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June 26, 2014

VIA HAND DELIVERY

ACCEPTED/FILED
JUN 26 2014
Federal Communications Commission
Office of the Secretary

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

Re: 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
Opposition to Petition for Reconsideration

Dear Ms. Dortch:

Transmitted herewith, on behalf of Western Pacific Broadcast, LLC, are an original and four copies of its Opposition to the Petition for Reconsideration 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
Robert D. Primosch
Counsel for Western Pacific Broadcast, LLC

Enclosure

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Western Pacific Broadcast, LLC	)	MB Docket No. 13-40
Amendment of Section 73.622(i)	)	RM-11691
Digital Television Table of Allotments	)	
(Seaford, Delaware and Dover,	)	
Delaware)	)	

To: Office of the Secretary, FCC
For: Media Bureau, Video Division

ACCEPTED/FILED
JUN 26 2014
Federal Communications Commission
Office of the Secretary

OPPOSITION TO PETITION FOR RECONSIDERATION

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June 26, 2014

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SUMMARY

Western Pacific Broadcast, LLC ("WPB") opposes the June 13, 2014 Petition for Reconsideration ("Petition") filed by PMCM TV, LLC ("PMCM") in this proceeding. PMCM has challenged the Media Bureau's May 1, 2014 *Report and Order* reallotting television channel 5 from Seaford, Delaware to Dover, Delaware.

As an initial matter, PMCM has not demonstrated that it has standing to challenge the Bureau's decision, and therefore its Petition should be dismissed as moot. In addition, the Petition largely relies on PMCM's argument that an unrelated judicial proceeding constitutes "changed circumstances" despite the finality of the Bureau's original channel 5 allotment more than four years ago. Apart from lacking any relevancy to this proceeding, the Bureau has already considered and rejected that argument, and PMCM's repetitious arguments on this point must be rejected - again. PMCM also continues to misinterpret the statutory authority that the Bureau invoked when it made the channel 5 allotment more than four years ago. The remainder of PMCM's arguments are speculative and otherwise lack merit.

In short, the Petition has nothing to do with the Dover allotment proceeding. The Bureau rationally determined that the reallotment of channel 5 to Dover served the public interest and resulted in a preferential arrangement of allotments. PMCM has failed to present any new facts or legal arguments to the contrary. Accordingly, the Petition should be denied.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Western Pacific Broadcast, LLC	)	MB Docket No. 13-40
Amendment of Section 73.622(i)	)	RM-11691
Digital Television Table of Allotments	)	
(Seaford, Delaware and Dover,	)	
Delaware)	)	

To: Office of the Secretary, FCC
For: Media Bureau, Video Division

OPPOSITION TO PETITION FOR RECONSIDERATION

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 Sections 1.106(g) and 1.4(h) of the Commission's rules, hereby submits its Opposition to the Petition for Reconsideration (the "Petition") filed by PMCM TV, LLC ("PMCM") with respect to the Bureau's May 1, 2014 decision to delete the channel 5 allotment at Seaford, Delaware and substitute channel 5 at Dover, Delaware (the "*Dover Report and Order*").[1]

PMCM's Petition should be denied because it has nothing to do with this proceeding. It is instead simply another repetitious filing by PMCM in its untimely effort to overturn the

[1] Western Pacific Broadcast, LLC, Amendment of Section 73.622(i), Digital Television Table Allotments (Seaford, Delaware and Dover, Delaware), Report and Order, MB Docket No. 13-40, DA 14-547 (rel. May 1, 2014) ("Dover Report and Order"). PMCM filed the Petition under Section 1.106 even though that rule applies to reconsideration in non-rulemaking proceedings. It should have filed pursuant to Section 1.429, which applies to reconsideration of final orders in rulemaking proceedings. Had PMCM done so, WPB's opposition would not be due until 15 days after public notice of the Petition, which has not yet occurred. *See* 47 C.F.R. §§ 1.429(f), 1.420(f). Nonetheless, to preserve its procedural rights in this matter, WPB is filing the instant Opposition in compliance with the "ten days plus three" deadline established under Sections 1.106(g) and 1.4(h) of the Commission's rules. WPB reserves the right to supplement this Opposition should the Commission put the Petition on public notice and create a new deadline for oppositions under Section 1.429(f).

original allotment of channel 5 to Seaford, Delaware which occurred more than *four years ago*.[2] PMCM failed to seek timely reconsideration or review of the *Seaford Report and Order*. In a decision released simultaneously with the *Dover Report and Order*, the Media Bureau denied PMCM's belated petition for reconsideration of the allotment of channel 5 to Seaford.[3]

The Petition should be denied on similar grounds because, apart from its repetitious arguments about PMCM's unfounded procedural right to challenge the *Seaford Report and Order* after the fact – arguments that have already been considered and rejected by the Bureau – the Petition contains nothing more than arguments that are merely speculative and irrelevant to the Bureau's decision to reallot channel 5 from Seaford to Dover.

I. BACKGROUND

The following facts are undisputed:

- Section 331(a) of the Communications Act of 1934, as amended (the "Act"), authorizes the Commission to allocate channels for commercial VHF television stations "in a manner which ensures that *not less than one* such channel shall be allocated to each State, if technically feasible."[4] Two VHF allotments in Delaware (*i.e.*, PMCM's channel 2 allotment at Wilmington, and

---

[2] *Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broadcast Stations (Seaford, Delaware),* Notice of Proposed Rulemaking, 24 FCC Rcd 14596 (MB 2009) ("*Seaford NPRM*"); *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*").

[3] *See 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) (*"Seaford MO&O on Further Reconsideration*"). PMCM has filed an Application for Review with respect to the *Seaford MO&O on Further Reconsideration*, repeating many of the arguments PMCM makes in the Petition. *See* Application for Review of PMCM TV, LLC, MB Docket No. 09-230 (filed June 2, 2014) ("Seaford AFR"). WPB has opposed that filing under separate cover and incorporates the arguments made therein by reference. *See* Opposition to Application for Review of Western Pacific Broadcast, LLC, MB Docket No. 09-230 (filed June 17, 2014) ("WPB Opposition to Seaford AFR").

[4] 47 U.S.C. § 331(a) (emphasis added).

WPB's channel 5 allotment at either Seaford or Dover) are "not less than one," and both are technically feasible.

- The Bureau initially allotted channel 5 to Seaford in a decision released on April 28, 2010 (the "*Seaford Report and Order*").[5] In that decision, the Bureau confirmed that the allotment of channel 5 to Seaford was not mutually exclusive with a separate allotment of channel 2 to Wilmington.[6] PMCM did not oppose the allotment of channel 5 to Seaford, and in fact supported it.[7]

- While the *Seaford Report and Order* was pending, PMCM pursued (1) an application for review of the Bureau's separate decision to reject PMCM's notification of its agreement to the reallotment of channel 2 Jackson, Wyoming to Wilmington, Delaware, and (2) a petition for mandamus before the D.C. Circuit, asking the court to compel the reallotment of channel 2 to Wilmington.[8] The Commission ultimately denied PMCM's application for review in the channel 2 matter (the "*Channel 2 Order*").[9]

- PMCM did not file a timely petition for reconsideration or a request for a stay of *Seaford Report and Order*, nor did it challenge the Commission's auction and award of the channel 5 construction permit to WPB in 2011.[10] In fact, far from challenging the Seaford allotment, PMCM *applied to bid* on the channel 5 allotment at Seaford but the Commission determined that PMCM was not qualified to participate in the auction.[11] Rather than challenge that decision, PMCM again pursued separate relief with respect to channel 2 at Wilmington, appealing the *Channel 2 Order* to the D.C. Circuit.

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[5] *See supra* note 2.

[6] *Id.* at 4468 n. 13 ("Because 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 [with respect to channel 2 at Wilmington] is not pertinent to the instant proceeding.").

[7] *See Dover Report and Order at* ¶ 2.; Reply Comments of Western Pacific Broadcasting, LLC, MB Docket No. 13-40, at 2-3 (filed Apr. 18, 2013) (discussing PMCM's statements supporting the channel 5 allotment).

[8] *See Seaford MO&O on Further Reconsideration* at ¶ 8.

[9] *Reallocation of Channel 2 from Jackson, Wyoming to Wilmington, Delaware*, Memorandum Opinion and Order, 26 FCC Rcd 13696 (2011) ("*Channel 2 Order*").

[10] *See Auction of VHF Commercial Television Station Construction Permit Closes; Winning Bidder Announced for Auction 90*, Public Notice, 26 FCC Rcd 1916, 1926 (2011); Federal Communications Commission, CDBS Public Access, Applications, File No. BNPCDT-20110330AAY.

[11] *See Auction of VHF Commercial Television Station Construction Permits; Three Bidders Qualified to Participate in Auction 90*, Public Notice, 26 FCC Rcd 881, 894 (2011).

- In a decision released on December 14, 2012 (the "*Channel 2 Appellate Order*"), the D.C. Circuit reversed and remanded the *Channel 2 Order*.[12] The Bureau ultimately reallotted channel 2 to Wilmington and issued a construction permit to PMCM for that facility.[13]

- In a Memorandum Opinion and Order released on February 13, 2013 (the "*Seaford MO&O on Reconsideration*"), the Bureau explicitly acknowledged the *Channel 2 Appellate Order* but still upheld the *Seaford Report and Order*, consistent with its prior finding that channel 5 at Seaford was not mutually exclusive with channel 2 at Wilmington.[14] Simultaneously with the *Seaford MO&O on Reconsideration*, the Bureau issued its Notice of Proposed Rulemaking for the instant proceeding (the "*Dover NPRM*"), requesting comment on WPB's proposal to move the channel 5 allotment from Seaford to Dover.[15]

- On March 15, 2013, nearly three years late, PMCM petitioned the Commission for reconsideration of the *Seaford Report and Order*.[16] PMCM attempted to justify the extreme lateness of its filing by claiming that the *Channel 2 Appellate Order* qualified as "changed circumstances" under Section 1.429(b)(1) of the Commission's rules.[17]

- On April 3, 2013, PMCM filed comments opposing the reallotment of channel 5 to Dover as proposed in the *Dover NPRM*, claiming among other things that its untimely petition for reconsideration in the Seaford proceeding, if successful, would preclude reallotment of channel 5 to Dover.[18]

- On May 1, 2014, the Bureau released the *Dover Report and Order* and concluded that PMCM's arguments in its comments were without merit.[19]

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[12] *PMCM TV, LLC v. FCC*, 701 F.3d 380 (D.C. Cir. 2012) ("*Channel 2 Appellate Order*").

[13] *See Dover Report and Order* at ¶ 2 n. 7, *citing Reallocation of Channel 2 from Jackson, Wyoming to Wilmington, Delaware*, Report and Order, 28 FCC Rcd 2823 (MB 2013).

[14] *See 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 MO&O on Reconsideration*").

[15] *Western Pacific Broadcast, LLC, Amendment of Section 73.622(i) Digital Television Table of Allotments (Seaford, Delaware and Dover, Delaware)*, Notice of Proposed Rulemaking, 28 FCC Rcd 1024 (MB 2013) ("*Dover NPRM*").

[16] *See* Petition of PMCM TV, LLC for Reconsideration, MB Docket No. 09-230 (dated Mar. 15, 2013).

[17] *Id.* at 1-3.

[18] *See* Comments of PMCM TV, LLC in Opposition to Notice of Proposed Rulemaking, MB Docket No. 13-40, at 2 (filed April 3, 2013).

[19] *Dover Report and Order*, ¶ 15.

PMCM filed the instant Petition on June 13, 2014, to which WPB now submits this timely Opposition.

II. PMCM HAS FAILED TO DEMONSTRATE THAT IT HAS STANDING TO CHALLENGE THE DOVER ALLOTMENT

As a threshold matter, there is a substantial question as to whether PMCM even has standing to challenge the Dover allotment. It is well settled that a petitioner bears the burden of establishing its standing,[20] and PMCM has not done so. The original allotment of channel 5 to Seaford was not mutually exclusive with the allotment of channel 2 to Wilmington,[21] and PMCM has not shown that the reallotment of channel 5 to Dover would cause any harmful interference or other injury to PMCM's operation of KJWP(TV) on channel 2 at Wilmington.[22] Nor can vague assertions that the petitioner is a competitor of a party to the proceeding be sufficient to establish standing.[23] Absent standing, the Petition should be dismissed as moot.[24]

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[20] *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 104 (1998).

[21] *Dover Report and Order*, ¶ 15.

[22] According to its website, KJWP(TV) launched on November 19, 2013 and is a MeTV affiliate. *See* http://kjwp2.com/about-us/ (last viewed June 23, 2014).

