

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

In re )  
)  
Program and System Information ) MB Docket No. 14-150  
Protocol (PSIP) Designation for )  
Station WJLP(TV) (formerly KVNV(TV)), )  
Middletown Township, New Jersey )  
FCC Facility ID No. 86537 )

To: Marlene H. Dortch, Secretary

**OPPOSITION TO  
PMCM TV, LLC’S EMERGENCY MOTION FOR STAY OF SUSPENSION OF  
SERVICE AND VIRTUAL CHANNEL RE-ASSIGNMENT  
AND APPLICATION FOR REVIEW**

ION Media License Company, LLC (“ION”), licensee of WPXN-TV, New York, New York (“WPXN”); Meredith Corporation (“Meredith”), the licensee of WFSB(TV), Hartford, Connecticut; and CBS Broadcasting Inc. (“CBS”), the licensee of KYW-TV, Philadelphia, Pennsylvania (“KYW”), respectfully submit this Opposition to the “Emergency Motion for Stay of Suspension of Service and Virtual Channel Re-Assignment” filed on November 10, 2014 (the “Emergency Motion”), by PMCM TV, LLC (“PMCM”), as supplemented by PMCM on March 12, 2015 by a “Consolidated Supplement” concerning both the Emergency Motion and PMCM’s related Application for Review.<sup>1</sup>

PMCM’s Emergency Motion, Application for Review, and Consolidated Supplement, both individually and collectively, fail to demonstrate that the Media Bureau has

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<sup>1</sup> By letter dated November 13, 2014, the Media Bureau suspended the deadline for filing Oppositions to PMCM’s Emergency Motion until after the conclusion of related judicial proceedings before the United States Court of Appeals for the District of Columbia Circuit. By e-mail dated March 16, 2015, the Media Bureau restarted the pleading cycle. This Opposition is timely filed within seven days of PMCM’s filing of the Consolidated Supplement. 47 C.F.R. § 1.45(d).

acted improperly. The Emergency Motion should be denied because PMCM is unlikely to prevail on the merits of its objections to the two contested letter decisions of the Media Bureau.<sup>2</sup> The letter decisions are consistent with Commission rules and policies. PMCM has not suffered and will not suffer irreparable harm as a result of those decisions. A stay, meanwhile, would substantially harm viewers, who would be confused by multiple stations using major channel 3, and stations WFSB, KYW, and WPXN, which have built brand identification and equity associated with their historical use of Channel 3. Public interest considerations including historic viewing patterns, settled business expectations, and brand equity compel a denial of the stay request. Ultimately, the “emergency” cited in PMCM’s Emergency Motion is entirely of PMCM’s own making. PMCM’s Application for Review likewise is without merit, and should be denied.

#### **I. THE COMMISSION SHOULD DENY THE EMERGENCY MOTION.**

To obtain a stay, a petitioner must demonstrate (1) that it is likely to prevail on the merits; (2) that it will suffer irreparable harm if a stay is not granted; (3) that other interested parties will not be harmed if the stay is granted; and (4) that the public interest favors grant of the stay.<sup>3</sup> PMCM fails on all counts.

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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. Oct. 23, 2014) (“October 23 Letter”); Letter from Hossein Hashemzadeh, Deputy Chief, Video Division, Media Bureau to counsel for PMCM regarding WJLP-TV, DA 14-1528 (rel. Nov. 7, 2014) (“November 7 Letter”).

<sup>3</sup> See *Wash. Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, Order, 27 FCC Rcd 10217, para. 9 (Media Bureau 2012).

**A. PMCM Is Unlikely to Prevail on the Merits.**

The Emergency Motion failed to show that PMCM is likely to prevail on the merits. PMCM is pressing an “Alternative PSIP Proposal” that has not been endorsed by the FCC and that is contrary to Commission precedent and to ATSC A/65 (the “PSIP Standard”), which provides clear rules for channel assignment when a station enters a market. The Bureau decision suspending PMCM’s program test authority was an appropriate response to PMCM’s defiance of Commission rules and procedure, and it is likely to be upheld on review.

PMCM’s “Alternative PSIP Proposal” requests that WJLP be assigned virtual channel 3.10, even though two stations, both of which have overlapping service areas with WJLP, already operate on major channel number 3: WFSB, Hartford, Connecticut, and KYW, Philadelphia, Pennsylvania. WJLP moved to Middletown Township, New Jersey, after operating for years as KVVV in Ely, Nevada. PMCM seeks to import the KVVV channel assignment from its former operation in Ely, Nevada, and apply it to the newly activated WJLP in Middletown Township, irrespective of existing channel assignments and service contours. This proposal has no basis in Commission precedent or the PSIP Standard and would have serious adverse implications for licensees affected by future station relocations.

The PSIP Standard seeks to prevent viewer confusion by avoiding the use of the same virtual channel assignment by two non-commonly-owned stations.<sup>4</sup> The PSIP Standard is also designed to be a self-executing method of assigning channels in various circumstances, including the situation presented here. Under the PSIP Standard, when a new entrant 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 must use as its major channel number the

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

RF channel number originally assigned to the incumbent station for its initial digital operations.<sup>5</sup> WJLP is a newly activated station in the market, and it cannot lay claim to a major channel number already being used by two incumbent stations with overlapping service areas. Under the PSIP Standard, WJLP should be assigned the major channel number of WFSB's original digital RF channel, which is 33.<sup>6</sup>

This outcome is supported by Commission precedent. In the Seaford, Delaware, case, the Media Bureau allocated RF channel 5 pursuant to the policy in Section 331(a) of the Communications Act—the same section that governs PMCM's New Jersey move-in—to allocate at least one VHF channel in each state. Because the DTV service contour of a station on the newly allocated channel would overlap with the contour of incumbent WTTG(TV), Washington, D.C. (which is assigned major channel number 5), the Media Bureau assigned the new station major channel number 36 — the incumbent station's digital RF channel number.<sup>7</sup> This is the Commission's established methodology. PMCM has not cited a single case in which the Commission afforded the relief PMCM is seeking here: to assign a newly activated local station the same major channel number as an incumbent station that is not commonly owned.<sup>8</sup>

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<sup>5</sup> ATSC A/65, Annex B, ¶ 1.1(4).

<sup>6</sup> The RF channel originally used for digital operations by KYW, 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>7</sup> *Seaford, Delaware*, 25 FCC Rcd 4466, 4472 (Video Div. 2010).

<sup>8</sup> PMCM cites what it contends are examples of other situations that are similar to its own. But it is not clear that *any* of them involves a situation in which a *new* entrant sought to use the same major channel number as other stations with overlapping service contours over the objections of the incumbent licensees. 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, and cannot be said to have done so in the examples PMCM cites. However, when the Media Bureau is directly confronted with a dispute about the PSIP Standard, it can and should resolve it.

The Media Bureau was acting within its authority and pursuant to the PSIP Standard and Commission rules when it assigned WJLP major channel number 33 on an interim basis, while this proceeding was underway. 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. The rules further provide that the FCC may suspend program test authority, without notice, for failure to comply with all terms of a construction permit, and that operations under program test authority must be in "strict compliance" with the rules.<sup>9</sup> On October 23, 2014, the Media Bureau assigned WJLP virtual channel 33 on an interim basis.<sup>10</sup> Yet more than ten days later, WJLP continued to use major channel 3, in violation of the Media Bureau's requirements and the PSIP Standard incorporated into the Commission's rules.<sup>11</sup> The Bureau's decision to suspend program test authority for this unexcused failure to comply is expressly contemplated and authorized by the rules.

PMCM's argument that it should have had thirty days to protest the October 23 Letter under Section 316 of the Act is unavailing. Section 316 applies to the modification of a station license or construction permit.<sup>12</sup> The Bureau's letters did not modify WJLP's construction permit. The permit itself requires compliance with all Commission rules. When WJLP proceeded with its unilateral interpretation and application of the PSIP Standard, and when it did not comply with the October 23 Letter's directive to use virtual channel 33 on an

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<sup>9</sup> 47 C.F.R. § 73.1620(b), (d).

<sup>10</sup> October 23 Letter.

<sup>11</sup> November 7 Letter.

<sup>12</sup> 47 U.S.C. § 316(a).

interim basis, the station was no longer in compliance with the rules, so a suspension of program test authority was appropriate.<sup>13</sup>

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) betrays a misreading of the statutory language. Section 1452(g)(1)(A) of the act prohibits the Commission from involuntarily modifying "the spectrum usage rights of a broadcast television licensee."<sup>14</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 licensee" 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 also inapplicable here. The October 23 and November 7 Letters pertain to *virtual* channel numbers, not RF channels. They neither assign PMCM's station to a UHF channel nor alter the amount of UHF spectrum available for auction.

