In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re:	)	
	)	
PAXSON COMMUNICATIONS CORP.,	)	**No. 04-1290**
	)	
Petitioner	)	

FCC OPPOSITION TO PETITION FOR ISSUANCE OF WRIT OF MANDAMUS

The Federal Communications Commission hereby opposes the Petition for Issuance of Writ of Mandamus filed by Paxson Communications Corporation. Paxson seeks an order from the Court directing the Commission to resolve issues in a pending rule making proceeding. The Commission has already resolved the "multicasting" issue raised in Paxson's mandamus petition, and Paxson has chosen to seek agency reconsideration of that ruling rather than immediate judicial review. Mandamus is not available in such circumstances where the petitioner has an adequate remedy at law. To the extent that Paxson seeks to force Commission action on another issue involving "dual carriage" of analog and digital signals of the same broadcaster, it has failed to show that the lack of a final FCC decision warrants the drastic remedy of mandamus at this time, particularly when Paxson's related reconsideration petition remains pending.

BACKGROUND

1. The Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) (1992 Cable Act), provides commercial television stations the ability to obtain carriage of their broadcast signals on cable systems operating in their local television market. Under the Act, a television station can obtain carriage by

electing (once every three years) to negotiate a voluntary carriage agreement (often called a retransmission-consent agreement) with the cable operator. *See* 47 U.S.C. § 325(b). Alternatively, the Act grants broadcasters that elect not to pursue retransmission-consent arrangements the right to obtain mandatory carriage of their television signal. *See* 47 U.S.C. 534.

The 1992 Cable Act requires all but the smallest cable systems to allot "up to one-third of [their] aggregate number of usable activated channels" to the carriage of local broadcast signals. 47 U.S.C. § 534(b)(1). The Act further specifies the parameters of cable operators' mandatory-carriage, or "must-carry," obligations. Cable operators must carry the entire "primary video, accompanying audio," and closed-captioning transmission of a television station, and "to the extent technically feasible, program-related material carried" within the broadcast signal. 47 U.S.C. § 534(b)(3)(A). The cable operator also must carry "the entirety of the program schedule" of a television station without any "material degradation" of the broadcast signal, although it may refuse to carry any signal that "substantially duplicates" the signal of another television station carried over its cable system. 47 U.S.C. § 534(b)(3)(B), (4)(a), (5). With limited exception, cable operators are not entitled to compensation for fulfilling their mandatory-carriage obligations for broadcast programming that is not covered by a retransmission consent agreement. 47 U.S.C. § 534(b)(10).

In *Turner Broadcasting System v. FCC*, 512 U.S. 622, 634 (1994) (*Turner I*), the United States Supreme Court evaluated the must-carry provisions of the statute under the intermediate-scrutiny standard articulated in *United States v. O'Brien*, 391 U.S. 367, 37 (1968). The Court observed that Congress had enacted the must-carry provisions to

promote three interrelated governmental interests: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming." *Id.* at 662-663. Although the Court determined that those interests were sufficiently important under *O'Brien's* intermediate-scrutiny standard, it remanded the case so that a more complete record could be developed on whether the must-carry provisions were necessary to promote those governmental interests and whether mandatory carriage burdened substantially more speech than necessary to further those interests. 512 U.S. at 662-68.

After a three-judge district court "oversaw another 18 months of factual development on remand," the Supreme Court in *Turner Broadcasting System v. FCC*, 520 U.S. 180, 187 (1997) (*Turner II*), concluded that the must-carry provisions satisfied intermediate-scrutiny review.

2. Historically, television stations in the United States have used an analog transmission standard. *See Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 293 (D.C. Cir. 2003) (*CEA*). In 1987, the FCC began exploring the possibility of transitioning television stations from the analog standard to a digital broadcast standard. *See Advanced Television*, 2 FCC Rcd 5125 (1987). Digital television (or DTV) offers many advantages over traditional analog signals. For instance, under the analog standard, broadcasters can transmit only one video programming signal, two or three audio signals, and certain additional information such as closed-captioning over a 6 megahertz (MHz) television channel. *CEA*, 347 F.3d at 293. Using digital technology, broadcasters could use the same 6 MHz of spectrum either to "multicast" multiple streams of video programming, or

to broadcast a single "high-definition" television signal that combines high-resolution video with movie-quality surround sound, while additionally providing consumers with data services. *Ibid.* In addition, DTV signals are more resistant to interference, a characteristic that both enhances the quality of the broadcast signal and allows for the reallocation of spectrum that in the past has been left vacant to guard against interference to uses of adjacent spectrum, such as emergency and wireless communications. *Id.* at 293-294.

In 1997, after enactment of the 1992 Cable Act, the FCC adopted a plan for transitioning analog television stations to a DTV standard. *Advanced Television Systems*, 12 FCC Rcd 12809 (1997) (*Fifth Report and Order*), *aff'd*, *Community Television, Inc. v. FCC*, 216 F.3d 1133 (D.C.Cir. 2000). The FCC's plan provides existing analog broadcasters a second 6 MHz channel on which they can broadcast a DTV signal. *Id.* at 12812 ¶ 8. Affiliates of the top four television networks (*i.e.*, ABC, CBS, Fox, and NBC) located in the top thirty television markets were required to complete construction of their DTV facilities by 1999; the construction deadline for all other commercial television stations was May 1, 2002. *Id.* at 12840-41 ¶ 76; *see also* 47 C.F.R. § 73.624(d).[1] Currently, all the top four network affiliates in the top thirty television markets, and 83% of all other commercial television stations, are broadcasting a digital signal. *Second DTV Periodic Review*, 19 FCC Rcd 18279, 18285 ¶¶ 14-15 (2004) (*DTV Second Review*).

[1] The FCC established a waiver process through which broadcasters could request additional time to construct their DTV facilities. *Fifth Report and Order*, 12 FCC Rcd at 12841 ¶ 77.

At the completion of the DTV transition, broadcasters will select one 6 MHz channel to return to the FCC and retain the other 6 MHz channel for their DTV operations. *Fifth Report and Order*, 12 FCC Rcd at 12849 ¶ 97 (citing 47 U.S.C. § 336(c)).

In the *Fifth Report and Order*, the FCC established 2006 as the target date for completion of the transition from analog to digital television. 12 FCC Rcd at 12850 ¶ 99. Shortly thereafter, Congress codified a target date of December 31, 2006, but provided for an extension of the transition period in individual markets where certain conditions exist.[2] The FCC has commenced a rulemaking proceeding to implement the statutory extension criteria. *See DTV Second Review*, 19 FCC Rcd at 18282 ¶ 6.

3. Congress understood when it passed the 1992 Cable Act that the transition to digital television would raise questions about the application of the Act's must-carry provisions to DTV broadcasts. Accordingly, Congress provided that "[a]t such time as the Commission prescribes modifications of the standards for television broadcast signals," it shall "initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards." 47 U.S.C. § 534(b)(4)(B). Later, in 1996, Congress provided guidance by specifying that broadcasters are not entitled to mandatory

---

[2] These conditions include: (1) one or more of the top four network affiliates are not broadcasting a DTV signal despite the exercise of due diligence; (2) digital-to-analog signal converter technology is not generally available; or (3) 15% or more of television households in the market "do not subscribe to a multichannel video programming distributor" (such as a cable or satellite provider) "that carries one of the digital television service programming channels" of each DTV station in the market, and "do not have" a DTV receiver or a digital-to-analog converter. 47 U.S.C. § 309(j)(14).

carriage of any "ancillary or supplementary services" (such as data services, for example) provided through their DTV signals. 47 U.S.C. § 336(b)(3). In the accompanying Conference Report, Congress stated that Section 534 was not intended "to confer must carry status on advanced [*i.e.*, digital] television" because "that issue is to be the subject of a Commission proceeding" under 47 U.S.C. § 534(b)(4)(B). Telecommunications Act of 1996, H.R. Conf. Rep. No. 104-458, at 121 (1996).

In July 1998, the FCC initiated the required proceeding under Section 534(b)(4)(B) to address the legal and technical issues raised by application of the 1992 Cable Act's must-carry provisions in the DTV environment. *Carriage of the Transmissions of Digital Television Broadcast Stations*, 13 FCC Rcd 15092 (1998) (*DTV Must Carry NPRM*). The FCC explained that "participation by the cable industry during the transition period is likely to be essential to the successful introduction of digital broadcast television," but that, in light of the recent *Turner* decision concerning the constitutionality of mandatory carriage, any rules that the FCC might adopt "must be carefully crafted to permit them to be sustained in the face of a constitutional challenge." *Id.* at 15101 ¶¶ 14-15. The FCC accordingly considered it "essential to build a record relating to the interests to be served" by DTV must-carry rules, "the factual predicate on which they would be based, the harms to be prevented, and the burdens they would impose." *Id.* at 15102. The FCC specifically observed that "the most difficult issues arise" during the transition period when most broadcasters have two 6 MHz television channels because, in that situation, "cable operators could be required to carry double the amount of television stations * * * while having to drop various and varied cable programming services where channel capacity is limited." *Id.* at 15112-13 ¶ 39.

4. On January 23, 2001, the FCC released a report and order in the *DTV Must Carry* proceeding. *Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598 (2001) (*DTV Must Carry Order*). The *DTV Must Carry Order* resolved a host of legal and technical issues to facilitate the carriage of DTV stations on cable systems. Of particular relevance here are three FCC determinations concerning the scope of cable operators' obligation to carry digital television signals.

First, the FCC determined that "broadcast stations operating only with digital signals are entitled to mandatory carriage" pursuant to the requirement of 47 U.S.C. § 534(b). *Id.* at 2605 ¶ 12. Thus, "new television stations that transmit only digital signals, and current television stations that return their analog spectrum allocation and convert to digital operations, must be carried" if they are eligible for carriage under 47 U.S.C. § 534. *Id.* at 2600 ¶ 1. The Commission further provided that broadcasters may require cable operators to transmit that digital signal to subscribers in an analog format, *id.* at 2630 ¶ 74.[3]

Second, the FCC concluded that a DTV station multicasting multiple digital video streams may obtain mandatory carriage for only one of those video streams. *Id.* at 2620-21 ¶ 54. The FCC reasoned that the requirement in 47 U.S.C. § 534(b)(3) that cable operators carry a station's "primary video" programming forecloses the broadcaster from compelling carriage of "several separate, independent and unrelated programming streams." *Id.* at 2622 ¶ 57. The FCC granted broadcasters the right to decide which of

---

[3] The *DTV Must Carry Order* indicated that the right to cable carriage of a digital signal in analog format may be phased out as the DTV transition progresses. 16 FCC Rcd at 2630 ¶ 74. The FCC is currently evaluating whether it should retain broadcasters' right to digital-to-analog conversion or mandate that cable systems carry DTV signals in digital format.

their digital programming streams would be the primary video signal entitled to mandatory carriage, *id*. at 2621 ¶ 54.

Finally, the FCC confirmed that cable operators and broadcasters may enter into voluntary agreements for the carriage of DTV signals in accordance with the retransmission-consent provisions of the 1992 Cable Act. *Id.* at 2609-2614 ¶¶ 24-36. In particular, the FCC preserved the ability of broadcasters operating both analog and digital broadcast facilities to seek carriage of their digital signals through the retransmission-consent process without relinquishing their right to mandatory carriage of their analog signal. *Id.* at 2610 ¶ 27. The FCC also declined to prohibit "tying" arrangements in which a broadcaster requires carriage of its DTV signal as a condition to consenting to retransmission of its analog signal. *Id.* at 2613 ¶ 35.

In the *DTV Must Carry Order*, the FCC also considered whether broadcasters operating both analog and digital television stations during the transition period may obtain mandatory carriage of both stations by cable systems under Section 534(b). Although the FCC concluded that it had the statutory authority to require carriage of both analog and digital signals, it rejected broadcasters' arguments that the Act compels such "dual carriage." *Id.* at 2600 ¶ 2 ("the statute neither mandates nor precludes" dual carriage); *accord id*. at 2606 ¶ 14; 2648 ¶ 113. The FCC recognized that, under the *Turner* cases, a requirement that cable operators provide dual carriage would be subject to *O'Brien*'s intermediate-scrutiny standard, *id*. at 2648 ¶ 114, and it "tentatively conclude[d]" that dual carriage would not have survived such scrutiny based on the then-existing record, *id*. at 2600 ¶ 3. The FCC issued a Further Notice of Proposed Rulemaking (*DTV Must Carry Further Notice*) to obtain additional comment and empirical

evidence on the need for and impact of a dual-carriage requirement. *Id.* at 2647-51 ¶¶ 117-121.

Ten parties, including Paxson, filed petitions requesting that the FCC reconsider various aspects of the *DTV Must Carry Order*. *See* Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings, 66 Fed. Reg. 23929 (May 10, 2001). Paxson (along with other broadcast interests) specifically requested that the FCC reconsider its decision to limit broadcasters' digital must-carry rights to a single video programming stream. Those reconsideration petitions remain pending.

5. On the day that the FCC released the *DTV Must Carry Order*, the agency also dismissed a complaint filed by Paxson seeking mandatory carriage of its DTV signal in Chicago. *Paxson Chicago License, Inc.*, 16 FCC Rcd 2185, 2186 ¶ 1 (2001) (*Paxson Order*). In its complaint, Paxson sought to have the Commission force the cable operator to replace Paxson's analog signal with an "analog version" of Paxson's primary digital programming channel, and also carry Paxson's five other multicast programming streams "on the digital portion of the cable systems for access by subscribers that have digital set-top boxes." *Ibid.* In rejecting Paxson's complaint, the FCC concluded that, under the *DTV Must Carry Order*, Paxson may not "assert digital carriage rights" for television stations broadcasting both analog and digital signals absent an affirmative determination by the FCC that broadcasters may exercise digital must-carry rights to obtain such dual carriage. *Id.* at 2189 ¶ 8. Paxson filed a petition for review of the FCC's decision in this Court on October 15, 2001. *Paxson Chicago License, Inc. v. FCC*, No. 01-1457 (D.C. Cir.). On October 8, 2002, the Court granted a joint motion by Paxson and the FCC to

hold the case in abeyance pending the agency's completion of the *DTV Must Carry* proceeding. That case continues to be held in abeyance.

ARGUMENT

Paxson's petition for a writ of mandamus falls far short of the high bar that must be overcome to warrant judicial intervention into the conduct of an agency proceeding. **"**Mandamus is a 'drastic remedy,' to be invoked only in extraordinary situations." *In re Papandreou*, 136 F.3d 247, 250 (D.C. Cir. 1998) (quoting *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976)); *accord Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980). Recognizing that the grant of mandamus "contributes to piecemeal litigation," *id.* at 35, courts require the petitioner, at a minimum, to show that its right to the writ is "clear and indisputable," *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988), and that "no other adequate means to attain the relief exist," *In re Papandreou*, 136 F.3d at 250. Even then, "issuance of the writ is in large part a matter of discretion with the court to which the petition is addressed." *Kerr v. United States District Court*, 426 U.S. at 403.

A "finding that [agency] delay is unreasonable does not, alone, justify judicial intervention." *In re Barr Lab.*, 930 F.2d 72, 74 (D.C. Cir.), *cert. denied*, 502 U.S. 906 (1991); *accord Cobell v. Norton*, 240 F.3d 1081, 1096 (D.C. Cir. 2001); *In re United Mine Workers*, 190 F.3d 545, 551 (D.C. Cir. 1999). A court still must determine whether delay is so egregious that it warrants mandamus. In *TRAC*, the Court set forth a list of considerations for evaluating whether an agency has engaged in egregious delay for which a writ of mandamus may be issued:

> (1) the time agencies take to make decisions must be governed by a rule of reason;

(2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason;

(3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake;

(4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority;

(5) the court should also take into account the nature and extent of the interests prejudiced by delay; and

(6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

750 F.2d at 80 (citations and internal quotation marks omitted). In addition, the Court considers whether the agency is actively working to bring its proceeding to completion. *See Cutler v. Hayes*, 818 F.2d 879, 897 (D.C. Cir. 1987) (courts "should evaluate any prospect of early completion"); *In re Monroe Communications Corp.*, 840 F.2d 942, 946 (D.C. Cir. 1988) (denying mandamus where the agency was taking steps to complete its proceeding).

I. PAXSON IS NOT ENTITLED TO A WRIT OF MANDAMUS WITH RESPECT TO MULTICASTING ISSUES THAT THE FCC HAS ALREADY DECIDED.

The Administrative Procedure Act authorizes courts to "compel agency action" only where action has been "unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Paxson asserts that a writ of mandamus is warranted because the FCC has unreasonably delayed resolution of "broadcasters' cable carriage rights for their full DTV signals." Pet. 28. Although Paxson does not define the term "full DTV signals" in its petition, its repeated use of the phrase "full digital multicast must-carry," *see, e.g.*, Pet. 2-4, 7-9, 11-12, 20, indicates that Paxson seeks a determination by the FCC that cable operators must carry all of the video streams that a broadcaster incorporates into its

digital transmission. With respect to that question, however, Paxson cannot make the requisite showing of agency delay because the FCC has already decided that DTV broadcasters engaged in multicasting are not entitled to mandatory carriage of more than one video stream. *DTV Must Carry Order*, 16 FCC Rcd at 2620-21 ¶ 54.