[23] *KERM, Inc. v. FCC*, 353 F.3d 57, 61 (D.C. Cir. 2004) (citing *Sierra Club v. EPA*, 292 F.3d 895 (D.C. Cir. 2002)).

[24] Armed only with guesswork, PMCM vaguely complains of the alleged impact reallotment of channel 5 to Dover would have on television service in Seaford. *See* Petition at 8-9. PMCM's apparent compassion for television viewers in Seaford is hard to reconcile with PMCM's ongoing attempt to nullify the *Seaford Report and Order*. In any event, PMCM's putative concerns as to Seaford would be insufficient to confer PMCM with standing to challenge the *Dover Report and Order*. *See, e.g., New World Radio, Inc. v. FCC,* 294 F.3d 164, 172 (D.C. Cir. 2002) (the "injury-in-fact" requirement for standing "serves to distinguish a person with a direct stake in the outcome of a litigation – even though small – from a person with a mere interest in the problem.") (quoting *United States v. Students Challenging Regulatory Agency Procedures (SCRAP),* 412 U.S. 669, 690 n.14 (1973)).

III. PMCM'S REPETITIOUS ARGUMENTS ABOUT "CHANGED CIRCUMSTANCES" SHOULD BE REJECTED – AGAIN

PMCM maintains that reconsideration is appropriate because the Bureau failed to address PMCM's "central argument" that the *Channel 2 Appellate Order* constitutes "changed circumstances" which "eliminated the essential predicate for both the original Seaford allotment and [the Dover allotment] proceeding."[25] However, the Bureau fully considered and rejected that argument in the decisions released on May 1, 2014. Specifically, the *Dover Report and Order* states:

> PMCM does not point to any case law in support of its contention that the court's decision in [the *Channel 2 Appellate Order*] ordering the Commission to issue PMCM a license for channel 2 at Wilmington somehow forms the basis for undoing a final grant of a construction permit for Seaford that is not mutually-exclusive with PMCM's [channel 2 allotment]. Moreover, contrary to PMCM's argument, the validity of the allotment of channel 5 to Seaford, Delaware in 2010 is not "unsettled." Our [*Seaford*] *MO&O on Further Reconsideration* released today dismisses PMCM's petition for reconsideration challenging the validity of that allotment.[26]

In an effort to rectify PMCM's failure to cite any case law in support of its "changed circumstances" argument in its *Dover NPRM* comments, the Petition cites to a 1979 Commission decision,[27] a 2012 Bureau decision,[28] and a 1987 Supreme Court decision,[29] none of which is availing. While the Commission's 1979 decision discusses "changed circumstances," it also notes:

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[25] *See* Petition at 5 (identifying the "changed circumstances" claim as PMCM's "central argument").

[26] *Dover Report and Order*, at 6.

[27] *Practice and Procedure*, 46 RR 2d 524 (1979); *see* Petition at n.11.

[28] *George R. Reed*, 27 FCC Rcd 9048, 9051 (MB 2012); *see* Petition at n.11.

[29] *Interstate Commerce Comm'n v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 278 (1987).

> We wish to emphasize however, that "changed circumstances" would not include those instances in which a party or parties consciously chose to withhold information or did not take advantage of available information. "We cannot allow [a party] to sit back and hope that a decision will be in its favor, and then, when it isn't, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed." *Colorado Radio Corp. v. FCC*, 118 F2d 24, 26 (DC Cir. 1941)."[30]

That is the situation here – PMCM failed to seek reconsideration or review of the *Seaford Report and Order* despite the fact that it was aware, or should have been aware, that it might later regret the Commission's decision to make that allotment.

The 2012 Bureau decision cited by PMCM involved the Commission's general policy of comity with state court actions, and was specifically contingent on the fact in that case that acknowledging the subsequent state court action would "not prejudice any involved party."[31] Here, WPB would clearly be prejudiced by re-opening the Seaford allotment, the subsequent auction, and the WMDE construction permit, all because of a judicial decision that has nothing to do with the Seaford allotment.

