

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
ION Media Networks, Inc., ultimate parent
of Paxson Los Angeles License, Inc.
v.
Charter Communications
Channel Positioning Complaints
CSR-8070-M
CSR-8071-M

MEMORANDUM OPINION AND ORDER

Adopted: February 26, 2009

Released: February 26, 2009

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. ION Media Networks, Inc., ultimate parent of Paxson Los Angeles License, Inc., licensee of television broadcast stations KPXN (ION, Ch. 30), San Bernardino, California, and WPXV (ION, Ch. 49), Norfolk, Virginia ("ION"), filed the above-captioned complaints against Charter Communications ("Charter"), for its failure to meet its channel positioning requirement with regard to KPXN on its cable systems serving Monterey Park and Thousand Oaks, California, and WPXV on its cable system serving Manteo, North Carolina. Oppositions to these petitions were filed on behalf of Charter to which ION has replied. For administrative convenience, we are consolidating the complaints into one proceeding. For the reasons discussed below, we grant ION's requests with respect to the 2009-2011 triennial carriage cycle.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act and implementing rules adopted by the Commission in Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues ("Must Carry Order"), commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market.1 A station's market for this purpose is its "designated market area," or DMA, as defined by Nielsen Media Research.2

18 FCC Rcd 2965, 2976-2977 (1993).

2Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. See 47 U.S.C. §

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3. The Commission has clarified that “broadcast stations may assert their carriage and channel positioning rights at any time so long as they have not elected retransmission consent.”<sup>3</sup> With respect to the channel number on which stations asserting must carry rights are to be carried, Section 614 of the Act and Section 76.57 of the Commission's rules provide commercial television stations with three possible options.<sup>4</sup> Pursuant to Section 76.57, a commercial broadcast station may elect to be carried on: (1) the channel number on which the station is broadcast over the air; (2) the channel number on which the station was carried on July 19, 1985; or, (3) the channel number on which the station was carried on January 1, 1992.<sup>5</sup> The Act and the rules also provide that a broadcast station may be carried on any other channel number mutually agreed upon by the station and the cable operator.<sup>6</sup>

4. ION station KPXN, San Bernardino, California transmits on channel 30 over the air, while ION station WPXV, Norfolk, Virginia transmits over the air on channel 49. However, Charter's Monterey Park, California cable system currently carries KPXN on channel 15 for those subscribers with digital cable ready equipment and on channel 30 for subscribers without such equipment.<sup>7</sup> Charter's Thousand Oaks, California cable system currently carries KPXN on channel 61.<sup>8</sup> Finally, Charter's Manteo, North Carolina cable system currently carries WPXV on channel 64.<sup>9</sup> Therefore, ION states that Charter is in violation of its obligation to carry KPXN and WPXV on their over-the-air channels, or on another channel mutually acceptable to the parties.<sup>10</sup>

5. WPXV elected mandatory carriage on Charter's cable systems in the Norfolk-Portsmouth-Newport News, Virginia DMA for the 2003-2005 carriage cycle, but made no election in 2005, defaulting to must carry status for the 2006-2008 cycle.<sup>11</sup> KPXV elected mandatory carriage on Charter's cable systems in the Los Angeles, California DMA for both the 2003-2005 and 2006-2008

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534(h)(1)(C). Section 76.55(e) of the Commission's rules requires that a commercial broadcast television station's market be defined by Nielsen Media Research's DMAs. See 47 C.F.R. § 76.55(e).

<sup>3</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, 8 FCC Rcd. 4142, 4144, ¶ 15 (1993).

<sup>4</sup> See 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57(a).

<sup>5</sup> See 47 C.F.R. § 76.57(a).

<sup>6</sup> See 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57(d). A cable system operator must also carry a default must-carry commercial television station on its over-the-air channel number or its historic July 19, 1985 or January 1, 1992 channel number, but “in the event that none of these specified channel positions are available due to a channel positioning request from a commercial television station affirmatively asserting its must-carry rights or such a request from a qualified local noncommercial educational station, the cable operator shall place the signal of such television station on a channel of the cable system's choice, so long as that channel is included on the basic service tier.” 47 C.F.R. § 76.57(f).

<sup>7</sup> KPXN Complaint at 1.

