

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)
)
Western Pacific Broadcast, LLC,)
Amendment of Section 73.622(i))
Digital Television Table of Allotments)
(Seaford, Delaware and Dover, Delaware))

MB Docket No. 13-40
RM-11691

FILED/ACCEPTED

APR - 3 2013

To: The Commission

Federal Communications Commission
Office of the Secretary

**COMMENTS IN OPPOSITION TO
NOTICE OF PROPOSED RULEMAKING**

PMCM TV, LLC ("PMCM"), by its attorneys and pursuant to Sections 1.415, 1.419 and 1.420 of the Commission's rules, hereby submits these Comments in opposition to the above-captioned Notice of Proposed Rulemaking ("NPRM").¹

The NPRM requests comments regarding the October 9, 2012 petition for rulemaking (the "Dover Petition") filed by Western Pacific Broadcast, LLC ("WPB") requesting a waiver of the Commission's freeze on the filing of petitions for rulemaking by television stations seeking to change their communities of license (the "Community Change Freeze"), and proposing to:

(i) amend the DTV Table of Allotments to delete Channel 5 at Seaford, Delaware and substitute Channel 5 at Dover, Delaware; and (ii) modify the construction permit for television broadcast station WMDE (FCC File No. BNPCT-20110330AAY) to specify Dover as the station's

¹ *Western Pacific Broadcast, LLC, Amendment of Section 73.622(i), Digital Television Table of Allotments (Seaford, Delaware and Dover, Delaware), Notice of Proposed Rulemaking, DA 13-160 (rel. Feb. 13, 2013) (MB). Federal Register publication of the NPRM occurred on March 4, 2013. These comments are therefore timely filed.*

community of license. For the reasons set forth herein, WPB's waiver request should be denied, and its reallocation proposal refused.

I. The Commission Should Not Act On The Dover Petition Until The Status Of The Seaford Allocation Is Resolved.

The Dover Petition is clearly not ripe for action. That is because the validity of the 2010 allocation the Commission made, on its own motion, of Channel 5 to Seaford, Delaware (the "Seaford Allocation") is unsettled. On March 15, 2013, PMCM filed a Petition for Reconsideration ("Reconsideration Petition") establishing that the Seaford Allocation was improper and should be set aside.² WPB's current proposal to reallocate Channel 5 to Dover merely compounds the initial error of the Seaford Allocation and, if approved, would constitute another ill-advised chapter in this ongoing southern Delaware saga.

In allocating Channel 5 to Seaford, the Media Bureau relied exclusively on Section 331(a) of the Communications Act.³ That provision was intended to apply *solely* in instances where no VHF service exists in a particular state – that is, where there is a statewide "VHF void." But, as the Reconsideration Petition makes clear, at the time the Bureau released its Notice of Proposed Rulemaking for the Seaford Allocation, there was no such "VHF void" in Delaware.⁴ More than six months *earlier*, PMCM had notified the Commission, also pursuant to Section 331(a), that it agreed to the reallocation of its full power Channel 2 VHF commercial television station from Jackson, Wyoming to Wilmington, Delaware.⁵ This reallocation was perfected when the U.S. Court of Appeals for the District of Columbia Circuit ordered the

² A copy of the Reconsideration Petition comprises Exhibit A hereto.

³ See Reconsideration Petition at 4.

⁴ See *id.*

⁵ See *id.* at 4-5.

Commission to reallocate PMCM's Channel 2 facility to Wilmington pursuant to PMCM's June 15, 2009 notification.⁶ Thus, Channel 2 had filled the "VHF void" before the Bureau proposed the Seaford Allocation, thereby vitiating the Commission's professed basis for proposing the allocation of Channel 5 to Seaford.

Although nothing in Section 331(a) precludes allocation of a second VHF channel to a community in Delaware, including Seaford, the salient point is that *nothing in Section 331(a) provided a basis for a second television allotment in Delaware*. As the D.C. Circuit stated, "section 331(a) fulfills congressional intent: it ensures that every State will have a VHF station."⁷ But once the "VHF void" has been removed, Section 331(a) does *not* provide a basis for additional allocations in a state, and does *not* supersede normal allotment procedures. Rather, additional television channels are allocated pursuant to well-established procedural mechanisms: namely, a proponent advances a request to provide service to a particular community and pledges to construct the proposed facility while carrying out local service responsibilities. Such a proposed allotment is then assessed under a conventional Section 307(b) analysis. Nothing of this sort occurred for the Seaford Allotment. Instead, the Bureau undertook an allocation on its own motion, incorrectly premised on the mandate of Section 331(a). Indeed, PMCM is aware of no other instance where the Commission, and not a proponent, was the moving party in a television allotment proceeding.

