

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Amendment of Section 73.622(i),
Post-Transition Table of DTV Allotments,
Television Broadcast Stations.
(Seaford, Delaware)
MB Docket No. 09-230
RM-11586

REPORT AND ORDER

Adopted: April 23, 2010

Released: April 28, 2010

By the Chief, Video Division, Media Bureau:

1. The Commission has before it a Notice of Proposed Rulemaking1 proposing the allotment of channel 5 to Seaford, Delaware, as Delaware’s first very high frequency (“VHF”) commercial television channel, pursuant to Section 331(a) of the Communications Act of 1934 (“Act”), as amended.2 In response to the Notice, six parties, The Honorable Edward E. Kaufman, United States Senator for the State of Delaware; Nave Broadcasting, LLC (“Nave”); PMCM TV, LLC (“PMCM”); ABC, Inc. (“ABC”); Fox Television Stations, Inc. (“Fox”); and Broadcast Maximization Committee (“BMC”), submitted comments, and three parties, Nave, BMC, and PMCM, submitted reply comments. For the reasons discussed below, we are amending the Post-Transition Table of DTV Allotments, Section 73.622(i) of the Commission’s Rules,3 by allotting channel 5 to Seaford, Delaware.

2. Background. Section 331(a) of the Act provides:

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 [a] licensee of a very high frequency commercial television station notifies the Commission to the effect that such licensee will agree to the reallocation of its channel to a community within a State in which there is allocated no very high frequency commercial television broadcast channel at the time [of] such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a license to such licensee for that purpose pursuant to such notification for a term of not to exceed 5 years as provided

1 Seaford, Delaware, 24 FCC Rcd 14596 (Vid. Div. 2009) (“Notice”).

2 47 U.S.C. § 331(a).

3 47 C.F.R. § 73.622(i).

in section 307(d) of this the Communications Act of 1934.

3. The State of Delaware currently does not have a VHF commercial television channel allotment.⁴ In order to fulfill the mandate that the Commission allot at least one VHF channel to each state, if technically feasible, the Commission, in the *Notice*, waived its freeze on the allotment of new television channels⁵ to initiate this proceeding and to advance the allotment policy of Section 331(a) of the Act.

4. Seaford is an incorporated community with a 2000 U.S. Census population of 6,699 people.⁶ Additionally, Seaford currently has one UHF noncommercial educational television allotment, and therefore the Commission has already determined that it is a community for allotment purposes.

5. **Comments.** Senator Kaufman supports the allotment of a new VHF channel to Delaware pursuant to Section 331 of the Act, which he states “is unambiguous in its priority to assure each state a commercial VHF channel.”⁷ Senator Kaufman further urges the Commission to accomplish two goals through this proceeding: 1) that the new allotment “be assigned to a community and be constructed in such a matter as to reach the greatest number of Delawareans, including those residing in the Wilmington area,” and 2) “that any license applicant demonstrate a commitment to delivering locally produced programming” responsive to the needs and interests of Delawareans.⁸ Senator Kaufman explains that currently “Delawareans tune predominantly [to] broadcast[ers] out of Philadelphia [, Pennsylvania] and Salisbury, Maryland,” and that these Pennsylvania and Maryland broadcasters “owe only a secondary obligation to address the needs of their Delaware viewers.”⁹ Nave also supports the allotment of a commercial VHF channel to Delaware and states that it “intends to apply to participate in the auction for the channel and, if it is the successful bidder, to promptly construct the station after grant.”¹⁰

6. PMCM states that it “strongly wants to go on record as supportive” of an additional television allocation to the State of Delaware.¹¹ PMCM explains that its “principals have for decades been strong proponents of the expansion of locally-based television” and “for too long the needs of Delaware have been

⁴ While channel *12 is allotted to Wilmington, Delaware, it is reserved for noncommercial educational use. 47 C.F.R. §73.622(i).

⁵ Public Notice, “Freeze on the Filings of Certain TV and DTV Requests for Allotment or Service Area Changes,” 19 FCC Rcd 14810 (MB 2004).

⁶ *Notice* at ¶ 1 (citing U.S. Census Bureau, *Demographic Profiles, Seaford City, Delaware*, <http://censtats.census.gov/cgi-bin/pct/pctProfile.pl> (access date Dec. 9, 2009)).

⁷ Senator Kaufman Comments at 1.

⁸ *Id.*

⁹ *Id.*

¹⁰ Nave Comments at 1.

¹¹ PMCM Comments at 2.

given short shrift by the Philadelphia-based broadcast stations that loom over Delaware's borders."¹² PMCM also states, however, that the Commission must ensure that the channel 5 allocation at Seaford does not cause impermissible interference to PMCM's June 15, 2009 notification, made pursuant to the second sentence of Section 331(a), that it agrees to the reallocation of its full power television station, KJWY(TV), channel 2, Jackson, Wyoming to Wilmington, Delaware.¹³ PMCM asserts that "even if [the Commission] seeks to implement the first sentence of Section 331 through the allotment proposed in the [*Notice*], it must still comply with the mandate of the second sentence of Section 331 as well" and issue PMCM a license for a television station on channel 2 at Wilmington.¹⁴

7. ABC, Fox, and BMC object to the proposal to allot channel 5 to Seaford. ABC, the licensee of WPVI-TV, Philadelphia, Pennsylvania, asserts that "the allocation will prevent WPVI from restoring service to certain of its former analog viewers who lost coverage" on June 12, 2009 when WPVI-TV commenced post-transition operations on digital channel 6.¹⁵ ABC states that it "believes and estimates that it will need to increase its signal strength by approximately 2 decibels" to "restore service to all of its former analog viewers," and by its "calculation, such a power increase would cause additional new interference of more than 1% to the [c]hannel 5 [p]roposal."¹⁶ Next, ABC observes that a number of network television stations in the Northeast are also operating on VHF channels and claims that the allocation of VHF spectrum for a new television station in Delaware could inhibit or preclude these stations from modifying their facilities as necessary to fully restore over-the-air television service to their former analog viewers.¹⁷ Lastly, ABC argues that "the post-DTV transition experiences of television broadcasters in the Northeast corridor operating on low-VHF channels demonstrate that a new station on channel 5 in Seaford will need more than the maximum 10 kW ERP specified in the Commission's rules for Zone I,"¹⁸ and that "even a relatively small power increase by any Seaford [s]tation will cause prohibitive interference" in violation of Section 73.616 of the Commission's rules.¹⁹

¹² *Id.* at 1-2.

¹³ *Id.* at 2-3. By letter dated December 18, 2009, the Media Bureau denied PMCM's request that the Commission reallocate channel 2 from Jackson, Wyoming to Wilmington, Delaware and issue PMCM a corresponding license. *PMCM TV, LLC, c/o Harry F. Cole, Esq.*, DA 09-2601 (MB 2009). PMCM subsequently filed a Petition for Issuance of Writ of Mandamus with the United States Court of Appeals for the District of Columbia Circuit and, on January 19, 2010, a Contingent/ Protective Application for Review and Request for Prompt Related Relief with the Commission. *In re PMCM TV, LLC*, D.C. Cir. Case No. 10-1001 (Jan. 5, 2010); Mot. for Leave to File Supp. to Pet. for Issuance of Writ of Mandamus and Supp., *In re PMCM TV, LLC*, D.C. Cir. Case No. 10-1001 (Jan. 22, 2010). Because our proposal to allot channel 5 to Seaford is not mutually-exclusive with an allotment of channel 2 to Wilmington, Delaware, the outcome of PMCM's appeal of the Media Bureau's December 18, 2009 decision is not pertinent to the instant proceeding.

¹⁴ *Id.* at 4.

¹⁵ ABC Comments at 1.

¹⁶ *Id.* at 4.

¹⁷ *Id.* at 1, 5-6.

¹⁸ *Id.* at 1-2.

¹⁹ *Id.* at 6.

8. Fox, the licensee of WTTG(TV), channel 36, Washington, D.C., submits that as “there is no previous major channel number associated with the proposed allotment, presumably, it would ... be assigned Program and System Information Protocol (“PSIP”) channel 5,” the same PSIP channel that Fox currently uses for WTTG(TV), pursuant to the PSIP Standard.²⁰ Fox explains that due to the proximity of the proposed allotment and its station, the “allotment and assignment of PSIP channel 5 to Seaford, Delaware will likely result in consumers’ tuners and MVPD head-ends unable to receive either WTTG or the proposed Seaford, Delaware allotment or constantly shifting between the two.”²¹ Therefore, Fox “requests that the allotment have a virtual/PSIP channel assigned to it other than channel 5” or that a different channel be allotted to Seaford.²²

9. Finally, BMC objects to the allotment of channel 5 at Seaford because “Channels 5 and 6 have been proposed for FM broadcasting in the *Diversity [Proceeding]*” and argues, “it is critical that the Commission avoid proposing any new [c]hannel 5 allotments” so as not to prejudice the outcome of the *Diversity Proceeding*.²³ Furthermore, BMC asserts that “the VHF spectrum is not suitable for DTV transmission and the Commission should not assume that Congress meant Section 331 [to be] applicable to digital television.”²⁴ BMC also notes that the NPRM did not mention whether any parties had previously expressed an interest in applying for and constructing a new station in Seaford, “which has always been a requirement for the allotment of a new channel,”²⁵ and states that “should a party express an interest in applying for this channel in comments,” BMC will demonstrate in its reply comments that there are other VHF channels available for allotment at Seaford.²⁶

10. **Reply Comments.** BMC, Nave, and PMCM submitted reply comments. BMC reaffirms its

²⁰ Fox Comments at 1. 47 C.F.R. §73.682(d) (incorporated by reference, see §73.8000). Section 73.682(d) requires digital broadcast television signals to comply with ATSC A/65C (“ATSC Program and System Information Protocol for Terrestrial Broadcast and Cable, Revision C With Amendment No. 1, dated May 9, 2006”) (“PSIP Standard”). PSIP is data that is transmitted along with a station’s digital signal and enables DTV receivers to link a station’s RF or major channel with its PSIP or virtual channel number. Digital television stations have both a RF or major channel number and a PSIP or virtual channel number. The RF or major channel number is the channel number allotted to each full-power television station pursuant to Section 73.622(i) of the Rules. The PSIP or virtual channel number is the channel number assigned to each full-power television station pursuant to the PSIP Standard and is the channel number that viewers input into their television sets in order to view a particular television station.

²¹ *Id.* at 1-2.

²² *Id.* at 2.

²³ BMC Comments at 1 (citing *Promoting Diversification of Ownership in the Broadcasting Services*, Report and Order and Third Notice of Proposed Rulemaking, 23 FCC Rcd 5922 (2008) (“*Diversity Proceeding*”). PMCM also comments on the *Diversity Proceeding* proposal to allot channel 5 to FM broadcasting and asserts that “it would be inadvisable at this time to allocate channel 5 to Seaford when it may be subject in the near future to a reallocation.” PMCM Comments at 3.

²⁴ *Id.* at 2.

²⁵ *Id.* at 1.

²⁶ *Id.* at 2.

objection to the allotment of channel 5 at Seaford and states that “either channel 2 or 3 can be allotted to Seaford” consistent with the Commission’s rules.²⁷ Nave, on the other hand, reaffirms its support for the proceeding and also states that it finds BMC’s proposal to allot channel 3 to Seaford as acceptable.²⁸ Finally, PMCM directs its reply comments to BMC’s comments. In doing so, PMCM reaffirms its initial comments, but also insists that “BMC’s suggestion that Section 331 does not apply in the digital era” is incorrect.²⁹ PMCM states that “The statute is not by its terms limited to any transmission format.”³⁰

11. **Discussion.** We believe the public interest will be served by adopting the proposed allotment, as it would provide the State of Delaware with a commercial VHF channel as required by Section 331 of the Communications Act. Channel 5 can be allotted to Seaford, as proposed, in compliance with the principal community coverage requirements of Section 73.625(a) of the Commission’s rules,³¹ at coordinates 38-39-15 N. and 75-36-42 W.

12. In response to Senator Kauffman’s request that the new Delaware VHF allotment “be assigned to a community and be constructed in such a matter as to reach the greatest number of Delawareans, including those residing in the Wilmington area,” the Commission, pursuant to Section 307(b) of the Act, is required to “make such distributions of licenses . . . among the several States and communities as to provide a fair, efficient, and equitable distribution of radio services to each of the same.”³² In order to fulfill this mandate, the Commission has established certain television allotment priorities: “(1) to provide at least one television service to all parts of the United States; (2) to provide each community with at least one television broadcast station; (3) to provide a choice of at least two television services to all parts of the United States; (4) to provide each community with at least two television stations; and (5) to assign any remaining channels to communities based on population, geographic location, and the number of television services available to the community from stations located in other communities.”³³ Wilmington, located in the Philadelphia, Pennsylvania designated market area (“DMA”), is currently served by a strong or moderate signal from 14 full-power television stations,³⁴ while Seaford, located in the Salisbury, Maryland DMA, is presently served by only

²⁷ BMC Reply Comments at 1-2. BMC notes that channels 2 or 3 “would be in conflict with the notification on file from PMCM and BMC does not wish to take a position contrary to that of PMCM.” BMC Reply Comments at 3. BMC explains that it “only offers these alternate channels for Seaford in the event that PMCM is not successful in having its licenses modified for [c]hannels 2 and 3 in Delaware (and New Jersey), respectively.” *Id.*

²⁸ Nave Reply Comments at 1.

²⁹ PMCM Reply Comments at 1-2.

³⁰ *Id.* at 2.

³¹ 47 C.F.R. § 73.625(a).

³² 47 U.S.C. §307(b).

³³ *Amendment of Section 3.606 of the Commission’s Rules and Regulations*, Sixth Report and Order, 41 F.C.C. 148, 167-173 (1952).

³⁴ *DTV Reception Maps*, Enter Location: Wilmington, DE, <http://www.fcc.gov/mb/engineering/maps/> (accessed April 6, 2010).

four full-power stations.³⁵ Therefore, consistent with Section 307(b) and the Commission's long-standing television allotment policies, the allotment of a new channel in southern Delaware, rather than northern Delaware, results in a more equitable distribution of television channels.³⁶

13. With respect to ABC's comments, we recognize that after June 12, 2009, many former analog viewers of WPVI(TV) were unable to receive the station's signal on digital channel 6, and that even with an increase in the station's effective radiated power, some viewers still are not able to view the station's over-the-air signal. In its comments, ABC states that on-going field studies indicate that the station may need to increase its power in order to restore service to its former analog viewers, and this power increase may result in interference to the new Seaford allotment. In connection with the DTV transition, the Commission has emphasized that "It is a priority of the Commission that all Americans continue to receive the television broadcast service that they are accustomed to receiving following the digital transition."³⁷ Accordingly, we will allot channel 5 at Seaford subject to the condition that any licensee must accept interference of up to 2% of the population within the allotment's DTV service area from WPVI(TV).³⁸

14. We disagree with ABC that the allotment of channel 5 at Seaford will impact the ability of other Northeast television stations to seek station modifications to attempt to restore service to former analog viewers who are experiencing difficulty viewing those stations' post-transition VHF digital signals. Except for WPVI(TV), none of the New York, Maryland, Washington, D.C. or Pennsylvania stations identified by ABC in its comments as potentially affected are on channels 5 or 6, and the proposed Seaford allotment complies with all distance separation requirements.³⁹ Thus, the allotment would have no preclusive impact on any requests by these stations to increase power to resolve VHF reception issues. We also disagree with ABC that the channel 5 proposal cannot be implemented in accordance with our interference rules. As proposed, the allotment fully complies with our interference rules and principal community coverage requirements, and a future application

³⁵ *DTV Reception Maps*, Enter Location: Seaford, DE, <http://www.fcc.gov/mb/engineering/maps/> (accessed April 6, 2010).

³⁶ Senator Kauffman also requests that any license applicant for the channel 5 allotment at Seaford demonstrate a commitment to delivering locally produced programming that is responsive to the needs and interests of Delaware residents. Under the public interest standard in the Communications Act, the ultimate licensee of the channel 5 allotment at Seaford will have an obligation to be aware of the important local issues in the communities that the station serves and to present programming that will inform its audiences about such issues. See *Ltr. from James J. Brown, Deputy Chief, Video Division, Media Bureau, to Mr. Stephen H. Macek, WGN Continental Broadcasting Company, c/o R. Clark Wadlow, Esq.*, 22 FCC Rcd 20917 (Vid. Div. 2007); *Application of National Broadcasting Co., Inc, For Renewal of License of Station WNBC(TV), New York, New York*, Memorandum Opinion and Order and Notice of Apparent Liability, 14 FCC Rcd 9026, 9031 (MB 1999); *The Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, Report and Order, 98 F.C.C. 2d 1075, ¶ 32 (1984).

³⁷ *Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Replacement Digital Low Power Television Translator Stations*, Report and Order, 24 FCC Rcd 5931, ¶ 3 (2009).

³⁸ We emphasize that the imposition of this condition on the Seaford television allotment does not relieve ABC from compliance with our interference protection rules with respect to previously proposed or licensed facilities of other television stations.

³⁹ 47 C.F.R. § 73.623(d).

for a construction permit for the channel 5 facility will be required to comply with our interference rules and policies.

15. While Fox assumes in its comments that a station allotted to RF channel 5 at Seaford would be assigned PSIP channel 5, the PSIP Standard does not require that result. The PSIP Standard “guarantee[s] 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 area.”⁴⁰ It appears there may be overlapping DTV service area contours between WTTG(TV), Washington, D.C. and the channel 5 allotment at Seaford. Therefore, pursuant to the PSIP Standard, the channel 5 allotment at Seaford will be assigned PSIP channel 36.⁴¹

16. While BMC argues that the Commission should avoid proposing new channel allotments or accepting applications on channels 5 and 6 given the pendency of the *Diversity Proceeding* proposal to reallocate channels 5 and 6 to the FM radio service, that proceeding remains pending and the Commission did not impose a freeze on the use of channels 5 and 6 in connection with the *Diversity Proceeding*. In addition, whether the allotment of channel 5 for commercial television use at Seaford would actually preclude any potential radio applicants if that spectrum were reallocated to the FM radio service is speculative. Should channels 5 and 6 be reallocated to the FM radio service in the future, and the Commission requires television licensees to vacate channels 5 and 6, we will consider a channel substitution at Seaford at that time.⁴² Finally, we are not persuaded by BMC’s assertion that Section 331 does not apply to digital television. Although we recognize that the technical advantages of analog VHF channels that existed at the time Section 331 was adopted no longer exist in the current digital environment, Congress has not yet repealed the statute. Therefore, as the language of Section 331 on its face is not limited to any specific transmission format, the Commission is required to follow the statute’s mandate by allotting at least one commercial VHF channel to every state “if technically feasible.” Furthermore, the channel 5 allotment is currently in compliance with all of the Commission’s Rules.

17. **Ordering Clauses.** Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission’s rules, IT IS ORDERED, That effective 30 days after the date of publication of this Report and Order in the Federal Register, the DTV Table of Allotments, Section 73.622(i) of the Commission’s rules, IS AMENDED, with respect to the community listed below, to read as follows:

<u>City and State</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Seaford, Delaware	*44	5, *44

⁴⁰ PSIP Standard at Annex B, §1, No. 8.

⁴¹ Channel 36 is the DTV RF channel number licensed to WTTG(TV), Washington, D.C.

⁴² BMC’s counterproposal to allot either channel 2 or 3 to Seaford is not entitled to consideration as BMC did not advance its counterproposal until the reply comment stage of this proceeding. Section 1.420(d) specially states that “Counterproposals shall be advances in initial comments only and will not be considered if they are advanced in reply comments.” 47 C.F.R. 1.420(d).

18. IT IS FURTHER ORDERED, That any licensee of the channel 5 allotment at Seaford will be subject to the condition that it must accept interference of up to 2% of the population within the allotment's DTV service area from WPVI(TV), Philadelphia, Pennsylvania.

19. The Commission will send a copy of this Report and Order in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

20. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

21. For further information concerning the proceeding listed above, contact Adrienne Y. Denysyk, Media Bureau, (202) 418-1600.

FEDERAL COMMUNICATIONS COMMISSION

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Media Bureau