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December 12, 2014

VIA HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Accepted/Files

DEC 12 2014
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
Motion to Dismiss

DOCKET FILE COPY ORIGINAL

Dear Ms. Dortch:

Transmitted herewith, on behalf of Western Pacific Broadcast, LLC, are an original and four copies of its Motion to Dismiss the June 2, 2014 Application for Review filed by PMCM TV, LLC in the above-captioned proceeding. A request for leave to file the Motion to Dismiss is being filed concurrently.

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

Respectfully submitted,

WILKINSON BARKER KNAUER, LLP



David A. O'Connor
Robert D. Primosch
Counsel for Western Pacific Broadcast, LLC

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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DEC 12 2014

Federal Communications Commission
Office of the Secretary

To: Office of the Secretary, FCC
For: The Commission

MOTION TO DISMISS

Western Pacific Broadcast, LLC (“WPB”), licensee of station WMDE(TV), channel 5, Dover, Delaware, (“WMDE”), by its counsel, hereby moves to dismiss as moot the Application for Review (“AFR”) filed in the above-referenced proceeding by PMCM TV, LLC (“PMCM”), licensee of station KJWP(TV), channel 2, Wilmington, Delaware.¹ As shown below, the AFR has been mooted by the finality of the Consumer and Government Affairs Bureau’s recent *Order* terminating the Commission’s docket for Auction 90, in which WPB successfully bid on channel 5 at its original community of license, Seaford, Delaware.²

¹ See PMCM Application for Review, MB Docket No. 09-230 (filed June 2, 2014). Under separate cover, WPB concurrently has asked the Commission for leave to file this Motion to Dismiss. WPB’s Opposition to the AFR, filed on June 17, 2014, remains pending. See WPB Opposition to Application for Review, MB Docket No. 09-230 (filed June 17, 2014). In that filing, WPB demonstrated why the AFR is meritless and why WPB would suffer extreme prejudice if its substantial investments in launching WMDE(TV), which has been licensed and operational for months now, were disrupted by PMCM’s dilatory conduct years after the Commission initially allotted channel 5 to Seaford.

² See *Termination of Certain Proceedings as Dormant*, Order, CG Docket No. 14-97, 29 FCC Rcd 11,017, 11,093 (CGB rel. Sept. 15, 2014) (terminating AU Docket No. 10-147) (the “*Auction 90 Termination Order*”); see also *Consumer & Governmental Affairs Bureau Seeks Comment on Termination of Certain Proceedings as Dormant*, Public Notice, CG Docket No. 14-97, 29 FCC Rcd 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 (continued)...

In the AFR, PMCM seeks review of the Media Bureau's *Memorandum Opinion and Order on Further Reconsideration* issued on May 1, 2014, in which the Bureau dismissed PMCM's grossly untimely petition for reconsideration of the Commission's pre-auction allotment of channel 5 to Seaford (said petition hereinafter the "Seaford PFR").³ In so doing, the Bureau rejected PMCM's contention that PMCM's successful court appeal with respect to the allotment of channel 2 to Wilmington constituted "changed circumstances" that warranted consideration of the Seaford PFR nearly three years after the Commission initially allotted channel 5 to Seaford, and roughly two years after the Commission closed the bidding in Auction 90, announced that WPB was the successful bidder for channel 5 at Seaford, and awarded WPB the construction permit for that facility.⁴ 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

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).

³ *Amendment of Section 73.622(i), Post Transition Table of DTV Allotments Television Broadcast Stations (Seaford, Delaware)*, Memorandum Opinion and Order on Further Reconsideration, 29 FCC Rcd 4769, 4771-2 (MB 2014); *see also* PMCM Petition for Reconsideration, MB Docket No. 09-230 (filed Mar. 13, 2013) ("Seaford PFR"). In a companion decision, the Bureau rejected PMCM's challenge to WPB's request that the Commission amend its Post-Transition Table of Allotments to delete the channel 5 allotment at Seaford, substitute channel 5 at Dover and modify WPB's construction permit accordingly. *Western Pacific Broadcast, LLC, Amendment of Section 73.622(i), Digital Television Table of Allotments (Seaford, Delaware and Dover, Delaware)*, Report and Order, 29 FCC Rcd 4773 (MB 2014).

⁴ *See Auction of VHF Commercial Television Station Construction Permit Closes; Winning Bidder Announced for Auction 90*, Public Notice, 26 FCC Rcd 1916, 1926 (2011) (announcement of WPB as winning bidder). Ironically, PMCM itself had applied to bid on the channel 5 allotment at Seaford, but the Commission found it unqualified. *See Auction of VHF Commercial Television Station Construction Permits; Three Bidders Qualified to Participate in Auction 90*, Public Notice, 26 FCC Rcd 881, 894 (2011). The Commission issued the channel 5 construction permit to WPB on May 4, 2011. *See* File No. BNPCDT-20110330AAY.

that license, the issuance of which is now a final decision.⁵ 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.⁶

The unchallenged and now final termination of the Auction 90 docket unquestionably moots the AFR, since it leaves no procedural vehicle through which PMCM may challenge WPB's successful auction bid for channel 5.⁷ Even if PMCM were to now file an untimely challenge to the *Auction 90 Termination Order*, there would be nothing for the Bureau or the Commission to reconsider or review – Auction 90 is over and cannot be revived.⁸ Absent the ability to challenge the channel 5 auction, PMCM procedurally cannot seek to challenge the Commission's underlying allotment of channel 5, as it is attempting to do in the AFR.

In sum, the results of Auction 90 and the *Auction 90 Termination Order* are final and cannot be reversed. By failing to challenge any aspect of Auction 90, and instead challenging only the pre-auction allotment of channel 5, the AFR requests relief that the Commission cannot

⁵ See File No. BLCDT-20141001CBV (granted October 9, 2014). The license grant became final on November 25, 2014.

⁶ 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(f), 1.115(d).

⁷ PMCM cannot contend that the mere filing of the Seaford PFR automatically stayed the allotment of channel 5 to Seaford or the auction thereof during Auction 90, since (1) it is well settled that the filing of petitions for reconsideration in rulemaking proceedings (even if timely) do not effect an automatic stay of the Commission's rules (see 47 C.F.R. § 1.429(k)), and (2) the Seaford PFR post-dated Auction 90 by roughly two years and thus could not have had any bearing on that proceeding in any case.

⁸ Compare, e.g., *Andrew Barrett*, 27 FCC Rcd 13,001 (MB 2012) (dismissing petitions for reconsideration as moot where petitioners sought new or modified full power analog television allotments after DTV transition deadline).

grant even if the AFR had any merit (which it does not). The AFR therefore must be dismissed.

Respectfully submitted,

WESTERN PACIFIC BROADCAST, LLC

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Its Attorneys

December 12, 2014

CERTIFICATE OF SERVICE

I, Paula Lewis, an employee of Wilkinson Barker Knauer, LLP, hereby certify that a copy of the foregoing Motion to Dismiss was served on December 12, 2014, by first class mail unless otherwise noted, to the following:

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