

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

In re:)
)
PMCM TV, LLC)
) CSR- 8919-M
Must-Carry Complaint Regarding)
Television Station WJLP(DT),) MB Docket No. 16-27
Middletown Township, New Jersey)
)

Attn: The Commission

OPPOSITION TO APPLICATION FOR REVIEW

Time Warner Cable Inc. (“TWC”),¹ by its attorneys, and pursuant to 47 C.F.R. Section 1.115, hereby submits this Opposition to the June 10, 2016 Application for Review filed by PMCM TV, LLC (“PMCM”), licensee of television broadcast station WJLP (DT), Middletown Township, NJ (“WJLP”), with regard to the Media Bureau’s *Memorandum Opinion and Order* (“*MO&O*”) denying PMCM’s channel positioning complaint against TWC.² For the reasons stated below, the Commission should deny PMCM’s Application for Review and reaffirm that WJLP has no right to carriage on cable channel 3 on TWC’s cable systems serving the New York City DMA.

ARGUMENT

As TWC explained in its opposition to PMCM’s channel positioning complaint, the issue presented in this case boils down to the following: is a digital broadcast television station’s right to cable carriage on its “over-the-air” channel number determined by reference to the station’s

¹ The acquisition of Time Warner Cable Inc. by Charter Communications was completed on May 17, 2016. For purposes of continuity and convenience, the respondent will be referred to herein as TWC.

² *PMCM TV, LLC, Licensee of WJLP, Middletown Township, New Jersey v. Time Warner Cable Inc.*, CSR-8919-M, Docket No. 16-27, Memorandum Opinion and Order, DA 16-549 (Med. Bur. May 17, 2016) (“*MO&O*”).

RF channel number or its PSIP (or “virtual”) channel number?³ In the *MO&O*, the Media Bureau agreed with TWC that Commission and Media Bureau precedent clearly recognizes that a digital broadcast television station’s virtual channel number, not its RF channel number, is the relevant channel number for purposes of determining the station’s on-channel cable carriage position and, on that basis, denied PMCM’s complaint.

In its Application for Review, PMCM challenges the Bureau’s ruling on several grounds. The common threads running through most of the “Questions Presented for Review” in the Application for Review are PMCM’s contentions that (i) the phrase “cable system channel number on which the local commercial television station is broadcast over the air” as used in the provisions of the Communications Act and Commission rules defining a must carry station’s channel positioning rights unequivocally means the station’s RF channel and (ii) interpreting that phrase term as referring to a station’s virtual channel for purposes of the cable channel positioning rules would require the Commission to interpret every other reference to a broadcast television station’s over-the-air channel in the Communications Act and Commission rules as a reference to the station’s virtual channel not its RF channel. PMCM’s position finds no support in either law or logic.

The starting point for interpreting the meaning of the phrase “cable system channel number on which the local commercial television station is broadcast over the air” as used in the context of the must carry channel positioning rule is the phrase’s plain language.

Notwithstanding PMCM’s assertions to the contrary, the reference in the channel positioning rules to a broadcaster’s over-the-air channel number is not without ambiguity; it could refer to the number of the RF channel over which the broadcaster transmits its signal or it could refer to

³ *PMCM TV, LLC, Licensee of WJLP, Middletown Township, New Jersey v. Time Warner Cable Inc.*, CSR-8919-M, Docket No. 16-27, Opposition to Must Carry Complaint (filed Feb. 8, 2016).

the channel number that an over-the-air viewer tunes his or her television to in order to receive the station's signal. In other words, the statutory term "over the air" can be interpreted from the perspective of the station or the perspective of the viewer.

When the channel positioning rules were first adopted in 1992, it didn't matter whether a station's over-the-air channel was defined from the perspective of the station or the perspective of the viewer. Either way, it was the station's RF channel number. However, as part of the digital transition in 2009, many stations changed RF channels. This led to the creation of the PSIP protocol, which allows stations to maintain their pre-transition channel identity. For example, prior to the digital transition, WWOR, Secaucus, New Jersey, transmitted its signal to over-the-air viewers using RF channel 9 and those viewers accessed the station by tuning their sets to channel 9. After the transition, WWOR began transmitting its signal on RF channel 38, but in order to maintain its channel identity and minimize viewer confusion, it uses virtual channel 9 thereby allowing over-the-air viewers to continue to access the station by tuning to channel 9 on their television sets (and allowing WWOR to continue to brand and market itself as "My9NJ").

