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June 28, 2006

Mr. Samuel Feder
General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20036

Re: CS Docket No. 98-120

Dear Mr. Feder:

You have invited us to comment on a June 15, 2006 submission by ION Media Networks[1] (formerly known as Paxson), which purports to show the financial difficulties that some television stations would face if the FCC does not force cable operators to carry multiple streams of digital programming from each must carry broadcaster. The ION filing was apparently submitted at the request of the General Counsel's office.

Over the course of this proceeding's eight-year history, the broadcasters have been unable to provide *any* factual or predictive evidence that an expansion of must carry rights to cover *not only* the main signal carried today *but also* all secondary digital streams is somehow necessary for their stations' survival. ION's filing does nothing to fill that evidentiary void.

ION's cover letter claims that "without the revenue streams to be generated by full cable carriage of digital broadcasters' free over-the-air programming, many of the nation's smaller broadcasters will face unprecedented economic hardship which could well threaten their continued ability to utilize the airwaves and to remain viable, competitive forces in the increasingly competitive video world." In short, the cover letter claims a cause (failure to carry multicast signals of must carry stations) and effect (greater station financial hardship). In support, a study of selected financial data from five broadcast groups is attached. ION's attachment, however, fails to demonstrate causation, or even a correlation, between the claimed cause and effect. The study, by Stephen E. Siwek, MBA, doesn't claim to address what would happen were multicast must carry not required, despite the suggestion in the ION cover letter.

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[1] The original document was apparently filed June 14, 2006, with a corrected version listed by the FCC as having been filed June 15, 2006.

The station group financial problems certainly have nothing to do with cable carriage. They have arisen *despite* cable carriage. At least since 1992, when Congress adopted the must carry rules, cable systems have been carrying these companies' analog broadcast signals. Cable carriage to date evidently has not stemmed the tide of financial bad news highlighted in the study. There is thus not even a correlation, let alone proof of causation, between the lack of must carry and the purported financial hardships.

Not only does the study provide no causal link between cable carriage and these stations' financial condition today. It also provides no reason to expect that cable carriage of yet-to-be-developed additional digital program streams would be the cure to these stations' financial woes in the future. ION's cover letter thoroughly mischaracterizes the data when it suggests that the study speaks to revenue streams that would be "generated" by forced cable carriage of multicast signals. The study contains not a shred of evidence – no analysis, no predictive model, no data at all – that even identifies the costs of, or revenues predicted to be generated by, digital multicast streams programmed by these financially weak companies. The Siwek data are all related to pre-digital transition broadcasting.

The stations in the study are among the "lower rated stations"[2] in the market. It is reasonable to assume that the lack of audience appeal of their *primary* channel makes it extremely unlikely that cable carriage of secondary digital channels could ever credibly be claimed to be the difference between these stations' financial success or failure. In any case, Siwek presents no evidence that contradicts this assumption.

Mere self-serving assertions that the lack of such carriage "*could* well threaten their continued ability to use the airwaves" hardly suffice to meet the evidentiary burden imposed by the Supreme Court on proponents of an expanded must carry requirement. As the Court made clear in the *Turner* case, "[w]hen the Government defends a regulation on speech as a means to address past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' *Quincy Cable TV, Inc.* v. *FCC*, 768 F.2d 1434, 1455 (CADC 1985). It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994) (plurality opinion).[3]

The Court narrowly upheld analog must carry, even in the face of a finding that Congress had "substantial evidence" to support its conclusion that "stations dropped or denied carriage would be at a 'serious risk of financial difficulty'" and would "deteriorate to a substantial degree or fail altogether." *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 208 (1997). And the Court made clear that, in considering the predictive judgments of Congress, it applied a "standard more deferential than we accord to judgments of an

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2 Declaration of Stephen E. Siwek at 3.

3 *See also Nixon* v. *Shrink Missouri Government PAC,* 528 U.S. 377, 392 (2000) ("We have never accepted mere conjecture as adequate to carry a First Amendment burden….").

administrative agency." *Id.* at 195. The financial data here fall far short of the evidentiary showing that Congress and the Court relied on to support even single analog carriage.

