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

In the Matter of	)	
	)	
Reallocation of Channel 2 from Jackson, Wyoming to Wilmington, Delaware	)	Facility ID No. 1283
	)	
Reallocation of Channel 3 from Ely, Nevada to Middletown Township, New Jersey	)	Facility ID No. 86537
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: September 15, 2011 **Released: September 15, 2011**

By the Commission: Commissioner Copps issuing a statement.

I. INTRODUCTION

1. The Commission has before it an Application for Review filed by PMCM TV, LLC ("PMCM"), the licensee of stations KJWY(TV), channel 2, Jackson, Wyoming and KVNV(TV), channel 3, Ely, Nevada.[1] PMCM asks the Commission to nullify the Media Bureau's rejection of PMCM's attempt to secure the immediate reallocation of channel 2 from Jackson to Wilmington, Delaware and channel 3 from Ely to Middletown Township, New Jersey pursuant to Section 331(a) of the Communications Act of 1934.[2] For the reasons set forth below, we deny the Application for Review. We agree with the Bureau's interpretation of the term "reallocation" in the second sentence of Section 331(a) to mean the shifting of a channel from one community to another community under circumstances where the channel cannot be used simultaneously at both locations because such dual operations would cause interference. This interpretation of "reallocation" is supported by the text, purpose, structure, and legislative history of Section 331(a). In addition, unlike PMCM's interpretation, this interpretation harmonizes Section 331(a) with Section 307(b) of the Act, which establishes the overarching goals of the Commission's channel allocation scheme, and gives effect to the policies supporting both provisions.

[1] Contingent/Protective Application for Review of PMCM TV, LLC and Request for Prompt Related Relief (Jan. 19, 2010) ("PMCM Application for Review").

[2] *See PMCM TV, LLC c/o Harry F. Cole, Esq.,* 24 FCC Rcd 14588 (MB 2009) ("*Bureau Decision*"); Letter from Donald J. Evans and Harry F. Cole, Counsel for PMCM TV, LLC to Marlene H. Dortch, Secretary, FCC, Regarding Relocation of Station KVNV(TV), Ely, Nevada (June 15, 2009); 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 (June 15, 2009) ("June 15, 2009 Requests"); 47 U.S.C. § 331(a). PMCM also filed a Petition for Issuance of Writ of Mandamus with the United States Court of Appeals for the District of Columbia Circuit, which was denied on May 12, 2010, and a Petition for Hearing or Rehearing En Banc, which was denied on August 6, 2010. *In re PMCM TV, LLC*, D.C. Cir., Case No. 10-1001 (May 12 and August 6, 2010).

II. BACKGROUND

2. Both at the time Section 331(a) was enacted and when PMCM filed its notifications, New Jersey and Delaware were the only states without a commercial VHF allotment. Section 331(a) provides that:

> Very High Frequency Stations. — It shall be the policy of the Federal Communications Commission to allocate channels for very high frequency commercial television broadcasting in a manner which ensures that not less than one such channel shall be allocated to each State, if technically feasible. In any case in which [a] licensee of a very high frequency commercial television broadcast station notifies the Commission to the effect that such licensee will agree to the reallocation of its channel to a community within a State in which there is allocated no very high frequency commercial television broadcast channel at the time [of] such notification, the Commission shall, notwithstanding any other provision of law, order such reallocation and issue a license to such licensee for that purpose pursuant to such notification for a term of not to exceed 5 years as provided in Section 307(d) of the Communications Act of 1934.[3]

3. We cannot properly understand the statute's meaning and purpose without some consideration of its history. Section 331(a) was adopted against the background of previous efforts in Congress and before the Commission to have a VHF commercial channel allotted to New Jersey.[4] At that time, VHF channels had substantial and well-known advantages over UHF channels, which were technically inferior.[5] By the 1950s, VHF channels 2-11 had been allotted to East Coast metropolitan areas, including New York City, Philadelphia, and Baltimore, and were not available for allotment to New Jersey or Delaware because of the minimum distance separation requirements specified in the Commission's rules.[6] Although the Commission allotted commercial VHF channel 13 to Newark, New Jersey in 1952, it was licensed to a New York state educational non-profit organization, and it has operated on a noncommercial basis for over 50 years.[7] Prior to the enactment of Section 331(a), the Commission considered and rejected various possible means of adding a new commercial VHF allocation to New Jersey, including the allotment of a "short-spaced" channel 8 to the state, which proponents later abandoned as "technically infeasible,"[8] and the reallocation of channel 7 from New York to New Jersey with the transmitter located near Freehold, New Jersey.[9] The Commission rejected the reallocation of

[3] 47 U.S.C. § 331(a).

[4] *See Bureau Decision*, 24 FCC Rcd at 14591.

[5] *Bureau Decision*, 24 FCC Rcd at 14594-95. In its 1952 allocation order, the Commission stated that "VHF can effectively cover large areas, and VHF was used wherever possible in larger cities since such cities have broad areas of common interest." *Television Assignments, Sixth Report and Order,* 41 F.C.C. 148, 168 (1952).

[6] The Commission's television allotment system is designed to ensure that television operations are spaced sufficiently far apart geographically to minimize interference between stations. *See Amendment of Television Table of Allotments to Add New VHF Stations in the Top 100 Markets*, 63 F.C.C. 2d 840, 849 (1977).

[7] *See Television Assignments, Sixth Report and Order,* 41 F.C.C. at 258-59, 266-67; *NTA Television Broadcasting Corp*., 44 F.C.C. 2563 (1961); *see also Bureau Decision*, 24 FCC Rcd at 14589 n.5. Similarly, channel 12 initially was allotted to Wilmington, Delaware as a commercial channel, but in 1970, the Commission reserved it for noncommercial educational use, based on the fact that the licensee had been providing a noncommercial educational service since 1963. *Wilmington, Delaware*, 18 R.R. 2d (P&F) 1603 (1970).

[8] *The New Jersey Coalition for Fair Broadcasting v. FCC*, 574 F.2d 1119, 1122 (D.C. Cir. 1978) ("*New Jersey Coalition*"); *see also Petition for Inquiry into the Need for Adequate Television Service for the State of New Jersey,* Docket No. 20350, First Report and Order and Further Notice of Proposed Rulemaking, 58 F.C.C.2d 790, 801-02 (1976) ("*First R&O, New Jersey Inquiry*"), *aff'd*, *New Jersey Coalition*.

[9] *New Jersey Coalition*, 574 F.2d at 1122; *see also First R&O, New Jersey Inquiry*, 58 F.C.C.2d at 802-04.

channel 7 in part because of the disruption and loss of existing service which would result to residents of Connecticut and Long Island.[10]

4. Meanwhile, RKO General, Inc. ("RKO"), the licensee of station WOR-TV (now WWOR-TV), channel 9, New York, New York, was engaged in a license renewal proceeding in which a competing applicant, Multi-State Communications, Inc. ("Multi-State"), sought a license to operate on the same channel.[11] Under the procedures in effect at that time, the Commission was required to conduct a comparative hearing to determine which applicant was better qualified to be the licensee of the New York station.[12] In 1980, the Commission determined that RKO lacked the character qualifications to continue to hold the license.[13] Senators Bradley and Williams of New Jersey immediately filed a petition on behalf of the State of New Jersey "proposing that [channel 9] be reallocated to any of several communities in New Jersey over which the current operation [of WOR-TV] places a city grade signal."[14] They argued that because their proposal would not require physical relocation of the channel 9 transmitter, their proposal was significantly different from the channel 7 reallocation proposal previously rejected by the Commission, which would have resulted in a loss of service to existing viewers.[15]

5. On September 3, 1982, Section 331 (now Section 331(a)) became law pursuant to legislation proposed by Senator Bradley.[16] As discussed in the *Bureau Decision*, Senator Bradley explained that:

> My amendment . . . will remove impediments which currently discourage an existing licensee in either New York or Philadelphia from voluntarily seeking to move to New Jersey. Under current law, that request would automatically trigger an action to open up that license to new applicants. In other words, the license would automatically be at risk to the current license holder. This makes it very unlikely that anyone would voluntarily offer to move to New Jersey.[17]

The Senator continued that one station – WOR-TV – had already expressed a desire to move to New Jersey and that "[u]nder the provisions of my amendment, the reallocation of a license to New Jersey will mean that the licenseholder will move its studios and offices to New Jersey . . . ."[18] Shortly after passage of Section 331, while its license renewal was still pending, RKO notified the Commission that it was

[10] *First R&O, New Jersey Inquiry*, 58 F.C.C.2d at 803.

[11] *See Bureau Decision*, 24 FCC Rcd at 14589.

[12] *See id.*

[13] *Id.*

[14] *Petition to Reallocate VHF-TV Channel 9 from New York, New York, to a City Within the City Grade Contour of WOR-TV*, Notice of Proposed Rulemaking, 84 F.C.C.2d 280, 282 (1981) ("*Petition to Reallocate VHF-TV Channel 9*"). In 1981, while the petition was still pending, the court of appeals remanded the matter of RKO's disqualification to the Commission. *RKO General, Inc. v. FCC*, 670 F2d 215 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 and 457 U.S. 1119 (1982).

[15] *Petition to Reallocate VHF-TV Channel 9*, 84 F.C.C.2d at 282. The Commission sought comment in response to the petition on a proposal in another pending proceeding to permit new short-spaced VHF allotments under certain technical circumstances, but it stated that "while RKO's license rights are subject to final adjudication in the Courts, we will not take any action in this matter which would prejudice RKO's position." *Id*. at 286.

[16] *Bureau Decision*, 24 FCC Rcd at 14589.

[17] *Id.* at 14592 (citing 128 Cong. Rec., S10946 (Aug. 19, 1982)).

[18] *Id.*

willing to relocate the WOR-TV main studio to New Jersey pursuant to Section 331.[19] Thereafter, the Commission ordered the reallocation of channel 9 from New York to Secaucus, New Jersey, issued RKO a license for that station for a term of five years, and terminated the comparative proceeding between RKO and Multi-State.[20] While Section 331(a) continued to be available as a means of securing a VHF channel allotment for the State of Delaware, no licensee ever sought the reallocation of its license to that state.

6. After June 12, 2009, when WWOR-TV and other television stations in the northeast region ceased analog operations as required by statute, New Jersey again was without a commercial VHF allotment due to WWOR-TV's decision to use its pre-transition UHF channel for post-transition operations.[21] It then became technically feasible to allot VHF channels to New Jersey and Delaware. On June 15, 2009, PMCM filed its notifications for the "reallocation" of its Ely, Nevada and Jackson, Wyoming stations, the acceptance of which would result in a complete withdrawal of full-power television service from those communities. According to PMCM, because Section 331(a) "mandates grant of the reallocation request[s] without regard to any other provision of law," it was entitled to the immediate issuance of licenses for channel 2 at Wilmington and channel 3 at Middletown Township. PMCM proposed to "move to implement the change[s] in location as quickly as possible within the normal time frame applied to newly authorized broadcast facilities."[22]

7. As noted in its decision denying PMCM's notifications, the Bureau considered two possible interpretations of the term "reallocation," as used in the statute. The interpretation advanced by PMCM would consider any VHF channel allotment to a state without a VHF channel as a "reallocation" if the proponent currently operates a station on the same channel anywhere in the United States and agrees to terminate service on that channel when it begins to operate on the channel in its new state.[23] Under the narrower interpretation adopted by the Bureau, "reallocation" would mean shifting the VHF channel to the new state under circumstances where the channel cannot be used simultaneously at the authorized location and in the new state because such dual operations would cause interference.[24]

---

[19] *See Multi-State Communications, Inc. v. FCC*, 728 F.2d 1519, 1522 (D.C. Cir.), *cert. denied*, 469 U.S. 1017 (1984).

[20] *See Bureau Decision*, 24 FCC Rcd at 14589-90. The Commission concluded that in light of the phrase "notwithstanding any other provision of law" in Section 331, neither its prior determination regarding RKO's lack of character qualifications nor Multi-State's comparative qualifications were relevant to its reallocation of channel 9 to New Jersey. *RKO General, Inc. (WOR-TV) and Multi-State Communications, Inc.*, 92 F.C.C.2d 1473, 1475 n.7, *aff'd*, *Multi-State*.

[21] Pursuant to the DTV Delay Act, Pub.L.No. 111-4, 123 Stat. 112 (2009), full-power television stations were required to cease providing an analog television service by June 13, 2009, and the Commission was directed to terminate all full-power analog television licenses. The Commission established a multi-step process by which stations elected a channel for post-transition operations. Stations operating on channels 2-51 were required to submit their election by February 10, 2005. *See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Seventh Further Notice of Proposed Rule Making, 21 FCC Rcd 12100, 12103-04 (2006). The Commission first published the approved post-transition DTV table of allotments in 2007. *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Seventh Report and Order and Eighth Further Notice of Proposed Rule Making, 22 FCC Rcd 15581, App. A (2007).

[22] June 15, 2009 Requests at 3. The original construction permit for a newly authorized television facility specifies a period of three years from the date of issuance of the original construction permit within which construction must be completed and an application for license filed. 47 C.F.R. § 73.3598(a).

[23] *Bureau Decision*, 24 FCC Rcd at 14590.

[24] *Id*. at 14591.

8. The Bureau concluded that the narrower interpretation of "reallocation" was more reasonable and was supported by the purpose, structure and legislative history of Section 331. In this regard, the Bureau noted that by directing the Commission to order a reallocation "notwithstanding any other provision of law," Congress intended to remove a legal impediment that would discourage an existing licensee in New York or Philadelphia from voluntarily agreeing to move to New Jersey. The Bureau explained that this language was necessary because in 1982, the Commission regarded a petition to change a station's community of license as triggering an opportunity for all interested parties to file applications for the allotment, even though the channel was already occupied by the petitioning station and no new service would result from the change in community of license because the petitioning station already served that area.[25] As Senator Bradley recognized, absent the inclusion of this language, no nearby licensee would volunteer to move to New Jersey because doing so would put its license at risk.

9. The Bureau also noted that unlike the first sentence of Section 331(a), which governs potential new channel allotments, the second sentence of Section 331(a) did not include a requirement that the reallocation of a channel be technically feasible. The Bureau read this omission of the "technically feasible" requirement as further indication that the second sentence of Section 331(a) was intended to encourage a station to propose the reallocation of its licensed channel to a nearby community that was already within its service area because in that case, technical feasibility would be assured.[26] In addition, the Bureau concluded that the narrower interpretation of the term "reallocation" is consistent with how the Commission has used this term in other contexts and with the Commission's longstanding policy disfavoring technical proposals that would result in loss of service.[27]

10. Finally, consistent with the mandate of the first sentence of Section 331(a), the Bureau announced that it was initiating rulemaking proceedings to allot channel 4 to Atlantic City, New Jersey and channel 5 to Seaford, Delaware.[28] Those proceedings have been completed, and the Post-Transition Table of DTV Allotments has been amended to reflect these new VHF channel allotments.[29] Although the Bureau determined that Section 331(a) required it to allocate commercial VHF channels to New Jersey and Delaware, and it has now done so, it observed that VHF channels are subject to a number of technical deficiencies in the digital environment and no longer offer the advantages that existed at the time Section 331 was adopted.[30] The Bureau also noted that since June 12, 2009, a number of television stations have requested the substitution of a UHF channel for their assigned post-transition VHF channel, citing reception problems inherent to digital VHF channels.[31]

III. DISCUSSION

11. In its Application for Review, PMCM asserts that the *Bureau Decision* contradicts the plain language of Section 331(a) and its legislative history, is inconsistent with Commission and judicial precedent, and defeats the statute's purpose.[32] In addition, PMCM claims that the Bureau exceeded its

[25] *Id*. at 14591-92.

[26] *Id.* at 14592-93.

[27] *Id.* at 14593-94.

[28] *Id*. at 14594-95.

[29] *In the Matter of Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments (Seaford, Delaware),* Report and Order, 24 FCC Rcd 4466 (Vid. Div. 2010), *petition for reconsideration pending*; *In the Matter of Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments (Atlantic City, New Jersey)*, Report and Order, 24 FCC Rcd 2606 (Vid. Div. 2010).

[30] *Bureau Decision*, 24 FCC Rcd at 14595.

[31] *Id.*

[32] PMCM Application for Review at 8-13.

delegated authority in rejecting PMCM's notifications and that the *Bureau Decision* therefore is procedurally defective.[33] Finally, PMCM suggests that *Bureau Decision* was predicated on the Bureau's disagreement with congressional policy and states that the Bureau may not "ignore an Act of Congress."[34] Because we affirm, and thereby ratify, the Bureau's decision, we need not consider PMCM's argument that the Bureau lacked delegated authority to act in this matter.[35] In affirming the Bureau's decision, we are not ignoring an Act of Congress. Rather, we are exercising the Commission's delegated authority to interpret an ambiguous statutory provision.[36] We consider below PMCM's arguments concerning the interpretation of Section 331(a).

12. The gravamen of PMCM's Application for Review is that the *Bureau Decision* defeats the will of Congress because the Bureau did not agree that Section 331(a) applies to PMCM's attempt to reallocate channels from Nevada and Wyoming to New Jersey and Delaware. In PMCM's view, the Commission has no discretion whatsoever in acting on PMCM's notification requests, and it urges the Commission to immediately issue it licenses for Wilmington and Middletown Township.[37] According to PMCM, Section 331(a) "by its terms *overrides all other provisions* of the United States Code and all other regulations of the FCC,"[38] indicating the Congressional intent "to make possible the relocation of a VHF station to one of the unserved states – no matter what it took or where the relocated station came from."[39] In urging its interpretation of the scope of the second sentence of Section 331(a), PMCM relies heavily on the fact that Section 331(a) uses what it characterizes as "broad, mandatory language" such as "'in **any** case,'" "'**notwithstanding any other provision of law**'" and "'the Commission **shall**.'"[40]

[33] PMCM Application for Review at 8-9.

[34] PMCM Application for Review at 8, 18.

[35] *See Murray Energy Corp. v. FERC,* 629 F.3d 231, 236 (D.C. Cir. 2011) (citing *Dana Corp. v. ICC*, 703 F.2d 1297, 1301 (D.C. Cir. 1983)). PMCM also asks the Commission to dismiss the Informal Objection filed by Nave Broadcasting, LLC ("Nave") for lack of standing due to its status as a low power television ("LPTV") licensee. PMCM Application for Review at 7, n.6 ("[A]s a LPTV licensee, Nave has no standing to object to potential interference from full power station reallocations"). We dismiss this portion of PMCM's Application for Review because its request is moot. While Nave filed an informal objection to PMCM's June 15, 2009 Requests, it did not file an opposition to PMCM's Application for Review and has not otherwise pursued its interests on review of the *Bureau Decision*. In any event, we would deny PMCM's request to dismiss Nave's informal objection because the Commission's rules do not provide formal procedures applicable to Section 331 notifications, and Nave's informal objection is therefore permissible under the Commission's rule permitting the filing of informal requests for Commission action. *See* 47 C.F.R. § 1.41 ("Except where formal procedures are required under the provisions of this chapter, requests for action may be submitted informally.")

[36] *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 996-97 (2005) ("the Commission has the discretion to fill the . . . statutory gap" created by ambiguity); *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843-44 (1984) (discussing implicit delegation of authority to agencies charged with administering a statutory scheme).

[37] PMCM Application for Review at 1. PMCM claims that the Commission itself has already determined that Section 331(a) affords the Commission no discretion in carrying out the provision's mandate. *Id.* (citing *RKO General, Inc.*, 1 FCC Rcd 1081, 1083 (1986)). PMCM overlooks the critical distinction between that case and its own. In *RKO*, there was no question as to whether Section 331(a) applied; the Commission was addressing the question of whether its normal allocation procedures should apply to a reallocation pursuant to Section 331(a). In PMCM's case, the Bureau determined that the statutory mandate does not apply to PMCM's notifications because they do not involve "reallocations" within the meaning of Section 331(a).

[38] PMCM Application for Review at 9 (emphasis in original).

[39] PMCM Application for Review at 10.

[40] PMCM Application for Review at 11 (emphasis in original).

13. As the D.C. Circuit stated in *Multi-State Communications*, "[c]onstruing a statutory term . . . requires more than a superficial and isolated examination of the statute's plain words. Ascertaining congressional intent requires us to examine 'the context in which statutory words are set – the statute's purpose, structure and history . . . .'"[41] We agree with the Bureau's determination that the term "reallocation" is susceptible to more than one interpretation and could have either the broad meaning that PMCM advocates or the more narrow meaning the Bureau found reasonable.[42] We also agree with the Bureau's conclusion that it is more reasonable to interpret the term to mean the moving of a VHF channel to a new state under circumstances where the channel cannot be used simultaneously at the authorized and proposed new location because such dual operations would cause interference. In contrast to PMCM's interpretation, this interpretation is not only consistent with the statute's words, but also with the purpose, structure and legislative history of Section 331(a).

14. An examination of the wording and structure of Section 331(a) reveals a narrowly drawn statutory scheme that is consistent with the interpretation of the term "reallocation" that the Bureau adopted and we affirm here. The first sentence of Section 331(a) directs the Commission to "allocate" at least one commercial VHF channel to each state "if technically feasible." The second sentence directs the Commission, upon a licensee's notification to the Commission that it is willing to agree to the "reallocation of its channel" to an unserved state, to order such reallocation and issue a license for the reallocated channel, "notwithstanding any other provision of law." In other words, Congress directed the Commission to allocate at least one commercial VHF channel to each state, using normal allocation procedures, where it was technically feasible to do so. Where it was not technically feasible to accomplish this objective using normal procedures, Congress provided an alternative mechanism that was intended to facilitate reallocations to unserved states by removing the comparative hearing requirements that otherwise would put a licensee's existing operations at risk and inhibit voluntary reallocations. The Bureau concluded, and we agree, that the absence of a technical feasibility proviso in the second sentence does not mean that Congress meant to require the Commission to order reallocations that would cause interference to other channels.[43] Rather, the absence of this language logically suggests that Congress did not believe it was necessary to require technical feasibility explicitly because technical feasibility is assured in situations involving reallocations of channels to nearby communities where the two allocations are mutually exclusive. Although PMCM takes issue with this aspect of the Bureau's analysis, it provides no basis or support for its position but instead simply complains that the Commission failed to allocate VHF channels to New Jersey and Delaware before PMCM filed its notifications.[44] Furthermore, it has suggested no reason why Congress would be concerned about technical feasibility in the first sentence of Section 331(a) when the Commission is allocating channels, but completely unconcerned about technical feasibility in the second sentence when a licensee proposes to move to a new location.

15. In addition, Congress restricted the availability of the reallocation mechanism to the willing licensee's current channel of operations, using the phrase "reallocation of *its* channel."[45] Our interpretation gives meaning to this limitation, since reallocation of a licensee's existing channel from one community to another, where simultaneous operation on that channel in both communities would be

[41] *Multi-State Communications*, 728 F.2d at 1522 (*quoting Natural Resources Defense Council, Inc. v. EPA*, 725 F.2d 761, 769 (D.C. Cir. 1984)). *See also California Metro Mobile Comm'cns, Inc. v. FCC*, 365 F.3d 38, 44-45 (D.C. Cir. 2004) (to determine whether Congress has spoken to the precise question at issue, courts use traditional tools of statutory interpretation -- text, purpose, structure, and history are traditional tools of statutory construction); *Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 297 (D.C. Cir. 2003) (same).

[42] *Bureau Decision,* 24 FCC Rcd at 14591.

[43] *Id.* at 14593.

[44] *See* PMCM Application for Review at 16-17.

[45] 47 U.S.C. § 331(a) (emphasis added).

mutually exclusive, would avoid interference that otherwise could prevent the allocation of a new channel to the unserved state. PMCM's interpretation, in contrast, could involve the reallocation of service from a distant community to a community in the unserved state in circumstances where the licensee's current channel is already in use within the same service area as the new community of license (*i.e.*, in an adjacent state). In that situation, reallocation would not necessarily be technically feasible. Had Congress intended such a broad reading of the provision, we believe it would have clarified that the Commission is required to reallocate channels pursuant to a section 331 notification only if it would be technically feasible to do so, and it would have allowed the Commission to assign the relocated licensee an appropriate available channel, rather than the same channel the licensee used in its original community of license. The absence of such provisions in section 331 further supports our narrower interpretation.

16. The legislative history also supports our interpretation. In disputing the Bureau's interpretation of the term "reallocation," PMCM asserts that the "Conference Report expressed an intent to readily embrace any and all voluntary station moves so long as the end result is that an unserved state gets a station," arguing that the use of terms such as "moving" and "transfers" by "any" licensees provides the clearest expression that Congress intended no restriction on the type of license which could be reallocated.[46] This argument, however, is clearly contradicted by the Conference Report expression that Section 331 was intended to "remove impediments which currently discourage a licensee . . . from voluntarily moving," impediments that Senator Bradley more fully explained "discourage an existing licensee in either New York or Philadelphia from voluntarily seeking to move to New Jersey [because] under current law, that request would automatically trigger an action to open up that license to new applicants."[47] As the Bureau explained, the phrase "notwithstanding any other provision of law" was intended to remove these impediments by ensuring that the licensee seeking reallocation would not lose its *existing* license through the competitive selection process applicable to the reallocation request.[48] Contrary to PMCM's view of Commission precedent, at the time Section 331 was enacted, no such impediment existed for the licensee of a VHF station in a distant state, such as PMCM, that might have sought to operate on the same channel in New Jersey or Delaware.[49] The distant licensee could have petitioned the Commission to allocate a new channel to New Jersey or Delaware had it been technically feasible for the Commission to do so, and it could have continued to operate in its authorized community pending the conclusion of the allotment proceeding and any proceeding to choose among mutually exclusive applicants. Thus, a distant licensee would not have been eligible for a reallocation under Section 331 because it was not subject to the impediment that Section 331 was meant to remove.

17. In support of its broad interpretation of the term "reallocation," PMCM asserts that the court in *Multi-State* "extensively surveyed" the legislative history of Section 331(a) and "viewed the term 'reallocate' as holding no mysterious import; it simply meant a 'change.'"[50] PMCM, however, misstates the scope of the court's examination of Section 331 in *Multi-State* and incorrectly concludes that the court's legislative history analysis contradicts a narrow interpretation of the term "reallocation." In fact,

[46] PMCM Application for Review at 12.

[47] *Bureau Decision*, 24 FCC Rcd at 14592 (citing 128 Cong. Rec., S10946 (Aug. 19, 1982)).

[48] *Bureau Decision*, 24 FCC Rcd at 14591-92.

[49] *Id.* at 14592. PMCM argues that a licensee proposing a long-distance reallocation would be subject to competing expressions of interest, citing *Cheyenne, Wyoming*, 62 F.C.C. 2d 63 (1976). PMCM Application for Review at 14. PMCM's reliance on the Commission's decision in *Cheyenne, Wyoming* is misplaced. The issue raised in that case was whether an existing licensee was entitled to a modification of its license to specify operation on a newly allotted superior class of channel in the same community where the licensee currently operated. *Cheyenne, Wyoming*, 62 F.C.C. 2d at ¶ 10. The Commission did not consider, and the decision did not purport to address, situations in which a licensee proposed to modify its license so that it could move its channel to serve a distant community.

[50] PMCM Application for Review at 12-13.

the court did not examine or construe the term "reallocate."

18. Rather, the court interpreted the portion of Section 331(a) that provided for the reallocation of a channel "to a State in which there is *allocated* no very high frequency commercial television broadcast channel."[51] Multi-State, the competing applicant in the WOR-TV renewal proceeding, asserted that the Commission's prior assignment of commercial VHF channel 13 to New Jersey precluded the application of Section 331(a) to reallocate commercial VHF channel 9 to New Jersey. The court rejected Multi-State's interpretation of the term "allocated" as meaning "assigned" and concluded that the provision was intended to provide each unserved state with an "*operating* VHF commercial television station."[52] The court further determined that the legislative history clearly indicated that Section 331(a) was intended to benefit New Jersey specifically and reasoned that a literal construction of the term "allocated" to mean "assigned," without any consideration of the operational status of New Jersey's existing commercial VHF channel, "would ignore congressional intent and thwart the legislative will."[53] The court's examination of the legislative history to inform its analysis of the term "allocated" does not conflict with our interpretation of the term "reallocation." On the contrary, the court's rejection of a literal construction of Section 331(a) in favor of one informed by congressional intent as reflected in the legislative history of the provision supports the interpretation that we adopt here.

19. The interpretation we adopt here also furthers the purpose of Section 331(a) and harmonizes the goals of Sections 331(a) and 307(b). The overall purpose of Section 331(a) was "to affirm the congressional intent that it is in the public interest for every State to have at least one VHF television station" and to affirmatively require the Commission to allot a commercial VHF channel to New Jersey and Delaware if in the future it became "technically feasible" to do so.[54] Our interpretation furthers this congressional purpose, as evidenced by the allocation of new VHF channels to New Jersey and Delaware once new allocations became technically feasible. Unlike PMCM's interpretation, however, this interpretation also avoids unnecessarily undermining the congressional purpose of Section 307(b) to ensure that channels are allocated in a fair and equitable manner.[55] In furtherance of Section 307(b), the Commission applies rules and policies intended to promote the underlying intent of Section 307(b) to create a nationwide, locally oriented system of broadcasting in which broadcasters are expected to serve the needs and interests of their communities.[56] Among other things, these rules are designed to ensure that stations broadcasting on the same channel in different communities will not create interference for other stations, as interference would deprive stations and their viewers of the full benefit of the allocated

[51] *Multi-State*, 728 F.2d at 1524 (emphasis added).

[52] *Multi-State*, 728 F.2d at 1522, 1524 (emphasis in original).

[53] *Multi-State*, 728 F.2d at 1524. In light of this interpretation, the court concluded that the Commission lacked the discretion to conduct a comparative hearing on competing applications for operation on channel 9. *Id.* at 1524-25.

[54] *See Bureau Decision*, 24 FCC Rcd at 14591 (citing H.R. Conf. Rep. 97-760 at 338 (1982)).

[55] Section 307(b) of the Communications Act provides that "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. § 307(b). *See Bureau Decision*, 24 FCC Rcd at 14590 (noting that PMCM's interpretation "would deprive the Commission of its discretion to allocate channels in the public interest, allow PMCM to determine the channel allocations in New Jersey and Delaware, and shield PMCM from competition for those channels").

[56] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 174 (1968) ("The Commission has concluded, and Congress has agreed, that these obligations require for their satisfaction the creation of a system of local broadcasting stations, such that 'all communities of appreciable size (will) have at least one television station as an outlet for local self-expression.'").

spectrum.[57] The Commission allots new channels after notice and comment rulemaking proceedings involving a determination that the proposed allotment to the new community would further the policy goals of Section 307(b) and the allotment priorities and policies adopted by the Commission to implement that section of the Communications Act.[58] All interested parties are afforded the opportunity to file for a newly allotted channel or propose alternative communities to be served by the channel.[59]

20. Our interpretation preserves the Commission's ability to follow its longstanding policies and practices under section 307(b) in all but the rare circumstance, such as existed in 1982 in New Jersey, in which the only technically feasible means of allocating a commercial VHF channel to an unserved state would be to reallocate an existing channel from a nearby community so as to permit service to the new state without causing interference to existing channels. Thus, our interpretation harmonizes the goals of Sections 307(b) and 331(a) and gives greater effect to both statutory provisions than does PMCM's.[60] PMCM's interpretation, in contrast, would grant licensees the sole discretion to determine which communities should be served, on what frequencies, and by which licensee, and could produce the absurd result of an unnecessary loss of service to an underserved community and interference to existing stations at the new location. Under PMCM's construction of Section 331(a), any licensee that wished to obtain a commercial VHF channel in a state without one could simply notify the Commission of its willingness to abandon service in its current community of license and commence service in any community of its choosing in the unserved state. Even if the Commission could allocate new channels to the unserved state in a technically feasible manner using normal allocation procedures, under PMCM's interpretation, it would be required to bypass these procedures and reallocate the channel in question to the licensee's chosen community without regard to whether the new service would cause interference to broadcast stations serving the same area, whether the location and frequency selected would minimize any technical deficiencies associated with post-transition VHF service, whether other communities in the unserved state would have a greater need for new service than the community chosen by the licensee, or whether the newly served community has a greater need for the channel than the formerly served community.[61] In

[57] The engineering required to achieve this result is often complicated and difficult, as evidenced by the Commission's unsuccessful attempts in the 1970s to allocate a commercial VHF channel to New Jersey. *See Bureau Decision*, 24 FCC Rcd at 14592-93.

[58] In order to fulfill its mandate to ensure a fair and equitable distribution of channels, the Commission has established certain television allotment priorities: "(1) to provide at least one television service to all parts of the United States; (2) to provide each community with at least one television broadcast station; (3) to provide a choice of at least two television services to all parts of the United States; (4) to provide each community with at least two television stations; and (5) to assign any remaining channels to communities based on population, geographic location, and the number of television services available to the community from stations located in other communities. *Television Assignments, Sixth Report and Order*, 41 F.C.C. at 167-173.

[59] *Bureau Decision*, 24 FCC Rcd at 14590; *Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcast Assignment*s, Memorandum Opinion and Order, 5 FCC Rcd 931, 933 n.5 (1990) ("A counterproposal is a proposal for an alternative and mutually exclusive allotment or set of allotments in the context of the proceeding in which the proposal is made."). If more than one applicant files for the channel, the Commission is required to award a construction permit through a competitive bidding process pursuant to Section 309(j) of the Act. 47 U.S.C. § 309(j).

[60] *See United Savings Ass'n v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 371 (1988) (citations omitted) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.").

[61] *See Public Citizen, et al. v. U.S. Dept. of Justice, et al.*, 491 U.S. 440, 453-54 (1989) (quoting *Church of the Holy Trinity v. United States,* 143 U.S. 457, 459 (1892)) ("[F]requently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.") PMCM's (continued....)

fact, PMCM's stations operating on channels 2 and 3 in Jackson, Wyoming, and Ely, Nevada, are the only stations licensed to those communities, and the broader populations residing within the viewing contours of those stations do not receive an over-the-air signal from any other full-power television station.[62] In contrast, residents of Middletown Township and Wilmington receive a strong over-the-air signal from up to 15 and 12 full-power television stations, respectively.[63] Thus, although the digital transition made it technically feasible for the Commission to allocate commercial VHF channels to New Jersey and Delaware, and the Commission has now done so, PMCM urges an interpretation of Section 331 that would result in a complete loss of full-power television service to communities in Nevada and Wyoming – losses that are completely unnecessary because the Nevada and Wyoming allocations have no effect whatsoever in New Jersey or Delaware -- and the addition of full-power service to communities that are already served by multiple full-power stations.[64]

21. Our interpretation is also consistent with the Commission's past use of the term "reallocation."[65] For example, in its *New Jersey Inquiry*, which predated the enactment of Section 331(a), the Commission clearly distinguished between an allotment, *i.e.*, the drop-in of a short-spaced channel 8 to New Jersey, and the "reallocation" of existing channels in New York to New Jersey.[66] PMCM does not point to any Commission order in which the term reallocate was used to refer to the deletion of a channel from one community and the addition of the same channel in another community where simultaneous operation on that channel in both communities would be feasible. Rather, the cases PMCM cites are either inapposite,[67] or involve the reallocation of a channel that had been deleted back to the community, the reallocation of a channel between nearby communities, or a proposal to move a station's transmitter to a location near its existing transmitter site.[68]

22. Finally, we address PMCM's assertion that the Commission has done "absolutely nothing" to fulfill the mandate of Section 331, alleging that the Commission ignored "a historic opportunity" in the 1990s to allot VHF channels to Delaware and New Jersey in connection with its

(...continued from previous page)
effort to invoke Section 331(a) illustrates how a broad interpretation of Section 331(a) could needlessly undermine the Commission's ability to carry out the mandate of Section 307(b).

[62] *DTV Reception Maps*, Enter Locations: Ely, Nevada and Jackson, Wyoming; http://www.fcc.gov/mb/engineering/maps/ (accessed March 16, 2011). While the maps indicate second stations KBNY in Ely and KBEO in Jackson, those stations are no longer in operation and the licenses were cancelled on January 7, 2011 and July 26, 2010, respectively. We note that technical proposals by existing licensees that result in loss of service have long been considered to be *prima facie* inconsistent with the public interest and must be supported by a strong showing of countervailing public interest benefits. *Bureau Decision*, 24 FCC Rcd at 14593.

[63] *DTV Reception Maps*, Enter Locations: Middletown Township, New Jersey and Wilmington, Delaware; http://www.fcc.gov/mb/engineering/maps/ (accessed September 21, 2010).

[64] PMCM states that "nothing would stop the Commission from immediately proposing to reassign Channels 2 and 3 to Nevada and Wyoming, respectively, so that there would be no loss of service in those states." PMCM Application for Review at 19. While the Commission certainly could initiate rulemaking proceedings to reinstate channels 2 and 3 or allocate different channels to Nevada and Wyoming, there is no guarantee that any party would be interested in applying for the newly allotted channels. Even assuming the channels were reinstated and construction permits awarded to new operators after PMCM terminated service, viewers would experience a gap in service during the allocation and licensing process, which could take over three years if the new operators took full advantage of the three year-construction period for new stations. *See* n. 21, *supra*.

[65] *See Bureau Decision*, 24 FCC Rcd at 14593.

[66] *New Jersey Coalition*, 574 F.2d at 1122; *First R&O, New Jersey Inquiry*, 58 F.C.C.2d at 802-04.

[67] *See* fn. 49, *supra.*

[68] *See* PMCM Application for Review at 14-16.

adoption of a DTV Table of Allotments.[69] PMCM's assertion is based on a misperception of technical constraints and the channel allotment process undertaken as part of the DTV transition. The allotment of VHF channels to communities in New Jersey and Delaware was precluded during the DTV transition because of impermissible interference that would have resulted to existing analog stations licensed to communities in New York, Pennsylvania and Maryland, as well as the District of Columbia.[70] It did not become technically feasible to drop-in VHF channels to communities in Delaware and New Jersey until television broadcasters ceased analog operations on June 13, 2009. PMCM filed its notifications on the very next business day, Monday, June 15, 2009, before the Commission had an opportunity to initiate proceedings to allot VHF channels to New Jersey and Delaware. On the same date that the Bureau issued its decision denying PMCM's notifications, it issued two Notices proposing to allocate channel 4 to Atlantic City and channel 5 to Seaford.[71] The Post-Transition Table of DTV Allotments has been amended to reflect these new VHF channel allotments,[72] the channels have been auctioned, [73] and the applications for construction permits filed by the winning bidder have been granted.[74] Thus, the Commission has fully complied in a timely manner with the statutory mandate that it allot at least one commercial VHF channel to each state, if technically feasible, and the purpose of Section 331(a) has been fulfilled.

[69] PMCM Application for Review at 4.

[70] The Commission established its initial (pre-transition) DTV Table of Allotments in 1997, providing existing broadcasters temporary use of an additional 6 MHz channel to provide DTV service in addition to their existing analog service. *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, MM Docket No. 87-268, Sixth Report and Order, 12 FCC Rcd 14588 (1997)("*DTV Sixth Report and Order*"); *see also* 47 C.F.R. § 72.622(b). These temporary grants of an additional 6 MHz channel for digital broadcasting during the transition were conditioned on broadcasters returning one of the channels at the end of the transition period. *See* 47 U.S.C. § 336(c). In crafting the pre-transition DTV Table of Allotments, the Commission sought to protect the existing service on analog channels from operation on the newly allotted paired digital channels, so that there would be as little loss of service as possible to the analog-viewing public during the transition. *DTV Sixth Report and Order,* 12 FCC Rcd at 14629. The Commission allotted 1605 new DTV channels in almost 900 communities in the continental United States in order to fully accommodate all eligible broadcasters with a second channel. *Id*. at 14681. Pursuant to the channel election procedures established by the Commission in connection with the adoption of the Post-Transition Table of DTV Allotments, licensees with two in-core channels (*i.e.,* channels 2-51*)* could elect to remain on their constructed pre-transition digital channel at the end of the transition, thereby releasing their analog channel, or could elect to construct a new digital facility on their analog channel and release their pre-transition digital channel at the end of the transition. *See Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, MB Docket No. 03-15, Report and Order, 19 FCC Rcd 18279 (2004). WWOR-TV was allotted UHF channel 38 as its pre-transition digital channel, *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, MM Docket No. 87-268, Sixth Report and Order, 12 FCC Rcd 14588, Appendix B (1997), since there was no available VHF channel for its paired use.

[71] *In the Matter of Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments (Seaford, Delaware),* Notice of Proposed Rulemaking, 24 FCC Rcd 14596 (Vid. Div. 2009); *In the Matter of Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments (Atlantic City, New Jersey),* Notice of Proposed Rulemaking, 24 FCC Rcd 14601 (Vid. Div. 2009).

[72] *In the Matter of Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments (Seaford, Delaware),* Report and Order, 24 FCC Rcd 4466 (Vid. Div. 2010), *petition for reconsideration pending*; *In the Matter of Amendment of Section 73.622(i), Post-Transition Table of DTV Allotments (Atlantic City, New Jersey)*, Report and Order, 24 FCC Rcd 2606 (Vid. Div. 2010).

[73] Auctions for the Atlantic City and Seaford construction permits commenced on February 15, 2011 and were completed on February 17, 2011. S*ee* Public Notice, "Auction of VHF Commercial Television Station Construction Permits Closes; Winning Bidder Announced for Auction 90," DA 11-312 (rel. March 1, 2011).

[74] FCC File Nos. BNPCDT-20110330AAY and BNPCDT-20110330AAX, granted May 4, 2011.

23. We do not think Congress intended for Section 331(a) to operate as a substitute for normal allocation procedures where, as here, the Commission can fulfill the statutory mandate of allocating at least one commercial VHF channel to each state using those procedures. In 1982, in contrast, technical constraints thwarted the Commission's ability to allocate VHF channels to unserved states. The reallocation mechanism established in Section 331(a) removed the comparative hearing impediment that discouraged an existing licensee in New York or Philadelphia from voluntarily seeking to move to an unserved state by a technically feasible reallocation, and, as a result of WOR-TV's use of that mechanism, enabled the Commission to reallocate a commercial VHF channel to New Jersey.

24. WWOR-TV continues to operate a full-power commercial station in New Jersey on a frequency it presumably deems to be equivalent or technically superior to the VHF channel it used until the end of the digital transition. Although we agree with the Bureau that the comparative technical advantages of VHF spectrum over UHF spectrum which led Congress to enact Section 331(a) no longer exist in the current digital environment, the Commission has now allotted new commercial VHF channels to New Jersey and Delaware. This result became technically feasible after WWOR-TV and other stations in the region vacated their analog VHF channels in favor of digital UHF channels. PMCM could have sought a license to operate on one or both of those new channels, as did other licensees, but it chose not to do so.[75] Section 331(a) provides a targeted means of overcoming procedural difficulties that this case does not present. It is therefore not available as a means of allowing PMCM to obtain licenses to move its operations from Nevada and Wyoming to New Jersey and Delaware.

IV. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED, that the Application for Review filed by PMCM TV, LLC IS DENIED.

26. IT IS FURTHER ORDERED that the request of PMCM TV, LLC to dismiss the informal objection of Nave Broadcasting, LLC, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[75] Public Notice, "Auction of VHF Commercial Television Station Construction Permits; Three Bidders Qualified to Participate in Auction 90," DA 11-136 (rel. Feb. 4, 2011) at Att. A, B & C.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS

Re: Reallocation of Channel 2 from Jackson, Wyoming to Wilmington, Delaware; Reallocation of Channel 3 from Ely, Nevada to Middletown Township, New Jersey

Given the history of New Jersey and Delaware citizens being underserved by media outlets time and time again, I closely weighed both the legal arguments and the policy considerations raised by this matter. In the end, after much deliberation, I believe we arrive at the correct decision as a matter of law. But it leaves me less than fully satisfied that underlying policy issues have not, in my opinion, yet received their full due at the Commission. These need to be clarified for the road ahead. And we must always be clear that licensees pay full attention to their communities of license. I hope there will be a sharp focus on this imperative as broadcast license renewals come up. Likewise, the Commission must be ever-mindful of its responsibility to states and local communities so their needs are addressed. My hope is that in the near future we will take meaningful steps to address the concerns of the residents of New Jersey and Delaware, which should be, of course, the concerns of us all. Finally, it is important to recognize the impact the DTV transition has had on the current media environment, and we need to take that into account as we interpret and implement Congressional statutes.