

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

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

Adopted: September 14, 2017

Released: September 15, 2017

By the Commission:

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I. INTRODUCTION

1. On June 5, 2015, the Chief, Media Bureau, issued a *Declaratory Ruling* pursuant to Section 1.2 of the Commission’s rules,¹ granting a Request for Declaratory Ruling filed by Meredith Corporation (Meredith), the licensee of television station WFSB(TV), RF channel 33, virtual channel 3, Hartford, Connecticut, that television station WJLP, RF channel 3, Middletown Township, New Jersey, be assigned virtual channel 33. The *Declaratory Ruling* also denied an “Alternative PSIP Proposal” and associated waiver request filed by PMCM TV, LLC (PMCM), then permittee of WJLP, proposing 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as 3.11, 3.12, etc.), while WFSB(TV) would retain virtual channels 3.1 through 3.9.² The *Declaratory Ruling* superseded the 2014 *Letter Orders* by the Video Division, Media Bureau, directing WJLP to use virtual channel 33 on an interim basis pending a decision based on the record in this docketed proceeding.³

¹ 47 CFR § 1.2.

² *Request for Declaratory Ruling by Meredith Corporation and “Alternative PSIP Proposal” by PMCM TV, LLC for WJLP (Formerly KVVN(TV)), Middletown Township, New Jersey*, MB Docket No. 14-150, Declaratory Ruling, 30 FCC Rcd 6078 (MB 2015) (*Declaratory Ruling*). PMCM’s application for a license for WJLP (File No. 0000001037) was granted on August 26, 2016.

³ See *Declaratory Ruling*, 30 FCC Rcd at 6084, para. 14 and *infra* para. 9 & note 30. The *Declaratory Ruling* also dismissed as moot PMCM’s associated November 10, 2014 “Emergency Motion for Stay of Suspension of Service and Virtual Channel Re-Assignment” of the Video Division’s 2014 *Letter Orders*. *Declaratory Ruling*, 30 FCC Rcd at 6105, para. 61.

2. The Commission now has before it Applications for Review (AFR) of the *Declaratory Ruling* filed by PMCM and Viacom Inc. (Viacom) on July 6, 2015. It also has before it an AFR filed by PMCM on November 10, 2014 seeking review of the 2014 *Letter Orders* directing WJLP to use virtual channel 33 on an interim basis. For the reasons set forth below, the Commission dismisses in part and denies in part PMCM's July 6, 2015 AFR, and dismisses Viacom's July 6, 2015 and PMCM's November 10, 2014 AFRs.⁴

II. BACKGROUND

3. *The PSIP Standard.* During the DTV transition, most full power television stations transmitted two over-the-air signals using two different radio frequency (RF) channels—an analog (NTSC) channel and a paired digital (DTV) channel capable of transmitting multiple streams of programming.⁵ The Advanced Television Systems Committee (ATSC), an international, non-profit member organization, developed a voluntary Program and System Information Protocol (the PSIP Standard or ATSC A/65C) setting forth rules and priorities for determining a digital television station's "virtual" or "major" channel number, the channel number viewers see on their television receiver when they view a digital television station over-the-air.⁶ The PSIP Standard introduced a "two-part" channel number navigational concept in order to permit broadcasters to retain the brand-identity they had as a result of years of marketing and advertising with respect to their analog channel, while also reducing consumer confusion about where to find existing channels.⁷

4. When ATSC initially adopted the PSIP 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 was used to group all channels that were to be identified as belonging to a particular broadcaster.⁹ The second part of the channel number, called the "minor" channel number, identified one program service within the group of services defined by the major number.¹⁰ Thus, the two-part numbering scheme allowed a station with RF analog channel 8, known locally as "Channel 8," and with RF digital channel 41, to have its digital programming appear to viewers as being carried on channels 8.1,

⁴ On May 17, 2016, the Bureau issued three Memorandum Opinion and Orders (MO&Os) denying must-carry complaints filed by PMCM seeking carriage of WJLP on cable channel 3 on cable systems in the New York, New York Designated Market Area (DMA). See *PMCM TV, LLC v. RCN Telecom Services, LLC*, Memorandum Opinion and Order, 31 FCC Rcd 5224 (MB 2016); *PMCM TV, LLC v. Service Electric Cable TV of New Jersey, Inc., d/b/a Service Electric Broadband Cable*, Memorandum Opinion and Order, 31 FCC Rcd 5230 (MB 2016); *PMCM TV, LLC v. Time Warner Cable Inc.*, Memorandum Opinion and Order, 31 FCC Rcd 5236 (MB 2016). PMCM filed a Consolidated AFR of the Bureau's MO&Os on June 10, 2016, and the Commission is addressing the Consolidated AFR concurrently with the instant order. *PMCM TV, Licensee of WJLP, Middletown Township, New Jersey v. RCN Telecom Services, LLC, et al*, Memorandum Opinion and Order, FCC 17-117 (2017) (the *Cable Carriage MO&O*).

⁵ *Declaratory Ruling*, 30 FCC Rcd at 6078-79, para. 3.

⁶ *Id.* at 6079, para. 4. In 2004, the Commission amended 47 CFR § 73.682(d) to adopt the ATSC PSIP Standard, and the current version of the rule requires television stations to comply with ATSC A/65C, dated May 9, 2006, when choosing a major channel. *Declaratory Ruling*, 30 FCC Rcd at 6080, para. 6. The parties below referred to ATSC A/65C as well as the most current version of the ATSC protocol dated August 7, 2013, which has not been incorporated into the Commission's rules. Because the Bureau's decision did not turn on using one version or the other, it cross-referenced to both. *Declaratory Ruling*, 30 FCC Rcd at 6080 n.14.

⁷ *Id.* at 6079-80, paras. 5-6.

⁸ The terms "virtual channel" and "major channel" are often used interchangeably. Parties to this proceeding also used the term "PSIP channel." *Id.* at 6079 n.8.

⁹ *Id.* at 6079-80, para. 5.

¹⁰ *Id.*

8.2, etc. when a viewer was channel surfing or consulting a paper or electronic program guide.¹¹ It also allowed viewers to receive the digital signal even if they did not know a station's assigned RF digital channel, simply by tuning to the established analog channel number.¹²

5. The mandatory requirements for assigning the major channel number component of stations' virtual channels are set forth in Annex B to ATSC A/65C, which 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."¹³ This 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, and that consumers associate with the station.¹⁴ 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.¹⁵ The vast majority of operating full power television stations were transmitting a licensed analog signal prior to the end of the DTV transition in June 2009, and accordingly, are currently using their former analog channel number as their "virtual" or "major" channel number.¹⁶

6. *PMCM's Construction and Current Operation of WJLP, Middletown Township, New Jersey*. PMCM acquired television station KVVV(TV), analog RF channel 3, Ely, Nevada, on November 12, 2008, and subsequently completed construction of the station's authorized digital channel 3 facility near Ely.¹⁷ As required by the PSIP Standard, PMCM used KVVV(TV)'s former analog channel number 3 as KVVV(TV)'s major channel number for digital operations in Ely.¹⁸ 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.¹⁹ On June 15, 2009, PMCM filed a notification (the Ely Notification), pursuant to Section 331(a) of the Communications Act, that it agreed to the reallocation of channel 3 from Ely to Middletown Township, New Jersey. That section of the Act provides that the Commission shall allocate a commercial very high frequency (VHF) channel to each state, if technically feasible, and further provides that if a licensee of a commercial VHF station notifies

¹¹ *Id.* at 6079-80, para. 5 & n.11. Services that were unrelated to the analog brand—for example, if a digital broadcaster transmitted community college lectures in its bit stream—could be given a different major channel number 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. *Id.* at para. 5.

¹² *Id.* at 6080, para. 6.

¹³ *Id.* at 6080-81, para. 7. The term "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 CFR § 73.622(e) (cited in Annex B.1.8 n.18). *Declaratory Ruling*, 30 FCC Rcd at 6081 n.17. The August 2013 protocol reflects a reorganization of Annex B and the guarantee of subpart 8 is a preamble to the mandatory assignment provisions. *Id.*

¹⁴ *Declaratory Ruling*, 30 FCC Rcd at 6092-93, para. 35 (citing *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, 18346-47, para. 153 (2004) (*Second Periodic Review*)).

¹⁵ *Id.* at 6080-81, para. 7.

¹⁶ *Id.* at 6081, para. 8.

¹⁷ *Id.* at 6081, para. 9.

¹⁸ *Id.*

¹⁹ *Id.* at 6081, para. 10, citing 47 U.S.C. § 337(e)(1); 47 CFR § 73.622(i).

the Commission that it agrees to the reallocation of its channel to a community in a state without a commercial VHF channel, “the Commission shall, notwithstanding any other provision of law, order such reallocation”²⁰

7. The Commission denied PMCM’s Ely Notification, interpreting the statute as requiring the Commission to order the reallocation of a commercial VHF 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 would not be the case with stations operating on RF channel 3 in Nevada and New Jersey.²¹ The United States Court of Appeals for the District of Columbia Circuit (the court of appeals) reversed the denial and required the Commission to approve the proposed reallocation of RF channel 3 from Nevada to New Jersey.²² The Video Division then reallocated digital RF channel 3 from Ely to Middletown Township.²³

8. PMCM filed an application for a construction permit to mount a channel 3 antenna on a tower atop the 4 Times Square Building in Manhattan, and Meredith filed an informal objection asserting that because the noise-limited contours of PMCM’s proposed station and WFSB(TV) would have significant overlap, both stations could not operate with the same virtual channel number and PMCM should be assigned virtual channel 33 in accordance with Annex B. The Video Division granted PMCM’s application without considering the merits of the virtual channel issue, and dismissed Meredith’s informal objection as premature. Meredith filed a timely Petition for Reconsideration on May 22, 2014, including a Request for Declaratory Ruling that PMCM’s station be assigned virtual channel 33.²⁴ After Meredith’s pleadings were briefed,²⁵ PMCM filed its Alternative PSIP Proposal, arguing, *inter alia*, that Annex B guarantees only that the two-part channel number combinations be unique to each station within its service area and proposing that WFSB(TV) could retain virtual channels 3.1 through 3.9, while PMCM’s station could be assigned 3.10 (with additional program streams identified as 3.11, 3.12, etc.).²⁶ By Public Notice released September 12, 2014, the Media Bureau sought comment on Meredith’s Request for a Declaratory Ruling and PMCM’s Alternative PSIP Proposal, with comments due October 14, 2014 and reply comments due October 29, 2014.²⁷

9. Before comments regarding the appropriate virtual channel for PMCM’s station were due, PMCM’s counsel notified the Commission on September 29, 2014 that PMCM had completed

²⁰ 47 U.S.C. § 331(a). 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. *Declaratory Ruling*, 30 FCC Rcd at 6081-82, para. 10.

²¹ *Id.* at 6082, para. 11, citing *Letter from William T. Lake, Chief, Media Bureau to PMCM TV, LLC*, 24 FCC Rcd 14588 (MB 2009), *app. for rev. denied, Reallocation of Channel 2 from Jackson, Wyoming to Wilmington, Delaware and Channel 3 from Ely, Nevada to Middletown Township, New Jersey*, Memorandum Opinion and Order, 26 FCC Rcd 13696 (2011).

²² *Declaratory Ruling*, 30 FCC Rcd at 6082, para. 11, citing *PMCM TV, LLC v. FCC*, 701 F.3d 380 (D.C. Cir. 2012).

²³ *Declaratory Ruling*, 30 FCC Rcd at 6082, para. 11, citing *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*, MB Docket No. 13-72, Report and Order, 28 FCC Rcd 2825 (Vid. Div. 2013).

²⁴ *Declaratory Ruling*, 30 FCC Rcd at 6082-83, para. 12.

²⁵ *See id.* at 6084-88, paras. 15-24.

²⁶ *Id.* at 6088-89, paras. 25-26.

²⁷ *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 (MB 2014).

construction of its reallocated facility and was commencing equipment tests as of that date.²⁸ On October 3, Meredith, ION Media License Company (ION), and CBS Broadcasting, Inc. (CBS) 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 3.10.²⁹ 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. After PMCM failed to comply, the Division suspended program test authority for WJLP effective November 10, 2014, indicating that program test authority would be reinstated upon notification that PMCM would operate the station using virtual channel 33 on an interim basis.³⁰ PMCM filed an Emergency Petition for Writ of Mandamus with the court of appeals on November 10, 2014, asking the court to order the Commission to rescind or stay the effectiveness of the suspension of program test authority.³¹ A temporary stay of the suspension of program test authority was imposed by the Division, and extended by the court. By order dated February 27, 2015, the court denied the petition for writ of mandamus and dissolved its stay.³² Accordingly, on March 16, 2015, WJLP began operating pursuant to program test authority using virtual channel 33 on an interim basis as required by the *2014 Letter Orders*.³³

10. *The Bureau's Declaratory Ruling.* Meredith's Request for Declaratory Ruling and PMCM's Alternative PSIP Proposal were extensively briefed by a number of interested parties,³⁴ and after consideration of all the arguments raised, the Bureau assigned WJLP virtual channel 33. The Bureau concluded that "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."³⁵ Annex B.1.4 provides that:

If, after the [DTV] 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.

Because Meredith's WFSB(TV) was previously licensed on NTSC RF channel 3 in an overlapping service area or "market," the Bureau concluded that WJLP, as the newly-licensed DTV broadcaster in that market, should use as its major channel number the DTV RF channel originally allocated to WFSB(TV),

²⁸ *Declaratory Ruling*, 30 FCC Rcd at 6084, para. 14. Shortly thereafter, the station's call sign changed from KVVN(TV) to WJLP. *Id.*

²⁹ *Id.* ION is the licensee of WPXN-TV, New York, New York, which has been carried on channel 3 on many Cablevision Systems Corporation systems in the New York DMA by mutual agreement of the parties. *Id.* at 6090 n.92. CBS is the licensee of KYW-TV, Philadelphia, Pennsylvania, which, like WFSB(TV), operates with virtual channel 3 and has contour overlap with WJLP. *Id.* at 6089, para. 27.

³⁰ *Id.*, citing *Letter, Donald J. Evans, Esq.*, 29 FCC Rcd 12733 (Vid. Div. 2014) and *Letter, Donald J. Evans, Esq.* (Nov. 7, 2014) (available at http://licensing.fcc.gov/cgi-bin/prod/cdb/forms/prod/getimportletter_exh.cgi?import_letter_id=54220) (*2014 Letter Orders*).

³¹ *PMCM TV, LLC, Petitioner, CBS Broadcasting, Inc., et al., Intervenor*, Case No. 14-1238 (D.C. Cir. 2014).

³² *Declaratory Ruling*, 30 FCC Rcd at 6084, para. 14, citing *In re PMCM TV, LLC*, No. 14-1238 (D.C. Cir. Feb. 27, 2015) (order denying mandamus, finding that PMCM had not shown that the Commission violated the court's mandate in *PMCM TV, LLC v. FCC* or that PMCM had a clear and indisputable right to operate using virtual channel 3, and dissolving stay).

³³ *Declaratory Ruling*, 30 FCC Rcd at 6084, para. 14.

³⁴ *Id.* at 6084-92, paras. 15-33.

³⁵ *Id.* at 6092, para. 34.

which is channel 33.³⁶ The Bureau rejected PMCM's argument that Annex B.1.4 was inapplicable in this case because it required that the new and incumbent stations be in the same Nielsen Media Research Designated Market Area (DMA). Rather, the Bureau reasoned that interpreting "market" to refer to a station's service area would better serve the Commission's purpose in adopting the PSIP protocol and was consistent with the design of Annex B.³⁷

11. The Bureau also concluded that even if Annex B.1.4 did not apply to this situation, Annex B.1.8, which states that the provisions of Annex B operate so as to "assign major_channel_number values . . . uniquely" to individual broadcasters, supports requiring WJLP to use a major channel number distinct from that of any other broadcaster with an overlapping service area.³⁸ The Bureau further concluded that assignment of virtual channel 33 was consistent with: (1) the Video Division's decision in *Seaford, Delaware*, where the Division assigned virtual channel 36 to a new digital channel 5 allotment for a community located 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,³⁹ (2) other decisions the Division had made when presented with a virtual channel conflict between stations with overlapping DTV service contours,⁴⁰ and (3) the published description of the operation of Annex B.1.4 by Mark K. Eyer, who serves as Chair of the ATSC technical group that maintains and revises the PSIP Standard.⁴¹

12. The Bureau further rejected PMCM's argument that Annex B.1.1—which provides that "existing" NTSC licenses must use their NTSC channel number as the major channel number for both the existing NTSC operations and digital operations—required the assignment of major channel 3 to WJLP, because at the time PMCM applied for a license for WJLP in New Jersey it no longer had an NTSC RF channel.⁴² The Bureau also rejected PMCM's argument that Annex B.1.5, which allows commonly owned stations to share a major channel number, sanctions WJLP's shared use of major channel 3 with WFSB(TV) and KYW-TV as long as the overlapping stations use different minor channel numbers, finding that the narrow exception to the unique assignment of major channel numbers to stations with overlapping contours is triggered only where the stations with overlapping contours are commonly owned, which is not present here.⁴³

13. In addition to rejecting PMCM's reading of the assignment provisions of Annex B, the Bureau rejected PMCM's assertion that it was entitled, by statute, to use virtual channel 3. First, the Bureau concluded that the purpose of Section 331 of the Communications Act, by which PMCM's station was reallocated from Nevada to New Jersey, was fulfilled when the Commission allocated RF channel 4 (66-72 megahertz (MHz)) to Atlantic City, New Jersey and RF channel 3 (60-66 MHz) to Middletown

³⁶ *Id.*

³⁷ *Id.* at 6092-94, paras. 35-36. WJLP is in the New York, New York DMA and WFSB(TV) is in the Hartford-New Haven, Connecticut DMA. *Id.* at 6086, para. 18. KYW-TV is in the Philadelphia, Pennsylvania DMA. Given the geographic proximity of these markets, there is overlap between these service areas.

³⁸ *Id.* at 6094, para. 37.

³⁹ *Id.* at 6094-95, paras. 38-40; *see generally 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) (subsequent citations omitted).

⁴⁰ *Declaratory Ruling*, 30 FCC Rcd at 6095, para. 41.

⁴¹ *Id.* at 6096, para. 42; *see also id.* at 6080 n.7, citing Mark K. Eyer, *PSIP: Program and System Information Protocol*, McGraw-Hill, 2003.

⁴² *Declaratory Ruling*, 30 FCC Rcd at 6096, para. 43.

⁴³ *Id.* at 6097-99, paras. 44-46.

Township in the DTV Table of Allotments.⁴⁴ Next, it concluded that requiring WJLP to use virtual channel 33 did not frustrate the purpose of Section 331, which was to facilitate the allotment of a commercial VHF channel to New Jersey given the substantial advantages VHF channels then had over UHF channels. Indeed, by operating on RF channel 3 with maximum effective radiated power (ERP) at 4 Times Square, WJLP is the second largest station of the 22 full power television stations licensed to the New York DMA.⁴⁵ Further, the Bureau disagreed that assigning WJLP virtual channel 33 violated 47 U.S.C. §§ 1452(g)(1)(A) or (g)(1)(B), finding those provisions apply to television stations' "spectrum usage rights," or RF channel numbers, in connection with a broadcast spectrum incentive auction, and not stations' virtual channel assignments.⁴⁶ Last, it rejected PMCM's argument that granting Meredith's Declaratory Ruling request would require the Commission, in making channel reassignments as part of the incentive auction, to protect two channels for each station—its RF channel number as well as its major channel number.⁴⁷

14. Finally, the Bureau concluded that PMCM failed to show good cause for a waiver of Section 73.682(d) of the Commission's rules and the assignment principles of Annex B.⁴⁸ The Bureau found that granting a waiver to permit WJLP to use virtual channel 3.10 would undermine the underlying purpose of Annex B, which is designed to ensure that broadcasters serving the same service area have unique major channel numbers in order to prevent consumer confusion and permit digital broadcasters to retain their existing brand identity as a result of years of marketing and advertising on their analog channels, and would also be inconsistent with other Bureau waiver decisions which have required a showing that the requesting station does not have contour overlap with any other station using the major channel number requested.⁴⁹ The Bureau also rejected PMCM's argument that the Commission should ignore contour overlap between WFSB(TV) and WJLP because of interference to WFSB(TV) from WCBS(TV), New York, New York, finding that of the approximately one million persons residing in the WFSB(TV)/WJLP overlap area, nearly a half million receive interference-free service from WFSB(TV), and that almost three million persons in the KYW-TV/WJLP overlap area receive interference-free service from KYW-TV.⁵⁰ With respect to PMCM's claim that the Commission had sanctioned over 105 situations where stations with overlapping service areas are purportedly using the same major channel number, the Bureau explained that PMCM's list was largely inaccurate, and that in the handful of instances in which two stations with overlapping service areas share a major channel number, none of these cases were brought to the Commission for resolution.⁵¹ The Bureau also concluded that grant of PMCM's request to use virtual channel 3.10 would result in harm to incumbent licensees by diluting their decades of local brand identification on channel 3, could lead to a large number of similar requests by

⁴⁴ *Id.* at 6099, para. 47. The Bureau pointed out that if Section 331 were read to apply to virtual channels, then the reallocation of channel 3 to New Jersey would have been unnecessary because WWOR-TV in Secaucus, New Jersey continues to operate with virtual channel 9. *Id.*

⁴⁵ *Id.* at 6099-6100, para. 48.

⁴⁶ *Id.* at 6100-01, para. 49.

⁴⁷ *Id.* at 6101, para. 50.

⁴⁸ *Id.* at 6101-05, paras. 51-60.

⁴⁹ *Id.* at 6102, para. 53.

⁵⁰ *Id.* at 6102-03, para. 54.

⁵¹ *Id.* at 6103-04, paras. 57-58. The Bureau also noted that if, in fact, there were multiple unadjudicated instances in which stations were using major channel numbers that were not in compliance with the channel assignment rules in ATSC A/65C and the affected stations did not object, this would not support PMCM's use of a noncompliant major channel. *Id.* at para. 57.

stations that would prefer their signals to be associated with the brand of a more highly rated station, and could lead to consumer confusion.⁵²

III. DISCUSSION.

15. As noted above, we have three AFRs related to WJLP's use of virtual channel 33: (1) PMCM's July 6, 2015 AFR of the *Declaratory Ruling*, (2) Viacom's July 6, 2015 AFR of the same decision, and (3) PMCM's November 10, 2014 AFR of the Video Division's *2014 Letter Orders* directing WJLP to use virtual channel 33 on an interim basis. An application for review must establish that the Bureau's actions either: (i) conflicted with statute, regulation, case precedent, or Commission policy, (ii) involved a question of law or policy not previously resolved by the Commission, (iii) involved precedent or policy that should be overturned or revised, (iv) made an erroneous finding as to an important fact, or (v) made a prejudicial procedural error.⁵³

A. PMCM's July 6, 2015 Application for Review.

16. In this AFR, PMCM raises five primary challenges to the Bureau's *Declaratory Ruling*. It alleges that the Bureau: (1) violated the Spectrum Act⁵⁴ section prohibiting the Commission from involuntarily changing a station's spectrum usage rights or channel prior to the broadcast incentive auction by assigning WJLP virtual channel 33, (2) misapplied the directives of ATSC A/65, Annex B so as to assign WJLP virtual channel 33, (3) erred in not permitting WJLP to use virtual channel 3 because it had contour overlap with other stations using virtual channel 3, even though other stations operate with virtual channel contour overlap and Congress mandated that a commercial VHF channel be allotted to New Jersey, (4) precluded PMCM and interested parties from engaging the staff on the issues by treating this proceeding as "restricted" for purposes of the Commission's *ex parte* rules, and (5) limited the ability of the Commission to repack stations in the broadcast incentive auction by ruling that a station's virtual channel number contour, as well as its RF channel contour, is entitled to protection. On July 21, Meredith and CBS filed an Opposition to PMCM's July 6, 2015 AFR, to which PMCM replied on August 3, 2015. Finally, on September 11, 2015, PMCM filed a Supplement to its AFR (Supplement) to submit an Emergency Request for Relief (Emergency Request) that it had filed the same day with the Bureau. In its Emergency Request to the Bureau, PMCM asserts that it should be permitted to use virtual channel 3.10 immediately because a number of viewers had complained that their television receivers do not display WJLP when tuned to channel 33.

17. As discussed below, we conclude that the Bureau correctly determined that ATSC A/65C, Annex B requires the assignment of virtual channel 33 to WJLP as licensed to Middletown Township, New Jersey.

18. *Arguments Not Raised Before the Bureau Are Procedurally Barred.* It is well settled that the Commission will not consider matters raised in an application for review upon which the Bureau had no opportunity to pass.⁵⁵ PMCM argues in its AFR that the Bureau erred in treating this docketed proceeding as restricted for *ex parte* purposes, rather than permit-but-disclose, and that it failed to offer any explanation for doing so.⁵⁶ PMCM states that the Bureau's application of the procedures for restricted proceedings to this matter "prevent[ed] PMCM, concerned members of Congress, and anyone

⁵² *Id.* at 6104-05, para. 59.

⁵³ 47 CFR § 1.115(b)(2).

⁵⁴ Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96 (Feb. 22, 2012), 126 Stat. 156, *codified at* 47 U.S.C. §§ 1401 *et seq.* (Spectrum Act).

⁵⁵ 47 U.S.C. § 155(c)(5); 47 CFR § 1.115(c); *see also* *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1183-84 (D.C. Cir. 2003) (upholding Commission's order dismissing arguments under Section 1.115(c) because that rule does not allow the Commission to grant an application for review if it relies upon arguments that were not presented below).

⁵⁶ PMCM AFR at 19-21; Reply at 5.

else from presenting their views . . . personally to Commission authorities.”⁵⁷ As Meredith and CBS point out, however, PMCM did not raise this issue before the Bureau prior to filing its AFR,⁵⁸ and we dismiss this argument as procedurally barred. We also note that counsel for PMCM subsequently asked the staff to clarify the *ex parte* status of this proceeding, and the Bureau explained in a *Public Notice* released December 3, 2015 why meetings with the staff concerning the merits or outcome of this proceeding have been conducted in conformance with the rules for restricted proceedings. The Bureau also formally designated the proceeding as restricted,⁵⁹ concluding that treating the proceeding as restricted would serve the interests of fairness and efficiency because the Petition for Declaratory Ruling is intertwined with related matters that are restricted, and the participation of the parties in meetings, pursuant to the restricted proceeding procedures, is beneficial to the decision making process.⁶⁰ PMCM did not file for reconsideration or review of the *Public Notice*.⁶¹

19. We also dismiss as procedurally barred the matters raised in PMCM’s Supplement. As PMCM admits, it concurrently raised the same matters with the Bureau. While PMCM asserts that its Supplement “presents relevant information which was not previously available,”⁶² the supporting declaration regarding PMCM’s allegation that some television receivers in the New York DMA have difficulty receiving WJLP’s over-the-air signal when the station uses virtual channel 33 specifically states that “[s]ince mid-March, 2015, shortly after WJLP changed its two-part virtual channel number from 3.10

⁵⁷ PMCM AFR at 20. PMCM incorrectly asserts that “the Bureau ignored the strongly supportive comments of over 400 members of the public who took the time to submit a comment.” *Id.* The Bureau reviewed approximately 500 comments filed by WJLP viewers and determined that none addressed the virtual channel issue, but instead stated that they wanted WJLP to remain on the air because they enjoyed its programming. *See Declaratory Ruling*, 30 FCC Rcd at 6092 n.105.

⁵⁸ Meredith/CBS Opposition at n.3. They further note that PMCM has not demonstrated how the Commission’s *ex parte* rules foreclosed any presentations or hindered PMCM from communicating with Commission decision makers, and that “[i]ndeed, even a cursory glance at the docket in this proceeding confirms that PMCM and its supporters have been ‘engaging the staff’ a great deal.” *Id.*

⁵⁹ *See Media Bureau Specifies Ex Parte Status of Pending Proceedings Involving PMCM TV, LLC*, MB Docket No. 14-150, DA 15-662, DA 15-667, Public Notice, 30 FCC Rcd 13677 (MB 2015) (MB *Ex Parte* Status Public Notice). The Commission has broad authority under the Communications Act to “conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.” 47 U.S.C. § 154(j). *See FCC v. Schreiber*, 381 U.S. 279, 289-90 (1965).

⁶⁰ MB *Ex Parte* Status Public Notice, *supra*.

⁶¹ Separately and independently, PMCM is wrong on the merits. Permit-but-disclose *ex parte* procedures permit interested parties to make written and oral *ex parte* presentations to the Commission and require that these presentations be disclosed in the record of the relevant proceeding as provided in 47 CFR § 1.1206(b). Under the restricted procedures, written presentations must be served on all of the parties, and no oral presentations may be made unless advance notice and an opportunity to be present is provided to all parties. *See* 47 CFR §§ 1.1202(b) & 1.1208. The record indicates that the parties conducted numerous meetings with Commission decision makers. *See, e.g.,* Letter from Eve R. Pogoriler, Counsel for ION Media License Co., LLC to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-150 (filed Aug. 4, 2014) (summarizing meeting on July 31, 2014); Letter from Rosemary C. Harold, Counsel to Viacom, Inc. to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-150 (filed Aug. 12, 2015) (summarizing meeting on Aug. 10, 2015); Letters from Donald J. Evans, Counsel for PMCM TV, LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-150 (filed Oct. 15 and Nov. 25, 2015) (referencing meetings on Oct. 13 and Nov. 25, 2015); Letter from Donald J. Evans, Counsel for PMCM TV, LLC, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-150 (filed Feb. 3, 2016) (summarizing meetings on Feb. 1, 2016). Thus, application of the rules for restricted proceedings did not prevent PMCM or other parties from presenting their views to Commission decision makers, as evidenced by the record. In addition, the Commission and its staff have the discretion to specify an *ex parte* status other than the “default” status provided for in the rules. *See* 47 CFR § 1.1200.

⁶² PMCM Supplement at 1.

to 33.1, PMCM has received . . . complaints . . . [advising] PMCM that, while they had previously watched the station on [c]hannel 3, they have since mid-March been unable to receive [the station's signal] by turning their receivers to [c]hannel 33.”⁶³ PMCM has offered no explanation why it could not have brought these matters to the attention of the Bureau before the *Declaratory Ruling* was released in June 2015 or in a timely petition for reconsideration to the Bureau.

20. We also note that the matter before the Bureau is not relevant to the issue before us—whether the Bureau, in the *Declaratory Ruling*, correctly determined that ATSC A/65C, Annex B requires the assignment of virtual channel 33 to WJLP as licensed to Middletown Township, New Jersey. The gravamen of PMCM's Emergency Request for Relief is that since it began using major channel 33 in March 2015, some television receivers in the viewing area do not display WJLP when directed to channel 33 through a remote control device, but instead display WCBS-TV in New York,⁶⁴ which operates on RF channel 33 (PMCM's major channel) and uses major channel 2. In addition, PMCM states that some receivers tuned to channel 3 receive WJLP but when tuned to channel 2 fail to receive WCBS-TV.⁶⁵ PMCM admits, however, that “receiver error is the likely cause of these problems”⁶⁶ and it appears that what PMCM characterizes as “Non-Working Sets,” when tuned to just a major channel number, search for and display the viewable signal of a station with a corresponding RF channel number.⁶⁷ This alleged receiver error, however, does not constitute an “emergency” because it appears that in most instances WJLP and WCBS-TV would be correctly displayed when these receivers are tuned to 33.1 and 2.1.⁶⁸ In addition, PMCM states that it “expects [these problems] will be found in millions [of] TV sets currently sold in the USA over the past 6 years.”⁶⁹ Accordingly, this situation is not unique to WJLP and WCBS-TV in New York, but would result in any area in which a licensee relinquished its analog channel number and another licensee in the area elected to use the relinquished channel for its digital operations.⁷⁰ Presumably viewers owning these television receiver models after the end of the DTV transition in 2009 have known to input both a major and minor channel in order to watch these stations.⁷¹

⁶³ September 11, 2015 Emergency Request, Declaration at para. 3.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at para. 4.

⁶⁷ A “Non-Working Set” tuned to channel 2 would display no television signal since no stations in the New York DMA broadcast on RF channel 2.

⁶⁸ See, e.g., Letter from Donald J. Evans, Counsel for PMCM TV, LLC to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-150 (filed Nov. 25, 2015) (PMCM Nov. 25, 2015 *Ex Parte* Letter) (stating that it would be unfair to require PMCM to educate viewers to input 33.1 instead of 33); Letter from Joshua N. Pila, Meredith Corporation and John W. Bagwell, CBS Broadcasting, Inc. to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-150 (filed Dec. 1, 2015) (Meredith/CBS Dec. 1, 2015 *Ex Parte* Letter) (stating that CBS informs viewers that they should tune to WCBS-TV by using a minor channel number containing a dot or a dash). Although PMCM claims that tuning to channel 33.1 did not resolve this problem for some viewers, PMCM Nov. 25, 2015 *Ex Parte* Letter at 2 and Attachment, PMCM has been informing its viewers that they should tune to 33.1 to receive the signal for over a year. See <http://wjlp3.com/> (visited Aug. 25, 2015 and Aug. 9, 2017). We also note that CBS undertook its own study using the same receivers tested by PMCM and reported that all of the receivers displayed PMCM's WJLP when 33.1 was entered. Meredith/CBS Dec. 1, 2015 *Ex Parte* Letter at 2.

⁶⁹ Emergency Request Declaration at paras. 3 & 9.

⁷⁰ As of July 16, 2015, more than 100 stations had an RF digital channel number that is the major channel number of another station operating in the same DMA. See *Cable Carriage MO&O* at n.104 and Appendix A. This does not include similarly situated stations with overlapping contours that are located in different DMAs.

⁷¹ See Letter from Joshua N. Pila, Counsel for Meredith, *et al.*, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 14-150 (filed Feb. 29, 2016) at 2 (“The tuning phenomenon that PMCM identified is not unique to WJLP, is known to the Bureau, and has been identified in more than forty other markets, yet in no other market has a licensee

(continued....)

21. In the *Declaratory Ruling*, the Bureau rejected PMCM’s argument that requiring PMCM to use virtual channel 33 would alter PMCM’s “spectrum usage rights” in violation of Section 1452(g)(1).⁷² PMCM now argues, for the first time, that because the Commission has determined that for cable carriage purposes, a broadcast station’s channel number is no longer defined as its RF channel, but is instead its major (i.e., virtual) channel number, “the change of WJLP’s virtual channel flatly and incontrovertibly violated [Section 1452(g)(1)(A) of the Act],” which not only prohibits the Commission from altering a licensee’s spectrum usage rights, but also prohibits the Commission from involuntarily reassigning a licensee to another television channel.⁷³ This argument is procedurally barred for the reasons stated above—it was not raised before the Bureau—and accordingly we dismiss this aspect of the AFR.

22. In the alternative, we also deny this portion of the AFR. First, the Bureau did not “change” WJLP’s virtual channel but instead determined that under the major channel assignment principles in Annex B, the appropriate virtual channel for WJLP as a newly licensed station at Middletown Township, New Jersey, as opposed to its abandoned operations at Ely, Nevada, was 33.⁷⁴ Second, the Spectrum Act does not define the term “channel,” and construing that statutory term to refer to RF spectrum is consistent with the major purpose of the statute, which is to make RF spectrum available for non-broadcast uses by auctioning spectrum that broadcasters are willing to relinquish.⁷⁵ This construction is also consistent with the statutory structure. The legislation provides guidelines for the reassignment of channels, and, by referring to “coverage area and population served,” these guidelines presume that the reassignment of a channel requires a broadcaster to use a different portion of the RF

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found the phenomenon of sufficient concern to seek relief from the Commission. Viewers [of WJLP] can avoid the prospect of mistuning by tuning in the channel as 33.1 rather than scrolling to 33.”). In addition, the tuner issue does not affect reception of WJLP via a cable system. WJLP’s signal was being carried by a number of cable systems as of September 2015. *See* Letter from Donald J. Evans, Counsel for PMCM TV, LLC, to Marlene H. Dortch, Secretary, FCC, at 2 (filed Sept. 30, 2015) (stating that Cablevision, Comcast, and TWC cable systems in the New York DMA were carrying WJLP); Letter from Tara M. Corvo, Counsel to Cablevision Systems Corp., to William T. Lake, Chief, Media Bureau, FCC, at 1 (filed Sept. 24, 2015) (stating that all Cablevision cable systems in the New York DMA on which WJLP had must carry rights began carrying WJLP on Sept. 3, 2015); Letter from Frederick W. Giroux, Counsel to Comcast Cable Communications, L.L.C., to William T. Lake, Chief, Media Bureau, FCC, at 1 (filed Sept. 30, 2015) (stating that Comcast cable systems serving New Jersey communities in the New York DMA began carrying WJLP on Sept. 3, 2015); Letter from Seth A. Davidson, Counsel to Time Warner Cable Inc., to William T. Lake, Chief, Media Bureau, FCC, at 1 (filed Sept. 30, 2015) (stating that TWC cable systems in the New York DMA began carrying WJLP on Aug. 25, 2015). Delivery of WJLP’s signal via satellite likewise does not present the tuner issue. *See* http://wjlp3.com/watch/?utm_source=homepage&utm_medium=banner&utm_campaign=Where%20to%20watch (visited Aug. 15, 2017) (indicating that WJLP’s signal is available via satellite on Dish Network).