Moreover, the Supreme Court has also made clear that "must carry is not intended to guarantee the financial health of all broadcasters, but to ensure a base number of broadcasters survive to provide service to non-cable households." *Id.* at 222. The attached Declaration of John E. Kane, co-founder and principal of Kane Reece, shows that the financial conditions faced by the stations reviewed in the Siwek Declaration are varied and complex. It is evident that the Siwek study fails to fully differentiate the broadcast operations of these companies, which may not be as precarious as he claims, and the acquisition and financing activities that have nothing to do with operations, but which may have created independent difficulties. These latter financial conditions have nothing to do with cable carriage or the digital transition.

At bottom, the ION filing provides nothing to show that the failure to carry multicast digital programming would threaten these stations' viability or the continued availability of the amount of programming currently provided on their analog channels. It cannot form a basis of a mandatory multicast rule.

Respectfully submitted,

/s/ Daniel L. Brenner

Daniel L. Brenner

Attachment

cc: Marlene H. Dortch
Honorable Kevin J. Martin
Honorable Jonathan S. Adelstein
Honorable Michael J. Copps
Honorable Deborah Taylor Tate
Honorable Robert M. McDowell
Heather Dixon
Rudy Brioché
Jessica Rosenworcel
Aaron Goldberger
Cristina Chou Pauzé

DECLARATION OF JOHN E. KANE

I, John E. Kane, do declare under penalty of perjury as follows:

1. I am the Co-Founder and principal of Kane Reece. Kane Reece is an international valuation, management and technical consulting firm founded in 1986 located at 822 South Avenue West, Westfield, NJ 07090. Through its practice groups, the firm serves businesses, attorneys, financial institutions, and governments. Principals and staff have decades of management and appraisal experience in industry, and have supported findings in numerous judicial and administrative venues. Clients range from "Fortune 500 companies" to closely held firms and partnerships. Engagements involve firms with underlying asset values ranging from millions to billions of dollars. Our valuation group is the largest independent provider serving the communications, entertainment, and media industries. We are experienced in all segments of these industries.

2. In my position, I conduct and manage appraisals of real and personal property, intangible assets, and business interests totaling hundreds of billions of dollars in value. I have defended appraisal studies before the Internal Revenue Service, the U.S. Bankruptcy Court, and the American Arbitration Association, and I provide litigation support in federal and local trial courts. My services are frequently sought by professional and industry groups as a speaker on valuation and business issues.

3. I combine my expertise in valuation and related financial management areas for communications, media, entertainment, retailing, and financial service businesses with a skill for appraising investment-grade real estate. I am also a leading expert in the now prominent field of sports team valuation and venue feasibility.

4. I received my undergraduate degree from Upsala College and an M.B.A. in Finance from St. Johns University where I was elected to the National Business Honor Society, Beta Gamma Sigma and the National Economics Honor Society, Omicron Delta Epsilon. In addition, I am a Chartered Financial Analyst (CFA), as well as a member of the New York Society of Security Analysts and the CFA Institute.

5. I am the author of "Sports Team Valuation and Venue Feasibility" in The Handbook of Advanced Business Valuation (McGraw Hill, 2000).

Summary Critique of Filing of ION Media Networks and Declaration of Stephen E. Siwek

6. I have been asked to review the June 15, 2006 filing from ION Media Networks ("ION") and the attached Declaration, together with exhibits, from Stephen E. Siwek ("Siwek Declaration"), of Economists Incorporated.

7. After careful review and a detailed analysis of the numerous SEC filings and Wall Street analyst reports pertaining to these companies (and other small broadcast station groups), I can render the following observations and opinions:

8. The Siwek Declaration does not provide any support to the claims made by ION that mandatory carriage of the multicast streams is warranted. Siwek simply reports that five self-selected broadcast television station firms[1] (the Siwek Group) suffered "large losses" for each of the preceding three years. There are many reasons why a broadcaster can report a "loss" but the Siwek Declaration does not present any evidence that the "losses" are attributable to the cable industry not carrying the multicast streams of their digital signals.

9. The Siwek Declaration fails to substantiate its claim that the federally mandated digital transition is responsible for the economic health of broadcasters.

10. ION's filing provided no evidence that broadcasters can generate sustaining revenues from multicasting.

11. ION's claim that the cost to cable operators to carry must carry multicast streams is costless is refuted by an earlier Kane Reece study on this topic.

