

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

In the Matters of

Request for Declaratory Ruling by
Meredith Corporation and Alternative PSIP
Proposal by PCMC TV, LLC for
Station WJLP(TV) (formerly KVVN(TV)),
Middletown Township, New Jersey
FCC Facility ID No. 86537

And

In the Matter of

PMCM TV, LLC, Licensee of WJLP,
Middletown Township, New Jersey

v.

RCN Telecom Services, LLC.

In the Matter of

PMCM TV, LLC, Licensee of WJLP,
Middletown Township, New Jersey

v.

Service Electric Cable TV of New Jersey Inc., d/b/a
Service Electric Broadband Cable

In the Matter of

PMCM TV, LLC, Licensee of WJLP,
Middletown Township, New Jersey

v.

Time Warner Cable Inc.

TO: Marlene H. Dortch, Secretary
For transmission to: The Commission

MB Docket No. 14-150

ACCEPTED/FILED

SEP 26 2017

Federal Communications Commission
Office of the Secretary

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CSR-8917-M
Docket No. 16-25

CSR-8918-M
Docket No. 16-26

CSR-8919-M
Docket No. 16-27

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Reply to Opposition

PMCM TV, LLC (“PMCM”), by its attorneys, hereby replies to the Opposition to Motion for Stay filed jointly by CBS, Inc. (CBS), Meredith Corp. (Meredith), and ION Media License Company, LLC (ION) on September 22, 2017. The opposing parties denounce PMCM in broad terms but offer nothing concrete to show that a stay is not justified here.

1. Likelihood of success on the merits.

It is always a stretch for an administrative agency to conclude that the decision it just reached is likely to be reversed on appeal. Yet an honest assessment of the situation must raise an issue in the Commission’s mind about the correctness of its action. For just one example, the Commission dismissed PMCM’s assertion that the Spectrum Act barred it from involuntarily changing WJLP’s channel on the grounds that PMCM had not properly raised it. The Commission handled this by first saying that it would not consider the matter in the context of the Cable Orders (where PMCM had pointed out that the Commission had declared the virtual channel to be a station’s “over-the-air channel”, which eliminated any uncertainty about whether a virtual channel was a channel implicated by Section 1452(g) of the Spectrum Act). The Commission instead said it would consider this issue in the context of the PSIP Docket, and in that context it decided that PMCM had not raised the issue so it could be dismissed. Of course, PMCM had in fact raised the Spectrum Act issue in that Docket repeatedly, but it had not raised the aspect about virtual channel = over the air channel because that ruling arose only after PMCM’s application for review had been filed. So the Commission’s ruling was incontrovertibly wrong.

On the merits, the Commission did not explain why Congress would have barred it from changing both “spectrum usage rights” *and* channels if it intended only cover spectrum usage rights (i.e, RF matters). It also did not explain why a change in the virtual channel was not itself a change in spectrum usage rights since the Commission considered a station’s virtual channel to be its over

the air channel. There is clearly a high likelihood that this decision will be reversed on this ground alone, not to mention all the other errors committed.

2. Cause of irreparable harm to PCMC

The objectors assert that PMCM has been carried on “major cable systems” on channel 3 for years. This is simply and patently untrue. Through the Commission’s and the objectors’ actions, WJLP was denied cable carriage entirely on most systems for more than a year. The only major cable system that now properly carries WJLP on channel 3 is Verizon Fios. As noted by PCMC in its motion, other cable systems carry it on some other channel or not at all. This makes it impossible for WJLP to establish its own brand identity throughout the market – something the objectors seem to feel is a broadcaster’s sacred right. But they are not willing for WJLP to enjoy that right.

Not only is the station relegated to cable Siberia distant from its VHF or former VHF competitors, but it also indisputably suffers a disadvantage from the inability of many TV sets to properly pick up the station on channel 33 due to the simultaneous transmissions of CBS’s New York station on that over the air channel. Not only does the simple “fix” for that problem propounded by CBS and Meredith not always work (i.e., having the viewer input the full major channel- minor channel combination), but the process would require massive consumer education to get people to understand that the hyphen on their remote clicker is actually a dot, and that if they have no remote clicker, they cannot tune to the station at all.

These factors very significantly affect WJLP’s bottom line, and there is no way these revenues, which are essential to the station’s ambitious public affairs programming plans, can ever be recovered when the Commission’s action is reversed.

