

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

)	
In re PMCM TV, LLC,)	No. 17-1190
Petitioner.)	
)	

**OPPOSITION OF THE FEDERAL COMMUNICATIONS COMMISSION
TO PETITION FOR ISSUANCE OF WRIT OF MANDAMUS**

This case concerns pending proceedings before the Federal Communications Commission involving a dispute over the channel position of WJLP—a New Jersey television station owned by PMCM TV, LLC (“PMCM”)—on cable systems and on televisions receiving over-the-air signals in the New York City Designated Market Area (“DMA”).¹ For the fourth time, PMCM has petitioned for a writ of mandamus pertaining to those proceedings. On three previous occasions, this Court declined to grant the extraordinary relief requested by PMCM.² The Court should do likewise here.

¹ A DMA is a market designation developed by Nielsen Media Research using “audience survey information from cable and noncable households to determine the assignment of counties to local television markets based on local stations’ respective viewer shares.” *Costa de Oro Television, Inc. v. FCC*, 294 F.3d 123, 125 (D.C. Cir. 2002).

² See *In re PMCM TV, LLC*, No. 14-1238 (D.C. Cir. Feb. 27, 2015) (per curiam) (“*February 2015 Mandamus Denial Order*”); *In re PMCM TV, LLC*, No. 15-1058 (D.C. Cir. Sept. 23, 2015) (per curiam) (“*September 2015 Mandamus Denial Order*”); *In re PMCM TV, LLC*, No. 16-1380 (D.C. Cir. Apr. 4, 2017) (per curiam) (“*April 2017 Mandamus Denial Order*”).

PMCM contends that it is entitled to mandamus because the FCC purportedly has unreasonably delayed action on PMCM's pending applications for review of certain orders issued by the Commission's Media Bureau. Pet. 19-30. But this proceeding does not involve the sort of agency delay that is "so egregious as to warrant mandamus." *Am. Hosp. Ass'n v. Burwell*, 812 F.3d 183, 189-90 (D.C. Cir. 2016) (quoting *Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984) ("*TRAC*"). Of the four applications for review filed by PMCM, two have become moot as a result of agency action; the third has been pending for about two years; and the fourth has been pending for about one year. Moreover, draft orders addressing each of PMCM's pending applications have been circulated by the FCC's Chairman to the other Commissioners, and those orders are now ripe for a vote. Consequently, mandamus is unwarranted.

PMCM also asks the Court to direct the Commission, "pending final proceedings in this matter, to immediately restore WJLP to channel 3 for cable positioning, virtual channel, and all other purposes." Pet. 29. As we explain below, this request for relief rests on a fundamental misreading of 47 U.S.C. § 1452(g). That statute does not compel the sort of extraordinary remedy sought by PMCM. Indeed, this Court rejected a similar request by PMCM more than two years ago. *See February 2015 Mandamus Denial Order.*

The “drastic” remedy of mandamus “is available only in extraordinary situations.” *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc) (internal quotation marks omitted). That drastic remedy is unwarranted in this case.

PMCM’s petition for a writ of mandamus should be denied.

BACKGROUND

This case involves a dispute regarding which channel position PMCM’s newly launched New Jersey television station will occupy on cable systems in the New York DMA and a related dispute regarding PMCM’s so-called “virtual” channel number (the number viewers use to receive the broadcast signal over the air, *i.e.*, on a television set that does not receive cable or satellite service). PMCM maintains that its station (WJLP) is entitled to be carried on cable channel 3 and to use “virtual” channel 3 for over-the-air broadcasting. As we explain below, the FCC’s Media Bureau has issued orders finding that WJLP is entitled to cable carriage on channel 33 and to use virtual channel 33 for over-the-air service. PMCM has filed applications for Commission review of the Bureau’s orders.

Notably, the pendency of these applications has not prevented PMCM’s station from obtaining cable carriage or broadcasting its signal over the air. The record in these proceedings indicates that since September 2015, WJLP has been

carried on channel 33 on the major cable systems serving the New York DMA.³

Given the widespread cable carriage of WJLP over the last two years, there is no basis for PMCM's unsubstantiated assertion that “*millions* of people in the New York market have been denied access to WJLP's signal for years” while PMCM's applications for review have been pending. Pet. 25.⁴

