

Before the  
Federal Communications Commission  
Washington DC 20554

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OFFICE OF THE SECRETARY

In the Matter of )  
 )  
The Relationship of )  
Paxson Communications Corporation )  
and National Broadcasting Company, Inc. )

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THIS COPY TO  
FLETCHER, HEALD & HILDRETH**

To: The Commission

**REPLY TO OPPOSITION TO REQUEST FOR DECLARATORY RULING**

**PAXSON COMMUNICATIONS  
CORPORATION**

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January 10, 2001

Its Attorney

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## SUMMARY

The evidence shows that NBC is reaching for control of Paxson Communications, a company in which it is not permitted to have even an attributable interest. NBC not only owns 32 percent of Paxson's equity, two-thirds of PCC's revenues are generated under network and national sales agreements between PCC and NBC, and under various joint sales and marketing agreements with NBC's owned and affiliated stations.

In its Request for Declaratory Ruling, Paxson showed that NBC named three of its employees to Paxson's board of directors and then manipulated those directors to serve NBC's interests. NBC also asserted a right to review and approve Paxson's budgets on a line-by-line basis. Using its employee-directors and other executives, NBC also interfered with Paxson's corporate financings. NBC says in its opposition that these encroachments represent nothing more than ordinary commercial behavior and that the investment and stockholders agreements between NBC and Paxson authorized this conduct. But, its conduct under its agreements with Paxson has resulted in such a broad extension of influence, if not control, over Paxson's affairs that NBC's interests in Paxson are now fully attributable under the multiple ownership rules.

In opposition to Paxson's showings that NBC prematurely took advantage of director appointment rights in the parties' stockholder agreement, put its employees on Paxson's board and then manipulated those directors, NBC argues that Paxson voluntarily nominated the NBC directors and, once they were seated, they never voted against a management resolution. In this reply, Paxson shows that the NBC directors were named by NBC under the appointment provision of the stockholder agreement and that they were puppets of NBC management.

In its opposition, NBC claims that it has only a limited right to review and approve Paxson's budgets. These rights extend, according to NBC, only to budgets for Pax TV and certain "Same Market Stations" in which NBC is permitted to have an attributable interest. The record shows otherwise. NBC's general counsel, during a dispute over a Paxson refinancing, asserted NBC's right, under the very provisions which NBC's opposition pleading says provide only a circumscribed right, to line-by-line approval authority over the *entire* Paxson budget. This is not surprising given the fact NBC knows that Paxson has only one budget.

In its opposition, NBC denies that it interfered with Paxson's corporate financings. Again, the record shows otherwise. While no NBC director voted against it, NBC's Chief Financial Officer asserted that a resolution of the Paxson board approving a \$200 million debt offering was void because the action exceeded the board's authority. The dispute about this debt offering culminated in NBC's assertion of line-item veto authority over Paxson's budgets. This, in turn, led to Paxson's request for FCC intervention. During this dispute, NBC also asserted the right to approve Paxson's planned tower sale/lease-back arrangement, even though that plan was not subject to NBC's review authority because it was not a disposition of assets.

NBC asserts that its conduct, and its exercise of rights under the agreements it has with Paxson, are shielded by the 33 percent EDP rule, which established a "bright line" with respect to attribution. This is not so. In adopting the EDP rule, the FCC said:

Of course, we retain discretion to review individual cases.... Such cases might occur, for example, when there is substantial evidence that the combined interests held are so extensive that they raise an issue of significant influence.... [Citation on page 14, *infra*]

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The facts presented by Paxson constitute “substantial evidence that the combined interests” of NBC in Paxson are “so extensive,” in light of NBC’s conduct, that they “raise an issue of significant influence” that is cognizable under the attribution rule. Declaratory relief, up to and including a requirement that NBC be required to divest its interests in Paxson, is therefore needed and requested.

