

Request for Waiver

American Broadcasting Companies, Inc. (“ABC”), licensee of commercial digital television (“DTV”) station WABC-TV, New York, New York (“WABC”),¹ respectfully requests a waiver of Sections 73.622(f)(7)(ii) and 73.622(f)(5) of the rules of the Federal Communications Commission (“FCC” or “Commission”).² Grant of such a waiver would permit WABC to increase its effective radiated power (“ERP”) to 27.0 kilowatts (“kW”), over its current authorized ERP of 11.69 kW. More specifically, the instant waiver request would enable WABC to operate DTV facilities (“Proposed Facility”) with 27.0 kW ERP at 405 meters (“m”) height above average terrain (“HAAT”) and a non-directional antenna. As explained in the attached Engineering Statement, the proposed modification can be accomplished without causing any impermissible interference to the licensed or planned post-transition operations of other affected stations. Because the Bureau treats WNJB(DT), New Brunswick, New Jersey (“WNJB”) as if it were located at 4 Times Square as described in WNJB’s most recent FCC Form 387 (FCC File No. BDTUET-20090416AGS), the predicted additional interference to WNJB from the Proposed Facility does not exceed 0.5%.³ The Proposed Facility does, however, cause interference to the facility WNJB currently is operating pursuant to a special temporary authority in excess of the amounts permitted by the FCC previously.⁴ Nevertheless, because WABC anticipates that it could serve virtually all of its former analog viewers on channel 7, its post-transition channel, with the Proposed Facility, grant of the instant application and waiver request is in the public interest.

I. 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 2001.⁵ 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.⁶ 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.⁷

¹ ABC filed a license application for WABC’s post-transition DTV facilities on June 12, 2009. FCC File No. BLCDDT-20090612ADK. This application remains pending.

² See 47 C.F.R. §§ 73.622(f)(7)(ii) and 73.622(f)(5).

³ See Engineering Statement at 7-8.

⁴ See *id.*

⁵ See FCC File No. BLCDDT-20010710ABU.

⁶ See FCC File Nos. BDSTA-20031024AAW (4 Times Square) and BXSTA-20040728APD (Empire State Building).

⁷ See FCC File No. BMDSTA-20040419ACL.

WABC elected to operate its post-transition DTV facilities on channel 7, its current analog channel, rather than its pre-transition channel, channel 45. The FCC allotted to WABC a DTV facility on channel 7 with 3.2 kW ERP at 491 m HAAT and a directional antenna. The WABC allotment facilities were based on the coverage of its analog facilities at World Trade Center. However, to date, no replacement structure suitable for television transmitting 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 post-9/11 DTV facility on channel 45) with 11.69 kW ERP at 405 m and a non-directional antenna ("WABC CP Facility").⁸ WABC commenced operations of the WABC CP Facility on June 12, 2009 and has filed a license to cover this facility ("WABC DTV Facility").⁹

The WABC DTV Facility specifies the largest facility WABC could operate without causing interference to any other DTV station in violation of Section 73.616(e) of the FCC's rules.¹⁰ However, following its transition to all-digital broadcasts on June 12, 2009, ABC promptly learned that the WABC DTV Facility does not enable WABC to serve many of its former over-the-air analog viewers. 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.¹¹ ABC applauds the Commission not only for its recognition of the unique problems faced by WABC and other VHF stations in urban areas but also for its prompt attention to working with affected stations to find a solution to the unique signal reception issues faced by stations such as WABC.¹² In this regard, ABC urges grant of the

⁸ 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.

⁹ *See* FCC File No. BLCDDT-200906012ACL.

¹⁰ *See* FCC File No. BPCDT-20080529AJT for discussion of interference protection.

¹¹ WABC currently broadcasts nearly 30 hours of original local news and public affairs programming per week. WABC in recent years has aired four Senatorial, three Gubernatorial, and three Mayoral debates, often with the WABC news team serving as moderators. Comments of The Walt Disney Company, MB Docket 04-233 (filed Apr. 28, 2008) ("TWDC Localism Comments") (detailing WABC's extensive efforts to serve its local community). WABC also broadcasts thousands of public service announcements each year. *See* TWDC Localism Comments.

¹² *See, e.g.,* John Eggerton, "ABC, FCC Working on DTV Reception Issues," BROADCASTING & CABLE, June 14, 2009 (noting that the FCC had spoken with affected stations and "is trying to figure out how to 'adjust the technical parameters of these stations to improve their service in the cities'").

instant application and request for waiver to enable it to serve its former analog viewers on channel 7.¹³

II. 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.¹⁴ 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"). 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").¹⁵ In the instant application, WABC proposes to increase power to 27.0 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.¹⁶ 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 premise of the ERP v. HAAT Limit or the Largest Facility Limit is not served by application of either rule 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 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 both the ERP v. HAAT Limit and the Largest Facility Limit as applied to the Proposed Facility. Such a waiver will permit WABC to operate a facility on channel 7 that will enable WABC to replicate its analog coverage and serve its former analog viewers. 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.¹⁷

¹³ Simultaneously herewith, ABC is filing an application seeking experimental authority to operate the Proposed Facility. ABC believes that the increase in ERP permitted by the requested experimental authority will improve markedly the ability of WABC's viewers to receive an over-the-air DTV signal. Following approval of the requested application for experimental authority, at the Commission's request, ABC will provide additional data regarding WABC's operation of the Proposed Facility pursuant to the experimental authority.

¹⁴ 47 C.F.R. § 73.622(f)(7)(ii).

¹⁵ 47 C.F.R. § 73.622(f)(5).

¹⁶ 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 WPIX and WNET will obtain authority for such increases in ERP, it respectfully requests a waiver of the Largest Facility Limit as described herein.

¹⁷ See note 11, *supra*.

As explained in the attached Engineering Statement, the proposed modification can be accomplished without causing any impermissible interference to the licensed or planned post-transition operations of other affected stations. Because the Bureau treats WNJB as if it were located at 4 Times Square as described in WNJB's most recent FCC Form 387 (FCC File No. BDTUET-20090416AGS), the predicted additional interference to WNJB from the Proposed Facility does not exceed 0.5%.¹⁸ The Proposed Facility does, however, cause interference to the facility WNJB currently is operating pursuant to a special temporary authority in excess of the amounts permitted by the FCC previously.¹⁹ Nevertheless, because WABC anticipates that it could serve virtually all of its former analog viewers on channel 7, its post-transition channel, with the Proposed Facility, grant of the instant application and waiver request is in the public interest.

The Commission may grant a waiver of its rules for good cause shown.²⁰ 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."²¹ In evaluating a request for waiver, the Commission should "take into account considerations of hardship, equity, or more effective implementation of overall policy."²² 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."²³

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.²⁴ 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 digital television service.²⁵ This digital off-air television reception challenge is exacerbated in urban areas such as Manhattan 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, 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. Because WABC has authority to operate the WABC DTV Facility on channel 7 at only 11.69 kW, it has been adversely impacted by the DTV signal reception issues.

¹⁸ See Engineering Statement at 7-8.

¹⁹ See *id.*

²⁰ 47 C.F.R. § 1.3.

²¹ *Northeast Cellular Telephone 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).

²² *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

²³ 47 C.F.R. § 1.925(b)(3).

²⁴ See, e.g., Doug Lung, "Solving VHF DTV Reception Problems," TV TECHNOLOGY, April 23, 2009, available at <http://www.tvtechnology.com/article/79862>.

²⁵ *Id.*

In the days following the DTV transition, it has become abundantly clear that WABC's current ERP simply does not enable the station to serve its former analog viewers over-the-air on channel 7. FCC approval of the instant application for the Proposed Facility and request for waiver of the ERP v. HAAT Limit and Largest Facility Limit, however, will enable WABC to increase 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 indoor antennas to receive WABC's digital signal.²⁶ Accordingly, grant of the instant request for waiver is in the public interest.

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For the reasons set forth herein, ABC respectfully requests that the FCC grant the instant application and request for waiver of the ERP v. HAAT Limit and, to the extent necessary, 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.

²⁶ See note 11, *supra*.