Paxson acknowledges (at 2) that, in the *DTV Must Carry Order*, "the FCC issued a ruling requiring cable operators to carry a single digital signal of each broadcaster that has ceased analog operations." Yet, elsewhere in its mandamus petition, Paxson incorrectly suggests that the issue of mandatory carriage of multicast signals remains unresolved. *See, e.g.*, Pet. 2 (stating that the FCC has "postponed" deciding "whether cable operators will be required to provide full digital multicast must-carry"); *id*. at 10 (stating that the *DTV Must Carry Order* "left entirely unresolved" whether "cable operators would be required to carry broadcasters' digital signals—including their multicast program streams—during the digital transition").

This is untrue even for analog/digital broadcasters during the transition to all digital television. The FCC's one-stream rule for digital broadcasts interprets the "primary video" language in 47 U.S.C. § 534(b)(3), which applies equally to all television stations irrespective of whether they have completed the digital transition. Nothing in the *DTV Must Carry Order* suggests that the FCC contemplated the possibility that broadcasters who have not yet completed the transition would receive more favorable carriage rights.

Nor may Paxson press in this forum its claim (at 7-9) that the 1992 Cable Act mandates carriage of multicast signals. Paxson had an opportunity to seek judicial review of the FCC's decision regarding multicasting-carriage after the *DTV Must Carry Order*

was published in the *Federal Register*. *See Carriage of Digital Television Broadcast Signals*, 66 Fed. Reg. 16533 (March 26, 2001); *see also* 47 U.S.C. § 402(a); 28 U.S.C. §§ 2342(1), 2344 (specifying procedure for obtaining review under the Hobbs Act). Paxson instead elected to ask the FCC to reconsider that decision. So long as Paxson's petition for reconsideration remains pending at the FCC, Paxson may not obtain judicial relief on the premise that the FCC's interpretation of the Act is erroneous. *See Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1040 (D.C. Cir. 1997) (party that has petition for reconsideration pending before FCC "must await the conclusion of those proceedings before bringing their claims" to court); *see also Bellsouth Corp. v. FCC*, 17 F.3d 1487, 1489 (D.C. Cir. 1994) ("a party that stays before an agency to seek reconsideration of an order cannot at the same time appear before a court to seek review of that same order").

To be sure, by asking the FCC to reconsider the multicasting-carriage issue, Paxson has kept alive the possibility that its interpretation of the 1992 Cable Act might yet prevail. But Paxson's decision to file a petition for reconsideration does not transform cable operators' obligations regarding the carriage of multicast signals, on which the FCC ruled in the *DTV Must Carry Order*, into an unresolved question that the Commission must address. And contrary to Paxson's assertion (at 20), it has not been "deprived" of its ability to obtain judicial review of the FCC's ruling on multicasting-carriage. In *Columbia Falls Alum. Co. v. EPA*, 139 F.3d 914 (D.C. Cir. 1998), this Court made clear that the filing of a petition for reconsideration not only tolls the time for seeking judicial review of the initial agency order, but also enables a party to obtain

judicial review of that order by withdrawing its petition for reconsideration and thereafter filing a petition for review. *Id.* at 919-20.

Thus, with respect to the question of carriage of multicast signals, Paxson has an adequate remedy at law because review is available under the Communications Act. "Mandamus is an extraordinary remedy that is not available when review by other means is possible." *Telecommunications Research & Action Ctr.*, 750 F.2d 70, 78 (D.C. Cir. 1984); *Cartier v. Secretary of State*, 506 F.2d 191, 199 (D.C.Cir. 1974), *cert. denied*, 421 U.S. 947 (1975) (availability of statutory judicial review is an alternative remedy that calls for refusal to resort to mandamus).

II. PAXSON HAS FAILED TO SHOW THAT IT IS ENTITLED TO A WRIT OF MANDAMUS ON THE DUAL CARRIAGE ISSUE THAT THE FCC HAS NOT FINALLY DECIDED.

1. As Paxson acknowledges (at 17), Congress has not established a timetable for completion of agency action on digital must-carry issues or applied the must-carry requirement to DTV. The Act merely directs the FCC to "initiate a proceeding" to "establish any changes" in its must-carry rules "necessary to ensure cable carriage" of DTV stations. *See* 47 U.S.C. § 534(b)(4)(B) (emphasis added).

In claiming unreasonable delay in the implementation of that rule making requirement, Paxson relies (at 17) primarily on the fact that the *DTV Must Carry* proceeding has been open since 1998. But there is no basis for Paxson's contention (at 17) that the FCC has "abdicat[ed] * * * its Congressionally-imposed responsibility." As contemplated by 47 U.S.C. § 534(b)(4)(B), the FCC initiated the *DTV Must Carry* proceeding shortly after establishing its DTV transition plan, and, since then, the agency has been actively engaged in bringing the proceeding to completion. As already explained, the FCC has

issued one substantial final order—the *DTV Must Carry Order*—establishing the mandatory-carriage rights of stations transmitting only a digital signal, clarifying that cable operators have an obligation to carry a DTV station's "primary video" signal, confirming that broadcasters may negotiate digital carriage without relinquishing their analog must-carry rights, and resolving a host of other difficult legal and technical issues surrounding the application of the 1992 Cable Act to digital television stations. *See* p. 7 above.

In the *DTV Must Carry Order*, the FCC also examined the record with respect to "the most difficult carriage issue[]" of dual carriage, *i.e.*, whether a broadcaster operating both analog and DTV stations during the DTV transition is entitled to have both stations carried by cable operators, and "tentatively conclude[d]" that imposing dual carriage "appears to burden cable operators' First Amendment interests substantially more than is necessary to further the government's substantial interest." 16 FCC Rcd at 2600 ¶ 3; *see also id.* at 2647 ¶ 112.[4] Although the FCC might have ended its inquiry there, the FCC determined that a more thorough examination of dual carriage was warranted, and, therefore, it adopted the *DTV Must Carry Further Notice* "to gather substantial evidence on this matter" in order to "evaluate the issues on a complete record." *Id.* at 2647 ¶ 112.

---

[4] Paxson asserts that in the FCC's proceeding it does not seek mandatory carriage for both its digital and analog signals, but, rather, carriage of its digital signal in place of its analog signal. Pet. 10-11 & n.8. Under Paxson's proposal, however, the cable operator would be required to convert one digital program stream—which "contains the same content" as Paxson's analog channel—into an analog format. *Ibid.* The only difference between the two approaches is that, under Paxson's proposal, the cable operator would be required to carry in its digital tier one less video stream (*i.e.*, the video stream that must be carried after being converted to analog).

Paxson suggests that there has been a *per se* unreasonable delay in resolving this aspect of the *DTV Must Carry* proceeding because the FCC supposedly has had "a complete record before it since at least the end of 2001." Pet. 1; *see also id.* at 17-18. The record in the *DTV Must Carry* rulemaking, however, did not close when the FCC received comments and information in response to the *DTV Must Carry Further Notice*, and it continues to be developed. Consistent with the FCC's practice in "permit-but-disclose" rulemaking proceedings, parties may make written and oral presentations (often called *ex parte* presentations) to FCC Commissioners and staff after the conclusion of the formal comment period. *See* 47 C.F.R. § 1.1206. As Paxson acknowledges, the *DTV Must Carry* docket remains very active, with "hundreds of meetings between FCC staff and advocates on all sides of this issue." Pet. 14. Indeed, since the end of 2001, there have been over 500 filings submitted in this proceeding (including more than 50 filings by Paxson alone), the most recent on December 9, 2004. Many parties (including parties aligned with Paxson) have provided new factual information and arguments for the agency's consideration. For example, earlier this year, broadcast network affiliates filed with the FCC a 25-page "white paper" examining cable systems' capacity to carry multicast DTV signals,[5] to which a cable company (Comcast Corporation) filed a detailed response on September 16, 2004.[6] On August 27, 2004, network affiliates filed another

---

[5] Larry Sidman *et al.*, "Digital Multicast Must-Carry: Greater Public Benefits, Less Burden on Cable Operators," *attached to* Letter from Jonathan Blake, Covington & Burling, *et al.*, to Chairman Michael Powell, FCC, CS Docket No. 98-120 (Apr. 16, 2004).

[6] Letter from James L. Casserly, Willkie, Farr & Gallagher, LLP, to Marlene H. Dortch, Secretary, FCC, CS Docket No. 98-120 (Sept. 16, 2004); *see also* James L. Casserly, Willkie, Farr & Gallagher, LLP, to Marlene H. Dortch, Secretary, FCC, CS Docket No. 98-120 (Nov. 15, 2004) (describing the technical and market concerns relating to digital must-carry).

white paper discussing "lessons" from the DTV transition that occurred in Berlin, Germany.[7] The FCC does not await the cessation of *ex parte* presentations before completing rulemaking proceedings. But it is misleading for Paxson to assert that the record in the *DTV Must Carry* proceeding was "complete" when the formal comment period ended.

Paxson also suggests that careful consideration of the competing policy issues raised by digital must-carry is unnecessary because the 1992 Cable Act unambiguously grants dual carriage rights to broadcasters. Pet. 8-9 (stating that the Act "required carriage of broadcasters' analog signals" and "full digital multicast must-carry," and that the FCC's failure "to understand that statutory mandate" is the "genesis" of Paxson's mandamus petition) (emphasis omitted). The FCC, however, rejected Paxson's reading of the 1992 Cable Act in the *DTV Must Carry Order*. 16 FCC Rcd at 2648 ¶ 113 (concluding that the Act "neither mandates nor precludes" dual carriage of a broadcaster's analog and digital signals), *id*. at 2620-21 ¶ 54 (holding that DTV broadcasters engaged in multicasting are not entitled under the Act to mandatory carriage of more than one video stream). Paxson has challenged the FCC's interpretation of the 1992 Cable Act in contesting the *Paxson Order*, which rejected Paxson's demand for immediate carriage of its multicast digital signals in Chicago. *See* 16 FCC Rcd at 2188 ¶ 7. However, as noted earlier (*see* p. 9 above), Paxson requested (jointly with the FCC) that that case be held in abeyance pending further FCC action in the *DTV Must Carry Proceeding* in which

[7] Hogan & Hartson, L.L.P., "White Paper: Lessons for the United States from the Berlin DTV Transition (July 14, 2004)," *attached to* Letter from Jonathon Blake, Covington & Burling, *et al.*, to Chairman Michael Powell, FCC, CS Docket No. 98-120 (Aug. 27, 2004).

Paxson, among others, has a reconsideration petition pending. Having asked the Court to defer considering whether the 1992 Cable Act compels carriage of digital signals for broadcasters who retain their analog service, Paxson should not be permitted effectively to raise that same issue in this mandamus proceeding.

2. Paxson asserts that a writ of mandamus compelling the agency to resolve outstanding issues in the *DTV Must Carry* proceeding "is precisely what is needed to ignite the DTV transition." Pet. 20. Paxson does not dispute that most commercial broadcasters are already broadcasting a digital signal, in accordance with the FCC's DTV transition plan, and that consumers who own television sets with digital tuners may obtain these digital broadcasts over-the-air. *See* p. 4 above. Rather, Paxson contends that cable carriage is necessary to ensure that viewers can obtain access to broadcasters' digital signals. Pet. 21.

Paxson ignores that, even in the absence of must-carry for dual analog/digital signals (and multiple digital video streams), broadcasters can negotiate retransmission-consent agreements for carriage of their DTV signals, and, further, broadcasters can require carriage of their DTV signals as a precondition to carriage of their analog signals. *DTV Must Carry Order*, 16 FCC Rcd at 2610 ¶ 27, 2613 ¶ 35. In the analog environment, the vast majority of television signals carried by cable systems are carried under retransmission consent agreements rather than must-carry requirements. *See id.* at 2654-55 ¶ 128 (noting that at least 80% of analog signals in 1993 were carried under retransmission consents).

Moreover, even if Paxson is correct that adopting further rules for digital must-carry would promote the DTV transition, there is no basis for concluding that the FCC

should have prioritized further action in the *DTV Must Carry* proceeding over other important actions that the FCC has taken in the last few years to promote the DTV transition. On August 8, 2002, for instance, the FCC established a requirement that, by July 1, 2007, all television receivers with screen sizes greater than 13 inches incorporate tuners capable of processing over-the-air DTV signals. *Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 17 FCC Rcd 15978 (2002). This Court has upheld that requirement as a reasonable step to further the DTV transition, accepting the agency's determination that it will accelerate the deployment of television sets capable of receiving and processing DTV signals. *CEA*, 347 F.3d at 300-304.

In October 2003, the FCC adopted technical, labeling, and encoding rules to ensure that cable subscribers can receive DTV signals through their cable system without the need for a separate set-top box. *Implementation of Section 304 of the Telecommunications Act of 1996*, 18 FCC Rcd 20885 (2003), *pets. for recon. pending, pet. for review filed, Echostar Satellite, Inc. v. FCC*, No. 04-1033 (D.C. Cir.). The following month, in an effort to promote the development of digital programming, the FCC adopted rules that protect against indiscriminate internet redistribution of digital programming. *Digital Broadcast Content Protection*, 18 FCC Rcd 20885 (2003), *pets. for recon. pending, pet. for review filed, American Library Ass'n v. FCC*, No. 04-1037 (D.C. Cir.).

Just this last September, the FCC completed the *DTV Second Review*, in which it resolved a host of issues "important to the rapid conversion of the nation's broadcast television system from analog to digital television." 19 FCC Rcd at 18280 ¶ 1. Although Paxson may have preferred that the FCC first reconsider its *DTV Must Carry Order* and

take other additional action in the *DTV Must Carry* proceeding before taking these other steps to promote the DTV transition, Paxson's preference does not override the FCC's "broad discretion in deciding how to achieve" its regulatory objectives. *Cutler*, 818 F.2d at 895.[8] *See FCC v. Schreiber*, 381 U.S. 279, 289-90 (1965)("Congress has 'left largely to [the FCC's] judgment the determination of the manner of conducting its business which would most fairly and reasonably accommodate' the proper dispatch of its business and the ends of justice."); *Global Crossing Tel., Inc. v. FCC*, 259 F.3d 740, 748-49 (D.C.Cir. 2001) (same).

3. Finally, Paxson cites (at 24-26), as alleged harm to broadcasters or to the "public safety and welfare," two additional bases for issuance of a writ of mandamus. Neither claim justifies mandamus here. In any event, the harm alleged would not arise from delay in FCC action, which could be addressed by mandamus, but from the FCC's failure to resolve issues in a manner consistent with Paxson's position, which could be addressed only by review on the merits. As noted above, Paxson chose to forego

---

[8] Since the release of the *DTV Must Carry Further Notice* in 2001, the FCC also has devoted substantial agency resources to many important communications matters other than the DTV transition, some of which are governed by statutory deadlines. *See, e.g., 2002 Biennial Regulatory Review*, 18 FCC Rcd 13620 (2003) (statutorily mandated review of the FCC's media ownership rules), *aff'd in part and remanded in part*, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004), *reh'g granted in part*, Sept. 3, 2004; *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) (comprehensive review of rules governing unbundling of the local telephone network), *aff'd in part and vacated in part*, *United States Telecomm. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004); RBOC Applications to Provide In-region, InterLATA Services under § 271, http://www.fcc.gov/Bureaus/Common_Carrier/in-region_applications/ (listing FCC actions on applications by Bell operating companies to provide long distance services under 47 U.S.C. § 271, which establishes a 90-day deadline for action on such applications).

immediate judicial review on the merits of the *DTV Must Carry Order* and moved to have its petition for review of the *Paxson Order* held in abeyance.

First, Paxson contends that broadcasters "bear a considerable regulatory burden" in having to operate "dual signals, one digital and one analog" during the DTV transition Pet. 22. Such dual transmissions in fact are not compelled. Although broadcasters are not required to terminate their analog operations before December 31, 2006 (47 U.S.C. § 309(j)(14)), there are opportunities for stations to cease broadcasting their analog signal early, and the Commission has authorized a number of stations to do so. *See, e.g.*, *WNVT-TV*, 18 FCC Rcd 18571 (MB 2003); *KVMD(TV)*, 18 FCC Rcd 9131 (MB 2003); *WWAC-TV*, 17 FCC Rcd 19148 (MB 2002).[9]

Paxson also relies on the fact that spectrum returned for public use after the DTV transition could be reallocated for use by emergency personnel. Paxson cites cases (at 26) stating that agency delay in proceedings affecting public health and safety is subject to particularly searching scrutiny. Those decisions, however, involve situations in which the agency is directly regulating a health or safety concern. Here, by contrast, Paxson's argument is only that agency action on an issue of economic regulation is expected to have beneficial consequences for public safety at some future date. In any event, because by statute the FCC cannot require broadcasters to cease their analog operations and return spectrum prior to December 31, 2006 – a date that is still two years away – Paxson's

[9] Thus, to the extent that broadcasting in both digital and analog formats imposes a heavy burden on Paxson, it could seek authority to cease analog operations without affecting the ability of cable subscribers to view Paxson's broadcast programming because Paxson's primary digital video signal contains the same content as its analog signal. Pet 11. Paxson, however, would not be able to reach viewers who obtain Paxson's programming over-the-air using a television set that does not have either a digital tuner or a digital-to-analog signal converter.

assertion that FCC delay is adversely impacting the availability of new spectrum for public safety is speculative and premature.

CONCLUSION

The petition for issuance of a writ of mandamus should be denied.

Respectfully submitted,

John A. Rogovin
General Counsel

Austin C. Schlick
Deputy General Counsel

Daniel M. Armstrong
Associate General Counsel

C. Grey Pash, Jr.
Nandan M. Joshi
Counsel

Federal Communications Commission
Washington, D. C. 20554
(202) 418–1740

December 22, 2004