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

In re)
)
Program and System Information)
Protocol (PSIP) Designation for)
Station WJLP(TV) (formerly KVNV(TV)),)
Middletown Township, New Jersey)
FCC Facility ID No. 86537)

MM Docket No. 14-150

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Federal Communications Commission
Office of the Secretary

TO: Marlene H. Dortch, Secretary

For transmission to: Video Division, Media Bureau

REPLY COMMENTS OF PMCM TV, LLC

PMCM TV, LLC, by its attorneys, submits this consolidated reply to the comments filed in this Docket.

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Summary

The Comments raise a handful of discrete topics. In response, this Reply will demonstrate:

- The correct two-part channel designation dictated by ATSC A/65 Annex B is major channel 3 coupled with a different minor channel such as the one selected by PMCM
- The Communications Act and the must-carry rules mandate that television stations exercising must-carry rights are entitled to be carried on their over-the-air channel, not their PSIP channel
- The Bureau's Seaford, DE action is both distinguishable and erroneous
- Temporary inconvenience to cable subscribers arising from the need to watch a different channel does not override statutory mandates and the Commission's regulations, both of which require television stations at their request to be carried by cable systems on their over-the-air RF channels
- Overarching adverse consequences would result from barring the overlap of television stations with identical major_channel_numbers
- The Commission should defer action on whether to enforce a patently unlawful channel positioning agreement
- Prompt resolution of this Docket is required and in the public interest

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I. Introduction

PMCM will address the foregoing topics in turn, but we must first observe that, except for a comment by a Mr. K.W. Richards who does not disclose his interest in the matter, the only comments opposing PMCM's alternative proposal have come from other stations with overlapping service areas who stand to gain by delaying as long as possible WJLP's full entry into the market with normal cable carriage. It behooves all of us to take this opportunity to step back and look at the broader picture of what is happening here. By delaying action on this matter while at the same time allowing the cable systems not to carry WJLP at all, the Bureau is indisputably preventing a competitive force from entering the marketplace in contravention of the pro-competitive principles the Commission has long espoused. It is also indisputably preventing the vast majority of the viewing public in the New York market from having access to a new and popular entertainment source, as well as a uniquely New Jersey-oriented source of news and public affairs programming.

II. The PSIP Major_Minor Channel Assignments According to ATSC A/65

PMCM has demonstrated at length in its Comments that a strict application of the principles of Annex B of ATSC A/65 requires that WJLP's PSIP must specify the major_channel_number 3 because that was its over-the-air RF channel number prior to the 2009 DTV transition. Moreover, Annex B unquestionably establishes that the signals of two stations with identical major_channel_numbers – such as WJLP and WFSB in this case – may overlap, as long as the two stations utilize separate and distinct minor channel numbers in their PSIPs to ensure that their signals are distinguishable from each other. PMCM has also demonstrated that, notwithstanding the contrary direction of ATSC A/65, there are over 100 circumstances where stations with *identical two-part* (i.e., major_channel_number and minor_channel_number) PSIP channel designations overlap without the slightest confusion or problem. Witness also the broad overlap of WACP, Atlantic City, and WNBC, New York, both of which utilize major_channel_number 4 and minor_channel_number 1. Overwhelming empirical evidence therefore strongly suggests that today's television sets and the people who use them are perfectly capable of distinguishing even overlapping identical two-part PSIP channel designations without

a problem. So one might well ask, where's the problem? If scores of stations with identical two-part channel designations overlap (in apparent violation of ATSC A/65) without issue, why is there suddenly concern about adverse consequences here? And if the Commission has done nothing to correct 100+ situations in which the signals of stations with identical two-part channel designations overlap in apparent violation of ATSC A/65, why is it taking extraordinary and unprecedented measures here, where the overlap of properly partitioned two-part channel designations is expressly contemplated by ATSC A/65?