<sup>8</sup> *Id.*

<sup>9</sup> WPXV Complaint at 1.

<sup>10</sup> Complaints at 1.

<sup>11</sup> Charter (WPXV) Opposition at 3 and Attachment A, Sept. 24, 2002 Letter from Karsten Amlie, Vice President, PAX Cable to David Oldani, Charter Communications.

carriage cycles.<sup>12</sup> However, in June, 2008 it formally demanded that Charter comply with the Commission's carriage and channel positioning rules and place KPXN and WPXV on their over-the-air channel on these cable systems.<sup>13</sup> On July 28, 2009, Charter responded to ION's notification.<sup>14</sup> It refused to position KPXN and WPXV on their over-the-air channels for several reasons: a) the over-the-air channels for KPXN and WPXV may not be on the basic tier of Charter's cable systems; b) ION did not elect must carry status for KPXN and WPXV for the current carriage cycle; and because, c) ION had consented to KPXN's and WPXV's current channel positions in the previous carriage cycle.<sup>15</sup>

6. Subsequently, ION filed two complaints, asserting its rights to position KPXN and WPXV on each station's over-the-air channel number. Although ION states Charter has previously indicated a willingness to resolve these issues informally, ION filed to preserve its rights should negotiations fail.<sup>16</sup>

### III. DISCUSSION

7. ION argues that in accordance with the Act and the Commission's rules, the Commission should order Charter to carry both of its stations on their over-the-air channel numbers: KPXN on channel 30 in the Los Angeles, California DMA, and WPXV on channel 49 in the Norfolk-Portsmouth-Newport News, Virginia DMA.<sup>17</sup> ION argues that the Commission's rules accord specific channel positioning options to must carry stations, including those that default to must carry status.<sup>18</sup> These channel positioning rights would apply to KPXN and WPXV, unless these channels are occupied by other must carry stations affirmatively asserting their channel positioning rights, or if the parties mutually agree upon another channel.<sup>19</sup> ION states these stations' 'historic' channel positions on January 1, 1992 or July 19,

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<sup>12</sup> Charter (KPXN) Opposition at 3-4; citing Attachment 1, Nov. 7, 2005 Letter from Steve Friedman, President, Paxson Cable, to Deborah Castellanos, Charter Communications (Paxson Communications Corporation was ION's predecessor in interest), and Attachment 2, Sept. 25, 2002 letter from Karsten Amlie, Vice President, Pax Cable to David Oldani, Charter Communications. Charter admits this correspondence does not reference the Thousand Oaks system.

<sup>13</sup> KPXN Complaint at 2-3 and Exhibits 1-2; WPXV Complaint at 2 and Exhibit 1. ION sent letters to Charter regarding its Monterey Park and Thousand Oaks cable systems on June 23 and 26, 2008, respectively. ION's letter regarding the Manteo cable system was sent June 25, 2008. ION notes that certified mail return receipts indicate that Charter received its Manteo and Monterey Park letters on June 27, 2008, and its Thousand Oaks letter on July 2, 2008.

<sup>14</sup> Charter responded to ION's demands regarding stations WPXV and KPXN by letter dated July 29, 2008. KPXN Complaint, Exhibit 3; WPXV Complaint, Exhibit 2.

<sup>15</sup> KPXN Complaint at 6 and Exhibit 3; WPXV Complaint at 4-5 and Exhibit 2.

<sup>16</sup> KPXN Complaint at 1; WPXV Complaint at 1-2. We note that in several extensions of time to file its opposition, Charter indicated that the parties were in negotiations to resolve the disputed issues. However, because there has been no resolution to these negotiations to date and Charter has ultimately filed its opposition, counsel for ION has requested that its complaint be processed.

<sup>17</sup> Complaints at 1.

<sup>18</sup> KPXN Complaint at 4 & n.12; WPXV Complaint at 3-4 & n.9 (citing 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57(f)).

