

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

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

TO: Marlene H. Dortch, Secretary

For transmission to: the Commission

PMCM TV's Reply to Opposition

PMCM TV, LLC, by its attorneys, replies to the Opposition to Application for Review filed jointly by Meredith Corporation and CBS Broadcasting, Inc. (Opponents). The Opposition misstates the record in numerous respects and ignores key facts and principles in others.

I. No Consumer "Poaching" Has Occurred or Could Occur

The claim of Opponents that WJLP is somehow "poaching" on their channel 3 "brands" and causing consumers to be unable to find their signals can be quickly dismissed. They raised this "sky is falling" alarm at the Bureau level without any factual support whatsoever. The Bureau unfortunately believed them and precipitously kicked WJLP off the air to prevent the calamitous consequences they had wrung their hands about. Yet when WJLP was restored to virtual channel 3.10 by the court, there was not a single complaint of confusion or inability to receive CBS or Meredith from any of the 20 million + viewers in the New York DMA. And somehow consumers were able to figure out without the slightest difficulty that CBS network programming is not Me-TV programming. Literally *none* of the harms the Opponents had wildly conjured came to pass. Conversely, the record shows that WJLP's viewers have had difficulty receiving the station because they expect their UHF antennas to be able to pick up what they perceive as channel 33, but they cannot do so because the signal is actually coming in on RF channel 3. Moreover, for reasons which we cannot explain, viewers receiving virtual channel 33

sometimes get CBS's over the air channel 33 instead. Clearly, assigning virtual channel 33 to WJLP has created a host of problems that did not exist when virtual channel 3.10 was being used. It is actually WJLP that is suffering by the imposition of an unnatural virtual channel.

II. The Bureau's Application of Annex B was Plainly Erroneous

The Opponents insist that the Bureau's interpretation of the PSIP Annex B protocols is a correct "plain-language" interpretation of those protocols. In so stating, they manage to ignore a large chunk of the Application for Review explaining exactly why that is not so.

- The Opponents insist that Paragraph 4 of Annex B is the governing paragraph without addressing how or why Paragraph 1, which on its face directly applies to WJLP, should not apply. WJLP is not "newly licensed" but has been licensed and operating since 2002. Paragraph 1 applies in that situation.
- They ignore the fact that Paragraph 4 requires the "allotment" of a new channel to a market, presumably because WJLP's channel is indisputably not "allotted" to the Hartford-New Haven DMA where channel 3 was previously allotted. And channel 3 has never been allotted to the New York DMA where WJLP's channel is allotted.
- They ignore the fact that Annex B consistently uses the term "overlapping DTV Service Areas" when that is what it means. The use of the term "market" in paragraph 4 must logically refer to something other than overlapping signals.
- They describe the use of Nielsen market delineations as a "specialized" method of defining a TV market when in fact it is the very method universally adopted and used by the FCC and the TV industry in defining TV markets. To use any other market definition would itself be extraordinary and would surely have elicited at least a few words of explanation or justification as to why the Annex B framers were using a definition of market that deviates so radically from the definition used by the FCC and the industry in all other contexts.
- They ignore the fact that the Bureau's use of overlapping service areas to define the market here created the very anomaly of conflicting virtual channel designations which would never occur under the Annex B paradigm: two different virtual channels being required to be assigned to the same station. For obvious reasons, they do not even attempt to justify that absurd result of applying Paragraph 4 to this situation.

- And finally, they assert that Annex B “provides for the use of the same major channel number for stations with overlapping service contours *only* when the stations have common ownership.” (Emph. added) To the contrary, the last sentence of Paragraph 5 of Annex B explicitly alludes to and contemplates situations where non-commonly owned stations with the same major channel number may have overlapping service areas. Even the Bureau acknowledged that such overlaps, while “rare,” are possible. This is obviously just such a case. The Opponents’ reasons for applying Paragraph 4 to the situation at hand are therefore even more faulty than the Bureau’s.