Despite the apparent absence of harm occasioned by overlap of identical major/minor channel combos, in order to ensure perfect compliance with the ATSC A/65 standards, PMCM adopted a different minor channel number from WFSB and KWY. Empirical experience again confirms the efficacy of ATSC A/65's provision for partitioned two-part channel designations. After almost a month of over-the-air transmission using PSIP 3.10, WJLP has not received a single complaint from viewers about confusion, and we must assume that CBS and Meredith have been similarly free from complaints or we would surely have heard about it. Significantly, CBS itself employed this exact measure to deal with problems arising from overlapping identical two-part channel designations outside Chicago, so it is hard to understand why or on what basis they would object to the same solution here.

Contrary to Meredith's repeated assertions, no waiver of the Commission's rules is necessary to effect this PSIP assignment since it is fully compliant. Because WJLP, WFSH and KYW use the same major_channel_number, ATSC A/65 Section B.1.1 (5) mandates that properly "partitioned" minor_channel_numbers be utilized. WJLP's use of minor_channel_numbers 10 *et seq.* meets that requirement. Indeed, it would contravene the rules to assign PMCM a PSIP with anything *but* 3 as its major channel. We should also note that Meredith's repeated complaint that its virtual channel is being "modified" or "commandeered" is plainly erroneous. Meredith's virtual channel – 3.1 – remains exactly as it has always been. It loses nothing by PMCM's use of virtual channel 3.10, nor does Meredith have any claim to all minor channels associated with major channel 3 since the ATSC A/65 protocols explicitly envision coincident use of major channels by independent licensees. Meredith is asserting ownership of rights it does not have and which the Commission may not grant.

So far as we can tell, the only basis for a claim that WJLP should be required to use major_channel_number 33 arises from the belief that ATSC A/65 Section B.1.1(4) somehow applies to this situation. But that section plainly does not apply here.¹ Section B.1.1 (4) applies by its terms only to circumstances where an RF channel “previously allotted for NTSC use in a market is later assigned to a “newly-licensed DTV licensee in that market.” (Emph. added) The Commission’s records establish that RF channel 3 was never previously allotted to the New York DMA for NTSC use. WJLP was allotted RF channel 3 in Middletown Township, New Jersey, which is in the New York DMA. (The Commission’s rules consistently define a TV station’s “market” as its Nielsen-determined DMA. *See* Section 76.55(e).) Thus, even if WJLP were deemed for the sake of argument to be a “newly-licensed station” – a notion which is flatly at odds with the fact that WJLP has been fully licensed since well before the DTV transition date of June, 2009 – Section B.1.1. (4) would still be inapplicable here by its own terms.

Television channels are allotted to specific communities in states which are within specific markets defined by the Commission’s rules. They are not allotted to service areas defined by service contours. RF channel 3 was previously allotted to the Hartford-New Haven market and the Philadelphia market for NTSC use. To apply Paragraph B.1.1.(4) here, the Commission would have to find that New York, Philadelphia, and Hartford comprise *the same market*, a finding which is not only absurd on its face but which is also inconsistent with the market definition used by the FCC for all cable TV carriage purposes. It would, moreover, appear to create a right of WJLP (and possibly others) to demand carriage on cable systems throughout the vast, now unified, New York-Hartford-Philadelphia market. We also note that if Paragraph B.1.1.(4) were applied, WJLP would be entitled not only to major channel 33 but also to channel 26 since it would be deemed by overlapping signals to reside in the Philadelphia market with KYW, whose over-the-air channel is 26. Which one applies? We assume the Bureau flipped a coin in deciding to temporarily assign virtual channel 33 to WJLP, but ATSC 65/A does not envision such arbitrary PSIP allocations. But in any case, the Commission should

¹ Several commenters have pointed to the Bureau’s decision to assign PSIP 25 to the Channel 5 allocation in Seaford, DE. *Amendment of Section 73.6229i, post-Transition Table of DTV Allotments, Television Broadcast Stations (Seaford, DE)*, 25 FCC Rcd 4466 (Vid. Div. 2010) There, of course, unlike WJLP, the station resulting from the new allocation was brand new and had no pre-existing ATSC PSIP assignment under Paragraph B.1.1(1) of Annex B. In any case, the PSIP allotment for Seaford was plainly erroneous because it appeared to be predicated on the Delaware station being in the Washington, DC market, which it is not. Since no one held the license at the time of this ruling, no one was in a position to point out the Bureau’s error.

certainly not allow the fact of peripheral overlap into the New York market by outside stations to dictate or severely limit the rights of viewers in the home market to have access to programming originating in that market.