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To: The Commission

**REPLY TO OPPOSITION TO REQUEST FOR DECLARATORY RELIEF**

Paxson Communications Corporation (“PCC”) hereby replies to those portions of the December 19, 2001 “Opposition to Petition to Deny” (hereafter, “Opposition”) filed by National Broadcasting Company, Inc. (“NBC”) which purports to address the issues raised in PCC’s December 4, 2001 Request for Declaratory Relief (hereafter, “Request”). NBC chose to file a single opposition to both the Request and PCC’s simultaneously filed petition to deny NBC’s applications to acquire control of the television stations owned by Telemundo Communications Group, Inc. (“Telemundo”). PCC is addressing several procedural matters raised by NBC in the Opposition, but not relevant to the Request, in a separate Consolidated Reply to Oppositions to Petition to Deny, also filed today. However, in order to preserve the opportunity afforded by Section 1.2 of the rules to have the matters raised in the Request adjudicated in the context of a declaratory ruling, PCC will respond to the bulk of the Opposition in this declaratory ruling proceeding. In response to NBC’s opposition to the matters raised in the Request, the following is shown:

## **I. Introduction**

Much of NBC's Opposition is irrelevant to the issues presented in the Request. NBC opens with allegations about PCC's good faith in its business dealings with NBC (Opposition, pp. 3-4). An attack concerning PCC's alleged commercial conduct has no place in an opposition pleading that includes an allegation, however unfounded, that PCC is attempting to embroil the FCC in a private dispute. Opposition, p. 5. NBC knows what is relevant here and it is not PCC's conduct. Equally irrelevant is NBC's repetition, at pages 5-9 of the Opposition, of facts showing how the parties structured their agreements with an eye to the FCC's attribution rule. If at all useful to the analysis, these recitations buttress PCC's argument that the issue here is not the agreements, but NBC's conduct under them and whether, *in retrospect*, the agreements contain safeguards sufficient to protect PCC from a hostile partner who is reaching for control of the company. Some portions of the Opposition are relevant, however, and they are discussed in turn below.

## **II. The NBC Directors**

NBC executives served on PCC's board of directors from December 1999 until December 4, 2001, the date PCC's FCC pleadings were filed. Contrary to the theory, advanced in the Opposition at pp. 12-14, that the NBC directors were voluntarily placed on the board by PCC's stockholders, these directors, except for interim appointments for the period December 1999 until May 1, 2000, were nominated by NBC under Section 2.1(b) of the Stockholder Agreement (Ex. 2, p. 9), included on the management slate in the proxy statement for the May 1, 2000 stockholders' meeting (*See*, Opposition, Ex. 1, p. 6)--as Section 2.1(b) required-- and voted for by the controlling "Paxson Stockholders," as also was required under Section 2.1(b). NBC's

attempt, at this late date, to disavow director provisions it negotiated and agreed to is inconsistent with the facts and is otherwise an implausible defense.

With respect to naming PCC directors, NBC admits that Section 2.1(b) of the Stockholder Agreement “giv[es] NBC something close to an appointment right” (Opposition, p. 13). Later in its pleading, NBC admits that having such a right would “[result] in the attribution of the Paxson stations to NBC” (Opposition, p. 14). But, in defense, it claims that its employees were put on the PCC board under Section 5.7 of the Investment Agreement, not the “appointment right” provision of the Stockholder Agreement. This is a ruse.

The last sentence of Section 5.7 states that NBC “intends” to nominate three directors, but nothing in the Investment Agreement provides for a procedure for their election. This is because the “Paxson Stockholders”, who elect the board of directors, were not parties to the Investment Agreement. Thus, while the Investment Agreement contains most of the implementing covenants and other provisions dealing with NBC’s investment in PCC, implementation of the director-election provision was left to the Stockholder Agreement. NBC’s claim that the Investment Agreement gave it a second avenue to board membership is a made-up argument meant to avoid attribution of PCC’s stations. This is not to say that Section 5.7 of the Investment Agreement was not honored by PCC, which *was* a party to the Investment Agreement. Just as Section 2.1(b) of the Stockholder Agreement required, PCC, which is a party to that agreement as well, listed three NBC directors as part of the management slate in the proxy statement for the May 1, 2000 meeting and excerpted by NBC in Exhibit 1 of its Opposition. The subsequent election of the NBC directors at the May 1, 2000 stockholders’ meeting by the controlling “Paxson Stockholders,” is the procedure provided for in Section



2.1(b) of the Stockholder Agreement and, as shown, could not have been accomplished under the Investment Agreement because the “Paxson Stockholders” were not parties to that agreement. There was and is only one path for NBC to follow when it wants to place representatives on the PCC board and that is through Section 2.1(b) of the Stockholder Agreement, a provision which NBC *admits* is tantamount to an “appointment right” with attribution consequences.