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

⁴ PMCM has been broadcasting WJLP's signal over the air since September 2014. See *Request for Declaratory Ruling by Meredith Corp. And “Alternative PSIP Proposal” By PMCM TV, LLC for WJLP (Formerly KVVV(TV)), Middletown Township, New Jersey*, 30 FCC Rcd 6078, 6084 ¶ 14 (Med. Bur. 2015) (“*PSIP Declaratory Ruling*”). Insofar as PMCM asserts that WJLP's “use of channel 33 caused multiple technical problems” (Pet. 28), it appears to be referring to the fact that after the transition to digital television in 2009, certain television receivers do not display the correct over-the-air station signal when some stations' channel numbers are entered. See Pet. 28 n.11. This issue does not occur when consumers receive television programming via cable or satellite television services. See <http://wjlp3.com> (listing cable and satellite services that carry WJLP's programming) (visited Aug. 14, 2017). Furthermore, there is a simple fix to the problem cited by PMCM. Over-the-air viewers of WJLP (*i.e.*, viewers who do not receive WJLP via cable or satellite services) “can avoid the prospect of mistuning by tuning in the channel as 33.1 rather than scrolling to 33.” Letter from Joshua N. Pila, Counsel for Meredith, *et al.*, to Marlene H. Dortch, FCC, MB Docket No. 14-

A. Mandatory Cable Carriage Under The Communications Act

Under Section 614 of the Communications Act of 1934, as amended, 47 U.S.C. § 534, and the FCC's implementing rules, *see* 47 C.F.R. § 76.51 *et seq.*, commercial television broadcast stations may assert mandatory rights to carriage on cable systems in their respective markets. *See* 47 U.S.C. § 534(a). A station may assert these mandatory carriage (or "must-carry") rights in the market defined by Nielsen Media Research as the station's "Designated Market Area." 47 C.F.R. § 76.55(e)(2).

When a commercial television station asserts must-carry rights, it may elect one of four possible channel positioning options. *See* 47 U.S.C. § 534(b)(6); 47 C.F.R. § 76.57(a), (d). Most relevant here, a station 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); *accord* 47 C.F.R. § 76.57(a).

A new commercial television station wishing to assert must-carry rights must notify cable operators in its market of that election no later than "30 days after commencing [to] broadcast." 47 C.F.R. § 76.64(f)(4); *see id.* § 76.64(h).

150, at 2 (filed Feb. 29, 2016); *see also* Letter from Joshua N. Pila, Counsel for Meredith, and John W. Bagwell, Counsel for CBS, to Marlene Dortch, FCC, MB Docket No. 14-150, at 2 (filed Dec. 1, 2015) (testing verified that when the equipment in question is tuned to channel 33.1, it receives the signal for WJLP in the New York DMA). WJLP's website notifies over-the-air viewers that the station is located at channel 33.1. *See* <http://wjlp3.com> (visited Aug. 14, 2017).

Ordinarily, a must-carry election “take[s] effect 90 days after it is made.” *Id.*

§ 76.64(f)(4). Thus, in the usual case, a cable operator that receives a must-carry notice from a new station must begin carrying the station as requested within 90 days or risk the prospect that the station will seek remedial action from the FCC as provided under Section 614(d) of the Act, 47 U.S.C. § 534(d), and Section 76.61 of the FCC’s rules, 47 C.F.R. § 76.61. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 2965, 2993-96 ¶¶ 115-128 (1993).

“Whenever a local commercial television station believes that a cable operator has failed to meet its [cable carriage] obligations,” the “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 other requirements of [Section 614].” 47 U.S.C. § 534(d)(1). “The cable operator” has “30 days” from “such written notification” to “respond in writing ... and either commence to carry the signal of [the requesting] station in accordance with the terms requested or state its reason for believing that it is not obligated” to do so. *Id.* A station that is formally “denied” its requested cable “carriage or channel positioning ... may obtain review of such denial by filing a complaint with the [FCC].” *Id.*

B. Channel Positioning In The Digital Television Era

Historically, in the age of analog broadcasting, there was no distinction between the physical “radio frequency” channel over which a U.S. television station broadcast its programming and the channel to which viewers without cable or satellite service tuned their television sets to receive the station’s programming over the air. That changed with the nation’s transition to digital television in 2009.

Today, the channel on which over-the-air viewers receive a station’s programming is determined by a two-part numerical code that all full power television stations transmit within their digital broadcasts. That code is known as a “Program System and Information Protocol” (or “PSIP”) channel. *See PSIP Declaratory Ruling*, 30 FCC Rcd at 6079-80 ¶¶ 4-6.

