February 5, 2016

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: MM Docket 14-150[1]

Dear Ms. Dortch:

Meredith Corporation ("Meredith") and CBS Broadcasting, Inc. ("CBS") once again find themselves supplementing a meeting description from PMCM TV, LLC ("PMCM") to address distortions and omissions concerning the Media Bureau's *Declaratory Order*, now on application for review by PMCM. This time, Meredith and CBS write regarding the letter filed by PMCM's counsel Donald Evans, Esq., in this docket on February 3, 2016.

In lieu of the background statement of PMCM, Meredith and CBS commend to the Commission's attention the well-reasoned and comprehensive decision of its Media Bureau which granted the *Declaratory Order* requested by Meredith and CBS and—consistent with statute, rule, precedent, and established policy—assigned WJLP to virtual channel 33 and rejected both (i) PMCM's contention that its WJLP is entitled to use virtual channel 3 at Middletown Township, New Jersey and (ii) PMCM's alternative contention that it is entitled to an unprecedented waiver to use virtual channel 3.10 *et seq.* as a "major channel." A copy of the *Declaratory Order* is attached as Exhibit A.

As the Bureau explains in the *Declaratory Order* ("*DO*"), after the digital transition, members of the public access broadcast television stations through their "virtual channels," which often differ from their RF channels. The Commission's rules and policies for assignment of virtual channels—the PSIP Rules—call for each television station to be identified uniquely in its market by its "major channel" designation (*e.g.*, the "3" in the channel name "3.xx"). Under the PSIP Rules, "market" means a station's over-the-air service area. (*DO* ¶¶21, 34, 36, 42) The

[1] PMCM also addressed, at the meeting and in its disclosure filing, the merits of three separate must-carry complaints that it filed on January 19, 2016, in ECFS Docket 12-1, none of which PMCM had served on Meredith, disclosed to Meredith when Meredith requested a statement of the topics to be covered at the meeting, or filed in Docket No. 14-150, even though each complaint expressly advocates grant of the pending PMCM applications for review of the Media Bureau's decision in MM Docket No. 14-150.

Commission expressly adopted this approach to avoid viewer confusion and to permit each incumbent station to retain the goodwill and "branding" that it has built up in its service area over many years through associating its program service with its channel number. (*DO* ¶¶5-6, 20, 27-28, 35, 53, 59) After the digital transition, the Commission's PSIP Rules required that a "newly licensed" station with service contours overlapping that of incumbent stations be assigned a virtual "major channel" number that does not duplicate the major channel assignment of an incumbent. (*DO* ¶¶5, 7) WJLP is "newly licensed" to Middletown Township, New Jersey (*DO* ¶¶16, 32) (having been previously licensed to Ely, Nevada) (*DO* ¶¶32, 34), and a "plain language" reading of the PSIP Rules (*DO* ¶¶32) requires that WJLP use virtual channel 33. (*DO* ¶¶16-20) The Commission has never approved the use of the same major channel number by separately owned stations with overlapping service areas (*DO* ¶58), nor has it approved the use of a collection of minor channel numbers as a station's "major" channel number. (*DO* ¶¶46) None of this implicates the Spectrum Act in any respect. (DO ¶¶49-50) PMCM's conflation of Designated Market Areas and overlapping service areas is irrelevant.

To illustrate the confusion that would result from PMCM's use of major channel 3 or its outside-of-all-rules alternative of channel 3.10 *et seq*., CBS pointed out in the meeting that CBS's KYW-TV, Philadelphia, Pennsylvania, broadcasts a vintage television service on its 3.2 channel. PMCM's summary instead refers erroneously to WCBS 2.2 in New York, which misstates CBS's example. The point is that over-the-air viewers directed to "Channel 3" by PMCM's marketing in the KYW-TV/WJLP overlap area would land on KYW-TV's primary 3.1 stream that viewers would identify with the CBS Network (*e.g.*, 60 Minutes, NCIS, Survivor, *etc*.). The viewer then would scroll through CBS's 3.2 Decades multicast stream containing classic TV programming before finally arriving at PMCM's classic TV programming on 3.10. Viewers would have no indication that these are separately owned services, particularly when presented with both the CBS vintage television channel and PMCM's similar service on immediately-adjacent channel 3 subchannels as if they were commonly owned alternatives, contrary to the purpose of the PSIP Rules to enable stations to continue to have their programming identified with their analog channel brands within their service areas. PMCM's incorrect reference to the WCBS channel rather than the KYW-TV channel also obscures the incentive for WJLP to benefit economically from generating confusion of its program services with those of CBS and Meredith.

PMCM also addressed difficulties that some of its viewers have encountered in tuning in WJLP because of malfunctions in some television sets. Although PMCM has stated that it first observed this phenomenon in March, it did not raise the matter before the Bureau until several months after the Bureau denied its claims to virtual channel 3, so this is not a matter addressed by the Bureau in its *Declaratory Order* or in any other order, policy statement, or proceeding. As PMCM previously told the Media Bureau, in all but one instance, the over-the-air tuning problems it observed for some set models did not occur when the viewer tuned in "33.1" rather than scrolling from "33."

Furthermore, it continues to amaze Meredith and CBS that PMCM claims it cannot educate viewers about the difference between UHF and VHF stations or how to enter a "dot one" (*i.e.*, 33.1) and yet asks the Commission to accept that viewers would be able to distinguish readily between, for example, CBS programming on channels 3.1, 3.2, *etc*. and WJLP's programming on channel 3.10 *et seq*. Indeed, it is not mere speculation that PMCM would fail to emphasize the ".10 *et seq*." subchannels it seeks for WJLP. As demonstrated by the screenshot attached as Exhibit B, PMCM affirmatively marketed WJLP to viewers merely as "Channel 3" during the period of its unauthorized operation on virtual channels 3.10 *et seq*.—operations that PMCM stopped only when directly ordered by the Media Bureau.

Moreover, as PMCM has acknowledged in submissions to the Bureau, the tuning phenomenon is not peculiar to WJLP but instead occurs wherever particular models of television sets are paired with common channel configurations. PMCM has identified the phenomenon thus far in almost fifty different station pairs. This is manifestly not a matter relevant to the interpretation of the PSIP Rules at issue in the pending applications for review. Furthermore, because the phenomenon allegedly results from the application of provisions of the Commission's rules and supposedly affects users of particular television set models throughout the nation, this is not a matter that the Commission properly can address through a waiver proceeding that suspends applicable law to give a station newly licensed in a market the same virtual major channel number as an incumbent. As the Bureau noted in its *Declaratory Order*, "by simply choosing different minor channel numbers than the station operating with the same major channel, the Commission could be presented with a large number of similar requests by stations that would prefer their signals to be associated with the brand of a more highly rated station." (*DO* ¶¶60).

PMCM makes clear their true purpose in Mr. Evans' letter when they note that a "consequence" of the Bureau's decision in this proceeding is a "loss of favored channel position." That sums it up. Unwilling to accept the results of a fully-briefed proceeding with multiple public comments, PMCM continues to claim that the only viable solution is to reverse the just-issued *Declaratory Order* and give PMCM some form of major channel 3, the only channel that the *Declaratory Order* expressly held that PMCM cannot have under applicable law. Meredith and CBS, in contrast, believe the Media Bureau's *Declaratory Order* fully resolves all issues properly before the Commission in the applications for review.

Should you have any questions about this correspondence, please contact the undersigned.

Very truly yours,

Meredith Corporation

By: /s/ *Joshua N. Pila*

Joshua N. Pila
Its Attorney

CBS Broadcasting, Inc.

By: /s/ *John W. Bagwell*

John W. Bagwell
Its Attorney

cc: Matthew Berry
Robin Colwell
Donald J. Evans
Anne Lucey
Seth Davidson
Ari Moscowitz
Rosemary Harold
Mace Rosenstein
Fred Giroux
Tara M. Corvo

EXHIBIT A

Declaratory Order

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Request for Declaratory Ruling by Meredith Corporation And "Alternative PSIP Proposal" By PMCM TV, LLC for WJLP (Formerly KVNV(TV)), Middletown Township, New Jersey	))))	MB Docket No. 14-150

DECLARATORY RULING

Adopted: June 4, 2015 **Released: June 5, 2015**

By the Chief, Media Bureau:

I. INTRODUCTION

1. By Public Notice released September 12, 2014, and pursuant to section 1.2 of the Commission's rules, the Media Bureau sought comment on a Request for Declaratory Ruling filed by Meredith Corporation ("Meredith"), the licensee of WFSB(TV), RF channel 33, virtual channel 3, Hartford, Connecticut, and an "Alternative PSIP Proposal" filed by PMCM TV, LLC ("PMCM"), permittee of WJLP (formerly licensed station KVNV(TV), Ely, Nevada), RF channel 3, Middletown Township, New Jersey.[1] In its Request for Declaratory Ruling, Meredith objects to the assignment of virtual channel 3 to PMCM's new Middletown Township station because there is significant overlap of the noise-limited contours of WFSB(TV) and WJLP, and asks for a ruling that WJLP be assigned virtual channel 33, which is WFSB(TV)'s RF channel number. In its Alternative PSIP Proposal, PMCM proposes that WJLP be assigned the two-part virtual channel number 3.10 (with any additional program streams transmitted by the station identified as 3.11, 3.12, etc.), while WFSB(TV) would retain virtual channels 3.1 through 3.9. PMCM also requests that if its proposal is deemed inconsistent with the Commission's rules, the Bureau grant a waiver to permit WJLP to operate with virtual channel 3.10.

2. In this Order we grant Meredith's Request for Declaratory Ruling, deny PMCM's Alternative PSIP Proposal and associated waiver request, and order PMCM to operate WJLP using virtual channel 33. In addition, as discussed below, we dismiss as moot PMCM's pending "Emergency Motion for Stay of Suspension of Service and Virtual Channel Re-Assignment" (Motion for Stay) filed in connection the Video Division's 2014 Letter Orders directing that WJLP operate using virtual channel 33 on an interim basis.

II. BACKGROUND

3. *The PSIP Standard*. During the DTV transition, most full power television stations transmitted two over-the-air signals using two radio frequency (RF) channels – an analog (NTSC) channel allotted to the station's community of license in the Table of Allotments[2] and a paired digital channel on a

[1] *Media Bureau Seeks Comment on Request for Declaratory Ruling By Meredith Corporation and "Alternative PSIP Proposal" by PMCM TV, LLC for KVNV(TV), Middletown Township, New Jersey*, MB Docket No. 14-150, Public Notice, 29 FCC Rcd 10556 (Med. Bur. 2014) (*Docket PN*); 47 C.F.R. § 1.2.

[2] 47 C.F.R. § 73.606(b).

different frequency allotted to the same community in the DTV Table of Allotments.[3] In analog broadcasting, if a viewer selected to view channel 4, its television receiver knew to tune to the standardized frequency of channel 4 (the 66-72 MHz band). The situation changed, however, with the advent of digital transmissions, which allowed a station to provide, in addition to its analog service, a multiplex digital service over a different RF channel.[4]

4. During the digital transition, both the analog and the digital transmissions were viewed on the channel number assigned for analog transmissions, even though the digital transmission was broadcast on a different frequency. This was made possible through the efforts of the Advanced Television Systems Committee, Inc. (ATSC), an international, non-profit member organization that developed a voluntary Program and System Information Protocol (the "PSIP Standard" or "ATSC A/65") setting forth rules and priorities for determining a digital television station's "virtual" channel number, the channel number viewers see on their television receiver when they view a digital television station over-the-air. PSIP consists of data—entered into a small collection of computer software tables—that is transmitted within a station's digital RF signal. This PSIP data is used to tell television receivers information about the station and what is being broadcast (the program data function), and to provide a method for receivers to identify a DTV station and determine how the receiver can tune to it (the system information function).[5] PSIP enables receivers to link a station's digital RF channel with its virtual channel number regardless of the actual RF channel used for digital transmission.[6]

5. The PSIP Standard introduced a "two-part" channel number navigational concept in response to broadcasters' need, as new digital services were being offered to viewers, to retain the brand-identity they had as a result of years of marketing and advertising with respect to their analog channel.[7] When ATSC first developed the Standard, the first part of the two-part number, called the "major" channel number, was required to be the same as the station's original analog channel number,[8] and the second part of the channel number, called the "minor" channel number, identified one program service

[3] 47 C.F.R. § 73.622(b).

[4] *See ATSC Recommended Practice: Program and System Information Protocol Implementation Guidelines for Broadcasters* (Document A/69:2009, December 25, 2009) at 49 (ATSC A/69:2009), *available at* http://www.atsc.org/cms/standards/a_69-2009.pdf. Section 73.682(d) of the rules, 47 C.F.R. § 73.682(d), does not incorporate ATSC A/69:2009 by reference, but provides that "licensees may also consult" this publication.

[5] ATSC A/69:2009 at 9-10; *see also id*. at 16-20.

[6] *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television,* MM Docket No. 03-15, Report and Order, 19 FCC Rcd 18279, 18343, para. 149 (2004) (*Second Periodic Review*). A virtual channel is called "virtual" because its identification (name and number) may be defined separately from its physical (RF) location. ATSC A/69:2009 at 16. It also "is called virtual because its definition is given by indirect reference through a data structure called a virtual channel table." *Id*. at 49.

[7] ATSC A/69:2009 at 49 and 52 ("[N]early all TV channel logos in media and print advertising feature the local broadcast channel number."); *see also* Mark K. Eyer, *PSIP: Program and System Information Protocol*, McGraw-Hill, 2003 at 2 (explaining that once ATSC defined a set of possible compression formats that would permit a station to deliver a digital signal that included several channels, "[b]roadcasters realized their brand-name recognition (the channel number they have used for decades to identify their product) was in danger of being lost [and] looked to the ATSC Standard to help with the problem"); *id.* at 9 (when the PSIP Standard was developed in 1997, it was determined that the system requirements would need to support channel branding and allow a broadcaster, when starting a new digital service, to associate the new programming with the channel label that had been used to establish identity in past years of advertising). Mr. Eyer has served as the Chair of the ATSC technical group that maintains and revises the PSIP Standard. *See* Press Release, ATSC, *ATSC Honors Mark Eyer, 2007 Bernard Lechner Award Recipient* (May 20, 2007), *available at* www.atsc.org.

[8] The terms "virtual channel" and "major channel" are often used interchangeably. In addition, parties to this proceeding also used the term "PSIP channel."

within the group of services defined by the major number.[9] As explained in ATSC A/69:2009, "[t]he major channel number is used to group all channels that are to be identified as belonging to a particular broadcaster" and "[t]he minor channel number specified a particular channel within the group with each major number."[10] In an example given in ATSC A/69:2009 pertaining to the channel numbering for companion analog and digital channels, the analog service was viewed as channel 12, while the digital multiplexed program streams were viewed as channels 12.1, 12.2, 12.3, and 12.4.[11] Thus, both the analog and digital signals for the station would be identified by the channel 12 "brand" when a viewer was channel surfing or consulting a paper or electronic program guide.[12] Services that are unrelated to the analog brand could be given a different major channel number; for example, if a digital broadcaster transmitted community college lectures in its bit stream it could use a major channel number different from its own major channel for the virtual channel carrying the lectures to preserve the station's brand and avoid creating the impression that both streams were programmed by the digital broadcaster, an impression that could arise if both streams were identified by the same major channel number.[13]

6. In its 2004 *Second Periodic Review*, the Commission amended section 73.682(d) of the rules to adopt the ATSC PSIP Standard. The current version of the rule requires compliance with ATSC A/65C ("ATSC Program and System Information Protocol for Terrestrial Broadcast and Cable, Revision C With Amendment No. 1, dated May 9, 2006") when choosing a major channel.[14] The Commission explained that it was adopting the PSIP Standard into its broadcast transmission rules because a station's digital RF channel number differed from its analog channel number and PSIP allowed viewers to receive the DTV signal, even if they did not know the digital channel number, simply by tuning to the analog channel.[15] The Commission also recognized that adopting the PSIP Standard would enable stations to maintain their analog channel number brand identification even though stations would be terminating all analog service on their NTSC channel at the end of the DTV transition.[16]

7. *Assignment of Major Channel Number Values*. The mandatory requirements for

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[9] ATSC A/69:2009 at 49. As discussed below, the PSIP Standard provides additional virtual channel assignment rules that were developed during the DTV transition.

[10] *Id.* at 27; *see also id*. at 52 ("The major channel number is used to group all services associated with a broadcaster's NTSC brand . . . . The minor channel number specifies a particular channel within that group. Zero (0) [was] reserved for the NTSC channel [and] [v]ideo services are required to use the range of 1-99.").

[11] *Id.* at Figure 6.2; *see also id*. at 52 (explaining that the two-part virtual numbering scheme allows a local station with analog channel 8, known locally as "Channel 8," and digital channel 41, to label the digital services that are being broadcast on channel 41 to appear to the consumer as "part of" Channel 8); Comments of the Advanced Television Systems Committee at 6, MM Docket No. 00-168 (Apr. 21, 2003) ("The PSIP 'minor channel number' is used to identify programs and other services, which are a part of the DTV service. For example, channel 4.1 may be an HDTV program service and it may be multiplexed with an SDTV service, which is channel 4.2. The viewer can now easily 'surf' from 4.0 (NTSC) to 4.1 (HDTV) to 4.2 (SDTV).").

[12] ATSC A/69:2009 at 52.

[13] *Id.* at 27, 52-53.

[14] *Second Periodic Review*, 19 FCC Rcd at 18345-56, para. 152; *see also* 47 C.F.R. § 73.682(d) (2014). The version incorporated in the rule is *available at* http://www.atsc.org/cms/standards/a65/A_65Cr1_with_amend_1.pdf. The most current version of the ATSC protocol, dated August 7, 2013 and *available at* www.atsc.org/cms/standards/a65/A65_2013.pdf, has not yet been incorporated into the Commission's rules. The parties refer to both versions of the ATSC protocol, and because our decision here does not turn on using one version or the other, we cross-reference to both.

[15] *Second Periodic Review*, 19 FCC Rcd at 18343, para. 149 ("PSIP identifies both the DTV channel and the associated NTSC channel and enables DTV receivers to associate the two channels, thereby making it easy for viewers to tune to the DTV station even if they did not know the [DTV RF] channel number.").

[16] *Id.* at 18346-47, para. 153.

assigning the major channel number component of stations' virtual channels are set forth in "Annex B: Additional Constraints on Virtual Channel Table for the U.S. (Normative)" to ATSC A/65C (Annex B). Annex B first lists the major channel number assignment provisions and then explains in subpart 8 that "[t]he provisions listed above assign major channel number values 2 through 69 *uniquely* to broadcasters licensed to broadcast Digital ATSC signals and guarantee that the two-part channel number combinations used by a broadcaster will be different from those used by any other broadcaster with an overlapping DTV service area."[17] Section 73.682(d) and Annex B are self-effectuating, and the Commission's involvement in virtual channel assignments ordinarily is limited to situations where a station chooses a major channel number and another station objects, or a station requests a waiver of the mandatory channel assignment provisions of Annex B.

8. The vast majority of currently operating full power television stations were transmitting a licensed analog signal prior to the end of the DTV transition in June 2009, and under the PSIP Standard, their former NTSC (analog) channel number was assigned as their major channel number for pre- and post-transition digital transmission.[18] For the approximately 25 stations that did not have an NTSC license at the time they commenced digital operations,[19] the PSIP Standard required the stations to use their digital RF channel number as their major channel number.[20] If a station's RF channel changed during or at the end of the DTV transition, the major channel number stayed the same.[21]

9. *PMCM's Relocation of KVNV(TV), Ely, Nevada to Middletown Township, New Jersey*. PMCM acquired KVNV(TV), analog RF channel 3, on November 12, 2008. KVNV(TV) terminated analog operations on February 17, 2009 and was silent for several months until PMCM completed construction of the station's authorized digital channel 3 facility near Ely and filed a license to cover the construction.[22] As required by the PSIP Standard, PMCM's licensed station KVNV(TV) used its former analog channel number 3 as its major channel number for digital operations in Ely.

10. As of June 12, 2009, full power television stations were required to cease analog operations, and with minor and temporary exceptions, operate solely on the digital RF channel allotted to the station in the Post-Transition Table of DTV Allotments.[23] On June 15, 2009, PMCM filed a notification (the "Ely Notification"), pursuant to section 331(a) of the Communication's Act, that it agreed to the reallocation of channel 3 from Ely, Nevada to Middletown Township, New Jersey. That section of the Act provides that:

> It shall be the policy of the [FCC] to allocate channels for very high frequency commercial television broadcasting in a manner which ensures that not less than one such channel shall be allocated to each State, if technically feasible. In any case in which the

[17] ATSC A/65C, Annex B.1.8. The term "overlapping DTV service area" means a full power station's noise-limited contour as defined in section 73.622(e) of the Commission's rules, 47 C.F.R. § 73.622(e). ATSC A/65:2013 reflects a reorganization of Annex B and the guarantee of subpart 8 is a preamble to the mandatory assignment provisions. ATSC A.65:2013, Annex B: B.1.1.

[18] ATSC A/65C, Annex B.1.1 (ATSC A/65:2013, Annex B: B.1.1.1).

[19] These would include new stations that received a digital construction permit rather than an analog construction permit, or flash cut to digital on their analog channel, as well as any stations that ceased analog operations and transmitted a digital-only signal prior to the Commission's adoption of ATSC A/65.

[20] ATSC A/65C, Annex B.1.2 (ATSC A/65:2013, Annex B: B.1.1.2).

[21] ATSC A/65C, Annex B.1.3. The most recent version of Annex B, which was adopted by ATSC several years after the DTV transition, states that "[i]f the RF channel assigned to a licensee for digital ATSC broadcast is changed for any reason, the major_channel_ number used by that licensee shall not change." ATSC A/65:2013, Annex B: B.1.1.3.

[22] FCC File No. BLCDT-20090527AEK, granted June 12, 2009.

[23] 47 U.S.C. § 337(e)(1); 47 C.F.R. § 73.622(i).

> licensee of a very high frequency commercial television broadcast station notifies the Commission to the effect that such licensee will agree to the reallocation of its channel to a community within a State in which there is allotted no very high frequency commercial television broadcast channel at the time of such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation . . . .[24]

Because station WWOR-TV, Secaucus, New Jersey, ceased analog operations on RF channel 9 on June 12, 2009 and began digital-only operations on RF channel 38, there was no longer a commercial VHF channel allotted to a community in New Jersey. WWOR-TV did, however, in accordance with Annex B, continue to use its former analog channel number 9 as its major channel number.

11. The Media Bureau denied PMCM's Ely Notification, interpreting the statute as requiring the Commission to order the reallocation of an RF channel only where the channel could not be used simultaneously at both locations due to interference that would occur from such dual operations, which was not the case with stations operating on channel 3 in Nevada and New Jersey.[25] The Video Division also initiated rulemaking proceedings pursuant to section 331(a) to allot a commercial VHF channel to New Jersey, as well as Delaware, since such allotments became technically feasible once full power television stations ceased analog operations on certain VHF channels.[26] On PMCM's appeal, the United States Court of Appeals for the District of Columbia Circuit reversed the denial of PMCM's Ely Notification and required the Commission to approve the proposed reallocation of RF channel 3 to New Jersey.[27] The Video Division thereupon reallocated RF channel 3 from Ely to Middletown Township as ordered, and directed PMCM to file an application for a construction permit specifying channel 3 at Middletown Township.[28]

12. *PMCM's Construction and Current Operation of WJLP, Middletown Township, New Jersey.* On May 28, 2013, PMCM filed an application for a construction permit proposing to top-mount an RF channel 3 antenna on a tower atop the 4 Times Square Building in Manhattan, and operate at the maximum effective radiated power ("ERP") permitted under the rules.[29] PMCM's proposed facility's

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[24] 47 U.S.C. § 331(a).

[25] *Letter from William T. Lake, Chief, Media Bureau to PMCM TV, LLC*, 24 FCC Rcd 14588 (Med. Bur. 2009). The Commission denied PMCM's Application for Review. *Reallocation of Channel 2 from Jackson, Wyoming to Wilmington, Delaware and Channel 3 from Ely, Nevada to Middletown Township, New Jersey*, 26 FCC Rcd 13696 (2011) (*PMCM*).

[26] *Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments (Seaford, Delaware*), 24 FCC 14596 (Vid. Div. 2009); *Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments (Atlantic City, New Jersey)*, 24 FCC Rcd 14601 (Vid. Div. 2009). By the 1950s, VHF channels 2-13 had been allotted to communities in East Coast metropolitan areas and were not available for allotment in New Jersey or Delaware. *PMCM*, 26 FCC Rcd at 13697-98, para. 3. Analog channel 9 was allotted to New Jersey after WWOR-TV agreed to its reallocation from New York City to Secaucus. *Id*. at 13698-99, para. 5.

[27] *See PMCM TV, LLC v. FCC*, 701 F.3d 380 (D.C. Cir. 2012) (*PMCM TV, LLC*). The D.C. Circuit's decision in *PMCM TV, LLC* did not address or concern the appropriate virtual channel assignment for PMCM's New Jersey station. *See In re PMCM TV, LLC*, No. 14-1238 (D.C. Cir. Feb. 27, 2015) (order denying mandamus and dissolving stay) (holding that the interim assignment of virtual channel 33 to PMCM did not "violate[]" the court's "mandate in *PMCM TV, LLC*").

[28] *Reallocation of Channel 3 from Ely, Nevada to Middletown Township, New Jersey, Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broadcast Stations*, 28 FCC Rcd 2825 (Vid. Div. 2013). Because the court held that a reallocation pursuant to section 331(a) "displac[es] the normal procedure for channel reallocation as well as normal procedures for issuing licenses," the Division concluded that the notice and comment rulemaking procedures of the Administrative Procedure Act did not apply to the proceeding. *Id*. at para. 4, citing *PMCM TV, LLC*, 701 F.3d at 385.

[29] FCC File No. BPCDT-20130528AJP.

noise-limited service contour, however, overlapped with that of Meredith's station WFSB(TV), which is using virtual channel 3,[30] and Meredith filed an informal objection premised solely on grounds pertaining to PMCM's future operations using virtual channel 3.[31] Meredith asserted that, because the two stations' noise-limited contours would have significant overlap, both stations cannot operate with the same virtual channel number, and PMCM should be assigned virtual channel 33 in accordance with Annex B. PMCM filed an opposition, making a number of arguments why it should be allowed to use virtual channel 3.[32] The Video Division, however, granted PMCM's application without considering the merits of the virtual channel issue, and dismissed Meredith's informal objection as premature, stating that a station's virtual channel designation is customarily considered after grant of the license modification application in a separate proceeding that solely addresses the virtual channel designation.[33] Meredith filed a timely Petition for Reconsideration on May 22, 2014,[34] including a Request for Declaratory Ruling that PMCM's station be assigned virtual channel 33.

13. By letters dated June 6, 2014, PMCM notified Cablevision Systems Corporation ("Cablevision"), Time Warner Cable Inc. ("TWC"), and Comcast Cable Communications, LLC ("Comcast," and collectively, "the MVPDs") that KVNV(TV) (now WJLP) would commence operation in August 2014 as a new television station in the New York, New York Designated Market Area ("New York DMA"). PMCM also notified the MVPDs that it was electing mandatory carriage of the station's signal on all cable systems operated by the MVPDs in the New York DMA and requesting carriage on channel 3. The MVPDs subsequently filed letter requests that the Commission allow them to defer implementing PMCM's must-carry request and channel position election until 90 days after the date of the Bureau's final decision on the appropriate virtual channel for over-the-air broadcasting by PMCM's station. On July 25, 2014, the Media Bureau released a Letter Order waiving section 76.64(f)(4) of the Commission's rules and granting the MVPDs' request (the "Cable Deferral Proceeding").[35] PMCM filed a timely Application for Review of the Bureau's July 25 Letter Order, which remains pending.[36] The Cable Deferral Proceeding is not part of this docketed proceeding, and we give no consideration to the arguments made in filings herein regarding parties' cable carriage and channel positioning rights, since this proceeding is solely concerned with the virtual channel to be used by WJLP for over-the-air

[30] WFSB(TV)'s digital RF channel is 33, but because its NTSC RF channel number was 3, its virtual channel is 3. WJLP also has significant contour overlap with KYW-TV, digital RF channel 26, virtual channel 3, Philadelphia, Pennsylvania, licensed to CBS Broadcasting, Inc. KYW-TV's NTSC RF channel number was also 3 and it uses virtual channel 3.

[31] Meredith Informal Objection (filed Feb. 18, 2014).

[32] PMCM Opposition to Informal Objection (filed Mar. 24, 2014).

[33] *Letter to PMCM TV, LLC*, File No. BPCDT-20130528AJP (rel. Apr. 17, 2014), *available at* http://licensing.fcc.gov/cgi-bin/prod/cdbs/forms/prod/getimportletter_exh.cgi?import_letter_id=49395.

[34] In the Petition for Reconsideration portion of its May 22 filing, Meredith argued that the Division erred in dismissing Meredith's informal objection as premature and failing to determine KVNV(TV)'s virtual channel at the pre-construction stage. The matters raised on reconsideration are not part of this proceeding. *See Docket PN*, 29 FCC Rcd at 10557 n.3. Because we are granting Meredith's Request for Declaratory Ruling, by separate letter the Video Division will dismiss Meredith's Petition for Reconsideration as moot.