NBC protests that it could not have been operating under Section 2.1(b) of the Stockholder Agreement because that provision proscribes the use of such a right until “NBC has determined that the FCC rules would allow it to have such appointment rights.” Opposition, p. 13; *see also*, Section 2.1(b) of the Stockholder Agreement, Request Ex.2, p. 9. The evidence shows that NBC made just such a determination. NBC’s general counsel, in his October 31, 2001, letter to PCC (Request, Ex. 23), said NBC believed having its employees on PCC’s board complied with all FCC rules. NBC also must have factored into its determination its theory, reflected at page 16 of the Opposition, that it would be consistent with the EDP rule for a preferred stockholder to have “the right to select the persons who will run for the board of directors.” (Quoting from *Review of the Commission’s Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Memorandum Opinion and Order on Reconsideration (“*EDP Recon Order*”), 16 FCC Rcd 1097, 1104 (2001).<sup>1</sup> Also factoring into NBC’s determination that exercising its appointment rights would not violate the attribution rule was the fact that none of the three named directors, personally, had an attributable interest in NBC

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<sup>1</sup> PCC disagrees with this reading of the *EDP Recon Order*. The quoted language was not intended as an invitation to investors to put their employees, or others under their exclusive control, on the boards of the entities in which they have non-EDP investments

because none served as officers or directors of NBC. At pages 16-17 of its Opposition, NBC makes this point and goes on to say, “Accordingly, these individuals could sit on the Paxson board without triggering attribution of the Paxson stations to NBC.” As noted, NBC’s general counsel believed, as late as October 31, 2001, that NBC’s placement of its employees on PCC’s board did not violate FCC rules. Request, Ex. 23. Thus, the record shows that NBC saw no problems with naming three of its executive employees to the PCC board. Clearly, NBC intended for them to be part of the management slate and elected at the May 1, 2000 shareholders’ meeting as Section 2.1(b) of the Stockholder Agreement required.

The boilerplate provisions of the Investment Agreement and the Stockholder Agreement, which say that there is no obligation on the part of PCC’s stockholders to elect *any* NBC-nominated directors to the board, relied on heavily in the Opposition, were never intended by the parties to allow PCC to reject *all* NBC nominees. Moreover, as shown above, Section 5.7 of the Investment Agreement (“The Investor intends to nominate three directors...”), and Section 2.1(b) of the Stockholder Agreement (permitting NBC to “appoint” directors once it makes the “determination” it is permissible to do so) together gave what NBC viewed as board-appointment rights no matter what window dressing had been included in the agreements. NBC admits this in the following discussion of Section 2.1(b):

The second scenario—giving NBC something close to an appointment right—applies only when *NBC has determined that the FCC rules would allow it to have such rights....*\* \* \* Because the term “Paxson Stockholders” includes Bud Paxson, the Company’s single majority stockholder, Section 2.1(b)—once invoked—ensures that the NBC Nominees will be elected to serve on the board.

Opposition, p. 14 (emphasis in original). The evidence shows that NBC had, in fact, made that determination. For its part, in the spring of 2000 PCC welcomed NBC's nomination of three new directors, which, as noted, was consistent with the parties' understandings, was important for the proper implementation of the Section 4.1 covenants, and did not appear at the time to present any threat to PCC's independence. However, in spite of these good intentions, the danger inherent in the NBC director provisions became a reality over time as NBC nominated its own employees as directors and then directed their conduct as PCC board members.

