

APPENDIX

APPENDIX

TABLE OF CONTENTS

Appendix A	Judgment in the United States Court of Appeals for the District of Columbia Circuit (June 20, 2018)	App. 1
Appendix B	Memorandum Opinion and Order Before the Federal Communications Commission, Washington, D.C. 20554 (September 15, 2017)	App. 9
Appendix C	Order Denying Petition for Panel Rehearing in the United States Court of Appeals for the District of Columbia Circuit (September 5, 2018)	App. 86
Appendix D	Order Denying Petition for Rehearing En Banc in the United States Court of Appeals for the District of Columbia Circuit (September 5, 2018)	App. 88

App. 1

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**No. 17-1209
September Term, 2017**

[Filed June 20, 2018]

PMCM TV, LLC,)
PETITIONER)
)
V.)
)
FEDERAL COMMUNICATIONS)
COMMISSION AND UNITED)
STATES OF AMERICA, U.S.)
DEPARTMENT OF JUSTICE)
ANTITRUST DIVISION,)
RESPONDENTS)
)
CBS CORPORATION, ET AL.,)
INTERVENORS)
)

Consolidated with 17-1210

On Petitions for Review of Orders of
the Federal Communications Commission

Before: GRIFFITH, WILKINS and KATSAS, *Circuit
Judges.*

J U D G M E N T

These cases were considered on petitions for review from the Federal Communications Commission, and on the briefs and oral arguments of the parties. The Court has afforded the issues full consideration and has determined that they do not warrant a published opinion. *See* Fed. R. App. P. 36; D.C. Cir. R. 36(d). It is

ORDERED and **ADJUDGED** that the petitions for review of the orders of the Federal Communications Commission be **DENIED**.

Petitioner PMCM TV, LLC obtained a license from the Federal Communications Commission to operate television station WJLP in northern New Jersey on radio-frequency channel 3, the same radio-frequency channel used by PMCM's predecessor station in Nevada. However, the FCC assigned WJLP virtual channel 33, the channel to which viewers tune their televisions in order to watch WJLP. The FCC did this to protect the "Channel 3" brand identity of intervenor broadcasters that already used virtual channel 3 in service areas that overlapped with that of WJLP. For similar reasons, the FCC refused to require cable operators to carry WJLP on cable television as "Channel 3." PMCM seeks review of both decisions.

Before the transition from analog to digital broadcasting, television stations broadcast on radio frequency bands with a fixed correspondence to the channel numbers shown on viewers' televisions. During the transition, many stations changed their radio frequencies from VHF to UHF, which was better suited for digital broadcasting. Nonetheless, to preserve brand identities, stations sought to retain the same "virtual"

App. 3

channel numbers—what viewers would select on their televisions in order to tune in.

To facilitate this transition, the Advanced Television Systems Committee, a non-profit organization, developed a voluntary Program and System Information Protocol (“PSIP Standard”) for assigning virtual channel numbers. The PSIP Standard allowed broadcasters to switch from VHF to UHF radio frequencies, while still retaining virtual channel numbers that match their old analog channel numbers.

Under the PSIP Standard, a broadcaster received a two-number virtual channel. The first number, called the “major” channel number, was the same as the station’s original analog channel number and was used to identify all of the broadcaster’s programming. The second number, called the “minor” channel number, identified one program service of the broadcaster. For example, an analog channel 4, known locally as “Channel 4,” but with a new digital radio-frequency channel 52, would have its programming appear to viewers as carried on channels 4.1, 4.2, and so forth.

The FCC has incorporated the 2006 version of the PSIP Standard into its own regulations. *See In re Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, Report and Order, 19 FCC Rcd. 18279, 18343–47 ¶¶ 149–53 (2004); 47 C.F.R. § 73.682(d).

In 2014, the FCC allowed WJLP to broadcast on radio-frequency channel 3 from an antenna in New York City. The FCC did not assign WJLP a virtual channel number at that time, so PMCM began using virtual channel 3. Intervenor Meredith Corporation

App. 4

objected because the service area of its Hartford, Connecticut station WSFB overlaps with the service area of WJLP. Before the digital transition, WSFB operated on radio-frequency channel 3; now, it broadcasts on radio-frequency channel 33 while using virtual channel 3 to preserve its brand identity. In response to Meredith's objections, PMCM proposed to partition virtual channel 3, with Meredith using virtual channels 3.1 through 3.9 and PMCM using virtual channels 3.10 and above. Intervenor CBS Corporation, which operates a Philadelphia-based television station on radio-frequency channel 26 and virtual channel 3, raised objections similar to those of Meredith. The FCC rejected PMCM's proposal and assigned WJLP virtual channel 33.

PMCM argues that the FCC misinterpreted the relevant PSIP Standard and arbitrarily assigned virtual channel 33 to WJLP. We reject both of these arguments.

The FCC's interpretation of the PSIP Standard, as incorporated into its regulations, "controls unless plainly erroneous or inconsistent with the regulation." *Press Commc'ns, LLC v. FCC*, 875 F.3d 1117, 1121 (D.C. Cir. 2017) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). The relevant portion of the PSIP Standard provides:

If, after the [digital] transition, a previously used [analog radio-frequency] channel in a market is assigned to a newly-licensed [digital TV] broadcaster in that market, the newly-licensed [digital TV] broadcaster shall use, as his major_channel_number, the number of the [digital TV radio-frequency] channel originally

App. 5

allocated to the previous [analog] licensee of the assigned channel.

PSIP Standard, Annex B.1(4).

This case largely turns on the term “market” as used in Annex B.1(4). The FCC interpreted “market” to mean service area—the geographic area reached by a station’s over-the-air signal. *In re Request for Declaratory Ruling by Meredith Corp. and Alternative PSIP Proposal by PMCM TV, LLC for WJLP (Formerly KVVV(TV)), Middletown Township, New Jersey*, Memorandum Opinion and Order, 32 FCC Rcd. 7229, 7243 ¶ 28 (2017) (“*PSIP Order*”). That placed WJLP and WSFB in the same “market,” thus making WJLP subject to Annex B.1(4). Accordingly, because WJLP was newly-licensed in the greater-New York area to broadcast on radio-frequency channel 3, which was the previously used analog radio-frequency channel of WSFB, WJLP was assigned virtual channel 33, the digital radio-frequency channel of WSFB. PMCM contends that “market” refers not to service area but to the narrower Neilson Designated Market Area (“DMA”). On that understanding, according to PMCM, WJLP would be in a different “market” from that of WSFB; so, Annex B.1(4) would not apply, and virtual channel 3 would be available.

The FCC reasonably interpreted “market” to mean service area rather than DMA. The FCC’s interpretation is consistent with the terms of Annex B.1(4), which does not specify whether “market” means service area or DMA, and it furthers the regulatory objective of preserving historic brand identities developed by existing broadcasters. Moreover, PMCM would not prevail even under its proposed

App. 6

interpretation of “market” to mean DMA. As the FCC further explained, the signal of WSFB extends into Fairfield County, Connecticut, which is part of the New York DMA. *PSIP Order* ¶ 35. Under either interpretation, WSFB “previously used” analog radio-frequency channel 3 in the relevant “market,” thus triggering Annex B.1(4).

The FCC did not act arbitrarily in applying Annex B.1(4) according to its terms. PMCM objects that the FCC has failed to prohibit many other duplicative assignments of major channel numbers in similar circumstances. However, as the FCC explained, its consistent approach has been to resolve channel-placement disputes when and only when one of the involved stations objects. *PSIP Order* ¶¶ 5, 39. We have no basis for setting aside that perfectly reasonable approach. Moreover, although PMCM understandably wants “proximity” to “major network-affiliated stations” with low virtual channel numbers (Br. 46), it was perfectly rational for the FCC to allow incumbent stations to protect brand identities built up over many years of programming and advertising. Finally, PMCM claims to have suffered various harms from the FCC’s assignment to it of virtual channel 33 in particular. Putting aside the seemingly mandatory rule that PMCM “shall use” that virtual channel, the FCC persuasively explained that the alleged harms were largely unsubstantiated and easily fixable. *PSIP Order* ¶¶ 19, 43.

PMCM also challenges the FCC’s refusal to require cable providers to carry WJLP on cable channel 3. The parties agree that WJLP is entitled to “must-carry” privileges on cable networks, but, once again, they

App. 7

disagree about channel positioning. The relevant statute provides:

Each signal carried in fulfillment of the carriage obligations of a cable operator under this section shall be carried on the cable system channel number on which the local commercial television station is *broadcast over the air*, or on the channel on which it was carried on [historical dates or on the channel] as is mutually agreed upon by the station and the cable operator. Any dispute regarding the positioning of a local commercial television station shall be resolved by the Commission.

47 U.S.C. § 534(b)(6) (emphasis added).

The FCC concluded that the “over the air” channel refers to the virtual channel number rather than the radio-frequency channel number. *In re PMCM TV, LLC v. RCN Telecom Services, LLC*, Memorandum Opinion and Order, 32 FCC Rcd. 7200, 7207–08 ¶ 13 (2017). Despite PMCM’s objections, we agree with the FCC that the “over the air” channel means the channel as perceived by viewers—the single analog channel before the digital transition, and the virtual channel afterward. As a textual matter, the virtual channel number is encoded in the signal that the station “broadcast[s] over the air.” Moreover, the FCC’s interpretation best harmonizes with the purpose of the must-carry requirement—to ensure that viewers have clear and easy access to local programming. *See, e.g., Turner Broad. Sys. v. FCC*, 520 U.S. 180, 191–93 (1997).

App. 8

Finally, PMCM argues that the FCC violated the Spectrum Act by reassigning its virtual channel number from 3 to 33, but that Act concerns the reallocation of radio frequencies, not the allocation of virtual channels. *See* 47 U.S.C. § 1452(g)(1)(A).

The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

PER CURIAM

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Ken Meadows

Deputy Clerk

APPENDIX B

Federal Communications Commission FCC 17-117

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

[Filed September 15, 2017]

**CSR-8917-M
MB Docket No. 16-25**

In the Matter of)
)
PMCM TV, LLC, Licensee of WJLP,)
Middletown Township, New Jersey)
)
v.)
)
RCN Telecom Services, LLC)
)

**CSR-8918-M
MB Docket No. 16-26**

PMCM TV, LLC, Licensee of WJLP,)
Middletown Township, New Jersey)
)
v.)
)
Service Electric Cable TV of New)
Jersey Inc., d/b/a Service Electric)

App. 10

Broadband Cable)
_____)

CSR-8919-M
MB Docket No. 16-27

PMCM TV, LLC, Licensee of WJLP,)
Middletown Township, New Jersey)
)
v.)
)
Time Warner Cable Inc.)
_____)

MEMORANDUM OPINION AND ORDER

Adopted: September 14, 2017

Released: September 15, 2017

By the Commission:

I. INTRODUCTION

1. On May 17, 2016, the Media Bureau (Bureau) issued three Memorandum Opinion and Orders (MO&Os) denying must carry complaints filed by PMCM TV, LLC (PMCM), licensee of commercial broadcast television station WJLP, Middletown Township, New Jersey, seeking carriage on cable channel 3, the channel number corresponding to the station's RF channel assignment, on cable systems operated by RCN Telecom Services, LLC (RCN), Service Electric Cable TV of New Jersey Inc., d/b/a Service Electric Broadband Cable (SECTV-NJ), and Time Warner Cable Inc. (TWC) in the New York, New

App. 11

York designated market area (New York DMA).¹ The Commission now has before it a Consolidated Application for Review of the Bureau's MO&Os filed by PMCM on June 10, 2016.²

2. The Commission also has before it an Application for Review filed by PMCM on August 25, 2014,³ seeking review of a Letter Order issued by the Bureau on July 25, 2014, which deferred implementation of PMCM's must carry request and channel position election for WJLP, which sought carriage on cable channel 3, until 90 days after a final decision on the appropriate Program System and Information Protocol (PSIP) virtual channel for the station,⁴ and an Application for Review filed by PMCM

¹ *PMCM TV, LLC v. RCN Telecom Services, LLC*, Memorandum Opinion and Order, 31 FCC Rcd 5224 (MB 2016) (*PMCM v. RCN*); *PMCM TV, LLC v. Service Electric Cable TV of New Jersey Inc., d/b/a Service Electric Broadband Cable*, Memorandum Opinion and Order, 31 FCC Rcd 5230 (MB 2016) (*PMCM v. SECTV-NJ*); *PMCM TV, LLC v. Time Warner Cable Inc.*, Memorandum Opinion and Order, 31 FCC Rcd 5236 (MB 2016) (*PMCM v. TWC*).

² PMCM Consolidated Application for Review, MB Docket Nos. 16-25, 16-26, 16-27 (filed June 10, 2016), <https://ecfsapi.fcc.gov/file/60002238704.pdf> (PMCM Consolidated Application for Review).

³ PMCM Application for Review (filed Aug. 25, 2014) (Deferral Application for Review).

⁴ *Requests to Defer Mandatory Carriage of WJLP (Formerly KVVN(TV)), Middletown Township, New Jersey*, Letter Order, 29 FCC Rcd 9102 (MB 2014) (*Deferral Letter Order*). PSIP consists of data transmitted along with a station's DTV signal which tells DTV receivers information about the station and what is being

on July 6, 2015,⁵ seeking review of a Letter Order issued by the Bureau on June 5, 2015, which reinstated PMCM's must carry request and channel position election for WJLP.⁶ For the reasons that follow, we deny in part and dismiss in part PMCM's Consolidated Application for Review and dismiss as moot PMCM's Applications for Review of the Bureau's *Deferral Letter Order* and *Reinstatement Letter Order*.

II. BACKGROUND

3. Pursuant to Section 614 of the Communications Act of 1934, as amended (Act), and the implementing rules adopted by the Commission, commercial television broadcast stations, such as WJLP, are entitled to assert mandatory carriage rights on cable

broadcast and provides a method for receivers to identify a DTV station and determine how the receiver can tune to it. PSIP enables receivers to link a station's digital RF channel with its "virtual" or major channel number – the number viewers see on their channel receiver when they view a DTV station over the air – regardless of the actual RF channel used for digital transmission. *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Report and Order, 19 FCC Rcd 18279, 18344-46, paras. 149-53 (2004) (*Second Periodic Review*). For purposes of the PSIP standard, the terms "virtual" channel and "major" channel are used interchangeably.

⁵ PMCM Application for Review (filed July 6, 2015) (Reinstatement Application for Review).

⁶ *Requests to Defer Mandatory Carriage of WJLP (Formerly KVVN(TV)), Middletown Township, New Jersey*, Letter Order, 30 FCC Rcd 6116 (MB 2015) (*Reinstatement Letter Order*).