⁶ *PMCM TV, LLC v. Federal Communications Commission*, 701 F.3d 380 (D.C. Cir. 2012) ("*PMCM v. FCC*"). The Commission has reallocated Channel 2 to Wilmington. See *Reallocation of Channel 2 from Jackson, Wyoming to Wilmington, Delaware, Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broadcast Stations*, DA 13-450 (rel. Mar. 18, 2013) (MB).

⁷ *PMCM v. FCC* at 385.

These infirmities have been brought to the Commission's attention in the Reconsideration Petition, and must be resolved prior to action being taken on the Dover Petition.

II. Waiver Of The Community Change Freeze In This Proceeding Is Unwarranted And Would Be Unsound As A Matter Of Public Policy.

Because the Community Change Freeze applies to WPB's reallocation request,⁸ WPB seeks a waiver thereof. Grant of that request, however, would be entirely inconsistent with the purposes underlying the Community Change Freeze and imprudently risk collateral damage to the public interest. The Commission should reject the waiver request accordingly.

The Community Change Freeze is an integral part of the Commission's mammoth, unprecedented spectrum reallocation plan that involves the potential repurposing of some 120 megahertz of broadcast television spectrum and the repacking of full-power television channels across the country. As the Commission expressly noted, the freeze is necessary "[t]o permit the Commission to evaluate its reallocation and repacking proposals and their impact on the Post-Transition Table of DTV Allotments."⁹ In other words, the freeze is intended to firm up the status quo and limit unintended consequences, allowing the Commission a free hand to undertake the complex process of organizing and executing a first-ever "reverse" spectrum auction and attendant channel repacking.

The NPRM asserts that because WPB's waiver request will not require a move of WMDE(TV)'s transmitter site or a change in the station's channel assignment, the request "will not undermine the purpose of the freeze."¹⁰ But the "purpose of the freeze" demands analysis

⁸ NPRM at ¶ 2.

⁹ *Freeze on the Filing of Petitions for Digital Channel Substitutions*, Public Notice, 26 FCC Rcd 7711 (MB 2011).

¹⁰ NPRM at ¶ 3.

beyond whether current transmission facilities will change – the freeze was put in place to allow the Commission to conduct an effective incentive auction, informed by broad public interest considerations. In that regard, WPB’s waiver request must be viewed in the incentive auction’s *overall* context. As explained below, grant of the waiver could easily result in the removal of *all* local television transmission service from Seaford, Delaware, an outcome contrary to the public interest and one that the Community Change Freeze is designed to circumvent.

Seaford is served by just a single television transmission service currently on air: WDPB(TV), Channel 44, licensed to WHY Y, Inc. WDPB operates as a non-commercial, full-time satellite station retransmitting the signal of WHY Y-TV, Wilmington, Delaware. WHY Y-TV is the PBS affiliate for the Philadelphia, Pennsylvania television market. These facts – that WDPB is located along the congested, spectrum-hungry eastern seaboard where it occupies a “prime” location in the upper end of the UHF band, providing “satellite” retransmission of a non-commercial educational “parent” whose primary focus is a much larger market – makes WDPB an obvious target for FCC spectrum reclamation and a frontline candidate for participation in any upcoming “reverse” spectrum auction.¹¹ Assuming the WDPB licensee makes this realistic scenario an actuality and participates in the auction, one of the essential predicates of the Dover Petition would disappear. Channel 5 would become Seaford’s sole local transmission service,

¹¹ See Deborah D. McAdams, *FCC Envoy Urges Public Stations to Participate in Auction*, TVTECHNOLOGY, Feb. 26, 2013, available at <http://www.tvtechnology.com/article/fcc-envoy-urges-public-stations-to-participate-in-auction/217972>. In his address, Media Bureau Chief William Lake, citing lean financial times for noncommercial stations and the opportunity presented by the incentive auction for such stations to eliminate programming redundancy stated: “Contributions of spectrum to the auction can bring a major capital infusion for cash strapped public entities.” *Id.* PMCM notes that while WDPB is merely a “satellite” station of a PBS-affiliated parent in a much larger DMA, the Salisbury DMA is home to another noncommercial, PBS-affiliated station – WCPB, Salisbury, Maryland.

not subject to removal to Dover.¹² WPB's contention that "Seaford would remain well-served after reallocation [of WMDE] because full-power noncommercial television station WDPB(TV), Channel 44, would remain licensed to that community"¹³ is therefore premature.

