

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

In the Matter of)	
)	
Amendment of Section 73.622(i),)	MB Docket No. 09-230
Post Transition Table of DTV Allotments)	RM-11586
Television Broadcast Stations)	
(Seaford, Delaware))	

**MEMORANDUM OPINION AND ORDER
ON FURTHER RECONSIDERATION**

Adopted: May 1, 2014

Released: May 1, 2014

By the Chief, Video Division, Media Bureau:

I. INTRODUCTION

1. The Media Bureau, Video Division has before it a petition filed by PMCM TV, LLC (“PMCM”) seeking reconsideration of the *Report and Order* to amend the Post-Transition Table of DTV Allotments¹ to allot channel 5 to Seaford, Delaware and the subsequent *Memorandum Opinion and Order on Reconsideration* upholding that allotment determination.² For the reasons set forth below, we dismiss PMCM’s petition for reconsideration as untimely.

II. BACKGROUND

2. The Media Bureau, Video Division issued a *Notice of Proposed Rulemaking* on December 18, 2009,³ proposing to allot channel 5 to Seaford, consistent with sections 307(b) and 331(a) of the Communications Act of 1934 (the Act), as amended.⁴ Section 331(a) provides,

Very High Frequency Stations. - It shall be the policy of the Federal Communications Commission to allocate channels for very high frequency commercial television broadcasting in a manner which ensures that not less than one such channel shall be allocated to each State, if technically feasible. In any case in which [a] licensee of a very high frequency commercial television station notifies the Commission to the effect that such licensee will agree to the reallocation of its channel to a community within a State in which there is allocated no very high frequency commercial television broadcast channel at the time [of] such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a

¹ 47 C.F.R. § 73.622(i).

² *Seaford, Delaware*, Report and Order, 25 FCC Rcd 4466 (Vid. Div. 2010) (“*Seaford Report and Order*”); *Seaford, Delaware*, Memorandum Opinion and Order on Reconsideration, 28 FCC Rcd 1167 (Vid. Div. 2013) (“*Seaford MO&O on Reconsideration*”).

³ *Seaford, Delaware*, Notice of Proposed Rulemaking, 24 FCC Rcd 14596 (Vid. Div. 2009) (“*Seaford Notice*”).

⁴ 47 U.S.C. §§ 307(b), 331(a).

license to such licensee for that purpose pursuant to such notification for a term of not to exceed 5 years as provided in section 307(d) of this the Communications Act of 1934.⁵

The only VHF channel allotted to Delaware at the time of the *Seaford Notice* was reserved for noncommercial educational use.⁶

3. PMCM filed comments and reply comments in response to the *Seaford Notice*. In its comments, PMCM indicated its support for additional television channel allotments to the underserved states of New Jersey and Delaware.⁷ PMCM did not object to the Seaford allotment in its comments, but stated only that the Commission must ensure that the channel 5 allotment at Seaford not cause impermissible interference to the facility proposed in PMCM's June 15, 2009 notification, made pursuant to the second sentence of section 331(a), that it agreed to the reallocation of KJWY(TV), channel 2, from Jackson, Wyoming to Wilmington, Delaware.⁸ PMCM similarly did not object to the Seaford allotment in its reply comments, but instead directed its reply to refuting arguments made by the Broadcast Maximization Committee ("BMC") in opposition to the proposed allotment.⁹

4. On April 28, 2010 the Division issued the *Seaford Report and Order* concluding that the Seaford proposal was in the public interest as it would provide the state of Delaware with a commercial VHF channel as required by section 331 of the Act.¹⁰ In adopting the Seaford proposal, the Division stated that the allotment of a new channel in Southern Delaware would result in an equitable distribution of channels consistent with the Commission's allotment priorities and section 307(b) of the Act.¹¹ The Division also rejected BMC's arguments that: (1) the Commission should avoid proposing new channel allotments on channels 5 and 6 given the pendency of a proposal to reallocate those channels to the FM radio service; and (2) section 331 does not apply to the digital television service.¹² Finally, the Division held that BMC's counterproposal to allot either channel 2 or channel 3 to Seaford was not entitled to consideration because BMC did not advance it until the reply comment stage.¹³

