

**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

Accepted/Filed

JUN 13 2014

To: The Commission

FCC Office of the Secretary

PETITION FOR RECONSIDERATION

PMCM TV, LLC ("PMCM"), by its attorneys and pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, hereby submits this Petition for Reconsideration with respect to the May 1, 2014 decision of the Video Division of the Media Bureau ("Bureau") in the above-captioned proceeding.¹ Under Rule 1.106(c)(2), the public interest will be served by agency consideration of these arguments.

The *Dover R&O* re-allotted television Channel 5 from Seaford, Delaware to Dover, Delaware, at the request of Western Pacific Broadcast, LLC ("WPB"), permittee of unbuilt station WMDE(TV), Channel 5, Seaford, and over the objections of PMCM.² PMCM based its objections in substantial part on the collateral consequences of a decision issued in December 2012 by the U.S. Court of Appeals for the District of Columbia Circuit, *PMCM TV, LLC v. Federal Communications Commission*, 701 F.3d 380 (D.C. Cir. 2012) (the "D.C. Circuit

¹ *Western Pacific Broadcast, LLC, Amendment of Section 73.622(i), Digital Television Table of Allotments (Seaford, Delaware and Dover, Delaware)*, Report and Order, DA 14-547 (rel. May 1, 2014) (MB) (the "*Dover R&O*"). Federal Register publication of the *Dover R&O* occurred on May 14, 2014. This petition is therefore timely filed, within thirty days thereof.

² See PMCM's April 3, 2013 Comments in this proceeding ("PMCM Comments").

Reversal”), which reversed and remanded the Commission’s denial of PMCM’s June 2009 exercise of notification rights (the “PMCM Notification”) under the second sentence of Section 331(a) of the Communications Act, 47 U.S.C. § 331(a) (“Section 331(a)”), to relocate Station KJWY(TV), Channel 2, from Jackson, Wyoming, to Wilmington, Delaware.³ As the PMCM Comments made clear, the D.C. Circuit Reversal undermined the basis for the initial Channel 5 Seaford allotment and, by extension, the proposed relocation of that same Channel 5 to Dover.

I. Background.

PMCM filed the PMCM Notification on June 15, 2009; it was denied by the Bureau on December 18, 2009. On that same December 2009 date, the Bureau departed from its normal procedures and proposed to add a new Channel 5 allotment to Seaford, Delaware, in express reliance on Section 331(a), even though: (i) Section 331(a) had been “on the books” since 1982; (ii) no one had asked the FCC to make such an allotment or promised to apply for it; (iii) there was a DTV allotment freeze in place; and (iv) the FCC was well aware of the PMCM Notification. According to the Seaford allotment NPRM,⁴ Seaford was proposed because

³ *Reallocation of Channel 2 from Jackson, Wyoming to Wilmington, Delaware*, 26 FCC Rcd 13696 (2011), *aff’g* 24 FCC Rcd 14588 (MB 2009). This FCC 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. For a discussion of the history and purposes of Section 331(a), see 701 F.3d at 382.

⁴ *Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broadcast Stations (Seaford, Delaware)*, 24 FCC Rcd 14596 (MB 2009).

Delaware lacked any VHF allotments (the “VHF Void”).⁵ The Seaford allotment was not in the adjacent and more populous Philadelphia, Pennsylvania DMA, however, and so ultimately generated more limited revenues at auction in February 2011 than a Philadelphia DMA allotment would likely have produced.⁶ The FCC affirmed the Bureau’s denial of PMCM’s move to Wilmington in September 2011 on grounds that a station relocation pursuant to Section 331(a) had to be mutually exclusive with the proponent’s existing facilities, and the PMCM Notification therefore was effectively trying to construct a “bridge too far.” In February 2012, Congress directed the FCC to implement novel incentive auction legislation which looks to reallocate spectrum from TV stations to the wireless industry (the “Incentive Auction”), with particularly thorny congestion issues to resolve along the Eastern Seaboard of the United States.