Broadcast firms can be operationally sound, yet show "losses"

12. Despite the portrayal of imminent doom for certain broadcasters included in the Siwek Group, to say a broadcaster suffers a "loss" is by itself meaningless. When ascertaining the "health" of a broadcast station group (or other media property), one must distinguish between two factors: (1) the operational health (typically measured by EBITDA[2]), and (2) the capital structure of the entity (i.e, the debt load the company has chosen to carry). The Siwek Declaration's reporting of "large losses" (primarily due to high debt loads) says nothing about the operational health of the companies nor did Siwek discuss why these companies chose to carry such debt. It is quite possible for a firm to be operationally sound, yet so self burdened with debt that it reports "losses."

13. In my review of the operational financials below for the Siwek Group, I found that four of the five firms generate positive Adjusted EBITDA and appear to be operationally sound.

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[1] The broadcasters chosen by Siwek include Acme Communications (ACME), Granite Broadcasting (Granite), ION Media Networks (ION), LIN Television (LIN) and Young Broadcasting (Young).

[2] EBITDA is Earnings Before Interest, Taxes, Depreciation and Amortization. Broadcast companies typically make additional adjustments including: adding amortization of program contract costs, impairment charges, and non-cash compensation, and deducting payments on program contracts. This is called Adjusted EBITDA (Adj. EBITDA).This measures the operating cash flow of a business. Adj. EBITDA margin is also a good tool to evaluate each of these companies. Adj. EBITDA margin is Adj. EBITDA divided by total revenue. The higher the percentage of the Adjusted EBITDA margin, the better the firm is positioned to meet its debt requirements.

Operating Measures

(in millions)		2005	2004	2003
Paxson Communications Corporation				
	Adj. EBITDA [b]	$78.8	$30.4	$56.9
	Adj. EBITDA Margin	31.0%	11.0%	21.0%
	Adj. EBITDA Financing Coverage	0.4	0.1	0.2
Acme Communications Inc.[b]				
	Adj. EBITDA	($1.0)	($0.8)	($2.8)
	Adj. EBITDA Margin	-2.4%	-2.0%	-7.8%
	Adj. EBITDA Financing Coverage	n/a	n/a	n/a
Granite Broadcasting Corporation				
	Adj.EBITDA [a]	$15.2	$10.8	$5.4
	Adj. EBITDA Margin	17.6%	13.4%	7.4%
	Adj. EBITDA Financing Coverage	0.2	0.2	0.1
Young Broadcasting Inc.				
	Adj. EBITDA [a]	$23.9	$53.3	$38.4
	Adj. EBITDA Margin	12.1%	23.6%	19.0%
	Adj. EBITDA Financing Coverage	0.4	0.8	0.6
LIN TV Corp. [b]				
	Adj. EBITDA	$113.0	$134.0	$115.0
	Adj. EBITDA Margin	29.7%	35.6%	33.4%
	Adj. EBITDA Financing Coverage	2.4	2.9	1.9

Source: a: Bank of America Report; b. Company data
EBITDA Coverage = EBITDA/Interest Charges + Preferred Dividends   EBITDA Margin = EBITDA/Revenue

14. Although ACME is not quite cash flow positive on an Adjusted EBITDA basis, each of the other businesses is generating sizable cash flow streams, ranging from $15 million for Granite to $113 million for LIN. Adjusted EBITDA gives a truer indication of the operating performance of a company, and it is the measure these broadcast companies themselves focus on.[3] The Adjusted EBITDA and Adjusted EBITDA margins presented above do not portray the dire state of these companies that the ION filing and Siwek Declaration attempted to paint.

15. The Operating Measures presented above also include Adjusted EBITDA Financing Coverage which indicates the extent to which finance charges are covered by Adjusted

[3] ION itself recently used EBITDA in its presentation at the Wachovia Securities Media & Communications Conference on May 24, 2006 (http://www.ionmedia.tv/investors/download/ION%20Wachovia%20Presentation%202006-05-24_FINAL.ppt; Slides #20 and 21. Likewise, LIN touted its strong EBITDA results at the 2005 CSFB High Yield Media & Telecom Conference on November 17, 2005 (http://library.corporate-ir.net/library/13/131/131042/items/174418/TVL111605.pdf)

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EBITDA. Any number less than one indicates that Adjusted EBITDA is insufficient to cover (i.e., pay for) finance charges. Based on the financials of the Siwek Group, only LIN appears to be able to cover its finance charges. This indicates that the other four companies have too high a debt load to make their debt service with operating cash flow alone.

