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October 18, 2017

VIA HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

ACCEPTED/FILED

OCT 18 2017

Federal Communications Commission
Office of the Secretary

Re: Amendment of Section 73.622(i),
Post-Transition Table of DTV Allotments
Television Broadcast Stations.
(Seaford, Delaware)
MB Docket No. 09-230
Reply to Opposition to Motion to Dismiss

Dear Ms. Dortch:

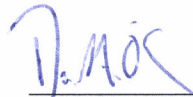
Transmitted herewith, on behalf of Western Pacific Broadcast LLC, are an original and eleven (11) copies of its Reply to Opposition to Motion to Dismiss in the above-captioned proceeding.

Should you have any questions concerning this matter, please contact the undersigned.

Respectfully submitted,

WILKINSON BARKER KNAUER, LLP

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Enclosure

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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: Office of the Secretary, FCC
For: The Commission

Federal Communications Commission
Office of the Secretary

REPLY TO OPPOSITION TO MOTION TO DISMISS

Western Pacific Broadcast LLC ("WPB"), licensee of television station WMDE(TV), channel 5, Dover, Delaware ("WMDE"), by its counsel, hereby submits its reply to the Opposition to Motion to Dismiss ("Opposition") filed in the above-referenced proceeding by PMCM TV, LLC ("PMCM"), the former licensee of station KJWP(TV), channel 2, Wilmington, Delaware ("KJWP").¹ In its Motion to Dismiss ("Motion"),² WPB seeks dismissal or denial of PMCM's Petition for Reconsideration ("PMCM Petition")³ with respect to the Commission's August 4, 2016 *Memorandum Opinion and Order* in this docket (the "2016 Seaford MO&O").⁴

¹ PMCM TV, LLC Opposition to Motion to Dismiss, MB Docket No. 09-230 (filed Oct. 5, 2017).

² Western Pacific Broadcast LLC Motion to Dismiss, MB Docket No. 09-230 (filed Sept. 22, 2017).

³ PMCM TV, LLC Petition for Reconsideration, MB Docket No. 09-230 (filed Sept. 22, 2016). No public notice regarding the PMCM Petition has been published by the Commission in the Federal Register, as required in order to commence a formal pleading cycle under Section 1.429(e) of the Commission's rules. See 47 C.F.R. § 1.429(e). WPB reserves the right to file an opposition to the PMCM Petition if and when the Commission puts that filing on public notice.

⁴ *Seaford, Delaware*, Memorandum Opinion and Order, 31 FCC Rcd 9388 (2016). In that decision, the Commission denied PMCM's June 2, 2014 Application for Review of three separate Media Bureau decisions and upheld the allotment of channel 5 to Seaford, Delaware, (continued)...

As shown below, PMCM still has no claim of standing to challenge the *2016 Seaford MO&O*, and thus the PMCM Petition should be dismissed or denied.

Earlier in this proceeding, PMCM explicitly grounded its claim of standing on its assertion that WMDE's authorized technical facilities on channel 5 at Seaford produced contour overlap with KJWP, and thus were likely to cause economic injury to KJWP.⁵ But PMCM is no longer the licensee of KJWP, having sold the station on August 31, 2017.⁶ Accordingly, as noted in WPB's Motion, PMCM no longer has any basis for claiming economic or other injury from the Commission's allotment of channel 5 to Seaford. PMCM therefore lacks standing to challenge the *2016 Seaford MO&O*.⁷

In an attempt to do an end run around its own words, PMCM contends that the Commission should ignore its sale of KJWP and find that PMCM remains an "interested party" under Section 1.429(a) of the Commission's rules.⁸ Nowhere, however, does PMCM claim that

WMDE(TV)'s original community of license. *See* Motion at 1 and the cases cited therein at note 3.

⁵ PMCM TV, LLC Reply to Opposition to Application for Review, MB Docket No. 09-230, at 1 n. 1 (filed July 2, 2014) ("[The Seaford rulemaking] culminated in agency approval of new commercial television station WMDE at Seaford, Delaware, the authorized technical facilities of which produce the expected cognizable signal contour overlap with KJWP. . . [T]he Seaford allotment was therefore likely to cause economic injury to PMCM through loss of viewership and advertising revenue and PMCM clearly has standing under well-settled precedent.") (citation omitted).

⁶ PMCM sold the station to Maranatha Broadcasting Company, Inc. *See* FCC File No. BALCDT-20160105ABB; *see also* http://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/pubacc/prod/app_det.pl?Application_id=1756793 (noting the August 31, 2017 consummation date).

⁷ Motion at 2-3. PMCM falsely claims that "WPB cites no case precedent in support of its Motion." *Id.* PMCM should read more closely -- cases are cited at footnote 6 of WPB's Motion.