App. 13

systems located within their market.⁷ A station's market for this purpose is its DMA, as defined by the Nielsen Company.⁸ The Commission has clarified that "broadcast stations may assert their carriage and channel positioning rights at any time so long as they have not elected retransmission consent."⁹ Section 614 of the Act and Section 76.57 of the Commission's rules provide commercial television stations with four possible channel positioning options to which they may assert their rights.¹⁰ Specifically, a commercial broadcast station may elect to be carried on: (1) the channel number on which the station is broadcast over the air; (2) the channel number on which the station

⁷ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, 2975-77, paras. 41-46 (1993); 47 U.S.C. § 534. The Commission subsequently extended mandatory carriage rights to digital television stations and amended its rules accordingly. *Carriage of Digital Television Broadcast Signals*, First Report and Order, 16 FCC Rcd 2598, 2606, paras. 15-16, 2610, para. 28 (2001) (*First Report and Order*); 47 CFR § 76.64(f)(4).

⁸ Section 614(h)(1)(C) of the Act provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. 47 U.S.C. § 534(h)(1)(C). Section 76.55(e)(2) of the Commission's rules specifies that a commercial broadcast television station's market is its DMA as determined by Nielsen Media Research. 47 CFR § 76.55(e)(2).

⁹ *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Clarification Order, 8 FCC Rcd. 4142, 4144, para. 15 (1993).

¹⁰ 47 U.S.C. § 534; 47 CFR § 76.57.

was carried on July 19, 1985; (3) the channel number on which the station was carried on January 1, 1992; or (4) any other channel number mutually agreed upon by the station and the cable operator.¹¹

A. Cable Deferral Proceeding

4. By letters dated June 6, 2014, PMCM notified three MVPDs – Cablevision Systems Corporation (Cablevision), Comcast Cable Communications, LLC (Comcast), and TWC – that WJLP would commence operation in August 2014 as a new television station in the New York DMA. PMCM also notified the MVPDs that it was electing mandatory carriage of the station’s signal on all cable systems operated by the MVPDs in the New York DMA and requesting carriage on channel 3. At that time, there was an ongoing dispute regarding WJLP’s PSIP virtual channel assignment, specifically whether PMCM was entitled to use virtual channel number 3 for its over-the-air broadcast signal.¹² The MVPDs subsequently filed letter requests that the Commission allow them to defer implementing PMCM’s must-carry request and channel position election until 90 days after the date of the Bureau’s final decision on the appropriate virtual channel for over-the-air broadcasting by WJLP. On July 25, 2014, the Bureau released a Letter Order waiving Section 76.64(f)(4) of the Commission’s rules and granting the

¹¹ 47 U.S.C. § 534(b)(6); 47 CFR § 76.57(a), (d).

¹² *Media Bureau Seeks Comment on Request for Declaratory Ruling by Meredith Corporation and “Alternative PSIP Proposal” by PMCM TV, LLC for KVVN(TV), Middletown Township, New Jersey*, Public Notice, 29 FCC Rcd 10556 (MB 2014).

App. 15

MVPDs' requests.¹³ On August 25, 2014, PMCM filed an Application for Review of the Bureau's *Deferral Letter Order*, arguing that PMCM has a statutory right to mandatory carriage of WJLP on cable systems within its market on the channel number on which WJLP is broadcast over the air, that PMCM is entitled to use its over-the-air RF channel 3 as its PSIP virtual channel number, and that the Bureau's *Deferral Letter Order* deprived WJLP of its right to cable carriage without undue delay.¹⁴

5. On June 5, 2015, the Bureau issued a Declaratory Ruling assigning virtual channel 33 to WJLP.¹⁵ On June 6, 2015, the Bureau issued a Letter Order reinstating PMCM's must carry request and

¹³ *Deferral Letter Order*, 29 FCC Rcd at 9105; 47 CFR § 76.64(f)(4) (requiring that a station's election of must-carry status take effect within 90 days of its election).

¹⁴ *Deferral Application for Review* at 1-3.

¹⁵ *Request for Declaratory Ruling by Meredith Corporation and Alternative PSIP Proposal by PMCM TV, LLC for WJLP (Formerly KVVN(TV)), Middletown Township, New Jersey*, Declaratory Ruling, 30 FCC Rcd 6078, 6092, para. 34 (MB 2015) (*PMCM PSIP Declaratory Ruling*). PMCM filed an Application for Review of the *PMCM PSIP Declaratory Ruling*. The Commission is issuing an order addressing the Application for Review of the *PMCM PSIP Declaratory Ruling* concurrently with the instant order. *Request for Declaratory Ruling by Meredith Corporation and "Alternative PSIP Proposal" by PMCM TV, LLC for WJLP (Formerly KVVN(TV)), Middletown Township, New Jersey*, Memorandum Opinion and Order, MB Docket No. 14-150, FCC 17-118 (2017) (*PMCM PSIP MO&O*).

channel position election for WJLP.¹⁶ The *Reinstatement Letter Order* found that the *PMCM PSIP Declaratory Ruling* removed the uncertainty regarding WJLP's PSIP virtual channel number that necessitated the *Deferral Letter Order* and that PMCM's initial must-carry request and channel position election seeking carriage on cable channel 3 would take effect in 90 days, on September 3, 2015.¹⁷ The *Reinstatement Letter Order* further stated that if the MVPDs do not implement PMCM's original must-carry request or channel position election within 90 days, PMCM may choose to invoke the cable carriage enforcement procedures set forth in Section 614 of the Act and Section 76.61 of the Commission's rules,¹⁸ or alternatively, PMCM may pursue carriage of WJLP on channel 33, the virtual channel the Bureau assigned to WJLP in the *PMCM PSIP Declaratory Ruling*.¹⁹ On July 6, 2015, PMCM filed an Application for Review of the *Reinstatement Letter Order*, arguing that the Bureau has negatively prejudged any complaint PMCM might file under the cable carriage enforcement procedures and that WJLP is entitled to cable carriage on cable channel 3, the channel number corresponding to the station's over-the-air RF channel assignment.²⁰

¹⁶ *Reinstatement Letter Order*, 30 FCC Rcd at 6116.

¹⁷ *Id.* at 6117.

¹⁸ 47 U.S.C. § 534(d); 47 CFR § 76.61.

¹⁹ *Reinstatement Letter Order*, 30 FCC Rcd at 6117.

²⁰ Reinstatement Application for Review at 4-5.

B. Cable Carriage Proceedings

6. RCN operates cable television systems serving various communities within the New York DMA. WJLP did not make a formal election on RCN's systems and, as a result, defaulted to must carry status pursuant to Section 76.64(f)(3) of the Commission's rules.²¹ On October 22, 2015, PMCM gave written notice to RCN pursuant to Section 76.61 of the Commission's rules that RCN had failed to meet its statutory and regulatory carriage obligations by failing to carry WJLP on channel 3.²² RCN did not respond to this letter.²³ On January 19, 2016, PMCM filed a must carry complaint against RCN seeking carriage of WJLP on cable channel 3.²⁴

7. By letter dated September 14, 2014, PMCM notified SECTV-NJ, which operates cable television

²¹ *PMCM v. RCN*, 31 FCC Red at 5225, para. 3. *See* 47 CFR § 76.64(f)(3).

²² *PMCM v. RCN*, 31 FCC Red at 5225-26, para. 3. *See* 47 CFR § 76.61(a)(1) ("Whenever a local commercial television station ... believes that a cable operator has failed to meet its carriage or channel positioning obligations, pursuant to §§76.56 and 76.57, such station shall notify the operator, in writing, of the alleged failure and identify its reasons for believing that the cable operator is obligated to carry the signal of such station or position such signal on a particular channel.").

²³ *PMCM v. RCN*, 31 FCC Red at 5226, para. 3.

²⁴ *Id.* PMCM stated in its complaint that RCN was currently carrying WJLP on cable channel 33 pursuant to the Bureau's previously stated position that must-carry stations must be carried on the PSIP channel associated with the station. *Id.*

systems serving various communities in the New York DMA, that WJLP was electing mandatory carriage for the election period starting January 1, 2015, and ending December 31, 2017, on all cable systems operated by SECTV-NJ in the New York DMA on channel 3, asserting that channel 3 was its “over the air” channel number.²⁵ On October 22, 2015, PMCM gave written notice to SECTV-NJ pursuant to Section 76.61 of the Commission’s rules that SECTV-NJ had failed to meet its statutory and regulatory carriage obligations by failing to carry WJLP on channel 3.²⁶ By letter dated November 18, 2015, SECTV-NJ rejected PMCM’s demand to be carried on channel 3, but indicated that it was “open to discussing carriage of WJLP on a mutually agreeable channel that is within the neighborhood of the other broadcast signals carried.”²⁷ On January 19, 2016, PMCM filed a must carry complaint against SECTV-NJ seeking carriage of WJLP on cable channel 3.²⁸

8. By letter dated June 6, 2014, PMCM notified TWC, which operates cable television systems serving various communities in the New York DMA, that WJLP would commence operation in August 2014 as a new television station in the New York DMA and that it was electing mandatory carriage for the election period ending December 31, 2014, for WJLP on all

²⁵ *PMCM v. SECTV-NJ*, 31 FCC Red at 5231, para. 3.

²⁶ *Id.* at 5232, para. 3.

²⁷ *Id.*

²⁸ *Id.*

cable systems operated by TWC in the New York DMA on channel 3, asserting that channel 3 was its “over the air” channel number.²⁹ On July 17, 2015, following the Bureau’s issuance of the *Reinstatement Letter Order*, TWC sent PMCM a letter inquiring whether PMCM intended to elect carriage for WJLP on cable channel 33 and indicating that it intended to voluntarily begin carrying WJLP, an affiliate of the MeTV network, on cable channel 1239, which was currently occupied by the satellite feed of the MeTV network, in order to provide a seamless transition for viewers of MeTV programming.³⁰ In its response dated July 28, 2015, PMCM reaffirmed its election of mandatory carriage on cable channel 3, declined an election for the placement of WJLP on cable channel 33, and accepted TWC’s offer to carry WJLP on an interim basis on channel 1239.³¹ By letter dated July 30, 2015, TWC acknowledged PMCM’s must carry election for WJLP and confirmed that it would commence carriage of WJLP on cable channel 1239 on or before September 3, 2015.³² TWC launched WJLP on cable channel 1239 on August 25, 2015.³³ On October 22, 2015, PMCM gave written notice to TWC pursuant to Section 76.61 of the Commission’s rules that TWC’s carriage of WJLP on cable channel 1239 fails to meet its statutory and

²⁹ *PMCM v. TWC*, 31 FCC Rcd at 5237, para. 3.

³⁰ *Id.* at 5238, para. 4.

³¹ *Id.*

³² *Id.*

³³ *Id.*

regulatory carriage obligations.³⁴ By letter dated November 19, 2015, TWC denied PMCM's request for carriage on cable channel 3, asserting that PMCM has no right to demand carriage of WJLP on channel 3 and that TWC's carriage of WJLP on channel 1239 is proper because PMCM was given the opportunity to update its channel placement election to select channel 33 but failed to do so.³⁵ On January 19, 2016, PMCM filed a must carry complaint against TWC seeking carriage of WJLP on cable channel 3.³⁶

9. On May 17, 2016, the Bureau issued three MO&Os denying PMCM's must carry complaints against RCN, SECTV-NJ, and TWC.³⁷ The Bureau concluded that PMCM is not entitled to mandatory carriage of WJLP on the cable systems of RCN, SECTV-NJ, and TWC in the New York DMA on cable channel 3, the channel number corresponding to WJLP's RF channel assignment.³⁸ The Bureau found that under the Commission's 2008 *Declaratory Order* addressing the responsibilities of cable operators with respect to carriage of digital broadcasters, a digital

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *PMCM v. RCN*, 31 FCC Rcd at 5224, para. 1; *PMCM v. SECTV-NJ*, 31 FCC Rcd at 5230, para. 1; *PMCM v. TWC*, 31 FCC Rcd at 5236, para. 1.

³⁸ *PMCM v. RCN*, 31 FCC Rcd at 5226, para. 5; *PMCM v. SECTV-NJ*, 31 FCC Rcd at 5232, para. 5; *PMCM v. TWC*, 31 FCC Rcd at 5239, para. 7.

broadcast station's virtual channel assignment, not its RF channel assignment, is the relevant channel number for purposes of determining the station's cable carriage position.³⁹ The Bureau rejected PMCM's assertion that the *2008 Declaratory Order* merely acknowledged that, following the digital transition, stations might prefer to claim carriage rights on their newly-adopted virtual channels and gave stations the option of demanding carriage on either their virtual channels or their RF channels.⁴⁰ The Bureau also rejected PMCM's claim that tying cable carriage rights exclusively to PSIPs rather than allotted channels would upset the cable carriage rights of possibly hundreds of stations across the country, noting that PMCM presented no evidence that the decision in the *2008 Declaratory Order* has upset the cable carriage rights of hundreds of stations.⁴¹

10. On June 10, 2016, PMCM filed a Consolidated Application for Review of the Bureau's

³⁹ *PMCM v. RCN*, 31 FCC Rcd at 5227, para. 6; *PMCM v. SECTV-NJ*, 31 FCC Rcd at 5233, para. 6; *PMCM v. TWC*, 31 FCC Rcd at 5240, para. 8 (each quoting *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, Declaratory Order, 23 FCC Rcd 14254, 14259, para. 15 (2008) (*2008 Declaratory Order*)).

⁴⁰ *PMCM v. RCN*, 31 FCC Rcd at 5227-28, para. 7; *PMCM v. SECTV-NJ*, 31 FCC Rcd at 5234, para. 7; *PMCM v. TWC*, 31 FCC Rcd at 5240, para. 9.

⁴¹ *PMCM v. RCN*, 31 FCC Rcd at 5228, para. 7; *PMCM v. SECTV-NJ*, 31 FCC Rcd at 5234, para. 7; *PMCM v. TWC*, 31 FCC Rcd at 5241, para. 9.

three MO&Os.⁴² In its Consolidated Application for Review, PMCM argues that a station’s “over-the-air channel” under Section 614(b)(6) of the Act refers to a transmitted frequency band, not a “virtual channel,” and Section 614(b)(6) guarantees a TV station the right to cable carriage on its “over-the-air channel”; that if the Bureau’s interpretation of “channel” in the Act is correct, the majority of stations which have thought themselves entitled to must carry status for the last two and a half decades under Section 614(h) of the Act do not now qualify because they are not “licensed and operating on a channel regularly assigned to a community within a cable system’s market”; that the Spectrum Act precludes the Bureau from changing WJLP’s channel from 3 to 33; the Bureau erred in acting on a novel matter on delegated authority; that WJLP is entitled to cable carriage on a VHF channel number under Section 331 of the Act; that the Commission failed to act on PMCM’s must carry demand within the 120-day period set by statute; and that the Bureau improperly denied PMCM’s cable carriage demand on RCN because RCN’s opposition to the demand was untimely.⁴³ On June 27, 2016, SECTV-

⁴² PMCM Consolidated Application for Review at 1.

⁴³ *Id.* at 6-14. PMCM claims that the delay in resolving the virtual major channel issue, followed by the assignment of an “erroneous” virtual major channel, and then the denial of must carry rights on cable channel 3 has resulted in millions of viewers being unable to access WJLP’s signal over the air or on cable, thus crippling its ability to provide the service to New Jersey which it was intended by Congress to deliver. *Id.* at 3. We note, however, that WJLP has been carried on numerous cable systems serving the New York DMA since September 2015. *See* PMCM TV, LLC, WJLP, Middletown Township NJ, Facility ID No. 86537, Letter from

App. 23

NJ and TWC filed Oppositions to PMCM's Consolidated Application for Review.⁴⁴ On July 6, 2016, PMCM filed a Consolidated Reply to the Oppositions filed by SECTV-NJ and TWC.⁴⁵

Donald J. Evans, Counsel for PMCM TV, LLC, to Marlene H. Dortch, Secretary, FCC, at 2 (filed Sept. 30, 2015) (stating that Cablevision, Comcast, and TWC cable systems in the New York DMA were carrying WJLP); *Id.*, Letter from Tara M. Corvo, Counsel to Cablevision Systems Corp., to William T. Lake, Chief, Media Bureau, FCC, at 1 (filed Sept. 24, 2015) (stating that all Cablevision cable systems in the New York DMA on which WLJP had must carry rights began carrying WJLP on Sept. 3, 2015); *Id.*, Letter from Frederick W. Giroux, Counsel to Comcast Cable Communications, L.L.C., to William T. Lake, Chief, Media Bureau, FCC, at 1 (filed Sept. 30, 2015) (stating that Comcast cable systems serving New Jersey communities in the New York DMA began carrying WJLP on Sept. 3, 2015); Letter from Seth A. Davidson, Counsel to Time Warner Cable Inc., to William T. Lake, Chief, Media Bureau, FCC, at 1 (filed Sept. 30, 2015) (stating that TWC cable systems in the New York DMA began carrying WJLP on Aug. 25, 2015).

⁴⁴ SECTV-NJ Opposition to Application for Review, MB Docket No. 16-26 (filed June 27, 2016), <https://ecfsapi.fcc.gov/file/10627013361891/Service%20Electric%20Opp%20to%20Application%20for%20Review.pdf> (SECTV-NJ Opposition); TWC Opposition to Application for Review, MB Docket No. 16-27 (filed June 27, 2016), <https://ecfsapi.fcc.gov/file/106272523715719/TWC%20Opposition%20to%20PMCM%20Application%20for%20Review%20June%202016.PDF> (TWC Opposition). RCN did not file an Opposition to the Application for Review.

⁴⁵ PMCM Consolidated Reply to Oppositions to Application for Review, MB Docket Nos. 16-25, 16-26, 16-27 (filed July 6, 2016), <https://ecfsapi.fcc.gov/file/10726786115541/16071902-7.pdf> (PMCM Consolidated Reply).

III. DISCUSSION

A. The Bureau Properly Concluded that WJLP's Channel Positioning Rights Are Based on its PSIP Virtual Channel, Not its RF Channel

11. For the reasons set forth herein, we conclude that interpreting the on-channel carriage option to define a digital station's "over the air" channel number by reference to the station's PSIP channel is reasonable and best serves the statutory purpose of the must-carry regime -- to ensure that broadcasters are not unfairly disadvantaged by cable operators' channel placement determinations.⁴⁶ The Commission's decision to tie the on-channel carriage option to PSIP channels serves this statutory purpose because it preserves broadcast stations' brand identity, allowing stations to elect cable carriage on the same channel numbers stations use to identify and market themselves to over-the-air

⁴⁶ See 1992 Cable Act, §2(a)(15) ("A cable television system which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby attract additional advertising revenues that otherwise might be earned by the cable system operator. As a result, there is an economic incentive for cable systems to terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position."). The Commission identified the PSIP protocol as the critical element in furthering the purposes of the must-carry regime. *First Report and Order*, 16 FCC Rcd at 2635, para. 83 (requiring cable operators to pass through channel mapping data because "the channel mapping protocols contained in the PSIP identification stream adequately address location issues consistent with Congress's concerns about nondiscriminatory treatment of television stations by cable operators.").

viewers.⁴⁷ PMCM's statutory interpretation, in contrast, would allow broadcasters to elect carriage only on their RF channels and thus would disrupt the existing must-carry regime by depriving broadcasters of the right to cable carriage on the channel number on which they have built their brand and on which viewers would expect to find the station. Moreover, PMCM's interpretation of the *2008 Declaratory Ruling* to allow broadcast stations to elect cable carriage on either of two channels (RF or PSIP) would upend the must-carry system by creating conflicts between stations broadcasting on an RF channel that has the same number as another station's PSIP major channel number. Accordingly, we conclude that the Bureau properly rejected PMCM's claim that WJLP is entitled to mandatory carriage on the RCN, SECTV-NJ, and TWC cable systems on cable channel 3, the channel number corresponding to WJLP's RF channel assignment.⁴⁸

12. PMCM asserts that Section 614(b)(6) of the Act indisputably requires a cable operator to carry a local broadcast station asserting must carry rights on the cable channel corresponding to the channel on

⁴⁷ See TWC Opposition at 4 (asserting that the Commission's decision in the *2008 Declaratory Order* was consistent with the underlying purpose of the channel positioning rules, which is to address concerns that cable operators could make it difficult for their subscribers to find local broadcast television stations by assigning those stations cable channel numbers that differed from the channel numbers stations use to identify and market themselves to over-the-air viewing audiences).

⁴⁸ PMCM Consolidated Application for Review at 6.

which the station “is broadcast over the air.”⁴⁹ PMCM states that the term “channel” is used throughout the Commission’s rules to refer to the frequency band on which a radio wave modulates when it is emitted from a transmitter and that channels are identified in the Commission’s TV rules with specific frequency bands.⁵⁰ PMCM further states that because WJLP is required by the FCC’s DTV Table of Allotments and its license to transmit on channel 3 (60-66 MHz), channel 3 must be the channel on which the station broadcasts “over the air.”⁵¹ According to PMCM, “[t]he arrival of digital television and, with it, the notion of ‘virtual’ channels, did *not* alter the statutory mandate of Section 614(b)(6) and did *not* affect PMCM’s right to carriage on Channel 3.”⁵²

13. We find PMCM’s argument unpersuasive. Congress did not define the meaning of the phrase “channel number on which the local commercial television station is broadcast over the air” as used in Section 614(b)(6). When this provision was enacted, the channel number on which a station’s signal was transmitted was the same channel number that viewers selected on their television tuner. As a result of the digital transition, that is not always the case

⁴⁹ *Id.*; 47 U.S.C. § 534(b)(6). *See also* 47 CFR § 76.57(a).

⁵⁰ PMCM Consolidated Application for Review at 6; PMCM Consolidated Reply at 4.

⁵¹ PMCM Consolidated Application for Review at 6. *See* 47 CFR § 73.622(h)(2)(i) (DTV Table of Allotments).

⁵² PMCM Consolidated Application for Review at 6-7 (emphasis in original).

today, and the term “broadcast over the air” thus could refer either to the RF spectrum the station uses to transmit its signal or the virtual (that is, PSIP) channel number the viewer selects on his or her television tuner. In 2008, pursuant to its authority to modify the statutory signal carriage requirements,⁵³ the Commission clarified that for purposes of the on-channel carriage option, a station’s “over the air” channel number would be defined by a station’s PSIP channel, not its RF channel.⁵⁴ The fact that the term “channel” is used in some contexts in the Commission’s rules and the Act to refer to a transmission frequency band does not mean that it is unreasonable to treat a digital station’s virtual channel as the channel on which the station “is broadcast over the air” for the limited purposes of the on-channel carriage option in Section 614(b)(6).⁵⁵ Further, interpreting the phrase

⁵³ 47 U.S.C. § 534(b)(4)(B).

⁵⁴ *2008 Declaratory Order*, 23 FCC Rcd at 14259, paras. 15-16.

⁵⁵ As SECTV-NJ points out, the term “channel” has multiple meanings throughout the Commission’s rules and the Act and even within Section 614 of the Act itself. For example, in Section 614(b)(1)(A) and (B), the term “channel” is used to refer to the number of different programming streams transmitted by a cable system, not the transmission frequencies of these programming streams. SECTV-NJ Opposition at 4-5. *See* 47 U.S.C. § 534(b)(1)(A) (“A cable operator of a cable system with 12 or fewer usable activated channels shall carry the signals of at least three local commercial television stations”); § 534(b)(1)(B) (“A cable operator of a cable system with more than 12 usable activated channels shall carry the signals of local commercial television stations, up to one-third of the aggregate number of usable activated channels of such system.”). *See also* 47 U.S.C. § 522(1) (“[T]he term ‘activated channels’ means those channels engineered at the headend of a

“channel number on which the local commercial television station is broadcast over the air” to refer to a station’s PSIP major channel number is consistent with the purpose of the channel placement provisions, which was to ensure that cable operators could not disadvantage broadcasters by placing their programming in an undesirable channel position.⁵⁶ The statutory “over the air,” or “on channel,” placement option protects broadcasters from disadvantaged channel placement by giving them the right to cable carriage on the channel on which they have built their brand. When the statute was enacted in 1992, this was their RF channel. In today’s post-digital marketplace, the PSIP major channel number serves the same purpose by ensuring that broadcasters’ decision to switch to a new RF channel post transition will not

cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational, or governmental use.”); *id.* § 531 (“Cable channels for public, educational, or governmental use”); *id.* § 522(4) (defining the terms “cable channel” and “channel” to mean “a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation).”); *id.* § 309(j)(15)(C)(vi) (referring to “the spectrum between channels 52 and 69, inclusive” as the spectrum “between frequencies 698 and 806 megahertz, inclusive”); *id.* § 543(l)(2) (defining “cable programming service” to mean any video programming provided over a cable system . . . other than (A) video programming carried on the basic service tier, and (B) video programming offered on a per channel or per program basis.”).

⁵⁶ See note 46, *supra*.

affect their historic brand identity.⁵⁷ Although the PSIP protocol did not exist in 1992, it is reasonable to interpret the ambiguous statutory language in light of the evolution of broadcasting technology.⁵⁸

14. Moreover, as a separate and independent basis for affirming the Bureau's conclusion that the "on channel" placement option is determined with reference to a broadcaster's PSIP channel number, we conclude that Section 614 (b)(4)(B) of the Act authorizes the Commission to define the statutory right with reference to the PSIP protocol rather than RF transmission. When Congress enacted Section 614(b)(6) as part of the must carry/retransmission consent regime, it recognized that the transition to digital television would necessitate changes to the signal

⁵⁷ See *Second Periodic Review*, 19 FCC Rcd at 18291 (because the PSIP protocol preserves stations' analog brand identity, "channel election decisions need not be based on considering stations' historic 'branding' to consumers, but instead may be based more on the operating characteristics of a particular frequency and the service populations the stations would project for each channel."). The fact that PMCM wishes to build a brand on channel 3 does not undermine this conclusion. PMCM lacked a channel 3 brand identity its new market when it sought to have its channel re-allocated to New Jersey.

⁵⁸ See 47 U.S.C. § 534(b)(4)(B) (concerning future Commission modification of standards for television broadcast signals); *Agape Church, Inc. v. FCC*, 738 F.3d 397, 407 (D.C. Cir. 2013) (upholding agency's interpretation of ambiguous statutory provision because agency "had latitude, within the bounds of the statute, 'to adapt [its] rules and policies to the demands of changing circumstances.'" (citation omitted)).

carriage requirements of cable television systems.⁵⁹ Congress accordingly granted the Commission broad authority to make such changes through its concurrent adoption of Section 614(b)(4)(B) of the Act, which provides:

At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.⁶⁰

15. Pursuant to this authority, the Commission sought comment on whether and, if so, how the on-channel carriage option should be modified as a result of the digital transition.⁶¹ At that same time, the

⁵⁹ SECTV-NJ Opposition at 5 (“Congress recognized as early as 1992 when Section 614 was passed that the change from analog TV transmission to digital TV transmission would require the FCC to adopt future carriage rules that were consistent with, but cognizant of, the digital revolution.”).

⁶⁰ 47 U.S.C. § 534(b)(4)(B). *See also id.* § 338(j) (directing the Commission to issue regulations prescribing requirements on satellite carriers that are comparable to the requirements on cable operators under Section 616(b)(4)(B)).

⁶¹ *See Carriage of the Transmissions of Digital Television Broadcast Stations*, Notice of Proposed Rulemaking, 13 FCC Rcd 15092, 15128, para. 78 (1998) (seeking comment on which of the statutory channel positioning options remain applicable in a digital environment), 15128-29, para. 80 (seeking comment on the need

industry was developing the PSIP protocol. In 2001, in its *First Report and Order* in the proceeding addressing digital broadcast signal carriage issues, the Commission concluded that “[i]n the digital environment it is generally anticipated that broadcast signals will be identified and tuned to through the PSIP information process rather than by identification with the specific frequency on which the station is broadcasting.”⁶² While some broadcasters had suggested that the analog channel positioning requirements should apply to DTV signals, the Commission rejected this suggestion, finding “that there is no need to implement channel positioning requirements for digital television signals of the same type currently applicable to analog signals.”⁶³ Rather, it found that “the channel mapping protocols contained in the PSIP identification stream adequately address location issues consistent with Congress’s concerns about nondiscriminatory treatment of television stations by cable operators.”⁶⁴ The Commission

for specific channel positioning requirements given the development of PSIP protocols that will technically link the digital channel number with that assigned to the analog channel); *Advanced Television Sys. & Their Impact Upon the Existing Television Broad. Serv.*, Fourth Further Notice of Proposed Rule Making and Third Notice of Inquiry, 10 FCC Rcd 10540, 10553, para. 83 (1995), *subsequent hist. omitted* (“Does ‘on-channel’ carriage have the same meaning in a digital as it does in an analog environment?”).

⁶² *First Report and Order*, 16 FCC Rcd at 2635, para. 83.

⁶³ *Id.* at 2634-35, paras. 82-83.

⁶⁴ *Id.* at 2635, para. 83.

accordingly adopted new Section 76.57(c) of the Commission's rules to require cable operators to pass through the PSIP information to ensure that cable subscribers would be able to tune to broadcast signals on their PSIP channel.⁶⁵ The Commission subsequently amended its rules to adopt the ATSC PSIP standard as part of its implementation of the digital transition.⁶⁶ In its *2008 Declaratory Order*, the Commission explained that "Section 76.57(c), adopted in the *First Report and Order*, should be read as clarifying the manner in which cable operators are to determine the channel number on which a local commercial or qualified NCE station is 'broadcast over the air' when implementing such a station's election under Sections 76.57(a) or (b)."⁶⁷ The Commission stated that "[i]n digital broadcasting, a broadcast station's channel number is no longer identified by reference to its over-the-air

⁶⁵ *Id.* See 47 CFR § 76.57(c) ("With respect to digital signals of a television station carried in fulfillment of the must-carry obligations, a cable operator shall carry the information necessary to identify and tune to the broadcast television signal.").

⁶⁶ *Second Periodic Review*, 19 FCC Rcd at 18345, para. 152; 47 CFR § 73.682(d) (requiring digital television signals to comply with ATSC A/65C (ATSC Program and System Information Protocol for Terrestrial Broadcast and Cable, Revision C with Amendment No. 1 dated May 9, 2006)). Under the PSIP protocol, stations that were operating on analog channels in 2004, when Section 73.682(d) was adopted, and were likely being viewed on cable on their analog channel numbers, were eligible to continue to be viewed on cable on that same channel number when they transitioned to digital-only on a different digital RF channel, thus allowing those stations to maintain their local brand identification. *Second Periodic Review*, 19 FCC Rcd at 18345, para. 153.

⁶⁷ *2008 Declaratory Order*, 23 FCC Rcd at 14259, para. 16.

radio frequency [but instead] “the station’s ‘major channel number’ is identified in its [PSIP].”⁶⁸ Thus, the Commission made clear in the *2008 Declaratory Order* that the carriage rights of a digital station attach to its PSIP major channel number rather than its RF channel number.⁶⁹

16. We reject PMCM’s contention that Section 614(b)(4)(B) does not give the Commission the authority to clarify the rights of digital stations under the on-channel carriage option because that section is a subsection of Section 614(b)(4), which is entitled “Signal Quality” and “deals only with the *technical* aspects of receiving a TV signal.”⁷⁰ According to PMCM, “[i]t is well-established that ‘where Congress includes particular language in one section of a statute but omits it in another ..., it is generally presumed that Congress acts intentionally and purposely in the

⁶⁸ *Id.* at para. 15.

⁶⁹ See TWC Opposition at 4 (asserting that the Commission’s decision in the *2008 Declaratory Order* was consistent with the underlying purpose of the channel positioning rules, which is to address concerns that cable operators could make it difficult for their subscribers to find local broadcast television stations by assigning those stations cable channel numbers that differed from the channel numbers stations use to identify and market themselves to over-the-air viewing audiences).

⁷⁰ PMCM Consolidated Application for Review at 8; PMCM Consolidated Reply at 5. PMCM states that there is no technical reason for designating the virtual channel as the over-the-air channel for purposes of Section 614(b)(6); rather, it was allowed solely to accommodate stations’ desire to be perceived as their old analog channel. PMCM Consolidated Application for Review at 8; PMCM Consolidated Reply at 5.

disparate inclusion or exclusion.”⁷¹ PMCM asserts that the language of Section 614(b)(4)(B) demonstrates “that Congress knew how to provide the Commission authority to adapt its *technical* rules as necessary” and that if Congress had intended to give the Commission the authority to make changes to the cable carriage provisions of Section 614(b)(6), Congress would have included similar language in that section.⁷² We acknowledge that the meaning of Section 614(b)(4) is not clear. We find, however, that Congress’ inclusion of Section 614(b)(4)(B) as a subsection of Section 614(b)(4) does not evince an intent to limit the Commission’s authority to making changes to the “technical aspects of receiving a TV signal.”⁷³ We think a more appropriate reading of Section 614(b)(4)(B) is that Congress intended to grant the Commission the authority to make any changes to the signal carriage requirements necessitated by modification of the standards for digital television broadcast signals. This reading is supported by the language of Section 614(b)(4)(B), which authorizes the Commission to make “*any changes* in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local television

⁷¹ PMCM Consolidated Application for Review at 8-9 (citing *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993)).

⁷² *Id.* at 9 (emphasis in original). *See also* PMCM Consolidated Reply (“Neither the FCC nor anyone else has suggested that there is a technical reason why the PSIP number should or must be substituted for the over the air channel number in the digital era.”).

⁷³ PMCM Consolidated Application for Review at 8.

stations....”⁷⁴ Further, although the heading for Section 614(b)(4) is “Signal Quality,” Section 614(b)(4)(B) authorizes the Commission “to establish any changes in the *signal carriage* requirements” it deems necessary. The Act does not say the Commission shall establish a proceeding to establish any changes in the “*signal quality*” requirements applicable to the carriage of broadcast stations by cable operators.⁷⁵ Moreover, while the phrase “signal carriage requirements” is not defined, we believe it is logical to interpret that term broadly to include the channel positioning requirements of Section 614(b)(6) given that Section 614 is entitled “*Carriage of local commercial television signals*,”⁷⁶ and the channel positioning requirements are set forth in a subsection of Section 614. Finally, in contrast with Section 614(b)(4)(A), which is entitled, “Nondegradation; technical specifications,” Section 614(b)(4)(B) does not use the words “technical,” “signal

⁷⁴ 47 U.S.C. § 534(b)(4)(B) (emphasis added).

⁷⁵ It is not necessary to interpret the Commission’s authority narrowly, as PMCM advocates, in order to make sense of its placement under the “Signal Quality” heading. The inclusion of Section 614(b)(4)(B) under the heading “Signal Quality” makes sense when considered in context – the quality of broadcast signals changed dramatically due to the transition from analog transmission to digital transmission. Thus, the inclusion of that section under the heading “Signal Quality” can be reconciled with our broad interpretation of the scope of the Commission’s authority.

⁷⁶ 47 U.S.C. § 534 (emphasis added) (“Each cable operator shall carry, on the cable system of that operator, the signals of local commercial television stations and qualified low power stations as provided by this section.”)

quality,” or other words to that effect, such as “nondegradation.” Section 614(b)(4)(B) is entitled, “Advanced television” and authorizes the Commission to modify cable operators’ broadcast signal carriage obligations in light of the transition to digital TV. Had Congress intended to limit authority granted in Section 614(b)(4)(B) to technical specifications or signal quality, it could have done so. That it did not is unsurprising, given that the digital transition introduced significant changes to the broadcasting industry such as the use of paired channels by broadcasters transmitting the same programming in both analog and digital format. Changes such as these could be expected to require regulatory measures affecting various rights and obligations, not just those affecting signal quality or other technical characteristics.

17. The digital transition presented complicated, interrelated issues involving both virtual channel assignment (PSIP) and cable carriage. When it exercised the authority granted by Section 614(b)(4), the Commission reasonably interpreted the statutory on-channel provision to refer to a single channel, not either of two channels (*i.e.*, PSIP or RF), given that the statute provides for carriage on “the channel” on which a station broadcasts over the air. The Commission’s determination that the on-channel cable carriage option is tied to a station’s PSIP channel ensured cable carriage by preserving broadcasters’ ability to demand carriage on their analog channel position, where viewers were accustomed to finding the station’s signal, even if they were transmitting on a different channel post-transition. This decision served the broad statutory purpose of the must-carry regime, which was to ensure that broadcasters were not unfairly

App. 37

disadvantaged by cable operators' channel placement determinations.⁷⁷ During the digital transition, broadcasters were permitted to transmit their signal in both analog and digital format, necessitating the use of two RF channels. The Commission's PSIP protocol allowed viewers to receive the DTV signal, even if they did not know the digital channel number, simply by tuning to the station's analog channel.⁷⁸ From the viewer's perspective, the station was broadcasting on the same channel in both analog and digital. Because of the different propagation characteristics of analog and digital transmission, many broadcasters chose to transmit their signal after the digital transition on an RF channel other than their historical analog channel.⁷⁹ Again, the PSIP protocol allowed viewers to find the station's digital signal by tuning to the station's pre-transition analog channel number.⁸⁰ The

⁷⁷ See note 46, *supra*.

⁷⁸ *PMCM PSIP Declaratory Ruling*, 30 FCC Rcd at 6080, para. 6.

⁷⁹ In fact, this aspect of the digital transition created the VHF vacancy in New Jersey that PMCM used as the basis for its re-allocation notification pursuant to Section 331(a) of the Act. At the end of the digital transition, WWOR-TV decided to transmit its digital signal permanently on channel 38, and it ceased operating on channel 9. See *id.*, 30 FCC Rcd at 6082, para. 10. See also *Second Periodic Review*, 19 FCC Rcd at 18291 (because the PSIP protocol preserves stations' analog brand identity, "channel election decisions need not be based on considering stations' historic 'branding' to consumers, but instead may be based more on the operating characteristics of a particular frequency and the service populations the stations would project for each channel.").

⁸⁰ See *PMCM PSIP Declaratory Ruling*, 30 FCC Rcd at 6080, para. 6; TWC Opposition at 3.

Commission’s decision to apply the on-channel carriage option to PSIP channels was a reasonable means of fulfilling the statutory purpose by enabling broadcasters to demand carriage on the channel on which they had built their brand before the digital transition, consistent with congressional concerns about discriminatory behavior by cable operators.⁸¹ Unlike the vast majority of broadcasters affected by the digital transition, PMCM is not seeking to preserve a brand identity built through a long history of analog operations in the area it now serves. PMCM operated on analog channel 3 only in Nevada.⁸² While it would

⁸¹ PMCM claims that “[n]either the FCC nor anyone else has suggested that there is a technical reason why the PSIP number should or must be substituted for the over the air channel number in the digital era. . . . [T]here is nothing about PSIPs that ‘necessitates’ a change in signal carriage requirements for cable systems due to changed TV transmission standards.” PMCM Consolidated Reply at 5. We do not read the term “necessary” in Section 614(b)(4)(B) to mean “indispensable.” In our view, a change is “necessary” where (as here) it is conducive to serving the goals of the statute. *See Cellco P’ship v. FCC*, 357 F.3d 88, 97 (D.C. Cir. 2004) “[C]ourts have long recognized that the term ‘necessary’ does not always mean ‘indispensable’ or ‘essential.’”; *CTIA v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003) (“[I]t suffices that a statute is conducive to and is plainly adapted to its end”) (internal quotations omitted); *id.* at 510 (“Indeed, there are many situations in which the use of the word ‘necessary,’ in context, means something that is done, regardless of whether it is indispensable, to achieve a particular end.”). That PMCM disagrees with the carriage rights afforded to WJLP does not undermine the validity of the Commission’s industry-wide implementation of the statutory must-carry regime in furtherance of statutory goals.

⁸² PMCM did not even begin broadcasting on channel 3 in New Jersey until five years after the transition.

prefer to build its brand in the New York DMA on channel 3, PMCM has not shown that its unique situation warrants a conclusion that the Commission exceeded its statutory authority when it clarified the rights of digital stations under the on-channel carriage option in the *2008 Declaratory Order*.

18. Further, while there is little discussion of Section 614(b)(4)(B) in the legislative history of the 1992 Cable Act,⁸³ the Commission previously has found that the legislative history of Section 336 of the Act reflects an intent by Congress that the Commission address must carry issues in the proceeding authorized

⁸³ With respect to Section 614(b)(4)(B), the House Conference Report states that “when the FCC adopts new standards for broadcast television signals, such as the authorization of broadcast high definition television (HDTV), it shall conduct a proceeding to make any changes in the signal carriage requirements of cable systems needed to ensure that cable systems will carry television signals complying with such modified standards in accordance with the objectives of this section.” H.R. REP. NO. 102-862, at 67 (1992). The Senate Committee Report describes the provision as providing that when the FCC adopts new standards for broadcast television signals, such as the authorization of broadcast HDTV, “it shall conduct a proceeding to make any changes in the signal carriage requirements of cable systems needed to ensure that cable systems will carry television signals complying with such modified standards in accordance with the objectives of new Section 614.” S. REP. NO. [http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0100713320&pubNum=0001503&originatingDoc=Ide7853532bee11dbbb4d83d7c3c3a165&refType=TV&originationContext=document&vvr=3.0&rs=cb1.0&transitionType=DocumentItem&contextData=\(sc.Keycite\)](http://www.westlaw.com/Link/Document/FullText?findType=Y&serNum=0100713320&pubNum=0001503&originatingDoc=Ide7853532bee11dbbb4d83d7c3c3a165&refType=TV&originationContext=document&vvr=3.0&rs=cb1.0&transitionType=DocumentItem&contextData=(sc.Keycite)) 102-92, at 85 (1991). As discussed in paragraph 17 above, the Commission’s determination that the on-channel carriage option is tied to the PSIP channel is consistent with the objectives of Section 614.

under Section 614(b)(4)(B).⁸⁴ Section 336(b)(3) specifies that ancillary and supplementary services offered by broadcast television stations have no mandatory carriage rights under Section 614 or 615.⁸⁵ In the *First Report and Order*, the Commission observed that the legislative history of Section 336 states: “With respect to (b)(3), the conferees do not intend this paragraph to confer must carry status on advanced television or other video services offered on designated frequencies. Under the 1992 Cable Act, that issue is to be the subject of a Commission proceeding under section 614(b)(4)(B) of the Communications Act.”⁸⁶ The Commission found that the most logical inference of this statement is that Congress contemplated that the Commission would address the issue of must carry for digital signals of local commercial and noncommercial television stations in the proceeding authorized by Section 614(b)(4)(B).⁸⁷

⁸⁴ *First Report and Order*, 16 FCC Rcd at 2608, para. 21. Section 336 was adopted as part of the Telecommunications Act of 1996. Telecommunications Act of 1996, Pub. L. No. 104-104, § 201, 110 Stat. 56 (1996); 47 U.S.C. § 336.

⁸⁵ 47 U.S.C. § 336(b)(3) (“In prescribing the regulations required by subsection (a), the Commission shall— ... apply to any other ancillary or supplemental service such of the Commission’s regulations as are applicable to the offering of analogous services by any other person, except that no ancillary or supplemental service shall have any rights to carriage under section 614 or 615....”).

⁸⁶ *First Report and Order*, 16 FCC Rcd at 2608, para. 21 (citing S. CONF. REP. NO. 104-230, at 161 (1996)).

⁸⁷ *Id.*

19. Moreover, we note that the Commission relied on its broad authority under Section 614(b)(4)(B) as the basis for numerous decisions on “non-technical” issues related to the DTV transition. Among other actions that the Commission took pursuant to its authority under Section 614(b)(4)(B), it amended the rules to clarify that commercial stations operating with digital-only signals were entitled to mandatory carriage;⁸⁸ clarified that noncommercial stations operating with digital-only signals were entitled to mandatory carriage;⁸⁹ extended the retransmission consent rules to digital television stations;⁹⁰ determined that the digital signals of superstations should be treated the same as their analog signals for purposes of Section 325(b)(2)(D) of the Act, which exempts cable operators from the requirement to obtain retransmission consent from superstations whose signals were available by a satellite or common carrier on May 1, 1991;⁹¹ interpreted the term “primary video,” as used in Sections 614 and 615 of the Act, to mean only a single programming stream and concluded that if a digital broadcaster elects to divide its digital spectrum into multiple separate, independent, and unrelated programming streams, only one of these streams will be considered primary and entitled to

⁸⁸ *Id.* at 2605-6, paras. 13-15.

⁸⁹ *Id.* at 2608, paras. 21-22.

⁹⁰ *Id.* at 2610, para. 28; 47 CFR § 76.64(f)(4).

⁹¹ *First Report and Order*, 16 FCC Rcd at 2612, para. 32. *See* 47 U.S.C. § 325(b)(2)(D).

mandatory carriage;⁹² clarified the carriage election process for full-power stations transitioning from analog to digital;⁹³ and clarified the carriage rights of digital low power television stations.⁹⁴ As SECTV-NJ points out, PMCM's narrow reading of Section 614(b)(4)(B) to give the Commission authority to make changes only to the "technical aspects of receiving a TV signal" would upend the entire must-carry/retransmission consent regime.⁹⁵

20. Finally, as discussed above, the Bureau's interpretation of Section 614(b)(4)(B) as authorizing the Commission to establish PSIP channels as the basis for a broadcaster's use of the on-channel carriage option is consistent with the statutory purpose. Accordingly, we find that the Commission has ample authority under Section 614(b)(4)(B) to clarify the rights of digital stations under the on-channel carriage option in Section 614(b)(6).⁹⁶

⁹² *First Report and Order*, 16 FCC Rcd at 2622, para. 57.

⁹³ *2008 Declaratory Order*, 23 FCC Rcd at 14258, para. 13.

⁹⁴ *Id.* at 14260, para. 18.

⁹⁵ SECTV-NJ Opposition at 6 (noting that PMCM's reading of Section 614(b)(4)(B) "would require the Commission now, 24 years after the 1992 Cable Act, to go back and start completely over to change only those carriage rules that deal with signal degradation and leave all other carriage rules alone, totally breaking the must-carry regime.").

⁹⁶ PMCM also asserts that "Congress was fully cognizant of, and actively engaged in, the DTV transition - but at no time did Congress even suggest that any revision of Section 614(b)(6) might be in order." PMCM Consolidated Application for Review at 7. As

21. PMCM further argues that the Commission expressly acknowledged in the *2008 Declaratory Order* that the channel placement options in Section 614(b)(6) of the Act “remain in effect after the digital transition.”⁹⁷ As the Bureau explained in the MO&Os, however, this is introductory language.⁹⁸ The Commission went on to clarify that in digital broadcasting, a broadcast station’s channel number is no longer identified by reference to its over-the-air radio frequency but instead is the PSIP major channel number.⁹⁹ The Commission also clarified in the *2008 Declaratory Order* with respect to the two carriage options that are tied to carriage on a specific historic date that “although the *First Report and Order* did not specifically address the significance of the statutory provisions and rules with respect to the ‘historic’ carriage options, these statutory options remain available to digital must-carry broadcasters.”¹⁰⁰ The Bureau correctly observed that this latter clarification

discussed above, Congress recognized that the DTV transition would necessitate many changes to the signal carriage requirements of cable television systems and provided the Commission the authority to make those changes through Section 614(b)(4)(B).

⁹⁷ PMCM Consolidated Application for Review at 7 (citing *2008 Declaratory Order*, 23 FCC Rcd at 14258, para. 14).

⁹⁸ *PMCM v. RCN*, 31 FCC Rcd at 5228 n.33; *PMCM v. SECTV-NJ*, 31 FCC Rcd at 5234 n.33; *PMCM v. TWC*, 31 FCC Rcd at 5240 n.40.

⁹⁹ *2008 Declaratory Order*, 23 FCC Rcd at 14259, para. 15.

¹⁰⁰ *Id.* at 14259, para. 16.

was necessary “because, in the *First Report and Order*, the Commission distinguished the two date-dependent channel placement options from the on-channel option, stating that they ‘are not suitable in the era of digital television.’”¹⁰¹ Thus, we do not believe that the statement cited by PMCM supports its position that it is entitled to mandatory carriage of WJLP on its RF channel number.

22. Additionally, we find no merit in PMCM’s argument that the Commission expanded a licensee’s must carry channel placement options to include placement on a station’s virtual channel number purely as an option and that the availability of this option does not alter a station’s right under Section 614(b)(6) to placement on its over-the-air channel.¹⁰² In fact, the

¹⁰¹ *PMCM v. RCN*, 31 FCC Rcd at 5228 n.33; *PMCM v. SECTV-NJ*, 31 FCC Rcd at 5234 n.33; *PMCM v. TWC*, 31 FCC Rcd at 5240 n.40 (all citing *First Report and Order*, 16 FCC Rcd at 2633 n.235). PMCM also argues that the Bureau failed to observe that in that same footnote in the *First Report and Order*, the Commission stated that the “on channel option is relevant to the new digital signals.... Since digital signals are generally new products, there is no analogous supporting rationale for requiring digital channel positioning on any channel other than a station’s over-the-air channel.” PMCM Consolidated Application for Review at 7 (quoting *First Report and Order*, 16 FCC Rcd at 2635, para. 81 n.235). PMCM’s reliance on the language in the *First Report and Order* fails to take into account that the Commission subsequently clarified in the *2008 Declaratory Order* that in digital broadcasting, a station’s channel number is no longer identified by reference to its over-the-air radio frequency but instead is identified by reference to its major channel number.

¹⁰² PMCM Consolidated Application for Review at 8. *See also* PMCM Consolidated Reply at 5-6.

Commission stated just the opposite, holding that “[i]n digital broadcasting, a broadcast station’s channel number is no longer identified by reference to its over-the-air radio frequency. Instead, in compliance with the ATSC standard, the station’s ‘major channel number’ is identified in its [PSIP].”¹⁰³ Moreover, had the Commission intended to add a new channel placement option, we think it would have been sufficiently significant to warrant explicit discussion or acknowledgement by the Commission given the practical implications of allowing broadcasters to assert must-carry rights on one of two different channel numbers, potentially leading to conflicts between broadcasters seeking must-carry rights on the same channel number.¹⁰⁴ Thus, if the Commission had

¹⁰³ *2008 Declaratory Order*, 23 FCC Rcd at 14259, para. 15.

¹⁰⁴ This scenario could arise in any DMA in which a licensee relinquished its analog RF channel and another licensee elected to use the relinquished channel for its digital operations. *See, e.g., Second Periodic Review*, 19 FCC.Rcd at 18298 & n.95 (“[I]f a two in-core licensee elects its DTV channel, then its NTSC [i.e., analog] channel will be released” and that channel will “become[] available for future selection by another licensee.”). In this regard, we note that, as of July 16, 2015, more than 100 broadcast stations had an RF digital channel number that is the virtual major channel number of another station operating in the same DMA, or conversely, had a virtual major channel number that is the RF digital channel number of another station operating in the same DMA. A list of these stations is attached as Appendix. This list was developed by first compiling list of full service TV stations, their virtual channel numbers, and their DMA assignments using LMS, CDBS, BIA, and tvnewscheck.com. Then, a list of the stations’ RF channel numbers as of July 16, 2015 (pre-incentive auction) was extracted from a snapshot of CDBS. The two lists were compared to find occurrences where, for two stations in the same DMA, the

intended to give broadcasters the choice of demanding carriage on either their PSIP or RF channel, cable systems could have been presented with conflicting demands from two stations requesting the same channel. Under these circumstances, the Commission presumably would have explained how to handle conflicting claims. We also note that the statute refers to the on-channel option in the singular, stating that a broadcaster is entitled to demand carriage on “the channel” on which it broadcasts over the air. However, nothing in the Commission’s discussion of the on-channel carriage option in the *First Report and Order* or the *2008 Declaratory Order* indicates that the Commission intended to add a new option. Accordingly, we find that the Bureau properly rejected PMCM’s argument.

B. The Bureau’s Interpretation of “Channel” Does Not Conflict with Section 614(h)(1)(A) of the Act

23. We find no merit in PMCM’s argument that the Bureau’s interpretation of “channel” for purposes of the cable channel positioning rules to mean a station’s PSIP major channel rather than its RF channel “eviscerates” the must carry rights guaranteed by Section 614(h)(1)(A) of the Act.¹⁰⁵ Section 614(h)(1)(A) defines a local commercial television station for

virtual major channel number occupied by one station was also the RF channel occupied by the other station. In some cases, a station was found to have multiple potential conflicts. These duplicates were filtered out to develop a list of 194 potentially conflicted stations.

¹⁰⁵ PMCM Consolidated Application for Review at 9.

purposes of the must carry provisions as a station “licensed and operating on a channel regularly assigned to its community by the Commission that, with respect to a particular cable system, is within the same cable television market as the cable system.”¹⁰⁶ PMCM states that virtual channels are not the channels on which stations are “licensed,” nor are they “assigned to communities.”¹⁰⁷ Therefore, PMCM says, under the Bureau’s interpretation of “channel,” hundreds of stations would lose their must carry status because they would not meet Section 614(h)(1)(A)’s definition of a local commercial television station.¹⁰⁸ As explained above, however, the Commission made clear in the *2008 Declaratory Order* that the term “channel” refers to the PSIP major channel for the specific purpose of determining a broadcaster’s channel position under the on-channel carriage option.¹⁰⁹ Further, as discussed above, the Act uses the term “channel” to mean different things in different contexts.¹¹⁰ Accordingly, it does not follow that the term “channel” as used in Section 614(h)(1)(A) of the Act must also refer to the PSIP major channel.¹¹¹ Thus, we

¹⁰⁶ 47 U.S.C. § 614(h)(1)(A).

¹⁰⁷ PMCM Consolidated Application for Review at 8.

¹⁰⁸ *Id.* at 9.

¹⁰⁹ *2008 Declaratory Order*, 23 FCC Rcd at 14259, paras. 15-16.

¹¹⁰ *See supra* note 55.

¹¹¹ *See* TWC Opposition at 5 (“The Commission’s decision to treat a station’s virtual channel number as its ‘over the air’ channel for purposes of the cable channel positioning rules does not in any way

find PMCM's dire warnings about the "cataclysmic" effect of the Bureau's orders to be unfounded.¹¹²

C. The Bureau Properly Declined to Address PMCM's Spectrum Act Argument

24. We conclude that the Bureau properly declined to address PMCM's argument that a provision of the Spectrum Act, 47 U.S.C. § 1452(g)(1)(A), precludes the Commission from involuntarily changing WJLP's channel until the Incentive Auction is over and the repacking process has been finalized.¹¹³ PMCM asserts that WJLP operated on channel 3 with PSIP

require the Commission to treat every other Communications Act provision or Commission rule that refers to a broadcast station's 'channel' as referring to the station's virtual channel. Rather, whether a provision or rule that refers to a broadcast station's "channel" is interpreted as referring to the station's RF channel or its virtual channel will depend on the context of the reference and on which interpretation best serves the purpose of the statutory provision or rule.").

¹¹² PMCM Consolidated Application for Review at 10.

¹¹³ PMCM Consolidated Application for Review at 10-11. 47 U.S.C. § 1452(g)(1)(A) provides that during the period prior to the completion of the Incentive Auction and repacking process:

the Commission may not—(A) involuntarily modify the spectrum usage rights of a broadcast television licensee or reassign such a licensee to another television channel except—(i) in accordance with this section; or (ii) in the case of a violation by such licensee of the terms of its license or a specific provision of a statute administered by the Commission, or a regulation of the Commission promulgated under any such provision.

Id.

major channel 3 for almost five years, until the Bureau changed its virtual channel to 33.¹¹⁴ According to PMCM, if its “channel” is deemed to be defined by its virtual channel, a compelled change from channel 3 to channel 33 would plainly constitute a change in its channel in direct violation of the Spectrum Act.¹¹⁵ The Bureau found in the MO&Os that this argument was a collateral attack on the Bureau’s *PMCM PSIP Declaratory Ruling* and had been raised in PMCM’s pending application for review of that decision.¹¹⁶ The Bureau accordingly concluded that this argument was not appropriately raised in the separate carriage complaint proceedings.¹¹⁷ PMCM now argues that “it is the Bureau’s determination that a station’s channel is its virtual channel rather than its over-the-air channel that creates the dilemma posed here: if WJLP’s channel is its virtual channel, then the Bureau has violated the Spectrum Act since October 2014; if WJLP’s channel is its RF over-the-air channel, then the Bureau must now be violating Section 614(b)(6) of the Act.”¹¹⁸ We agree

¹¹⁴ PMCM Consolidated Application for Review at 10-11.

¹¹⁵ *Id.* at 11.

¹¹⁶ *PMCM v. RCN*, 31 FCC Rcd at 5228 n.36; *PMCM v. SECTV-NJ*, 31 FCC Rcd at 5235 n.37; *PMCM v. TWC*, 31 FCC Rcd at 5241 n.43.

¹¹⁷ *PMCM v. RCN*, 31 FCC Rcd at 5228 n.36; *PMCM v. SECTV-NJ*, 31 FCC Rcd at 5235 n.37; *PMCM v. TWC*, 31 FCC Rcd at 5241 n.43.

¹¹⁸ PMCM Consolidated Application for Review at 12. *See also* PMCM Consolidated Reply at 6. Contrary to PMCM’s suggestion that “it was the Bureau’s determination,” it was the Commission

with the Bureau that PMCM's Spectrum Act argument is more appropriately addressed in the proceeding responding to PMCM's application for review of the *PMCM PSIP Declaratory Ruling*, and we are concurrently addressing PMCM's argument in that proceeding.¹¹⁹

D. The Bureau Did Not Err in Deciding PMCM's Carriage Complaints on Delegated Authority

25. We disagree with PMCM's assertion that the Bureau "erred by taking upon itself the authority to rule in this matter."¹²⁰ Sections 0.61 and 0.283 of the Commission's rules delegate authority to the Media Bureau to handle must carry complaints.¹²¹ Further, as discussed above, PMCM's complaints did not "present

that made the determination in the *2008 Declaratory Order* that, for the specific purpose of determining a broadcaster's channel position under the on-channel carriage option, a station's channel is the PSIP major channel. *See supra* para. **Error! Reference source not found..**

¹¹⁹ *PMCM PSIP MO&O*, FCC 17-118, at paras. 21-22. In the PSIP proceeding, among other things, we reject PMCM's suggestion that interpreting the term "channel" as referring to a station's virtual channel for the limited purposes of the on-channel carriage option in Section 614(b)(6) requires the Commission to interpret every other reference to a broadcast television station's channel in the Act and the Commission's rules as a reference to the station's virtual channel rather than its RF channel. *Id.* at para. 22 (citing *Verizon California, Inc. v. FCC*, 555 F.3d 270, 276 (D.C. Cir. 2009)).

¹²⁰ PMCM Consolidated Application for Review at 12.

