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June 17, 2014

VIA HAND DELIVERY

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554
Attention: Video Division, Media Bureau

Accepted/Filed

JUN 17 2014

FCC Office of the Secretary

Re: Western Pacific Broadcast, LLC
Amendment of Section 73.622(i), Post-Transition Table of DTV
Allotments, Television Broadcast Stations. (Seaford, Delaware)
MB Docket No. 09-230
Opposition to Application for Review

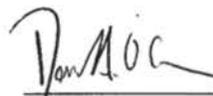
Dear Ms. Dortch:

Transmitted herewith, on behalf of Western Pacific Broadcast, LLC, are an original and four copies of its Opposition to the Application for Review filed by PMCM TV, LLC in the above-captioned proceeding.

Should there be any questions concerning this filing, please contact the undersigned.

Respectfully submitted,

WILKINSON BARKER KNAUER, LLP



David A. O'Connor
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Counsel for Western Pacific Broadcast, LLC

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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))

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JUN 17 2014

To: Office of the Secretary, FCC
For: The Commission

FCC Office of the Secretary

OPPOSITION TO APPLICATION FOR REVIEW

Western Pacific Broadcast, LLC (“WPB”), the permittee of unbuilt station WMDE(TV), channel 5, Dover, Delaware, Facility ID No. 189357 (“WMDE”), by its counsel and pursuant to Section 1.115(d) of the Commission’s rules,¹ hereby submits its Opposition to the June 2, 2014 Application for Review (“AFR”) filed in the above-referenced proceeding by PMCM TV, LLC (“PMCM”), licensee of station KJWP(TV), channel 2, Wilmington, Delaware. As shown below, the AFR merely rehashes arguments that the Bureau has already addressed and rejected in its *Memorandum Opinion and Order on Further Reconsideration* issued on May 1, 2014.² Thus, the AFR should be denied.

¹ 47 C.F.R. § 1.115(d).

² *Amendment of Section 73.622(i), Post Transition Table of DTV Allotments Television Broadcast Stations (Seaford, Delaware)*, Memorandum Opinion and Order on Further Reconsideration, MB Docket No. 09-230, DA 14-546 (rel. May 1, 2014) (“*Memorandum Opinion and Order*”). In a separate decision released simultaneously with the *Memorandum Opinion and Order*, the Bureau granted WPB’s request to move the channel 5 allotment from Seaford to Dover, Delaware, with no change in WMDE’s service contour. See *Western Pacific Broadcast, LLC*, Report and Order, MB Docket No. 13-40, DA 14-547 (rel. May 1, 2014).

The AFR is the latest chapter of PMCM's grossly untimely attempt to overturn the Commission's allotment of channel 5 to Seaford, Delaware *over four years ago*.³ As the Bureau points out, PMCM never sought reconsideration of the Bureau's 2010 *Report and Order* in the Seaford proceeding (the "*Seaford Report and Order*").⁴ In fact, PMCM made it clear that the proposed allotment of channel 5 had no bearing whatsoever on its request under Section 331(a) of the Communications Act of 1934, as amended, to move channel 2 from Jackson, Wyoming to Wilmington.⁵ It is equally clear that Section 331(a) authorizes the Commission to give the State of Delaware more than one VHF allotment,⁶ and thus the allotment of channel 2 to Wilmington had no preclusionary effect on the Commission's allotment of channel 5 to Seaford.

Nonetheless, PMCM belatedly filed a petition for reconsideration of the *Seaford Report and Order* and the *Seaford Order on Reconsideration* on March 13, 2013, nearly three years after the deadline for seeking reconsideration of the *Seaford Report and Order* had passed. Once

³ *Amendment of Section 73.622(i), Post Transition Table of DTV Allotments Television Broadcast Stations (Seaford, Delaware)*, Report and Order, 25 FCC Rcd 4466 (MB 2010) ("*Seaford Report and Order*"); *Amendment of Section 73.622(i), Post Transition Table of DTV Allotments, Television Broadcast Stations (Seaford, Delaware)*, Memorandum Opinion and Order, 28 FCC Rcd 1167, 1169 (MB 2013) ("*Seaford Order on Reconsideration*").

