

**ORIGINAL**

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

In the Matter of )  
)  
Amendment of Section 73.622(i), ) MB Docket No. 09-230  
Post-Transition Table of DTV Allotments, ) RM-11586  
Television Broadcast Stations )  
(Seaford, Delaware) )

**FILED/ACCEPTED**

**JUN - 7 2010**

To: Office of the Secretary  
Attn: Chief, Video Division

Federal Communications Commission  
Office of the Secretary

**PETITION FOR RECONSIDERATION**

1. Broadcast Maximization Committee ("BMC") hereby submits its Petition for Reconsideration pursuant to Section 1.429 of the Commission's Rules in response to the *Report and Order* ("R&O") in the above captioned proceeding.<sup>1</sup> The R&O allotted VHF DTV Channel 5 to Seaford, Delaware instead of either Channels 2 or 3 as proposed by BMC. In its Comments, BMC reminded the Media Bureau ("Bureau") that there is a pending proceeding before the Commission to consider the use of Channels 5 and 6 for radio broadcasting in MB Docket 07-294 ("*Diversity* proceeding").<sup>2</sup> BMC also noted that no interest had been expressed for Channel 5 in Seaford prior to the issuance of the *NPRM*. Although one party did express an interest in its Comments, that party stated in its Reply Comments that it would accept Channel 3 instead.<sup>3</sup> Rather than explain why the Bureau preferred Channel 5 over either alternate channel, the

<sup>1</sup> DA 10-698, rel. April 28, 2010, 75 FR 25119 (2010). This pleading is submitted within 30 days of the publication of the R&O in the Federal Register. See Section 1.429(d) of the Commission's Rules.

<sup>2</sup> *In the Matter of Promoting Diversification of Ownership in the Broadcasting Services* (MB Docket No 07-294), *Report and Order and Third Further Notice of Proposed Rule Making*, 23 FCC Rcd 5922 (2008) ("*Diversity* proceeding").

<sup>3</sup> The interest was expressed by Nave Broadcasting, LLC ("Nave").

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Bureau reasoned that there were no obstacles to the allotment of Channel 5 at Seaford at this time.

2. In the *NPRM*, the Bureau took the unusual step of proposing the allotment of Channel 5 at Seaford, despite the fact that no party had expressed an interest in this proposal. This procedure is unprecedented and contrary to the manner in which all other allotments are proposed pursuant to Section 307(b) of the Communications Act of 1934, as amended (“Act”). Instead, the Bureau asked the public if there were any interest in the Channel 5 noting that Section 331(a) of the Act requires the allotment of at least one VHF channel in every state. The Bureau did receive one expression of interest in Channel 5 at Seaford.<sup>4</sup> However, there were four (4) parties which filed oppositions to the allotment of that particular channel.<sup>5</sup>

3. Fox opposed Channel 5 at Seaford because it would conflict with the PSIP<sup>6</sup> assignment for Station WTTG, licensed to Fox, in Washington, DC. Fox suggested that a different channel should be allotted to Seaford. The Bureau’s response was that a different PSIP channel (36) could be assigned to the Seaford channel. ABC opposed the Seaford proposal because it would prevent Station WPVI in Philadelphia and other stations in the Northeast from restoring service to its former analog viewers not yet able to receive the digital signals. The Bureau’s response was that Channel 5 at Seaford meets the Commission’s distance separation requirements. Finally, PMCM stated that, in view of the Commission’s proposal to repurpose Channel 5 in the pending *Diversity* proceeding, the allotment of Channel 5 to Seaford should be considered, if at all, in the context of the *Diversity* proceeding. In its Reply, Nave indicated that it was willing to apply for Channel 3 instead of Channel 5 at Seaford.

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<sup>4</sup> See note 3, *supra*.

<sup>5</sup> The four parties were ABC, Inc. (“ABC”), Fox Television Stations, Inc. (“Fox”), PMCM TV, LLC and BMC.

<sup>6</sup> PSIP refers to Program and System Information Protocol which is explained in note 20 of the *R&O*.