The simple solution to the circumstance of overlapping major channel PSIPs is the one propounded by the ATSC and adopted by PMCM. ATSC A/65 Section B.1.1. (5) contemplates precisely such situations with approval, as long as the stations' respective `minor_channel_numbers` are appropriately partitioned to distinguish the stations' signals. And also as noted above, this specific approach has already been demonstrated to work in the real world. Not only would any other approach be inconsistent with ATSC A/65, but any other approach would create massive complications, as will be set forth below.

III. Mandatory Cable Carriage on a Station's Over-the-Air Channel

If WJLP were to operate with a `major_channel_designation` in its PSIP of some number other than 3, we would have to confront directly the question of whether "over the air" really means "over the air." We acknowledge that the Bureau has in several cases taken the position that, despite the absolute mandate of Section 534 of the Act, a TV station is no longer entitled to be carried on cable systems on its over-the-air channel. Rather, the Bureau has indicated that, for cable channel positioning purposes, a station's over-the-air channel is now the `major_channel_number` in its PSIP -- a number that can evidently be assigned at the whim of the Commission with no reference whatsoever to the actual over-the-air channels assigned to stations in the Table of Allotments. See 47 C.F.R. 73.603 "Numerical Designation of Television Channels." The full Commission has, of course, never adopted this position, nor could it, because that would directly contravene the statute. To the contrary, the Commission in 2008 expressly reiterated that the channel positioning mandates of Section 534 of the Act and 76.57 still apply. *Carriage of Digital Television Broadcast Signals*, 23 FCC Rcd 14254 (2008).

We will not repeat the arguments in this regard that we have made in detail elsewhere, but we will instead quote the comment of Turner Broadcasting System, Inc., which states the Bureau's apparent policy succinctly: "For purposes of channel positioning rights for digital television stations demanding carriage on cable systems, the Commission has clarified that a station's channel number is not its over-the-air radio broadcasting channel, but instead its virtual

channel number.” (Turner Comment at p.3) If that were indeed the Commission’s position, it would be facially unlawful because the Act requires carriage on one’s “over-the-air” channel – not some other arbitrary channel number.

A determination that a DTV station’s channel is identified by the major channel in its PSIP rather than its over-the-air channel would also implicate the provisions of Section 6403(g) of the Middle Class Tax Relief Act. 47 U.S.C. Section 1452(g). That section prohibits the Commission from involuntarily reassigning any licensee to another television channel pending the close of the Incentive Auction. Because the statute prohibits both changes in spectrum usage rights *and* changes in channel designations, it is clear that the channel change prohibition is not limited to just reassignment of frequencies.² If the Commission, therefore, were to adopt the position posited by PMCM’s opponents that a station’s “channel” is now the major_channel_number specified in its PSIP rather than the station’s actual over-the-air channel, then assigning WJLP a major_channel_number other than 3 would necessarily constitute involuntarily reassigning the station to “another television channel.” This is plainly and expressly prohibited by the MCTRA. If WJLP’s “over-the-air channel” is now its major_channel_number designation for cable carriage purposes, the Commission cannot change that designation until after the Incentive Auction is over. On the other hand, if, for purposes of Section 534 of the Act, a station’s “over-the-air channel” is identified, as PMCM contends, by the over-the-air RF channel on which the station in fact operates, then WJLP is statutorily entitled to be carried on channel 3 on all cable systems, including those in Fairfield County. The Commission cannot have it both ways.