<sup>19</sup> KPXN Complaint at 4-5 & nn.13-14; WPXV Complaint at 4 & nn.10-11 (citing 47 U.S.C. § 534(b)(6); 47 C.F.R. §§ 76.57(f) and 76.57(d); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 9 FCC Rcd 6723, 6752 (1994); *Christian Television Network, Inc. v. Tele-Media Company of Southwest*

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1985 are not relevant to the cable systems herein.<sup>20</sup> Furthermore, given that there is no controlling mutual agreement between ION and Charter, ION argues Charter has no choice but to position KPXM and WPXV on their over-the-air channels.<sup>21</sup> Furthermore, ION argues Charter cannot refuse to so position the stations on the ground that it would require the relocation of other stations.<sup>22</sup> This refusal, ION states, would violate the Commission's requirement that operators retransmit must carry stations on the basic tier.<sup>23</sup>

8. In opposition, Charter argues that ION's complaints should be summarily dismissed for belatedly seeking a new channel position in the final days of the current triennial must carry period.<sup>24</sup> Charter points out that ION filed its complaints just days before the October 1, 2008 election deadline applicable to the 2009-2011 must carry cycle. Charter asserts ION will have ample opportunity to file a timely complaint in the new must carry period, as that will reopen the channel placement issue.<sup>25</sup>

9. In reply, ION retorts that its channel positioning requests are validly and timely made in accordance with the rules.<sup>26</sup> It states it fully satisfied all applicable statutory and regulatory procedures and filed its complaints within the 60-day period after Charter's denial of its demands.<sup>27</sup> ION argues it was compelled by the Commission's rules to file its complaint promptly to avoid forfeiting its rights once Charter refused to honor ION's requests with respect to KPXM and WPXV.<sup>28</sup> Moreover, ION argues that the Commission has made clear that a broadcaster may assert its carriage and channel rights "at any time" and has repeatedly upheld this position.<sup>29</sup> ION further asserts that accepting Charter's arguments that

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*Kentucky*, 18 FCC Rcd 10653, 10656 (2003), *recon. aff'd on other grounds*, 19 FCC Rcd 9878 (2004); *False Communications, LLC v. Allen's TV Cable Service, Inc.*, 18 FCC Rcd 11304, 11308 (2003); *Univision Partnership of New Jersey v. Comcast Cablevision of Danbury*, 17 FCC Rcd 18327, 18328 (2002)).

<sup>20</sup>KPXM Complaint at 5; WPXV Complaint at 4.

<sup>21</sup>*Id.*; WPXV Complaint at 4.

<sup>22</sup>KPXM Complaint at 6; WPXV Complaint at 5.

<sup>23</sup>*Id.*; WPXV Complaint at 5. ION points to numerous cases where the Commission has rejected this defense without qualification and has held that cable systems must configure their broadcast tiers as necessary to accommodate the channel position rights of local television stations. *Id.*; WPXV Complaint at 5. (citing *Cablevision Systems Corporation*, 15 FCC Rcd 3269 (1999); *Brunson Communications, Inc. v. RCN Telecom Services, Inc.*, 15 FCC Rcd 8992 (2000), *appl. for rev. denied*, 16 FCC Rcd 21499 (2001); *Paxson Hawaii License, Inc.*, 14 FCC Rcd 9105 (1999).

<sup>24</sup>Charter (KPXM) Opposition at 1; Charter (WPXV) Opposition at 1 (hereinafter "Oppositions" unless referred to individually).

<sup>25</sup>Oppositions at 2.

<sup>26</sup>KPXM Reply at 3; WPXV Reply at 2-3.

<sup>27</sup>Replies at 3.

<sup>28</sup>*Id.*

<sup>29</sup>KPXM Reply at 4; WPXV Reply at 3-4. For instance, ION argues, in *Paxson Los Angeles License, Inc. v. West Valley Cablevision Industries, Inc., d/b/a Time Warner Communications ("Paxson Los Angeles")*, the Commission rejected Time Warner's argument that Paxson's request to have WPXV carried on a single uniform channel (rather than on two separate channels) was filed a year too late. KPXM Reply at 4 & n.8; WPXV Reply at 3-4 & n.8 (citing *Paxson Los Angeles*, 14 FCC Rcd 7070 (1999)). Similarly, it states, in *United Broadcast Group II, Inc. v. Texas Cable Partners, L.P. ("United Broadcast")*, where the broadcaster's complaint seeking to be carried on a single,

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ION should re-commence asserting its channel positioning rights in January 2009 would restart the procedural clock and, as a practical matter, defer action on KPXN and WPXV's channel positioning rights.<sup>30</sup>

10. Furthermore, ION argues its instant complaints assert channel positioning rights that will continue into the 2009-2011 carriage cycle.<sup>31</sup> ION points to the Commission's recent clarification that for channel positioning purposes, the over-the-air channel for a digital station is determined by reference to the major channel number carried in its PSIP.<sup>32</sup> As explained in our *2008 Viewability Clarification Order*, a station's "major channel number" usually corresponds to the over-the-air radio frequency at which the station previously broadcast its analog signal.<sup>33</sup> In compliance with the relevant ATSC standard, a station's "major channel number" is identified in its program and system information protocol ("PSIP").<sup>34</sup> KPXN and WPXV have major channel numbers identical to their over-the-air channel numbers.<sup>35</sup> Therefore, ION argues because KPXN and WPXV have, and will continue to have, must carry rights on channels 30 and 49, both before and after the digital transition, its demand for uniform carriage of KPXN and WPXV on channels 30 and 49 remains relevant into this cycle.<sup>36</sup>

11. In its opposition, Charter further asserts WPXV "defaulted" to must carry status on the Manteo, North Carolina cable system during the 2005 election period.<sup>37</sup> Charter argues WPXV never contested Charter's positioning of it after the October 2002 carriage election.<sup>38</sup> When WPXV had the option in 2005 of electing one of three statutorily-designated channel positions or a "mutually agreeable" alternative, WPXV again remained silent regarding its preference.<sup>39</sup> Under the circumstances, Charter maintains it reasonably assumed WPXV was satisfied with its existing channel assignment.<sup>40</sup> Charter

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uniform channel was filed more than a year and a half later, the Commission again rejected the cable operator's argument that it was filed too late. KPXN Replies at 5 & n.14, citing *United Broadcast*, 14 FCC Rcd 6766 (1999).

<sup>30</sup> KPXN Reply at 6-7 nn.20-24, WPXV Reply at 5-6 nn.20-24, citing 47 C.F.R. §§ 76.61(a)(2), 76.62(a)(5), 76.7(b)(1) and (c)(3), and 76.61(a)(4).

<sup>31</sup> Replies at 7.

<sup>32</sup> Replies at 7 & n.26 (citing *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, FCC 08-224, ¶¶ 14-16 (rel. Sept. 26, 2008) ("*2008 Viewability Clarification Order*").

<sup>33</sup> See *2008 Viewability Clarification Order*, FCC 08-224, at ¶ 15.

<sup>34</sup> *Id.* (citing *Program and System Information Protocol for Terrestrial Broadcast and Cable*, ATSC Document A/65 (Dec. 23, 1997)).

<sup>35</sup> Replies at 7 & n.27(citing *2008 Viewability Clarification Order*, FCC 08-224 at ¶ 15)..

<sup>36</sup> *Id.* at 7.

<sup>37</sup> Charter (WPXV) Opposition at 3.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* Charter argues ION's reliance on *Brunson Communications, Inc. v. RCN Telecom Services* ("*Brunson Communications*"), for the proposition that "channel position agreements expire at the end of each carriage cycle absent an express written agreement to the contrary," is not at issue here. *Id.*, citing *Brunson Communications*, 16 FCC Rcd 21499 (2001).

contends that WPXV, having defaulted to must carry in 2005 for the 2006-2008 period, also defaulted on its right to demand an alternate channel position for the duration of that election cycle.<sup>41</sup>

12. For the Monterey Park and Thousand Oaks, California systems, Charter asserts that ION similarly assented in its 2005 election letter to a “mutually agreeable” channel placement for KPXN through the 2003-2005 election cycles, “as well as for the upcoming election cycle for January 1, 2006 through December 31, 2008.”<sup>42</sup> Charter asserts this prolonged the status quo established by Paxson’s 2002 election letter, which had consented to KPXN’s placement on channels 15 and 30 on Charter’s Monterey Park system.<sup>43</sup> Given the 2005 letter’s failure to identify any channel positioning disagreements, Charter asserts that this complaint should be dismissed.<sup>44</sup>

13. ION disputes Charter’s arguments about the effects of prior election letters as well as Charter’s assumption that, due to KPXN’s and WPXV’s silence, these stations defaulted to channel positions “mutually agreeable” with Charter.<sup>45</sup> ION states that Charter must carry KPXN and WPXV on their over-the-air channels because no mutual agreement exists authorizing carriage of KPXN and WPXV on any other channel numbers.<sup>46</sup> ION argues that even if it had consented to KPXN’s channel positions on Charter’s Monterey Park system in its 2002 correspondence with Charter, the Commission has concluded that channel positioning agreements expire at the end of each carriage cycle absent an express written agreement to the contrary.<sup>47</sup> Accordingly ION never consented to Charter’s dual-channel carriage of KPXN in Monterey Park for the subsequent 2006-2008 carriage cycle.<sup>48</sup> Furthermore, ION argues that during the 2003-2005 carriage cycle, its lack of consent to KPXN’s channel placement on the Thousand Oaks cable system and lack of objection to WPXV’s placement on the Manteo system, combined with ION’s continuing silence concerning these stations’ placement during the 2006-2008 period, did not amount to a “mutual agreement” with Charter as to their placement, or extinguish Charter’s channel positioning obligations.<sup>49</sup>

14. Finally, Charter responds that even if the Commission were inclined to grant ION’s complaints, the time necessary to re-engineer the systems and provide appropriate customer notice would

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<sup>41</sup>*Id.* at 4.

<sup>42</sup> KPXN Opposition at 3 (citing Attachment 1, Nov. 7, 2005 Letter from Steve Friedman, President, Paxson Cable, to Deborah Castellanos, Charter Communications (Paxson Communications Corporation was ION’s predecessor in interest)).

<sup>43</sup> *Id.* at 3-4 (citing Attachment 2, Sept. 25, 2002 letter from Karsten Amlie, Vice President, Pax Cable to David Oldani, Charter Communications. Charter admits this correspondence does not reference the Thousand Oaks system).

<sup>44</sup> *Id.* at 4.

<sup>45</sup> See KPXN Reply at 10; WPXV Reply at 9. ION argues the Commission has rejected similar arguments raised by a cable system. KPXN Reply at 10 & n.39; WPXV Reply at 9 & n.35 (citing *Complaint of Paxson Los Angeles License, Inc. v. West Valley Cablevision Indus., Inc. d/b/a Time Warner Comm.*, 14 FCC 7070, 7072 (1999)).

<sup>46</sup> KPXN Reply at 11; WPXV Reply at 9.

<sup>47</sup> See KPXN Complaint at Exhibit 3; KPXN Reply at 11 & n.43 (citing *Brunson Communications*, 15 FCC Rcd at 8998 (2000)).

<sup>48</sup> KPXN Reply at 12.

<sup>49</sup> KPXN Reply at 8-11; WPXV Reply at 9.

preclude it from implementing the requested relief prior to January 1, 2009.<sup>50</sup> Specifically with regard to the Manteo cable system, Charter points out that the particular channel which ION is seeking for WPXV is not included within the Manteo system's basic tier.<sup>51</sup> In order to correct this, Charter states that the cable channel would need to be re-trapped, which would impose substantial financial burdens on the cable system.<sup>52</sup> In addition, Charter states that the new traps would compromise the security of two adjacent channels that are not currently part of the basic-only tier.<sup>53</sup> Charter argues that imposing this extraordinary operational burden on Charter and its subscribers makes no sense, particularly when the change could not possibly be implemented prior to January 1, 2009.<sup>54</sup> Therefore, Charter respectfully submits that ION's complaint for Manteo should be dismissed and the costs of compliance should be considered in a later proceeding, if the same issues arise during the 2009-2011 must carry cycle.<sup>55</sup>

15. ION replies that the Commission has held in numerous cases that cable systems must configure their broadcast tiers as necessary to accommodate the channel position rights of local television stations.<sup>56</sup> As a result, ION argues, Charter's decision to locate channel 49 on its expanded basic tier on its Manteo system cannot serve as a basis for failing to honor WPXV's over-the-air channel rights.<sup>57</sup> Moreover, ION points out that Charter's claimed compliance costs are not sufficient to support a waiver of a cable operator's channel positioning obligations.<sup>58</sup> In this instance, Charter's stated cost per subscriber is \$2.80 and, based on Charter's estimate of 25,000 total system subscribers, the total cost of compliance would be approximately \$70,000.<sup>59</sup> ION argues, however, that in the only Commission decision where costs were found to justify a waiver of a cable operator's channel positioning obligations, *WXTV License Partnership, G.P.*, the cost per subscriber was \$9.82 and the total cost was \$1,061,642.<sup>60</sup> In that same decision, the Commission ordered the cable operator to comply with its channel positioning

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<sup>50</sup>Oppositions at 2.

