

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

ORIGINAL

In the Matters of

Request for Declaratory Ruling by
Meredith Corporation and Alternative PSIP
Proposal by PCMC TV, LLC for
Station WJLP(TV) (formerly KVVV(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.

MB Docket No. 14-150

ACCEPTED/FILED

SEP 20 2017

Federal Communications Commission
Office of the Secretary

CSR-8917-M
Docket No. 16-25

DOCKET FILE COPY ORIGINAL

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

CSR-8918-M
Docket No. 16-26

In the Matter of

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

v.

Time Warner Cable Inc.

CSR-8919-M
Docket No. 16-27

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

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EMERGENCY MOTION FOR STAY

PMCM TV, LLC (“PMCM”), by its counsel, hereby moves the Commission to immediately stay the effectiveness of the its *Memorandum Opinion and Order*, FCC 17-118, released September 15, 2017 (the “*MO&O*”), and of the underlying Media Bureau *Declaratory Ruling*, 30 FCC Rcd 6078 (MB 2015) (“*Declaratory Ruling*”), which erroneously assigned Station WJLP a virtual channel different from the two-part channel on which WJLP would be directed to operate by application of the normal PSIP protocols, and to stay the effectiveness of its *Memorandum Opinion and Order*, FCC 17-117, released September 15, 2017 (“*MO&O-Cable*”), which purports to define a television station’s channel on which it broadcasts over the air as its virtual channel as established by the PSIP protocol. As will be set forth below, implementation of the *MO&O*, *Declaratory Ruling*, and *MO&O-Cable* will (i) create irreparable harm to PMCM, (ii) offer no material benefit whatsoever to any other party, (iii) indisputably misinterpret the PSIP assignment standards set by ATSC A/65C, (iv) continue to allow the very viewer disruption that the Commission has said the PSIP protocol is designed to prevent, (v) undermine the intent of Section 331 of the Act to provide a VHF channel, recognizable as such, to New Jersey, and (vi) directly violate the Middle Class Tax Relief Act.

Because of the exigency of the situation, PMCM requests that the Commission act on this request **no later than noon on September 22**. This will give PMCM time to seek similar relief from the Court if the Commission chooses not to act.

Background

As the Commission is fully aware, this matter had its origins when PMCM relocated WJLP, its channel 3 Nevada television station, to New Jersey by operation of Section 331 of the Communications Act. By that section, Congress required the Commission to allocate at least one VHF TV channel to each state, something which the Commission had overlooked despite the statutory mandate. Although much has changed since the 1982 enactment of Section 331, particularly with the DTV transition over two decades later, the major networks in most DMAs (including the New York DMA at issue here) continue to operate on VHF virtual channels because they recognize the superiority of that channel position, both for over the air and cable purposes. Viewers look for their local broadcast stations in that VHF channel range.

In 2014, after intervention of the U.S. Court of Appeals for the D.C. Circuit¹ forced the Commission to allow WJLP's relocation as required by statute, PMCM completed construction of WJLP to serve primarily the needs of New Jersey, as intended by the statute. Despite the fact that PMCM offered to waive its right to mandatory cable carriage on channel 3 in Fairfield County, Meredith Corporation (Meredith), the Hartford, CT licensee of WFSB which operates on channel 33 but uses major channel 3.1 as its PSIP, lodged an objection to WJLP's operation on channel 3, asking that the station be relegated instead to PSIP major channel 33. Meredith's Hartford station has a small overlap with WJLP in Fairfield County, CT. Several cable systems promptly asked the Media Bureau to permit them to defer the statutorily required carriage of WJLP's signal until the Bureau finally decided the matter. The Bureau complied, and that prevented WJLP from being viewed in most of the millions of homes in the New York DMA which receive television via cable for a substantial period of time. Thereafter, the Bureau took the unprecedented step of opening a public docket to consider the issues that had been raised by Meredith. (DA 14-1298, rel. September 12, 2014)

While this matter was pending, WJLP began operating under program test authority on RF channel 3 using the two-part virtual channel number 3.10 to distinguish it from Meredith's 3.1 two-part virtual channel. The comments submitted in this Docket showed that that (i) no actual viewer out of twenty-two million people in the service area was harmed or confused in any way by WJLP's over the air operation on virtual channel 3.10 and (ii) there are many instances of overlapping identical two-part virtual channel situations in the United States (including one involving channel 4 which the Bureau had belatedly allotted to New Jersey) where both of the stations involved have operated for years without the slightest harm or confusion to anyone. While the Commission contests the number of such overlaps found by PMCM, it does not provide any alternative figure and notes that no complaints have been registered with regard to these situations. Moreover, this comment misses the point, which is that the lack of recognition or objection to instances of major channel overlap demonstrates that such signal overlap creates no appreciable issues.

Nonetheless, based on only an overly rosy description of what the PSIP A/65C authors believed that the PSIP protocol would accomplish, the *Declaratory Ruling* required WJLP to change its virtual channel to Channel 33.1. This decision has taken on an added significance because of the Commission's concurrent decision in the *MO&O - Cable* that, despite the plain language of the statute establishing the channel placement rights for a station carried pursuant to mandatory carriage, the channel on which a station "broadcasts over the air" is now not the spectrum on which a station

¹ *PMCM TV, LLC v. FCC*, 701 F.3d 380 (D.C. Cir. 2012).

broadcasts but the virtual channel, which may or may not have any relation to the station's RF channel. In any event, this determination means that not only must WJLP identify itself as Channel 33 in over the air broadcasts, but also its ability to elect mandatory cable carriage on Channel 3 is severely limited for at least the next three years.

Prerequisites for a Stay

The well-known criteria for granting a stay are set forth in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921 (D.C.Cir. 1958):

- (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal?
- (2) Has the petitioner shown that without such relief, it will be irreparably injured?
- (3) Would the issuance of a stay substantially harm other parties interested in the proceedings?
- (4) Where lies the public interest?

Here all of these factors require a stay.

1. Likelihood of success on the merits.

The likelihood of PMCM's success in these matters is quite high. The basic holdings of the *MO&O* and the underlying *Declaratory Ruling* rest on a patent misreading of the applicable standard set forth in ATSC A/65C. Likewise, the *MO&O - Cable* must rely on an obvious misreading of statutory language. Indeed, throughout the lengthy history of PMCM's dealings with the Commission, the repeated theme has been the Commission's refusal to apply the plain meaning of statutory and regulatory language.

With regard to the *MO&O* and *Declaratory Ruling*, it is quite plain that Paragraph 1 of Annex B to ATSC A/65C, which requires a licensee that had an existing NTSC license to use its NTSC channel as its major channel, is applicable to WJLP. There is no dispute that WJLP was an existing NTSC station, nor does a change of location pursuant to a minor modification application such as filed by WJLP negate that past fact. While it is true that WJLP no longer has an existing NTSC license, neither does any full power television station in the United States. If that fact negates Paragraph 1 for WJLP, then it must do the same for every other television station, especially any television station that might relocate. Surely, the Commission does not mean to indicate that for any station that is licensed at a new transmitter location, or any station that might change communities of license to implement a post-auction channel sharing arrangement, Paragraph 1 no longer applies. The result would be massive disruption.

Furthermore, in seeking to apply Paragraph 4 of Annex B to the situation at hand, the *MO&O* and *Declaratory Ruling* must engage in a tortured reading of that paragraph. Paragraph addresses a situation which applies only if the over-the-air RF channel at issue (here channel 3) had previously been used by a station for NTSC operation in that same market (which it has not), had then been abandoned by that station for an alternate DTV channel (which it has not), and the former NTSC channel had then been re-allotted to the same market as a vacant channel available for new applications (which, again, it has not). While the *MO&O* advances a novel reading of the word “used,” it is clear from the context and from common Commission usage that a channel is “used” at a particular location, which is the community of license. WFSB is licensed to Hartford, CT, which is not in the New York DMA but the Hartford-New Haven DMA. In contrast, WJLP’s RF channel 3 is allotted to Middletown Township, NJ, which is in the New York DMA. Thus, the two stations are clearly not in the same market.

Moreover, it is clear that the term “market” does not mean an area defined by overlapping signal contours. First, such contours are not generally used by the Commission to establish the bounds of TV markets. TV markets are defined by the Commission for all other purposes by their Nielsen DMAs, which indisputably put WJLP in the New York market and WFSB in the Hartford market; The Commission’s rules expressly define a television station’s “market” as the station’s Nielsen-defined DMA. Section 76.55(e)(2). The Division’s seeming inclination to define “market” by reference to contour overlap flies in the face of the fact that the Commission expressly abandoned precisely that approach in the context of multiple ownership analysis. *See, e.g., 2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules*, FCC 03-127 (released July 2, 2003).²

Second, this interpretation ignores the fact that everywhere else in Annex B where the authors intended to refer to situations where there are overlapping station signals such as we have here, they expressly called that an “overlapping DTV Service Area.” The fact that that they refer in paragraph 4 to a “market” rather than an overlapping DTV Service Area compellingly suggests that they did *not* intend paragraph 4 to apply where there were simply overlapping service areas.

Yet another factor indicating that PMCM will prevail on the merits is that the *MO&O* and *Declaratory Ruling* rely largely upon Paragraph 8 of Annex B, which is a descriptive rather than prescriptive paragraph. While that paragraph does state that the channel assignment provisions “guarantee” that there will be no overlap of two-part channel combinations with another broadcaster,

² While the Commission does allow common ownership of two stations in the same market which do not have overlapping contours, this exception does not change the fact that the stations are still in the same market.

this paragraph is simply reciting the expected outcome of adopting the PSIP protocol. Paragraph 8 clearly does not mean that ensuring that no such overlap occurs is mandatory. PMCM has demonstrated that there are many such overlaps of stations with common major channel numbers, including another one involving a hurriedly allotted VHF channel in New Jersey. While there is some dispute as to the exact number, the reason that the Commission has given for rejecting consideration of such instances, which is that they have not been addressed because no one has complained, underscores two facts: first, that lack of major channel overlap is not actually mandatory or guaranteed, and second, that when such overlap occurs, it does not create real-world problems.

With regard to the *Cable MO&O*'s determination that a station's "virtual" channel should determine the cable channel to which a station is statutorily entitled, this decision also ignores plain statutory language. Consequently, PMCM is likely to prevail in this matter as well. In making its ruling, the Commission ignored the unequivocal contrary language of the Communications Act of 1934, as amended, which authorizes a station to elect cable carriage on the channel on which the station "broadcast[s] over the air," as well as the fact that that language could not have been intended to include "virtual" channels – since the concept of "virtual" channels was unknown when Section 534(b)(6) was enacted. It is, after all, axiomatic that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning ... at the time Congress enacted the statute." See, e.g., *Perrin v. United States*, 444 U.S. 37, 42 (1979). While the *MO&O- Cable* spends a good deal of time and ink in reciting what the Commission has decided to "clarify" this language, the Commission does not have the authority unilaterally to change the words enacted by Congress or their plain meaning. Thus, PMCM must prevail on this point as well.

Finally, the Middle Class Tax Relief Act at Section 1452(g) expressly prohibits the Commission from involuntarily assigning a television station to a new channel prior to the Incentive Auction. 47 U.S.C. Section 1452(g). As noted above, the Commission has now taken the position that a DTV station's "channel" is defined by its virtual channel number rather than its over the air channel, thus limiting must carry cable carriage rights to the station's virtual channel. If a DTV station's channel is now defined by its virtual channel, then a change in a station's virtual channel is assigning that station a new channel. While the Commission has stated that channel can have more than one meaning, it is clear that the only different meanings for that term as applied to television broadcast stations originate from the Commission's own say-so, not from the words used by Congress. Obviously, the Commission does not have the authority to apply novel meanings to plain Congressional language.

2. Irreparable Harm

Because the Commission has identified a station's virtual channel as its over-the-air channel, without a stay of the *MO&O*, WJLP's prospects for the upcoming must-carry/retransmission consent election deadline are now grim. It appears that the only feasible channel on which WJLP may require mandatory carriage of its station is Channel 33. This channel, however, is far away from the other local, commercial channels and places WJLP at a severe competitive disadvantage. Viewers expect to find local, network programming in channel numbers associated with the VHF band. Not being grouped with the other local broadcasters will discourage local viewers from finding and watching WJLP. This loss of viewers and revenue represents an irreparable harm to WJLP.

Most importantly, with the upcoming election deadline on October 1, 2017, WJLP's channel will be locked in for the next three years, January 1, 2018, through December 31, 2020. Being relegated to the broadcast channel hinterlands during that entire time period will inevitably and significantly reduce the revenues needed to sustain both the station's technical operations and its ability to produce top quality public affairs programming focused on New Jersey. PMCM has already won a number of Emmys for its local public affairs programming – an obligation that the station's owners took seriously when they undertook to provide TV service in this market.. Advertisers pay for the number of viewers watching a particular show, and viewers tend to stay in the channel range where they are accustomed to finding entertaining programming and not to stray outside that range. Without access to the audience that only channel 3 can deliver, the station cannot hope to continue producing this level of original programming. Thus, even though WJLP might be able to return to the lower part of the channel band after three years, the critical and possibly permanent damage will already have been done.

Furthermore, PMCM has demonstrated that, for over the air viewers, having WJLP on Channel 33.1 creates actual problems with viewer reception that did not exist on Channel 3.10. In its Supplement, PMCM demonstrated that many viewers who enter Channel 33 into their receivers get WCBS, which operates on RF Channel 33, rather than WJLP. Thus, instead of preventing viewer confusion, this PSIP assignment actually causes it. While a very precise entry of Channel 33.1, as opposed to just Channel 33, appears to address this problem in many, but not all, TV sets, it is unfair to single out WJLP as the sole local station for which viewers must be so precise, instead of merely scrolling up and down with a remote or entering only the major channel number. These difficulties in both finding and reliably watching WJLP add an unfair burden which causes the irreparable harm of loss of viewership. A broadcast station obviously cannot survive without access to an audience from which

to derive advertising revenues. The outcome of the *MO&O* is likely to be to kill this station by making it difficult or impossible for most viewers to find or access the station.

3. No harm to others

Docket 14-150 establishes beyond dispute that, during the time that WJLP used virtual channel 3.10 there was no harm to, or confusion of, any actual viewer among the New York DMA's 22 million people. The other parties to the proceeding that operate on major channel 3 are in separate markets, and WJLP's use of the same major channel cannot infringe on any rights that they may have. As noted above, the scores of other instances of major channel overlap have not created any issues sufficient to cause any confusion or complaints to the Commission, and this situation will be the same.

4. The public interest supports a stay

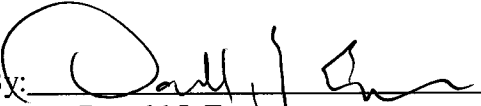
Given all the above, there can be no question of where the public interest lies. The Commission's two September 15 Orders impose a double-whammy on WJLP. The erroneous PSIP designation not only prevents many of its potential over the air viewers from being able to receive its signal at all, but it results in about half of the TV sets in the market routing WJLP viewers to CBS. At the same time, the determination that the erroneous PSIP number constitutes the station's "over the air" channel for cable placement purposes disassociates the station from all of the other stations that identify as VHF stations on the market's cable systems. Congress plainly understood that cable channel placement was important when it required cable systems to carry must-carry stations on their over the air channels. The Commission's declaration that a station's over the air channel is now an artificial number that bears no relationship to the channel on which the station broadcasts over the air denies WJLP and all other similarly situated stations their statutory right. It also will now create a nightmare in the must-carry world since no station using a different PSIP than its licensed channel will be entitled to must-carry status under Section 634(h) of the Act.

There is nothing in law or regulation which indicates that WJLP should be relegated to Channel 33. Placement there will not alleviate any confusion to the public or protect any critical interests of others, as there is no confusion, and there are no such interests. The PSIP protocol incorporated in the Commission's rules by reference plainly indicates that WJLP should be assigned major channel 3. Only a willful misconstruction of the plain language of ATSC A/65C can lead to any other conclusion, just as only a willful misconstruction of statutory language delayed WJLP's move to New Jersey for a period of years, until the Court of Appeals intervened. At this point, allowing WJLP to broadcast on major channel 3 will assist the public in finding the quality programming that WJLP provides and thus will

serve the public interest. Another intervention of the Court of Appeals should not be required to make this happen.

Respectfully submitted,

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September 20, 2017

CERTIFICATE OF SERVICE

I, Donald J. Evans, hereby certify that on this 20th day of September, 2017 I caused copies of the foregoing "Emergency Motion for Stay" to be hand-delivered, emailed or sent by overnight mail (as indicated below) to the following persons:

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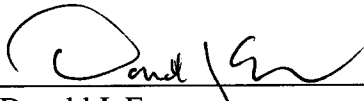
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