A principal reason PCC welcomed NBC's nomination of directors was, as stated in the Request, the check such directors would provide on NBC's veto powers under the covenants included in Section 4.1 of the Investment Agreement, which, in combination, are unique and far reaching. In attempting to characterize its rights under these covenants as commercially reasonable, NBC cites cases where covenants similar to some of the ones included in the Investment Agreement were approved by the FCC. Opposition, pp. 8-10. This analysis has at least two flaws. First, it views the covenants in isolation instead of as a whole. NBC cites no case where the FCC approved the entire menu of investor covenants included in Section 4.1 of the Investment Agreement. Second, NBC's list of covenants and case citations does not include what turned out to be the three most dangerous provisions of the agreements—those permitting budget review, the naming of directors (in the Stockholder Agreement), and the debt limitation provision of the certificate of designations applicable to NBC's 8% preferred stock. NBC does not cite any case where this combination of rights was approved by the Commission. As shown below, it is this very combination - - and NBC's willingness to use every contractual provision at its disposal to interfere with PCC's decision making - - which is the heart of the issue.

A critical provision of Section 4.1 (*see* Request, Ex. 1, p. 43) negates NBC's veto power over certain PCC corporate actions if any one of the three NBC-selected directors votes in favor of a measure (e.g., a stock offering or a budget ) which is covered by one of those covenants. While NBC accuses PCC of "*post hoc* rationalization" in relying on the check mechanism, NBC's position is based on its view, which NBC assumes PCC shared, that the NBC-selected directors would serve NBC's interests, not PCC's and that the check mechanism was window dressing. Nothing could be farther from the truth. As explained above, the veto rights granted to NBC under Section 4.1 of the Investment Agreement, taken as a whole, raised serious control issues, and the director check mechanism addressed these concerns. Unlike other PCC debt and equity instruments, the NBC investment was not redeemable for five years. For this reason, PCC inserted the director check mechanism to prevent NBC from using the veto provisions in Section 4.1 to extract concessions from PCC. This mechanism would have worked as planned had NBC named independent directors to PCC's board of directors as the FCC's attribution rule requires. PCC was not naive with respect to NBC's rights under the agreements; it simply never contemplated that the persons NBC would name as PCC board members, employees or not, would behave as NBC puppets rather than acting independently according to their fiduciary obligations under well-established Delaware law. For its part, NBC simply disavows the director check mechanism. This is not surprising since NBC's rights under the Section 4.1 covenants would have been negated had it heeded the attribution rule and named independent directors.

Until the beginning of the disputes which precipitated the filing of the Request, the presence of three NBC executives on PCC's board did not present problems. They contributed their knowledge and experience to decision making, and the check mechanism, implemented

through affirmative votes of the NBC directors, worked well by providing finality with respect to corporate actions that implicated the investor covenants. This was consistent with the design of the agreements and the intent of the parties. While the check mechanism apparently was not important to NBC, and NBC's directors may have all along been mere puppets, obtaining finality on affected resolutions was crucial to PCC's ability to function as a public corporation and FCC licensee of over 60 television stations.

As shown in the Request, NBC decided, unilaterally, to do away with the director check mechanism when PCC warned NBC that the NBC directors should not take their direction from NBC, because doing so violated FCC rules and Delaware corporate law. The minutes of PCC's September 7, 2001 board meeting reflect this. The three NBC directors abstained from voting on two resolutions involving important financing plans pending resolution of the dispute, reflected in Request Exhibits 14 and 15, about whether a certain PCC refinancing violated the debt covenants pertinent to NBC's preferred stock.<sup>2</sup> While none of the three directors voted against the resolutions before the board, their abstentions meant that NBC retained the legal right, if any, under Section 4.1 of the Investor Agreement, to veto the proposed transactions. This is exactly the type of limbo PCC had hoped to avoid by having NBC-appointed, but still independent directors on its board. NBC is simply wrong when it characterizes PCC's reliance on the check mechanism as a rationalization; it was NBC, by putting puppets on the PCC board, which abused the carefully-constructed arrangements between the parties.

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<sup>2</sup> Contrary to the statement included on page iii of the Opposition, NBC did not raise questions about the subject financing until *after* it had been approved by PCC's board, and consummated on July 12, 2001. It was only then that NBC declared the financing invalid (Request, Ex. 14) and began to manipulate its directors to extract concessions. See page 12, *infra*.

