

Request for Waiver

In the instant application, American Broadcasting Companies, Inc. (“ABC”), licensee of WABC-TV, New York, New York (“WABC”), proposes to increase its effective radiated power (“ERP”) from 26.9 kilowatts (“kW”) to 34.0 kW ERP (“Proposed Facility”). To facilitate grant of this proposed power increase, ABC respectfully requests a waiver of Section 73.622(f)(7)(ii) and, to the extent necessary, Section 73.622(f)(5) of the rules of the Federal Communications Commission (“FCC” or “Commission”). Grant of the instant application and waiver requests is in the public interest because it will enable WABC to provide over-the-air digital television (“DTV”) service to many of its former analog viewers who temporarily lost WABC’s signal after it permanently transitioned to all-digital broadcasts on June 12, 2009. As explained in the attached Engineering Statement, with the exceptions of WBNG-TV, Binghamton, New York (“WBNG”), WWNY-TV, Carthage, New York (“WWNY”), and WXXA-TV, Albany, New York (“WXXA”), WABC’s proposed power increase satisfies all applicable rules regarding interference.¹ To address the predicted interference to WBNG, WWNY, and WXXA, ABC entered into a four-way interference acceptance agreement with WBNG License, Inc. (“WBNG License”), licensee of WBNG, United Communications Corporation (“United”), licensee of WWNY, and Newport Television License, LLC (“Newport”), licensee of WXXA (“Second Interference Agreement”), a copy of which is attached hereto. WABC’s proposal also complies with the terms of a previous interference acceptance agreement between ABC, New Jersey Public Broadcasting Authority (“NJPA”), licensee of WNJB(DT), New Brunswick, New Jersey (“WNJB”) and WGAL Hearst Television Inc. (“Hearst”), licensee of WGAL(DT), Lancaster, Pennsylvania (“WGAL”) (“First Interference Agreement”), a copy of which also is attached hereto.

BACKGROUND

WABC has served the New York, New York designated market area (“New York DMA”) on channel 7 for over sixty years, commencing operations on August 10, 1948. WABC is the flagship station of the ABC Television Network and the sole ABC network station serving the New York DMA. WABC was an early adopter of DTV technology, commencing operation with a full-power DTV facility on channel 45, its pre-transition channel, at the World Trade Center in 2001.² After losing its original DTV facility on September 11, 2001, WABC constructed two replacement DTV facilities, first at 4 Times Square and subsequently at the Empire State Building.³ In addition, prior to the DTV transition, WABC maintained an auxiliary facility on channel 7 at Alpine Tower in the event of an emergency resulting in the loss of WABC service from other authorized sites.⁴

¹ See Engineering Statement at 4, 8.

² See FCC File No. BLCDDT-20010710ABU.

³ See FCC File Nos. BDSTA-20031024AAW (4 Times Square) and BXSTA-20040728APD (Empire State Building).

⁴ See FCC File No. BMDSTA-20040419ACL.

WABC elected to operate on its post-transition DTV facilities on channel 7, its current analog channel, rather than on its pre-transition channel, channel 45. The FCC initially allotted to WABC a DTV facility on channel 7 with 3.2 kW ERP at 491 meters (“m”) height above average terrain (“HAAT”) and a directional antenna. The WABC allotment facilities were based on the coverage of its analog facilities at the World Trade Center. However, to date, no replacement structure suitable for television frequencies has been constructed at that site. Thus, the exact DTV facility specified in Appendix B for WABC cannot be constructed at this time. Accordingly, on June 18, 2008, ABC obtained a construction permit for a post-transition DTV facility for WABC at the Empire State Building (the location from which it operated its post-9/11 DTV facility on channel 45) with 11.69 kW ERP at 405 m HAAT and a non-directional antenna (“WABC CP Facility”).⁵ WABC commenced operations of the WABC CP Facility on June 12, 2009 (“WABC DTV Facility”).