⁷² *Declaratory Ruling*, 30 FCC Rcd at 6100, para. 49 (finding that Section 1452 pertains to the “spectrum usage rights” that broadcasters may choose to relinquish in the incentive auction, and those rights are associated with a station’s RF channel, not its virtual channel). *See also Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567, 6718-19, para. 356 (2014) (*Incentive Auction R&O*), *aff’d*, *Nat’l Assoc. of Broadcasters, et al. v. FCC*, 789 F.3d 165 (D.C. Cir. 2015) (While the Spectrum Act does not define “spectrum usage rights,” under the Communications Act, only a station license confers on the holder the right to “use” the station to transmit a signal, and the Commission similarly interpreted the term “spectrum usage rights” to mean the rights of a broadcaster to use spectrum pursuant to a license.).

⁷³ PMCM AFR at 8; 47 U.S.C. § 1452(g)(1)(A).

⁷⁴ We agree with Meredith and CBS that even if Section 1452 applies to virtual channels as well as RF channels, there was no “involuntary change” that would invoke that section. Rather, pursuant to the assignment provisions of Annex B, WJLP received 33 as its virtual channel by operation of law when it voluntarily moved its station from Ely to Middletown Township as a newly licensed station. *See* Meredith/CBS Opposition at 8-9.

⁷⁵ 47 U.S.C. § 1452(a).

spectrum.⁷⁶ The legislation also provides for the reimbursement of the costs incurred by broadcasters that re-locate their operations to a new “television channel,” suggesting that Congress recognized that when a broadcaster commences operations on a different RF channel, it may incur significant operational costs.⁷⁷ Further, there is no indication that Congress meant for the term “channel” in Section 1452(g)(1)(A) (prohibiting involuntary reassignment of a “television channel”) to have a different meaning than the meaning of that same term as used in Section 1452(g)(1)(B), which prohibits the reassignment of “a broadcast television licensee from a very high frequency television channel to an ultra high frequency television channel” except under certain circumstances.⁷⁸ The terms “ultra high frequency television channel” and “very high frequency television channel” are defined as segments of the radio frequency spectrum.⁷⁹ The Commission has implemented this legislation by conducting an auction of RF spectrum, not an auction of major channel assignments pursuant to the PSIP Standard.⁸⁰ Finally, we reject PMCM’s suggestion that interpreting the term “channel” as referring to a station’s virtual channel for a station’s on-

⁷⁶ 47 U.S.C. § 1452(b)(2) (“In making any reassignments or reallocations under paragraph (1)(B), the Commission shall make all reasonable efforts to preserve, as of February 22, 2012, the coverage area and population served of each broadcast television licensee, as determined using the methodology described in OET Bulletin 69 of the Office of Engineering and Technology of the Commission.”).

⁷⁷ 47 U.S.C. § 1452(b)(3)-(4), (g)(1). For example, operation on a different RF channel could require a broadcaster to relocate or reconfigure its transmission facilities. *See Incentive Auction Task Force and Media Bureau Finalize Catalog of Reimbursement Expenses*, Public Notice, 32 FCC Rcd 1199 (IATF/MB 2017) (Commission adopts revised Catalog of costs for equipment and services broadcasters are most likely to incur as a result of their new channel assignments, including tower work and replacing transmitters, antennas, and transmission lines).

⁷⁸ 47 U.S.C. § 1452(g)(1)(B). The provisions in Section 1452(g) are applicable from February 22, 2012 until: (1) the completion of the incentive auction and spectrum repacking process authorized by the statute or (2) September 30, 2022 (whichever comes first). 47 U.S.C. § 1452(g)(2)(A)-(C). The statute includes a third possible ending date that is inapplicable because the conditions specified in that provision were not satisfied. *Id.* § 1452(g)(2)(B). The Commission announced on April 13, 2017 that the incentive auction has closed and also announced final television band channel assignments as a result of the repacking process. *Incentive Auction Closing and Channel Reassignment Public Notice: The Broadcast Television Incentive Auction Closes; Reverse Auction and Forward Auction Results Announced; Final Television Band Channel Assignments Announced; Post-Auction Deadlines Announced*, Public Notice, 32 FCC Rcd 2786 (2017) (*Closing and Channel Reassignment Public Notice*). Thus, the foregoing restrictions no longer apply. *See Application of KM LPTV of Chicago-13, L.L.C. for A Displacement Application for Class A Television Station WOCC-CD, Chicago, Illinois*, 32 FCC Rcd 5433, 5436-37, para. 10 & n.27 (2017); *The Incentive Auction Task Force & Media Bureau Adopt Filing Requirements for the Transition Progress Report Form by Stations That Are Not Eligible for Reimbursement from the TV Broadcast Relocation Fund*, Public Notice, 32 FCC Rcd 4029, 4030, para. 3 (2017).

⁷⁹ 47 U.S.C. § 1401(32) (“The term ‘ultra high frequency’ means, with respect to a television channel, that the channel is located in the portion of the electromagnetic spectrum between the frequencies from 470 megahertz to 698 megahertz.”); *id.* § 1401(33) (“The term ‘very high frequency’ means, 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* 47 U.S.C. § 1401(7) (“The term ‘broadcast television spectrum’ means the portion of the electromagnetic spectrum between the frequencies from 54 [MHz] to 72 [MHz], from 76 [MHz] to 88 [MHz], from 174 [MHz] to 216 [Mhz], and from 470 [MHz] to 698 [MHz].”). These identified portions of the electromagnetic spectrum correspond to television channels 2 through 51. *See* 47 CFR § 73.603.

⁸⁰ *See Closing and Channel Reassignment Public Notice*, 32 FCC Rcd at 2790, para. 7 (identifying the pre-auction television band—Low-VHF, High-VHF, or UHF—for each broadcast station with a winning reverse auction bid); *id.* at 2793-94, para. 16 and 47 CFR § 73.603(a) (600 MHz Band Plan resulting from the incentive auction includes 70 MHz of spectrum (614-698 MHz) which corresponds to television channels 38 through 51). Moreover, as the Bureau pointed out, in connection with implementing rules for the broadcast incentive auction, the Commission specifically addressed PMCM’s channel 3 spectrum usage rights, and stated 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. *Incentive Auction R&O*, 29 FCC Rcd at 6666, paras. 221-22.

channel cable carriage option requires the Commission to interpret every other reference to a broadcast television station's channel in the Act or Commission rules as a reference to the station's virtual channel rather than its RF channel.⁸¹ The Act uses the term "channel" to mean different things in different contexts.⁸²

23. *The Bureau Correctly Applied the Directives of ATSC A/65C, Annex B.* The Bureau carefully examined ATSC A/65C, Annex B, as incorporated into the Commission's rules, and concluded that Annex B.1.4 applies to the facts at hand and requires that WJLP use virtual channel 33 for its operations at Middletown Township. While PMCM disagrees with that conclusion, we find that it has failed to demonstrate under Section 1.115(b) of the Commission's rules that the Bureau erred in reaching the conclusion that ATSC A/65C, Annex B requires WJLP to use virtual channel 33.⁸³

24. PMCM claims in its AFR that the Bureau erred by not applying Annex B.1.1. Annex B.1.1 provides that "broadcasters with existing NTSC licenses" were required to use their existing NTSC channel number as their major channel number.⁸⁴ In its AFR, PMCM first reiterates its argument that because WJLP operated on channel 3 both before and after the digital transition, the assignment of that virtual channel was mandatory and complains that the *Declaratory Ruling* "does not even attempt to explain why the mandate of [B.1.1] does not apply on its face to WJLP under the PSIP Protocols."⁸⁵ On the contrary, the Bureau explained that under that assignment principle in Annex B, station KVVN(TV), which operated with NTSC channel 3 prior to the DTV transition, appropriately used major channel 3 for its post-transition digital RF channel 3 operations at Ely. However, when PMCM applied in 2014 for a license to operate its newly constructed facility for Middletown Township, KVVN(TV)'s NTSC RF channel number in Ely had long been rendered a nullity since all NTSC licenses had been terminated by statute on June 12, 2009.⁸⁶ While PMCM asserts that nothing in Annex B suggests that a station that

⁸¹ See *Verizon California, Inc. v. FCC*, 555 F.3d 270, 276 (D.C. Cir. 2009). ("[I]t is not impermissible under *Chevron* for an agency to interpret an imprecise term differently in two separate sections of a statute which have different purposes.") (quoting *Abbott Labs. v. Young*, 920 F.2d 984, 987 (D.C. Cir. 1990)).

⁸² For example, in Section 614(b)(1)(A), the term "channel" is used to refer to the number of different programming streams transmitted by a cable system, not the transmission frequencies of these programming streams. See 47 U.S.C. § 534(b)(1)(A) ("A cable operator of a cable system with 12 or fewer usable activated channels shall carry the signals of at least three local commercial television stations"). See also 47 U.S.C. § 522(1) ("[T]he term 'activated channels' means those channels engineered at the headend of a cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational, or governmental use."); *id.* § 531 ("Cable channels for public, educational, or governmental use"). See also 47 U.S.C. § 522(4) (defining the terms "cable channel" and "channel" to mean "a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation)"). See also 47 U.S.C. § 309(j)(15)(C)(vi) (referring to "the spectrum between channels 52 and 69, inclusive" as the spectrum "between frequencies 698 and 806 megahertz, inclusive"); 47 U.S.C. § 543(l)(2) (defining "cable programming service" to mean any video programming provided over a cable system . . . other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis").

⁸³ PMCM once again asserts, without support, that Annex B is not a "rule." PMCM AFR at 5. The Commission, however, incorporated ATSC A/65C into its rules. See *Declaratory Ruling*, 30 FCC Rcd at 6098 n.139; see also IBR Handbook, Office of the Federal Register (Apr. 2016) at 1 ("The legal effect of [Incorporation by Reference] is that the material is treated as if it was published in the Federal Register and the CFR. This material has the force and effect of law, just like all regulations published in the Federal Register and the CFR"); *PPG Industries, Inc. v. Costle*, 659 F.2d 1239, 1250 (D.C. Cir. 1981) ("If a required definition or procedure is part of a rule, it must be published or incorporated by reference in the Federal Register.").

⁸⁴ ATSC A/65C, Annex B.1.1.

⁸⁵ PMCM AFR at 9.

⁸⁶ *Declaratory Ruling*, 30 FCC Rcd at 6096, para. 43; see also *id.* at 6081, para. 8.

“moves” should lose its major channel number, allowing PMCM to use its former NTSC channel from a different market would be inconsistent with the design of Annex B, which presumes that the designated major channel number is available in the station’s service area. This is true in the normal scenario in which a broadcaster is using as its major channel number the same analog RF channel number it used in the same market before the transition. Annex B was designed so that broadcasters could do this. By relocating to a new market after the end of the digital transition and seeking to continue to use its previous analog RF channel as its major channel number in the new market, however, PMCM has upset this careful design, as borne out by the fact that PMCM’s use of major channel 3 would result in simultaneous use of channel 3 by multiple stations with overlapping services areas.

25. Annex B.1.4 is designed to avoid this problem and specifically sets forth the channel assignment protocol for stations, like WJLP, that become newly licensed in a market after the DTV transition. Annex B.1.4 states: “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 its major channel number, “the DTV RF channel [number] originally allocated to the previous NTSC licensee of the assigned channel.” Because WJLP was newly licensed in New Jersey, and channel 3 was previously used in the market served by WJLP, as defined by its digital contour, it is this protocol, rather than B.1.1, that applies to PMCM.

26. PMCM argues that B.1.4 does not apply, asserting that WJLP is not newly licensed because its “long existence as a licensed station is indisputable and its relocation to New Jersey under the provisions of § 331 of the Act was entirely premised on the fact that it was an existing, licensed station which necessarily had an existing, previously assigned virtual channel.”⁸⁷ However, as the Bureau pointed out, the fact that PMCM had a station in Ely does not change the fact that WJLP was a newly constructed station that applied for a license in 2014 for a channel that was allocated to Middletown Township after the 2009 DTV transition.⁸⁸ Indeed, PMCM characterized its future Middletown Township facility as a “newly authorized broadcast facilit[y]” in the 2009 Ely Notification.⁸⁹ PMCM’s one sentence assertion that WJLP cannot be considered newly licensed because of licensure of KVVV(TV) in Ely and Section 331 falls short of establishing the factors required for the Commission to overturn the *Declaratory Ruling* on these issues.

27. PMCM also asserts that the Bureau’s reliance on Annex B.1.4 to assign WJLP virtual channel 33 is premised on an erroneous interpretation of the word “market” in the phrase “assigned to a newly-licensed broadcaster in that market.”⁹⁰ Annex B does not define the term “market.” PMCM

⁸⁷ PMCM AFR at 12. PMCM also cites to “*KSQA, LLC*, released December 3, 2012” by the Video Division, as further support of its assertion that it cannot be considered newly licensed for purposes of Annex B.1.4. *Id.* at n.9; letter decision available at http://licensing.fcc.gov/cgi-bin/prod/cdbs/forms/prod/getimportletter_exh.cgi?import_letter_id=37293. KSQA was operating on digital RF channel 12, having never operated on an NTSC channel. The Division held that the PSIP Standard mandated that the station use major channel 12 because the new digital licensee never held an NTSC license, and Annex B.1.2 required that it use its assigned digital RF channel as its major channel. ATSC 65/C, Annex B.1.2 (explaining that if a broadcaster without an NTSC license receives a license to broadcast on digital RF channel 49, it must use major channel number 49 for the station). As PMCM acknowledged below, Annex B.1.2 is inapplicable here. *Declaratory Ruling*, 30 FCC Rcd at 6096-97 n.133. The Division’s conclusion that KSQA, which never held an NTSC license, was a “new licensee” for purposes of Annex B.1.2. has no bearing on whether PMCM was “a newly-licensed DTV broadcaster in [the] market” when the Bureau granted its application to commence operations on digital channel 3 in New Jersey after having operated on NTSC channel 3 in Nevada.

⁸⁸ *Declaratory Ruling*, 30 FCC Rcd at 6092, para. 34.

⁸⁹ *Id.* at n.107; Ely Notification at 3 (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*.”) (emphasis added).

⁹⁰ PMCM incorrectly references the most current version of the ATSC protocol, dated August 7, 2013, which has not been incorporated into the rules. That version describes Annex B.1.4 as applying to situations where “an RF

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claims that the term “market” as used in Annex B refers to Nielsen DMAs, and that since WJLP is assigned to the New York DMA, it is not in the same “market” as WSFB(TV), which is in the Hartford, DMA, or KYW-TV, which is in the Philadelphia DMA. In furtherance of this argument, PMCM argues for the first time that B.1.4 does not apply because television channels are “allotted” to “communities” in the Post-Transition Table of Allotments and not “service areas,” that channel 3 is allotted to Middletown Township, New Jersey in the Table, a community in the New York DMA, and that “[s]ince an NTSC channel 3 was never ‘previously allotted’ to the New York DMA, Paragraph (4) cannot possibly apply.”⁹¹

28. For the reasons identified by the Bureau in the *Declaratory Ruling*, we conclude that defining the term “market” to refer to the newly licensed station’s digital contour (i.e., service area) is a reasonable approach that best serves the Commission’s purpose in adopting the PSIP Standard and the stated objectives set forth in Annex B. Specifically, this approach preserves the value of incumbent stations’ brand identity, reduces consumer confusion, and serves the Annex B objective that non-commonly owned stations in overlapping service areas should have unique major channel numbers.⁹² As the Bureau stated, 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.⁹³ We also note that PMCM’s argument that channels are “allotted” to communities and not service areas relies on language from a version of Annex B that ATSC adopted in 2013, and has not been incorporated in our rules.⁹⁴ The 2006 version incorporated in the Commission’s rules, in contrast, does not refer to the allotment of channels but rather refers to “a previously used NTSC RF channel in the market.”⁹⁵ Channel 3 was previously used by two stations prior to the digital transition in communities that are within PMCM’s digital contour, or market. Thus, channel 3 is an “NTSC RF channel” that was “previously used” in a market in which the same channel has been assigned to a station that is newly licensed to operate in that market. Moreover, as PMCM concedes, channels are allotted to communities in the Table of Allotments, which makes no mention of markets or DMAs.⁹⁶ The allotment of a channel number to a community says nothing about how the Commission should determine what “market” that community is in for purposes of Annex B.

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channel previously allotted for NTSC in a market is assigned to a newly-licensed DTV licensee in that market . . .” PMCM AFR at 10.

⁹¹ *Id.*

⁹² *Declaratory Ruling*, 30 FCC Rcd at 6092-94, para. 35. See also *Second Periodic Review*, 19 FCC Rcd at 18346, 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.”); *id.* at 18354, para. 172 (“Thus, PSIP allows broadcasters to keep their existing channel number in the digital world, thereby assisting viewers who have come to identify these numbers with particular broadcasters and preserving the investment broadcasters have made in marketing these numbers.”).

⁹³ *Declaratory Ruling*, 30 FCC Rcd at 6092-94, para. 35.

⁹⁴ The 2013 version of Annex B.1.4. provides that “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.” ATSC A/65:2013, Annex B: B.1.1.4, *available at* <https://www.atsc.org/standard/a652013-program-and-system-information-protocol-for-terrestrial-broadcast-and-cable/> (emphasis added).

⁹⁵ The 2006 version of Annex B, which is incorporated in the Commission’s rules says: “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.” Annex B.1.4, *available at* <http://www.atsc.org/cms/standards/a65/>; see PMCM AFR at Att. A (ATSC A/65C, Annex B (2006)); 47 CFR § 73.682(d) (incorporating the 2006 version of Annex B into the Commission’s rules by reference).

⁹⁶ PMCM AFR at 10.

29. PMCM next argues that because the “framers” used the term “overlapping DTV Service Areas” in other sections of Annex B, they “clearly knew how to say ‘overlapping DTV Service Areas’ when that’s what they meant [and] [t]he fact that they did *not* refer to overlapping services areas in referring to the ‘market’ here should compellingly convey that they did not mean overlapping service areas.”⁹⁷ We do not find this argument persuasive. As the Bureau pointed out, Annex B also does not use the terms Designated Market Area or DMA, whereas other rules do.⁹⁸ Moreover, the Commission uses DMAs in the application of the multiple ownership rules, and as noted below, the rules also incorporate contour overlap criteria.⁹⁹ In any event, the objectives of those rules have nothing to do with the objectives of Annex B—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 brand¹⁰⁰—and the Commission’s objective to prevent consumer confusion.

30. PMCM is also incorrect in suggesting that the Commission no longer uses contours in connection with television markets.¹⁰¹ When the Commission adopted the Nielsen DMAs to establish the geographic scope of its television multiple ownership rules, it exempted a licensee from the multiple ownership restrictions if the commonly-owned stations did not have contour overlap.¹⁰² Because the Commission continued to consider contour overlap in connection with applying its multiple ownership rules, we see no reason to assume that ATSC specifically assumed in 2006 in adopting Annex B that the concepts of “market” and service areas were somehow mutually exclusive.

31. PMCM further contends the Bureau’s use of service contours rather than DMA to define market in Annex B.1.4 “creates the potential for conflicting major channel assignments” and “virtually guarantees, as it did here, that duplicative major channel numbers would be mandatorily assigned in the

⁹⁷ PMCM AFR at 11.

⁹⁸ *Declaratory Ruling*, 30 FCC Rcd at 6093, para. 35.

⁹⁹ 47 CFR § 73.3555(b)-(c).

¹⁰⁰ *Declaratory Ruling*, 30 FCC Rcd at 6079, 6093-94, 6102, paras. 5, 35, 53; ATSC A/65C, Annex B.1.8 (“The provisions listed above assign major_channel_number values 2 through 69 uniquely . . . 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.”); 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 (“Broadcasters 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 (discussing the need to allow broadcasters to associate their digital programming with the channel number that had been used to establish their brand identity).

¹⁰¹ *See* PMC AFR at 11-12. PMCM’s reliance on the Commission’s 2003 revisions to its local ownership rules is inapposite, as those rule changes were remanded and the pre-existing rules remained in effect. PMCM AFR at 11 (citing *2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MM Docket No. 02-227, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 (2003), *aff’d in part and remanded in part*, *Prometheus Radio Project v. FCC*, 373 F.3d 372, 435 (3d Cir. 2004).

¹⁰² *Review of the Commission’s Regulations Governing Television Broadcasting*, MM Docket No. 91-221, Report and Order, 14 FCC Rcd 12903, 12907, 12926, paras. 8, 47 (1999). The Commission’s radio-television cross-ownership rule, which was in effect during the relevant period, also relies on contour overlap. *See* 47 CFR § 73.3555(c). *See also* *In the Matter of 2014 Quadrennial Regulatory Review F Review of the Commission’s Broadcast Ownership Rules & Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, MB Docket No. 14-50, Second Report and Order, 31 FCC Rcd 9864, 9876, 9945, paras. 32, 200 (2016) (replacing reference to analog Grade B contour overlap measurement with digital noise limited service contour for local TV and radio/TV rules); 47 CFR § 73.3555(b)-(c).

vast markets created by overlapping service areas.”¹⁰³ According to PMCM, in the Bureau’s view “WJLP’s ‘market’ extends from Maryland, where KYW’s channel 3 in Philadelphia reaches, to Rhode Island, where WHPX in New London reaches”¹⁰⁴ and results in “a tangled spaghetti plate of overlapping service areas forming a single gigantic market from New England almost to Washington, DC where two, three, or maybe more major channel numbers would all be required to be mandatorily assigned.”¹⁰⁵ PMCM is simply wrong in concluding that the Bureau’s interpretation of Annex B results in a “market” spanning from Maryland to Rhode Island. Rather, consistent with the Bureau’s approach, we interpret the term “market” to refer to PMCM’s service area, which is no larger than WJLP’s digital contour.

32. We also disagree that the Bureau’s interpretation results in the assignment of conflicting major channels. WFSB(TV), RF channel 33, and KYW-TV, RF channel 26, both use major channel number 3 pursuant to Annex B.1.1. Because WJLP, as a newly licensed station in New Jersey, has contour overlap with two separate stations operating on different RF channel numbers, Annex B.1.4 results in two separate major channel number assignments. PMCM points to the fact that the Bureau’s approach could have required PMCM to use both major channel 33 and major channel 26 if channel 26 had been available and that this approach must be wrong because requiring a licensee to use two different major channel numbers is “an impossibility.”¹⁰⁶ We do not believe it is reasonable to interpret Annex B.1.4 to require a station to use two major channel numbers when it has contour overlap with two stations. The more reasonable result would be to permit the station to choose the channel it preferred from the application of Annex B.1.4. PMCM also claims that the unavailability of channel 26 means that the Bureau’s approach must be wrong.¹⁰⁷ However, when the Commission adopted the PSIP Standard, it recognized that some broadcasters might have a unique situation that is not provided for in the PSIP Standard and stated that in those circumstances, “the Commission may grant exceptions on a case-by-case basis.”¹⁰⁸ For instance, if WJLP only had contour overlap with KYW-TV whose current RF channel number is unavailable, this would have resulted in a “unique situation” requiring the assignment of a major channel number other than KYW-TV’s RF channel number.¹⁰⁹ In this case, however, WJLP has contour overlap with WFSB(TV) in addition to KYW-TV. Therefore, WFSB’s RF channel, channel 33, is available for use by WJLP as its major channel number. Moreover, PMCM disregards the fact that the Bureau’s approach did, in fact, produce a unique major channel number (despite the fact that the mid-Atlantic is one of the most congested regions in the country), consistent with the design principles stated in Annex B.1.8, whereas PMCM’s interpretation and its Alternative PSIP Proposal would result unnecessarily in “duplicative major channel assignments.”¹¹⁰ And while PMCM suggests that chaos will

¹⁰³ PMCM AFR at 12-13.

¹⁰⁴ *Id.* at 13.

¹⁰⁵ PMCM AFR at 14.