The issue of whether Seaford will "remain well-served" is dependent on the outcome of the impending incentive auction. Allowing all such "digital dust" to settle, post-auction, was the very purpose of the Community Change Freeze. In other words, the incentive auction fate of Seaford's Channel 44 is the very type of uncertainty that motivated the Bureau to institute the freeze. With benefit of the freeze, the Commission may "evaluate its reallocation and repacking proposals" in light of all the complex factors put in motion by the first-of-its-kind incentive auction.¹⁴ At a minimum, the Commission must keep the Dover Petition "on ice" until the Commission knows if the 6 MHz of spectrum currently used as Channel 44 at Seaford will survive the incentive auction as a television allotment.

The Commission has prudently put the Community Change Freeze in place. Now, it must let that freeze serve its intended purpose by resisting approval of a proposed change that, in context, clearly threatens to leave Seaford, post-auction, bereft of local service.

¹² See NPRM at ¶ 4, making clear that a proposed community of license change must "not deprive a community of its sole broadcast station."

¹³ *Id.* at ¶ 5.

¹⁴ The uniqueness and complexities of the incentive auction and the attendant Community Change Freeze render inapposite any attempt to analogize this freeze to prior digital allotment freezes. The Dover Petition unsuccessfully attempts one such analogy, but the cited FCC digital allotment exercise (dating to 1997) did not have to account for components like the first-time "reverse" auction now in play. See Petition for Rulemaking of Western Pacific Broadcast, LLC, MB Docket No. 13-40 (Oct. 9, 2012) at 4 n.12.

III. The Public Interest Factors That Supported The Commission's Preference For Seaford In 2010 Remain In Place.

Even assuming, *arguendo*, that the Seaford Allotment was somehow proper (a contention PMCM disputes), and that the Commission determines that it should entertain WPB's request to waive the Community Change Freeze (which PMCM has shown it should not), the Dover Petition should still be rejected.

Though it fell well short of what is required under a traditional 307(b) analysis in allocating Channel 5 to Seaford, the Commission in 2010 did enunciate *some* basis for selecting Seaford over other Delaware communities as a community of license. The Commission noted that Seaford is located in southern Delaware, in the smaller Salisbury, Maryland DMA (market #144), where it receives only four full-power television signals. By contrast, communities located in central and northern Delaware, which are part of the Philadelphia DMA (market #4), are much better served. Wilmington, for example, receives service from 14 full-power television stations.¹⁵ Primarily for these reasons, despite a direct request from then Delaware Senator Ted Kaufman that the station be assigned so that it would "reach the greatest number of Delawareans, including those residing in the Wilmington area,"¹⁶ the Commission concluded that "*the allotment of a new channel in southern Delaware, rather than northern Delaware, results in a more equitable distribution of television channels.*"¹⁷

WPB now seeks to change the community of license of the allocation from Seaford to Dover, which, like Wilmington and other communities in the more populous central and northern

¹⁵ See Exhibit B hereto for a comparison of actual television service currently provided in the Salisbury and Philadelphia DMAs. As noted therein, the Salisbury DMA does not currently have an over-the-air NBC affiliate.

¹⁶ *Seaford, Delaware*, Report and Order, 25 FCC Rcd 4466, 4467 (MB 2010) ("*Seaford R&O*").

¹⁷ *Id.* at 4471 (emphasis added).

parts of Delaware, is located in the Philadelphia DMA. Other than Dover's larger population, the NPRM cites no reason for revisiting, much less changing, its 2010 decision to allot a new channel to Seaford, in southern Delaware. To the contrary, the same basic allocation considerations apply. Service in Sussex County in southern Delaware, as compared with central and northern Delaware, is no more robust in 2013 than it was in 2010. Furthermore, as the Commission is aware, a change in a station's community of license necessarily results in a change in the focus of the station's local public service programming. As a result, the Bureau's aspirations for a station targeting the needs of underserved areas of southern Delaware, consistent with the reasoning enunciated in the *Seaford R&O*, will be frustrated even before the station is ever built. This concern will be magnified if, once the Community Change Freeze is lifted, WPB attempts to use its reallocation to Dover as a springboard to move WMDE even deeper into the Philadelphia market, further from those underserved residents of southern Delaware.