NBC has a director attribution problem regardless of how the FCC might treat, under the EDP rule, the contractual rights NBC has to name PCC board members. This is because Note 2, subsection (h) of Section 73.3555 of the rules makes director positions attributable regardless of the investor's status under the EDP rule. Here, NBC has interpreted the director appointment provisions of the Investment Agreement and the Stockholder Agreement as allowing it to put its own employees on PCC's board and then to control their conduct as directors. This turned out to be the equivalent to having NBC itself on the PCC board. In addition to NBC's manipulation of the NBC directors in connection with votes on PCC financings, PCC has presented other evidence that the NBC directors acted as agents for, and under the direction of NBC. Request Exhibit 13 is a letter from then-PCC director Brandon Burgess, on NBC letterhead, stating NBC's demands for contractual concessions from PCC. Exhibit 17 is an e-mail to PCC from Lawrence Tu, NBC's general counsel, asking on behalf of "the NBC representatives" for materials for an upcoming directors' meeting. Exhibit 18 is another e-mail from Mr. Tu, this one asking PCC to add an agenda item to the upcoming September 7, 2001 board meeting to discuss the debt restructuring controversy covered in pages 11-13 of the Request. A clear example of how much the NBC directors were mere puppets is shown by the fact that when Mr. Tu failed to attend the September 7 board meeting, the NBC directors were unable on their own accord to proceed with the agenda item requested by Mr. Tu. Request Ex. 16, pp. 7-8. Exhibits 22 and 23 are letters from Mr. Tu protesting statements by PCC's FCC counsel that NBC had controlled their voting as directors, but then offering to "arrange" their resignations. It is not enough for NBC to say that the NBC directors never voted against a PCC-sponsored resolution, or that they voted in favor of some resolutions. The attribution rule proscribes their *presence* on the board if

they are controlled by NBC, which is what the evidence shows.<sup>3</sup> Because it was NBC itself that had a presence on PCC's board, its interests in PCC became attributable to it under the multiple ownership rules.

NBC's gesture of having the NBC directors resign once PCC filed its pleadings with the FCC has dual significance. First, it is an admission by NBC that it should never have placed its employees on PCC's board; and second, the removals do not cure the director attribution problem. Instead, NBC should have nominated individuals to PCC's board who would have fulfilled their duties to act independently as required by FCC rules and Delaware law. Had it done so, the carefully-crafted director check mechanism would have been effective, and no attribution and fiduciary duty issues would have arisen. NBC, now a hostile partner, still has the right to name directors to PCC's board. As noted above, NBC admits in its Opposition that Section 2.1(b) of the Stockholder Agreement provides "something close to an appointment right" and, NBC could again make the threshold "determination" of FCC compliance that Section 2.1(b) requires on the basis of its appointees not having official (officer or director) positions with NBC. It is fully expected NBC will make such nominations, and that the new directors will be no more independent than the previously-appointed NBC executives if the Commission, in the context of this proceeding, favorably reviews the director nomination provisions in the Stockholder Agreement.

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<sup>3</sup> Had the NBC directors been permitted to act independently, or had NBC appointed unaffiliated independent directors, the Note 2, subsection (h) director attribution issue would exist only to the extent it reaches director-appointment rights. *See, e.g., Viacom, Inc.*, 8 FCC Rcd 8439, 8442 (such rights proscribed under the attribution rule).

### III. Budgeting

NBC takes issue with PCC's showing that, using Section 4.1(a) of the Investment Agreement, NBC asserted control over PCC's corporate budgeting. In the Opposition, NBC argues that although NBC has a right to review and approve PCC's budgets, and changes to them, the definition of "budget" does not include operations of PCC stations in markets where NBC would not be permitted to have an attributable interest. Opposition, pp. 10-11. This defense presents two interrelated problems for NBC. First, it constitutes an admission that, under the attribution rule, NBC could not have the budget approval rights provided in Section 4.1(a) on a company-wide basis. Second, the defense does not take into account the fact that there is only one PCC budget. The evidence shows NBC knows this. When Lawrence Tu, NBC's general counsel, asserted NBC's rights under the budget approval provision of the Investment Agreement, he did not distinguish between, on the one hand, "Same Market Stations" and the Pax TV network, with respect to which the Opposition says NBC could intervene, and, on the other, the rest of the company, with respect to which NBC now admits it cannot have budget review rights. Mr. Tu, who was concerned at the time with a company-wide refinancing, asserted control over the *entire* PCC budget:

As you know, NBC currently has certain contractual rights to approve the Company's budget and material deviations from that budget. We propose to utilize that existing right to resolve this impasse [over the company-wide refinancing] by agreeing to the following:

\* \* \*

As part of its annual budget process, the Company will include in the budget submitted to NBC a detailed capital expenditure plan for the succeeding 12 month period, setting forth with sufficient specificity the items or categories of items of planned capital expenditures or capital lease transactions and the projected timetable (to deal with the remaining



period of this year, we propose that the Company provide a similarly-detailed capital expenditure plan for the remaining months)

Request, Ex. 20, p. 3. It would not have been possible to meet these NBC demands without ceding to it review authority over the entire PCC budget, which is exactly what Mr. Tu's letter says NBC was seeking. Moreover, regardless of the definition of the term "budget" included in the Investment Agreement, NBC is entitled to review the budgets of *every co-located PCC station* under the terms the joint sales agreements the parties agreed to as part of the overall transaction. See Request, Ex.10 (New York Joint Sales Agreement), p. 7. While an argument might be made on behalf of a bank or other institutional lender that these budget review rights, by themselves, do not constitute a delegation of control, in the hands of NBC, a competitor on a nationwide basis and now a hostile investor, NBC's asserted budget review right constitutes a direct threat to PCC's independence and cuts to the heart of licensee control. At a minimum, the budget review right confers a degree of influence over PCC sufficient to implicate the attribution rule. And, NBC can be expected to aggressively pursue every right its PCC agreements may arguably be construed to afford unless the FCC provides the declaratory relief sought in the Request.

#### **IV. Financings**

NBC denies that it interfered with PCC's efforts to refinance portions of its debt. Opposition, pp. 18-20. It claims that its appointed directors either acquiesced (p. 19) or abstained (p. 20) when NBC disagreed with proposed board resolutions dealing with such financings. This approach is misleading. While the \$200 million debt offering referred to by NBC was approved by the "sole NBC Nominee" present at the June 24, 2001 board meeting, in a letter dated July 30, 2001, NBC (through Mark Begor, Executive Vice President and Chief

Financial Officer) asserted the meeting was invalid and the actions taken exceeded the board's authority. Request, Ex. 14, p. 1. Moreover, it was this refinancing which precipitated the dispute that culminated in PCC's asking for declaratory relief from the FCC to restrain NBC.

This dispute, discussed at pages 11-14 of the Request and evidenced in Exhibits 14-23, began with NBC executive Mark Begor's post-meeting complaint letter, continued with Jeff Sagansky's (PCC's) response, and culminated with Lawrence Tu's responses to PCC's FCC counsel's letter of admonition after Mr. Tu had asserted line-item budget review authority over the entire PCC budget. If this series of events does not show interference, PCC does not know how NBC defines the word.

The background relating to the matters voted on at the September 7, 2001 board meeting provides another illustration of how NBC attempted to interfere with vital PCC financings. In its Opposition, NBC states that at that meeting (the minutes of which NBC sought to cleanse) the NBC directors abstained rather than vote against a tower sale/leaseback transaction that was on the agenda. Opposition, p. 20. What is not on the record about this transaction is most telling. There is no covenant in Section 4.1 of the Investment Agreement which allows NBC to review and approve PCC financings, except those involving the issuance of equity instruments. Likewise, the certificate of designations pertaining to NBC's 8% Class B preferred stock limits PCC's ability to incur additional debt, but does not restrict lease financing. So, in order to obtain control over this financing, NBC claimed the sale/leaseback arrangement was a "disposition" under Section 4.1(g) of the Investment Agreement, which gives NBC a veto over the sale of material assets of the company. Footnote 56, on page 19 of the Opposition, reflects this strained interpretation of Section 4.1(g). But there was no disposition. PCC still possesses

