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January 8, 2015

VIA HAND DELIVERY

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

Accepted/Files

JAN - 8 2015

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

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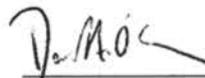
Dear Ms. Dortch:

Transmitted herewith, on behalf of Western Pacific Broadcast, LLC, are an original and four copies of its Reply to the December 29, 2014 Opposition to Motion to Dismiss filed by PMCM TV, LLC in the above-captioned proceeding.

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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JAN - 8 2015

Federal Communications Commission
Office of the Secretary

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

REPLY TO OPPOSITION TO MOTION TO DISMISS

Western Pacific Broadcast, LLC (“WPB”), licensee of station WMDE(TV), channel 5, Dover, Delaware, (“WMDE”), by its counsel, hereby replies to the Opposition to Motion to Dismiss filed on December 29, 2014 in the above-referenced proceeding by PMCM TV, LLC (“PMCM”), licensee of station KJWP(TV), channel 2, Wilmington, Delaware (the “PMCM Opposition to Motion to Dismiss”).¹

As shown in the Motion to Dismiss, PMCM’s Application for Review (“AFR”) of the Media Bureau’s *Memorandum Opinion and Order on Further Reconsideration* in the above-referenced proceeding (the “*Second Seaford Reconsideration Order*”)² should be dismissed because it has been mooted by the finality of the Consumer and Government Affairs Bureau’s more recent *Order* terminating the Commission’s docket for Auction 90, in which WPB

¹ See WPB Motion to Dismiss, MB Docket 09-230 (filed December 12, 2014); PMCM Application for Review, MB Docket No. 09-230 (filed June 2, 2014) (“AFR”).

² *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 (MB 2014) (“*Second Seaford Reconsideration Order*”). In a companion proceeding, the Media Bureau amended its Post-Transition Table of Allotments to delete the channel 5 allotment at Seaford and substitute channel 5 at Dover, and modified 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) (“*Dover Report and Order*”).

successfully bid on the channel 5 allotment at Seaford, Delaware.³ PMCM does not dispute that it never asked for a stay of or challenged the results of Auction 90, nor does it dispute that the Auction 90 proceeding is now terminated via a final order and thus is no longer subject to challenge.⁴ Instead, PMCM floats a series of red herrings that only cement the case for dismissal of the AFR.

Having no supporting authority at hand,⁵ PMCM quotes boilerplate Commission language advising Auction 90 participants that the status of the allotments they were bidding on could be affected by, *inter alia*, “petitions for reconsideration, informal objections, [or] applications for review,” and that Auction 90 participants “are solely responsible for identifying associated risks [thereof]. . . .”⁶ This language is irrelevant – the general principle that auction winners take their authorizations subject to Commission action in related proceedings has nothing to do with (and thus cannot cure) the fatal procedural infirmities of PMCM’s filings in *this* proceeding.

³ 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).

⁴ PMCM also does not dispute that it did not challenge WPB’s post-auction application for the channel 5 construction permit at Seaford, nor does it dispute that the Commission’s grant of that application is final. See Federal Communications Commission, CDBS Public Access, Applications, File No. BNPCDT-20110330AAY.

⁵ Like PMCM’s July 2, 2014 Reply to WPB’s Opposition to the AFR, PMCM’s Opposition to WPB’s Motion to Dismiss does not include a single citation to any precedent that supports PMCM’s arguments. See PMCM Reply to Opposition to Application for Review, MB Docket No. 09-230 (filed July 2, 2014); WPB Opposition to Application for Review, MB 09-230 (filed June 17, 2014) (“WPB Opposition to AFR”).

⁶ PMCM Opposition to Motion to Dismiss at 2, quoting *Auction of VHF Commercial Television Station Construction Scheduled for February 15, 2011, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and other Procedures for Auction 90*, Public Notice, 25 FCC Rcd 14880, 14891 (2010).

