

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

In re )  
 )  
Request for Declaratory Ruling ) MB Docket No. 14-150  
by Meredith Corporation )  
 )  
and )  
 )  
“Alternative PSIP Proposal” by )  
PMCM TV, LLC, for KVVV(TV), )  
Middletown Township, NJ )

To: Marlene H. Dortch, Secretary

**OPPOSITION OF ION MEDIA LICENSE COMPANY, LLC,  
TO APPLICATION FOR REVIEW**

ION Media License Company, LLC (“ION”), licensee of WPXN-TV (“WPXN”), New York, New York, respectfully submits this Opposition to the Application for Review filed in the captioned proceeding on November 10, 2014, by PMCM TV, LLC (“PMCM”).

PMCM seeks review of two letters it received from the Media Bureau concerning the operations of PMCM station WJLP-TV (“WJLP”) in Middletown Township, New Jersey. The first letter, dated October 23, 2014 (“October 23 Letter”), assigned WJLP to virtual channel 33 “for use on an interim basis” while Commission staff sought comments on and considered PMCM’s “Alternative PSIP Proposal,” in which PMCM proposed a permanent virtual channel assignment of 3.10 for WJLP.<sup>1</sup> However, before the comment period closed or the staff could consider the proposal, WJLP began broadcasting programming on virtual channel 3.10 and advertising itself as “Channel 3,” in defiance of the temporary assignment to virtual channel 33.

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<sup>1</sup> Letter from Hossein Hashemzadeh, Deputy Chief, Video Division, Media Bureau to counsel for PMCM regarding WJLP-TV, DA 14-1528 (rel. Oct. 23, 2014).

The Media Bureau then sent a second letter, dated November 7, 2014 (“November 7 Letter”), suspending WJLP’s program test authority because PMCM was “operating in a manner inconsistent” with the temporary virtual channel assignment—but stating that WJLP could resume broadcasting, so long as it used virtual channel 33.<sup>2</sup>

PMCM presents three questions for review by the Commission. First, PMCM asks whether the temporary assignment of virtual channel 33 to PMCM station WJLP is “contrary to the express terms of ATSC A/65.”<sup>3</sup> In fact, the assignment is consistent with FCC rules and precedent, and with ATSC A/65 (the “PSIP Standard”). Second, PMCM asks whether the Commission’s rules preclude suspension of program test authority when the permittee has commenced operations pursuant to program test authority consistent with the terms of its construction permit.<sup>4</sup> PMCM’s construction permit requires all operations to be in compliance with the Communications Act and Commission rules. By openly defying the Bureau’s October 23 Letter and operating in violation of the PSIP Standard (which has been incorporated into the Commission’s rules), PMCM was not in compliance with the rules, and its program test authority was properly suspended. Finally, PMCM asks if the Bureau’s temporary assignment to WJLP of virtual channel 33 is a modification of its license or construction permit such that it should have been given 30 days to respond.<sup>5</sup> The temporary assignment was not a modification, however, as PMCM’s construction permit did not specify a virtual channel number, PMCM agreed to a delay

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<sup>2</sup> Letter from Hossein Hashemzadeh, Deputy Chief, Video Division, Media Bureau to counsel for PMCM regarding WJLP-TV, DA 14-1528 (rel. Nov. 7, 2014).

<sup>3</sup> PMCM TV, LLC, Application for Review, MB Docket No. 14-150, at 1-2 (Nov. 10, 2014) (“Application for Review”).

<sup>4</sup> *Id.* at 2.

<sup>5</sup> *Id.*

of that determination, and the October 23 Letter expressly stated that the temporary assignment was made without prejudice to the pending proceeding.

**I. The Temporary Virtual Channel Assignment Was Consistent with FCC Rules and Precedent, and with the PSIP Standard.**

The Media Bureau's temporary assignment of virtual channel 33 to WJLP was consistent with Commission rules and precedent, and with the PSIP Standard, which provides clear instruction for channel assignments when a new station enters a market. The PSIP Standard seeks to prevent viewer confusion and allow broadcasters to maintain their local brand identity by avoiding the use of the same virtual channel by stations with overlapping service areas.<sup>6</sup> The basic purpose of the Communications Act, as well, is "to ensure interference-free broadcasting."<sup>7</sup> PMCM's "Alternative PSIP Proposal" requests that WJLP be assigned virtual channel 3.10, even though two stations with overlapping service areas with WJLP already operate on major channel number 3 — Meredith Corporation's WFSB(TV), Hartford, Connecticut, and CBS Broadcasting Inc.'s KYW(TV), Philadelphia, Pennsylvania. WFSB and KYW have operated on channel 3 for decades, and, pursuant to longstanding FCC authorizations, have the exclusive right to use channel 3 in their respective service areas. This right includes the authority to operate on all of the minor channel numbers that fall under major channel number 3 (*i.e.*, 3.1, 3.2, 3.3, ... 3.10, *et seq.*).