In short, following the digital transition, references to a station's "over the air" channel no longer were "unequivocally" references to the station's RF channel and it was incumbent on the Commission, pursuant to its general public interest authority as well as the specific authority granted to it to update the cable carriage rules in connection with the digital transition, to determine whether, in the context of the cable channel positioning rules, a broadcast station's rights attach to its RF channel number or its virtual channel number.⁴ As the Bureau stated in the *MO&O*, the Commission made this determination in its *2008 Declaratory Order*, explaining that

⁴ 47 U.S.C. § 303(r) (authorizing the Commission to "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with the law, as may be necessary to carry out" its obligation to promote the public interest); 47 U.S.C. § 534(b)(4)(B) (directing the Commission "to establish any changes in the signal carriage requirements of cable television systems" necessitated by the digital transition). *See also* *MO&O* at ¶ 8.

“[i]n digital broadcasting, a broadcast station’s channel number is no longer identified by reference to its over-the-air radio frequency” and that “any station carried pursuant to mandatory carriage may demand carriage on its major channel number as broadcast in the station’s PSIP.”⁵ This decision was entirely consistent with the underlying purpose of the cable channel positioning rules, which is to address concerns that cable operators could make it difficult for their subscribers to find local broadcast television stations by assigning those stations cable channel numbers that differed from the channel numbers stations use to identify and market themselves to over-the-air viewing audiences.⁶

Under the circumstances, the Media Bureau’s decision that WJLP’s “over the air” channel number for purposes of determining the station’s cable channel positioning rights is channel 33 – the virtual channel number that off-air viewers tune to receive the station, and not channel 3 – the station’s RF channel number – is unassailable. Moreover, as discussed below, this determination is in no way called into question by any of PMCM’s remaining arguments.

For example, PMCM argues that if the Bureau’s decision is upheld, it will “eviscerate” the must carry rights of broadcast stations because the must carry provisions apply only to stations operating on channels identified in the Commission’s Table of Allotments and those channels are RF channels, not virtual channels.⁷ There is absolutely no merit to this *reductio ad absurdum* argument or PMCM’s hyperbolic claims that upholding the Bureau’s decision will

⁵ *MO&O* at ¶ 8, citing *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, Declaratory Order, 23 FCC Rcd 14254, 14259 (2008) (“2008 Declaratory Order”). See also *KSQA, LLC v. Cox Cable Commc’ns, Inc.*, Memorandum Opinion and Order, 27 FCC Rcd 13185, 13186-87 (MB 2012); *Gray Television Licensee, LLC v. Zito Media, L.P.*, 28 FCC Rcd 10780 (MB 2013); *Carriage Letter*, 30 FCC Rcd at 6117, n. 6; *In re PMCM TV, LLC*, No 15-1058, Opposition of the Federal communications Commission to Petition for Writ of Mandamus (D.C. Cir., filed June 19, 2015).

⁶ See e.g., 138 Cong. Rec. 6509 (July 23, 1992) (Statement of Rep. Lehman) (noting that the purpose of the channel positioning provision was to protect subscribers who are “accustomed to viewing [local broadcast] stations on their current channel assignments” and the marketing of stations based on their channel assignments).

⁷ App. for Review at 9.

have “cataclysmic” consequences.⁸ The Commission’s decision to treat a station’s virtual channel number as its “over the air” channel for purposes of the cable channel positioning rules does not in any way require the Commission to treat every other Communications Act provision or Commission rule that refers to a broadcast station’s “channel” as referring to the station’s virtual channel. Rather, whether a provision or rule that refers to a broadcast station’s “channel” is interpreted as referring to the station’s RF channel or its virtual channel will depend on the context of the reference and on which interpretation best serves the purpose of the statutory provision or rule. PMCM has offered no reason why the reference to the station’s “channel” in the provision defining which broadcast stations have must carry rights should be interpreted as anything other than a reference to a station’s RF channel.⁹

PMCM also argues that the Bureau exceeded the bounds of its delegated authority “by taking upon itself” to decide PMCM’s channel positioning complaint against TWC.¹⁰ As pointed out above, the Bureau found that the issue of whether a station’s RF channel or its virtual channel is its “over-the-air” channel for purposes of the channel positioning rules was resolved by the Commission in the *2008 Declaratory Order* and has been the subject of several Bureau orders as well.¹¹ Consequently, PMCM’s complaint did not present any “novel questions of law,

⁸ *Id.* at 10.

⁹ PMCM also repeats the argument that if WJLP’s channel number for purposes of the cable channel positioning rules is defined as its virtual channel number, the Commission will have violated the Spectrum Act by reassigning WJLP from virtual channel 3 to virtual channel 33. As indicated above, PMCM is simply wrong in its assertion that the decision to define a station’s virtual channel number as its over-the-air channel number for the specific purpose of implementing the cable channel positioning rules after the digital transition has any impact on how a station’s “channel” is defined for purposes of other provisions of the Communications Act. In any event, as the Bureau correctly noted, PMCM’s Spectrum Act arguments represent collateral attacks on the Bureau’s decision to assign WJLP virtual channel 33 and are not properly raised in this channel positioning complaint proceeding. *See MO&O* at 6, note 43.

¹⁰ App. for Review at 12.

¹¹ *See MO&O* at ¶¶ 6, 8. PMCM argues that even if the Commission has previously addressed the scope of a broadcaster’s on-channel cable carriage rights following the digital transition, its decision on that subject (in the *2008 Declaratory Order*) merely added carriage on a station’s virtual channel number as a new option for stations

fact, or policy that cannot be resolved under existing precedents or guidelines” and was properly decided by the Bureau on delegated authority.¹²

Finally, PMCM contends that the Bureau’s decision violated the statutory requirement that must carry complaints be decided within 120 days.¹³ Although the *MO&O* was released 119 days after the filing of PMCM’s complaint, PMCM argues, in effect, that the clock should have begun running two years ago when it filed its Application for Review of the Media Bureau’s July 2014 Deferral Order staying TWC’s obligation to commence carriage of WJLP pending resolution of the dispute between PMCM and certain other broadcasters over the station’s PSIP assignment.¹⁴ As an initial matter, this issue was not raised by PMCM in its complaint or in its

and did not alter a station’s right to elect carriage on its RF channel number. App. for Review at 8 and note 7 (citing the Commission’s statement that a broadcaster “may” demand carriage on its virtual channel number). While the use of the word “may” does indicate that choosing carriage based on a station’s virtual channel number is optional, not mandatory, it does not mean that a digital television station’s channel positioning choices include its RF channel number. Rather, it merely reflects the fact that carriage on the cable channel number corresponding to a digital television station’s “over-the-air” (*i.e.*, virtual) channel number is only one of several cable channel positioning options that the statute and rules give a must-carry broadcast station. *See* 47 U.S.C. § 534(b)(6); 47 C.F.R. §§ 76.57(a), (c) (providing that a must-carry station may elect its cable channel placement from among the following options: the cable channel number corresponding to station’s over-the-air channel, the cable channel number corresponding to the cable channel on which the station was carried on July 19, 1985, the cable channel number corresponding to the cable channel on which the station was carried on January 1, 1992, or such other cable channel number as is mutually agreed upon by the station and cable operator. Where, as is the case here, the station requesting mandatory carriage was not broadcasting July 19, 1985 or January 1, 1992 (and thus was carried on the cable system on either of those dates), the station’s only options are the cable channel number corresponding to the station’s virtual channel number or a cable channel mutually agreed to by the station and the cable operator. *See KSQA, LLC v. Cox Cable Commc’ns, Inc.*, Memorandum Opinion and Order, 27 FCC Rcd 13185, 13186-87 (MB 2012) (a digital station’s channel positioning choice “may attach only to its Major Channel Number as carried in its PSIP” (emphasis added)).

¹² *See* 47 C.F.R. §§ 0.61, 0.283. In an attempt to buttress its argument that its complaint raised novel issues, PMCM points to its Spectrum Act argument. App. for Review at 12. However, as noted above, the Bureau did not decide PMCM’s Spectrum Act argument, which is before the Commission in a separate proceeding and which relates to the decision to assign WJLP virtual channel 33, not to how the channel positioning rules are to be applied.

¹³ App. for Review at 13. *See also* 47 U.S.C. § 534(d)(3).

¹⁴ App. for Review at 13.

reply to TWC's opposition to that complaint and, as such, it is not a proper subject for an application for review.¹⁵

In any event, the period preceding the filing of PMCM's must carry complaint on January 19, 2016 is irrelevant to the application of the 120 day period. Indeed, PMCM previously sought mandamus from the Court of Appeals for the District of Columbia Circuit on the grounds that its Application for Review of the Media Bureau's July 2014 "Deferral Order" was the functional equivalent of a complaint and thus triggered the commencement of the 120 day clock for resolving must carry complaints.¹⁶ In an amicus brief responding to PMCM's mandamus petition, TWC pointed out that there is no authority supporting PMCM's position and that at the time PMCM filed its Application for Review of the Deferral Order it not only had not filed a complaint, it also had not complied with the detailed procedural prerequisites for filing a complaint.¹⁷ It is noteworthy that the Court of Appeals, in denying PMCM's mandamus petition, specifically indicated that PMCM's Application for Review of the July 2014 Deferral Order had been rendered moot by the Commission's June 5, 2015 decision assigning virtual channel 33 to WJLP.¹⁸ The Court also stated with respect to PMCM's request for a writ compelling the

¹⁵ See 47 C.F.R. § 1.115(c) ("No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass"). Possibly in an attempt to circumvent this restriction, PMCM also argues that the Section 534(d)(3) requires that the Commission itself, not the Bureau on delegated authority, decide carriage and channel positioning complaints within 120 days. App. for Review at 13 note 10. There is no indication anywhere in the statute or legislative history that Congress intended to restrict the Commission's ability to delegate the resolution of must carry complaints to the Media Bureau; indeed, such delegation has been taken as a given for more than 20 years. See 47 C.F.R. § 0.61.

¹⁶ *In re: PMCM TV, LLC*, Petition for Issuance of Writ of Mandamus, No 15-1058 (D.C. Cir. Filed March 17, 2015).

¹⁷ *In re: PMCM TV, LLC*, Brief Amicus Curiae of Time Warner Cable Inc. and Cablevision Systems Corporation in Opposition to Petition for Issuance of Writ of Mandamus, No 15-1058 (D.C. Cir. Filed June 26, 2015). In fact, at the time it filed its Application for Review of the July 2014 Deferral Order, WJLP had not even begun broadcasting and thus its initial request for carriage was untimely.

¹⁸ *In re: PMCM TV, LLC*, No. 15-1058, Order (D.C. Cir. Sept. 23, 2015).

CERTIFICATE OF SERVICE

I, Glenda V. Thompson, hereby certify that on this 27th day of June, 2016, I caused a copy of the foregoing "Opposition to Application for Review" to be placed in the U.S. Postal Service, first class postage prepaid, upon the following, except as otherwise indicated:

Donald J. Evans
Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street
11th Floor
Arlington, VA 22209
Counsel for PMCM TV, LLC

Mace J. Rosenstein
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Counsel for ION Media License Co. LLC

Joyce Bernstein (By Hand)
Video Division
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Michael D. Basile
Cooley LLP
1299 Pennsylvania Avenue, N.W.
Suite 700
Washington, D.C. 20004
Counsel for Meredith Corporation

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

Commissioner Ajit Pai (By Hand)
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Jonathan Sallet, General Counsel (By Hand)
Office of General Counsel
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Jessica Rosenworcel (By Hand)
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Chairman Thomas Wheeler (By Hand)
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Michael O'Rielly (By Hand)
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Mignon Clyburn (By Hand)
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Thomas K. Steel, Jr.
RCN Telecom Services, LLC
650 College Road East
Suite 3100
Princeton, NJ 08540

James E. Dunstan
Mobius Legal Group, PLLC
P.O. Box 6104
Springfield, VA 22150
*Counsel to Service Electric Cable TV of New
Jersey Inc.*


Glenda V. Thompson

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