To review, the Media Bureau allotted channel 5 to Seaford in a *Report and Order* released on April 28, 2010 (the “*Seaford Report and Order*”).⁷ PMCM did not seek reconsideration of that decision within the 30-day time period for such petitions under Section 1.106(f) of the Commission’s Rules.⁸ Another party, Broadcast Maximization Committee, did file a timely petition for reconsideration (the “BMC Petition”), asking the Bureau to allot channel 2 or channel 3 to Seaford, instead of channel 5.⁹ BMC also questioned the legality of the *Notice of Proposed Rulemaking* in which the Commission initially proposed to allot channel 5 to Seaford.¹⁰ The Media Bureau denied the BMC Petition in a *Memorandum Opinion and Order* released February 13, 2013 (the “*First Seaford Reconsideration Order*”).¹¹

On March 15, 2013, nearly *three years* after issuance of the *Seaford Report and Order* and *two years* after Auction 90 was completed, PMCM filed a petition for reconsideration of both the *Seaford Report and Order* and the *First Seaford Reconsideration Order* (said petition the “Seaford PFR”), challenging for the first time the Media Bureau’s allotment of *any* television channel to Seaford.¹² The Media Bureau dismissed the Seaford PFR in the *Second Seaford*

⁷ *Amendment of Section 73.622(i), Post Transition Table of DTV Allotments Television Broadcast Stations (Seaford, Delaware)*, Report and Order, 25 FCC Rcd 4466 (MB 2010) (“*Seaford Report and Order*”).

⁸ 47 C.F.R. § 1.106(f).

⁹ Broadcast Maximization Committee Petition for Reconsideration, MB Docket No. 09-230 (filed June 7, 2010) (the “BMC Petition”).

¹⁰ *Id.* at 2.

¹¹ *Amendment of Section 73.622(i), Post Transition Table of DTV Allotments, Television Broadcast Stations (Seaford, Delaware)*, Memorandum Opinion and Order, 28 FCC Rcd 1167 (MB 2013) (“*First Seaford Reconsideration Order*”).

¹² See PMCM Petition for Reconsideration, MB Docket No. 09-230 (filed Mar. 13, 2013) (“Seaford PFR”). PMCM also submitted the Seaford PFR into the record for the companion Dover proceeding. See Comments of PMCM TV, LLC in Opposition to Notice of Proposed Rulemaking, MB Docket No. 13-40, at Exhibit A (April 3, 2013); *Dover Report and Order*, n 2 *supra*. The Commission announced the winning bidders in Auction 90 via a Public Notice released March 1, 2011. See *Auction of VHF Commercial Television Station Construction* (continued)...

Reconsideration Order, finding that (1) PMCM's request for reconsideration of the *Seaford Report and Order* was untimely and (2) PMCM's request for reconsideration of the *First Seaford Reconsideration Order* was an untimely collateral challenge of the *Seaford Report and Order*.¹³ Undaunted, PMCM has sought review of the *Second Seaford Reconsideration Order* via the AFR.

The procedural history set forth above belies PMCM's claim that WPB, as a bidder in Auction 90, assumed the risk of potential Commission action on PMCM's untimely filings attacking the channel 5 allotment. Indeed, there was no risk for WPB to assume, because PMCM did not seek reconsideration of the channel 5 allotment before or during Auction 90 or even close to the Commission's deadline for petitions for reconsideration of the *Seaford Report and Order*.¹⁴ Nor did PMCM preserve its rights to challenge the channel 5 allotment by participating in BMC's challenge to the *Seaford Report and Order*.¹⁵

Equally wrong is PMCM's contention that the allotment of channel 5 "is *not* the subject of a final FCC order."¹⁶ As confirmed both by the *Second Seaford Reconsideration Order* and

Permit Closes; Winning Bidder Announced for Auction 90, Public Notice, 26 FCC Rcd 1916, 1926 (2011).

¹³ *Second Seaford Reconsideration Order*, 29 FCC Rcd at 4771-2. See also Reply Comments of Western Pacific Broadcast, LLC, MB Docket No. 13-40, at 9 n.35 (filed April 18, 2013) ("WPB Dover Reply Comments").

¹⁴ See 47 U.S.C. § 405(a); 47 C.F.R. §§ 1.106(f), 1.115(d).

¹⁵ On the contrary, PMCM's participation was limited to *opposing* BMC's "counterproposal," "since the allocation of Channel 2 or 3 to Seaford would create interference to PMCM's operation on Channel 2 or 3, depending on which channel was allocated." PMCM Qualified Opposition to Petition for Reconsideration, MB Docket No. 09-230, at 1 (filed July 28, 2010). PMCM could have taken, but did not take, the opportunity to challenge the channel 5 allotment at Seaford. In any event, the Media Bureau rationally concluded that "a petition for reconsideration of a final order is not the appropriate vehicle to raise a challenge to, or otherwise reconsider, the legality of the issuance of an underlying notice of proposed rulemaking." *First Seaford Reconsideration Order*, 28 FCC Rcd at 1169.

¹⁶ PMCM Opposition to Motion to Dismiss at 3 (emphasis in original)

the record before the Commission, the Seaford PFR was untimely in all respects,¹⁷ and thus procedurally insufficient to disturb the finality of the *Seaford Report and Order* or its underlying *Notice of Proposed Rulemaking*.

Moreover, it is absurd for PMCM to suggest that the Commission should have foreseen that PMCM would seek reconsideration of the *Seaford Report and Order* years after the release of the *Seaford Report and Order* and the completion of Auction 90.¹⁸ By PMCM's own account, PMCM's untimely filing of the Seaford PFR was triggered by the D.C. Circuit's 2012 reversal of the Commission's rejection of PMCM's proposal to move the allotment of channel 2 from Jackson, Wyoming to Wilmington, Delaware.¹⁹ Two years before, however, *PMCM had acknowledged before the court and the Commission that the outcome of the channel 2 matter had no bearing on the allotment of channel 5 to Seaford.*²⁰ PMCM underscored this fact by attempting, unsuccessfully, to bid in Auction 90 on the channel 5 Seaford allotment.²¹ The Media Bureau, in turn, rationally concluded in 2010 that the allotment of channel 2 to

¹⁷ *Second Seaford Reconsideration Order*, n. 11 *supra*. See also WPB Opposition to AFR at 2-4; WPB Dover Reply Comments at 2-10.

¹⁸ See PMCM Opposition to Motion to Dismiss at 3 (upbraiding the Commission for its “damn the torpedoes, full speed ahead” approach to Auction 90).

¹⁹ *PMCM TV, LLC v. FCC*, 701 F.3d 380 (D.C. Cir. 2012) (“*Channel 2 Appellate Order*”).

²⁰ See PMCM Petition for Issuance of Writ of Mandamus, *In re PMCM TV, LLC*, D.C. Cir. Case No. 10-1001, at 9 n.4 (Jan. 5, 2010) (“PMCM notes that, even if the recent proposals to allot channels to Atlantic City and Seaford were to be adopted, that would not alter PMCM’s right to relief [in the Channel 2 matter]. . . .”); see also Comments of PMCM TV, LLC, MB Docket No. 09-230 (filed Jan. 29, 2010) (“[R]egardless of whether additional channels are allocated to New Jersey and Delaware as a result of the pending NPRMs, PMCM’s channels must be allocated to these states.”). The “pending NPRMs” included the *Notice of Proposed Rulemaking for the Seaford channel 5 allotment*. See *Amendment of Section 73.622(i), Post Transition Table of DTV Allotments, Television Broadcast Stations (Seaford, Delaware)*, Notice of Proposed Rulemaking, 24 FCC Rcd 14596 (MB 2009).

²¹ *Auction of VHF Commercial Television Station Construction Permits; Three Bidders Qualified to Participate in Auction 90*, Public Notice, 26 FCC Rcd 881, 894 (2011) (finding PMCM unqualified to bid on the channel 5 allotment at Seaford).

Wilmington did not preclude the allotment of channel 5 to Seaford.²² PMCM nonetheless takes the Commission to task for failing to stop its auction of the channel 5 allotment at Seaford or hold the results of that auction in abeyance when neither PMCM nor anyone else asked the Commission to do so, and when the event that triggered the filing of the Seaford PFR two years *after* the completion of Auction 90 was, by PMCM's own admission, unrelated to the allotment being auctioned. Again, PMCM's position cannot be taken seriously.²³

Equally meritless is PMCM's contention (without any supporting authority) that PMCM's mere filing of the untimely Seaford PFR excused PMCM from any obligation "to challenge any other, much less every other, FCC action predicated on that deficient allotment."²⁴ PMCM likewise claims without support that, were the Commission to somehow grant the Seaford PFR, "the Seaford Allotment would be void *ab initio* and the FCC's imprudent effort to sell rights relating thereto would be set aside."²⁵ These contentions fly in the face of Section