¹²¹ 47 CFR §§ 0.61, 0.283.

novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines.”¹²² The Commission clarified the channel positioning rights of digital television stations in its *2008 Declaratory Order*, stating that after the digital transition, a must-carry station’s carriage rights attach to its PSIP major channel number rather than its RF channel number.¹²³ The Bureau has applied this guidance in a number of decisions since that time.¹²⁴ Accordingly, we find that the Bureau properly

¹²² *Id.* § 0.283(c).

¹²³ *See supra* para. **Error! Reference source not found..**

¹²⁴ *Gray Television Licensee, LLC v. Zito Media, L.P.*, Memorandum Opinion and Order, 28 FCC Rcd 10780, 10781 n.10 (MB Policy Div. 2013) (“for purposes of digital broadcasting channel positioning, a station’s over-the-air broadcast channel number is no longer identified by reference to its over-the-air radio frequency, but instead to its Major Channel Number as carried in its PSIP.”); *America-CV Station Group, Inc. v. Liberty Cablevision of Puerto Rico, Inc.*, Memorandum Opinion and Order, 28 FCC Rcd 29, 33, para. 8 (MB Policy Div. 2013) (finding that a station’s channel positioning rights attached to channel 42, its PSIP major channel number, rather than channel 41, its RF channel number); *KSQA, L.L.C. v. Cox Cable Communications, Inc.*, Memorandum Opinion and Order, 27 FCC Rcd 13185, 13187, para. 4 (MB Policy Div. 2012) (stating that “in digital broadcasting for purposes of channel positioning, a station’s over-the-air broadcast channel number is no longer identified by reference to its over-the-air radio frequency, but instead to its Major Channel Number as carried in its PSIP.”); *Ion Media Networks, Inc. v. Charter Communications*, Memorandum Opinion and Order, 24 FCC Rcd 2461, 2468, para. 17 (MB Policy Div. 2009) (stating that “for channel positioning purposes, the over-the-air channel for a digital station is determined by reference to the major channel numbers carried in its PSIP.”).

addressed PMCM's must carry complaints on delegated authority.

26. In an attempt to buttress its argument that its complaints raised novel issues, PMCM argues that the Spectrum Act was only enacted in 2012 and that the full Commission has had no occasion to interpret this statute's prohibition on changing a station's channel during the pendency of the Incentive Auction proceedings.¹²⁵ We find this argument unpersuasive. As we explain above, PMCM's Spectrum Act argument relates to the Bureau's decision in the *PMCM PSIP Declaratory Ruling* to assign virtual channel 33 to WJLP and is being addressed in the context of that proceeding.¹²⁶ In any event, our review of the Bureau's decision on the merits and our denial of the Application for Review moot the claim that the Bureau acted improperly on delegated authority.¹²⁷

E. PMCM's Argument that Section 331 Entitles WJLP to Cable Carriage on a VHF Channel Is Procedurally Barred

27. We reject PMCM's argument that WJLP is entitled to cable carriage on a VHF channel under

¹²⁵ PMCM Consolidated Application for Review at 12.

¹²⁶ *See supra* para. 24.

¹²⁷ *See Murray Energy Corp. v. FERC*, 629 F.3d 231, 236 (D.C. Cir. 2011) (agency's ratification of staff decision resolved any potential problems with staff's exercise of delegated authority).

Section 331 of the Act.¹²⁸ Section 331 provides for the allocation or reallocation of a VHF channel to a community in a state that did not have a commercial VHF channel.¹²⁹ WJLP was reallocated from Ely, Nevada to Middletown Township, New Jersey in 2013 pursuant to Section 331.¹³⁰ PMCM contends that the assignment of a UHF virtual channel number coupled with the denial of cable carriage on a VHF channel undermine the intent of Section 331 to make a VHF channel available to New Jersey.¹³¹ As SECTV-NJ observes, PMCM did not raise this issue in its must carry complaints filed in January 2016 and raises it for the first time in its Consolidated Application for

¹²⁸ PMCM Consolidated Application for Review at 4; PMCM Consolidated Reply at 7-8.

¹²⁹ 47 U.S.C. § 331(a) (“It shall be the policy of the [FCC] 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 the 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 allotted 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”).

¹³⁰ *Reallocation of Channel 3 from Ely, Nevada to Middletown Township, New Jersey, Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broadcast Stations*, Report and Order, 28 FCC Rcd 2825 (MB Vid. Div. 2013).

¹³¹ PMCM Consolidated Application for Review at 4; PMCM Consolidated Reply at 7-8.

Review.¹³² Section 5(c)(5) of the Act and Section 1.115(c) of the Commission's rules bar applications for review that rely "on questions of fact or law upon which the [designated authority issuing the decision] has been afforded no opportunity to pass."¹³³ Thus, since the Bureau did not have the opportunity to pass on this argument, it is procedurally barred and we dismiss this aspect of PMCM's Consolidated Application for Review.¹³⁴

28. As an alternative and independent basis for rejecting PMCM's argument, we conclude that the Bureau's assignment of virtual channel 33 to WJLP, together with its finding that WJLP is not entitled to cable carriage on channel 3, do not frustrate the purpose of Section 331. PMCM claims that the clear intent of Section 331 is "to give underserved states an *identifiable VHF dial position* and VHF frequency that can compete with the major VHF stations in the same

¹³² SECTV-NJ Opposition at 9.

¹³³ 47 U.S.C. § 155(c)(5); 47 CFR § 1.115(c); *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (upholding Commission order dismissing arguments under Section 1.115(c) because that rule does not allow the Commission to grant an application for review if it relies upon arguments that were not presented below).

¹³⁴ 47 U.S.C. § 155(c)(5) (barring applications for review that rely "on questions of fact or law upon which the [designated authority issuing the decision] has been afforded no opportunity to pass"); 47 CFR § 1.115(c) (same); *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (upholding Commission dismissal of arguments not presented below).

market.”¹³⁵ PMCM, however, offers no support in the statute or legislative history for this claim.

29. The express purpose of Section 331 is to “ensure that not less than one [VHF commercial television broadcasting] channel shall be allocated to each State, if technically feasible.”¹³⁶ The statute was intended to facilitate the allotment of a VHF channel to New Jersey.¹³⁷ The Bureau’s finding that WJLP is not entitled to cable carriage on channel 3 does not frustrate this purpose because WJLP continues to broadcast on an RF channel in the VHF spectrum. Although the statute and legislative history are silent regarding the rationale for ensuring that all states have at least one commercial VHF channel, VHF channels had substantial and well-known technical advantages over UHF channels at the time.¹³⁸ As

¹³⁵ PMCM Consolidated Application for Review at 4 (emphasis in original). *See also* PMCM Consolidated Reply at 7 (asserting that “divorcing WJLP from its fundamental identity as a VHF channel ...effectively reduces the station to a virtual UHF channel in the public perception”).

¹³⁶ 47 U.S.C. § 331(a).

¹³⁷ *PMCM TV, LLC v. FCC*, 701 F.3d 380, 383 (D.C. Cir. 2012) (*PMCM TV v. FCC*) (“Congress enacted section 331(a) to solve a specific problem existing at the time of its passage—the lack of a commercial VHF station in New Jersey.”).

¹³⁸ *See Reallocation of Channel 2 from Jackson, Wyoming to Wilmington, Delaware and Reallocation of Channel 3 from Ely, Nevada to Middletown Township, New Jersey*, Memorandum Opinion and Order, 26 FCC Rcd 13696, 13697, para. 3 (2011); *PMCM PSIP Declaratory Ruling*, 30 FCC Rcd at 6099, para. 48 & n.147.

explained in the *PMCM PSIP Declaratory Ruling*, by virtue of its operation on RF channel 3 with maximum effective radiated power at 4 Times Square, WJLP is the second largest of the 22 full power television stations in the New York DMA, covering an area of approximately 34,960 square kilometers and serving a population of over 21 million.¹³⁹ In addition, Section 331 expressly refers to “channels for very high frequency commercial television broadcasting,” which are defined in the Commission’s rules as the television channels in the 54-62, 66-72, 76-88, and 174-216 MHz frequency bands.¹⁴⁰ In its 2012 decision finding that the Commission was required under Section 331 to approve PMCM’s request for reallocation of RF channel 3 from Ely, Nevada to Middletown Township, New Jersey, the D.C. Circuit recognized that Section 331 dealt with radio frequency spectrum.¹⁴¹ PMCM broadcasts on a channel in the VHF spectrum band, and the Commission’s resolution of the cable carriage complaints does not change this fact or in any way

¹³⁹ *PMCM PSIP Declaratory Ruling*, 30 FCC Rcd at 6100, para. 48.

¹⁴⁰ 47 CFR § 73.603(a) (frequencies for channels 2 through 13); *Improvements to UHF Television Reception*, Report and Order, 90 FCC 2d 1121, 1121, para. 1 (1982) (VHF television channels are 2 through 13); *Television Assignments*, Sixth Report and Order, 41 FCC 148, 153, para. 19 (1952) (Commission has allocated 12 VHF television channels, 2 through 13, in the 54-216 “megacycle” (i.e., MHz) frequency band).

¹⁴¹ *PMCM TV v. FCC*, 701 F.3d at 384 (finding that PMCM’s interpretation of section 331 to permit a reallocation even if interference were to occur made “little sense” in view of “the basic purpose of the Communications Act—to ensure interference-free broadcasting”).

impair PMCM's use of the VHF spectrum. Accordingly, we conclude that the Bureau's finding that WJLP is not entitled to cable carriage on a VHF channel does not undermine the intent of Section 331.

F. The Bureau Did Not Violate the Statutory 120-Day Timeline for Resolving Cable Carriage Disputes

30. We reject PMCM's argument that the Bureau violated the statutory 120-day deadline for resolving cable carriage disputes set forth in Section 614(d)(3) of the Act by failing to act on PMCM's June 6, 2014 demand for cable carriage until May 17, 2016.¹⁴² Section 614(d)(3) provides that "[w]ithin 120 days after the date *a complaint* is filed, the Commission shall determine whether the cable operator has met its obligations under this section."¹⁴³ As discussed above, by letters dated June 6, 2014, PMCM notified Cablevision, Comcast, and TWC that WJLP would commence operation in August 2014 as a new television station in the New York DMA and that it was electing mandatory carriage of the station's signal on all cable systems operated by the MVPDs in the New York DMA on channel 3.¹⁴⁴ The MVPDs subsequently filed letter requests that the Commission allow them to defer implementing PMCM's must-carry request and channel position election until 90 days after the date of the

¹⁴² PMCM Consolidated Application for Review at 1, 13-4; PMCM Consolidated Reply at 2.

¹⁴³ 47 U.S.C. § 614(d)(3) (emphasis added).

¹⁴⁴ *See supra* para. 4.

Bureau’s final decision on WJLP’s PSIP virtual channel assignment.¹⁴⁵ On July 25, 2014, the Bureau released the *Deferral Letter Order* waiving Section 76.64(f)(4) of the Commission’s rules and granting the MVPDs’ requests.¹⁴⁶ PMCM argues that it strongly opposed the MVPDs’ requests for deferral of the carriage mandate, effectively “complaining” that the MVPDs were asking to be allowed to evade the mandate, “but the Bureau effectively tossed out the statutorily fixed timeline” with its *Deferral Letter Order*.¹⁴⁷ PMCM asserts that “nothing in the Act permits the Commission or its delegated authorities to simply place the 120-day timeline on hold while it looks at some other issues.”¹⁴⁸ PMCM asserts that when the Bureau began its review of PMCM’s must carry complaints in January 2016, it therefore was already in violation of the statutory 120-day deadline.

31. PMCM appears to be suggesting that the Commission should have treated its opposition to the MVPDs’ requests for indefinite extension of the carriage mandate as a “complaint” subject to the 120-

¹⁴⁵ *Id.*

¹⁴⁶ *Deferral Letter Order*, 29 FCC Rcd at 9105; 47 CFR § 76.64(f)(4) (requiring that a station’s election of must-carry status take effect within 90 days of its election).

¹⁴⁷ PMCM Consolidated Application for Review at 13; PMCM Consolidated Reply at 2.

¹⁴⁸ PMCM Consolidated Application for Review at 13. *See also* PMCM Consolidated Reply at 2.

day statutory deadline.¹⁴⁹ PMCM, however, cites no authority to support this position. PMCM's argument also ignores the specific procedural framework set forth in the Act and the Commission's rules for resolving cable carriage and channel positioning disputes. Under this framework, as a condition precedent to filing a cable carriage complaint with the Commission, a station is required to provide the cable operator with a written notification explaining why it believes the operator has violated its cable carriage or channel positioning obligations "with the same level of specificity, raising all issues, as the station would raise before the Commission if the request should be denied."¹⁵⁰ The cable operator then has 30 days to respond and its response must "contain the same level of specificity, as well as all affirmative defenses, as the cable operator would raise before the Commission in defense of a complaint against it."¹⁵¹ Given the expedited 120-day timeframe, the station's notification and the operator's response "serve as a primary part of the pleadings" that inform the Commission's analysis in a complaint proceeding.¹⁵² At the time PMCM filed its opposition to the MVPDs' requests for indefinite

¹⁴⁹ PMCM Consolidated Reply at 2.

¹⁵⁰ *Implementation of the Cable Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, 2994, para. 119 (1993) (*Broadcast Signal Carriage Order*). See also 47 CFR § 76.61(a).

¹⁵¹ *Broadcast Signal Carriage Order*, 8 FCC Rcd at 2994, para. 120. See also 47 CFR § 76.61(b).

¹⁵² *Broadcast Signal Carriage Order*, 8 FCC Rcd at 2994, para. 119-20.

extension of the carriage mandate, PMCM had not complied with these detailed prerequisites to filing a carriage complaint.¹⁵³ Under these circumstances, it would have been unreasonable to expect the Commission to resolve the merits of PMCM's "complaint" within 120 days.

32. We also reject PMCM's assertion that it was entitled to final agency disposition of its carriage claims within 120 days because Section 614(d)(3) unequivocally requires that cable carriage disputes be resolved by the full Commission within 120 days.¹⁵⁴ PMCM contends that if action by the Bureau were deemed to satisfy the statutory 120-day timeframe,

¹⁵³ TWC Opposition at 7. As TWC and SECTV-NJ point out, PMCM had not even made a valid carriage election for WJLP at that time. *Id.* n.17; SECTV-NJ Opposition at 2-3. Under Section 76.64(f)(4), new television stations are required to make an election no earlier than 60 days prior to commencing broadcasting and no later than 30 days after commencing broadcasting. 47 CFR § 76.64(f)(4). WJLP commenced broadcasting on or about October 3, 2014. PMCM's June 6, 2014, election letter to TWC was sent approximately 120 days prior to going on the air and therefore was not a valid election. *PMCM v. TWC*, 31 FCC Rcd at 5237, para. 3. PMCM did not make a carriage election for SECTV-NJ until September 14, 2014. *PMCM v. SECTV-NJ*, 31 FCC Rcd at 5231, para. 3. PMCM never made a formal carriage election on RCN's systems and, as a result, defaulted to must carry status pursuant to Section 76.64(f)(3) of the Commission's rules. *PMCM v. RCN*, 31 FCC Rcd at 5225, para. 3.

¹⁵⁴ PMCM Consolidated Application for Review at n.10. *See also* PMCM Consolidated Reply at 2. Pursuant to Sections 0.61 and 0.283 of the Commission's rules, the Commission has delegated to the Media Bureau the authority to resolve cable carriage complaints. 47 CFR §§ 0.61, 0.283.

that timeframe would be rendered meaningless because the Commission could then sit on any applications for review of the Bureau's actions indefinitely.¹⁵⁵ We disagree. If PMCM had prevailed before the Bureau, the cable operators would have been compelled to begin carrying WJLP on cable channel 3, even if the operators filed applications for review.¹⁵⁶ Further, Section 5(c) of the Act authorizes the Commission to delegate statutory responsibilities to the staff, whose action "shall have the same force and effect" as "orders . . . of the Commission."¹⁵⁷ The Commission properly delegated the resolution of must-carry complaints to the Bureau.¹⁵⁸

33. Moreover, we disagree with PMCM's assertion that by imposing the 120-day timeframe, Congress intended to ensure that parties to a carriage dispute would know within 120 days the Commission's resolution of their dispute, so that they could comply

¹⁵⁵ PMCM Consolidated Application for Review at n.10; PMCM Consolidated Reply at 3.

¹⁵⁶ SECTV-NJ Opposition at n.13. *See* 47 CFR § 76.61(a)(4) ("If the Commission determines that a cable operator has failed to meet its must-carry obligations, the Commission shall order that, within 45 days of such order or such other time period as the Commission may specify, the cable operator reposition the complaining station or, in the case of an obligation to carry a station, commence or resume carriage of the station and continue such carriage for at least 12 months.").

¹⁵⁷ 47 U.S.C. § 155(c).

¹⁵⁸ 47 CFR § 0.61(f).

with it or seek judicial review.¹⁵⁹ Nothing in the statute or its legislative history indicates that Congress intended that the full Commission make a final determination on cable carriage disputes within 120 days. In addition, we note that Section 338 of the Act, which was added by the Satellite Home Viewer Improvement Act of 1999 (SHVIA),¹⁶⁰ contains procedures for resolving carriage complaints against satellite carriers similar to those applicable to cable carriage complaints under Section 614(d), including a 120-day timeframe for resolving such complaints.¹⁶¹ Congress was aware when it enacted SHVIA that the Commission had delegated authority to the Bureau to address cable carriage complaints,¹⁶² but it did not expressly require that the full Commission issue a final determination resolving satellite carriage complaints within 120 days. Rather, Congress used virtually identical language in Section 338(f)(3) as it had used in

¹⁵⁹ PMCM Consolidated Application for Review at n.10; PMCM Consolidated Reply at 3.

¹⁶⁰ P.L. No. 106-113, 113 Stat. 1501, Appendix I (1999). SHVIA required satellite carriers that provide local-into-local retransmission of broadcast stations pursuant to the statutory copyright license to “carry upon request the signals of all television broadcast stations within that local market” 47 U.S.C. § 338.

¹⁶¹ 47 U.S.C. § 338(f).

¹⁶² See *Hall v. United States*, 132 S.Ct. 1882, 1889 (2012) (“We assume that Congress is aware of existing law when it passes legislation.”).

App. 63

Section 614(d)(3).¹⁶³ If Congress had intended that the full Commission resolve cable carriage complaints within 120 days and subsequently determined that the Commission had improperly delegated must carry complaints for Bureau resolution, we expect that it would have made this intention clear when it enacted the parallel provision for satellite carriage complaints.¹⁶⁴

¹⁶³ *Cf.* 47 U.S.C. § 338(f)(3) (“Within 120 days after the date a complaint is filed under paragraph (1), the Commission shall determine whether the satellite carrier has met its obligations under subsections (b) through (e) of this section.”) with 47 U.S.C. § 534(d)(3) (“Within 120 days after the date a complaint is filed, the Commission shall determine whether the cable operator has met its obligations under this section.”).

¹⁶⁴ As SECTV-NJ observes, it would be virtually impossible for the full Commission to issue an order within 120 days after a cable carriage complaint is filed and then acted upon by the Bureau under delegated authority. SECTV-NJ Opposition at 14-5. Under the pleading schedule established in the Commission’s rules, the following time periods apply: 20 days after service of the complaint to file an opposition (47 CFR § 76.7(b)(ii)); 10 days to file a reply (47 CFR § 76.7(c)(iii)); 30 days to file an application for review after the Bureau issues an order (47 CFR § 1.115(d)); 15 days to file an opposition to an application for review (47 CFR § 1.115(d)); and 10 days to file a reply to an opposition (47 CFR § 1.115(d)). *Id.* at 15 n.11. Thus, under PMCM’s interpretation, the Bureau and Commission would have only 35 days outside of the pleading cycle to review the pleadings and write two orders. *Id.* at 15. This would likely necessitate that the Commission decide all must carry and channel positioning disputes in the first instance. Requiring the Commission to decide all must carry and channel positioning disputes in the first instance would be a tremendous waste of Commission resources as the large majority of must carry complaints are resolved successfully on delegated authority.

**G. The Bureau Did Not Err in Treating RCN's
Late-Filed Opposition as an Informal
Comment**

34. We reject PMCM's argument that the Bureau should have granted PMCM's must carry complaint against RCN because RCN's opposition to the complaint was late-filed.¹⁶⁵ RCN's opposition was late-filed because it was filed more than 20 days after PMCM served the complaint on RCN.¹⁶⁶ The Bureau found that RCN failed to present any extraordinary circumstances to justify the late filing of its opposition, but included its pleading in the record as an informal comment for the benefit of having a complete record.¹⁶⁷ PMCM argues that the Bureau should have treated its complaint against RCN as unopposed and granted it.¹⁶⁸ PMCM further argues that the Bureau's decision to take cognizance of the late-filed pleading "effectively nullifies the purpose of the rules requiring parties to file pleadings on time if they care about a matter in issue."¹⁶⁹ We disagree. The Bureau's inclusion of RCN's opposition in the record as an informal comment did not alter the outcome of the proceeding or result in a delay in the Bureau's decision. As discussed above, the

¹⁶⁵ PMCM Consolidated Application for Review at 14.

¹⁶⁶ *PMCM v. RCN*, 31 FCC Rcd at 5224, n.3. See 47 CFR § 76.7(b)(2) (requiring that oppositions to must carry complaints be filed within 20 days of service of the complaint).

¹⁶⁷ *PMCM v. RCN*, 31 FCC Rcd at 5224, n.3.

¹⁶⁸ PMCM Consolidated Application for Review at 14.

¹⁶⁹ *Id.*

Bureau properly found, based on the Commission's clarification in the *2008 Declaratory Order*, that WJLP is not eligible to be carried on RCN's systems on cable channel 3 because the carriage rights of a digital station attach to its PSIP major channel number, not its RF channel number.¹⁷⁰ PMCM appears to argue without citing any support that the Commission is required to grant without further inquiry all must carry complaints that lack a timely opposition. Again, we disagree. The Bureau was not required to ignore the settled law on this issue simply because RCN's opposition to the complaint was late-filed.

H. PMCM Should Work with SECTV-NJ to Commence Carriage of WJLP on SECTV-NJ's Cable Systems

35. We also address PMCM's complaint, raised for the first time in its Consolidated Reply, that SECTV-NJ is still not carrying WJLP on its systems at all in violation of Section 614 of the Act and that the Bureau has done nothing to remediate that violation.¹⁷¹ PMCM asserts that SECTV-NJ has been flagrantly violating the law since October 2014, when WJLP went on the air.¹⁷² The record indicates that PMCM notified SECTV by letter dated September 14, 2014 that WJLP

¹⁷⁰ See *supra* para. **Error! Reference source not found..**

¹⁷¹ PMCM Consolidated Reply at 7. A review of SECTV-NJ's website appears to confirm that SECTV-NJ is not carrying WJLP on its systems serving the New York DMA. See <http://www.secable.com/channel-lineup/channels> (last visited Aug. 7, 2017).

¹⁷² PMCM Consolidated Reply at 7.

was electing mandatory carriage for the election period starting January 1, 2015 and ending December 31, 2017 on all cable systems operated by SECTV-NJ in the New York DMA on channel 3.¹⁷³ At the time PMCM made its must carry election, the dispute concerning WJLP's virtual channel assignment was ongoing.¹⁷⁴ On October 22, 2015, approximately four months after the Bureau issued a declaratory ruling assigning WJLP virtual channel 33, PMCM gave written notice to SECTV-NJ pursuant to Section 76.61 of the Commission's rules that SECTV-NJ has failed to meet its statutory and regulatory carriage obligations by failing to carry WJLP on channel 3.¹⁷⁵ By letter dated November 18, 2015, SECTV-NJ rejected PMCM's demand to be carried on channel 3, but indicated that it was "open to discussing carriage of WJLP on a mutually agreeable channel that is within the neighborhood of the other broadcast signals carried."¹⁷⁶

¹⁷³ *PMCM v. SECTV-NJ*, 31 FCC Rcd at 5231, para. 3.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* PMCM suggests that the Bureau has failed to enforce PMCM's must-carry rights after SECTV-NJ failed to carry PMCM in response to its 2014 must-carry demand. PMCM Consolidated Reply at 7 ("Service Electric has been flagrantly violating the law since October 2014 when WJLP went on the air. . . .and the Bureau has done nothing to remediate the violation – not a fine, not a sanction, not an admonition, not even a wagged finger. Who is enforcing the law here?"). The Commission's rules provide aggrieved broadcasters an avenue for relief in such circumstances by affording them the opportunity to file complaints. 47 CFR § 76.61. With respect to its 2014 must-carry demand, PMCM did

36. The Bureau subsequently denied PMCM's must carry complaint against SECTV-NJ, finding that PMCM's channel positioning rights for WJLP may attach only to its major channel number as carried in its PSIP, namely channel 33, and that WJLP is not entitled to be carried on channel 3.¹⁷⁷ Nevertheless, the Bureau noted that SECTV-NJ was open to discussing carriage of WJLP on another mutually agreeable channel in the same neighborhood as the other broadcast signals carried on its systems and encouraged the parties to find a mutually agreeable channel so that SECTV-NJ could commence carriage of WJLP without delay.¹⁷⁸ PMCM does not indicate what, if any, efforts it has made to work with SECTV-NJ following issuance of the Bureau's MO&O to find a mutually agreeable channel for WJLP on SECTV-NJ's systems. As explained above, we agree with the Bureau that PMCM is not entitled to carriage of WJLP on cable channel 3. We urge PMCM and SECTV-NJ to work together to begin carriage of WJLP on SECTV-NJ's systems on channel 33 or on another mutually agreeable channel without further delay.

not invoke its right to such relief. *See id.* § 76.61(a)(5)(2) (when a cable operator fails to respond to a must-carry demand within 30 days, a broadcaster may file a complaint provided it does so no later than 60 days after the cable operator was required to respond). The Bureau did not act unreasonably in adjudicating the complaint before it rather than a complaint that PMCM failed to lodge.

¹⁷⁷ *Id.* at 5234-35, para. 7.

¹⁷⁸ *Id.* at 5235, para. 8.

I. PMCM's Applications for Review of the Bureau's *Deferral Letter Order* and *Reinstatement Letter Order* Are Moot

37. We dismiss as moot PMCM's application for review of the *Deferral Letter Order* issued by the Bureau on July 25, 2014, which deferred implementation of PMCM's must carry request and channel position election for WJLP until 90 days after a final decision on the appropriate PSIP virtual channel for the station,¹⁷⁹ and its application for review of the *Reinstatement Letter Order* issued by the Bureau on June 5, 2015, which reinstated WJLP's carriage rights.¹⁸⁰ As the U.S. Court of Appeals for the D.C. Circuit previously has concluded, PMCM's Deferral Application for Review was mooted by the Bureau's decision in the *PMCM PSIP Declaratory Ruling* assigning virtual channel 33 to WJLP.¹⁸¹ PMCM's Reinstatement Application for Review is likewise moot in light of the instant decision addressing PMCM's Consolidated Application for Review.

IV. ORDERING CLAUSES

38. Accordingly, **IT IS ORDERED** that, pursuant to Sections 4(i), 4(j), and 614 of the

¹⁷⁹ Deferral Application for Review, *supra* note 3.

¹⁸⁰ Reinstatement Application for Review, *supra* note 5.

¹⁸¹ *PMCM, LLC*, No. 15-1508, slip op. at 1 (D.C. Cir., Sept. 23, 2015) (*per curiam*) (dismissing as moot PMCM's petition for writ of mandamus to the extent that it sought an immediate ruling on its application for review of the *Deferral Letter Order* issued by the Bureau July 25, 2014).

Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 534, and Section 1.115 of the Commission's rules, 47 CFR § 1.115, the Consolidated Application for Review filed by PMCM, LLC, on June 10, 2016 **IS DISMISSED** to the extent that it raises matters not previously presented to the Bureau as discussed in paragraph 25 and otherwise **IS DENIED**.

