

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

In re)	
)	
PMCM TV, LLC,)	No. 15-1058
)	
Petitioner)	
)	

**OPPOSITION OF THE FEDERAL COMMUNICATIONS COMMISSION
TO PETITION FOR WRIT OF MANDAMUS**

The Court should dismiss in part as moot and otherwise deny the petition of PMCM TV, LLC, for a writ of mandamus—a “drastic” remedy that “is available only in extraordinary situations.” *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc) (internal quotation marks omitted).

PMCM asks the Court to compel the Federal Communications Commission to “act[] immediately” on PMCM’s application for review of a cable carriage order that the FCC’s Media Bureau issued in July 2014. Pet. 26. Recent FCC action has rendered that application for review moot, and there is no cause for the FCC to decide it. The Court should therefore dismiss that aspect of PMCM’s petition for mandamus. In any event, PMCM’s application for review has been fully briefed for not even eight months—a period that neither violates any statutory deadline nor otherwise remotely approaches the kind of “egregious” delay required to justify the “extraordinary remedy” of mandamus. *In re Monroe Commc’ns Corp.*, 840 F.2d 942, 945 (D.C. Cir. 1988).

The Court should deny the petition insofar as PMCM seeks an order requiring the FCC to declare that “all cable systems as to which PMCM . . . has elected must-carry status” for its newly launched New Jersey television station must carry the station “on Channel 3.” Pet. 26. PMCM has shown no “clear and indisputable” right to carriage on cable channel 3. *E.g.*, *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988) (internal quotation marks omitted). Nor has PMCM shown, as it must, that mandamus is its only available means of obtaining such carriage. *See Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002).

BACKGROUND

This case concerns PMCM’s effort to bypass statutorily provided administrative procedures for seeking carriage of its newly launched New Jersey television station on cable channel 3 in the New York media market.

A. Mandatory Cable Carriage under the Communications Act

Under Section 614 of the Communications Act of 1934 (Communications Act or Act), as amended, 47 U.S.C. § 534, and the FCC’s implementing rules, *see* 47 C.F.R. § 76.51 *et seq.*, commercial television broadcast stations may assert mandatory rights to carriage on cable systems in their respective markets, *see* 47 U.S.C. § 534(a); *Implementation of the Cable Consumer Protection and Competition Act of 1992*, Report and Order, 8 FCC Rcd 2965, 2975 ¶ 37 (1993) (*1993 Implementing Order*). A station’s market for this purpose is its “Designated Market

Area,” as defined by the Nielsen Company, 47 C.F.R. § 76.55(e)(2), and mandatory carriage rights are commonly called “must-carry” rights.

When a commercial television station asserts must-carry rights, it may elect one of four possible channel positioning options. *See* 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57(a), (d). Most relevant here, a station may elect carriage on “the cable system channel number on which the . . . station is broadcast over the air.” 47 U.S.C. § 534(b)(6); *accord* 47 C.F.R. § 76.57(a).

A new commercial television station wishing to assert must-carry rights must notify cable operators in its market of that election no later than “30 days after commencing [to] broadcast.” 47 C.F.R. § 76.64(f)(4); *see id.* § 76.64(h). Ordinarily, an election of must-carry status “take[s] effect 90 days after it is made.” *Id.* § 76.64(f)(4). Thus, in the usual case, a cable operator that receives a must-carry notice from a new station must, within 90 days, either begin carrying the station as requested or risk that the station will seek remedial action from the FCC as provided under Section 614(d) of the Act, 47 U.S.C. § 534(d), and implemented in Section 76.61 of the FCC’s rules, 47 C.F.R. § 76.61; *see 1993 Implementing Order*, 8 FCC Rcd at 2993–96 ¶¶ 115–128.

“Whenever a local commercial television station believes that a cable operator has failed to meet its [cable carriage] obligations,” the “station shall notify the operator, in writing, of the alleged failure and identify its reasons for believing that

the cable operator is obligated to carry the signal of such station or has otherwise failed to comply with the channel positioning . . . or other requirements of [Section 614].” 47 U.S.C. § 534(d)(1). “The cable operator” then has “30 days” from “such written notification” to “respond in writing . . . and either commence to carry the signal of [the requesting] station in accordance with the terms requested or state its reason for believing that it is not obligated” to do so. *Id.* A station that is formally “denied” its requested cable “carriage or channel positioning” through this process “may obtain review of such denial by filing a complaint with the [FCC].” *Id.*

Once a commercial television station files a cable carriage complaint with the agency, the Act establishes further procedural requirements. The FCC must “afford [the] cable operator an opportunity to present data and arguments to establish that there has been no failure to meet its obligations” under the statute. 47 U.S.C. § 534(d)(2). Then— “[w]ithin 120 days after the date” the station “file[s]” its “complaint”—the agency must “determine whether the cable operator has met its [cable carriage] obligations.” *Id.* § 534(d)(3). At that time, the agency must either “order the cable operator to reposition” or “commence carriage of the [complaining] station” or, if “the cable operator has fully met the requirements of [Section 614], . . . dismiss the complaint.” *Id.*

B. Channel Positioning in the Digital Television Era

Historically, in the age of analog broadcasting, there was no distinction between the physical “radio frequency” channel over which a U.S. television station broadcast its programming and the channel to which viewers without cable or satellite service tuned their television sets to receive the station’s programming over the air. That changed with the nation’s transition to digital television in 2009.

Today, the channel on which over-the-air viewers receive a station’s programming is determined by a two-part numerical code that all television stations transmit within their digital broadcasts. *See Media Bureau Seeks Comment on Request for Declaratory Ruling by Meredith Corporation and ‘Alternative PSIP Proposal’ by PMCM TV, LLC for KVVN(TV), Middletown Township, New Jersey*, Public Notice, 29 FCC Rcd 10556, 10556 n.1 (Media Bur. 2014) (Public Notice); Pet. 7. That code is known as a station’s “Program System and Information Protocol” (PSIP) channel, and is more colloquially called its “virtual” channel, *id.*, because it can be set irrespective of the radio frequency channel over which the station broadcasts. The first numeral of the PSIP channel is its “major” channel, the second its “minor” channel. *See Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, Second Report and Order and Second Memorandum Opinion and Order, 17 FCC Rcd 15978, 16002 ¶ 52 n.83 (2002), *subsequent history omitted*. Under Section 73.682(d) of the FCC’s rules, 47

C.F.R. § 73.682(d), absent a waiver, a station's PSIP channel must be set based on privately developed protocols that the rule incorporates by reference.

Because the channel on which over-the-air viewers receive a station's programming is no longer tied to the radio frequency channel on which the station physically broadcasts, the FCC has "clarif[ied] the manner in which cable operators are to determine the channel number on which a local commercial . . . station is 'broadcast over the air'" in the digital era. *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Declaratory Order, 23 FCC Rcd 14254, 14259 ¶ 16 (2008) (*2008 Declaratory Order*). A "cable operator," the Commission has explained, "can identify the correct channel location by reference to the PSIP," *id.* at 14259 ¶ 15, and "any station carried pursuant to mandatory carriage may demand carriage on its major channel number as broadcast in [its] PSIP," *id.* at 14259 ¶ 16; *see also* 47 C.F.R. § 76.57(c) ("With respect to digital signals of a . . . station carried in fulfillment of the must-carry obligations, a cable operator shall carry the information necessary to identify and tune to the broadcast television signal."); *Carriage of Digital Television Broadcast Signals*, First Report and Order, 16 FCC Rcd 2598, 2635 ¶ 83 (2001) (*First Report and Order*) (concluding that "the channel mapping protocols contained in the PSIP identification stream adequately address [cable channel] location issues" in the digital era).

Acting on delegated authority, the Policy Division of the FCC's Media Bureau has interpreted the full Commission's guidance on this point to mean that, in digital broadcasting, a station's statutory right to demand carriage on its "over-the-air" channel is limited to demanding carriage on its PSIP major channel. *KSQA, LLC v. Cox Cable Commc'ns, Inc.*, Memorandum Opinion and Order, 27 FCC Rcd 13185, 13186–87 ¶ 4 (Media Bur. Policy Div. 2012); *see Gray Television Licensee, LLC v. Zito Media, LP*, Memorandum Opinion and Order, 28 FCC Rcd 10780, 10781, 10783 ¶¶ 3 n.10, 10 (Media Bur. Policy Div. 2013); *Mauna Kea Broad. Co. v. Time Warner Enter. Co.*, Memorandum Opinion and Order, 27 FCC Rcd 13188, 13198 ¶ 19 (Media Bur. Policy Div. 2012). The Division has expressly rejected the theory that a station now has the option of demanding carriage on either the cable channel corresponding to its radio frequency channel or the position corresponding to its PSIP major channel. *See KSQA*, 27 FCC Rcd at 13186–87 ¶ 4.

C. The Launch of PMCM's New Jersey Station Prompts Disputes

1. FCC Grants PMCM's Request to Reallocate Radio Frequency Channel 3 to New Jersey

In 2008, PMCM became the licensee of station KVNV(TV), radio frequency channel 3, in Ely, Nevada. *See Request for Declaratory Ruling by Meredith Corporation and "Alternative PSIP Proposal" by PMCM TV, LLC for WJLP (Formerly KVNV(TV)), Middletown Township, New Jersey, Declaratory Ruling, DA 15-662*, at 4 ¶ 9 (Media Bur. June 5, 2015) (*PSIP Declaratory Ruling*) (attached

as Exhibit 1). Shortly thereafter, as part of the 2009 transition to digital television, New Jersey's only commercial very high frequency (VHF) television station vacated radio frequency channel 9 in exchange for ultra-high frequency (UHF) spectrum. *See Reallocation of Channel 2 from Jackson, Wyoming to Wilmington, Delaware*, Memorandum Opinion and Order, 26 FCC Rcd 13696, 13699 ¶ 6 (2011), *rev'd*, *PMCM TV, LLC v. FCC*, 701 F.3d 380 (D.C. Cir. 2012).¹

On the basis that New Jersey thus lacked a commercial VHF station, PMCM invoked Section 331(a) of the Communications Act, 47 U.S.C. § 331(a), and sought to have the FCC reallocate VHF channel 3 from Ely, Nevada, to Middletown Township, New Jersey, *see PMCM TV*, 701 F.3d at 383, which is in the New York media market. The FCC initially concluded that the statute did not require that reallocation. *See id.* On PMCM's appeal, this Court reversed. *See id.* at 385. The FCC thereupon reallocated radio frequency channel 3 as the Court had directed. *See Reallocation of Channel 3 from Ely, Nevada to Middletown Township, New Jersey, Amendment of Section 73.622(i), Post-Transition Table of DTV*

¹ "VHF" and "UHF" are well-understood terms that specify the radio frequency on which a television (or radio) station transmits its signal. *See, e.g.*, Newton's Telecom Dictionary 988 (24th ed. 2008) (defining VHF as "[f]requencies from 30 MHz to 300MHz"); *accord* 47 C.F.R. § 2.101(b). In the analog era, "VHF channels . . . enjoyed substantial technical advantages over other broadcasting methods." *PMCM TV*, 701 F.3d at 381. But in some instances, VHF spectrum "is poorly suited for digital broadcasting." *Id.* at 382–83. In part for that reason, "when the United States transitioned from analog to digital television broadcasting" in 2009, the FCC "allowed several stations to substitute other [radio frequency] channels for their VHF allotments." *Id.*

Allotments, Television Broadcast Stations, Report and Order, 28 FCC Rcd 2825, 2825 ¶ 1 (Media Bur. 2013).

2. Incumbent Stations Dispute PMCM's Right to Use Major Channel 3

In May 2013, PMCM applied to the FCC for a construction permit to build a New York City broadcast facility for its New Jersey station. *See PSIP Declaratory Ruling* at 5 ¶ 12. That application prompted a dispute between PMCM and Meredith Corporation concerning what PSIP channel PMCM's station is entitled to use. *See id.* at 6 ¶ 12. Meredith is the licensee of an incumbent television station whose service area overlaps that of PMCM's station. *See id.* Meredith's station has identified itself to viewers as "Channel 3" for more than half a century. *See id.* at 7–8 ¶ 15. Although in the digital era Meredith's station no longer broadcasts over radio frequency channel 3—instead using radio frequency channel 33—the station continues to use PSIP major channel 3. *See id.* at 8 ¶ 15. Meredith therefore opposed PMCM's application, arguing that to avoid the risk of consumer confusion and protect Meredith's established local brand, PMCM's station should be required to use major channel number 33 instead of 3. *See id.* at 6, 9 ¶¶ 12, 20.

In April 2014, the Video Division of the FCC's Media Bureau granted PMCM's construction permit application, declaring it premature at that juncture to decide the question of PMCM's major channel assignment. *See PSIP Declaratory Ruling* at 6 ¶ 12. Meredith sought reconsideration of the Division's order the next

month, at the same time requesting a declaratory ruling that PMCM's station should "not commence program tests on [Major] Channel 3." Meredith Petition for Reconsideration and Request for Declaratory Ruling 1 (May 22, 2014) (attached as Exhibit 2).

3. PMCM Requests Mandatory Carriage on Cable Channel 3, and the FCC Temporarily Defers the Time for Cable Operators to Respond

Shortly thereafter, on June 6, 2014, PMCM notified cable operators in the New York media market that it would "commence operation [of] a new television station" in that market "during the week of August 4, 2014." *E.g.*, Letter from PMCM to Time Warner Cable 1 (June 6, 2014) (attached as Exhibit 3). PMCM informed the cable operators that it was "elect[ing] mandatory carriage . . . on Channel 3," which it characterized as its station's "over-the-air channel number." *Id.*

In light of the ongoing dispute concerning PMCM's PSIP channel assignment, the New York cable operators asked the FCC to defer their obligation to implement PMCM's "must-carry request and channel position election . . . until 90 days from the date the Media Bureau issues a final decision on the virtual channel that [PMCM's station] is entitled to occupy." Letter from Counsel to Cablevision Systems Corp. to FCC Secretary 1 (June 12, 2014) (Cablevision Deferral Letter) (Pet. Attachment D); *accord* Letter from Counsel to Comcast Cable Communications, LLC to FCC Secretary 2–3 (July 11, 2014) (Comcast Deferral Letter) (attached as Exhibit 4); Letter from Counsel to Time Warner Cable Inc. to FCC Sec-

retary 1, 3 (July 11, 2014) (Time Warner Deferral Letter) (attached as Exhibit 5). In support of their requests, the cable operators explained that if they were to implement PMCM's requests for carriage on cable channel 3, they would need to "redo [their] channel line-ups across the entire New York [media market]," where other stations already occupied cable channel 3. Cablevision Deferral Letter 2; *accord* Comcast Deferral Letter 2; Time Warner Deferral Letter 2–3. They further explained that if subsequently, in response to Meredith's pending petition, the FCC's Media Bureau were to decide that PMCM's station is *not* entitled to use PSIP major channel 3, they would need to disrupt their "channel line-ups a second time," "wasting time and resources and confusing consumers." Cablevision Deferral Letter 2; *accord* Comcast Deferral Letter 2; Time Warner Deferral Letter 3.

PMCM opposed the cable operators' deferral requests. *See generally* PMCM Letter to FCC Secretary (June 26, 2014) (PMCM Cable Deferral Opposition) (Pet. Attachment E).² In doing so, PMCM's primary argument was that its New Jersey station has a clear entitlement to use PSIP major channel 3, and thus to demand carriage on cable channel 3. *See id.* at 1–2. PMCM also asserted, in a footnote, that "the Commission's 2008 decision to require cable carriage according to a station's PSIP channel," instead of its radio frequency channel, "appears to contravene the [Communications] Act"—an "apparent error" that PMCM asserted the Bureau

² Although PMCM's opposition responded specifically to the Cablevision Deferral Letter, all of the cable operators' deferral requests were effectively the same.

would “hopefully” not need “to resolve . . . in this case” because, in PMCM’s view, its station was entitled to use major channel 3. *Id.* at 1 n.1.

D. Cable Deferral Order

In an order released on July 25, 2014, the FCC’s Media Bureau granted the cable operators’ deferral requests. *Tara M. Corvo, Esq.*, Letter, 29 FCC Rcd 9102, 9102 (Media Bur. 2014) (*Cable Deferral Order*) (Pet. Attachment A). In doing so, the Bureau applied Section 1.3 of the FCC’s rules, 47 C.F.R. § 1.3, which allows the agency to waive its rules “for good cause shown,” *Cable Deferral Order*, 29 FCC Rcd at 9104 (quoting 47 C.F.R. § 1.3). Citing the ongoing PSIP channel dispute between Meredith and PMCM, the Bureau explained: “Until this conflict is resolved, . . . [the] virtual channel number [for PMCM’s station] may be subject to change and [cable operators] cannot ascertain on which channel they will be required to definitively carry the station.” *Id.* Meanwhile, the Bureau recognized that the cable operators would need to move stations already carried on channel 3 to carry PMCM’s station at that position. *See id.* at 9105. Reasoning that requiring the cable operators to “commence carriage of [PMCM’s station] on channel 3 as its virtual channel,” when the Bureau might soon thereafter “assign the station a different virtual channel,” would entail “technical impediments and . . . consumer confusion,” *id.*, the Bureau waived the ordinary rule that PMCM’s “election of must-carry status take effect within 90 days,” *id.* at 9104; *see* 47 C.F.R.

§ 76.64(f)(4). Instead, the Bureau allowed the New York cable operators to “defer carriage of [PMCM’s station] until 90 days from the date” of the Bureau’s “final decision on the station’s virtual channel,” which the Bureau “anticipate[d] . . . be[ing] able to issue . . . without lengthy delay.” *Cable Deferral Order*, 29 FCC Rcd at 9105.

On August 25, 2014, PMCM filed an application for review by the full Commission of the *Cable Deferral Order*. See Application for Review (Aug. 25, 2014) (Pet. Attachment B). The pleading cycle in response to that application closed on October 22, 2014. See Reply of PMCM to Opposition of Meredith (Oct. 22, 2014) (attached as Exhibit 6).

E. Subsequent Developments

Meanwhile, in connection with the PSIP channel dispute, PMCM submitted to the FCC an “Alternative PSIP Proposal” in which PMCM argued that the agency should partition major channel 3—allowing Meredith’s station to use PSIP channels 3.1 through 3.9, while PMCM’s station would use PSIP channels 3.10 and above. See PMCM Alternative PSIP Proposal 3 (Aug. 8, 2014) (attached as Exhibit 7). On September 12, 2014, the Media Bureau issued a public notice opening a docketed proceeding to receive public comment on PMCM’s proposal and Meredith’s competing request for declaratory ruling. See Public Notice, 29 FCC Rcd at 10556–57.

During the comment period in that docketed proceeding, PMCM completed the construction of its New York facility and commenced broadcasting under “program test” authority. *PSIP Declaratory Ruling* at 7 ¶ 14. Shortly thereafter, Meredith, CBS Broadcasting Inc., and ION Media License Company³ jointly complained to the FCC that PMCM’s station was operating on PSIP channel 3.10, which they argued PMCM was not entitled to use without first obtaining permission from the FCC. *See PSIP Declaratory Ruling* at 7 ¶ 14; *Donald J. Evans, Esq., Letter*, 29 FCC Rcd 12733, 12734 (Media Bur. Video Div. 2014) (*PSIP Interim Order*). The incumbent stations asked the FCC to direct PMCM’s station to use PSIP channel 33 (Meredith’s radio frequency channel number) on an interim basis, pending resolution of the parties’ dispute in the docketed proceeding. *See id.* Upon considering both the incumbents’ joint letter and PMCM’s response, the Video Division of the FCC’s Media Bureau ordered PMCM’s station to use major channel 33 on an interim basis. *See id.* at 12735–36.

When PMCM ignored that order, the Video Division directed PMCM to comply or have its program test authority suspended. *See PSIP Declaratory Ruling* at 7 ¶ 14. In response, PMCM petitioned this Court for a writ of mandamus, argu-

³ CBS is the licensee of KYW-TV, radio frequency channel 26, Philadelphia, Pennsylvania. *PSIP Declaratory Ruling* at 6 ¶ 12 n.30. Like Meredith’s station, KYW uses major channel 3 and for more than half a century has identified itself to viewers as “Channel 3” in a service area overlapping that of PMCM’s station. *See id.* at 12 ¶ 27. ION is the licensee of a television station carried by Cablevision on cable channel 3 in the New York media market. *See Pet.* 16 n.11.

ing that the Court’s 2012 *PMCM TV* decision and Section 331(a) of the Communications Act, among other authorities, gave PMCM’s New Jersey station a clear and indisputable right to use major channel 3. *See In re PMCM TV, LLC*, No. 14-1238, at 1 (D.C. Cir. Feb. 27, 2015) (per curiam) (*2015 Mandamus Denial Order*) (attached as Exhibit 8); *PSIP Declaratory Ruling* at 7 ¶ 14. After hearing oral argument, the Court denied PMCM’s petition, holding that PMCM had not “demonstrated . . . a clear and indisputable right to relief . . . under [the Court’s 2012 decision in *PMCM TV* or] any other relevant source of law.” *See 2015 Mandamus Denial Order* at 1 (internal quotation marks and citations omitted). PMCM thereafter agreed to use major channel 33 on an interim basis until the Media Bureau issued a merits decision in the PSIP proceeding. *See PSIP Declaratory Ruling* at 7 ¶ 14.

The Media Bureau issued that decision on June 5, 2015, ordering PMCM to continue using major channel 33 going forward. *See PSIP Declaratory Ruling* at 1 ¶ 2. The *PSIP Declaratory Ruling* functioned to end the deferral period imposed under the *Cable Deferral Order*—as the Bureau expressly noted in a letter to PMCM and the New York cable operators on the same date. *See Requests to Defer Mandatory Carriage of KVNV(TV), Middletown Township, New Jersey*, Letter, DA 15-667, at 2 (Media Bur. June 5, 2015) (*June Letter*) (attached as Exhibit 9). The New York cable operators now have until September 3, 2015, to either implement PMCM’s existing request for mandatory carriage on cable channel 3 or face the

prospect that PMCM will seek remedial action at the FCC through the statutorily provided complaint process. *See id.*; *see also* 47 U.S.C. § 534(d) (discussed *supra* pp. 3–4). Alternatively, under the terms of the *June Letter*, PMCM has the option of making a new must-carry and channel position election, should it decide to seek carriage for its station on cable channel 33, consistent with the major channel assignment of the *PSIP Declaratory Ruling*. *See June Letter* at 2–3.

ARGUMENT

THE PETITION SHOULD BE DISMISSED IN PART AS MOOT AND OTHERWISE DENIED.

The remedy of “mandamus is drastic; it is available only in extraordinary situations . . . [and] is hardly ever granted.” *Cheney*, 406 F.3d at 729 (internal quotation marks omitted). “[T]hose invoking the [C]ourt’s mandamus jurisdiction must have a clear and indisputable right to relief,” and even then, “whether mandamus relief should issue is discretionary.” *Id.* (internal quotation marks omitted). Moreover, when a party seeks mandamus on a theory of unreasonable agency delay, such delay must be “egregious,” *Monroe Communications*, 840 F.2d at 945, under the factors set forth in *Telecommunications Research and Action Center v. FCC*, 750 F.2d 70 (D.C. Cir. 1984) (*TRAC*).

As explained further below, PMCM’s petition for mandamus is largely moot in light of the FCC’s *PSIP Declaratory Ruling*. To the extent the petition is not moot, PMCM has failed to show that this is “one of the exceptionally rare cases” in

which a judicial decree directing agency action might be warranted. *In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1991). To the contrary, the FCC has at all times acted in good faith—and well within the proper bounds of its considerable discretion—when determining how most efficiently to resolve this complicated set of interrelated disputes concerning the launch of PMCM’s New Jersey station.

A. In View of the *PSIP Declaratory Ruling*, PMCM’s Principal Request for Relief Is Moot.

PMCM’s claim that the Court should require “immediate[.]” action on PMCM’s application for review of the *Cable Deferral Order*, Pet. 23, depends heavily on the fallacious assertion that the order “deprives” PMCM’s station of “any” cable carriage “indefinitely,” *id.* at 23 (emphasis omitted); *see id.* at 9, 23–25. PMCM misapprehends the *Cable Deferral Order*.⁴

The *Cable Deferral Order* was a response to specific requests from three New York cable operators. *See* 29 FCC Rcd at 9102. Those cable operators did not seek an indefinite stay of their respective obligations to implement PMCM’s must-carry requests—they merely sought a deferral of those obligations “until 90 days

⁴ In addition to the reasons set forth below, PMCM is incorrect that the *Cable Deferral Order* affects the ability of its New Jersey station to obtain “any” cable carriage. Pet. 23 (emphasis omitted). The *Cable Deferral Order* concerns only the station’s must-carry rights on the “channel number on which . . . [it] is broadcast over the air.” 47 U.S.C. § 534(b)(6). In the wake of the order, PMCM could have pursued, among other options, mandatory carriage on a channel number “mutually agreed upon by the station and the cable operator.” *Id.* There is no evidence in the record that PMCM has done so.

from the date the *Media Bureau* issues a final decision on” PMCM’s PSIP channel assignment. Cablevision Deferral Letter 1 (emphasis added); *accord id.* at 3; Comcast Deferral Letter 1, 2–3; Time Warner Deferral Letter 1, 3. In seeking that time-limited deferral, the cable operators sought to avoid wasting resources and causing disruption to consumers by placing PMCM’s station on cable channel 3 when—in view of the pending PSIP dispute between PMCM and Meredith—it was possible the Bureau would soon assign PMCM’s station a major channel number other than 3. *See* Cablevision Deferral Letter 2–3; Comcast Deferral Letter 2; Time Warner Deferral Letter 2–3.

The relief the Media Bureau granted in the *Cable Deferral Order* was no more expansive than what the cable operators had reasonably requested. *See, e.g.*, 29 FCC Rcd at 9102 (“grant[ing] the [cable operators’] letter requests”). Contrary to PMCM’s repeated assertions in the petition, *e.g.*, Pet. 3, 10, 11, 24, nowhere does the order postpone the operators’ obligations to implement PMCM’s must-carry requests until there is a final agency order in the PSIP proceeding—let alone until Meredith and PMCM have exhausted all avenues of judicial review. Rather, it is clear from the context of the *Cable Deferral Order*’s references to a “final” PSIP decision that the order merely defers the time to implement PMCM’s must-carry requests until 90 days from *the Bureau*’s decision in the PSIP proceeding:

We acknowledge that delaying the effectiveness of PMCM’s must-carry request until after *our* decision on [the appropriate] virtual chan-

nel number [for PMCM's station] may result in PMCM not obtaining cable carriage for its station by the Fall. Nevertheless, . . . [u]nder these circumstances, we conclude that a waiver of Section 76.64(f)(4) is appropriate, to allow [the cable operators] to defer carriage . . . until 90 days from the date there is a final decision on the station's virtual channel. *The Bureau anticipates that it will be able to issue its decision without lengthy delay.*"

29 FCC Rcd at 9105 (emphasis added); *see also Cellco P'ship v. FCC*, 700 F.3d 534, 544 (D.C. Cir. 2012) (underscoring "the 'high level of deference due to an agency in interpreting its own orders and regulations'" (quoting *MCI Worldcom Network Servs., Inc. v. FCC*, 274 F.3d 542, 548 (D.C. Cir. 2001))).

The Media Bureau has now resolved the PSIP channel dispute. *See generally PSIP Declaratory Ruling*. The Bureau has also notified PMCM and the New York cable operators that the 90-day period to implement PMCM's must-carry request is now running. *See June Letter* at 2. Under the circumstances, there is no longer any need for the FCC to decide PMCM's application for review of the *Cable Deferral Order*—let alone for this Court to order the agency to do so immediately.

Notably, the *Cable Deferral Order* did not decide the question of PMCM's eventual entitlement to mandatory carriage on cable channel 3. The parties did not brief that question in the manner required for the FCC to adjudicate a cable carriage complaint. *See 1993 Implementing Order*, 8 FCC Rcd at ¶¶ 119–121 (discussed *infra* p. 23). Rather, the pleadings of both PMCM and the cable operators recognized that, in the digital era, a must-carry station's cable channel position is

typically determined by reference to the station's PSIP major channel number. *See, e.g.,* Comcast Deferral Letter 2 (“Any change in [the] Virtual Channel [of PMCM's station] would impact [the station's] channel positioning rights, and Comcast's channel positioning obligations, pursuant to 47 C.F.R. § 76.57.”); PMCM Cable Deferral Opposition 1 n.1 (asserting that “the Commission's 2008 decision” on this point “appears to contravene the [Communications] Act,” but also stating that “[i]t will hopefully be unnecessary to resolve this apparent error in this case since [PMCM's station's] over the air channel is the same as the ‘major channel’ in its PSIP”). The parties agreed, in other words, that the must-carry channel positioning rights of PMCM's station could turn on the station's major channel number. That is why the Media Bureau elected to defer the cable operators' obligation to implement must-carry requests within 90 days: to enable the Bureau to assign PMCM's station a major channel number *before* adjudicating PMCM's cable carriage rights (if it became necessary to do so). *See Cable Deferral Order*, 29 FCC Rcd at 9105.

To the extent PMCM contends its station is entitled to carriage on cable channel 3 irrespective of the station's major channel assignment, by virtue of using radio frequency channel 3, PMCM remains able to assert that view before the FCC. For example, at the appropriate time, as provided under Section 614(d) of the Act and Section 76.61 of the FCC's rules, PMCM may initiate a formal complaint at

the agency—something it has not yet done—against any cable operator that does not honor its request for placement on cable channel 3. *See supra* pp. 3–4. The FCC would then decide, in the context of that proceeding, whether to depart from the Media Bureau’s earlier interpretations of what constitutes a station’s “over-the-air” channel in the digital era, *see supra* p. 7, and thus whether PMCM’s station is entitled to cable carriage on its radio frequency channel. Because the *Cable Deferral Order* did not reach that question, however, the FCC need not decide it in the context of PMCM’s pending application for review. Insofar as PMCM seeks an order directing the FCC to “act[] immediately” on the application for review, Pet. 26; *accord id.* at 1, the Court should dismiss the petition for mandamus as moot.

B. There Has Been No Unreasonable Agency Delay.

Even if the *PSIP Declaratory Ruling* had not mooted PMCM’s request that this Court require the FCC to “immediately” decide PMCM’s application for review of the *Cable Deferral Order*, Pet. 26, PMCM’s petition for mandamus falls well short of establishing the kind of “egregious” agency delay that could warrant such “extraordinary” judicial relief, *Monroe Communications*, 840 F.2d at 945.

“The first and most important” of the *TRAC* factors that guide this Court “in assessing claims of agency delay . . . is that the time agencies take to make decisions must be governed by a ‘rule of reason.’” *In re Core Commc’ns, Inc.*, 531 F.3d 849, 855 (D.C. Cir. 2008) (internal quotation marks omitted). The Court’s

analysis of that factor may be influenced by the second of the *TRAC* factors: whether the agency has violated a congressionally prescribed timeline for action. *See Barr Laboratories*, 930 F.2d at 75. Violation of a statutory deadline, however, does not automatically warrant mandamus. *See id.*; *see also Western Coal Traffic League v. Surface Transp. Bd.*, 216 F.3d 1168, 1175 (D.C. Cir. 2000) (following *Barr Laboratories*). That is in part because an “agency is in a unique—and authoritative—position to view its projects as a whole” and determine how “optimal[ly]” to “allocate its resources” toward resolving the various matters pending before it. *Barr Laboratories*, 930 F.2d at 76.

The first and second *TRAC* factors weigh firmly against PMCM’s request for mandamus. Contrary to PMCM’s assertions, Pet. 16, 19, the FCC has not violated the 120-day deadline for resolving formal cable carriage complaints set forth in Section 614(d)(3) of the Act. That deadline is not implicated here because—as PMCM itself acknowledges, *see* Pet. 15—there has been no cable carriage “complaint” to the FCC within the meaning of the statute. *See* 47 U.S.C. § 534(d)(3). Although PMCM contends that the agency should have treated its June 26, 2014, opposition to Cablevision’s deferral request as “the functional equivalent of [a] ‘complaint,’” Pet. 15, it cites no authority to support that proposition.

The notion that opposing Cablevision’s deferral request sufficed to trigger the 120-day clock of Section 614(d)(3) ignores the very specific procedural

framework set forth in the Act and the FCC’s rules for resolving cable carriage and channel positioning disputes. Under that framework, before the clock can start on the FCC’s period for resolving such disputes, several things must happen: The station must provide the cable operator with a written explanation of why it believes the operator has violated its cable carriage or channel positioning obligations— “raising all issues,” at “the same level of specificity,” “as the station would raise” if it were ultimately to seek to enforce its request before the FCC. *1993 Implementing Order*, 8 FCC Rcd at 2994 ¶ 119. If the operator nonetheless wishes to deny the station’s request, it must respond in writing at “the same level of specificity,” raising “all [the] affirmative defenses” it “would raise before the Commission in defense of a complaint against it.” *Id.* ¶ 120. Those written exchanges (or a failure to respond on the part of the cable operator) are “condition[s] precedent” to a station’s ability to file a formal complaint with the agency. *Id.* ¶ 119. That is in part because, once the 120-day deadline for resolving a cable carriage complaint is triggered, “time is of the essence.” *Id.* ¶ 118. The parties’ written exchanges “serve as a primary part of the pleadings” that inform the FCC’s expedited analysis in a complaint proceeding. *Id.* ¶¶ 119–120. It is not reasonable to expect the FCC to resolve the merits of a cable carriage dispute within 120 days without the benefit of that process.

Beyond arguing, incorrectly, that the FCC was required to decide the application for review within 120 days of when PMCM opposed Cablevision's deferral request (i.e., by October 24, 2014, Pet. 16, just two days after the close of the application's pleading cycle, *see supra* p. 13), PMCM makes no attempt to explain why the delay here violates the rule of reason. *See* Pet. 18–19. To date, fewer than eight months have passed since the close of the pleading cycle on PMCM's application for review. *See supra* p. 13. This Court has previously deemed much longer delays reasonable. *See, e.g., Her Majesty the Queen in Right of Ontario v. EPA*, 912 F.2d 1525, 1534 (D.C. Cir. 1990) (finding a delay of “more than nine years” was not unreasonable); *Monroe Communications*, 840 F.2d at 946 (characterizing a delay of several years as not “unreasonable on its face,” in part because the Court “must give agencies great latitude in determining their agendas,” and the FCC had permissibly chosen to resolve other pending matters “first, as a prelude to orderly resolution of the . . . issue in this proceeding”).

None of the remaining *TRAC* factors favors mandamus either. As PMCM correctly concedes, Pet. 19, this is not a case that implicates “human health and welfare”—the third of the *TRAC* factors, 750 F.2d at 80. That factor thus favors the FCC. With regard to the fourth factor, we do not contend that deciding PMCM's application for review would significantly impede the FCC's ability to conduct “activities of a higher or competing priority.” *Id.* Nonetheless, this aspect of the

TRAC analysis favors the FCC because there is no longer any practical need to decide PMCM's application for review, *see supra* pp. 17–21, and because choosing to resolve the PSIP channel dispute before ruling on PMCM's application for review of the *Cable Deferral Order* was well within the “great latitude” this Court affords agencies “in determining their agendas,” *Monroe Communications*, 840 F.2d at 946; *see also Cutler v. Hayes*, 818 F.2d 879, 896 (D.C. Cir. 1987) (“An agency has broad discretion to set its agenda and to first apply its limited resources to the regulatory tasks it deems most pressing.”).

As to the fifth *TRAC* factor—“the nature and extent of the interests prejudiced by delay,” 750 F.2d at 80—PMCM exaggerates when arguing that the *Cable Deferral Order* “is effectively suffocating [PMCM's station] by preventing it from reaching the significant majority of potential viewers in its market.” Pet. 20. As already explained, *see supra* p. 17 n.4, the *Cable Deferral Order* did not prevent PMCM from seeking mandatory carriage on a channel mutually agreeable to PMCM and the cable operators. Moreover, in view of the *PSIP Declaratory Ruling* and *June Letter*, PMCM cannot credibly contend that inaction on its application for review of the *Cable Deferral Order* is now preventing it from seeking to enforce its station's cable carriage and channel position election—let alone from doing so “for the indefinite future.” Pet. 20. Indeed, PMCM has recently backed away from that assertion, acknowledging in a letter to the Court pursuant to Federal Rule of

Appellate Procedure 28(j) that the cable operators now have until September 3, 2015, to implement PMCM's election, at which point, if they do not, PMCM may initiate the process for filing a formal complaint. *See* PMCM 28(j) Letter 1–2 (June 12, 2015); *accord June Letter* at 2; *supra* pp. 3–4. Alternatively, the FCC has made clear that PMCM may make a new must-carry and channel position election should it decide to seek carriage for its station on cable channel 33, consistent with the station's PSIP major channel assignment. *See June Letter* at 2–3.

Finally, with respect to the sixth *TRAC* factor—whether there is “impropriety lurking behind agency lassitude,” 750 F.2d at 80 (internal quotation marks omitted)—PMCM's allegations of bad faith by the agency are baseless. *See* Pet. 20–26. As supposed evidence of the FCC's institutional “antipathy . . . to PMCM's undertaking,” Pet. 21, PMCM relies in part on the FCC's initial determination that Section 331(a) of the Act did not require the reallocation of radio frequency channel 3 from Nevada to New Jersey, *see id.* That assertion of bad faith is belied by this Court's decision in *PMCM TV*, which made clear that Section 331(a) is plagued by “linguistic defects,” 701 F.3d at 385, characterizing the FCC's and PMCM's respective readings of the statute as “equally unsatisfying,” *id.* at 384. Indeed, this Court has twice previously denied mandamus petitions in which PMCM made similar assertions of bad faith. *See 2015 Mandamus Denial Order* at 1 (holding that PMCM's 2014 mandamus petition failed to show that “the FCC ha[d] violated [the

Court's] mandate in [*PMCM*]"); *In re PMCM TV, LLC*, No. 10-1001 (D.C. Cir. May 12, 2010) (per curiam) (attached as Exhibit 10) (denying, without requiring a response, *PMCM*'s 2010 petition for an order directing the FCC to immediately reallocate radio frequency channel 3 to New Jersey).⁵

PMCM likewise cannot establish bad faith by pointing to the FCC's handling of the *PMCM*-Meredith PSIP dispute, *see* Pet. 21–22, or of the cable deferral proceedings, *see id.* at 22–25. As this Court recognized when denying *PMCM*'s 2014 petition for mandamus—holding that *PMCM* had no “clear and indisputable right” to “virtual channel 3,” *2015 Mandamus Denial Order* at 1 (internal quotation marks omitted)—and for the reasons explained in the *PSIP Declaratory Ruling*, the virtual channel dispute was far from “baseless,” Pet. 21. The FCC reasonably elected to resolve that dispute in the orderly course of a docketed proceeding. And as explained above, *see supra* pp. 13–15, 25, it was well within the FCC's discretion to resolve the *PMCM*-Meredith PSIP dispute before requiring cable operators to implement the must-carry and channel position election of *PMCM*'s station when all parties recognized that guidance from the Media Bureau on the PSIP question could avoid a formal cable carriage dispute.

⁵ *PMCM* sought rehearing and rehearing en banc of the 2010 order, which the Court denied with no member requesting a vote. *See In re PMCM TV, LLC*, No. 10-1001 (D.C. Cir. Aug. 6, 2010) (per curiam) (attached as Exhibits 11 and 12).

In sum, PMCM has failed to establish any delay remotely sufficient to justify an order directing immediate action on PMCM's application for review.

C. PMCM Lacks a Clear and Indisputable Right to Carriage on Cable Channel 3.

Finally, the Court should deny PMCM's request that the Court "insure that PMCM's [s]tation . . . is accorded . . . mandatory carriage . . . rights" on cable channel 3. Pet. 1; *accord id.* at 26. To justify such relief, PMCM would have to show a "clear and indisputable" right to carriage on cable channel 3. *E.g.*, *Cheney*, 406 F.3d at 729 (internal quotation marks omitted). In other words, PMCM must show that the FCC failed to perform a "clear and indisputable," or purely "ministerial," duty. *E.g.*, *Lozada Colon v. U.S. Dep't of State*, 170 F.3d 191, 191 (D.C. Cir. 1999) (*per curiam*) (internal quotation marks omitted). PMCM must also show that it has "no . . . adequate remedy available" other than mandamus. *E.g.*, *Power*, 292 F.3d at 786. PMCM fails to make either of those required showings.

PMCM contends, first, that the FCC has failed to perform its "mandatory" duty to resolve cable carriage disputes within 120 days. Pet. 16. But as already explained, *see supra* pp. 22–23, PMCM has not yet commenced a cable carriage complaint proceeding triggering the 120-day deadline. Should PMCM one day file a cable carriage complaint that comports with the process set forth in the Act and the FCC's rules, *see supra* pp. 3–4, the FCC will resolve that dispute in accord with that process.

PMCM is likewise mistaken to contend that its station has a clear and indisputable right to cable carriage on its radio frequency channel number. *See* Pet. 16. PMCM emphasizes that Section 614(b)(6) of the Act allows a station electing must-carry status to choose carriage on “the cable system channel number on which the local commercial television station is broadcast over the air.” 47 U.S.C. § 534(b)(6). But in the era of digital television, as the FCC and industry participants have long recognized, what constitutes a station’s “over the air” channel for this purpose is open to question. *See, e.g., 2008 Declaratory Order*, 23 FCC Rcd at 14258–59 ¶¶ 14–16 (providing clarifying guidance); *First Report and Order*, 16 FCC Rcd at 2633–35 ¶¶ 81–83 (discussing related industry comments).

Anticipating that the transition to digital television might affect the appropriate “signal carriage requirements of cable television systems,” Congress expressly entrusted the FCC to “establish any changes” in those requirements that the agency deemed appropriate. 47 U.S.C. § 534(b)(4)(B). Pursuant to that authority, the FCC has recognized that, in the era of digital broadcasting, a “station carried pursuant to mandatory carriage” that elects carriage on its over-the-air channel “may demand carriage on its major channel number.” *2008 Declaratory Order*, 23 FCC Rcd at 14259 ¶ 16; *see id.* at 14254–55 ¶¶ 1, 4 (citing 47 U.S.C. § 534(b)(4)(B)). Both the Policy Division of the FCC’s Media Bureau, *see KSQA*, 27 FCC Rcd at 13186–87 ¶ 4, and PMCM—when opposing Cablevision’s deferral

request—have interpreted the FCC’s 2008 *Declaratory Order* to mean that a station’s option to elect carriage on its over-the-air channel is *exclusive* to its PSIP major channel, *see* PMCM Cable Deferral Opposition 1 n.1. PMCM now argues, however, that the 2008 *Declaratory Order* merely allowed an additional “option” for must-carry stations, which may alternatively continue to request carriage on their radio frequency channel numbers. Pet. 14. Both the FCC’s precedent and PMCM’s own shifting arguments undermine the claim that PMCM’s station has a clear and indisputable right to carriage on cable channel 3.

In any event, as the FCC has made clear, PMCM may avail itself of ordinary administrative processes should it wish to continue pursuing carriage on cable channel 3 despite its station’s recent assignment of PSIP major channel 33. *See June Letter* at 2. Under the circumstances, PMCM has failed to show that it has no “adequate remedy” other than mandamus. *E.g., Power*, 292 F.3d at 786. The Court should therefore deny PMCM’s request for an order directing the FCC to ensure carriage for PMCM’s station on cable channel 3.

CONCLUSION

For the foregoing reasons, the petition for mandamus should be dismissed in part as moot and otherwise denied.

Respectfully submitted,

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June 19, 2015

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

In the Matter of)
Request for Declaratory Ruling by Meredith) MB Docket No. 14-150
Corporation And "Alternative PSIP Proposal")
By PMCM TV, LLC for WJLP (Formerly)
KVVN(TV)), Middletown Township, New Jersey)

DECLARATORY RULING

Adopted: June 4, 2015

Released: June 5, 2015

By the Chief, Media Bureau:

I. INTRODUCTION

1. By Public Notice released September 12, 2014, and pursuant to section 1.2 of the Commission's rules, the Media Bureau sought comment on a Request for Declaratory Ruling filed by Meredith Corporation ("Meredith"), the licensee of WFSB(TV), RF channel 33, virtual channel 3, Hartford, Connecticut, and an "Alternative PSIP Proposal" filed by PMCM TV, LLC ("PMCM"), permittee of WJLP (formerly licensed station KVVN(TV), Ely, Nevada), RF channel 3, Middletown Township, New Jersey.1 In its Request for Declaratory Ruling, Meredith objects to the assignment of virtual channel 3 to PMCM's new Middletown Township station because there is significant overlap of the noise-limited contours of WFSB(TV) and WJLP, and asks for a ruling that WJLP be assigned virtual channel 33, which is WFSB(TV)'s RF channel number. In its Alternative PSIP Proposal, PMCM proposes that WJLP be assigned the two-part virtual channel number 3.10 (with any additional program streams transmitted by the station identified as 3.11, 3.12, etc.), while WFSB(TV) would retain virtual channels 3.1 through 3.9. PMCM also requests that if its proposal is deemed inconsistent with the Commission's rules, the Bureau grant a waiver to permit WJLP to operate with virtual channel 3.10.

2. In this Order we grant Meredith's Request for Declaratory Ruling, deny PMCM's Alternative PSIP Proposal and associated waiver request, and order PMCM to operate WJLP using virtual channel 33. In addition, as discussed below, we dismiss as moot PMCM's pending "Emergency Motion for Stay of Suspension of Service and Virtual Channel Re-Assignment" (Motion for Stay) filed in connection the Video Division's 2014 Letter Orders directing that WJLP operate using virtual channel 33 on an interim basis.

II. BACKGROUND

3. The PSIP Standard. During the DTV transition, most full power television stations transmitted two over-the-air signals using two radio frequency (RF) channels - an analog (NTSC) channel allotted to the station's community of license in the Table of Allotments2 and a paired digital channel on a

1 Media Bureau Seeks Comment on Request for Declaratory Ruling By Meredith Corporation and "Alternative PSIP Proposal" by PMCM TV, LLC for KVVN(TV), Middletown Township, New Jersey, MB Docket No. 14-150, Public Notice, 29 FCC Rcd 10556 (Med. Bur. 2014) (Docket PN); 47 C.F.R. § 1.2.

2 47 C.F.R. § 73.606(b).

different frequency allotted to the same community in the DTV Table of Allotments.³ In analog broadcasting, if a viewer selected to view channel 4, its television receiver knew to tune to the standardized frequency of channel 4 (the 66-72 MHz band). The situation changed, however, with the advent of digital transmissions, which allowed a station to provide, in addition to its analog service, a multiplex digital service over a different RF channel.⁴

4. During the digital transition, both the analog and the digital transmissions were viewed on the channel number assigned for analog transmissions, even though the digital transmission was broadcast on a different frequency. This was made possible through the efforts of the Advanced Television Systems Committee, Inc. (ATSC), an international, non-profit member organization that developed a voluntary Program and System Information Protocol (the “PSIP Standard” or “ATSC A/65”) setting forth rules and priorities for determining a digital television station’s “virtual” channel number, the channel number viewers see on their television receiver when they view a digital television station over-the-air. PSIP consists of data—entered into a small collection of computer software tables—that is transmitted within a station’s digital RF signal. This PSIP data is used to tell television receivers information about the station and what is being broadcast (the program data function), and to provide a method for receivers to identify a DTV station and determine how the receiver can tune to it (the system information function).⁵ PSIP enables receivers to link a station’s digital RF channel with its virtual channel number regardless of the actual RF channel used for digital transmission.⁶

5. The PSIP Standard introduced a “two-part” channel number navigational concept in response to broadcasters’ need, as new digital services were being offered to viewers, to retain the brand-identity they had as a result of years of marketing and advertising with respect to their analog channel.⁷ When ATSC first developed the Standard, the first part of the two-part number, called the “major” channel number, was required to be the same as the station’s original analog channel number,⁸ and the second part of the channel number, called the “minor” channel number, identified one program service

³ 47 C.F.R. § 73.622(b).

⁴ See *ATSC Recommended Practice: Program and System Information Protocol Implementation Guidelines for Broadcasters* (Document A/69:2009, December 25, 2009) at 49 (ATSC A/69:2009), available at http://www.atsc.org/cms/standards/a_69-2009.pdf. Section 73.682(d) of the rules, 47 C.F.R. § 73.682(d), does not incorporate ATSC A/69:2009 by reference, but provides that “licensees may also consult” this publication.

⁵ ATSC A/69:2009 at 9-10; see also *id.* at 16-20.

⁶ *Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, MM Docket No. 03-15, Report and Order, 19 FCC Rcd 18279, 18343, para. 149 (2004) (*Second Periodic Review*). A virtual channel is called “virtual” because its identification (name and number) may be defined separately from its physical (RF) location. ATSC A/69:2009 at 16. It also “is called virtual because its definition is given by indirect reference through a data structure called a virtual channel table.” *Id.* at 49.

⁷ ATSC A/69:2009 at 49 and 52 (“[N]early all TV channel logos in media and print advertising feature the local broadcast channel number.”); see also Mark K. Eyer, *PSIP: Program and System Information Protocol*, McGraw-Hill, 2003 at 2 (explaining that once ATSC defined a set of possible compression formats that would permit a station to deliver a digital signal that included several channels, “[b]roadcasters realized their brand-name recognition (the channel number they have used for decades to identify their product) was in danger of being lost [and] looked to the ATSC Standard to help with the problem”); *id.* at 9 (when the PSIP Standard was developed in 1997, it was determined that the system requirements would need to support channel branding and allow a broadcaster, when starting a new digital service, to associate the new programming with the channel label that had been used to establish identity in past years of advertising). Mr. Eyer has served as the Chair of the ATSC technical group that maintains and revises the PSIP Standard. See Press Release, ATSC, *ATSC Honors Mark Eyer, 2007 Bernard Lechner Award Recipient* (May 20, 2007), available at www.atsc.org.

⁸ The terms “virtual channel” and “major channel” are often used interchangeably. In addition, parties to this proceeding also used the term “PSIP channel.”

within the group of services defined by the major number.⁹ As explained in ATSC A/69:2009, “[t]he major channel number is used to group all channels that are to be identified as belonging to a particular broadcaster” and “[t]he minor channel number specified a particular channel within the group with each major number.”¹⁰ In an example given in ATSC A/69:2009 pertaining to the channel numbering for companion analog and digital channels, the analog service was viewed as channel 12, while the digital multiplexed program streams were viewed as channels 12.1, 12.2, 12.3, and 12.4.¹¹ Thus, both the analog and digital signals for the station would be identified by the channel 12 “brand” when a viewer was channel surfing or consulting a paper or electronic program guide.¹² Services that are unrelated to the analog brand could be given a different major channel number; for example, if a digital broadcaster transmitted community college lectures in its bit stream it could use a major channel number different from its own major channel for the virtual channel carrying the lectures to preserve the station’s brand and avoid creating the impression that both streams were programmed by the digital broadcaster, an impression that could arise if both streams were identified by the same major channel number.¹³

6. In its 2004 *Second Periodic Review*, the Commission amended section 73.682(d) of the rules to adopt the ATSC PSIP Standard. The current version of the rule requires compliance with ATSC A/65C (“ATSC Program and System Information Protocol for Terrestrial Broadcast and Cable, Revision C With Amendment No. 1, dated May 9, 2006”) when choosing a major channel.¹⁴ The Commission explained that it was adopting the PSIP Standard into its broadcast transmission rules because a station’s digital RF channel number differed from its analog channel number and PSIP allowed viewers to receive the DTV signal, even if they did not know the digital channel number, simply by tuning to the analog channel.¹⁵ The Commission also recognized that adopting the PSIP Standard would enable stations to maintain their analog channel number brand identification even though stations would be terminating all analog service on their NTSC channel at the end of the DTV transition.¹⁶

7. *Assignment of Major Channel Number Values.* The mandatory requirements for

⁹ ATSC A/69:2009 at 49. As discussed below, the PSIP Standard provides additional virtual channel assignment rules that were developed during the DTV transition.

¹⁰ *Id.* at 27; *see also id.* at 52 (“The major channel number is used to group all services associated with a broadcaster’s NTSC brand The minor channel number specifies a particular channel within that group. Zero (0) [was] reserved for the NTSC channel [and] [v]ideo services are required to use the range of 1-99.”).

¹¹ *Id.* at Figure 6.2; *see also id.* at 52 (explaining that the two-part virtual numbering scheme allows a local station with analog channel 8, known locally as “Channel 8,” and digital channel 41, to label the digital services that are being broadcast on channel 41 to appear to the consumer as “part of” Channel 8); Comments of the Advanced Television Systems Committee at 6, MM Docket No. 00-168 (Apr. 21, 2003) (“The PSIP ‘minor channel number’ is used to identify programs and other services, which are a part of the DTV service. For example, channel 4.1 may be an HDTV program service and it may be multiplexed with an SDTV service, which is channel 4.2. The viewer can now easily ‘surf’ from 4.0 (NTSC) to 4.1 (HDTV) to 4.2 (SDTV).”).

¹² ATSC A/69:2009 at 52.

¹³ *Id.* at 27, 52-53.

¹⁴ *Second Periodic Review*, 19 FCC Rcd at 18345-56, para. 152; *see also* 47 C.F.R. § 73.682(d) (2014). The version incorporated in the rule is available at http://www.atsc.org/cms/standards/a65/A_65Cr1_with_amend_1.pdf. The most current version of the ATSC protocol, dated August 7, 2013 and available at www.atsc.org/cms/standards/a65/A65_2013.pdf, has not yet been incorporated into the Commission’s rules. The parties refer to both versions of the ATSC protocol, and because our decision here does not turn on using one version or the other, we cross-reference to both.

¹⁵ *Second Periodic Review*, 19 FCC Rcd at 18343, para. 149 (“PSIP identifies both the DTV channel and the associated NTSC channel and enables DTV receivers to associate the two channels, thereby making it easy for viewers to tune to the DTV station even if they did not know the [DTV RF] channel number.”).

¹⁶ *Id.* at 18346-47, para. 153.

assigning the major channel number component of stations' virtual channels are set forth in "Annex B: Additional Constraints on Virtual Channel Table for the U.S. (Normative)" to ATSC A/65C (Annex B). Annex B first lists the major channel number assignment provisions and then explains in subpart 8 that "[t]he provisions listed above assign major channel number values 2 through 69 *uniquely* to broadcasters licensed to broadcast Digital ATSC signals and guarantee that the two-part channel number combinations used by a broadcaster will be different from those used by any other broadcaster with an overlapping DTV service area."¹⁷ Section 73.682(d) and Annex B are self-effectuating, and the Commission's involvement in virtual channel assignments ordinarily is limited to situations where a station chooses a major channel number and another station objects, or a station requests a waiver of the mandatory channel assignment provisions of Annex B.

8. The vast majority of currently operating full power television stations were transmitting a licensed analog signal prior to the end of the DTV transition in June 2009, and under the PSIP Standard, their former NTSC (analog) channel number was assigned as their major channel number for pre- and post-transition digital transmission.¹⁸ For the approximately 25 stations that did not have an NTSC license at the time they commenced digital operations,¹⁹ the PSIP Standard required the stations to use their digital RF channel number as their major channel number.²⁰ If a station's RF channel changed during or at the end of the DTV transition, the major channel number stayed the same.²¹

9. *PMCM's Relocation of KVVN(TV), Ely, Nevada to Middletown Township, New Jersey.* PMCM acquired KVVN(TV), analog RF channel 3, on November 12, 2008. KVVN(TV) terminated analog operations on February 17, 2009 and was silent for several months until PMCM completed construction of the station's authorized digital channel 3 facility near Ely and filed a license to cover the construction.²² As required by the PSIP Standard, PMCM's licensed station KVVN(TV) used its former analog channel number 3 as its major channel number for digital operations in Ely.

10. As of June 12, 2009, full power television stations were required to cease analog operations, and with minor and temporary exceptions, operate solely on the digital RF channel allotted to the station in the Post-Transition Table of DTV Allotments.²³ On June 15, 2009, PMCM filed a notification (the "Ely Notification"), pursuant to section 331(a) of the Communication's Act, that it agreed to the reallocation of channel 3 from Ely, Nevada to Middletown Township, New Jersey. That section of the Act provides that:

It shall be the policy of the [FCC] 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 the

¹⁷ ATSC A/65C, Annex B.1.8. The term "overlapping DTV service area" means a full power station's noise-limited contour as defined in section 73.622(e) of the Commission's rules, 47 C.F.R. § 73.622(e). ATSC A/65:2013 reflects a reorganization of Annex B and the guarantee of subpart 8 is a preamble to the mandatory assignment provisions. ATSC A.65:2013, Annex B: B.1.1.

¹⁸ ATSC A/65C, Annex B.1.1 (ATSC A/65:2013, Annex B: B.1.1.1).

¹⁹ These would include new stations that received a digital construction permit rather than an analog construction permit, or flash cut to digital on their analog channel, as well as any stations that ceased analog operations and transmitted a digital-only signal prior to the Commission's adoption of ATSC A/65.

²⁰ ATSC A/65C, Annex B.1.2 (ATSC A/65:2013, Annex B: B.1.1.2).

²¹ ATSC A/65C, Annex B.1.3. The most recent version of Annex B, which was adopted by ATSC several years after the DTV transition, states that "[i]f the RF channel assigned to a licensee for digital ATSC broadcast is changed for any reason, the major_channel_number used by that licensee shall not change." ATSC A/65:2013, Annex B: B.1.1.3.

²² FCC File No. BLCDDT-20090527AEK, granted June 12, 2009.

²³ 47 U.S.C. § 337(e)(1); 47 C.F.R. § 73.622(i).

licensee of a very high frequency commercial television broadcast 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 allotted 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 reallocation²⁴

Because station WWOR-TV, Secaucus, New Jersey, ceased analog operations on RF channel 9 on June 12, 2009 and began digital-only operations on RF channel 38, there was no longer a commercial VHF channel allotted to a community in New Jersey. WWOR-TV did, however, in accordance with Annex B, continue to use its former analog channel number 9 as its major channel number.

11. The Media Bureau denied PMCM's Ely Notification, interpreting the statute as requiring the Commission to order the reallocation of an RF channel only where the channel could not be used simultaneously at both locations due to interference that would occur from such dual operations, which was not the case with stations operating on channel 3 in Nevada and New Jersey.²⁵ The Video Division also initiated rulemaking proceedings pursuant to section 331(a) to allot a commercial VHF channel to New Jersey, as well as Delaware, since such allotments became technically feasible once full power television stations ceased analog operations on certain VHF channels.²⁶ On PMCM's appeal, the United States Court of Appeals for the District of Columbia Circuit reversed the denial of PMCM's Ely Notification and required the Commission to approve the proposed reallocation of RF channel 3 to New Jersey.²⁷ The Video Division thereupon reallocated RF channel 3 from Ely to Middletown Township as ordered, and directed PMCM to file an application for a construction permit specifying channel 3 at Middletown Township.²⁸

12. PMCM's Construction and Current Operation of WJLP, Middletown Township, New Jersey. On May 28, 2013, PMCM filed an application for a construction permit proposing to top-mount an RF channel 3 antenna on a tower atop the 4 Times Square Building in Manhattan, and operate at the maximum effective radiated power ("ERP") permitted under the rules.²⁹ PMCM's proposed facility's

²⁴ 47 U.S.C. § 331(a).

²⁵ *Letter from William T. Lake, Chief, Media Bureau to PMCM TV, LLC*, 24 FCC Rcd 14588 (Med. Bur. 2009). The Commission denied PMCM's Application for Review. *Reallocation of Channel 2 from Jackson, Wyoming to Wilmington, Delaware and Channel 3 from Ely, Nevada to Middletown Township, New Jersey*, 26 FCC Rcd 13696 (2011) (PMCM).

²⁶ *Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments (Seaford, Delaware)*, 24 FCC 14596 (Vid. Div. 2009); *Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments (Atlantic City, New Jersey)*, 24 FCC Rcd 14601 (Vid. Div. 2009). By the 1950s, VHF channels 2-13 had been allotted to communities in East Coast metropolitan areas and were not available for allotment in New Jersey or Delaware. *PMCM*, 26 FCC Rcd at 13697-98, para. 3. Analog channel 9 was allotted to New Jersey after WWOR-TV agreed to its reallocation from New York City to Secaucus. *Id.* at 13698-99, para. 5.

²⁷ See *PMCM TV, LLC v. FCC*, 701 F.3d 380 (D.C. Cir. 2012) (*PMCM TV, LLC*). The D.C. Circuit's decision in *PMCM TV, LLC* did not address or concern the appropriate virtual channel assignment for PMCM's New Jersey station. See *In re PMCM TV, LLC*, No. 14-1238 (D.C. Cir. Feb. 27, 2015) (order denying mandamus and dissolving stay) (holding that the interim assignment of virtual channel 33 to PMCM did not "violate[]" the court's "mandate in *PMCM TV, LLC*").

²⁸ *Reallocation of Channel 3 from Ely, Nevada to Middletown Township, New Jersey, Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broadcast Stations*, 28 FCC Rcd 2825 (Vid. Div. 2013). Because the court held that a reallocation pursuant to section 331(a) "displac[es] the normal procedure for channel reallocation as well as normal procedures for issuing licenses," the Division concluded that the notice and comment rulemaking procedures of the Administrative Procedure Act did not apply to the proceeding. *Id.* at para. 4, citing *PMCM TV, LLC*, 701 F.3d at 385.

²⁹ FCC File No. BPCDT-20130528AJP.

noise-limited service contour, however, overlapped with that of Meredith's station WFSB(TV), which is using virtual channel 3,³⁰ and Meredith filed an informal objection premised solely on grounds pertaining to PMCM's future operations using virtual channel 3.³¹ Meredith asserted that, because the two stations' noise-limited contours would have significant overlap, both stations cannot operate with the same virtual channel number, and PMCM should be assigned virtual channel 33 in accordance with Annex B. PMCM filed an opposition, making a number of arguments why it should be allowed to use virtual channel 3.³² The Video Division, however, granted PMCM's application without considering the merits of the virtual channel issue, and dismissed Meredith's informal objection as premature, stating that a station's virtual channel designation is customarily considered after grant of the license modification application in a separate proceeding that solely addresses the virtual channel designation.³³ Meredith filed a timely Petition for Reconsideration on May 22, 2014,³⁴ including a Request for Declaratory Ruling that PMCM's station be assigned virtual channel 33.

13. By letters dated June 6, 2014, PMCM notified Cablevision Systems Corporation ("Cablevision"), Time Warner Cable Inc. ("TWC"), and Comcast Cable Communications, LLC ("Comcast," and collectively, "the MVPDs") that KVVN(TV) (now WJLP) would commence operation in August 2014 as a new television station in the New York, New York Designated Market Area ("New York DMA"). PMCM also notified the MVPDs that it was electing mandatory carriage of the station's signal on all cable systems operated by the MVPDs in the New York DMA and requesting carriage on channel 3. The MVPDs subsequently filed letter requests that the Commission allow them to defer implementing PMCM's must-carry request and channel position election until 90 days after the date of the Bureau's final decision on the appropriate virtual channel for over-the-air broadcasting by PMCM's station. On July 25, 2014, the Media Bureau released a Letter Order waiving section 76.64(f)(4) of the Commission's rules and granting the MVPDs' request (the "Cable Deferral Proceeding").³⁵ PMCM filed a timely Application for Review of the Bureau's July 25 Letter Order, which remains pending.³⁶ The Cable Deferral Proceeding is not part of this docketed proceeding, and we give no consideration to the arguments made in filings herein regarding parties' cable carriage and channel positioning rights, since this proceeding is solely concerned with the virtual channel to be used by WJLP for over-the-air

³⁰ WFSB(TV)'s digital RF channel is 33, but because its NTSC RF channel number was 3, its virtual channel is 3. WJLP also has significant contour overlap with KYW-TV, digital RF channel 26, virtual channel 3, Philadelphia, Pennsylvania, licensed to CBS Broadcasting, Inc. KYW-TV's NTSC RF channel number was also 3 and it uses virtual channel 3.