⁸ Section 1.429(a) states that "[a]ny interested person" may file a petition for reconsideration of a final action in a rulemaking proceeding.

it is suffering or will suffer any economic harm or other injury from the Commission's allotment of channel 5 to Seaford. Instead, PMCM once again contends that the Seaford allotment cannot be squared with Section 331(a) of the Communications Act of 1934, as amended (the "Communications Act") because, as PMCM suggests, "Section 331(a) cannot support the allocation of a Delaware channel [*i.e.*, the Seaford allotment] *in addition to* the channel brought to Delaware by PMCM [*i.e.*, KJWP]." ⁹ PMCM asserts that it has "an abiding interest" in proper implementation of Section 331(a), although having now divested KJWP, it is unclear exactly what that interest might be. ¹⁰

WPB has already demonstrated in prior filings why PMCM's reading of Section 331(a) is wrong on the merits, and WPB incorporates those arguments herein by reference. ¹¹ More important, to demonstrate standing before the Commission, a petitioner must show personal injury that is traceable to the challenged action, and a substantial likelihood that the relief requested will redress the claimed injury. ¹² PMCM satisfies none of these criteria, since it can claim no injury from the Seaford allotment now that it no longer owns KJWP. Nor can PMCM

⁹ Opposition at 3 (emphasis in original). Section 331(a) states in relevant part that "[i]t shall be the policy of the Federal Communications Commission to allocate channels for very high frequency commercial television broadcasting in a manner which ensures that not less than one such channel shall be allocated to each State, if technically feasible." 47 U.S.C. § 331(a).

¹⁰ Opposition at 2.

¹¹ See Reply Comments of Western Pacific Broadcast, LLC, MB Docket No. 13-40, at 10-12 (filed April 18, 2013); Western Pacific Broadcast, LLC Opposition to Application for Review, MB Docket No. 09-230, at 2 (filed June 17, 2014).

¹² See, e.g., *Urbanmedia One*, Order on Reconsideration, 32 FCC Rcd 5264, 5265 n. 11 (2017); *Public Media of New England, Inc.*, Memorandum Opinion and Order, 30 FCC Rcd 14922, 14923 (2015) ("In the broadcast regulatory context, standing is generally shown in one of three ways: (1) as a competitor in the market subject to signal interference; (2) as a competitor in the market subject to economic harm; or (3) as a resident of the station's service area or regular listener of the station.") (footnote omitted).

sensibly assert that it is acting to protect the public interest,¹³ since it is absurd to suggest that the citizens of Delaware are disserved by having two in-state VHF stations instead of one. Therefore, whatever PMCM's residual interest in this matter may be, it is not sufficient to confer it with standing to challenge the *2016 Seaford MO&O*.

PMCM pushes the envelope even further by contending that it need not demonstrate standing at all, since there is no standing requirement for petitions for reconsideration in rulemaking proceedings.¹⁴ Essentially, PMCM is arguing that a challenge to a Commission adjudicatory order under Section 1.106 requires standing but a challenge to a Commission rulemaking order under Section 1.429(a) does not. Neither the Commission's rules nor the governing statute (Section 405(a) of the Communications Act) draws that distinction, and PMCM cites no authority that says otherwise. Indeed, had PMCM truly believed that such a distinction exists, it presumably would not have tried to demonstrate that it has standing to attack the *2016 Seaford MO&O* in the instant rulemaking proceeding.¹⁵

The Commission should also reject PMCM's strained attempt to show that station WMDE competes with PMCM's station in the New York DMA, WJLP(TV), Middletown

¹³ Opposition at 3 ("PMCM properly continues to pursue issues in this notice and comment rule making which implicate Section 331(a) and bear directly on the public interest.").

¹⁴ Opposition at 3 ("[N]o rule requires 'interested persons' to demonstrate standing in order to participate in the rule making process, including filing petitions for reconsideration.").

¹⁵ The history of Section 1.429 suggests that the Commission did not use the phrase "any interested person" in Section 1.429(a) to imply that standing is unnecessary for a Section 1.429 petition for reconsideration. See *Amendment of Procedures for Reconsideration of Actions in Notice and Comment Rulemaking Proceedings*, Memorandum Opinion and Order, 57 FCC 2d 699 (1975) ("Section 1.429(a) provides that 'any interested person' may petition for reconsideration of Commission action in a notice and comment rulemaking proceeding. This rule eliminates a discrepancy between actual Commission practice in rulemaking proceedings and Section 1.106(b), which requires a showing of cause for petitioner's failure to participate in an earlier stage of a proceeding.").

Township, New Jersey. Citing a recent Commission Order in an unrelated case, PMCM claims that the Commission has taken “an expansive definitional view of the ‘markets’ in which WJLP competes, including with KYW, Philadelphia.”¹⁶ PMCM goes on to claim that “KYW is home to the Philadelphia DMA as defined by Nielsen, the same DMA in which WPB’s WMDE, Dover, Delaware, operates.”¹⁷ From this PMCM leaps to the conclusion that “WJLP and WMDE both compete in the Philadelphia DMA.”¹⁸ PMCM wants the Commission to infer from this that WJLP competes with both KYW and WMDE. But PMCM is wrong as a factual matter – WMDE is not assigned to the Philadelphia DMA or the New York DMA. WJLP and WMDE are in completely different markets with no contour overlap, and they do not compete with each other for viewership or advertising.¹⁹ Hence, PMCM cannot derive any standing in this proceeding from its continued ownership of WJLP.²⁰

¹⁶ Opposition at 3 n. 11, citing *Request for Declaratory Ruling by Meredith Corporation and “Alternative PSIP Proposal” by PMCM TV, LLC (formerly KVVN(TV), Middletown Township, New Jersey*, FCC 17-118, ¶ 32 (rel. Sept. 15, 2017) (“*PMCM PSIP Order*”).

