

Before the
Federal Communications Commission
Washington, DC 20554

In re Applications of)	
)	
Venture Technologies Group, LLC.)	File No. 0000054805
)	
and)	
)	
Ventana Television, Inc.)	File No. 0000048498
For Television Stations on Channel 33)	

To: The Commission

Received-FCC
JUL 26 2019
Bureau / Office

**PMCM TV, LLC's
APPLICATION FOR REVIEW**

PMCM TV, LLC ("PMCM") hereby applies to the full Commission for review of the Video Division's June 26, 2019 Letter Order ("*Letter Order*") denying PMCM's petition to deny the above-referenced applications mutually exclusive applications for channel 33 in the New York City metro area.

QUESTIONS PRESENTED FOR REVIEW

1. The Commission recently determined that the right of an incumbent station to protect its virtual channel brand from use by a new entrant in the same market may not be impaired by operations of the new entrant. Did the Division therefore err by allowing stations to operate on an RF channel that will indisputably cause confusion in the reception of the incumbent's signal on the branded virtual channel that it has developed?

FACTORS WARRANTING COMMISSION REVIEW

The following factors warrant Commission review of the Division's *Letter Order*:

1. The action taken conflicts with the Commission's recent policy decision that preservation of a station's brand identity is a superior interest to clear over the air reception of a new broadcast signal.
2. The *Letter Order* rejected undisputed evidence that the work-around relied upon by the Division to prevent the problem caused by overlapping virtual and over-the-air channels in the same market is generally unavailable to a large number of consumers and therefore does not solve the serious problem presented. The *Letter Order* therefore relied on an erroneous finding as to a material fact.

This application for review seeks reversal of the *Letter Order* denying PMCM's petition to deny and instead seeks dismissal of the captioned applications. PMCM has no objection to the grant of either application on a channel other than Channel 33 which would not interfere with PMCM's virtual channel identity on Channel 33 or reassigning WJLP to a suitable VHF PSIP channel.

Introduction

The two applications at issue here both seek to operate on channel 33 in the New York City area. They are mutually exclusive with each other, but both pose the same problem for PMCM's Station WJLP in Middletown Township, New Jersey which has already been plagued by the long standing and frustrating signal problem with CBS as explained below. WJLP operates on RF channel 3 but its virtual channel has been identified by the Commission as channel 33, the virtual channel it was assigned by operation of the FCC's interpretation of the PSIP protocols.¹ The long history of PMCM's unsuccessful effort to avoid relegation to virtual

¹ *Request for Declaratory Ruling filed by Meredith Corp. and "Alternative PSIP Proposal" by PMCM TV, LLC for WJLP*, 32 FCC Rcd 7229 (2017) ("*Channel 33 Order*")

channel 33 rather than to its historic virtual channel 3 is detailed in Docket 14-150 and need not be repeated here. In the course of those proceedings, however, a certain technical phenomenon relating to the interaction between virtual channels and RF channels became an issue that had to be addressed.

The problem arose when PMCM kept getting complaints from viewers, or attempted viewers, that when they tried to tune in to PMCM's signal, their television either routed them to CBS's station in New York, returned them to their prior channel, or went dark.² This was puzzling since under the PSIP protocols and the Commission's rules, TV sets are required to automatically translate an over the air signal from the channel on which it is broadcast on to the virtual channel which it has been assigned. The viewer therefore perceives CBS, for example, as channel 2 even though it actually operated at that time on channel 33. Similarly, WJLP operates on RF channel 3 but should appear on people's TVs as channel 33. PMCM received enough of these complaints that the problem could not be attributed to some kind of consumer error, as PMCM originally suspected. PMCM therefore undertook a test.

It randomly tested some 40 TV sets made by a broad range of different manufacturers. The results were astounding. As graphically demonstrated by PMCM in a detailed video capture of the actual results of the tests,³ PMCM found that more than half of the TV sets in the market were not correctly tuning to WJLP's virtual channel (33) but rather to WCBS or to no channel at all. This was especially disconcerting since CBS had an "oldies" type format on one of its subchannels which was similar to WJLP's "classic TV" format. Surprised by these findings, PMCM took similar readings in two other communities to see if the same result was achieved. It

² WCBS uses virtual channel 2 but operated on RF channel 33 since the DTV conversion in 2009. It will shortly be switching to RF channel 36.

³ See PMCM's October 15, 2015, October 20, 2015 and September 11, 2015 submissions in Docket 14-150.

was. When these findings were shared with CBS, they independently got the same results from their own tests. Consumer Reports also got similar results when it was alerted to the problem. The only reasonable conclusion was that a large proportion of TV sets in the American market have not been programmed to correctly tune to a virtual channel when that channel overlaps with the same RF channel in a given market. The same effect will occur if the captioned stations are allowed to operate on RF channel 33.

CBS noted a potential work-around by the consumer simply entering “33.1” on their remote rather than the conventional and customary “33” when he wants to tune to channel 33. There are several serious problems with this approach. First, no other station in the U.S. is forced to make its viewers follow a specialized dialing method to tune in to its primary program stream. Even such a small add-on to the station selection process is enough to prevent, discourage or confuse some potential viewers, as PMCM has found. Second, viewers must somehow be educated to attempt that fix, something that cannot be conveyed to potential viewers over the air since they cannot reach the affected channel in the first place. Third, the simple “.1” fix which the Commission relied on to minimize the problem was demonstrated not to work *at all* on some sets, a circumstance that the Commission just ignored. There was literally no way to tune to your desired channel. And finally, the Commission’s simple and readily available fix is neither simple nor readily available if your remote control *does not have a dot on it*. To date, the Commission has simply attempted to minimize the problem rather than resolving its. Indeed, the Division has unaccountably reached the conclusion that viewers in the New York DMA have

“presumably learned how to resolve the situation” in the four years that WJLP has been operating with its channel 33 PSIP. *Letter Order* at p.5.⁴

The Division’s wholly unsupported supposition was wrong. WJLP’s potential viewership continues to be plagued by this RF/PSIP mistuning issue. During the pendency of Docket 14-150, hundreds of viewers lodged complaints with the Commission that they were having trouble accessing WJLP’s family-friendly programming. Those citizen comments were completely ignored in the Commission’s resolution of that docket, but the complaints continue. As recently as two weeks ago, a potential viewer in Fairfield County contacted WJLP to complain that no matter what he did, including clicking a dot + 1 after clicking on 33, did not work. We must assume that this viewer is only different from many other potential WJLP viewers in that he took the trouble to report the issue to the station rather than just giving up entirely. Surely the viewing experience of actual members of the public whom WJLP – and the Commission – are supposed to be serving must be considered in deciding whether there is a real problem which requires a resolution better than pressing non-existent dots on their remotes.

In its Petition to Deny, PMCM added an additional piece of information to the mass of data about the extent of the problem which had been presented earlier in connection with the Docket 14-150 proceedings. PMCM had pointed out that some TV remotes do not have a dot on their face for viewers to click on. PMCM at that time had not extensively surveyed the field of commonly used remotes to determine how many did not have the dot. However, before filing its

⁴ The Division also declared that the overlapping signal problem affects over half of the TV sets in the United States, so the “issue of ‘receiver error’ is well known to viewers of over-the-air television.” *Id.* Yet no one who PMCM has discussed this issue with, including many engineers and the TV testers at Consumer Reports, had ever heard of this issue until PMCM brought it to their attention. The Commission has unaccountably made no effort to enforce its own rules that require TV manufacturers to program their sets to translate the PSIP signal properly, so the phenomenon is likely to continue indefinitely into the future.

instant Petition, PMCM undertook a survey of remote control units sold for use with popular TV set manufacturers.⁵ The results, presented as an attachment to PMCM's Petition, surprised even PMCM. It turns out that the only major manufacturer that uses the dot on its remote is Sony. Smaller manufacturers Emerson and Dynex also use the dot, but most other major manufacturers do not display a dot on their remote device. How are hapless consumers supposed to effectuate the "simple" work-around when their TV remote control does not permit them to do so? In short, the Division ignored undisputed evidence that the problem with overlapping RF and PSIP channels is real, is causing actual diversion of viewers from their desired channel with no way to remediate the problem, and is not going away.

