

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Amendment of Section 73.622(i),)
Post-Transition Table of DTV Allotments,)
Television Broadcast Stations.)
(Seaford, Delaware))

MB Docket No. 09-230

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To: The Commission

Federal Communications Commission
Office of the Secretary

PETITION FOR RECONSIDERATION
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PMCM TV, LLC (“PMCM”), by its attorneys and pursuant to 47 C.F.R. § 1.429(a), hereby petitions the Commission to reconsider its August 4, 2016 Memorandum Opinion and Order, FCC 16-105, in the above-captioned proceeding (the “FCC MO&O”), which denied PMCM’s June 2, 2014 Application for Review (“AFR”) of three Media Bureau orders in this docketed proceeding: (i) the Video Division’s April 28, 2010 Report and Order, 25 FCC Rcd 4466 (the “Seaford R&O”); (ii) the Video Division’s February 13, 2013 Memorandum Opinion and Order on Reconsideration, 28 FCC Rcd 1167 (the Bureau Reconsideration Order or “BRO”); and (iii) the Video Division’s May 1, 2014 Memorandum Opinion and Order on Further Reconsideration, 29 FCC Rcd 4769 (the “Further BRO”). The Further BRO denied PMCM’s March 15, 2013 Petition for Reconsideration (the “PMCM 2013 PFR”) of the BRO and the Seaford R&O.¹

FCC Rule 1.429(a) allows any “interested person” to petition the Commission for reconsideration of a final action in rulemaking proceedings. This regulation in turn echoes

¹ Public notice of the FCC MO&O was published in the Federal Register on August 26, 2016. This petition is therefore timely filed under 47 C.F.R. § 1.4(b)(1). Initially capitalized terms not otherwise defined herein have the meanings established in the AFR.

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47 U.S.C. § 405(a), which establishes PMCM's fundamental reconsideration right. PMCM is an interested person herein, as it has participated in this proceeding from its inception.

Reconsideration would serve the public interest because, as explained below, the FCC MO&O completely failed to address the Bureau's prominent and continued reliance in the BRO on 47 U.S.C. § 331(a) ("Section 331(a)") as its central supporting rationale, an error that warrants correction.² In fact, in the larger context of this proceeding, Section 331(a) has *twice* been misapplied by the FCC – once when it rejected the June 15, 2009 PMCM Notification and again when the agency refused to delete the unorthodox Seaford allotment it had expressly premised on Section 331(a), even *after* that premise had been eliminated by the December 14, 2012 D.C. Circuit Reversal.

The gravamen of the FCC MO&O is that PMCM filed the PMCM 2013 PFR some three years late, after PMCM's Section 405(a) opportunity to timely challenge the original Seaford allotment in 2010 through reconsideration had expired. The FCC MO&O holds, in effect, that PMCM was legally obligated to seek reconsideration of the Seaford allotment in 2010 on hypothetical grounds – namely that PMCM would succeed in persuading the United States Court of Appeals for the District of Columbia Circuit by means of a *then-still pending* appeal that the FCC had failed to follow the dictates of Section 331(a) when the agency denied the PMCM Notification.³ As a precedential matter, the FCC MO&O improvidently breaks new ground by placing on a private petitioner the inflexible burden to take action based on the *assumptive*

² One of several grounds warranting reconsideration is that the FCC MO&O did not "fully consider[]" PMCM's arguments with respect to Section 331(a). *Cf.* 47 C.F.R. § 1.429(1)(3).

³ PMCM had notified the FCC that it was relocating its Jackson, Wyoming VHF (Channel 2) station to Wilmington, Delaware to fill the then-existing VHF void in Delaware.

speculation that an action *the FCC has taken* and is defending on appeal in court is unlawful.⁴

Solely on these procedural grounds, the FCC MO&O declines to rule on the AFR's underlying merits.

PMCM does not here re-argue its AFR. Rather, this petition asks the FCC to examine the basis of the FCC MO&O's conclusion that the PMCM 2013 PFR was three years late, reverse that finding, and proceed to an evaluation of the merits in this proceeding. PMCM believes those merits are simple and clear. The BRO expressly relied on Section 331(a) as the basis to reject the Broadcast Maximization Committee's challenge to the allotment of Channel 5 to Seaford, a challenge premised in part on grounds that the Bureau's "unusual step of proposing the allotment of channel 5 at Seaford, despite the fact that no party had expressed an interest in this proposal" was "unprecedented and contrary to the manner in which all other allotments are proposed pursuant to Section 307(b) of the Communications Act of 1934, as amended." BRO at ¶ 4. But,

⁴ Tellingly, neither the Further BRO nor the FCC MO&O cites any precedent for the proposition that the Commission will entertain reconsideration on the basis of a speculative prediction of a Court reversal of the Commission's own action. Instead, FCC precedent over the decades has squarely and consistently rejected speculation as a grounds for reconsideration. *See, e.g., Antilles Wireless, L.L.C.*, 24 FCC Rcd 4696, 4700 n.47 (WTB 2009) ("While Clearwire admits the MO&O correctly describes its current practice, it states that its technology may improve in the future This argument provides no basis for granting reconsideration. It is entirely speculative, based on the current record, whether Clearwire will be able to provide a viable service using the 4 MHz channel currently available to it."); *Community Service Broadcasting, Inc.*, 8 FCC Rcd 5044 n.1 (1993) ("Given Lesso's consistently expressed intent [to consummate an acquisition], Babbs' speculation does not constitute a basis for reconsideration."); *Policy Regarding Character Qualifications in Broadcast Licensing*, 1 FCC Rcd 421, 425 n.11 ("Its arguments are based on mere speculation. It is well established that, pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429 (1985), this is not a sufficient basis for reconsideration."). The dissonant nature of the Commission's position in this case is evidenced by the language repeated in paragraph 7 of the FCC MO&O – faulting PMCM for not seeking reconsideration in 2010 on the basis of a court reversal which at that time was merely "possible" or a "foreseeable outcome." If the Commission believed the DC Circuit Reversal was actionably "foreseeable" in 2010, why did it issue the *Seaford R&O* in the first place?

by the time the BRO was issued, this reliance on Section 331(a) had been vitiated by the D.C. Circuit Reversal. The Seaford allotment fails accordingly.

PMCM urges the Commission to find that the BRO was open to further challenge by PMCM *precisely because Section 331(a) stood at the heart of that Order*. Indeed, the BRO was premised in essential part on Section 331(a)'s fundamental precept that the FCC should eliminate any state's VHF void to the extent technically feasible: "[W]e emphasize that the decisions that we made in the *Notice* and the *Report and Order* were intended to serve the public interest and comply with section 331's VHF policy. Section 331 poses a somewhat unique circumstance compared to other allocations, by imposing a policy of allocating at least one VHF frequency to each state, if technically feasible." BRO at ¶ 6 (footnote omitted).

Because the Bureau explicitly relied on Section 331(a) as a fundamental basis for the BRO, PMCM was entitled to seek further reconsideration *in 2013* of that ruling.⁵ Here, PMCM properly sought *further* reconsideration based on changed circumstances relating to the fundamental Section 331(a) basis of the BRO. The FCC MO&O's criticism of PMCM as tardy rings particularly hollow, where the agency *itself* had full knowledge in 2013 that the BRO's express reliance on the "somewhat unique" circumstances of Section 331(a) had already been undercut in the interim by the D.C. Circuit Reversal. Stated differently: When the Bureau issued the BRO, it already knew Delaware no longer met Section 331(a)'s unique VHF void threshold requirement, yet it nonetheless "doubled down" on that rationale.

In sum, PMCM properly sought reconsideration by means of the PMCM 2013 PFR within 30 days of the FCC action complained of – Bureau reliance in the BRO on Section 331(a)

⁵ For this reason, the FCC MO&O is wrong to affirm the Bureau's finding in the Further BRO that the 2013 PMCM PFR was "outside the scope" of the BRO. FCC MO&O at ¶ 8. This is not a case where the grounds underlying a *further* reconsideration request are entirely peripheral to, and therefore disconnected from, the rationale of the *initial* reconsideration order.

to reaffirm its highly unorthodox, unprompted allotment of Channel 5 to Seaford. It would be entirely inequitable for the FCC to continue to insulate from a substantive merits review *its own failure* to follow the dictates of Section 331(a), solely on the basis of an *asserted procedural PMCM lapse*, namely the “failure” to file a reconsideration petition in 2010 based on speculation that a reviewing court would ultimately rule in PMCM’s favor.⁶

CONCLUSION

PMCM respectfully requests that the Commission grant this petition and afford it the relief requested above and in the AFR.

Respectfully submitted,

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⁶ PMCM notes that the 2013 PMCM PFR fits comfortably under the rationale articulated in *Communications Vending Corp. of Arizona v. FCC*, 365 F.3d 1064, 1075 (D.C. Cir. 2004), cited by the FCC MO&O, pursuant to which a petitioner preserves its rights ultimately to seek reconsideration by taking diligent earlier action. FCC MO&O at n.50. Here, PMCM acted diligently by timely filing the appeal which ultimately led to the D.C. Circuit Reversal.

CERTIFICATE OF SERVICE

I, Rebecca J. Cunningham, hereby certify that that on this 22nd day of September, 2016, I served copies of the foregoing Petition for Reconsideration by causing them to be delivered by first class, postage prepaid U.S. mail to the following:

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