In sum, PMCM is wrong about Commission precedent, wrong about the PSIP Standard, wrong about the Bureau's authority to assign WJLP virtual channel 33 and to suspend program test authority when WJLP defied the Bureau's order, and wrong about the Spectrum Act. PMCM thus is unlikely to succeed on the merits of its Application for Review.

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<sup>13</sup> Moreover, earlier in this proceeding, the Media Bureau observed that "PMCM states that 'PSIP major[/virtual] channel information is not included in a license modification application,' and therefore should not be considered at this time." Letter from Hossein Hashemzadeh, Deputy Chief, Video Division, Media Bureau to Counsel for PMCM TV, LLC, FCC File No. BPCDT-20130528AJP (rel. April 17, 2014), *citing* PMCM Opposition to Informal Objection at 2 (filed Mar. 24, 2014). Agreeing with PMCM that "a station's virtual channel designation is not included in or considered in a license modification application," the Media Bureau determined at the time that it was "premature" to address Meredith's concerns about what virtual channel PMCM should use. *Id.* We are now in the midst of the separate proceeding necessitated by PMCM's desire not to resolve the virtual channel issue at an earlier stage of the process. PMCM cannot claim that 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.

<sup>14</sup> 47 U.S.C. § 1452(g)(1)(A).

**B. PMCM Will Not Suffer Irreparable Harm.**

PMCM has not shown that denial of its stay request would cause it irreparable harm. Indeed, if PMCM has suffered any harm, it is self-inflicted. PMCM could have accepted the interim assignment of virtual channel 33 and conducted program test operations on that channel. Then, if WJLP was assigned virtual channel 33 permanently, it would not have needed to change at all, and if PMCM's "alternative proposal" was accepted, it would only have had to change its virtual channel once.<sup>15</sup>

**C. Grant of a Stay Will Substantially Harm Other Interested Parties, Including Incumbent Stations in the Tri-State Area and Their Viewers.**

The requested stay would harm Meredith's WFSB, CBS's KYW, and ION's WPXN, and disrupt their historical relationships with viewers. PMCM has promoted WJLP as "Channel 3" both in its broadcasts and online, diluting the brand equity in Channel 3 that the CBS, ION and Meredith stations have built over decades of local programming. A stay that allows WJLP to use major channel number 3 would harm the identity and brand established by each of these licensees.

Multiple Channel 3 assignments in the same viewing area also will confuse viewers. Consumers in the Tri-State area have become accustomed to finding the programming of the incumbent stations on channel 3. WFSB has been identified as channel 3 in the overlap area for almost 50 years. KYW has been identified as channel 3 in Philadelphia and parts of New Jersey for more than 75 years. WPXN has been carried by certain Cablevision cable systems in New York on channel 3 for more than a decade. A fourth "Channel 3" would confuse viewers and disrupt settled business expectations. PMCM has presented no reason why a station

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<sup>15</sup> In any event, PMCM is now operating on virtual channel 33. Therefore, there will be no harm to PMCM if it were required to continue using that virtual channel until this proceeding is resolved.

moving 2,000 miles across the country should be allowed to upend those longstanding relationships.<sup>16</sup>

**D. A Stay Would Harm the Public Interest.**

The public interest is not served by granting a stay request to a company that has shown its willingness to defy FCC requirements. For more than ten 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 directive of the Bureau. Licensees who ignore Media Bureau letters to pursue their private business interests should not be rewarded with a stay of the very instructions they ignored. In such circumstances, a stay would undermine Commission authority to regulate its licensees; indeed, it would promote an anarchic regulatory scheme in which parties would be free to comply selectively with only those Commission decisions with which they agree.

Furthermore, the public interest is not served by causing viewer confusion or disrupting the longstanding relationships of the incumbent stations with their communities. Viewers should be able to find incumbent stations where they have historically found them, without confusing duplication in over-the-air channel positioning and disruption to existing cable channel lineups. The public interest also requires honoring established business arrangements, such as ION's carriage on the Cablevision systems.

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<sup>16</sup> PMCM asserts that "No one has confused WJLP's 'Me-TV' programming with Meredith's or CBS's major network programming." Consolidated Supplement at 4. But viewers could certainly be confused as to which licensee is providing the programming. The incumbents should not be required to endure periods of brand erosion and loss of viewership and advertising—or to engage experts or conduct expensive surveys to demonstrate these obvious harms—so that PMCM can proceed with its novel, and erroneous, reading of the PSIP Standard.

