ORAL ARGUMENT NOT YET SCHEDULED

**No. 20-1334**

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

PMCM TV, LLC,

*Appellant*,

v.

FEDERAL COMMUNICATIONS COMMISSION,

*Appellee*.

On Appeal from an Order of the Federal Communications Commission

# BRIEF FOR APPELLEE

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

(A) **Parties and Amici.**

The Appellant is PMCM TV, LLC.

The Appellee is the Federal Communications Commission.

Connecticut Public Broadcasting, Inc., and NRJ TV NY License Co., LLC, intervened in support of Appellee.

(B) **Rulings under Review.** Appellant challenges the Federal Communications Commission's Memorandum Opinion and Order, *Application of Connecticut Public Broadcasting, Inc. to Convert to DTS Operation*, FCC 20-115, 35 FCC Rcd 8978, 2020 WL 4734854 (rel. Aug. 11, 2020) (*Order*), *reprinted at* JA ___–___.

(C) **Related Cases.** The *Order* under review has not previously been before this Court or any other court. Appellee is not aware of any other related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

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| **Commission / FCC** | Appellee Federal Communications Commission |
| **Connecticut Broadcasting** | Intervenor Connecticut Public Broadcasting, Inc. |
| ***Bureau Letter Order*** | Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau, to Connecticut Broadcasting and PMCM (June 12, 2019) (JA ___–___) |
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| ***Order*** | Memorandum Opinion & Order, *Application of Connecticut Public Broadcasting, Inc. to Convert to DTS Operation*, FCC 20-115, 35 FCC Rcd 8978, 2020 WL 4734854 (rel. Aug. 11, 2020) (JA ___–____) |

**GLOSSARY**
**(continued)**

| | |
|---|---|
| **PMCM** | Appellant PMCM TV, LLC |
| **WABC-TV** | Broadcast station WABC-TV in New York, New York, the service area of which WEDW applied to match |
| **WEDW** | Broadcast station WEDW in Stamford, Connecticut, licensed to Connecticut Broadcasting |
| **WJLP** | Broadcast station WJLP in Middletown Township, New Jersey, licensed to PMCM |
| **WZME** | Broadcast station WZME in Bridgeport, Connecticut, that shares a channel with WEDW |

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PMCM TV, LLC,

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On Appeal from an Order of
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**BRIEF FOR APPELLEE**

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## INTRODUCTION

Connecticut Public Broadcasting, Inc. (Connecticut Broadcasting) is the licensee of a non-commercial educational television station in Stamford, Connecticut. The station applied to operate a distributed transmission system, which uses multiple synchronized transmitters rather than a single transmitter to broadcast a television signal. Under its proposal, Connecticut Broadcasting would operate one of its transmitters from Bridgeport, Connecticut, and the other from the

Empire State Building in New York City. The FCC granted the application on the ground that the proposed distributed transmission system would solve interference problems from another station and expand service to new viewers, while at the same time preserving Connecticut Broadcasting's existing service.

On appeal, PMCM TV, LLC (PMCM) contends that the Commission "bent or sidestepped" its rules by granting Connecticut Broadcasting's application. (PMCM Br. 32). That is not so. In granting the application, the Commission made informed judgments and reasonably applied settled agency precedent to uncontested facts. Several arguments that PMCM raises in this Court were never presented to the Commission and are therefore barred under the Communications Act. Regardless, each of PMCM's arguments fails to undermine the Commission's decision to grant Connecticut Broadcasting's application as in the public interest.

## JURISDICTIONAL STATEMENT

The Commission released the final *Order* on review on August 11, 2020 (JA ___), and PMCM filed a timely notice of appeal on September 1, 2020. *See* 47 U.S.C. § 402(c). This Court has jurisdiction under 47 U.S.C. § 402(b)(6) because PMCM was a party to the agency proceeding and aggrieved by the *Order*'s grant of Connecticut Broadcasting's application

to modify its construction permit to allow distributed transmission system operation.

## STATEMENT OF ISSUES

1. Whether the Commission reasonably granted Connecticut Broadcasting a new distributed transmission system reference point that would serve the public interest by preventing station interference, maintaining service to existing viewers, and extending service to viewers in western Connecticut?

2. Whether the Commission reasonably applied agency precedent to an uncontested record to allow Connecticut Broadcasting to match the geographic coverage area of the largest station in its market?

3. Whether the Commission reasonably exercised its broad discretion to provide a fair, efficient, and equitable distribution of licenses among communities when it rejected a conjectural allegation that Connecticut Broadcasting was abandoning the Connecticut community that it continues to serve?

## PERTINENT STATUTES AND REGULATIONS

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

## COUNTERSTATEMENT OF THE CASE

### A. Statutory and Regulatory Framework

#### 1. Broadcast Station Licensing

Television and radio broadcast stations are built and operated pursuant to licenses issued by the FCC under the Communications Act. *See, e.g.,* 47 U.S.C. §§ 301, 308, 309. Licensees may apply for modifications of their approved construction permits and station licenses, *id.* § 308(a), and the FCC may grant modification if the Commission finds that "the public interest, convenience, and necessity would be served by the granting" of such application, *id.* § 309(a). The FCC must distribute licenses "among the several States and communities" in a "fair, efficient, and equitable" way. *Id.* § 307(b).

To protect the public interest, the Commission generally guards against loss of service to existing viewers, while recognizing the benefits of expanding service to new viewers. *See, e.g.*, Memorandum Opinion & Order, *Applications of Stockholders of Renaissance Commc'ns Corp. (Transferor) and Tribune Co. (Transferee)*, 12 FCC Rcd 11866, 11867 ¶22 (1997) ("[P]rovision of a new network service to additional viewers, without the loss of such service to existing viewers, constitutes a

significant public interest benefit."), *aff'd*, *Tribune Co. v. FCC*, 133 F.3d 61 (D.C. Cir. 1998).

**2. Distributed Transmission Systems**

For decades, television stations used an "analog" transmission standard that converted broadcast signals into pictures and sound. *See Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 293 (D.C. Cir. 2003). But in 2009, "the broadcast television industry completed a congressionally mandated transition from analog to digital transmission." *Nat'l Ass'n of Broadcasters v. FCC*, 789 F.3d 165, 169 (D.C. Cir. 2015).

In advance of the transition to digital television, the Commission adopted rules to help digital stations improve service. *See generally* Report & Order, *Digital Television Distributed Transmission System Technologies*, 23 FCC Rcd 16731 (2008) (*DTS R&O*). These rules permit digital television stations to operate a distributed transmission system, which uses "multiple synchronized transmitters" in the station's service area instead of a single transmitter. 47 C.F.R. § 73.626(a); *see DTS R&O*, 23 FCC Rcd at 16734 ¶4. A distributed transmission system has significant benefits for television broadcasting, including that it increases indoor reception reliability; is less likely to interfere with other

channels; and can reach areas blocked from a single transmitter's signals.[1] *DTS R&O*, 23 FCC Rcd at 16734 ¶6.

The Commission's rules govern where a station may place its distributed transmission system transmitters. Each station has a "reference point," *id.* at 16748–49 ¶29; *see* 47 C.F.R. § 73.626(c)(2), and the Commission's rules dictate the distance from that reference point that a distributed transmission system station may serve.[2] *See Order* ¶4 (JA ___); 47 C.F.R. § 73.626(c), (d). Generally, distributed transmission system transmitters must be within the station's authorized service area, with coverage limited to that area. *See* 47 C.F.R. § 73.626(f)(2), (6); *DTS R&O*, 23 FCC Rcd at 16750–51 ¶¶32–33.

Reference points are not set in stone. Stations received an initial reference point under the Commission's 2008 *DTS R&O*, but "a station

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[1] One benefit of a distributed transmission system is that it can "fill in" service to poorly served areas (PMCM Br. 3), but "filling-in gaps in coverage" is only one of eight categories of benefit that the Commission cited when authorizing distributed transmission systems. *See DTS R&O*, 23 FCC Rcd at 16738–40 ¶14. A "fill in" need is not a prerequisite to use a distributed transmission system.

[2] A distributed transmission system station's "authorized service area" is the area it could theoretically serve if it operated a "single-transmitter-location" facility. *See* 47 C.F.R. § 73.626(b).

may request a change to its reference point … provided certain criteria are met." *DTS R&O*, 23 FCC Rcd at 16748–49 ¶29. A change requires an "appropriate public interest showing" and "that the resulting service area circle fully encompasses the station's authorized service area." *Ibid.*

The FCC also permits changes to authorized service areas. For example, the FCC's rules allow stations to match the "geographic coverage area" of "the largest station within their market."[3] 47 C.F.R. § 73.622(f)(5); *see DTS R&O*, 23 FCC Rcd at 16751–52 ¶35. This rule "seeks to equalize the coverage areas of all stations within a market." *DTS R&O*, 23 FCC Rcd at 16751–52 ¶35. To that end, the FCC has long allowed single-transmitter stations to increase their operating power or antenna height to provide extended service. *See ibid.* Stations with a distributed transmission system may "obtain the same coverage under the rule as would a single-transmitter station, provided the [distributed transmission system] service would not result in new interference." *Ibid.*

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[3] In this context, the "largest station" refers to the size of the service "area," not the number of viewers. *See* Report & Order and Further Notice of Proposed Rulemaking, *Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, 16 FCC Rcd 5946, 5973–74 ¶74 (2001) (*2001 Digital Television R&O*).

### B. The Incentive Auction Repacking

This case arises from the FCC's incentive auction repacking, which was a congressionally authorized plan "to shift a portion of the licensed airwaves from over-the-air television broadcasters to mobile broadband providers." *Nat'l Ass'n of Broadcasters*, 789 F.3d at 168. In 2012, Congress authorized the FCC to (1) conduct an incentive auction to encourage television broadcasters to give up their spectrum rights for incentive payments; (2) "repack" broadcasters declining to give up their rights into new channels in a smaller band of spectrum; and (3) offer the relinquished spectrum to wireless carriers. *Id.* at 169–70.

Under the Commission's incentive auction rules, stations assigned a new channel during the repacking process were given a three-month window in which they were "required to file minor change applications for construction permits" to operate their newly assigned channels. *See* Report & Order, *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, 29 FCC Rcd 6567, 6789–91 ¶¶543, 546 (2014), *aff'd*, *Nat'l Ass'n of Broadcasters*, 789 F.3d 165 (*Incentive Auction R&O*). In a later filing window, all repacked stations could apply to modify their initial construction permits to expand their facilities. *See* Public Notice, *Incentive Auction Task Force and Media*

*Bureau Announce the Opening of the Second Filing Window for Eligible Full Power and Class A Television Station—October 3 through November 2, 2017*, 32 FCC Rcd 6989, 6989–90 ¶2 (IATF/MB 2017).

### C. Connecticut Broadcasting's Application

Connecticut Broadcasting is the licensee of non-commercial educational television station WEDW in Stamford, Connecticut. *Order* ¶1 (JA ___). During the incentive auction repacking process, WEDW was reassigned from radio-frequency channel *49 to radio-frequency channel *21.[4] *Order* ¶3 (JA ___–___). WEDW shares its channel *21 spectrum with commercial station WZME in Bridgeport, Connecticut,[5] and both stations are part of the New York City Designated Market Area. *Ibid.*

After its reassignment to channel *21, Connecticut Broadcasting filed the construction permit application required under the FCC's rules. *Ibid.*; *see Incentive Auction R&O*, 29 FCC Rcd at 6789–91 ¶¶543, 546. That permit was for its preexisting site near Bridgeport, Connecticut.

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[4] The Commission uses an asterisk to denote channels reserved for non-commercial educational use and licensed only to nonprofit educational organizations or municipalities.

[5] During the incentive auction proceedings, broadcasters could bid to relinquish spectrum usage rights to share a television channel with another station. *See* 47 U.S.C. § 1452(a)(2)(C). WZME used that option to share a channel with WEDW.

*Order* ¶3 (JA ___–___). During the later window for filing permit modification applications, Connecticut Broadcasting applied to move its channel *21 facility southwest from Bridgeport to a site near Stamford. *Ibid.* The FCC granted that unopposed application in December 2017, and no party appealed that now-final decision. *Ibid.*

The same day that Connecticut Broadcasting applied for its Stamford construction permit, another station (WDVB-CD) filed a separate application that "would have caused interference to WEDW's proposed facility, especially in the underserved area to which WEDW was seeking to expand." *Id.* ¶6 n.16 (JA ___). Connecticut Broadcasting realized that a distributed transmission system could solve this interference problem, *see ibid.*, and so it applied to modify its Stamford construction permit to allow use of a distributed transmission system. *See id.* ¶4 (JA ___). Under this proposal, Connecticut Broadcasting would no longer build a transmitter at the Stamford site. *Ibid.* Instead, WEDW would use Stamford as its distributed transmission system reference point and place two synchronized transmitters in its service area: one at its existing site near Bridgeport, and one at the Empire State Building in New York City. *Ibid.* This proposal would also allow WEDW to match

the geographic coverage area of the largest station in the New York City market, which at the time was WABC-TV. *See id.* ¶8 (JA ___).

PMCM, which is the licensee of commercial station WJLP in New Jersey, objected to Connecticut Broadcasting's distributed transmission system application. PMCM contended that the proposal was likely to damage it economically because one of its commercial competitors—WEDW's channel sharing partner WZME—would also benefit from channel *21's expanded service in New York City. *See* Informal Objection, at 1 (JA ___). PMCM's principal legal complaint was that the reference point for WEDW's proposed distributed transmission system should be at Bridgeport, not Stamford. *Id.* at 2 (JA ___). Because the distributed transmission system rules would not permit WEDW to specify the Empire State Building as a transmitter site if Bridgeport were the reference point, PMCM argued that the FCC should deny Connecticut Broadcasting's proposal to place a transmitter at the Empire State Building. *See id.* at 2–3 (JA ___–___). PMCM also argued that the FCC should deny Connecticut Broadcasting's application because it would diminish service to viewers in central and eastern Connecticut. *See id.* at 4–6 (JA ___–___).

PMCM later supplemented its objection with a new argument contesting Connecticut Broadcasting's request to match WABC-TV's service area in the New York City market. *See* Supplement to Informal Objection, at 1–3 (JA ___–___). Although WABC-TV held a construction permit to build facilities that would make it the largest station in the market, these facilities were not built. According to PMCM, WABC-TV therefore did not have actual "coverage" for Connecticut Broadcasting to match. *See id.* at 2 (JA ___).

In opposition, Connecticut Broadcasting asserted that its application was in the public interest and asked the FCC to approve Stamford as an appropriate reference point. *See* Response to Informal Objection, at 7 (JA ___). For one, Connecticut Broadcasting contended that placing a transmitter on the Empire State Building would improve WEDW's service by eliminating interference from station WDVB-CD. *Id.* at 8 (JA ___). For another, the proposal would preserve service to all existing WEDW viewers (as well as viewers of its channel sharing partner, WZME), while also expanding WEDW's service in western Connecticut. *Id.* at 7 (JA ___). Connecticut Broadcasting noted that viewers in western Connecticut are likely to point their antennas at Manhattan—not Stamford or Bridgeport—and so a transmitter on the

Empire State Building would align WEDW's signal with most other over-the-air signals reaching western Connecticut viewers. *Id.* at 9 (JA ___).

The FCC's Media Bureau granted Connecticut Broadcasting's application and rejected PMCM's objections. *See* Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau, to Connecticut Broadcasting and PMCM, at 1–2 (June 12, 2019) (*Bureau Letter Order*) (JA ___–___). The Bureau agreed with Connecticut Broadcasting that a Stamford reference point would serve the public interest by eliminating interference from WDVB-CD; preserving service for WZME's existing viewers; and extending WEDW's service in western Connecticut. *See id.* at 5 (JA ___). The Bureau also found, contrary to PMCM's objection, that no loss of service would occur in WEDW's existing service area. *Ibid.*

The Bureau also concluded that the FCC's rules permitted Connecticut Broadcasting's requested service area expansion. *Id.* at 5–6 (JA ___–___). First, the Bureau concluded that stations could apply to match the largest service area based on construction permits (like WABC-TV's) pending at the time the application is filed, regardless whether the facilities described in the permits are operational. *Ibid.* Alternatively, the Bureau found that if WABC-TV's service area were disregarded, PMCM's station WJLP has the largest service area in the

market, and Connecticut Broadcasting's application permissibly matched WJLP's service area. *See id.* at 6 (JA ___).

### D. PMCM's Application for Review

PMCM applied to the Commission for review of the *Bureau Letter Order* and objected to three conclusions. *See* Application for Review (JA ___–___).

*First*, PMCM argued that Stamford was not a proper reference point for WEDW because (1) Connecticut Broadcasting had not requested a new reference point in its application, and (2) a Stamford reference point would not provide coverage to WEDW's existing Bridgeport service area. *Id.* at 5–6 (JA ___–____). PMCM conceded that Connecticut Broadcasting "could, of course, have requested a change of its reference point" to Stamford "as being in the public interest." Reply to Opposition, at 2 (JA ____). But in PMCM's view, that request must appear in an application—not a later-filed pleading. *See ibid.*; Application for Review, at 5 (JA ___).

*Second*, PMCM objected to Connecticut Broadcasting's service area match. *See* Application for Review, at 6–8 (JA ___–___). PMCM's main argument attacked only one basis for the *Bureau Letter Order:* that WEDW could match WABC-TV's coverage. *See ibid.* PMCM addressed

the Bureau's alternative holding, that WEDW could match PMCM's coverage, only in a footnote. *Id.* at 7 n.5 (JA ___). That footnote made two targeted points: (1) that Connecticut Broadcasting's application had not asked to match PMCM's service area and (2) that PMCM was a party to agreements with other stations that "effectively limit PMCM's coverage." *Ibid.*

*Third*, PMCM argued that the *Bureau Letter Order* improperly allowed Connecticut Broadcasting to abandon its Connecticut community of license in favor of the major New York City market. *See id.* at 8–10 (JA ___–____).

### E. The *Order* on Review

On review, the Commission upheld the Bureau's public interest findings and affirmed the grant of Connecticut Broadcasting's distributed transmission system application. *See Order* ¶13 (JA ___).

*First*, the Commission affirmed the Bureau's conclusion that a Stamford reference point for WEDW would serve the public interest. *Id.* ¶14 (JA ___–___). The Commission agreed that "a grant of the [distributed transmission system] Application would eliminate interference, preserve service to existing viewers while also extending service, and make service available to viewers that point their antennas

at New York City, where most of the market's other television stations' transmission facilities are located." *Ibid.* The Commission also rejected PMCM's argument that a change in reference point would diminish service in central and eastern Connecticut, finding that PMCM's evidence "does not discuss any loss of service resulting from [distributed transmission system] operations." *See id.* ¶16 (JA ___–___).

*Second*, the Commission affirmed the Bureau's finding that Connecticut Broadcasting could match PMCM's WJLP service area. *Id.* ¶17 (JA ___). The Commission noted that "PMCM has not challenged" the Bureau's analysis of WJLP's coverage. *Ibid.* The Commission then agreed with the Bureau's uncontested finding that "WJLP was the largest station in the market at the time of grant" of the application and that "WJLP's authorized service area would cover WEDW's proposed [distributed transmission system] service area." *Ibid.*

The Commission rejected PMCM's argument that Connecticut Broadcasting could not match WJLP's service area because its application did not mention WJLP. *See id.* ¶17 n.58 (JA ___). As the Commission explained, nothing in its rules bars the Commission from basing a service area match on the service areas existing at the time an application is granted. *Ibid.* Rather, Congress authorized the

Commission to consider not only an "application," but also "such other matters as the Commission may officially notice." *Ibid.* (citing 47 U.S.C. § 309(a)).

*Finally*, the Commission rejected PMCM's argument that Connecticut Broadcasting's application would "undermine the Commission's longstanding commitment to community-based service" under 47 U.S.C. § 307(b). *Id.* ¶18 (JA ___–___). The Commission dismissed as "wholly conjectural" PMCM's allegation that Connecticut Broadcasting would "focus more on the larger urban audience of New York City to the detriment of its licensed community." *Ibid.* As the Commission explained, "Nothing in the record indicates that WEDW will abandon its service obligations to its licensed community, and population density alone is an insufficient basis to deny the benefits of [distributed transmission system] technology."[6] *Ibid.*

This appeal followed.

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[6] On the same day, the Commission approved a change to WEDW's community of license from Bridgeport to Stamford. *See Order* ¶1 n.3 (JA ___) (citing Memorandum Opinion & Order, *Amendment of Section 73.622(i) Post-Transition Table of DTV Allotments (Bridgeport and Stamford, Connecticut)*, FCC 20-144, 2020 WL 4734853 (rel. Aug. 11, 2020)). That order is final and has not been appealed.

## STANDARDS OF REVIEW

The Administrative Procedure Act provides that the Court may set aside only those agency actions that are arbitrary, capricious, unsupported by substantial evidence, or contrary to law. *See* 5 U.S.C. § 706(2). "Under this highly deferential standard of review, the court presumes the validity of agency action and must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment." *Nat'l Lifeline Ass'n v. FCC*, 983 F.3d 498, 507 (D.C. Cir. 2020) (quoting *Cellco P'ship v. FCC*, 357 F.3d 88, 93–94 (D.C. Cir. 2004)). In particular, "the Commission's judgments on the public interest are 'entitled to substantial judicial deference.'" *M2Z Networks, Inc. v. FCC*, 558 F.3d 554, 558 (D.C. Cir. 2009) (quoting *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981)).

The Commission also receives deference to reasonable interpretations of its own rules, to the extent they are ambiguous. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2414–18 (2019). This "general rule" of deference "gives an agency significant leeway to say what its own rules mean," *id.* at 2414, 2418, so long as the agency's position is official, fair and considered, and within its substantive expertise, *see id.* at 2416–18. *See also Nat'l Lifeline Ass'n*, 983 F.3d at 507.

## SUMMARY OF THE ARGUMENT

I. The Commission reasonably granted Connecticut Broadcasting's request to change its distributed transmission system reference point from Bridgeport to Stamford, Connecticut, as in the public interest. As the Commission found, the new reference point allows Connecticut Broadcasting to use a distributed transmission system to overcome interference and to expand coverage in western Connecticut, all without loss of service to existing viewers.

PMCM argues that Stamford cannot serve as a reference point because Connecticut Broadcasting does not have an actual or authorized broadcast facility at that site. (PMCM Br. 19–20). PMCM did not present to the Commission its specific argument that Section 73.626 of the FCC's rules precludes a Stamford reference point, and it cannot raise that claim for the first time here. *See* 47 U.S.C. § 405(a). The argument fails regardless; Section 73.626 merely fixes a station's initial reference point, but it does not prevent the Commission from changing a reference point to serve the public interest. *See* 47 C.F.R. § 73.626(c)(2).

II. The Commission reasonably allowed Connecticut Broadcasting to expand WEDW's service area to match the size of WJLP's authorized service area. *See id.* § 73.622(f)(5). The uncontested record before the

Commission showed that, at the time the FCC granted the application, WJLP had the largest service area in WEDW's market. The Commission correctly rejected PMCM's argument that WEDW could match only WJLP's actual service area, as opposed to its authorized service area. At minimum, the Court should defer to that reasonable interpretation of the FCC's own rules.

PMCM's objections about the size of the service area granted to WEDW (PMCM Br. 24–25) and the size of its own service area (*id.* 25–27) are not properly before the Court because PMCM did not make them to the Commission. *See* 47 U.S.C. § 405(a). They fail in any event. *First*, PMCM's actual service area (as opposed to its predicted, authorized service area) is irrelevant under Section 73.622(f)(5), so any error in calculation was harmless. *See* 5 U.S.C. § 706. *Second*, PMCM's objection to the service area granted to WEDW is conclusory and fails to discuss the rule on which the Commission relied. The argument is also wrong; the Commission's rules allow "minimal" coverage beyond a matched service area size, 47 C.F.R. § 73.626(f)(2), and PMCM's objection is to an extension of less than three percent of the authorized service area.

III. The Commission reasonably found that granting Connecticut Broadcasting's application was consistent with the Commission's

statutory obligation to distribute licenses equitably across communities. *See* 47 U.S.C. § 307(b). The application gives the benefit of distributed transmission system technology to Connecticut viewers—including new viewers in western Connecticut, where WEDW is licensed—without diminishing existing service in central and eastern Connecticut. And the Commission reasonably distinguished the agency precedent on which PMCM relies, in which the Media Bureau rejected an earlier proposal by WZME's predecessor to relocate its only transmitter to New York City and thereby deprive 2.2 million viewers of service.

PMCM argues for the first time that the Commission violated two of its own distributed transmission system rules (PMCM Br. 30), but Section 405 precludes review of those newly raised claims. *See* 47 U.S.C. § 405(a). Regardless, the arguments fail. The Commission's rules do not prohibit distributed transmission system stations like WEDW from providing *any* secondary service within their markets, as PMCM suggests. And the Commission did not violate community-based licensing principles by moving WEDW's reference point to the same city as its community of license.

## ARGUMENT

PMCM accuses the Commission of breaking its own rules to grant Connecticut Broadcasting's distributed transmission system application. (PMCM Br. 32). To the contrary, the Commission applied settled agency rules and precedent to uncontested facts in concluding that Connecticut Broadcasting's application served the public interest.

### I. THE COMMISSION REASONABLY GRANTED CONNECTICUT BROADCASTING A REFERENCE POINT AT STAMFORD.

#### A. The Commission Reasonably Found That The Requested Reference Point Would Serve The Public Interest.

PMCM concedes that the Commission's rules allow licensees like Connecticut Broadcasting to request a new reference point. (PMCM Br. 18–19). Here, Connecticut Broadcasting asked the Media Bureau to change its reference point to benefit the public interest. *See* Response to Informal Objection, at 7 (JA ___).[7] That Connecticut Broadcasting did so in its response to PMCM's objection, rather than in its initial application,

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[7] The request stated: "Should the Commission determine that the reference point specified in the Stamford Permit is not automatically the appropriate [distributed transmission system] reference point, it should nevertheless find that moving WEDW's reference point is in the public interest and administratively change WEDW's [distributed transmission system] reference point[.]"

did not preclude granting the request. As the Commission held, no rule requires a licensee to request a new reference point, or to make a public interest showing, only in an application rather than another pleading. *Order* ¶14 & n.43 (JA ___). PMCM cites no contrary rule here. "The Commission is entitled to control over its procedures," *Mobilfone of Ne. Pa., Inc. v. FCC*, 682 F.2d 269, 271 (D.C. Cir. 1982), and that broad discretion defeats PMCM's unsupported argument that Connecticut Broadcasting did not properly request a new reference point.

The Commission's view of the record was also reasonable. The FCC's rules allow a change in reference point if the change serves the public interest and provides coverage to the station's entire authorized service area. *See DTS R&O*, 23 FCC Rcd at 16748–49 ¶29. The Commission found both conditions satisfied and affirmed the requested change. *Order* ¶14 (JA ___–___). PMCM does not challenge either of those findings, both of which are well-supported in the record. *See id.* ¶14 & n.44 (public interest) (JA ___–___); *id.* ¶16 & n.50 (service coverage) (JA ___). This public interest finding is "entitled to substantial judicial deference." *M2Z Networks, Inc. v. FCC*, 558 F.3d 554, 558 (D.C. Cir. 2009) (quotation marks omitted).

PMCM's objection "that Connecticut Broadcasting had no intention of constructing or operating WEDW from Stamford" when it applied for its Stamford construction permit is unfounded and irrelevant. (PMCM Br. 19).

*First*, the Commission found no evidence of bad faith from Connecticut Broadcasting and therefore rejected PMCM's claim that Connecticut Broadcasting filed a "bogus" construction permit application and never actually intended to construct facilities at Stamford. *Order* ¶15 (JA ___). The Commission credited Connecticut Broadcasting's claim that it requested to use a distributed transmission system shortly after approval of its Stamford construction permit because "concerns of potential interference" at the Stamford site arose only after it applied for the Stamford permit.[8] *Id.* ¶15 & n.47 (JA ___). As PMCM concedes (PMCM Br. 19), Connecticut Broadcasting made clear during the

[8] Connecticut Broadcasting filed its initial Stamford construction permit application on November 2, 2017, which was the last day of the filing window for those post-repacking applications. *See* LMS File No. 0000034896, at 1 (JA ___); Public Notice, 32 FCC Rcd at 6989 ¶1. Connecticut Broadcasting faced potential interference at Stamford by reason of an application filed by WDVB-CD the same day. *See* Opposition to Application for Review, at 5 (JA ___) (citing LMS File No. 0000034859 (filed Nov. 2, 2017)).

proceeding that it would not build a transmitter at Stamford if allowed to use a distributed transmission system from Bridgeport and New York instead. *See id.* ¶4 (JA ___). Moreover, Connecticut Broadcasting had no obligation to build a transmitter at Stamford while its modification application was pending, *see id.* ¶15 (JA ___), and doing so would have been an unwise use of limited resources, *see id.* ¶14 (JA ___–___).

*Second*, whether Connecticut Broadcasting ever intended to build a transmitter at Stamford is irrelevant to the central issue here. The question in this proceeding is whether the distributed transmission system proposal, including the request for a Stamford reference point, is in the public interest. *See id.* ¶14 (JA ___–___); 47 U.S.C. § 309(a). This public interest standard gives the FCC flexibility to allow stations to adjust their operations in the face of challenges—just as Connecticut Broadcasting did here by changing Stamford from a transmitter site to a distributed transmission system reference point. PMCM does not question that public interest finding. Instead, PMCM attacks Connecticut Broadcasting's intentions in seeking its initial Stamford construction permit. That is an improper collateral attack on a distinct—and final—order. *Order* ¶15 & n.46 (JA ___).

### B. PMCM Forfeited Its Main Legal Argument That A Reference Point Must Correspond To A Station's Facilities, Which Fails In Any Event.

1. In this Court, PMCM's principal legal objection is that a reference point must correspond to "actual facilities that are prescribed to be built and operated."[9] (PMCM Br. 20; *see id.* 13). In PMCM's view, this follows from 47 C.F.R. § 73.626(c)(2), which references "facilities" in identifying a "[distributed transmission system] reference point." PMCM cannot raise that argument here because it was not raised to the Commission.

Under the Communications Act, "the FCC must be 'afforded [an] opportunity to pass' on all arguments made to a court." *NTCH, Inc. v. FCC*, 841 F.3d 497, 508 (D.C. Cir. 2016) (quoting 47 U.S.C. § 405(a)). This "condition precedent to judicial review," 47 U.S.C. § 405(a), is "strictly construed." *Nat'l Lifeline Ass'n v. FCC*, 983 F.3d 498, 509 (D.C. Cir. 2020) (quoting *In re: Core Commc'ns, Inc.*, 455 F.3d 267, 276 (D.C. Cir. 2006)). Thus, a party seeking judicial review must have "flagged" an

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[9] PMCM separately objects to the Media Bureau's conclusion that applications are granted on the facts at the time an application is filed. (PMCM Br. 20–22). But, as PMCM concedes, the Court "does not need to consider" this Bureau-level determination (*id.* 20), which the Commission did not adopt.

argument so that "a reasonable Commission *necessarily* would have seen the question raised [in court] as part of the case presented to it." *NTCH*, 841 F.3d at 508 (quoting *Time Warner Entm't Co. v. FCC*, 144 F.3d 75, 81 (D.C. Cir. 1998) (emphasis in original)).

Here, the Commission had no opportunity to address PMCM's argument about Section 73.626(c)(2). (PMCM Br. 20). In its pleadings to the Commission, PMCM never cited Section 73.626 in connection with its arguments about the Stamford reference point's public interest benefits.[10] *See* Application for Review, at 4–6 (JA ___–___); Reply to Opposition, at 1–3 (JA ___–____). At most, PMCM alluded to a facilities requirement in its reply, but only in response to Connecticut Broadcasting's separate argument that Stamford was automatically the correct reference point under the FCC's rules. *See* Opposition to Application for Review, at 7–8 (JA ___–____); Reply to Opposition, at 1–3 (JA ___–____). PMCM then conceded that Connecticut Broadcasting

[10] PMCM cited the rule to the Media Bureau. *See* Reply to Response to Informal Objection, at 1–2 (JA ___–___). But that did not "preserve the argument for appellate review" because PMCM "was required to present it to the Commission in its application for review of the Media Bureau's decision." *Nueva Esperanza, Inc. v. FCC*, 863 F.3d 854, 860 (D.C. Cir. 2017).

could request a change in reference point in the public interest. *See* Reply to Opposition, at 2 (JA ___). The only substantive legal argument that PMCM raised regarding the public interest was that "a reference point can only be changed if the resulting service area would fully encompass that station's previously authorized service area." *Ibid.*

Mere allusion to a definition, like the one PMCM now cites (PMCM Br. 20), does not exhaust an argument if the party never "argu[ed] that the Commission was bound to apply [that] definition." *Nw. Indiana Tel. Co., Inc. v. FCC*, 824 F.2d 1205, 1210 n.8 (D.C. Cir. 1987). Because PMCM never argued that Section 73.626(c)(2) constrains the Commission's discretion to grant a new reference point in the public interest, PMCM did not "*necessarily*" raise the question and never "flagged" this argument to the Commission. *Cf. NTCH*, 841 F.3d at 508 (emphasis in original).

2. In any event, PMCM's argument that the Commission's rules require a reference point to correspond to station facilities is meritless.

Section 73.626(c)(2) of the Commission's rules identifies a station's distributed transmission system reference point as that "established" in a prior FCC Order "and the corresponding facilities for the station's channel assignment as set forth in that FCC Order." 47 C.F.R.

§ 73.626(c)(2). PMCM errs by fixating on the word "facilities" divorced from other key text and the rule's broader "context, … history, and purpose." *Abramski v. United States*, 573 U.S. 169, 179 (2014) (cleaned up). In 2008, the Commission determined an initial reference point for each station if that station decided to use a distributed transmission system. *See DTS R&O*, 23 FCC Rcd at 16748–49 ¶29. The Commission used the station's digital television facilities as that initial point.[11] *See ibid.* Although a distributed transmission system station would "[g]enerally" use that "current reference point," a station could also "request a change to its reference point" by making "the appropriate public interest showing" and "showing that the resulting service area circle fully encompasses he station's authorized service area." *Ibid.*

Section 73.626(c)(2) reflects this framework. The rule identifies where a reference point "is established." 47 C.F.R. § 73.626(c)(2); *see DTS*

[11] These "facilities" were from Appendix B to a 2007 FCC Order. *See DTS R&O*, 23 FCC Rcd at 16748–49 ¶29 n.119. That appendix listed the technical parameters of a facility (including "transmitter site") that the station could build to replicate its licensed analog facility following the 2009 transition to digital television. *See* Seventh Report & Order and Eighth Further Notice of Proposed Rule Making, *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, 22 FCC Rcd 15581, 15672 (2007).

*R&O*, 23 FCC Rcd at 16748–49 ¶29. In this context, "establish" most naturally means "to settle or fix after consideration or by enactment." *See* 1 Webster's Third New International Dictionary 778 (1981). But the term does not imply permanence; for example, "a congressional bill" might establish "duties on … imports" or "quota limits," *id.*, subject to executive adjustment. So, too, here: fixing an initial point does not by itself constrain future adjustments.

Context also suggests no relevant constraint. The Commission authorized future changes to initial reference points without identifying a facilities limitation—despite imposing other limitations, like "showing that the resulting service area circle fully encompasses the station's authorized service area." *DTS R&O*, 23 FCC Rcd at 16748–49 ¶29.

Finally, PMCM's argument would have required Connecticut Broadcasting "to first build a new transmitter at the Stamford site prior to filing the [distributed transmission system] Application," which the Commission found would not have been "a wise use of resources." *Order* ¶14 (JA ___–___). Thus, neither text, context, history, purpose, nor "common sense," *Abramski*, 573 U.S. at 179, favors PMCM's view of the Commission's rule.

## II. THE COMMISSION REASONABLY ALLOWED CONNECTICUT BROADCASTING TO MATCH PMCM'S SERVICE AREA.

### A. Uncontested Findings And Settled Precedent Supported The Commission's Decision.

The Commission held that Connecticut Broadcasting's distributed transmission system service area may match the size of PMCM's "authorized service area" for station WJLP. *Order* ¶17 (JA ___). That is consistent with the FCC's rules and the uncontested facts before the agency, *id.*, and PMCM's objections are unavailing. (PMCM Br. 22–28).

The Commission's rules allow digital television stations to increase their power level or antenna height "up to that needed to provide the same geographic coverage area as the largest station within their market."[12] 47 C.F.R. § 73.622(f)(5). The Commission's rules extend this benefit to stations using distributed transmission systems. *See DTS R&O*, 23 FCC Rcd at 16751–52 ¶35 ("[Distributed transmission system] stations may obtain the same coverage under the rule as would a single-

[12] The relevant "market" is the station's Designated Market Area (DMA), a group of counties for which the largest share of television viewing belongs to stations located in that market area. *2001 Digital Television R&O*, 16 FCC Rcd at 5973–74 ¶74; *see Incentive Auction R&O*, 29 FCC Rcd at 6726 ¶372 n.1105. WEDW, WZME, and WJLP are each in the New York City Designated Market Area. *Order* ¶¶3, 17 (JA ___–___, ___).

transmitter station, provided the [distributed transmission system] service would not result in new interference.”).

Citing this rule and an uncontested factual record, the Commission allowed WEDW to match the “authorized service area” of the largest station in its market—PMCM’s WJLP station. *Order* ¶17 (JA ___). As the Commission noted, PMCM neither contested the Bureau’s “analysis of WJLP’s coverage contour” nor “that WJLP served this area” at the time the Bureau granted Connecticut Broadcasting’s application. *Ibid.* Indeed, PMCM’s single footnote of argument about WJLP’s coverage area provided no evidence that the Bureau’s calculation of its authorized service area was wrong. *See* Application for Review, at 7 n.5 (JA ___).

PMCM argues that the Commission erred by not considering its actual coverage area as opposed to its authorized service area. According to PMCM, Section 73.622(f)(5)’s reference to a “geographic coverage area” must mean the actual area to which the largest station provides service, not a “theoretical” service area. (PMCM Br. 27, 23; *see id.* 15, 24). The Commission rejected that argument and concluded that the largest station’s actual coverage area—including, for example, limitations resulting from the station’s contracts with third parties—does not limit the service area that a station using a distributed transmission system

may apply to match. *Order* ¶17 n.57 (JA ___). As the Commission explained, the relevant rules "do not impose such restrictions." *Ibid.*

PMCM's contrary argument is again inconsistent with the rule's "context, … history, and purpose." *Abramski*, 573 U.S. at 179 (cleaned up). In 2001, the Commission clarified Section 73.622 and held that "the geographical coverage determination is based on the area within the [digital television] station's noise-limited contour, calculated using predicted F(50, 90) field strengths as set forth in Section 73.622(e) of the Rules and the procedure specified in Section 73.625(b) of the Rules." *See 2001 Digital Television R&O*, 16 FCC Rcd at 5973–74 ¶74. The Commission's distributed transmission system rules incorporate that clarification. *See DTS R&O*, 23 FCC Rcd at 16751–52 ¶35 & n.144 (quoting *2001 Digital Television R&O*, 16 FCC Rcd at 5973–74 ¶74).

The Commission's 2001 guidance resolves this dispute. To determine the "geographical coverage" a station can match, the Commission looks to Sections 73.622(e) and 73.625(b) of its rules. *See 2001 Digital Television R&O*, 16 FCC Rcd at 5973–74 ¶74. Section 73.622(e) defines a digital television station's "service area … as determined using the method in section 73.625(b)." 47 C.F.R. § 73.622(e). And that method merely "predict[s]" coverage. *Id.* § 73.625(b)(1). The

rules explain that "true coverage may vary from these estimates" due to "actual conditions"; "the actual extent of service will usually be less than indicated by these estimates due to interference from other stations"; and the predicted contours "give no assurance of service to any specific percentage of receiver locations within the distances indicated." *Id.* § 73.625(a)(3). In short, the Commission's authoritative guidance on Section 73.622(f)(5) equates "geographic coverage" with a *predicted* service area—not the actual coverage area.

This approach makes sense. Using predicted coverage under a uniform methodology is efficient and administrable; it allows stations and the FCC to calculate coverage areas without spending resources to determine, in every case, the actual area that the largest station in a market reaches. Contrary to PMCM's suggestions (PMCM Br. 23, 26–27), the object of service area matching is not perfect parity among stations in a market. When the Commission first promulgated the rule, it noted that service area matching "would *tend* to equalize the coverage areas of all stations within a market and *reduce* the current disparities among stations," but not necessarily eliminate disparities. *See* Sixth Report & Order, *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, 12 FCC Rcd 14588, 14595–96 ¶12

(1997) (emphasis added). Just as "no legislation pursues its purposes at all costs," *CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014), the Commission's service area matching rule balances parity against administrability.

In response, PMCM cites only an inapt portion of the *2001 Digital Television R&O*. PMCM argues that Section 73.622(f) applies "only" where the largest station in the market is "serving" a larger area, with "serving" meaning "something more than lines on a piece of paper"—i.e., actual service. (PMCM Br. 24). But the guidance PMCM cites addresses the distinct issue of when stations "must comply with the maximum power and antenna height" requirements. *See 2001 Digital Television R&O*, 16 FCC Rcd at 5973–74 ¶74. Only after addressing that issue did the Commission turn to "the geographical coverage determination." *See ibid*. And as explained, the Commission's approach looks to predicted—not actual—service areas. *See ibid.*

Appropriately understood, the rule supports the Commission's conclusion that contract-related limits on service areas are irrelevant when determining the service area size that a distributed transmission system station can match. *See Order* ¶17 n.57 (JA ___). At the very least,

the Court should defer to this reasonable, longstanding, and authoritative interpretation. *Kisor*, 139 S. Ct. at 2415–18.

PMCM likewise fails in its attack on the Commission's ruling that a station need not identify the largest station in the market in its application. (PMCM Br. 28). The Commission correctly dismissed this argument as inconsistent with applicable rules and with the Commission's statutory authority to take official notice of facts in making its public interest determinations. *See Order* ¶17 n.58 (JA ___) (citing 47 U.S.C. § 309(a)). As with its argument that stations may request a new reference point only in an application, PMCM again fails to cite any specific rule to support its position—just as it failed to cite any such rule in its pleadings to the Commission.[13] *See* Application for Review, at 7 n.5 (JA ___). Finally, any application-related procedural error is harmless because there is no dispute that WJLP is in fact the largest station in the market and that Connecticut Broadcasting could apply to match its service area size. *See* 5 U.S.C. § 706; *cf. Nat'l Ass'n of Broadcasters*, 789 F.3d at 176–77.

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[13] PMCM's passing reference to 47 C.F.R. § 73.3511 is inapposite. (PMCM Br. 23). That rule requires parties to file appropriate applications, but it does not govern the applications' contents.

### B. PMCM's Objections To The Commission's Coverage Area Calculations Are Barred Because They Were Not Raised To The Commission.

1. PMCM alleges that there is a "1,200 square kilometer difference in area" between what the Media Bureau calculated and what was granted to Connecticut Broadcasting (*see* PMCM Br. 24–25); and that WJLP "suffer[s] significant loss of useable signal" because it transmits on a Very High Frequency (VHF) channel (*id.* at 25–27). PMCM did not raise these arguments to the Commission and cannot raise them here.[14] *See* 47 U.S.C. § 405(a).

To begin, "vague allusions … do not serve to satisfy the requirements of section 405(a)." *NTCH*, 841 F.3d at 508. PMCM admits that its argument to the Commission only "briefly alluded" to issues with service area calculation. (PMCM Br. 27 (citing Application for Review,

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[14] PMCM alludes to another issue: that its facilities are not fully constructed. (PMCM Br. 23; *see id.* 8, 15). That, too, is precluded because PMCM never "questioned that WJLP served [the authorized service] area" when the Commission granted the application. *Order* ¶17 (JA ___); *see* Application for Review, at 7 n.5 (JA ___). PMCM also forfeits the issue by not squarely arguing that a station cannot match the service area of an authorized, but not constructed, facility. *See Jawad v. Gates*, 832 F.3d 364, 371 (D.C. Cir. 2016). The argument also fails on the merits, because the service matching rule looks to predicted service, not actual service. *See supra*, at 33–36.

at 7 n.5 (JA ___))). That understates the case. PMCM's Application for Review contained a single general statement—that "the noise floor experienced by a low band VHF station in an urban environment such as New York City is radically different from that of a similarly situated UHF station, thus making a real world apples to apples comparison of 'coverage' … impossible." Application for Review, at 7 n.5 (JA __). PMCM did not argue, as it does here, that the Commission granted WEDW too much coverage area, nor that WJLP's service area "is not in fact what the FCC's service curves predict." (*See* PMCM Br. 25).

Section 405 "require[s] complainants to give the Commission a 'fair opportunity' to pass on a … factual argument," not just a legal one. *Gencom Inc. v. FCC*, 832 F.2d 171, 187 (D.C. Cir. 1987). This rule is especially important in "a highly technical area," *see ibid.*, and Section 405 precludes judicial review of "quantitative arguments" where "the grist was there, but nothing was made of it" to the Commission. *Alianza Federal de Mercedes v. FCC*, 539 F.2d 732, 739 (D.C. Cir. 1976). Having failed to "bring matters into focus" with specific, record- and evidence-based arguments that "fairly raised" the issue of coverage calculation, *cf. ibid.*, PMCM "by-pass[ed] an opportunity to correct what it now asserts

is a completely unsupported factual error" and cannot seek judicial review. *Cf. Gencom*, 832 F.2d at 187.

PMCM contends that it had no "opportunity" to raise its objections to the Commission (PMCM Br. 25), but the record belies that argument. The Bureau granted WEDW's requested service area size by reference to WJLP's authorized service area. *See Bureau Letter Order*, at 6 (JA ___). The Bureau disclosed its calculations of WJLP's authorized service area and of a 116.4-kilometers distributed transmission system arc; concluded that Connecticut Broadcasting's proposed transmitter sites were within that arc; and acknowledged that "while the Empire State Building contour extends beyond that arc in two areas, those extension are minimal, which is allowed." *Ibid*. (citing *DTS R&O*, 23 FCC Rcd at 16750–51 ¶33); *see also* 47 C.F.R. § 73.626(f)(2) (permitting "extension of coverage beyond the station's authorized service area" that is "minimal" and "necessary" to cover the entire authorized area). PMCM knew the findings necessary to object to the Bureau's calculations. In any event, PMCM does not explain why it could not have filed a petition for reconsideration raising its new objections after the *Order* issued. *See* 47 C.F.R. § 1.106; *Nat'l Lifeline Ass'n*, 983 F.3d at 509 (petition for

reconsideration required even if the petitioner had no reason to raise an argument initially).

2. Regardless, PMCM's contention that its "actual coverage" was miscalculated fails because the FCC's rules allow distributed transmission system stations to match predicted service areas, not actual coverage area. *See supra*, at 33–36. Any error was therefore harmless, because PMCM's actual coverage area is irrelevant under the rule. *See* 5 U.S.C. § 706; *Nat'l Ass'n of Broadcasters*, 789 F.3d at 176–77.

Nor should the Court entertain PMCM's argument that the Commission granted WEDW 1,200 too many square kilometers of service area. (PMCM Br. 24–25). The Commission allowed WEDW's coverage to extend beyond the calculated 116.4-kilometer distributed transmission system arc under a rule permitting "minimal" extensions. *See Order* ¶17 n.56 (JA ___) (affirming *Bureau Letter Order*, at 6 (citing *DTS R&O*, 23 FCC Rcd at 16750–51 ¶33) (JA ___)); *see also* 47 C.F.R. § 73.626(f)(2). That decision was sound: WJLP's authorized service area is 42,605.5 square kilometers, and the asserted 1,200 square kilometer extension for WEDW is less than three percent of that total. *See Order* ¶17 & n.56 (JA ___).

PMCM makes only a conclusory assertion that this minimal extra service area is "inconsistent with any rule" (PMCM Br. 25), without even mentioning the rule that the Commission applied. PMCM cites no basis for holding that a less-than-three-percent deviation is not "minimal," as the rule allows. 47 C.F.R. § 73.626(f)(2). This Court generally "will not consider asserted but unanalyzed arguments" like this, nor should it here. *Jawad*, 832 F.3d at 371 (quoting *Anna Jacques Hosp. v. Sebelius*, 583 F.3d 1, 7 (D.C. Cir. 2009) (cleaned up)); *accord Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983).

## III. THE COMMISSION REASONABLY ACCOUNTED FOR THE FAIR, EFFICIENT, AND EQUITABLE DISTRIBUTION OF LICENSES.

### A. The Commission Found No Evidence That The Application Would Harm Service To Connecticut Broadcasting's Connecticut Communities.

The Communications Act directs the Commission to distribute "licenses … among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." 47 U.S.C. § 307(b). This requires "balancing myriad considerations," a task that "Congress delegated to the Commission." *Mary V. Harris Found. v. FCC*, 776 F.3d 21, 25 (D.C. Cir. 2015). "The FCC has broad discretion under section 307(b) to determine the public

interest," *Winter Park Commc'ns, Inc. v. FCC*, 873 F.2d 347, 352 (D.C. Cir. 1989), and "to decide what factors would be dispositive in expanding access to radio service." *Mary V. Harris Found.*, 776 F.3d at 25.

The Commission's findings were reasonable and consistent with Section 307(b)'s community focus. As the Commission found, granting Connecticut Broadcasting's application would increase service to western Connecticut viewers without loss of service to any existing central and eastern Connecticut viewers. *See Order* ¶18 (JA ___–___). And the Commission's longstanding view is that expanding options without a significant loss of service is a public benefit. *Cf., e.g.*, Memorandum Opinion & Order, *Applications of Stockholders of Renaissance Commc'ns Corp. (Transferor) and Tribune Co. (Transferee)*, 12 FCC Rcd 11866, 11867 ¶22 (1997), *aff'd*, *Tribune Co. v. FCC*, 133 F.3d 61 (D.C. Cir. 1998) ("[P]rovision of a new network service to additional viewers, without the loss of such service to existing viewers, constitutes a significant public interest benefit.").

PMCM contends that the Commission's decision nonetheless threatens television service to WEDW's Connecticut viewers. (PMCM Br. 31). According to PMCM, stations will prove unable to resist "the lure of service to the 22 million or so people in the greater New York market."

(*Ibid.*). But the Commission found "[n]othing in the record" to suggest that Connecticut Broadcasting would abandon its obligations to its Connecticut communities, and it therefore rejected as "wholly conjectural" PMCM's unsupported allegation that Connecticut Broadcasting would focus on New York City to the detriment of its licensed Connecticut community. *Order* ¶ 18 (JA ___–___). The Commission also took the opportunity to "remind all licensees of the seriousness of their obligation to serve their communities of license, and not to divert resources to serve other, larger communities in their service area." *Ibid.* In the end, the Commission concluded that "population density alone is an insufficient basis to deny the benefits of DTS technology," *ibid.*—benefits that include reaching previously blocked areas, improving service and reception, reducing interference, and enhancing spectrum efficiency. *See DTS R&O*, 23 FCC Rcd at 16738–40 ¶14.

PMCM also contends that Connecticut Broadcasting's distributed transmission system application is materially the same as an application the Media Bureau denied almost a decade earlier. (PMCM Br. 2–3, 29–31). In 2008, the predecessor to WZME—Connecticut Broadcasting's current channel sharing partner—applied to relocate its one transmitter

from Bridgeport to the Empire State Building. *See Order* ¶¶10, 18 (JA ___, ___–___). The Media Bureau denied this request "in large part due to the loss of service" to 2.2 million Connecticut viewers that would have resulted from the move. *Id.* ¶18 (JA ___–___).

Apart from the fact that a Bureau decision does not bind the Commission, *Comcast Corp. v. FCC*, 526 F.3d 763, 769 (D.C. Cir. 2008), Connecticut Broadcasting's application is materially different from the 2008 application. WZME's predecessor was not applying to use a distributed transmission system. Rather, it proposed to move its single transmitter from Bridgeport to New York City, which would have deprived service to 2.2 million existing viewers. *Order* ¶ 18 (JA ___–___). By contrast, Connecticut Broadcasting proposed to *add* a second distributed transmission system transmitter at the Empire State Building, which would improve service to western Connecticut while maintaining service to all existing viewers. *Ibid.*

The weighing of public interest considerations is committed to the FCC's "broad discretion under section 307(b)," *Winter Park Commc'ns*, 873 F.2d at 352, and is "entitled to substantial judicial deference." *M2Z Networks*, 558 F.3d at 558 (quotation marks omitted). The Commission's

finding on this record that Connecticut Broadcasting's application will serve its community of license, and the public interest, was reasonable.

### B. PMCM's Secondary Service And Transmitter Distance Arguments Are Barred And Fail In Any Event.

1. PMCM complains that the *Order* violates the FCC's distributed transmission system rules by allowing Connecticut Broadcasting (1) to provide "Secondary Service"[15] throughout the New York Designated Market Area and (2) to use "a hypothetical maximized facility" to move the center of its coverage area over 90 kilometers from its principal community. (PMCM Br. 30; *see id.* 31–32).

PMCM did not raise either of these arguments to the Commission.[16] Instead, PMCM rested on its argument that Connecticut Broadcasting's application was an improper attempt to move WZME into New York City. *See* Application for Review, at 8–10 (JA ___–___); Reply to Opposition, at 4–5 (JA___–____). PMCM never cited a "secondary service" or "90

[15] A "secondary" service is unprotected from interference and subject to potential displacement. *See, e.g.*, *Incentive Auction R&O*, 29 FCC Rcd at 6673–74 ¶239 & n.740 (citing 47 C.F.R. § 74.702(b)).

[16] PMCM cited the "hypothetical maximized facility" argument to the Media Bureau. *See* Reply to Response to Informal Objection, at 5 (JA ___). But, its failure to renew that argument to the Commission precludes judicial review. *Nueva Esperanza*, 863 F.3d at 860.

kilometer" limitation as grounds to deny the application under the distributed transmission system rules. Because PMCM did not afford the Commission an opportunity to pass on these arguments, Section 405 precludes judicial review. *See Nat'l Lifeline Ass'n*, 983 F.3d at 509; *NTCH*, 841 F.3d at 508.

2. In any event, PMCM's arguments fail to show a violation of the distributed transmission system rules or Section 307(b).

*First*, PMCM misunderstands the Commission's "secondary service" limitation. In adopting the distributed transmission system rules, the Commission considered whether to allow broadcasters using a distributed transmission system to serve their entire Designated Market Areas. *See DTS R&O*, 23 FCC Rcd at 16743–46 ¶¶20–25. The Commission rejected that proposal to avoid "special treatment" for distributed transmission system stations as compared to single-transmitter stations. *See id.* at 16746 ¶25. To "afford consistent treatment" to both station types, *ibid.*, the Commission generally limited distributed transmission system broadcasting to the station's authorized service area—an area generally smaller than the Designated Market Area and comparable to what single-transmitter stations serve. *See id.* at 16743–44 ¶20. The Commission rejected secondary service in an *entire*

Designated Market Area to avoid the possibility of stations' serving "communities 100 or more miles away from their community of license." *Ibid*. But not all secondary service is prohibited; for example, the Commission allows "incidental secondary service that results from the necessary placement of transmitters near the edge of a station's service area." *Id*. at 16746 ¶25 n.102.

Connecticut Broadcasting's application was consistent with that regime. PMCM does not argue that Connecticut Broadcasting now serves its entire market, nor communities 100 miles or more from its community of license. (PMCM Br. 30). Moreover, Connecticut Broadcasting is not receiving "special treatment"; its service area is comparable to PMCM's WJLP, a single-transmitter station. *See DTS R&O*, 23 FCC Rcd at 16746 ¶25; *supra*, at 40–41. The policy concerns behind the secondary service limitation are not present on this record.

*Second*, PMCM objects that Connecticut Broadcasting's Bridgeport transmitter is "almost 100 kilometers from the Empire State Building." (PMCM Br. 30). That is irrelevant; what matters is the distance of the station's reference point from its principal community. *See DTS R&O*, 23 FCC Rcd at 16748–49 ¶29 (declining to "allow stations to move the center of their coverage area to nearly 90 km from the principal

community"). Under the *Order*, Connecticut Broadcasting's reference point is in Stamford, Connecticut—which is also its community of license. *See Order* ¶¶1, 14 (JA___, ___–___).

## CONCLUSION

The Court should affirm the *Order*.

Dated: January 28, 2021

Respectfully submitted,

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I, Adam G. Crews, hereby certify that on January 28, 2021, I caused the foregoing Brief for Appellee to be filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the Court's electronic CM/ECF system, which caused a true and correct copy of the same to be served on all participants in the case registered to receive such notices.

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# STATUTORY ADDENDUM

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# 47 U.S.C. § 301

## § 301. License for radio communication or transmission of energy

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States (except as provided in section 303(t) of this title); or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

# 47 U.S.C. § 307(b)

### § 307. Licenses

* * *

**(b) Allocation of facilities**
In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

* * *

# 47 U.S.C. § 308

### § 308. Requirements for license

**(a) Writing; exceptions**
The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it: *Provided*, That (1) in cases of emergency found by the Commission involving danger to life or property or due to damage to equipment, or (2) during a national emergency proclaimed by the President or declared by the Congress and during the continuance of any war in which the United States is engaged and when such action is necessary for the national defense or security or otherwise in furtherance of the war effort, or (3) in cases of emergency where the Commission finds, in the nonbroadcast services, that it would not be feasible to secure renewal applications from existing licensees or otherwise to follow normal licensing procedure, the Commission may grant construction permits and station licenses, or modifications or renewals thereof, during the emergency so found by the Commission or during the continuance of any such national emergency or war, in such manner and upon such terms and conditions as the Commission shall by regulation prescribe, and without the filing of a formal application,

but no authorization so granted shall continue in effect beyond the period of the emergency or war requiring it: *Provided further*, That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

**(b) Conditions**

All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee in any manner or form, including by electronic means, as the Commission may prescribe by regulation.

**(c) Commercial communication**

The Commission in granting any license for a station intended or used for commercial communication between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 35 of this title.

**(d) Summary of complaints**

Each applicant for the renewal of a commercial or noncommercial television license shall attach as an exhibit to the application a summary of written comments and suggestions received from the public

and maintained by the licensee (in accordance with Commission regulations) that comment on the applicant's programming, if any, and that are characterized by the commentor as constituting violent programming.

# 47 U.S.C. § 309(a)

## § 309. Application for license

**(a) Considerations in granting application**
Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

* * *

# 47 U.S.C. § 405

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

**(a)** After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a

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

**(b)(1)** Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

**(2)** Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

# 47 C.F.R. § 73.622(e) & (f)(5)

## § 73.622 Digital television table of allotments.

* * *

**(e) DTV Service Areas.**
(1) The service area of a DTV station is the geographic area within the station's noise-limited F(50,90) contour where its signal strength is predicted to exceed the noise-limited service level. The noise-limited contour is the area in which the predicted F(50,90) field strength of the station's signal, in dB above 1 microvolt per meter (dBu) as determined using the method in section 73.625(b) exceeds the following levels (these are the levels at which reception of DTV service is limited by noise):

| | dBu |
|---|---|
| Channels 2-6 | 28 |
| Channels 7-13 | 36 |
| Channels 14-69 | 41 |

(2) Within this contour, service is considered available at locations where the station's signal strength, as predicted using the terrain dependent Longley–Rice point-to-point propagation model, exceeds the levels above. Guidance for evaluating coverage areas using the Longley–Rice methodology is provided in *OET Bulletin No. 69*. Copies of this document are available on the FCC's website. See *https://www.fcc.gov/general/oet-bulletins-line*.
(3) For purposes of determining whether interference is caused to a DTV station's service area, the maximum technical facilities, i.e., antenna height above average terrain (antenna HAAT) and effective radiated power (ERP), specified for the station's allotment are to be used in determining its service area.

**(f) DTV maximum power and antenna heights.**

* * *

(5) Licensees and permittees assigned a DTV channel in the initial DTV Table of Allotments may request an increase in either ERP in some azimuthal direction or antenna HAAT, or both, that exceed the initial technical facilities specified for the allotment in Appendix B of the *Memorandum Opinion and Order* (referenced in paragraph (c) of this section), up to the maximum permissible limits on DTV power and antenna height set forth in paragraph (f)(6), (f)(7), or (f)(8) of this section, as appropriate, or up to that needed to provide the same geographic coverage area as the largest station within their market, whichever would allow the largest service area. Such requests must be accompanied by a technical showing that the increase complies with the technical criteria in § 73.623(c), and thereby will not result in new interference exceeding the de minimis standard set forth in that section, or statements agreeing to the change from any co-channel or adjacent channel stations that might be affected by potential new interference, in accordance with § 73.623(f). In the case where a DTV station has been granted authority to construct pursuant to § 73.623(c), and its authorized coverage area extends in any azimuthal direction beyond the DTV coverage area determined for the DTV allotment reference facilities, then the authorized DTV facilities are to be used in addition to the assumed facilities of the initial DTV allotment to determine protection from new DTV allotments pursuant to § 73.623(d) and from subsequent DTV applications filed pursuant to § 73.623(c). The provisions of this paragraph regarding increases in the ERP or antenna height of DTV stations on channels in the initial DTV Table of Allotments shall also apply in cases where the licensee or permittee seeks to change the station's channel as well as alter its ERP and antenna HAAT. Licensees and permittees are advised that where a channel change is requested, it may, in fact, be necessary in specific cases for the station to operate with reduced power, a lower antenna, or a directional antenna to avoid causing new interference to another station.

* * *

# 47 C.F.R. § 73.625(a) & (b)(1)

### § 73.625 DTV coverage of principal community and antenna system.

**(a) Transmitter location.**
(1) The DTV transmitter location shall be chosen so that, on the basis of the effective radiated power and antenna height above average terrain employed, the following minimum F(50,90) field strength in dB above one uV/m will be provided over the entire principal community to be served:

| Channels 2-6 | 35 dBu |
|---|---|
| Channels 7-13 | 43 dBu |
| Channels 14-69 | 48 dBu |

| Channels 2-6 | 28 dBu |
|---|---|
| Channels 7-13 | 36 dBu |
| Channels 14-69 | 41 dBu |

(2) The location of the antenna must be so chosen that there is not a major obstruction in the path over the principal community to be served.
(3) For the purposes of this section, coverage is to be determined in accordance with paragraph (b) of this section. Under actual conditions, the true coverage may vary from these estimates because the terrain over any specific path is expected to be different from the average terrain on which the field strength charts were based. Further, the actual extent of service will usually be less than indicated by these estimates due to interference from other stations. Because of these factors, the predicted field strength contours give no assurance of service to any specific percentage of receiver locations within the distances indicated.

**(b) Determining coverage.**

(1) In predicting the distance to the field strength contours, the F (50,50) field strength charts (Figures 9, 10 and 10b of § 73.699 of this part) and the F (50,10) field strength charts (Figures 9a, 10a and 10c of § 73.699 of this part) shall be used. To use the charts to predict the distance to a given F (50,90) contour, the following procedure is used: Convert the effective radiated power in kilowatts for the appropriate azimuth into decibel value referenced to 1 kW (dBk). Subtract the power value in dBk from the contour value in dBu. Note that for power less than 1 kW, the difference value will be greater than the contour value because the power in dBk is negative. Locate the difference value obtained on the vertical scale at the left edge of the appropriate F (50,50) chart for the DTV station's channel. Follow the horizontal line for that value into the chart to the point of intersection with the vertical line above the height of the antenna above average terrain for the appropriate azimuth located on the scale at the bottom of the chart. If the point of intersection does not fall exactly on a distance curve, interpolate between the distance curves below and above the intersection point. The distance values for the curves are located along the right edge of the chart. Using the appropriate F (50,10) chart for the DTV station's channel, locate the point where the distance coincides with the vertical line above the height of the antenna above average terrain for the appropriate azimuth located on the scale at the bottom of the chart. Follow a horizontal line from that point to the left edge of the chart to determine the F (50,10) difference value. Add the power value in dBk to this difference value to determine the F (50,10) contour value in dBu. Subtract the F (50,50) contour value in dBu from this F (50,10) contour value in dBu. Subtract this difference from the F (50,50) contour value in dBu to determine the F (50,90) contour value in dBu at the pertinent distance along the pertinent radial.

* * *

# 47 C.F.R. § 73.626

## § 73.626 DTV distributed transmission systems.

**(a)** A DTV station may be authorized to operate multiple synchronized transmitters on its assigned channel to provide service consistent with the requirements of this section. Such operation is called a distributed transmission system (DTS). Except as expressly provided in this section, DTV stations operating a DTS facility must comply with all rules applicable to DTV single-transmitter stations.

**(b)** For purposes of compliance with this section, a station's "authorized service area" is defined as the area within its predicted noise-limited service contour determined using the facilities authorized for the station in a license or construction permit for non–DTS, single-transmitter-location operation.

**(c) Table of Distances.** The following Table of Distances describes (by channel and zone) a station's maximum service area that can be obtained in applying for a DTS authorization.

| Channel | Zone | F(50,90) field strength (dBu) | Distance from reference point |
|---|---|---|---|
| 2-6 | 1 | 28 | 108 km. (67 mi.) |
| 2-6 | 2 and 3 | 28 | 128 km. (80 mi.) |
| 7-13 | 1 | 36 | 101 km. (63 mi.) |
| 7-13 | 2 and 3 | 36 | 123 km. (77 mi.) |
| 14-51 | 1, 2 and 3 | 41 | 103 km. (64 mi.) |

(1) DTV station zones are defined in § 73.609.
(2) DTS reference point. A station's DTS reference point is established in the FCC Order that created or made final modifications to the Post–Transition DTV Table of Allotments, § 73.622(i), and the corresponding facilities for the station's channel assignment as set forth in that FCC Order.

**(d) Determining DTS coverage.** The coverage for each DTS transmitter is determined based on the F(50,90) field strength given in the Table of Distances (in paragraph (c) of this section), calculated in accordance with § 73.625(b). The combined coverage of a DTS station is the logical union of the coverage of all DTS transmitters.

**(e) DTS protection from interference.** A DTS station must be protected from interference in accordance with the criteria specified in § 73.616. To determine compliance with the interference protection requirements of § 73.616, the population served by a DTS station shall be the population within the station's combined coverage contour, excluding the population in areas that are outside both the DTV station's authorized service area and the Table of Distances area (in paragraph (c) of this section). Only population that is predicted to receive service by the method described in § 73.622(e)(2) from at least one individual DTS transmitter will be considered.

**(f) Applications for DTS.** An application proposing use of a DTS will not be accepted for filing unless it meets all of the following conditions:

(1) The combined coverage from all of the DTS transmitters covers all of the applicant's authorized service area;

(2) Each DTS transmitter's coverage is contained within either the DTV station's Table of Distances area (pursuant to paragraph (c) of this section) or its authorized service area, except where such extension of coverage beyond the station's authorized service area is of a minimal amount and necessary to meet the requirements of paragraph (f)(1) of this section;

(3) Each DTS transmitter's coverage is contiguous with at least one other DTS transmitter's coverage;

(4) The coverage from one or more DTS transmitter(s) is shown to provide principal community coverage as required in § 73.625(a);

(5) The "combined field strength" of all the DTS transmitters in a network does not cause interference to another station in excess of the criteria specified in § 73.616, where the combined field strength level is determined by a "root-sum-square" calculation, in which the combined field strength level at a given location is equal to the square root of the sum of the squared field strengths from each transmitter in the DTS network at that location.

(6) Each DTS transmitter must be located within either the DTV station's Table of Distances area or its authorized service area.

**(g)** All transmitters operating under a single DTS license must follow the same digital broadcast television transmission standard.

## 47 C.F.R. § 73.3511

### § 73.3511 Applications required.

**(a)** Formal application means any request for authorization where an FCC form for such request is prescribed. The prescription of an FCC form includes the requirement that the proper edition of the form is used. Formal applications on obsolete forms are subject to the provisions of § 73.3564 concerning acceptance of applications and § 73.3566 concerning defective applications.
**(b)** Informal application means all other written requests for authorization. All such applications should contain a caption clearly indicating the nature of the request submitted therein.
**(c)** Formal and informal applications must comply with the requirements as to signing specified herein and in § 73.3513.