April 15, 2003

W. Kenneth Ferree
Chief, Media Bureau
Federal Communications Commission
Washington, DC 20554

RE: Assignment of KTF F(TV)(formerly KPXF(TV))
Porterville, CA
File No. BALCT - 20020730ABO
Facility ID No. 35512

Dear Mr. Ferree:

Petitioner Kimberly Mayhew respectfully submits these comments addressing the March 28, 2003 letters submitted by Paxson Communications License Company (“Paxson”) and The Christian Network, Inc. (“CNI”). The two letters responded to questions posed by the Chief, Media Bureau in an inquiry letter dated March 10, 2003.

The CNI Agreement Must Be Reviewed In its Entirety

At the outset, Petitioner stresses that the various provisions of the “CNI Station Agreement” which is the focus of this inquiry must be read *in pari materia*. The format of the inquiry letter permitted Paxson and CNI to answer the staff’s questions as if the various requirements of the CNI Station Agreement were unrelated to each other. Among the clauses of the CNI Station Agreement which are of particular relevance in this regard are the following:.

1. Under Section 4(a) of the CNI Station Agreement, the term of the agreement is essentially perpetual. As the Chief, Mass Media Bureau said in the February 7, 2003 *Staff Decision* (1800E1 -DB), at p. 3, “The Station Agreement runs e[illegible]

is, prevented from assigning the station without CNI's written consent, and without the new purchaser assuming the terms and conditions of the CNI Station Agreement in full. Univision must notify CNI within 48 hours of the execution of a contract for sale, and must include specific CNI assignment language in any such contract. Notification must also be given to CNI within 5 days of filing an assignment application and within 5 days of receiving Commission approval.

4. Under Section 6(a) of the CNI Station Agreement, Paxson and Univision are contractually precluded from providing complete and candid answers to this, or any other, FCC inquiry. This provision provides in relevant part that:

> If this Agreement is challenged at the FCC...whether or not in connection with any Station's License renewal, transfer or assignment application,...such Station's Licensee, current or subsequent, shall defend this Agreement and the parties performance thereunder...throughout all FCC...proceedings. The parties hereto agree that they shall take no action to support in any manner, such a challenge to this Agreement.

What is ***not*** in the CNI Station Agreement is of no less importance than what is contained in it. In particular, it bears emphasis that Univision must provide 5 hours daily of its airtime, and one-tenth of its digital feed to CNI ***without compensation***. Nor is there any "local" break for the sale of local advertising by Univision. And, while CNI stresses its non-profit status, CNI Resp. at p. 5, it does not represent that all of its current programming is non-commercial in nature or foreswear that it will not convert to advertiser-supported programming in the future. Indeed, Section 4(c) of the CNI Station Agreement expressly contemplates that CNI is free to sell commercials.

The Commission must Invalidate the Coercive Terms of the CNI Station agreement, at Least for the Purpose of Conducting this Inquiry, and Obtain Univision's Responses as to Whether It Is Constrained from Presenting Programming Which It Believes Will Better Serve Its Viewers

Petitioner respectfully asks that the Commission immediately notify Paxson and Univision that the contractual provisions describe above are unenforceable insofar as they preclude presenting complete and truthful answers to the Commission in this proceeding.

The cumulative effect of the three provisions described above is to raise serious questions as to whether Univision (or any other entity which has or will purchase a station currently subject to the same terms in an agreement with CNI) can ever exercise meaningful authority over their own programming. Once a licensee enters into the CNI Station Agreement, the only way that a broadcast property can be sold is for the purchaser to buy the station subject to the CNI Station Agreement and all the limitations contained therein. Purchasers have no effective means of negotiating to purchase the station without assuming the CNI Station Agreement, since the seller (in this case, Paxson) has no ability to convey the property without requiring assumption of the CNI Agreement in unmodified form, and without CNI's written consent. For the same reasons, purchasers also have no effective means of negotiating for modifications in the terms. Thus, for example, even if Univision wished

to modify the CNI Agreement so it could carry Spanish language programming on special holidays, it could not expect to be able to do so.