³¹ Meredith Informal Objection (filed Feb. 18, 2014).

³² PMCM Opposition to Informal Objection (filed Mar. 24, 2014).

³³ *Letter to PMCM TV, LLC*, File No. BPCDT-20130528AJP (rel. Apr. 17, 2014), available at http://licensing.fcc.gov/cgi-bin/prod/cdbs/forms/prod/getimportletter_exh.cgi?import_letter_id=49395.

³⁴ In the Petition for Reconsideration portion of its May 22 filing, Meredith argued that the Division erred in dismissing Meredith's informal objection as premature and failing to determine KVVN(TV)'s virtual channel at the pre-construction stage. The matters raised on reconsideration are not part of this proceeding. See *Docket PN*, 29 FCC Rcd at 10557 n.3. Because we are granting Meredith's Request for Declaratory Ruling, by separate letter the Video Division will dismiss Meredith's Petition for Reconsideration as moot.

³⁵ *Letter from William T. Lake, Chief, Media Bureau, to Tara M. Corvo, Esq., et al.*, 29 FCC Rcd 9102 (Med. Bur. 2014); 47 C.F.R. § 76.64(f)(4) (requiring that a station's election of must-carry status take effect within 90 days of its election).

³⁶ In its Application for Review, PMCM argues, among other things, that regardless of the determination as to its right to use virtual channel 3 or 3.10 for over-the-air broadcasting, it is entitled to mandatory cable carriage on cable channel 3 by virtue of its RF channel. PMCM Application for Review (Aug. 24, 2014) at 1, 7-9. PMCM filed a Petition for Writ of Mandamus with the United States Court of Appeals for the District of Columbia Circuit in connection with its Application for Review. *In re PMCM TV, LLC*, Case No. 15-1058.

broadcasting in New Jersey.³⁷

14. By letter dated September 29, 2014, PMCM, through its counsel, notified the Commission that it had completed construction of its new television facility to serve New Jersey and was commencing equipment tests as of that date.³⁸ PMCM's requested change of its station's call sign from KVVV(TV) to WJLP became effective on October 3. That same day, Meredith, ION Media License Company ("ION"), and CBS Broadcasting, Inc. ("CBS"),³⁹ made a joint filing stating that as of September 30, PMCM's station had commenced program-length commercial network ("ME-TV") programming, identifying itself as "Channel 3" and using virtual channel 3.10. By letter dated October 23, 2014, the Video Division directed WJLP to use virtual channel 33 on an interim basis pending a decision in this proceeding.⁴⁰ After PMCM failed to comply with the October 23 Letter Order, by letter dated November 7, 2014, the Video Division suspended program test authority for WJLP effective November 10, 2014, indicating that the Division would reinstate program test authority upon notification that PMCM would operate the station on an interim basis consistent with the Division's October 23 Letter Order.⁴¹ PMCM filed an Emergency Petition for Writ of Mandamus with the United States Court of Appeals for the District of Columbia Circuit on November 10, 2014, asking the court to order the Commission to rescind or stay the effectiveness of the suspension of program test authority.⁴² In order to permit orderly briefing before the court, the Division imposed a temporary stay of the suspension of program test authority, and by order dated November 25, 2014, the court extended the stay pending court review and expedited the case. By order dated February 27, 2015, the court denied the petition for writ of mandamus and dissolved its stay.⁴³ Accordingly, since March 16, 2015, WJLP has been operating pursuant to program test authority using virtual channel 33 on an interim basis as required by the Video Division's 2014 Letter Orders.

III. REQUEST FOR DECLARATORY RULING AND ALTERNATIVE PSIP PROPOSAL.

15. *Arguments of the Parties.* Meredith's Hartford station commenced operations on RF

³⁷ While some of the parties extensively briefed cable carriage issues, they acknowledge that these issues are outside the scope of this proceeding. See Oct. 29 Joint Reply Comments of TWC and Cablevision at 2 ("[T]he issue raised by Meredith's Declaratory Ruling petition and PMCM's Alternative PSIP Proposal is the assignment of WJLP's PSIP channel."); Oct. 29 Reply Comments of PMCM at 10 ("[I]t is beyond the scope of this proceeding to determine whether or not ION has rights to be carried on cable channel 3. This proceeding is solely concerned with what two-part PSIP channel designation is to be used by WJLP.").

³⁸ PMCM filed a license to cover construction on October 22, 2014. FCC File No. 0000001037.

³⁹ ION is the licensee of WPXN-TV, New York, New York. CBS is the licensee of KYW-TV.

⁴⁰ Letter, Donald J. Evans, Esq., 29 FCC Rcd 12733 (Vid. Div. 2014) ("October 23 Letter Order" and collectively, with the November 7 Letter Order, the "2014 Letter Orders").

⁴¹ Available at http://licensing.fcc.gov/cgi-bin/prod/cdbs/forms/prod/getimportletter_exh.cgi?import_letter_id=54220.

⁴² *PMCM TV, LLC, Petitioner, CBS Broadcasting, Inc., et al., Intervenor*, Case No. 14-1238 (D.C. Cir. 2014). On that same date, PMCM filed an Application for Review and Motion for Stay with the Commission. Briefing on the Application for Review was completed in December 2014.

⁴³ See *In re PMCM TV, LLC*, No. 14-1238 (D.C. Cir. Feb. 27, 2015) (order denying mandamus and dissolving stay). At the same time that the Division imposed a temporary stay of the suspension of program test authority, it also suspended the deadline for filing oppositions to PMCM's Motion for Stay. After the February 27 court order, the Division restarted the pleading cycle. PMCM filed a Consolidated Supplement on March 12, ION, Meredith, and CBS filed a Joint Opposition on March 19, and PMCM filed a Motion for Leave to File and a Reply on April 1, 2015. Although we dismiss the Motion for Stay as moot, and do not summarize the parties' arguments here, we have considered any new arguments made after the close of the comment period in this proceeding, as further discussed below.

channel 3 over 50 years prior to the end of the digital transition in 2009,⁴⁴ and in its Request for Declaratory Ruling, Meredith states that “every viewer in WFSB(TV)’s service area has continued to turn to Channel 3 to watch WFSB(TV)” since it began digital operations using RF channel 33 and virtual channel 3.⁴⁵ Meredith asserts that WFSB(TV) and KVVN(TV), which was still operating in Ely at the time Meredith filed for a Declaratory Ruling, could not both operate with virtual channel 3 when KVVN(TV) moved to New Jersey.⁴⁶ Meredith explains that if both stations were to operate with virtual channel 3.1, different television receivers would resolve the conflict differently, leading to viewer confusion; some television receivers could show both stations on channel 3.1, and if KVVN(TV) operated with multiple multicast channels, “it is possible that viewers would first need to cycle through multiple channels on Channel 3 before reaching WFSB(TV)’s programming.”⁴⁷

16. According to Meredith, when a conflict arises between a new and an incumbent station, subpart 4 of Annex B provides:

If, after February 17, 2009, an RF channel previously allotted for NTSC in a market is assigned to a newly-licensed DTV licensee in that market, the newly-licensed DTV licensee shall use, as its major_channel_number, the number of the DTV RF channel originally assigned to the previous NTSC licensee of the assigned channel.⁴⁸

Meredith argues that KVVN(TV) must use WFSB(TV)’s RF channel number 33 as its virtual channel as required by Annex B.1.4.⁴⁹ Meredith also notes that the assignment of virtual channel 33 to KVVN(TV) is consistent with a Video Division decision allotting RF channel 5 to Seaford, Delaware, but assigning the RF allotment virtual channel 36 because the proposed allotment had contour overlap with WTTG(TV), RF channel 36, virtual channel 5, Washington, D.C.⁵⁰

17. In its June 4, 2014 Opposition, PMCM argues that Meredith’s claim of difficulties with over-the-air reception and possible viewer confusion if both stations use virtual channel 3.1 are unsupported and that Meredith offered no evidence to refute PMCM’s March 24, 2014 Opposition showing “that the reception difficulties posited by Meredith would not occur in the real world.”⁵¹ PMCM further asserts that Meredith’s Declaratory Ruling requires the Commission “to ignore one portion of the PSIP standard clearly applicable here while applying another that it is equally clearly inapplicable.”⁵²

⁴⁴ Television and Cable Factbook, Vol. I at A-244 (Warren Communications News 2012).

⁴⁵ Request for Declaratory Ruling at 2. In addition, although WFSB(TV)’s community of license is located in the Hartford-New Haven, Connecticut DMA, as a result of a market modification, WFSB(TV)’s local market also includes communities in Fairfield County, Connecticut, located in the New York DMA, where WJLP’s community of license is located. See *Modification of the Television Market of Station WFSB*, 10 FCC Rcd 4939 (CSB 1995).

⁴⁶ Request for Declaratory Ruling at 5.

⁴⁷ *Id.* at 3.

⁴⁸ *Id.* Meredith cites to ATSC A/65:2013, Annex B: B.1.1.4, which was adopted by ATSC several years after the DTV transition. The corresponding provision in ATSC A/65C, Annex B.1.4, does not reference the February 2009 date, but states that this provision applies “after the transition.”

⁴⁹ Request for Declaratory Ruling at 5-6.

⁵⁰ *Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broadcast Stations (Seaford, Delaware)*, MB Docket No. 09-230, Report and Order, 25 FCC Rcd 4466 (Vid. Div. 2010), *recon. denied*, Memorandum Opinion and Order on Reconsideration, 28 FCC Rcd 1167 (Vid. Div. 2013), Memorandum Opinion and Order on Further Reconsideration, 29 FCC Rcd 4769 (Vid. Div. 2014), *app. rev. pending (Seaford, Delaware)*.

⁵¹ PMCM June 4 Opposition at 2. PMCM also points to the fact that WNBC, New York, New York, and WACP, Atlantic City, New Jersey, both operate on virtual channel 4 with overlapping contours with no apparent ill effects. *Id.* at 4-5.

⁵² *Id.* at 2.

According to PMCM, because KVVN(TV) was then an operating station in Ely which previously had an NTSC license, it is not a new station and is not engaged in a rulemaking proceeding to assign a new channel. Instead, “as a station with an existing NTSC license at the time it commenced digital service, KVVN’s major channel number is set to its prior NTSC RF channel number, Channel 3.”⁵³

18. PMCM further contends that Annex B.1.4 does not apply because that provision refers to newly licensed and incumbent stations assigned to “markets,” and KVVN(TV) and WFSB(TV) are not located in the same Designated Market Area (“DMA”); rather, KVVN(TV) is in the New York DMA while WFSB(TV) is in the Hartford-New Haven DMA. PMCM states that, while ATSC A/65C defines “DTV Service Area” as a station’s noise-limited contour, “there is no definition in ATSC A/65C which equates the term ‘DTV Service Area’ with the term ‘market,’ and it cannot be assumed that any such equivalency was intended.”⁵⁴

19. PMCM also argues that the *Seaford, Delaware* allotment decision is “inapposite.” PMCM acknowledges that the decision referred to the fact that the proposed allotment and WTTG(TV), the protesting station, were in different DMAs, and also noted that there would be contour overlap between WTTG(TV) and the proposed allotment, in ruling that the prospective Seaford licensee must use WTTG(TV)’s digital RF channel as its major channel. PMCM asserts, however, that “the decision contains no discussion of the staff’s thinking in this regard, nor was there any party to the proceeding whose interests would be affected by that ruling.”⁵⁵ PMCM also seeks to distinguish *Seaford, Delaware* from the situation at hand by arguing that the Seaford channel was allotted through a rulemaking proceeding while channel 3 in Middletown Township was reallocated by operation of a statute enforced by a court order, and that the future licensee of the Seaford channel “clearly would be a newly-licensed DTV licensee which had not previously held an NTSC license for the allotment.”⁵⁶

20. In its June 16, 2014 Reply, Meredith reiterates that Annex B.1.4 governs because KVVN(TV) would be newly licensed to Middletown Township and it is irrelevant that it was previously licensed to Ely, Nevada.⁵⁷ Meredith asserts that PMCM’s reading of the PSIP Standard not only ignores the text of the Standard but is contrary to the Commission’s express reasons for incorporating the Standard in its rules – to avoid virtual channel conflicts among stations and allow broadcasters to maintain their local brand identification.⁵⁸ Meredith also asserts that, because KVVN(TV) previously operated in Ely, Nevada, more than a thousand miles away, “no potential viewer in KVVN(TV)’s new market identifies KVVN(TV) with a Channel 3 dial position,” unlike WFSB(TV), where “viewers have identified WFSB(TV) as the Channel 3 station in their market for decades, and [WFSB(TV)] has branded and promoted itself as the Channel 3 station in its service area.”⁵⁹ Meredith states that “[it] is understandable (although scarcely commendable) that a new entrant to the market like PMCM would like to trade on the good will that WFSB(TV) has built up over decades by confusingly positioning itself as an ‘alternative’ Channel 3 in the market.”⁶⁰

21. Meredith further contends that the PSIP Standard does not define its use of “market” to mean “DMA,” but “uses the term ‘market’ functionally in addressing areas where stations have service

⁵³ *Id.* at 4; *see also id.* at 6.

⁵⁴ *Id.* at 7.

⁵⁵ *Id.*

⁵⁶ *Id.* at 8.

⁵⁷ Meredith Reply at 2.

⁵⁸ *Id.* at 3-4.

⁵⁹ *Id.* at 5.

⁶⁰ *Id.*

contour overlap.”⁶¹ According to Meredith, this is consistent with the approach taken in *Seaford, Delaware*, where there were overlapping DTV service contours between WTTG(TV) in the Washington, D.C. DMA and the channel 5 allotment at Seaford, in the Salisbury, Maryland DMA, and the Seaford allotment was assigned WTTG(TV)’s RF channel number as its virtual channel. Meredith also argues that the fact that KVVN(TV) was previously licensed in Nevada and moved pursuant to a court order does not mean that it is not “newly licensed” in New Jersey.⁶²

22. PMCM filed a supplement on July 7, 2014, asserting that, because KVVN(TV) already operated with virtual channel 3 in Ely, altering its virtual channel would require a rulemaking proceeding and would be contrary to section 331 of the Communications Act. According to PMCM, when section 331 was enacted by Congress in 1982, a station’s broadcast channel meant only one thing – its RF channel – and changing KVVN(TV)’s virtual channel would thwart the intent of Congress and the court’s mandate in ordering the reallocation of channel 3 to Middletown Township.⁶³ PMCM also notes that in the *Incentive Auction Report and Order*,⁶⁴ when discussing the repacking of broadcast stations onto a smaller portion of the UHF band as a result of the broadcast incentive auction, the Commission did not address whether a station’s virtual channel might have to be protected in repacking. According to PMCM, “[a]doption of Meredith’s theory [that virtual channels must be protected from signal overlap] . . . would both seriously delay the Incentive Auction as presently envisioned and severely limit the number of channels that will be able to be freed up through the auction process.”⁶⁵ Finally, PMCM submitted a map showing extensive contour overlap between WNBC, New York, New York and WACP, Atlantic City, New Jersey, and states that while both stations use virtual channel 4, there is no record of complaints from viewers, supporting PMCM’s technical showing that overlapping virtual channels should not cause technical problems.⁶⁶

23. In its July 11 opposition, Meredith argues that PMCM provides no reasonable basis for reading section 331 to dictate a station’s virtual channel. While PMCM cites to the statutory language that the Commission order a channel reallocation to a state without a commercial VHF channel “notwithstanding any other provision of law,” Meredith contends that the court rejected PMCM’s expansive reading of that phrase, ruling that “this language simply serves to ‘displace[] the normal procedures for channel reallocation as well as the normal procedures for issuing licenses.’”⁶⁷ Moreover, Meredith states that section 331’s reference to “channel” means the physical, allotted channel, which was the only meaning of the term when Congress enacted that provision, and “[b]y allocating a physical VHF channel to New Jersey, the Commission has honored both the letter and purpose of the statute.”⁶⁸ If that were not the case, Meredith asserts, “then the existence of WWOR(TV), Secaucus, New Jersey, operating on Virtual Channel 9, fully would have . . . removed the rationale for permitting KVVN(TV) to move from Nevada to New Jersey in the first place.”⁶⁹ Meredith also points out that in the *Seaford, Delaware* decision, the Video Division relied on section 331 to allot RF channel 5 to Seaford, yet at the same time

⁶¹ *Id.* at 7.

⁶² *Id.* at 7-8.

⁶³ Supplement at 1-2. PMCM further states that “Section 331’s requirement that the Commission reallocate the channel ‘notwithstanding any other provision of law’ should make clear that any countervailing considerations must yield to this mandate.” *Id.* at 2.

⁶⁴ *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auction*, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6567 (2014) (*Incentive Auction R&O*).

⁶⁵ Supplement at 3-4.

⁶⁶ *Id.* at 4.

⁶⁷ Meredith Opposition to Supplement at 2, citing *PMCM TV, LLC*, 701 F.3d at 385.

⁶⁸ Meredith Opposition to Supplement at 2.

⁶⁹ *Id.* at 2-3.

relied on the PSIP Standard to assign virtual channel 36 to the allotment.⁷⁰

24. With respect to PMCM's incentive auction argument, Meredith states that, given the interference protections built into the repacking process, it is highly unlikely that stations will move the substantial distances necessary for virtual channels to overlap.⁷¹ Finally, Meredith asserts that the fact that some receivers could identify stations with the same virtual channel as separate stations simply amounts to an argument for discarding the PSIP Standard entirely, and that KVVN(TV), as a newcomer to the market, should not benefit from viewers' confusion of KVVN(TV)'s signal with Meredith's signal.⁷²

25. PMCM filed its Alternative PSIP Proposal on August 8, 2014,⁷³ reiterating the arguments set forth in its June 4 and July 7 filings that Annex B calls for the assignment of KVVN(TV)'s NTSC RF channel number in Ely as WJLP's major channel number in New Jersey and that Annex B.1.4 does not apply.⁷⁴ PMCM further argues that Annex B guarantees only that the "two-part channel number combinations" be different from that used by another licensee with overlapping service area, and in order to "reconcile the apparent Annex B prohibition on overlapping identical PSIPs with application of subordinate paragraphs in Annex B that result in two overlapping stations having the same major channel," proposes that it be assigned the two-part virtual channel 3.10 (with additional program streams to be identified as 3.11, 3.12, etc.) while WFSB(TV) would retain virtual channels 3.1 through 3.9.⁷⁵ According to PMCM, "nothing in Annex B requires the consent of other common major channel users when the two part PSIP is not identical."⁷⁶ PMCM also asserts that the Commission "has **already** authorized multiple situations involving overlapping *identical* (i.e., both major channel and minor channel numbers) PSIPs for stations serving millions of households," and to PMCM's knowledge, no adverse effects have occurred.⁷⁷

26. PMCM also contends that the Commission should not be concerned about contour overlap between WFSB(TV) and WJLP because 384,414 people within the WFSB(TV) service contour in Fairfield County are subject to interference from co-channel station WCBS(TV), New York, New York. According to PMCM, "over the air reception of WFSB in Fairfield County is virtually non-existent" and there should be no concern about overlap if there is no viewable signal.⁷⁸ PMCM further asserts that viewers within this overlap area in Fairfield County receiving a WFSB(TV) signal "would have to use a high gain antenna oriented toward Hartford – directly in the opposite direction from [WJLP] – so that

⁷⁰ *Id.* at 4.

⁷¹ *Id.*

⁷² *Id.* at 5.

⁷³ PMCM first raised this proposal during a meeting with Commission staff and counsel for Meredith and the MVPDs on July 31, 2014. The staff requested that PMCM file a written proposal and serve other interested parties.

⁷⁴ Alternative PSIP Proposal at 1-3. PMCM reiterates that section 331 requires the assignment of virtual channel 3 to WJLP. *Id.* at 9-10. PMCM also argues that that assigning WJLP virtual channel 3.10 would protect its right to demand cable carriage on its over-the-air channel and that it is entitled to carriage on its RF channel pursuant to the Communications Act and the Commission's cable carriage rules and policies. *See id.* at 7-9. As discussed above, we do not consider the latter cable carriage arguments in this proceeding.

⁷⁵ *Id.* at 3. PMCM also proposed an alternative to the assignment of 3.10 – that KVVN(TV)'s major channel number be designated at 14, *id.* at 10-11, but withdrew that proposal in the separate Cable Deferral Proceeding. *See* PMCM Application for Review (filed Aug. 25, 2014) at n.13.

⁷⁶ Alternative PSIP Proposal at 5.

⁷⁷ *Id.* at 4, 6 (emphasis in original). PMCM submitted a number of maps showing contour overlap between stations which it claims are using the same virtual channel numbers. Attachments A through C-2.

⁷⁸ *Id.* at 6.

[WJLP's] signal would not be picked up at all.”⁷⁹ Shortly after filing its Alternative PSIP Proposal, PMCM submitted additional information regarding over-the-air reception of WFSB(TV), claiming that, if there were any “[h]ypothetical would-be WFSB over-the-air viewers in [the WCBS(TV)/WFSB(TV) overlap area],” any such viewers “would necessarily be pointing [their] antenna **away from [WJLP],**” resulting in attenuation of the WJLP signal at the viewer’s receive antenna and effectively blocking WJLP’s signal and preventing it from notifying the receiver of WJLP’s major channel PSIP number.⁸⁰

27. After this proceeding was docketed, Meredith and CBS, the licensee of KYW-TV, Philadelphia, Pennsylvania, which also operates on virtual channel 3 and whose service area is overlapped by WJLP, filed joint comments opposing the Alternative PSIP Proposal, arguing that:

PMCM’s waiver request is entirely without precedent. PMCM cites no instance in which the Commission has ever subdivided a major channel number to assign separate chunks of the major channel to separately owned stations for concurrent use in the same area or in which the Commission has required an incumbent broadcaster to change its own virtual channel to accommodate a station newly licensed in the market.⁸¹

Meredith and CBS assert that “PMCM falls far short of demonstrating that its situation is ‘unique’ or otherwise warrants grant of a waiver of the plainly applicable PSIP Standard”⁸² so as to support assignment of a subdivided PSIP and the modification of the incumbent stations’ virtual channel 3, the channel on which WFSB(TV) and KYW-TV have been identified in the overlap areas for some 50 and 75 years, respectively. Moreover, they claim that grant of a waiver would not serve the public interest and is not necessary for PMCM to provide a new service to the public, since assigning WJLP virtual channel 33 is consistent with the way the Commission has treated other similarly situated stations, and allowing WJLP to use channel 3.10 would not serve to preserve any existing brand identification because WJLP, as a new entrant in the market, has none, unlike the incumbent stations.⁸³

28. Meredith and CBS further assert that grant of a waiver would undermine the Commission’s goals in adopting the PSIP Standard as part of its rules, for the following reasons.⁸⁴ First, WJLP’s use of the same major channel number in the overlap area with incumbent stations would create viewer confusion; according to Meredith and CBS, the sequential minor channel numbers of a major channel tell the public that a single licensee has a responsibility for the programming, and PMCM’s operation pursuant to program test authority using virtual channel 3.10, while also identifying itself as “Channel 3,” implies to the public that WFSB(TV) or KYW-TV (depending on the overlap area in question) is programming that channel.⁸⁵ Second, PMCM’s proposal undermines the policy goal of preserving brand identification that the incumbent stations have built up on their channels through long years of service, and PMCM’s demonstrated plan to identify itself as “Channel 3” and not “Channel 3.10” in the overlap area further undermines and dilutes the local brand identification of WFSB(TV) and KYW-TV as “Channel 3” in the overlap areas.⁸⁶ Moreover, setting a precedent of imposing forced sharing of a major channel number simply because one party to a dispute requests it would undercut the goal of clarity and certainty of virtual channel assignments that led the Commission to adopt the PSIP Standard and would inevitably “spur future waiver requests from stations seeking to improve their lot by alternative

⁷⁹ *Id.*

⁸⁰ PMCM Aug. 13 Explanatory Supplement at 3 (emphasis in original).

⁸¹ Meredith/CBS Oct. 14 Comments at 2.

⁸² *Id.* at 2-3.

⁸³ *Id.* at 4-5.

⁸⁴ *Id.* at 5.

⁸⁵ *Id.* at 6.

⁸⁶ *Id.* at 6-7.

virtual channel positioning”⁸⁷ based on “whatever arguments may be most readily at hand, [which is] exactly what the adoption of the PSIP Standard was intended to avoid.”⁸⁸

29. In its comments, PMCM emphasizes that, because the Commission incorporated ATSC A/65 by reference into section 73.682(d) of the rules, the virtual channel assignment provisions are “effectively self-effectuating” and “DTV licensees are left to insert into their respective PSIPs, without any prior Commission approval, a virtual channel designation that complies with ATSC A/65.”⁸⁹ PMCM reiterates that its proposal to use virtual channel 3.10 for its New Jersey station fully complies with ATSC A/65 by virtue of KVVN(TV)’s channel 3 analog operation in Ely, and argues that ATSC A/65 does not guarantee that overlapping signals with major channel numbers will not occur, but only that there will be no overlap of two-part channel number combinations. In support, it cites to subpart 5 of Annex B, which permits commonly owned stations with overlapping DTV service areas to use a common major channel number as long as the minor channel numbers are partitioned so that there is no duplication of the two-part channel number in the service areas.⁹⁰ PMCM also asserts that Meredith’s concerns about viewer confusion if both stations use major channel number 3 are belied by the fact that, “[a]ccording to a study of the Commission’s publicly-available databases, more than 100 situations nationwide currently exist in which non-commonly-owned-or-controlled stations with overlapping signals are using the same major channel number [and] the Commission would have been alerted to massive confusion across the country at some point over the past five years” if such confusion would have resulted.⁹¹

30. ION filed comments supporting Meredith’s Request for Declaratory Ruling, agreeing that Annex B assigns WJLP virtual channel 33 and that this assignment is consistent with Commission precedent.⁹² Turner Broadcasting System, Inc. (“Turner”) also supported assigning WJLP virtual channel 33.⁹³ K.M. Richards, who states he is a long-standing broadcast consultant, filed comments observing that, having moved a channel 3 facility into an area where virtual channel 3 is already in use by two previous stations, PMCM’s proposal for a “split” virtual channel 3 “is more likely to cause confusion rather than resolution,” since for over-the-air viewers “the use of ‘3.10’ . . . will create the false impression that KVVN’s signal originates via either WFSB(TV)’s or KYW-TV’s facilities, when this is clearly not the case.”⁹⁴

31. Paul S. Rotella, Esq., the President and CEO of The New Jersey Broadcasters Association (NJBA), filed comments in support of PMCM’s proposal.⁹⁵ Mr. Rotella states that “I feel

⁸⁷ *Id.* at 7.

⁸⁸ *Id.* at 7-8.

⁸⁹ PMCM Oct. 14 Comments at 1-2.

⁹⁰ *Id.* at 6-9. PMCM also reiterates that, if licenses are to be accorded an exclusive right to a particular major channel number as Meredith asserts, the Commission’s repacking software for use in the upcoming incentive auction will have to be revised to do so, which could result in delay of the auction and possibly discourage broadcasters’ participation in the auction. *Id.* at 15-16.

⁹¹ *Id.* at 10-11; *see also id.* at Attachment A. Again, we do not consider PMCM’s arguments regarding its cable carriage rights (*id.* at 16-19) in this proceeding.

⁹² ION Oct. 14 Comments at 6-7. ION is the licensee of WPXN-TV, New York, New York, which has been carried on channel 3 on many Cablevision systems in the New York DMA by mutual agreement of the parties. *Id.* at 1-2.

⁹³ Turner Oct. 14 Comments at 2-3. Turner states that for many years TNT, a Turner network, has been carried on TWC systems on channel 3. *See id.* at 1-3. As with PMCM and ION, we do not consider arguments made regarding TNT’s cable carriage rights in this proceeding.

⁹⁴ K.M. Richards Sept. 12 Comments at 1. Mr. Richards also asserts that the assignment of virtual channel 33 is consistent with past precedent.

⁹⁵ The three-page filing almost exclusively addresses cable carriage issues related to the separate Cable Deferral Proceeding and those arguments will not be considered here.

that PMCM's use of virtual channel 3.10 effectively and efficiently accomplishes [the requirement "that the two part channel number combinations used by a broadcaster will be different from those used by any other [broadcaster] with overlapping DTV service areas]."⁹⁶ Mr. Rotella also states that he is aware that at least four TV stations "have large overlapping PSIP numbers in the New Jersey 'market'" and that to the best of his knowledge, there have been no reports of consumer confusion or loss of service due to the overlap.⁹⁷

32. Except for PMCM and Mr. Rotella, the parties support the plain-language interpretation of the PSIP Standard advanced by Meredith and CBS and reflected in Commission precedent that assigns virtual channel 33 to WJLP.⁹⁸ Meredith and CBS claim that, while PMCM argues that Annex B.1.4 does not apply because WJLP, WFSB(TV), and KYW-TV are not in the same DMA, there is no indication that the drafters of ATSC A/65 used "market" as a reference to the DMA market definition, and the fact that KVVN(TV) was previously licensed in Nevada does not change the fact that WJLP is "newly licensed" in New Jersey.⁹⁹ They further argue that, if the Commission interprets the PSIP Standard as providing a menu of available combinations of major and minor channel numbers from which a station may select at will, including major channel numbers that conflict with other stations with overlapping service contours so as to restrict incumbent stations from using a particular range of minor channel numbers, the Commission will continually face proceedings in which parties argue about which of the multiple channel choices would best serve the public interest and do the least harm to incumbents.¹⁰⁰ With respect to the PMCM list of over 100 non-commonly owned stations with overlapping contours that share a major channel number, ION points out that some are, in fact, commonly owned. ION asserts, however, that these examples do not show "selective enforcement" by the Commission because the PSIP Standard is self-executing by stations, and the Commission interprets the PSIP Standard when presented with a conflict by stations.¹⁰¹

33. In its reply, PMCM once again complains of selective enforcement in this case. It asserts that the over 100 circumstances it has identified where stations with overlapping contours are using an identical two-part virtual channel, including WACP, Atlantic City and WNBC, New York, "strongly suggests that today's television sets and the people who use them are perfectly capable of distinguishing even overlapping identical two-part PSIP channel designations without a problem."¹⁰² PMCM firmly disputes that Annex B.1.4 applies in this case because it is not newly licensed and its station is not in the same DMA as WFSB(TV) and KYW-TV.¹⁰³ Instead, according to PMCM, Annex B.1.5 contemplates WJLP's use of major channel 3, as long as the minor channel numbers are partitioned to distinguish the stations' signals.¹⁰⁴ PMCM further asserts that granting Meredith's Declaratory Ruling request "would create substantial complications for the Incentive Auction process" because it "would effectively establish a protected contour for every station not only for its over-the-air channel but also for its major channel

⁹⁶ Paul S. Rotella/NJBA Oct. 13 Comments at 3.

⁹⁷ *Id.*

⁹⁸ Meredith/CBS Oct. 29 Reply at 2-3.

⁹⁹ *Id.* at 4; *see also* ION Oct. 29 Reply at 2.

¹⁰⁰ Meredith/CBS Oct. 29 Reply at 6.

¹⁰¹ ION Oct. 29 Reply at 3-4.

¹⁰² PMCM Oct. 29 Reply at 1-2. According to PMCM, "it appears that the concerns that prompted ATSC to impose the minor channel number partitioning requirement were essentially unfounded." *Id.* at 6.