<sup>51</sup>Charter (WPXV) Opposition at 4. Charter states that approximately 3,200 basic-only subscribers compared to the approximately 25,000 Manteo system subscribers do not currently have access to cable channel 49. *Id.*

<sup>52</sup>*Id.* at 4. Charter states that preliminary estimates place the cost of new traps at approximately \$9 per basic-only subscriber, and associated labor costs at approximately \$13 per basic-only subscriber, or more than \$2.80 per system subscriber. *Id.* at 4-5.

<sup>53</sup>*Id.* at 5.

<sup>54</sup>*Id.*

<sup>55</sup>*Id.*

<sup>56</sup>WPXV Reply at 11 & n.46 (citing *WXTV License Partnership, G.P.*, 14 FCC Rcd 6482, 6500 (1999), *pet. for recon. granted in part and denied in part*, 15 FCC Rcd 3308 (2000); *Golden Orange Broadcasting Co.*, 18 FCC Rcd 4985, 4988-89 (2003); *Brunson Communications*, 15 FCC Rcd at 8992, 9000; *Paxson Hawaii License, Inc.*, 14 FCC Rcd 9105, 9108 (1999)). "Commission has found that inconvenience, marketing problems, the need to reconfigure the basic tier, the need to employ additional traps, or the need to make technical changes are not sufficient reasons for denying the channel positioning request of a qualified television station." *Id.* at 11-12 & n.47 (citing *Golden Orange Broadcasting Co.*, 18 FCC Rcd at 4986; *see also Must Carry Order*, 8 FCC Rcd at 2988)).

<sup>57</sup>*Id.* at 12.

<sup>58</sup>*Id.* ION states that, in *Brunson Communications*, the Commission held that the relevant figures for evaluating a cable operator's compliance costs in this context are cost per subscriber and total cost. *Id.* at 12 & n.48 (citing *Brunson Communications*, 16 FCC Rcd at 21505-06).

<sup>59</sup>*Id.* at 12 & n.49 (citing Charter (WPXV) Opposition at 4-5).

<sup>60</sup>*Id.* at 12 & n.50 (citing *WXTV License Partnership, G.P.*, 14 FCC Rcd at 6501).

obligations on a separate system where the cost per subscriber was \$31 and the total cost was \$446,000,<sup>61</sup> and more recently ordered a cable operator who claimed a cost of \$9.87 per subscriber and a total cost of \$599,880 to reconfigure its basic tier.<sup>62</sup> ION argues that Charter's claimed costs fall far below those in these cases. In addition, ION argues Charter has provided no information to support its claim that "new traps would compromise the security of two adjacent channels."<sup>63</sup>

16. We agree with Charter that because ION's complaint was filed just days before the October 1, 2008 deadline for television broadcast stations to make their mandatory carriage election, there was not enough time to enact the channel positioning change requested for WPXV prior to December 31, 2008.<sup>64</sup> Nevertheless, we also agree with ION that dismissing the instant complaint as it relates to the 2009-2011 election cycle would be counterproductive because the same issues raised in this proceeding would equally apply in any future complaint and the unnecessary delay in resolving ION's claims would not be in the public interest. In fact, given the that the 2006-2008 carriage cycle has ended, our decision herein will relate only to the channel positioning rights of WPXV and KPXN for the 2009-2011 carriage cycle. Any arguments raised by either party relative to the previous carriage cycle are now moot and need not be addressed.

17. In this instance, ION specifically requested that its demands to be carried on its over-the-air channels during the 2006-2008 carriage cycle be applied to its carriage in the 2009-2011 cycle. We will grant this request. As discussed above, for channel positioning purposes, the over-the-air channel for a digital station is determined by reference to the major channel numbers carried in its PSIP.<sup>65</sup> Like nearly all full-power television stations, KPXN and WPXV have major channel numbers identical to their over-the-air analog broadcast frequency.<sup>66</sup> Accordingly, we conclude that Charter must position WPXV and KPXN on their over-the-air channel numbers, 49 for WPXV and channel 30 for KPXN, in the 2009-2011 carriage cycle.

