

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

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| In the Matter of: |) | |
| |) | |
| Paxson Chicago License, Inc. |) | |
| |) | |
| v. |) | |
| |) | |
| 21 st Century TV Cable, Inc. |) | CSR 5593-M |
| |) | |
| Wedgewood Communications |) | CSR 5594-M |
| |) | |
| TV Cable of Rensselaer |) | CSR 5595-M |
| |) | |
| AT&T Broadband |) | CSR 5596-M |
| |) | |
| Ameritech New Media |) | CSR 5603-M |
| |) | |
| Mediacom Communications Corporation |) | CSR 5604-M |
| |) | |
| Charter Communications, Inc. |) | CSR 5605-M |
| |) | |
| Optel Cable, Inc. |) | CSR 5625-M |
| |) | |
| Mediacom |) | CSR 5626-M |
| |) | |
| Grand Ridge Cable Co. |) | CSR 5627-M |
| |) | |
| Western Cable Communications |) | CSR 5628-M |
| |) | |
| Kraus Electronic Systems |) | CSR 5629-M |
| |) | |
| Consumer Cable of America |) | CSR 5630-M |
| |) | |
| Application for Review of Order of the |) | |
| Cable Services Bureau Denying Requests for |) | |
| Carriage |) | |

MEMORANDUM OPINION AND ORDER

Adopted: August 9, 2001

Released: August 15, 2001

By the Commission:

I. INTRODUCTION

1. The Commission has before it an Application for Review filed by Paxson Chicago License, Inc. (“Paxson”). Paxson seeks review of an order issued by the Cable Services Bureau (the “Bureau”) which denied the must carry complaints of television station WCPX-DT, Chicago, Illinois regarding certain Chicago-area cable systems.¹ For the reasons discussed below, we affirm the Bureau’s action and deny Paxson’s Application for Review.

II. BACKGROUND

2. Paxson is the licensee of television station WCPX, Chicago, Illinois. WCPX broadcasts an NTSC analog television service on channel 38 and a digital television service on channel 46.² Paxson filed 13 must carry complaints against cable operators in and around Chicago, Illinois. Paxson requested that the Commission order each of the cable operators involved to replace the existing WCPX analog service with a downconverted analog version of the digital primary Central Time feed of PAXTV received from channel 46 and place the remaining five channel 46 programming streams on the digital portion of the cable systems for access by subscribers that have digital set-top boxes. The Bureau consolidated the complaints and dismissed Paxson’s request. The Bureau found that Paxson’s request was inconsistent with the Commission’s *Digital Television Broadcast Signal Carriage Report and Order and Further Notice of Proposed Rule Making*.³ The *Bureau Order* noted that the Commission has stated that television stations that broadcast in both analog and digital modes, like Paxson’s, cannot assert digital carriage rights until such issue is resolved in the pending proceeding.⁴

III. DISCUSSION

3. In its Application for Review, Paxson asserts that several of the Commission’s decisions in the *Digital Must Carry Report and Order* are flawed, and therefore it will be seeking reconsideration of them. Paxson argues it was erroneous for the Bureau to dismiss the complaints based on the Commission’s incorrect decisions.⁵ Paxson also submits that because the Commission did not address Paxson’s dual carriage proposal in the *Digital Must Carry Report and Order*, the Bureau’s action involves a question that has not been previously decided.⁶ Paxson requests that the Bureau’s decision be reversed and the

¹ *Paxson Chicago License, Inc. v. 21st Century TV Cable, Inc., et al.*, Memorandum Opinion and Order, DA 01-149 (rel. Jan 23, 2001) (“*Bureau Order*”). Oppositions to Paxson’s Application were filed by AT&T Corp., Charter Communications, L.L.C., Mediacom Communications Corp., RCN Cable TV of Chicago, Inc., and TVCable of Rensselaer, Inc.

² The digital transmission on channel 46 includes six separate multiplexed programming streams: (1) the primary Central Time feed of PAXTV; (2) PAXTV east coast feed; (3) PAXTV west coast feed; (4) The Worship Network; (5) The Praise Network; and (6) The TLN Network. *Bureau Order* at ¶ 2.

³ *Bureau Order* at ¶ 8, citing *Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission’s Rules*, First Report and Order and Further Notice of Proposed Rulemaking, FCC 01-22 (rel. Jan. 23, 2001) (“*Digital Must Carry Report and Order*”).

⁴ *Bureau Order* at ¶ 9, citing CS Docket No. 98-120.