III. Violation of the Spectrum Act

In its Application for Review, PMCM pointed out that the Bureau’s involuntary reassignment of WJLP to a new virtual channel violates Section 1452(g)(1)A) of the Spectrum Act. That section expressly and absolutely bars the Commission from involuntarily reassigning a television licensee to another channel prior to the Incentive Auction. Ordinarily, one would not have thought that a station’s television channel is defined by its virtual channel rather than its over the air channel, but the Bureau has consistently so held since 2012. It necessarily follows that if a station’s “channel” is defined by its virtual channel, then reassigning a station to a different virtual channel constitutes reassigning its channel, which violates the Act.

Opponents in response assert that Sections 1401(32) and (33) of the Act define channels as segments of the RF spectrum. A glance at the referenced section of the Act confirms that this is not true. Those sections simply provide that “ultra high frequency” means, with respect to a television channel, 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” means, with respect to a television channel, 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 megahertz to 216 megahertz.” The statute nowhere defines a “channel.” So while we know what is meant by a reference to a VHF channel or a UHF channel, we don’t know what is meant by a channel. Here it is particularly important to note that §1452(g)(A) bans not only changes in TV station’s spectrum usage rights (i.e., its use of particular frequencies) but also bans changes in its “channel.” If the section were intended to

ban only changes in RF aspects of station, the reference to “channel” changes, in addition to RF changes, would be meaningless surplusage – something the rules of statutory construction abhor. *United States v. Porter*, 745 F.3d 1035 (10th Cir., 2014), citing Bryan A. Garner, *A Dictionary of Modern Legal Usage* 860 (2d ed. 1995) (“Courts often recite the canon of construction that prevents them from reading statutory or contractual language in a way that renders part of it surplusage.”); *see also* William N. Eskridge, Jr., et al., *Legislation and Statutory Interpretation* 275 (2d ed.2006) (noting “the presumption that every statutory term adds something to a law's regulatory impact”)

Here we must be guided by the Bureau’s own definition of a channel as being the station’s virtual channel. PMCM vigorously disagrees with the Bureau’s interpretation that a station’s channel is its virtual channel rather than its RF channel, but the Commission cannot with any consistency, honesty or intellectual rigor define a station’s channel as its over the air channel for purposes of Section 1451 but not as its over the air channel for purposes of Section 534(b)(6) and (h)(1)(A). Of course, if Opponents are correct that the statute defines a station’s channel by its RF channel number, then the Bureau has consistently and grossly misapplied the cable carriage rules in this case and elsewhere and has unlawfully and needlessly deprived PMCM of its statutory carriage rights on Channel 3.

Opponents next insist that the Bureau has not involuntarily changed WJLP’s channel by assigning it virtual channel 33 because the assignment was self-executing under the PSIP protocols. This is absurd. Station WJLP indisputably had been assigned major channel 3 under the PSIP protocols. It operated with major virtual channel 3 for many years in Nevada and then operated with that major virtual channel when it initiated broadcasting in New Jersey. The CDBS database listed channel 3 as WJLP’s virtual channel until the day in October, 2014 when it was reassigned virtual channel 33 by Bureau fiat and over PMCM’s strong objection. On that day the virtual channel number in the CDBS database changed. To call this anything but an involuntary change of channel is, to be kind, inconsistent with the facts.

Finally, Opponents argue that if a change in virtual channels constitutes a change in channel, then *their* channels would also be unlawfully changed if they were deprived of their use of virtual channels 3.10 and above. But neither CBS nor Meredith use or have ever used minor channels .10 and above in connection with their major virtual channel 3’s. That is why PMCM

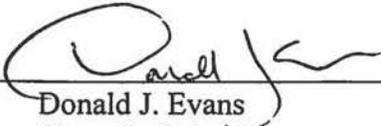
chose .10 as its minor channel – to provide a unique major/mior channel combination as contemplated by Annex B. Opponents’ major virtual channels and their minor channels will remain what they have always have been if WJLP retains channel 3.10 and above. There is therefore no “change” whatsoever in their virtual channels.