The Bureau's original determination to allocate Channel 5 to Seaford rather than Dover or another Delaware community in the Philadelphia DMA, was strongly supported by *public interest* considerations, which outweighed fiscal factors. After all, an auction of a new FCC allotment at Dover would easily have raised substantially more money for the U.S. Treasury than the one at Seaford. An illustration of that reality is not difficult to find. That is, in the same Auction 90 that included the Seaford Allocation, WPB itself bid \$3,838,000 (and paid \$2,494,700 after new entrant discounts) for a permit in Atlantic City, NJ, which is part of the Philadelphia DMA. That auction attracted three qualified bidders and 13 rounds of bidding were conducted. In contrast, the FCC's simultaneous auction of the Seaford Channel 5 permit netted

only \$136,500, and there was only one bidder – WPB.¹⁸ Obviously, in allotting Channel 5 to Seaford, the Bureau prioritized the needs of residents of Seaford and Sussex County in southern Delaware, electing not to place the station in a more populous (and profitable) DMA. If the Seaford Allocation is allowed to depart for Dover, the public interest benefits articulated by the Bureau in the *Seaford R&O* will be lost.

IV. Denial Of The Petition Would Be Consonant With FCC Allocation Policies.

PMCM has explained in Section II above that waiver of the Community Change Freeze is *not* warranted at this time, given that any reclamation of Channel 44 at Seaford during the incentive auction process will create an absolute bar, under the Commission’s traditional allotment priorities, to the Dover Petition. Section III above shows that public interest factors which motivated the Seaford Allocation remain in place. In addition to these showings, PMCM urges the Commission to recognize other overarching allocation priorities, particularly as they have evolved in recent years, which clearly favor the provision of service to rural and/or underserved areas, and to which the Dover Petition runs directly counter.

As explained above, Seaford is a smaller community located in the more rural, southern area of Delaware, and is part of the Salisbury, Maryland DMA, ranked 144th. Seaford currently receives only four over-the-air television services. Dover, on the other hand, is a larger community located in the much larger, and much better-served, Philadelphia DMA, ranked 4th. Given these stark realities, PMCM urges the Commission here to follow the approach it takes in analogous radio allocation proceedings, where the Commission has expressly “adopted procedures to forestall the movement of . . . service from rural areas to more urban areas absent a

¹⁸ For facts cited herein relating to Auction 90, see *Auction of VHF Commercial Television Station Construction Permits Closes*, Public Notice, DA 11-312 (rel. Mar. 1, 2011), and the Attachments thereto.

*compelling showing of need.*¹⁹ PMCM submits that a similar presumption should rationally be applied against the relocation of television service proposed in this proceeding. The Dover Petition falls far short of demonstrating such a “compelling need” for the reallocation of WMDE, which should lead to its denial. Indeed, as these Comments establish, Seaford’s need for service is more compelling than Dover’s. Denial of the Dover Petition would also further the Commission’s allocations goal, as articulated in the Rural Radio proceeding, “to preserve existing service at, and provide greater opportunity for new service to, rural areas and smaller communities.”²⁰

V. Conclusion.

For all of the reasons set forth above, PMCM hereby requests that WPB’s requested waiver of the Community Change Freeze, as well as the NPRM’s proposed amendments to the DTV Table of Allotments, be denied.

Respectfully submitted,

PMCM TV, LLC

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April 3, 2013

Its Attorneys

¹⁹ *Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Second Order on Reconsideration, FCC 12-127 (¶ 5) (2012) (emphasis added).

²⁰ *Id.* at ¶ 18.

EXHIBIT A



WASHINGTON, DC

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March 15, 2013

VIA HAND DELIVERY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: MB Docket No. 09-230; Petition for Reconsideration

Dear Ms. Dortch:

Transmitted herewith, pursuant to Section 1.429 of the Commission's rules, are an original and eleven copies of a Petition for Reconsideration filed in the above-referenced proceeding on behalf of PMCM TV, LLC.

Please date-stamp the enclosed "Return Copy" of this filing and return it to the courier delivering the package.

If there are any questions concerning this matter, please contact me.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'F. Scott Pippin', written in a cursive style.

