

# ORIGINAL

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, DC 20554

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

**ACCEPTED/FILED**

JUL 21 2015

To: Marlene Dortch, Secretary **DOCKET FILE COPY ORIGINAL**

Federal Communications Commission  
Office of the Secretary

For Transmission to: The Commission

## **OPPOSITION OF MEREDITH CORPORATION AND CBS BROADCASTING, INC., TO APPLICATION FOR REVIEW**

Meredith Corporation (“Meredith”) and CBS Broadcasting, Inc. (“CBS”), by their attorneys, hereby oppose the above-captioned Application for Review, filed on July 6, 2015, by PMCM TV, LLC (“PMCM”), permittee of WJLP(TV), Middletown Township, New Jersey (formerly KVNV(TV), Ely, Nevada) (“WJLP”). PMCM seeks review of the Media Bureau’s Declaratory Ruling, issued June 5, 2015, in MM Docket 14-150 (“Declaratory Ruling”).

This proceeding concerns the virtual channel WJLP is permitted to use as a television station newly licensed at Middletown Township, New Jersey. In its Declaratory Ruling, the Bureau, adopting a plain-language interpretation of the applicable Commission rules,<sup>1</sup> (1) granted Meredith’s request, supported by CBS, for a declaration that WJLP, as a station newly licensed in the market, should use virtual channel 33 and not virtual channel 3, which

<sup>1</sup> ATSC A/65C (“ATSC Program and System Information Protocol for Terrestrial Broadcast and Cable, Revision C with Amendment No. 1, dated May 9, 2006”) (the “PSIP Standard”), incorporated in the Commission’s rules by 47 C.F.R § 73.682(d).

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Meredith's WFSB(TV), Hartford, Connecticut ("WFSB") has used in a common service area with WJLP for half a century and CBS's KYW-TV, Philadelphia, Pennsylvania, has used for even longer<sup>2</sup>; and (2) denied PMCM's Alternative PSIP Proposal and associated waiver request for the unprecedented assignment of a succession of minor channels (3.10 *et seq.*) as WJLP's "major channel."

As the Bureau painstakingly chronicled in the Declaratory Ruling, PMCM has advanced multiple and contradictory positions in this proceeding, each having in common PMCM's insistence that WJLP, a station that PMCM voluntarily elected to relocate from Ely, Nevada, has the right to duplicate the same virtual channel that market incumbents WFSB and KYW-TV have used in their respective common service areas with WJLP for more than fifty years. PMCM's position, if accepted, means that over-the-air viewers who are long-accustomed to tuning in to enjoy Meredith's WFSB or KYW-TV in their respective Commission-authorized over-the-air service areas at best would receive a screen asking them, in effect, whether they would like to tune to WJLP instead. At worst, the viewer would not be able to receive WFSB or KYW-TV at all. Poaching a channel that Meredith and CBS each have extensively promoted for more than half a century has obvious commercial advantages for a market newcomer like WJLP. The Commission's policy, however, consistently has been to prevent market newcomers from causing this kind of injury to incumbents by assigning unique major channels as virtual channels in each station's viewing area. In its application for review, PMCM seeks to cast the Bureau as the source of delay and confusion in this proceeding. In fact, PMCM itself is the author and perpetrator, having filed multiple and often inconsistent interlocutory appeals, striving to have its case judged in the first instance by the D. C. Circuit and to forestall the issuance of the Bureau

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<sup>2</sup> The service areas of WFSB and KYW-TV do not overlap.

decision in the Declaratory Ruling that predictably has ordered WJLP to use virtual channel 33.<sup>3</sup> The Bureau's declaration that the PSIP Standard requires WJLP to use virtual channel 33 accords with Commission policy, Commission precedent, and the literal language of the Commission's rules.<sup>4</sup> The Commission should affirm the Bureau's decision forthwith and deny PMCM's application for review.

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<sup>3</sup> PMCM belatedly asserts that, by choosing not to designate MM Docket 14-150 as a "permit-but-disclose" proceeding for purposes of the *ex parte* rules, the Bureau

precluded PMCM, interested members of the public, and New Jersey's elected representatives from engaging the staff on the issues presented.

Application at 1. PMCM did not raise this issue before the Bureau and thus may not assert it now in an application for review. Section 1.115(c) of the Commission's rules provides:

No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.

