full Commission reverse and vacate the conditional grant of the assignment in this case, and defer further action on the application until such time as the staff can determine whether there are substantial and material facts which preclude grant of the application. Petitioner further asks that the Commission grant all such other relief as may be just and proper.

Respectfully submitted,

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April 15, 2003

⁶In fact, the Commission directed that the parties submit the reformulated LMA within 30 days of the release of the order. *Id.*, 17 FCCRcd at 10842-43.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Application for Review* has been served by United States Mail, postage prepaid and properly addressed, this 15th day of April, 2003, upon:

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