The WABC DTV Facility specifies the largest facility WABC can operate without causing interference to any other DTV station in violation of Section 73.616(e) of the FCC’s rules. However, following its transition to all-digital broadcasts on June 12, 2009, ABC promptly learned that WABC could not serve many of its former over-the-air analog viewers with the WABC DTV Facility. Thus, at the time of the transition, such viewers could not receive WABC’s DTV signal on channel 7 and no longer had access to ABC network or locally-produced programming (including news, emergency information, and other public affairs programming) received prior to the DTV transition.

Following the DTV transition, ABC worked diligently with the Commission and other affected television stations to find a permanent solution to the signal reception issues unique to digital television service. To this end, on January 5, 2010, ABC entered into the First Interference Agreement with NJPBA and Hearst to enable each of WABC, WNJB, and WGAL to effectuate power increases in order to improve each station’s respective coverage areas. Pursuant to the First Interference Agreement, WNJB agreed to accept predicted additional interference resulting from WABC’s power increase in order to enable WABC to increase its power to 26.9 kW ERP.⁶ As a result of the First Interference Agreement, WABC obtained FCC approval to increase its power to 26.9 kW ERP. WABC commenced operations of the WABC CP Facility and filed a license application on May 3, 2011 to cover this facility, which was granted on September 2, 2011.⁷

⁵ The noise-limited contour of the WABC Facility was predicted to contain the population that resides within the noise-limited contour of the Appendix B/World Trade Center facility. See FCC File No. BPCDT-20090529AJT. On June 20, 2009, ABC also filed an application for a construction permit for post-transition DTV facilities at Freedom Tower (“Freedom Tower CP Application”). See FCC File No. BMPCDT-20090620AMV. ABC requested acceptance and delayed processing of the Freedom Tower CP Application and understands that acceptance of the Freedom Tower Application without further processing effectively will provide interference protection for the Lower Manhattan facilities without restricting WABC’s ability to operate under, and ultimately license, its post-transition DTV facilities at the Empire State Building, as authorized in BPCDT-20080529AJT

⁶ See First Interference Agreement at ¶ 4.

⁷ See FCC File No. BLCDDT-20110503ACF.

WABC's operation with the increased ERP of 26.9 kW for the past two years has not solved the reception difficulties experienced by all of WABC's former analog viewers. Continuing its diligent efforts to find a solution to these reception issues, on January 9, 2012, ABC entered into the Second Interference Agreement with WBNG License, United, and Newport to enable each of WABC, WBNG, WWNY, and WXXA to effectuate power increases in order to improve each station's respective coverage areas. Pursuant to the Second Interference Agreement, WBNG and WXXA⁸ agreed to accept any interference which is predicted to result from WABC's proposed power increase.⁹ As a result of the Second Interference Agreement, WABC's proposed increase in power to 34.0 kW ERP satisfies the FCC's rules regarding interference.

REQUEST FOR WAIVER

Section 73.622(f)(7)(ii) of the FCC's rules provides that the ERP for a Zone I facility on channels 7-13 with a HAAT above 305 m is determined using a mathematical formula.¹⁰ Applying this formula to WABC, the maximum ERP for WABC is 11.69 kW, the ERP of the WABC DTV Facility ("ERP v. HAAT Limit").¹¹ Section 73.622(f)(5) of the Commission's rules prohibits stations from increasing their ERP beyond "that needed to provide the same geographic coverage area as the largest station within their market" ("Largest Facility Limit").¹² When operating with the ERP derived from the mathematical formula set forth in Section 73.622(f)(7)(ii), the WABC DTV Facility likely is currently defined as the largest facility within the New York DMA.¹³ In the instant application, WABC proposes to increase its power to 34.0 kW ERP, in excess of that permitted by the ERP v. HAAT Limit. In addition, under the FCC's rules, the Proposed Facility likely will be defined as the largest station in the New York DMA.¹⁴ However, given that the ERP of the Proposed Facility is necessary to serve WABC's former analog viewers over-the-air, real-life experience has shown that the underlying premises of the ERP v. HAAT Limit and the Largest Facility Limit are not served by application of these rules to WABC in the post-transition world. Indeed, it contravenes the public interest to limit WABC's ERP based on these rules (and thereby preclude it from serving its former analog viewers with an

⁸ WABC's proposed power increase will not result in additional new interference to WWNY in excess of the FCC's rules regarding interference.

⁹ See Second Interference Agreement at ¶¶ 5, 7.

¹⁰ See 47 C.F.R. § 73.622(f)(7)(ii) (2010).

¹¹ See Engineering Statement at 3.

¹² See 47 C.F.R. § 73.622(f)(5).

¹³ WCBS-TV(DT), New York, NY ("WCBS") has a pending application specifying a facility larger than the WABC facility but, until such time as that application is granted, the WABC DTV Facility is the largest facility in the market. See FCC File No. BMPCDT-20080619AAZ. In addition, to the extent that television stations WPIX(DT), New York, New York ("WPIX") and WNET(DT), Newark, New Jersey ("WNET") apply for and obtain authority to increase their respective ERPs, the Proposed Facility may not, in fact, be defined as the largest facility in the New York DMA pursuant to the FCC's rules. Nevertheless, because ABC does not know whether or when WCBS, WPIX or WNET will obtain authority for such increases in ERP, it respectfully requests a waiver of the Largest Facility Limit as described herein.

¹⁴ See *supra* note 13.

over-the-air DTV signal) when a DTV station outside of Zone I can more freely increase its power as necessary to serve its former analog viewers. Accordingly, ABC respectfully requests a waiver of the ERP v. HAAT Limit and, to the extent necessary, the Largest Facility Limit as applied to the Proposed Facility. Such a waiver will permit WABC to operate permanently a facility on channel 7 that will enable WABC to serve its former analog viewers with an over-the-air digital signal. Grant of the instant request is in the public interest as it furthers the Commission's long-standing objective of ensuring that all of a station's former analog viewers continue to receive over-the-air television service following the DTV transition. Moreover, grant of the instant request will enable WABC to avoid disenfranchising many of its former over-the-air analog viewers who previously had received—but, at the time of the transition, could not receive—ABC network or locally-produced programming from WABC.

The Commission may grant a waiver of its rules for good cause shown.¹⁵ Specifically, the Commission has discretion to waive any rule where “particular facts would make strict compliance with the rule inconsistent with the public interest” and “special circumstances warrant a deviation from the general rule.”¹⁶ In evaluating a request for waiver, the Commission should “take into account considerations of hardship, equity, or more effective implementation of overall policy.”¹⁷ In addition, the Commission should consider whether “application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.”¹⁸

As the Commission is well-aware, television stations operating DTV facilities on VHF channels, such as channel 7, face unique reception problems, particularly indoor reception. Indeed, it is well-established that the maximum ERP levels allotted by the FCC to television stations operating on VHF channels are insufficient to reach certain analog viewers who rely on indoor antennas for reception of DTV service. This digital off-air television reception challenge is exacerbated in urban areas such as New York City because of the urban canyon effect whereby tall buildings limit coverage. Moreover, urban over-the-air viewers often reside in high-rise buildings where indoor reception is severely impaired due to wall attenuation. Such viewers also are unlikely to have the option of using rooftop antennas to mitigate reception issues and thus rely on indoor antennas to receive over-the-air television signals. Indeed, in the aftermath of the DTV transition on June 12, 2009, WABC received a significant number of telephone calls from its former analog viewers in the New York City area, with many viewers reporting signal reception issues. Grant of the instant application for the Proposed Facility, the request for waiver of the ERP v. HAAT Limit, and, to the extent necessary, the request for waiver of the Largest Facility Limit will enable WABC to increase permanently the strength of its signal within its existing analog service area and will minimize the loss of ABC network and WABC-produced programming to viewers who currently rely on over-the-air reception from digital receivers with

¹⁵ 47 C.F.R. § 1.3.

¹⁶ *Ne. Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969)).

¹⁷ *WAIT Radio*, 418 F.2d at 1159.

¹⁸ 47 C.F.R. § 1.925(b)(3).

indoor antennas to receive WABC's digital signal. Accordingly, such grant is in the public interest. For the reasons set forth herein, ABC respectfully requests that the Commission grant the instant application, the request for waiver of the ERP v. HAAT Limit and, to the extent necessary, the request for waiver of the Largest Facility Limit to enable WABC to construct and operate the Proposed Facility in order to serve its former over-the-air analog viewers.