The Commission's rules give the Bureau wide discretion to determine whether or not to employ permit-but-disclose procedures. *See* 47 C.F.R. §1.1200. Moreover, PMCM in fact met with Commission representatives regarding MM Docket 14-150 in October 2014, and an associational supporter present at the meeting subsequently submitted a letter in the docket referencing support for PMCM's position from specified elected representatives. The *ex parte* rules merely required that PMCM provide Meredith, CBS, and other interested parties with an opportunity to be present and participate at any meetings with decision-making staff and to be served with any further submissions. PMCM has not demonstrated that imposition of the Commission's *ex parte* rules foreclosed the presentation of any relevant argument or materially hindered PMCM from communicating any legitimate position to Commission decision makers. Indeed, even a cursory glance at the docket in this proceeding confirms that PMCM and its supporters have been "engaging the staff" a great deal.

<sup>4</sup> Citing the D.C. Circuit's November 25, 2014, order for temporary stay and oral argument in PMCM's challenge to the Bureau's interlocutory order for interim assignment of channel 33, PMCM makes the astounding statement that "the D.C. Circuit has already ruled that PMCM's position on the merits of the PSIP channel issue is likely to prevail," as if the court had granted PMCM's mandamus petition rather than denied it. PMCM plainly is not recounting what the court said, but what it infers the court was thinking based on PMCM's assumptions about why the court granted a temporary stay. Moreover, whatever impression the court had when it issued the temporary stay and ordered oral argument, the court apparently did not retain that initial impression. After reviewing the briefs and hearing oral argument, the court denied PMCM's petition for mandamus and dissolved the stay, stating that it "has accorded the issues full

**I. The Bureau Properly Determined That the PSIP Standard Requires WJLP to Use Virtual Channel 33.**

The Bureau properly determined that paragraph 4 of the PSIP Standard governs the question of WJLP's virtual channel. That paragraph applies when

an RF channel previously allotted for NTSC in a market [in this case, channel 3, used by WFSB, which has a common service area with WJLP] is assigned to a newly-licensed DTV licensee in that market . . . .<sup>5</sup>

The "newly-licensed DTV licensee in that market" is WJLP, which—although previously licensed to Ely, Nevada—is "newly licensed" to the market it presently serves from Middletown Township, New Jersey. In this situation, the PSIP Standard provides for the station "newly licensed . . . in that market" to use as its virtual channel the RF channel of the station previously assigned to the RF channel to which the new licensee has succeeded. Thus, PMCM, which has succeeded to RF channel 3, WFSB's former channel, would use virtual channel 33, the channel number corresponding to WFSB's current RF channel.

This outcome not only accords with the language of the PSIP Standard but also advances the Commission's stated objective "to assign major channel number values 2 through 69 uniquely to licensees licensed to broadcast digital ATSC signals."<sup>6</sup> It also advances the twin policies leading the Commission to adopt the PSIP Standard in the first place: to avoid public confusion and to preserve the equity that incumbents have in their channel numbers from years (more than fifty years for WFSB) of developing and promoting their program services. In contrast, Section 1 of the PSIP Standard, which PMCM would apply, deals with the assignment

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consideration and has determined that they do not warrant a published opinion." *See In re: PMCM TV, LLC, Order*, Case No. 14-1238 (February 27, 2015).

<sup>5</sup> PSIP Standard, Annex B.1.4.

<sup>6</sup> Declaratory Ruling at para. 44, *citing* PSIP Standard, Annex B.1.8.

of virtual channels to market incumbents during the digital transition. WJLP, which has just moved to Middletown Township, New Jersey, from Ely, Nevada, is in no respect a market incumbent.<sup>7</sup> To be clear, no viewer in WJLP's newly licensed market, several thousand miles from its original licensed location, had any expectation of watching WJLP on channel 3.

PMCM nevertheless asserts that Paragraph 4 does not prevent WJLP from adopting virtual channel 3, because WJLP is not in the same "market" as Meredith's WFSB or CBS's KYW-TV under the PSIP Standard, notwithstanding the substantial overlap of digital service areas between WJLP and WFSB and between WJLP and KYW-TV and the potential for affecting adversely hundreds of thousands of viewers in the overlap areas. In effect, PMCM argues that the concept of being in the same "market," as used in the PSIP Standard, cannot mean the only thing that the text of PSIP Standard possibly could mean—that is, having overlapping DTV Service Areas. PMCM contends instead that "market" in the PSIP Standard necessarily means—and can only mean—"Nielsen-defined Designated Market Area ("DMA")." PMCM's contention does not withstand analysis.

