

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

In the Matter of)
)
PMCM TV, LLC) CSR-8918-M
) MB Docket No. 16-25
Must-Carry Complaint Regarding)
Television Station WJLP(DT),)
Middletown Township, New Jersey)

To: Marlene H. Dortch, Secretary

For transmission to: The Commission

REPLY TO OPPOSITION TO COMPLAINT

PMCM TV, LLC (“PMCM”) hereby replies to the “Opposition to Complaint” filed by RCN Telecom Services, LLC (“RCN”) in the above-captioned matter.

As a threshold matter, RCN’s Opposition should be dismissed without consideration, as it was filed more than six weeks after the deadline for such a filing set forth in the Commission’s rules. RCN has put forth no explanation of any “unusual circumstances” justifying this late filing and, as a result, the Opposition should be dismissed. Even if the Opposition is considered, however, it advances no legal or factual argument to suggest that WJLP(DT) is not entitled to carriage on Channel 3.

As set out in PMCM’s Complaint, PMCM’s right to carriage on Channel 3 – the channel on which Station WJLP(DT) broadcasts over the air – is statutory. Section 614(b)(6) of the Communications Act expressly directs that a local commercial television station is, at the station’s option, entitled to be carried on “the cable system channel number on which the ... station is broadcast over the air.” RCN does not dispute (nor could it) that the statute says what it

says, and RCN does not dispute (nor could it) that WJLP(DT) in fact broadcasts over the air on Channel 3.

That, of course, leaves RCN in a difficult position. After all, if Congress has given an express direction, neither RCN nor, more importantly, the Commission, can legitimately ignore that direction. RCN in its Opposition does not in fact even mention the statute, and instead relies on one Commission decision and two Division-level decisions purportedly applying that Commission decision. Unfortunately for RCN, however, no Bureau or even Commission decision can support actions directly contrary to a clear statutory imperative.

I. THE OPPOSITION SHOULD BE DISMISSED AS LATE-FILED

Preliminarily, RCN's response to the Complaint is late-filed and should be dismissed without consideration. Section 76.7(b) of the Commission's rules, which sets out the procedures governing the filing and processing of complaints regarding carriage, contains two separate subsections regarding the filing of responses to complaints.¹ RCN's Opposition is late-filed under either subsection. Section 76.7(b)(1) provides "interested parties" twenty days from the date of public notice to file oppositions or comments to the complaint. Section 76.7(b)(2) establishes a different deadline for the party who is the subject of the complaint, providing that "any party who is served with a complaint" must file an answer within twenty days of service of the complaint. PMCM served RCN with its Complaint on January 19, 2016, and RCN's response was thus due by no later than February 8, 2016. Even if the Opposition is considered under Section 76.7(b)(1), however, it would still have needed to be filed by February 23, based on public notice of the filing being published on February 3.

¹ Section 76.61 incorporates the requirements of Section 76.7 to complaints concerning carriage.

The Opposition, however, was not filed until April 6, 2016.² While RCN in a footnote to the Opposition requested leave to submit the Opposition after the deadline, the only reason it provided for its lateness was “administrative error.”³ As the Court of Appeals for the D.C. Circuit has reminded the Commission waiver of a filing deadline must be based on findings both that waiver would serve the public interest and that unusual circumstances sufficiently explain the late-filing.⁴ Here, failure to internally route documents to the proper personnel (or to file a signed pleading for almost a month) hardly constitutes unusual or exceptional circumstances justifying waiver of the filing deadline. As a result, the Opposition should be dismissed.

II. THE COMMUNICATIONS ACT REQUIRES CARRIAGE OF WJLP(DT) ON CHANNEL 3, THE STATION’S OVER-THE-AIR RF CHANNEL

In the absence of any legitimate basis to deny carriage on Channel 3 to WJLP(DT) as required by the statute, RCN argues that rather than reading the statute as written, the Commission should instead substitute its own judgement for that clear statutory language and require carriage only on Channel 33. RCN offers no statutory or other Congressional support for that proposition, nor does it provide any basis under which the Commission even has the authority to apply anything other than a literal reading to the statute. Instead, RCN relies on one Commission decision and a small number of Bureau decisions purportedly applying that

² Although the Opposition appears to have been dated as of March 10, it appears that it was in fact filed in ECFS on April 6, a filing date confirmed in a cover letter accompanying the copy served on PMCM.