It is thus understandable that Univision has been silent in this proceeding to date. Inasmuch as Univision is carrying its Telefutura Network on KPFX(TV) (now KTFF(TV)), it is of particular importance for the Commission to obtain a truly voluntary answer from Univision as to whether it believes it can best serve the Porterville/Fresno area with the programming provided by CNI. Telefutura is a 24-hour Spanish language service produced and distributed by Univision, and it is highly unlikely that Univision would be willingly carrying English language CNI programming rather than its own programming unless it were contractually bound to be doing so. The Commission should therefore direct Univision to provide truthful answers as to the legal effect of the CNI Agreement and its desire to carry CNI's English language programming for the next 50 years or longer, and whether it would substitute Spanish language or other Univision-produced programming for CNI programming were it free to do so. The Commission should assure Univision that any contractual obligations, such as those described above, are null and void to the extent that they preclude Univision from providing complete and truthful answers to such queries.

Question 1: Is CNI a "Network Organization"?

CNI does not expressly dispute that its operations fall within the ambit of the Commission's "Chain Broadcasting" rules. Paxson defers to CNI on this matter. CNI does imply that it should be treated like syndicators. It points out that CNI and syndicators generally employ the "same method of simultaneous distribution of programming via satellite...."

The statement is factually correct, but quite incomplete; syndicated programming generally is not broadcast simultaneously, as is the case of networks such as CNI's. Moreover, syndicators typically permit broadcasters to carry programming whenever they wish, give them the right to cancel program contracts annually or even quarterly, preempt or reschedule at will.

Question 2: Should 47 CFR §658(e) "Be Considered Inapplicable in this Case"?

Although the Commission staff asked whether it should enforce its network affiliation rules "in this case," CNI and Paxson respond with generic requests for broad relief which clearly go far beyond "this case."

This is an assignment proceeding, not a rulemaking. Petitioner understands the staff's question to address whether the particular circumstances "in this case" merit special consideration. Neither Paxson nor CNI, nor the silent Univision, make any showing as to whether special treatment, such as a waiver, is justified with respect to the particular station involved in this case, Channel 61 in Porterville, CA.

Rather than address the narrow question posed by the staff, CNI and Paxson use the staff's question as an opportunity to ask for broad and sweeping relief which goes far beyond the scope of this proceeding, and certainly far beyond the authority of the staff to consider under delegated

authority. *See* 47 CFR §0.283[1] CNI and Paxson argue generically that the Commission should not enforce 47 §73.658(e) as to the CNI Station Agreement. They do not disclose how many stations would be affected by such an action,[2] much less identify all the other affected parties.

Not only do CNI and Paxson seek a waiver applicable to all parties to any similar CNI Station Agreement, but they also seek an unlimited waiver, *i.e*, without a sunset, and relieving them from each and every subpart of the network affiliation rules. This, too, is far beyond anything this record could possibly support. If such action were ever justified, it must be done with notice and comment, and with full opportunity for all affected broadcasters, and all affected listeners to participate.

Leaving aside the overbreadth of the waiver request, Paxson and CNI fall far short of justifying why 47 CFR §73.658(e) should not be applied in its entirety to them. They maintain that CNI is more nearly like a syndicator than a network,[3] and point out that the current network affiliation rules, which derive from the radio "Chain Broadcasting" rules, were directed at the abuse of power by the large networks of the day. They also argue that, because CNI is a much smaller entity than the major networks, and because it only programs overnight hours, CNI should not be treated as a "network organization" under Section 73.658. According to CNI, "it has neither the power nor the disposition to exert power over television stations in the manner that the major networks once did." It adds that

> The Commission's concern that the network affiliation rules are necessary to prevent a small group from holding a "powerful influence" over broadcast television... is not

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[1]Section 0.283 provides that "The Chief, Media Bureau, is delegated authority to perform all functions of the Bureau, described in § 0.61, provided that the following matters shall be referred to the Commission en banc for disposition:

> (a) Notices of proposed rulemaking and of inquiry and final orders in such proceedings, with the exception of rule-making proceedings involving the allotment of FM and television channels.
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> * * * *
>
> (c) Matters that present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines.