¹⁰⁶ *Id.*

¹⁰⁷ While WJLP also has contour overlap with KYW-TV, that station’s allotted RF channel 26 is not available for use by WJLP because channel 26 is the RF and virtual channel number of WHPX-TV, New London, Connecticut, which also has contour overlap with WJLP. *Declaratory Ruling*, 30 FCC Rcd at 6092 n.108.

¹⁰⁸ *Second Periodic Review*, 19 FCC Rcd at 18346, para. 153.

¹⁰⁹ *Id.*

¹¹⁰ PMCM also states, incorrectly, that “[i]f DMAs are used to define the ‘markets,’ as PMCM believes the framers intended, then there would always be a unique major channel number assigned to stations in each market—exactly as Annex B requires.” PMCM AFR at 13. In large DMAs, two stations sometimes operated on the same analog RF channel and accordingly, use the same major channel number. For example, in the Denver, Colorado DMA (1) stations KREG-TV, Glenwood Springs, Colorado and KCDO-TV, Sterling, Colorado both operated on NTSC channel 3, *see* 47 CFR § 73.606, and both use virtual channel 3; and (2) KCNC-TV, Denver and KNEP, Sidney, Nebraska both use virtual channel 4. When PMCM’s station KVVV(TV) was operating in Ely, Nevada with virtual channel 3 at the time of the DTV transition, another station in the Salt Lake City, Utah DMA, KCBU, Price, Utah, was also assigned virtual channel 3 under Annex B. In large DMAs such as these, the Commission was able to

(continued....)

result from the Bureau's interpretation, as the Bureau explained in the *Declaratory Ruling*, the vast majority of currently operating full power television stations were transmitting a licensed analog or digital signal prior to the end of the DTV transition in June 2009, and their virtual channel assignment has and will stay the same.¹¹¹ Annex B.1.4 only applies to the handful of stations whose channels were allotted after the DTV transition¹¹² and any stations which may be newly allotted in the future.

33. PMCM also criticizes the Bureau's consideration of a description of Annex B.1.4 in a publication by Mr. Eyer, who serves as Chair of the ATSC group responsible for the PSIP Standard, in interpreting Annex B. Mr. Eyer describes Annex B.1.4 as applying to a situation where: (1) Broadcaster A had an existing NTSC license, obtained a digital license and operated both until the DTV transition was complete, when it shut down analog operations and (2) a new broadcaster, Broadcaster B, then "comes into the area" with its digital RF channel being the same channel number that was used by Broadcaster A for its analog service.¹¹³ According to Mr. Eyer, Annex B.1.4's requirement that Broadcaster B use Broadcaster A's assigned DTV RF channel as its major channel number "works because all of the digital services operated by [Broadcaster A] use the original NTSC RF channel as their major channel number, leaving the DTV service's RF channel number unused *in this area*."¹¹⁴ The Bureau noted that this was the exact situation here, with Meredith being Broadcaster A and PMCM being Broadcaster B, and that Mr. Eyer's description of the operation of Annex B.1.4 was consistent with its interpretation of the word "market" to refer to a station's service area.¹¹⁵

34. PMCM argues that this publication is "less than helpful," suggesting that Mr. Eyer "simply seems to have used 'area' as a synonym for market as used in [Annex B.1.5]."¹¹⁶ We believe, however, that Mr. Eyer's published description of the operation of Annex B.1.4 logically supports the Bureau's interpretation of the undefined term "market" in that section. With respect to PMCM's continued undocumented assertion that Dr. Richard Chernock, who is associated with ATSC, suggested to PMCM that by using different minor channel numbers, stations with overlapping service areas could use the same major channel numbers consistent with Annex B,¹¹⁷ PMCM did not submit a declaration from Mr. Chernock, nor did he file comments.¹¹⁸

35. As an alternative and independent basis for affirming the Bureau's application of Annex B.1.4 to assign PSIP channel 33 to WJLP, we conclude that the Bureau's application of this protocol is correct even if the term "market" is construed to mean DMA, as PMCM asserts. Nielsen assigns counties

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allocate the same RF channel for use in more than one service area because the service areas do not overlap. The fact that there are DMAs where two stations operated on the same RF channel number and are assigned the same virtual channel number supports the Bureau's use of service contours rather than DMA to define market in Annex B.1.4.

¹¹¹ *Declaratory Ruling*, 30 FCC Rcd at 6081, para. 8.

¹¹² *See id.* at 6082, para. 11 & n.26.

¹¹³ *Declaratory Ruling*, 30 FCC Rcd at 6096, para. 42.

¹¹⁴ *Id.*

¹¹⁵ *Id.*; *see also id.* at 6092-93, para. 35.

¹¹⁶ PMCM AFR at 15.

¹¹⁷ PMCM AFR at 15-16.

¹¹⁸ *Declaratory Ruling*, 30 FCC at 6097 n.136. PMCM also alleges that "PMCM invited the Commission staff themselves to check with Dr. Chernock to get his input since it was his group that knew exactly how the protocols are to work [and that] staff either refused to get that input or did not get the answer they wanted." PMCM AFR at 16. If PMCM wanted the staff and parties to consider Dr. Chernock's opinion, PMCM should have entered it into the record.

to DMAs, and it separately assigns stations to DMAs.¹¹⁹ PMCM argues that Annex B.1.4 does not apply to PMCM because Nielsen assigns WJLP to the New York DMA and channel 3 was not “allotted” to the New York DMA prior to the digital transition.¹²⁰ Even construing “market” to mean DMA, however, the application of Annex B.1.4 to a particular scenario does not turn on whether the channel of the station that operated on the channel prior to the digital transition is “allotted” to a community located in a particular DMA. Rather, Annex B.1.4 turns on whether an NTSC channel was “used . . . in a market” and subsequently is “assigned to” a newly licensed broadcaster “in that market.”¹²¹ Meredith’s station WFSB(TV) used NTSC RF channel 3 to broadcast an over-the-air signal before the digital transition to communities in Fairfield County, Connecticut, which Nielsen assigns to the New York DMA, as well as communities in the Hartford-New Haven DMA.¹²² Thus, when WJLP was licensed to serve Middletown Township, New Jersey, channel 3 was “a previously used NTSC RF channel” in the New York DMA [i.e., in Fairfield County], and channel 3 was “assigned to a newly-licensed DTV broadcaster [i.e., PMCM] in that market [i.e., the New York DMA].”¹²³ Thus, even under PMCM’s interpretation of the term “market,” Annex B.1.4 applies here. Further, applying Annex B.1.4 in this manner produces the same result as the Bureau’s approach, that is, PMCM’s PSIP major channel number is 33, since WFSB is the previous licensee of NTSC RF channel 3, and its previously assigned digital RF channel is channel 33.¹²⁴

36. PMCM asserts that Annex B.1.5¹²⁵ should govern here, “because it provides that commonly owned stations with overlapping DTV service areas can adopt the same major channel number regardless of the application of the other Paragraphs of Annex B, as long as they have distinct minor channel numbers.”¹²⁶ PMCM states that this provision “establishes the important principle that the

¹¹⁹ See <http://www.nielsen.com/intl-campaigns/us/dma-maps.html>.

¹²⁰ PMCM AFR at 10. The Commission allocates channels to communities. Pursuant to PMCM’s Section 331 notification, channel 3 was reallocated to Middletown Township, New Jersey, which is located in a county that Nielsen assigns to the New York DMA.

¹²¹ As noted above in para. 28, PMCM relies on the 2013 version of Annex B, which post-dates the version the Commission incorporated by reference in its rules. The 2013 version reads as follows: “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.” ATSC A/65:2013, Annex B: B.1.1.4, available at <https://www.atsc.org/standard/a652013-program-and-system-information-protocol-for-terrestrial-broadcast-and-cable/> (emphasis added). The Commission has not incorporated this version of Annex B into its rules. The 2006 version of Annex B, which is incorporated in the Commission’s rules says: “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.” ATSC A/65C, Annex B.1.4. (cited in note 95, *supra*). For the reasons explained above, *supra* para. 28, the phrase “previously allotted for NTSC in a market,” which appears in the 2013 version of Annex B, provides no guidance regarding the meaning of the term “market,” since channels are allotted to communities.

¹²² According to the 2016 Television and Cable Factbook, Stations Vol. 1 at A-244 (Warren Communications News, Vol 84), all the counties in Connecticut are assigned by Nielsen to the Hartford- New Haven DMA, except Fairfield County, which is in the New York DMA.

¹²³ Channel 3 was also “a previously used NTSC RF channel” in the Hartford-New Haven DMA, but that has no bearing on the application of Annex B.1.4 to WJLP where “market” means DMA because WJLP was newly licensed to a community in the New York DMA.

¹²⁴ See Annex B.1.4 (stating that “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.”).

¹²⁵ See *Declaratory Ruling*, 30 FCC Rcd at 6097, para. 45.

¹²⁶ PMCM AFR at 14-15.

system works fine as long as unique *two-part* virtual channel numbers are used by overlapping stations . . .”¹²⁷ PMCM further asserts that “more importantly, Paragraph (5) also notes that the two-part channel numbers must be distinct from those used by *other licensees* with overlapping services areas who are also sharing the same channel numbers” and concludes that this provision “provides a way of dealing with outlier overlapping service areas without disturbing the basic structure of the virtual channel assignment process.”¹²⁸ As PMCM itself acknowledged below, Annex B.1.5 “addresses a narrow universe of situations” that is triggered only where a broadcaster owns or controls two or more different RF channels with overlapping services areas.¹²⁹ PMCM does not, because it cannot, assert that the situation before us—PMCM-owned station WJLP having contour overlap with Meredith-owned WFSB(TV) and CBS-owned KYW-TV— involves any commonly owned or controlled stations. Accordingly, the Bureau correctly concluded that the Annex B.1.5 unique major channel exception for commonly owned stations is inapplicable.

37. In the *Declaratory Ruling*, the Bureau concluded that requiring WJLP to use virtual channel 33 is consistent with other Bureau decisions involving a virtual channel conflict between stations with overlapping DTV service areas, citing two cases where one of the stations was required to use a different channel and a proceeding where the Commission identified the appropriate virtual channel for a new channel allotment.¹³⁰ PMCM claims that the precedent the Bureau relied on is inapplicable.¹³¹ Specifically, PMCM claims that the *Seaford* allotment decision should have been decided differently and that the other two cases the Bureau cited are distinguishable.¹³² While some of the facts in those cases differ from the case before us, in each case the Commission required a unique virtual channel for each station when presented with a virtual channel conflict.¹³³ Significantly, PMCM has not shown that the

¹²⁷ *Id.* (emphasis in original).

¹²⁸ *Id.* at 15 (emphasis in original). Annex B.1.5. allows for non-commonly owned stations to use the same major channel number in very narrow circumstances not present here. Specifically, commonly owned stations may choose any major channel number assigned to any of the commonly owned stations. This presents the possibility that the commonly owned stations would choose a major channel number that is already being used by a non-commonly owned station whose service area overlaps the service area of one of the commonly owned stations. In that scenario, the commonly owned stations may not use the same two-part channel combination as any overlapping non-commonly owned station using the same major channel number. See Annex B.1.5 (“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 in 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 DTV service areas of other broadcasters using that same major_channel_number.”).

¹²⁹ *Declaratory Ruling*, 30 FCC Rcd at 6097, para. 45.

¹³⁰ *Declaratory Ruling*, 30 FCC Rcd at 6094-95, paras. 38-41.

¹³¹ PMCM AFR at 16-17. PMCM does not contend that the Bureau failed to follow its precedent but rather states that the three cases the Bureau discussed are “not helpful.” PMCM AFR at 16.

¹³² *Id.* In *Seaford, Delaware*, the Video Division assigned virtual channel 36 to a new RF channel 5 allotment in the Salisbury, Maryland DMA that would have contour overlap with WTTG(TV), RF channel 36, virtual channel 5, a station in the Washington, D.C. DMA. *Seaford, Delaware*, 25 FCC Rcd at 4472, para. 15. In the *Declaratory Ruling*, the Bureau addressed and rejected each of PMCM’s arguments regarding the *Seaford* decision. *Declaratory Ruling*, 30 FCC Rcd at 6094-95, paras. 38-40. PMCM does not refute the Bureau’s reasoning but instead offers a new rationale, claiming for the first time that the Bureau should have applied Annex B.1.2 to assign major channel number 5 to the *Seaford* allotment, even though WTTG(TV) also used that major channel number, and that the Bureau should have required the *Seaford* licensee and WTTG(TV) to partition the channel number to resolve the conflict arising from their contour overlap. PMCM AFR at 16-17.