**E. The Court of Appeals Proceeding Does Not Dictate the Outcome Here.**

PMCM mischaracterizes the effect of the proceedings in the Court of Appeals. PMCM argues that because the Court granted a stay of the Bureau's November 7 letter, the Commission must rule in favor of PMCM on its Emergency Motion here.<sup>17</sup> PMCM states that the Court's decision to issue a stay "makes the Commission's decision regarding the Emergency Stay Motion an easy one," and asserts that the Commission "need not scratch its head too deeply on this one."<sup>18</sup> That is correct -- but not for the reasons PMCM believes. The Court granted the stay only "pending further order of the court," under the standard for a stay "pending court review."<sup>19</sup> In its February 27, 2015, order, following briefing and oral argument, the Court *dissolved* the stay and *denied* PMCM's petition for a writ of mandamus. The Court's decision to dissolve the stay moots any possible argument that there is a Court decision in effect that addresses the merits of PMCM's request for a stay at the FCC.

**II. THE COMMISSION SHOULD DENY THE APPLICATION FOR REVIEW.**

The affected broadcast parties previously have filed Oppositions to PMCM's Application for Review, and will not restate their arguments here. Because PMCM's Consolidated Supplement was filed with respect to both its Emergency Motion and its Application for Review, the undersigned reiterate their position that the Commission should deny the Application for Review.

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<sup>17</sup> Consolidated Supplement at 3.

<sup>18</sup> *Id.*

<sup>19</sup> *PMCM TV, LLC*, No. 14-1238, Order (D.C. Cir., Feb. 27, 2015).

**CONCLUSION**

For the foregoing reasons, PMCM's Emergency Motion and Application for Review should be dismissed or denied.

Respectfully submitted,

**MEREDITH CORPORATION**

**ION MEDIA LICENSE COMPANY, LLC**

By: Michael D. Basile (by EP)  
Michael D. Basile  
John S. Logan

By: Eve Pogoriler  
Mace J. Rosenstein  
Eve R. Pogoriler

Cooley LLP  
1299 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

Covington & Burling LLP  
One CityCenter  
850 Tenth Street, NW  
Washington, DC 20001-4956  
202-662-6000

*Its Counsel*

*Its Counsel*

**CBS BROADCASTING INC.**

By: John Bagwell (by EP)  
John Bagwell

51 West 52nd Street  
New York, NY 10019

*Its Counsel*

March 19, 2015

**CERTIFICATE OF SERVICE**

I, Eve R. Pogoriler, certify that on this 19th day of March, 2015, I served copies of the foregoing "Opposition to PMCM TV, LLC's Emergency Motion for Stay of Suspension of Service and Virtual Channel Re-Assignment and Application for Review" by causing them to be delivered by first class U.S. mail or e-mail, as indicated, to the following:

Barbara Kreisman, Chief (by e-mail)  
Video Division  
Media Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Joyce Bernstein (by e-mail)  
Video Division  
Media Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Hossein Hashemzadeh (by e-mail)  
Video Division  
Media Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

Donald J. Evans  
Fletcher, Heald & Hildreth, P.L.C.  
1300 N. 7th Street -- 11th Floor  
Arlington, VA 22209  
*Counsel for PMCM TV, LLC*

Seth A. Davidson  
Ari Z. Moskowitz  
Edwards Wildman Palmer LLP  
1255 23rd Street, N.W.  
8th Floor  
Washington, D.C. 20037  
*Counsel for Time Warner Cable Inc.*

Frederick W. Giroux  
Davis Wright Tremaine LLP  
1919 Pennsylvania Avenue, N.W.  
Suite 800  
Washington, D.C. 20006-3401  
*Counsel for Comcast Corp.*

Bill LeBeau  
Holland & Knight  
800 17th Street, N.W.  
Suite 1100  
Washington, D.C. 20006  
*Counsel for Turner Broadcasting System, Inc.*

Tara M. Corvo  
Mary Lovejoy  
Mintz, Levin, Cohn, Ferris,  
Glovsky and Popeo, P.C.  
701 Pennsylvania Avenue, N.W.  
Suite 900  
Washington, D.C. 20004-2608  
*Counsel for Cablevision Systems Corporation*

  
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Eve R. Pogoriler