¹⁰³ *Id.* at 3. PMCM also asserts that, if Annex B.1.4 applied, PMCM would be entitled to not only major channel 33 but also major channel 26, which is KYW-TV's RF channel, and "[w]e assume the Bureau flipped a coin in deciding to temporarily assign virtual channel 33 to WJLP" *Id.*

¹⁰⁴ *Id.* at 4.

numbers.”¹⁰⁵

34. *Discussion.* We conclude that, on the facts before us, the assignment of WJLP’s virtual channel is governed by ATSC A/65C, Annex B.1.4, and that even if Annex B.1.4 did not itself directly apply to the facts of this case, Annex B.1.8 supports an equivalent result. ATSC A/65C, Annex B.1.4 provides as follows:

If, after the transition, a previously used NTSC RF channel in a market is assigned to a newly-licensed DTV broadcaster in that market, the newly-licensed DTV broadcaster shall use, as his major channel number, the number of the DTV RF channel originally allocated to the previous NTSC licensee of the assigned channel.

As discussed in Annex B.1.4, after the DTV transition, digital RF channel 3, which was the previously used NTSC RF channel of WFSB(TV) and KYW-TV, was allotted to Middletown Township, New Jersey through a rulemaking proceeding.¹⁰⁶ PMCM was granted a construction permit for digital RF channel 3 on April 17, 2014, constructed a new facility, and filed a license to cover the new construction on October 22, 2014. The fact that PMCM had a station on RF channel 3 licensed to Ely, Nevada does not change the fact that WJLP is a newly constructed station that has applied for a license for a channel that was allocated to Middletown Township, New Jersey after the digital transition.¹⁰⁷ Because WFSB(TV) was previously the NTSC licensee of RF channel 3 in an overlapping service area, or “market,” WJLP, as the new DTV broadcaster in that market, should use as its major channel number the DTV RF channel originally allocated to WFSB(TV), which is channel 33.¹⁰⁸

35. We reject PMCM’s reading of Annex B.1.4 to require that the new and incumbent stations be located in the same DMA by virtue of the reference in Annex B.1.4 to the previous use of an NTSC channel in a “market.” Annex B does not define the term “market.” Based on the express design

¹⁰⁵ *Id.* at 9. After the Video Division issued its Nov. 7, 2014 Letter Order terminating WJLP’s program test authority using virtual channel 3.10, approximately 500 viewers of WJLP filed comments between November 10 and November 25, 2014, when the court issued a stay of the Video Division’s 2014 Letter Orders. None of the comments addressed the virtual channel issue, but instead stated that they wanted WJLP to remain on the air because they enjoyed its programming.

¹⁰⁶ *Reallocation of Channel 3 from Ely, Nevada to Middletown Township, New Jersey, Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broadcast Stations*, 28 FCC Rcd 2825 (Vid. Div. 2013); 47 C.F.R. § 73.622(i) (2014) (reflecting Middletown Township’s new channel 3 allotment). PMCM is simply incorrect when it argues that the reallocation of channel 3 from Nevada to New Jersey was not the subject of a rulemaking proceeding.

¹⁰⁷ PMCM acknowledged that grant of its June 15, 2009 section 331 Ely Notification would require the construction of a new television station, stating that upon issuance of a reallocation order, “PMCM is prepared to move to implement the change in location as quickly as possible within the normal time frame applied to *newly authorized broadcast facilities.*” Ely Notification at 3 (emphasis added). PMCM noted that, in contrast to the only other case where section 331 had been applied, “PMCM must not only establish a new studio but must also undertake the much more radical relocation and reconstruction of its entire transmitting facility, [so that] *an implementation period consistent with a new television authorization is appropriate.*” *Id.* (emphasis added); see also June 6, 2014 Letter from PMCM to TWC attached to Oct. 29, 2014 Joint Reply of TWC/Cablevision (“Pursuant to Section 614 of the Communications Act . . . , and Section 76.64(f)(4) of the [Commission’s] rules, this will inform you that Television Station KVVV, Middletown Township, New Jersey . . . will commence operation as a new television station in the New York, New York DMA during the week of August 4, 2014.”) (emphasis added).

¹⁰⁸ The Bureau did not, as PMCM suggests, arbitrarily assign WFSB(TV)’s RF channel 33 for WJLP’s use on an interim basis. See *supra* n. 103. KYW-TV’s allotted RF channel 26 is not available for use by WJLP because it is the RF and virtual channel number of WHPX-TV, New London, Connecticut, which has contour overlap with WJLP.

of Annex B, however, we think the term is best interpreted to refer to a station's service area. Annex B.1.8 expressly provides that the various provisions of Annex B "assign major channel number values 2 through 69 uniquely to broadcasters licensed to broadcast Digital ATSC signals"¹⁰⁹ to ensure an orderly navigation of channels by viewers and protect brand identity within a station's service area.¹¹⁰ In addition, when it adopted the PSIP Standard, which includes multiple references to broadcasters' "service areas," the Commission described the Standard as providing a uniform method of "avoid[ing] conflict with duplicative numbers in a market," strongly suggesting that the Commission viewed the terms "service area" and "market" as interchangeable.¹¹¹ As this case illustrates, interpreting "market" to mean DMA would mean that two stations placing a viewable broadcast signal over the same area could both use the same major channel number, contrary to the design of Annex B. If ATSC had meant the commonly used word "market" to mean the trademark-protected Designated Market Areas created by Nielsen Media Research (Nielsen), a TV audience measuring service, presumably it would have said so.¹¹² Moreover, DMAs reflect television viewing patterns as measured by Nielsen, not the area of a station's DTV service area as defined in Annex B and section 73.622(e) of the Commission's rules.¹¹³ While PMCM is correct that the Commission uses DMAs as the definition of a television station's market in the application of the Commission's multiple ownership rules, "[t]he ultimate objective of [the Commission's] ownership rules are to promote diversity and to foster economic competition, while minimizing any adverse effects [that] pursuit of these goals has on the efficient organization of the industry."¹¹⁴ These stated objectives of our multiple ownership rules, as well as PMCM's assertion that, as stations in separate DMAs, WJLP, WFSB(TV), and KYW-TV have a different "nexus of local competitors, local advertising opportunities, local market conditions and local programming needs,"¹¹⁵ have nothing to do with the stated objectives of Annex B: to "assign major_channel_number

¹⁰⁹ ATSC A/65C, Annex B:1.8.

¹¹⁰ ATSC A/69: 2009 at 50-51; *see also Second Periodic Review*, 19 FCC Rcd at 18346-47, para. 153 ("The major channel number also allows broadcasters to maintain their local brand identification.").

¹¹¹ *Second Periodic Review*, 19 FCC Rcd at 18346-47, para. 153 ("ATSC states that the PSIP Standard defines specific requirements for use of 'major channel numbers' to provide viewers with a uniform methodology to access DTV services and to avoid conflict with duplicative numbers in a market. The major channel number also allows broadcasters to maintain their local brand identification. We see no reason to modify this standard." (emphasis added)); *compare, e.g., ATSC A/65C, Annex B:1.8* ("The provisions listed above assign major_channel_number values 2 through 69 uniquely to broadcasters licensed to broadcast Digital ATSC signals and guarantee that the two-part channel number combinations used by a broadcaster will be different from those used by any other broadcaster with an overlapping DTV service area." (emphasis added; footnote omitted)).

¹¹² We acknowledge PMCM's argument that, if ATSC had meant "market" to mean "service area"—a defined term under the FCC's rules, *see* 47 C.F.R. § 73.622(e)—ATSC could have used that term instead. *See* PMCM Oct. 14, 2014 Comments at 7 n.7. Be that as it may, in view of the language in Annex B.1.8 providing that the various provisions of Annex B are designed in part to "guarantee that the two-part channel number combinations used by a broadcaster will be different from those used by any other broadcaster with an overlapping DTV service area" (emphasis added; footnote omitted), we think it reasonable to interpret "market" in the context of Annex B.1.4 to mean service area, rather than DMA.

¹¹³ DMAs are unique, county-based geographic areas designated by Nielsen based on television viewership in the counties that make up each DMA. *See Review of the Commission's Regulations Governing Television Broadcasting*, MM Docket No. 91-221, Report and Order, 14 FCC Rcd 12903, 12924 n.75 (1999). In designating DMAs and compiling DMA-based audience ratings of television programs, Nielsen collects data from television households and assigns counties to DMAs based on viewership. Counties are assigned to a DMA if the majority or, in the absence of a majority, the preponderance, of viewing in the county is recorded for the programming of the television stations located in the DMA. *Id.* at 12926-27, para. 48. The ratings data are used by television stations in deciding which programming should be aired, and by advertisers and stations to negotiate advertising rates. *Id.*

¹¹⁴ *Id.* at 12910, para. 15.

¹¹⁵ Alternative PSIP Proposal at 2-3.

values . . . uniquely” and to “guarantee” that broadcasters “with . . . overlapping DTV service area[s]” also have non-overlapping two-part virtual channel numbers.¹¹⁶

36. Not only would interpreting “market” to mean a DMA frustrate the design of Annex B, which expressly states that its various provisions operate to prevent unrelated stations with overlapping service areas from using the same major channel number,¹¹⁷ it would also lead to absurd results. For example, the Salt Lake City, Utah DMA is comprised of the entire state of Utah and parts of Nevada. Reading the word “market” in Annex B.1.4 to mean “Nielsen DMA” would mean that, if a new station were authorized to Elko, Nevada, which is part of the Salt Lake City DMA, the new station would not be able to use for its virtual channel the major channel number of any of the 23 full power and Class A stations licensed to other communities in the DMA, even though the distance between Elko and those stations would ensure be no contour overlap.¹¹⁸ Similarly, if a new station were authorized to Bishop, California, which is part of the Los Angeles, California DMA, the new station would not be able to use a virtual channel containing the same major channel number as any of the 32 full power and Class A stations licensed to other communities in the DMA, even though there is no possibility of any contour overlap given the distance.¹¹⁹

37. For the reasons explained above, on the facts here, we conclude that Annex B.1.4 governs and dictates the assignment of virtual channel 33 to WJLP. We would reach the same conclusion, however, even without reference to Annex B.1.4. As discussed already, Annex B.1.8 makes clear that the various provisions of Annex B operate to “assign major_channel_number values . . . uniquely” to individual broadcasters.¹²⁰ Thus, Annex B.1.8 itself supports our conclusion that WJLP should use a major channel number distinct from that of any other broadcaster with an overlapping service area.

38. Our assignment of virtual channel 33 to WJLP is consistent with *Seaford, Delaware*, where the Video Division assigned virtual channel 36 to a new channel 5 allotment in the Salisbury, Maryland DMA which would have contour overlap with WTTG(TV), RF channel 36, virtual channel 5, a station in the Washington, D.C. DMA, and we find PMCM’s attempts to distinguish or otherwise discredit the *Seaford* decision unavailing. PMCM argues that the *Seaford* channel was allotted through a rulemaking proceeding and that any prospective licensee would clearly be “newly-licensed,” while already-licensed KVVN(TV) was reallocated by operation of section 331 and enforced by court order. Both channel 5 at *Seaford* and channel 3 at Middletown Township, however, were allotted through a rulemaking proceeding pursuant to section 331 of the Communications Act. The only difference between the two proceedings is that the Bureau dispensed with notice and comment in the New Jersey proceeding and PMCM has not explained the relevance of this distinction. Moreover, operation of the new television stations at both locations required the filing of an application for a construction permit and the construction and licensing of the newly constructed facility. Thus, we see no basis for treating the two stations differently in assigning a virtual channel.

39. PMCM also argues that “the [*Seaford*] decision contains no discussion of the staff’s

¹¹⁶ ATSC A/65C, Annex B:1.8; ATSC A/65:2013, Annex B: B.1.1.8.

¹¹⁷ See *infra* paras. 45-46 (discussion of limited exception to unique major channel assignments for commonly owned or controlled stations).

¹¹⁸ Station KENV is licensed to Elko, which is located slightly over 200 miles from Salt Lake City, the community closest to Elko with licensed stations. KENV’s eastern-most contour is approximately 55 miles from the Salt Lake City stations’ western-most contours.

¹¹⁹ Station KVME is licensed to Bishop, which is located almost 190 miles from Barstow, the community closest to Bishop with a licensed station, KILM. KVME’s southern-most contour is approximately 100 miles from KILM’s northern-most contour. There are 210 Nielsen DMAs, and Salt Lake City and Los Angeles are just two of a number of geographically widespread DMAs where a similar result could occur.

¹²⁰ ATSC A/65C, Annex B:1.8; ATSC A/65:2013, Annex B: B.1.1.

thinking” in assigning a virtual channel, “nor was there any party in the proceeding whose interests would be affected by that ruling.”¹²¹ The *Seaford* decision, however, expressly referenced Annex B.1.8 and the stated goal of assigning major channel numbers uniquely. In addition, the decision noted that WTTG(TV) was operating on channel 36 and using virtual channel 5, that the new channel 5 allotment would have contour overlap with WTTG(TV), and accordingly assigned the allotment WTTG(TV)’s RF channel 36 as its virtual channel—which is consistent with Annex B.1.4.¹²²

40. With respect to its suggestion that *Seaford* has no precedential value because there was no “party in the proceeding whose interests would be affected” by the virtual channel assignment, WTTG(TV)’s interests were clearly affected, as indicated by its comments in the proceeding. Moreover, PMCM, which was in the midst of pursuing its Ely Notification to have channel 3 reallocated to New Jersey, was itself a party to the *Seaford* rulemaking proceeding, which was also conducted pursuant to section 331 in order to allot a commercial VHF channel to a community in a state with no such allotment. While PMCM filed reply comments in the proceeding, it did not object to WTTG’s request that the allotment be assigned a virtual channel other than channel 5. Nor did PMCM file a petition for reconsideration of the virtual channel order or raise the issue in connection with a petition for reconsideration filed by another commenter in the proceeding, which PMCM opposed.¹²³

41. Requiring WJLP to use virtual channel 33 is also consistent with other decisions the Bureau had made when presented with a virtual channel conflict between stations with overlapping DTV service contours. In *Associated Christian Television System, Inc.*,¹²⁴ WWSB(TV), Sarasota, Florida, was operating with virtual channel 40, and WACX(TV), Leesburg, Florida, commenced digital operations using the same virtual channel, which was its digital RF channel. The licensee of WWSB(TV) complained to the Commission “that WACX(TV)’s use of virtual channel 40 was interfering with reception of station WWSB(TV) by causing digital television receivers to lock onto station WACX(TV) incorrectly.”¹²⁵ The Video Division ordered WACX(TV) to use its A/65C assigned NTSC channel number as its virtual channel, and the fact that the stations were licensed to communities in separate DMAs was not a factor for consideration.¹²⁶ Similarly, the Commission permitted station KCWT-CA, La Feria, Texas to operate with major channel 21 in lieu of its A/65C assigned major channel 30 because the station had contour overlap with a station licensed to Matamoros, Tamaulipas, Mexico on RF channel 30 that was also utilizing 30 as its major channel number. The assignment of major channel 21 to KCWT-CA was based on the Commission’s own study showing that “the station’s protected service contour will not overlap with the protected service contour of another station operating on major channel 21.”¹²⁷

¹²¹ PMCM June 4 Opposition at 7.

¹²² PMCM argues that the *Seaford* decision also is not binding because “staff plainly took a contrary action in the essentially contemporaneous” Atlantic City section 331 allotment proceeding. *Id.*; see also PMCM Apr. 1, 2015 Reply at 2. Unlike *Seaford*, none of the commenters, including PMCM which also participated in the Atlantic City proceeding, raised an issue regarding the proposed Atlantic City allotment’s appropriate virtual channel, and accordingly, no determination was made in the proceeding. See *Atlantic City, New Jersey*, Report and Order, 25 FCC Rcd 2606 (Vid. Div. 2010).

¹²³ See generally *Seaford, Delaware*, 28 FCC Rcd 1167. After the court ordered the Commission to reallocate channel 3 from Ely to Middletown Township, PMCM filed a petition for reconsideration challenging the initial allotment in 2010 of channel 5 at Seaford (for reasons unrelated to the virtual channel issue), and that petition was denied. *Seaford, Delaware*, 29 FCC Rcd 4769.

¹²⁴ *Associated Christian Television System, Inc.*, 25 FCC Rcd 9237 (Vid. Div. 2010).

¹²⁵ *Id.* at 9237.

¹²⁶ WWSB(TV) is located in the Tampa-St. Petersburg-Sarasota, Florida DMA, while WACX(TV) is in the Orlando-Daytona Beach-Melbourne, Florida DMA.

¹²⁷ Available at http://licensing.fcc.gov/cgi-bin/prod/cdbs/forms/prod/getimportletter_exh.cgi?import_letter_id=43967.

42. Finally, it is worth noting that Mr. Eyer, who served as Chair of the ATSC technical group that maintains and revises the PSIP Standard, describes the operation of Annex B.1.4 in a manner consistent with our interpretation of the use of the word “market” in that subsection:

Let’s say Broadcaster A has an existing NTSC license and obtains a license to broadcast digital TV. This broadcaster operates both analog and digital broadcasts until the nationwide transition to digital broadcasting is complete. At that time, they shut down the analog transmitter. . . [A] new broadcaster, Broadcaster B, *comes into the area* and is assigned the same RF channel as was previously used by the original broadcaster for the old analog service. What major channel number must Broadcaster B use? The rule . . . for this situation says that the new digital broadcaster must use the RF channel number of the original analog broadcaster’s assigned DTV RF carrier. This works because all of the digital services operated by the original broadcaster use the original NTSC RF channel as their major channel number, leaving the DTV service’s RF channel number unused *in this area*.¹²⁸

This, of course, is the exact situation presented here. Meredith (Broadcaster A) had an existing NTSC license for channel 3 and obtained a digital license to broadcast on RF channel 33.¹²⁹ Meredith operated on both channels until June 12, 2009, when it ceased analog operations on channel 3. PMCM (Broadcaster B) was subsequently authorized to operate on digital RF channel 3 in the same area in which Meredith had operated on analog RF channel 3. As Mr. Eyer explains, the assignment of major channel 33 to PMCM works because Meredith is using major channel 3 for WFSB(TV) and thus, its RF channel number 33 is unused in the area as a major channel number.¹³⁰

43. We disagree with PMCM that Annex B.1.1 provides for the assignment of major channel 3 to WJLP.¹³¹ That provision states that “[f]or broadcasters with existing NTSC licenses, the major channel number for the existing NTSC channels, as well as the digital virtual channels . . . shall be set to the current NTSC RF channel number.” Under this assignment rule, KVNV(TV) appropriately used major channel 3 for its operations at Ely. However, when PMCM applied in 2014 for a license to operate newly constructed WJLP at Middletown Township on DTV RF channel 3, it no longer had an NTSC channel number or license because all such licenses had been terminated by statute on June 12, 2009.¹³² Thus, by the time PMCM filed for a license to operate WJLP on digital RF channel 3 in New Jersey, KVNV(TV)’s NTSC RF channel number in Nevada had long been rendered a nullity by the completion of the digital transition.¹³³

¹²⁸ *PSIP: Program and System Information Protocol* at 105 (emphasis added); see also *id.* at 106, Figure 5.5. Notably, Mr. Eyer does not use the words “market” or “Designated Market Area” to describe the operation of this subsection.

¹²⁹ See FCC File No. BLCDT-20041029AIL.

¹³⁰ While KYW-TV also qualifies as Broadcaster A in Mr. Eyer’s example, KYW-TV’s RF channel 26 is not available for WJLP because it is the RF and virtual channel number of WHPX-TV, New London, Connecticut, which has contour overlap with WJLP.

¹³¹ See *supra* para. 17.

¹³² See DTV Delay Act, Pub. L. No. 111-4, 123 Stat. 112 (2009); 47 U.S.C. § 309 note 3002(b). Because PMCM filed its Ely Notification after June 12, 2009, there was never an opportunity for it to apply for an NTSC license for a facility at Middletown Township. See *Pending Applications and Pleadings Related to Proceedings for New Analog Full-Power Television Stations for Communities in Several States*, Order, 26 FCC Rcd 14301 (Vid. Div. 2011) (Commission statutorily prohibited from granting analog authorizations after June 12, 2009 digital television transition), *subsequent history omitted*.

¹³³ We agree with PMCM that Annex B.1.2 does not apply in this case, but not because KVNV(TV) had an analog license at Ely. See PMCM Oct. 14 Comments at 7; ATSC A/65:2013, Annex B: B.1.1.2 (“For a new licensee without an existing NTSC license at the time it commenced digital service, the major channel number for the virtual

(continued....)

44. We agree with the commenters opposing PMCM's Alternative PSIP Proposal that limiting incumbents WFSB(TV) and KYW-TV to the use of virtual channels 3.1 through 3.9, and permitting WJLP to use virtual channels 3.10, 3.11, and above, would be unprecedented. The Commission has never assigned the same major channel number to separately owned stations for concurrent use in the same area, nor has it ever limited a broadcaster in the number of minor channel numbers it may use.¹³⁴ Moreover, such proposed concurrent use does not comport with the mandatory major channel assignment provisions in ATSC A/65C, Annex B, which expressly states that the protocol is to "assign major_channel_number values 2 through 69 *uniquely* to licensees licensed to broadcast digital ATSC signals" ¹³⁵

45. PMCM argues that Annex B does not proscribe overlap of stations using the same major channel number because, in addition to assigning major channels "uniquely," the channel assignment provisions also "guarantee that the two-part channel number combinations" used by a broadcaster will be different from those used by any other broadcaster with an overlapping DTV service area.¹³⁶ Because Annex B also requires unique two-part (major/minor) channel numbers, PMCM argues that ATSC A/65C somehow sanctions its shared use of major channel 3 with WFSB(TV) and KYW-TV. This argument, however, erroneously relies on an exception, which is inapplicable here, to the overall assignment provisions of Annex B that ensure unique major channel numbers. This exception is set forth in Annex B.1.5, which provides that:

If a broadcaster owns or controls broadcast licenses for two or more different RF channels having overlapping service areas, he may use a common major_channel_number for all services on all channels. He may choose the major_channel_number as determined above for any one of the RF channels. The values of the minor_channel_number fields must be partitioned to insure that there is no duplication of the two-part channel number in the DTV service area, including the overlapping service areas of other broadcasters using that same major_channel_number.

As PMCM itself acknowledges, Annex B.1.5 "addresses a narrow universe of situations,"¹³⁷ that is

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channels controlled by the licensee shall be set to the FCC-assigned RF channel number for ATSC digital TV broadcast."). Instead, that subpart applied during the transition to stations that never constructed an analog facility but instead commenced the initial service with a digital facility. *See PSIP: Program and System Information Protocol* at 104-05. Also, even assuming that Annex B.1.2 could be read to apply to PMCM, that subpart, unlike Annex B.1.4, would result in duplication of major channel numbers by stations serving the same viewers, which would contravene the design of Annex B, which expressly states that its various provisions assign broadcasters unique major channel numbers. We also agree with PMCM that Annex B.1.3 is inapplicable here because PMCM's RF channel number did not change. *Id.*; ATSC A/65:2013, Annex B: B.1.1.3 ("If the RF channel assigned to a licensee for digital ATSC broadcast is changed for any reason, the major channel number used by that licensee shall not change."). Instead, PMCM's RF channel was reallocated from Nevada to New Jersey after the DTV transition and, as discussed above, its virtual channel number for its New Jersey station is governed by Annex B.1.4 and B.1.8.

¹³⁴ WFSB(TV) and KYW-TV are presently each entitled by ATSC A/65C to operate on major channel 3 with a minor channel range from 1-99. *See supra* n.30.

¹³⁵ Annex B:1.8.

¹³⁶ *Id.* PMCM claims that Dr. Richard Chernock suggested this approach, and that a number of experts knowledgeable about the PSIP channel assignment process with whom PMCM consulted agreed that Dr. Chernock's suggested approach is consistent with ATSC A/65 and that there would be no confusion of TV receivers. Alternative PSIP Proposal at 4. PMCM, however, did not provide a declaration from any of these individuals, nor did these individuals file comments in this proceeding. Accordingly, we give these claims no weight. We also note that, according to the ATSC website, Dr. Chernock is the Chairman of ATSC Technology Group 3, and not the Chairman of ATSC as PMCM represents.

¹³⁷ *See* PMCM Oct. 14 Comments at 8, para. 16; *see also PSIP: Program and System Information Protocol* at 105 (explaining that, if commonly owned PBS stations had contour overlap, the licensee could use a common major

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triggered only where a broadcaster owns or controls stations operating on two or more different RF channels having overlapping service areas. In that case the broadcaster may use a common major channel number for those stations, as long as that channel is consistent with the mandatory assignment rules, i.e., one of the stations is entitled to use the major channel.¹³⁸ Here, PMCM does not own or control WFSB(TV) or KYW-TV, and this exception is inapplicable.¹³⁹

46. Despite the fact that there are no commonly owned or controlled stations involved in this proceeding, PMCM argues that Annex B.1.5 “sheds important light on the determination of two-part channel numbers” here,¹⁴⁰ because that subsection requires that the minor channel numbers be partitioned so that there is no duplication of the two-part combination used by the commonly owned stations in their overlap area, *as well as* “the overlapping DTV service areas of other broadcasters using that same major channel number.”¹⁴¹ ATSC does not provide an explanation why it drafted the unique major channel exception for commonly owned stations to include a scenario where there might be overlap with non-commonly owned stations using the same major channel number. One reasonable possibility is that ATSC envisioned that allowing commonly owned stations to use the same major channel number might create duplicative use of the same major channel number by two unaffiliated stations if one of the commonly owned stations has an overlapping service area with a non-commonly owned station, i.e., there would not be any duplicative use of the same major channel by non-commonly owned stations but for the exception allowing commonly owned stations to share a major channel number. Under our technical rules, however, such overlap would rarely occur.¹⁴² In any event, Section B.1.5 clearly does not itself

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channel number so that all the PBS stations are accessible as a group and the channel logo and advertising for the stations can feature just one major channel number). Mr. Eyer goes on to further explain that, because minor channel numbers must be assigned so that the two-part channel numbers are unique in any given service area, “[f]or broadcasters who operate more than one transmitter in one DTV service area and who choose to label the services in their digital multiplexes with common major channel numbers, the minor channel numbers must again be chosen so that no overlap occurs [i.e.], one of the multiplexes, for example, could carry channel 15.1, 15.2 and 15.3, while a second multiplex carries 15.4, 15.5 and 15.6.” *Id.* at 105-06. An example of such usage is commonly owned noncommercial educational television stations WNVTV, Goldvein, Virginia and WNVTV, Fairfax, Virginia, which share major channel number 30, with WNVTV using virtual channels 30.1 through 30.6 and WNVTV using 30.7 through 30.12.

¹³⁸ As the 2013 version of Annex B makes clear, however, this is “a limited exception to the mandatory requirements of #1 through #4 above.” PMCM cites to ATSC A/65:2013, Annex B: B.1.1.5. The corresponding provision in ATSC A/65C is Annex B: 1.5. While the 2013 version restructures the 2006 rule and changes certain terminology, these do not substantively change the underlying channel assignment principle.

¹³⁹ We disagree with PMCM that our interpretation of Annex B.1.5, which is consistent with the interpretation urged by Meredith, CBS, and others, indicates an abandonment of ATSC A/65 and would require a notice and comment rulemaking proceeding. PMCM Oct. 14 Comments at 15. Our interpretation indicates no such “abandonment” of the PSIP Standard incorporated into the Commission’s rules since Annex B:1.5’s permission for stations with overlapping service areas to share a major channel number is on its face limited to commonly owned or controlled stations. We also disagree with PMCM that, because the Commission incorporated ATSC A/65C into its rules, it lacks authority to interpret the protocol. The Commission retains its authority to interpret its rules, whether the Commission drafted the rules itself or incorporated into its rules a standard adopted by an advisory body.

¹⁴⁰ PMCM Oct. 14 Comments at 8.

¹⁴¹ *Id.* at 8-9.

¹⁴² Because most stations were assigned their former analog channel number as their major channel number under Annex B, and the minimum co-channel spacing requirements for analog allotments ranged from 154.4 to 219.5 miles, *see* 47 C.F.R. §73.610(b)(1), major channel overlap with a non-commonly owned station would not likely occur. The potential for overlap would increase if the non-commonly owned station had, at some point, modified its facility to move to a location closer to the commonly owned stations, or if more than two commonly owned stations with overlapping contours were using the same major channel number, thereby further extending the common contour. While PMCM asserts that there are over 100 station pairs with overlapping contours using the same major

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authorize the sharing of major channel number 3 by PMCM-owned station WJLP, Meredith-owned WFSB(TV), and CBS-owned KYW-TV, as it is expressly limited to situations involving commonly owned stations. The reference to “overlapping service areas of other broadcasters using that same major channel number” is incidental and does not expand the scope of this provision.

47. We also disagree that WJLP must be assigned virtual channel 3 because KVNV(TV)’s digital RF channel at Ely was reallocated to Middletown Township pursuant to section 331 of the Communications Act. Section 331, which was enacted in 1982, provides for the allocation or reallocation of a VHF channel to a community in a state that did not have a commercial VHF channel. Section 331 does not define the term “channel” or provide any other indication regarding congressional intent. Rather, the statute is silent in this regard. The express purpose of section 331 is to “ensure that not less than one [VHF commercial television broadcasting] channel shall be allocated to each State, if technically feasible.”¹⁴³ That purpose was fulfilled when the Commission allocated not one, but two, VHF frequencies to New Jersey, i.e., RF channel 4 in Atlantic City and RF channel 3 in Middletown Township. At the time section 331 was enacted, digital television and the concept of virtual channels did not exist. In addition, the statute expressly refers to “very high frequency commercial television broadcast channel[s],” which are defined by the Commission’s rules as the television channels on the 54-62, 66-72, 76-88, and 174-216 MHz frequency bands.¹⁴⁴ The court in *PMCM TV, LLC* also recognized that section 331 dealt with radio frequency spectrum when it held that PMCM’s interpretation of section 331 to permit a reallocation even if interference were to occur made “little sense” in view of “the basic purpose of the Communications Act [] to ensure interference-free broadcasting”¹⁴⁵ Moreover, as Meredith points out, if section 331 were read to apply to virtual channels, then the reallocation of channel 3 from Nevada to New Jersey pursuant to the statute arguably would have been unnecessary because WWOR-TV in Secaucus was operating on virtual channel 9 at the time of PMCM’s Ely Notification, and it continues to do so.

48. Further, requiring WJLP to use virtual channel 33 does not frustrate the purpose of section 331, which was to facilitate the allotment of a VHF channel to New Jersey given VHF channels’ then substantial and well-known advantages over UHF channels.¹⁴⁶ At the time of enactment of section 331, the “technical disadvantages faced by UHF stations (channels 14-83) compared to VHF stations (channel 2-13)”¹⁴⁷ were well-known by the Commission, broadcasters, and Congress. Requiring WJLP

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channel numbers, as discussed below, the station pairs identified by PMCM include stations that are not required to comply with section 73.682(d). The actual number of stations that are required to comply with section 73.682(d) is much smaller. *See infra* paras. 57-58.

¹⁴³ 47 U.S.C. § 331(a).

¹⁴⁴ *See* 47 C.F.R. § 73.603(a) (frequencies for channels 2 through 13); *Improvements to UHF Television Reception*, GN Docket No. 78-391, Report and Order, 90 F.C.C. 2d 1121, 1121, para. 1 (1982) (VHF television channels are 2 through 13); *Television Assignments*, Sixth Report and Order, 41 F.C.C. 148, 153, para. 19 (1952) (Commission has allocated 12 VHF television channels, 2 through 13, in the 54-216 “megacycle” (i.e., MHz) frequency band); *see also* Newton’s *Telecom Dictionary* 988 (24th ed. 2008) (defining VHF as “[f]requencies from 30 MHz to 300 MHz”).

¹⁴⁵ *PMCM TV, LLC*, 701 F.3d at 384 (citing *Nat’l Broad. Co. v. FCC*, 516 F.2d 1101, 1110 (D.C. Cir. 1974)) (“Congress created the Federal Communications Commission and its predecessor, the Federal Radio Commission, because the available space on the electromagnetic spectrum was far exceeded by the number of those who would use it.”).

¹⁴⁶ *See PMCM*, 26 FCC Rcd at 13697, para. 3.