The PSIP Standard provides that when a new entrant to a market launches over-the-air service in an area where its RF channel number is already being used by another station for its major channel number, the new entrant shall use as its major channel number the RF

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<sup>6</sup> See ATSC A/65, Annex B, ¶ 1.1(4).

<sup>7</sup> *PMCM TV, LLC v. FCC*, 701 F.3d 380, 384 (D.C. Cir. 2012).

channel number originally assigned to the incumbent station for its initial digital operations.<sup>8</sup>

WJLP is a newly licensed station in its market and it cannot lay claim to a major channel number *already being used by two* incumbent stations with overlapping service areas. Thus, under the PSIP Standard, WJLP should be assigned the major channel number equivalent to WFSB's original digital RF channel, which is 33.<sup>9</sup>

Commission precedent is in accord. In a recent case in which PMCM established a new station with RF channel 5 in Seaford, Delaware, the DTV service contour of PMCM's new station in Delaware overlapped with the contour of WTTG(TV), Washington (which is assigned major channel number 5), so the PMCM station was assigned major channel number 36.<sup>10</sup> The new entrant was given major channel number 36 because "Channel 36 is the DTV RF channel number licensed to WTTG(TV)."<sup>11</sup> In other cases, the Media Bureau has declined to assign the same major channel number to two stations with overlapping service contours, recognizing the confusion and disruption such overlaps can cause.<sup>12</sup> In numerous pleadings filed throughout this

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<sup>8</sup> ATSC A/65, Annex B, ¶ 1.1(4). Implicitly, that channel would not also have been in use as an analog broadcast channel when stations commenced digital operations, and thus it would be free for use as a virtual channel by a new station.

<sup>9</sup> The RF channel originally used for digital operations by KYW(TV), whose service contour also overlaps that of WJLP, is not available for WJLP's major channel number because it is already being used by a Connecticut station, WHPX, whose signal contour overlaps WJLP's.

<sup>10</sup> *Seaford, Delaware*, 25 FCC Rcd 4466, 4472 (Video Div. 2010).

<sup>11</sup> *Id.* at 4472 n.41.

<sup>12</sup> *See, e.g., Associated Christian Television Systems, Inc.*, 25 FCC Rcd 9237, 9237 (Video Div. 2010) (finding that, pursuant to Section 73.682(d), WACX(TV) could not be assigned the same virtual channel as WWSB(TV) because the two stations' service contours overlapped (WACX is licensed to a community in the Orlando-Daytona Beach-Melbourne, FL, designated market area, and WWSB is licensed to a community in the Tampa-St. Petersburg (Sarasota), FL, designated market area)); Letter from Hossein Hashemzadeh, Deputy Chief, Video Division, Media Bureau, to counsel for Entravision Holdings, LLC regarding KETF-CD (Feb. 17, 2012) (authorizing KETF-CD to switch from major channel number 25 to 31 because of overlapping protected service contours with a Mexican station also using major channel number 25); Letter from Hossein Hashemzadeh, Deputy Chief, Video Division, Media Bureau, to Donald Winters, Director, MCUSA, Inc., regarding Channel 5, Logan, Utah (Oct. 26, 2011) (continued...)

proceeding, PMCM has failed to cite to a single case in which the FCC has approved of the unusual approach PMCM has proposed here.<sup>13</sup>

The Commission has incorporated the PSIP Standard into its rules to “avoid conflict with duplicative [channel] numbers in a market” and to “allow[] broadcasters to maintain their local brand identification.”<sup>14</sup> WFSB has been known to viewers as Channel 3 for more than 50 years, and KYW has been known as Channel 3 for more than 70 years. For more than a decade, pursuant to a channel positioning agreement, WPXN has been carried on cable channel 3 on nearly all of Cablevision’s New York systems. All three stations have spent considerable years and resources building their channel 3 brand identities. Allowing them to maintain the value of their investment in channel 3, and avoiding viewer confusion, align with the very purposes of the PSIP Standard.

The Bureau’s temporary assignment of virtual channel 33 to WJLP ensures that the incumbent stations and their viewers are not harmed while the ongoing proceeding regarding WJLP’s virtual channel assignment plays out. But PMCM short-circuited that process, in defiance of the October 23 Letter. Before the Media Bureau ruled on PMCM’s “Alternative PSIP Proposal” for WJLP to be assigned virtual channel 3.10, PMCM began running commercial programming on WJLP on virtual channel 3.10, and it continued to air programming on channel

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(stating that because there appeared to be an overlap between existing station K45GL-D and MCUSA’s proposed facility, the new station would be assigned PSIP Channel 45, the RF channel for K45GL).

<sup>13</sup> PMCM purports to cite examples of other situations that it believes are similar to its own. But it is not clear that any of them involve a situation in which a *new* station in a market sought to use the same major channel number as other stations with overlapping service areas. Moreover, PMCM concedes that the PSIP Standard is self-executing — the Media Bureau is not generally called upon to endorse the virtual channel selection of any particular station. However, when the Media Bureau is confronted with a dispute about the PSIP Standard, it can and should resolve it.

<sup>14</sup> *Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, Report and Order, 19 FCC Rcd 18279, 18346 (2004).

3.10 even after the Bureau assigned WJLP major channel 33 on a temporary basis.<sup>15</sup> The November 7 Letter suspending program test authority was a proper response to PMCM's refusal to follow the temporary assignment. The Bureau carefully followed the PSIP Standard and Commission precedent in making the temporary assignment to minimize viewer confusion while considering PMCM's unprecedented proposal.

## **II. Suspension of Program Test Authority Is Permitted When a Permittee Does Not Comply with Commission Rules or the Terms of Its Construction Permit.**

WJLP's construction permit requires compliance with the Communications Act and Commission regulations, and states that equipment and program tests shall be conducted only pursuant to Sections 73.1610 and 73.1620 of the Commission's rules. PMCM's contention that the November 7 Letter suspending program test authority is "unlawful" is contradicted by the plain language of the rules. Section 73.1620(d) requires operations under program test authority to be in "strict compliance" with the rules governing broadcast stations, and Section 73.1620(b) gives the FCC authority to "revoke, suspend, or modify program tests by any station without right of hearing" for failure to comply with the terms of the station's construction permit (which, in turn, require compliance with the Commission's rules).<sup>16</sup>

PMCM failed to comply with the rules in two ways. First, the Commission's rules incorporate the PSIP Standard. The PSIP Standard does not authorize WJLP to use virtual channel 3.10. WJLP's use of that virtual channel prior to having secured a waiver to allow its "Alternative PSIP Proposal" thus was in violation of the PSIP Standard incorporated into the Commission's rules, and was a valid basis for the suspension of program test authority. Second,

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<sup>15</sup> Letter from Hossein Hashemzadeh, Deputy Chief, Video Division, Media Bureau to counsel for PMCM regarding WJLP-TV, DA 14-1528 (rel. Oct. 23, 2014).

<sup>16</sup> 47 C.F.R. § 73.1620(b),(d).

PMCM continued operations on virtual channel 3.10 after it had been assigned virtual channel 33 by a decision of the Media Bureau. The Media Bureau operates with the delegated authority of the Commission,<sup>17</sup> and is expressly authorized by the rules to enter into correspondence concerning any matter for which it is responsible.<sup>18</sup> PMCM's disregard for the Media Bureau's October 23 Letter was a valid basis for the Bureau's decision to suspend WJLP's program test authority.

It is both in the public interest and necessary for the Bureau to suspend program test authority when a station does not follow Bureau instruction and operates contrary to a standard incorporated by reference into the Commission's rules. For more than 10 days after the Media Bureau assigned WJLP virtual channel 33 on a temporary basis, WJLP continued to use major channel number 3, in open defiance of the unambiguous direction of the Bureau. Allowing WJLP to remain on the air would undermine Commission authority to regulate its licensees and would promote the notion that licensees can selectively follow only those Commission instructions with which they agree.