F. Scott Pippin

FSP/fsp
Enclosures

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,)
Television Broadcast Stations.)
(Seaford, Delaware))

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

PETITION FOR RECONSIDERATION

PMCM TV, LLC (“PMCM”), by its attorneys and pursuant to Section 405 of the Communications Act of 1934, as amended (the “Act”), 47 U.S.C. §405, and Section 1.429 of the Commission’s rules, 47 C.F.R. §1.429, hereby seeks reconsideration of the decisions in this proceeding¹ premised on a significant change in circumstances, namely the issuance by the U.S. Court of Appeals for the District of Columbia Circuit of the decision in *PMCM TV, LLC v. Federal Communications Commission*, 701 F.3d 380 (D.C. Cir. 2012) (the “*D.C. Circuit Decision*”), which reversed and remanded the Commission’s denial of PMCM’s exercise of notification under the second sentence of Section 331(a) of the Act, 47 U.S.C. §331(a), to relocate Station KJWY(TV), Channel 2, from Jackson, Wyoming, to Wilmington, Delaware.² The D.C. Circuit’s reversal of the

¹ *Seaford, Delaware*, Report and Order, 25 FCC Rcd 4466 (MB 2010) (“*Seaford R&O*”) and Memorandum Opinion and Order on reconsideration, DA 13-198 (rel. February 13, 2013) (“*Seaford Reconsideration Order*”).

² *Reallocation of Channel 2 from Jackson, Wyoming to Wilmington, Delaware*, 26 FCC Rcd 13696 (2011) (“*Decision on Review*”). This decision also denied PMCM’s notification under Section 331(a) of the reallocation of Station KVVV(TV), Channel 3, from Ely, Nevada, to Middletown Township, New Jersey.

Decision on Review invalidates the basis for the Commission's unprecedented step of proposing the allocation of Channel 5 to Seaford, Delaware on its own motion, rather than following the traditional practice of requiring the submission of a petition for the institution of a rulemaking from a party committed to the construction and operation of the station. As will be demonstrated in this pleading, the Commission has improperly applied the mandate of Section 331(a) in acting on its own motion to fill a purported "void" of VHF service in Delaware by allotting Channel 5 to Seaford without a proponent committed to service to that community; in fact, VHF service in Delaware had already been properly proposed in accordance with Section 331(a) by PMCM.

This pleading is timely filed under the *Seaford Reconsideration Order*.

I. Procedural History

On December 18, 2009, the Bureau, on its own initiative and citing the mandate of Section 331(a) of the Communications Act, proposed to allocate channel 5 to Seaford, Delaware (the "Seaford Allotment").³ On the same day it issued the *Seaford NPRM*, the Bureau denied PMCM's request to reallocate, expressly made pursuant to Section 331(a), PMCM's full-power television station KJWY(TV), Channel 2, Jackson, Wyoming to Wilmington, Delaware.⁴ By April 28, 2010, when the Bureau issued the *Seaford R&O* approving the Seaford Allotment, PMCM had pending before the full Commission an Application for Review of the Bureau's denial of the KJWY(TV) reallocation request. On September 15, 2011, the full Commission issued the *Decision on Review*, upholding the Bureau's denial of the PMCM notification under Section 331(a) and observing that

³ *Seaford, Delaware*, Notice of Proposed Rulemaking, 24 FCC Rcd 14596 (MB 2009) ("*Seaford NPRM*").

⁴ *Reallocation of Channel 2 from Jackson, WY to Wilmington, DE*, 24 FCC Rcd 14588 (2009) ("*PMCM Notification Denial*").

the Commission had, by then, issued the *Seaford NPRM* on its own motion to assign Channel 5 to Seaford, Delaware, amended the Post-Transition Table of DTV Allotments accordingly, auctioned the channel to the sole bidder, and granted the construction permit for the station.⁵ PMCM appealed the *Decision on Review* to the Court of Appeals for the District of Columbia Circuit. The December 14, 2012 *D.C. Circuit Decision* ruled in favor of PMCM, reversed the FCC's denial of the KJWY(TV) reallocation, and ordered the Commission to reallocate PMCM's Channel 2 facility to Wilmington.⁶

PMCM submits this Petition for Reconsideration pursuant to Section 1.429 of the Commission's Rules in response to the allotment order issued in the *Seaford R&O*, as upheld on reconsideration by the *Seaford Reconsideration Order*. This Petition relies on changed circumstances and therefore is properly filed pursuant to Section 1.429(b)(1). None of the arguments set forth here has been presented to the Bureau or the Commission, nor could they have been presented until the issuance of the *D.C. Circuit Decision*. Consideration of these new arguments is therefore appropriate and respectfully requested at this time. The Commission's reconsideration rule grants wide latitude where the public interest is served by a complete factual and legal record.⁷

⁵ *Decision on Review* at 13706-07.

⁶ PMCM is still awaiting Commission action on the D.C. Circuit's mandate.

⁷ The *Seaford Reconsideration Order* states that a "petition for reconsideration of a final order is not the appropriate vehicle to raise a challenge to, or otherwise reconsider, the legality of the issuance of an underlying notice of proposed rulemaking." *Seaford Reconsideration Order* at ¶6. This claim is made without reference to precedent or other authority. Not only does Section 405 give aggrieved parties the right to file petitions for reconsideration, but such petitions are a predicate to seeking judicial review of issues such as those in this filing. As noted above, neither the Bureau nor the Commission has had an opportunity to consider or pass upon these matters.

II. The Bureau's Allocation of Channel 5 to Seaford, Delaware Under Section 331(a) was Improper

The Bureau's proposal to allocate Channel 5 at Seaford on its own motion was improper. The *Seaford NPRM* relied exclusively upon the mandate of Section 331(a) of the Act.⁸ The first sentence of that Section provides that:

It shall be the policy of the Federal Communications Commission to allocate channels for very high frequency commercial television broadcasting in a manner which ensures that not less than one channel shall be allocated to each State, if technically feasible.

47 U.S.C. §331(a). As interpreted by the D.C. Circuit, "section 331(a) fulfills congressional intent: it ensures that every State will have a VHF station so long as that goal can be accomplished without causing signal interference." *D.C. Circuit Decision* at 385.

Despite what the Bureau may have thought at the time the *Seaford NPRM* was issued, no "VHF void" then existed in Delaware. The *Seaford NPRM* was released more than *six months* after PMCM notified the Commission, under the provisions of the second sentence of Section 331(a), that it agreed to the reallocation of its full power VHF

⁸ *Seaford NPRM* at 1. While the Appendix to the *Seaford NPRM* contained a boilerplate attachment that the Commission was acting pursuant to five sections of the Communications Act (including Section 307(b), but not mentioning Section 331(a)), it is clear from the text of the *Seaford NPRM* that the Bureau initiated the *Seaford NPRM* "[i]n order to fulfill the mandate that the Commission allot at least one VHF channel to each state," that is, "to advance the allocation policies of Section 331(a) of the Act." *Id.*

commercial television station in Jackson, Wyoming to Wilmington, Delaware.⁹ Over the Bureau's, and then the Commission's, rejections, PMCM's notification was perfected when the D.C. Circuit reversed the Commission's *Decision on Review* and directed that the Commission approve the reallocation of PMCM's Channel 2 to Wilmington pursuant to PMCM's notification of June 15, 2009.

Accordingly, as of the date of the Bureau's institution of the *Seaford NPRM* – December 17, 2009 – there was no “VHF void” in Delaware. The reallocation of PMCM's Channel 2 had filled that “void.” The only basis given for the issuance of the *Seaford NPRM* – to fulfill Congressional intent that at least one VHF channel be allotted to Delaware – was vitiated by the *D.C. Circuit Decision*.

The first sentence of Section 331(a) does not necessarily preclude the allocation to a state of additional channels beyond first VHF service. PMCM submits, however, that the Commission would need a basis *other than Section 331(a)* to do so, such as a conventional 307(b) analysis, and should adhere to the well-established procedural mechanism of relying upon the request of a proponent of a particular allotment in order to achieve the desired service results.

PMCM acknowledges that, although the issuance of the *NPRM* rested solely upon the authority of Section 331(a) in ultimately concluding that the community of Seaford in Sussex County was underserved and thus was the appropriate community of license for a

⁹ The second sentence of Section 331(a) states:

In any case in which [*sic*] 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 allocated no very high frequency commercial television broadcast channel at the time [*sic*] such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a license to such licensee for that purpose pursuant to such notification for a term of not to exceed 5 years as provided in section 307 (d) of the Communications Act of 1934.

commercial allotment in Delaware, the Bureau observed that “Wilmington, located in the Philadelphia, Pennsylvania designated market area (“DMA”), is currently served by a strong or moderate signal from 14 full-power television stations, while Seaford, located in the Salisbury, Maryland DMA, is presently served by only four full-power stations.”¹⁰ The decision cited comments submitted by Senator Edward E. Kaufman of Delaware in which he supported the allotment of a new VHF channel to Delaware and urged the Commission to assign that channel to a community that would reach the greatest number of Delawareans, including those residing in the Wilmington area, and stressed the importance of local news and public service directed to Delaware viewers.^{11 12} The Bureau concluded in the *Seaford R&O* that Wilmington residents were already well-served and instead allotted the new channel to a community in southern Delaware where there was a much greater need for service, finding that “consistent with Section 307(b) and the Commission’s long-standing television allotment policies, the allotment of a new channel in southern Delaware, rather than in northern Delaware, results in a more equitable distribution of television channels.”¹³

¹⁰ *Seaford R&O* at 4470-71. One of the four full-time stations is WDPB(TV), which is licensed to WHY Y, Inc. and is a full satellite of Station WHY Y-TV, the principal PBS affiliate serving Philadelphia.

¹¹ *Seaford R&O* at 4467.

¹² In comments filed in response to the *Seaford NPRM*, PMCM stated that “[its] principals have for decades been strong proponents of the expansion of locally-based television opportunities. . . . Like New Jersey, for too long the needs of Delaware have been given short shrift by the Philadelphia-based broadcast stations that loom over Delaware’s borders. Indeed it was the dearth of New Jersey and Delaware TV stations, and the corresponding lack of coverage of New Jersey and Delaware issues, that prompted Congress to enact Section 331 in the first place. So PMCM wants to go strongly on record as supportive of additional channel allocations for these undeserved states.” *Comments of PMCM TV, LLC*, MB Docket No. 09-230 (Jan. 29, 2010) at 1-2. PMCM noted, however, that its support for the Seaford Allocation “must take into account the factual and legal realities” presented by PMCM’s reallocation notifications under Section 331(a). As PMCM correctly asserted in its Comments, and confirmed by the *D.C. Circuit Decision*, that if approved, the Seaford Allotment would be as an additional, and not the first, VHF allotment to Delaware, and there would no longer be a statutory requirement that a further VHF channel be assigned to Delaware. *Id.* at 2-3.

¹³ *Seaford R&O* at 4470-71.

Other than the allotment of Channel 4 to Atlantic City made at the same time and on the same Section 331(a) theory as the allotment of Channel 5 to Seaford, PMCM is aware of no other instance where the Commission – and not a proponent – has been the moving party in a TV allotment proceeding. In normal allocation procedures, a party – not the Commission – would have formulated and advanced a request for the provision of service to Seaford, and would have committed to build and operate a Seaford station as a part of the rulemaking process. But the departure from the norm here – premised incorrectly on the mandate of Section 331(a) – and the decision to allocate the channel made on the Commission’s own motion, rather than at the urging of a proponent on which the Commission could depend to carry out the expected local service and community responsibilities identified in course of the allotment proceeding, has further, potentially adverse consequences, and the Commission should not adopt an entirely new rulemaking procedure without good cause and a full explanation for the change.

An indication of such adverse consequences is evidenced by the Bureau’s release of a Notice of Proposed Rulemaking on February 13, 2013 in which the permittee of the unbuilt Seaford allotment, which was the sole bidder at the auction of the channel, now seeks to change the community of license of the allocation from Seaford, in the Salisbury DMA (Market Number 144), serving southern Delaware, to Dover, which is within the Philadelphia DMA (Market Number 4).¹⁴ As the Commission is well aware, a change in community of license of a station results in changes in the focus of the station’s local public service programming. As a result, the Bureau’s aspirations for service to the

¹⁴ *Western Pacific Broadcast, LLC. Amendment of Section 73.622(i) Digital Television Table of Allotments (Seaford, Delaware and Dover, Delaware)*, Notice of Proposed Rulemaking, DA 13-160 (rel. Feb. 13, 2013).

under-served areas of southern Delaware consistent with the 307(b) analysis which lies at the heart of the *Seaford R&O* may well be frustrated before the station once allocated to Seaford is ever built.¹⁵

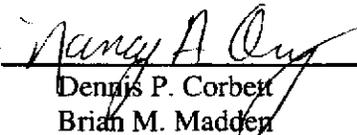
III. Conclusion

For the reasons set forth above, the predicate of the *Seaford NPRM* and the Commission's subsequent decision were incorrect. No "VHF void" existed as of that date of the NPRM. As confirmed by the D.C. Circuit, Channel 2 is to be reallocated to Wilmington, Delaware as PMCM requested in its notification under Section 331(a). While the Commission may allocate additional channels to Delaware, it may not do so in sole reliance on Section 331(a) and on its own motion, as is clear from the Commission's precedent and practices in allocation proceedings. Therefore, the Seaford Allocation should be set aside.

Respectfully submitted,

PMCM TV, LLC

By



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March 15, 2013

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¹⁵In addition, certain principals of PMCM are also licensees of radio stations, and as such urged in the Seaford proceeding, *see Comments of PMCM TV, LLC* at 3, as did another commentator, there remains pending a proposal that channels 5 and 6 be assigned to radio use, and that proposal might be complicated or precluded in part by the Seaford allotment; this concern was rejected as "speculative." *Seaford NPRM* at 4472. The over-stated need by the Commission to satisfy the mandate of Section 331(a) and to allocate a VHF channel to Delaware, when PMCM's notification had already satisfied that obligation, might have alleviated this, and subsequent spectrum management concerns that have developed, such as the auction and repacking procedures with regard to the proposed incentive auction.

CERTIFICATE OF SERVICE

I, Deborah A. Morris, hereby certify that a copy of the Petition for
Reconsideration was served on March 15, 2013, by first class mail to the following:

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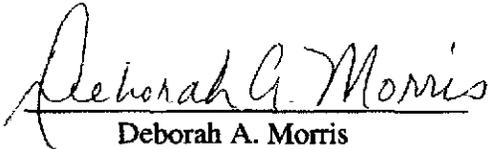

Deborah A. Morris

EXHIBIT B

As noted in the Comments to which this Exhibit is appended, WPB proposes to change its community of license from a community in the Salisbury, Maryland DMA to a community in the Philadelphia, Pennsylvania DMA. A review of the *Television & Cable Factbook 2012* and BIA Research, Inc.'s *Media Access Pro* database indicates that television stations licensed to communities in the respective markets serve their viewers with the following programming content:

Salisbury, MD DMA	
Station	Programming Affiliation
WBOC-TV (21), Salisbury, MD	CBS, Fox
WMDT (47), Salisbury, MD	ABC, CW
WCPB (28), Salisbury, MD	PBS (Maryland Public Television Network)
WDPB (44), Seaford, DE	PBS (full-time satellite of WHYY-TV – Pennsylvania Public Television Network)
Philadelphia, PA DMA	
Station	Programming Affiliation
KYW-TV (26), Philadelphia, PA	CBS
WBPH-TV (9), Bethlehem, PA	Independent
WCAU (34), Philadelphia, PA	NBC
WFMZ-TV (46), Allentown, PA	Independent
WGTW-TV (27), Burlington, NJ	Trinity Broadcasting Network
WMCN-TV (44), Atlantic City, NJ	Independent
WMGM-TV (36), Wildwood, NJ	NBC
WPHL-TV (17), Philadelphia, PA	My Network TV, Independent
WPPX-TV (31), Wilmington, DE	ION
WPSG (32), Philadelphia, PA	CW
WPVI-TV (6), Philadelphia, PA	ABC
WTVE (25), Reading, PA	Independent
WTFX-TV (42), Philadelphia, PA	Fox
WUVP-DT (29), Vineland, NJ	Univision

WWSI (49), Atlantic City, NJ	Telemundo
WACP (4), Atlantic City, NJ	Independent
WHYY-TV (12), Wilmington, DE	PBS (Pennsylvania Public Television Network)
WLVT-TV (39), Allentown, PA	PBS (Pennsylvania Public Television Network)
WNJS (22), Camden, NJ	PBS (NJTV)
WNJT (43), Trenton, NJ	PBS (NJTV)
WYBE (35), Philadelphia, PA	(Public Television (Independent))

NOTE: The Salisbury, Maryland market has no NBC affiliate. The Philadelphia, DMA is served by the four major networks (ABC, CBS, Fox, NBC), two Spanish language networks (Univision, Telemundo), CW and MyTV affiliates, a religious programmer, *five* independent television stations, and *five* public television stations.

CERTIFICATE OF SERVICE

I, Rebecca J. Cunningham, hereby certify that a copy of the foregoing Comments in Opposition to Notice of Proposed Rulemaking was served on April 3, 2013, by first class mail, to the following:

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Rebecca Cunningham