

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

PMCM TV, LLC,)	
)	
<i>Petitioner,</i>)	
)	
v.)	Nos. 17-1209 and 17-1210
)	
FEDERAL COMMUNICATIONS)	
COMMISSION and UNITED STATES)	
OF AMERICA,)	
)	
<i>Respondents.</i>)	
)	

**OPPOSITION OF FEDERAL COMMUNICATIONS COMMISSION TO
EMERGENCY MOTION FOR STAY**

In September 2014, petitioner PMCM TV, LLC began operating a commercial broadcast television station, WJLP, in the New York City media market. These cases concern WJLP’s proper channel positioning—over the air (No. 17-1209) and on cable systems (No. 17-1210).

On four previous occasions, PMCM asked this Court to issue a writ of mandamus ordering the Federal Communications Commission to allow WJLP to use channel 3 for all purposes while PMCM’s channel positioning disputes were resolved. In each instance, the Court denied PMCM’s request. Most recently—just weeks ago—the Court held that PMCM had failed to establish a “clear and indisputable” right to position WJLP on “channel 3 for cable ... and all other

purposes.” See *In re PMCM TV, LLC*, No. 17-1190 (D.C. Cir. Sept. 1, 2017) (per curiam) (“*September 2017 Mandamus Denial*”) (quotation marks omitted).

Undeterred by this Court’s prior rulings rejecting its claims, PMCM now seeks a stay pending judicial review of the Commission’s final orders concerning WJLP’s channel positioning, which reaffirm that WJLP must use channel 33 (as it has for the last two years).

If PMCM’s “emergency” motion sought nothing more than to preserve the status quo, PMCM would face a heavy burden of persuasion: A stay is a highly unusual remedy that courts seldom grant. But PMCM’s burden is still greater here, where the orders on review left in place PMCM’s and other broadcasters’ existing channel positioning. In asking this Court to take the extreme step of *altering* WJLP’s current channel positioning, PMCM is seeking the same affirmative relief as in its four failed mandamus petitions—relief that would upend, not preserve, the status quo.

PMCM is not entitled to such extraordinary relief. The Commission’s orders were entirely reasonable, and PMCM is unlikely to prevail in its challenges. Furthermore, a major premise of PMCM’s motion—that WJLP would be unable to move to cable channel 3 for several years even if it won this litigation—is false. The Court should deny PMCM’s motion.

BACKGROUND

A. Channel Positioning For Over-the-Air Broadcasts

In the age of analog broadcasting, there was no distinction between the physical “radio frequency” (“RF”) channel over which a television station broadcast its programming and the channel to which viewers tuned their televisions to receive the station’s over-the-air programming. That changed with the nation’s transition to digital television (“DTV”) in 2009.

Today, the channel on which over-the-air viewers watch a station is determined by a two-part numerical code that all full power stations transmit within their digital broadcasts. That code is known as a “Program System and Information Protocol” (“PSIP”) channel.¹

A station’s PSIP channel consists of two numbers. *See PSIP Declaratory Ruling* ¶ 5. The first of those numbers—the “major” channel number—is the channel number viewers see on their receivers when they view a DTV station over the air. Because a station’s major channel number is not necessarily related to the station’s physical RF channel, major channels are sometimes called “virtual”

¹ *See Request for Declaratory Ruling by Meredith Corp. And “Alternative PSIP Proposal” By PMCM TV, LLC for WJLP (Formerly KVNV(TV)), Middletown Township, New Jersey, 30 FCC Rcd 6078, 6079-80 ¶¶ 4-6 (Media Bur. 2015) (“PSIP Declaratory Ruling”).*

channels.² For instance, Washington’s public TV station, WETA, formerly broadcast on RF channel 26. It now broadcasts over RF channel 27, but the station continues to be identified as channel 26 (its virtual channel).

Because of the DTV transition, it is now possible to fit more programming into the same RF bandwidth. Some stations therefore broadcast on multiple channels. The second portion of a PSIP channel—the “minor” channel number—serves to identify particular programming streams when a single station broadcasts more than one stream. WETA, for example, uses channel 26.1 for WETA-HD, 26.2 for WETA-UK, and 26.3 for WETA-Kids.

The FCC requires that, absent a waiver, stations set their PSIP channels following privately developed protocols that the agency has incorporated by reference in its rules. 47 C.F.R. § 73.682(d).

B. Mandatory Cable Carriage

Under Section 614 of the Communications Act, 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. A station may assert these “must-carry” rights in the area

² *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 (Media Bur. 2014) (“*Public Notice*”).

defined by Nielsen Media Research as the station's "Designated Market Area" (or "DMA"). 47 C.F.R. § 76.55(e)(2).

A commercial television station asserting must-carry rights generally must be carried 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).

Before the DTV transition, a station asserting must-carry rights could demand that cable operators place the station on the cable channel number corresponding with its RF channel, which was the channel to which over-the-air viewers tuned their televisions to receive the station's programming. Congress anticipated, however, that the DTV transition could require alterations to the Commission's cable carriage regime. Accordingly, Congress provided that, when implementing the DTV transition, 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 ... standards" modified for that transition. 47 U.S.C. § 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 following the DTV 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 Commission explained that must-carry rights allow a station to demand “carriage on its major channel number as broadcast in [its] PSIP,” *id.*—that is, its “virtual” channel.

C. PMCM’s Dispute With Meredith Over Channel Positioning

In 2008, PMCM became the licensee of station KVNV(TV), RF channel 3, in Ely, Nevada. *See PSIP Declaratory Ruling* ¶ 9. 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 Commission granted PMCM’s request to reallocate RF channel 3 from Nevada to New Jersey pursuant to 47 U.S.C. § 331(a). *See Reallocation of Channel 3 from Ely, Nevada to Middletown Township, New Jersey*, 28 FCC Rcd 2825 (Media Bur. 2013). PMCM thereafter applied to the FCC for a construction permit to build a New York City broadcast facility for its New Jersey station. *PSIP Declaratory Ruling* ¶ 12.

The “service contour”—or coverage area—of PMCM’s New Jersey station overlaps with that of a station operated by Meredith Corporation in the Hartford-New Haven, Connecticut DMA that identifies itself to viewers as “Channel 3.” *See PSIP Declaratory Ruling* ¶ 12. When PMCM applied for its construction permit, Meredith’s station had been operating as Channel 3 in the stations’ overlap area for nearly half a century. *See id.* ¶ 15. Meredith was concerned that if PMCM’s station

used major channel 3, the station's broadcasts would cause consumer confusion and dilute the established brand of Meredith's station. *See id.* ¶ 28. Meredith therefore objected to PMCM's construction permit application, arguing that PMCM's station should be required to use major channel 33. *See id.* ¶ 12.

In April 2014, the FCC's Media Bureau granted PMCM's construction permit application without deciding the major channel assignment for PMCM's station, a question the Bureau deemed premature. *See PSIP Declaratory Ruling* ¶ 12. Meredith petitioned for reconsideration and requested a declaratory ruling that PMCM's station be assigned major channel 33. *See id.* PMCM for its part 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 id.* ¶ 25. The Bureau opened a docketed proceeding to receive public comment on Meredith's request for declaratory ruling and PMCM's alternative PSIP proposal. *See Public Notice*, 29 FCC Rcd at 10556-58.

Around the same time, in September 2014, PMCM completed construction of its New York facility and commenced broadcasting under "program test" authority. *See PSIP Declaratory Ruling* ¶ 14. Shortly thereafter, several incumbent stations complained to the FCC that PMCM's station—now known as WJLP—was operating without authorization using PSIP channel 3.10. *See id.* 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. When PMCM ignored that order, the Bureau directed PMCM to comply or have its program test authority suspended effective November 10, 2014. *See id.* ¶ 14.

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. *See PSIP Declaratory Ruling* ¶ 14. 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). Shortly thereafter, WJLP began operating pursuant to program test authority using virtual channel 33. *See PSIP Declaratory Ruling* ¶ 14.

In June 2015, the Bureau granted Meredith's request for declaratory ruling, denied PMCM's alternative PSIP proposal, and ordered PMCM to operate WJLP using virtual channel 33 on a permanent basis. *PSIP Declaratory Ruling* ¶ 2. PMCM then applied for Commission review of the *PSIP Declaratory Ruling*.

D. PMCM's Channel Positioning Disputes With Cable Operators

On June 6, 2014, before its dispute with Meredith had been resolved, PMCM notified cable operators in the New York DMA that its station would commence operation in August 2014, and that it was electing mandatory carriage on cable channel 3. *See PSIP Declaratory Ruling* ¶ 13. 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 made a virtual channel designation for PMCM's station. *See Tara M. Corvo, Esq.*, 29 FCC Rcd 9102, 9105 (Media Bur. 2014).

On the same day that it issued the *PSIP Declaratory Ruling*, the Bureau notified PMCM and the New York cable operators that the waiver had ended, and that the cable operators had 90 days (*i.e.*, until September 3, 2015) to respond to PMCM's original must-carry demand 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). The Bureau did not address whether PMCM had the right to carriage on cable channel 3, but specifically noted that PMCM had the option of making a new must-carry election "to pursue carriage for WJLP on cable channel 33," the PSIP channel now permanently assigned to the station. *Id.*

PMCM opted to continue seeking carriage on cable channel 3. Three cable operators—RCN Telecom Services, LLC, Service Electric Cable TV of New Jersey Inc., and Time Warner Cable Inc. (“TWC”)—declined (or failed to respond to) PMCM’s request that they carry WJLP on cable channel 3.³

On January 19, 2016, PMCM filed must-carry complaints against RCN, Service Electric, and TWC, asking the FCC to order carriage of WJLP on cable channel 3. The Media Bureau denied PMCM’s 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). PMCM then sought Commission review.

During the administrative must-carry proceedings, PMCM on three separate occasions filed mandamus petitions asking this Court to order the Commission to mandate that WJLP be carried on cable channel 3. Each time, the Court ruled that PMCM was not entitled to such extraordinary relief. *See September 2017 Mandamus Denial; In re PMCM TV, LLC*, No. 16-1380 (D.C. Cir. Apr. 4, 2017)

³ Although RCN and TWC declined to carry WJLP on cable channel 3, they have carried the station on other channels on their systems for the last two years, as have various other New York DMA cable operators. *See* <http://wjlp3.com/watch>.

(per curiam); *In re PMCM TV, LLC*, No. 15-1058 (D.C. Cir. Sept. 23, 2015) (per curiam).

E. Orders On Review

On September 15, 2017, the Commission issued two orders addressing PMCM's applications for review. In one, the Commission denied PMCM's application for review of the *PSIP Declaratory Ruling*.⁴ In the other, it denied PMCM's application for review of the orders denying PMCM's must-carry complaints.⁵

2017 PSIP Order. The Commission affirmed the Bureau's assignment of major channel 33 to WJLP. It determined that the Bureau correctly applied the PSIP protocols that had been incorporated into the FCC's rules. *2017 PSIP Order* ¶¶ 23-43. The Commission agreed that under the relevant protocol, WJLP should not be assigned major channel 3 "[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." *Id.* ¶ 25.

⁴ *Request for Declaratory Ruling by Meredith Corporation And "Alternative PSIP Proposal" By PMCM TV, LLC for WJLP (Formerly KVVN(TV)), Middletown Township, New Jersey*, FCC 17-118 (Sept. 15, 2017) ("*2017 PSIP Order*").

⁵ *PMCM TV, LLC, Licensee of WJLP, Middletown Township, New Jersey v. RCN Telecom Services, LLC*, FCC 17-117 (Sept. 15, 2017) ("*2017 Must-Carry Order*").

The Commission rejected PMCM's contention that, for purposes of applying the PSIP protocols, the term "market" must necessarily mean "DMA," not "digital contour." *2017 PSIP Order* ¶ 27. Construing its own rules, the Commission reasoned that "defining the term 'market' to refer to the newly licensed station's digital contour (*i.e.*, service area) is a reasonable approach" that best serves the purpose underlying the PSIP protocols—"to ensure that broadcasters serving the same area have a unique major channel number, which in turn ensures that broadcasters who built their brand in a service area on a particular channel can retain their brand identification even if they are no longer using the same RF channel on which they built their brand." *Id.* ¶¶ 28-29; *see also id.* ¶ 40 (citing Annex B.1.8). The FCC found that "PMCM's use of major channel 3 would result in simultaneous use of channel 3 by multiple stations with overlapping service areas," including Meredith's station in the Hartford DMA and CBS Broadcasting's KYW-TV in the Philadelphia DMA. *Id.* ¶ 24.

The Commission concluded that, in any event, even if the term "market" were construed to mean DMA as PMCM proposed, the result for WJLP under the PSIP protocols was the same. The Commission explained that Meredith's station had "used" analog RF channel 3 to broadcast its signal to communities in Fairfield County, Connecticut, "which Nielsen assigns to the New York DMA." *2017 PSIP*

Order ¶ 35. Consequently, under any reading of the relevant PSIP protocol, major channel 3 was not available to WJLP.

2017 Must-Carry Order. The Commission affirmed the Bureau’s denial of PMCM’s must-carry complaints, agreeing with the Bureau that the cable channel positioning rights of WJLP are based on its PSIP—not its RF—channel. *2017 Must-Carry Order* ¶¶ 11-22.

The Commission rejected PMCM’s argument that the must-carry statute’s reference to the “channel number on which the local commercial television station is broadcast over the air,” 47 U.S.C. § 534(b)(6), must necessarily mean the station’s RF channel number. In the FCC’s judgment, this undefined statutory phrase can reasonably be read to mean the station’s PSIP major channel number. The provision in question was designed to give broadcasters “the right to cable carriage on the channel on which they have built their brand.” *2017 Must-Carry Order* ¶ 13. “In today’s post-digital marketplace,” the Commission explained, “the PSIP major channel number serves the same purpose by ensuring that broadcasters’ decision to switch to a new RF channel post[-]transition will not affect their historic brand identity.” *Id.*

As “a separate and independent basis for affirming the Bureau’s conclusion,” the Commission determined that “Section 614(b)(4)(B) of the Act authorizes the Commission to define the statutory [must-carry] right with reference

to the PSIP protocol rather than RF transmission.” *2017 Must-Carry Order* ¶ 14.

That is what the Commission did in the *2008 Declaratory Order*. *See id.* ¶ 15.

ARGUMENT

To obtain a stay, PMCM must show that (1) it will likely prevail on the merits, (2) it will suffer irreparable harm unless a stay is granted, (3) other parties will not be harmed if a stay is granted, and (4) a stay will serve the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). To merit such an “extraordinary remedy,” PMCM must make “a clear showing” that it is “entitled to such relief.” *Winter v. NRDC*, 555 U.S. 7, 22 (2008). PMCM has failed to meet this exacting standard.

The Court should be particularly circumspect about granting a stay because PMCM is not asking merely to preserve the status quo—its current channel positioning rights—pending judicial review of the FCC’s orders. Rather, PMCM asks the Court to “restore” PMCM’s ability to position its station to over-the-air viewers (and by extension to cable viewers) as channel 3. Mot. 1. Although PMCM’s station did briefly operate on channel 3—from November 2014 until February 2015—it was allowed to do so only because this Court temporarily stayed the Media Bureau’s earlier order mandating that the station operate on channel 33. But the Court vacated that stay and denied PMCM’s mandamus petition because PMCM had no “clear and indisputable right” to that relief.

September 2017 Mandamus Denial (quoting *In re Cheney*, 406 F.3d 723, 729 (D.C. Cir. 2005) (en banc)). The status quo today is that WJLP operates on channel 33 (and is carried on various channels on cable systems). PMCM's purported "stay" would thus require significant changes to the status quo.

I. PMCM Is Not Likely To Succeed On The Merits.

PMCM's latest pleading rehashes the arguments that this Court rejected in denying PMCM's earlier mandamus petitions. Those arguments "concern a subject matter [that] is technical, complex, and dynamic," and the Commission's expert judgment on such matters is entitled to great deference. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1002-03 (2005) (quotation marks omitted). That highly deferential standard of review makes it unlikely that PMCM will succeed on the merits.

Spectrum Act. PMCM first contends (Mot. 9-10) that when the FCC required WJLP to use major channel 33, and denied PMCM the ability to demand carriage on cable channel 3, the agency "chang[ed] the station's channel" and violated Section 1452(g) of the Spectrum Act, 47 U.S.C. § 1452(g). But "Section 1452 pertains to [a broadcaster's] spectrum usage rights," which are "associated with a station's RF channel, not its virtual channel." *2017 PSIP Order* ¶ 21 n.72 (quotation marks omitted). And neither the FCC's assignment of major channel 33 to WJLP nor its related cable carriage decision changed the broadcast spectrum

allocated for WJLP's broadcasts—RF channel 3—or the station's right to use that spectrum. *See id.* ¶ 22. Moreover, the Commission reasonably determined that Congress used the term “channel” in different ways in different statutes or contexts, *id.* ¶ 22 & n.82, and that there is no reason the term must mean the same thing in the Spectrum Act as in the cable carriage context. *See id.* ¶ 22. Particularly given the *Chevron* deference that the FCC's reasonable interpretation of these statutory terms is entitled to receive, PMCM is unlikely to succeed in its argument that the *2017 PSIP Order* is inconsistent with the Spectrum Act.⁶

Other Challenges To The *2017 PSIP Order*. PMCM's remaining challenges to the *2017 PSIP Order* are also unlikely to succeed.

PMCM argues that the FCC was required to interpret the term “market” in Annex B.1.4 of the PSIP protocols to mean a station's “Nielsen denominated DMA.” Mot. 11. But the Commission reasonably explained why that term is better interpreted “to refer to [a] newly licensed station's digital contour (i.e., service area).” *2017 PSIP Order* ¶ 28; *see id.* ¶¶ 28-34. Among other reasons, “this approach preserves the value of incumbent stations' brand identity, reduces

⁶ PMCM's suggestion (Mot. 10) that it was improper for the FCC to dismiss PMCM's Spectrum Act argument on procedural grounds is unfounded. PMCM does not dispute that it failed to raise this argument in the relevant Media Bureau proceedings. *See* Mot. 10-11; *2017 PSIP Order* ¶ 21. In any event, the Commission addressed and rejected PMCM's argument on the merits. *See 2017 PSIP Order* ¶ 22.

consumer confusion, and serves the Annex B objective that non-commonly owned stations in overlapping service areas should have unique major channel numbers.”

Id. ¶ 28. The Commission’s reasonable interpretation of the PSIP protocols, as incorporated by reference in the FCC’s rules, is entitled to deference. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997).⁷

PMCM also asserts that the FCC arbitrarily forbade “major virtual channel overlap” in this case without applying that same standard to other stations. Mot. 14. Not so. As the Commission explained, although there are some instances (a “handful,” *2017 PSIP Order* ¶ 38) “in which stations with overlapping contours may be using the same major channel,” those stations have not complained to the Commission, so they “[do] not establish precedent in favor of permitting overlapping stations to use the same major channel number in situations such as [PMCM’s].” *Id.* To the contrary, on previous occasions when the agency has been “presented with a virtual channel conflict” between two stations, it has “required a unique virtual channel for each station.” *Id.* ¶ 37.

⁷ Moreover, PMCM fails to address the Commission’s “alternative and independent basis for affirming the ... application of Annex B.1.4. to assign PSIP channel 33 to [PMCM’s station].” *2017 PSIP Order* ¶ 35. As the Commission explained, because Meredith’s station formerly used analog RF channel 3 “to broadcast an over-the-air signal” in a Connecticut county that “Nielsen assigns to the New York DMA,” “even under PMCM’s interpretation of the term ‘market,’” PMCM’s station would be assigned major channel 33 under Annex B.1.4. *Id.*

Finally, PMCM contends that the FCC improperly “dismissed [a] solid body of scientific facts” concerning the difficulty PMCM asserts viewers experience when tuning to WJLP on major channel 33. Mot. 14. PMCM did not bring the information in question to the FCC’s attention until a supplement to its application for review filed in September 2015, months after the Media Bureau issued the June 2015 *PSIP Declaratory Ruling*. See *2017 PSIP Order* ¶ 16. Yet PMCM has acknowledged that the reception issue about which it complains began in March 2015, *see id.* ¶ 19, and it offers no explanation here for why it did not present the matter to the Bureau before the June 2015 order (or in a petition for reconsideration). The Commission thus correctly dismissed this argument as procedurally barred. *Id.* In any event, as the Commission explained, the possibility that some older television receivers may require viewers to tune their sets to “33.1” instead of “33” to receive WJLP does not undermine the agency’s carefully reasoned conclusion that the PSIP protocols require PMCM to use major channel 33. *See id.* ¶ 20.

Must-Carry. PMCM challenges the *2017 Must-Carry Order* on the basis that “[a] station’s over the air channel” under Section 614(b)(6) of the Communications Act, 47 U.S.C. § 534(b)(6), “cannot be its virtual channel.” Mot. 15. That premise is at odds with PMCM’s own position before the agency that Section 614(b)(6) could reasonably be interpreted as giving “stations the option of

demanding carriage on either their virtual channels or their RF channels.” *2017 Must-Carry Order* ¶ 9; *see id.* ¶ 21 & n.97. And the arguments that PMCM now offers do not support its claim that a “cable system channel number on which the ... station is broadcast over the air,” 47 U.S.C. § 534(b)(6), can only mean a station’s RF channel number.

PMCM argues that “channel” in Section 614 must mean RF channel because, when that provision of the Act was enacted, “[t]here was no such thing as a ‘virtual channel.’” Mot. 16. But as the Commission explained, “it is reasonable to interpret the ambiguous statutory language in light of the evolution of broadcasting technology.” *2017 Must-Carry Order* ¶ 13. When Section 614(b)(6) was enacted, “the channel number on which a station’s signal was transmitted”—*i.e.*, the RF channel—“was the same channel number that viewers selected on their television tuner.” *Id.* Because that is no longer the case, “interpreting the phrase ‘channel number on which the ... station is broadcast over the air’ to refer to a station’s PSIP major channel number is consistent with the purpose of the channel placement provisions.” *Id.* (quoting 47 U.S.C. § 534(b)(6)).

PMCM also contends that “the term channel is used throughout the FCC’s television rules solely in reference to the frequency band allotted to a station in the FCC’s Table of Allotments.” Mot. 16. That is incorrect, as the Commission explained. *See 2017 Must-Carry Order* ¶ 13 n.55. Furthermore, “[t]he fact that the

term ‘channel’ is used in some contexts in the Commission’s rules ... to refer to a transmission frequency band does not mean it is unreasonable” to recognize a distinct meaning for that term “for the limited purposes of the on-channel carriage option in Section 614(b)(6).” *Id.* ¶ 13.

Finally, PMCM entirely fails to address the FCC’s separate, independent holding that as part of the DTV transition, Congress specifically granted the agency the authority to modify the on-channel carriage option to reflect virtual channels. *See* 47 U.S.C. § 534(b)(4)(B); *2017 Must-Carry Order* ¶¶ 14-22.

II. PMCM Has Not Demonstrated Irreparable Injury.

The Court need go no further than determining that PMCM has failed to show a likelihood of success on the merits. *See Ark. Dairy Co-op Ass’n v. USDA*, 573 F.3d 815, 832 (D.C. Cir. 2009). But PMCM also fails to satisfy this Court’s “high standard for irreparable injury.” *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006). “Such injury must be both certain and great, actual and not theoretical,” and “beyond remediation.” *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555 (D.C. Cir. 2015) (quotation marks omitted). “Bare allegations” will not suffice; PMCM “must provide proof.” *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). PMCM has failed to carry this burden.

Although PMCM alleges that it will suffer competitive harm if WJLP cannot use channel 3 to reach over-the-air and cable television viewers (Mot. 17-18), it provides no substantiation for that claim. If the claim had any basis, PMCM should be able to document it. After all, WJLP has used PSIP channel 33 for more than two years, and three cable companies rejected PMCM's demand for placement on cable channel 3 nearly two years ago. Yet PMCM has not produced a shred of hard evidence, by affidavit or otherwise, that it has suffered any substantial harm from the requirement that WJLP use PSIP channel 33.⁸

Insofar as PMCM claims competitive harm based on the supposed "inability of [certain older] TV sets to distinguish between virtual and over the air channels when both transmit in the same market," Mot. 17, PMCM acknowledges that any such reception problem can be addressed by directing viewers to enter channel 33.1 into their receivers, *see* Mot. 14; *2017 PSIP Order* ¶ 20 n.68. Indeed, "PMCM has been informing its viewers that they should tune to 33.1 to receive the signal for over a year." *Id.* Because the television receiver issue cited by PMCM is easily remediable, it does not justify the extraordinary remedy PMCM seeks.

⁸ For example, PMCM now asserts for the first time that "identification as channel 33" for over-the-air viewers "loses between 25 and 350% of the station's potential audience." Mot. 18. Those unsubstantiated figures are supposedly "based on comparison of WJLP's audience share with PMCM's sister station's audience share in Wilmington," Mot. 18 n.15, but PMCM makes no showing that it has controlled for other factors in making that comparison.

Furthermore, there is no basis for PMCM's claim that WJLP "may be foreclosed from making a new [cable channel placement] election until October of 2020" unless a stay is granted. Mot. 18. The Commission's rules do not prohibit mid-cycle must-carry elections in all circumstances.⁹ And in the unlikely event that (after merits briefing and oral argument) the Court rules in PMCM's favor and directs the FCC to require carriage of WJLP on cable channel 3, the Commission would be obligated to implement the Court's mandate "forthwith." 47 U.S.C. § 402(h); see *Qualcomm Inc. v. FCC*, 181 F.3d 1370, 1376 (D.C. Cir. 1999). Consequently, a stay is unwarranted because "corrective relief will be available ... in the ordinary course of litigation." *Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

Finally, PMCM's assertions (Mot. 3-4, 19) that WJLP will lose protection to which it is entitled under the Spectrum Act absent a stay are baseless. The Spectrum Act's prohibition against modifying spectrum usage rights was time-limited and expired with the conclusion of the Commission's incentive auction and related broadcast television channel reassignments. See *2017 PSIP Order* ¶ 45. In

⁹ See, e.g., 47 C.F.R. § 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.

any event, nothing in the orders on review has altered either the coverage area or the population served by WJLP, which continues to broadcast on RF channel 3.

III. A Stay Would Harm Third Parties And The Public Interest.

A stay would plainly harm third parties and the public interest. Meredith's station—as well as ION Media License Company's WPXN and CBS Broadcasting's KYW—have built their brand identities as “channel 3” over the course of many years, whereas WJLP is a newcomer to the market. *See 2017 Must-Carry Order* ¶ 17; *2017 PSIP Order* ¶ 28. A stay risks causing viewer confusion and harming the brand identity of these established stations. The public interest would not be served by disrupting the channel lineup to which viewers are accustomed, or by upsetting the settled expectations of stations that have served their communities for decades.

CONCLUSION

The Court should deny the motion for stay.

Respectfully submitted,

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Commission
Washington, DC 20554
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September 27, 2017

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/s/ James M. Carr

James M. Carr

Counsel for Respondents

CERTIFICATE OF FILING AND SERVICE

I, James M. Carr, hereby certify that on September 27, 2017, I filed the foregoing Opposition of Federal Communications Commission to Emergency Motion for Stay with the Clerk of Court for the United States Court of Appeals for the District of Columbia Circuit using the electronic CM/ECF system.

/s/ James M. Carr

James M. Carr

Counsel for Respondents