5. Only BMC filed a timely Petition for Reconsideration of the *Seaford Report and Order*. In its Petition for Reconsideration, BMC contested the Division's decision to allot channel 5 to Seaford, rather than channel 2 or channel 3 as proposed in BMC's reply comments. Specifically, BMC maintained that the Division had taken "the unusual step of proposing the allotment of channel 5 at Seaford, despite the fact that no party had expressed an interest in this proposal."¹⁴ BMC also argued that the Division "incorrectly believed that neither channel 2 or 3 could be considered because they were counterproposals

⁵ *Id.*

⁶ *Seaford Notice*, 24 FCC Rcd at 14596 n.2.

⁷ PMCM Comments at 2.

⁸ *Id.* By letter dated December 18, 2009, the Media Bureau denied PMCM's reallocation request, which PMCM appealed. *PMCM TV, LLC, c/o Harry F. Cole, Esq.*, 24 FCC Rcd 14588 (MB 2009).

⁹ PMCM Reply Comments.

¹⁰ *Seaford Report and Order*, 25 FCC Rcd at 4470.

¹¹ *Id.* at 4470-71 (citing 47 U.S.C. § 307(b)).

¹² *Id.*

¹³ *Id.* at 4472 n.42 (quoting 47 C.F.R. § 1.420(d) ("Counterproposals shall be advanced in initial comments only and will not be considered in reply comments.")).

¹⁴ BMC Petition for Reconsideration at 2.

and could not be offered at the reply stage.”¹⁵ PMCM did not support BMC’s petition for reconsideration but instead submitted a “Qualified Opposition,” stating that BMC’s counterproposal to allot channel 2 or 3 instead of channel 5 could not be considered prior to Commission action on PMCM’s June 15, 2009 notifications agreeing to the reallocation of KJWY(TV) to Wilmington and KVVV(TV), channel 3, Ely, Nevada to Middletown Township, New Jersey because BMC’s counterproposal was mutually-exclusive with the proposed reallocation of PMCM’s stations.¹⁶ On December 14, 2012, the U.S. Court of Appeals for the D.C. Circuit reversed the Commission’s decision to deny PMCM’s reallocation requests and instructed the Commission to approve the channels 2 and 3 reallocations.¹⁷

6. The Division denied BMC’s petition for reconsideration on February 13, 2013.¹⁸ The Division held that the decision to propose the allotment of channel 5 at Seaford was made to serve the public interest and to comply with section 331’s VHF channel allotment policy.¹⁹ The Division explained that “Section 331 poses a somewhat unique circumstance compared to other allocations, by imposing a policy of allocating at least one VHF frequency to each state, if technically feasible.”²⁰ Finally, the Division, in light of the D.C. Circuit’s decision in *PMCM TV*, dismissed as moot BMC’s argument that its request to allocate channel 2 or 3 at Seaford, rather than channel 5, did not qualify as a counterproposal as the Court had directed the Commission to grant PMCM a license for channel 2 in Wilmington and channel 3 in Middleton Township, New Jersey.²¹

7. PMCM filed for reconsideration of both the *Seaford Report and Order* and the *Seaford MO&O on Reconsideration* on March 15, 2013. In that petition, PMCM seeks reconsideration “premised on a significant change in circumstance, namely the issuance by the U.S. Court of Appeals for the District of Columbia Circuit of the decision in *PMCM TV, LLC v. Federal Communication*.”²² Specifically, PMCM asserts that the Commission “improperly applied the mandate of [s]ection 331(a) in acting on its own motion to fill a purported ‘void’ of VHF service to that community; [when] in fact, VHF service in Delaware had already been properly proposed in accordance with [s]ection 331(a) by PMCM.”²³

III. DISCUSSION

8. We dismiss PMCM’s requests for reconsideration of the *Seaford Report and Order* and the *Seaford MO&O on Reconsideration*. With respect to PMCM’s request for reconsideration of the *Seaford Report and Order*, section 1.429(d) of the Commission’s rules requires that a “petition for reconsideration and any supplement thereto shall be filed within 30 days from the date of the public notice of such action.”²⁴ The *Seaford Report and Order* was published in the Federal Register on May 7, 2010.²⁵

¹⁵ *Id.* at 3.