⁴ See *Memorandum Opinion and Order* at ¶ 5. Channel 5 at Seaford and channel 2 at Wilmington were in different markets and were not mutually exclusive with each other. Ironically, then, PMCM had no standing to challenge the Seaford allotment in any case. See *Seaford Report and Order*, 25 FCC Rcd at 4468 n. 13.

⁵ See, e.g., Petition for Issuance of Writ of Mandamus, *In re PMCM TV, LLC*, D.C. Cir. Case No. 10-1001, at 9 n. 4 (Jan. 5, 2010) ("PMCM notes that, even if the recent proposals to allot channels to Atlantic City and Seaford were to be adopted, that would not alter PMCM's right to relief [with respect to Wilmington]"); Reply Comments of Western Pacific Broadcasting, LLC, MB Docket No. 13-40, at 2-3 (filed Apr. 18, 2013) (discussing PMCM's support of the channel 5 allotment at Seaford).

⁶ 47 U.S.C. § 331(a) ("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 such channel shall be allocated to each State, if technically feasible.").

again, citing Section 1.429 of the Commission's rules, PMCM contends that its petition for reconsideration was timely filed because "changed circumstances" precluded it from filing a timely petition for reconsideration of the *Seaford Report and Order* in 2010.⁷ Once again, PMCM claims that the "changed circumstance" in this case is the D.C. Circuit's decision in *PMCM TV, LLC v. FCC*,⁸ in which the Court reversed and remanded the Commission's earlier rejection of PMCM's Section 331(a) notification for the channel 2 allotment at Wilmington.⁹

Appropriately, the *Memorandum Opinion and Order* makes short work of PMCM's "changed circumstances" argument:

PMCM's reliance on section 1.429(b)(1) of the Commission's rules is misplaced. By the time the *Seaford Report and Order* was released, PMCM had filed an application for review of the Bureau's rejection of the re-allocation notifications, and it had filed a petition for mandamus in the D.C. Circuit asking the court to compel the re-allocation [of channel 2 to Wilmington]. Thus, it already knew that reversal of the Bureau's action was possible. The fact that the Bureau's rejection of PMCM's reallocation notifications was not yet final and unappealable did not excuse PMCM's failure to raise objections that were based on a foreseeable outcome, i.e., the possible reversal of the Bureau's action by the Commission or by a reviewing court.¹⁰

Stripped of its rhetoric, PMCM's response is meager: "The applicable test . . . requires the existence of changed circumstances, not the 'anticipation' or 'prediction' of such a change. . .

⁷ AFR at 4-5. Section 1.429(b)(1) of the Commission's rules states that the Commission may consider an untimely petition for reconsideration "where the facts or arguments relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission." 47 C.F.R. § 1.429(b)(1).

⁸ 701 F.3d 380 (D.C. Cir. 2012).

⁹ AFR at 4-5. The Court issued its decision on December 14, 2012, well after PMCM's deadline for seeking reconsideration of the *Seaford Report and Order* had passed.

¹⁰ *Memorandum Opinion and Order* at ¶ 8 (footnote omitted). The Bureau also found PMCM's petition for reconsideration untimely with respect to the *Seaford Order on Reconsideration*. *Id.* at ¶ 9.

Requiring parties to seek reconsideration on the basis of *predictions of judicial results* would open a Pandora's Box of epic proportions."¹¹ PMCM misses the point. As noted by the Bureau, PMCM's success on appeal cannot be deemed "changed circumstances" for purposes of justifying PMCM's grossly untimely petition for reconsideration, since it was entirely foreseeable that PMCM might succeed at the appellate level. That hardly could have been news to PMCM – appellants win, or they lose. PMCM's error is its assumption that the "changed circumstances" exception in Section 1.429(b)(1) always permits an untimely petition for reconsideration as long as the petitioner does not have 100% *certainty* of a particular outcome in court. It is not surprising that PMCM cites no authority for this proposition, as it would render the "changed circumstances" exception virtually meaningless: any petitioner could invoke the exception merely by filing a court appeal, regardless of when or how that appeal eventually is resolved. Indeed, the Pandora's Box PMCM fears would be far more "epic" if parties before the Commission were permitted to sit on their procedural rights indefinitely until their pending court appeals reach a final decision (in this case, well over two years after PMCM's petition for reconsideration of the *Seaford Report and Order* was due). That scenario is impossible to square with the principle of administrative finality, and PMCM again cites no authority to the contrary.¹²

¹¹ AFR at 5 (emphasis in original).