¹⁴⁷ *Improvements to UHF Television Reception*, 90 F.C.C. 2d at 1121, para. 1. Some of these disadvantages included the fact the UHF stations had to broadcast at higher, more costly power levels to achieve coverage similar to VHF stations, UHF frequencies were more attenuated by natural obstacles such as terrain and foliage, and some television receivers at that time did not provide equivalent tuning and reception of UHF and VHF signals. *Id.* at n.1; *see also Amendment of Section 73.3555 of the Commission’s Rules Relating to Multiple Ownership of AM, FM and*

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to use virtual channel 33 in no way detracts from the technical attributes associated with the use of an RF channel in the VHF spectrum. By virtue of operating on RF channel 3 with maximum ERP at 4 Times Square, of the 22 full power television stations licensed to communities in the New York DMA, WJLP is the second largest station, with a noise-limited contour covering 34,960 square kilometers and a 2010 census population of 21,384,863.¹⁴⁸ The fact that WJLP operates with virtual channel 33, so that television receivers tune to that channel when displaying WJLP's programming, rather than virtual channel 3, has no impact whatsoever on the station's over-the-air audience reach as a result of broadcasting on digital RF channel 3. In this regard, we note that PMCM has offered nothing to indicate that Congress, in enacting section 331, believed that "[d]ial location among the existing 'big' stations was important."¹⁴⁹ Nor is there any evidence in the record, as PMCM apparently contends, that lower channel positions are inherently economically superior to higher ones. Thus, for all of the foregoing reasons, we believe it is reasonable to interpret the term "very high frequency commercial television broadcast channel" as used in section 331(a) to have the same meaning as set forth in the Commission's rules, that is, it refers to RF spectrum.

49. PMCM also argues that assigning WJLP major channel 33 violates 47 U.S.C. § 1452(g). As ION, Meredith, and CBS point out, section 1452(g)(1)(A) governs the availability of "spectrum usage rights" in connection with a broadcast spectrum incentive auction and does not concern virtual channel assignments, which have no bearing on a station's spectrum usage rights on its RF channel.¹⁵⁰ PMCM apparently concedes that subsection (g)(1)(A) does not apply,¹⁵¹ but argues that the Joint Opposition ignores the last clause of the section, (g)(1)(B), which bars the Commission from "reassign[ing] a broadcast television station from a [VHF] channel to a [UHF] channel" unless the reassignment will not decrease the total amount of UHF spectrum available for reallocation in connection with the broadcast incentive auction or a request for such a reassignment was pending with the Commission on May 31, 2011.¹⁵² According to PMCM, this language "makes it clear that no forced reassignment of channels, virtual or otherwise is lawful."¹⁵³ This section, however, also clearly applies to RF spectrum, rather than virtual channel assignments.¹⁵⁴ In connection with implementing rules for the broadcast incentive auction, the Commission specifically addressed PMCM's channel 3 spectrum usage rights. In making channel reassignments, the Commission is required to make "all reasonable efforts" to preserve coverage

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Television Broadcast Stations, GN Docket No. 83-1009, Memorandum Opinion and Order, 100 F.C.C. 2d 74, 93, para. 43 (1985) (due to physical nature of the UHF and VHF bands, actual equality between service on the two bands cannot be expected "because the laws of physics dictate that UHF signal strength will decrease more rapidly with distance than does VHF signal strength," citing *Comparability for UHF Television, Final Report*, Sept. 1980 (UHF Comparability Task Force)).

¹⁴⁸ The third and fourth largest stations in the market, WPIX and WCBS-TV, have coverage areas of 29,997 and 28,709 square kilometers, or approximately 85 and 82 percent of WJLP's coverage area.

¹⁴⁹ Consolidated Reply of PMCM TV, LLC in D.C. Cir. Case No. 14-1238 (Nov. 19, 2014) at 7.

¹⁵⁰ See Mar. 19, 2015 Joint Opposition to Motion for Stay at 6; 47 U.S.C. § 1452(g)(1)(A).

¹⁵¹ See PMCM Apr. 1, 2015 Reply to Opposition at 2-3.

¹⁵² See 47 U.S.C. § 1452(g)(1)(B)(i) and (ii); PMCM Apr. 1, 2015 Reply at 2-3. The date of May 31, 2011 refers to the Media Bureau's issuance of a freeze on channel substitution petitions. See *Freeze on the Filing of Petitions for Digital Channel Substitutions, Effective Immediately*, Public Notice, 26 FCC Rcd 7721 (Med. Bur. 2011).

¹⁵³ PMCM Apr. 1, 2015 Reply at 2.

¹⁵⁴ See 47 U.S.C. § 1401(32) (defining the term "ultra high frequency" to mean "with respect to a television channel, that the channel is located in the portion of the electromagnetic spectrum between the frequencies 470 megahertz to 698 megahertz"); *id.* § 1401(33) (defining the term "very high frequency" to mean "with respect to a television channel, that the channel is located in the portion of the electromagnetic spectrum between the frequencies from 54 megahertz to 72 megahertz, from 76 megahertz to 88 megahertz, or from 174 megahertz to 216 megahertz"); see also *Incentive Auction R&O*, 29 FCC Rcd at 6667-70, paras. 227-31.

area and population served of television broadcast licensees as of February 22, 2012, the enactment date of the Spectrum Act.¹⁵⁵ Although PMCM did not have a license application on file for its channel 3 facility in New Jersey by that date, the Commission stated that it would exercise its discretion to protect PMCM's coverage area and population served based on its RF channel 3 facilities as reflected in its authorized construction permit.¹⁵⁶ Assigning WJLP major channel 33 does not impact the Commission's grant of discretionary protection to PMCM based on its RF channel 3 facilities.

50. PMCM is also incorrect that granting Meredith's Declaratory Ruling request would substantially complicate the broadcast incentive auction process because the Commission in making channel reassignments would have to protect two channels for each station, the RF channel number as well as the major channel number. When the Commission makes channel reassignments, it is only required to consider a station's RF channel, which is the channel used to establish a station's coverage area and population served.¹⁵⁷ Moreover, in making channel reassignments, the Commission will not change a station's existing location¹⁵⁸ and because a station's major channel does not change when a station's RF channel number changes,¹⁵⁹ there is no possibility of major channel contour overlap.

IV. PMCM'S WAIVER REQUEST

51. PMCM requests that, to the extent its proposal to operate WJLP using virtual channel 3.10 might be deemed inconsistent with the Commission's rules or the PSIP Standard, it be granted a waiver of the pertinent rules.¹⁶⁰ As discussed above, we conclude that section 73.682(d) of the rules requires the assignment of virtual channel 33 to WJLP.¹⁶¹ Accordingly, a waiver would be necessary to permit the station to use virtual channel 3.10 instead.

52. It is well-settled that the party petitioning for a waiver bears a heavy burden of showing good cause: "[an] applicant [for a waiver] faces a high hurdle even at the starting gate."¹⁶² The Commission will adhere strictly to its rules unless a party can demonstrate the "in the public interest the rule should be waived."¹⁶³ Furthermore, the Commission may waive a provision of its rules only for

¹⁵⁵ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, 126 Stat. 156, § 6403(b)(2) (Feb. 22, 2012).

¹⁵⁶ *Incentive Auction R&O*, 29 FCC Rcd at 6666, paras. 221-22.

¹⁵⁷ *See generally id.* at § III.B. 1 & 2.

¹⁵⁸ *Incentive Auction Task Force Releases Information Related to Incentive Auction Repacking*, ET Docket No. 13-26, GN Docket No. 12-268, Public Notice, 28 FCC Rcd 10370, Tech. App., § 4.1 (IATF 2013).

¹⁵⁹ ATSC Annex B.1.3.

¹⁶⁰ Alternate PSIP Proposal at 11.

¹⁶¹ In the *Second Periodic Review*, the Commission stated that, "[t]o the extent broadcasters have a unique situation that is not provided for in PSIP, the Commission may grant exceptions on a case-by-case basis." *Second Periodic Review*, 19 FCC Rcd at 18346, para. 153. PMCM has failed to show that its construction and operation of a new television station on a channel allotted to Middletown Township after the DTV transition presents a "situation that is not provided for" in Annex B. For example, such a situation would have been presented if WJLP only had contour overlap with KYW-TV, since KYW-TV's RF channel is not available for WJLP's use. *See supra* nn. 108 & 130. If that had been the case, Annex B.1.8 would require the assignment of a different channel number that is unique within WJLP's service area.

¹⁶² *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

¹⁶³ *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 18 FCC Rcd 16121, 16130, para. 26 (2003) (citing *FPC v. Texaco, Inc.*, 377 U.S. 33, 39 (1964)).

“good cause shown,”¹⁶⁴ and grant of a waiver cannot undermine the purpose of the rule.¹⁶⁵ The Commission must take a “hard look” at petitions for waiver¹⁶⁶ and consider all relevant facts when determining if good cause exists.¹⁶⁷ In addition, “[t]he agency must explain why deviation better serves the public interest, and articulate the nature of the special circumstances, to prevent discriminatory application and to put future parties on notice as to its operations.”¹⁶⁸

53. PMCM did not present a persuasive good cause showing, and as explained below, we conclude that it has failed, by a wide measure, to meet its heavy burden of showing good cause for a waiver. As discussed above, Annex B, which is incorporated by reference into section 73.682(d), is designed to ensure that broadcasters serving the same area have a unique major channel number, which in turn ensures that broadcasters who built their brand in a service area on a particular channel can retain their brand identification even if they are no longer using the same RF channel on which they built their brand.¹⁶⁹ Waiving section 73.682(d) to permit WJLP to use virtual channel 3.10 in areas where WFSB(TV) and KYW-TV also use virtual channel 3 would undermine the purpose of Annex B. Moreover, in granting waivers of the PSIP Standard, the Video Division has consistently required a showing that the requesting station does not have contour overlap with any other station using the major channel requested.¹⁷⁰ Because other stations with overlapping contours also use major channel 3, granting a waiver here to allow WJLP to use virtual channel 3.10 would be inconsistent with our prior decisions. Below, we consider PMCM’s reasons for concluding that its alternative proposal best serves the public interest.

54. First, PMCM argues that the Commission should discount contour overlap between WFSB(TV) and WJLP because, due to interference from WCBS(TV), only 384,414 people within the WFSB(TV)/WJLP overlap area in Fairfield County can see WFSB(TV).¹⁷¹ PMCM admits, however, that 258,601 persons in Fairfield County alone receive interference-free service from WFSB(TV), and this number cannot be considered *de minimis*. Moreover, the WFSB(TV)/WJLP overlap area covers a much larger area than Fairfield County. According to the staff’s analysis using *TVStudy* and one kilometer cell size and terrain profile spacing,¹⁷² approximately one million (1,058,336) persons reside in the WFSB(TV)/WJLP overlap area and nearly half a million (485,348) receive interference-free service from WFSB(TV).¹⁷³ Further, PMCM does not address any aspect of its contour overlap with KYW-TV. According to a staff analysis using *TVStudy* and one kilometer cell size and terrain profile spacing, nearly three million (2,866,918) persons in the KYW-TV/WJLP overlap area receive interference-free service

¹⁶⁴ 47 C.F.R. § 1.3.

¹⁶⁵ *WAIT Radio*, 418 F.2d at 1157.

¹⁶⁶ *FPC v. Texaco*, 377 U.S. at 39.

¹⁶⁷ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

¹⁶⁸ *Northeast Cellular Telephone Company, L.P. v. FCC*, 897 F.2d 1165, 1166 (D.C. Cir. 1990).

¹⁶⁹ See *Second Periodic Review*, 19 FCC Rcd at 18346-47, para. 153.

¹⁷⁰ See, e.g., KPOM-LD, Ontario, California, available at http://licensing.fcc.gov/cgi-bin/prod/cdbs/forms/prod/getimportletter_exh.cgi?import_letter_id=48568; KETF-CD, Laredo, Texas, available at http://licensing.fcc.gov/cgi-bin/prod/cdbs/forms/prod/getimportletter_exh.cgi?import_letter_id=31837; KCWT-CA, La Feria, Texas, available at http://licensing.fcc.gov/cgi-bin/prod/cdbs/forms/prod/getimportletter_exh.cgi?import_letter_id=43967; WMYS-LP, South Bend, Indiana, available at http://licensing.fcc.gov/cgi-bin/prod/cdbs/forms/prod/getimportletter_exh.cgi?import_letter_id=35363.

¹⁷¹ Alternative PSIP Proposal at 6; Supplement at 2-3.

¹⁷² These were the study criteria used by PMCM. Explanatory Supplement, Engineering Statement at 1.

¹⁷³ Using a 0.5 kilometer cell size, which was used in granting WCBS(TV)’s current authorization, 505,952 persons in the WFSB(TV)/WJLP overlap area receive interference-free service from WFSB(TV).

from KYW-TV. Thus, approximately 3.25 million persons could be affected by PMCM's use of the same major channel number as WFSB(TV) and KYW-TV.

55. Second, with respect to PMCM's argument that most or all of the WFSB(TV) viewers are using a directional antenna pointed away from WJLP— which, PMCM claims, would mitigate any harm from allowing the two stations to use the same major channel number¹⁷⁴ — PMCM provides no evidence to document its assertion, and thus, we reject it as mere speculation. With respect to its assertion that there also is no real contour overlap because WFSB(TV) viewers are using a certain type of consumer grade antenna that will result in attenuation or blocking of WJLP's signal, carving a “notch” in the station's signal and resulting in a “de facto reduction” of WJLP's contour in the direction of WFSB(TV),¹⁷⁵ PMCM again has provided no evidence to document this assertion. The Commission uses the OET Bulletin 69 methodology to determine reception of DTV signals, which utilizes certain planning factors to characterize the equipment, including antenna systems, used for home reception.¹⁷⁶ The receiving antenna planning factor used was chosen by a working group of the FCC Advisory Committee for Advanced Television Service,¹⁷⁷ and PMCM gives no reason why we should alter our reliance on these planning factors in this case.

56. PMCM also asserts that, because the cable and satellite penetration rate in Fairfield County is 92 percent, the number of over-the-air viewers that would see both stations on major channel 3 is minimal.¹⁷⁸ As noted above, however, the WFSB(TV)/WJLP overlap area encompasses more than just Fairfield County, and PMCM does not provide similar information for these areas or any of the KYW-TV/WJLP overlap area. Because PMCM's showing is incomplete, we give no consideration to its argument that good cause exists to waive section 73.682(d) based on cable and satellite penetration rates in the overlapping service areas.¹⁷⁹

57. PMCM also claims that the Commission has sanctioned over 105 situations where stations with overlapping service areas are purportedly using the same major channel number, and that, since no adverse effects have occurred, there is no need to prohibit stations with contour overlap from using the same major channel number.¹⁸⁰ First, as explained below, PMCM has greatly overstated the prevalence of shared major channel use by stations with overlapping contours. Second, while PMCM states that the Commission has sanctioned or allowed these stations to use the same major channel number, none of these instances were presented to the Bureau for its review and approval and, as a result, the examples PMCM cites have no value as precedent in this case, where a new station is seeking a waiver to permit it to use a major channel that is already being used in overlapping service areas over the incumbent stations' objections. If, in fact, there are multiple unadjudicated instances in which stations are using major channels that are not in compliance with the major channel assignment rules in ATSC A/65C and affected stations do not object, this does not support PMCM's use of a noncompliant major

¹⁷⁴ See *supra* para. 26. PMCM does not raise any reception issues by viewers in the KYW-TV/WJLP overlap area.

¹⁷⁵ Explanatory Supplement at 3-4, Engineering Statement at 1 and maps.

¹⁷⁶ OET Bulletin No. 69: Longley-Rice Methodology for Evaluating TV Coverage and Interference at 3.

¹⁷⁷ *Id.* at 9.

¹⁷⁸ PMCM does not identify the source of this information.

¹⁷⁹ We do not take a position on whether a low level of over-the-air viewership could constitute good cause for waiving the channel assignment provisions in Annex B. In this regard, we note that some cable and satellite subscribers own television receivers that are not connected to the MVPD service and thus view over-the-air signals on these receivers. See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MM Docket No. 12-203, Fifteenth Report, 18 FCC Rcd 10496, 10570, para. 145 (2013).

¹⁸⁰ See *supra* paras. 29, 33.

channel.¹⁸¹ And while PMCM points to this list as proof that the ATSC A/65C major channel assignment rules may be unnecessary, the protocol remains part of our rules and subject to enforcement.

58. We also note that PMCM's study, which relied primarily on data procured from a non-FCC website,¹⁸² does not, as it argues, demonstrate widespread disregard of the PSIP Standard by stations. Based on further examination of PMCM's study, it appears there are only a handful of instances in which two stations with overlapping service areas share a major channel number, and none of these cases has been brought to the Commission for resolution. Approximately 20 percent of the paired situations identified by PMCM involve two low power television ("LPTV") stations, which are not required to comply with the PSIP Standard.¹⁸³ In many of the paired instances involving a Class A or LPTV station, when using the Class A and LPTV stations' protected contour as defined by the Commission's rules, rather than the contour used by the non-FCC website, there is no contour overlap.¹⁸⁴ Moreover, with respect to the paired situations involving just full power and Class A stations, while there appears to be contour overlap, in many cases intervening terrain or one or more interfering station(s) blocks the stations' signals in the overlap area. In the remaining handful of paired situations in which stations with overlapping contours may be using the same major channel, because the situation has not been brought to our attention, the stations involved may be unconcerned about harm to their brand identity vis-à-vis the other station.

59. We also conclude that granting PMCM's request to use virtual channel 3.10 would result in harm to incumbent licensees and otherwise harm the public interest. As discussed above, an important aspect of the two-part channel number navigational concept adopted in ATSC A/65 was to permit digital broadcasters to retain their existing brand identity as a result of years of marketing and advertising on their analog channels.¹⁸⁵ According to Meredith and CBS, WFSB(TV) has been identified and marketed as channel 3 for 50 years and KYW-TV for over 75 years.¹⁸⁶ Allowing WJLP to use virtual channel 3.10 in the same areas where WFSB(TV) and KYW-TV are using virtual channel 3.1, et seq., would dilute the incumbent stations' local brand identification, because the sequential minor channel numbers of a major channel number tell viewers that a single licensee has the responsibility for the programming, and WJLP's use of virtual channel 3.10 could lead viewers to believe the programming was coming from WFSB(TV) or KYW-TV.¹⁸⁷ Moreover, insofar as PMCM contends that its station's brand would be

¹⁸¹ PMCM asserts that "the Bureau's willingness to question WJLP's virtual channel number . . . is suspiciously inconsistent with the fact that the Commission has allowed more than 100 situations which apparently violate ATSC A/65 to continue unabated" and "raises troubling questions of inappropriate selective enforcement." PMCM Oct. 14 Comments at 12 n.10. None of these situations have been brought to the Bureau's attention by the conflicting stations, however, and, when presented with conflicting virtual channels between stations, the Bureau consistently assigns unique major channel numbers to the stations. We also note that, as discussed below, PMCM's list is largely inaccurate.

¹⁸² See PMCM's Oct. 14 Comments, Attachment A at 1.

¹⁸³ *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, MB Docket No. 03-185, Report and Order, 19 FCC Rcd 19381, 19413, para. 243. The Commission may, however, require an LPTV station to implement PSIP if its digital transmission conflicts with a Class A or full power station in order to eliminate the conflict. *Id.* and n.504.

¹⁸⁴ In other instances, the LPTV station is operating an analog-only facility or its license has expired.

¹⁸⁵ See *supra* paras. 5-6.

¹⁸⁶ See *supra* para. 6; Mar. 19, 2015 Joint Opposition to the Motion for Stay at 7. While ION also argues that it would be harmed if WJLP was assigned virtual channel 3.10, that harm would be based upon ION and PMCM having conflicting cable channel placement rights, a matter which is outside the scope of this proceeding. Thus, we do not take into consideration possible harm to ION in reaching our decision here.

¹⁸⁷ While PMCM asserts that "[n]o one has confused WJLP's 'Me-TV' programming with Meredith's or CBS's major network programming," (Mar. 12, 2015 Supplement to Emergency Motion to Stay at 4) the confusion arises

(continued....)

distinguishable from the brands of the incumbent stations because its channel would appear on viewers' screens as "3.10," not "3" or "3.1,"¹⁸⁸ that ignores not only the historical practice of co-branding stations with a single major channel number,¹⁸⁹ but also evidence that PMCM intends to brand its station as "Channel 3."¹⁹⁰ Furthermore, even assuming (as PMCM appears to contend) that viewers can readily distinguish among subchannels within a single major channel, allowing PMCM's station to use virtual channel 3.10 would require the incumbent stations to rebrand themselves to consumers as "Channel 3.1" instead of merely "Channel 3." Accordingly, grant of a waiver would impermissibly undermine an underlying purpose of ATSC A/65C—to assign major channel numbers uniquely to broadcasters—which allows broadcasters to retain the brand identity they developed through years of marketing and advertising on their analog channel.¹⁹¹ Conversely, when WJLP commenced New Jersey operations in October 2014, it had no existing brand identification in its service area because its previous operations had been in Nevada. If there was any harm to PMCM, it was short-term, since WJLP operated with virtual channel 3.10 for less than five months, and any harm was the direct result of PMCM's decision to initiate operations on channel 3.10 while the Petition for Declaratory Ruling and its Alternative PSIP Proposal to use channel 3.10 were pending, and not to comply with the Video Division's 2014 Letter Orders that it operate using virtual channel 33 on an interim basis while this proceeding was ongoing. Moreover, as noted above,¹⁹² PMCM has provided no evidence that virtual channel 3 is inherently superior to virtual channel 33.

60. The shared use of major channel 3 in the overlap areas could also lead to administrative burdens, both for the stations affected by the overlap and for the Commission. Because viewers could be led to believe that WFSB(TV) or KYW-TV was the source of programming on channel 3.10, there is a reasonable possibility that viewers of WJLP on channel 3.10 in the overlap area with a complaint regarding WJLP's programming, operations, or signal quality would complain to those stations or file a complaint with the Commission against WFSB(TV) or KYW-TV, wasting Commission and station resources to sort out the confusion. Moreover, as Meredith and CBS point out, if we were to allow PMCM to subvert the underlying design of ATSC A/65C to "assign major channel number values 2 through 69 uniquely to broadcasters licensed to broadcast Digital ATSC signals" by simply choosing different minor channel numbers than the station operating with the same major channel, the Commission could be presented with a large number of similar requests by stations that would prefer their signals to be associated with the brand of a more highly rated station.

V. THE VIDEO DIVISION'S 2014 LETTER ORDERS

61. As discussed above, PMCM's November 10, 2014 Application for Review and Motion for Stay of the Video Division's 2014 Letter Orders directing it to use virtual channel 33 on an interim basis are pending.¹⁹³ Because we have now reached a decision, on the merits, regarding WJLP's virtual channel assignment, the Video Division's 2014 Letter Orders are no longer in effect and accordingly, PMCM's Motion for Stay of these interim orders is moot. The Commission will separately act on the Application for Review.

(Continued from previous page)

when a viewer of WJLP believes that the programming being watched comes from Meredith or CBS, and this type of individual viewer confusion caused by multiple virtual channel 3 assignments in a viewing area is not easily quantified. See Mar. 19, 2015 Joint Opposition to the Motion for Stay at n.16.

¹⁸⁸ PMCM Mar. 12, 2015 Supplement at 4.

¹⁸⁹ See *supra* paras. 5-6.

¹⁹⁰ See *supra* para. 28.

¹⁹¹ See *supra* paras. 5-6.

¹⁹² See *supra* para. 48.

¹⁹³ See *supra* para. 14.

VI. ORDERING CLAUSE

62. Accordingly, IT IS ORDERED that, pursuant to the authority contained in section 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. § 303(r), and sections 1.2 and 73.682(d) of the Commission's rules, 47 C.F.R. §§ 1.2, 73.682(d), and the authority delegated pursuant to sections 0.61 and 0.283 of the Commission's rules, 47 C.F.R. §§ 0.61, 0.283, the Request for Declaratory Ruling filed by Meredith Corporations IS GRANTED and PMCM TV, LLC must operate WJLP, Middletown Township, New Jersey using virtual channel 33. IT IS FURTHER ORDERED that the Alternative PSIP Proposal and associated request for a waiver filed by PMCM TV, LLC IS DENIED and that its Emergency Motion for Stay of Suspension of Service and Virtual Channel Reassignment IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION



William T. Lake
Chief, Media Bureau

14-150

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Application of)

PMCM TV, LLC)

For a Television Station Construction)
Permit for KVVN(TV), Middletown)
Township, New Jersey)

File No. BPCDT-20130528AJP
Facility ID No. 86537

Accepted/Filed

MAY 22 2014

FCC Office of the Secretary

To: Office of the Secretary
Attn: Chief, Video Division, Media Bureau

**PETITION FOR RECONSIDERATION AND
REQUEST FOR DECLARATORY RULING OF
MEREDITH CORPORATION**

Meredith Corporation ("Meredith") files this Petition for Reconsideration and Request for Declaratory Rules regarding the Media Bureau's letter decision dated April 17, 2014 (the "Letter Decision") granting the above captioned construction permit application for KVVN(TV).¹ The Letter Decision failed to address the disruption that KVVN(TV) would cause on Virtual Channel 3 if it commenced operations on that channel.² This failure was a material error and inconsistent with Bureau precedent. Therefore, the Bureau should grant Meredith's Petition and declare that KVVN(TV) may not commence program tests on Virtual Channel 3. Instead, when KVVN(TV) commences program tests, it must do so on Virtual Channel 33.

¹ This Petition is timely filed. See 47 C.F.R. §1.106(f). The Bureau granted the KVVN(TV) construction permit application on April 17, 2014. The grant appeared on Public Notice on April 22, 2014. See Report No. 48223. To the extent necessary, Meredith requests, pursuant to 47 C.F.R. § 1.41, that the Bureau affirmatively declare that KVVN(TV)'s Virtual Channel is Channel 33.

² Letter to PMCM TV, LLC, File No. BPCDT-20130528AJP, at 1-2 (rel. Apr. 17, 2014) (stating that a station's virtual channel number should be addressed in a separate proceeding after grant of a license application).

BACKGROUND

For almost fifty years, WFSB(TV), Hartford, Connecticut, has operated on Channel 3, and viewers know WFSB(TV) as Channel 3. This well established viewer expectation did not change as a result of the DTV transition because the Commission wisely incorporated the Program System and Information Protocol (“PSIP”) standard into its rules.³ PSIP has preserved the longstanding brand equity that Meredith and other broadcasters have built in their channel numbers, and PSIP allows viewers to continue watching a station on the same channel number they are accustomed to watching.

Since the DTV transition was completed in 2009, WFSB(TV) has operated on Virtual Channel 3 and RF Channel 33. Thus, every viewer in WFSB(TV)’s service area has continued to tune to Channel 3 to watch WFSB(TV), and WFSB(TV) continues to enjoy statutory must-carry rights on Channel 3 throughout its DMA and in various communities in Fairfield County, Connecticut, which is in the New York DMA.⁴ Given WFSB(TV)’s historic connection to Channel 3, most cable and satellite operators in the Hartford-New Haven DMA and in Fairfield County continue to carry WFSB(TV) on Channel 3.

WFSB(TV)’s exclusive right to Channel 3 within the station’s service area had been unquestioned for more than fifty years until PMCM TV, LLC (“PMCM”) filed an application to relocate KVNV(TV) from remote Ely, Nevada to a tower atop Times Square in New York City. KVNV(TV) will operate on RF Channel 3, and KVNV(TV) intends to commence operations using Virtual Channel 3 as well.

³ *Second Periodic Review of the Commission’s Rules & Policies Affecting the Conversion to Digital Television*, 19 FCC Rcd 18297, 18345, ¶152 (2004).

⁴ *Modification of the Television Market of Station WFSB*, 10 FCC Rcd 4939 (CSB 1995) (adding certain communities in Fairfield County, Connecticut to WFSB(TV)’s market for purposes of electing must-carry status).

The noise limited contours for WFSB(TV) and KVVN(TV) overlap significantly.⁵ Hundreds of thousands of viewers live within the overlap area, which includes most of Fairfield County, Connecticut and large portions of New Haven and Litchfield Counties, which are inside the Hartford-New Haven DMA. Today, when those viewers tune to Channel 3.1, they receive WFSB(TV)'s primary program stream affiliated with the CBS network.

If KVVN(TV) commences operations using Virtual Channel 3, it is not clear what station viewers will see on Channel 3.1. In its Opposition, PMCM speculates that viewers still will be able to find WFSB(TV)'s CBS programming somewhere on Channel 3.⁶ WFSB(TV)'s programming might appear on Channel 3.1, but many TV receivers likely will also show KVVN(TV) on Channel 3.1 as well. Moreover, if KVVN(TV) operates with multiple multicast channels, it is possible that viewers would first need to cycle through multiple channels on Channel 3 before reaching WFSB(TV)'s programming. Bottom line – and as PMCM acknowledges – different DTV receivers would resolve the conflict differently, and viewer confusion is inevitable.

Meredith, therefore, filed an Informal Objection against the KVVN(TV) construction permit application.⁷ In its Informal Objection, Meredith demonstrated that the ATSC PSIP standard, which is incorporated into Section 73.682(d) of the Commission's rules, requires

⁵ See Informal Objection of Meredith Corporation, Exhibit A-1 (filed Feb. 18, 2014).

⁶ See Opposition to Informal Objection, Exhibit 1 at ¶ 27.

⁷ In its Opposition, PMCM claims that Meredith cannot object to KVVN(TV) operating on Virtual Channel 3 because Meredith's low power station WSHM-LD also operates on Virtual Channel 3. See Opposition at 6. Unlike KVVN(TV), however, WSHM-LD substantially simulcasts the programming from WFSB(TV) with the exception of certain local Springfield-based programming. Thus, the likelihood of consumer confusion is significantly less. Moreover, as a low power station WSHM-LD does not have must carry rights and cannot make a channel position election that would conflict with WFSB(TV).

KVNV(TV) to operate Virtual Channel 33 to avoid a PSIP conflict with WFSB(TV).⁸ In Opposition, PMCM claimed that because KVNV(TV) would not cause actual RF interference, the Commission should ignore the ATSC procedures for resolving a PSIP conflict.⁹ Moreover, because it should be “possible” for television receivers to distinguish between KVNV(TV)’s program streams and WFSB(TV)’s program streams, PMCM argued that the Commission need not concern itself with another full power television station operating on Virtual Channel 3 in WFSB(TV)’s service area.¹⁰

The Letter Decision did not rule on the merits of the PSIP dispute. Instead, the Bureau granted the KVNV(TV) construction permit application and stated that any decision regarding the Virtual Channel “is customarily considered after grant of the license modification application in a separate proceeding that solely addresses the virtual channel designation.”¹¹ The Letter Decision, however, is inconsistent with Bureau precedent addressing PSIP channel numbers at the pre-construction stage. Moreover, even though the Letter Decision claims that it is not assigning a PSIP channel number to KVNV(TV), CDBS indicates that the Bureau has assigned Virtual Channel 3 to KVNV(TV). Finally, given that PMCM claims that it is entitled to operate on Virtual Channel 3, licensing efficiency and sound processing policy require that the Bureau should not wait for the inevitable viewer confusion before assigning KVNV(TV) its appropriate virtual channel number. As required by Commission rules – and binding precedent – the Bureau should affirmatively require KVNV(TV) to operate on Virtual Channel 33.

⁸ Informal Objection at 3.

⁹ Opposition at 4.

¹⁰ *Id.*

¹¹ Letter Decision at 2.

I. Commission Rules Require KVNV(TV) to Operate on Virtual Channel 33.

ATSC's PSIP rules ensure that two unrelated, full-power stations with overlapping noise limited contours do not use the same PSIP major channel number. Specifically, ATSC A/65 "guarantee[s] that the two-part [virtual] channel number combinations used by a licensee will be different from those used by any other licensee with an overlapping DTV Service Area."¹² ATSC A/65 defines a station's "DTV Service Area" as its noise limited contour.¹³ Thus, under ATSC A/65, full-power stations with overlapping noise limited contours, like WFSB(TV) and KVNV(TV), cannot both operate with the same virtual channel number.