³ RCN only explains a delay in circulating the Complaint to its proper personnel. It provides no explanation whatsoever as to why a pleading dated as of March 10 was apparently not filed until April 6.

⁴ See *NetworkIP, LLC v. FCC*, 548 F.3d 116, 127 (D.C. Cir. 2008), citing *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

Commission decision. With all due respect, the decisions on which RCN relies do not, and could not in any event, support RCN's position here.

Contrary to the explicit language of Section 614 of the Communications Act, RCN asserts that the term "channel" as used by Congress should be read to refer to the virtual channel encoded into a station's Program and System Information Protocol ("PSIP"). That, of course, is incorrect, as the statute makes clear. First, the language of Section 614(b)(6) is itself unambiguous. It refers to the channel on which the station is "broadcast over the air." A station broadcasts on one and only one channel, *i.e.*, the RF channel specified in its license by the Commission. The language which Congress chose to use is unmistakably clear on its face and not validly open to other interpretations more convenient to RCN: it refers to the channel on which the station's signal is in fact broadcast, *not* to the station's assigned PSIP channel. RCN points to nothing in the Act that might support its interpretation. By contrast, the statute elsewhere demonstrates that Congress intended the word "channel" to mean a station's over-the-air RF channel.

Section 614(b)(6) establishes the carriage rights of "local commercial television stations." As defined in Section 614(h)(1)(A), such a station is a station "***licensed and operating on a channel regularly assigned to its community by the Commission.***" (Emphasis added.) From this definition it is clear that, in the context of cable carriage, Congress understood the term "channel" to be a channel which is (a) specified in a station's license and (b) "regularly assigned to a community by the Commission." The only television channels which the Commission assigns to communities are those set out in the Digital Television Table of Allotments, Section 73.622 of the rules. Those channels are the RF channels on which stations, including WJLP(DT), are licensed to operate and do in fact operate. By contrast, the Commission does *not*

regularly assign virtual channels to stations, it does not regularly include reference to a virtual channel in stations' licenses, and it does not regularly assign virtual channels to communities.

In fact, the concept of "virtual channel" is totally absent from the licensing process: nothing in the application for a television construction permit, in the resulting construction permit, in the application for a television license or in the resulting license refers in any way to "virtual channel." Nor do the Commission's rules provide for the assignment of virtual channels by the Commission; rather, the rules merely incorporate by reference ATSC 65 and require that stations comply with the standards set out therein. See Section 73.682(d). As far as PMCM is aware, the Commission has never routinely sought to confirm what virtual channels stations may actually be specifying in their respective PSIPs, and instead has undertaken such inquiries in only a very small handful of exceptional situations.

Moreover, it must be noted that the term "channel" is used throughout the FCC's rules (as well as the Act) to refer to an objective phenomenon, *i.e.*, the frequency band on which a radio wave modulates when it is emitted from a transmitter. In the TV rules, channels are identified with specific frequency bands. Since the channel on which WJLP(DT) is required, by its FCC-issued license, to emanate radio waves from its transmitter is channel 3 (60-66 MHz), that must be the channel on which the station broadcasts "over the air." Allowing channels to be identified by some other arbitrary number divorces them from the objective and immutable physical reality of the frequency involved.

And it is beyond argument that the concept of "virtual channels" is wholly imaginary: unlike a station's RF channel, which is a matter of technical fact corresponding to the particular frequency on which the station actually transmits, "virtual channels" are simply made-up fictions not necessarily having any relationship to reality. The Media Bureau's arbitrary assignment of

virtual channel 33 to WJLP(DT) illustrates this: Channel 33 has nothing to do with anything related to WJLP(DT) or the market in which WJLP(DT) operates. Rather, the Bureau effectively plucked that number from thin air, claiming concern that WJLP(DT)'s use of virtual channel 3.10 was somehow unacceptable. Of course, the subsequent factual record demonstrates how wrong the Bureau was: while WJLP(DT)'s use of virtual channel 3.10 resulted in ZERO reported technical problems during approximately five months of operation, its use of virtual channel 33 (at the Bureau's insistence) has since resulted in scores (or more) of viewer complaints arising from technical problems apparently unforeseen by the Bureau and, regrettably, unaddressable by PMCM.