The public interest is not served promoting viewer confusion or disrupting longstanding relationships stations have with their viewers. Rather, the public interest requires allowing viewers to find stations where they have historically found them and honoring established business arrangements, such as ION's agreement with Cablevision.

### **III. The Media Bureau Letters Did Not Modify PMCM's Construction Permit, and the Middle Class Tax Relief Act Does Not Apply to the Instant Case.**

PMCM is incorrect in its assertion that the October 23 Letter should be viewed as a modification of its construction permit, and that it should have been given 30 days to protest

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<sup>17</sup> 47 C.F.R. § 0.61.

<sup>18</sup> 47 C.F.R. § 0.204.

the modification. The October 23 Letter, assigning WJLP virtual channel 33 on a temporary basis, was not a modification of WJLP's construction permit because, as PMCM acknowledges, "[a] construction permit contains no reference at all to any virtual channel number."<sup>19</sup> The October 23 Letter makes no changes or modifications to WJLP's construction permit, which assigns it RF channel 3. That has not changed. WJLP still is assigned to RF channel 3; the instant dispute concerns only WJLP's virtual channel number.

The October 23 Letter further stated that the temporary assignment was made without prejudice to the pending proceeding, in which the FCC sought comment on PMCM's proposal that WJLP be assigned virtual channel 3.10 and Meredith's request for a declaratory ruling affirming that the PSIP Standard requires WJLP to be assigned virtual channel 33. Indeed, PMCM previously agreed that WJLP's virtual channel assignment should be made in a proceeding *separate from* its construction permit application. When Meredith filed an informal objection to the construction permit and license modification for WJLP (which had been operating as KVVN in Nevada), the Media Bureau dismissed Meredith's informal objection as "premature" because, the Bureau stated, "We agree with PMCM solely on the point that a station's virtual channel designation is not included in or considered in a license modification application."<sup>20</sup> Rather, it is considered in a separate proceeding "that solely addresses the virtual channel designation."<sup>21</sup> We are now in the midst of that proceeding. PMCM cannot claim that

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<sup>19</sup> Application for Review, at 15.

<sup>20</sup> Letter from Hossein Hashemzadeh, Deputy Chief, Video Division, Media Bureau to counsel for PMCM TV, LLC (rel. April 17, 2014), *available at* [http://licensing.fcc.gov/cgi-bin/prod/cdbs/forms/prod/getimportletter\\_exh.cgi?import\\_letter\\_id=49395](http://licensing.fcc.gov/cgi-bin/prod/cdbs/forms/prod/getimportletter_exh.cgi?import_letter_id=49395)

<sup>21</sup> *Id.*

this separate proceeding effects a modification of its construction permit when it previously agreed that its construction permit application was distinct from its virtual channel assignment.

Finally, PMCM's reliance on Title VI of the Middle Class Tax Relief and Job Creation Act of 2012 (also known as the Spectrum Act) suffers from a misreading of the statutory language.<sup>22</sup> Section 1452(g)(1)(A) of the act prohibits the Commission from involuntarily modifying "the spectrum usage rights of a broadcast television licensee."<sup>23</sup> The Spectrum Act thus protects stations' RF channels; it does not speak to stations' virtual channels, the subject of this proceeding. Section 1452(g)(1)(B) prohibits the Commission from "reassign[ing] a broadcast television license" from a VHF channel to a UHF channel, unless the reassignment will not decrease the total amount of UHF spectrum available for the auction. This section is doubly inapplicable here. First, the October 23 Letter did not reassign WJLP from a VHF to a UHF channel; it merely made a temporary virtual channel assignment. Second, because the October 23 and November 7 Letters only deal with major channel numbers, they have no effect on the amount of spectrum available for auction. The letters are in no way a "violation of the law," as PMCM contends.<sup>24</sup>

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<sup>22</sup> Application for Review, at 17.

<sup>23</sup> 47 U.S.C. § 1452(g)(1)(A).

<sup>24</sup> Application for Review, at 17.

**CONCLUSION**

For the foregoing reasons, ION respectfully requests the Application for Review be dismissed or denied.

Respectfully submitted,

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November 25, 2014

## CERTIFICATE OF SERVICE

I, Stephen Kiehl, certify that on this 25th day of November, 2014, I served copies of the foregoing Opposition to Application for Review by causing them to be delivered by hand or by first class, postage prepaid U.S. mail, as indicated, to the following:

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