² “During the [pre-Incentive Auction] period described in Paragraph 2, the Commission may not –

- (A) Involuntarily modify the spectrum usage rights of a broadcast television licensee or reassign such a license to another television channel except –
 - (i) in accordance with this section; or
 - (ii) in the case of a violation of its license or a specific provision of a statute administered by the Commission promulgated under any such provision...

IV. Consumer Confusion is Not a Factor

In their respective comments, Meredith and ION express vague concerns about the possibility of “confusion” arising from WJLP’s use of major_channel_number 3. (Meredith Comments at p5-6; ION Comments at p. 1. Neither of them describes with any precision – indeed, none of them describes at all – exactly what sorts of “confusion” they may have in mind. Whatever their imaginings may be, though, the Commission’s own extensive, first-hand experience conclusively puts to rest any notion that the overlap of stations with identical major_channel_numbers is likely to cause any confusion at all.

As noted above, there currently exist more than 100 situations, nationwide, in which two or more stations with overlapping signals are using identical major_channel_numbers. The combined audiences in all those markets number conservatively in the tens of millions. If the other commenters’ concerns about “confusion” had any validity at all, presumably substantial numbers of complaints would have been raised in each of those 100+ situations – resulting in thousands upon thousands of complaints. But no flood of complaints has materialized. Since the 100+ situations have been in place for years, it is reasonable to conclude that there has in fact been no “confusion” at all, contrary to the self-serving but unfounded claims of the commenters. That’s why the Commission’s empirical experience is so striking. With 100+ situations involving ATSC-proscribed two-part channel designation overlap and no significant (if any) complaints rolling in, it appears that the concerns that prompted ATSC to impose the minor_channel_number partitioning requirement were essentially unfounded. Stations with identical two-part channel designations can serve common areas with no apparent difficulty. And if that’s the case, then *a fortiori* stations which comply with Section B.1.1 (5) by using different two-part channel combinations will cause no problems at all.

Even more to the point, Station WACP(TV), RF Channel 4, Atlantic City went on the air more than two years ago. It uses two-part channel designation 4.1. Its signal overlaps that of Station WNBC(TV), New York, which also uses two-part channel designation 4.1. The overlap area of those two stations alone – an area over a considerable portion of New Jersey – contains millions of viewers. And yet, as far as PMCM is aware, not a single instance of “confusion” has been presented to the Commission by any of those viewers. Similarly, PMCM is unaware of any

viewer “confusion” in connection with its own use of two-part channel designation 3.10 for WJLP. To the contrary, we have received kudos from viewers on the clarity of our signal.

Since experience establishes that there is no reasonable likelihood of any problem, one might wonder why the commenters are so intent on creating the contrary (albeit demonstrably inaccurate) impression. The smoke of viewer “confusion” about over-the-air transmissions – completely unsupported by any actual viewers – is simply a screen to disguise the real basis for the ION’s, Meredith’s and Turner’s objection to PMCM’s carriage on channel 3: all of them currently enjoy carriage on cable channel 3 on some systems, and they don’t want anyone else to take their position.

While this is understandable, this is not what the Act and Commission’s rules require. Section 534 of the Communications Act mandates must-carry cable carriage on a station’s over-the-air channel. The Act’s cable channel positioning provision makes no allowance for alternative channel carriage placements based on long usage or viewership patterns or even confusion. Indeed, the Act, at Section 534 (b)(9), expressly provides that the transition process occasioned by must-carry notices “shall not be used to undermine or evade the channel positioning or carriage requirements imposed upon cable operators under this section.” In other words, Congress understood that some disruption could occur as a result of on-channel must-carry demands, but that disruption must not serve as a basis for evasion of on-channel carriage obligations. Despite this strong statutory prohibition, the Bureau to date has authorized *exactly* what the statute proscribes. The commenters are trying to carve out an exception to the statutory mandate that does not exist, but the Commission itself has no authority to create such an exception. Nor should it.