[35] *Letter from William T. Lake, Chief, Media Bureau, to Tara M. Corvo, Esq., et al.*, 29 FCC Rcd 9102 (Med. Bur. 2014); 47 C.F.R. § 76.64(f)(4) (requiring that a station's election of must-carry status take effect within 90 days of its election).

[36] In its Application for Review, PMCM argues, among other things, that regardless of the determination as to its right to use virtual channel 3 or 3.10 for over-the-air broadcasting, it is entitled to mandatory cable carriage on cable channel 3 by virtue of its RF channel. PMCM Application for Review (Aug. 24, 2014) at 1, 7-9. PMCM filed a Petition for Writ of Mandamus with the United States Court of Appeals for the District of Columbia Circuit in connection with its Application for Review. *In re PMCM TV, LLC*, Case No. 15-1058.

broadcasting in New Jersey.[37]

14. By letter dated September 29, 2014, PMCM, through its counsel, notified the Commission that it had completed construction of its new television facility to serve New Jersey and was commencing equipment tests as of that date.[38] PMCM's requested change of its station's call sign from KVNV(TV) to WJLP became effective on October 3. That same day, Meredith, ION Media License Company ("ION"), and CBS Broadcasting, Inc. ("CBS"),[39] made a joint filing stating that as of September 30, PMCM's station had commenced program-length commercial network ("ME-TV") programming, identifying itself as "Channel 3" and using virtual channel 3.10. By letter dated October 23, 2014, the Video Division directed WJLP to use virtual channel 33 on an interim basis pending a decision in this proceeding.[40] After PMCM failed to comply with the October 23 Letter Order, by letter dated November 7, 2014, the Video Division suspended program test authority for WJLP effective November 10, 2014, indicating that the Division would reinstate program test authority upon notification that PMCM would operate the station on an interim basis consistent with the Division's October 23 Letter Order.[41] PMCM filed an Emergency Petition for Writ of Mandamus with the United States Court of Appeals for the District of Columbia Circuit on November 10, 2014, asking the court to order the Commission to rescind or stay the effectiveness of the suspension of program test authority.[42] In order to permit orderly briefing before the court, the Division imposed a temporary stay of the suspension of program test authority, and by order dated November 25, 2014, the court extended the stay pending court review and expedited the case. By order dated February 27, 2015, the court denied the petition for writ of mandamus and dissolved its stay.[43] Accordingly, since March 16, 2015, WJLP has been operating pursuant to program test authority using virtual channel 33 on an interim basis as required by the Video Division's 2014 Letter Orders.

III. REQUEST FOR DECLARATORY RULING AND ALTERNATIVE PSIP PROPOSAL.

15. *Arguments of the Parties*. Meredith's Hartford station commenced operations on RF

[37] While some of the parties extensively briefed cable carriage issues, they acknowledge that these issues are outside the scope of this proceeding. *See* Oct. 29 Joint Reply Comments of TWC and Cablevision at 2 ("[T]he issue raised by Meredith's Declaratory Ruling petition and PMCM's Alternative PSIP Proposal is the assignment of WJLP's PSIP channel."); Oct. 29 Reply Comments of PMCM at 10 ("[I]t is beyond the scope of this proceeding to determine whether or not ION has rights to be carried on cable channel 3. This proceeding is solely concerned with what two-part PSIP channel designation is to be used by WJLP.").

[38] PMCM filed a license to cover construction on October 22, 2014. FCC File No. 0000001037.

[39] ION is the licensee of WPXN-TV, New York, New York. CBS is the licensee of KYW-TV.

[40] *Letter, Donald J. Evans, Esq*., 29 FCC Rcd 12733 (Vid. Div. 2014) ("October 23 Letter Order" and collectively, with the November 7 Letter Order, the "2014 Letter Orders").

[41] *Available at* http://licensing.fcc.gov/cgi-bin/prod/cdbs/forms/prod/getimportletter_exh.cgi?import_letter_id=54220.

[42] *PMCM TV, LLC, Petitioner, CBS Broadcasting, Inc., et al., Intervenors*, Case No. 14-1238 (D.C. Cir. 2014). On that same date, PMCM filed an Application for Review and Motion for Stay with the Commission. Briefing on the Application for Review was completed in December 2014.

[43] *See In re PMCM TV, LLC*, No. 14-1238 (D.C. Cir. Feb. 27, 2015) (order denying mandamus and dissolving stay). At the same time that the Division imposed a temporary stay of the suspension of program test authority, it also suspended the deadline for filing oppositions to PMCM's Motion for Stay. After the February 27 court order, the Division restarted the pleading cycle. PMCM filed a Consolidated Supplement on March 12, ION, Meredith, and CBS filed a Joint Opposition on March 19, and PMCM filed a Motion for Leave to File and a Reply on April 1, 2015. Although we dismiss the Motion for Stay as moot, and do not summarize the parties' arguments here, we have considered any new arguments made after the close of the comment period in this proceeding, as further discussed below.

channel 3 over 50 years prior to the end of the digital transition in 2009,[44] and in its Request for Declaratory Ruling, Meredith states that "every viewer in WFSB(TV)'s service area has continued to turn to Channel 3 to watch WFSB(TV)" since it began digital operations using RF channel 33 and virtual channel 3.[45] Meredith asserts that WFSB(TV) and KVNV(TV), which was still operating in Ely at the time Meredith filed for a Declaratory Ruling, could not both operate with virtual channel 3 when KVNV(TV) moved to New Jersey.[46] Meredith explains that if both stations were to operate with virtual channel 3.1, different television receivers would resolve the conflict differently, leading to viewer confusion; some television receivers could show both stations on channel 3.1, and if KVNV(TV) operated with multiple multicast channels, "it is possible that viewers would first need to cycle through multiple channels on Channel 3 before reaching WFSB(TV)'s programming."[47]

16. According to Meredith, when a conflict arises between a new and an incumbent station, subpart 4 of Annex B provides:

> If, after February 17, 2009, an RF channel previously allotted for NTSC in a market is assigned to a newly-licensed DTV licensee in that market, the newly-licensed DTV licensee shall use, as its major_channel_number, the number of the DTV RF channel originally assigned to the previous NTSC licensee of the assigned channel.[48]

Meredith argues that KVNV(TV) must use WFSB(TV)'s RF channel number 33 as its virtual channel as required by Annex B.1.4.[49] Meredith also notes that the assignment of virtual channel 33 to KVNV(TV) is consistent with a Video Division decision allotting RF channel 5 to Seaford, Delaware, but assigning the RF allotment virtual channel 36 because the proposed allotment had contour overlap with WTTG(TV), RF channel 36, virtual channel 5, Washington, D.C.[50]

17. In its June 4, 2014 Opposition, PMCM argues that Meredith's claim of difficulties with over-the-air reception and possible viewer confusion if both stations use virtual channel 3.1 are unsupported and that Meredith offered no evidence to refute PMCM's March 24, 2014 Opposition showing "that the reception difficulties posited by Meredith would not occur in the real world."[51] PMCM further asserts that Meredith's Declaratory Ruling requires the Commission "to ignore one portion of the PSIP standard clearly applicable here while applying another that it is equally clearly inapplicable."[52]

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[44] Television and Cable Factbook, Vol. I at A-244 (Warren Communications News 2012).

[45] Request for Declaratory Ruling at 2. In addition, although WFSB(TV)'s community of license is located in the Hartford-New Haven, Connecticut DMA, as a result of a market modification, WFSB(TV)'s local market also includes communities in Fairfield County, Connecticut, located in the New York DMA, where WJLP's community of license is located. *See Modification of the Television Market of Station WFSB*, 10 FCC Rcd 4939 (CSB 1995).

[46] Request for Declaratory Ruling at 5.

[47] *Id.* at 3.

[48] *Id.* Meredith cites to ATSC A/65:2013, Annex B: B.1.1.4, which was adopted by ATSC several years after the DTV transition. The corresponding provision in ATSC A/65C, Annex B.1.4, does not reference the February 2009 date, but states that this provision applies "after the transition."

[49] Request for Declaratory Ruling at 5-6.

[50] *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 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*).

[51] PMCM June 4 Opposition at 2. PMCM also points to the fact that WNBC, New York, New York, and WACP, Atlantic City, New Jersey, both operate on virtual channel 4 with overlapping contours with no apparent ill effects. *Id.* at 4-5.

[52] *Id*. at 2.

According to PMCM, because KVNV(TV) was then an operating station in Ely which previously had an NTSC license, it is not a new station and is not engaged in a rulemaking proceeding to assign a new channel. Instead, "as a station with an existing NTSC license at the time it commenced digital service, KVNV's major channel number is set to its prior NTSC RF channel number, Channel 3."[53]

18. PMCM further contends that Annex B.1.4 does not apply because that provision refers to newly licensed and incumbent stations assigned to "markets," and KVNV(TV) and WFSB(TV) are not located in the same Designated Market Area ("DMA"); rather, KVNV(TV) is in the New York DMA while WFSB(TV) is in the Hartford-New Haven DMA. PMCM states that, while ATSC A/65C defines "DTV Service Area" as a station's noise-limited contour, "there is no definition in ATSC A/65C which equates the term 'DTV Service Area' with the term 'market,' and it cannot be assumed that any such equivalency was intended."[54]

19. PMCM also argues that the *Seaford, Delaware* allotment decision is "inapposite." PMCM acknowledges that the decision referred to the fact that the proposed allotment and WTTG(TV), the protesting station, were in different DMAs, and also noted that there would be contour overlap between WTTG(TV) and the proposed allotment, in ruling that the prospective Seaford licensee must use WTTG(TV)'s digital RF channel as its major channel. PMCM asserts, however, that "the decision contains no discussion of the staff's thinking in this regard, nor was there any party to the proceeding whose interests would be affected by that ruling."[55] PMCM also seeks to distinguish *Seaford, Delaware* from the situation at hand by arguing that the Seaford channel was allotted through a rulemaking proceeding while channel 3 in Middletown Township was reallocated by operation of a statute enforced by a court order, and that the future licensee of the Seaford channel "clearly would be a newly-licensed DTV licensee which had not previously held an NTSC license for the allotment."[56]

20. In its June 16, 2014 Reply, Meredith reiterates that Annex B.1.4 governs because KVNV(TV) would be newly licensed to Middletown Township and it is irrelevant that it was previously licensed to Ely, Nevada.[57] Meredith asserts that PMCM's reading of the PSIP Standard not only ignores the text of the Standard but is contrary to the Commission's express reasons for incorporating the Standard in its rules – to avoid virtual channel conflicts among stations and allow broadcasters to maintain their local brand identification.[58] Meredith also asserts that, because KVNV(TV) previously operated in Ely, Nevada, more than a thousand miles away, "no potential viewer in KVNV(TV)'s new market identifies KVNV(TV) with a Channel 3 dial position," unlike WFSB(TV), where "viewers have identified WFSB(TV) as the Channel 3 station in their market for decades, and [WFSB(TV)] has branded and promoted itself as the Channel 3 station in its service area."[59] Meredith states that "[it] is understandable (although scarcely commendable) that a new entrant to the market like PMCM would like to trade on the good will that WFSB(TV) has built up over decades by confusingly positioning itself as an 'alternative' Channel 3 in the market."[60]

21. Meredith further contends that the PSIP Standard does not define its use of "market" to mean "DMA," but "uses the term 'market' functionally in addressing areas where stations have service

[53] *Id.* at 4; *see also id*. at 6.

[54] *Id.* at 7.

[55] *Id.*

[56] *Id.* at 8.

[57] Meredith Reply at 2.

[58] *Id*. at 3-4.

[59] *Id.* at 5.

[60] *Id.*

contour overlap."[61] According to Meredith, this is consistent with the approach taken in *Seaford, Delaware*, where there were overlapping DTV service contours between WTTG(TV) in the Washington, D.C. DMA and the channel 5 allotment at Seaford, in the Salisbury, Maryland DMA, and the Seaford allotment was assigned WTTG(TV)'s RF channel number as its virtual channel. Meredith also argues that the fact that KVNV(TV) was previously licensed in Nevada and moved pursuant to a court order does not mean that it is not "newly licensed" in New Jersey.[62]

22. PMCM filed a supplement on July 7, 2014, asserting that, because KVNV(TV) already operated with virtual channel 3 in Ely, altering its virtual channel would require a rulemaking proceeding and would be contrary to section 331 of the Communications Act. According to PMCM, when section 331 was enacted by Congress in 1982, a station's broadcast channel meant only one thing – its RF channel – and changing KVNV(TV)'s virtual channel would thwart the intent of Congress and the court's mandate in ordering the reallocation of channel 3 to Middletown Township.[63] PMCM also notes that in the *Incentive Auction Report and Order*,[64] when discussing the repacking of broadcast stations onto a smaller portion of the UHF band as a result of the broadcast incentive auction, the Commission did not address whether a station's virtual channel might have to be protected in repacking. According to PMCM, "[a]doption of Meredith's theory [that virtual channels must be protected from signal overlap] . . . would both seriously delay the Incentive Auction as presently envisioned and severely limit the number of channels that will be able to be freed up through the auction process."[65] Finally, PMCM submitted a map showing extensive contour overlap between WNBC, New York, New York and WACP, Atlantic City, New Jersey, and states that while both stations use virtual channel 4, there is no record of complaints from viewers, supporting PMCM's technical showing that overlapping virtual channels should not cause technical problems.[66]

23. In its July 11 opposition, Meredith argues that PMCM provides no reasonable basis for reading section 331 to dictate a station's virtual channel. While PMCM cites to the statutory language that the Commission order a channel reallocation to a state without a commercial VHF channel "notwithstanding any other provision of law," Meredith contends that the court rejected PMCM's expansive reading of that phrase, ruling that "this language simply serves to 'displace[] the normal procedures for channel reallocation as well as the normal procedures for issuing licenses.'"[67] Moreover, Meredith states that section 331's reference to "channel" means the physical, allotted channel, which was the only meaning of the term when Congress enacted that provision, and "[b]y allocating a physical VHF channel to New Jersey, the Commission has honored both the letter and purpose of the statute."[68] If that were not the case, Meredith asserts, "then the existence of WWOR(TV), Secaucus, New Jersey, operating on Virtual Channel 9, fully would have . . . removed the rationale for permitting KVNV(TV) to move from Nevada to New Jersey in the first place."[69] Meredith also points out that in the *Seaford, Delaware* decision, the Video Division relied on section 331 to allot RF channel 5 to Seaford, yet at the same time

[61] *Id.* at 7.

[62] *Id.* at 7-8.