¹³³ PMCM states that *Associated Christian Television System, Inc.*, 25 FCC Rcd 9237 (MB 2003), “simply stands for the proposition that a station must use as its major virtual channel the NTSC channel it used prior to the digital transition.” PMCM AFR at 16. As we have explained above, this principle does not govern the instant case because

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Bureau's decision was inconsistent with these decisions and thus has not demonstrated legal error on this basis.¹³⁴

38. The fact that some other stations with overlapping service areas use the same major channel number does not persuade us that Annex B should be interpreted to permit PMCM to use major channel number 3. PMCM asserted below 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 sharing the same major channel number.¹³⁵ The Bureau rejected this argument explaining first, that PMCM had greatly overstated the prevalence of the situation and that there were only a handful of situations in which stations with overlapping contours may be using the same major channel number.¹³⁶ PMCM continues to assert incorrectly that "there are more than a hundred" situations involving overlapping use of PSIP major channel numbers,¹³⁷ yet PMCM does not dispute the Bureau's factual findings to the contrary or offer any analysis to refute the Bureau's determination that PMCM's list is inaccurate, except to question why low power television (LPTV) stations should not be included.¹³⁸ With respect to the remaining handful of situations in which stations with overlapping contours may be using the same major channel, the Bureau reasonably concluded that the stations may be unconcerned about harm to their brand identity vis-à-vis the other station, unlike WFSB(TV) and KYW-TV with respect to WJLP.¹³⁹ The lack of any complaint or Commission-initiated enforcement action does not establish precedent in favor of permitting overlapping stations to use the same major channel number in situations such as the case before us where the affected incumbent stations do not consent.

39. PMCM also complains that the Bureau disregarded the fact that WACP, Atlantic City, uses channel 4 as its virtual channel, and has significant overlap with WNBC, New York City, which also uses virtual channel 4. Again, as the Bureau explained in the *Declaratory Ruling*, Section 73.682(d) of the rules and Annex B are self-effectuating and the Commission's involvement is ordinarily limited to situations where a station chooses a major channel and another station objects, or a station requests a

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WJLP was a new licensee in the market, which distinguishes this case from the facts of *Associated Christian*. In the *Declaratory Ruling*, the Bureau cited the case as an example of a situation in which the Bureau resolved a PSIP conflict resulting from contour overlap between two stations operating in different DMAs by requiring the stations to use unique major channel numbers. *Declaratory Ruling*, 30 FCC Rcd at 6095, para. 41. While the facts are not comparable in all respects, the Bureau's decision here does not conflict with the holding in *Associated Christian*. Similarly, PMCM claims that the case involving station KCWT-CA is distinguishable because it "involve[d] international coordination with a non-PSIP compliant regulatory regime" but does not allege that the Bureau's decision here conflicts with the KCWT-CA decision. PMCM AFR at 16; see *Declaratory Ruling*, 30 FCC Rcd at 6095, para. 41.

¹³⁴ 47 CFR § 1.115(a)(2)(i) (application for review demonstrates legal error where "the action taken pursuant to delegated authority is in conflict with . . . case precedent."). As noted above, rather than showing that the Bureau deviated from its precedent, PMCM contends that the *Seaford* decision was wrongly decided and *Associated Christian* and the KCWT-CA decision are distinguishable. PMCM AFR at 16-17.

¹³⁵ *Declaratory Ruling*, 30 FCC Rcd at 6103, para. 57.

¹³⁶ For example, the Bureau explained that PMCM's study, which relies primarily on data procured from a non-FCC website, included: (1) low power television stations which are not required to comply with the PSIP Standard, and in some instances were either expired or operating an analog-only facility; and (2) stations where there was no contour overlap or the contour overlap was blocked by terrain or one or more interfering stations. *Id.* at 6103-04, paras. 57-58.

¹³⁷ PMCM AFR at 17.

¹³⁸ PMCM AFR at n.15. As the Bureau stated, LPTV stations are not required to comply with the PSIP Protocol. *Declaratory Ruling*, 30 FCC Rcd at 6104, para. 58.

¹³⁹ *Declaratory Ruling*, 30 FCC Rcd at 6104, para. 58.

waiver of the mandatory channel assignment provisions of Annex B.¹⁴⁰ Unlike Meredith and CBS, NBC did not object to WACP using virtual channel 4. When presented with conflicting virtual channels between stations, the Bureau consistently assigns unique major channel numbers to the stations,¹⁴¹ as it did in the *Declaratory Ruling* and *Seaford, Delaware*.

40. Even assuming the PSIP Protocols do not directly address PMCM's situation, the Bureau's solution better serves the Commission's goals in adopting the Annex B protocol. As PMCM points out, when the Commission adopted the PSIP protocol, it retained discretion to grant exceptions on a case-by-case basis "to the extent broadcasters have a unique situation that is not provided for in PSIP."¹⁴² PMCM has not shown that adoption of its Alternative Proposal would be an appropriate exercise of this discretion. Assuming PMCM's situation is not provided for in Annex B, the Bureau's decision to assign WJLP PSIP channel 33 is a reasonable exercise of discretion because, unlike PMCM's Alternative Proposal, it serves the overarching goals of reducing consumer confusion, and ensuring that the longstanding channel 3 brand associated with existing broadcasters' operations is not diluted by the entry of a new broadcaster operating on channel 3 in the same area.¹⁴³ This purpose is served by the guiding principle set forth in 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." The goal of the PSIP protocol, therefore, is to "assign major_channel_values . . . uniquely to broadcasters." PMCM prefers to interpret this provision to "guarantee" only 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."¹⁴⁴ As discussed above, the circumstances under which Annex B permits the partitioning of a major channel number are narrowly circumscribed, as set forth in B.1.5.¹⁴⁵

41. Annex B.1.5 limits partitioning strictly to situations in which commonly owned stations choose to share a major channel number and thus need to partition their channel and to situations in which the sharing of a major channel number by commonly owned stations creates overlap with other stations using the same major channel number. This makes sense in light of the Commission's principal concern in adopting the Annex B PSIP protocol, which was to prevent consumer confusion and brand dilution by ensuring that broadcasters use unique major channel numbers. The exception in B.1.5 is consistent with that goal; there would be no concern about brand dilution by a rival station if commonly owned stations made the decision to partition or share channels. The one possible situation in which stations may have to involuntarily accept partitioning is where commonly owned stations choose to share a major channel number that overlaps with the signal of a third-party station, a situation that likely would be rare.

42. We think it is more reasonable to interpret that "guarantee" in B.1.8 as a reference to the

¹⁴⁰ *Declaratory Ruling*, 30 FCC Rcd at 6080-81, para. 7, 6103-04, paras. 57-58.

¹⁴¹ *Id.* at 6094-95, paras. 38 to 41, 6104 n.181.

¹⁴² *Second Periodic Review*, 19 FCC Rcd at 18346-47, para. 153; PMCM AFR at 19 & n.16.

¹⁴³ The Bureau's analysis is set forth in detail. *Declaratory Ruling*, 30 FCC Rcd at 6101-05, paras. 51-60. Among other things, the Bureau found that, even though PMCM claims no viewers have complained about confusion resulting from use of virtual channel 3.10, over 3.25 million people who currently receive interference-free signals from WFSB(TV) or KYW-TV reside in areas where PMCM's signal overlaps with those signals. *Id.* at 6102-03, para. 54.

¹⁴⁴ PMCM AFR at 5 ("[T]he protocols are designed to ensure 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.'" (citing Annex B.1.1 (8)) (emphasis added by PMCM).

¹⁴⁵ We note that PMCM could have proposed a different solution other than partitioning channel 3 and in fact did so initially, before later withdrawing that proposal. *Declaratory Ruling*, 30 FCC Rcd at 6088 n.75 (proposing to use PSIP channel 14).

exception to the unique channel number scheme that is set forth in B.1.5 – that is, because B.1.5 allows multiple stations to use a common major channel number only if it is partitioned, the PSIP protocols “guarantee” that no two broadcasters will use the same two-part channel combination in an overlapping area. Thus, the “guarantee” in B.1.8 that no two broadcasters will use the same two-part channel number does not mean that Annex B allows broadcasters to partition a major channel number outside of the narrow framework described in B.1.5. Further, we note that the equities favor this interpretation – PMCM’s Alternative PSIP Proposal would require incumbents with brands built on over 50 years of broadcasting on channel 3 to re-brand their stations as channels 3.1-3.9 (rather than “Channel 3”) in the service area¹⁴⁶ in order to address a conflict created by PMCM, a newcomer, that affects only part of the service area. Moreover, PMCM would retain the rights to use 90 of the 99 subchannels (3.10 through 3.99). Finally, the Bureau’s denial of an exception to the PSIP protocols to permit the partitioning of channel 3 was consistent with precedent.¹⁴⁷

43. PMCM asserts that “[g]iven the history and purpose of [channel 3’s] relocation to New Jersey, the Bureau should have assigned the station a VHF virtual channel even if the PSIP protocols did not otherwise require it.”¹⁴⁸ In support of this argument, PMCM asserts that “most over-the-air receive antennas do not pick up low-band VHF channels,” and some viewers inexplicably pick up CBS RF channel 33 (PSIP channel 2) when tuning to virtual channel 33.¹⁴⁹ The problems with digital operations on low VHF channels in the mid-Atlantic region were well known when PMCM decided to move its operations from Nevada to New Jersey. If PMCM’s viewers are experiencing technical difficulties based on PMCM’s decision to operate on a low-band VHF channel, the appropriate remedy is for PMCM to educate its consumers regarding antennas.¹⁵⁰ Moreover, allowing WJLP to use virtual channel 3 would not alleviate the reception problems experienced by viewers of low-band VHF channels in areas such as

¹⁴⁶ *Declaratory Ruling*, 30 FCC Rcd at 6105, para. 59. Since a virtual channel is transmitted by a station to all its viewers, just like its audio and video, the same virtual channel must be used throughout the service area. If two virtual channel numbers are used, such as for transmitting unaffiliated programming, *id.* at 6079-80, para. 5, then both virtual channels appear throughout the service area.

¹⁴⁷ *Declaratory Ruling*, 30 FCC Rcd at 6102, para. 53 (waivers granted only where applicant shows that the requesting station does not have contour overlap with any other station using the major channel requested).

¹⁴⁸ PMCM AFR at 18-19. PMCM claims that “WJLP has been exiled to broadcast Siberia,” and members of the public do not perceive WJLP as a VHF station, “so they lose the very benefit that Congress tried to convey.” PMCM AFR at 18.

¹⁴⁹ *Id.* at 18; *see also id.* at 3 n.3 (“[M]any of WJLP’s over-the-air viewers [are] unable to pick up its signal because some digital receive antennas do not pick up VHF channels.”). As indicated above, PMCM’s claim regarding CBS channel 2 was not previously presented to the Bureau, and we dismiss it as procedurally defective. PMCM also claims that the *Declaratory Ruling* impairs its cable carriage rights. PMCM AFR at 18-19. This concern is more appropriately considered in the *Cable Carriage MO&O*. Furthermore, PMCM’s claim that the Bureau’s declaratory ruling proceeding unlawfully delayed cable operators’ obligation to carry WJLP is moot because the Bureau reinstated cable operators’ obligation to effectuate PMCM’s channel election notifications, *Requests to Defer Mandatory Carriage of WJLP (Formerly KVVV(TV))*, Middletown Township, New Jersey, Letter Order, 30 FCC Rcd 6116 (MB 2015), and subsequently adjudicated the must-carry complaints that PMCM filed when the subject cable operators failed to carry PMCM on channel 3. These are the subject of a separate Application for Review, which we are resolving concurrently. *See supra* at note 4.

¹⁵⁰ In this regard, we note that many broadcasters operating in this region, including Meredith and CBS, chose to transition permanently from operation on RF channels in the VHF band to operations on UHF RF channels for technical reasons, while using PSIP channels associated with the VHF band as prescribed by Annex B. The viewing experience is optimized when consumers use an antenna designed for reception of a station’s RF channel. For example, via its website, PMCM could encourage viewers complaining of reception problems to go to <https://www.fcc.gov/consumers/guides/antennas-and-digital-television> to learn about ways to improve television reception. We have addressed above PMCM’s claim that some viewers erroneously receive a CBS station when they tune to channel 33. *See supra* paras. 19-20.

the mid-Atlantic region. We also disagree that the statutory basis for the reallocation of channel 3 to New Jersey justifies deviation from the protocols of Annex B and adoption of PMCM's Alternative PSIP Proposal. The Bureau explained at great length why Section 331 did not require the assignment of virtual channel 3 to WJLP, and PMCM does not identify any legal error in the Bureau's reasoning or otherwise challenge the Bureau's conclusions.¹⁵¹

44. *The Commission Was Not Required to Protect Stations' Virtual Channels in Connection with the Broadcast Incentive Auction's Repacking Process.* In its Declaratory Ruling, the Bureau explained that in making channel reassignments as part of the incentive auction, the Commission was only required to consider a station's RF channel, which is the channel used to establish a station's coverage area and population served.¹⁵² Moreover, in making channel reassignments, the Commission did not change stations' existing locations¹⁵³ and because a station's major channel number does not change when a station's RF channel number changes,¹⁵⁴ there would be no possibility of major channel contour overlap.