¹⁶ PMCM Qualified Opposition at 1.

¹⁷ *PMCM TV, LLC v. FCC*, 701 F.3d 380 (D.C. Cir. 2012) (“*PMCM TV*”).

¹⁸ *Seaford MO&O on Reconsideration*, 28 FCC Rcd 1167.

¹⁹ *Id.* at 1169.

²⁰ *Id.*

²¹ *Seaford MO&O on Reconsideration*, 28 FCC at 1169.

²² PMCM Petition for Reconsideration at 1 (citing 47 C.F.R. §1.429(b)(1)).

²³ *Id.* at 2.

²⁴ 47 C.F.R. § 1.429(d).

²⁵ 75 FR 25119 (May 7, 2010).

Accordingly, PMCM's March 15, 2013 request for reconsideration of the *Seaford Report and Order* is untimely. Additionally, PMCM's reliance on section 1.429(b)(1) of the Commission's rules is misplaced. By the time the *Seaford Report and Order* was released, PMCM had filed an application for review of the Bureau's rejection of the re-allocation notifications, and it had filed a petition for mandamus in the D.C. Circuit asking the court to compel the re-allocation.²⁶ Thus, it already knew that reversal of the Bureau's action was possible. The fact that the Bureau's rejection of PMCM's reallocation notifications was not yet final and unappealable did not excuse PMCM's failure to raise objections that were based on a foreseeable outcome, i.e., the possible reversal of the Bureau's action by the Commission or by a reviewing court.²⁷

9. With respect to PMCM's request for reconsideration of the *Seaford MO&O on Reconsideration*, we dismiss this request as well. PMCM's request for reconsideration of the *Seaford MO&O on Reconsideration* is an untimely collateral challenge of the *Seaford Report and Order* that should have been presented in a timely petition for reconsideration in 2010.²⁸ The Commission has stated in the past that indirect challenges to decisions that were adopted in proceedings in which the right to review has expired are considered impermissible collateral attacks and are properly denied.²⁹ Here, PMCM's request is outside the scope of the *Seaford MO&O on Reconsideration*. The *Seaford MO&O on Reconsideration* addresses not whether a channel should be allotted to Seaford as PMCM contests in its petition for reconsideration, but rather which channel should be allotted to Seaford, Delaware. In fact, the Bureau granted PMCM's request in its Qualified Opposition by denying BMC's petition for reconsideration and allotting channel 5 to Seaford, rather than channel 2 or 3, as proposed by BMC.

IV. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by PMCM TV, LLC IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau

²⁶ PMCM's comments at 1 n.1.

²⁷ In fact, it appears PMCM contemplated ultimate reversal of the Bureau's decision when it filed its "Qualified Opposition" to BMC's Petition for Reconsideration of the *Seaford Report and Order* to preserve its argument that the Commission should not grant BMC's request to select channel 2 or 3 instead of channel 5 for the new VHF allocation at Seaford because doing so would conflict with its re-allocation notifications.

²⁸ *Michael S. Rice*, Memorandum Opinion and Order, 16 FCC Rcd 18394 (2001) (dismissed as an untimely and collateral challenge to a proceeding that had been previously finalized); *Junk Fax Prevention Act of 2005*, 27 FCC Rcd 4912, 4915 (CGB 2012) (improper collateral challenge to the rule that should have been presented in a timely petition for reconsideration); *Letter to Steven Wendell*, 21 FCC Rcd 8665 (MB 2006) (declining to consider untimely collateral challenge to grant of a license application); *Letter to Jerrold Miller, Esq.*, 21 FCC Rcd 2200 (MB 2006) (rejecting untimely collateral challenge to grant of assignment application).

²⁹ *Motions for Declaratory Rulings Regarding Commission Rules and Policies for Frequency Coordination in the Private Land Mobile Radio Services*, Memorandum Opinion and Order, 14 FCC Rcd 12752, 12757, para. 11 (1999); *MCI Telecommunications Corp. v. Pacific Northwest Bell Telephone Co.*, Memorandum Opinion and Order, 5 FCC Rcd 216, para. 41, n.38 (1990), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (*per curiam*).