[63] Supplement at 1-2. PMCM further states that "Section 331's requirement that the Commission reallocate the channel 'notwithstanding any other provision of law' should make clear that any countervailing considerations must yield to this mandate." *Id*. at 2.

[64] *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auction*, GN Docket No. 12-268, Report and Order, 29 FCC Rcd 6567 (2014) (*Incentive Auction R&O*).

[65] Supplement at 3-4.

[66] *Id*. at 4.

[67] Meredith Opposition to Supplement at 2, citing *PMCM TV, LLC*, 701 F.3d at 385.

[68] Meredith Opposition to Supplement at 2.

[69] *Id.* at 2-3.

relied on the PSIP Standard to assign virtual channel 36 to the allotment.[70]

24. With respect to PMCM's incentive auction argument, Meredith states that, given the interference protections built into the repacking process, it is highly unlikely that stations will move the substantial distances necessary for virtual channels to overlap.[71] Finally, Meredith asserts that the fact that some receivers could identify stations with the same virtual channel as separate stations simply amounts to an argument for discarding the PSIP Standard entirely, and that KVNV(TV), as a newcomer to the market, should not benefit from viewers' confusion of KVNV(TV)'s signal with Meredith's signal.[72]

25. PMCM filed its Alternative PSIP Proposal on August 8, 2014,[73] reiterating the arguments set forth it its June 4 and July 7 filings that Annex B calls for the assignment of KVNV(TV)'s NTSC RF channel number in Ely as WJLP's major channel number in New Jersey and that Annex B.1.4 does not apply.[74] PMCM further argues that Annex B guarantees only that the "two-part channel number combinations" be different from that used by another licensee with overlapping service area, and in order to "reconcile the apparent Annex B prohibition on overlapping identical PSIPs with application of subordinate paragraphs in Annex B that result in two overlapping stations having the same major channel," proposes that it be assigned the two-part virtual channel 3.10 (with additional program streams to be identified as 3.11, 3.12, etc.) while WFSB(TV) would retain virtual channels 3.1 through 3.9.[75] According to PMCM, "nothing in Annex B requires the consent of other common major channel users when the two part PSIP is not identical."[76] PMCM also asserts that the Commission "has **already** authorized multiple situations involving overlapping *identical* (i.e., both major channel and minor channel numbers) PSIPs for stations serving millions of households," and to PMCM's knowledge, no adverse effects have occurred.[77]

26. PMCM also contends that the Commission should not be concerned about contour overlap between WFSB(TV) and WJLP because 384,414 people within the WFSB(TV) service contour in Fairfield County are subject to interference from co-channel station WCBS(TV), New York, New York. According to PMCM, "over the air reception of WFSB in Fairfield County is virtually non-existent" and there should be no concern about overlap if there is no viewable signal.[78] PMCM further asserts that viewers within this overlap area in Fairfield County receiving a WFSB(TV) signal "would have to use a high gain antenna oriented toward Hartford – directly in the opposite direction from [WJLP] – so that

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[70] *Id*. at 4.

[71] *Id*.

[72] *Id*. at 5.

[73] PMCM first raised this proposal during a meeting with Commission staff and counsel for Meredith and the MVPDs on July 31, 2014. The staff requested that PMCM file a written proposal and serve other interested parties.

[74] Alternative PSIP Proposal at 1-3. PMCM reiterates that section 331 requires the assignment of virtual channel 3 to WJLP. *Id*. at 9-10. PMCM also argues that that assigning WJLP virtual channel 3.10 would protect its right to demand cable carriage on its over-the-air channel and that it is entitled to carriage on its RF channel pursuant to the Communications Act and the Commission's cable carriage rules and policies. *See id*. at 7-9. As discussed above, we do not consider the latter cable carriage arguments in this proceeding.

[75] *Id*. at 3. PMCM also proposed an alternative to the assignment of 3.10 – that KVNV(TV)'s major channel number be designated at 14, *id.* at 10-11, but withdrew that proposal in the separate Cable Deferral Proceeding. S*ee* PMCM Application for Review (filed Aug. 25, 2014) at n.13.

[76] Alternative PSIP Proposal at 5.

[77] *Id.* at 4, 6 (emphasis in original). PMCM submitted a number of maps showing contour overlap between stations which it claims are using the same virtual channel numbers. Attachments A through C-2.

[78] *Id*. at 6.

[WJLP's] signal would not be picked up at all."[79] Shortly after filing its Alternative PSIP Proposal, PMCM submitted additional information regarding over-the-air reception of WFSB(TV), claiming that, if there were any "[h]ypothetical would-be WFSB over-the-air viewers in [the WCBS(TV)/WFSB(TV) overlap area]," any such viewers "would necessarily be pointing [their] antenna **away from** [WJLP]," resulting in attenuation of the WJLP signal at the viewer's receive antenna and effectively blocking WJLP's signal and preventing it from notifying the receiver of WJLP's major channel PSIP number.[80]

27. After this proceeding was docketed, Meredith and CBS, the licensee of KYW-TV, Philadelphia, Pennsylvania, which also operates on virtual channel 3 and whose service area is overlapped by WJLP, filed joint comments opposing the Alternative PSIP Proposal, arguing that:

> PMCM's waiver request is entirely without precedent. PMCM cites no instance in which the Commission has ever subdivided a major channel number to assign separate chunks of the major channel to separately owned stations for concurrent use in the same area or in which the Commission has required an incumbent broadcaster to change its own virtual channel to accommodate a station newly licensed in the market.[81]

Meredith and CBS assert that "PMCM falls far short of demonstrating that its situation is 'unique' or otherwise warrants grant of a waiver of the plainly applicable PSIP Standard"[82] so as to support assignment of a subdivided PSIP and the modification of the incumbent stations' virtual channel 3, the channel on which WFSB(TV) and KYW-TV have been identified in the overlap areas for some 50 and 75 years, respectively. Moreover, they claim that grant of a waiver would not serve the public interest and is not necessary for PMCM to provide a new service to the public, since assigning WJLP virtual channel 33 is consistent with the way the Commission has treated other similarly situated stations, and allowing WJLP to use channel 3.10 would not serve to preserve any existing brand identification because WJLP, as a new entrant in the market, has none, unlike the incumbent stations.[83]

28. Meredith and CBS further assert that grant of a waiver would undermine the Commission's goals in adopting the PSIP Standard as part of its rules, for the following reasons.[84] First, WJLP's use of the same major channel number in the overlap area with incumbent stations would create viewer confusion; according to Meredith and CBS, the sequential minor channel numbers of a major channel tell the public that a single licensee has a responsibility for the programming, and PMCM's operation pursuant to program test authority using virtual channel 3.10, while also identifying itself as "Channel 3," implies to the public that WFSB(TV) or KYW-TV (depending on the overlap area in question) is programming that channel.[85] Second, PMCM's proposal undermines the policy goal of preserving brand identification that the incumbent stations have built up on their channels through long years of service, and PMCM's demonstrated plan to identify itself as "Channel 3" and not "Channel 3.10" in the overlap area further undermines and dilutes the local brand identification of WFSB(TV) and KYW-TV as "Channel 3" in the overlap areas.[86] Moreover, setting a precedent of imposing forced sharing of a major channel number simply because one party to a dispute requests it would undercut the goal of clarity and certainty of virtual channel assignments that led the Commission to adopt the PSIP Standard and would inevitably "spur future waiver requests from stations seeking to improve their lot by alternative

[79] *Id.*

[80] PMCM Aug. 13 Explanatory Supplement at 3 (emphasis in original).

[81] Meredith/CBS Oct. 14 Comments at 2.

[82] *Id*. at 2-3.

[83] *Id.* at 4-5.

[84] *Id*. at 5.

[85] *Id.* at 6.

[86] *Id*. at 6-7.

virtual channel positioning"[87] based on "whatever arguments may be most readily at hand, [which is] exactly what the adoption of the PSIP Standard was intended to avoid."[88]

29. In its comments, PMCM emphasizes that, because the Commission incorporated ATSC A/65 by reference into section 73.682(d) of the rules, the virtual channel assignment provisions are "effectively self-effectuating" and "DTV licensees are left to insert into their respective PSIPs, without any prior Commission approval, a virtual channel designation that complies with ATSC A/65."[89] PMCM reiterates that its proposal to use virtual channel 3.10 for its New Jersey station fully complies with ATSC A/65 by virtue of KVNV(TV)'s channel 3 analog operation in Ely, and argues that ATSC A/65 does not guarantee that overlapping signals with major channel numbers will not occur, but only that there will be no overlap of two-part channel number combinations. In support, it cites to subpart 5 of Annex B, which permits commonly owned stations with overlapping DTV service areas to use a common major channel number as long as the minor channel numbers are partitioned so that there is no duplication of the two-part channel number in the service areas.[90] PMCM also asserts that Meredith's concerns about viewer confusion if both stations use major channel number 3 are belied by the fact that, "[a]ccording to a study of the Commission's publicly-available databases, more than 100 situations nationwide currently exist in which non-commonly-owned-or-controlled stations with overlapping signals are using the same major channel number [and] the Commission would have been alerted to massive confusion across the country at some point over the past five years" if such confusion would have resulted.[91]

30. ION filed comments supporting Meredith's Request for Declaratory Ruling, agreeing that Annex B assigns WJLP virtual channel 33 and that this assignment is consistent with Commission precedent.[92] Turner Broadcasting System, Inc. ("Turner") also supported assigning WJLP virtual channel 33.[93] K.M. Richards, who states he is a long-standing broadcast consultant, filed comments observing that, having moved a channel 3 facility into an area where virtual channel 3 is already in use by two previous stations, PMCM's proposal for a "split" virtual channel 3 "is more likely to cause confusion rather than resolution," since for over-the-air viewers "the use of '3.10' . . . will create the false impression that KVNV's signal originates via either WFSB(TV)'s or KYW-TV's facilities, when this is clearly not the case."[94]

31. Paul S. Rotella, Esq., the President and CEO of The New Jersey Broadcasters Association (NJBA), filed comments in support of PMCM's proposal.[95] Mr. Rotella states that "I feel

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[87] *Id.* at 7.

[88] *Id*. at 7-8.

[89] PMCM Oct. 14 Comments at 1-2.

[90] *Id*. at 6-9. PMCM also reiterates that, if licenses are to be accorded an exclusive right to a particular major channel number as Meredith asserts, the Commission's repacking software for use in the upcoming incentive auction will have to be revised to do so, which could result in delay of the auction and possibly discourage broadcasters' participation in the auction. *Id*. at 15-16.

[91] *Id.* at 10-11; *see also id*. at Attachment A. Again, we do not consider PMCM's arguments regarding its cable carriage rights (*id.* at 16-19) in this proceeding.

[92] ION Oct. 14 Comments at 6-7. ION is the licensee of WPXN-TV, New York, New York, which has been carried on channel 3 on many Cablevision systems in the New York DMA by mutual agreement of the parties. *Id*. at 1-2.

[93] Turner Oct. 14 Comments at 2-3. Turner states that for many years TNT, a Turner network, has been carried on TWC systems on channel 3. *See id*. at 1-3. As with PMCM and ION, we do not consider arguments made regarding TNT's cable carriage rights in this proceeding.

[94] K.M. Richards Sept. 12 Comments at 1. Mr. Richards also asserts that the assignment of virtual channel 33 is consistent with past precedent.

[95] The three-page filing almost exclusively addresses cable carriage issues related to the separate Cable Deferral Proceeding and those arguments will not be considered here.

that PMCM's use of virtual channel 3.10 effectively and efficiently accomplishes [the requirement "that the two part channel number combinations used by a broadcaster will be different from those used by any other [broadcaster] with overlapping DTV service areas]."[96] Mr. Rotella also states that he is aware that at least four TV stations "have large overlapping PSIP numbers in the New Jersey 'market'" and that to the best of his knowledge, there have been no reports of consumer confusion or loss of service due to the overlap.[97]

32. Except for PMCM and Mr. Rotella, the parties support the plain-language interpretation of the PSIP Standard advanced by Meredith and CBS and reflected in Commission precedent that assigns virtual channel 33 to WJLP.[98] Meredith and CBS claim that, while PMCM argues that Annex B.1.4 does not apply because WJLP, WFSB(TV), and KYW-TV are not in the same DMA, there is no indication that the drafters of ATSC A/65 used "market" as a reference to the DMA market definition, and the fact that KVNV(TV) was previously licensed in Nevada does not change the fact that WJLP is "newly licensed" in New Jersey.[99] They further argue that, if the Commission interprets the PSIP Standard as providing a menu of available combinations of major and minor channel numbers from which a station may select at will, including major channel numbers that conflict with other stations with overlapping service contours so as to restrict incumbent stations from using a particular range of minor channel numbers, the Commission will continually face proceedings in which parties argue about which of the multiple channel choices would best serve the public interest and do the least harm to incumbents.[100] With respect to the PMCM list of over 100 non-commonly owned stations with overlapping contours that share a major channel number, ION points out that some are, in fact, commonly owned. ION asserts, however, that these examples do not show "selective enforcement" by the Commission because the PSIP Standard is self-executing by stations, and the Commission interprets the PSIP Standard when presented with a conflict by stations.[101]

33. In its reply, PMCM once again complains of selective enforcement in this case. It asserts that the over 100 circumstances it has identified where stations with overlapping contours are using an identical two-part virtual channel, including WACP, Atlantic City and WNBC, New York, "strongly suggests that today's television sets and the people who use them are perfectly capable of distinguishing even overlapping identical two-part PSIP channel designations without a problem."[102] PMCM firmly disputes that Annex B.1.4 applies in this case because it is not newly licensed and its station is not in the same DMA as WFSB(TV) and KYW-TV.[103] Instead, according to PMCM, Annex B.1.5 contemplates WJLP's use of major channel 3, as long as the minor channel numbers are partitioned to distinguish the stations' signals.[104] PMCM further asserts that granting Meredith's Declaratory Ruling request "would create substantial complications for the Incentive Auction process" because it "would effectively establish a protected contour for every station not only for its over-the-air channel but also for its major channel

[96] Paul S. Rotella/NJBA Oct. 13 Comments at 3.

[97] *Id.*

[98] Meredith/CBS Oct. 29 Reply at 2-3.

[99] *Id*. at 4; *see also* ION Oct. 29 Reply at 2.

[100] Meredith/CBS Oct. 29 Reply at 6.

[101] ION Oct. 29 Reply at 3-4.

[102] PMCM Oct. 29 Reply at 1-2. According to PMCM, "it appears that the concerns that prompted ATSC to impose the minor channel number partitioning requirement were essentially unfounded." *Id.* at 6.

[103] *Id*. at 3. PMCM also asserts that, if Annex B.1.4 applied, PMCM would be entitled to not only major channel 33 but also major channel 26, which is KYW-TV's RF channel, and "[w]e assume the Bureau flipped a coin in deciding to temporarily assign virtual channel 33 to WJLP . . . ." *Id*.