First, precedent supports the Bureau's interpretation of "market." The *Seaford, Delaware* proceeding, also a proceeding to implement Section 331 of the Communications Act, defines "market" in Paragraph 4 of the PSIP Standard in terms of overlapping digital service areas, just as the Bureau defines the concept in the Declaratory Ruling.<sup>8</sup>

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<sup>7</sup> PMCM quibbles that the Commission cannot consider WJLP to be a "newly licensed station," because it previously held a license for Ely, Nevada. WJLP is being licensed now, however, to Middletown Township, New Jersey, and will be a station "newly licensed" in that market. Paragraph 4 of the PSIP Standard addresses stations that are new stations in a particular market rather than incumbents in that market, and it is irrelevant to WJLP's status of "newly licensed" in its present market that WJLP previously may have been licensed elsewhere.

<sup>8</sup> See Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broadcast Stations (Seaford, Delaware), MB Docket No. 09-230, Report and Order, 25 FCC Rcd 4466 (Vid. Div. 2010), *recon. denied*, Memorandum Opinion and Order on Reconsideration, 28

Second, because the PSIP Standard neither addresses nor employs any concept of a relationship among stations serving the same area other than “overlapping DTV Service Area,” it is eminently reasonable for the Bureau to interpret the term “market” as used in Paragraph 4 of the PSIP Standard as a short-hand reference to “the common area served by the overlapping DTV Service Area contours of the particular television broadcast stations under discussion.” It is unreasonable to insist—as PMCM does—that the term necessarily and exclusively invokes a specialized Nielsen proprietary commercial definition of “market” not otherwise referenced in or relevant to the PSIP Standard.

**II. PMCM Failed to Justify a Waiver to Permit WJLP and Force WFSB and KYW-TV to Use a Succession of Minor Channel Numbers as Virtual Major Channels.**

PMCM touts its scheme for the assignment of separate collections of minor channels as major channels for WJLP, WFSB, and KYW-TV as a means for the Commission to address conflicting claims to major channel 3 in this proceeding. Thus, PMCM would have the Commission assign its minor channels 3.10 *et seq.* as its “major channel” and modify the “major channel” assignment for Meredith’s WFSB and CBS’s KYW-TV to the series of minor channels 3.1 to 3.9, inclusive. The PSIP Standard, however, provides for use of the same major channel number for stations with overlapping service contours only when the stations have common ownership, something not present here. PMCM’s “solution” therefore would require a waiver of the Commission’s rules. Because PMCM failed to establish any basis or justification for such a waiver, the Bureau properly denied its request. An applicant for waiver has a high hurdle at the starting gate, even though the Commission may grant waivers of its rules if, in unique circumstances, a waiver would better advance the policies underlying a rule than strict adherence

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FCC Rcd 1167 (Vid. Div. 2013), Memorandum Opinion and Order on Further Reconsideration, 29 FCC Rcd 4769 (Vid. Div. 2014), *app. rev. pending* (Seaford, Delaware).

to the literal terms of the rule in question. The waiver PMCM seeks, however, would contravene not only the letter of the PSIP Standard, but also multiple policies underlying it, including the assignment of a unique major channel identifier to each independently owned station, the preservation of an incumbent station's identification of its service with a particular channel number, and the avoidance of public confusion. Accordingly, PMCM's waiver request fails at the outset, and the Bureau properly rejected it.<sup>9</sup>

### **III. The Spectrum Act Is Irrelevant to the Bureau's Declaratory Ruling.**

Equally misguided is PMCM's new contention, advanced merely as an illustration in the proceedings below but now presented as if it were a serious argument, that the Spectrum Act—the enabling statute for the upcoming broadcast incentive auction—forbids the Commission from requiring PMCM—or, presumably, any other licensee—to use as a virtual channel any channel different from one it already has, which in the case of WJLP would be its RF channel, channel 3. Restated for clarity, PMCM's argument runs like this: (1) Section 1452(g)(1)(A) of the Spectrum Act provides that, during the run-up to the broadcast incentive auction, the Commission “may not [i]nvoluntarily modify the spectrum usage rights of a broadcast television licensee or reassign such a licensee to another television *channel*” (emphasis added), except in situations not applicable here; (2) the Commission has held consistently that, with the change to digital television, a television station's virtual channel became its “over-the-air channel” for purposes of