45. In its AFR, PMCM asserts once again, without any support, that "[b]ecause the Bureau's formulation forbids any overlap of virtual major channel numbers, it means that the Commission's channel assignment algorithm must account for and prevent any such overlap . . ."¹⁵⁵ This assertion is incorrect. The auction began March 29, 2016, and as discussed above, closed on April 13, 2017.¹⁵⁶ The Auction System has now finalized the channel reassignment plan for the post-auction television bands using the optimization procedures adopted by the Commission,¹⁵⁷ which did not consider virtual channels in making channel assignments.¹⁵⁸ PMCM also argues that a policy precluding virtual contour overlap

¹⁵¹ The Bureau explained that Section 331 does not define the term "channel" and was enacted before the creation of virtual channels, noting that even if this term could be construed to mean virtual channel, re-allocation would not have been required because New Jersey already had a VHF virtual channel at the time of PMCM's Section 331 notification. *Declaratory Ruling*, 30 FCC Rcd at 6099, para. 47. The Bureau concluded that requiring WJLP to use virtual channel 33 does not frustrate the purpose of Section 331 because WJLP continues to operate with the technical attributes associated with the use of an RF channel in the VHF spectrum, and, in fact, of the 22 full power television stations licensed to the New York DMA, it is the second largest in area and population served. *Declaratory Ruling*, 30 FCC Rcd at 6099-6100, para. 48. The Bureau also pointed to the fact the court in *PMCM TV, LLC* recognized that Section 331 dealt with radio frequency spectrum. *Id.* at 6099, para. 47. Subsequently, the court concluded in denying a mandamus petition that PMCM had not shown that the Bureau's ruling that WJLP use virtual channel 33 on an interim basis violated the court's mandate in *PMCM TV, LLC*. *In re PMCM TV, LLC*, No. 14-1238 (D.C. Cir. Feb. 27, 2015).

¹⁵² *Declaratory Ruling*, 30 FCC Rcd at 6101, para. 50, citing *Incentive Auction R&O* at § III.B.1 & 2. *See also Declaratory Ruling*, 30 FCC Rcd at 6100, para. 49.

¹⁵³ *Declaratory Ruling*, 30 FCC Rcd at 6101, para. 50, citing *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).

¹⁵⁴ ATSC A/65C, Annex B.1.3 ("If during or at the end of the [DTV] transition period, the RF channel assigned to a broadcaster for digital ATSC broadcast is changed for any reason, the major_channel_number used by the broadcasters shall not change.")

¹⁵⁵ PMCM AFR at 21.

¹⁵⁶ *See supra* n.78.

¹⁵⁷ *The Incentive Auction Task Force, With The Media and Wireless Telecommunications Bureaus, Releases a Public Notice Concerning Confidential Letters Regarding Post-Incentive Auction Channel Assignments; Limited Waiver of Prohibited Communications Rules; and Broadcast Station Sales and Transfers*, GN Docket No. 12-268, Public Notice, 32 FCC Rcd 1109 (2017).

means “there could very well be situations where [potential channel sharing bidders] involving site moves of ten to twenty miles would be precluded solely by the newly declared virtual major channel overlap taboo.”¹⁵⁹ Given the rules we adopted for channel sharing bids in connection with the auction, we do not expect that a winning channel sharing bid would result in a relocating sharee station having virtual channel contour overlap with an incumbent station,¹⁶⁰ but in the unlikely event that occurs, we would use the requirements for assigning a major channel number set forth in Annex B, as the Bureau did in the *Declaratory Ruling*.

46. Based upon the foregoing, we conclude that the Bureau correctly assigned WJLP virtual channel 33 in the *Declaratory Ruling*, and as discussed deny in part and dismiss in part PMCM’s July 6, 2015 AFR of the *Declaratory Ruling*.

B. Viacom’s July 6, 2015 Application for Review.

47. Viacom did not file comments in this proceeding. Instead, it filed a pleading titled “Application for Review” stating that Viacom’s Nickelodeon cable service is carried on channel 33 on all of Cablevision’s cable systems in the New York DMA. According to Viacom, “the crux of this proceeding is whether WJLP(TV), a must-carry station, has the right to elect carriage on [channel 3 or channel 33]”¹⁶¹ and it asks “that the Bureau, via modification to the *Declaratory Ruling* or a clarification thereof, advise . . . that Cablevision will not be required to carry WJLP(TV) on channel 33” unless WJLP elects carriage on channel 33 by July 16, 2015 and the *Declaratory Ruling* is final.¹⁶² PMCM opposed the AFR, arguing that it should be dismissed on both procedural and substantive grounds,¹⁶³ to which Viacom replied.¹⁶⁴

48. We agree with PMCM that Viacom’s filing is procedurally defective. Section 1.115(a) of the rules requires that “[a]ny person filing an application for review who has not previously participated in the proceeding shall include with his application a statement . . . showing good reason why it was not possible for him to participate in the earlier stages of the proceeding.”¹⁶⁵ Likewise, Section 1.115(c) states that no application for review will be granted if it relies on questions of fact or law on which the delegated authority has been afforded no opportunity to pass.¹⁶⁶ Viacom claims that “[t]he combination

(Continued from previous page) _____

¹⁵⁸ See *Incentive Auction Task Force Releases Revised Baseline Data and Prices for Reverse Auction; Announces Revised Filing Window Dates*, AU Docket No. 14-252, Public Notice, 30 FCC Rcd 12559 (IATF 2015) (releasing data regarding stations to be protected in the repacking process that will be used to determine feasible channel assignments, based on stations’ authorized RF facilities).

¹⁵⁹ PMCM AFR at 21.

¹⁶⁰ A winning channel sharing bidder may not propose to share with a station located outside its DMA. *Incentive Auction R&O*, 29 FCC Rcd at 6727, para. 374. As noted above, most full power television stations are currently using their former analog channel number as their virtual channel. *Supra* at para. 5. Given the minimum distance separation requirements between co-channel analog stations set forth in 47 CFR 73.610(b)—between 154.5 and 219.5 miles depending on geographic location and channel number—two co-channel analog stations rarely would have been located in the same DMA. See *supra* n.110, discussing large markets in which two stations use the same RF or virtual channel number. The scenario PMCM describes could only occur if a winning channel sharing bidder could share with another station in the DMA that was located further than the minimum distance separation requirements from the winning bidder.

¹⁶¹ Viacom AFR at 2.

¹⁶² Viacom AFR at 3-4.

¹⁶³ PMCM Opposition to AFR (filed July 21, 2015).

¹⁶⁴ Viacom Reply to Opposition to AFR (filed Aug. 3, 2015).

¹⁶⁵ 47 CFR § 1.115(a).

¹⁶⁶ 47 CFR § 1.115(c).

of the *Declaratory Ruling* and the June 5 MVPD Letter raised for the first time the possibility that WJLP(TV) might have the right to elect carriage on channel 33 and displace Nickelodeon.”¹⁶⁷ However, as PMCM points out, Meredith had been urging since February 2014 that WJLP be assigned virtual channel 33 and the Bureau’s subsequent *2014 Letter Orders* required WJLP(TV) to use channel 33 on an interim basis, and thus, the potential impact on Viacom’s cable positioning rights was readily apparent before release of the *Declaratory Ruling*.¹⁶⁸

49. We also agree with PMCM that Viacom’s filing fails to comply with Section 1.115(b)(1), which requires that an application for review plainly state the questions presented for review.¹⁶⁹ More importantly, Viacom’s filing fails to specify with particularity, as required by Section 1.115(b)(2), the factors which warrant Commission reconsideration.¹⁷⁰ Viacom’s filing does not address the question of the appropriate virtual channel for WJLP but instead raises the issue of when and on what channel WJLP should be carried on cable systems, stating incorrectly that “the crux of this proceeding” is whether WJLP has the right to elect carriage on channel 3 or channel 33.¹⁷¹ As PMCM points out, in its *Declaratory Ruling*, the Bureau repeatedly emphasized that parties’ cable carriage and channel positioning rights were not part of the docketed proceeding, which is solely concerned with the virtual channel to be used by WJLP for over-the-air broadcasting in New Jersey.¹⁷² Because we are dismissing Viacom’s AFR on these procedural grounds, we do not need to reach the other arguments raised in PMCM’s Opposition regarding additional procedural grounds for dismissal,¹⁷³ or which relate to matters outside the scope of the docketed proceeding or not previously raised with the Bureau.¹⁷⁴

C. PMCM’s November 10, 2014 Application for Review.

50. As discussed above, PMCM’s AFR of the Video Division *2014 Letter Orders* directing it to use virtual channel 33 on an interim basis is pending.¹⁷⁵ In that application PMCM argued, *inter alia*, that the October 23 Letter Order obligated PMCM to use a virtual channel number that is demonstrably contrary to the express terms of the PSIP Protocol, that the November 7 Letter Order terminating program test authority was unlawful, and that requiring PMCM to change its major channel number required the Commission to comply with the procedures of Section 316 of the Communications Act.¹⁷⁶ The Commission will not consider matters raised in an application for review upon which the Bureau had no opportunity to pass.¹⁷⁷ Accordingly, we dismiss the November 10, 2014 AFR because it raised matters

¹⁶⁷ Viacom AFR at n.4.

¹⁶⁸ PMCM Opposition at 3. Viacom filed a petition for reconsideration of the June 5, MVPD Letter, which is not relevant to this proceeding and which will be resolved separately.

¹⁶⁹ 47 CFR § 1.115(b)(1).

¹⁷⁰ *See supra* para. 15.

¹⁷¹ Viacom AFR at 2. The Bureau resolved this question in three orders denying must-carry complaints filed by PMCM, concluding that PMCM is not entitled to demand carriage on channel 3, and we are concurrently affirming those determinations. *See supra* n. [[4]].

¹⁷² *See Declaratory Ruling*, 30 FCC Rcd at 6083-84, para. 13 & n.37, 6088 n.74, and 6090 nn.91, 93, and 95

¹⁷³ *See* PMCM Opposition at 5-6.

¹⁷⁴ *Id.* at 6-8.

¹⁷⁵ On the same date it filed that AFR, PMCM filed an Emergency Petition for Writ of Mandamus with the United States Court of Appeals for the District of Columbia Circuit, which the court denied on February 27, 2015. *See supra* para. 9.

¹⁷⁶ 47 U.S.C. § 316.

¹⁷⁷ 47 U.S.C. § 155(c)(5); 47 CFR § 1.115(c); *see also* *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1183-84 (D.C. Cir. 2003) (upholding Commission’s order dismissing arguments under Section 1.115(c) because that rule does not allow the Commission to grant an application for review if it relies upon arguments that were not presented below).

contemplated in the docketed proceeding on which the Bureau had not yet acted, or were raised for the first time in the AFR. Moreover, because the *Declaratory Ruling*, on the merits, reached a decision regarding WJLP's virtual channel assignment, the *2014 Letter Orders* are no longer in effect, and accordingly, PMCM's AFR is moot.

IV. ORDERING CLAUSE

51. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and Section 1.115(b) and (c) of the Commission's rules, 47 CFR § 1.115(b), (c), the Application for Review of the *Declaratory Ruling* in MB Docket No. 14-150 of PMCM TV, LLC IS DISMISSED IN PART and DENIED IN PART.

52. IT IS FURTHER ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and Section 1.115(a)-(c) of the Commission's rules, 47 CFR § 1.115(a)-(c), the Application for Review of the *Declaratory Ruling* in MB Docket No. 14-150 of Viacom Inc. IS DISMISSED.

53. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 1.154(i), the November 10, 2014 Application for Review filed by PMCM TV, LLC of the Video Division *2014 Letter Orders* IS DISMISSED as MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary