

BRIEF FOR RESPONDENTS

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

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No. 17-1209 (CONSOLIDATED WITH No. 17-1210)

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PMCM TV, LLC,

PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION  
AND UNITED STATES OF AMERICA,

RESPONDENTS.

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ON PETITIONS FOR REVIEW OF ORDERS OF THE  
FEDERAL COMMUNICATIONS COMMISSION

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## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

### **1. Parties.**

The petitioner is PMCM TV, LLC. The respondents are the Federal Communications Commission and the United States of America. The intervenors supporting respondents are ION Media License Company, LLC, Meredith Corporation, CBS Corporation, and Charter Communications, Inc.

### **2. Rulings under review.**

*Request for Declaratory Ruling by Meredith Corp. And “Alternative PSIP Proposal” By PMCM TV, LLC for WJLP (Formerly KVVN(TV)), Middletown Township, New Jersey, 32 FCC Rcd 7229 (2017) (JA\_\_\_\_) (“PSIP Order”); PMCM TV, LLC v. RCN Telecom Services, LLC, 32 FCC Rcd 7200 (2017) (JA\_\_\_\_) (“Cable Carriage Order”).*

### **3. Related cases.**

This case has not previously been before this Court or any other court. PMCM previously filed four separate mandamus petitions involving related issues (D.C. Cir. Nos. 14-1238, 15-1058, 16-1380, and 17-1190), all of which this Court denied. We are aware of no other pending cases related to this one.

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## **GLOSSARY**

ATSC	Advanced Television Systems Committee, the private organization that developed standards for digital television broadcasting in the United States
NTSC	National Television Standards Committee, the private group that developed technical standards that the FCC adopted in 1953 for analog television broadcasting in the United States
PSIP	Program and System Information Protocol, a protocol governing the assignment of channel numbers to television stations after the digital television transition
UHF	ultra high frequency; a range of radio frequencies from 300 MHz to 3 GHz on which television stations transmit their signals
VHF	very high frequency; a range of radio frequencies from 30 MHz to 300 MHz on which television stations transmit their signals

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BRIEF FOR RESPONDENTS

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**JURISDICTION**

The orders on review were released on September 15, 2017. PMCM TV, LLC (“PMCM”) filed timely petitions for review of the orders within 60 days of their release. *See* 28 U.S.C. § 2344; 47 C.F.R. § 1.4(b)(2). The Court has jurisdiction under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1). For the reasons discussed in Section IV of the Argument, PMCM lacks standing to raise its challenge under the Spectrum Act, 47 U.S.C. § 1452(g).

## QUESTIONS PRESENTED

With the transition of broadcast television from analog to digital, the channel by which a station is identified no longer necessarily corresponds to the radio frequency channel over which the station broadcasts. Instead, it is assigned in accordance with the privately developed “Program and System Information Protocol” (“PSIP”), which the FCC has incorporated in its rules, and is known as the station’s PSIP—or “virtual”—channel.

Several years after the digital television transition was completed, PMCM moved its television station from Nevada to New Jersey, where it commenced operations on a newly licensed station. When that station, WJLP, began using virtual channel 3, two incumbent broadcasters that were already using virtual channel 3 objected. Those broadcasters, whose coverage areas overlapped with WJLP’s, had been operating as “Channel 3” for more than half a century. The FCC’s Media Bureau, applying the PSIP Standard incorporated in the Commission’s rules, concluded that WJLP should be assigned virtual channel 33. The Commission affirmed.<sup>1</sup>

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<sup>1</sup> *Request for Declaratory Ruling by Meredith Corp. And “Alternative PSIP Proposal” By PMCM TV, LLC for WJLP (Formerly KVVN(TV)), Middletown Township, New Jersey*, 30 FCC Rcd 6078 (Media Bur. 2015) (JA\_\_\_\_) (“*Declaratory Ruling*”), *aff’d*, 32 FCC Rcd 7229 (2017) (JA\_\_\_\_) (“*PSIP Order*”).

Under section 614 of the Communications Act, 47 U.S.C. § 534, broadcasters may insist that local cable operators carry their stations on the channel on which they broadcast over the air. After three cable operators declined to carry WJLP on cable channel 3, PMCM filed “must-carry” complaints against them under 47 U.S.C. § 534(b)(6). The Commission upheld the Bureau’s denial of those complaints, concluding that section 614 did not require cable operators to carry WJLP on channel 3 because that was WJLP’s radio frequency channel, not its virtual channel.<sup>2</sup>

PMCM challenges the *PSIP Order* and the *Cable Carriage Order*.

This case presents the following questions:

(1) Whether the Commission reasonably interpreted and applied its rules governing the assignment of virtual channels when it determined that WJLP should be assigned virtual channel 33.

(2) Whether the Commission reasonably interpreted 47 U.S.C. § 534 when it concluded that WJLP was not entitled to carriage on cable channel 3.

(3) Whether PMCM has standing to assert a violation of the Spectrum Act; and, if so, whether the Commission violated that statute by assigning virtual channel 33 to WJLP.

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<sup>2</sup> *PMCM TV, LLC v. RCN Telecom Services, LLC*, 32 FCC Rcd 7200 (2017) (JA\_\_\_\_) (“*Cable Carriage Order*”).

## STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in an addendum to this brief.

## COUNTERSTATEMENT

### **A. Channel Positioning And The Transition From Analog To Digital Television**

In the age of analog broadcasting, there was no distinction between the physical “radio frequency” channel over which a television station broadcast its signal and the channel to which viewers tuned their televisions to receive the station’s over-the-air programming. That changed with the advent of digital television.

During the nation’s transition from analog to digital television in the first decade of this century, most full power television stations transmitted two over-the-air signals using two radio frequency channels: an analog channel “and a paired digital channel on a different frequency.” *Declaratory Ruling* ¶ 3 (JA\_\_\_\_-\_\_\_\_).<sup>3</sup> Even “as new digital services were being offered to viewers,” broadcasters sought “to retain the brand-identity they had”

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<sup>3</sup> Analog channels are also known as “NTSC” channels. *See Declaratory Ruling* ¶ 3 (JA\_\_\_\_). The acronym “NTSC” refers to the National Television Standards Committee, which developed the technical standards that the FCC approved in 1953 for analog television broadcasting in the United States. *See* NEWTON’S TELECOM DICTIONARY 865 (28th ed. 2014). To avoid confusion, this brief uses the term “analog” in place of the acronym “NTSC.”

established through “years of marketing and advertising with respect to their analog channel.” *Id.* ¶ 5 (JA\_\_\_\_). To address this issue, the Advanced Television Systems Committee (“ATSC”)—an international, non-profit member organization—developed a Program and System Information Protocol (“PSIP”). *Id.* ¶ 4 (JA\_\_\_\_). The FCC incorporated the PSIP Standard into its rules. *See Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, 19 FCC Rcd 18279, 18343-47 ¶¶ 149-153 (2004) (“*Second Periodic Review*”).<sup>4</sup>

Under the PSIP Standard, the channel on which over-the-air viewers receive a station’s digital programming is determined by a two-part numerical code known as a “PSIP channel.” The first number in a station’s PSIP channel is the “major” channel number (also known as the “virtual” channel number). *Declaratory Ruling* ¶ 5 & n.8 (JA\_\_\_\_). Viewers tune their television to this channel number to view a digital station over the air.

A station’s major channel number is usually “the same as [its] original analog channel number.” *Declaratory Ruling* ¶ 5 (JA\_\_\_\_). The use of PSIP channels thus “enables channel number navigation using the familiar analog

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<sup>4</sup> Specifically, FCC rules require “compliance 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’).” *Declaratory Ruling* ¶ 6 (JA\_\_\_\_); *see* 47 C.F.R. § 73.682(d).

channel numbers to tune to new digital channel assignments.” *Second Periodic Review*, 19 FCC Rcd at 18346 n.356. This allowed “broadcasters to maintain their local brand identification” by retaining their analog channel numbers even after they discontinued analog broadcasts in 2009. *Id.* at 18346 ¶ 153. For instance, Washington’s public TV station, WETA, which for many years aired its analog signal on radio frequency channel 26, still identifies itself as channel 26 (its virtual channel), even though it now broadcasts its digital signal on radio frequency channel 27.

The second part of a PSIP channel—the “minor” channel number—serves to identify particular programming streams when a single station broadcasts more than one stream. *Declaratory Ruling* ¶ 5 (JA\_\_\_\_). For example, WETA uses channel 26.1 for WETA-HD, 26.2 for WETA-UK, and 26.3 for WETA-Kids. See <https://weta.org/tv/channelguide>.

Annex B to the PSIP Standard prescribed rules for assigning PSIP channels. Among other things, Annex B sought to preclude any newly licensed digital broadcaster from using a virtual channel number that was already being used in the same market by an incumbent broadcaster. See *Declaratory Ruling* ¶ 34 (JA\_\_\_\_); Annex B.1.4.



## **B. Mandatory Cable Carriage**

Under section 614(a) of the Communications Act, 47 U.S.C. § 534(a), commercial television broadcast stations may assert rights to mandatory cable carriage. A station may assert these “must-carry” rights on cable systems in the market defined by Nielsen Media Research as the station’s “Designated Market Area.” 47 C.F.R. § 76.55(e)(2).

A station asserting must-carry rights may elect carriage on “the cable system channel number on which the ... station is broadcast over the air.” 47 U.S.C. § 534(b)(6). Before the digital transition, a station making this election could demand that cable operators place the station on the cable channel number corresponding to its radio frequency channel. Congress anticipated, however, that the digital transition could require modifications to the FCC’s cable carriage regime. Accordingly, Congress provided that, when implementing the digital transition, the FCC “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 [the] modified standards” for digital television. *Id.* § 534(b)(4)(B).

Pursuant to that directive, the Commission in 2008 “clarif[ied] the manner in which cable operators are to determine the channel number on

which a local commercial ... station is ‘broadcast over the air’” for purposes of satisfying must-carry obligations after the digital transition. *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission’s Rules*, 23 FCC Rcd 14254, 14259 ¶ 16 (2008) (“2008 Declaratory Order”). The agency explained that “any station carried pursuant to mandatory carriage may demand carriage on its major channel number as broadcast in [its] PSIP,” *ibid.*—that is, its “virtual” channel.

### **C. PMCM’s Channel Positioning Dispute With Broadcasters**

Section 331(a) of the Communications Act, 47 U.S.C. § 331(a), provides that a television station broadcasting on a VHF frequency in one state may relocate to another state that has no VHF station.<sup>5</sup> In 2008, PMCM became the licensee of station KVVN(TV), radio frequency channel 3, in Ely, Nevada. *See Declaratory Ruling* ¶ 9 (JA\_\_\_\_). Several years later, in accordance with this Court’s decision in *PMCM TV, LLC v. FCC*, 701 F.3d 380 (D.C. Cir. 2012), the FCC granted PMCM’s request, pursuant to section 331(a), to move its station from Nevada to New Jersey and to operate on

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<sup>5</sup> The terms “VHF” (“very high frequency”) and “UHF” (“ultra high frequency”) specify the radio frequency range on which a television station transmits its signal. *See* NEWTON’S TELECOM DICTIONARY 1263 (“UHF” includes frequencies “ranging from about 300 MHz to about 3 GHz”); *id.* at 1297 (“VHF” includes “frequencies between about 30 MHz and 300 MHz”).

radio frequency channel 3 in New Jersey. *Reallocation of Channel 3 from Ely, Nevada to Middletown Township, New Jersey*, 28 FCC Rcd 2825 (Media Bur. 2013). PMCM then applied to the Commission for a construction permit to build a broadcast facility in New York City for its New Jersey station. *Declaratory Ruling* ¶ 12 (JA\_\_\_\_).

The “service contour”—or coverage area—of PMCM’s New Jersey station overlaps with that of WFSB(TV), a station licensed to Hartford, Connecticut and operated by Meredith Corporation. WFSB has identified itself to viewers as “Channel 3” for more than half a century. It operated on radio frequency channel 3 in the analog era and, while it now broadcasts on radio frequency channel 33, it uses virtual channel 3 to preserve its historic channel identification. Meredith was concerned that allowing PMCM’s station to use virtual channel 3 could create viewer confusion and dilute the established brand of Meredith’s Hartford station. Meredith therefore objected to PMCM’s construction permit application, arguing that PMCM’s station should be required to use virtual channel 33 instead of virtual channel 3. *See Declaratory Ruling* ¶¶ 12, 15-16 (JA\_\_\_\_-\_\_\_\_).

In April 2014, the FCC’s Media Bureau granted PMCM’s construction permit application without deciding the virtual channel assignment for PMCM’s station (a question the Bureau deemed premature). Meredith

petitioned for reconsideration and requested a declaratory ruling that PMCM's station be assigned virtual channel 33. *See Declaratory Ruling* ¶ 12 (JA\_\_\_\_). PMCM then submitted to the FCC an "Alternative PSIP Proposal" under which virtual channel 3 would be partitioned, allowing Meredith's station to use PSIP channels 3.1 through 3.9 and PMCM's station to use PSIP channels 3.10 and above. *See Public Notice*, 29 FCC Rcd 10556 (2014) (JA\_\_\_\_). The Media Bureau opened a proceeding to receive public comment on Meredith's request for declaratory ruling and PMCM's alternative PSIP proposal. *Id.* at 10557 (JA\_\_\_\_).

In September 2014, PMCM completed construction of its new television facility and commenced broadcasting under "program test" authority. *PSIP Order* ¶ 9 (JA\_\_\_\_-\_\_\_\_). Soon thereafter, several incumbent stations complained to the FCC that PMCM's station—now known as WJLP—was using PSIP channel 3.10 without authorization. By letter dated October 23, 2014, the Media Bureau ordered WJLP to use virtual channel 33 on an interim basis until the Bureau resolved PMCM's dispute with Meredith over the use of virtual channel 3. When PMCM ignored that order, the Bureau directed PMCM to comply or have its program test authority suspended effective November 10, 2014. *See ibid.* (JA\_\_\_\_).

On November 10, 2014, PMCM filed an emergency petition for writ of mandamus asking this Court to order the FCC to rescind or stay the effectiveness of the suspension of program test authority. After the Media Bureau entered a temporary stay of its order, the Court extended the stay pending review of PMCM’s mandamus petition. *PSIP Order* ¶ 9 (JA\_\_\_\_).

On February 27, 2015, the Court denied the mandamus petition and dissolved the stay. *In re PMCM TV, LLC*, No. 14-1238 (D.C. Cir. Feb. 27, 2015) (per curiam). The next month, WJLP began operating pursuant to program test authority using virtual channel 33 on an interim basis. *PSIP Order* ¶ 9 (JA\_\_\_\_).

Meanwhile, in the administrative proceeding concerning WJLP’s virtual channel assignment, CBS, on behalf of its Philadelphia station KYW-TV, joined Meredith in opposing PMCM’s “Alternative PSIP Proposal.” KYW had operated on channel 3 for about 75 years, and its service area also overlaps with WJLP’s. Like Meredith, CBS was concerned that its station’s “local brand identification” would be diluted if PMCM’s proposal to partition virtual channel 3 were adopted. *See Declaratory Ruling* ¶¶ 27-28 (JA\_\_\_\_). CBS agreed with Meredith that under the PSIP Standard, virtual channel 33 should be assigned to WJLP. *Id.* ¶ 32 (JA\_\_\_\_).

In June 2015, the Media Bureau granted Meredith’s petition for declaratory ruling, denied PMCM’s alternative PSIP proposal, and ordered PMCM to operate WJLP using virtual channel 33 on a permanent basis.

*Declaratory Ruling ¶ 2 (JA\_\_\_\_).*

The Bureau determined that the assignment of WJLP’s virtual channel was governed by Annex B.1.4 of the PSIP Standard, which provides:

If, after the [digital] transition, a previously used [analog radio frequency] channel in a market is assigned to a newly-licensed [digital] broadcaster in that market, the newly-licensed [digital] broadcaster shall use, as his major\_channel\_number, the number of the [digital radio frequency] channel originally allocated to the previous [analog] licensee of the assigned channel.

*Declaratory Ruling ¶ 34 (JA\_\_\_\_).* The Bureau found that this provision applied because WJLP, “a newly constructed station,” had “applied for a license for a channel that was allocated to ... New Jersey after the digital transition.” *Ibid.* Applying Annex B.1.4 to the facts of this case, the Bureau concluded: “Because WFSB(TV) was previously the [analog] licensee of [radio frequency] channel 3 in an overlapping service area, or ‘market,’ WJLP, as the new [digital] broadcaster in that market, should use as its major channel number the [digital radio frequency] channel originally allocated to WFSB(TV), which is channel 33.” *Ibid.*

#### **D. PMCM's Channel Positioning Dispute With Cable Operators**

On June 6, 2014, before the dispute over WJLP's virtual channel assignment had been resolved, PMCM notified certain cable operators in the New York area that WJLP would commence operation in August 2014, and that it was electing mandatory carriage on cable channel 3. *Cable Carriage Order* ¶ 4 (JA\_\_\_\_). Under 47 C.F.R. § 76.64(f)(4), PMCM's must-carry election was scheduled to take effect 90 days later. At the cable operators' request, however, the Media Bureau waived section 76.64(f)(4) to allow them to defer implementing PMCM's must-carry election until 90 days after the Bureau assigned a virtual channel to WJLP. *Tara M. Corvo, Esq.*, 29 FCC Rcd 9102, 9105 (Media Bur. 2014) (JA\_\_\_\_, \_\_\_\_).<sup>6</sup>

When the Bureau issued the *Declaratory Ruling* assigning virtual channel 33 to WJLP on June 5, 2015, it immediately notified the New York cable operators and PMCM that the cable operators had 90 days (*i.e.*, until September 3, 2015) to respond to PMCM's original must-carry demand for

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<sup>6</sup> In a mandamus petition filed in March 2015, PMCM asked the Court to direct the FCC to order that WJLP be carried on channel 3 on all cable systems as to which PMCM had elected must-carry status. The Court denied that petition, finding that PMCM had "not demonstrated a clear and indisputable right to such relief." *In re PMCM TV, LLC*, No. 15-1058 (D.C. Cir. Sept. 23, 2015) (*per curiam*) (internal quotation marks omitted).

carriage on cable channel 3. *Tara M. Corvo, Esq.*, 30 FCC Rcd 6116, 6117 (Media Bur. 2015) (JA\_\_\_\_, \_\_\_\_). The Bureau also waived 47 C.F.R. § 76.64(f)(4) to give PMCM the option of making a new must-carry election “to pursue carriage for WJLP on cable channel 33,” the station’s newly assigned virtual channel. *Id.* at 6117-18 (JA\_\_\_\_-\_\_\_\_).

PMCM opted to continue to seek carriage on cable channel 3. Three cable operators—RCN Telecom Services, LLC (“RCN”), Service Electric Cable TV of New Jersey Inc. (“Service Electric”), and Time Warner Cable Inc. (“TWC”)—declined (or failed to respond to) PMCM’s request that they carry WJLP on cable channel 3. PMCM then filed must-carry complaints with the FCC pursuant to 47 U.S.C. § 534(d) and 47 C.F.R. § 76.61(a), arguing that WJLP was entitled to carriage on cable channel 3 because the station was “broadcast over the air” on radio frequency channel 3. *Cable Carriage Order* ¶¶ 6-8 (JA\_\_\_\_-\_\_\_\_).

The Media Bureau denied PMCM’s complaints on May 17, 2016.<sup>7</sup> It rejected PMCM’s claim that WJLP was “broadcast over the air” on channel 3

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<sup>7</sup> *PMCM TV, LLC v. RCN Telecom Services, LLC*, 31 FCC Rcd 5224 (Media Bur. 2016) (JA\_\_\_\_) (“RCN Order”); *PMCM TV, LLC v. Service Electric Cable TV of New Jersey Inc.*, 31 FCC Rcd 5230 (Media Bur. 2016) (JA\_\_\_\_) (“Service Electric Order”); *PMCM TV, LLC v. Time Warner Cable Inc.*, 31 FCC Rcd 5236 (Media Bur. 2016) (JA\_\_\_\_) (“TWC Order”).



and was therefore entitled to carriage on cable channel 3 under 47 U.S.C.

§ 534(b)(6). Citing the FCC’s *2008 Declaratory Order*, the Bureau explained that after the digital transition, the channel number on which a station is “broadcast over the air”—*i.e.*, the channel number to which must-carry rights attach—is the station’s “PSIP major channel number rather than its [radio frequency] channel number.”<sup>8</sup> Therefore, the Bureau concluded, PMCM’s must-carry rights for WJLP “attach only to ... channel 33, ... and WJLP is not entitled to be carried on channel 3 absent an agreement for carriage on that channel.”<sup>9</sup>

#### **E. The Orders On Review**

PMCM sought review by the full Commission of the Bureau’s orders assigning virtual channel 33 to WJLP and denying PMCM’s must-carry

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<sup>8</sup> *RCN Order* ¶ 6 (JA\_\_\_\_); *Service Electric Order* ¶ 6 (JA\_\_\_\_); *TWC Order* ¶ 8 (JA\_\_\_\_).

<sup>9</sup> *RCN Order* ¶ 7 (JA\_\_\_\_); *Service Electric Order* ¶ 7 (JA\_\_\_\_-\_\_\_\_); *TWC Order* ¶ 9 (JA\_\_\_\_).

complaints. In two orders issued on September 15, 2017, the Commission affirmed the Bureau’s orders and denied PMCM’s applications for review.<sup>10</sup>

### **1. The *PSIP Order***

The Commission concluded that the Bureau appropriately determined that WJLP should be assigned virtual channel 33. In reaching this conclusion, the Commission rejected PMCM’s contention that Annex B.1.1 mandates the assignment of virtual channel 3 to WJLP. The Commission instead determined that Annex B.1.4 applied and mandated the assignment of virtual channel 33. It also concluded that even if Annex B.1.4 were inapplicable, the Bureau’s decision was reasonable.

a. “Annex B.1.1 provides that ‘broadcasters with existing [analog] licenses’ were required to use their existing [analog] channel number as their major channel number.” *PSIP Order* ¶ 24 (JA\_\_\_\_) (quoting Annex B.1.1). Consistent with this protocol, KVVN(TV)—the PMCM station that broadcast on analog channel 3 in Ely, Nevada before the digital transition—

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<sup>10</sup> While the applications for review were pending, PMCM filed two more mandamus petitions—the third and fourth such petitions in this proceeding in less than three years. Those petitions sought an order directing the FCC to assign virtual channel 3 to WJLP and to mandate carriage of WJLP on cable channel 3. Those petitions—like PMCM’s earlier requests for mandamus—were denied. *See In re PMCM TV, LLC*, No. 16-1380 (D.C. Cir. Apr. 4, 2017) (per curiam); *In re PMCM TV, LLC*, No. 17-1190 (D.C. Cir. Sept. 1, 2017) (per curiam).

“appropriately used major channel 3 for its post-transition digital ... operations at Ely.” *Ibid.* But the FCC determined that Annex B.1.1 became inapplicable when PMCM moved its station from Nevada to New Jersey. As the Commission explained, “when PMCM applied in 2014 for a license to operate its newly constructed facility for Middletown Township, KVVN(TV)’s [analog] channel number in Ely had long been rendered a nullity since all [analog] licenses had been terminated by statute on June 12, 2009.” *Ibid.*; *see* DTV Delay Act, Pub. L. No. 111-4, 123 Stat. 112 (2009).

b. The Commission determined that the Bureau properly applied Annex B.1.4 instead of B.1.1. Annex B.1.4 “sets forth the channel assignment protocol for stations, like WJLP, that become newly licensed in a market after the [digital] transition.” *PSIP Order* ¶ 25 (JA\_\_\_\_). The Commission agreed with the Bureau that “this protocol, rather than [Annex] B.1.1,” applied here because “WJLP was newly licensed in New Jersey, and channel 3 was previously used in the market served by WJLP, as defined by its digital contour.” *Ibid.*

PMCM contended that the Bureau misapplied Annex B.1.4 by treating WJLP and WFSB(TV) as if they were in the same “market.” PMCM maintained that the term “market” in Annex B.1.4 means a station’s Nielsen-defined Designated Market Area (not its digital contour). The Commission

disagreed. *See PSIP Order* ¶ 27 (JA\_\_\_\_-\_\_\_\_). Noting that “Annex B does not define the term ‘market,’” *ibid.* (JA\_\_\_\_), the Commission held that the Bureau reasonably construed the term “to refer to the newly licensed station’s digital contour (i.e., service area).” *Id.* ¶ 28 (JA\_\_\_\_). This approach, the Commission concluded, “best serves the Commission’s purpose in adopting the PSIP Standard” because it “preserves the value of incumbent stations’ brand identity” and “reduces consumer confusion.” *Ibid.* The Commission further observed that the Bureau’s interpretation of Annex B.1.4 achieved the PSIP Standard’s principal objective by ensuring that “non-commonly owned stations in overlapping service areas” would “have unique major channel numbers.” *Ibid.*; *see also id.* ¶ 40 (JA\_\_\_\_) (the “goal” of the PSIP Standard “is to ‘assign major\_channel\_values ... uniquely to broadcasters’”) (quoting Annex B.1.8).

The Commission also rejected PMCM’s argument on the “alternative and independent basis” that “even if the term ‘market’ is construed to mean [Designated Market Area], as PMCM asserts,” Annex B.1.4 would still require the assignment of virtual channel 33 to WJLP. *PSIP Order* ¶ 35 (JA\_\_\_\_). The application of “Annex B.1.4 turns on whether an [analog] channel was ‘used ... in a market’ and subsequently is ‘assigned to’ a newly licensed broadcaster ‘in that market.’” *Ibid.* (JA\_\_\_\_) (quoting Annex B.1.4).

In this case, “Meredith’s station WFSB(TV) used [analog radio frequency] channel 3 to broadcast an over-the-air signal before the digital transition to communities in Fairfield County, Connecticut, which Nielsen assigns to the New York [Designated Market Area]”—the same Designated Market Area WJLP serves. *Ibid.* “Thus,” the Commission explained, “even under PMCM’s interpretation of the term ‘market,’” Annex B.1.4 “produces the same result” here: WJLP’s “major channel number is 33,” since WFSB previously used analog channel 3 in the New York Designated Market Area, and WFSB’s “previously assigned digital [radio frequency] channel is channel 33.” *Ibid.*

c. Finally, the Commission determined that even assuming the PSIP Standard did “not directly address PMCM’s situation,” the Bureau’s decision to assign virtual channel 33 to WJLP was “a reasonable exercise of discretion.” *PSIP Order* ¶ 40 (JA\_\_\_\_). Contrasting the Bureau’s approach with PMCM’s “alternative” PSIP proposal, the Commission found that “the Bureau’s solution better serves the Commission’s goals in adopting the Annex B protocol” by “ensuring that the longstanding channel 3 brand associated with existing broadcasters’ operations is not diluted by the entry of a new broadcaster operating on channel 3 in the same area.” *Ibid.*

## 2. The *Cable Carriage Order*

In a separate order, the Commission affirmed the denial of PMCM's must-carry complaints, ruling that "the Bureau properly rejected PMCM's claim that WJLP is entitled to mandatory carriage on the RCN, [Service Electric], and TWC cable systems on cable channel 3." *Cable Carriage Order* ¶ 11 (JA\_\_\_\_).

As the Commission noted, "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" 47 U.S.C. § 534(b)(6). *Cable Carriage Order* ¶ 13 (JA\_\_\_\_). PMCM maintained that this phrase unambiguously entitles a broadcaster to cable carriage on its station's radio frequency channel (in WJLP's case, channel 3). *Id.* ¶ 12 (JA\_\_\_\_-\_\_\_\_). The FCC disagreed with PMCM's reading of the must-carry statute's "on-channel carriage option." *Id.* ¶ 13 (JA\_\_\_\_-\_\_\_\_).

The Commission explained that when Congress enacted the must-carry statute, "the channel number on which a station's signal was transmitted was the same channel number that viewers selected on their television tuner." *Cable Carriage Order* ¶ 13 (JA\_\_\_\_). After the digital transition, however, "that is not always the case ..., and the term 'broadcast over the air' thus could refer either to the [radio frequency] spectrum the station uses to

transmit its signal or the virtual ... channel number” viewers select on their television tuner. *Ibid.* Consistent with the FCC’s *2008 Declaratory Order*, the Bureau interpreted the must-carry statute’s on-channel carriage option “to refer to a station’s PSIP major channel number.” *Ibid.* The Commission found that this interpretation best served “the purpose of the [statute’s] channel placement provisions ... by giving [broadcasters] the right to cable carriage on the channel on which they have built their brand.” *Ibid.*; *see also id.* ¶ 11 (JA\_\_\_\_) (linking “the on-channel carriage option to PSIP channels ... 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 viewers”).

“[A]s a separate and independent basis for affirming” the Bureau’s interpretation of the on-channel carriage option, the Commission concluded that “[s]ection 614(b)(4)(B) of the [Communications] Act authorizes the Commission to define” this statutory carriage option “with reference to the PSIP [Standard] rather than [radio frequency] transmission.” *Cable Carriage Order* ¶ 14 (JA\_\_\_\_). Section 614(b)(4)(B) directs the FCC “to establish any changes in the signal carriage requirements of cable television systems necessary to ensure” the carriage of local television stations in light of the “modified standards” for digital television broadcasting. 47 U.S.C.

§ 534(b)(4)(B). “In 2008, pursuant to its authority to modify the statutory signal carriage requirements” under section 614(b)(4)(B), “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 [radio frequency] channel.” *Cable Carriage Order* ¶ 13 (JA\_\_\_\_) (citing 2008 *Declaratory Order*, 23 FCC Rcd at 14259 ¶¶ 15-16). Consequently, the Commission held, the Bureau properly denied PMCM’s must-carry complaints. *Id.* ¶ 15 (JA\_\_\_\_).

#### **F. Subsequent Developments**

After filing petitions for review of the *PSIP Order* and the *Cable Carriage Order*, PMCM moved for a stay of the orders pending review. On September 29, 2017, the Court denied the stay motion.

### **SUMMARY OF ARGUMENT**

PMCM insists that WJLP—a station newly licensed to New Jersey—is entitled to use virtual channel 3, even though that channel is already being used in WJLP’s service area by two stations that have operated on channel 3 for more than half a century. PMCM also maintains that the must-carry statute entitles WJLP to carriage on cable channel 3, even though PMCM’s reading of the statute would upend channel lineups on cable systems



throughout the country. Neither the FCC’s rules nor the must-carry statute compel such counterintuitive and counterproductive results.

In resolving the disputes over WJLP’s channel placement, the FCC properly applied both the PSIP Standard and the must-carry statute. The Commission’s decisions were reasonable and should be affirmed.

I. Annex B.1.4 to the PSIP Standard, which has been incorporated by reference into the FCC’s rules, applies to “stations, like WJLP, that become newly licensed in a market after the [digital] transition.” *PSIP Order* ¶ 25 (JA\_\_\_\_). The Commission reasonably explained that “[b]ecause WJLP was newly licensed in New Jersey, and channel 3 was previously used in the market served by WJLP, as defined by its digital contour,” Annex B.1.4 applies to WJLP. *Ibid.* And Annex B.1.4 prescribes that “WJLP, as the new [digital] broadcaster in that market, should use as its major channel number” channel 33, “the [digital radio frequency] channel originally allocated to WFSB(TV).” *Declaratory Ruling* ¶ 34 (JA\_\_\_\_).

PMCM’s attempts to poke holes in the Commission’s reasoning are all unavailing. PMCM argues that WJLP is not in the same “market” as WFSB. It reads the term “market” in Annex B.1.4 to mean a Nielsen-defined Designated Market Area. Br. 26-28. But Annex B.1.4 does not define “market,” and it makes no mention of Designated Market Areas. The

Commission reasonably concluded that in this context, a station’s “market” should be “defined by its digital contour.” *PSIP Order* ¶ 25 (JA\_\_\_\_). The agency’s interpretation best “preserves the value of incumbent stations’ brand identity” by ensuring that “stations in overlapping service areas ... have unique major channel numbers.” *Id.* ¶ 28 (JA\_\_\_\_).

PMCM also contends that WJLP is entitled to use virtual channel 3 under the “plain language” of Annex B.1.1. Br. 24. But that section applies only to “broadcasters with *existing* [analog] licenses.” *Declaratory Ruling* ¶ 43 (JA\_\_\_\_) (quoting Annex B.1.1) (emphasis added). By the time WJLP began broadcasting in New Jersey in 2014, the digital transition had long been completed, and PMCM no longer had an analog license. *Ibid.*; *PSIP Order* ¶ 24 (JA\_\_\_\_). Accordingly, the Commission reasonably concluded that Annex B.1.4, rather than Annex B.1.1, applied in this case.

II. Even assuming that Annex B did “not directly address PMCM’s situation,” the decision to assign virtual channel 33 to WJLP was “a reasonable exercise of discretion.” *PSIP Order* ¶ 40 (JA\_\_\_\_). It served the “overarching goals” of the PSIP Standard by “reducing consumer confusion” and “ensuring that the longstanding channel 3 brand associated with” WFSB(TV) and KYW-TV for more than five decades “is not diluted by the entry of a new broadcaster operating on channel 3 in the same area.” *Ibid.*

Although PMCM recites a litany of “harms” supposedly caused by the assignment of virtual channel 33 to WJLP (Br. 43-50), the harms it alleges are largely unsubstantiated, affect only a small percentage of viewers, and can be easily remedied without altering WJLP’s virtual channel assignment.

III. Congress granted the FCC broad discretion to modify cable carriage requirements to account for the digital television transition. *See* 47 U.S.C. § 534(b)(4)(B). The agency reasonably exercised that discretion when it determined that after the transition, the channel to which must-carry rights attach—*i.e.*, the channel on which a station is “broadcast over the air,” 47 U.S.C. § 534(b)(6)—is the station’s “virtual” channel (the channel to which viewers tune their televisions to receive the station’s digital signal). *Cable Carriage Order* ¶¶ 13-22 (JA\_\_\_\_-\_\_\_\_).

There is no basis for PMCM’s claim (Br. 52-53) that the term “channel” in section 614(b)(6) unambiguously means a station’s radio frequency channel. The statute refers to the “channel number on which the ... station is broadcast over the air.” 47 U.S.C. § 534(b)(6). The channel on which a station is broadcast over the air could be either its virtual channel (the channel identifying PSIP information the station transmits to tuners) or its radio frequency channel; the statute does not specify.

If PMCM's reading of the statute were adopted, widespread disruption would ensue. Under PMCM's interpretation, stations around the country could demand cable carriage on their radio frequency channel numbers and displace the established local stations that currently occupy those slots. The Commission wisely declined to adopt a statutory construction that would cause such upheaval.

IV. PMCM's claim that the FCC violated the Spectrum Act by changing WJLP's virtual channel is unavailing for two reasons. First, PMCM lacks standing to raise this claim. The statute's ban on involuntary channel changes expired before PMCM brought this lawsuit. Consequently, PMCM cannot obtain redress for any alleged violation.

In any event, PMCM's Spectrum Act claim fails on the merits. To begin with, the Spectrum Act does not apply to virtual channels. It concerns the allocation of radio frequency channels, which were at issue in the incentive auction that the statute authorized. *PSIP Order* ¶ 22 (JA\_\_\_\_). But even assuming that the statute banned involuntary changes of virtual channels, no such change occurred here. "Rather, pursuant to the assignment provisions of Annex B, WJLP received 33 as its virtual channel by operation of law" when PMCM "voluntarily moved its station" from Nevada to New Jersey and obtained a new license. *Id.* n.74 (JA\_\_\_\_).

## STANDARD OF REVIEW

PMCM's challenge to the FCC's interpretation of the statutes it administers is reviewed under *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). If "Congress has directly spoken to the precise question at issue," the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. But "if the statute is silent or ambiguous with respect to the specific issue, the question" for the Court is whether the agency has adopted "a permissible construction of the statute." *Id.* at 843; *see also City of Arlington v. FCC*, 569 U.S. 290, 307 (2013). If the implementing agency's reading of an ambiguous statute is reasonable, the Court must "accept the agency's construction of the statute, even if the agency's reading differs from what the [Court] believes is the best statutory interpretation." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

The Court must uphold the challenged FCC orders unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Under this highly deferential standard of review," the Court "presumes the validity of agency action." *Cellco P'ship v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004) (internal quotation marks omitted). The Court "is not to ask whether [the challenged] regulatory decision is the

best one possible or even whether it is better than the alternatives.” *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760, 782 (2016). To prevail, “[t]he Commission need only articulate a ‘rational connection between the facts found and the choice made.’” *Rural Cellular Ass’n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)).

## **ARGUMENT**

### **I. THE COMMISSION REASONABLY INTERPRETED ANNEX B IN ASSIGNING VIRTUAL CHANNEL 33 TO WJLP**

In rejecting PMCM’s argument that WJLP should be allowed to use virtual channel 3 rather than virtual channel 33, the FCC reasonably construed Annex B. The Commission’s interpretation of Annex B is entitled to deference. Even under a non-deferential standard of review, however, the agency’s reading of Annex B should be affirmed because it is eminently reasonable—indeed, far more reasonable than PMCM’s alternative reading.

#### **A. The Commission’s Interpretation Of Annex B Is Entitled To Deference.**

Section 73.682(d) of the FCC’s rules incorporates by reference the PSIP Standard—*i.e.*, “ATSC A/65C: ‘ATSC Program and System Information Protocol for Terrestrial Broadcast and Cable, Revision C With Amendment No. 1 dated May 9, 2006,’ (January 2, 2006).” 47 C.F.R.

§ 73.682(d). This rule requires broadcasters to comply with the PSIP Standard “when choosing a major channel.” *Declaratory Ruling* ¶ 6 (JA\_\_\_\_). The requirements for assigning major channel numbers to stations are set forth in Annex B to the PSIP Standard. *PSIP Order* ¶ 5 (JA\_\_\_\_).

Applying Annex B to PMCM’s newly licensed New Jersey station, the Media Bureau assigned virtual channel 33 to WJLP. *Declaratory Ruling* ¶ 34 (JA\_\_\_\_). In upholding this channel assignment, the Commission concluded that the Bureau correctly interpreted and applied Annex B. *PSIP Order* ¶¶ 23-43 (JA\_\_\_\_-\_\_\_\_).

PMCM contends that the Commission misconstrued and misapplied Annex B. Br. 19-32. This argument faces a high hurdle. It is well settled that “the FCC’s interpretation of its own regulations ‘control[s] 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)). “This broad deference is all the more warranted when, as here, the regulation concerns a complex and highly technical regulatory program, in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.” *Thomas Jefferson Univ. v. Shalala*, 512 U.S.

504, 512 (1994) (internal quotation marks omitted).<sup>11</sup> Under this deferential standard of review, the Commission’s reasonable reading of Annex B easily passes muster.

PMCM argues that the Court owes no deference to the FCC’s interpretation of Annex B because the agency “was not interpreting its own rules.” Br. 20. That claim is baseless. The Commission incorporated the PSIP Standard—including Annex B—into its rules. *See PSIP Order* n.83 (JA\_\_\_); 47 C.F.R. §§ 73.682(d), 73.8000(a), (b)(4).<sup>12</sup> The FCC does not relinquish “its authority to interpret its rules” when it incorporates into those rules “a standard adopted by an advisory body.” *Declaratory Ruling* n.139 (JA\_\_\_). Indeed, as this Court has observed, the Supreme Court has deferred to the “EPA’s interpretation of state environmental regulatory standards the agency incorporated by reference” into its regulations. *See Gurfel v. SEC*, 205 F.3d 400, 402 (D.C. Cir. 2000) (citing *Arkansas v. Oklahoma*, 503 U.S.

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<sup>11</sup> As this Court has long recognized, disputes over broadcasters’ use of particular channels involve complex technical issues within the FCC’s expertise. *See Cmty. Television, Inc. v. FCC*, 216 F.3d 1133 (D.C. Cir. 2000); *Hubbard Broad., Inc. v. FCC*, 663 F.2d 220 (D.C. Cir. 1980).

<sup>12</sup> “The legal effect” of incorporation by reference is that Annex B “has the force and effect of law, just like all regulations published in the Federal Register and the [Code of Federal Regulations].” *See* IBR Handbook, Office of the Federal Register at 1 (Oct. 2017), available at <https://www.archives.gov/files/federal-register/write/handbook/ibr.pdf>.



91, 110-11 (1992)). The FCC is likewise entitled to deference when it interprets the PSIP Standard incorporated into its rules.<sup>13</sup>

PMCM next asserts that “[n]o deference is due an agency’s interpretation of its own regulation” when the agency “‘has elected merely to paraphrase’ language from another source.” Br. 20 (quoting *Fogo de Chao (Holdings) Inc. v. U.S. Dep’t of Homeland Sec.*, 769 F.3d 1127, 1135 (D.C. Cir. 2014)). But the regulation at issue there “paraphrase[d] *the statutory language*” the agency was charged with implementing, *Fogo de Chao*, 769 F.3d at 1135 (internal quotation marks omitted) (emphasis added)—language that would have the force of law even without the regulation. Here, the PSIP Standard applies as a matter of federal law only by virtue of its incorporation into FCC rules. Thus, unlike in *Fogo de Chao*—where the agency’s regulations added “nothing material” to a statute that otherwise would have

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<sup>13</sup> In a footnote, PMCM cites two law review articles for the proposition that “agency reliance on privately developed standards ... should be subject to non-deferential judicial review.” Br. 20 n.15. Those articles concern issues that PMCM does not raise here (*i.e.*, whether the public has adequate access to documents incorporated by reference, and whether agencies may permissibly delegate rulemaking authority to private organizations). Neither of those articles contends (as PMCM does) that when an agency’s rules incorporate privately developed standards by reference, the agency’s interpretation of those standards is entitled to no deference.

applied, *ibid.*—the PSIP Standard governs solely because it has been adopted by the agency.

PMCM also contends that the Commission’s interpretation of Annex B in this case should receive no deference because it was “preceded by a very lengthy period of conspicuous inaction.” Br. 19 (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012)). This claim rests on the erroneous premise that there are “100 or more situations similar to WJLP’s” in which the FCC has not acted to prevent stations from using the same major channel number in overlapping service areas. Br. 19; *see also* Br. 23 (asserting that the Commission “failed for years to impose its current interpretation in scores of other identical situations”). But the Commission’s limited intervention in the channel assignment process was entirely understandable. “Section 73.682(d) and Annex B are self-effectuating, and the Commission’s involvement in virtual channel assignments ordinarily is limited to situations where a station chooses a major channel number and another station objects, or a station requests a waiver of the mandatory channel assignment provisions of Annex B.” *PSIP Order* ¶ 5 (JA\_\_\_\_). In the few instances when the Bureau has been “presented with” disputes over “conflicting virtual channels between stations,” it has “consistently assign[ed]

unique major channel numbers to the stations,” just as it did here. *Id.* ¶ 39 (JA\_\_\_\_).<sup>14</sup>

In any event, as the Bureau explained, “PMCM has greatly overstated the prevalence of shared major channel use by stations with overlapping contours.” *Declaratory Ruling* ¶ 57 (JA\_\_\_\_); *see also PSIP Order* ¶ 38 (JA\_\_\_\_). There are only a “handful of situations in which stations with overlapping contours may be using the same major channel.” *PSIP Order* ¶ 38 (JA\_\_\_\_).<sup>15</sup> Those situations had not previously “been brought to [the FCC’s] attention,” and the Bureau reasonably concluded that “the stations involved may be unconcerned about harm to their brand identity vis-à-vis the other station.” *Declaratory Ruling* ¶ 58 (JA\_\_\_\_).

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<sup>14</sup> See, e.g., *Declaratory Ruling* ¶¶ 38-41 (JA\_\_\_\_-\_\_\_\_); *Assignment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broadcast Stations (Seaford, Delaware)*, 25 FCC Rcd 4466, 4472 ¶ 15 (Media Bur. 2010); *Associated Christian Television System, Inc.*, 25 FCC Rcd 9237 (Media Bur. 2010).

<sup>15</sup> PMCM claimed to have discovered 105 such instances, but many of them involved low power television stations, which are not required to comply with the PSIP Standard. *Declaratory Ruling* ¶ 58 (JA\_\_\_\_). Numerous other examples cited by PMCM involved “no contour overlap” or situations in which “intervening terrain or one or more interfering station(s) blocks the stations’ signals in the overlap area.” *Ibid.*; *see also PSIP Order* ¶ 38 & n.136 (JA\_\_\_\_).

**B. The Commission's Interpretation Of Annex B Is Persuasive And Reasonable.**

There is no reason for the Court to deviate from the deferential standard of review applicable to the FCC's reading of its own rules. But even if the agency were afforded no deference, its interpretation of Annex B would be "entitled to respect ... to the extent it has the power to persuade." *In re Polar Bear Endangered Species Act Listing & Section 4(d) Rule Litig.*, 709 F.3d 1, 18 (D.C. Cir. 2013) (internal quotation marks omitted). As we explain, the FCC's reading of Annex B was "eminently reasonable," *ibid.*, and should be upheld even under the non-deferential standard of review proposed by PMCM (*see* Br. 19).

1. By its terms, Annex B.1.4 applies "[i]f, after the [digital] transition, a previously used [analog radio frequency] channel in a market is assigned to a newly-licensed [digital] broadcaster in that market." *Declaratory Ruling* ¶ 34 (JA\_\_\_\_) (quoting Annex B.1.4). In that situation, Annex B.1.4 provides that "the newly-licensed [digital] broadcaster shall use, as his major\_channel\_number, the number of the [digital radio frequency] channel originally allocated to the previous [analog] licensee of the assigned channel." *Ibid.* (quoting Annex B.1.4).

The Bureau reasonably found that Annex B.1.4 applied to WJLP. This "newly constructed station" had "applied for a license for a channel that was

allocated to Middletown Township, New Jersey after the digital transition.” *Declaratory Ruling* ¶ 34 (JA\_\_\_\_). As the Bureau explained, WJLP was licensed to operate on digital radio frequency channel 3, and WFSB(TV)—Meredith’s station in Hartford—had previously used analog radio frequency channel 3 “in an overlapping service area, or ‘market.’” *Ibid.* Accordingly, the Bureau determined that under Annex B.1.4, “WJLP, as the new [digital] broadcaster in that market, should use as its major channel number the [digital radio frequency] channel originally allocated to WFSB(TV)” — channel 33. *Ibid.* The Commission affirmed the Bureau’s reasonable interpretation and application of Annex B. *See PSIP Order* ¶ 25 (JA\_\_\_\_) (because “WJLP was newly licensed in New Jersey, and channel 3 was previously used in the market served by WJLP, as defined by its digital contour,” Annex B.1.4, “rather than B.1.1,” applies to WJLP).

The application of Annex B.1.4 to WJLP yielded a unique major channel number in this case. It thus served the purpose of the PSIP Standard set forth in Annex B.1.8: to “assign major\_channel\_number values ... uniquely to broadcasters.” *PSIP Order* ¶ 40 (JA\_\_\_\_) (quoting Annex B.1.8). The Commission’s approach here was also consistent with a “published description of the operation of Annex B.1.4” by the chairman of the ATSC group responsible for the PSIP Standard. *Id.* ¶ 34 (JA\_\_\_\_); *see* MARK K.

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(Annex B.1.4 “works” to ensure that the new broadcaster is assigned a unique major channel number “because all of the digital services operated by the original broadcaster use the original [analog radio frequency] channel as their major channel number, leaving the [digital television] service’s [radio frequency] channel number unused”).

2. None of PMCM’s arguments advocating the application of Annex B.1.1, or opposing the application of B.1.4, is persuasive.

a. PMCM claims that “the plain language” of Annex B.1.1 mandated the assignment of virtual channel 3 to WJLP. Br. 24. Annex B.1.1 provides that “[f]or broadcasters with existing [analog] licenses, the major\_channel\_number for the existing [analog] channels, as well as the digital virtual channels, ... shall be set to the current [analog radio frequency] channel number.” *Declaratory Ruling* ¶ 43 (JA\_\_\_\_) (quoting Annex B.1.1). According to PMCM, this part of Annex B “dictates” that WJLP use major channel 3 because “WJLP operated as an analog station on [radio frequency] channel 3” before the digital transition. Br. 23. That is incorrect.

WJLP never operated as an analog station. Its predecessor, KVVN(TV), operated on analog channel 3 in Ely, Nevada before the digital transition. “However, when PMCM applied in 2014 for a license to operate

newly constructed WJLP [in New Jersey] on [radio frequency] channel 3, it no longer had an [analog] channel number or license because all such licenses had been terminated by statute on June 12, 2009.” *Declaratory Ruling* ¶ 43 (JA\_\_\_\_); *accord PSIP Order* ¶ 24 (JA\_\_\_\_). Because PMCM had no “existing” analog license or channel when WJLP commenced operation, Annex B.1.1 was inapplicable.

Moreover, as the Commission explained, Annex B.1.1 was designed to enable incumbent broadcasters to use “as [their] major channel number the same analog [radio frequency] channel number [they] used *in the same market before the transition.*” *PSIP Order* ¶ 24 (JA\_\_\_\_) (emphasis added). In the Commission’s judgment, “allowing PMCM to use its former [analog] channel from a different market” would “upset this careful design” by permitting “simultaneous use of channel 3 by multiple stations with overlapping service[] areas.” *Ibid.* Annex B.1.4 was “designed to avoid this problem” by prescribing “the channel assignment protocol for stations, like WJLP, that become newly licensed in a market after the [digital] transition.” *Id.* ¶ 25 (JA\_\_\_\_).

b. PMCM argues that the Commission misconstrued the term “market” in Annex B.1.4. It maintains that “market” in this context must mean the Nielsen-defined Designated Market Area. Br. 26-28. But “Annex B does not

define the term ‘market.’” *PSIP Order* ¶ 27 (JA\_\_\_\_). “If ATSC had meant the commonly used word ‘market’ to mean the trademark-protected Designated Market Areas created by [Nielsen], presumably it would have said so.” *Declaratory Ruling* ¶ 35 (JA\_\_\_\_). Yet Annex B does not contain a single reference to the term “Designated Market Area.” *PSIP Order* ¶ 29 (JA\_\_\_\_).

PMCM points out that other provisions of Annex B refer to “overlapping service areas,” whereas Annex B.1.4 does not. Br. 27. But the mere fact that Annex B.1.4 does not mention “service areas” does not foreclose the Commission from interpreting the term “market” to include the area covered by a television station’s signal, since a station’s signal contour has long been relevant to identifying the market the station serves. *See PSIP Order* ¶ 30 (JA\_\_\_\_) (even after it “adopted the Nielsen [Designated Market Areas] to establish the geographic scope of its television multiple ownership rules,” the Commission “continued to consider contour overlap in connection with applying” those rules); 47 C.F.R. § 73.3555(b)(1)(i) (an entity may own, control, or operate two television stations licensed in the same Designated Market Area if the “digital ... service contours of the stations ... do not overlap”). Conversely, the absence of any reference to “Designated Market



Areas” in Annex B belies PMCM’s assertion that “market” in Annex B.1.4 must mean “Designated Market Area.”<sup>16</sup>

In any event, even if the FCC had construed the term “market” in Annex B.1.4 to mean Designated Market Area, the outcome of this proceeding would not have changed. As the Commission explained, “WFSB(TV) used [analog radio frequency] channel 3 to broadcast an over-the-air signal before the digital transition to communities in Fairfield County, Connecticut, which Nielsen assigns to the New York [Designated Market Area]”—the same Designated Market Area WJLP serves. *PSIP Order* ¶ 35 (JA\_\_\_\_). Because WFSB previously used analog channel 3 in the New York Designated Market Area, Annex B.1.4 would apply “even under PMCM’s interpretation of the term ‘market,’” and WJLP’s major channel number would be 33 (the number of WFSB’s digital radio frequency channel). *Ibid.*

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<sup>16</sup> As the Commission noted, the ATSC chairman’s description of Annex B.1.4 “supports the Bureau’s interpretation of the undefined term ‘market.’” *PSIP Order* ¶ 34 (JA\_\_\_\_); see EYER, *supra*, at 105 (Annex B.1.4 applies when a new broadcaster “comes into the area” after the digital transition “and is assigned the same [radio frequency] channel as was previously used by the original broadcaster for the old analog service”) (emphasis added). Although PMCM claims that Dr. Richard Chernock of ATSC “suggested” that PMCM’s alternative PSIP proposal “would be fully consistent with Annex B,” Br. 32, PMCM never submitted a declaration from Chernock, and he filed no comments in this proceeding. *PSIP Order* ¶ 34 (JA\_\_\_\_). Accordingly, the agency appropriately gave PMCM’s claims about Chernock “no weight.” *Declaratory Ruling* n.136 (JA\_\_\_\_).

c. PMCM argues that the FCC’s reading of Annex B.1.4. is “untenable” because it does not direct the assignment of a single virtual channel in cases like this one, where a station has contour overlap with multiple stations, and thus the agency must “make an ad hoc determination of which channel to assign based on nothing that appears in or was contemplated by Annex B.” Br. 29. But “when the Commission adopted the PSIP Standard, it recognized that some broadcasters might have a unique situation that is not provided for in the PSIP Standard.” *PSIP Order* ¶ 32 (JA\_\_\_\_).

In assigning a virtual channel to WJLP, the Commission properly accounted for the station’s special circumstances. It recognized that the Bureau’s interpretation of Annex B.1.4 “results in two separate major channel number assignments” for WJLP because the station “has contour overlap with two separate stations operating on different [radio frequency] channel numbers”—WFSB(TV) on channel 33 and KYW-TV on channel 26. *PSIP Order* ¶ 32 (JA\_\_\_\_). Virtual channel 26 was unavailable; it was already being used by another station that has contour overlap with WJLP. *Id.* n.107 (JA\_\_\_\_). Consequently, the Bureau assigned virtual channel 33 to WJLP. *See Declaratory Ruling* ¶ 34 & n.108 (JA\_\_\_\_). This channel assignment was plainly reasonable.

d. PMCM purports to find support for its reading of Annex B.1.4 in later versions of that protocol. It notes that although the 2006 version of Annex B.1.4 refers to a “previously used [analog radio frequency] channel in a market,” the 2009 and 2013 versions of Annex B.1.4 refer to a radio frequency “channel previously allotted for [analog] in a market.” Br. 28. According to PMCM, this revision confirms that the term “market” in Annex B.1.4 means “Designated Market Area.”

PMCM’s reliance on later versions of Annex B is misplaced for two reasons. First, those versions of Annex B were never incorporated into the FCC’s rules. *PSIP Order* ¶ 28 (JA\_\_\_\_).<sup>17</sup> Second, contrary to PMCM’s assertion, the reference to “allotted” channels in subsequent versions of Annex B.1.4 does not resolve the question of how to interpret the undefined term “market.” The Commission explained that “channels are allotted to communities in the Table of Allotments, which makes no mention of markets

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<sup>17</sup> PMCM maintains that the agency’s failure to do so violates OMB Circular A-119. Br. 22. This argument is not properly before the Court because PMCM never raised the issue with the Commission. *See* 47 U.S.C. § 405(a); *NTCH, Inc. v. FCC*, 841 F.3d 497, 508 (D.C. Cir. 2016). In addition, the Circular does not “create new rights or benefits” for “a party against the United States, its agencies or instrumentalities.” OMB Circular A-119 ¶ 16 (Jan. 2016). In any event, as we explain, the outcome of this proceeding would not have changed if the Commission had applied the latest version of Annex B.

or [Designated Market Areas]. The allotment of a channel number to a community says nothing about how the Commission should determine what ‘market’ that community is in for purposes of Annex B.” *Ibid.*

3. Finally, PMCM disagrees with the Commission’s view that Annex B is designed to assign unique major channel numbers to broadcasters with overlapping service areas. According to PMCM, the Commission’s view cannot be correct because Annex B.1.5 and B.1.6 permit stations with overlapping signals to use the same major channel number. Br. 30.

Because PMCM never mentioned Annex B.1.6 before the Commission, the Court should not consider PMCM’s argument vis-à-vis Annex B.1.6. *See* 47 U.S.C. § 405(a); *NTCH*, 841 F.3d at 508. In any event, both Annex B.1.5 and B.1.6 apply only to commonly owned stations. *See PSIP Order* ¶ 36 (JA\_\_\_\_) (Annex B.1.5 “is triggered only where a broadcaster owns or controls two or more different [radio frequency] channels with overlapping service[] areas”); *id.* ¶ 40 (JA\_\_\_\_) (“the circumstances under which Annex B permits the partitioning of a major channel number are narrowly circumscribed”). Those provisions carve out limited exceptions to the general rule that Annex B requires stations with overlapping service areas to use unique major channel numbers.

PMCM also attempts to rely on the statement in Annex B.1.8 that the provisions of Annex B guarantee that “the two-part channel number combinations used by a broadcaster will be different from those used by any other broadcaster with an overlapping [digital] service area.” Br. 29 (quoting Annex B.1.8). Insofar as PMCM argues that Annex B.1.8 does not require the assignment of unique major channel numbers (Br. 30-31), it has forfeited that argument by failing to raise it before the agency. *See* 47 U.S.C. § 405(a); *NTCH*, 841 F.3d at 508.<sup>18</sup> In any event, the FCC reasonably construed that statement “as a reference to the exception to the unique channel number scheme that is set forth in [Annex] B.1.5,” not as a statement that stations may widely share virtual channel numbers so long as their two-part PSIP channel numbers are distinct. *PSIP Order* ¶ 42 (JA\_\_\_\_).

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As the foregoing discussion makes clear, the FCC’s interpretation of the PSIP Standard incorporated in its rules was neither “plainly erroneous”

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<sup>18</sup> In the proceeding below, PMCM took a very different position, asserting that Annex B.1.8 requires “that each station in a [Designated Market Area] has a unique major channel assignment.” PSIP Application for Review at 13 (JA\_\_\_\_). At that time, PMCM did not dispute that Annex B.1.8 required the assignment of unique major channel numbers. It simply argued that this requirement applied only to stations in the same Designated Market Area, not (as the Bureau concluded) to stations with overlapping service areas.

nor “inconsistent with the regulation.” *See Press Commc’ns*, 875 F.3d at 1121 (internal quotation marks omitted). Rather, the Commission’s reading of the complex technical provisions of Annex B was “eminently reasonable.” *See Polar Bear*, 709 F.3d at 18. It “produce[d] a unique major channel number” in this case, even though “the mid-Atlantic is one of the most congested regions in the country.” *PSIP Order* ¶ 32 (JA\_\_\_\_). By contrast, PMCM’s interpretation “would result unnecessarily in duplicative major channel assignments.” *Ibid.* (internal quotation marks omitted).

## **II. THE ASSIGNMENT OF VIRTUAL CHANNEL 33 TO WJLP WAS REASONABLE REGARDLESS OF WHETHER ANNEX B RESOLVED THE ISSUE**

Even if Annex B did not directly address the issue, the FCC’s decision to assign virtual channel 33 to WJLP was entirely reasonable. The reason that Annex B aims “to ensure ... unique major channel number” assignments is to allow “broadcasters who built their brand in a service area on a particular channel [to] retain their brand identification even if they are no longer using the same [radio frequency] channel on which they built their brand.” *PSIP Order* ¶ 29 (JA\_\_\_\_); *see also Second Periodic Review*, 19 FCC Rcd at 18346 ¶ 153 (under the PSIP Standard, the “major channel number ... allows broadcasters to maintain their local brand identification”). The assignment of virtual channel 33 to WJLP served that purpose by “ensuring that the

longstanding channel 3 brand associated with existing broadcasters’ operations is not diluted by the entry of a new broadcaster operating on channel 3 in the same area.” *PSIP Order* ¶ 40 (JA\_\_\_\_). It also achieved the agency’s goal of “reducing consumer confusion” by preventing multiple stations from using the same major channel number in overlapping service areas. *Ibid.*

PMCM contends that it was arbitrary for the FCC to reject WJLP’s request to use PSIP channel 3.10. According to PMCM, there was no evidence of “customer confusion or inability to receive a desired signal” during the six months when WJLP operated (without prior authorization) on PSIP channel 3.10. Br. 34.<sup>19</sup> But as Meredith and CBS pointed out, viewers were unlikely to “complain if they thought [channel 3.10] was associated with an existing television station on major channel 3, like any other multicast.” Meredith/CBS Letter, Dec. 28, 2015, at 1 (JA\_\_\_\_).

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<sup>19</sup> In September 2014, before the Media Bureau had decided which virtual channel WJLP should use, the station began broadcasting on PSIP channel 3.10. In November 2014, after the Bureau directed WJLP to use virtual channel 33 on an interim basis until the station was assigned a permanent virtual channel, PMCM responded by filing a mandamus petition with this Court. A stay entered by the Bureau and extended by the Court allowed WJLP to keep using channel 3.10 while the mandamus petition was pending. After the Court denied the petition and dissolved the stay, WJLP moved to channel 33.1 in March 2015. *See Declaratory Ruling* ¶ 14 (JA\_\_\_\_).

Moreover, in claiming that WJLP's fleeting use of channel 3.10 produced "*no* adverse consequences" (Br. 34), PMCM ignores the strenuous objections of Meredith and CBS, who were justifiably concerned that WJLP's use of channel 3.10 could adversely affect their stations' established brand identity. They explained that if WJLP were permitted to use channel 3.10, "over-the-air viewers"—viewers without cable or satellite television—"accustomed to tuning in to ... WFSB or KYW-TV in their respective ... service areas" would at best "receive a screen asking them, in effect, whether they would like to tune to WJLP instead. At worst, [viewers] would not be able to receive WFSB or KYW-TV at all." Meredith/CBS Opposition to Application for Review at 2 (JA\_\_\_\_). In opposing PMCM's proposal to partition major channel 3, Meredith and CBS urged the FCC to prevent WJLP from "[p]oaching a channel" that their stations had "extensively promoted for more than half a century." *Ibid.*

The concerns expressed by the incumbent broadcasters distinguish this case from the "handful of situations" in which stations with overlapping contours are currently using the same major channel number. *PSIP Order* ¶ 38 (JA\_\_\_\_). In those instances, no incumbent broadcaster objected to



another station's use of the same virtual channel in the same service area.<sup>20</sup>

Because Annex B was designed to be “self-effectuating,” the Commission typically gets involved in virtual channel assignments only when an incumbent station opposes the use of its virtual channel by a new station in an overlapping service area. *Id.* ¶ 5 (JA\_\_\_\_). In that circumstance, the agency has “consistently assign[ed] unique major channel numbers to the [new] stations.” *Id.* ¶ 39 (JA\_\_\_\_). The Commission reasonably took the same approach here.

PMCM argues that the FCC in this case deviated without explanation from its practice of declining to intervene in branding disputes over call signs. Br. 38-39. Once again, having never presented this claim to the Commission, PMCM is precluded from making the argument on appeal. *See* 47 U.S.C. § 405(a); *NTCH*, 841 F.3d at 508. In any event, the Commission's policy regarding call sign disputes is irrelevant. Call signs do not overlap; they are uniquely assigned to broadcasters. The fact that the Commission leaves to private resolution claims that different call signs are so similar as to be confusing does not undermine the Commission's decision here to take the

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<sup>20</sup> *See, e.g., PSIP Order* ¶ 39 (JA\_\_\_\_-\_\_\_\_) (although “WACP, Atlantic City, uses channel 4 as its virtual channel, and has significant overlap with WNBC, New York City, which also uses virtual channel 4,” WNBC “did not object to WACP using virtual channel 4”).

potential for audience confusion into account in ensuring that multiple stations do not use the same virtual channel in overlapping service areas.

PMCM also asserts that the FCC's efforts to protect a station's identification with a specific channel go beyond the protections afforded by the U.S. Patent and Trademark Office, which "does not award exclusive trademark protection to television channel numbers." Br. 40. This argument, too, is procedurally barred because it was never presented to the Commission. *See* 47 U.S.C. § 405(a); *NTCH*, 841 F.3d at 508. In any event, the claim lacks merit. The Commission is not providing trademark protection; it is applying an established mechanism for assigning television station identifications. In this context, it was entirely reasonable for the agency to take into account investments in brand identity by incumbent licensees and the potential for viewer confusion.

PMCM claims that the assignment of virtual channel 33 to WJLP caused it "serious and unnecessary harms." Br. 43. But the harms it alleges are largely unsubstantiated, affect only a small fraction of viewers,<sup>21</sup> and can be easily remedied without altering WJLP's virtual channel assignment.

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<sup>21</sup> Because the vast majority of television viewers in the New York Designated Market Area subscribe to cable or satellite services, they do not watch television "over the air." Those viewers will be unaffected by any problems with the reception of WJLP's over-the-air signal.

PMCM complains that some viewers are unable to receive WJLP's signal when they tune their television sets to channel 33. Br. 44-46. But PMCM never raised this issue with the Bureau before it applied for Commission review of the *Declaratory Ruling*. And it "offered no explanation" why it could not have brought the issue to the Bureau's attention "before the *Declaratory Ruling* was released in June 2015 or in a timely petition for reconsideration to the Bureau." *PSIP Order* ¶ 19 (JA\_\_\_\_).<sup>22</sup>

"It is well settled that the Commission will not consider matters raised in an application for review upon which the Bureau had no opportunity to pass." *PSIP Order* ¶ 18 (JA\_\_\_\_) (citing 47 U.S.C. § 155(c)(5) and 47 C.F.R. § 1.115(c)). Accordingly, the Commission concluded that PMCM's arguments concerning television sets that could not receive WJLP on channel 33 were "procedurally barred." *Id.* ¶ 19 (JA\_\_\_\_).

In any event, the receiver error identified by PMCM occurs only with certain types of television receivers, and it can be easily fixed. "[I]t appears

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<sup>22</sup> PMCM claims that it "did not become aware of the extent and cause of this problem" until after the deadline for filing a petition for reconsideration had passed. Br. 44 n.35. By its own admission, however, PMCM first discovered the problem in March 2015—three months before the *Declaratory Ruling* was released. See Supplement to PSIP Application for Review, McGowan Decl. ¶ 3 (JA\_\_\_\_). The deadline for filing petitions for reconsideration of the *Declaratory Ruling* was July 6, 2015—four months after PMCM first learned of the problem.

that in most instances,” WJLP is “correctly displayed” when the receivers in question “are tuned to 33.1.” *PSIP Order* ¶ 20 (JA\_\_\_\_).<sup>23</sup> Since 2015, WJLP’s website has informed the station’s over-the-air viewers “that they should tune to 33.1 to receive the signal.” *Id.* n.68 (JA\_\_\_\_) (citing <http://wjlp3.com>).

PMCM asserts that asking viewers to enter a two-part channel number into their receivers creates a unique “practical impediment to receiving WJLP.” Br. 45. Not so. As of July 2015, “more than 100 stations had [a radio frequency] digital channel number that is the major channel number of another station operating in the same [Designated Market Area].” *PSIP Order* n.70 (JA\_\_\_\_); see *Cable Carriage Order* App. A (JA\_\_\_\_-\_\_\_\_). There are thus many instances in which viewers without cable or satellite television must “input both a major and minor channel.” *PSIP Order* ¶ 20 (JA\_\_\_\_). PMCM offers no evidence for its assertion that “many remote control units do not have a dot.” Br. 46. And PMCM itself states that viewers had no trouble finding WJLP during the six months the station operated on channel

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<sup>23</sup> See *PSIP Order* n.68 (JA\_\_\_\_) (“CBS undertook its own study using the same receivers tested by PMCM and reported that all of the receivers displayed PMCM’s WJLP when 33.1 was entered”) (citing Meredith/CBS Letter, Dec. 1, 2015, at 2 (JA\_\_\_\_)).

3.10. Br. 14-15. If viewers could find WJLP on channel 3.10, they should be able to find it on channel 33.1.

PMCM speculates that other viewers cannot receive WJLP's signal because they have installed "antennas designed for UHF reception only, which do not permit reception of WJLP." Br. 43. The record, however, contains no evidence of the widespread use of such antennas, and PMCM's theory is implausible. PMCM suggests no reason why a television viewer would install an antenna that could not receive both UHF and VHF signals. And if WJLP's viewers are using the wrong antenna, "the appropriate remedy is for PMCM to educate its consumers regarding antennas." *PSIP Order* ¶ 43 (JA\_\_\_\_).

PMCM also argues that the assignment of virtual channel 33 to WJLP deprived the station of "the substantial benefit of proximity to other [VHF] stations in on-screen programming guides and channel placement." Br. 46. But nothing in the record supports PMCM's assumption that "lower channel positions are inherently economically superior to higher ones." *Declaratory Ruling* ¶ 48 (JA\_\_\_\_). Nor is there any basis for PMCM's contention that the FCC's treatment of WJLP has significantly reduced "WJLP's ability to be seen either over the air or over cable." Br. 47. "[O]f the 22 full power television stations licensed to communities in the New York [Designated

Market Area], WJLP is the second largest station, with a noise-limited contour covering 34,960 square kilometers and a 2010 census population of 21,384,863.” *Declaratory Ruling* ¶ 48 (JA\_\_\_\_). In addition, WJLP is “carried on numerous cable systems serving the New York [Designated Market Area],” including two of the three systems that were the subject of PMCM’s must-carry complaints. *Cable Carriage Order* n.43 (JA\_\_\_\_); see <http://wjlp3.com/watch>. Given the widespread availability of WJLP in the New York Designated Market Area, PMCM cannot credibly claim that the station’s use of virtual channel 33 has resulted in a “loss of service to a large segment of the public.” Br. 47.

Finally, the FCC rightly rejected the notion that “the statutory basis for the reallocation of channel 3 to New Jersey justifies deviation from the protocols of Annex B and adoption of PMCM’s Alternative PSIP Proposal.” *PSIP Order* ¶ 43 (JA\_\_\_\_). Section 331 of the Communications Act was enacted “to facilitate the allotment of a VHF channel to New Jersey.” *Declaratory Ruling* ¶ 48 (JA\_\_\_\_). “That purpose was fulfilled when the Commission allocated” two VHF frequencies to New Jersey: radio frequency channel 4 in Atlantic City and radio frequency channel 3 in Middletown Township. *Id.* ¶ 47 (JA\_\_\_\_). Contrary to PMCM’s argument (Br. 48-50), section 331 has nothing to do with virtual channels; it concerns the allocation

of radio frequency channels. *See* 47 U.S.C. § 331(a); *see also* *PMCM*, 701 F.3d at 384 (recognizing that section 331(a) deals with radio frequency spectrum and the need “to ensure interference-free broadcasting” when allocating a VHF channel to New Jersey). Thus, “requiring WJLP to use virtual channel 33 does not frustrate”—indeed, is unrelated to—“the purpose of section 331.” *Declaratory Ruling* ¶ 48 (JA\_\_\_\_).

In the end, the Commission reasonably determined that none of the concerns raised by *PMCM* justified reversal of the Bureau’s *Declaratory Ruling*. As the Commission found, the decision to assign virtual channel 33 to WJLP served the “overarching goals” of the PSIP Standard by “reducing consumer confusion” and ensuring that the channel 3 brand associated with WFSB(TV) and KYW-TV for over five decades “is not diluted by the entry of a new broadcaster operating on channel 3 in the same area.” *PSIP Order* ¶ 40 (JA\_\_\_\_).

### **III. THE COMMISSION REASONABLY DETERMINED THAT WJLP WAS NOT ENTITLED TO CARRIAGE ON CABLE CHANNEL 3**

Under section 614 of the Communications Act, a local commercial television station may demand carriage on cable systems within its market “on the ... channel number on which the ... station is broadcast over the air.” 47 U.S.C. § 534(b)(6). *PMCM* maintains that this must-carry statute

unambiguously entitles WJLP to carriage on cable channel 3 because the station is “broadcast over the air” on radio frequency channel 3. Br. 50-60. The FCC reasonably rejected PMCM’s reading of the statute.

Although section 614(b)(6) refers to the “channel number on which the local commercial television station is broadcast over the air,” 47 U.S.C. § 534(b)(6), “Congress did not define the meaning of [that] phrase.” *Cable Carriage Order* ¶ 13 (JA\_\_\_\_). When the must-carry statute was enacted in 1992, “the channel number on which a station’s signal was transmitted was the same channel number that viewers selected on their television tuner.” *Ibid.* After the digital transition, however, that is not always the case. While a station still transmits its signal on a radio frequency channel, over-the-air viewers of the station must tune their televisions to a PSIP channel to receive the signal. And in many cases, as we have explained, a station’s radio frequency channel number differs from its PSIP channel number. Thus, the ambiguous phrase “broadcast over the air” in section 614(b)(6) “could refer either to the [radio frequency] spectrum the station uses to transmit its signal or the virtual (that is, PSIP) channel number” stations transmit to television tuners. *Ibid.*

The FCC reasonably resolved this ambiguity in 2008 when it clarified that “a station’s ‘over the air’ channel number would be defined by a station’s



PSIP channel, not its [radio frequency] channel.” *Cable Carriage Order* ¶ 13 (JA\_\_\_\_) (citing *2008 Declaratory Order*, 23 FCC Rcd at 14259 ¶¶ 15-16). The Commission explained that this interpretation of section 614(b)(6) was “consistent with” the statute’s purpose—“to ensure that cable operators could not disadvantage broadcasters by placing their programming in an undesirable channel position.” *Ibid.* “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.” *Ibid.* In the digital age, the channel number that reflects a station’s “historic brand identity” is “the PSIP major channel number.” *Ibid.*

PMCM contends that the FCC cannot reasonably construe section 614(b)(6) to refer to virtual channels because such channels did not exist when the statute was enacted. Br. 53-54. But it was entirely reasonable for the Commission “to interpret the ambiguous statutory language in light of the evolution of broadcasting technology.” *Cable Carriage Order* ¶ 13 (JA\_\_\_\_). Where (as here) statutory language is ambiguous, the agency has “latitude, within the bounds of the statute, ‘to adapt [its] rules and policies to the demands of changing circumstances.’” *Agape Church, Inc. v. FCC*, 738 F.3d 397, 408 (D.C. Cir. 2013) (quoting *Rust v. Sullivan*, 500 U.S. 173, 187

(1991)). This Court must defer to the FCC’s interpretation of the Communications Act “so long as the Congress has not unambiguously forbidden it and it is otherwise permissible.” *NTCH, Inc. v. FCC*, 877 F.3d 408, 412 (D.C. Cir. 2017) (internal quotation marks omitted).

The must-carry statute gave the FCC considerable leeway to modify cable carriage requirements to account for the advent of digital television. In anticipation that the digital transition “would necessitate changes to the signal carriage requirements of cable television systems,” Congress “granted the Commission broad authority to make such changes.” *Cable Carriage Order* ¶ 14 (JA\_\_\_\_). Section 614(b)(4)(B) authorizes the Commission “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 [the] modified standards” for digital television. 47 U.S.C. § 534(b)(4)(B).

Exercising its authority under section 614(b)(4)(B), the FCC adopted a rule to clarify “the manner in which cable operators are to determine the channel number on which a local commercial ... station is ‘broadcast over the air’ when implementing such a station’s [must-carry] election.” 2008 *Declaratory Order*, 23 FCC Rcd at 14259 ¶ 16; see *Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598, 2635 ¶ 83 (2001) (“*Digital*

*Carriage Order*”); 47 C.F.R. § 76.57(c). The Commission made clear that under this rule, the cable “carriage rights of a digital station attach to its PSIP major channel number rather than its [radio frequency] channel number.” *Cable Carriage Order* ¶ 15 (JA\_\_\_\_).

PMCM argues that section 614(b)(4)(B) authorizes only technical changes, and that “channel positioning has nothing to do with ensuring that cable carriage conforms to modified technical standards.” Br. 55. This argument ignores the statute’s expansive language.

PMCM bases its reading of section 614(b)(4)(B) on the headings of section 614(b) (“Signal quality”) and section 614(b)(4)(A) (“Nondegradation; technical specifications”). As a threshold matter, courts are justifiably reluctant “to give great weight to statutory headings.” *Holland v. Williams Mountain Coal Co.*, 256 F.3d 819, 822 (D.C. Cir. 2001). The headings used in statutes are “not meant to take the place of the detailed provisions of the text.” *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1169 (2014) (internal quotation marks omitted).

Furthermore, the headings on which PMCM relies cannot bear the weight PMCM places on them. Section 614(b)(4)(B)—which is entitled “Advanced television”—“does not use the words ‘technical,’ ‘signal quality,’ or ... ‘nondegradation.’” *Cable Carriage Order* ¶ 16 (JA\_\_\_\_). It authorizes

the Commission to make “*any changes in the signal carriage* requirements of cable television systems necessary to ensure cable carriage” of local stations’ broadcast signals after the digital transition. 47 U.S.C. § 534(b)(4)(B) (emphasis added). Noting that “[s]ection 614 is entitled ‘*Carriage of local commercial television signals,*’” the Commission reasonably concluded that the phrase “*signal carriage* requirements” in section 614(b)(4)(B) encompasses more than just signal *quality* requirements and should be interpreted “broadly to include the channel positioning requirements” of section 614(b)(6). *Cable Carriage Order* ¶ 16 (JA\_\_\_\_). As this Court has repeatedly recognized, “statutes written in broad, sweeping language should be given broad, sweeping application.” *Nat’l Cable & Telecomm. Ass’n v. FCC*, 567 F.3d 659, 664 (D.C. Cir. 2009) (quoting *Consumer Elec. Ass’n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003)).

PMCM contends that the Commission’s action here falls outside the scope of section 614(b)(4)(B) because a change in channel positioning rights is not “necessary to ensure cable carriage.” Br. 56. But PMCM incorrectly assumes that only “technical transmission changes” are “necessary to ensure cable carriage” after the digital transition. *Ibid.* To the contrary, as the Commission explained, its decision to link the on-channel cable carriage option 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 [their] station’s signal, even if they were transmitting on a different channel post-transition.” *Cable Carriage Order* ¶ 17 (JA\_\_\_\_).

The Commission reasonably concluded that, for purposes of section 614(b)(4)(B), “a change is ‘necessary’ where (as here) it is conducive to serving the goals of the statute.” *Cable Carriage Order* n.81 (JA\_\_\_\_) (citing *Cellco*, 357 F.3d at 97, and *Cellular Telecomm. & Internet Ass’n v. FCC*, 330 F.3d 502, 509 (D.C. Cir. 2003)). The fundamental goal of the must-carry statute is “to ensure that broadcasters [are] not unfairly disadvantaged by cable operators’ channel placement determinations.” *Id.* ¶ 17 (JA\_\_\_\_-\_\_\_\_). The Commission’s conclusion that must-carry rights apply to virtual channels (not radio frequency channels) serves the statute’s purpose “by enabling broadcasters to demand carriage on the channel on which they had built their brand before the digital transition.” *Ibid.* (JA\_\_\_\_).

The legislative history of section 336 of the Communications Act, 47 U.S.C. § 336, provides additional support for the Commission’s reading of section 614(b)(4)(B). The conference report on section 336 states that “the conferees do not intend [section 336(b)(3)] to confer must carry status on advanced television or other video services offered on designated

frequencies.... [T]hat issue is to be the subject of a Commission proceeding under section 614(b)(4)(B) of the Communications Act.” S. CONF. REP. NO. 104-230, at 161 (1996). The Commission reasonably inferred from this statement 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 [s]ection 614(b)(4)(B).” *Cable Carriage Order* ¶ 18 (JA\_\_\_\_); *see also Digital Carriage Order*, 16 FCC Rcd at 2608 ¶ 21.

Finally, PMCM argues that the FCC’s interpretation of section 614(b)(6) will cause “hundreds” of stations to lose their must-carry rights (Br. 59-60) because such rights apply only to “local commercial television station[s],” defined as stations that are “licensed and operating on a channel regularly assigned to its community by the Commission.” 47 U.S.C. § 534(h)(1)(A). PMCM is mistaken. Under the agency’s interpretation, stations will still meet the statute’s definition of a “local commercial television station” even if they use “a virtual channel different from [their] licensed [radio frequency] channel.” Br. 59.

As the Commission explained, “the Act uses the term ‘channel’ to mean different things in different contexts.” *Cable Carriage Order* ¶ 23 (JA\_\_\_\_) (citing *id.* n.55 (JA\_\_\_\_)); *see also Verizon Cal., Inc. v. FCC*, 555

F.3d 270, 276 (D.C. Cir. 2009) (an agency may “interpret an imprecise term differently in two separate sections of a statute which have different purposes”) (internal quotation marks omitted).

Section 614(b)(6), which concerns “channel positioning,” and section 614(h)(1)(A), which defines “local commercial television station,” employ different language to modify the term “channel.” Section 614(b)(6) refers to the channel on which a station is “broadcast over the air,” 47 U.S.C.

§ 534(b)(6), but does not say that the channel must be “regularly assigned to its community by the Commission,” as section 614(h)(1)(A) provides, *id.*

§ 534(h)(1)(A). Not only is the statutory language dissimilar, but the purposes of each provision are distinct. Section 614(h)(1)(A) defines the stations to which must-carry rights attach; section 614(b)(6) identifies the channel position to which those stations are entitled.

Given the contrasting language and purpose of these two provisions, the Commission reasonably construed “channel” differently for each. For the limited “purpose of determining a broadcaster’s channel position under the on-channel carriage option” provided by section 614(b)(6), the agency interpreted “channel” to mean “the PSIP major channel.” *Cable Carriage Order* ¶ 23 (JA\_\_\_\_). In the context of the definition set forth in section 614(h)(1)(A), the Commission properly understood the term “channel” to

mean a station's radio frequency channel. It was entirely appropriate for the Commission to identify the stations to which must-carry rights attach as those the Commission has licensed to the community; the nature of their channel is beside the point. In identifying the channel position to which those stations are entitled, the Commission properly took account of the channel (in this case, the virtual channel) associated with on-air reception and brand identity.

PMCM's alternative interpretation would upend the existing cable carriage regime. Under the FCC's approach, a local station can demand cable carriage on its virtual channel number (typically, the channel number on which the station has built its brand). If PMCM had its way, however, local stations could demand carriage on their radio frequency channel numbers, blocking other stations from obtaining carriage on their virtual channel numbers. For example, a local station operating on digital radio frequency channel 3 in Philadelphia could demand carriage on cable channel 3. In that event, KYW-TV would be relegated to some other cable channel, even though it "has been identified and marketed as channel 3" in Philadelphia "for over 75 years," *Declaratory Ruling* ¶ 59 (JA\_\_\_\_), and it continues to be received by over-the-air viewers on virtual channel 3, *id.* ¶ 27 (JA\_\_\_\_). The widespread and substantial disruption that would flow from PMCM's reading



of the must-carry statute further confirms the reasonableness of the FCC's statutory interpretation.

#### **IV. THE COMMISSION'S DECISION TO ASSIGN VIRTUAL CHANNEL 33 TO WJLP DID NOT VIOLATE THE SPECTRUM ACT**

Title VI of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156, known as the Spectrum Act, “authorizes the FCC to shift a portion of the licensed airwaves from over-the-air television broadcasters to mobile broadband providers” through an “incentive auction and channel-reassignment process.” *Nat’l Ass’n of Broadcasters v. FCC*, 789 F.3d 165, 168-69 (D.C. Cir. 2015). Section 1452(g) of the Spectrum Act provides that, with certain specified exceptions, the Commission may not “involuntarily modify the spectrum usage rights of a broadcast television licensee or reassign such a licensee to another television channel,” 47 U.S.C. § 1452(g)(1)(A), from February 22, 2012, until (1) the completion of the incentive auction and spectrum repacking process authorized by the statute or (2) September 30, 2022 (whichever comes first). *Id.* § 1452(g)(2)(A)-(C).

PMCM contends that the FCC violated the Spectrum Act by changing WJLP's virtual channel. Br. 60-63. It lacks standing to assert this claim

because the alleged violation is not redressable. *See Branton v. FCC*, 993 F.2d 906, 910-12 (D.C. Cir. 1993). In any event, the claim lacks merit.

A. By its terms, the Spectrum Act’s prohibition on involuntary channel changes expired when the FCC completed its incentive auction and spectrum repacking process. *See* 47 U.S.C. § 1452(g)(2)(A). That occurred on April 13, 2017, when the Commission publicly announced the close of the incentive auction and the “final television band channel assignments” made in the repacking process. *PSIP Order* n.78 (JA\_\_\_\_) (citing *Incentive Auction Closing and Channel Reassignment Public Notice*, 32 FCC Rcd 2786 (2017)). As a result, the “restrictions” imposed on the agency by section 1452(g) “no longer apply.” *Ibid.* Indeed, the ban on channel changes lapsed five months before the Commission adopted the *PSIP Order*.

In the absence of any “ongoing violations” of the Spectrum Act, PMCM is reduced to complaining about “an irremediable past injury.” *See KERM, Inc. v. FCC*, 353 F.3d 57, 60 (D.C. Cir. 2004). “But past injury is not enough to support the standing of a party who doesn’t seek damages or similar compensation for that injury.” *Jaramillo v. FCC*, 162 F.3d 675, 677 (D.C. Cir. 1998). “If a petitioner cannot obtain compensation to himself for a past injury, he has failed to show its redressability.” *Ibid.*; *see Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 106-07 (1998).

PMCM cannot demonstrate that any past injury it may have suffered from the FCC’s alleged Spectrum Act violation “is likely” to “be redressed by a favorable decision” from this Court. *Spectrum Five LLC v. FCC*, 758 F.3d 254, 260 (D.C. Cir. 2014) (internal quotation marks omitted). A remand of this issue would not alter the outcome. Even if WJLP were entitled to use virtual channel 3 while the statutory ban on channel reassignments was in effect, that ban has expired. Nothing in the Spectrum Act currently bars the FCC from directing WJLP to use virtual channel 33. In this situation, a remand would be a “useless formality,” since “there is not the slightest doubt that the [agency] would simply reaffirm” its original decision. *Am. Fed’n of Gov’t Employees v. FLRA*, 778 F.2d 850, 862 n.19 (D.C. Cir. 1985) (internal quotation marks omitted); *see also Catholic Healthcare West v. Sebelius*, 748 F.3d 351, 354 (D.C. Cir. 2014) (“it would be futile to remand” an issue when it is obvious that further consideration of the issue on remand would not change the agency’s conclusion).

B. PMCM’s Spectrum Act claim lacks merit in any event. The Commission reasonably determined that the Spectrum Act’s restrictions on involuntary channel changes apply to radio frequency channels, not virtual channels. *PSIP Order* ¶ 22 (JA\_\_\_\_). As the Commission explained, section 1452 “pertains to the ‘spectrum usage rights’ that broadcasters may choose to

relinquish in the incentive auction, and those rights are associated with a station's [radio frequency] channel, not its virtual channel." *Id.* n.72 (JA\_\_\_\_) (citing *Declaratory Ruling* ¶ 49 (JA\_\_\_\_)).

PMCM takes the position that section 1452(g) must necessarily "extend to virtual channel assignments" because "the FCC declared that a station's virtual channel is actually its 'over the air' channel" under 47 U.S.C. § 534(b)(6). Br. 63. But the Spectrum Act and the must-carry statute are different statutes serving different purposes. The fact that both statutes use the term "channel" does not mean that the FCC must construe the term to mean the same thing in each statute. *See Am. Council on Educ. v. FCC*, 451 F.3d 226, 232-33 (D.C. Cir. 2006) (upholding the FCC's decision to construe the term "telecommunications carrier" differently in two different statutes). The Spectrum Act's prohibition on channel changes while the incentive auction and repacking were ongoing was plainly intended to protect the "spectrum usage rights," *i.e.*, the radio frequency channels, of stations that would be affected by the auction. By contrast, a station's virtual channel has nothing to do with the spectrum used by that station, and would not affect or be affected by the auction or repacking.

Even if (as PMCM contends) section 1452(g) forbade the FCC to change a station's virtual channel, the Commission reasonably found that "the

Bureau did not ‘change’ WJLP’s virtual channel.” *PSIP Order* ¶ 22 (JA\_\_\_\_).

“Rather, pursuant to the assignment provisions of Annex B, WJLP received 33 as its virtual channel by operation of law” when PMCM “voluntarily moved its station” from Nevada to New Jersey and obtained a new license.

*Id.* n.74 (JA\_\_\_\_).

## CONCLUSION

PMCM's Spectrum Act claim should be dismissed for lack of standing or, in the alternative, denied. In all other respects, PMCM's petitions for review should be denied.

Respectfully submitted,

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March 2, 2018

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

PMCM TV, LLC,

PETITIONER,

v.

FEDERAL COMMUNICATIONS COMMISSION AND  
UNITED STATES OF AMERICA,

RESPONDENTS.

No. 17-1209  
(CONSOLIDATED  
WITH No. 17-  
1210)

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7) and the Court's order of December 15, 2017, I hereby certify that the accompanying Brief for Respondents in the captioned case contains 14,299 words.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times Roman font.

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March 2, 2018

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## **47 U.S.C.A. § 331(a)**

### **§ 331. Very high frequency stations and AM radio stations**

#### **(a) Very high frequency stations**

It shall be the policy of the Federal Communications Commission to allocate channels for very high frequency commercial television broadcasting in a manner which ensures that not less than one such channel shall be allocated to each State, if technically feasible. In any case in which licensee of a very high frequency commercial television broadcast station notifies the Commission to the effect that such licensee will agree to the reallocation of its channel to a community within a State in which there is allocated no very high frequency commercial television broadcast channel at the time<sup>1</sup> such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a license to such licensee for that purpose pursuant to such notification for a term of not to exceed 5 years as provided in section 307(d) of this title.

\* \* \* \* \*

## 47 U.S.C. § 405(a)

### **§ 405. Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order**

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under

section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

\* \* \* \* \*

## **47 U.S.C. § 534**

### **§ 534. Carriage of local commercial television signals**

#### **(a) Carriage obligations**

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. Carriage of additional broadcast television signals on such system shall be at the discretion of such operator, subject to section 325(b) of this title.

#### **(b) Signals required**

##### **(1) In general**

**(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, except that if such a system has 300 or fewer subscribers, it shall not be subject to any requirements under this section so long as such system does not delete from carriage by that system any signal of a broadcast television station.

**(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.

##### **(2) Selection of signals**

Whenever the number of local commercial television stations exceeds the maximum number of signals a cable system is required to carry under paragraph (1), the cable operator shall have discretion in selecting which such stations shall be carried on its cable system, except that--

**(A)** under no circumstances shall a cable operator carry a qualified low power station in lieu of a local commercial television station; and

**(B)** if the cable operator elects to carry an affiliate of a broadcast network (as such term is defined by the Commission by regulation), such cable operator shall carry the affiliate of such broadcast network whose city of license reference point, as defined in section 76.53 of title 47, Code of Federal Regulations (in effect on January 1, 1991), or any successor regulation thereto, is closest to the principal headend of the cable system.

### **(3) Content to be carried**

**(A)** A cable operator shall carry in its entirety, on the cable system of that operator, the primary video, accompanying audio, and line 21 closed caption transmission of each of the local commercial television stations carried on the cable system and, to the extent technically feasible, program-related material carried in the vertical blanking interval or on subcarriers. Retransmission of other material in the vertical blanking interval or other nonprogram-related material (including teletext and other subscription and advertiser-supported information services) shall be at the discretion of the cable operator. Where appropriate and feasible, operators may delete signal enhancements, such as ghost-canceling, from the broadcast signal and employ such enhancements at the system headend or headends.

**(B)** The cable operator shall carry the entirety of the program schedule of any television station carried on the cable system unless carriage of specific programming is prohibited, and other programming authorized to be substituted, under section 76.67 or subpart F of part 76 of title 47, Code of Federal Regulations (as in effect on January 1, 1991), or any successor regulations thereto.

### **(4) Signal quality**

#### **(A) Nondegradation; technical specifications**

The signals of local commercial television stations that a cable operator carries shall be carried without material degradation. The Commission shall adopt carriage standards to ensure that, to the extent technically feasible, the quality of signal processing and carriage provided by a cable system for the carriage of local commercial television stations will be no less than that provided by the system for carriage of any other type of signal.

#### **(B) Advanced television**

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.

### **(5) Duplication not required**

Notwithstanding paragraph (1), a cable operator shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network (as such term is defined by regulation). If a cable operator elects to carry on its cable system a signal which substantially duplicates the signal of another local commercial television station carried on the cable system, or to carry on its system the signals of more than one local commercial television station affiliated with a particular broadcast network, all such signals shall be counted toward the number of signals the operator is required to carry under paragraph (1).

### **(6) Channel positioning**

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 July 19, 1985, or on the channel on which it was carried on January 1, 1992, at the election of the station, or on such other channel number 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.

### **(7) Signal availability**

Signals carried in fulfillment of the requirements of this section shall be provided to every subscriber of a cable system. Such signals shall be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a connection. If a cable operator authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with the equipment and materials for such connections, the operator shall notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box and shall offer to sell or lease such a converter box to such subscribers at rates in accordance with section 543(b)(3) of this title.

### **(8) Identification of signals carried**

A cable operator shall identify, upon request by any person, the signals carried on its system in fulfillment of the requirements of this section.

**(9) Notification**

A cable operator shall provide written notice to a local commercial television station at least 30 days prior to either deleting from carriage or repositioning that station. The notification provisions of this paragraph shall not be used to undermine or evade the channel positioning or carriage requirements imposed upon cable operators under this section.

**(10) Compensation for carriage**

A cable operator shall not accept or request monetary payment or other valuable consideration in exchange either for carriage of local commercial television stations in fulfillment of the requirements of this section or for the channel positioning rights provided to such stations under this section, except that--

**(A)** any such station may be required to bear the costs associated with delivering a good quality signal or a baseband video signal to the principal headend of the cable system;

**(B)** a cable operator may accept payments from stations which would be considered distant signals under section 111 of Title 17 as indemnification for any increased copyright liability resulting from carriage of such signal; and

**(C)** a cable operator may continue to accept monetary payment or other valuable consideration in exchange for carriage or channel positioning of the signal of any local commercial television station carried in fulfillment of the requirements of this section, through, but not beyond, the date of expiration of an agreement thereon between a cable operator and a local commercial television station entered into prior to June 26, 1990.

**(c) Low power station carriage obligation**

**(1) Requirement**

If there are not sufficient signals of full power local commercial television stations to fill the channels set aside under subsection (b) of this section--

(A) a cable operator of a cable system with a capacity of 35 or fewer usable activated channels shall be required to carry one qualified low power station; and

(B) a cable operator of a cable system with a capacity of more than 35 usable activated channels shall be required to carry two qualified low power stations.

**(2) Use of public, educational, or governmental channels**

A cable operator required to carry more than one signal of a qualified low power station under this subsection may do so, subject to approval by the franchising authority pursuant to section 531 of this title, by placing such additional station on public, educational, or governmental channels not in use for their designated purposes.

**(d) Remedies**

**(1) Complaints by broadcast stations**

Whenever a local commercial television station believes that a cable operator has failed to meet its obligations under this section, 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 has otherwise failed to comply with the channel positioning or repositioning or other requirements of this section. The cable operator shall, within 30 days of such written notification, respond in writing to such notification and either commence to carry the signal of such station in accordance with the terms requested or state its reasons for believing that it is not obligated to carry such signal or is in compliance with the channel positioning and repositioning and other requirements of this section. A local commercial television station that is denied carriage or channel positioning or repositioning in accordance with this section by a cable operator may obtain review of such denial by filing a complaint with the Commission. Such complaint shall allege the manner in which such cable operator has failed to meet its obligations and the basis for such allegations.

**(2) Opportunity to respond**

The Commission shall afford such cable operator an opportunity to present data and arguments to establish that there has been no failure to meet its obligations under this section.



### **(3) Remedial actions; dismissal**

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. If the Commission determines that the cable operator has failed to meet such obligations, the Commission shall order the cable operator to reposition the complaining station or, in the case of an obligation to carry a station, to commence carriage of the station and to continue such carriage for at least 12 months. If the Commission determines that the cable operator has fully met the requirements of this section, it shall dismiss the complaint.

### **(e) Input selector switch rules abolished**

No cable operator shall be required--

(1) to provide or make available any input selector switch as defined in section 76.5(mm) of title 47, Code of Federal Regulations, or any comparable device; or

(2) to provide information to subscribers about input selector switches or comparable devices.

### **(f) Regulations by Commission**

Within 180 days after October 5, 1992, the Commission shall, following a rulemaking proceeding, issue regulations implementing the requirements imposed by this section. Such implementing regulations shall include necessary revisions to update section 76.51 of title 47 of the Code of Federal Regulations.

### **(g) Sales presentations and program length commercials**

#### **(1) Carriage pending proceeding**

Pending the outcome of the proceeding under paragraph (2), nothing in this chapter shall require a cable operator to carry on any tier, or prohibit a cable operator from carrying on any tier, the signal of any commercial television station or video programming service that is predominantly utilized for the transmission of sales presentations or program length commercials.

#### **(2) Proceeding concerning certain stations**

Within 270 days after October 5, 1992, the Commission, notwithstanding prior proceedings to determine whether broadcast television stations that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience, and necessity, shall complete a proceeding in accordance with this paragraph to determine whether broadcast television stations that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience, and necessity. In conducting such proceeding, the Commission shall provide appropriate notice and opportunity for public comment. The Commission shall consider the viewing of such stations, the level of competing demands for the spectrum allocated to such stations, and the role of such stations in providing competition to nonbroadcast services offering similar programming. In the event that the Commission concludes that one or more of such stations are serving the public interest, convenience, and necessity, the Commission shall qualify such stations as local commercial television stations for purposes of subsection (a) of this section. In the event that the Commission concludes that one or more of such stations are not serving the public interest, convenience, and necessity, the Commission shall allow the licensees of such stations a reasonable period within which to provide different programming, and shall not deny such stations a renewal expectancy solely because their programming consisted predominantly of sales presentations or program length commercials.

## **(h) Definitions**

### **(1) Local commercial television station**

#### **(A) In general**

For purposes of this section, the term “local commercial television station” means any full power television broadcast station, other than a qualified noncommercial educational television station within the meaning of section 535(l) (1) of this title, 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 television market as the cable system.

#### **(B) Exclusions**

The term “local commercial television station” shall not include--

(i) low power television stations, television translator stations, and passive repeaters which operate pursuant to part 74 of title 47, Code of Federal Regulations, or any successor regulations thereto;

(ii) a television broadcast station that would be considered a distant signal under section 111 of Title 17, if such station does not agree to indemnify the cable operator for any increased copyright liability resulting from carriage on the cable system; or

(iii) a television broadcast station that does not deliver to the principal headend of a cable system either a signal level of -45dBm for UHF signals or -49dBm for VHF signals at the input terminals of the signal processing equipment, if such station does not agree to be responsible for the costs of delivering to the cable system a signal of good quality or a baseband video signal.

### **(C) Market determinations**

(i) For purposes of this section, a broadcasting 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, except that, following a written request, the Commission may, with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section. In considering such requests, the Commission may determine that particular communities are part of more than one television market.

(ii) In considering requests filed pursuant to clause (i), the Commission shall afford particular attention to the value of localism by taking into account such factors as--

(I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community or on the satellite carrier or carriers serving such community;

(II) whether the television station provides coverage or other local service to such community;

(III) whether modifying the market of the television station would promote consumers' access to television broadcast station signals that originate in their State of residence;

(IV) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community; and

(V) evidence of viewing patterns in households that subscribe and do not subscribe to the services offered by multichannel video programming distributors within the areas served by such multichannel video programming distributors in such community.

(iii) A cable operator shall not delete from carriage the signal of a commercial television station during the pendency of any proceeding pursuant to this subparagraph.

(iv) Within 120 days after the date on which a request is filed under this subparagraph (or 120 days after February 8, 1996, if later), the Commission shall grant or deny the request.

## **(2) Qualified low power station**

The term "qualified low power station" means any television broadcast station conforming to the rules established for Low Power Television Stations contained in part 74 of title 47, Code of Federal Regulations, only if--

(A) such station broadcasts for at least the minimum number of hours of operation required by the Commission for television broadcast stations under part 73 of title 47, Code of Federal Regulations;

(B) such station meets all obligations and requirements applicable to television broadcast stations under part 73 of title 47, Code of Federal Regulations, with respect to the broadcast of nonentertainment programming; programming and rates involving political candidates, election issues, controversial issues of public importance, editorials, and personal attacks; programming for children; and equal employment opportunity; and the Commission determines that the provision of such programming by such station would address local news and informational needs which are not being adequately served by full power television broadcast

stations because of the geographic distance of such full power stations from the low power station's community of license;

(C) such station complies with interference regulations consistent with its secondary status pursuant to part 74 of title 47, Code of Federal Regulations;

(D) such station is located no more than 35 miles from the cable system's headend, and delivers to the principal headend of the cable system an over-the-air signal of good quality, as determined by the Commission;

(E) the community of license of such station and the franchise area of the cable system are both located outside of the largest 160 Metropolitan Statistical Areas, ranked by population, as determined by the Office of Management and Budget on June 30, 1990, and the population of such community of license on such date did not exceed 35,000; and

(F) there is no full power television broadcast station licensed to any community within the county or other political subdivision (of a State) served by the cable system.

Nothing in this paragraph shall be construed to change the secondary status of any low power station as provided in part 74 of title 47, Code of Federal Regulations, as in effect on October 5, 1992.

## **47 U.S.C. § 1452**

### **§ 1452. Special requirements for incentive auction of broadcast TV spectrum**

#### **(a) Reverse auction to identify incentive amount**

##### **(1) In general**

The Commission shall conduct a reverse auction to determine the amount of compensation that each broadcast television licensee would accept in return for voluntarily relinquishing some or all of its broadcast television spectrum usage rights in order to make spectrum available for assignment through a system of competitive bidding under subparagraph (G) of section 309(j)(8) of this title.

##### **(2) Eligible relinquishments**

A relinquishment of usage rights for purposes of paragraph (1) shall include the following:

(A) Relinquishing all usage rights with respect to a particular television channel without receiving in return any usage rights with respect to another television channel.

(B) Relinquishing all usage rights with respect to an ultra high frequency television channel in return for receiving usage rights with respect to a very high frequency television channel.

(C) Relinquishing usage rights in order to share a television channel with another licensee.

##### **(3) Confidentiality**

The Commission shall take all reasonable steps necessary to protect the confidentiality of Commission-held data of a licensee participating in the reverse auction under paragraph (1), including withholding the identity of such licensee until the reassignments and reallocations (if any) under subsection (b)(1)(B) become effective, as described in subsection (f)(2).

#### **(4) Protection of carriage rights of licensees sharing a channel**

A broadcast television station that voluntarily relinquishes spectrum usage rights under this subsection in order to share a television channel and that possessed carriage rights under section 338, 534, or 535 of this title on November 30, 2010, shall have, at its shared location, the carriage rights under such section that would apply to such station at such location if it were not sharing a channel.

#### **(b) Reorganization of broadcast TV spectrum**

##### **(1) In general**

For purposes of making available spectrum to carry out the forward auction under subsection (c)(1), the Commission--

(A) shall evaluate the broadcast television spectrum (including spectrum made available through the reverse auction under subsection (a)(1)); and

(B) may, subject to international coordination along the border with Mexico and Canada--

(i) make such reassignments of television channels as the Commission considers appropriate; and

(ii) reallocate such portions of such spectrum as the Commission determines are available for reallocation.

##### **(2) Factors for consideration**

In making any reassignments or reallocations under paragraph (1)(B), the Commission shall make all reasonable efforts to preserve, as of February 22, 2012, the coverage area and population served of each broadcast television licensee, as determined using the methodology described in OET Bulletin 69 of the Office of Engineering and Technology of the Commission.

##### **(3) No involuntary relocation from UHF to VHF**

In making any reassignments under paragraph (1)(B)(i), the Commission may not involuntarily reassign a broadcast television licensee--

(A) from an ultra high frequency television channel to a very high frequency television channel; or

(B) from a television channel between the frequencies from 174 megahertz to 216 megahertz to a television channel between the frequencies from 54 megahertz to 88 megahertz.

#### **(4) Payment of relocation costs**

##### **(A) In general**

Except as provided in subparagraph (B), from amounts made available under subsection (d)(2), the Commission shall reimburse costs reasonably incurred by-

-

(i) a broadcast television licensee that was reassigned under paragraph (1)(B)(i) from one ultra high frequency television channel to a different ultra high frequency television channel, from one very high frequency television channel to a different very high frequency television channel, or, in accordance with subsection (g)(1)(B), from a very high frequency television channel to an ultra high frequency television channel, in order for the licensee to relocate its television service from one channel to the other;

(ii) a multichannel video programming distributor in order to continue to carry the signal of a broadcast television licensee that--

(I) is described in clause (i);

(II) voluntarily relinquishes spectrum usage rights under subsection (a) with respect to an ultra high frequency television channel in return for receiving usage rights with respect to a very high frequency television channel; or

(III) voluntarily relinquishes spectrum usage rights under subsection (a) to share a television channel with another licensee; or

(iii) a channel 37 incumbent user, in order to relocate to other suitable spectrum, provided that all such users can be relocated and that the total relocation costs of such users do not exceed \$300,000,000. For the purpose of this section, the spectrum made available through relocation of channel 37



incumbent users shall be deemed as spectrum reclaimed through a reverse auction under subsection (a).

**(B) Regulatory relief**

In lieu of reimbursement for relocation costs under subparagraph (A), a broadcast television licensee may accept, and the Commission may grant as it considers appropriate, a waiver of the service rules of the Commission to permit the licensee, subject to interference protections, to make flexible use of the spectrum assigned to the licensee to provide services other than broadcast television services. Such waiver shall only remain in effect while the licensee provides at least 1 broadcast television program stream on such spectrum at no charge to the public.

**(C) Limitation**

The Commission may not make reimbursements under subparagraph (A) for lost revenues.

**(D) Deadline**

The Commission shall make all reimbursements required by subparagraph (A) not later than the date that is 3 years after the completion of the forward auction under subsection (c)(1).

**(5) Low-power television usage rights**

Nothing in this subsection shall be construed to alter the spectrum usage rights of low-power television stations.

**(c) Forward auction**

**(1) Auction required**

The Commission shall conduct a forward auction in which--

(A) the Commission assigns licenses for the use of the spectrum that the Commission reallocates under subsection (b)(1)(B)(ii); and

**(B)** the amount of the proceeds that the Commission shares under clause (i) of section 309(j)(8)(G) of this title with each licensee whose bid the Commission accepts in the reverse auction under subsection (a)(1) is not less than the amount of such bid.

## **(2) Minimum proceeds**

### **(A) In general**

If the amount of the proceeds from the forward auction under paragraph (1) is not greater than the sum described in subparagraph (B), no licenses shall be assigned through such forward auction, no reassignments or reallocations under subsection (b)(1)(B) shall become effective, and the Commission may not revoke any spectrum usage rights by reason of a bid that the Commission accepts in the reverse auction under subsection (a)(1).

### **(B) Sum described**

The sum described in this subparagraph is the sum of--

- (i)** the total amount of compensation that the Commission must pay successful bidders in the reverse auction under subsection (a)(1);
- (ii)** the costs of conducting such forward auction that the salaries and expenses account of the Commission is required to retain under section 309(j)(8)(B) of this title; and
- (iii)** the estimated costs for which the Commission is required to make reimbursements under subsection (b)(4)(A).

### **(C) Administrative costs**

The amount of the proceeds from the forward auction under paragraph (1) that the salaries and expenses account of the Commission is required to retain under section 309(j)(8)(B) of this title shall be sufficient to cover the costs incurred by the Commission in conducting the reverse auction under subsection (a)(1), conducting the evaluation of the broadcast television spectrum under subparagraph (A) of subsection (b)(1), and making any reassignments or

reallocations under subparagraph (B) of such subsection, in addition to the costs incurred by the Commission in conducting such forward auction.

### **(3) Factor for consideration**

In conducting the forward auction under paragraph (1), the Commission shall consider assigning licenses that cover geographic areas of a variety of different sizes.

## **(d) TV Broadcaster Relocation Fund**

### **(1) Establishment**

There is established in the Treasury of the United States a fund to be known as the TV Broadcaster Relocation Fund.

### **(2) Payment of relocation costs**

Any amounts borrowed under paragraph (3)(A) and any amounts in the TV Broadcaster Relocation Fund that are not necessary for reimbursement of the general fund of the Treasury for such borrowed amounts shall be available to the Commission to make the payments required by subsection (b)(4)(A).

### **(3) Borrowing authority**

#### **(A) In general**

Beginning on the date when any reassignments or reallocations under subsection (b)(1)(B) become effective, as provided in subsection (f)(2), and ending when \$1,000,000,000 has been deposited in the TV Broadcaster Relocation Fund, the Commission may borrow from the Treasury of the United States an amount not to exceed \$1,000,000,000 to use toward the payments required by subsection (b)(4)(A).

#### **(B) Reimbursement**

The Commission shall reimburse the general fund of the Treasury, without interest, for any amounts borrowed under subparagraph (A) as funds are

deposited into the TV Broadcaster Relocation Fund.

#### **(4) Transfer of unused funds**

If any amounts remain in the TV Broadcaster Relocation Fund after the date that is 3 years after the completion of the forward auction under subsection (c)(1), the Secretary of the Treasury shall--

(A) prior to the end of fiscal year 2022, transfer such amounts to the Public Safety Trust Fund established by section 1457(a)(1) of this title; and

(B) after the end of fiscal year 2022, transfer such amounts to the general fund of the Treasury, where such amounts shall be dedicated for the sole purpose of deficit reduction.

#### **(e) Numerical limitation on auctions and reorganization**

The Commission may not complete more than one reverse auction under subsection (a)(1) or more than one reorganization of the broadcast television spectrum under subsection (b).

#### **(f) Timing**

##### **(1) Contemporaneous auctions and reorganization permitted**

The Commission may conduct the reverse auction under subsection (a)(1), any reassignments or reallocations under subsection (b)(1)(B), and the forward auction under subsection (c)(1) on a contemporaneous basis.

##### **(2) Effectiveness of reassignments and reallocations**

Notwithstanding paragraph (1), no reassignments or reallocations under subsection (b)(1)(B) shall become effective until the completion of the reverse auction under subsection (a)(1) and the forward auction under subsection (c)(1), and, to the extent practicable, all such reassignments and reallocations shall become effective simultaneously.

##### **(3) Deadline**

The Commission may not conduct the reverse auction under subsection (a)(1) or

the forward auction under subsection (c)(1) after the end of fiscal year 2022.

**(4) Limit on discretion regarding auction timing**

Section 309(j)(15)(A) of this title shall not apply in the case of an auction conducted under this section.

**(g) Limitation on reorganization authority**

**(1) In general**

During the period described in paragraph (2), 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; or

**(B)** reassign a broadcast television licensee from a very high frequency television channel to an ultra high frequency television channel, unless--

**(i)** such a reassignment will not decrease the total amount of ultra high frequency spectrum made available for reallocation under this section; or

**(ii)** a request from such licensee for the reassignment was pending at the Commission on May 31, 2011.

**(2) Period described**

The period described in this paragraph is the period beginning on February 22, 2012, and ending on the earliest of--

**(A)** the first date when the reverse auction under subsection (a)(1), the reassignments and reallocations (if any) under subsection (b)(1)(B), and the forward auction under subsection (c)(1) have been completed;

**(B)** the date of a determination by the Commission that the amount of the proceeds from the forward auction under subsection (c)(1) is not greater than the sum described in subsection (c)(2)(B); or

**(C)** September 30, 2022.

**(h) Protest right inapplicable**

The right of a licensee to protest a proposed order of modification of its license under section 316 of this title shall not apply in the case of a modification made under this section.

**(i) Commission authority**

Nothing in subsection (b) shall be construed to--

**(1)** expand or contract the authority of the Commission, except as otherwise expressly provided; or

**(2)** prevent the implementation of the Commission's "White Spaces" Second Report and Order and Memorandum Opinion and Order (FCC 08-260, adopted November 4, 2008) in the spectrum that remains allocated for broadcast television use after the reorganization required by such subsection.

**47 C.F.R. § 73.682(d)**

**§ 73.682 TV transmission standards.**

\* \* \* \* \*

(d) Digital broadcast television transmission standard. Effective October 11, 2011 transmission of digital broadcast television (DTV) signals shall comply with the standards for such transmissions set forth in ATSC A/52: “ATSC Standard Digital Audio Compression (AC–3)”, ATSC A/53, Parts 1–4 and 6: 2007 “ATSC Digital Television Standard,” (January 3, 2007), and ATSC A/53 Part 5:2010 “ATSC Digital Television Standard: Part 5—AC–3 Audio System Characteristic,” (July 6, 2010), except for section 6.1.2 (“Compression Format Constraints”) of A/53 Part 4: 2007 (“MPEG–2 Video Systems Characteristics”) and the phrase “see Table 6.2” in section 6.1.1 Table 6.1 and section 6.1.3 Table 6.3, and ATSC A/65C: “ATSC Program and System Information Protocol for Terrestrial Broadcast and Cable, Revision C With Amendment No. 1 dated May 9, 2006,” (January 2, 2006) (all standards incorporated by reference, see § 73.8000). Although not incorporated by reference, licensees may also consult ATSC A/54A: “Recommended Practice: Guide to Use of the ATSC Digital Television Standard, including Corrigendum No. 1,” (December 4, 2003, Corrigendum No. 1 dated December 20, 2006, and ATSC A/69: “Recommended Practice PSIP Implementation Guidelines for Broadcasters,” (June 25, 2002) (Secs. 4, 5, 303, 48 Stat., as amended, 1066, 1068, 1082 (47 U.S.C. 154, 155, 303)). ATSC A/54A and ATSC A/69 are available from Advanced Television Systems Committee (ATSC), 1750 K Street, NW., Suite 1200, Washington, DC 20006, or at the ATSC Web site: <http://www.atsc.org/standards.html>.

\* \* \* \* \*

## **47 C.F.R. § 73.8000**

### **§ 73.8000 Incorporation by reference.**

(a) The materials listed in this section are incorporated by reference in this part. These incorporations by reference were approved by the Director of the Federal Register in accordance with [5 U.S.C. 552\(a\)](#) and 1 CFR part 51. These materials are incorporated as they exist on the date of the approval, and notice of any change in these materials will be published in the Federal Register. The materials are available for inspection at the Federal Communications Commission (FCC), 445 12th St., SW., Reference Information Center, Room CY–A257, Washington, DC 20554 and at the National Archives and Records Administration (NARA). For information on the availability of this material at NARA, call 202–741–6030, or go to:

[http://www.archives.gov/federal\\_register/code\\_of\\_federal\\_regulations/ibr\\_locations.html](http://www.archives.gov/federal_register/code_of_federal_regulations/ibr_locations.html).

(b) The following materials are available from Advanced Television Systems Committee (ATSC), 1776 K Street NW., 8th Floor, Washington, DC 20006; or at the ATSC Web site: <http://www.atsc.org/standards.html>.

- (1) ATSC A/52: “ATSC Standard Digital Audio Compression (AC–3),” 1995, IBR approved for § 73.682.
- (2) ATSC A/53 Parts 1–4 and 6: 2007 “ATSC Digital Television Standard,” (January 3, 2007) and ATSC A/53 Part 5: 2010 “ATSC Digital Television Standard: Part 5—AC–3 Audio System Characteristic,” (July 6, 2010), as listed below:
  - (i) A/53, Part 1:2007, “Digital Television System” (January 3, 2007), IBR approved for § 73.682.
  - (ii) A/53, Part 2:2007, “RF/Transmission System Characteristics” (January 3, 2007), IBR approved for § 73.682.
  - (iii) A/53, Part 3:2007, “Service Multiplex and Transport Subsystem Characteristics” (January 3, 2007), IBR approved for § 73.682.



(iv) A/53, Part 4:2007, “MPEG–2 Video System Characteristics” (January 3, 2007), IBR approved for § 73.682, except for § 6.1.2 of A/53 Part 4: 2007, and the phrase “see Table 6.2” in section 6.1.1 Table 6.1 and section 6.1.3 Table 6.3.

(v) A/53, Part 5: 2010, “AC–3 Audio System Characteristics” (July 6, 2010), IBR approved for § 73.682.

(vi) A/53, Part 6:2007, “Enhanced AC–3 Audio System Characteristics” (January 3, 2007), IBR approved for § 73.682.

(3) [Reserved]

(4) ATSC A/65C: “ATSC Program and System Information Protocol for Terrestrial Broadcast and Cable, Revision C With Amendment No. 1 dated May 9, 2006,” (January 2, 2006), IBR approved for §§ 73.682.

(5) ATSC A/85:2013 “ATSC Recommended Practice: Techniques for Establishing and Maintaining Audio Loudness for Digital Television,” (March 12, 2013) (“ATSC A/85 RP”), IBR approved for § 73.682.

<Text of subsection (b)(6) added by 83 FR 5026, effective March 5, 2018.>

(6) ATSC A/321:2016, “System Discovery and Signaling” (March 23, 2016), IBR approved for § 73.682.

<Text of subsection (b)(7) added by 83 FR 5026, effective March 5, 2018.>

(7) ATSC A/322:2017 “Physical Layer Protocol” (June 6, 2017), IBR approved for § 73.682.

(c) [Reserved]

(d) The following materials are available at the FCC, 445 12th St., SW., Reference Information Center, Room CY–A257, Washington, DC 20554, or at the FCC's Office of Engineering and Technology (OET) Web site:

<http://www.fcc.gov/oet/info/documents/bulletins/>.

(1) OET Bulletin No. 69: “Longley–Rice Methodology for Evaluating TV Coverage and Interference” (February 6, 2004), IBR approved for § 73.616.

(3) [Reserved]

**47 C.F.R. § 76.57(c)**

**§ 76.57 Channel positioning**

\* \* \* \* \*

(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.

## **47 C.F.R. § 76.61(a)**

### **§ 76.61 Disputes concerning carriage**

**(a)** Complaints regarding carriage of local commercial television stations.

**(1)** Whenever a local commercial television station or a qualified low power 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.

**(2)** The cable operator shall, within 30 days of receipt of such written notification, respond in writing to such notification and either commence to carry the signal of such station in accordance with the terms requested or state its reasons for believing that it is not obligated to carry such signal or is in compliance with the channel positioning and repositioning and other requirements of the must-carry rules. If a refusal for carriage is based on the station's distance from the cable system's principal headend, the operator's response shall include the location of such headend. If a cable operator denies carriage on the basis of the failure of the station to deliver a good quality signal at the cable system's principal headend, the cable operator must provide a list of equipment used to make the measurements, the point of measurement and a list and detailed description of the reception and over-the-air signal processing equipment used, including sketches such as block diagrams and a description of the methodology used for processing the signal at issue, in its response.

**(3)** A local commercial television station or qualified low power television station that is denied carriage or channel positioning or repositioning in accordance with the must-carry rules by a cable operator may file a complaint with the Commission in accordance with the procedures set forth in § 76.7 of this part. In addition to the requirements of § 76.7 of this part, such complaint shall specifically:

**(i)** Allege the manner in which such cable operator has failed to meet its obligations and the basis for such allegations.

(ii) Be accompanied by the notice from the complainant to the cable television system operator, and the cable television system operator's response, if any. If no timely response was received, the complaint shall so state.

(iii) Establish the complaint is being filed within the sixty-day deadline stated in paragraph (a)(5) of this section.

(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. If the Commission determines that the cable operator has fully met the must-carry requirements, it shall dismiss the complaint.

(5) No must-carry complaint filed pursuant to paragraph (a) of this section be accepted by the Commission if filed more than sixty (60) days after—

(i) The denial by a cable television system operator of request for carriage or channel position contained in the notice required by paragraph (a)(1) of this section, or

(ii) The failure to respond to such notice within the time period allowed by paragraph (a)(2) of this section.

## **Annex B:**

### **Additional Constraints on Virtual Channel Table For the U.S.**

#### **(Normative)**

#### **1. ASSIGNMENT OF MAJOR CHANNEL NUMBER VALUES FOR TERRESTRIAL BROADCAST IN THE U.S.**

The assignment of major\_channel\_number values in the U.S. shall be based on the rules below.

- 1) For broadcasters with existing NTSC licenses, the major\_channel\_number for the existing NTSC channels, as well as the digital virtual channels, controlled by the broadcaster, shall be set to the current NTSC RF channel number. E.g., assume a broadcaster who has an NTSC broadcast license for RF channel 13 is assigned RF channel 39 for digital ATSC broadcast. That broadcaster is required to use major\_channel\_number 13 for identification of the analog NTSC channel on RF channel 13, as well as the digital virtual channels it is controlling on RF channel 39.
- 2) For a new broadcaster without an existing NTSC license, the major\_channel\_number for the digital virtual channels controlled by the broadcaster shall be set to the FCC assigned RF channel number for ATSC digital TV broadcast. E.g., assume a broadcaster who currently has no NTSC broadcast license applies and receives a license for digital ATSC broadcast on RF channel 49. That broadcaster is required to use major\_channel\_number 49 for identification of the digital virtual channels that it is controlling on RF channel 49.
- 3) If during or at the end of the transition period, the RF channel assigned to a broadcaster for digital ATSC broadcast is changed for any reason, the major\_channel\_number used by that broadcaster shall not change.
- 4) If, after the transition, a previously used NTSC RF channel in a market is assigned to a newly-licensed DTV broadcaster in that market, the newly-licensed DTV broadcaster shall use, as his major\_channel\_number, the number of the DTV RF channel originally allocated to the previous NTSC licensee of the assigned channel.
- 5) If a broadcaster owns or controls broadcast licenses for two or more different RF channels having overlapping service areas, he may use a common major\_channel\_number for all services on all channels. He may choose the major\_channel\_number as determined above for any one of the RF channels. The values in the minor\_channel\_number fields must be partitioned to insure that there is no duplication of the two-part channel number in the DTV service area, including the overlapping DTV service areas of other broadcasters using that same major\_channel\_number.
- 6) The two-part channel numbers for other broadcasts may be included in the DTV transport stream, provided that the channel\_TSID and source\_id are exactly associated with the two-part channel number combinations used by the referenced broadcaster and there is no duplication with those used by any broadcaster whose DTV service<sup>16</sup> area overlaps with the emitting station's DTV service<sup>17</sup> area.

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<sup>16</sup> CFR 47 73.622(e) [13]

<sup>17</sup> CFR 47 73.622(e) [13]

- 7) A broadcaster may include in the transmitted multiplex programming originating from a different licensed broadcaster and use the major/minor channel numbers of the original broadcast if the major/minor channel number combinations are coordinated in the local broadcast area to avoid conflicts. The coordination process is beyond the scope of this document.
- 8) The provisions listed above assign `major_channel_number` values 2 through 69 uniquely to broadcasters licensed to broadcast Digital ATSC signals and guarantee that the two-part channel number combinations used by a broadcaster will be different from those used by any other broadcaster with an overlapping DTV service<sup>18</sup> area.
- 9) Values for `major_channel_number` from 70 to 99 may be used to identify groups of digital services carried in an ATSC multiplex that the broadcaster wishes to be identified by a different major channel number. Values 70 through 99 must be unique in each potential receiving location or the receiver will not be able to correctly select such services. For example a local broadcaster transmitting community college lectures in its bit stream may want to use a `major_channel_number` different than its own `major_channel_number` for the virtual channel carrying the lectures. The assessment of the feasibility of using this capability, as well as the coordination process for assignment of these `major_channel_number` values is beyond the scope of this document.
- 10) For a translated signal, the major/minor channel numbers shall remain the same as the original broadcast station unless the major channel conflicts with a broadcaster operating in the service area of the translator. In that case, the translator shall change the major number to a non-conflicting number.

## 2. REQUIREMENT TO TRANSMIT ANALOG TRANSMISSION SIGNAL ID

Broadcasters which reference an NTSC signal by inserting a `channel_TSID` in a VCT shall cause insertion of an analog Transmission Signal ID within the VBI of each referenced NTSC signal per CEA-608-C [3]. Refer to Annex D Section 9 for a discussion of the use of the analog Transmission Signal ID.

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<sup>18</sup> CFR 47 73.622(e) [13]

## **CERTIFICATE OF FILING AND SERVICE**

I, James M. Carr, hereby certify that on March 2, 2018, I electronically filed the foregoing Brief for Respondents with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

*s/ James M. Carr*

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