3. Thus, when the Bureau evaluated the comments and replies, it was faced with four parties opposing Channel 5 and the only party expressing an interest stating that it was willing to apply for Channel 3 instead. Under these circumstances, it is difficult to understand why the Bureau believed it was in the public interest to allot Channel 5 when Channels 2 or 3 were viable options. The only explanation that can be discerned comes from note 42 of the *R&O* where the Bureau incorrectly believed that neither Channel 2 nor 3 could be considered because they were counterproposals and could not be offered at the reply stage. Based on this incorrect assumption, the Bureau gave no consideration to the alternative channels. BMC is very surprised that the Bureau would take the position that a nonconflicting channel offered as alternative could be considered a counterproposal.<sup>7</sup>

4. A counterproposal is a proposal which is mutually exclusive or conflicts with the channel proposed in a proceeding.<sup>8</sup> Neither Channel 2 nor 3 conflicted with Channel 5 at Seaford and therefore BMC was not required to propose either of these channels at the comment deadline. When several oppositions were filed opposing Channel 5 for various technical reasons, it was entirely appropriate for BMC or anyone else to offer an alternative channel in reply comments as a means of resolving the issues raised by the opponents. There are numerous rule making cases where an alternate channel is suggested in reply comments to resolve issues raised in comments whether as a result of a counterproposal or some other technical matter. In fact, this is exactly what reply comment filings are designed to achieve. The Bureau itself can allot an alternate channel without the channel having been proposed or mentioned at an earlier stage of

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<sup>7</sup> In fact, the Bureau recognized that Channel 2 is not a conflicting channel where it stated in note 2, “[b]ecause our proposal to allot Channel 5 to Seaford is not mutually exclusive with an allotment of Channel 2 to Wilmington, Delaware, the outcome of PMCM’s appeal of the Media Bureau’s December 18, 2009 decision is not pertinent to the instant proceeding.”

<sup>8</sup> See e.g. *Pinewood, SC*, 5 FCC Rcd 7609 at para. 8 (1990); *Lafayette, LA*, 3 FCC Rcd 4614 (MM Bureau 1988).

the rule making proceeding.<sup>9</sup> As long as the community does not change and the channel is equivalent, then the alternate allotment is considered to be within the scope of the notice in the proceeding.<sup>10</sup>

5. The main reason that counterproposals are to be filed by the comment deadline is to provide notice to other interested parties so that they can participate and express their opposition or support in reply comments. However, with regard to alternate channels, these proposals are considered equivalent and within the scope of the notice. Thus there is no special need for another round of comments and it is appropriate to wait until reply comments to submit an alternate channel proposal. Here, the only party that was affected by the suggested alternate channel was Nave which had expressed an interest in Channel 5. However, not only was Nave aware of the alternate channel when it filed its reply comments but it actually expressed its interest in Channel 3 in its Reply Comments.<sup>11</sup>

6. Thus, the Bureau erred when it refused to consider Channels 2 or 3 as alternative channels to Channel 5. When viewed in that light and taking into consideration the concerns expressed by Fox and ABC as well as the interest expressed by Nave in Channel 3, the public interest is not served by the Bureau's insistence on allotting Channel 5 instead of Channels 2 or 3. This is especially true when the pending proposal in the *Diversity* proceeding to use Channels 5 and 6 for FM broadcasting is taken into account. Accordingly, BMC urges the Commission to reconsider its decision to allot Channel 5.

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<sup>9</sup> See e.g. *Santa Maria, CA*, 7 FCC Rcd 7608 (1992); *Grand Junction, CO*, 3 FCC Rcd 2071 (1988);

<sup>10</sup> *Medford and Grants Pass, Oregon*, 45 RR 2d 359 (Broadcast Bureau 1979); *Pensacola, Florida*, 62 RR 2d 535 (MM Bur. 1987). See also *Owensboro On the Air v. United States*, 262 F.2d 702 (D.C. Cir. 1958).

<sup>11</sup> See Nave Reply Comments at p.1.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

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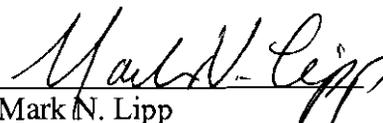
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