

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

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

**MEMORANDUM OPINION AND ORDER**

**Adopted: August 3, 2016**

**Released: August 4, 2016**

By the Commission:

**I. INTRODUCTION**

1. The Commission has before it for consideration an Application for Review<sup>1</sup> filed by PMCM TV, LLC (“PMCM”), seeking review of three decisions by the Video Division of the Media Bureau (the “Division”): (1) the *Seaford Report and Order* that allotted very high frequency (“VHF”) television channel 5 to Seaford, Delaware;<sup>2</sup> (2) the *Seaford MO&O on Reconsideration* rejecting a petition for reconsideration of the *Seaford Report and Order*<sup>3</sup> and (3) the *Seaford MO&O on Further Reconsideration* dismissing PMCM’s petition for reconsideration of the prior *Seaford* decisions as untimely.<sup>4</sup> For the reasons set forth below, we deny the AFR.

**II. BACKGROUND**

2. On June 15, 2009, PMCM TV, LLC (“PMCM”), the licensee of KJWY(TV), channel 2, Jackson, Wyoming, notified the Commission, pursuant to section 331(a) of the Communications Act of 1934, as amended (the “Act”),<sup>5</sup> that it sought reallocation of channel 2 from Jackson, Wyoming to Wilmington, Delaware.<sup>6</sup> In pertinent part, section 331(a) provides that it shall be Commission policy “to allocate channels for [VHF] commercial television broadcasting in a manner which ensures that not less than one such channel shall be allocated to each State, if technically feasible. In any case in which [a] licensee of a very high frequency commercial television broadcast station notifies the Commission to the

<sup>1</sup> PMCM TV, LLC Application for Review (filed Jun. 2, 2014) (the “AFR”).

<sup>2</sup> *Seaford, Delaware*, Report and Order, 25 FCC Rcd 4466, MB Docket No. 09-230 (Vid. Div. 2010) (“*Seaford Report and Order*”).

<sup>3</sup> *Seaford, Delaware*, Memorandum Opinion and Order on Reconsideration, 28 FCC Rcd 1167, MB Docket No. 09-230 (Vid. Div. 2013) (“*Seaford MO&O on Reconsideration*”).

<sup>4</sup> *Seaford, Delaware*, Memorandum Opinion and Order on Further Reconsideration, 29 FCC Rcd 4769, MB Docket No. 09-230 (Vid. Div. 2014) (“*Seaford MO&O on Further Reconsideration*”).

<sup>5</sup> 47 U.S.C. § 331(a).

<sup>6</sup> Letter from Donald J. Evans and Harry F. Cole, Counsel for PMCM TV, LLC, to Marlene H. Dortch, Secretary, FCC, Regarding Relocation of Station KJWY(TV), Jackson, Wyoming (Jun. 15, 2009) (“Reallocation Request”). PMCM concurrently notified the Commission of its intention to reallocate its Nevada channel 3 Station KVVN(TV) to Middletown Township, New Jersey pursuant to Section 331. Letter from Donald J. Evans and Harry F. Cole, Counsel for PMCM TV, LLC, to Marlene H. Dortch, Secretary, FCC, Regarding Relocation of Station KVVN(TV), Ely, Nevada (Jun. 15, 2009).

effect that such licensee will agree to the reallocation of its channel to a community within a State in which there is allocated no very high frequency commercial television broadcast channel at the time [of] such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a license to such licensee for that purpose pursuant to such notification.” The Media Bureau (the “Bureau”) denied PMCM’s Reallocation Request<sup>7</sup> and the Commission affirmed the Bureau decision.<sup>8</sup>

3. PMCM appealed the *Commission Decision* to the United States Court of Appeals for the District of Columbia (the “Court”), which subsequently reversed the Commission’s denial and remanded to the Commission to approve PMCM’s Reallocation Request.<sup>9</sup> On March 18, 2013, the Bureau consequently approved the reallocation of channel 2 from Jackson, Wyoming to Wilmington, Delaware in accordance with the Court’s instructions.<sup>10</sup>

4. *Seaford Report and Order*. On December 18, 2009, concurrently with the Bureau’s denial of PMCM’s Reallocation Request, the Division issued a *Notice of Proposed Rulemaking* proposing to allot channel 5 to Seaford pursuant to sections 331(a) and 307(b).<sup>11</sup> PMCM, which participated in the proceeding, did not object to the channel 5 allotment. To the contrary, it stated that it “strongly wants to go on the record as supportive” of an allotment in Delaware, but urged that any allotment not cause impermissible interference to the channels for which it sought reallocation in its June 15, 2009, notifications.<sup>12</sup> It also asserted that its reallocation requests were first-in-time and thus must still be given effect under section 331(a) regardless of whether the Commission allotted channel 5 to Seaford.<sup>13</sup> The Division subsequently adopted its Seaford proposal in 2010 in the *Seaford Report and Order*, finding that the allotment of a new channel in Southern Delaware would result in an equitable distribution of channels pursuant to section 307(b).<sup>14</sup> The Division concluded that, “[b]ecause our proposal to allot channel 5 to Seaford is not mutually-exclusive with an allotment of channel 2 to Wilmington, Delaware, the outcome of PMCM’s appeal [seeking reallocation of channel 2 to Wilmington] is not pertinent to the instant proceeding.”<sup>15</sup>

5. *Seaford MO&O on Reconsideration*. The Broadcast Maximization Committee (“BMC”) filed a timely petition for reconsideration of the *Seaford Report and Order*. BMC argued that the *Seaford*

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<sup>7</sup> *PMCM TV, LLC c/o Harry Cole, Esq.*, Letter Order, 24 FCC Rcd 14588 (MB 2009) (“*Notification Denial Letter Order*”).

<sup>8</sup> *Reallocation of Channel 2 from Jackson, Wyoming to Wilmington, Delaware and Reallocation of Channel 3 from Ely, Nevada to Middletown Township, New Jersey*, Memorandum Opinion and Order, 26 FCC Rcd 13696 (2011) (“*Commission Decision*”).

<sup>9</sup> *PMCM LLC, TV v. FCC*, 701 F.3d 380(D.C. Cir. Dec. 14, 2012) (“*PMCM TV*”) (directing Commission to reallocate PMCM’s channel 2 from Wyoming to Wilmington, Delaware and Channel 3 from Nevada to Middletown Township, New Jersey).

<sup>10</sup> *Reallocation of Channel 2 from Jackson, Wyoming to Wilmington, Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broadcast Stations*, Report and Order, 28 FCC Rcd 2828 (MB 2013) (“*Reallocation Order*”). By concurrently released Order, the Bureau also approved the reallocation of channel 3 from Ely, Nevada to Middletown Township, New Jersey. *Reallocation of Channel 3 from Ely, Nevada, to Middletown Township, New Jersey, Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments, Television Broadcast Stations*, Report and Order, 28 FCC Rcd 2825 (MB 2013).

<sup>11</sup> *Seaford, Delaware*, Notice of Proposed Rulemaking, 24 FCC Rcd 14596 (Vid. Div. 2009).

<sup>12</sup> Comments of PMCM TV, LLC, at 2.

<sup>13</sup> *Id.*

<sup>14</sup> *Seaford Report and Order*, 25 FCC Rcd at 4471.

<sup>15</sup> *Id.* at 4468 n.13.

*Report and Order* erred when it refused to consider channels 2 or 3 as alternatives to channel 5.<sup>16</sup> PMCM filed a “Qualified Opposition to Petition for Reconsideration,” asserting that BMC’s counterproposal to place the new allotment at channel 2 or 3 could not be considered prior to Commission action on its reallocation requests.<sup>17</sup> The Division dismissed BMC’s argument as moot, noting that “[t]he Court’s order in *PMCM TV* directed the Commission to grant PMCM a license for channel 2 in Wilmington, Delaware.”<sup>18</sup> Thus, while upholding the allotment at Seaford, the *Seaford MO&O on Reconsideration* was consistent with PMCM’s reallocation request.

6. *Seaford MO&O on Further Reconsideration*. On May 1, 2014, the Division dismissed PMCM’s March 15, 2013 petition for reconsideration (the “Petition”) of both the *Seaford Report and Order* as well as the subsequent *Seaford MO&O on Reconsideration*. PMCM had sought reconsideration of those decisions based on the Court’s issuance of *PMCM TV*, claiming that the decision invalidated the Seaford allocation. PMCM asserted that the Commission “improperly applied the mandate of [s]ection 331(a) in acting on its motion to fill a purported ‘void’ of VHF service to that community; [when] in fact, VHF service in Delaware had already been properly proposed in accordance with [s]ection 331(a) by PMCM [with the filing of its Reallocation Request].”<sup>19</sup> The Petition asserted that the release of *PMCM TV* constituted “changed circumstances” pursuant to section 1.429(b)(1) of the Commission’s rules, and that the arguments that it belatedly raised could not have been presented previously.<sup>20</sup>

7. In the *Seaford MO&O on Further Reconsideration*, the Division dismissed PMCM’s request for reconsideration of the *Seaford Report and Order* as untimely under section 1.429(d) of the Commission’s rules, which requires petitioners to seek reconsideration no later than 30 days after public notice of Commission action. It noted that the *Seaford Report and Order* was published in the Federal Register on May 7, 2010, well before PMCM’s March 2013 Petition for Reconsideration.<sup>21</sup> Additionally, the Division concluded that PMCM’s reliance on section 1.429(b)(1) of the Commission’s rules was misplaced because PMCM knew that reversal of the Bureau’s *Notification Denial Letter Order* was possible and “[t]he fact that the Bureau’s rejection of PMCM’s reallocation notifications was not yet final and unappealable did not excuse PMCM’s failure to raise objections that were based on a foreseeable outcome . . . .”<sup>22</sup> The Division noted that PMCM apparently contemplated ultimate reversal of the Bureau’s *Notification Denial Letter Order* when it filed its “Qualified Opposition” to BMC’s Petition for Reconsideration of the *Seaford Report and Order*.<sup>23</sup>

8. The Division further concluded that PMCM’s Petition was an untimely collateral challenge of the *Seaford Report and Order* that should have been presented in a timely petition for

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<sup>16</sup> See *Seaford MO&O on Reconsideration* at 1168 (citing BMC Petition for Reconsideration at 2) (citations omitted). BMC also maintained that the Bureau’s proposed allotment of channel 5 at Seaford, where no party expressed an interest in this proposal, was unusual and unprecedented. *Id.* Unlike PMCM, however, BMC did not argue that this invalidated the Seaford allotment. The Division stated, among other things, that BMC did not identify any impropriety with or legal barrier to the Division’s allocation method. *Seaford MO&O on Reconsideration*, 28 FCC Rcd at 1129.

<sup>17</sup> PMCM TV, LLC Qualified Opposition to Petition for Reconsideration at 1 (“Qualified Opposition”).

<sup>18</sup> *Id.* at 1169.

<sup>19</sup> *Seaford MO&O on Further Reconsideration*, 29 FCC Rcd at 4771 (citing PMCM Petition for Reconsideration at 2).

<sup>20</sup> *Id.* (citing 47 C.F.R. § 1.429(b)(1)); Petition at 2.

<sup>21</sup> *Id.* (citing 75 FR 25119 (May 7, 2010)).

<sup>22</sup> *Id.* at 4772 (explaining that PMCM had already sought review of the Bureau’s rejection of PMCM’s re-allocation notifications, and had already petitioned for mandamus in the D.C. Circuit asking the court to compel re-allocation).

<sup>23</sup> *Id.* n.27.

reconsideration in 2010.<sup>24</sup> The Division determined that PMCM's request was outside the scope of the subsequent *Seaford MO&O on Reconsideration*, which "addresses not whether a channel should be allotted to Seaford as PMCM contests in its petition for reconsideration, but rather which channel should be allotted to Seaford, Delaware. In fact, the Bureau granted PMCM's request in its Qualified Opposition by denying BMC's petition for reconsideration and allotting channel 5 to Seaford, rather than channel 2 or 3, as proposed by BMC."<sup>25</sup>

9. In the AFR, PMCM contends that the Division improperly dismissed its Petition by failing to take into account the significant changed circumstance of the issuance of *PMCM TV*.<sup>26</sup> Specifically, PMCM argues that the Division committed prejudicial error by creating a new, unsound "foreseeability" test and selectively applying it to PMCM.<sup>27</sup> PMCM contends that its obligation is to raise the changed circumstance at the first opportunity to do so, and that it could not have raised the D.C. Circuit's reversal back in 2010, which was the last opportunity to present argument to the Division about Seaford.<sup>28</sup> According to PMCM, a reconsideration petition in 2010 premised on a prediction of future success at the appellate level would have been summarily dismissed by the Commission as improperly speculative.<sup>29</sup> PMCM further contends that it "supported the Seaford allotment under the premise that underserved areas of the state would receive local service, not under the present circumstances where a Dover allocation has supplanted the Seaford allotment."<sup>30</sup>

10. WPB filed an opposition to the AFR ("Opposition"). WPB contends that PMCM's interpretation of section 1.429(b)(1) would lead to uncertainty, permitting an aggrieved party to file an untimely petition for reconsideration so long as the petitioner lacks 100% certainty of a particular court outcome, because any petitioner could invoke such an exception merely by filing a court appeal.<sup>31</sup> WPB argues that PMCM proceeded at its own risk when it elected not to request reconsideration or even a stay of the *Seaford Report and Order* while it pursued the Wilmington channel 2 matter in court, and the fact that PMCM made the wrong choice is PMCM's doing, and the Bureau gave full consideration to PMCM's arguments in the decisions.<sup>32</sup>

11. In its Reply to the Opposition, PMCM asserts that WPB fundamentally misapprehends the facts and issues presented. For example, PMCM argues that the relevant test should not be whether the Bureau's allegedly "hasty and ill-considered"<sup>33</sup> 2010 Seaford allotment had any bearing on the Reallocation Request, but whether the Court's reinstatement *ab initio* of the PMCM Notification has a bearing on the Seaford allotment. PMCM also contends that WPB cannot now argue that section 331(a)

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<sup>24</sup> *Id.* at 4672 (citations omitted).

<sup>25</sup> *Id.* at 4672. On the same day that the Division released the *Seaford MO&O on Further Reconsideration*, it released a Report and Order that granted a rulemaking petition filed by Western Pacific Broadcast, LLC ("WPB"), the permittee of unbuilt station WMDE(TV), channel 5, Seaford, Delaware to request a change in its community of license to Dover, Delaware. *Western Pacific Broadcast, LLC*, Amendment of Section 73.622(i), Digital Television Table of Allotments (Seaford, Delaware and Dover, Delaware), 29 FCC Rcd 4773 (MB Vid. Div. 2014). PMCM filed a petition for reconsideration of that order, which remains pending. *See* Petition for Reconsideration of PMCM, LLC, MB Docket No. 13-40 (filed Jun. 13, 2014).

<sup>26</sup> AFR at 1.

<sup>27</sup> *Id.* at 4.

<sup>28</sup> *Id.* (citing 47 C.F.R. §§ 1.106, 1.429).

<sup>29</sup> *Id.* at 5.

<sup>30</sup> *Id.* at 2 n.4.

<sup>31</sup> Opposition at 4.

<sup>32</sup> *Id.* at 5.

<sup>33</sup> Reply at 2.

somehow authorizes the allotment of additional VHF channels, because the initial Seaford allotment was entirely based upon the so-called “VHF void.”<sup>34</sup>

12. On December 12, 2014, WPB filed a Motion to Dismiss the AFR on the basis that the termination of the Commission’s docket for Auction 90, in which WPB successfully bid on channel 5 at its original community of license, Seaford, Delaware, has mooted the AFR.<sup>35</sup> WPB argues that the results of Auction 90 and the *Auction 90 Termination Order* are final and cannot be reversed, and therefore PMCM procedurally cannot seek to challenge the Commission’s underlying allotment of channel 5.<sup>36</sup> PMCM opposed the WPB Motion on the basis that it is fundamental precept “that a successful legal challenge to an initial FCC order nullifies that order and subsequent FCC actions taken with respect thereto.”<sup>37</sup> PMCM also cites to the Public Notice for Auction 90, which it argues put WPB on explicit notice that if it bought rights to the Seaford allotment, it did so subject to legal risk.<sup>38</sup> In its Reply, among other responses, WPB asserts that there was no legal risk for WPB to assume in light of the procedural history here, because PMCM did not seek reconsideration of the channel 5 allotment before or during Auction 90 or close to the deadlines for petitions for reconsideration of the *Seaford Report and Order*.<sup>39</sup>

### III. DISCUSSION

13. Upon consideration of the AFR and the entire record, we affirm the Division’s dismissal of the PMCM Petition.<sup>40</sup> In ordering the Seaford allotment, the Commission concluded that the outcome of PMCM’s Reallocation Request was not relevant.<sup>41</sup> PMCM did not seek reconsideration of that finding until nearly three years later when, for the first time, it opposed the new Seaford allotment that it had previously “strongly” supported. In hindsight, PMCM now argues that the Commission should have postponed allocating a new channel to Delaware while its efforts to reallocate channel 2 played out at the Commission and in court, even though the pendency of that litigation did not prevent PMCM from raising other concerns premised on a favorable outcome regarding its Reallocation Request, and the Seaford allotment is consistent with that request.<sup>42</sup> In short, it appears that PMCM simply changed its strategy as developments unfolded.

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<sup>34</sup> Reply at 3-4.

<sup>35</sup> WPB Motion to Dismiss, MB Docket No. 09-230 (filed Dec. 12, 2014) (“WPB Motion”) at 1 (citing *Termination of Certain Proceedings as Dormant*, Order, CG Docket No. 14-97, 29 FCC Rcd 11,017, 11,093 (CGB 2014) (“*Auction 90 Termination Order*”).

<sup>36</sup> WPB Motion at 3.

<sup>37</sup> PMCM Opposition at 2 (citing 5 U.S.C. § 706(a) (reviewing courts “shall” set aside unlawful agency actions)).

<sup>38</sup> PMCM Opposition at 2-3 (citing *Auction of VHF Commercial Television Station Construction Scheduled for February 15, 2011, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments, and Other Procedures for Auction 90*, Public Notice, AU Docket No. 10-47, 25 FCC Rcd 14880, 14891 (2010)).

<sup>39</sup> WPB Reply at 4. On February 4, 2015, PMCM filed Comments in Response to the Reply, disputing a contention put forth by WPB that PMCM has acknowledged that the outcome of the Wilmington channel 2 matter had no bearing on the allotment of channel 5 to Seaford.

<sup>40</sup> An Application for Review must establish that the actions of the delegated authority: (i) conflicted with statute, regulation, case precedent or Commission policy; (ii) involved a question of law or policy not previously resolved by the Commission; (iii) involved precedent or policy that should be overturned or revised; (iv) made an erroneous finding as to an important fact; or (v) made a prejudicial procedural error. See 47 C.F.R. § 1.115(b)(2).

<sup>41</sup> *Seaford Report and Order*, 25 FCC Rcd at 4468 n.13.

<sup>42</sup> PMCM now attempts to excuse its failure to object to the Seaford allotment earlier on the grounds that it had no reason to object to the proposal to place the allotment in Seaford, in Southern Delaware, which lacked robust broadcast service, but its interests changed when Western Pacific applied to change the community of license to Dover. See AFR at 2 n.4. PMCM even sought to bid in the auction for channel 5. See *Auction of VHF Commercial Television Station Construction Permits; Three Bidders Qualified to Participate in Auction 90*, Public Notice, 26

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14. The staff was correct in determining that PMCM's Petition for Reconsideration of the *Seaford Report and Order* was untimely. Section 405 of the Act provides that "petitions for reconsideration must be filed within thirty days from the date upon which public notice is given of the action . . . complained of."<sup>43</sup> Public notice of the *Seaford Report and Order* was given on May 7, 2010. The Petition for Reconsideration was filed on March 15, 2013, on the basis that allotment of a new channel to Seaford was improper.<sup>44</sup> PMCM's claim that its Petition was timely because it was filed within 30 days after issuance of the *Seaford MO&O on Further Reconsideration* is entirely without merit.<sup>45</sup> PMCM's Petition challenged the allocation adopted in the *Seaford Report and Order*, not the Commission's rejection of BMC's argument that the Commission should have placed the new allocation at channel 2 or 3. As to its request for reconsideration of the *Seaford MO&O on Reconsideration*, the Petition therefore was an impermissible collateral challenge to the *Seaford Report and Order*.<sup>46</sup> The deadline for filing the Petition therefore was 30 days after public notice of the *Seaford Report and Order*, not 30 days after public notice of the *Seaford MO&O on Reconsideration*. Accordingly, PMCM filed its Petition for Reconsideration approximately three years late.

15. The Commission can only accept late-filed petitions for reconsideration if the petitioner shows that extraordinary circumstances warrant overriding the statutory filing deadline.<sup>47</sup> As the D.C. Circuit has explained, "[a]lthough section 405 does not absolutely prohibit FCC consideration of untimely petitions for reconsideration, we have discouraged the Commission from accepting such petitions in the absence of extremely unusual circumstances."<sup>48</sup> Consistent with the D.C. Circuit's decisions, the Commission in applying that standard has focused on whether the Commission has failed to adhere to its procedural rules for providing notice of its decisions.<sup>49</sup> PMCM has not even attempted to show that it has met this standard, much less demonstrated that the extraordinary circumstances required under this precedent are present here.<sup>50</sup>

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FCC Rcd 881, 894 (2011) (finding PMCM and other prospective bidders unqualified to bid in the auction). As to its objection to an allotment in Dover, WMDE's application for a change in community of license is the proper proceeding for the airing of this grievance, and in fact, PMCM has sought reconsideration of the Bureau's decision in that proceeding. See Petition for Reconsideration of PMCM, LLC, MB Docket No. 13-40 (filed Jun. 13, 2014); *Western Pacific Broadcast, LLC, Amendment of Section 73.622(i), Digital Television Table of Allotments (Seaford, Delaware and Dover, Delaware)*, Report and Order, 29 FCC Rcd 4773 (Vid. Div. 2014).

<sup>43</sup> 47 U.S.C. § 405(a).

<sup>44</sup> PMCM Petition for Reconsideration, at 2.

<sup>45</sup> See *id.*

<sup>46</sup> See *Motions for Declaratory Rulings Regarding Commission Rules and Policies for Frequency Coordination in the Private Land Mobile Radio Services*, Memorandum Opinion and Order, 14 FCC Rcd 12752, 12757 (1999); *MCI Telecommunications Corp. v. Pacific Northwest Bell Telephone Co.*, Memorandum Opinion and Order, 5 FCC Rcd 216, n. 38 (1990) *recon denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co. v. FCC*, 951 F. 2d 1259 (10th Cir. 1991) (*per curiam*).

<sup>47</sup> *Reuters Limited v. FCC*, 781 F.2d 946, 952 (D.C. Cir. 1986).

<sup>48</sup> *Virgin Islands Telephone Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993), *citing Reuters*, 781 F.2d at 951-52. See *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 199-200 (D.C. Cir. 2003).

<sup>49</sup> See *Satellite Signals of New England, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 515, 518 (2010); *Emmis Radio License Corp.*, Memorandum Opinion and Order, 17 FCC Rcd 14733 n.4 (2002) (*citing Gardner v. FCC*, 530 F.2d 1086, 1090 (D.C. Cir. 1976) and dismissing petitions for reconsideration where in each case the petitioner did not allege that there was defective notice that made it impossible to meet the filing deadline for requesting reconsideration); *Adelphia Communications Corporation*, Memorandum Opinion and Order, 12 FCC Rcd 10759, 10760 n.9 (1997) (same).

<sup>50</sup> See *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) ("[T]he Commission does not abuse its discretion when it 'declin[es] to entertain a late-filed petition in the absence of extenuating circumstances prohibiting a timely

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16. The assertion that the Court's decision in *PMCM TV* constituted "changed circumstances" warranting an extension of the deadline for reconsideration of the *Seaford Report and Order* is also without merit. This contention presumes incorrectly that a showing of "changed circumstances" under section 1.429(b) warrants an extension of the statutory deadline for the filing of petitions for reconsideration. Thus, PMCM claims that "[i]t is hornbook law that 'changed circumstances' provide an adequate legal basis for reconsideration" and that the "relevant test is whether the petitioner has raised the changed circumstance at the first opportunity to do so."<sup>51</sup> Rather than supporting its theory that changed circumstances can support a request for reconsideration filed after the applicable statutory deadline, the single case PMCM cites, a 1979 Commission order, relates not to the filing of petitions for reconsideration after the statutory deadline but instead to the circumstances under which parties may seek reconsideration of a Commission order denying an application for review.<sup>52</sup> Section 1.429(b)(1) sets forth the limited circumstances in which new matter raised in a timely petition for reconsideration will be considered.<sup>53</sup> It does not and cannot supersede the statutorily established deadline for the filing of petitions for reconsideration, which is set forth in Section 405 of the Act and reflected in Section 1.429(d) of the Commission's rules.<sup>54</sup>

17. For the foregoing reasons, PMCM's argument that the Petition was timely filed because of its submission within 30 days of the release of the *Seaford MO&O on Further Reconsideration*<sup>55</sup> is without merit. We therefore affirm the Bureau's dismissal of the Petition and deny the AFR. In light of our denial of the AFR, the Motion to Dismiss and associated pleadings are moot. We therefore dismiss these filings.

18. **ACCORDINGLY, IT IS ORDERED** That, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), the Application for Review IS DENIED.

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filing.' *21st Century Telesis Joint Venture v. FCC*, 318 F.3d 192, 200 (D.C. Cir. 2003). In fact, we have gone so far as to discourage the Commission from entertaining late-filed pleadings 'in the absence of extremely unusual circumstances.' *Id.*'). See also *Communications Vending Corp. of Arizona, Inc. v. FCC*, 365 F.3d 1064, 1075 (D.C. Cir. 2004) ("[E]quitable tolling is unwarranted where a litigant has 'failed to exercise due diligence in preserving his legal rights.'").

<sup>51</sup> AFR at 4.

<sup>52</sup> *Id.* at n.6 (citing "Practice and Procedure," 46 RR 2d 524 (1979)).

<sup>53</sup> 47 C.F.R. § 1.429(b)(1) ("A petition for reconsideration which relies on facts or arguments which have not previously been presented to the Commission will be granted only under the following circumstances: (1) The facts or arguments relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commission.").

<sup>54</sup> 47 U.S.C. § 405; 47 C.F.R. § 1.429(d). There is no exception in section 1.429(d) for late-filed petitions based on new information nor any other exception.

<sup>55</sup> AFR at 2.

19. **IT IS FURTHER ORDERED** That, pursuant to section 4(i)-(j) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i)-(j), and section 1.41 of the Commission's rules, 47 C.F.R. § 1.41, the Motion to Dismiss, Request for Leave to File Motion to Dismiss, and Reply to Opposition to Motion to Dismiss of Western Pacific Broadcast, LLC, and the Opposition to Motion to Dismiss, Comments in Response to Reply to Opposition to Motion to Dismiss, and Request for Leave to File Comments in Response to Reply to Opposition to Motion to Dismiss of PMCM TV, LLC, ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary