

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

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

MM Docket No. 14-150

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Accepted / Filed

TO: Marlene H. Dortch, Secretary

MAR 12 2015

For transmission to: The Commission

Federal Communications Commission
Office of the Secretary

**CONSOLIDATED SUPPLEMENT TO
EMERGENCY MOTION FOR STAY OF SUSPENSION OF SERVICE AND
VIRTUAL CHANNEL RE-ASSIGNMENT AND APPLICATION FOR REVIEW**

PMCM TV, LLC (PMCM), by its attorneys, hereby supplements its November 10, 2014 Emergency Motion for Stay and its Application for Review of the same date to update the record with current information and again urge the Commission to stay the Mass Media Bureau's directive to relocate from channel 3 to virtual channel 33 pending the full Commission's review of the matter.

Background. PMCM filed an Application for Review on November 10, 2014 seeking review of two extraordinary actions by the Mass Media Bureau. These consisted of (1) an October 23, 2014 letter assigning PMCM's Middletown Township, NJ station virtual channel 33 in lieu of the virtual (and over-the-air channel) 3 that the station has always operated on, and (2) a November 7, 2014 Order suspending the program test authority of the station (WJLP) unless PMCM agreed to operate on Channel 33. The Application for Review lays out in detail how the assignment of channel 33 is in direct conflict with the protocols established by the independent Advanced Television Standards Committee that developed and promulgated the standards adopted by the Commission for PSIP (virtual channel) assignments. The validity of assignment

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of PSIP 3.10 to WJLP was confirmed by the chairman of the ATC committee. There is therefore no basis, temporary or otherwise, to assign major channel 33 to WJLP.

The Bureau's error was compounded by first opening a "docket" to consider which PSIP was appropriate and then attempting to impose a new PSIP on WJLP without even waiting for the record in the docket (14-150) to be completed. The Bureau has also taken the extraordinary step of treating the docket (which is open to everyone in the world) as a restricted proceeding, although declaratory ruling proceedings are presumptively permit-but-disclose under the Commission's ex parte rules. These actions have had the effect of delaying indefinitely any permanent assignment of a correct PSIP to WJLP, with the direct effect of preventing WJLP from being carried on some of the major cable systems in the New York DMA.¹ While the Bureau committed to resolve the PSIP issues "without undue delay" in July of 2014, the matter has in fact dragged on with extraordinary delay for more than six months. At a recent court hearing regarding this matter, counsel for the Commission was not able to provide even a guesstimate of when the Bureau would resolve this case.

In its November 10, 2014 Emergency Motion for Stay of Suspension of Service and Virtual Channel Assignment, PMCM laid out a host of reasons why the effect of the Bureau's two orders should be stayed pending review by the Commission. These included the potential for irreparable harm to PMCM, the lack of cognizable harm to any other party, the obvious prejudgment of issues presented in the docket, and the creation of disruption to viewers. Not least among the reasons cited was the direct violation of Section 1452(g) of the Middle Class Tax Relief and Job Creation Act of 2012. That statute forbids the FCC from involuntarily changing a station's channel until the incentive auction is over, which is precisely what the Bureau's action does.

The Commission has yet to act on the Emergency Request, although all of the factors meriting emergency action by the full Commission remain in place. This Supplement brings to

¹ By an earlier Order, the Mass Media Bureau relieved three cable systems of the statutory obligation to carry WJLP on their systems indefinitely, despite the command of the Communications Act to resolve all cable carriage disputes in not more than 120 days. That patently unlawful and unprecedented Order has been under review by the full Commission since August 25, 2014.

the Commission's attention two key developments which have occurred since the filing of the November 10 Motion.

A. Action by the Court

When the Commission failed to act in a timely fashion on the Emergency Stay request, PMCM sought relief from the D.C. Circuit. Reviewing the very same circumstances that had been presented to the Commission, the Court found that all elements necessary to support a stay, including likelihood of success on the merits, had been established. The Court therefore granted a stay. See attached Order issued November 25, 2014. The judicial stay was later lifted in connection with Court's decision not to issue a writ of mandamus. See attached February 27, 2015 Order.

While the Court later found that the exceptionally high hurdle necessary for issuance of a writ of mandamus compelling the FCC to act outside the ordinary course had not been met, the Court's November 25 Order effectively makes the Commission's decision regarding the Emergency Stay Motion an easy one. The Court which will review any Commission action on this motion and on this case generally has already found that all elements necessary to support a stay have been met. The Commission therefore need not scratch its head too deeply on this one since its superior authority has already answered the question for it.

Of course, in making its own ruling on the stay request, the Commission is not operating under the much higher standard applicable to issuance of a writ of mandamus – *i.e.*, a showing that the petitioning party has a clear and indisputable right to the extraordinary relief requested – but rather the same well-known, four pronged standard applied by the Court itself when it granted a stay. The Court held that that “stringent” standard had been met. The law of this case, therefore, is that a stay is fully warranted. Failure by the Commission to heed the Court's precedent would violate the law.

B. No Harm Has Been Occasioned by PMCM's Operation on Channel 3.10

The Bureau's October 23 action assigning a new virtual channel to WJLP did not offer any explanation as to why there was a need for precipitous action on that matter before the record in Docket 14-150 was even closed. While a couple of broadcasters had made vague allegations of harm caused by consumer “confusion,” there was no apparent need for haste in abruptly

assigning WJLP to a different virtual channel. There was no harm to anyone else, but extreme and irreparable harm to WJLP and its viewers. Nor did the Bureau's November 7 order identify any facts whatsoever warranting precipitous action. On the contrary, the Docket showed hundreds of viewers – the public whom the Commission is supposed to be serving -- unanimously expressing concern that WJLP was being forced off the air.

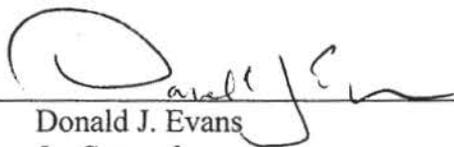
In the four full months that WJLP has been operating on channel 3 pursuant to the Court's stay, there has not been a single expression of confusion by any of the approximately 22 million viewers who reside in the New York DMA. No one has confused WJLP's "Me-TV" programming with Meredith's or CBS's major network programming. In other words, real life has confirmed that WJLP's operation on channel 3.10 causes no harm to anyone, but most especially it confirms that there is no justification for WJLP to be forced to move on an interim basis, thus creating the very viewer confusion and disruption that the Bureau's orders – and long Commission precedent -- purport to be at pains to avoid.

C. Conclusion

For the reasons set forth above and in the November 10 Emergency Motion, PMCM urges the Commission to act immediately to prevent further harm to the public.

Respectfully submitted,

PMCM TV, LLC

By: 
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Its Counsel

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March 12, 2015

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1238

September Term, 2014

FCC-14-150

Filed On: November 25, 2014

In re: PMCM TV, LLC,

Petitioner

CBS Broadcasting, Inc., et al.,
Intervenors

BEFORE: Rogers, Kavanaugh, Pillard, Circuit Judges

ORDER

Upon consideration of the emergency petition for writ of mandamus and the responses thereto, the motion to exceed page limits, and the lodged reply, it is

ORDERED that motion to exceed page limits be granted. The Clerk is directed to file the lodged reply. It is

FURTHER ORDERED that the Federal Communications Commission's November 7, 2014 letter suspending petitioner's authority to operate WJLP-TV be stayed pending further order of the court. Petitioner has satisfied the stringent requirements for a stay pending court review. See Winter v. Natural Res. Def. Council, 555 U.S. 7, 20 (2008); D.C. Circuit Handbook of Practice and Internal Procedures 33 (2013). It is

FURTHER ORDERED, on the court's own motion, that this case be expedited. It is

FURTHER ORDERED, on the court's own motion, that the parties hand deliver within 14 days of the date of this order 8 paper copies of their submissions, following the form for brief covers. See Fed. R. App. P. 32.

The Clerk is directed to calendar the petition for oral argument on an appropriate date following the refiling of the parties' submissions.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Michael C. McGrail
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14-1238**September Term, 2014**

FILED ON: FEBRUARY 27, 2015

IN RE: PMCM TV, LLC,
PETITIONER

CBS BROADCASTING, INC., ET AL.,
INTERVENORS

On Petition for Writ of Mandamus

Before: GARLAND, *Chief Judge*, KAVANAUGH, *Circuit Judge*, and WILLIAMS, *Senior
Circuit Judge*

ORDER

This cause came to be heard on the petition for writ of mandamus, the briefs of the parties, and argument by counsel. The Court has accorded the issues full consideration and has determined that they do not warrant a published opinion. *See* D.C. CIR. R. 36(d). Upon consideration of the foregoing, it is

ORDERED that the petition for writ of mandamus be denied.

Petitioner PMCM TV, LLC seeks a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651, directing the FCC to rescind a letter suspending the operating authority of one of PMCM's stations unless and until PMCM certifies that it will operate the station using "virtual" channel 33, as the FCC had directed, rather than "virtual" channel 3, as PMCM wishes. The FCC order at issue is an interim measure intended to preserve the status quo ante in the relevant service areas while the Commission completes a pending notice-and-comment proceeding. Because PMCM has neither shown that the FCC has violated our mandate in *PMCM TV, LLC v. FCC*, 701 F.3d 380 (D.C. Cir. 2012), nor demonstrated that it has a "clear and indisputable" right to relief, *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 381 (2004) (quoting *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 403 (1976)), under any other relevant source of law, *see, e.g.*, 47 U.S.C. §§ 316, 331(a), 1452(g); 47 C.F.R. § 73.682(d), we deny PMCM's request for a writ of mandamus. It is

FURTHER ORDERED that the stay entered by the Court on November 25, 2014 be dissolved.

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Pursuant to D.C. Circuit Rule 36, this disposition will not be published.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Jennifer M. Clark
Deputy Clerk

CERTIFICATE OF SERVICE

I, Donald J. Evans, hereby certify that on this 12th day of March, 2015, I caused copies of the foregoing "Consolidated Supplement to Emergency Motion for Stay of Suspension of Service and Virtual Channel Re-Assignment and Application for Review" to be placed in the U.S. Postal Service, first class postage prepaid and/or, as noted below, sent by electronic mail to the following:

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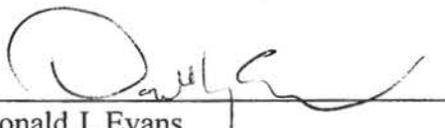
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