The Act (which is echoed verbatim in the Commission’s own rules) provides an easily administrable mechanism for determining cable channel placement: you go on your over-the-air channel unless you reach an agreement with the cable system to go somewhere else. The alternative posited implicitly by the commenters would codify the notion of squatters’ rights. If adopted by the Commission, it would require the Commission to assess such intangibles as long time use, viewer expectations, established good will, or success in ratings, every time a station sought to exercise its must-carry channel placement rights in a way that might disrupt a cable

system's previous line-up. No process for such subtle and complex comparative evaluations currently exists, and the Commission would be hard-pressed to develop one. And even if the Commission were inclined to consider such a process, it would defeat the statutory scheme of mandating extremely prompt cable carriage with speedy resolution of any disputes within 120 days at the most. (47 U.S.C. 534 (d)).

We must note finally that, unlike positions on cable channels, changing major channel numbers of over-the-air stations *does* create consumer confusion. Unlike cable systems which bill their customers monthly and routinely include new channel line-ups as inserts, a broadcast station has no easy way of ensuring that its potential viewing audience knows that its channel has changed. It is unfair to suggest that broadcaster be compelled to publicize by mail or other mass media the fact that its PSIP channel is being repeatedly revised. The public at the time of the DTV transition had years to prepare for the change in stations' channels, an event for which the Commission required mandatory explanatory announcements to be broadcast repeatedly for many months in advance to avoid any confusion. While that transition was complicated by the conversion from analog to digital broadcasting, a major element of the Commission's concern was the simple change in broadcast channels. If a channel change in the DTV transition context required a significant lead time and months of announcements to prevent viewer confusion, the Bureau should assume that there will be no less viewer preparation needed here to accomplish a change to channel 33, channel 26, channel 14 or some other channel and then change back to channel 3 once PMCM's rights to that channel are established. If the Bureau is to weigh the effects of viewer confusion in this matter at all, it must not ignore the serious viewer confusion that will surely be occasioned by shifting WJLP from PSIP to PSIP to PSIP. WJLP should certainly be afforded no less than the transition period which the Bureau has bestowed on the cable systems.

V. Adverse Consequences of Not Adopting the Alternative Proposal

As has been noted, there are more than 100 situations where stations whose signals overlap use identical two-part channel designations in their respective PSIPs. The Bureau has to date made no apparent effort to alter those situations in any way. If the Bureau were here to deem impermissible the overlap of two stations with *non*-identical two-part designations, that

would constitute selective enforcement of a non-existent policy against a single disfavored licensee. To avoid the appearance, and, indeed, the reality, of unfair and discriminatory treatment, the Commission would, at a minimum, have to require at least one station in each of the 100+ overlap situations identified by PMCM to change its major_channel_number. That alone would lead to significant disruption of consumer expectations, precisely the type of disruption that the Bureau seems to be concerned about here. But the disruption there would occur on a massive scale involving stations nationwide. It would also create a major new source of controversy for the Commission to resolve. Presumably, stations which have used particular major_channel_numbers for a number of years will be reluctant to relinquish those numbers, an ineluctable fact that will in turn require the Commission to develop some means of determining which of the competing claimants for a particular major_channel_number should be allowed to retain it.

A ruling that major_channel_numbers in PSIP channel designations are entitled to more protection than the ATSC A/65 protocols now require would also create substantial complications for the Incentive Auction process. To grant Meredith's Declaratory Ruling request would effectively establish a protected contour for every station not only for its over-the-air channel but also for its major_channel_number. This means that in repacking the stations remaining after the Incentive Auction, the Commission would have a major new constraint to accommodate. For example, Station WMDE, Dover, DE (*nee* Seaford), is authorized to operate over-the-air on channel 5, yet the Bureau, in an unusual action, assigned it PSIP major_channel_number 36. Annex B provides that if an RF channel is changed for any reason, the station's PSIP shall not change. That means that in the repacking, both channel 4 and channel 36 are now blocked over much of the mid-Atlantic seaboard. The same thing would apply to all other stations whose major_channel_number designations differ from their actual over-the-air channels. Since the repacking process contemplates, and will almost certainly require, some relocation of stations – whether as a result of facilities-sharing arrangements or site moves to accommodate newly assigned channels – it is a certainty, especially in constrained areas like the mid-Atlantic, that the need to protect two channels from overlap rather than one will limit the Commission's ability to squeeze the remaining stations into the available channel slots.