When a conflict arises because, for example, a station moves into a new market, ATSC A/65 requires the new entrant to change its PSIP major channel number to avoid the conflict:

If, after February 17, 2009, an RF channel previously allotted for NTSC in a market is assigned to a newly-licensed DTV licensee in that market, the newly-licensed DTV licensee shall use, as its major channel number, the number of the DTV RF channel originally assigned to the previous NTSC licensee of the assigned channel.¹⁴

Section 73.682(d) of the Commission's rules incorporates this requirement into the Commission's rules for full-power stations.¹⁵

This PSIP rule perfectly describes the current situation between KVNV(TV) and WFSB(TV). KVNV(TV) will operate on RF Channel 3. That channel was previously allotted for NTSC use by WFSB(TV) in large portions of KVNV(TV)'s DTV Service Area. Having moved across the country to the New York DMA, KVNV(TV) will be "a newly-licensed DTV licensee in that market." Therefore, because KVNV(TV)'s use of Virtual Channel 3 would

¹² "ATSC Standard: Program Information Protocol for Terrestrial Broadcast and Cable (PSIP)," Advanced Television Systems Committee, Doc. A/65:2013, Rev. Aug. 7, 2013 ("ATSC A/65B"), at 91.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 47 C.F.R. §73.682(d).

conflict with WFSB(TV)'s longstanding use of Channel 3, KVVN(TV) must use the RF channel number for WFSB(TV) – Channel 33 – as its Virtual Channel.

Binding Bureau precedent confirms that KVVN(TV) must operate on Virtual Channel 33. In 2010, when the Bureau allotted DTV Channel 5 to Seaford, Delaware, the Bureau did not assign Virtual Channel 5 to the Seaford station. Instead, the Bureau assigned Virtual Channel 36 to the allotment because of the “overlapping DTV service contours between WTTG(TV), [Virtual Channel 5], Washington, D.C. and the channel 5 allotment at Seaford.”¹⁶ Channel 36 is WTTG(TV)'s RF Channel.

Commission rules compel the same result here. KVVN(TV) is the new entrant into the market. Its noise limited contour will overlap the noise limited contour for WFSB(TV) – a station with a long-established presence on Channel 3. Therefore, KVVN(TV) cannot operate on the same Virtual Channel as WFSB(TV). Instead, it must operate on Virtual Channel 33. As Meredith demonstrated in its Informal Objection, assigning Virtual Channel 33 to KVVN(TV) will not conflict with any other full power television station.¹⁷

In its Opposition, PMCM claims that the Bureau should disregard the contour overlap because “KVVN and WFSB are not located in the same market.”¹⁸ *Seaford, Delaware*, however, makes it abundantly clear that a station's contour – not its DMA – is the touchstone for whether a full-power station may operate on the same virtual channel as another.¹⁹ In *Seaford, Delaware*, the Bureau determined that contour overlap was likely. Therefore, it assigned the new entrant

¹⁶ *Amendment of Section 63.622(i), Post-Transition Table of DTV Allotments, Television Broadcast Stations (Seaford, Delaware)*, 25 FCC Rcd 4466, ¶15 (2010)

¹⁷ Informal Objection at 3.

¹⁸ See Opposition at 7.

¹⁹ Given that PMCM was a party to the *Seaford, Delaware* proceeding, Meredith is surprised that PMCM would claim here that the signal contour overlap could have no bearing on the Bureau's decision. See Opposition at 7.

Virtual Channel 36 to avoid a PSIP conflict. Commission rules require that the Bureau follow the same procedures here by assigning Virtual Channel 33 to KVNV(TV).

II. The Letter Decision's Failure to Address the PSIP Conflict Was in Error and Must Be Corrected on Reconsideration.

Despite Commission rules and binding precedent requiring KVNV(TV) to use the Channel 33 as its Virtual Channel, the Letter Decision held that it was "premature" to determine KVNV(TV)'s Virtual Channel at this pre-construction stage.²⁰ "Rather, such an objection to virtual channel designations is customarily considered after grant of the license modification application in a separate proceeding that solely addresses the virtual channel designation."²¹ *Seaford, Delaware*, however, demonstrates that the Bureau in fact will determine virtual channel designations before a license application is granted.

In *Seaford, Delaware*, the FCC assigned the new Seaford station its Virtual Channel number at the first possible opportunity: the order allotting channel 5 to Seaford, Delaware. The Commission released the *Seaford, Delaware* decision on April 28, 2010.²² The Commission did not grant a construction permit for this station until more than a year later on May 4, 2011, and the Commission did not even assign this station a call sign until June 14, 2012. As a result of the Bureau's decision in *Seaford, Delaware*, when the permittee of the station commences operations, it will do so on Virtual Channel 36. Thus, contrary to what the Letter Decision suggests, the Bureau does not wait until after grant of a license application to assign a Virtual Channel. Instead, it will resolve a potential PSIP dispute at the first opportunity after the issue is raised.

²⁰ Letter Decision at 1.

²¹ *Id.* at 2.

²² *Seaford, Delaware*, 25 FCC Rcd at ¶15.

III. The Bureau Should Assign Virtual Channel 33 to KVNV(TV) Without Delay.

By declaring the PSIP issue “premature,” the Letter Decision suggests that the Bureau can wait to assign KVNV(TV) a PSIP channel. Meredith respectfully disagrees. The time to assign a Virtual Channel to KVNV(TV) is now. The construction permit for KVNV(TV) grants PMCM automatic program test authority. Thus, PMCM requires a Virtual Channel assignment that is consistent with FCC rules and ATSC A/65 before commencing program tests. If PMCM commences operations on Virtual Channel 3, it will do so in violation of FCC rules. Under Section 1.80, the base forfeiture for unauthorized emissions is \$4,000 per day.²³ Given the possibility of a substantial forfeiture if PMCM operates on the wrong Virtual Channel, the Bureau should remove the potential for such a result by assigning Virtual Channel 33 to KVNV(TV) – as required by *Seaford, Delaware* and ATSC A/65.

Aside from violating FCC rules, if PMCM operates on Virtual Channel 3, it will cause disruptions to local viewers. Even assuming every DTV receiver operates exactly as PMCM speculates in its Opposition, it still is unclear on what channel over-the-air viewers will find WFSB(TV)’s programming. Today, WFSB(TV)’s CBS programming can be found on Channel 3.1. If KVNV(TV) also operates on Virtual Channel 3, WFSB(TV) might remain on Channel 3.1, but it might not. Or, over-the-air viewers might see multiple stations on Channel 3.1. Regardless, different DTV receivers will resolve the conflict differently. For example, if KVNV(TV) operates with four or five standard definition multicast channels, WFSB(TV) might appear on Channel 3, but only after first cycling through all of KVNV(TV)’s program streams. In any event, when tuning to Channel 3, many viewers, naturally, would assume that KVNV(TV)’s programming was Meredith’s programming causing substantial confusion in

²³ 47 C.F.R. §1.80.

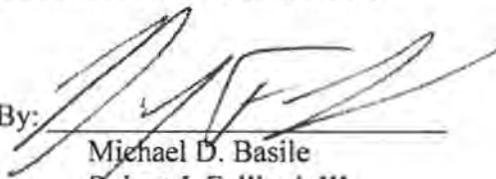
WFSB(TV)'s market. This conflict also could affect MVPDs that receive WFSB(TV) over the air at their headend or local receive site if their antennas lock on to stations via their Virtual Channel. Those MVPDs would receive no notice of the potential PSIP conflict that KVNV(TV) would cause when it commences operations. The Bureau can avoid these problems by promptly declaring that KVNV(TV) must commence program tests using Virtual Channel 33.

CONCLUSION

Because KVNV(TV) is the new entrant to the market and its PSIP Channel will conflict with WFSB(TV)'s PSIP Channel, ATSC A/65 and Commission rules requires the station to use WFSB(TV)'s RF Channel as its Virtual Channel. The Bureau, therefore, should grant this Petition and affirmatively declare that KVNV(TV) must operate on Virtual Channel 33. As the Bureau did in *Seaford, Delaware*, the Bureau should assign a PSIP virtual channel to KVNV(TV) before KVNV(TV) commences operations and before there is any opportunity for viewer disruption.

Respectfully submitted,

MEREDITH CORPORATION

By: 
Michael D. Basile
Robert J. Folliard, III

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Washington, D.C. 20004
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May 22, 2014

CERTIFICATE OF SERVICE

I, Rayya Khalaf, a secretary at the law firm of Cooley LLP, do hereby certify that a true and correct copy of the foregoing "Petition for Reconsideration and Request for Declaratory Ruling" was served by first-class U.S. mail, postage-prepaid, unless otherwise indicated, on the 22th day of May, 2014 on the following:

Barbara Kreisman, Esq. *
Chief, Video Division
Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Harry F. Cole, Esq.
1300 N. 17th Street
11th Floor
Arlington, VA 22209


Rayya Khalaf

* Via hand delivery.

KVNV DTV 3
Middletown Township, NJ

June 6, 2014

Via Certified Mail, Return Receipt Requested

Time Warner Cable
13820 Sunrise Valley Drive
Herndon, VA 20171

Re: Mandatory Carriage Election for KVNV, Middletown Township, NJ

Dear Sir or Madam:

Pursuant to Section 614 of the Communications Act of 1934, as amended, and Section 76.64(f)(4) of the rules of the Federal Communications Commission, this will inform you that Television Station KVNV, Middletown Township, New Jersey (the "Station") will commence operation as a new television station in the New York, New York DMA during the week of August 4, 2014.

PMCM TV, LLC, the licensee of the Station, hereby elects mandatory carriage of the Station's television signal pursuant to Section 76.56(b) on all cable systems operated by Cablevision Systems Corp. or its subsidiaries and affiliates serving the New York, New York DMA, including but not necessarily limited to, those set forth on Exhibit A hereto, for the election period ending December 31, 2014. The Station is licensed to Middletown Township, New Jersey, which is located in Monmouth County, New Jersey and is part of the New York, New York DMA. KVNV will be broadcasting from 4 Times Square in New York City serving the entire New York DMA. The Station therefore is entitled to elect mandatory carriage on your system(s) under the rules of the FCC. Pursuant to Section 76.57 of the FCC's rules.

PMCM TV, LLC requests carriage of the Station on Channel 3, its over-the-air channel number. As KVNV will be broadcasting HD in 720p we are also respectfully requesting the station be simultaneously carried on the same corresponding number on the HD tier as is normally afforded other local broadcasters who have chosen on channel carriage.

Time Warner Cable
 June 6, 2014
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Exhibit A
 Cable Communities

Community Unit ID	Community Name	County	State
NJ0082	FORT LEE	BERGEN	NJ
NJ0092	EDGEWATER	BERGEN	NJ
NJ0203	RIDGEFIELD	BERGEN	NJ
NJ0208	ENGLEWOOD CLIFFS	BERGEN	NJ
NJ0232	CLIFFSIDE PARK	BERGEN	NJ
NJ0251	ENGLEWOOD	BERGEN	NJ
NJ0252	PALISADES PARK	BERGEN	NJ
NJ0253	FAIRVIEW	BERGEN	NJ
NJ0254	RIDGEFIELD PARK	BERGEN	NJ
NJ0339	LITTLE FERRY	BERGEN	NJ
NJ0427	MOONACHIE	BERGEN	NJ
NJ0431	LEONIA	BERGEN	NJ
NJ0484	TETERBORO	BERGEN	NJ
NJ0338	GUTTENBERG	HUDSON	NJ
NY0220	LA GRANGE	DUTCHESS	NY
NY0221	PLEASANT VALLEY	DUTCHESS	NY
NY0222	POUGHKEEPSIE	DUTCHESS	NY
NY0223	POUGHKEEPSIE	DUTCHESS	NY
NY0362	TIVOLI	DUTCHESS	NY
NY0477	RED HOOK	DUTCHESS	NY
NY0478	RED HOOK	DUTCHESS	NY
NY0479	RHINEBECK	DUTCHESS	NY
NY0480	RHINEBECK	DUTCHESS	NY
NY1280	BROOKLYN	KINGS	NY
NY0104	NEW YORK	NEW YORK	NY
NY0234	NEW YORK	NEW YORK	NY
NY0218	DEERPARK	ORANGE	NY
NY0219	PORT JERVIS	ORANGE	NY
NY0243	CORNWALL	ORANGE	NY
NY0244	CORNWALL	ORANGE	NY
NY0246	NEW WINDSOR	ORANGE	NY
NY0247	NEWBURGH	ORANGE	NY
NY0248	NEWBURGH	ORANGE	NY
NY0484	MONTGOMERY	ORANGE	NY
NY0492	MONTGOMERY	ORANGE	NY
NY0502	BLOOMING GROVE	ORANGE	NY
NY0503	WASHINGTONVILLE	ORANGE	NY
NY0513	WALDEN	ORANGE	NY
NY0514	CRAWFORD	ORANGE	NY
NY0547	MAYBROOK	ORANGE	NY
NY0717	WALKKILL	ORANGE	NY

Time Warner Cable
 June 6, 2014
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Community Unit ID	Community Name	County	State
NY0773	HIGHLAND FALLS	ORANGE	NY
NY0819	HIGHLAND	ORANGE	NY
NY0821	MIDDLETOWN	ORANGE	NY
NY0845	GOSHEN	ORANGE	NY
NY0846	GOSHEN	ORANGE	NY
NY0970	WAWAYANDA	ORANGE	NY
NY1022	U S MILITARY ACADEMY	ORANGE	NY
NY1088	OTISVILLE	ORANGE	NY
NY1089	MOUNT HOPE	ORANGE	NY
NY1090	HAMPTONBURGH	ORANGE	NY
NY1648	CHESTER	ORANGE	NY
NY1281	QUEENS	QUEENS	NY
NY1340	QUEENS	QUEENS	NY
NY1312	STATEN ISLAND	RICHMOND	NY
NY0161	JEFFERSONVILLE	SULLIVAN	NY
NY0198	LIBERTY	SULLIVAN	NY
NY0225	ROCKLAND	SULLIVAN	NY
NY0439	MAMAKATING	SULLIVAN	NY
NY0440	WOODRIDGE	SULLIVAN	NY
NY0441	FALLSBURG	SULLIVAN	NY
NY0464	LIBERTY	SULLIVAN	NY
NY0472	NEVERSINK	SULLIVAN	NY
NY0488	DELAWARE	SULLIVAN	NY
NY0507	TUSTEN	SULLIVAN	NY
NY0524	CALLICOON (YOUNGSVIL	SULLIVAN	NY
NY0548	MONTICELLO	SULLIVAN	NY
NY0597	HIGHLAND	SULLIVAN	NY
NY0621	BETHEL	SULLIVAN	NY
NY0628	THOMPSON	SULLIVAN	NY
NY0718	BLOOMINGBURG	SULLIVAN	NY
NY0719	WURTSBORO	SULLIVAN	NY
NY1115	FORESTBURGH	SULLIVAN	NY
NY1324	FREMONT	SULLIVAN	NY
NY1377	LUMBERLAND	SULLIVAN	NY
NY1558	COCHECTON	SULLIVAN	NY
NY0163	HURLEY	ULSTER	NY
NY0164	KINGSTON	ULSTER	NY
NY0165	ESOPUS	ULSTER	NY
NY0166	KINGSTON	ULSTER	NY
NY0167	ULSTER	ULSTER	NY
NY0168	WOODSTOCK	ULSTER	NY
NY0262	SAUGERTIES	ULSTER	NY
NY0400	MARLBORO	ULSTER	NY
NY0436	WAWARSING	ULSTER	NY

Time Warner Cable

June 6, 2014

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Community Unit ID	Community Name	County	State
NY0437	ELLENVILLE	ULSTER	NY
NY0438	ROCHESTER	ULSTER	NY
NY0473	OLIVE	ULSTER	NY
NY0481	SAUGERTIES	ULSTER	NY
NY0494	MARBLETOWN	ULSTER	NY
NY0495	ROSENDALE	ULSTER	NY
NY0515	SHAWANGUNK	ULSTER	NY
NY0556	SHANDAKEN	ULSTER	NY
NY0600	NEW PALTZ	ULSTER	NY
NY0601	NEW PALTZ	ULSTER	NY
NY0766	GARDINER	ULSTER	NY
NY1290	PLATTEKILL	ULSTER	NY
NY1291	LLOYD	ULSTER	NY
NY1463	DENNING	ULSTER	NY
NY1493	HURLEY (W)	ULSTER	NY
NY1989	HARDENBURGH	ULSTER	NY
NY0398	MOUNT VERNON	WESTCHESTER	NY



STAMP & RETURN
1919 Pennsylvania Avenue N.W.
Washington, D.C. 20006-3401

Frederick W. Giroux
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fredgiroux@dwt.com

July 11, 2014

ACCEPTED/FILED

JUL 11 2014

Federal Communications Commission
Office of the Secretary

VIA HAND DELIVERY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street SW
Washington, DC 20554

**Re: Application of PMCM TV, LLC
File No. BPCDT-20130528AJP; Facility ID No. 86537**

Dear Ms. Dortch:

Comcast Cable Communications, LLC, on behalf of its subsidiaries and affiliates, (“Comcast”) respectfully requests that the Commission expedite a final decision in the above-captioned matter in order to provide certainty in regards to the appropriate channel position for Television Station KVVN, Middletown Township, NJ (“KVVN”). In the alternative, Comcast requests that the Commission issue an Order permitting Comcast to delay carriage of KVVN until an appropriate time after the date on which the Media Bureau issues a decision in the above-referenced matter so that Comcast may satisfy any notification requirements associated with its signal carriage obligations.¹

By letter dated June 6, 2014, KVVN elected mandatory carriage on Comcast’s cable systems serving communities in the New York DMA, including certain Connecticut communities in Fairfield County and various other New Jersey and New York communities in the New York DMA.² KVVN indicated that it intends to commence operation on August 4, 2014 and requested carriage on Channel 3, KVVN’s over-the-air and virtual channel number.³ Under the Commission’s rules, KVVN’s election takes effect 90 days from the date it was made, in this case September 4, 2014. *See* 47 C.F.R. § 76.64(f)(4).

¹ In response to a similar request for mandatory carriage from KVVN, Cablevision requested that it not be required to launch KVVN for a period of 90 days after the Media Bureau issues an order resolving the channel dispute in this proceeding. *See* Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from Tara M. Corvo, Mintz Levin (dated, June 12, 2014) (“Cablevision Letter”).

² *See* Exhibit A. Letter to Michael Nissenblatt, Senior Vice President, Broadcast Relations, Comcast Cable Communications, LCC, from Robert McAllen, Managing Member, PMCM TV LLC (dated, June 6, 2014).

³ *See id.*

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Page 2

In response to KVVN's carriage request, Comcast began making arrangements to launch KVVN's signal on its New York DMA systems in compliance with the must carry rules. However, in early June, Comcast became aware of the Petition for Reconsideration and Request for Declaratory Ruling ("Petition") filed by Meredith Corporation ("Meredith") on behalf of WFSB, Hartford, CT.⁴ Meredith maintains that WFSB is entitled to continue to operate on Virtual Channel 3, and that KVVN be assigned an alternative Virtual Channel; Virtual Channel 33. Any change in KVVN's Virtual Channel would impact KVVN's channel positioning rights, and Comcast's channel positioning obligations, pursuant to 47 C.F.R. § 76.57. WFSB, by way of its long-standing association with channel 3, is currently retransmitted by Comcast on cable channel 3 in cable systems serving customers in Fairfield County, CT and Putnam, Dutchess, and Westchester Counties, NY in the New York DMA. Subsequent to WFSB's filing, Cablevision Systems Corporation and ION, Media License Company, LLC submitted letters in this proceeding addressing similar KVVN-channel 3 concerns.

Comcast does not take a position on the merits of Meredith's Petition. Rather, Comcast is concerned that the regulatory uncertainty concerning the rights to be placed on channel 3 could lead to an unnecessary degree of viewership disruption. To be sure, even routine carriage elections cause some disruption to Comcast's business operations, requiring realignment of channel lineups and addressing channel changes with other broadcast stations or cable networks. Going through that process, and then having to reverse it, not only would increase the disruption, but would increase consumer confusion and frustration.

If WFSB's Petition is not reconciled in the near-term, Comcast will have to make channel changes on its seventeen channel lineups serving cable communities in the New York DMA, educate its customers and franchising authorities on these changes and, then, possibly, duplicate efforts and/or reverse these changes if Meredith is ultimately successful on the merits of its case and KVVN is reassigned to a Virtual Channel other than channel 3. This outcome would waste time and resources from an administrative and manpower perspective and, more concerning, could lead to unnecessary customer confusion.

For the reasons stated above, Comcast requests that the Commission expedite its decision on the Petition in order to provide Comcast with adequate time to meet its September carriage obligations to KVVN and avoid any unnecessary viewership disruption. In the alternative, the Commission should alleviate Comcast of its immediate must carry obligation to begin carriage of KVVN on cable channel 3 in September and permit Comcast to delay implementing KVVN's must-carry request until at least 90 days from the date that the Media Bureau releases a final

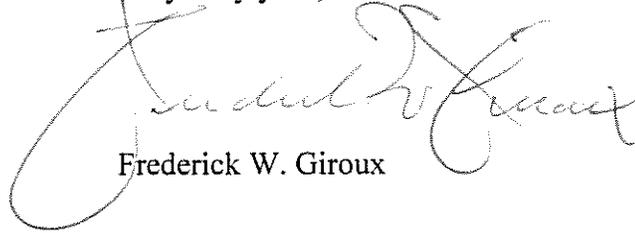
⁴ See Petition for Reconsideration and Request for Declaratory Ruling of Meredith Corporation, File No. BPCDT-20130528AJP, Facility ID No. 86537. See also, Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from Mace Rosenstein, Covington & Burling LLP, on behalf of ION Media License Company, LLC (dated June 18, 2014).

July 11, 2014
Page 3

decision on the Petition and establishes certainty in regards to what channel position KVVN should occupy through-out the New York DMA.

Please contact the undersigned if you have any questions regarding this matter.

Very truly your,



Frederick W. Giroux

cc: Barbara Kreisman
Steven Broeckaert
Hossein Hashemzadeh
Michael D. Basile
Tara M. Corvo
Donald J. Evans
Mace Rosenstein

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July 11, 2014

VIA HAND DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re: Application of PMCM TV, LLC; File No. BPCDT-20130528 AJP;
Facility ID No. 86537**

Dear Ms. Dortch:

Time Warner Cable Inc. ("TWC"), through its undersigned attorneys, hereby writes with regard to Cablevision Systems Corporation's ("Cablevision") June 12, 2014 request for an order allowing Cablevision to delay implementing the must-carry request and channel position election of Television Station KVVN, Middletown Township, NJ ("KVVN") until 90 days from the date the Media Bureau issues a final decision on the virtual channel that KVVN is entitled to occupy. For the reasons stated below, TWC requests that the Commission issue a similar order allowing TWC to delay implementing the must-carry request and cable channel position election that it has received from KVVN.

TWC owns and operates cable television systems serving over one million subscribers residing within the area defined as the New York, NY Designated Market Area. On or about June 6, 2014, TWC received from PMCM TV, LLC ("PMCM") a formal notice electing mandatory carriage for KVVN on Cable Channel 3. Channel 3 currently has been designated by the Media Bureau as KVVN's over-the-air channel and its virtual channel. The notice received from PMCM states that KVVN will commence operations in the New York DMA "during the week of August 4, 2014." There are a variety of different residential and business channel lineups serving these systems; not only is Cable Channel 3 already occupied on the overwhelming majority of these line-ups, but in most instances the programming service currently occupying Cable Channel 3 has been carried on that channel for many years.

If PMCM meets the activation timetable indicated in the aforesaid notice and otherwise meets the requirements for mandatory carriage, TWC may have to initiate carriage of KVVN on Cable Channel 3 as early as early September, 2014. See 47 C.F.R. §76.64(f)(4). However, the question of KVVN's virtual channel assignment is presently pending before the Commission in a hotly-contested dispute between Meredith Corporation ("Meredith"), licensee of Station WFSB

Marlene H. Dortch
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(TV) (“WFSB”) and PMCM. WFSB is a Hartford, CT station that currently occupies Virtual Channel 3. On May 22, 2014, Meredith petitioned the Media Bureau to reconsider its grant of KVVN’s construction permit application on April 17, 2014, and, if necessary, to declare that KVVN’s virtual channel is Channel 33, not Channel 3.¹

As indicated above, on June 12, 2014, Cablevision filed a request for the identical relief requested herein by TWC. Contrary to the assertions made by PMCM in its June 26, 2014 opposition to Cablevision’s request, PMCM’s right to carriage on Virtual Channel 3 is not at all “settled” given Meredith’s pending petition to have KVVN’s virtual channel changed to Channel 33. There is indeed “uncertainty” as to whether the fact that KVVN operates on virtual Channel 3 in Ely, NV is determinative of its virtual channel assignment upon its reallocation to the New York DMA. In this regard, TWC notes that the only reason that a spot was open in New Jersey for KVVN was that WWOR, which previously broadcast on VHF RF Channel 9 moved to UHF RF Channel 38, while retaining Channel 9 as its virtual channel. Thus, what mattered was whether there was a station with an RF VHF frequency in New Jersey, not the virtual channel of the station filling the vacancy. PMCM’s contention that it would be contrary to the intent of Section 331(a) for it to be assigned a non-VHF virtual channel does not hold water. Finally, Meredith’s pleadings have very clearly articulated the certainty that the assignment of KVVN to Virtual Channel 3, the same virtual channel on which WFSB operates, will cause disruption and confusion for viewers who have a long history of associating that channel with WFSB (but no expectations whatsoever with respect to the location of KVVN).²

In light of the facts and legal arguments, and given the indisputable fact that KVVN has no “brand equity” in Virtual Channel 3 in the New York DMA, TWC believes that WFSB has made a compelling case for relief. Under the circumstances, the prudent and equitable course for the Commission to take is to minimize the risk of subscriber confusion and disruption by granting both Cablevision and TWC relief in the form of an order delaying the implementation of KVVN’s demand for “on-channel” carriage of its signal on Cable Channel 3.

TWC seconds Cablevision’s contention that the potential for confusion and disruption is particularly significant in this case, where a new must-carry station is entering the New York DMA and requesting carriage on a low channel number that TWC’s consumers have long associated with other programming. The programming services (broadcast and non-broadcast) that TWC currently carries on Cable Channel 3 have occupied that location for many, many years. Repositioning those services will set off a domino effect that will add to the disruption and confusion. TWC will have to negotiate new channel positions for the services being

¹ Application of PMCM TV, LLC for a Television Station Construction Permit for KVVN (TV), Middletown Township, New Jersey, File No. BPCDT-20130528AJP, Petition for Reconsideration and Request for Declaratory Ruling of Meredith Corporation (May 22, 2014).

² TWC does not currently carry WFSB, which is assigned to the Hartford, CT DMA, on any of TWC’s New York DMA cable systems.

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Page 3

displaced and those negotiations could result in the displacement of other services, with further negotiations and possible displacements.

Thus, like Cablevision, TWC could have to redo its channel line-ups across the New York DMA (where TWC is one of the largest providers of cable service) in order to accommodate KVNV. And like Cablevision, TWC could face the very difficult prospect of rearranging its channel line-ups a second time if it begins carrying KVNV on Cable Channel 3 and Meredith then prevails in its petition, resulting in a DMA-wide change in KVNV's virtual channel.

In addition to the burden of having to renegotiate various carriage agreements and reconfigure its channel line-ups, only to have to undo those changes at a later date, TWC could face a substantial burden in giving timely and effective notice to the more than one million subscribers who could be affected by the initial channel line-up changes and then by the subsequent changes that would follow a decision changing KVNV's virtual channel. The situation would be exacerbated by the fact that the notice of the initial changes would be given during the late summer when many subscribers are on vacation.

In short, by granting the requested relief, the Commission will spare the waste of resources and eliminate the consumer confusion that will occur if TWC has to engage in widespread channel positioning negotiations and subscriber notifications before the Media Bureau resolves the pending dispute over KVNV's virtual channel position.

For the foregoing reasons, TWC respectfully requests that the Commission immediately issue an order allowing TWC to delay implementing PMCM's must-carry request and channel position election on behalf of KVNV for at least 90 days from the date the Media Bureau issues a final decision on KVNV's virtual channel position.

Sincerely,



Seth A. Davidson

Counsel to Time Warner Cable Inc.

cc (via email):

Barbara Kreisman, FCC
Donald J. Evans, Fletcher, Heald & Hildreth (PMCM)
Mace Rosenstein, Covington & Burling (ION)
Tara Corvo, Mintz Levin (Cablevision)
Michael D. Basile (Meredith)

AM 35050154.1



Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re)
)
PMCM TV, LLC)
)
Requests of Various Cable Television)
Operators to Defer Carriage of)
Station WJLP(TV) (formerly KVNV(TV),)
FCC Facility ID No. 86537,)
Middletown Township, New Jersey)

Accepted/Files

OCT 22 2014

Federal Communications Commission
Office of the Secretary

To: Marlene H. Dortch, Secretary

For transmission to: The Commission

**REPLY OF PMCM TV, LLC
TO OPPOSITION OF MEREDITH CORPORATION**

DONALD J. EVANS
HARRY F. COLE

Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street – 11th Floor
Arlington, Virginia 22209
703-812-0400

Counsel for PMCM TV, LLC

October 22, 2014

1. PMCM TV, LLC (“PMCM”) hereby replies to the Opposition filed by Meredith Corporation (“Meredith”) in the above-captioned matter.¹

2. Meredith claims that the decision of the Media Bureau (“Bureau”) below is based on “facts”. *See, e.g.*, Opposition at 4. To the contrary, the Bureau’s decision is based on inaccuracy piled on inaccuracy. First, even though it accurately quotes ATSC A/65 with respect to the need to use different “two-part channel number combinations”, Bureau Letter at 3, the Bureau ignores that clear language. The Bureau instead focuses exclusively on the use of `major_channel_numbers` only, without regard to `minor_channel_numbers`. This reflects a fundamental misunderstanding of the PSIP concept as expressly set out in ATSC A/65. The Bureau appears to believe that ATSC A/65 prohibits signal overlap from two stations with the same `major_channel_number` regardless of the stations’ `minor_channel_numbers`. But ATSC A/65 expressly contemplates precisely such overlap. At Annex B, Section B.1.1 (5), ATSC A/65 provides that

[t]he values in the `minor_channel_number` fields shall be partitioned to ensure that there is no duplication of the two-part channel number in the DTV Service Area, ***including the overlapping DTV Service Areas of other licensees using that same major_channel_number.***

(Emphasis added.) Since the two-part PSIP channel number used by PMCM – 3.10 – provides the `minor_channel_number` partitioning directed by ATSC A/65, no basis at all exists for the Bureau’s action below: PMCM’s PSIP is in full compliance with ATSC A/65 and there is no reason to relieve any cable system of the obligation to carry Station WJLP as required.²

¹ While Meredith’s Opposition was apparently filed on September 9, 2014, it was not served by Meredith on PMCM until October 8, 2014. *See* Attachment A hereto. Because of that delay in service, PMCM requests an extension of the time within which to respond to the Opposition to and including October 22, 2014, which would afford PMCM the time to which it would ordinarily be entitled for the preparation and submission of a reply. PMCM understands that Meredith does not oppose such an extension.

² For its part, throughout its Opposition Meredith refers repeatedly, and incorrectly, to “Virtual Channel 3”, ignoring the fact that, according to ATSC A/65, the term “virtual channel” refers to the *two-part* channel designation, *i.e.*, both the `major_channel_number` ***and*** the `minor_channel_number`. While Meredith’s

3. Second, the Bureau Letter is based on the doubly inaccurate assertion that Meredith and PMCM have “conflicting channel placement claims” on certain cable systems in Fairfield County (the only county over which the stations’ signals overlap). *Id.* Contrary to the Bureau’s claim, no such conflict exists for two separate and independent reasons.

4. As an initial matter, PMCM has advised both Meredith and the Bureau that, in order to resolve this matter quickly, PMCM is willing to waive any claim to carriage on cable channel 3 in Fairfield County for as long as Meredith asserts a contrary claim.³ In other words, even if, *arguendo*, there were some conflict on that front, PMCM has eliminated that conflict. To the extent that the Bureau’s action below is premised on some supposed conflict over the right to be carried on cable channel 3 in Fairfield County, the Bureau’s action is baseless.

5. The Bureau’s error on this point is aggravated by a serious misconception concerning Meredith’s claim to carriage on cable channel 3 in Fairfield County. The Bureau seems to believe that Meredith’s claim derives from must-carry rights. *Id.* (“WFSB(TV) is entitled to mandatory carriage on cable channel 3...”). But Meredith’s station (WFSB) is, and through the 2017 term⁴ will be, carried on Fairfield County cable systems pursuant to retransmission consent arrangements, *not* “mandatory carriage” rights. By contrast, PMCM’s right to carriage on Fairfield

insistence on ignoring the dispositive significance of minor_channel_numbers here is understandable, if regrettable, the Bureau’s failure to grasp that ATSC A/65 accords no special rights to major_channel_numbers standing alone is troubling. That failure is not limited to the Bureau’s Letter at issue here. As far as PMCM can determine, the Bureau maintains no record at all of any station’s minor_channel_number(s). Without such records, the Bureau is incapable of determining compliance with the terms of ATSC A/65 unless the affected stations voluntarily provide the Bureau with their two-part PSIP channel numbers. Here, of course, WJLP’s two-part PSIP number – 3.10 – plainly complies with ATSC A/65.

³ PMCM’s willingness is premised on prompt, favorable resolution of the instant matter. PMCM is statutorily-entitled to cable carriage on its over-the-air channel and will assert that right with respect to all cable systems, including those in Fairfield County, if this matter is not resolved promptly and favorably.

⁴ According to a document in WFSB’s online public inspection file, Meredith appears to have elected retransmission consent rather than must-carry through the 2015-2017 term.

County cable systems *is* based on PMCM's must-carry rights. It is well-established that a station exercising must-carry rights to certain channel positioning has priority over a contrary claim deriving from non-must-carry rights, *e.g.*, from retransmission consent agreements. Thus, even if PMCM had not ceded its carriage rights (as described above), there would still be no conflict. Again, the Bureau's eagerness to deprive PMCM of crucial cable carriage is founded on an erroneous factual premise.

6. In view of the foregoing, Meredith's facile claim that the Bureau's action below is "amply supported by the Bureau's unchallenged statement of the facts" is simply wrong. The Bureau's "facts" were wrong and they are directly challenged by PMCM here.

7. Meredith displays a similarly cavalier disregard for the facts. For example, Meredith self-servingly, and inaccurately, asserts that there exist "competing claims to virtual channel 3". Meredith Opposition at 7. That assertion suggests, inaccurately, both that the term "virtual channel 3" has any meaning and that one and only one station in a given area can utilize major_channel_number 3 in its PSIP. But as noted in Footnote 2, above, the term "virtual channel 3" is inconsistent with ATSC A/65's definition of "virtual channel". Moreover, also as noted above, ATSC A/65 demonstrates expressly and with astonishing clarity that non-commonly-owned stations with overlapping signals *can* utilize the same major_channel_number; the notion of "competing claims" to a single major_channel_number is, thus, meaningless. While some conflict with respect to *two-part* channel numbers might theoretically⁵ arise, no such conflict exists here because, as

⁵ PMCM emphasizes that the possibility of a conflict with respect to identical overlapping two-part PSIP channel numbers is, *at the very most*, only theoretical because, as PMCM has previously demonstrated, there already exist more than 100 such situations throughout the country. *See, e.g.*, PMCM's Comments in MM Docket No. 14-150 (submitted October 14, 2014), which include a listing of those situations compiled by PMCM from Commission and non-Commission sources. Those situations appear to have been in place for all (or at least most) of the more than five years since the June, 2009 DTV transition, and possibly longer. To the best of PMCM's knowledge, no claims of "conflict" have arisen with respect to any of those situations, and the Bureau has not taken any steps on its own to address any of those situations. Since the Bureau has

directed by ATSC A/65, PMCM is utilizing a separate and distinct (*i.e.*, “partitioned”) `minor_channel_number`.

8. Meredith also claims that PMCM has sought “an unprecedented waiver” with respect to WJLP’s two-part PSIP channel number. Meredith Opposition at 6. PMCM has requested no such waiver because no waiver is required. The only Commission rule relative to designation of PSIP channel numbers is Section 73.682(d), which merely incorporates by reference, and mandates compliance with, ATSC A/65. PMCM’s two-part PSIP channel number complies with ATSC A/65, eliminating any need for a waiver of any kind.⁶

9. Finally, Meredith attempts to make light of the Bureau’s action on review here, as if this kind of thing happens every day. But the Bureau’s action is nothing if not extraordinary: it forecloses carriage of WJLP on three major cable systems throughout the New York DMA *indefinitely* simply because of a non-existent “conflict” relating to carriage in a single peripheral county. Meredith mischaracterizes the Bureau’s action as staying PMCM’s carriage rights “until the Bureau can adjudicate the disputed PSIP issues.” Meredith Opposition at 4. That is inaccurate: the Bureau’s order relieves the cable companies in question of the obligation to carry WJLP until the matter of WJLP’s PSIP channel number has been “finally” resolved. The notion of “finality” ordinarily includes not only a first-level decision (here, for example, a Bureau decision), but also all possible levels of appeal up to and including the U.S. Supreme Court – a process which could easily

not taken any steps to address the 100+ instances of overlapping two-part PSIP channel designations, one might legitimately wonder why the Bureau has chosen to impose itself here, where no such overlap is in issue.

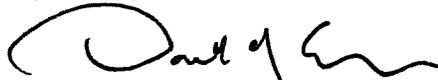
⁶ PMCM is also constrained to observe that the Commission’s rules do not themselves contemplate that licensees will apply for or otherwise request any particular PSIP channel number, nor does any construction permit or license issued by the Commission contain reference to the PSIP channel number to be used by the permittee or licensee. This presumably explains why, as noted above in Footnote 2, the Bureau does not appear to have any record of the `minor_channel_numbers` of any of its licensees’ PSIPs, even though `minor_channel_numbers` are an essential element of the ATSC A/65 PSIP design.

take five or more years to complete. Even if PMCM prevails at the very first level, the cable companies would not be required to carry WJLP until years later (assuming that Meredith or some other party is willing to prosecute appeals). That is nothing less than extraordinary.

10. That's particularly so because the Bureau's "finality" provision constitutes, in effect, the grant of an anticipatory stay preventing implementation of any intervening resolution favorable to PMCM. But the Commission generally declines to grant stays as a routine matter, and certainly not in this anticipatory fashion. Moreover, in order to obtain a stay, a party must ordinarily demonstrate, *inter alia*, that it will be irreparably harmed absent a stay. The only harm that Meredith has posited is some possible inconvenience that might arise should WJLP's cable channel need to be changed at some point. Such inconvenience is, of course, something that cable companies (and their subscribers) routinely encounter without dire effects. Even if Meredith's self-servingly overstated description of that inconvenience were to be credited *arguendo*, it would not rise to the level of "irreparable harm" sufficient to justify the stay the Bureau has effectively granted. That, too, underscores the extraordinary nature of the decision below.

11. The Bureau, relying on non-existent "facts" and an incorrect understanding of ATSC A/65, has prevented WJLP from obtaining – possibly for years to come – the cable carriage to which it is statutorily entitled. That decision should be reversed immediately, assuring WJLP of its carriage rights now, rather than years from now.

Respectfully submitted,


/s/ Donald J. Evans

Donald J. Evans

Harry F. Cole

Fletcher, Heald & Hildreth, P.L.C.

1300 N. 17th Street – 11th Floor

Arlington, Virginia 22209

703-812-0400

evans@fhhlaw.com

Counsel for PMCM TV LLC

October 22, 2014

Attachment A

From: Logan, John [mailto:jlogan@cooley.com]
Sent: Wednesday, October 08, 2014 11:21 AM
To: Donald Evans
Cc: Basile, Michael
Subject: PMCM TV, LLC: Meredith Opposition to Application for Review

Dear Don:

As a follow-up to our telephone conversation this morning, I am enclosing a copy of Meredith's Opposition to your client PMCM TV, LLC's Application for Review in the V matter. As we discussed, you inadvertently were left off the certificate of service and we have just discovered the omission.

We will make a corrected filing with the FCC and will of course consent to any reasonable extension of time if you should wish to respond on behalf of your client.

Sincerely yours,
John S. Logan
Cooley LLP
1299 Pennsylvania Avenue, NW • Suite 700
(enter from 12th and E Streets)
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CERTIFICATE OF SERVICE

I, Harry F. Cole, hereby certify that on this 22nd day of October, 2014, I caused copies of the foregoing "Reply of PMCM TV, LLC to Opposition of Meredith Corporation" to be placed in the U.S. Postal Service, first class postage prepaid, or hand-delivered (as indicated below) addressed to the following persons:

Chairman Thomas Wheeler (by hand)
Federal Communications Commission
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Washington, D.C. 20554

Commissioner Mignon Clyburn (by hand)
Federal Communications Commission
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Washington, D.C. 20554

Commissioner Jessica Rosenworcel
(by hand)
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Washington, D.C. 20006



Harry F. Cole

MB 14-150

SEP 9 - 2014

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

Federal Communications Commission
Office of the Secretary

In re Application of)
)
PMCM TV, LLC)
)
For Minor Modification of the License for)
KVVV(TV), Facility ID Number 86537,)
Middletown Township, New Jersey)
)

File No. BPCDT-20130528AJP

RECEIVED - FCC
AUG - 8 2014

Federal Communications Commission
Bureau / Office

Directed to: Office of the Secretary
Attention: Chief, Video Division, Media Bureau

Alternative PSIP Proposal

PMCM TV, LLC

Donald J. Evans
FLETCHER, HEALD & HILDRETH, P.L.C.
1300 North 17th Street, 11th Floor
Arlington, VA 22209
Phone: (703) 812-0400
Its Attorney

August 8, 2014

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Summary

PMCM TV, LLC ("PMCM") submits its analysis of the PSIP/cable channel carriage issue that has arisen in the captioned case. The analysis takes into account the discussion among the parties at a July 31, 2014 meeting convened by the staff to discuss the matter, as well as a survey of the PSIP allocation guidelines and the statutory and regulatory mandates requiring cable carriage on a station's "over-the-air" channel.

Based on this review, PMCM proposes a PSIP assignment that accommodates Meredith Broadcasting's concerns about perceived over the air and cable carriage impacts on its existing service. The combination of major channel 3 and minor channel 10 *et seq.* fully meets the requirements of ATSC A/65 Annex B for over the air reception issues (to the extent that there actually are any such issues given the lack of over the air viewership in Fairfield County), and PMCM's agreement to rescind its demand for cable carriage on Channel 3 in Fairfield County eliminates any issues regarding conflicting demands for channel 3.

PMCM also stresses the statutory and regulatory imperatives that give commercial TV stations the right to cable carriage on their actual over-the-air channels. The proposal set forth largely meets those requirements.

The proposal also takes into account the unique circumstances of KVVN's allocation to New Jersey as a VHF channel pursuant to a court order, a remedial measure that would be largely undercut by relegation to a non-VHF cable channel position.

Finally, PMCM offers an alternative PSIP/cable channel carriage assignment which would less effectively permit service to begin both on the air and on cable. This alternative would have PMCM accept major channel 14 as its PSIP but would also require an order mandating cable carriage on Channel 3, except in Fairfield County.

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

In re Application of)

PMCM TV, LLC)

File No. BPCDT-20130528AJP

For Minor Modification of the License for)
KVNV(TV), Facility ID Number 86537,)
Middletown Township, New Jersey)

Directed to: Office of the Secretary
Attention: Chief, Video Division, Media Bureau

Alternative PSIP Proposal

PMCM TV, LLC believes that the meeting among the Bureau staff and the parties last week was a constructive airing of the issues related to PSIP assignment for KVNV. While we disagree with some of the positions taken by the staff, we have taken into consideration the discussion in order to come up with a PSIP/channel carriage plan that would meet our needs, should address the concerns of Meredith Broadcasting, and would be consistent with the Bureau's thinking as we could divine it. The problem presented is to fashion a solution that maintains the integrity of the PSIP assignment protocols as enunciated in Annex B of ATSC A/65 while also complying with the bluntly stated will of Congress and the Commission that stations have the right to be carried by cable systems on their "over-the-air" channel.

As we understand it, the Bureau believes that Annex B requires that there be no overlap of the DTV Service Areas of television stations with the same major channel number in their

two-part virtual PSIP channels without the consent of other overlapping users of that major channel number. Ordinarily that policy would prevent Station KVVN(TV) from using its over-the-air RF Channel 3 as its major channel number for PSIP purposes, thereby preventing it from demanding cable carriage on its over-the-air channel, as authorized and contemplated by the statute and the rules.

At the outset, we note that the situation presented here, while not unique, is one where two overlapping stations have the right to major channel 3 in their PSIP by operation of Annex B of ATSC A/65. Paragraph (1) of Section B.1.1 of the Annex calls for the assignment of the NTSC RF channel number as the major channel number to a station which was operating on that channel at the time of its digital conversion. This paragraph, by its terms, applies to both KVVN and WFSB. We do not believe that Paragraph (4) of Section B.1.1 applies here because the application of that provision (which could be argued to cause the assignment of channel 33 to KVVN) is limited by its terms to situations where a channel is allotted to a "market" where the same major channel was previously assigned. The key here is market allotment. Everywhere else in Annex B the text refers explicitly to overlapping DTV Service Areas when it is referring to areas where there is signal overlap. In Paragraph 4, however, it uniquely refers to a "market," which must be presumed to have a different meaning than overlapping DTV Service Areas. As recently as August 6, the Media Bureau issued an Order indicating that a commercial TV station's "market" is its "designated market area" or DMA as defined by Nielsen.¹ This definition of a TV station's market is used consistently throughout the rules when the "market" (as opposed to signal contour coverage) is what is intended. In the present context, this makes perfect sense since it would be flatly erroneous on every possible factual level to say that a

¹ *Pine Telephone, Inc.*, DA 14-1142, re. August 6, 2014.

station in Hartford, CT in the Hartford DMA with its own nexus of local competitors, local advertising opportunities, local market conditions, and local programming needs is in the same "market" as a station in Middletown Township, NJ, which is separated from Connecticut by an entire state, is in a different DMA, and faces an entirely different matrix of competitive and business issues from the Hartford market. In no other instance does the Commission equate a "market" with partly overlapping service areas and it should not do so here.

It is also important in this context to note that Paragraph 4 expressly applies to the market where a channel is "allotted" -- not where its signal contours run. Reference to the table of allotments in Part 73.622 quickly confirms that WFSB's channel 3 was "allotted" to Hartford, CT which is in the Hartford DMA while KVVN's channel 3 is allotted to Middletown Township, NJ in the New York DMA. The use of "allotment" in the text confirms that the DMA of allotment rather than overlapping service areas was what was contemplated.²

Proposed Solution

How then do we reconcile the apparent Annex B prohibition on overlapping identical PSIPs with application of the subordinate paragraphs in Annex B which result in two overlapping stations having the same major channel? The staff indicated at the meeting that it would entertain a proposal to resolve this problem. Our proposal is that Station KVVN(TV) simply be assigned the two-part virtual PSIP channel 3.10 (with any additional KVVN program streams that may eventually be transmitted to be identified as 3.11, 3.12, etc.) while WFSB would retain PSIP channel 3.1 through 3.9.

² We also note in this connection that Channel 33 does not fall within the basic broadcast channel tier of the cable operators in the New York DMA. To be placed in each cable system's basic tier (see 614(b)(7) and 76.57(f)) KVVN would have to be placed elsewhere in each cable channel line-up with confusingly different channel designations in different cities and counties.

The advantages of this proposal are several.

Compliance with Annex B

First, it would be completely consistent with Annex B of ATSC A/65 which guarantees only that the “*two-part channel number combinations* used by a licensee will be different from those used by any other licensee with an overlapping DTV Service Area.” (Emphasis added.)³ Nothing in Annex B – or anywhere else that we’re aware of – precludes overlapping television signals with different two-part channel numbers, *i.e.*, where the overlapping stations share a common major channel number but have distinct minor channel numbers. To confirm this we have consulted with a number of experts knowledgeable about the PSIP assignment process and its effects, including Dr. Richard Chernock, the chairman of the ATSC. Dr. Chernock himself suggested the very approach proposed here as a solution which would obviate any PSIP problem. All agree that this approach would be consistent with ATSC A/65 *and* that there would be no confusion of the TV receiver by such a PSIP assignment. We invite the Commission to check with Dr. Chernock to verify our findings.

Our conclusion is, of course, confirmed in the laboratory of the real world. As we mentioned during the meeting, the Commission has *already* authorized multiple situations involving overlapping *identical* (*i.e.*, both major channel and minor channel numbers) PSIPs for stations serving millions of households. To the best of our knowledge, no adverse effects have occurred in any of those situations.⁴ That circumstance, repeated over and over in numerous parts of the country, demonstrates compellingly that the prophylactic mandate of the preamble to

³ Major channel numbers are to be uniquely assigned in different regions (defined as countries) under the ATSC.

⁴ There is no simple way to identify how many instances of overlapping identical PSIPs exist. Besides the situations in Louisiana-Arkansas-Mississippi (non-commonly owned stations KSLA, KETZ and WJTV all share virtual channel 12.1), in Nevada, and in New Jersey which we mentioned at the meeting, there are overlaps of full power and class A stations with identical PSIPs in Detroit and Chicago. (See attachments A, B, and C). In no case are we aware of any problem arising.

Annex B may be unnecessary – but we do not propose here to take issue with that. We note those circumstances simply to assure the Commission that (a) there is ample precedent for overlapping major channel PSIPs and (b) there need be no fear of any adverse consequences if our proposal is adopted. If overlapping identical PSIPs can co-exist in peace, non-identical overlapping PSIPs are even more secure.

By adding a separate and distinct minor channel, the Commission would – in full compliance with ATSC A/65 – eliminate any identical overlap at all with any other station already broadcasting with a PSIP that includes major channel 3. This would permit Meredith full flexibility to add new subchannels without a viewer even once having to spend the nanosecond necessary to scroll through PMCM's channels. Under this PSIP arrangement, WFSB will always come up as the first viewer choice for channel 3 in the limited areas where it can be received over the air, so there is no detriment whatsoever to WFSB's access to channel 3 vs. that of other competing stations in its market. Although the real world facts suggest that assignment of a much higher minor channel (*e.g.*, 3.10) is an unnecessary precaution, PMCM would accept that limitation in order to avoid any conceivable overlap of identical two-part channel number PSIPs. And, since ATSC A/65 guarantees freedom from overlap of *two-part* channel numbers, compliance with the PSIP protocol would be achieved.

We observe that nothing in Annex B requires the consent of other common major channel users when the two part PSIP is not identical. Because the two part PSIP combination is recognized as distinct from any other overlapping PSIP in the service area, no confusion can arise. To be sure, Paragraph 5 of Annex B permits co-owned stations to deviate from the usual PSIP assignment rules by voluntarily sharing the same major channel number, but it then prescribes that any potential confusion be eliminated by exactly the approach proposed here:

assigning distinct minor channel numbers. We must emphasize again that nothing in Annex B prevents overlapping major channel numbers as long the minor channel numbers are different. The system is designed to accommodate that very eventuality.⁵

The Bureau's concern with overlapping PSIPs here is especially curious since WFSB's channel 33 RF signal contour is substantially short-spaced to WCBS's channel 33 contour. See Attachment D⁶. The digital service contour overlap of these two stations embraces a huge area in south-central Connecticut and results in destructive interference to some 147,534 households and 381,414 people within the WFSB service contour in Fairfield County alone. This Commission-mandated RF overlap perhaps explains why over the air reception of WFSB in Fairfield County is virtually non-existent. Moreover, when analyzed with the assumption of a typical consumer antenna, there is no PSIP overlap at all. Recent data indicate that the cable and satellite penetration rate in Fairfield County is among the highest in the United States -- 92%. Accordingly, from a practical standpoint, the over-the-air viewership of WFSB is a non-factor in resolving the PSIP issue. The RF channel 33 DTV assignments already prevent most potential WFSB viewers in the overlap area from receiving a WFSB signal. And those that *can* receive a signal would have to use a high gain antenna oriented toward Hartford -- directly in the opposite direction from KVVN -- so that KVVN's signal would not be picked up at all. In other words, even if overlapping major channel PSIPs were a theoretical issue, which they are not, over-the-air viewers would not be substantively affected.

⁵ The solution proposed here would also eliminate any possibility of adverse effect on the Channel 3 PSIP user in Philadelphia.

⁶ A narrative explaining exhibit D-2 will be submitted Monday.

The Need to Protect Over-the-Air Carriage Rights

Designation of PSIP channel 3.10 would also protect the other critical value at stake here: PMCM's unqualified right to demand cable carriage on its over-the-air channel. The importance of this unambiguous mandate cannot be overemphasized:

a. Section 614 (B)(6) of the Communications Act, as the Commission has repeatedly acknowledged, expressly requires that signals carried in fulfillment of the must carry obligations set forth in the Act "shall be carried on the cable system channel number on which the local commercial television station is broadcast over the air..." The statute could not be clearer.

b. The Commission's own cable carriage rules duly implement Section 614(B)(6) of the Act by also requiring that "a cable operator shall carry [a must carry] signal on the cable system channel number on which the local commercial television station is broadcast over the air..." 47 C.F.R. 76.57(a)

c. In interpreting the must carry obligations of cable operators under Section 614 in the digital environment, the Commission in 2008 reaffirmed that "the channel placement options in Sections 614(b)(6) and 615(g)(5), as implemented in Section 76.57 of the Commission's rules, remain in effect after the digital transition."⁷ The right of a commercial television station to be carried on the same channel number on which the station is broadcast over the air thus remains an option, as both the statute and the rule explicitly require. The Commission also clarified that stations "may" demand carriage on their major channel number as broadcast in the station's PSIP, but it did not require them to do so. *Id.* at 14258. Nothing here

⁷ *Carriage of Digital Television Broadcast Signal: Amendment to Part 76 of the Commission's Rules*, 23 FCC Rcd. 14254, 14257 (2008).

mandates or even suggests that the statutorily mandated over-the-air channel option has been abandoned.

Several years earlier, in the *First Report and Order and Further Notice of Proposed Rulemaking, In the Matter of Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd. 2598, 2635 (2001), the Commission had indicated that digital channel position requirements were unnecessary since digital technology would map the broadcast channel to the PSIP. This "technology-based" solution, the Commission said, resolved broadcaster concerns that they would not be carried on their over-the-air channel as required in the analog regime. At the same time, the Commission indicated that in the digital environment, "there is no analogous supporting rationale for requiring digital channel positioning on any cable channel other than on a station's over-the-air channel." *Ibid.* at 2633, footnote 235. The Commission accordingly modified Section 76.57(c) of the rules to require a cable operator "to carry the information necessary to identify and tune to the broadcast television signal." Again, nothing here suggests that mandatory carriage on the over-the-air channel is no longer operative. The opposite, rather, appears to be true.

We understand that the Bureau has recently suggested in several orders that cable carriage on one's over-the-air channel may no longer be a right.⁸ Given clear and express statutory language and numerous Commission pronouncements all to the contrary, we do not need to address those decisions here, but it is inconceivable that one's "over-the-air" channel, as

⁸ See, for example, *KSQA, L.L.C. v. Cox Cable Communications, Inc.*, 27 FCC Rcd 13185 (Policy Div. 2012). See also *Gray Television Licensee, LLC*, 28 FCC Rcd 10780 (Policy Div. 2013); *America-CV Station Group, Inc.*, 28 FCC Rcd 29 (Policy Div. 2013); *Mauna Kea Broadcasting Company*, 27 FCC Rcd 13188 (Policy Div. 2012). We do note, however, that the Bureau in the *KSQA* case appears to have misread the Commission's 2008 declaration that broadcast channels are no longer identified by reference to their over the air radio frequencies. The *KSQA* Order incorrectly states that the Commission declared that "a station's over-the-air broadcast channel number" is no longer so identified. The Commission said no such thing, nor could it have in view of the statutory mandate.

protected by both the statute and the rules, could be anything other than one's over-the-air channel as identified in the table of allotments. Part 73, Sections 601 *et. seq.* of the Commission's rules consistently identify over the air channel numbers by the numbers designated in the allotment tables and their associated radio frequencies. KVNV's allotted over-the-air channel number is there designated as channel 3. To identify KVNV's over the air channel number as anything but channel 3 would not only contravene the statute (and the implementing rule) directly, but would also be administrative doublespeak of the highest order. Such a reading would literally read the words "over the air" out of the statute.

d. While the Cable Carriage Act, rule 76.57(a), and the 2008 Declaratory Ruling all unanimously guarantee the right of a TV station to demand carriage on its over the air channel, PMCM is willing to forego its right to cable carriage on channel 3 on the Fairfield County cable systems so long as WFSB operates on channel 3 there. This concession is offered in the interest of resolving this issue with the least disruption to incumbent stations with must carry rights to channel 3. Upon confirmation of KVNV's right to major channel 3 PSIP, we would immediately amend our must carry demand on the Fairfield County cable systems to demand carriage elsewhere in the basic channel tier.

Section 331

In addition to the integrity of the PSIP rules and the absolute preference in the statute and rules for over-the-air channel placement, there is a third important value at stake here. It cannot be ignored that KVNV came to the New Jersey market by virtue of an extraordinary Act of Congress that mandated the allotment of a VHF channel to New Jersey. Section 331 speaks in terms of reallocating a VHF *channel* to an unserved state by operation of the law. At the time Section 331 was adopted, of course, one's over-the-air channel was the same as its receiver dial

position. To reallocate Channel 3 to New Jersey but to then strip it of the panoply of rights associated with that channel under the Cable Carriage Act might well be viewed as not only contravening the purpose of Section 331 (again) but also as deliberately, perhaps even contemptuously, thwarting the mandate of the court. At the very least, the Commission should be sensitive to the objective of the statute in ensuring that the people of the state have access to a VHF channel that can compete with the VHF channels in nearby states, not only over the air but on the cable systems over which much of the viewership occurs.

An Alternative to Assignment of PSIP 3.10

As an alternative, but less desirable, proposal, PMCM would not object to the staff's suggestion that KVVN's major channel number be designated as 14 in its PSIP, *provided* the Commission also specifies that KVVN would be entitled to cable carriage on channel 3 throughout the New York DMA except Fairfield County. Since cable position is not dependent on broadcast PSIPs, the Commission may require on-channel carriage regardless of the assigned PSIP and, indeed, under this approach the Commission would have to expressly impose that requirement in order to comply with Section 614(b)(6) of the Act. Again, PMCM would agree in this context to modify its demand for carriage on Channel 3 in Fairfield County, and instead demand carriage in that County on Channel 14 or another channel mutually agreed to with the cable operators. It would also waive any right to cable carriage on Channel 3 outside the New York DMA.

This alternative approach, like our first proposal, would eliminate any concerns regarding overlapping PSIPs which either Meredith or the Channel 3 user in Philadelphia might have had. The PSIP Channel 14/guaranteed carriage on Channel 3 option is decidedly not our preferred choice since it means that over-the-air viewers would pick KVVN up on Channel 14, thus

diminishing the practical effect of having a new VHF station in New Jersey. We are nevertheless willing to accept this PSIP as long as the Commission expressly provides, in connection with the designation of major channel number 14 for KVVN, that PMCM would retain its right to demand cable carriage on its over-the-air Channel 3. PMCM would reserve the right, however, to have its PSIP conformed to its over-the-air Channel 3 in the event the Commission clarifies the governing rules to permit such an assignment.

Contingent Waiver Request

To the extent that either of the proposals set forth above might be deemed in any way inconsistent with the Commission's rules or the ATSC standards – and, as noted above, PMCM believes that there is no such inconsistency – PMCM hereby requests waiver of the pertinent rule so as to effectuate the on-channel carriage mandate of the Act and avoid any duplication of PSIPs.

Conclusion

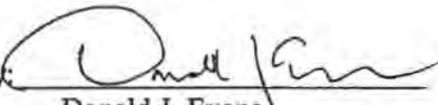
The above proposal is a good faith effort to accommodate the needs and interests of Meredith⁹ and the staff's understanding of the PSIP assignment rules. Our purpose here is to reach a practical solution that should work to substantially accomplish the mandates of the Cable Carriage Act, the Commission's rules, ATSC A/65 and Section 331. In our view, through the simple assignment of PSIP 3.10 to KVVN, the concerns raised by Meredith can be resolved satisfactorily in a manner which is consistent with the mandates of the Act, the rules, ATSC A/65 and full Commission precedent. By assuring PMCM its statutory right to assert carriage on its over-the-air broadcast channel, the Commission would also be advancing Congress's intent, as

⁹ We do not here address the position of ION. If ION's facially unlawful channel placement agreement with Cablevision is pressed, those parties would have to deal with that at a later point.

expressed in Section 331 of the Act, to ensure that New Jersey has its own VHF channel enjoying the same over-the-air and cable carriage rights as other equivalent VHF stations.

Finally, PMCM requests that the Bureau ordain, consistent with the normal mechanics of Section 1.103 of its rules, that the PSIP and on-channel carriage determination made consistent with PMCM's proposal herein be made effective immediately, irrespective of, but obviously subject to, any subsequent reconsideration or review that might be sought.

Respectfully submitted,
PMCM TV, LLC

By: 
Donald J. Evans
Its Attorney

FLETCHER, HEALD & HILDRETH, P.L.C.
1300 North 17th Street, 11th Floor
Arlington, VA 22209
Phone: (703) 812-0400

August 8, 2014

ATTACHMENT A

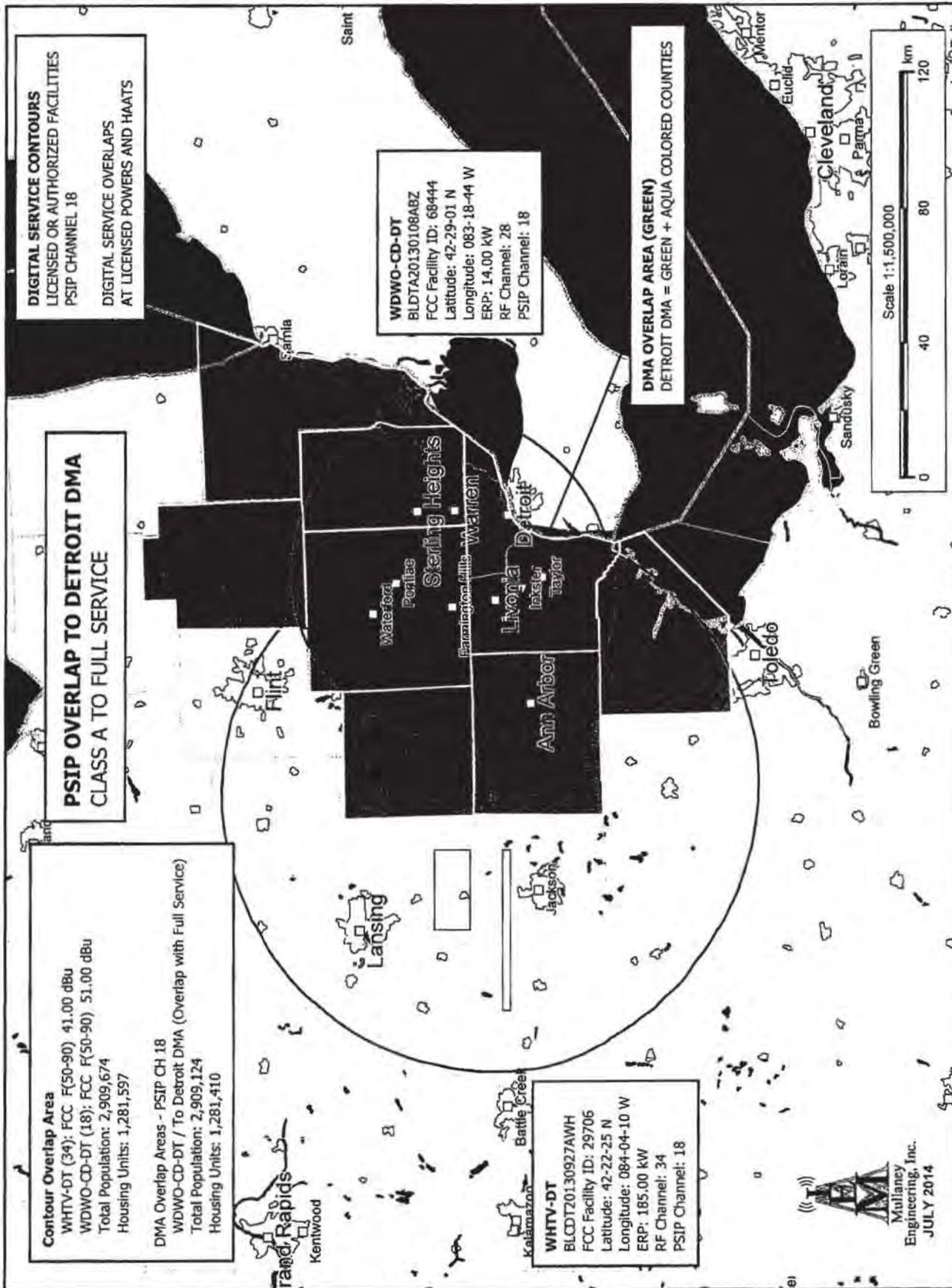


Exhibit 7

ATTACHMENT B

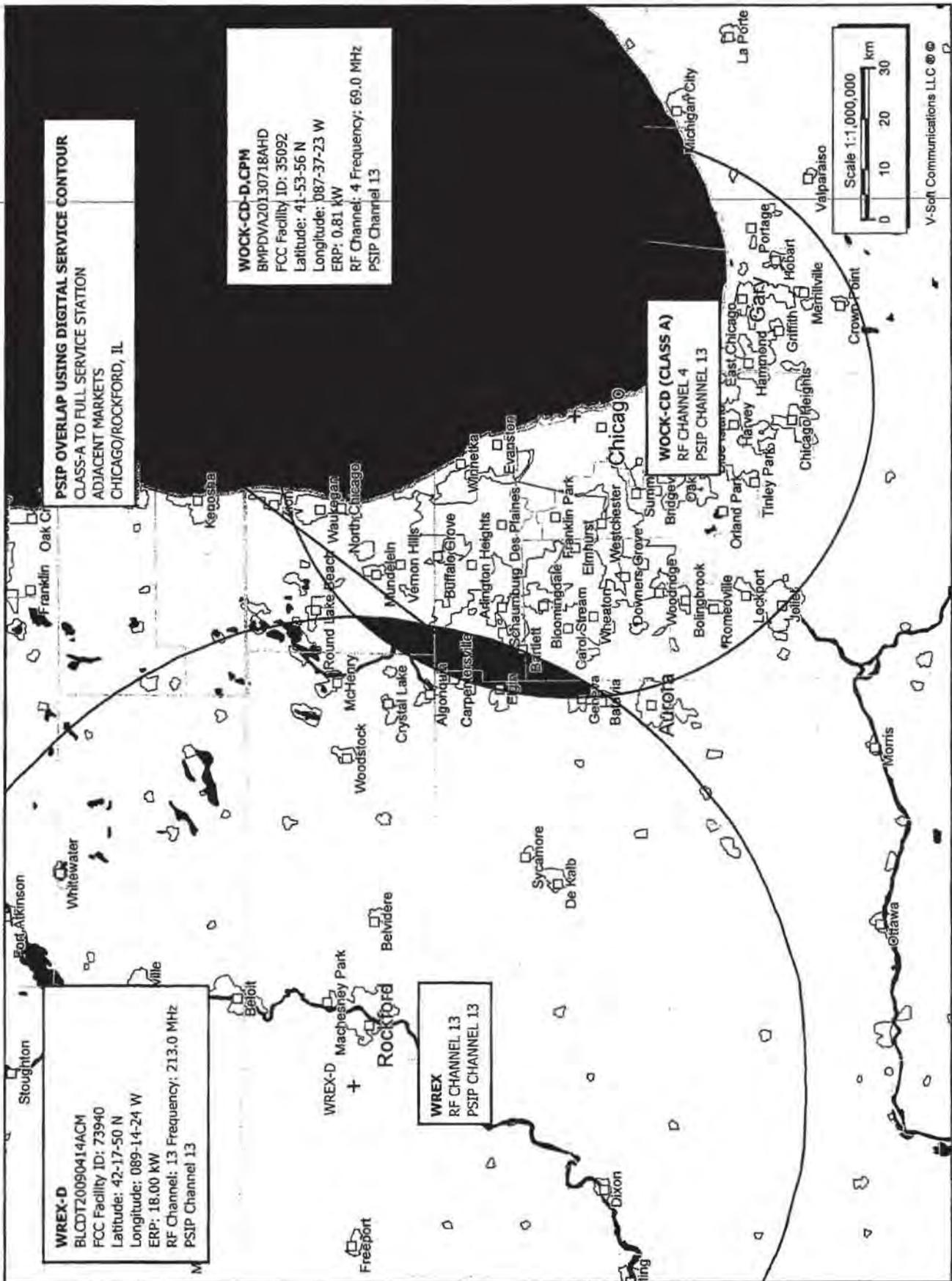
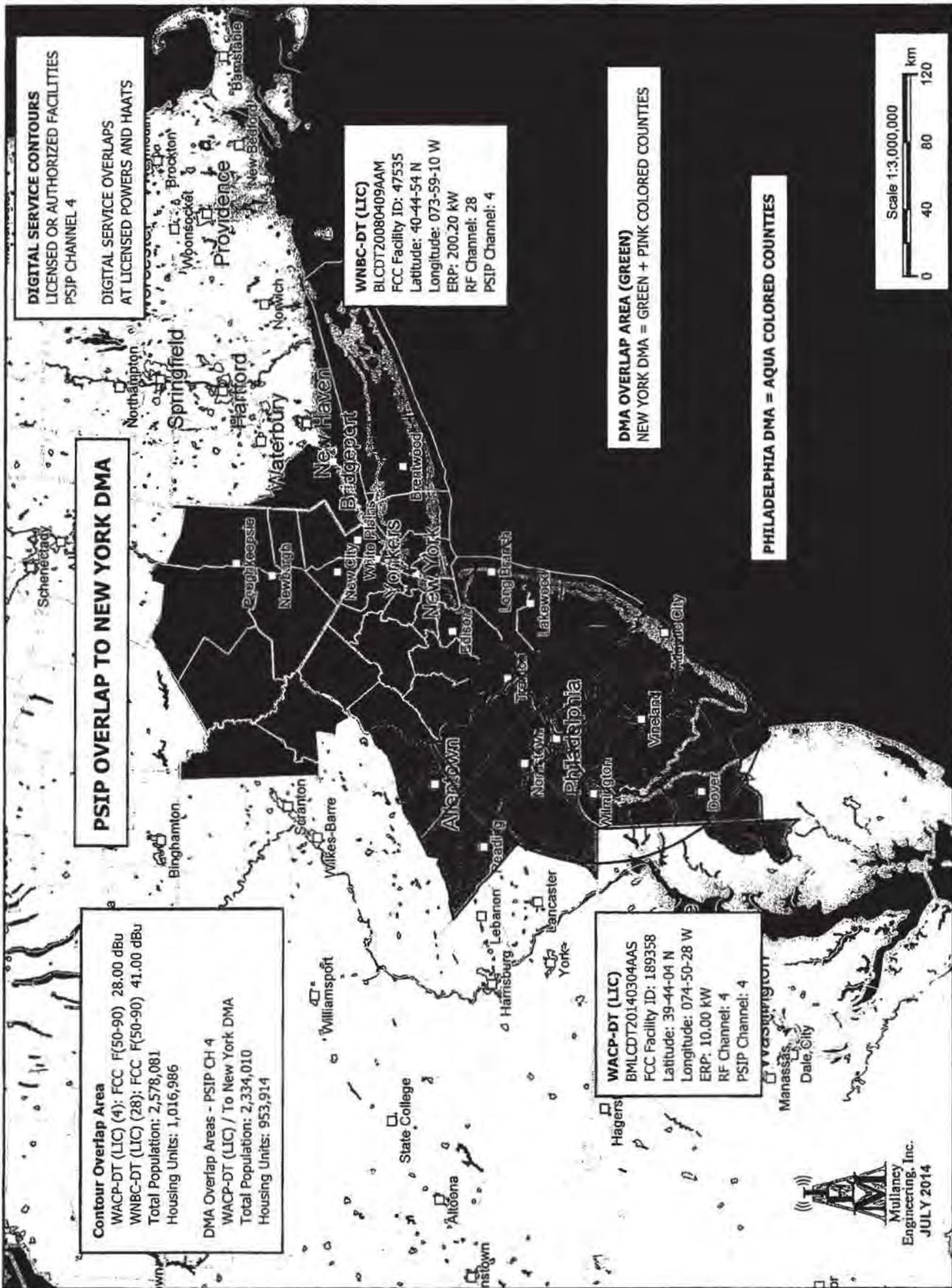
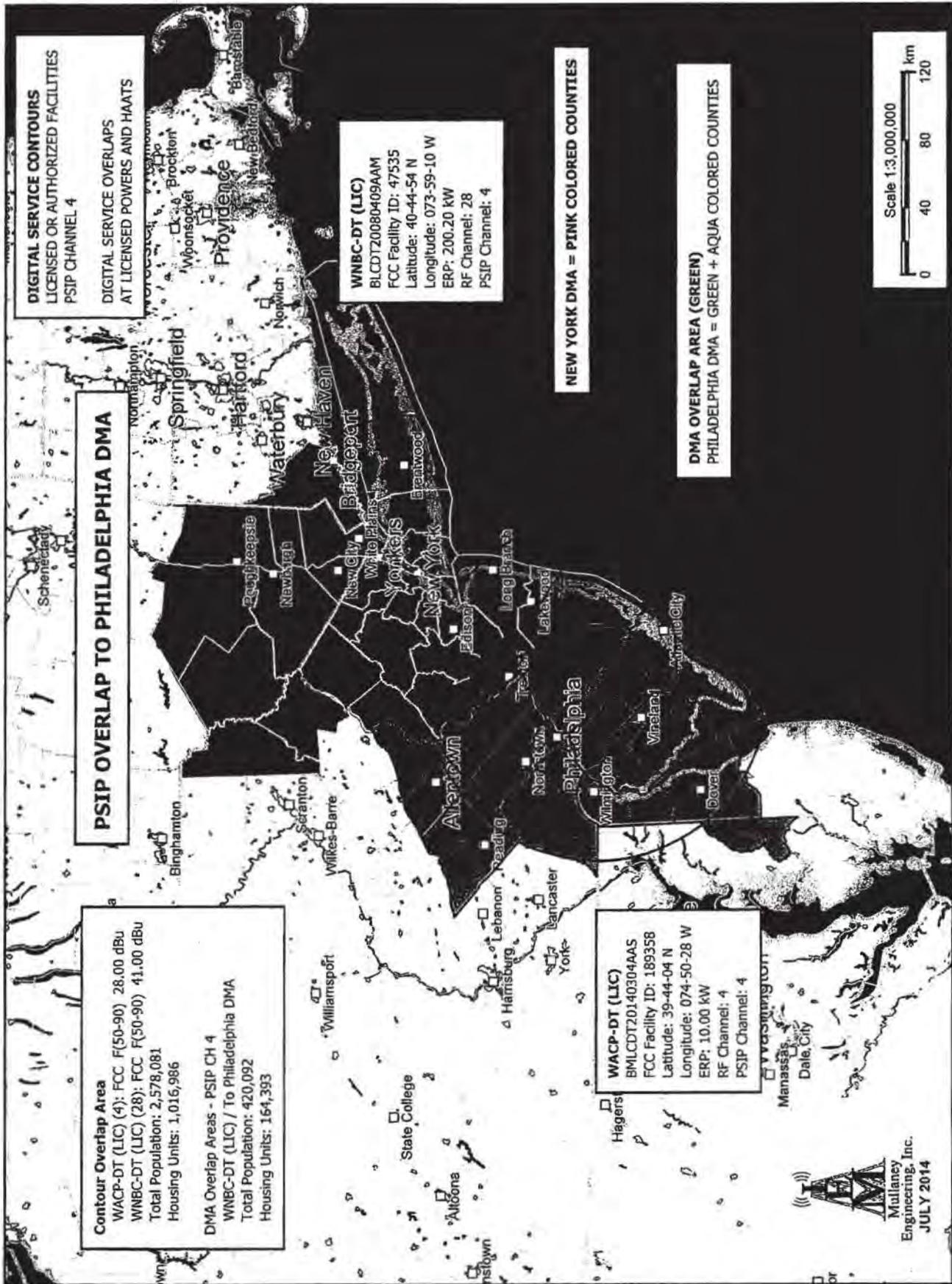


Exhibit 7

ATTACHMENT C-1



ATTACHMENT C-2



ATTACHMENT D

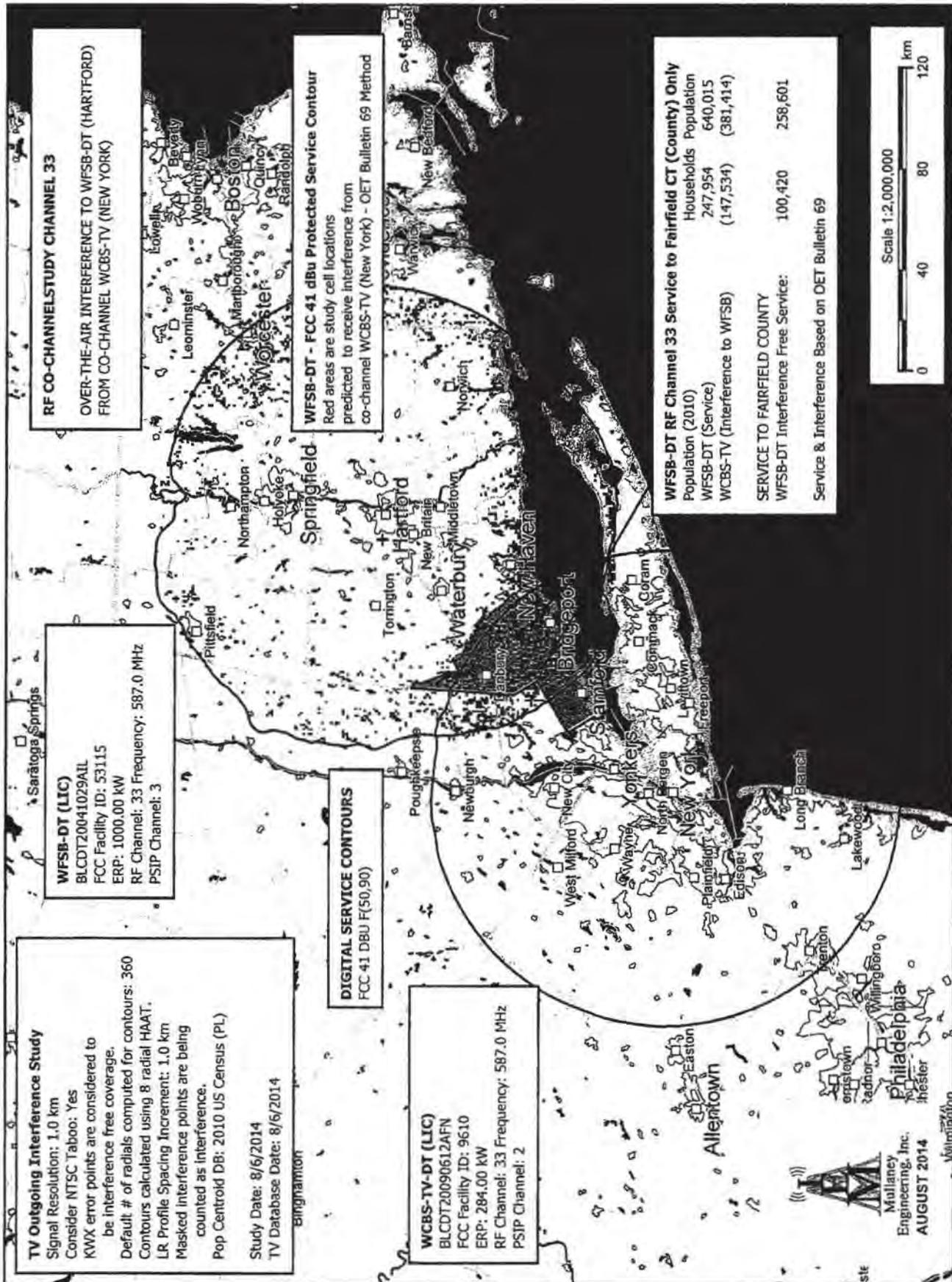


Exhibit 7

OVER-THE-AIR STUDY

The focus of this study is Fairfield County Connecticut only.

The population/households numbers were computed using the methods provided for in OET Bulletin Number 60 (Longley-Rice prediction method).

The numbers are:

WFSB-DT RF Channel 33 Service to Fairfield CT (County) Only

Population (2010)	Households	Population	
WFSB-DT (Service)	247,954	640,015	- Baseline service in Fairfield County
WCBS-TV (Interference to WFSB)	(147,534)	(381,414)	- Interference to the baseline service

SERVICE TO FAIRFIELD COUNTY

WFSB-DT Interference Free Service: 100,420 258,601 - Net WFSB service to Fairfield County. Service & Interference is based on OET Bulletin 69 predictive method.

Narrative:

From the above figures – WFSB is predicted to provide service to 247,954 households within Fairfield County, of those predicted service households interference is predicted to occur to 147,534 households from co-channel WCBS (New York), the net interference free household number is 100,420.

The calculation method for the population number is the same, WFSB is predicted to provide service to 640,015 persons within Fairfield County, of the predicted population, interference is predicted to 381,414 persons from WCBS (NEW York), the net interference free population number is 258.601 persons.

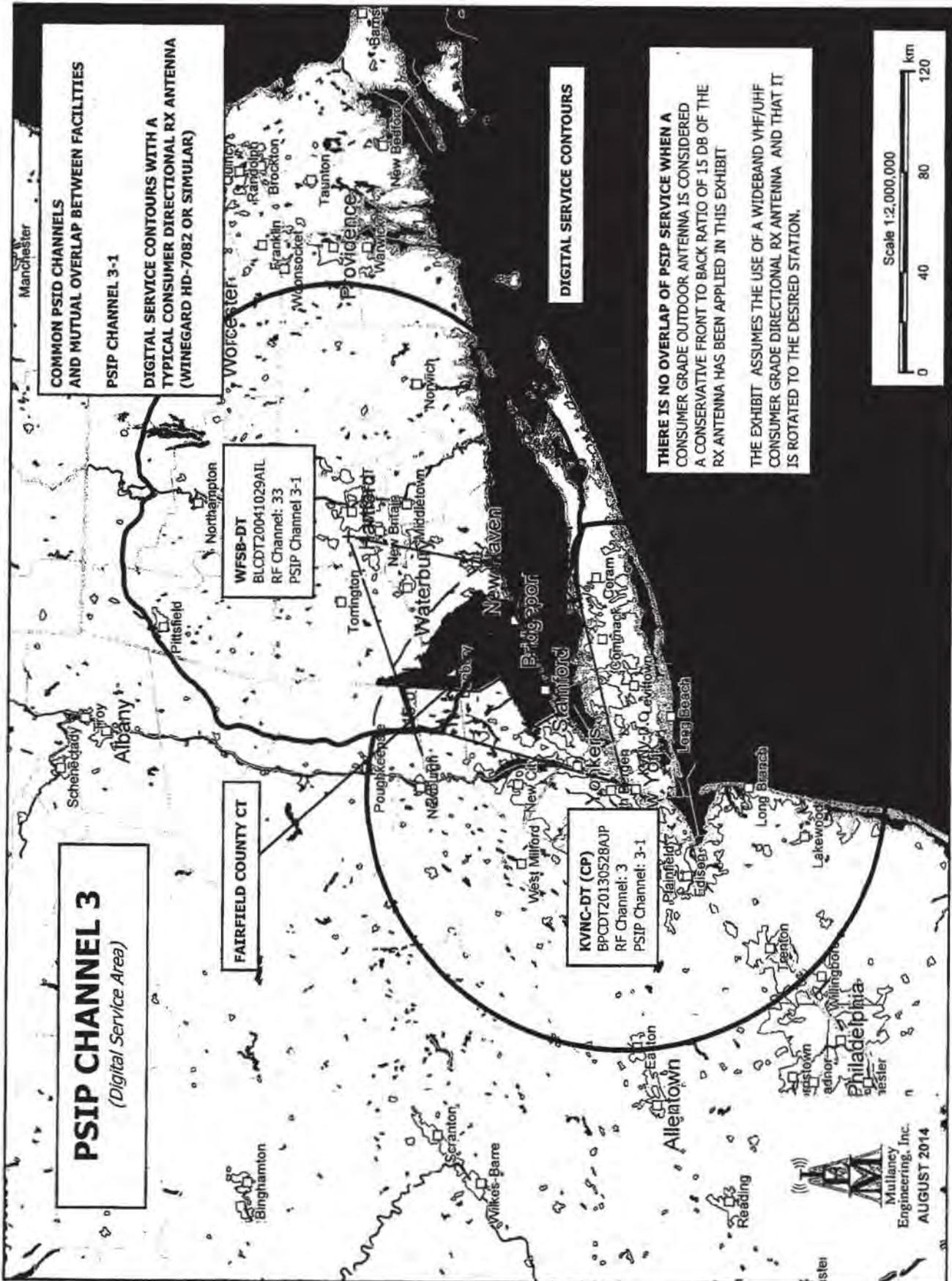
Fairfield CT (County) Percentages of service are:

	Households	Population
WFSB-DT (Service)	100%	100% (baseline service in Fairfield County)
WCBS-TV (Interference to WFSB)	59.5%	59.6%
WFSB-DT Interference Free Service:	40.5%	40.4%

Summary: OVER-THE-AIR SERVICE TO FAIRFIELD COUNTY

Nearly 60 % of the service to Fairfield County that WFSB is predicted to provide is subject to interference from co-channel WCBS, New York.

ATTACHMENT D-2



Certificate of Service

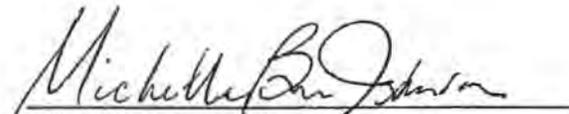
I, Michelle Brown Johnson, hereby certify that on this 8th day of August, 2014, I caused copies of the foregoing "Alternative PSIP Proposal" to be placed in the U.S. Postal Service, first class postage prepaid, or hand-delivered (as indicated below) addressed to the following persons:

Barbara Kreisman, Chief (by hand)
Video Division
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Joyce Bernstein (by hand)
Video Division
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Michelle Brown Johnson

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1238

September Term, 2014

FILED ON: FEBRUARY 27, 2015

IN RE: PMCM TV, LLC,
PETITIONER

CBS BROADCASTING, INC., ET AL.,
INTERVENORS

On Petition for Writ of Mandamus

Before: GARLAND, *Chief Judge*, KAVANAUGH, *Circuit Judge*, and WILLIAMS, *Senior
Circuit Judge*

ORDER

This cause came to be heard on the petition for writ of mandamus, the briefs of the parties, and argument by counsel. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). Upon consideration of the foregoing, it is

ORDERED that the petition for writ of mandamus be denied.

Petitioner PMCM TV, LLC seeks a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651, directing the FCC to rescind a letter suspending the operating authority of one of PMCM's stations unless and until PMCM certifies that it will operate the station using "virtual" channel 33, as the FCC had directed, rather than "virtual" channel 3, as PMCM wishes. The FCC order at issue is an interim measure intended to preserve the status quo ante in the relevant service areas while the Commission completes a pending notice-and-comment proceeding. Because PMCM has neither shown that the FCC has violated our mandate in *PMCM TV, LLC v. FCC*, 701 F.3d 380 (D.C. Cir. 2012), nor demonstrated that it has a "clear and indisputable" right to relief, *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 381 (2004) (quoting *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 403 (1976)), under any other relevant source of law, *see, e.g.*, 47 U.S.C. §§ 316, 331(a), 1452(g); 47 C.F.R. § 73.682(d), we deny PMCM's request for a writ of mandamus. It is

FURTHER ORDERED that the stay entered by the Court on November 25, 2014 be dissolved.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk



Federal Communications Commission
Washington, D.C. 20554

June 5, 2015

TARA M. CORVO, ESQ.
FREDERICK W. GIROUX, ESQ.
SETH A. DAVIDSON, ESQ.
DONALD J. EVANS, ESQ.

FCC File No. BPCDT-20130528AJP
Facility ID No. 86537
DA 15-667

Released: June 5, 2015

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Re: Requests to Defer Mandatory Carriage of KVNV(TV), Middletown Township, New Jersey

Dear Counsel:

By letter dated July 25, 2014, the Media Bureau (the "Bureau") waived Section 76.64(f)(4) of the Commission's rules to allow Cablevision Systems Corporation, Time Warner Cable Inc. and Comcast Cable Communications,

LLC (the “MVPDs”) to defer implementing the must-carry request and channel position election of PMCM TV, LLC (“PMCM”) for television station WJLP (formerly KVNV(TV)), Middletown Township, New Jersey (“WJLP”) until 90 days from the date of a final decision by the Bureau on WJLP’s virtual channel.¹ The Bureau determined that deferral was warranted to minimize disruption for consumers and the accompanying confusion and channel line-up disruption for the MVPDs to accommodate WJLP’s request to be placed on cable channel 3 at a time when it was possible—in view of a pending dispute between PMCM and the licensee of an incumbent station already using Program System and Information Protocol (“PSIP”)² virtual channel 3 in a service area overlapping WJLP’s—that the Bureau would soon assign WJLP a different virtual channel.³ Concurrent with this Letter Order, the Bureau is releasing its decision on the appropriate PSIP virtual channel for television station WJLP.⁴ That decision removes the uncertainty regarding WJLP’s PSIP virtual channel number that necessitated the *Deferral Letter Order*.⁵ Accordingly, PMCM’s initial must-carry request and channel position election is effective 90 days from today (September 3, 2015). If the MVPDs do not implement PMCM’s original must-carry request or channel position election within that time, PMCM may choose to invoke the cable carriage enforcement procedures set forth in 47 U.S.C. § 534(d) and 47 C.F.R. § 76.61. Alternatively, if PMCM should now wish to pursue carriage for WJLP on cable channel 33—the virtual channel the Bureau has assigned WJLP in the *PMCM PSIP Declaratory Ruling*—we see good cause to again waive Section 76.64(f)(4) of the Commission’s rules to the extent necessary to permit PMCM to expeditiously assert that carriage election for WJLP.⁶ Accordingly, we **HEREBY WAIVE** Section 76.64(f)(4) of the rules to permit PMCM to newly **ELECT CARRIAGE AND CHANNEL POSITION** for WJLP,

¹ See *Tara M. Corvo, Esq., Frederick W. Giroux, Esq., Seth A. Davidson, Esq., Donald J. Evans, Esq.*, 29 FCC Rcd 9102 (MB 2014) (“*Deferral Letter Order*”).

² PSIP channels are also commonly referred to as “virtual” or “major” channels.

³ *Deferral Letter Order*, 29 FCC Rcd at 9102.

⁴ *Request for Declaratory Ruling by Meredith Corporation and “Alternative PSIP Proposal by PMCM TV, LLC for WJLP (Formerly KVNV(TV)), Middletown Township, New Jersey*, MB Docket No. 14-150, Declaratory Ruling (DA 15-662, rel. June 5, 2015, MB) (“*PMCM PSIP Declaratory Ruling*”).

⁵ PMCM has argued in its pending Application for Review of the *Deferral Letter Order* that the Bureau deferred the MVPDs’ must-carry obligations until 90 days from the time the full Commission issues a final order resolving the virtual channel issue and “any and all appeals” are exhausted. Application for Review at 15. Notwithstanding the use of the phrase “final decision,” however, the *Deferral Letter Order* merely granted Cablevision’s request to defer its must-carry obligations until 90 days after “the Media Bureau issues a final decision” resolving the virtual channel issue. Letter from Tara M. Corvo, Counsel for Cablevision Systems Corporation (Cablevision) to Marlene H. Dortch, FCC Secretary (June 12, 2014) in *Application of PMCM TV, LLC; File No. BPCDT-20130528AJP; Facility ID No. 86537* (Cablevision Deferral Request) (emphasis added). Taking the order’s references to a “final decision” in proper context, it is clear that the relief the Bureau granted was no more expansive than what Cablevision requested. See *Deferral Letter Order*, 29 FCC Rcd at 9105 (referencing “our decision on [the appropriate] virtual channel number” for WJLP and stating, “The Bureau anticipates that it will be able to issue *its decision* without lengthy delay.” (emphasis added)).

⁶ See 47 C.F.R. § 1.3 (“Any provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.”); see also *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, Declaratory Order, 23 FCC Rcd 14254, 14259, paras. 15-16 (2008) (clarifying that in the digital era, a “cable operator can identify the correct channel location by reference to the PSIP,” and “any station carried pursuant to mandatory carriage may demand carriage on its major channel number as broadcast in [its] PSIP”); *KSQA, LLC v. Cox Cable Commc’ns, Inc.*, Memorandum Opinion and Order, 27 FCC Rcd 13185, 13186–87, para. 4 (Media Bur. Policy Div. 2012) (holding that, in the digital era, a station asserting must-carry rights on its over-the-air channel does not have the option to elect carriage on its radio frequency channel rather than on its major channel).”

Middletown Township, New Jersey on the MVPDs within thirty (30) days of the release of this Letter Order. In accordance with Section 76.64(f), any such election shall take effect ninety (90) days after it is made.⁷

Sincerely,

William T. Lake
Chief,
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Cc:

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⁷ 47 C.F.R. § 76.64(f)(4).

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1001

September Term 2009

FCC-DA09-2603

Filed On: May 12, 2010

In re: PMCM TV, LLC,

Petitioner

Federal Communications Commission

BEFORE: Rogers, Garland, and Brown, Circuit Judges

ORDER

Upon consideration of the petition for writ of mandamus, the motion for leave to file a supplement to the petition, and the lodged supplement, it is

ORDERED that the motion for leave to file the supplement be granted. The Clerk is directed to file the lodged document. It is

FURTHER ORDERED that the petition for writ of mandamus be denied. Petitioner has not demonstrated that the Federal Communications Commission has violated a clear duty to act. Northern States Power Co. v. U.S. Dep't of Energy, 128 F.3d 754, 758 (D.C. Cir. 1997). Moreover, petitioner has not shown that it has no other adequate means to obtain the relief requested. Id.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1001

September Term 2009

FCC-DA09-2603

Filed On: August 6, 2010

In re: PMCM TV, LLC,

Petitioner

BEFORE: Rogers, Garland, and Brown, Circuit Judges

ORDER

Upon consideration of the petition for rehearing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

MaryAnne Lister
Deputy Clerk/LD

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-1001

September Term 2009

FCC-DA09-2603

Filed On: August 6, 2010

In re: PMCM TV, LLC,

Petitioner

BEFORE: Sentelle, Chief Judge, and Ginsburg, Henderson, Rogers, Tatel,
Garland, Brown, Griffith, and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: */s/*
MaryAnne Lister
Deputy Clerk/LD

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

In re)	
)	
PMCM TV, LLC,)	No. 15-1058
)	
Petitioner)	
)	

CERTIFICATE OF SERVICE

I, Sarah E. Citrin, hereby certify that on June 19, 2015, I electronically filed the foregoing Opposition of the Federal Communications Commission to Petition for Writ of Mandamus with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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/s/ Sarah E. Citrin