[104] *Id.* at 4.

numbers."[105]

34. *Discussion*. We conclude that, on the facts before us, the assignment of WJLP's virtual channel is governed by ATSC A/65C, Annex B.1.4, and that even if Annex B.1.4 did not itself directly apply to the facts of this case, Annex B.1.8 supports an equivalent result. ATSC A/65C, Annex B.1.4 provides as follows:

> If, after the transition, a previously used NSTC RF channel in a market is assigned to a newly-licensed DTV broadcaster in that market, the newly-licensed DTV broadcaster shall use, as his major_channel_number, the number of the DTV RF channel originally allocated to the previous NTSC licensee of the assigned channel.

As discussed in Annex B.1.4, after the DTV transition, digital RF channel 3, which was the previously used NTSC RF channel of WFSB(TV) and KYW-TV, was allotted to Middletown Township, New Jersey through a rulemaking proceeding.[106] PMCM was granted a construction permit for digital RF channel 3 on April 17, 2014, constructed a new facility, and filed a license to cover the new construction on October 22, 2014. The fact that PMCM had a station on RF channel 3 licensed to Ely, Nevada does not change the fact that WJLP is a newly constructed station that has applied for a license for a channel that was allocated to Middletown Township, New Jersey after the digital transition.[107] Because WFSB(TV) was previously the NTSC licensee of RF channel 3 in an overlapping service area, or "market," WJLP, as the new DTV broadcaster in that market, should use as its major channel number the DTV RF channel originally allocated to WFSB(TV), which is channel 33.[108]

35. We reject PMCM's reading of Annex B.1.4 to require that the new and incumbent stations be located in the same DMA by virtue of the reference in Annex B.1.4 to the previous use of an NTSC channel in a "market." Annex B does not define the term "market." Based on the express design

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[105] *Id*. at 9. After the Video Division issued its Nov. 7, 2014 Letter Order terminating WJLP's program test authority using virtual channel 3.10, approximately 500 viewers of WJLP filed comments between November 10 and November 25, 2014, when the court issued a stay of the Video Division's 2014 Letter Orders. None of the comments addressed the virtual channel issue, but instead stated that they wanted WJLP to remain on the air because they enjoyed its programming.

[106] *Reallocation of Channel 3 from Ely, Nevada to Middletown Township, New Jersey, Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broadcast Stations*, 28 FCC Rcd 2825 (Vid. Div. 2013); 47 C.F.R. § 73.622(i) (2014) (reflecting Middletown Township's new channel 3 allotment). PMCM is simply incorrect when it argues that the reallocation of channel 3 from Nevada to New Jersey was not the subject of a rulemaking proceeding.

[107] PMCM acknowledged that grant of its June 15, 2009 section 331 Ely Notification would require the construction of a new television station, stating that upon issuance of a reallocation order, "PMCM is prepared to move to implement the change in location as quickly as possible within the normal time frame applied to *newly authorized broadcast facilities*." Ely Notification at 3 (emphasis added). PMCM noted that, in contrast to the only other case where section 331 had been applied, "PMCM must not only establish a new studio but must also undertake the much more radical relocation and reconstruction of its entire transmitting facility, [so that] *an implementation period consistent with a new television authorization is appropriate*." *Id.* (emphasis added); *see also* June 6, 2014 Letter from PMCM to TWC attached to Oct. 29, 2014 Joint Reply of TWC/Cablevision ("Pursuant to Section 614 of the Communications Act . . ., and Section 76.64(f)(4) of the [Commission's] rules, this will inform you that Television Station KVNV, Middletown Township, New Jersey . . . *will commence operation as a new television station in the New York, New York DMA* during the week of August 4, 2014.") (emphasis added).

[108] The Bureau did not, as PMCM suggests, arbitrarily assign WFSB(TV)'s RF channel 33 for WJLP's use on an interim basis. *See supra* n. 103. KYW-TV's allotted RF channel 26 is not available for use by WJLP because it is the RF and virtual channel number of WHPX-TV, New London, Connecticut, which has contour overlap with WJLP.

of Annex B, however, we think the term is best interpreted to refer to a station's service area. Annex B.1.8 expressly provides that the various provisions of Annex B "assign major channel number values 2 through 69 uniquely to broadcasters licensed to broadcast Digital ATSC signals"[109] to ensure an orderly navigation of channels by viewers and protect brand identity within a station's service area.[110] In addition, when it adopted the PSIP Standard, which includes multiple references to broadcasters' "service areas," the Commission described the Standard as providing a uniform method of "avoid[ing] conflict with duplicative numbers in *a market*," strongly suggesting that the Commission viewed the terms "service area" and "market" as interchangeable.[111] As this case illustrates, interpreting "market" to mean DMA would mean that two stations placing a viewable broadcast signal over the same area could both use the same major channel number, contrary to the design of Annex B. If ATSC had meant the commonly used word "market" to mean the trademark-protected Designated Market Areas created by Nielsen Media Research (Nielsen), a TV audience measuring service, presumably it would have said so.[112] Moreover, DMAs reflect television viewing patterns as measured by Nielsen, not the area of a station's DTV service area as defined in Annex B and section 73.622(e) of the Commission's rules.[113] While PMCM is correct that the Commission uses DMAs as the definition of a television station's market in the application of the Commission's multiple ownership rules, "[t]he ultimate objective of [the Commission's] ownership rules are to promote diversity and to foster economic competition, while minimizing any adverse effects [that] pursuit of these goals has on the efficient organization of the industry."[114] These stated objectives of our multiple ownership rules, as well as PMCM's assertion that, as stations in separate DMAs, WJLP, WFSB(TV), and KYW-TV have a different "nexus of local competitors, local advertising opportunities, local market conditions and local programming needs,"[115] have nothing to do with the stated objectives of Annex B: to "assign major_channel_number

[109] ATSC A/65C, Annex B:1.8.

[110] ATSC A/69: 2009 at 50-51; *see also Second Periodic Review*, 19 FCC Rcd at 18346-47, para. 153 ("The major channel number also allows broadcasters to maintain their local brand identification.").

[111] *Second Periodic Review*, 19 FCC Rcd at 18346-47, para. 153 ("ATSC states that the PSIP Standard defines specific requirements for use of 'major channel numbers' to provide viewers with a uniform methodology to access DTV services and to avoid conflict with duplicative numbers *in a market*. The major channel number also allows broadcasters to maintain their local brand identification. We see no reason to modify this standard." (emphasis added)); *compare, e.g.,* ATSC A/65C, Annex B:1.8 ("The provisions listed above assign major_channel_number values 2 through 69 uniquely to broadcasters licensed to broadcast Digital ATSC signals and guarantee that the two-part channel number combinations used by a broadcaster will be different from those used by any other broadcaster with an *overlapping DTV service area*." (emphasis added; footnote omitted)).

[112] We acknowledge PMCM's argument that, if ATSC had meant "market" to mean "service area"—a defined term under the FCC's rules, *see* 47 C.F.R. § 73.622(e)—ATSC could have used that term instead. *See* PMCM Oct. 14, 2014 Comments at 7 n.7. Be that as it may, in view of the language in Annex B.1.8 providing that the various provisions of Annex B are designed in part to "guarantee that the two-part channel number combinations used by a broadcaster will be different from those used by any other broadcaster with an overlapping DTV *service area*" (emphasis added; footnote omitted), we think it reasonable to interpret "market" in the context of Annex B.1.4 to mean service area, rather than DMA.

[113] DMAs are unique, county-based geographic areas designated by Nielsen based on television viewership in the counties that make up each DMA. *See Review of the Commission's Regulations Governing Television Broadcasting*, MM Docket No. 91-221, Report and Order, 14 FCC Rcd 12903, 12924 n.75 (1999). In designating DMAs and compiling DMA-based audience ratings of television programs, Nielsen collects data from television households and assigns counties to DMAs based on viewership. Counties are assigned to a DMA if the majority or, in the absence of a majority, the preponderance, of viewing in the county is recorded for the programming of the television stations located in the DMA. *Id*. at 12926-27, para. 48. The ratings data are used by television stations in deciding which programming should be aired, and by advertisers and stations to negotiate advertising rates. *Id*.

[114] *Id.* at 12910, para. 15.

[115] Alternative PSIP Proposal at 2-3.

values . . . uniquely" and to "guarantee" that broadcasters "with . . . overlapping DTV service area[s]" also have non-overlapping two-part virtual channel numbers.[116]

36. Not only would interpreting "market" to mean a DMA frustrate the design of Annex B, which expressly states that its various provisions operate to prevent unrelated stations with overlapping service areas from using the same major channel number,[117] it would also lead to absurd results. For example, the Salt Lake City, Utah DMA is comprised of the entire state of Utah and parts of Nevada. Reading the word "market" in Annex B.1.4 to mean "Nielsen DMA" would mean that, if a new station were authorized to Elko, Nevada, which is part of the Salt Lake City DMA, the new station would not be able to use for its virtual channel the major channel number of any of the 23 full power and Class A stations licensed to other communities in the DMA, even though the distance between Elko and those stations would ensure be no contour overlap.[118] Similarly, if a new station were authorized to Bishop, California, which is part of the Los Angeles, California DMA, the new station would not be able to use a virtual channel containing the same major channel number as any of the 32 full power and Class A stations licensed to other communities in the DMA, even though there is no possibility of any contour overlap given the distance.[119]

37. For the reasons explained above, on the facts here, we conclude that Annex B.1.4 governs and dictates the assignment of virtual channel 33 to WJLP. We would reach the same conclusion, however, even without reference to Annex B.1.4. As discussed already, Annex B.1.8 makes clear that the various provisions of Annex B operate to "assign major_channel_number values . . . uniquely" to individual broadcasters.[120] Thus, Annex B.1.8 itself supports our conclusion that WJLP should use a major channel number distinct from that of any other broadcaster with an overlapping service area.

38. Our assignment of virtual channel 33 to WJLP is consistent with *Seaford, Delaware,* where the Video Division assigned virtual channel 36 to a new channel 5 allotment in the Salisbury, Maryland DMA which would have contour overlap with WTTG(TV), RF channel 36, virtual channel 5, a station in the Washington, D.C. DMA, and we find PMCM's attempts to distinguish or otherwise discredit the *Seaford* decision unavailing. PMCM argues that the Seaford channel was allotted through a rulemaking proceeding and that any prospective licensee would clearly be "newly-licensed," while already-licensed KVNV(TV) was reallocated by operation of section 331and enforced by court order. Both channel 5 at Seaford and channel 3 at Middletown Township, however, were allotted through a rulemaking proceeding pursuant to section 331 of the Communications Act. The only difference between the two proceedings is that the Bureau dispensed with notice and comment in the New Jersey proceeding and PMCM has not explained the relevance of this distinction. Moreover, operation of the new television stations at both locations required the filing of an application for a construction permit and the construction and licensing of the newly constructed facility. Thus, we see no basis for treating the two stations differently in assigning a virtual channel.

39. PMCM also argues that "the [*Seaford*] decision contains no discussion of the staff's

[116] ATSC A/65C, Annex B:1.8; ATSC A/65:2013, Annex B: B.1.1.8.

[117] *See infra* paras. 45-46 (discussion of limited exception to unique major channel assignments for commonly owned or controlled stations).

[118] Station KENV is licensed to Elko, which is located slightly over 200 miles from Salt Lake City, the community closest to Elko with licensed stations. KENV's eastern-most contour is approximately 55 miles from the Salt Lake City stations' western-most contours.

[119] Station KVME is licensed to Bishop, which is located almost 190 miles from Barstow, the community closest to Bishop with a licensed station, KILM. KVME's southern-most contour is approximately 100 miles from KILM's northern-most contour. There are 210 Nielsen DMAs, and Salt Lake City and Los Angeles are just two of a number of geographically widespread DMAs where a similar result could occur.

[120] ATSC A/65C, Annex B:1.8; ATSC A/65:2013, Annex B: B.1.1.

thinking" in assigning a virtual channel, "nor was there any party in the proceeding whose interests would be affected by that ruling."[121] The *Seaford* decision, however, expressly referenced Annex B.1.8 and the stated goal of assigning major channel numbers uniquely. In addition, the decision noted that WTTG(TV) was operating on channel 36 and using virtual channel 5, that the new channel 5 allotment would have contour overlap with WTTG(TV), and accordingly assigned the allotment WTTG(TV)'s RF channel 36 as its virtual channel—which is consistent with Annex B.1.4.[122]

40. With respect to its suggestion that *Seaford* has no precedential value because there was no "party in the proceeding whose interests would be affected" by the virtual channel assignment, WTTG(TV)'s interests were clearly affected, as indicated by its comments in the proceeding. Moreover, PMCM, which was in the midst of pursuing its Ely Notification to have channel 3 reallocated to New Jersey, was itself a party to the *Seaford* rulemaking proceeding, which was also conducted pursuant to section 331 in order to allot a commercial VHF channel to a community in a state with no such allotment. While PMCM filed reply comments in the proceeding, it did not object to WTTG's request that the allotment be assigned a virtual channel other than channel 5. Nor did PMCM file a petition for reconsideration of the virtual channel order or raise the issue in connection with a petition for reconsideration filed by another commenter in the proceeding, which PMCM opposed.[123]

41. Requiring WJLP to use virtual channel 33 is also consistent with other decisions the Bureau had made when presented with a virtual channel conflict between stations with overlapping DTV service contours. In *Associated Christian Television System, Inc.*,[124] WWSB(TV), Sarasota, Florida, was operating with virtual channel 40, and WACX(TV), Leesburg, Florida, commenced digital operations using the same virtual channel, which was its digital RF channel. The licensee of WWSB(TV) complained to the Commission "that WACX(TV)'s use of virtual channel 40 was interfering with reception of station WWSB(TV) by causing digital television receivers to lock onto station WACX(TV) incorrectly."[125] The Video Division ordered WACX(TV) to use its A/65C assigned NTSC channel number as its virtual channel, and the fact that the stations were licensed to communities in separate DMAs was not a factor for consideration.[126] Similarly, the Commission permitted station KCWT-CA, La Feria, Texas to operate with major channel 21 in lieu of its A/65C assigned major channel 30 because the station had contour overlap with a station licensed to Matamoros, Tamaulipas, Mexico on RF channel 30 that was also utilizing 30 as its major channel number. The assignment of major channel 21 to KCWT-CA was based on the Commission's own study showing that "the station's protected service contour will not overlap with the protected service contour of another station operating on major channel 21."[127]

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[121] PMCM June 4 Opposition at 7.