A station’s PSIP channel consists of two numbers. *See PSIP Declaratory Ruling*, 30 FCC Rcd at 6079-80 ¶ 5. The first of these numbers—the “major” channel number—is the channel number viewers see on their television receiver when they view a digital television station over-the-air. This “major channel” is often called the station’s “virtual channel” because it can be set irrespective of the radio frequency channel over which the station broadcasts.⁵ The second number in the PSIP channel—the “minor” channel number—identifies one program service

⁵ *See Media Bureau Seeks Comment on Request for Declaratory Ruling by Meredith Corp. and “Alternative PSIP Proposal” by PMCM TV, LLC for KVVV(TV), Middletown Township, New Jersey*, 29 FCC Rcd 10556, 10556 n.1 (Med. Bur. 2014) (“Public Notice”).

within the group of services defined by the major channel number. For example, a station with PSIP channel 12.3 has a major channel number of 12 and a minor channel number of 3. Under Section 73.682(d) of the FCC's rules, 47 C.F.R. § 73.682(d), absent a waiver, a station's PSIP channel must be set based on privately developed protocols that the rule incorporates by reference. *See PSIP Declaratory Ruling*, 30 FCC Rcd at 6080 ¶ 6.

Because the channel on which over-the-air viewers receive a station's programming is no longer tied to the radio frequency channel on which the station physically broadcasts, the FCC has "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 in the digital era. *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 Commission has explained that "any station carried pursuant to mandatory carriage may demand carriage on its major channel number as broadcast in [its] PSIP." *Id.*; *see also id.* at 14259 ¶ 15 (a "cable operator can identify the correct channel location" for must-carry purposes "by reference to the PSIP"); *Carriage of Digital Television Broadcast Signals*, 16 FCC Rcd 2598, 2635 ¶ 83 (2001) ("*Digital Television Order*") ("the channel mapping protocols contained in the PSIP identification stream adequately address [cable channel]

location issues” in the digital era); 47 C.F.R. § 76.57(c) (“With respect to digital signals of a ... 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”).

Acting on delegated authority, the FCC’s Media Bureau has interpreted the full Commission’s guidance on this subject to mean that, in digital broadcasting, a station’s statutory right to demand carriage on its “over-the-air” channel is limited to demanding carriage on its PSIP major channel. *KSQA, LLC v. Cox Cable Commc’ns, Inc.*, 27 FCC Rcd 13185, 13186-87 ¶ 4 (Media Bur. 2012); *see also Gray Television Licensee, LLC v. Zito Media, LP*, 28 FCC Rcd 10780, 10781 n.10 (Media Bur. 2013); *Mauna Kea Broad. Co. v. Time Warner Entm’t Co.*, 27 FCC Rcd 13188, 13198 ¶ 17 (Media Bur. 2012). The Bureau has expressly rejected the notion that a station has the option of demanding carriage on either the cable channel corresponding to its radio frequency channel or the cable channel corresponding to its PSIP major channel. *See KSQA*, 27 FCC Rcd at 13186-87 ¶ 4.

C. Reallocation Of PMCM’s Station From Nevada To New Jersey And PMCM’s Dispute With Meredith Over Channel Positioning

In 2008, PMCM became the licensee of station KVNV(TV), radio frequency channel 3, in Ely, Nevada. *See PSIP Declaratory Ruling*, 30 FCC Rcd at 6081 ¶ 9. Shortly thereafter, as part of the 2009 transition to digital television, New Jersey’s only commercial very high frequency (“VHF”) television station vacated radio

frequency channel 9 in exchange for ultra-high frequency (“UHF”) spectrum. *See Reallocation of Channel 2 from Jackson, Wyoming to Wilmington, Delaware*, 26 FCC Rcd 13696, 13699 ¶ 6 (2011), *rev’d*, *PMCM TV, LLC v. FCC*, 701 F.3d 380 (D.C. Cir. 2012).⁶ “As a result, New Jersey ... had no VHF stations.” *PMCM TV*, 701 F.3d at 383.

In light of that development, PMCM—invoking Section 331(a) of the Communications Act, 47 U.S.C. § 331(a)—sought to have the FCC reallocate VHF channel 3 from Ely, Nevada, to Middletown Township, New Jersey, which is in the New York DMA. The Commission initially concluded that the statute did not require that reallocation. *See PMCM TV*, 701 F.3d at 383. On review, this Court reversed. *See id.* at 385. Pursuant to the Court’s mandate, the FCC granted the reallocation of radio frequency channel 3 that PMCM had requested. *Reallocation of Channel 3 from Ely, Nevada to Middletown Township, New Jersey*, 28 FCC Rcd 2825 (Media Bur. 2013).

⁶ “VHF” and “UHF” specify the radio frequency range on which a television station transmits its signal. *See* Newton’s Telecom Dictionary 1263 (28th ed. 2014) (“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”). In the analog era, VHF channels “enjoyed substantial technical advantages over other broadcasting methods.” *PMCM TV*, 701 F.3d at 381. But VHF spectrum “is poorly suited for digital broadcasting” in some instances; consequently, “when the United States transitioned from analog to digital television broadcasting,” the FCC “allowed several stations”—including the only VHF station in New Jersey—“to substitute other channels for their VHF allotments.” *Id.* at 382-83.

In May 2013, when PMCM applied to the FCC for a construction permit to build a New York City broadcast facility for its New Jersey station, Meredith Corporation, which operates a television station using major channel 3 in the Hartford-New Haven, Connecticut DMA, objected to PMCM's use of PSIP major channel 3. The service contour of Meredith's station overlaps with that of PMCM's station. *See PSIP Declaratory Ruling*, 30 FCC Rcd at 6082-83 ¶ 12. Meredith's station has identified itself to viewers as "Channel 3" for more than half a century. *See id.* at 6084-85 ¶ 15. Concerned that PMCM's use of major channel 3 could cause consumer confusion and dilute the established brand of Meredith's station, Meredith argued that PMCM's station should be required to use major channel 33 instead. *See id.* at 6083 ¶ 12, 6086 ¶ 20.

In April 2014, the Media Bureau granted PMCM's construction permit application without resolving the question of PMCM's major channel assignment. The Bureau explained that a station's virtual channel designation is typically made in a separate proceeding. Meredith petitioned for reconsideration and requested a declaratory ruling that PMCM's station be assigned virtual channel 33. *See PSIP Declaratory Ruling*, 30 FCC Rcd at 6083 ¶ 12.

PMCM subsequently submitted to the FCC an "Alternative PSIP Proposal" under which major 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 at 10556-57. On September 12, 2014, the Media Bureau issued a public notice opening a docketed proceeding to receive public comment on Meredith's request for declaratory ruling and PMCM's alternative PSIP proposal. *Id.* at 10556-58.

D. PMCM's Must-Carry Election

On June 6, 2014, PMCM notified cable operators in the New York DMA that its television station would commence operation in August 2014, and that it was electing mandatory carriage on channel 3. *See PSIP Declaratory Ruling*, 30 FCC Rcd at 6083 ¶ 13. Under Section 76.64(f)(4) of the FCC's rules, 47 C.F.R. § 76.64(f)(4), PMCM's must-carry election was scheduled to take effect 90 days later, on September 4, 2014. *See Tara M. Corvo, Esq.*, 29 FCC Rcd 9102, 9103 (Media Bur. 2014) ("*Cable Deferral Order*").

At the cable operators' request, the Media Bureau in July 2014 waived Section 76.64(f)(4) to allow the cable operators to defer implementing PMCM's must-carry and channel position election until 90 days from the date of a final decision on the virtual channel designation for PMCM's station. *Cable Deferral Order*, 29 FCC Rcd at 9105. The Bureau reasoned that it made little sense to require cable operators to position PMCM's station on virtual channel 3—thereby displacing stations that already occupied that channel—until the Bureau issued a

ruling regarding PMCM's virtual channel assignment. *Id.* at 9104-05. PMCM filed an application for Commission review of the *Cable Deferral Order*.

E. PMCM's 2014 Mandamus Petition

In September 2014, PMCM completed construction of its New York facility and commenced broadcasting under "program test" authority. Shortly thereafter, several incumbent stations jointly complained to the FCC that PMCM's station, now known as WJLP, was operating without authorization on PSIP channel 3.10. By letter dated October 23, 2014, the Media Bureau ordered WJLP to use PSIP major channel 33 on an interim basis until the Bureau resolved PMCM's dispute with Meredith over the use of major channel 3. *See Donald J. Evans, Esq.*, 29 FCC Rcd 12733 (Media Bur. 2014). When PMCM ignored that order, the Bureau directed PMCM to comply or have its program test authority suspended. *See PSIP Declaratory Ruling*, 30 FCC Rcd at 6084 ¶ 14.

In response, PMCM filed an emergency petition for writ of mandamus (No. 14-1238) asking this Court to direct the FCC to rescind the Bureau's suspension of WJLP's program test authority. Among other things, PMCM claimed that it had a clear right to mandamus relief under 47 U.S.C. § 1452(g).⁷ Section 1452(g)

⁷ Section 1452(g) was enacted as part of the Spectrum Act (*i.e.*, Title VI of the Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156). The Spectrum Act "responds to the rapidly growing demand for mobile broadband services" by authorizing the FCC "to reallocate a portion of the licensed airwaves from television broadcasters to mobile broadband providers" through a

prohibited the FCC, during the period in question, “from ‘involuntarily modify[ing] the spectrum usage rights of a broadcast television licensee or reassign[ing] such a licensee to another television channel.’” Mandamus Petition, No. 14-1238, at 3 (quoting 47 U.S.C. § 1452(g)(1)(A)). PMCM argued that the Bureau violated Section 1452(g) by reassigning WJLP’s major channel number from 3 to 33. *See* Mandamus Petition, No. 14-1238, at 3-4, 6, 18; Consolidated Reply, No. 14-1238, at 8-10.

The Court denied the mandamus petition, declaring that the Bureau could permissibly order PMCM to use channel 33 as “an interim measure intended to preserve the status quo ante in the relevant service areas” until the agency assigned a virtual channel to WJLP. *February 2015 Mandamus Denial Order*. The Court held that PMCM had not “demonstrated that it has a clear and indisputable right to relief” under the mandate in *PMCM TV* or “any other relevant source of law,” including 47 U.S.C. § 1452(g). *Id.* (internal quotation marks omitted). PMCM thereafter agreed to use major channel 33 on an interim basis until the Media Bureau designated WJLP’s virtual channel.

F. PMCM’s 2015 Mandamus Petition

multi-stage incentive auction. *Mako Commc’ns, LLC v. FCC*, 835 F.3d 146, 147 (D.C. Cir. 2016); *see also Nat’l Ass’n of Broadcasters v. FCC*, 789 F.3d 165, 168-69 (D.C. Cir. 2015) (“NAB”). This incentive auction commenced in the first half of 2016. It concluded in April 2017. *See Incentive Auction Closing and Channel Reassignment Public Notice*, 32 FCC Rcd 2786 (2017) (“*Auction Closing Notice*”).

Less than a month after the Court denied its petition in No. 14-1238, PMCM filed yet another mandamus petition (No. 15-1058). This time, it asked the Court to direct the FCC to “act[] immediately” on PMCM’s application for review of the *Cable Deferral Order*, which had been pending for less than seven months. Mandamus Petition, No. 15-1058, at 26. PMCM asserted that the dispute over WJLP’s virtual channel did not justify any delay in implementing PMCM’s must-carry election. *Id.* at 13. It maintained that WJLP had “a clear right” to carriage on cable channel 3 under 47 U.S.C. § 534(b)(6) because “WJLP broadcasts over the air on Channel 3.” *Id.* at 12. PMCM therefore sought a writ of mandamus compelling the FCC to order carriage of WJLP on cable channel 3 “on all cable systems as to which PMCM ... has elected must-carry status.” *Id.* at 26.

On June 5, 2015, while the mandamus petition in No. 15-1058 was still pending, the Media Bureau issued an order granting Meredith’s request for declaratory ruling, denying PMCM’s alternative PSIP proposal, and ordering PMCM to operate WJLP using virtual channel 33. *PSIP Declaratory Ruling*, 30 FCC Rcd at 6078 ¶ 2. That same day, in a letter sent to PMCM and the New York cable operators, the Bureau made clear that the *PSIP Declaratory Ruling* terminated the deferral period established by the *Cable Deferral Order*, and that the cable operators now had 90 days (*i.e.*, until September 3, 2015) to respond to PMCM’s original must-carry request for carriage on cable channel 3. *See Request*

to *Defer Mandatory Carriage of KVNV(TV), Middletown Township, New Jersey*, 30 FCC Rcd 6116, 6117 (Media Bur. 2015) (*June 2015 Letter*). Under the terms of the letter, PMCM had the option of making a new must-carry and channel position election “to pursue carriage for WJLP on cable channel 33,” the virtual channel that the Bureau had assigned to the station. *Id.*

In July 2015, PMCM filed applications for Commission review of the *PSIP Declaratory Ruling* and the *June Letter*. Those applications remain pending.

On September 23, 2015, the Court dismissed the mandamus petition in No. 15-1058 as moot to the extent PMCM sought “an immediate ruling” on its application for review of the *Cable Deferral Order*. *September 2015 Mandamus Denial Order*. The Court explained that “action on the application for review” was “no longer needed” in light of the *PSIP Declaratory Ruling*. *Id.* It also denied the mandamus petition to the extent PMCM sought to “compel[] the Commission to order that [WJLP] be carried on Channel 3 on all cable systems as to which [PMCM] has elected must-carry status.” *Id.* The Court held that PMCM had “not demonstrated a clear and indisputable right to such relief.” *Id.* (internal quotation marks omitted).

G. PMCM’s Must-Carry Complaints

After receiving the *June Letter*, PMCM opted to continue pursuing carriage for WJLP on channel 3. In the fall of 2015, three cable operators—RCN Telecom

Services, LLC, Service Electric Cable TV of New Jersey Inc., and Time Warner Cable Inc.—declined PMCM’s request for carriage on channel 3. On January 19, 2016, PMCM filed must-carry complaints against these cable operators, asking the FCC to order carriage of WJLP on channel 3.

Ruling on PMCM’s must-carry complaints within 120 days of their filing (in accordance with 47 U.S.C. § 534(d)(3)), the Media Bureau denied the complaints on May 17, 2016. *See PMCM TV, LLC v. RCN Telecom Services, LLC*, 31 FCC Rcd 5224 (Media Bur. 2016); *PMCM TV, LLC v. Service Electric Cable TV of New Jersey Inc.*, 31 FCC Rcd 5230 (Media Bur. 2016); *PMCM TV, LLC v. Time Warner Cable Inc.*, 31 FCC Rcd 5236 (Media Bur. 2016). (We will refer to these three orders collectively as the *Cable Carriage Orders*.) The Bureau rejected PMCM’s argument that WJLP was entitled to carriage on cable channel 3 because the station broadcasts over radio frequency channel 3. The Bureau noted that in the *2008 Declaratory Order*, “the Commission explained that ‘Section 76.57(c) [of the FCC’s rules] should be read as clarifying 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.’” *PMCM v. RCN*, 31 FCC Rcd at 5227 ¶ 6 (quoting *2008 Declaratory Order*, 23 FCC Rcd at 14259 ¶ 16). “Thus,” the Bureau concluded, “the Commission made clear that after the digital transition, a must-carry station’s carriage rights attach to

its PSIP major channel number rather than its [radio frequency] channel number.” *Id.*; see also *PMCM v. Service Electric*, 31 FCC Rcd at 5233 ¶ 6; *PMCM v. Time Warner*, 31 FCC Rcd at 5240 ¶ 8.

In light of the 2008 *Declaratory Order*, the Bureau determined that WJLP was “not entitled to be carried on channel 3” of a cable system unless PMCM and the cable operator reached “an agreement for carriage on that channel.” *PMCM v. RCN*, 31 FCC Rcd at 5228 ¶ 7. Absent such an agreement, the Bureau found that “PMCM’s channel positioning rights for WJLP” under 47 U.S.C. § 534 “attach only to its major channel number as carried in its PSIP, namely channel 33.” *Id.*; see also *PMCM v. Service Electric*, 31 FCC Rcd at 5234-35 ¶ 7; *PMCM v. Time Warner*, 31 FCC Rcd at 5241 ¶ 9.

On June 10, 2016, PMCM filed a consolidated application for review of the *Cable Carriage Orders*. Service Electric and Time Warner filed oppositions to PMCM’s application for review on June 27, 2016. PMCM filed a consolidated reply to these oppositions on July 6, 2016. The Commission has not yet acted on PMCM’s application for review of the *Cable Carriage Orders*.

H. PMCM’s 2016 Mandamus Petition

On October 31, 2016, PMCM filed a third mandamus petition pertaining to its channel dispute with Meredith. Once more, PMCM asserted that it had a statutory right to carriage of WJLP on cable channel 3 under 47 U.S.C.

§§ 534(b)(6) and 1452(g). Once more, the Court denied PMCM's request for mandamus relief. *In re PMCM TV, LLC*, No. 16-1380 (D.C. Cir. Apr. 4, 2017) (per curiam) (“*April 2017 Mandamus Denial Order*”). Noting that PMCM had “filed applications for review with the Commission seeking the same relief” it requested in its mandamus petition, the Court ruled that PMCM had “failed to show that the statutory process providing for administrative and judicial review set forth in 47 U.S.C. §§ 155(c)(4) and 402(a) is not an adequate remedy.” *Id.* The Court also rejected PMCM's assertion that “the Commission has unreasonably delayed in acting on the applications for review.” *Id.* The Court stated that its denial of PMCM's claim of unreasonable delay was “without prejudice to renewal in the event of additional significant delay.” *Id.*

ARGUMENT

THE PETITION SHOULD BE DENIED

The “drastic” remedy of mandamus “is available only in extraordinary situations” and “is hardly ever granted.” *Cheney*, 406 F.3d at 729 (internal quotation marks omitted). Where (as here) a party seeks mandamus on the ground that an agency has unreasonably delayed action, the petitioner must demonstrate that the agency's delay is “so egregious as to warrant mandamus.” *Am. Hosp. Ass'n*, 812 F.3d at 189-90 (internal quotation marks omitted). PMCM has failed to make that showing here.

The longest pending application in this case—PMCM’s application for review of the *Cable Deferral Order*—was filed in August 2014. *See* Pet., Addendum B. But with the issuance of the *PSIP Declaratory Ruling* in June 2015, the *Cable Deferral Order* ceased to be in effect. Consequently, as this Court noted in September 2015, “action on the application for review” of the *Cable Deferral Order* “is no longer needed.” *September 2015 Mandamus Denial Order*.

Likewise, once the Bureau adopted the *PSIP Declaratory Ruling*, its previous order temporarily assigning virtual channel 33 to WJLP—*Donald J. Evans, Esq.*, 29 FCC Rcd at 12733—became moot. Thus, it was no longer necessary for the Commission to act on PMCM’s November 2014 application for review of the Bureau’s temporary assignment order. Mandamus relief is plainly unwarranted with respect to the two applications that have become moot.

At this point, only two of PMCM’s applications for review concern live issues. The application for review of the *PSIP Declaratory Ruling* has been pending for about two years (since July 2015). And the application for review of the Bureau’s *Cable Carriage Orders* has been pending for about a year (since June 2016). These periods of agency deliberation do not constitute the sort of “unreasonable delay” that would warrant the extraordinary remedy of mandamus. *See In re Monroe Commc’ns Corp.*, 840 F.2d 942, 945-47 (D.C. Cir. 1988) (delay

of several years fell “so short of egregious” that it did not justify mandamus); *TRAC*, 750 F.2d at 80-81 (delays of two and five years did not warrant mandamus).

In any event, the Commission is moving toward completion of the pending proceedings. On August 21, 2017, the FCC’s Chairman circulated to the other Commissioners draft orders addressing each of PMCM’s applications for review. Those orders are now ripe for a vote. The Commission’s progress in these proceedings obviates any need for mandamus.

PMCM suggests that if these proceedings are not resolved before the next must-carry election deadline (October 2, 2017), PMCM’s efforts to obtain carriage on cable channel 3 “will likely be frustrated for another three-year election cycle.” Pet. 19. But it is far from clear that PMCM would be foreclosed from obtaining relief for the next three years if the Commission or the Court later determines that WJLP is entitled to carriage on cable channel 3. The Commission’s rules do not prohibit mid-cycle must-carry elections in all circumstances.⁸

The Court should also deny PMCM’s request “that the Commission ... be ordered, pending final proceedings in this matter, to immediately restore WJLP to

⁸ See, e.g., 47 C.F.R. §76.64(f)(4) (new broadcasters may make a must-carry election in the middle of a three-year cycle, “any time between 60 days prior to commencing broadcast and 30 days after commencing broadcast”); *id.* § 76.64(f)(5) (a broadcaster may make a mid-cycle must-carry election if the FCC modifies the broadcaster’s market for must-carry purposes). In addition, “[a]ny provision of the [FCC’s] rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.” 47 C.F.R. § 1.3.

channel 3 for cable positioning, virtual channel, and all other purposes.” Pet. 29.

PMCM argues that it is entitled to such extraordinary relief because “Section 1452(g) [of the Spectrum Act] protects PMCM’s channel from being changed as of February, 2012.” *Id.* The Court has already considered and rejected that argument.

When the Media Bureau temporarily assigned virtual channel 33 to WJLP in the fall of 2014, PMCM maintained in a mandamus petition that it had a right to virtual channel 3 under Section 1452(g). The Court disagreed. In denying PMCM’s 2014 mandamus petition, the Court held that PMCM had not “demonstrated that it has a clear and indisputable right to relief” under Section 1452(g). *February 2015 Mandamus Denial Order* (internal quotation marks omitted).

In attempting to rely on Section 1452(g), PMCM misconstrues the statute. As its name denotes, the Spectrum Act is concerned with the use of spectrum. “Congress, in the Spectrum Act, authorized the FCC to hold an incentive auction to encourage broadcasters to relinquish their spectrum rights [to mobile broadband providers] in exchange for incentive payments.” *NAB*, 789 F.3d at 169-70. Section 1452(g)(1)(A) pertains to the “spectrum usage rights” that broadcasters may choose to relinquish in the incentive auction. Those rights are associated with a television station’s radio frequency channel, *not* its virtual channel. Section 1452(g) “does not concern virtual channel assignments, which have no bearing on

a station's spectrum usage rights on its [radio frequency] channel." *PSIP*

Declaratory Ruling, 30 FCC Rcd at 6100 ¶ 49.

The FCC has expressly committed to preserve PMCM's spectrum usage rights by exercising its discretion under 47 U.S.C. § 1452(b)(2) "to protect PMCM's coverage area and population served based on its [radio frequency] channel 3 facilities as reflected in its authorized construction permit." *PSIP Declaratory Ruling*, 30 FCC Rcd at 6101 ¶ 49 (citing *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd 6567, 6666 ¶¶ 221-222 (2014)). The Media Bureau orders to which PMCM objects do not deviate from that commitment. None of those orders has altered either the coverage area or the population served by WJLP, which continues to broadcast on radio frequency channel 3.

Although PMCM asserts that the Media Bureau changed WJLP's "channel" from 3 to 33 (Pet. 9-10), the Bureau's assignment of virtual channel 33 to WJLP did *not* change either the broadcast spectrum allocated for the station's broadcasts—*i.e.*, radio frequency channel 3—or the station's right to use that spectrum. The Bureau did not violate Section 1452(g) by assigning virtual channel 33 to WJLP. And nothing in the statute mandates that WJLP be assigned virtual channel 3.

Moreover, while PMCM acknowledges that Section 1452(g)(1)(A) bars the Commission from modifying spectrum usage rights for only a limited time, it mistakenly believes that the statutory prohibition is still in effect. Pet. 15-16. Under the statute's terms, the prohibition ends on "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." 47 U.S.C. § 1452(g)(2)(A). On April 13, 2017, the Commission released a public notice announcing "the completion of the reverse and forward auctions" as well as "the broadcast television channel reassignments and reallocations of broadcast television spectrum for flexible use made in the repacking process." *Auction Closing Notice*, 32 FCC Rcd at 2788 ¶ 1. The *Auction Closing Notice* marked the conclusion of the period governed by Section 1452(g)(1).⁹

⁹ PMCM also argues that the plain language of 47 U.S.C. § 534(b)(6) gives WJLP a right to mandatory cable carriage on channel 3. Pet. 10-15. To the contrary, this Court ruled in September 2015 that PMCM had "not demonstrated a clear and indisputable right to such relief" under the must-carry statute. *September 2015 Mandamus Denial Order* (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, the petition for a writ of mandamus should be denied.

Respectfully submitted,

Jennifer Tatel
Acting General Counsel

Richard K. Welch
Deputy Associate General Counsel

/s/ James M. Carr

James M. Carr
Counsel

Federal Communications Commission
Washington, D. C. 20554

August 21, 2017

CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit requirements of Fed. R. App. P. 27(d)(2)(a) because the document contains 6081 words, as determined by the word-count function of Microsoft Word 2016, excluding the parts of the document exempted by Fed. R. App. P. 32(f); and

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(6) because the document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

/s/ James M. Carr

James M. Carr
Counsel

CERTIFICATE OF FILING AND SERVICE

I, James M. Carr, hereby certify that on August 21, 2017, I electronically filed the foregoing Opposition of the Federal Communications Commission to Petition for Issuance of Writ of Mandamus with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic 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

James M. Carr

Counsel

Federal Communications Commission

Service List:

Donald J. Evans

Harry F. Cole

Fletcher, Heald & Hildreth, OLC

1300 North 17th Street

Arlington, VA 22209

Counsel for: PMCM TV, LLC