⁵ Paxson Application for Review at 3.

⁶ Paxson claims that the Commission has not addressed its “Either-Or” proposal to allow broadcasters the ability to elect when their mandatory carriage signal would be converted from analog to digital. *Id.* at 9.

digital carriage complaints reinstated and held in abeyance until the Commission responds to the petitions for reconsideration of the *Digital Must Carry Report and Order*.⁷

4. In opposition, the cable operators assert that Paxson fails to demonstrate that the Bureau's decision satisfies any of the criteria for granting review and therefore, should be denied.⁸ AT&T contends that the Commission resolved the legal question underlying Paxson's complaints when it released the *Digital Must Carry Report and Order*, and the legal reasoning and conclusion of the *Bureau Order* are entirely consistent with the Commission's existing rules.⁹ RCN maintains that the Bureau properly interpreted the Commission's rules and policies to mean that rules for dual carriage of analog and digital formats have not been adopted.¹⁰ Marcus argues that Paxson's attempt to use the Application for Review as an opportunity to redress perceived wrongs in the digital must carry rulemaking is an insufficient basis for reversing the *Bureau Order*.¹¹

5. After reviewing the Application for Review and the oppositions thereto, we conclude that Section 614(h)(1)(C)(iv) requires that a must carry complaint be granted or denied within 120 days after the date on which a must carry complaint is filed.¹² To satisfy this statutory requirement, Paxson's complaint must be decided on the merits under present law rather than dismissed because a rulemaking is pending. Although the Commission is considering the issue of mandatory dual carriage in the context of the Further Notice of Proposed Rulemaking released as part of the *Digital Must Carry Report and Order*, to date no current Commission rule entitles television stations to mandatory carriage of both an analog and a digital signal on a cable system or entitles a station broadcasting both digital and analog content to elect mandatory carriage of the digital content, multiple streams of content, or a downconverted analog version of the digital content rather than the broadcast content of its analog service.¹³ In this regard, the Commission stated:

. . . we have received comments arguing that the statute requires dual carriage or that the statute forbids it. It is our view, having deliberated extensively on this question, that neither of these views prevail. Based on the record currently before us, we believe that the statute neither compels dual carriage; nor prohibits it. It is precisely the ambiguity of the statute that has driven this policy debate. In order to weigh the constitutional questions inherent in a statutory construction that would permit dual carriage, we believe it appropriate and necessary to more fully develop the record in this regard. Because any decision requiring dual carriage would likely be subject to a constitutional challenge, and because an administrative agency can consider potential constitutional infirmities in deciding between possible interpretations of a statute, we are compelled to further develop

⁷ *Id.*

⁸ AT&T Opposition at 1; RCN Opposition at 4.

⁹ AT&T Opposition at 2.

¹⁰ RCN Opposition at 4.

¹¹ Marcus Cable Opposition at 3.

¹² 47 U.S.C. § 534(h)(1)(C)(iv).

¹³ See *Digital Must Carry Report and Order*, ¶¶ 112-113. See also ¶ 57 ("if a digital broadcaster elects to divide its digital stream into several separate, independent and unrelated programming streams, only one of these streams is considered primary and entitled to mandatory carriage.")

the record on the impact dual carriage would have on broadcast stations, cable operators and cable programmers, as well as consumers. We believe that more evidence is necessary because the Supreme Court sustained the Act's analog broadcast signal carriage requirements against a First Amendment challenge principally because Congress and the broadcasting industry built a substantial record of the harm to television stations in the absence of mandatory analog carriage rules.¹⁴

While we commend those broadcasters already on the air with digital television, based on the limited record amassed in this must carry complaint proceeding, we have no basis for concluding that the statute requires dual carriage.¹⁵ Accordingly, we deny Paxson's must carry complaints. Our decision, however, is without prejudice to Paxson refiling its complaints should the Commission, upon review of the record developed by the Further Notice, determine that dual carriage is required under Section 614.

IV. ORDERING CLAUSES

6. Accordingly, **IT IS ORDERED** that the Application for Review filed by Paxson Chicago License, Inc. **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

¹⁴ *Id.* at ¶ 113.

¹⁵ Paxson could seek to have its digital signal carried in an analog format if it returns its analog spectrum. *See Digital Must Carry Report and Order*, ¶ 2 (“new stations that transmit only digital signals, and current television stations that return their analog spectrum allocation and convert to digital operations, must be carried”).