[2]Paxson implicitly confirms that other parties would be covered by the relief requested by making reference to the fact that "Univision, NBC and Equity Broadcasting, have agreed to allow CNI to provide public interest programming under terms similar to the Station Agreement at issue here." Paxson Resp. at p. 4.

[3]See p. 3, *supra*.

[4]Paxson argues in a similar vein that "CNI holds no unfair bargaining power over the television licensees with which it contracts, or in fact, any substantial bargaining powerf a c t ,

lemons by boasting that over 10 years "it has never had a program preempted by a station due to 'unsuitability,'..." CNI Resp. at 6. This proves far too much: it is contractually impossible to preempt CNI programming because the CNI Station Agreement effectively precludes any effort even to try.

Under the right to reject rule, networks may not preclude licensees from rejecting unsatisfactory programming. The narrow conditions under which a program can be deemed "unsuitable" under the CNI Station Agreement go beyond what the Commission allows. To the extent that the CNI Station Agreement precludes Univision from rejecting programming ***it*** deems unsuitable, even if that programming does not violate a "law, regulation or policy," it transgresses the right to reject rule. The requirement of seven days' written notice for preemptions (other than fast-breaking news) exacerbates the improper restraint. It is common for network affiliates to discover through prescreening that a soon-to-be broadcast program is unsuitable for their community; the seven day rule deprives Univision of the power to deal with such problems.

While the CNI Station Agreement dutifully tracks the language of the right to reject rule in giving Univision the purported ability to meet its legal obligations, the CNI Station Agreement introduces a definition of "unsuitable" programming which impermissibly narrows that right. This, combined with the severe limits on what Univision may substitute (discussed below), simply cannot be squared with the "right to reject" rule.

What CNI and Paxson say in answer to the inquiry is little more than babble describing boilerplate savings clause provisions attesting to compliance with Commission rules. However, the real issue is not minimal performance sufficient to retain a license, but whether the incumbent licensee can decide what best serves its audience. It is noteworthy that the only real effort to limit the impact of the right to reject language comes from Paxson, which is merely an affiliate, and not CNI, whose construction would be operative in any dispute with Univision. Paxson stresses in this regard that "a program may be deemed unsuitable not only if *the program content* would violate applicable laws, but also if *broadcasting* ("telecasting") the program would do so." Paxson Resp. at 7.

It is hard to see why this distinction could matter. From the standpoint of meeting the needs of Porterville, the point is not whether the content or "broadcasting" the content would somehow be against the law. Rather, the goal of the "right to reject" rule is to give licensees the latitude to adjust their program offerings to meet changing needs and interests. CNI and Paxson appear to believe that the goal of Commission policy is minimally acceptable and lawful programming, not providing the best service to the public.

Question 4: Substitution

The essence of the "right to reject" rule is that licensees are entitled to have the ability to reject a network's programming in favor of programming the licensee deems to be of greater local or national importance. Section 2(f) of the CNI Station Agreement interferes with this right by requiring that CNI, and not the licensee, can select the substitute programming.

In response to the question of how the limited substitution right provided in the CNI Station

Agreement can be squared with the flexibility licensees need, CNI merely paraphrases the language in question and assures the Commission that its programming is, indeed, very good. Here again, Paxson goes somewhat further. It says the same thing as CNI, albeit more forcefully, and then declares that "It is difficult to imagine a change in community needs and standards great enough to render programming that satisfies the Station Agreement unsuitable for any community."

This, too, proves far too much. It is up to Univision, not CNI, and certainly not Paxson, to determine what is suitable for carriage on Channel 61. The question is not what is within the range of Paxson's imagination, but what is within the range of Univision's commitment to its viewers. The restrictions on Univision are far too inhibiting to pass muster.

Question 5: The Time Option Rule

CNI and Paxson have almost nothing to say in response to a detailed, four part question about how the reservation of a channel for 24 hours per day can be reconciled with the time option rule. CNI simply says, in one short paragraph, that it is prepared to offer 24 hours of programming each day. Paxson is more expansive, adding the obvious but irrelevant fact that Univision is free to program the station if CNI fails to do so, missing the point the time option rule is designed to insure, that the licensee can confidently program without fear that a network (here, CNI) can claim the time whenever it wishes. Paxson provides the additional blithe assurance that "CNI's right to program the station extends to no more than ten percent of the station's digital spectrum." There is nothing in Section 658(e) which could be read as suggesting that optioning of "only" 10 percent of a station's airtime is permissible.

Question 6: The 50-Year Term

CNI justifies the 50-year term of the CNI Station Agreement by pointing to the fact that the Commission eliminated a two-year limit on affiliation agreements in 1988. It notes that the Commission has approved a transaction in which there was a 10 year affiliation. However, contrary to what CNI says, CNI Resp. at p. 9, that case does not even ***mention***, much less reject, "allegations that provision, in conjunction with other provisions of the agreement, controlled 'in perpetuity' the station's network affiliation." *Id.*, citing *BBC License Subsidiary,* 10 FCCRcd 7926, ¶39 (1995).

CNI also disputes the Commission's comparison of the CNI Station Agreement to LMA arrangements since "CNI provides only five hours of programming in a 24 hour period, and in the digital world will provide programming only for a non-primary channel,..." CNI Resp. at p. 9. Thus, it says, while the term is "longer than the network affiliation and local marketing agreement" which are cited, "the Agreement does not provide for CNI to have *any involvement whatsoever* in the station's day to day operations." CNI Resp. at p. 10.

Paxson argues similarly, stressing that no Commission precedent places an absolute outer limit on the length of LMA's. Paxson Resp. at p. 11. It then progresses to a much more complicated argument that the CNI Station Agreement is really two agreements, the first of which terminates when analog programming ends, and the second of which covers only the digital programming period.

Id. It says that digital programming is new and therefore "the station Agreement differs so significantly from traditional analog LMA's that this fact cannot be decisive." *Id.*

Petitioner urges the Commission to overlook the overheated rhetoric, and focus on the non-responsiveness of these answers, and also to view them in the context of the full terms of the agreement. In particular, Petitioner points to the interaction of the unlimited term and the absence of any meaningful right of Univision to terminate the CNI Station Agreement. Other than CNI's miscitation, there is no effort to explain how a perpetual agreement can be reconciled with Commission precedent.

As to Paxson's speculative argument based on when digital programming may actually begin and upon the claim that broadcasting full-time on a multi-cast format is somehow less intrusive than a full time LMA would be in an analog environment, it is double-talk. Full time is full-time, 50 years is 50 years, and perpetual is perpetual. This is, moreover, an extraordinary claim to make in a license assignment proceeding. To say that the Media Bureau lacks authority to make such policy judgments is an understatement. While this is a matter which the full Commission might address some day in a rulemaking, it cannot possibly permit the Media Bureau to make the requisite conclusion that there are no substantial and material questions of fact as to whether this assignment is in the public interest.

Petitioner does agree, to a limited extent, with CNI and Paxson insofar as they indicate that LMA precedents may not be fully applicable here. However, Petitioner disagrees as to the reason for this. The CNI Station Agreement is actually ***more*** restrictive than many LMA's, since its preemption provisions are so limited. For example, while LMA's typically give licensees the right to control candidate uses under Section 315, the CNI Station Agreement gives no such latitude to Univision in either the overnight analog programming or the full-time digital programming controlled by CNI.

CONCLUSION

The issue properly before the Media Bureau is whether the CNI Station Agreement is in the public interest as it applies to Channel 61 in Porterville, CA. No waiver has been requested on this basis, and none can be granted on this record, especially when all the terms of the CNI Station Agreement are viewed *in pari materia.* If the Media Bureau is unable to find that this transaction is in the public interest, it must designate the application for hearing.

To the extent that CNI and Paxson make broader arguments pertaining generally to all CNI affiliates, and broader claims relating to industry-wide network affiliation and digital television policy, they are outside the scope of this proceeding and far beyond the delegated authority of the

Media Bureau.

Respectfully submitted,

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