The Commission Must Take Affirmative Steps to Solve the Problem

Let us state at the outset that PMCM disagreed vigorously with the Commission's determination in the *Channel 33 Order* that a broadcast station's right to be received correctly by over the air viewers is subordinate to an incumbent station's interest in protecting the "brand" identification associated with its PSIP. This policy, which elevated brand identity over broadcast reception as a value in the Commission's pantheon of priorities, seemed to turn the long-held primacy of fostering a multitude of broadcast media voices on its head. But the new policy is now in effect and must be implemented consistently.

Because WJLP's PSIP is fixed as channel 33, its PSIP must be protected from newcomers to the market, just as the full Commission decided to protect WCBS's and WFSB's use of PSIP channel 3 from WJLP's operations. WJLP's viewers are indisputably being redirected, restricted, or denied access to its signal while the overlap with RF channel 33

⁵ See attached excerpt from PMCM's Petition to Deny.

continues. PMCM had looked forward to the relocation of WCBS to RF channel 36, which would have alleviated the nagging and persistent issues of viewer misdirection that have plagued the station since its relegation to PSIP 33. The assignment of RF channel 33 to two new stations in the market now threatens to recreate, and thus perpetuate, the overlap problem. Again, PMCM cannot be required to protect other stations (WCBS and WFSB) and yet not receive the same level of protection by the Commission that was afforded those broadcasters in the past. That inconsistency would be directly detrimental to PMCM and WJLP.

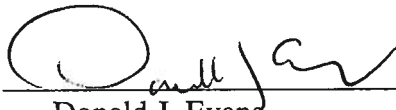
In this case, it is WJLP which is the incumbent station whose brand rights have priority status and must be protected. Assignment of a different PSIP number to the new stations will not correct the problem because it is the new stations' RF operations that will wreak havoc on viewer access as previously demonstrated with CBS and WJLP. To the extent that WJLP has established channel 33 branding rights in its four+ years of operation on that PSIP, those rights are entitled to protection against newcomers. Agency policies must be applied consistently and without discrimination,⁶ and therefore the policy enunciated in the *Channel 33 Order* must be applied here to preserve the incumbent station's brand. The policy holds even greater force here since the interfering stations are LPTV stations with secondary status to full power station WJLP. It would seriously undermine the Commission's traditional prioritization of broadcast service categories to permit secondary stations to interfere with the ability of full power station viewers to access their desired station. The assignment of new channel 33 stations to the New

⁶ *Nat'l Black Media Coal. v. FCC*, 775 F.2d 342, 355 (D.C. Cir. 1985) "Our analysis leads to the conclusion that the Commission departed from the dictates of [its stated policy] in this case. Of course, an agency does have the right to develop new policies and methodologies and it is not our place to stand in the way of such development. But it is also a clear tenet of administrative law that if the agency wishes to depart from its consistent precedent it must provide a principled explanation for its change of direction. ... We have steadfastly held that "an agency changing its course must apply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored". *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C.Cir.1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971)." (internal citations omitted).

York/New Jersey market would undermine the Commission's fundamental obligation to allocate broadcast licenses in a "fair, efficient, and equitable" manner, as required by Section 307(b) of the Act. The grant of an application for a new station which will effectively interfere with reception of service from an existing station is neither fair nor equitable, nor does it comply with the Commission's usual policy of avoiding disruption of existing broadcast services to viewers. The Commission cannot keep pretending that this issue does not exist.

As PMCM has indicated, the problem could be permanently resolved by placing the new stations on a different RF frequency. Alternatively, PMCM could be relocated to a different VHF PSIP that would also permanently eliminate the problem, freeing up valuable spectrum in the process. PMCM would be open to either alternative so that both the new channel 33 entrants and WJLP can operate without creating viewer confusion or, worse, denying them access to its signal altogether. Absent such a remedy, the captioned applications must be denied.

PMCM TV, LLC

By: 
Donald J. Evans
Its Attorney

FLETCHER HEALD & HILDRETH, PLC
1300 North 17th Street, 11th Floor
Arlington, VA 22209
(703) 812-0490
evans@fhhlaw.com

July 26, 2019

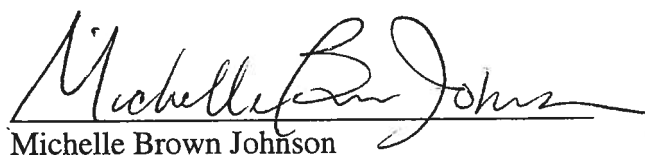
CERTIFICATE OF SERVICE

I, Michelle Brown Johnson, a secretary at Fletcher, Heald & Hildreth PLC, hereby certify that a true and correct copy of the foregoing "Application for Review" was sent on this 26th day of July, 2019, via First-Class United States mail, postage pre-paid, or as otherwise specified, to the following:

C. Sean Spivey
Hogan Lovells US LLP
55 Thirteenth St. NW
Washington, DC 20004

Joan Stewart
Wiley Rein LLP
1776 K St. NW
Washington, D.C. 20006

Barbara Kreisman*
Chief, Video Division
Media Bureau
Federal Communications Commission
Washington, DC 20554



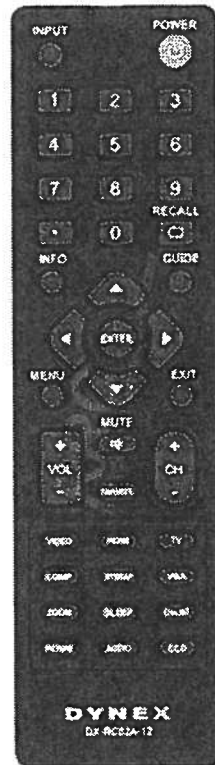
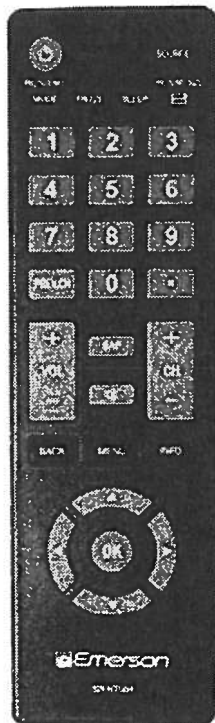
Michelle Brown Johnson

*By email



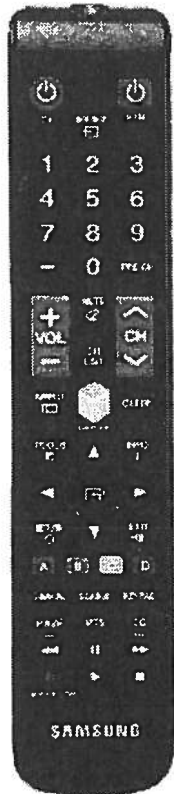
SONY SMART LED HDTV
REMOTE CONTROL
RM-YD102

EMERSON
32FNT004 LCD
HDTV REMOTE
CONTROL



DYNEX
DX-RC01A-12 DX-RC02A-12
LCD LED TV REMOTE

The "DOT" Group

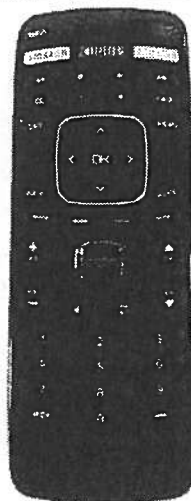


SAMSUNG SMART
REMOTE CONTROL
BN59-01179A

PANASONIC
REMOTE CONTROL
FOR 3D TV
N2QAYB000837



VIZIO XRT122
REMOTE CONTROL
FOR SMART HDTV

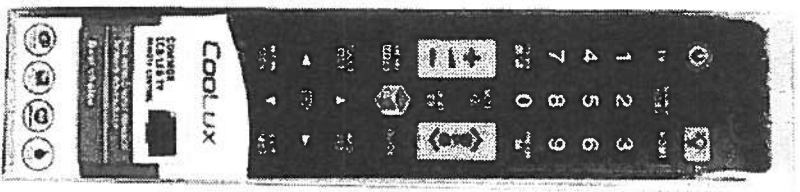


VIZIO 0980-0306-1020
REMOTE CONTROL

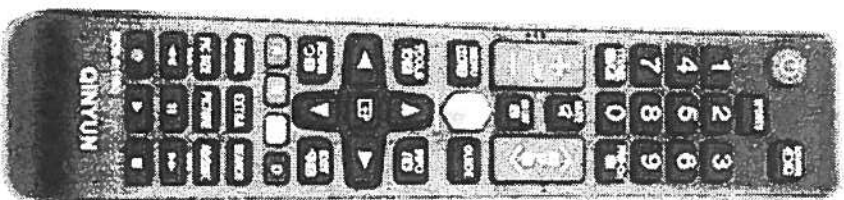


LG AKB73715892
HDTV REMOTE
CONTROL FOR
50PB6600

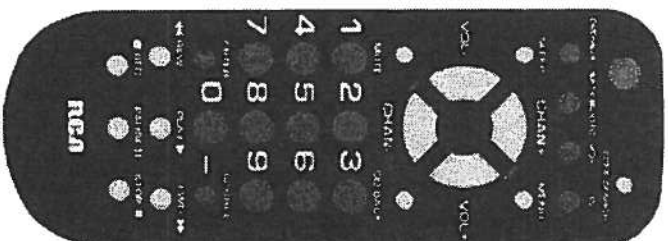
The "DASH" Group



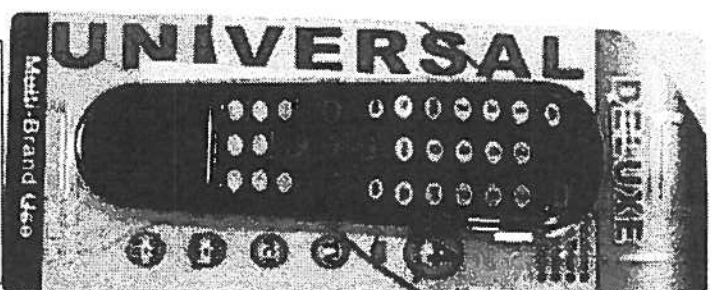
CoolLux
Universal Remote Control
(Amazon.com)



QinYun
Universal Remote Control
QINYUN BN59-011980
(Amazon.com)



RCA 4-FUNCTION REMOTE
RCR504BZ



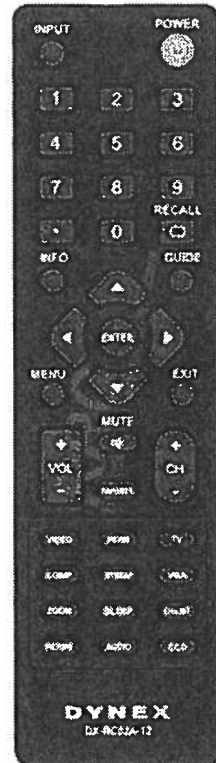
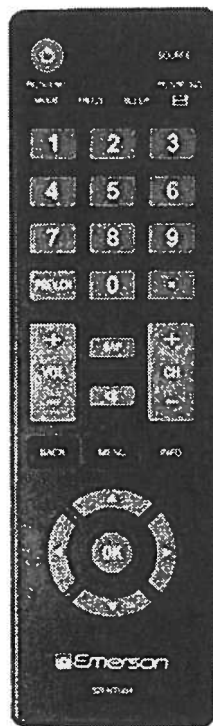
6-Device-TV/VCR-DVD-
AUX-CABLE
RCA-GE-ProScan-Sony-
Magnavox-Philips-Zenith
(Amazon.com)

The "NEITHER" or
"UNCLEAR" GROUP



SONY SMART LED HDTV
REMOTE CONTROL
RM-YD102

EMERSON
32FNT004 LCD
HDTV REMOTE
CONTROL



DYNEX
DX-RC01A-12 DX-RC02A-12
LCD LED TV REMOTE

The "DOT" Group



SAMSUNG SMART
REMOTE CONTROL
BN59-01179A

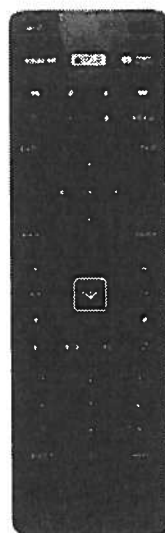
PANASONIC
REMOTE CONTROL
FOR 3D TV
N2QAYB000837



VIZIO XRT122
REMOTE CONTROL
FOR SMART HDTV

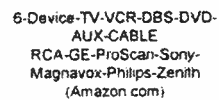


LG AKB73715692
HDTV REMOTE
CONTROL FOR
50PB6600



VIZIO D980-0306-1020
REMOTE CONTROL

The "DASH" Group



The "NEITHER" or "UNCLEAR" GROUP