3. There is no harm to other stations in the market.

While CBS and Meredith continue to assert that their “brands” are somehow diminished by WJLP’s use of virtual channel 3, no evidence whatsoever of any confusion by the public was offered for the record. As all concerned found during WJLP’s six month period of operation on Channel 3.10, TV sets and viewers were presented with two different stations to select, each of which was explicitly identified by network affiliation. So far as the record reflects, there was not a single instance of any impact on the channel 3 “brand” at all. Of course, as PMCM pointed out, no one can have a proprietary right in a number – the trademark office will only register a mark including a number if it is associated with other identifying and distinguishing elements. PMCM holds the registered trademark rights to “WJLP 3” in its service area, but this does not protect it from WFSB’s use of channel 3 in its business promotions. Neither does WFSB’s use of channel 3 prevent WJLP from identifying itself as WJLP 3: under trademark law, neither station has any right to claim exclusive branding rights to the use of channel 3.

The Commission’s concern here with branding rights is astonishing since the Commission expressly abandoned any interest or expertise in resolving branding disputes associated with overlapping call signs back in 1983.¹ The Commission determined at that time that broadcasting was a mature industry and had no further need for protectionist policies that required the FCC to referee call sign disputes. The Commission concluded that trying to determine whether overlapping call signs were confusingly similar was an unnecessary waste of Commission resources. The Commission therefore opted to leave resolution of these disputes to local judicial forums that were better equipped to resolve the issues presented. The Commission has not explained in any way why it has suddenly developed an interest in policing branding rights again.

¹ *Revision of Section 73.3550 of the Commission’s Rules with Respect to the Assignment of New or Modified Call Signs to AM, FM or TV Broadcast Stations*, 54 RR2d 1493 (1983)

Such a step should have warranted a rulemaking since call signs should obviously enjoy the same trademark protection if the FCC is back in the brand policing business. And obviously the present PSIP dispute has embroiled the Commission in exactly the sort of unproductive determination of public confusion or not which the Commission long ago correctly disavowed.

Perversely, while Meredith expresses wild-eyed but unsubstantiated paranoia about WJLP's overlapping use of channel 3, it seems perfectly happy with WABC's use in New York of the "Eyewitness News" brand which is identical to WFSB's own overlapping "Eyewitness News" broadcast brand. How is that people can easily distinguish the two simultaneously broadcast "Eyewitness News" shows from each other, but they cannot distinguish CBS's highly promoted network programming from WJLP's "classic TV" format (which is often broadcast in black and white rather than color)? The objectors' claims of "harm" do not hold water.

Of course, objector ION has no standing to claim harm whatsoever. Its only interest in this case is staying on channel 3 on one of the major cable systems in New York. Channel 3 is neither its over the air channel nor its virtual channel. But ION has already confessed to the Commission that it only holds that spot by virtue of illegally paying the cable operator consideration which is absolutely forbidden by Section 614(10) of the Act. It remains unclear why the Commission has not to date taken any enforcement action against this blatant violation of the Act and its own rules, but at the very least the Commission should not allow ION to gain any benefit from those illegal payments vis a vis an innocent must-carry station like WJLP. But that matter is not now before the Commission or the Court. Once WJLP is restored to channel 3, the Commission will have to decide whether channel placement based on an illegal payment supersedes a rightful must-carry demand for on-channel placement.

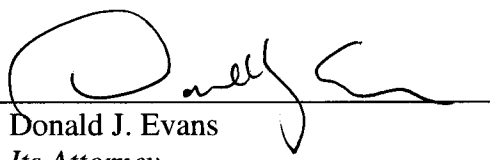
4. The public interest supports a stay

The foregoing discussion along with the factors cited in PMCM's original Motion establishes fairly conclusively where the public interest lies in this case. You have on the one hand an innocent station that for more than 8 years has been denied the most basic rights: to operate in the state to which the statute entitled it, to be carried by cable systems in its market at all or on the channel guaranteed by Congress, to operate over the air on its own channel so that it can be received and recognized by the public, to be free from channel changes prohibited by the Spectrum Act, and to be assigned a PSIP consistent with the ATSC protocols. All of these obstacles have been imposed by the FCC, resulting in serious, permanent harm that can never be remedied in the future. Against this catalogue of errors that works not only to WJLP's detriment but also to the public of New Jersey who have been, and are being denied a specialized program source targeted at their needs, we have a demonstrated record of no harm at all to the people who are objecting. This weighing of the benefits and the harms of staying the FCC's order should be an easy task. PMCM urges the Commission to grant the stay as requested.²

Respectfully submitted,

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September 26, 2017

² We note that as promised in the original Motion, PMCM was forced to file a similar motion with the Court of Appeals when the Commission failed to act promptly.

Certificate of Service

I, Donald J. Evans, hereby certify that on this 26th day of September, 2017 I caused copies of the foregoing "Reply to Opposition" to be hand-delivered, emailed or sent by overnight mail (as indicated below) to the following persons:

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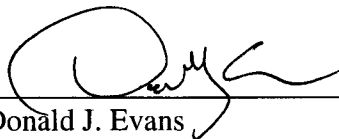
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