¹⁷ Opposition at 3 n. 11. PMCM presumably meant to say that “the Philadelphia DMA is home to KYW.”

¹⁸ *Id.*

¹⁹ The signal contour maps for each station in the Commission’s records show no contour overlap. Compare <https://publicfiles.fcc.gov/tv-profile/wjlp/contour-maps/> with <https://publicfiles.fcc.gov/tv-profile/wmde/contour-maps/>.

²⁰ PMCM also cites paragraphs 13 and 26 of the *PMCM PSIP Order* as evidence that “proper overall interpretation and implementation by the FCC of Section 331(a) remain of vital interest to PMCM.” Opposition at 3 n.11. The *PMCM PSIP Order* concerns the assignment of a virtual channel to WJLP and has nothing to do with the Seaford allotment or PMCM’s standing to challenge the Seaford allotment in the wake of its sale of KJWP.

Finally, PMCM contends that “the Commission continues to assess [in this proceeding] the allocation of a new television station to the state of Delaware [at Seaford].”²¹ This does not tell the whole story. PMCM’s late-filed challenge to the Seaford allotment has been mooted by the finality of the Consumer and Government Affairs Bureau’s *Order* terminating the Commission’s docket for Auction 90, in which WPB was the highest bidder for the channel 5 allotment at Seaford (the “*Auction 90 Termination Order*”).²² As discussed in WPB’s prior filings in this docket,²³ at no time did PMCM seek reconsideration or full Commission review of the closure of Auction 90, let alone WPB’s successful bid therein or the subsequent award of the channel 5 construction permit to WPB. Nor did PMCM challenge WPB’s application for a license to cover the construction permit or the Commission’s grant of that license, the issuance of which is now a final decision.²⁴ Moreover, PMCM did not seek reconsideration or full Commission review of the *Auction 90 Termination Order* and, because that decision is now final, PMCM is barred from doing so now.²⁵

²¹ Opposition at 1.

²² *Termination of Certain Proceedings as Dormant*, Order, CG Docket No. 14-97, 29 FCC Red 11,017, 11,093 (CGB rel. Sept. 15, 2014) (terminating AU Docket No. 10-147); *see also* *Consumer & Governmental Affairs Bureau Seeks Comment on Termination of Certain Proceedings as Dormant*, Public Notice, CG Docket No. 14-97, 29 FCC Red 7664, 7743 (CGB rel. June 30, 2014). The *Auction 90 Termination Order* was published in the *Federal Register* on September 29, 2014 and became final 40 days thereafter, i.e., on November 8, 2014. *See* 79 Fed. Reg. 58,344 (Sept. 29, 2014); *see also* 47 C.F.R. § 1.117(a).

²³ *See, e.g.*, Western Pacific Broadcast, LLC Motion to Dismiss, MB Docket No. 09-230 (filed Dec. 12, 2014).

²⁴ *See* File No. BLCDDT-20141001CBV (granted October 9, 2014). The license grant became final on November 25, 2014.

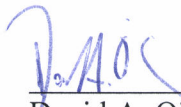
²⁵ Any petition for reconsideration or application for full Commission review of the *Auction 90 Termination Order* was due on October 29, 2014. *See* 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(t), 1.115(d).

The unchallenged and now final termination of the Auction 90 docket unquestionably moots the PMCM Petition, since it leaves no procedural vehicle through which PMCM may challenge WPB's successful auction bid for channel 5 at Seaford. Even if PMCM were to now file an untimely challenge to the *Auction 90 Termination Order*, there would be nothing for the Commission to reconsider or review – Auction 90 is over and cannot be revived. Absent the ability to challenge the channel 5 *auction*, PMCM is procedurally barred from seeking to challenge the Commission's underlying allotment of channel 5, as it is attempting to do in the PMCM Petition.

In sum, PMCM has yet to demonstrate that it has any standing to pursue to the PMCM Petition, and in any case the *Auction 90 Termination Order* has mooted that filing. WPB requests that the PMCM Petition be dismissed or denied in accordance with Section 1.429(i) of the Commission's rules.²⁶

Respectfully submitted,

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²⁶ 47 C.F.R. § 1.429(i).

CERTIFICATE OF SERVICE

I, Paula Lewis, an employee of Wilkinson Barker Knauer, LLP, hereby certify that a copy of the foregoing Reply to Opposition to Motion to Dismiss was served on October 18, 2017, by first class mail unless otherwise noted, to the following:

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