[122] PMCM argues that the *Seaford* decision also is not binding because "staff plainly took a contrary action in the essentially contemporaneous" Atlantic City section 331 allotment proceeding. *Id.*; s*ee also* PMCM Apr. 1, 2015 Reply at 2. Unlike Seaford, none of the commenters, including PMCM which also participated in the Atlantic City proceeding, raised an issue regarding the proposed Atlantic City allotment's appropriate virtual channel, and accordingly, no determination was made in the proceeding. *See Atlantic City, New Jersey,* Report and Order, 25 FCC Rcd 2606 (Vid. Div. 2010).

[123] *See generally Seaford, Delaware*, 28 FCC Rcd 1167. After the court ordered the Commission to reallocate channel 3 from Ely to Middletown Township, PMCM filed a petition for reconsideration challenging the initial allotment in 2010 of channel 5 at Seaford (for reasons unrelated to the virtual channel issue), and that petition was denied. *Seaford, Delaware*, 29 FCC Rcd 4769.

[124] *Associated Christian Television System, Inc.*, 25 FCC Rcd 9237 (Vid. Div. 2010).

[125] *Id.* at 9237.

[126] WWSB(TV) is located in the Tampa-St. Petersburg-Sarasota, Florida DMA, while WACX(TV) is in the Orlando-Daytona Beach-Melbourne, Florida DMA.

[127] *Available at* http://licensing.fcc.gov/cgi-bin/prod/cdbs/forms/prod/getimportletter_exh.cgi?import_letter_id=43967.

42. Finally, it is worth noting that Mr. Eyer, who served as Chair of the ATSC technical group that maintains and revises the PSIP Standard, describes the operation of Annex B.1.4 in a manner consistent with our interpretation of the use of the word "market" in that subsection:

> Let's say Broadcaster A has an existing NTSC license and obtains a license to broadcast digital TV. This broadcaster operates both analog and digital broadcasts until the nationwide transition to digital broadcasting is complete. At that time, they shut down the analog transmitter. . . [A] new broadcaster, Broadcaster B, *comes into the area* and is assigned the same RF channel as was previously used by the original broadcaster for the old analog service. What major channel number must Broadcaster B use? The rule . . . for this situation says that the new digital broadcaster must use the RF channel number of the original analog broadcaster's assigned DTV RF carrier. This works because all of the digital services operated by the original broadcaster use the original NTSC RF channel as their major channel number, leaving the DTV service's RF channel number unused *in this area*.[128]

This, of course, is the exact situation presented here. Meredith (Broadcaster A) had an existing NTSC license for channel 3 and obtained a digital license to broadcast on RF channel 33.[129] Meredith operated on both channels until June 12, 2009, when it ceased analog operations on channel 3. PMCM (Broadcaster B) was subsequently authorized to operate on digital RF channel 3 in the same area in which Meredith had operated on analog RF channel 3. As Mr. Eyer explains, the assignment of major channel 33 to PMCM works because Meredith is using major channel 3 for WFSB(TV) and thus, its RF channel number 33 is unused in the area as a major channel number.[130]

43. We disagree with PMCM that Annex B.1.1 provides for the assignment of major channel 3 to WJLP.[131] That provision states that "[f]or broadcasters with existing NTSC licenses, the major_channel_number for the existing NTSC channels, as well as the digital virtual channels . . . shall be set to the current NTSC RF channel number." Under this assignment rule, KVNV(TV) appropriately used major channel 3 for its operations at Ely. However, when PMCM applied in 2014 for a license to operate newly constructed WJLP at Middletown Township on DTV RF channel 3, it no longer had an NTSC channel number or license because all such licenses had been terminated by statute on June 12, 2009.[132] Thus, by the time PMCM filed for a license to operate WJLP on digital RF channel 3 in New Jersey, KVNV(TV)'s NTSC RF channel number in Nevada had long been rendered a nullity by the completion of the digital transition.[133]

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[128] *PSIP: Program and System Information Protocol* at 105 (emphasis added); *see also id.* at 106, Figure 5.5. Notably, Mr. Eyer does not use the words "market" or "Designated Market Area" to describe the operation of this subsection.

[129] *See* FCC File No. BLCDT-20041029AIL.

[130] While KYW-TV also qualifies as Broadcaster A in Mr. Eyer's example, KYW-TV's RF channel 26 is not available for WJLP because it is the RF and virtual channel number of WHPX-TV, New London, Connecticut, which has contour overlap with WJLP.

[131] *See supra* para. 17.

[132] *See* DTV Delay Act, Pub. L. No. 111-4, 123 Stat. 112 (2009); 47 U.S.C. § 309 note 3002(b). Because PMCM filed its Ely Notification after June 12, 2009, there was never an opportunity for it to apply for an NTSC license for a facility at Middletown Township. *See Pending Applications and Pleadings Related to Proceedings for New Analog Full-Power Television Stations for Communities in Several States*, Order, 26 FCC Rcd 14301 (Vid. Div. 2011) (Commission statutorily prohibited from granting analog authorizations after June 12, 2009 digital television transition), *subsequent history omitted*.

[133] We agree with PMCM that Annex B.1.2 does not apply in this case, but not because KVNV(TV) had an analog license at Ely. *See* PMCM Oct. 14 Comments at 7; ATSC A/65:2013, Annex B: B.1.1.2 ("For a new licensee without an existing NTSC license at the time it commenced digital service, the major channel number for the virtual

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44. We agree with the commenters opposing PMCM's Alternative PSIP Proposal that limiting incumbents WFSB(TV) and KYW-TV to the use of virtual channels 3.1 through 3.9, and permitting WJLP to use virtual channels 3.10, 3.11, and above, would be unprecedented. The Commission has never assigned the same major channel number to separately owned stations for concurrent use in the same area, nor has it ever limited a broadcaster in the number of minor channel numbers it may use.[134] Moreover, such proposed concurrent use does not comport with the mandatory major channel assignment provisions in ATSC A/65C, Annex B, which expressly states that the protocol is to "assign major_channel_number values 2 through 69 *uniquely* to licensees licensed to broadcast digital ATSC signals . . . ."[135]

45. PMCM argues that Annex B does not proscribe overlap of stations using the same major channel number because, in addition to assigning major channels "uniquely," the channel assignment provisions also "guarantee that the two-part channel number combinations" used by a broadcaster will be different from those used by any other broadcaster with an overlapping DTV service area.[136] Because Annex B also requires unique two-part (major/minor) channel numbers, PMCM argues that ATSC A/65C somehow sanctions its shared use of major channel 3 with WFSB(TV) and KYW-TV. This argument, however, erroneously relies on an exception, which is inapplicable here, to the overall assignment provisions of Annex B that ensure unique major channel numbers. This exception is set forth in Annex B.1.5, which provides that:

> If a broadcaster owns or controls broadcast licenses for two or more different RF channels having overlapping service areas, he may use a common major_channel_number for all services on all channels. He may choose the major_channel_number as determined above for any one of the RF channels. The values of the minor_channel_number fields must be partitioned to insure that there is no duplication of the two-part channel number in the DTV service area, including the overlapping service areas of other broadcasters using that same major_channel_number.

As PMCM itself acknowledges, Annex B.1.5 "addresses a narrow universe of situations,"[137] that is

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channels controlled by the licensee shall be set to the FCC-assigned RF channel number for ATSC digital TV broadcast."). Instead, that subpart applied during the transition to stations that never constructed an analog facility but instead commenced the initial service with a digital facility. *See PSIP: Program and System Information Protocol* at 104-05. Also, even assuming that Annex B.1.2 could be read to apply to PMCM, that subpart, unlike Annex B.1.4, would result in duplication of major channel numbers by stations serving the same viewers, which would contravene the design of Annex B, which expressly states that its various provisions assign broadcasters unique major channel numbers. We also agree with PMCM that Annex B.1.3 is inapplicable here because PMCM's RF channel number did not change. *Id.*; ATSC A/65:2013, Annex B: B.1.1.3 ("If the RF channel assigned to a licensee for digital ATSC broadcast is changed for any reason, the major channel number used by that licensee shall not change."). Instead, PMCM's RF channel was reallocated from Nevada to New Jersey after the DTV transition and, as discussed above, its virtual channel number for its New Jersey station is governed by Annex B.1.4 and B.1.8.

[134] WFSB(TV) and KYW-TV are presently each entitled by ATSC A/65C to operate on major channel 3 with a minor channel range from 1-99. *See supra* n.30.

[135] Annex B:1.8.

[136] *Id.* PMCM claims that Dr. Richard Chernock suggested this approach, and that a number of experts knowledgeable about the PSIP channel assignment process with whom PMCM consulted agreed that Dr. Chernock's suggested approach is consistent with ATSC A/65 and that there would be no confusion of TV receivers. Alternative PSIP Proposal at 4. PMCM, however, did not provide a declaration from any of these individuals, nor did these individuals file comments in this proceeding. Accordingly, we give these claims no weight. We also note that, according to the ATSC website, Dr. Chernock is the Chairman of ATSC Technology Group 3, and not the Chairman of ATSC as PMCM represents.

[137] *See* PMCM Oct. 14 Comments at 8, para. 16; *see also PSIP: Program and System Information Protocol* at 105 (explaining that, if commonly owned PBS stations had contour overlap, the licensee could use a common major
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triggered only where a broadcaster owns or controls stations operating on two or more different RF channels having overlapping service areas. In that case the broadcaster may use a common major channel number for those stations, as long as that channel is consistent with the mandatory assignment rules, i.e., one of the stations is entitled to use the major channel.[138] Here, PMCM does not own or control WFSB(TV) or KYW-TV, and this exception is inapplicable.[139]

46. Despite the fact that there are no commonly owned or controlled stations involved in this proceeding, PMCM argues that Annex B.1.5 "sheds important light on the determination of two-part channel numbers" here,[140] because that subsection requires that the minor channel numbers be partitioned so that there is no duplication of the two-part combination used by the commonly owned stations in their overlap area, *as well as* "the overlapping DTV service areas of other broadcasters using that same major channel number."[141] ATSC does not provide an explanation why it drafted the unique major channel exception for commonly owned stations to include a scenario where there might be overlap with non-commonly owned stations using the same major channel number. One reasonable possibility is that ATSC envisioned that allowing commonly owned stations to use the same major channel number might create duplicative use of the same major channel number by two unaffiliated stations if one of the commonly owned stations has an overlapping service area with a non-commonly owned station, i.e., there would not be any duplicative use of the same major channel by non-commonly owned stations but for the exception allowing commonly owned stations to share a major channel number. Under our technical rules, however, such overlap would rarely occur.[142] In any event, Section B.1.5 clearly does not itself

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channel number so that all the PBS stations are accessible as a group and the channel logo and advertising for the stations can feature just one major channel number). Mr. Eyer goes on to further explain that, because minor channel numbers must be assigned so that the two-part channel numbers are unique in any given service area, "[f]or broadcasters who operate more than one transmitter in one DTV service area and who choose to label the services in their digital multiplexes with common major channel numbers, the minor channel numbers must again be chosen so that no overlap occurs [i.e.], one of the multiplexes, for example, could carry channel 15.1, 15.2 and 15.3, while a second multiplex carries 15.4, 15.5 and 15.6." *Id*. at 105-06. An example of such usage is commonly owned noncommercial educational television stations WNVT, Goldvein, Virginia and WNVC, Fairfax, Virginia, which share major channel number 30, with WNVC using virtual channels 30.1 through 30.6 and WNVT using 30.7 through 30.12.

[138] As the 2013 version of Annex B makes clear, however, this is "a limited exception to the mandatory requirements of #1 through #4 above." PMCM cites to ATSC A/65:2013, Annex B: B.1.1.5. The corresponding provision in ATSC A/65C is Annex B: 1.5. While the 2013 version restructures the 2006 rule and changes certain terminology, these do not substantively change the underlying channel assignment principle.

[139] We disagree with PMCM that our interpretation of Annex B.1.5, which is consistent with the interpretation urged by Meredith, CBS, and others, indicates an abandonment of ATSC A/65 and would require a notice and comment rulemaking proceeding. PMCM Oct. 14 Comments at 15. Our interpretation indicates no such "abandonment" of the PSIP Standard incorporated into the Commission's rules since Annex B:1.5's permission for stations with overlapping service areas to share a major channel number is on its face limited to commonly owned or controlled stations. We also disagree with PMCM that, because the Commission incorporated ATSC A/65C into its rules, it lacks authority to interpret the protocol. The Commission retains its authority to interpret its rules, whether the Commission drafted the rules itself or incorporated into its rules a standard adopted by an advisory body.

[140] PMCM Oct. 14 Comments at 8.

[141] *Id.* at 8-9.

[142] Because most stations were assigned their former analog channel number as their major channel number under Annex B, and the minimum co-channel spacing requirements for analog allotments ranged from 154.4 to 219.5 miles, s*ee* 47 C.F.R. §73.610(b)(1), major channel overlap with a non-commonly owned station would not likely occur. The potential for overlap would increase if the non-commonly owned station had, at some point, modified its facility to move to a location closer to the commonly owned stations, or if more than two commonly owned stations with overlapping contours were using the same major channel number, thereby further extending the common contour. While PMCM asserts that there are over 100 station pairs with overlapping contours using the same major

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authorize the sharing of major channel number 3 by PMCM-owned station WJLP, Meredith-owned WFSB(TV), and CBS-owned KYW-TV, as it is expressly limited to situations involving commonly owned stations. The reference to "overlapping service areas of other broadcasters using that same major channel number" is incidental and does not expand the scope of this provision.

47. We also disagree that WJLP must be assigned virtual channel 3 because KVNV(TV)'s digital RF channel at Ely was reallocated to Middletown Township pursuant to section 331 of the Communications Act. Section 331, which was enacted in 1982, provides for the allocation or reallocation of a VHF channel to a community in a state that did not have a commercial VHF channel. Section 331 does not define the term "channel" or provide any other indication regarding congressional intent. Rather, the statute is silent in this regard. The express purpose of section 331 is to "ensure that not less than one [VHF commercial television broadcasting] channel shall be allocated to each State, if technically feasible."[143] That purpose was fulfilled when the Commission allocated not one, but two, VHF frequencies to New Jersey, i.e., RF channel 4 in Atlantic City and RF channel 3 in Middletown Township. At the time section 331 was enacted, digital television and the concept of virtual channels did not exist. In addition, the statute expressly refers to "very high frequency commercial television broadcast channel[s]," which are defined by the Commission's rules as the television channels on the 54-62, 66-72, 76-88, and 174-216 MHz frequency bands.[144] The court in *PMCM TV, LLC* also recognized that section 331 dealt with radio frequency spectrum when it held that PMCM's interpretation of section 331 to permit a reallocation even if interference were to occur made "little sense" in view of "the basic purpose of the Communications Act [] to ensure interference-free broadcasting . . . ." [145] Moreover, as Meredith points out, if section 331 were read to apply to virtual channels, then the reallocation of channel 3 from Nevada to New Jersey pursuant to the statute arguably would have been unnecessary because WWOR-TV in Secaucus was operating on virtual channel 9 at the time of PMCM's Ely Notification, and it continues to do so.