¹² The need for finality is a fundamental policy of administrative law. *See e.g., Radio Para La Raza*, 40 F.C.C. 2d 1102, 1104 (1973) ("The courts have noted a strong policy in favor of administrative finality, and have held that proceedings that have become final will not be reopened unless there has been fraud on the agency's or the court's processes, or unless the result is manifestly unconscionable." (citing *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238 (1944), *Greater Boston Television Corp. v. FCC*, 463 F.2d 268 (D.C. Cir. 1971), and *KIRO, Inc. v. FCC*, 438 F.2d 141 (D.C. Cir. 1970)); *California Metro Mobile Communications, Inc. v. FCC*, 365 F.3d 38, 45 (D.C. Cir. 2004) ("No doubt licensees have a strong and legitimate interest in administrative repose, *see, e.g., 47 U.S.C. § 405(a) . . .*"); *see also Birach Broadcasting Corp.*, (continued)...

Since the Bureau has committed no error in its analysis of PMCM's arguments, it has committed no "prejudicial error," either.¹³ The Bureau gave full consideration to PMCM's arguments and correctly found that PMCM's success on appeal with respect to the channel 2 allotment did not qualify as "changed circumstances" under Section 1.429(b)(1). PMCM thus proceeded at its own risk when it elected not to request reconsideration or even a stay of the *Seaford Report and Order* while it pursued the channel 2 matter in court. The fact that PMCM made the wrong procedural choice is PMCM's doing, not the Bureau's. Furthermore, as noted above and in the record below, the allotment of channel 5 to Seaford and the allotment of channel 2 to Wilmington were not mutually exclusive. Hence, in any case, the Commission's adoption of the former caused PMCM no prejudice with respect to the latter.¹⁴

In sum, WPB has already bid on and paid for the channel 5 spectrum at auction, applied for and received its channel 5 construction permit, and successfully petitioned the Commission to move the channel 5 allocation to Dover, thus providing the capital of and second largest city in Delaware with its first local television service. Moreover, WBP has already incurred significant

Memorandum Opinion and Order, 16 FCC Rcd 5015, 5018 (2001) (rejecting petitioner's untimely attempt to use a subsequent proceeding to litigate final decisions as "fundamentally flawed" and noting that "[i]t is well settled that we do not re-open proceedings that are final unless there has been fraud on our processes or the challenged result is unconscionable.") (citation omitted); *DWHNY(AM), McComb, MS*, Letter, 27 FCC Rcd 2920, 2922 (MB 2012) (citing *Radio Para La Raza*); *Interstate Communications, Inc.*, Order on Reconsideration, 22 FCC Rcd 13269, 13270 (IB 2007).

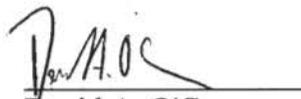
¹³ AFR at 4, 6. See also 47 C.F.R. § 1.115(b)(2)(v).

¹⁴ On this point PMCM attempts to change course, stating that it "supported the Seaford allotment under the premise that underserved areas of the state would receive local service, not under the present circumstances where a Dover allocation has supplanted the Seaford allotment." AFR at 2 n. 4. If PMCM's alleged prejudice is tied to the allotment of channel 5 to Dover, not to Seaford, then the Commission should dismiss PMCM's AFR and require PMCM to pursue relief through its pending petition for reconsideration of the Dover allotment, if PMCM has standing to do so. See Petition for Reconsideration of PMCM, LLC, MB Docket No. 13-40 (filed June 13, 2014).

costs related to the build-out of WMDE, including equipment purchases and a tower lease. There is no legal or public interest justification for the Commission to upend all of this (and lay WPB's associated investments to waste) due to PMCM's extremely untimely and unsubstantiated attempt to remedy its failure to challenge the Seaford channel 5 allotment in a timely manner *over four years ago*. PMCM's AFR should be denied.

Respectfully submitted,

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June 17, 2014

CERTIFICATE OF SERVICE

I, Paula Lewis, an employee of Wilkinson Barker Knauer, LLP, hereby certify that a copy of the foregoing Opposition to Application for Review was served on June 17, 2014, by first class mail unless otherwise noted, to the following:

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