16. What appears to be the main reasons the Siwek Group companies are showing "large losses" is the fact that the companies are currently highly leveraged and/or were poorly managed at some point in the past and are trying to work their way out of financial trouble.[4] A closer examination of their financials and Wall Street analyst reports illustrates why these companies, although generating positive cash flows, may be currently suffering economic hardship.

17. ION's predecessor (a.k.a. Paxson Communications) attempted to create a seventh broadcast television network by purchasing a large number of broadcast stations in an attempt to achieve national network reach using a large amount of debt ($2.7 billion). The business plan failed and now the company is primarily broadcasting either simulcasts of its analog signal or infomercials on five of its six multicast streams.[5]

18. Granite is living with the legacy of bad deals and poor operating decisions.[6] Granite overpaid for syndicated sitcoms that proceeded to underperform.[7] Likewise, in 2000, Granite made history when it offered to pay reverse compensation of $362 million (over 10 years) to secure the distribution right to be the sole NBC affiliate in San Jose and San Francisco. At the time,

[4] Other factors can also affect the operational end of a business. The cyclical nature of political advertising can cause advertising revenues to decline in non-election years. Likewise, a sluggish national advertising market can affect the revenues of local broadcasters.
[5] ION program schedules by station are available at www.ionline.tv/stations, see for example WXPX-TV Tampa.
[6] *The Worst Stock in Television;* Broadcasting & Cable; December 20, 2004; http://www.broadcastingcable.com/article/CA488912.html?display=On+the+Street
[7] Id

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one security analyst termed the station "permanently unprofitable." Shareholders balked at the move and within months Granite was forced to sell the San Jose station back to NBC.[8]

19. Young's operating results in 2005 suffered (compared to 2004 results) from a fall off in political advertising and the introduction of Nielsen's people meters in one DMA that previously was responsible for a third of Young's advertising revenue.[9] Even faced with these problems, Young was able to generate positive Adjusted EBITDA in 2005.

20. ACME's apparent "problem" stems from the fact that the company's stations are affiliated with two weaker broadcast networks, both of which will cease operation by the fall.

21. These financials are not indicative of the overall health of the television broadcast industry. The 2005 reported financial results from Hearst Argyle, Gray Broadcasting, Sinclair Broadcasting Group, and Nexstar indicate stronger Adjusted EBITDA margins (in the 35%-40% range), lower debt levels and positive operating income. Even Siwek admits that the Siwek Group is "not intended to represent the entire spectrum of publicly traded broadcast entities." I would submit that the Siwek Group represents only one end of that spectrum.

<u>The role of debt in the Siwek Group's "large losses"</u>

22. Broadcasters have two primary ways to finance their operations: incur debt or issue equity (stocks). The choice is up to management. Some broadcast groups have opted to incur large levels of debt, while other companies chose to issue stock equity.

23. As the table below clearly illustrates, the Siwek Group opted to incur debt and have combined total obligations of more than $5 billion on adjusted EBITDA of $230 million.

[8] Id

[9] *Taking Stock of the Year Ahead, Lessons from 2005;* Broadcasting & Cable; January 2, 2006; http://www.broadcastingcable.com/article/CA6295751.html?display=News

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Leverage at December 31, 2005
in millions

	Total Debt (including redeemable pref stock)	Adj. EBITDA	Debt + Pref Stock/ Adj. EBITDA
ION (aka Paxson)	$2,441	$78.8	31.0
ACME Broadcasting	$54	($1.0)	NM
Granite Broadcasting	$750	$15.2	49.3
LIN TV	$982	$113.0	8.7
Young Broadcasting	$786	$23.9	32.9
Total for 5 Companies	**$5,013**	**$229.9**	**21.8**

24. Thus, it was not surprising to see four of five companies in the Siwek Group (ACME, Granite, Young, and ION) identified in a recent Bear Stearns report as being highly leveraged local broadcast companies whose stock prices have had the worst performance.[10]

25. A review of other broadcast station groups' financials indicates that the Siwek Group "losses" are not indicative of the industry.[11]

There is no evidence that the broadcaster digital transition is responsible for the high debt load carried by the Siwek Group or that it is related to the Cable Industry

26. The Siwek Declaration claims that the high debt load carried by the Siwek Group was caused by, among other reasons, the "federally mandated construction of DTV facilities." Siwek makes no attempt to quantify or document this assertion and provides no details as to the cost of digital construction for any of the companies. Moreover, even if digital conversion cost

[10] *Local TV: It's all About Leverage*; pg. 6; Bear Stearns Equity Research, May 26, 2006.
[11] Id.

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data were provided, it is not clear what that cost has to do with the cable television industry, which has borne its own cost in transitioning to a digital platform. The cable industry itself has spent over $100 billion since 1996 upgrading its own facilities in order to offer consumers greater choice in an array of voice, video and high speed data products, including digital products.[12]

Multicasting has yet to be proven as cure to broadcasters' ills

27. ION claims in its filing that Siwek's analysis indicates that multicast must carry is needed to provide revenue streams for the survival of "many of the nation's smaller broadcasters."[13] The Siwek Declaration, however, contains no support for this statement. Siwek makes no mention at all of multicast streams. Nor does the Declaration make any predictions about the revenue streams that might be generated by multicast programming streams. In any event, ION itself has failed to demonstrate that it can generate sustainable revenue on the multicast streams.[14]

28. In fact, multicasting of advertiser-supported digital broadcast streams has not been shown to be profitable to local broadcasters. A Bear Stearns analysis recently explained "while companies have used digital spectrum for HDTV services, DTV services (Sinclair is using some digital channels to launch a music network – The Tube) and to launch a low-cost cable television competitor (USDTV), we have not yet seen an economic model that will deliver a return for owners of local TV stations."[15]

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[12] See Kane Reece Report entitled *The Economic Impact of Multicast Must Carry*, September 7, 2005 at p. 11. (Kane Reece Report) at http://www.ncta.com/IssueBrief.aspx?contentId=2716.

[13] ION Letter from Brandon Burgess (CEO) to Ms. Dortch, June 14, 2006 at page 2.

[14] As noted above, ION typically carries national "Paid Programming" on 5 of its 6 multicast streams for a large portion of its broadcast day. This is in direct contradiction with ION's claim that multicast will enable "broadcasters to offer all viewers programming that serves the needs and interests of local communities." (ION letter at page 2. emphasis added).

[15] *Local TV: It's all About Leverage*; pg. 5; Bear Stearns Equity Research,; May 26, 2006

29. I concur with the Bear Stearns assessment and, in my professional experience, I have yet to see any viable business model for advertiser-supported digital multicasting local programming. TV stations will not benefit from a self-induced, further fractionalization of the advertiser-supported video market.

Multicast must carry is not costless to cable operators

30. ION's filing also claims that "the carriage of these free over-the-air programming services (i.e., multicast streams) would impose no financial burden on cable whatsoever." The Siwek Declaration does not support this assertion and does not address the cost to cable of a multicast requirement. In any event, ION's assertion is baseless.

31. The value of cable's digital spectrum was documented in a September 2005 study that I authored entitled "The Economic Impact of Multicast Must Carry."[16] That study concluded that "[g]iven capacity constraints and, more significantly, the value of cable's broadband bandwidth, the economic burden to add mandatory multicast programming will be substantial."[17] We demonstrated that "under even the most conservative valuation approach ("the leased access approach"), the cost to cable operators to implement a mandatory multicast regime is in the $4.2 - $5.6 billion range. Under an 'opportunity cost approach' – which we believe is very reasonable methodology to use in this instance – the cost of a multicast regime to cable operators exceeds $115.6 billion."[18]

[16] Kane Reece Report.

[17] Id.

[18] Id.

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Conclusions

32. Neither the ION filing nor the Siwek Declaration provide any meaningful analysis or support of the broadcasters' claim that mandatory multicast must carry is warranted or that the economic state of the five companies was caused by the digital conversion or will be solved by multicast must carry.

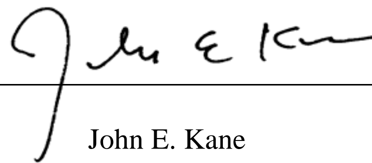
33. The data presented by Siwek fails to provide the complete picture of the economic health of the broadcast industry as a whole, nor even for the five selected companies.

34. The Siwek Group, although generally operationally sound, show "losses" primarily due to the large debt load the companies themselves chose to carry.

35. Neither ION nor Siwek present any economic model to support the claim that mandatory multicast streams will produce sustainable revenues.

36. To the contrary of ION's claim, the cost to cable operators to carry mandatory multicast streams would be substantial.

Executed this 27th day of June, 2006.

By: 

John E. Kane