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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

JUL - 9 2014

Federal Communications Commission
Office of the Secretary

To: The Commission
Video Division, Media Bureau

REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION

PMCM TV, LLC ("PMCM"), by its attorneys, hereby replies to the June 26, 2014 Opposition ("Opposition" or "Opp.") of Western Pacific Broadcast, LLC ("WPB") to PMCM's June 13, 2014 Petition for Reconsideration ("Petition") in the above captioned proceeding.¹

At its outset, the Opposition contests PMCM's standing in this public notice and comment rulemaking proceeding. Opp. at 5. WPB's arguments are baseless. As a procedural matter, WPB errs by "jumping the gun" and trying to fault PMCM for not making in its

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*"). The Video Division and the Media Bureau are both referred to herein as the "Bureau." In the Petition, PMCM inadvertently cited to 47 C.F.R. § 1.106 (non-rulemaking proceedings) rather than 47 C.F.R. § 1.429 (rulemakings), a ministerial error that is immaterial. The relevant facts are that PMCM timely sought reconsideration of a Commission action (the *Dover R&O*), in the appropriate rulemaking docket. As an interested party which had timely filed comments in the docket, PMCM was exercising its right, conferred by statute (47 U.S.C. § 405), to seek reconsideration of the *Dover R&O*. The Petition should therefore be processed in the normal course. PMCM notes that, in any event, the Petition conformed to the requirements of 47 C.F.R. § 1.429, which closely parallel those set forth in 47 C.F.R. § 1.106. That is, the Petition was filed within 30 days of the FCC's giving public notice of the *Dover R&O*, did not exceed the Rule's 25-page limitation, was timely served on WPB, demonstrated material error in the *Dover R&O* as well as how the public interest would be served by grant of reconsideration, and stated its request for relief with particularity.

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Comments before the FCC in this proceeding the “standing” showing necessary to support a petition for review or appeal filed in an Article III appellate court. For present purposes, PMCM notes that it clearly has standing under well-settled precedent. *See Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940). The captioned proceeding is closely intertwined with PMCM’s efforts to bring a first licensed television service to Delaware. In fact, on the same day it denied the PMCM Notification (defined *infra*) in 2009, the FCC launched the Channel 5, Seaford, Delaware channel allotment proceeding (MB Docket No. 09-230) as the first step toward rushing a new Delaware station onto the air, the technical facilities of which would undoubtedly compete with PMCM’s KJWP(TV), relocated to Wilmington. That FCC initiative culminated in agency approval of new commercial television station WMDE at Seaford, Delaware, the authorized technical facilities of which produce the expected predicted signal contour overlap with KJWP. In this proceeding, the FCC has approved a WMDE move to Dover, a community located within the same DMA (Philadelphia) as KJWP, which has only increased the likelihood of economic injury to PMCM through loss of viewership and advertising revenue.

The remainder of the Opposition tries to work around the central fact that the Petition is premised on the Bureau’s failure to properly take into account 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 Reversal”), which reversed and remanded the Commission’s denial of PMCM’s 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.²

WPB first ineffectually tries to distinguish the case law cited by PMCM on changed circumstances. As PMCM has shown, as long ago as 1979, the FCC itself identified court decisions as a type of "changed circumstance" that would justify reconsideration under Commission rules. Petition at 6-7 & n.11.³ The language from that 1979 precedent WPB cites in opposition is completely inapposite. Opp. at 6-7. The quoted passage applies only to petitioners who try to "parry" with previously available evidence after *losing* a decision they had hoped would be in their favor. PMCM did not lose the DC Circuit Reversal, but rather won it. Indeed, the principle cited by WPB applies more appropriately here to the FCC, the losing party in the D.C. Circuit Reversal, which tried to rush the Seaford allotment through rather than wait for resolution of the Wilmington appeal. As PMCM has shown, that 2012 Court decision has ramifications for the FCC's ill-considered approach to Section 331(a), not for PMCM. Notably, WPB cites no precedent supporting its central proposition, that a Court reversal of an FCC decision is somehow *not* a changed circumstance justifying a fresh look on reconsideration. Plainly, it is.

With respect to the legal standard utilized by the FCC in this case, WPB does little more than parrot the Bureau's novel test that PMCM was obligated to seek reconsideration in 2010 on the basis of a prediction or foreseeing of the D.C. Circuit Reversal, and WPB attempts to fault PMCM for not doing so three and a half years ago. But WPB's paraphrasing of PMCM's argument on the Bureau's imprudent new "foreseeability" test is, once again, inaccurate.

² *Reallocation of Channel 2 from Jackson, Wyoming to Wilmington, Delaware*, 26 FCC Rcd 13696 (2011), *aff'g* 24 FCC Rcd 14588 (MB 2009).

³ *See also WKLC, Inc.*, 28 FCC Rcd 2061 (MB 2013) (granting a petition for reconsideration and recognizing changed circumstances because of an intervening court decision).

According to WPB, PMCM's position would "always" permit otherwise untimely reconsideration requests so long as a petitioner lacked "100% *certainty*" of a Court victory. Opp. at 9 (emphasis in original). That summation misstates PMCM's position. Changed circumstances of this type do not always exist, but *only* if and when a petitioner *prevails* in Court and succeeds in obtaining reversal of an unlawful agency action. Where, on the other hand, the FCC prevails, circumstances have not changed and reconsideration is not supported. The Commission has never found that a mere prediction of a winning Court appeal justifies reconsideration. Rather, the FCC has consistently ruled that speculation (here, a predicted appellate victory) is an inadequate basis for reconsideration. Ultimately, the FCC's anticipation of success in Court likely explains why the FCC decided to roll the dice on PMCM's appeal. With the D.C. Circuit reversal, however, the agency lost that bet, producing a number of collateral consequences, including those raised here by PMCM concerning the original Seaford allotment.

WPB's emphasis on the importance of "finality" of FCC decisions (Opp. at 8 and 9) is completely misplaced. The Seaford allotment decision is decidedly *not* final. That is because the Bureau elected not to take action until 2013 on a timely filed 2010 reconsideration petition relating to the Seaford allotment. By 2013, the 2012 D.C. Circuit had intervened, and the Court's decision constituted a changed circumstance, supporting PMCM's timely filed 2013 petition for further reconsideration. In sum, the Seaford allotment is *not* final, and the years of delay in the processing of the Seaford allotment are not the fault of PMCM.

In its Section IV, the Opposition offers a novel reading of Section 331(a). In WPB's view, Section 331(a) authorizes the Seaford allotment because a second allotment to Delaware is "not less than one." In addition to the fact that a private party like WPB cannot supply a

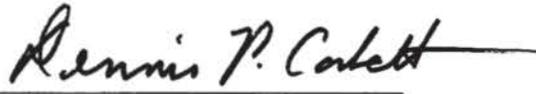
rationale for the Seaford allotment on which the FCC itself did not rely, WPB's argument is unsupportable, stretching Section 331(a) beyond its clear boundaries. In fact, the plain language of Section 331(a) is precisely targeted, directing the FCC to take steps to facilitate the elimination of any VHF television station void in any state, nothing more, nothing less. Once a particular state has "one" VHF station allocation, Section 331(a)'s mandate of "not less than one" such allocation has been fulfilled and Section 331(a) becomes irrelevant to any further allotment decision relating to that state. In the case of Delaware, the FCC erred in not accepting the PMCM Notification as it related to Wilmington in 2009, which created the artificial Delaware VHF void the FCC imprudently moved to fill via the Seaford allotment. In other words, WPB's central problem remains – the sole basis cited by the FCC for the Seaford allotment was Section 331(a) and the need to fill what turned out to be a non-existent VHF void in Delaware. With the collapse of that solitary rationale, the Seaford allotment falls as well.

Curiously, WPB continues to fault PMCM for relying on what it terms "speculation" about WDPB(TV) and the incentive auction and WPB's own future plans for the WMDE facilities. But WPB cannot have it both ways. That is, as noted above, the Opposition elsewhere insists that PMCM was required to speculate in 2009 about the future success of a court appeal not decided until 2012, so WPB's contradictory objections on grounds of speculation should be rejected here. Furthermore, WPB's focus on alleged speculation cannot hide the fact that WPB offers no assurances that it will not in the future reorient WMDE service away from the southern Delaware community (Seaford) that was so important to the FCC's 2010 Seaford allotment decision. The reality remains, as PMCM has previously pointed out, that the public interest stands to be the loser if WMDE's Dover relocation is allowed to stand.

Finally, the equities cited by WPB (Opp. at 5-6) are irrelevant for several reasons. First, the Bureau's efforts to imprudently rush Seaford through FCC processes during the very same period of time PMCM was challenging the Bureau's dismissal of the PMCM Notification cannot save Seaford/Dover now. The FCC should have waited until the Section 331(a) dust relating to the *Wilmington* allotment had settled before moving on with its unilateral *Seaford* (now Dover) plan. In any event, equities do nothing to undermine the APA mandate that unlawful agency action shall be set aside. 5 U.S.C. § 706. Here, the Seaford allotment unlawfully filled a non-existent VHF void and with its demise, WPB's move to Dover loses its foundation, and fails. For all the reasons given in PMCM's Comments in this proceeding, in its Petition and in this Reply, the Dover allotment should be reconsidered and rescinded.

Respectfully submitted,

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July 9, 2014

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CERTIFICATE OF SERVICE

I, Rebecca J. Cunningham, hereby certify that that on this 9th day of July, 2014, I served copies of the foregoing Reply to Opposition to Petition for Reconsideration by causing them to be delivered by first class, postage prepaid U.S. mail to the following:

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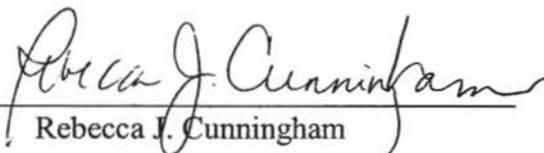
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