

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

FILED ON: JUNE 20, 2018

PMCM TV, LLC,

PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, U.S. DEPARTMENT
OF JUSTICE ANTITRUST DIVISION,

RESPONDENTS

CBS CORPORATION, ET AL.,

INTERVENORS

Consolidated with 17-1210

On Petitions for Review of Orders of
the Federal Communications Commission

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

J U D G M E N T

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

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

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

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

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

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

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

In 2014, the FCC allowed WJLP to broadcast on radio-frequency channel 3 from an antenna in New York City. The FCC did not assign WJLP a virtual channel number at that time, so PMCM began using virtual channel 3. Intervenor Meredith Corporation objected because the service area of its Hartford, Connecticut station WSFB overlaps with the service area of WJLP. Before the digital transition, WSFB operated on radio-frequency channel 3; now, it broadcasts on radio-frequency channel 33 while using virtual channel 3 to preserve its brand identity. In response to Meredith's objections, PMCM proposed to partition virtual channel 3, with Meredith using virtual channels 3.1 through 3.9 and PMCM using virtual channels 3.10 and above. Intervenor CBS Corporation, which operates a Philadelphia-based television station on radio-frequency channel 26 and virtual channel 3, raised objections similar to those of Meredith. The FCC rejected PMCM's proposal and assigned WJLP virtual channel 33.

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

The FCC's interpretation of the PSIP Standard, as incorporated into its regulations, "controls unless plainly erroneous or inconsistent with the regulation." *Press Commc'ns, LLC v.*

FCC, 875 F.3d 1117, 1121 (D.C. Cir. 2017) (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). The relevant portion of the PSIP Standard provides:

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

PSIP Standard, Annex B.1(4).

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

The FCC reasonably interpreted “market” to mean service area rather than DMA. The FCC’s interpretation is consistent with the terms of Annex B.1(4), which does not specify whether “market” means service area or DMA, and it furthers the regulatory objective of preserving historic brand identities developed by existing broadcasters. Moreover, PMCM would not prevail even under its proposed interpretation of “market” to mean DMA. As the FCC further explained, the signal of WSFB extends into Fairfield County, Connecticut, which is part of the New York DMA. *PSIP Order* ¶ 35. Under either interpretation, WSFB “previously used” analog radio-frequency channel 3 in the relevant “market,” thus triggering Annex B.1(4).

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

that PMCM “shall use” that virtual channel, the FCC persuasively explained that the alleged harms were largely unsubstantiated and easily fixable. *PSIP Order* ¶¶ 19, 43.

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

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

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

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

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

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

PER CURIAM

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Ken Meadows

Deputy Clerk