Later that year, in December, following considerable PMCM effort before the Court during the intervening period of time (e.g., seeking mandamus), the D.C. Circuit Reversal overturned the FCC’s PMCM Notification denial and ordered the FCC to allow PMCM’s move to Wilmington. The FCC meanwhile kept the Seaford allotment proceeding rolling along –

⁵ In the *Dover R&O* (at ¶ 2), the Bureau recites that PMCM did not oppose in early 2010 a new television channel allotment to the underserved state of Delaware. But the circumstances in 2010 were entirely different than they are today. PMCM was at that time necessarily focused on addressing the Bureau’s denial of the PMCM Notification. Furthermore, when the Bureau selected Seaford over other Delaware communities in 2010, it noted that Seaford is located in relatively underserved southern Delaware, in the smaller Salisbury, Maryland DMA. That market is home to only four full-power television signals, none of which carries programming provided by NBC, one of the “big four” television networks. By contrast, communities located in central and northern Delaware are part of the much better served Philadelphia DMA. Primarily for this reason, 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.” *Seaford, Delaware*, Report and Order, 25 FCC Rcd 4466, 4471 (Vid. Div. 2010). As discussed below, Bureau approval of WPB’s relocation to Dover imprudently reverses this course.

⁶ See Auction 90 Fact Sheet (WTB Feb. 17, 2011), available at http://wireless.fcc.gov/auctions/default.htm?job=auction_factsheet&id=90. See also PMCM Comments at 8-9.

auctioning the new frequency in February 2011 (as noted above), granting a construction permit in May 2011, and, in this proceeding, on May 1, 2014, granting WPB's October 2012 petition to reallocate Channel 5 to Dover. PMCM, at the first opportunity to do so, in its timely-filed March 15, 2013 Petition for Reconsideration in MB Docket No. 09-230, raised the changed circumstance of the D.C. Circuit Reversal. PMCM argued that the D.C. Circuit Reversal had eliminated, as of the time of the PMCM Notification, the VHF Void in Delaware, thereby vitiating the Section 331(a) predicate for the Channel 5 allotment at Seaford.

In the PMCM Comments, PMCM pressed this same contention, first raised in the Seaford reconsideration context, that the D.C. Circuit Reversal constituted a classic changed circumstance which had eliminated *ab initio* the Bureau's basis for the Seaford allotment. PMCM also argued in its Comments that: (i) the Bureau needed to allow the impending first-of-its-kind Incentive Auction to play out before waiving the freeze on new digital television stations and allowing any WPB departure from Seaford, given the potential for the only other Seaford station, PBS-affiliated satellite station WDPB(TV), to sell its rights to operate on prime UHF Channel *44 in that auction, leaving Seaford bereft of *local transmission* service; and (ii) the totality of the circumstances favored leaving the Seaford allotment in Seaford.

The *Dover R&O* dismissed PMCM's objections, finding that a grant of WPB's move to Dover from Seaford would result in a preferential arrangement of television station allotments. Specifically, the Bureau: (i) attached no weight to the D.C. Circuit Reversal, citing instead: cases relating to the importance of preserving the finality of its prior decisions (here, the Seaford allotment), the lack of cited precedent supporting the proposition that a court decision can constitute a supervening "change in circumstances," and the Bureau's contemporaneous

dismissal of PMCM's challenge to the Seaford allotment;⁷ (ii) upheld its prior waiver of the freeze on new TV allotments by dismissing as mere "speculation" the possibility that Seaford will find itself bereft of all local service after the Incentive Auction; (iii) found that Dover is preferential to Seaford essentially because it has a larger population; and (iv) concluded that WMDE(TV)'s providing a first local service to Dover outweighs the public interest considerations favoring Seaford on which the Bureau had originally relied.

The *Dover R&O* should be reconsidered and the Dover allotment should be rescinded, for the reasons set forth below.

II. Argument.

Reconsideration is appropriate in this case because the *Dover R&O* fails to address PMCM's central argument, which is based on the D.C. Circuit Reversal.⁸ The *Dover R&O* acknowledges this argument (at n.20), but then skirts it.

The "elephant" in this particular "room" remains the D.C. Circuit Reversal, which eliminated the essential predicate for both the original Seaford allotment and this proceeding. The Bureau, after all, elected to premise the Seaford allotment *entirely* on what turned out to be a non-existent VHF Void in Delaware. Without that void, the Seaford allotment collapses. The Bureau cannot eliminate this vital issue relating to its own singular Section 331(a) rationale for allotting Channel 5 to Seaford by citing alleged failures of PMCM to act in that docketed proceeding. PMCM did act in the FCC proceeding that mattered most at that time (i.e., the PMCM Notification proceeding), ultimately pursuing in Court the Commission's ill-advised denial of the PMCM Notification, and prevailing. The FCC, rather than wait for the PMCM

⁷ On June 2, 2014, PMCM filed an Application for Review with the Commission concerning this Bureau action in MB Docket No. 09-230 (the "PMCM Application for Review").

⁸ 47 C.F.R. §§ 1.106(c)(1), 1.106(b)(2)(i).

Notification to sort itself out, rushed ahead with a brand new Delaware allotment on its own motion, and then compounded the problem by auctioning and issuing a construction permit and approving a move of that permit to Dover. It is no answer for the Bureau to cite a generalized public interest in the finality of FCC decisions, at least not when the *non-final* Channel 5 Seaford allotment, which underpins the issuance of WPB's construction permit, is entirely predicated on "VHF Void" facts which were simultaneously the subject of active litigation. The dispositive reality in this matter is simple – the FCC should not have been pursuing an allotment on its own motion to fill a phantom VHF Void, one that existed only because of an unlawful Bureau denial of the PMCM Notification. The FCC's insistence on doing so was itself unlawful, and the resulting, continuing legal hemorrhaging should be staunched now, through review and reversal of the Seaford allotment and reconsideration of the Dover relocation.

In its contemporaneous May 1, 2014 denial of PMCM's request for reconsideration of the Seaford allotment, the Bureau faulted PMCM for not challenging the Seaford allotment all along, even before the D.C. Circuit Reversal. PMCM, the Bureau concludes, could have and should have foreseen the Court's eventual action. PMCM has already challenged that rationale as insufficient to support the Bureau's actions in the Seaford allotment proceeding, and PMCM incorporates those arguments by reference here.⁹ PMCM cannot be held to a standard that requires it to predict court results. The relevant test is not "predicted" changed circumstances, but actual "changed circumstances." Such changed circumstances exist *now*, with profound ramifications for the Seaford allotment and the move to Dover. In the same vein, the *Dover R&O's* attempt to fault PMCM for not citing "changed circumstances" case law in the PMCM

⁹ See PMCM Application for Review at 4-6. As PMCM has pointed out, it is more appropriate to view the Bureau's action through a lens focused on what the Bureau should have foreseen. Here, rather than reasonably foresee a Court reversal, the FCC "rolled the dice" by pushing ahead with its new Seaford allotment, gambling on a Court affirmance that never came.

Comments (at ¶ 15) is unavailing.¹⁰ That is because court decisions constitute the plainest vanilla of “changed circumstances” justifying reconsideration.¹¹ The Administrative Procedure Act provides that final FCC decisions are always subject to court review,¹² and the principle that the FCC must abide by reviewing courts’ decisions is part of the agency’s foundational DNA.

It was particularly inconsistent and unsustainable for the Bureau, in denying further reconsideration of the Seaford allotment (DA 14-546 at ¶ 8), to criticize PMCM for failing to foresee the D.C. Circuit Reversal and *then* for the Bureau in the *Dover R&O* (at ¶ 16) to reject as “speculative” PMCM’s argument that approving a Dover relocation might lead to a total loss of local transmission service in Seaford. After all, on this point, PMCM was not using speculation as a basis for a request that the FCC deny the Dover relocation, but rather arguing that any decision on such a move *had to wait*. PMCM believes it entirely reasonable to foresee a sale of WDPB’s Channel *44 spectrum in the fast approaching Incentive Auction. WDPB is a Seaford PBS-affiliated satellite of Philadelphia market (also PBS-affiliated) parent WHYY-TV, Wilmington, Delaware and, given WDPB’s prime UHF Channel *44 position on the Eastern Seaboard, it might easily generate funds for its parent through sale at auction. If such a sale occurs, and the Dover relocation stands, Seaford will no longer have local transmission service,

¹⁰ The “changed circumstances test” is set forth in 47 C.F.R. §§ 1.106 and 1.429.

¹¹ See *Practice and Procedure*, 46 RR 2d 524 (1979) (recognizing that changed circumstances include “cases decided by a court . . . after the pleading cycle has ended”); *George R. Reed*, 27 FCC Rcd 9048, 9051 (MB 2012). See also *Interstate Commerce Comm’n v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 278 (1987) (changed circumstances provide an independent basis for judicial review of an otherwise non-reviewable agency denial of reconsideration).

¹² 5 U.S.C. § 704. See also 47 U.S.C. § 402.

an entirely unacceptable result under well-established FCC precedent,¹³ all because the FCC imprudently failed to wait and see what will happen.

PMCM respectfully preserves for full Commission review all other arguments it made in the PMCM Comments. For present purposes, PMCM notes that the *Seaford R&O*'s reliance (at ¶¶ 14, 17) on the fact that the current WPB Dover relocation proposal does not entail any change in technical facilities is misplaced. With WMDE reassigned to Dover, WPB can reasonably be expected to look for the first viable opportunity to re-orient its over-the-air service toward the much larger population centers beckoning in the Philadelphia DMA, away from Seaford and southern Delaware. This concern is no more "speculative" than the predicate underlying the Bureau's approval of the Dover move, namely that WMDE's transmission facilities will continue to provide city grade service to Seaford in the future. In the absence of a site restriction preventing a WMDE move to the north (with the collateral benefit of preserving the opportunity to reuse Channel 5 for Incentive Auction repacking in major markets to the north), the assumption that WMDE will not move north is itself truly speculative.

In addition, the Bureau's emphasis on static (for now) service contours authorized in WMDE's present construction permit improperly equates over-the-air reception service with local transmission service. The Commission has long differentiated, and assigned different allotment priority weights to, these two factors.¹⁴ Except in the case of white or gray area coverage (not present here), first local transmission service trumps reception service, and Seaford

¹³ *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, Report and Order*, 4 FCC Rcd 4870 (1989) *recon. granted in part*, Memorandum Opinion and Order, 5 FCC Rcd 7094, 7097 (1990).

¹⁴ *Amendment of Section 73.606(b), Table of Allotments, Television Broadcast Stations (Columbia and Edenton, North Carolina)*, Opinion, 19 FCC Rcd 14618, 14618 n.3 (MB 2004) (citing Sixth Report and Order on Television Allocations, 41 FCC 148 (1952)).

here stands to lose such service. The cold reality of the *Dover R&O* is that, if upheld, it sanctions the loss of an important local transmission service originally assigned to less well-served Seaford in southern Delaware, and a loss of a television station's attendant primary attention to Seaford's problems, needs, and interests. In the overall context of this proceeding, given all of the considerations identified in the PMCM Comments, that stands to be a clear net public interest defeat.

III. Conclusion.

For all of the reasons set forth above and in the PMCM Comments, PMCM hereby requests that the *Dover R&O* should be reconsidered and the Dover allotment should be rescinded.

Respectfully submitted,

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June 13, 2014

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CERTIFICATE OF SERVICE

I, Rebecca J. Cunningham, hereby certify that a copy of the foregoing Petition for Reconsideration was served on June 13, 2014, by first class mail, to the following:

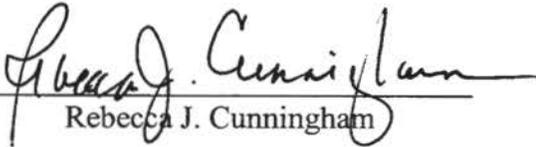
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