48. Further, requiring WJLP to use virtual channel 33 does not frustrate the purpose of section 331, which was to facilitate the allotment of a VHF channel to New Jersey given VHF channels' then substantial and well-known advantages over UHF channels.[146] At the time of enactment of section 331, the "technical disadvantages faced by UHF stations (channels 14-83) compared to VHF stations (channel 2-13)"[147] were well-known by the Commission, broadcasters, and Congress. Requiring WJLP

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channel numbers, as discussed below, the station pairs identified by PMCM include stations that are not required to comply with section 73.682(d). The actual number of stations that are required to comply with section 73.682(d) is much smaller. *See infra* paras. 57-58.

[143] 47 U.S.C. § 331(a).

[144] *See* 47 C.F.R. § 73.603(a) (frequencies for channels 2 through 13); *Improvements to UHF Television Reception*, GN Docket No. 78-391, Report and Order, 90 F.C.C. 2d 1121, 1121, para. 1 (1982) (VHF television channels are 2 through 13); *Television Assignments,* Sixth Report and Order, 41 F.C.C. 148, 153, para. 19 (1952) (Commission has allocated 12 VHF television channels, 2 through 13, in the 54-216 "megacycle" (i.e., MHz) frequency band); *see also* Newton's Telecom Dictionary 988 (24th ed. 2008) (defining VHF as "[f]requencies from 30 MHz to 300 MHz").

[145] *PMCM TV, LLC*, 701 F.3d at 384 (citing *Nat'l Broad. Co. v. FCC*, 516 F.2d 1101, 1110 (D.C. Cir. 1974)) ("Congress created the Federal Communications Commission and its predecessor, the Federal Radio Commission, because the available space on the electromagnetic spectrum was far exceeded by the number of those who would use it.").

[146] *See PMCM*, 26 FCC Rcd at 13697, para. 3.

[147] *Improvements to UHF Television Reception*, 90 F.C.C. 2d at 1121, para. 1. Some of these disadvantages included the fact the UHF stations had to broadcast at higher, more costly power levels to achieve coverage similar to VHF stations, UHF frequencies were more attenuated by natural obstacles such as terrain and foliage, and some television receivers at that time did not provide equivalent tuning and reception of UHF and VHF signals. *Id*. at n.1; *see also Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and*
(continued….)

to use virtual channel 33 in no way detracts from the technical attributes associated with the use of an RF channel in the VHF spectrum. By virtue of operating on RF channel 3 with maximum ERP at 4 Times Square, of the 22 full power television stations licensed to communities in the New York DMA, WJLP is the second largest station, with a noise-limited contour covering 34,960 square kilometers and a 2010 census population of 21,384,863.[148] The fact that WJLP operates with virtual channel 33, so that television receivers tune to that channel when displaying WJLP's programming, rather than virtual channel 3, has no impact whatsoever on the station's over-the-air audience reach as a result of broadcasting on digital RF channel 3. In this regard, we note that PMCM has offered nothing to indicate that Congress, in enacting section 331, believed that "[d]ial location among the existing 'big' stations was important."[149] Nor is there any evidence in the record, as PMCM apparently contends, that lower channel positions are inherently economically superior to higher ones. Thus, for all of the foregoing reasons, we believe it is reasonable to interpret the term "very high frequency commercial television broadcast channel" as used in section 331(a) to have the same meaning as set forth in the Commission's rules, that is, it refers to RF spectrum.

49. PMCM also argues that assigning WJLP major channel 33 violates 47 U.S.C. § 1452(g). As ION, Meredith, and CBS point out, section 1452(g)(1)(A) governs the availability of "spectrum usage rights" in connection with a broadcast spectrum incentive auction and does not concern virtual channel assignments, which have no bearing on a station's spectrum usage rights on its RF channel.[150] PMCM apparently concedes that subsection (g)(1)(A) does not apply,[151] but argues that the Joint Opposition ignores the last clause of the section, (g)(1)(B), which bars the Commission from "reassign[ing] a broadcast television station from a [VHF] channel to a [UHF] channel" unless the reassignment will not decrease the total amount of UHF spectrum available for reallocation in connection with the broadcast incentive auction or a request for such a reassignment was pending with the Commission on May 31, 2011.[152] According to PMCM, this language "makes it clear that no forced reassignment of channels, virtual or otherwise is lawful."[153] This section, however, also clearly applies to RF spectrum, rather than virtual channel assignments.[154] In connection with implementing rules for the broadcast incentive auction, the Commission specifically addressed PMCM's channel 3 spectrum usage rights. In making channel reassignments, the Commission is required to make "all reasonable efforts" to preserve coverage

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Television Broadcast Stations, GN Docket No. 83-1009, Memorandum Opinion and Order, 100 F.C.C. 2d 74, 93, para. 43 (1985) (due to physical nature of the UHF and VHF bands, actual equality between service on the two bands cannot be expected " 'because the laws of physics dictate that UHF signal strength will decrease more rapidly with distance than does VHF signal strength,' " citing *Comparability for UHF Television, Final Report*, Sept. 1980 (UHF Comparability Task Force)).

[148] The third and fourth largest stations in the market, WPIX and WCBS-TV, have coverage areas of 29,997 and 28,709 square kilometers, or approximately 85 and 82 percent of WJLP's coverage area.

[149] Consolidated Reply of PMCM TV, LLC in D.C. Cir. Case No. 14-1238 (Nov. 19, 2014) at 7.

[150] *See* Mar. 19, 2015 Joint Opposition to Motion for Stay at 6; 47 U.S.C. § 1452(g)(1)(A).

[151] *See* PMCM Apr. 1, 2015 Reply to Opposition at 2-3.

[152] *See* 47 U.S.C. § 1452(g)(1)(B)(i) and (ii); PMCM Apr. 1, 2015 Reply at 2-3. The date of May 31, 2011 refers to the Media Bureau's issuance of a freeze on channel substitution petitions. *See Freeze on the Filing of Petitions for Digital Channel Substitutions, Effective Immediately*, Public Notice, 26 FCC Rcd 7721 (Med. Bur. 2011).

[153] PMCM Apr. 1, 2015 Reply at 2.

[154] *See* 47 U.S.C. § 1401(32) (defining the term "ultra high frequency" to mean "with respect to a television channel, that the channel is located in the portion of the electromagnetic spectrum between the frequencies 470 megahertz to 698 megahertz"); *id.* § 1401(33) (defining the term "very high frequency" to mean "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"); *see also Incentive Auction R&O*, 29 FCC Rcd at 6667-70, paras. 227-31.

area and population served of television broadcast licensees as of February 22, 2012, the enactment date of the Spectrum Act.[155] Although PMCM did not have a license application on file for its channel 3 facility in New Jersey by that date, the Commission stated that it would exercise its discretion to protect PMCM's coverage area and population served based on its RF channel 3 facilities as reflected in its authorized construction permit.[156] Assigning WJLP major channel 33 does not impact the Commission's grant of discretionary protection to PMCM based on its RF channel 3 facilities.

50. PMCM is also incorrect that granting Meredith's Declaratory Ruling request would substantially complicate the broadcast incentive auction process because the Commission in making channel reassignments would have to protect two channels for each station, the RF channel number as well as the major channel number. When the Commission makes channel reassignments, it is only required to consider a station's RF channel, which is the channel used to establish a station's coverage area and population served.[157] Moreover, in making channel reassignments, the Commission will not change a station's existing location[158] and because a station's major channel does not change when a station's RF channel number changes,[159] there is no possibility of major channel contour overlap.

IV. PMCM'S WAIVER REQUEST

51. PMCM requests that, to the extent its proposal to operate WJLP using virtual channel 3.10 might be deemed inconsistent with the Commission's rules or the PSIP Standard, it be granted a waiver of the pertinent rules.[160] As discussed above, we conclude that section 73.682(d) of the rules requires the assignment of virtual channel 33 to WJLP.[161] Accordingly, a waiver would be necessary to permit the station to use virtual channel 3.10 instead.

52. It is well-settled that the party petitioning for a waiver bears a heavy burden of showing good cause: "[an] applicant [for a waiver] faces a high hurdle even at the starting gate."[162] The Commission will adhere strictly to its rules unless a party can demonstrate the "in the public interest the rule should be waived."[163] Furthermore, the Commission may waive a provision of its rules only for

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[155] Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. 112-96, 126 Stat. 156, § 6403(b)(2) (Feb. 22, 2012).

[156] *Incentive Auction R&O,* 29 FCC Rcd at 6666, paras. 221-22.

[157] *See generally id*. at § III.B. 1 & 2.

[158] *Incentive Auction Task Force Releases Information Related to Incentive Auction Repacking*, ET Docket No. 13-26, GN Docket No. 12-268, Public Notice, 28 FCC Rcd 10370, Tech. App., § 4.1 (IATF 2013).

[159] ATSC Annex B.1.3.

[160] Alternate PSIP Proposal at 11.

[161] In the *Second Periodic Review*, the Commission stated that, "[t]o the extent broadcasters have a unique situation that is not provided for in PSIP, the Commission may grant exceptions on a case-by-case basis." *Second Periodic Review*, 19 FCC Rcd at 18346, para. 153. PMCM has failed to show that its construction and operation of a new television station on a channel allotted to Middletown Township after the DTV transition presents a "situation that is not provided for" in Annex B. For example, such a situation would have been presented if WJLP only had contour overlap with KYW-TV, since KYW-TV's RF channel is not available for WJLP's use. *See supra* nn. 108 & 130. If that had been the case, Annex B.1.8 would require the assignment of a different channel number that is unique within WJLP's service area.

[162] *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

[163] *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, 18 FCC Rcd 16121, 16130, para. 26 (2003) (citing *FPC v. Texaco, Inc*., 377 U.S. 33, 39 (1964)).

"good cause shown,"[164] and grant of a waiver cannot undermine the purpose of the rule.[165] The Commission must take a "hard look" at petitions for waiver[166] and consider all relevant facts when determining if good cause exists.[167] In addition, "[t]he agency must explain why deviation better serves the public interest, and articulate the nature of the special circumstances, to prevent discriminatory application and to put future parties on notice as to its operations."[168]

53. PMCM did not present a persuasive good cause showing, and as explained below, we conclude that it has failed, by a wide measure, to meet its heavy burden of showing good cause for a waiver. As discussed above, Annex B, which is incorporated by reference into section 73.682(d), is designed to ensure that broadcasters serving the same area have a unique major channel number, which in turn ensures that broadcasters who built their brand in a service area on a particular channel can retain their brand identification even if they are no longer using the same RF channel on which they built their brand.[169] Waiving section 73.682(d) to permit WJLP to use virtual channel 3.10 in areas where WFSB(TV) and KYW-TV also use virtual channel 3 would undermine the purpose of Annex B. Moreover, in granting waivers of the PSIP Standard, the Video Division has consistently required a showing that the requesting station does not have contour overlap with any other station using the major channel requested.[170] Because other stations with overlapping contours also use major channel 3, granting a waiver here to allow WJLP to use virtual channel 3.10 would be inconsistent with our prior decisions. Below, we consider PMCM's reasons for concluding that its alternative proposal best serves the public interest.

54. First, PMCM argues that the Commission should discount contour overlap between WFSB(TV) and WJLP because, due to interference from WCBS(TV), only 384,414 people within the WFSB(TV)/WJLP overlap area in Fairfield County can see WFSB(TV).[171] PMCM admits, however, that 258,601 persons in Fairfield County alone receive interference-free service from WFSB(TV), and this number cannot be considered *de minimis*. Moreover, the WFSB(TV)/WJLP overlap area covers a much larger area than Fairfield County. According to the staff's analysis using *TVStudy* and one kilometer cell size and terrain profile spacing,[172] approximately one million (1,058,336) persons reside in the WFSB(TV)/WJLP overlap area and nearly half a million (485,348) receive interference-free service from WFSB(TV).[173] Further, PMCM does not address any aspect of its contour overlap with KYW-TV. According to a staff analysis using *TVStudy* and one kilometer cell size and terrain profile spacing, nearly three million (2,866,918) persons in the KYW-TV/WJLP overlap area receive interference-free service

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[164] 47 C.F.R. § 1.3.

[165] *WAIT Radio*, 418 F.2d at 1157.

[166] *FPC v. Texaco*, 377 U.S. at 39.

[167] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).

[168] *Northeast Cellular Telephone Company, L.P. v. FCC*, 897 F.2d 1165, 1166 (D.C. Cir. 1990).

[169] *See Second Periodic Review*, 19 FCC Rcd at 18346-47, para. 153.

[170] *See, e.g.*, KPOM-LD, Ontario, California, *available at* http://licensing.fcc.gov/cgi-bin/prod/cdbs/forms/prod/getimportletter_exh.cgi?import_letter_id=48568; KETF-CD, Laredo, Texas, *available at* http://licensing.fcc.gov/cgi-bin/prod/cdbs/forms/prod/getimportletter_exh.cgi?import_letter_id=31837 ; KCWT-CA, La Feria, Texas, *available a*t http://licensing.fcc.gov/cgi-bin/prod/cdbs/forms/prod/getimportletter_exh.cgi?import_letter_id=43967; WMYS-LP, South Bend, Indiana, *available at* http://licensing.fcc.gov/cgi-bin/prod/cdbs/forms/prod/getimportletter_exh.cgi?import_letter_id=35363.

[171] Alternative PSIP Proposal at 6; Supplement at 2-3.

[172] These were the study criteria used by PMCM. Explanatory Supplement, Engineering Statement at 1.

[173] Using a 0.5 kilometer cell size, which was used in granting WCBS(TV)'s current authorization, 505,952 persons in the WFSB(TV)/WJLP overlap area receive interference-free service from WFSB(TV).

from KYW-TV. Thus, approximately 3.25 million persons could be affected by PMCM's use of the same major channel number as WFSB(TV) and KYW-TV.

55. Second, with respect to PMCM's argument that most or all of the WFSB(TV) viewers are using a directional antenna pointed away from WJLP— which, PMCM claims, would mitigate any harm from allowing the two stations to use the same major channel number[174] — PMCM provides no evidence to document its assertion, and thus, we reject it as mere speculation. With respect to its assertion that there also is no real contour overlap because WFSB(TV) viewers are using a certain type of consumer grade antenna that will result in attenuation or blocking of WJLP's signal, carving a "notch" in the station's signal and resulting in a "de facto reduction" of WJLP's contour in the direction of WFSB(TV),[175] PMCM again has provided no evidence to document this assertion. The Commission uses the OET Bulletin 69 methodology to determine reception of DTV signals, which utilizes certain planning factors to characterize the equipment, including antenna systems, used for home reception.[176] The receiving antenna planning factor used was chosen by a working group of the FCC Advisory Committee for Advanced Television Service,[177] and PMCM gives no reason why we should alter our reliance on these planning factors in this case.