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<sup>9</sup> PMCM seeks to bolster its case for waiver by citing instances in which separately owned stations, almost exclusively low power television stations or low power stations paired with full service stations, used the same major channel number in areas of service contour overlap without, apparently, engendering complaints and by pointing to the paucity of viewer complaints during the brief period that WJLP operated with virtual channel 3.10 in defiance of Bureau instructions. These showings, even if true, have no relevance to PMCM's waiver request. A waiver request presumes the validity of the rule for which waiver is sought. If PMCM seeks to vindicate a position that the PSIP Standard is no longer necessary, its proper recourse is a petition for rulemaking to modify or delete the PSIP Standard, not a waiver request.

MVPD carriage rights, because the virtual channel, not the RF channel, is now the channel by which the viewing public identifies the television station in a digital world; and (3) the prohibitions in the Spectrum Act against the Commission's reassigning a licensee to another television channel therefore preclude the Commission from requiring WJLP to use virtual channel 33 when WJLP has RF channel 3 and PMCM wants to use it as WJLP's virtual channel. This argument has multiple fatal flaws.

First, the Spectrum Act does not forbid the Commission from interpreting its rules to determine a licensee's virtual channel. When the Spectrum Act addresses "channels," it is addressing auctionable portions of the electromagnetic spectrum, not virtual channels. Indeed, the Spectrum Act unambiguously and exclusively defines "channels" as segments of the radiofrequency spectrum.<sup>10</sup>

Second, even if PMCM could surmount the hurdle of showing that Section 1452(g)(1)(A) of the Spectrum Act applies to virtual channels, the Bureau here made no "involuntary change" to WJLP's virtual channel that would invoke the provisions of that Section. The Commission adopted the PSIP Standard as a self-executing protocol, with the Commission stepping in to interpret or waive provisions in response to complaints or waiver requests. Here, the Bureau did not modify PMCM's legitimate spectrum rights or reassign a channel to the WJLP licensee to achieve a preferred allotment of RF channels. Rather, WJLP received channel 33 as its virtual channel by operation of law when it moved to Middletown Township, New Jersey, as a newly licensed station in its new market. The Bureau's Declaratory Ruling sets forth—and does not

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<sup>10</sup> See 47 U.S.C. § 1401(32)-(33), defining "ultra high frequency" channels to mean "that the channel is located in the portion of the electromagnetic spectrum between the frequencies from 470 megahertz to 698 megahertz" and "very high frequency" channels to mean "that the channel is located in the portion of the electromagnetic spectrum between the frequencies from 54 megahertz to 72 megahertz, from 76 megahertz to 88 megahertz, or from 174 to 216 megahertz."

alter, reassign, or change—those virtual channel rights that PMCM possesses under the PSIP Standard, given the posture of the authorization it holds and PMCM’s decision to invoke Section 331 to relocate WJLP from Ely, Nevada.

Finally, if the Spectrum Act’s proscription on modification of “spectrum usage rights” or alterations to licensees’ “channels” were to apply so broadly as to bar the Bureau from issuing a declaratory ruling interpreting WJLP’s virtual channel rights under the PSIP Standard, then those provisions necessarily would prevent the Bureau from modifying Meredith’s and CBS’s longstanding rights in channel 3 by forcing on WFSB and KYW-TV a major channel sharing arrangement with WJLP for virtual channel 3 in their respective common service areas with WJLP.

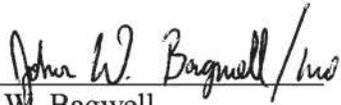
### Conclusion

For the reasons set forth above, Meredith and CBS submit that the Commission should affirm the Bureau’s Declaratory Ruling in all respects and deny PMCM’s Application for Review.

Respectfully submitted,

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July 21, 2015

## CERTIFICATE OF SERVICE

I, Rayya Khalaf, a secretary at the law firm of Cooley LLP, do hereby certify that a true and correct copy of the foregoing "Opposition of Meredith Corporation and CBS Broadcasting, Inc. to Application for Review" was served by first-class U.S. mail, postage-prepaid, unless otherwise indicated, on the 21st day of July, 2015 on the following:

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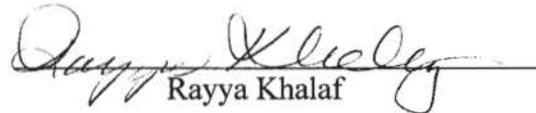
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