18. With regard to WPXV's carriage on channel 49 for the 2009-2011 cycle, Charter only raises the affirmative defense that because WPXV's over-the-air channel number is not located on the Manteo system's basic tier, the system would need to be reconfigured by installing new traps, the costs of which would be burdensome. Charter fails to provide any financial information to either support or justify such costs. Even if Charter had provided supporting documentation, however, the costs cited by Charter fail to justify the grant of a channel positioning waiver.<sup>67</sup> In view of this, we cannot grant Charter's request.<sup>68</sup> Accordingly, we will grant ION's request and order Charter to position WPXV on its

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<sup>61</sup>*Id.* at 12 & n.51 (citing *WXTV License Partnership, G.P.*, 14 FCC Rcd at 6489, 6500).

<sup>62</sup>*Id.*, at 12-13 & n.52 (citing *Golden Orange Broadcasting Co.*, 18 FCC Rcd at 4988-89 & n.30).

<sup>63</sup>*Id.* at 13 & n.53 (citing Opposition at 5).

<sup>64</sup> ION's Complaints were filed with the Commission on September 26, 2008.

<sup>65</sup> See ¶ 10 and note 32, *supra*.

<sup>66</sup> Replies at 7 & n.27(citing *2008 Viewability Clarification Order*, FCC 08-224 at ¶ 15).

<sup>67</sup> See e.g., *Brunson Communications, Inc. v. RCN Telecom Services, Inc.*, 15 FCC Rcd 8992 (1999); *WXTV License Partnership, G.P.*, 14 FCC Rcd 6482 (1999); *pet. for recon. granted in part and denied in part*, 15 FCC Rcd 3308 (2000).

<sup>68</sup> As stated in the *Must Carry Reconsideration Order*, a cable system cannot avoid its must carry obligations because it must reconfigure its system to accommodate a must carry station's rights to carriage on its over-the-air channel. See *Must Carry Reconsideration*, 9 FCC Rcd 6723, 6754-55 (1994).



over-the-air channel number, channel 49 on Charter's cable system serving Manteo, North Carolina, during the 2009-2011 carriage cycle.

19. With regard to Charter's Monterey Park and Thousand Oaks cable systems, we find that ION has made a legitimate channel positioning request for carriage on its over-the-air channel number, channel 30. Although Charter has made no affirmative defense regarding KPXN's carriage on its systems for the 2009-2011 carriage cycle, it had every opportunity to argue that there were technical or expense-related reasons why it could not provide on-channel carriage for KPXN on its Monterey Park and Thousand Oaks systems. Accordingly, we will grant ION's request and order Charter to position KPXN on its over-the-air channel number, channel 30, on the Monterey Park and Thousand Oaks cable systems.

#### IV. ORDERING CLAUSES

20. Accordingly, **IT IS ORDERED** that the petition filed by ION Media Networks, Inc., ultimate parent of Paxson Los Angeles, Inc. (CSR-8071-M) **IS GRANTED** pursuant to Section 614(d)(3) of the Communications Act of 1934, as amended, 47 U.S.C. § 534(d)(3). Charter Communications **IS ORDERED** to reposition WPXV on Channel 49, the station's over-the-air channel number, on Charter's cable system serving Manteo, North Carolina, within 60 days from the release date of this order.

21. **IT IS FURTHER ORDERED**, that the petition filed by ION Media Networks, Inc., ultimate parent of Paxson Los Angeles, Inc. (CSR-8070-M) **IS GRANTED** pursuant to Section 614(d)(3) of the Communications Act of 1934, as amended, 47 U.S.C. § 534(d)(3). Charter Communications **IS ORDERED** to reposition KPXN on Channel 30, the station's over-the-air channel number, on Charter's cable systems serving Monterey Park and Thousand Oaks, California, within 60 days from the release date of this order.

22. These actions are taken pursuant to authority delegated by Section 0.283 of the Commission's rules.<sup>69</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker  
Senior Deputy Chief, Policy Division  
Media Bureau

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<sup>69</sup>47 C.F.R. § 0.283.