

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

In the Matter of )
PMCM TV, LLC, Licensee of WJLP, ) CSR-8919-M
Middletown Township, New Jersey ) Docket No. 16-27
v. )
Time Warner Cable Inc. )

MEMORANDUM OPINION AND ORDER

Adopted: May 17, 2016

Released: May 17, 2016

By the Chief, Media Bureau:

I. INTRODUCTION

1. PMCM TV, LLC (PMCM), licensee of commercial broadcast television station WJLP, Middletown Township, New Jersey, filed the above-captioned must carry complaint pursuant to Sections 76.7 and 76.61 of the Commission's rules, seeking to ensure carriage on cable channel 3, the channel number corresponding to the station's RF channel assignment, on cable systems operated by Time Warner Cable Inc. (TWC) in the New York, New York designated market area (New York DMA). TWC filed an opposition to PMCM's complaint, and PMCM filed a reply. For the reasons that follow, we deny PMCM's complaint.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act of 1934, as amended (Act), and the implementing rules adopted by the Commission, commercial television broadcast stations, such as WJLP, are entitled to assert mandatory carriage rights on cable systems located within their market. A station's market for this purpose is its DMA, as defined by the Nielsen Company. The Commission has clarified

1 47 CFR §§ 76.7, 76.61.

2 Must-Carry Complaint of PMCM TV, LLC, against Time Warner Cable Inc., CSR-8919-M, Docket No. 16-27 (filed Jan. 19, 2016) (PMCM Complaint).

3 Opposition of Time Warner Cable Inc., CSR-8919-M, Docket No. 16-27 (filed Feb. 8, 2016) (TWC Opposition); Reply of PMCM TV, LLC, CSR-8919-M, Docket No. 16-27 (filed Feb. 23, 2016) (PMCM Reply).

4 Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues, Report and Order, 8 FCC Rcd 2965, 2975-77, paras. 41-46 (1993). The Commission subsequently has extended mandatory carriage rights to digital television stations under Section 614(a) of the Act and amended its rules accordingly. Carriage of Digital Television Broadcast Signals, First Report and Order, 16 FCC Rcd 2598, 2606, paras. 15-16, 2610, para. 28 (2001) (First Report and Order); 47 CFR § 76.64(f)(4).

5 Section 614(h)(1)(C) of the Act provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. 47 U.S.C. § 534(h)(1)(C). Section 76.55(e)(2) of the Commission's rules specifies that a

(continued...)

that “broadcast stations may assert their carriage and channel positioning rights at any time so long as they have not elected retransmission consent.”<sup>6</sup> Section 614 of the Act and Section 76.57 of the Commission’s rules provide commercial television stations with four possible channel positioning options to which they may assert their rights.<sup>7</sup> Specifically, a commercial broadcast station may elect to be carried on: (1) the channel number on which the station is broadcast over the air; (2) the channel number on which the station was carried on July 19, 1985; or (3) the channel number on which the station was carried on January 1, 1992.<sup>8</sup> Alternatively, a broadcast station may be carried on any other channel number mutually agreed upon by the station and the cable operator.<sup>9</sup>

3. TWC operates cable television systems serving various communities in the New York DMA. By letter dated June 6, 2014, PMCM notified TWC that WJLP would commence operation in August 2014 as a new television station in the New York DMA and that it was electing mandatory carriage for the election period ending December 31, 2014 for WJLP on all cable systems operated by TWC in the New York DMA on channel 3, asserting that channel 3 was its “over the air” channel number.<sup>10</sup> At the time PMCM made its must carry election, there was an ongoing dispute concerning WJLP’s virtual or PSIP<sup>11</sup> major channel assignment, specifically whether PMCM was entitled to use virtual channel number 3 for its over-the-air broadcast signal.<sup>12</sup> In light of this dispute, TWC and two other MVPDs filed requests seeking deferral of PMCM’s must carry and channel positioning election until 90 days after the Media Bureau’s final decision on the appropriate virtual channel for over-the-air broadcasting by WJLP. By letter dated July 25, 2014, the Media Bureau waived Section 76.64(f)(4) of the Commission’s rules and granted the deferral requests.<sup>13</sup>

4. On June 5, 2015, concurrent with its issuance of a declaratory ruling assigning WJLP virtual

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commercial broadcast television station’s market is its DMA as determined by Nielsen Media Research. 47 CFR § 76.55(e)(2).

<sup>6</sup> *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Clarification Order, 8 FCC Rcd. 4142, 4144, para. 15 (1993).

<sup>7</sup> 47 U.S.C. § 534; 47 CFR § 76.57.