IV. Ex Parte Status

The ex parte status of a Docketed Declaratory Ruling proceeding arises because both the Bureau and other members of the Commission’s staff have unaccountably deemed this proceeding to be restricted. The provisions of §1.1206(a)(3) of the rules plainly denominate the proceeding as “permit-but-disclose,” which would permit ordinary contacts with the Commissioners and their staffs to discuss the merits of the matter subject only to providing a post-meeting summary. There is no order or explanation of any kind for why the Bureau and the Commission have treated the case as “restricted” in contravention of the rules applicable to Declaratory Rulings. Yet that is what happened. Hence the “double secret probation” nature of the situation: without any written authority whatsoever, the Commission has been imposing an unwarranted, unlawful and uncalled for restriction on a proceeding which has elicited much interest from both the public and the elected representatives of New Jersey who are seeing their state once again being given the short end of the stick. The Commission can remedy this error by clarifying in the course of its consideration of this matter that ex parte presentations under the normal “permit-but-disclose” rules are permissible.

Respectfully submitted,

PMCM TV, LLC

By: 
Donald J. Evans
Harry F. Cole
Anne Goodwin Crump

Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street – 11th Floor
Arlington, Virginia 22209
703-812-0430

August 3, 2015

CERTIFICATE OF SERVICE

I, Donald J. Evans, hereby certify that on this 3rd day of August, 2015, do hereby certify that a true and correct copy of the foregoing "Reply to Opposition" was served by first-class U.S. mail, postage-prepaid, and/or, as noted below, sent by electronic mail to the following:

Tara M. Corvo
Mary Lovejoy
Seth Davidson
Mintz, Levin, Cohn, Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004-2608

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

William LeBeau
Holland & Knight
800 17th Street, N.W., Suite 1100
Washington, D.C. 20006

Michael D. Basile
John S. Logan
Cooley LLP
1299 Pennsylvania Avenue NW
Suite 700
Washington, DC 20004

John Bagwell
51 West 52nd Street
New York, NY 10019

Seth A. Davidson
Ari Z. Moskowitz
Edwards Wildman Palmer LLP
1255 23rd Street, N.W., 8th Floor
Washington, DC 20037

Frederick W. Giroux
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue, N.W.
Suite 800
Washington, DC 20006-3401

Mace Rosenstein
Eve Pogoriler
Stephen Kiehl
Covington & Burling LLP
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004

Hossein Hashemzadeh
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(By email: Hossein.hashemzadeh@fcc.gov)

Joyce Bernstein
Video Division, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(By email: Joyce.Bernstein@fcc.gov)

William Lake
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(By email: William.lake@fcc.gov)

Barbara Kreisman
Video Division, Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(By email: Barbara.kreisman@fcc.gov)

Keith R. Murphy, Senior Vice President
Government Relations & Regulatory Counsel
Viacom, Inc.
1501 M Street, N.W., Suite 1100
Washington, DC 20005

Commissioner Mignon Clyburn *
Federal Communications Commission
445 12th Street, N.W.
Washington, DC 20554

Commissioner Jessica Rosenworcel *
Federal Communications Commission
445 12th Street, N.W.
Washington, DC 20554

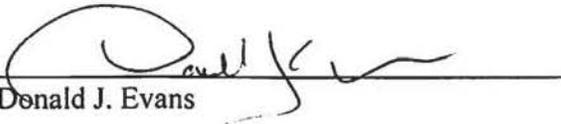
Jonathan Sallet, General Counsel *
Office of General Counsel
Federal Communications Commission
445 12th Street, N.W.
Washington, DC 20554

Chairman Thomas Wheeler *
Federal Communications Commission
445 12th Street, N.W.
Washington, DC 20554

Commissioner Michael O'Rielly *
Federal Communications Commission
445 12th Street, N.W.
Washington, DC 20554

Commissioner Ajit Pai *
Federal Communications Commission
445 12th Street, N.W.
Washington, DC 20554

Anne Lucey
CBS Corporation
601 Pennsylvania Avenue, N.W.
Suite 540
Washington, DC 20004


Donald J. Evans

* Via Hand-Delivery