all of the towers, albeit under leases rather than through ownership. The transaction involved no equity offering and no new debt, yet NBC again interfered with PCC's financial planning. Since its directors abstained from approving the arrangement, it presumably has reserved the right to veto it even at this time. This example shows again that NBC, far from being a passive investor, has sought to impose itself as an active, if not controlling partner. More importantly, it shows how NBC was willing to stretch a Section 4.1 covenant to make it apply to a transaction not covered by that covenant in order to achieve an overall agenda. As fiduciaries of PCC's shareholders under Delaware law, and under the FCC's attribution rule, the NBC directors could not lawfully engage in this type of interference with a PCC financing.

#### **V. The Effect of NBC's Combined Interests**

NBC argues that none of the rights it has, including the right to name PCC directors, implicates the multiple ownership rules because it is protected from attribution by the EDP rule's 33 percent "bright line" test. Opposition, pp. ii (summary), 6, 15-16. Parsing the PCC/NBC agreements on a covenant-by-covenant basis (and, of course, ignoring NBC's conduct under each covenant) may paint a rosy picture for NBC, but this is a flawed analytic approach in light of the facts presented in the Request. In its *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, 14 FCC Rcd 12559 (1999), *aff'd*, 16, FCC Rcd 1097 (2001), the Commission said,

Of course, we retain discretion to review individual cases that present unusual issues on a case-by-case basis where it would serve the public interest to conduct such a review. Such cases might occur, for example, when there is substantial evidence that the combined interests held are so extensive that they raise an issue of significant influence such that the Commission's multiple ownership rules should be implicated, notwithstanding the fact that these combined interests do not come within the parameters of the EDP rule.

14 FCC Rcd at 12581 (footnote omitted). PCC has shown that there *is* such substantial evidence, and that NBC's combined interests are so extensive as to raise an issue of significant influence even if the EDP bright line has not been crossed. Not only does NBC own a 32 percent equity interest in PCC, two-thirds of the company's revenues are controlled under joint sales and marketing agreements through which NBC's owned and affiliated stations sell advertising time available on PCC's television stations and network. Further, NBC claims the right to review and approve PCC's budgets, line by line. While backing off as a result of PCC's FCC filings, the record shows NBC believes it can name its own executives to PCC's board of directors and then use its board representation to push its own agenda and interfere with PCC financial transactions. This is not the picture NBC wants the FCC to see. Instead, NBC portrays itself as nonvoting, minority stockholder seeking to protect its investment through "ordinary commercial behavior" (Opposition, p. 15). The facts and NBC's own actions demonstrate otherwise. NBC, through the conduct detailed in the Request, is reaching for control of PCC. It already controls PCC's revenue stream and it will control the rest of PCC's finances if it exercises all the rights the evidence shows it claims over budgeting and borrowing.

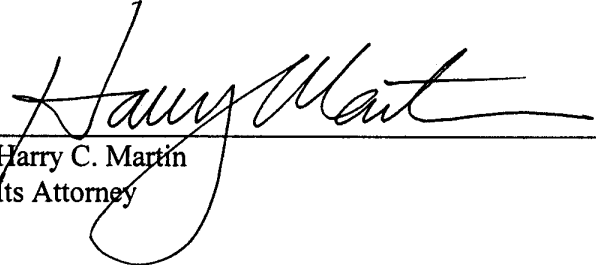
Most chilling is NBC's willingness to use whatever powers it has to achieve its goals, regardless of the FCC's rules and Delaware corporate law. When a dispute arose concerning the debt limits included in the certificate of designations, NBC used its puppet directors, who abstained from voting, to attempt to keep decisions concerning important financings from becoming final. NBC improperly sought to use a covenant in the Investment Agreement to block a PCC sale/lease-back financing that was not subject to that covenant. NBC used

Brandon Burgess, then a PCC director, to negotiate significant dilutions of PCC's rights under its agreements with NBC in return for additional financing. Request, Ex. 13. More recently, as evidenced in the attached Reply Ex. 1, NBC used its leverage with commonly-controlled GE Capital Commercial Finance, Inc., to block yet another PCC financing. NBC can be expected to exert its economic and financial muscle in similar ways in the future in order to advance its agenda and extract concessions from PCC. These tactics could easily extend to the critical areas of programming and personnel, with NBC using any leverage it can bring to bear to restrict PCC's discretion with respect to programming and personnel matters notwithstanding the fact NBC does not, and could not under the FCC's rules, have such rights under its agreements with PCC. In short, NBC's combined rights under the agreements, and its willingness to abuse those rights, jeopardize PCC's licensee control prerogatives under the Communications Act.

This situation is exacerbated by the hostility that now exists between the two companies. It is unlikely any of the benefits of the overall transaction, such as program support, will be forthcoming. The evidence shows that, if the Commission were to approve the current arrangements, and NBC's conduct under them, there is little doubt that NBC would see such a decision as a green light for even greater involvement in PCC's affairs. It would have every incentive to be even more involved since, as seen, it disagrees with the way PCC is being managed. In sum, if it is found that NBC has abused the carefully-written agreements the parties entered into in 1999, there is every prospect that such tactics will continue in the future. As shown in PCC's companion Consolidated Reply, the Commission cannot ignore this type of conduct on the part of any licensee, much less one operating on the outer limits of the multiple ownership rules.

**WHEREFORE**, These matters considered, it is respectfully requested that the Commission reject the arguments raised in the Opposition and grant the relief requested by PCC in its Request for Declaratory Ruling.

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January 10, 2002

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**REPLY EXHIBIT 1**

**GE CAPITAL LETTER, DECEMBER 14, 2001**

**GE Capital**

Communications Group  
GE Capital Commercial Finance, Inc  
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Alpharetta, GA 30004 1976  
678 624-7900, Fax 678 624-7903

December 14, 2001

Tom Severson  
Chief Financial Officer  
Paxson Communications Corporation  
601 Clearwater Park Road  
West Palm Beach, FL 33401

Dear Tom:

Further to our phone conversation today, this letter will confirm that GE Capital has decided not to seek credit approval for a securitization transaction for Paxson at this time pending resolution of legal proceedings recently instituted by Paxson against NBC.

I would hope that we would be able to move forward on the transaction once Paxson's differences with NBC have been resolved.

Sincerely,

Timothy C. Huban  
Senior Vice President

TCH/jr



## CERTIFICATE OF SERVICE

I, Joan P. George, a secretary in the law firm of Fletcher, Heald & Hildreth, do hereby certify that a true copy of the *Reply to Opposition to Request for Declaratory Ruling* was sent this 10<sup>th</sup> day of January, 2002, by hand where indicated and by first-class mail postage prepaid to the following:

Shaun A. Maher, Esquire \*  
Chief, Video Services Division  
Federal Communications Commission  
The Portals  
445 12<sup>th</sup> Street, SW, Room 2-A666  
Washington, D.C. 20554

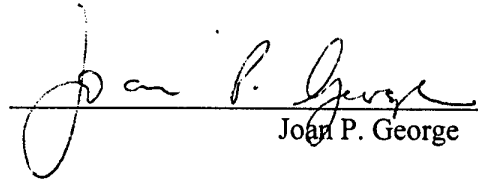
Diane Zipursky, Esquire  
National Broadcasting Company, Inc.  
1299 Pennsylvania Avenue, NW, 11<sup>th</sup> Floor  
Washington, DC 20004  
Counsel for National Broadcasting Co., Inc.

Howard A. Topel, Esquire  
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Counsel for Telemundo Communications Group, Inc.

Brad C. Deutsch, Esquire  
Hogan & Hartson, LLP  
555 13<sup>th</sup> Street, NW  
Washington, DC 20004-1109  
Counsel for Council Tree Hispanic Broadcasters II, LLC

Juan A. Figueroa, Esquire  
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New York, NY 10013  
Counsel for Puerto Rican Legal Defense and Education  
Fund, Inc.

Margaret L. Tobey, Esquire  
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2000 Pennsylvania Avenue, NW, Suite 200  
Washington, DC 20006-3458  
Co-Counsel for National Broadcasting Company, Inc.

  
Joan P. George

\* By hand