Section 1452(g)(1)(A) of the Middle Class Tax Relief and Job Creation Act, 47 U.S.C. §1452(g)(1)(A), provides further statutory support to PMCM. There Congress flatly prohibited the Commission from reassigning a television station from one channel to another until the conclusion of the Incentive Auction. Here it is beyond argument that WJLP(DT) has been assigned to, and has operated on, Channel 3 for more than a decade. But if RCN's interpretation of "channel" – *i.e.*, that "channel" for carriage purposes really should mean PSIP – were valid, then the Commission's arbitrary specification of virtual channel 33 for WJLP(DT) would constitute a reassignment of the station from one channel to another in violation of Section 1452(g)(1)(A).

PMCM directed the Commission's, and RCN's, attention to these statutory considerations in its Complaint. Not surprisingly, RCN does not mention them in its Opposition.

Instead, RCN cites the 2008 Declaratory Ruling and two rulings by a Deputy Division Chief within the Media Bureau.⁵

But the *2008 Declaratory Ruling* does not and cannot get RCN where it wants (or needs) to go. Rather, that ruling merely acknowledged that, following the digital television transition, stations might prefer to claim carriage rights on their newly-adopted virtual channels, and it provided that “any station carried pursuant to mandatory carriage *may* demand carriage on its [virtual] channel number as broadcast in the station’s PSIP.” *2008 Declaratory Ruling*, 23 FCC Rcd at 14258-59 (emphasis added). That is, the Commission merely expanded the discretionary carriage choices available to stations; it did not purport to eliminate any, including particularly the option of carriage on the channel on which the station broadcasts over the air.⁶

Nor could the Commission have done so. As demonstrated above, the Communications Act is very clear that one of the carriage choices available to stations electing mandatory carriage must be the channel on which the station is “broadcast over the air.” Unless and until Congress amends or deletes that language, the Commission is bound to comply with it. The Commission – an agency created by and subordinate to Congress – is powerless to ignore Congress’s explicit direction. And, truth be told, the Commission appears to have recognized this limitation: at no

⁵ See RCN Opposition at 2-3, citing: (1) *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, Declaratory Order, 23 FCC Rcd 14254 (2008) (the “2008 Declaratory Ruling”); (2) *KSQA, LLC v. Cox Cable Commc’ns, Inc.*, Memorandum Opinion and Order, 27 FCC Rcd 13185, 13186-87 (MB 2012); and (3) *Gray Television Licensee, LLC v. Zito Media, L.P.*, 28 FCC Rcd 10780, n. 2010 (MB 2013).

⁶ To the contrary, in its *2008 Declaratory Ruling*, the Commission seemed to underscore the fact that the “historic” statutory options remained unchanged: “[T]he channel placement options in Sections 614(b)(6) and 615(g)(5) of the Act ... remain in effect after the digital transition. ... [W]ith respect to the “historic” carriage options, these statutory options remain available to digital must-carry broadcasters....” 23 FCC Rcd at 14258-59 (footnote omitted).

point in the *2008 Declaratory Ruling* did the Commission purport to interpret, or re-interpret, the express language of Section 614(b)(6).

The two subsequent decisions of a Deputy Division Chief are even thinner reeds on which RCN might rely. If the full Commission cannot write a clear statutory provision out of existence, *a fortiori* a deputy official in a subordinate office (*i.e.*, Division) of a subordinate office (*i.e.*, Bureau) within the Commission cannot do so. The two Division rulings cited by RCN misread and misapply the *2008 Declaratory Ruling* in a manner inconsistent with, and thus prohibited by, the statute.

CONCLUSION

As demonstrated herein, PMCM has clearly established WJLP(DT)'s right to carriage on the station's over-the-air Channel 3 on RCN's systems. In its late-filed Opposition, RCN has not provided any evidence to suggest that the station is not entitled to carriage. Under the Communications Act, the station is entitled to, and has, elected to be carried on its over-the-air Channel 3, and RCN is obligated to honor this election. In view of all of the above, PMCM is plainly entitled to carriage of Station WJLP(DT) on Channel 3, *i.e.*, the channel on which the station broadcasts over the air, on all of RCN's systems in the New York, New York DMA.

Respectfully submitted,

/s/ Donald J. Evans

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April 18, 2016

CERTIFICATE OF SERVICE

I, Daniel A. Kirkpatrick, hereby certify that on this 18th day of April, 2016, I caused a copy of the foregoing “Reply to Opposition to Must Carry Complaint” to be placed in the U.S. mail, first class postage prepaid, addressed to the organizations listed on the following pages.

/s/ Daniel A. Kirkpatrick

Daniel A. Kirkpatrick

<p>RCN Telecom Services, LLC 650 College Road East Princeton, NJ 08540 Attn: Ms. Deborah A. Rankin</p>	<p>Time Warner Cable 60 Columbus Circle New York, NY 10023 Attn: Mr. Andrew Rosenberg</p>
<p>Service Electric Cable TV of New Jersey Inc., d/b/a/ Service Electric Broadband Cable 320 Sparta Avenue Sparta, NJ 07871 Attn: Robert Williams, Jr., General Counsel</p>	<p>Mobius Legal Group, PLLC P.O. Box 6104 Springfield, VA 22150 Attn: James E. Dunstan <i>Counsel to RCN</i></p>
<p>Cablevision Systems Corporation 1111 Stewart Avenue Bethpage, NY 11714 Attn: Mr. Tom Montemagno, EVP, Programming</p>	<p>Verizon, Inc. 1300 I Street, NW Washington, DC 20005</p>
<p>Comcast Cable Communications, LLC One Comcast Center Philadelphia, PA 19103 Attn: Mr. Michael Nissenblatt</p>	<p>Advanced Broadband, L.P. 4636 Street Rd., Trevose, PA 19053</p>
<p>Blue Ridge Cable Technologies, Inc. 613 Third Street P.O. Box 215 Palmerton, PA 18071</p>	<p>Charter Communications Entertainment I LLC 12405 Powerscourt Drive St. Louis, MO 63131</p>
<p>Hometown Online Inc. 47 Main Street Warwick, NJ 10990</p>	<p>Hovbilt Inc. Suite 12 Village Mall Freehold, NJ 07728</p>
<p>Service Electric Cable TV, Inc. 1045 Hamilton Street Allentown, PA 18101</p>	<p>Sky Satellite Corp. 258 Glen St. Glen Cove, NY 11542</p>
<p>DISH Network, L.L.C. 9601 S. Meridian Blvd. Englewood, CO 80112</p>	<p>DIRECTV, Inc. 2260 E. Imperial Hwy El Segundo, CA 90245</p>

<p>State of Connecticut Dept. of Energy and Environmental Protection Public Utilities Regulatory Authority Ten Franklin Square New Britain, CT 06051</p>	<p>New York State Department of Public Service Cable TV Franchise Authority 3 Empire State Plaza Albany, NY 12223 Attn: Office of the Secretary</p>
<p>New Jersey Board of Public Utilities Office of Cable Television 44 S. Clinton Avenue P.O. Box 350 Trenton, NJ 08625</p>	<p>American Broadcasting Companies Inc. 77 West 66th St., 16th floor New York, NY 10023</p>
<p>CBS Broadcasting Inc. 1800 K Street, NW, Suite 920 Washington, DC 20006</p>	<p>NBC Telemundo License LLC 300 New Jersey Ave., NW, Suite 700 Washington, DC 20001</p>
<p>Fox Television Stations Inc. 400 North Capital Street, Ste. 890 Washington, DC 20001</p>	<p>WPIX, LLC 220 East 42nd St. New York, NY 10017</p>
<p>ION Media License Co., LLC 601 Clearwater Park Rd. West Palm Beach, FL 33401</p>	<p>Trinity Broadcasting Network of New York, Inc. 111 East 15th St. New York, NY 10003</p>
<p>Univision New York, LLC 5999 Center Drive Ste. 4083 Los Angeles, CA 90045</p>	<p>CBS LITV, LLC 1800 K St., NW, Ste. 920 Washington, DC 20006</p>
<p>WRNN License Co., LLC 800 Westchester Ave., Ste. S-640 Rye Brook, NY 10573</p>	<p>Mountain Broadcasting Corp. 99 Clinton Rd. West Caldwell, NJ 07006</p>
<p>WXTV License Partnership GP 5999 Center Dr., Ste. 4083 Los Angeles, CA 90045</p>	<p>NRJ TV NY License Co., LLC 722 South Denton Tap Rd., Ste. 130 Coppell, TX 75019</p>
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