²² *Seaford Report and Order*, 25 FCC Rcd at 4468 n.13 ("Because our proposal to allot channel 5 to Seaford is not mutually-exclusive with an allotment of channel 2 to Wilmington, Delaware, the outcome of PMCM's appeal [with respect to channel 2] is not pertinent to the instant proceeding."). As noted *supra*, PMCM did not seek reconsideration of that finding until it filed the Seaford PFR nearly three years later. It therefore is not surprising that the Media Bureau gave no credit to PMCM's claim that the *Channel 2 Appellate Order* qualified as "changed circumstances" under Section 1.429(b)(1) which might serve to excuse PMCM's untimely filing of the Seaford PFR. See *Second Seaford Reconsideration Order*, 29 FCC Rcd at 4772 & n.27; *Dover Report and Order*, 29 FCC Rcd at 4778 ("PMCM does not point to any case law in support of its contention that the court's decision in [the *Channel 2 Appellate Order*] ordering the Commission to issue PMCM a license for channel 2 at Wilmington somehow forms the basis for undoing a final grant of a construction permit for Seaford that is not mutually-exclusive with PMCM's [channel 2 allotment at Wilmington]").

²³ As confirmed by the Media Bureau and emphasized in WPB's prior filings, PMCM's posture throughout this proceeding and the companion Dover proceeding flouts the fundamental principle that government licensees have a strong and legitimate interest in administrative finality, and thus agency decisions will not be reopened absent fraud upon the agency's processes or a showing that the outcome is manifestly unconscionable. See *Dover Report and Order* at 4778; WPB Dover Reply Comments at 7-8 and the cases cited at nn. 30-31 therein.

²⁴ Opposition at 3.

²⁵ *Id.*

1.429(k) of the Commission's Rules, which states in relevant part: "Without special order of the Commission, the filing of a petition for reconsideration [in a rulemaking proceeding] shall not excuse any person from complying with any rule or operate in any manner to stay or postpone its enforcement."²⁶ Thus, even if the Seaford PFR had been timely, it would not have effected a stay of the *Seaford Report and Order* or Auction 90.²⁷ Indeed, the Commission repealed the "automatic stay" rule in FM and TV allotment proceedings (former Section 1.420(f)) specifically to thwart obstructive, "hail Mary" petitions for reconsideration such as the Seaford PFR:

The record before us confirms . . . that the automatic stay rule has regularly resulted in delay in the commencement of construction and the provision of expanded service to the public. Not even those commenters who oppose a change in the rule dispute the assertion that the vast majority of petitions for reconsideration are ultimately denied. We believe that the many apparently meritless petitions for reconsideration the rule appears to have encouraged have imposed a substantial and unwarranted cost on local communities, individual broadcasters, and the Commission itself. . . . By facilitating meritless petitions for reconsideration, the rule needlessly diverts resources that otherwise would be available to the Commission for the performance of other necessary functions.²⁸

WPB has already demonstrated in its prior filings 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

²⁶ 47 C.F.R. § 1.429(k). See also Motion to Dismiss at 3 n.7 (citing Section 1.429(k)). Furthermore, PMCM's position cannot be squared with the Media Bureau's finding in the *First Seaford Reconsideration Order* that "a petition for reconsideration of a final order is not the appropriate vehicle to raise a challenge to, or otherwise reconsider, the legality of the issuance of an underlying notice of proposed rulemaking." See n.15, *supra*.

²⁷ It is for this reason that Auction 90 could proceed notwithstanding the filing of the BMC Petition. As noted *supra*, the Media Bureau ultimately denied the BMC Petition in the *First Seaford Reconsideration Order*.

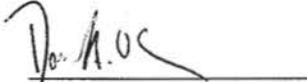
²⁸ *Allotment Orders (Automatic Stays)*, Report and Order, 11 FCC Rcd 9501, 9504-05 (1996).

conduct years after the Media Bureau allotted channel 5 to Seaford. Put simply, WPB is precisely the type of licensee that Section 1.429(k) is designed to protect. The Commission must not defeat the purpose and spirit of the rule or the broader principle of administrative finality by rewarding PMCM's procedural gamesmanship. Hence, for the reasons set forth herein and in the Motion to Dismiss, the AFR should be dismissed. Alternatively, the AFR should be denied for the reasons set forth in WPB's June 17, 2014 Opposition to the AFR.

Respectfully submitted,

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January 8, 2015

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 January 8, 2015, by first class mail unless otherwise noted, to the following:

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