VI. ION's Claim to Channel 3

ION has insinuated itself into the current discussion despite the fact that neither its major_channel_number designation nor its over-the-air RF channel is 3. Its concern is that if WJLP is assigned major_channel_number 3 as required by ATSC A/65, ION may be removed from its preferred channel position on Channel 3 on the Cablevision cable system. ION's only claim to a right to be positioned on Channel 3 is an alleged agreement between it and Cablevision guaranteeing ION placement on channel 3. ION has not to date produced the agreement, so no one knows whether the agreement does indeed provide such guarantees. But what we do know – because ION has candidly and explicitly conceded this fact – is that the agreement provides that “valuable consideration” is to be paid to Cablevision for ION's channel position. ION further concedes that it has indeed been paying such valuable consideration to Cablevision. (June 18, 2014 Letter of Mace Rosenstein on behalf of ION Media License Company, LLC to Marlene Dortch) This agreement and these payments are in direct violation of Section 534(B)(10) of the Act, which categorically prohibits the payment of any “valuable consideration” to a cable operator for channel positioning rights. The Commission cannot possibly rely on a patently unlawful and therefore unenforceable agreement to defeat the otherwise lawful demand of a station for on-channel carriage. It remains a mystery as to why the Commission has not, at a minimum, instituted an investigation of an admitted serious violation of its rules. But for our purposes here, the Commission need only ignore the purported agreement and take up the violation in connection with Cablevision or ION's license renewal.

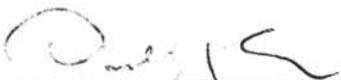
All that said, it is beyond the scope of this proceeding to determine whether or not ION has rights to be carried on cable channel 3. This proceeding is solely concerned with what two-part PSIP channel designation is to be used by WJLP. Cablevision, which has not commented in this docket, has earlier expressed its willingness to put WJLP on whatever channel the Commission decides to assign to it. If at that point Cablevision stands on its unlawful agreement with ION to deny proper carriage, the Commission can deal with it at that time.

VII. Timing

The Bureau has repeatedly expressed its understanding that time is of the essence in resolving the issues presented in this docket. The Bureau has acted with extraordinary alacrity in first relieving the cable systems of their normal obligation to carry WJLP and then purporting to

relegate WJLP to PSIP channel 33 on an interim basis. PMCM requests the same alacrity in acting to confirm that, as a permanent matter, WJLP's two-part PSIP channel designation is 3.10. In this regard, Section 534(d) of the Act requires the Commission to act on cable carriage complaints within 120 days. The cable systems have been granted an indefinite deferral of carriage on the grounds that the PSIP matter is unresolved, which contravenes the statutory timetable for resolution of cable carriage issues. This docket is, in effect, the vehicle which the Bureau has adopted for the resolution of PMCM's demand for cable carriage. The 120-day period prescribed by statute running from PMCM's objection to the cable systems' request (i.e., June 27) should therefore apply to set October 23 as the benchmark deadline for action on this matter. More importantly, a viewing source for some 2 million cable subscribers in New Jersey, a source covered by the special mandate of Section 331 of the Act to provide VHF service to New Jersey, is being delayed. The Bureau should therefore act promptly to ensure that its most important imperative – service to the public – is not undermined by the bald desire of other stations in the market to forestall competition.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Donald J. Evans, hereby certify that on this 29th day of October, 2014, I caused copies of the foregoing "Reply Comments" to be placed in the U.S. Postal Service, first class postage prepaid or, as noted below, sent by electronic mail to the following:

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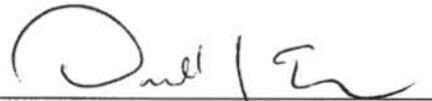
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