<sup>8</sup> 47 U.S.C. § 534(b)(6); 47 CFR § 76.57(a).

<sup>9</sup> 47 U.S.C. § 534(b)(6); 47 CFR § 76.57(d).

<sup>10</sup> TWC Opposition at 2, Ex. A.

<sup>11</sup> PSIP consists of data transmitted along with a station’s DTV signal which tells DTV receivers information about the station and what is being broadcast and provides a method for receivers to identify a DTV station and determine how the receiver can tune to it. PSIP enables receivers to link a station’s digital RF channel with its “virtual” or major channel number – the number viewers see on their channel receiver when they view a DTV station over the air – regardless of the actual RF channel used for digital transmission. *Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, Report and Order, 19 FCC Rcd 18279, 18344-6, paras. 149-53 (2004) (*Second Periodic Review*). For purposes of the PSIP standard, the terms “virtual” channel and “major” channel are used interchangeably.

<sup>12</sup> *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 (MB 2014).

<sup>13</sup> *Tara M. Corvo, Esq., Frederick W. Giroux, Esq., Seth A. Davidson, Esq., Donald J. Evans, Esq.*, Letter, 29 FCC Rcd 9102, 9105 (MB 2014), *rev. pending*.

channel 33,<sup>14</sup> the Bureau issued a letter lifting the July 25, 2014 deferral order and making PMCM's initial must-carry request and channel position election effective in 90 days, as of September 3, 2015.<sup>15</sup> The Bureau stated that if TWC and the other MVPDs do not implement PMCM's original must-carry request or channel position election within that time, PMCM may choose either to invoke the cable carriage enforcement procedures set forth in Section 614 of the Act and Section 76.61 of the Commission's rules or alternatively to elect carriage for WJLP on cable channel 33, the virtual channel assigned to WJLP.<sup>16</sup> On July 17, 2015, TWC sent PMCM a letter inquiring whether PMCM intended to elect carriage for WJLP on cable channel 33 and indicating that it intended to voluntarily begin carrying WJLP, an affiliate of the MeTV network, on cable channel 1239, which was currently occupied by the satellite feed of the MeTV network, in order to provide a seamless transition for viewers of MeTV programming.<sup>17</sup> In its July 28, 2015 response, PMCM reaffirmed its election of mandatory carriage on cable channel 3, declined an election for the placement of WJLP on cable channel 33, and accepted TWC's offer to carry WJLP on an interim basis on channel 1239.<sup>18</sup> By letter dated July 30, 2015, TWC acknowledged PMCM's must carry election for WJLP and confirmed that it would commence carriage of WJLP on cable channel 1239 on or before September 3, 2015.<sup>19</sup> TWC launched WJLP on cable channel 1239 on August 25, 2015.<sup>20</sup>

5. On October 22, 2015, PMCM gave written notice to TWC pursuant to Section 76.61 of the Commission's rules that TWC's carriage of WJLP on cable channel 1239 fails to meet its statutory and regulatory carriage obligations.<sup>21</sup> By letter dated November 19, 2015, TWC denied PMCM's request for carriage on cable channel 3, asserting that PMCM has no right to demand carriage of WJLP on channel 3 and that TWC's carriage of WJLP on channel 1239 is proper because PMCM was given the opportunity to update its channel placement election to select channel 33 but failed to do so.<sup>22</sup> On January 19, 2016, PMCM filed its must carry complaint seeking carriage of WJLP on cable channel 3.<sup>23</sup>

### III. DISCUSSION

6. Initially, with regard to procedural issues, we note that PMCM seeks action on its complaint by the full Commission.<sup>24</sup> However, Sections 0.61 and 0.283 of the Commission's rules delegate authority to the Media Bureau to handle must carry complaints.<sup>25</sup> Further, as discussed below, PMCM's complaint does

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<sup>14</sup> *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, 30 FCC Rcd 6078, 6092, para. 34 (MB 2015) (*PMCM PSIP Declaratory Ruling*), *rev. pending*.

<sup>15</sup> *Tara M. Corvo, Esq., Frederick W. Giroux, Esq., Seth A. Davidson, Esq., Donald J. Evans, Esq.*, Letter, 30 FCC Rcd 6116, 6117 (MB 2015).

<sup>16</sup> *Id.*

<sup>17</sup> TWC Opposition at 3, Ex. B.

<sup>18</sup> *Id.* at 3, Ex. C.

<sup>19</sup> *Id.* at 3, Ex. D.

<sup>20</sup> *Id.* at 3, Ex. E.

<sup>21</sup> PMCM Complaint at 2-3, Ex. 1

<sup>22</sup> *Id.* at 3, Ex. 2.

<sup>23</sup> *Id.* at 1.

<sup>24</sup> *Id.* at 1-2.

<sup>25</sup> 47 CFR §§ 0.61, 0.283.

not “present novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines.”<sup>26</sup> Accordingly, we will treat the complaint as having been filed with the Bureau.

7. We conclude that PMCM is not entitled to mandatory carriage of WJLP on TWC’s cable systems in the New York DMA on cable channel 3, the channel number corresponding to WJLP’s RF channel assignment. PMCM states that Section 614(b)(6) of the Act and Section 76.57 of the Commission’s rules require a cable operator to carry a local broadcast station electing must carry status “on the cable system channel number on which the local commercial television station is broadcast over the air.”<sup>27</sup> PMCM asserts that it is entitled to carriage of WJLP on cable channel 3 because the FCC’s Post-DTV Table of Allotments specifies that the “channel” allotted to Middletown Township is channel 3 and the frequency on which channel 3 must broadcast over the air is 60-66 MHz.<sup>28</sup> PMCM further asserts that Part 73 consistently identifies a station’s “channel” with the channel allotted to it in the Table of Allotments and the frequency on which it radiates its signal.<sup>29</sup> PMCM acknowledges that “the Media Bureau has in some cases taken the position that a must-carry station’s cable carriage position is determined by its PSIP major number rather than the channel associated with the frequency on which it broadcasts over the air,” but argues that this position is at odds with the language of Section 614(b)(6) and would subvert the entire channel-based regulatory scheme of Part 73.<sup>30</sup>

8. We find PMCM’s arguments unpersuasive. As TWC observes, Commission and Media Bureau precedent clearly recognizes that a digital broadcast station’s virtual channel assignment, not its RF channel assignment, is the relevant channel number for purposes of determining the station’s cable carriage position.<sup>31</sup> In Section 614(b)(4)(B) of the Act, Congress explicitly authorized the Commission “to establish any changes in the signal carriage requirements of cable television systems necessary” to accommodate the conversion from analog to digital television.<sup>32</sup> Pursuant to this authority, the Commission considered whether and, if so, how the on-channel must-carry channel placement option should be modified as a result of the digital transition.<sup>33</sup> At that time, the industry was developing the PSIP protocol. To ensure that cable subscribers would be able to tune to broadcast signals on their PSIP channel, the Commission modified its rules to require cable operators to pass through the PSIP information.<sup>34</sup> Subsequently, as part of its implementation of the digital transition, the Commission

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<sup>26</sup> *Id.* § 0.283(c).

<sup>27</sup> PMCM Complaint at 5; PMCM Reply at 2.

<sup>28</sup> PMCM Complaint at 5. *See also* 47 CFR § 73.603(a).

<sup>29</sup> PMCM Complaint at 5; PMCM Reply at 3-4.

<sup>30</sup> PMCM Complaint at 5-6.

<sup>31</sup> TWC Opposition at 4.

<sup>32</sup> 47 U.S.C. § 534(b)(4)(B). *See also id.* § 338(j) (directing the Commission to issue regulations prescribing requirements on satellite carriers that are comparable to the requirements on cable operators under Section 616(b)(4)(B)).

<sup>33</sup> *See First Report and Order, supra* n.4, 16 FCC Rcd at 2603, 2633 n.235 (of the statutory channel placement options, “only the on-channel option is relevant to the new digital signals”). *See also Advanced Television Sys. & Their Impact Upon the Existing Television Broad. Serv.*, Fourth Further Notice of Proposed Rule Making and Third Notice of Inquiry, 10 FCC Rcd 10540, 10553 (1995), *subsequent hist. omitted* (“Does ‘on-channel’ carriage have the same meaning in a digital as it does in an analog environment?”).

<sup>34</sup> *First Report & Order*, 16 FCC Rcd at 2635 (adopting new 47 CFR § 76.57(c)).

amended its rules to adopt the ATSC PSIP Standard.<sup>35</sup> In its *2008 Declaratory Order* addressing the responsibilities of cable operators with respect to carriage of digital broadcasters, the Commission clarified broadcasters' rights with respect to the on-channel option.<sup>36</sup> The Commission explained that "[i]n digital broadcasting, a broadcast station's channel number is no longer identified by reference to its over-the-air radio frequency. Instead, in compliance with the ATSC standard, the station's 'major channel number' is identified in its [PSIP]."<sup>37</sup> The Commission further clarified that "any station carried pursuant to mandatory carriage may demand carriage on its major channel number as broadcast in the station's PSIP."<sup>38</sup> As the basis for this clarification, the Commission explained that "Section 76.57(c), adopted in the *First Report and Order*, should be read as clarifying the manner in which cable operators are to determine the channel number on which a local commercial or qualified NCE station is 'broadcast over the air' when implementing such a station's election under Sections 76.57(a) or (b)."<sup>39</sup> Thus, the Commission made clear that after the digital transition, a must-carry station's carriage rights attach to its PSIP major channel number rather than its RF channel number.

9. Further, there is no indication in the Commission's discussion of the on-channel carriage option in the *First Report and Order* or the *2008 Declaratory Order* that the Commission intended to add a new option, and had the Commission intended that result, it would have been sufficiently significant to warrant explicit recognition. For these reasons, we find no merit in PMCM's assertion that the *2008 Declaratory Order* merely acknowledged that, following the digital transition, stations might prefer to claim carriage rights on their newly-adopted virtual channels and gave stations the discretion to demand carriage on either their virtual channels or their RF channels.<sup>40</sup> We have previously rejected the argument

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<sup>35</sup> *Second Periodic Review*, 19 FCC Rcd at 18345, para. 152; 47 CFR § 73.682(d) (requiring digital television signals to comply 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)). Under the PSIP protocol, stations that were operating on analog channels in 2004, when 73.682(d) was adopted, and were likely being viewed on cable on their analog channel numbers, were eligible to continue to be viewed on cable on that same channel number when they transitioned to digital-only on a different digital RF channel, thus allowing those stations to maintain their local brand identification. *Second Periodic Review*, 19 FCC Rcd at 18345, para. 153.

<sup>36</sup> *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Declaratory Order, 23 FCC Rcd 14254, 14259, para. 16 (2008) (*2008 Declaratory Order*) (noting that "one of those statutory options is carriage on the broadcast channel number").

<sup>37</sup> *Id.* at para. 15.

<sup>38</sup> *Id.* at para. 16.

<sup>39</sup> *Id.*

<sup>40</sup> PMCM Reply at 5. In support of its argument that the Commission intended to permit broadcasters to assert must-carry rights on their RF channel, PMCM relies on the Commission's statement in the *2008 Declaratory Order* clarifying "that the channel placement options in Sections 614(b)(6) and 615(g)(5) of the Act, as implemented in Section 76.57 of the Commission's Rules, remain in effect after the digital transition." *Id.* at 5 n.2 (citing *2008 Declaratory Order*, 23 FCC Rcd at 14258). But this is introductory language, and the *2008 Declaratory Order* frames this more narrowly later in the document, where it clearly states this clarification with reference to the carriage options that are tied to carriage on a specific historic date. *2008 Declaratory Order*, 23 FCC Rcd at 14259, para. 16 ("We also clarify that although the *First Report and Order* did not specifically address the significance of the statutory provisions and rules with respect to the 'historic' carriage options, these statutory options remain available to digital must-carry broadcasters.") (footnote omitted). This clarification was necessary because, in the *First Report and Order*, the Commission distinguished these two date-dependent options from the on-channel option, stating that they "are not suitable in the era of digital television." *First Report and Order*, 16 FCC Rcd at 2633 n.235.

that a station has two must carry channel positioning options in the digital era, the right to carriage on its RF channel number or to carriage on its PSIP major channel number.<sup>41</sup> We also reject PMCM's assertion that "to now suddenly tie cable carriage rights exclusively to PSIPs rather than allotted channels would in one stroke upset the cable carriage rights of possibly hundreds of stations across the country."<sup>42</sup> PMCM has presented no evidence that the decision in the *2008 Declaratory Order* has upset the cable carriage rights of hundreds of stations. To the contrary, there have been few must carry complaints concerning cable carriage of broadcast television signals on PSIP major channel numbers in the seven years since the digital transition. Accordingly, we conclude that under Section 614 of the Act and Section 76.57 of the Commission's rules, PMCM's channel positioning rights for WJLP may attach only to its major channel number as carried in its PSIP, namely channel 33, or such other channel as PMCM and TWC may determine is mutually agreeable, and WJLP is not entitled to be carried on channel 3 absent an agreement for carriage on that channel.<sup>43</sup>

10. While WJLP's PSIP major channel is channel 33, TWC argues that its carriage of WJLP on cable channel 1239 is lawful because PMCM affirmatively opted not to seek carriage of WJLP on cable channel 33.<sup>44</sup> TWC asserts that when, as here, a station demands carriage on a cable channel other than the one on which it has the right to carriage, the cable operator is free to unilaterally assign a cable channel for the station.<sup>45</sup> PMCM does not address this argument in its reply. We note that PMCM has consented to TWC's carriage of WJLP on cable channel 1239 on an interim basis, pending a decision on its application for review of the Bureau's declaratory ruling assigning WJLP virtual channel 33.<sup>46</sup> Given that PMCM did not seek carriage of WJLP on channel 33 on TWC's cable systems, TWC's current carriage of WJLP on cable channel 1239 is lawful.

11. Finally, PMCM asserts that TWC has not made channel 1239 a part of its basic service tier

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<sup>41</sup> *KSQA, L.L.C. v. Cox Cable Communications, Inc.*, Memorandum Opinion and Order, 27 FCC Rcd 13185, 13187, para. 4 (MB Policy Div. 2012). See also *Gray Television Licensee, LLC v. Zito Media, L.P.*, Memorandum Opinion and Order, 28 FCC Rcd 10780, 10781 n.10 (MB Policy Div. 2013) ("for purposes of digital broadcasting channel positioning, a station's over-the-air broadcast channel number is no longer identified by reference to its over-the-air radio frequency, but instead to its Major Channel Number as carried in its PSIP."); *America-CV Station Group, Inc. v. Liberty Cablevision of Puerto Rico, Inc.*, Memorandum Opinion and Order, 28 FCC Rcd 29, 33, para. 8 (MB Policy Div. 2013) (finding that a station's channel positioning rights attached to channel 42, its PSIP major channel number, rather than channel 41, its RF channel number); *Ion Media Networks, Inc. v. Charter Communications*, Memorandum Opinion and Order, 24 FCC Rcd 2461, 2468, para. 17 (MB Policy Div. 2009) (stating that "for channel positioning purposes, the over-the-air channel for a digital station is determined by reference to the major channel numbers carried in its PSIP.").

<sup>42</sup> PMCM Complaint at 6.

<sup>43</sup> PMCM also raises several other arguments in its pleadings: that the Spectrum Act, 47 U.S.C. § 1452(g)(1)(A), "bars the Commission from involuntarily changing any TV station's channel until the Incentive Auction is over" (PMCM Complaint at 6, PMCM Reply at 4-5); that "the concept of 'virtual channels' is wholly imaginary" and that the Media Bureau's arbitrary assignment of virtual channel 33 to WJLP has "resulted in scores (or more) of viewer complaints arising from technical problems" (PMCM Reply at 4); and that the rationale underlying the Bureau's decision to assign virtual channel 33 to WJLP will have a negative impact on repacking in the aftermath of the Incentive Auction (PMCM Complaint at 2). These arguments are collateral attacks on the Bureau's *PMCM PSIP Declaratory Ruling* and have been raised in PMCM's pending application for review of that decision. Accordingly, they are not appropriately raised here.

<sup>44</sup> TWC Opposition at 6.

<sup>45</sup> *Id.*

<sup>46</sup> See *supra* para. 4.

and requests that, regardless of what action the Commission takes regarding WJLP's demand for carriage on cable channel 3, the Commission order TWC to make WJLP's signal available on the basic service tier on all of its systems, as required by Sections 76.57(f) and 76.901(a) of the Commission's rules.<sup>47</sup> In response, however, TWC states that while channel 1239 was not part of the basic service tier when it was carrying the MeTV network feed, TWC added this channel to the basic service tier when it launched WJLP.<sup>48</sup> In addition, we have reviewed the TV packages and channel line-ups for several TWC systems serving communities in the New York DMA.<sup>49</sup> Based on our review, we find that TWC has in fact made WJLP's signal available on the basic service tier on its systems in the New York DMA.

12. Accordingly, **IT IS ORDERED** that, pursuant to Section 614 of the Communications Act of 1934, as amended, 47 U.S.C. § 534, the must carry complaint filed by PMCM TV, LLC, licensee of commercial broadcast television station WJLP, Middletown Township, New Jersey, against Time Warner Cable, Inc. **IS DENIED**.

13. This action is taken under authority delegated by Section 0.283 of the Commission's rules.<sup>50</sup>

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake  
Chief, Media Bureau

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<sup>47</sup> PMCM Complaint at 6 n.5. See 47 CFR §§ 76.57(f), 76.901(a).

<sup>48</sup> TWC Opposition at 6 n.18.

<sup>49</sup> See <http://www.timewarnercable.com/en/plans-packages/tv/digital-cable-tv-plans.html> (last visited April 7, 2016).

<sup>50</sup> 47 CFR § 0.283.