39. **IT IS FURTHER ORDERED** that, pursuant to Sections 4(i), 4(j), and 614 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 534, and Section 1.115 of the Commission's rules, 47 CFR § 1.115, the Applications for Review filed by PMCM, LLC, on August 25, 2014 and July 6, 2015 **ARE DISMISSED** as moot.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX

List of Broadcast Television Stations That, as of July 16, 2015, Had an RF Digital Channel Number That Is the Virtual Major Channel Number of Another Station Operating in the Same DMA, or Had a Virtual Major Channel Number That Is the RF Digital Channel Number of Another Station Operating in the Same DMA

DMA	Call-sign	Facility ID	RF Digital Channel	Virtual Channel
ALBANY-SCHENECTADY-TROY	WNYA	136751	13	51
ALBANY-SCHENECTADY-TROY	WNYT	73363	12	13
ALBUQUERQUE-SANTA FE	KASA-TV	32311	27	2
ALBUQUERQUE-SANTA FE	KAZQ	1151	17	32
ALBUQUERQUE-SANTA FE	KBIM-TV	48556	10	10
ALBUQUERQUE-SANTA FE	KCHF	60793	10	11
ALBUQUERQUE-SANTA FE	KENW	18338	32	3
ALBUQUERQUE-SANTA FE	KNMD-TV	84215	8	9
ALBUQUERQUE-SANTA FE	KOBR	62272	8	8

App. 71

DMA	Call-sign	Facility ID	RF Digital Channel	Virtual Channel
ALBUQUERQU E-SANTA FE	KRPV- DT	53539	27	27
ALBUQUERQU E-SANTA FE	KUPT	27431	29	29
ALBUQUERQU E-SANTA FE	KWBQ	76268	29	19
AUGUSTA	WCES- TV	23937	6	20
AUGUSTA	WJBF	27140	42	6
BANGOR	WABI- TV	17005	13	5
BANGOR	WMED- TV	39649	10	13
BIRMINGHAM (ANN TUSC)	WBRC	71221	50	6
BIRMINGHAM (ANN TUSC)	WVUA	77496	6	23
BOISE	KBOI- TV	49760	9	2
BOISE	KNIN- TV	59363	10	9
BOSTON (MANCHESTE R)	WUNI	30577	29	27
BOSTON (MANCHESTE R)	WUTF- DT	60551	27	66

App. 72

DMA	Call-sign	Facility ID	RF Digital Channel	Virtual Channel
BUFFALO	WBBZ-TV	9088	7	67
BUFFALO	WKBW-TV	54176	38	7
BUFFALO	WNLO	71905	32	23
BUFFALO	WPXJ-TV	2325	23	51
BURLINGTON-PLATTSBURGH	WCAX-TV	46728	22	3
BURLINGTON-PLATTSBURGH	WVNY	1125	13	22
CHAMPAIGN&SPRNGFLD-DECATUR	WICD	25684	41	15
CHAMPAIGN&SPRNGFLD-DECATUR	WSEC	70536	15	14
CHICAGO	WCPX-TV	10981	43	38
CHICAGO	WGBO-DT	12498	38	66
CHICAGO	WLS-TV	73226	44	7
CHICAGO	WPWR-TV	48772	51	50

App. 73

DMA	Call-sign	Facility ID	RF Digital Channel	Virtual Channel
CHICAGO	WSNS-TV	70119	45	44
CHICAGO	WXFT-DT	60539	50	60
CLEVELAND-AKRON (CANTON)	WDLI-TV	67893	49	17
CLEVELAND-AKRON (CANTON)	WEAO	49421	50	49
CLEVELAND-AKRON (CANTON)	WKYC	73195	17	3
DALLAS-FT. WORTH	KAZD	17433	39	55
DALLAS-FT. WORTH	KMPX	73701	30	29
DALLAS-FT. WORTH	KTXA	51517	29	21
DALLAS-FT. WORTH	KXTX-TV	35994	40	39
DAVENPORT-R.ISLAND-MOLINE	KQIN	5471	34	36
DAVENPORT-R.ISLAND-MOLINE	KWQC-TV	6885	36	6

App. 74

DMA	Call-sign	Facility ID	RF Digital Channel	Virtual Channel
DAVENPORT-R.ISLAND-MOLINE	WMW C-TV	81946	8	53
DAVENPORT-R.ISLAND-MOLINE	WQAD-TV	73319	38	8
DENVER	KBDI-TV	22685	13	12
DENVER	KRNE-TV	47971	12	12
DENVER	KTNE-TV	47996	13	13
DETROIT	WJBK	73123	7	2
DETROIT	WKBD-TV	51570	14	50
DETROIT	WPXD-TV	5800	50	31
DETROIT	WXYZ-TV	10267	41	7
EVANSVILLE	WEHT	24215	7	25
EVANSVILLE	WTVW	3661	28	7
FARGO-VALLEY CITY	KGFE	53320	15	2
FARGO-VALLEY CITY	KJRE	53315	20	19
FARGO-VALLEY CITY	KVRR	55372	19	15

App. 75

DMA	Call-sign	Facility ID	RF Digital Channel	Virtual Channel
GRAND RAPIDS-KALMZOO-B.CRK	WOOD-TV	36838	7	8
GRAND RAPIDS-KALMZOO-B.CRK	WWM T	74195	8	3
GREEN BAY-APPLETON	WFRV-TV	9635	39	5
GREEN BAY-APPLETON	WIWN	60571	5	68
GREENVILLE-N.BERN-WASHNGTN	WUNF-TV	69300	25	33
GREENVILLE-N.BERN-WASHNGTN	WUNK-TV	69149	23	25
HONOLULU	KFVE	36917	22	9
HONOLULU	KGMD-TV	36914	9	9
HONOLULU	KHAW-TV	4146	11	11
HONOLULU	KHET	26431	11	11
HONOLULU	KHNL	34867	35	13
HONOLULU	KHVO	64544	13	13
HONOLULU	KOGG	34859	16	15
HONOLULU	KUPU	89714	15	56

App. 76

DMA	Call-sign	Facility ID	RF Digital Channel	Virtual Channel
HOUSTON	KTMD	64984	48	47
HOUSTON	KYAZ	31870	47	51
INDIANAPOLIS	WFYI	41397	21	20
INDIANAPOLIS	WHM B-TV	37102	20	40
INDIANAPOLIS	WIPB	3646	23	49
INDIANAPOLIS	WNDY -TV	28462	32	23
JUNEAU	KTNL- TV	60519	7	13
JUNEAU	KUBD	60520	13	4
KANSAS CITY	KCWE	64444	31	29
KANSAS CITY	KMBC -TV	65686	29	9
KANSAS CITY	KMCI- TV	42636	41	38
KANSAS CITY	KSHB- TV	59444	42	41
LA CROSSE- EAU CLAIRE	WEUX	2709	49	48
LA CROSSE- EAU CLAIRE	WXOW	64549	48	19
LEXINGTON	WKYT- TV	24914	36	27

App. 77

DMA	Call-sign	Facility ID	RF Digital Channel	Virtual Channel
LEXINGTON	WTVQ-DT	51597	40	36
LITTLE ROCK-PINE BLUFF	KATV	33543	22	7
LITTLE ROCK-PINE BLUFF	KETS	2770	7	2
LOS ANGELES	KBEH	56384	24	63
LOS ANGELES	KILM	63865	44	64
LOS ANGELES	KTLA	35670	31	5
LOS ANGELES	KVCR-DT	58795	26	24
LOS ANGELES	KVMD	16729	23	31
LOS ANGELES	KXLA	55083	51	44
MIAMI-FT. LAUDERDALE	WFOR-TV	47902	22	4
MIAMI-FT. LAUDERDALE	WSBS-TV	72053	3	22
MINNEAPOLIS-ST. PAUL	KAWB	49579	28	22
MINNEAPOLIS-ST. PAUL	Kawe	49578	9	9
MINNEAPOLIS-ST. PAUL	KMSP-TV	68883	9	9
MINNEAPOLIS-ST. PAUL	KTCI-TV	68597	23	17
MINNEAPOLIS-ST. PAUL	WUCW	36395	22	23

App. 78

DMA	Call-sign	Facility ID	RF Digital Channel	Virtual Channel
MINOT-BISMARCK-DICKINSON	KMCY	22127	14	14
MINOT-BISMARCK-DICKINSON	KWSE	53318	11	4
MINOT-BISMARCK-DICKINSON	KXMD-TV	55683	14	11
MOBILE-PENSACOLA (FT WALT)	WDPM-DT	83740	23	18
MOBILE-PENSACOLA (FT WALT)	WSRE	17611	31	23
MONROE-EL DORADO	KETZ	92872	10	12
MONROE-EL DORADO	KTVE	35692	27	10
NEW YORK	WLNY-TV	73206	47	55
NEW YORK	WNJU	73333	36	47
NEW YORK	WJLP	86537	3	33
NEW YORK	WCBS	9610	33	2
ORLANDO-DAYTONA BCH-MELBRN	WKM G-TV	71293	26	6

App. 79

DMA	Call-sign	Facility ID	RF Digital Channel	Virtual Channel
ORLANDO-DAYTONA BCH-MELBRN	WVEN-TV	131	49	26
PHILADELPHI A	WTFX-TV	51568	42	29
PHILADELPHI A	WUVP-DT	60560	29	65
PITTSBURGH	WPCW	69880	11	19
PITTSBURGH	WPXI	73910	48	11
PROVIDENCE- NEW BEDFORD	WNAC-TV	73311	12	64
PROVIDENCE- NEW BEDFORD	WPRI-TV	47404	13	12
PUERTO RICO	WCCV-TV	3001	46	54
PUERTO RICO	WDWL	4110	30	36
PUERTO RICO	WECN	19561	18	64
PUERTO RICO	WELU	26602	34	32
PUERTO RICO	WIDP	18410	45	46
PUERTO RICO	WMEI	26676	14	14
PUERTO RICO	WOST	60357	22	14
PUERTO RICO	WRUA	15320	33	34
PUERTO RICO	WSJU-TV	4077	31	30
PUERTO RICO	WTCV	28954	32	18

App. 80

DMA	Call-sign	Facility ID	RF Digital Channel	Virtual Channel
PUERTO RICO	WUJA	8156	48	58
PUERTO RICO	WVOZ-TV	29000	47	48
RALEIGH-DURHAM (FAYETVLLE)	WFPX-TV	21245	36	62
RALEIGH-DURHAM (FAYETVLLE)	WUNP-TV	69397	36	36
SALT LAKE CITY	KCSG	59494	14	4
SALT LAKE CITY	KGWR-TV	63170	13	13
SALT LAKE CITY	KJZZ-TV	36607	46	14
SALT LAKE CITY	KMYU	35822	9	12
SALT LAKE CITY	KSTU	22215	28	13
SALT LAKE CITY	KUEN	69582	36	9
SALT LAKE CITY	KUTF	69694	12	12
SAN ANTONIO	KCWX	24316	5	2
SAN ANTONIO	KENS	26304	39	5
SAN ANTONIO	KHCE-TV	27300	16	23
SAN ANTONIO	KVAW	32621	18	16

App. 81

DMA	Call-sign	Facility ID	RF Digital Channel	Virtual Channel
SAN FRANCISCO-OAK-SAN JOSE	KBCW	69619	45	44
SAN FRANCISCO-OAK-SAN JOSE	KCNS	71586	39	38
SAN FRANCISCO-OAK-SAN JOSE	KDTV-DT	33778	51	14
SAN FRANCISCO-OAK-SAN JOSE	KEMO-TV	34440	32	50
SAN FRANCISCO-OAK-SAN JOSE	KMTP-TV	43095	33	32
SAN FRANCISCO-OAK-SAN JOSE	KQEH	35663	50	54
SAN FRANCISCO-OAK-SAN JOSE	KRON-TV	65526	38	4

App. 82

DMA	Call-sign	Facility ID	RF Digital Channel	Virtual Channel
SAN FRANCISCO-OAK-SAN JOSE	KTNC-TV	21533	14	42
SAN FRANCISCO-OAK-SAN JOSE	KTVU	35703	44	2
SIOUX FALLS(MITCHELL)	KDSD-TV	61064	17	16
SIOUX FALLS(MITCHELL)	KELO-TV	41983	11	11
SIOUX FALLS(MITCHELL)	KPLO-TV	41964	13	6
SIOUX FALLS(MITCHELL)	KPSD-TV	61071	13	13
SIOUX FALLS(MITCHELL)	KQSD-TV	61063	11	11
SIOUX FALLS(MITCHELL)	KSFY-TV	48658	13	13
SIOUX FALLS(MITCHELL)	KTTW	28521	7	17

App. 83

DMA	Call-sign	Facility ID	RF Digital Channel	Virtual Channel
SPRINGFIELD-HOLYOKE	WGBY-TV	72096	22	57
SPRINGFIELD-HOLYOKE	WWLP	6868	11	22
ST. LOUIS	KMOV	70034	24	4
ST. LOUIS	KNLC	48525	14	24
SYRACUSE	WCNY-TV	53734	25	24
SYRACUSE	WSTM-TV	21252	24	3
TAMPA-ST. PETE (SARASOTA)	WEDU	21808	13	3
TAMPA-ST. PETE (SARASOTA)	WMOR-TV	53819	19	32
TAMPA-ST. PETE (SARASOTA)	WTTA	4108	32	38
TAMPA-ST. PETE (SARASOTA)	WTVT	68569	12	13
TULSA	KJRH-TV	59439	8	2
TULSA	KTUL	35685	10	8
WASHINGTON DC (HAGRSTWN)	WETA-TV	65670	27	26

App. 84

DMA	Call-sign	Facility ID	RF Digital Channel	Virtual Channel
WASHINGTON DC (HAGRSTWN)	WHAG-TV	25045	26	25
WASHINGTON DC (HAGRSTWN)	WNVC	9999	24	30
WASHINGTON DC (HAGRSTWN)	WNVN	10019	30	30
WAUSAU-RHINELANDER	WJFW-TV	49699	16	12
WAUSAU-RHINELANDER	WMOV	81503	12	4
WEST PALM BEACH-FT. PIERCE	WHDT	83929	42	59
WEST PALM BEACH-FT. PIERCE	WPEC	52527	13	12
WEST PALM BEACH-FT. PIERCE	WPTV-TV	59443	12	5
WEST PALM BEACH-FT. PIERCE	WXEL-TV	61084	27	42

App. 85

DMA	Call-sign	Facility ID	RF Digital Channel	Virtual Channel
WICHITA-HUTCHINSON PLUS	KAKE	65522	10	10
WICHITA-HUTCHINSON PLUS	KBSL-DT	66416	10	10
WICHITA-HUTCHINSON PLUS	KPTS	33345	8	8
WICHITA-HUTCHINSON PLUS	KSCW-DT	72348	12	33
WICHITA-HUTCHINSON PLUS	KSNK	72362	12	8
WICHITA-HUTCHINSON PLUS	KSWK	60683	8	3
WICHITA-HUTCHINSON PLUS	KWCH-DT	66413	19	12
WICHITA-HUTCHINSON PLUS	KWKS	162115	19	19

APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**No. 17-1209
September Term, 2018
FCC-17-118**

[Filed September 5, 2018]

PMCM TV, LLC,)
)
Petitioner)
)
v.)
)
Federal Communications)
Commission and United)
States of America, U.S.)
Department of Justice)
Antitrust Division,)
)
Respondents)
)
CBS Corporation, et al.,)
Intervenors)
)

Consolidated with 17-1210

BEFORE: Griffith, Wilkins, and Katsas, Circuit
Judges

App. 87

ORDER

Upon consideration of petitioner's petition for panel rehearing filed on August 6, 2018, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Ken R. Meadows

Deputy Clerk

APPENDIX D

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**No. 17-1209
September Term, 2018
FCC-17-118**

[Filed September 5, 2018]

PMCM TV, LLC,)
)
Petitioner)
)
v.)
)
Federal Communications)
Commission and United)
States of America, U.S.)
Department of Justice)
Antitrust Division,)
)
Respondents)
)
CBS Corporation, et al.,)
Intervenors)
)

Consolidated with 17-1210

BEFORE: Garland, Chief Judge, and Henderson,
Rogers, Tatel, Griffith, Kavanaugh*,
Srinivasan, Millett, Pillard, Wilkins,
and Katsas, Circuit Judges

ORDER

Upon consideration of petitioner's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Ken R. Meadows

Deputy Clerk

* Circuit Judge Kavanaugh did not participate in this matter.