56. PMCM also asserts that, because the cable and satellite penetration rate in Fairfield County is 92 percent, the number of over-the-air viewers that would see both stations on major channel 3 is minimal.[178] As noted above, however, the WFSB(TV)/WJLP overlap area encompasses more than just Fairfield County, and PMCM does not provide similar information for these areas or any of the KYW-TV/WJLP overlap area. Because PMCM's showing is incomplete, we give no consideration to its argument that good cause exists to waive section 73.682(d) based on cable and satellite penetration rates in the overlapping service areas.[179]

57. PMCM also claims that the Commission has sanctioned over 105 situations where stations with overlapping service areas are purportedly using the same major channel number, and that, since no adverse effects have occurred, there is no need to prohibit stations with contour overlap from using the same major channel number.[180] First, as explained below, PMCM has greatly overstated the prevalence of shared major channel use by stations with overlapping contours. Second, while PMCM states that the Commission has sanctioned or allowed these stations to use the same major channel number, none of these instances were presented to the Bureau for its review and approval and, as a result, the examples PMCM cites have no value as precedent in this case, where a new station is seeking a waiver to permit it to use a major channel that is already being used in overlapping service areas over the incumbent stations' objections. If, in fact, there are multiple unadjudicated instances in which stations are using major channels that are not in compliance with the major channel assignment rules in ATSC A/65C and affected stations do not object, this does not support PMCM's use of a noncompliant major

[174] *See supra* para. 26. PMCM does not raise any reception issues by viewers in the KYW-TV/WJLP overlap area.

[175] Explanatory Supplement at 3-4, Engineering Statement at 1 and maps.

[176] OET Bulletin No. 69: Longley-Rice Methodology for Evaluating TV Coverage and Interference at 3.

[177] *Id.* at 9.

[178] PMCM does not identify the source of this information.

[179] We do not take a position on whether a low level of over-the-air viewership could constitute good cause for waiving the channel assignment provisions in Annex B. In this regard, we note that some cable and satellite subscribers own television receivers that are not connected to the MVPD service and thus view over-the-air signals on these receivers. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MM Docket No. 12-203, Fifteenth Report, 18 FCC Rcd 10496, 10570, para. 145 (2013).

[180] *See supra* paras. 29, 33.

channel.[181] And while PMCM points to this list as proof that the ATSC A/65C major channel assignment rules may be unnecessary, the protocol remains part of our rules and subject to enforcement.

58. We also note that PMCM's study, which relied primarily on data procured from a non-FCC website,[182] does not, as it argues, demonstrate widespread disregard of the PSIP Standard by stations. Based on further examination of PMCM's study, it appears there are only a handful of instances in which two stations with overlapping service areas share a major channel number, and none of these cases has been brought to the Commission for resolution. Approximately 20 percent of the paired situations identified by PMCM involve two low power television ("LPTV") stations, which are not required to comply with the PSIP Standard.[183] In many of the paired instances involving a Class A or LPTV station, when using the Class A and LPTV stations' protected contour as defined by the Commission's rules, rather than the contour used by the non-FCC website, there is no contour overlap.[184] Moreover, with respect to the paired situations involving just full power and Class A stations, while there appears to be contour overlap, in many cases intervening terrain or one or more interfering station(s) blocks the stations' signals in the overlap area. In the remaining handful of paired situations in which stations with overlapping contours may be using the same major channel, because the situation has not been brought to our attention, the stations involved may be unconcerned about harm to their brand identity vis-à-vis the other station.

59. We also conclude that granting PMCM's request to use virtual channel 3.10 would result in harm to incumbent licensees and otherwise harm the public interest. As discussed above, an important aspect of the two-part channel number navigational concept adopted in ATSC A/65 was to permit digital broadcasters to retain their existing brand identity as a result of years of marketing and advertising on their analog channels.[185] According to Meredith and CBS, WFSB(TV) has been identified and marketed as channel 3 for 50 years and KYW-TV for over 75 years.[186] Allowing WJLP to use virtual channel 3.10 in the same areas where WFSB(TV) and KYW-TV are using virtual channel 3.1, et seq., would dilute the incumbent stations' local brand identification, because the sequential minor channel numbers of a major channel number tell viewers that a single licensee has the responsibility for the programming, and WJLP's use of virtual channel 3.10 could lead viewers to believe the programming was coming from WFSB(TV) or KYW-TV.[187] Moreover, insofar as PMCM contends that its station's brand would be

[181] PMCM asserts that "the Bureau's willingness to question WJLP's virtual channel number . . . is suspiciously inconsistent with the fact that the Commission has allowed more than 100 situations which apparently violate ATSC A/65 to continue unabated" and "raises troubling questions of inappropriate selective enforcement." PMCM Oct. 14 Comments at 12 n.10. None of these situations have been brought to the Bureau's attention by the conflicting stations, however, and, when presented with conflicting virtual channels between stations, the Bureau consistently assigns unique major channel numbers to the stations. We also note that, as discussed below, PMCM's list is largely inaccurate.

[182] *See* PMCM's Oct. 14 Comments, Attachment A at 1.

[183] *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Digital Low Power Television, Television Translator, and Television Booster Stations and to Amend Rules for Digital Class A Television Stations*, MB Docket No. 03-185, Report and Order, 19 FCC Rcd 19381, 19413, para. 243. The Commission may, however, require an LPTV station to implement PSIP if its digital transmission conflicts with a Class A or full power station in order to eliminate the conflict. *Id*. and n.504.

[184] In other instances, the LPTV station is operating an analog-only facility or its license has expired.

[185] *See supra* paras. 5-6.

[186] *See supra* para. 6; Mar. 19, 2015 Joint Opposition to the Motion for Stay at 7. While ION also argues that it would be harmed if WJLP was assigned virtual channel 3.10, that harm would be based upon ION and PMCM having conflicting cable channel placement rights, a matter which is outside the scope of this proceeding. Thus, we do not take into consideration possible harm to ION in reaching our decision here.

[187] While PMCM asserts that "[n]o one has confused WJLP's 'Me-TV' programming with Meredith's or CBS's major network programming," (Mar. 12, 2015 Supplement to Emergency Motion to Stay at 4) the confusion arises

(continued….)

distinguishable from the brands of the incumbent stations because its channel would appear on viewers' screens as "3.10," not "3" or "3.1,"[188] that ignores not only the historical practice of co-branding stations with a single major channel number,[189] but also evidence that PMCM intends to brand its station as "Channel 3."[190] Furthermore, even assuming (as PMCM appears to contend) that viewers can readily distinguish among subchannels within a single major channel, allowing PMCM's station to use virtual channel 3.10 would require the incumbent stations to rebrand themselves to consumers as "Channel 3.1" instead of merely "Channel 3." Accordingly, grant of a waiver would impermissibly undermine an underlying purpose of ATSC A/65C—to assign major channel numbers uniquely to broadcasters— which allows broadcasters to retain the brand identity they developed through years of marketing and advertising on their analog channel.[191] Conversely, when WJLP commenced New Jersey operations in October 2014, it had no existing brand identification in its service area because its previous operations had been in Nevada. If there was any harm to PMCM, it was short-term, since WJLP operated with virtual channel 3.10 for less than five months, and any harm was the direct result of PMCM's decision to initiate operations on channel 3.10 while the Petition for Declaratory Ruling and its Alternative PSIP Proposal to use channel 3.10 were pending, and not to comply with the Video Division's 2014 Letter Orders that it operate using virtual channel 33 on an interim basis while this proceeding was ongoing. Moreover, as noted above,[192] PMCM has provided no evidence that virtual channel 3 is inherently superior to virtual channel 33.

60. The shared use of major channel 3 in the overlap areas could also lead to administrative burdens, both for the stations affected by the overlap and for the Commission. Because viewers could be led to believe that WFSB(TV) or KYW-TV was the source of programming on channel 3.10, there is a reasonable possibility that viewers of WJLP on channel 3.10 in the overlap area with a complaint regarding WJLP's programming, operations, or signal quality would complain to those stations or file a complaint with the Commission against WFSB(TV) or KYW-TV, wasting Commission and station resources to sort out the confusion. Moreover, as Meredith and CBS point out, if we were to allow PMCM to subvert the underlying design of ATSC A/65C to "assign major channel number values 2 through 69 uniquely to broadcasters licensed to broadcast Digital ATSC signals" by simply choosing different minor channel numbers than the station operating with the same major channel, the Commission could be presented with a large number of similar requests by stations that would prefer their signals to be associated with the brand of a more highly rated station.

V. THE VIDEO DIVISION'S 2014 LETTER ORDERS

61. As discussed above, PMCM's November 10, 2014 Application for Review and Motion for Stay of the Video Division's 2014 Letter Orders directing it to use virtual channel 33 on an interim basis are pending.[193] Because we have now reached a decision, on the merits, regarding WJLP's virtual channel assignment, the Video Division's 2014 Letter Orders are no longer in effect and accordingly, PMCM's Motion for Stay of these interim orders is moot. The Commission will separately act on the Application for Review.

(Continued from previous page)
when a viewer of WJLP believes that the programming being watched comes from Meredith or CBS, and this type of individual viewer confusion caused by multiple virtual channel 3 assignments in a viewing area is not easily quantified. *See* Mar. 19, 2015 Joint Opposition to the Motion for Stay at n.16.

[188] PMCM Mar. 12, 2015 Supplement at 4.

[189] *See supra* paras. 5-6.

[190] See s*upra* para. 28

[191] *See supra* paras. 5-6.

[192] *See supra* para. 48

[193] *See supra* para. 14.

VI. ORDERING CLAUSE

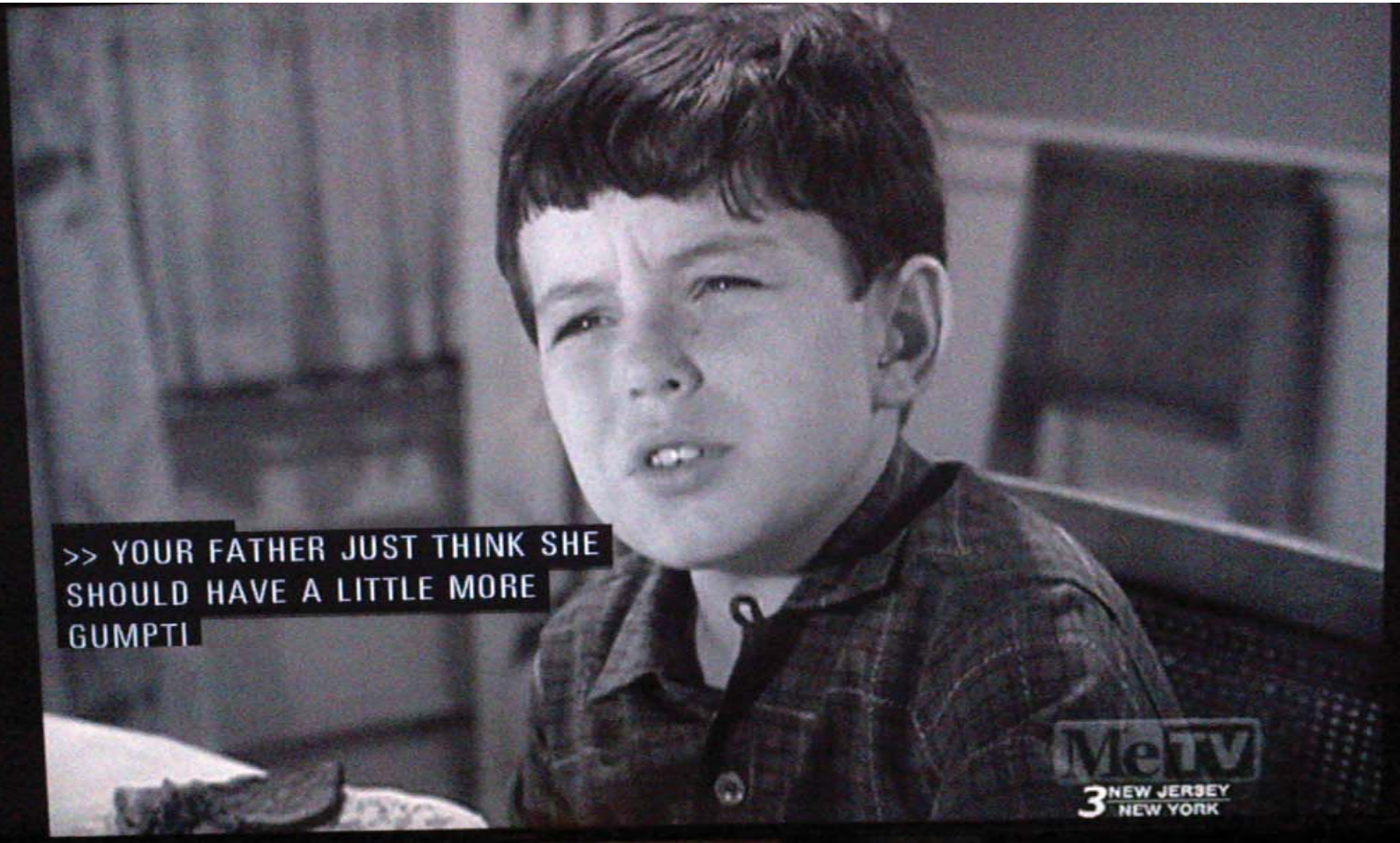
62. Accordingly, IT IS ORDERED that, pursuant to the authority contained in section 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. § 303(r), and sections 1.2 and 73.682(d) of the Commission's rules, 47 C.F.R. §§ 1.2, 73.682(d), and the authority delegated pursuant to sections 0.61 and 0.283 of the Commission's rules, 47 C.F.R. §§ 0.61, 0.283, the Request for Declaratory Ruling filed by Meredith Corporations IS GRANTED and PMCM TV, LLC must operate WJLP, Middletown Township, New Jersey using virtual channel 33. IT IS FURTHER ORDERED that the Alternative PSIP Proposal and associated request for a waiver filed by PMCM TV, LLC IS DENIED and that its Emergency Motion for Stay of Suspension of Service and Virtual Channel Reassignment IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

William T. Lake
Chief, Media Bureau

EXHIBIT B

Screen Shot of WJLP


>> YOUR FATHER JUST THINK SHE
SHOULD HAVE A LITTLE MORE
GUMPTI
MeTV
3 NEW JERSEY
NEW YORK