Finally, the Supreme Court decision cited by PMCM merely notes that "changed circumstances" might present an opportunity for judicial review, but the case did not actually involve any changed circumstances.[32] In short, PMCM fails to cite any relevant case law which would alter the Bureau's decision to reject PMCM's "change circumstances" arguments in this proceeding. To the contrary, the Commission and the courts have long recognized that

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[30] *Practice and Procedure*, 46 RR 2d 524, ¶ 10 n.5.

[31] *George R. Reed*, 27 FCC Rcd at 9051.

[32] *See Interstate Commerce Comm'n v. Brotherhood of Locomotive Engineers*, 482 U.S. at 278. The Court noted that "overturning the refusal to reopen requires 'a showing of the clearest abuse of discretion.'" *Id.* (quoting *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 534-535 (1946)).

proceedings will be reopened only under extremely limited circumstances. Specifically, unless there has been fraud on the agency's or court's processes, or unless the result is "manifestly unconscionable," there is an overriding policy in favor of administrative finality.[33] This is an exceedingly high standard that PMCM makes no attempt to satisfy, nor could it.

The Bureau also considered and rejected PMCM's "changed circumstances" argument in the *Seaford MO&O on Further Reconsideration*:

> 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.[34]

Stripped of its rhetoric, PMCM's response is weak: "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.'"[35] PMCM misses the point. As noted by the Bureau, PMCM's success on appeal cannot be deemed "changed circumstances" for purposes of Section 1.429(b)(1), since it was entirely foreseeable that PMCM might succeed at the appellate

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[33] *Interstate Comm'cations, Inc.*, Order on Reconsideration, 22 FCC Rcd 13269 n.10 (IB 2007) (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); *KIRO, Inc. v. FCC*, 438 F.2d 141 (D.C. Cir. 1970); *Radio Para La Raza*, Memorandum Opinion and Order, 40 FCC 2d 1102, 1104 (1973)).

[34] *Seaford MO&O on Further Reconsideration* at ¶ 8 (footnote omitted).

[35] Petition at 6. *See also* Seaford AFR at 5 ("The applicable test . . . requires the existence of changed circumstances, not the 'anticipation' or 'prediction' of such a change. . . Requiring parties to seek reconsideration on the basis of predictions of judicial results would open a Pandora's Box of epic proportions.").

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.

This, of course, would render the "changed circumstances" exception virtually meaningless. Any petitioner could invoke the exception merely by filing a court appeal and sitting on its procedural rights indefinitely (holding Commission proceedings and the parties thereto hostage in the process) until his or her appeal is finally resolved. This case demonstrates why the resulting disruption of the Commission's processes would be significant: the *Channel 2 Appellate Order* was issued well over *two years* after PMCM's petition for reconsideration of the *Seaford Report and Order* was due. It is simply impossible to square PMCM's argument with the principle of administrative finality, and predictably PMCM cites no authority to the contrary.[36]

PMCM also errs in assuming that the "changed circumstances" exception in Section 1.429(b)(1) is somehow an exception to the 30-day rule in Section 1.429(d). It is not, and PMCM's attempt to invoke "changed circumstances" is at this point more than four years too late.

IV. THE BUREAU WAS WELL WITHIN ITS STATUTORY AUTHORITY TO ISSUE THE *SEAFORD NPRM*

PMCM is also wrong to suggest that the Bureau issued the *Seaford NPRM* solely to address a "VHF void" in Delaware pursuant to the *second* sentence of Section 331(a) of the

[36] *See Dover Report and Order* at ¶ 15 n. 33 and the cases cited therein.

Act.[37] It is no surprise that PMCM quotes no language to this effect from the *Seaford NPRM* or the *Seaford Report and Order*, since it does not exist. The Bureau in fact made it clear that it was acting in accordance with the "not less than one" language in Section 331(a)'s first sentence, not the "VHF void" language in the statute's second sentence.[38] Thus, PMCM's claims that the "VHF void" disappeared upon issuance of the *Channel 2 Appellate Order*, and that this in turn vitiated the entire premise for the *Seaford NPRM* and, by extension, the reallotment of channel 5 to Dover, are wholly irrelevant.[39]

V. PMCM'S OTHER ARGUMENTS ARE SPECULATIVE AND OTHERWISE UNAVAILING

In the *Dover Report and Order*, the Bureau properly dismissed as speculative PMCM's claim that the remaining station licensed to Seaford, WDPB(TV), might surrender its license in the Incentive Auction and leave Seaford with no local television service.[40] PMCM responds by

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[37] *See* Petition at 2-3. Section 331(a) in its entirety reads as follows: "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. In any case in which 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 [of] 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 this title."

[38] *See Seaford Report and Order*, 25 FCC Rcd at 4467 ("In order to fulfill the mandate that the Commission allot *at least one* VHF channel to each state, if technically feasible, the Commission, in the [*Seaford NPRM*], waived its freeze on the allotment of new television channels to initiate this proceeding and to advance the allotment policy of Section 331(a) of the Act.") (emphasis added) (citation omitted); *Seaford NPRM*, 24 FCC Rcd at 14596 ("In order to fulfill the mandate that the Commission allot *at least one* VHF channel to each state, if technically feasible, the Commission is waiving the freeze on the filing of new DTV allotments to initiate this proceeding and to advance the allocation policies of Section 331(a) of the Act.") (emphasis added) (footnote omitted).

[39] *Id.* at 5.

[40] *Dover Report and Order* at ¶ 16.

offering more speculation about what WDPB(TV) might do in the incentive auction.[41] The Bureau has already considered and rejected this argument, and PMCM has presented no new facts. Moreover, the Bureau was not obligated, as PMCM would have it,[42] to wait until the Incentive Auction is completed before moving forward with the *Dover Report and Order*, and PMCM cites no authority to the contrary. As before, these speculative arguments must be rejected. The Bureau acted reasonably in finding that the public interest would be served by realloting channel 5 to Dover, and properly rejected PMCM's arguments that ultimately would have required the Bureau to deny first local television service to Dover and its larger population, merely because of speculation about what might happen to WDPB(TV) in the future.

PMCM likewise muses in the Petition that WMDE might in future decide not to continue providing city grade signal coverage over Seaford and that, absent a site restriction on the station's transmission facilities, "the assumption that WMDE will not move north is itself truly speculative."[43] Once again, this argument is predicated on PMCM's assumptions about what WPB might or might not do in the future. Mere speculation does not formulate a rational reason for a site restriction or for reconsideration of the *Dover Report and Order*, and PMCM cites no case law in support of its theories.[44]

Finally, the Bureau's Section 307(b) analysis did not, as PMCM would have it, "improperly equate[] over-the-air reception service with local transmission service."[45] Reallotment of channel 5 from Seaford to Delaware plainly would result in a preferred

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[41] *See* Petition at 7-8.

[42] *Id.* at 8.

[43] *Id.* at 8.

[44] *See Dover Report and Order* n.38 (citing relevant case law in which the Commission has rejected similar speculative arguments).

[45] *Id.*

arrangement under the Commission's Section 307(b) allotment priorities, as it would provide Dover, the capital of and second largest city in Delaware (with nearly five times the population of Seaford) with its first local television service, while preserving WMDE's city grade signal coverage over Seaford.[46] The Bureau did *not* say that WMDE's continued city grade signal coverage over Seaford had the same Section 307(b) priority as the former allotment of channel 5 to that community. Instead the Bureau found, correctly, that allotment of channel 5 to Dover should be afforded a higher Section 307(b) priority than allotment of channel 5 to Seaford after taking all the relevant Section 307(b) criteria into account.[47]

VI. CONCLUSION

At bottom, PMCM's Petition has nothing to do with the Dover allotment, and is simply a vehicle for PMCM to rehash arguments that the Bureau has already considered and rejected. In the meantime, 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 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.

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[46] See Dover Report and Order at ¶ 17.

[47] It is unclear why PMCM attempts to support its argument by citing footnote 3 of the Bureau's Notice of Proposed Rulemaking in *Columbia and Edenton, North Carolina,* 19 FCC Rcd 14618 (MB 2004), since it merely repeats the Commission's Section 307(b) criteria without any analysis thereof. *See* Petition at 8 n. 14.

The Petition does not present any facts or legal arguments to the contrary and should be denied.

Respectfully submitted,

WESTERN PACIFIC BROADCAST, LLC

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Its Attorneys

June 26, 2014

CERTIFICATE OF SERVICE

I, Paula Lewis, an employee of Wilkinson Barker Knauer, LLP, hereby certify that a copy of the foregoing Opposition to Petition for Reconsideration was served on June 26, 2014, by first class mail unless otherwise noted, to the following:

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