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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communication Commission
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In the Matter of	)	
	)	
Amendment of Section 73.622(b)	)	MB Docket No. 02-92
Table of Allotments	)	RM-10363
Digital Television Broadcast Stations	)	
(Albany, New York)	)	

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Federal Communications Commission
Office of the Secretary

To: Chief, Media Bureau

PETITION FOR RECONSIDERATION

I. INTRODUCTION

American Broadcasting Companies, Inc. ("ABC"), by its attorneys and pursuant to Section 1.106 of the rules of the Federal Communications Commission ("Commission"), 47 C.F.R. § 1.106, hereby requests that the Commission's Media Bureau ("Bureau") reconsider the Report and Order ("Order") issued by the Bureau's Video Division ("Division") in the above-captioned proceeding.[1] In the Order, the Division granted the request of Clear Channel Broadcasting Licenses, Inc. ("Clear Channel") to amend the digital television ("DTV") table of allotments, 47 C.F.R. § 73.622(b), to substitute DTV channel 7 for DTV channel 4 at Albany, New York.[2] ABC, which is the licensee of commercial television station WABC-TV, channel 7,

[1] Allotment of Section 73.622(b), Table of Allotments, Digital Television Broadcast Stations (Albany, New York), *Report and Order*, MB Docket No. 02-92, RM-10363 (rel. Mar. 10, 2004) ("Order").

[2] The Division issued the Order in response to a petition for rulemaking ("Petition") filed by Clear Channel, licensee of commercial television station WXXA-TV, NTSC channel 23, Albany, New York ("WXXA"). Clear Channel has filed an application for a permit to construct DTV facilities on its assigned DTV channel 4. (See FCC File No. BPCDT-19991027ABR). The application remains pending

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New York, New York ("WABC"), and the permittee of DTV station WABC-DT, channel 45, New York, New York, urges the Bureau to reconsider the Division's Order and to deny Clear Channel's Petition to amend the DTV table of allotments because Clear Channel has failed to demonstrate that the proposed change is in the public interest. The rationale offered by Clear Channel in its original Petition was rejected by the Division in its Order. In its reply comments, Clear Channel attempted to justify the proposed channel change by offering two alternative brief and unsupported propositions. No factual showing was made to support either of these propositions. Accordingly, the Division erred in relying on these bases in granting Clear Channel's Petition.

As demonstrated herein set forth herein and in the comments and reply comments filed in this proceeding by ABC and United Communications Corporation ("United"), the substitution of DTV channel 7 for DTV channel 4 at Albany is contrary to the public interest. Specifically, the reallotment will cause interference to WABC that will result in the loss of local and network ABC television service for a substantial number of viewers in the New York metropolitan area. WABC already has suffered a reduction of approximately 20,000 people within its Grade B signal contour as a result of its forced relocation following September 11, 2001. A population reduction of an additional 25,000 people due to interference caused by the unnecessary and unbeneficial reallotment sought by Clear Channel clearly is contrary to the public interest. This public interest harm is in no way offset by the minimal public interest benefits, if any, asserted by Clear Channel to support the reallotment. The Bureau therefore should reverse the Division's Order and deny the Petition.

II. THE BUREAU SHOULD REVERSE THE DIVISION'S ORDER AND DENY CLEAR CHANNEL'S PETITION TO AMEND THE DTV TABLE OF ALLOTMENTS BECAUSE THE PROPOSED REALLOTMENT DOES NOT SERVE THE PUBLIC INTEREST

A The Purported Benefits Asserted by Clear Channel are Insufficient to Substantiate The Proposed Channel Change

Clear Channel's allegation of the potential for interference to video cassette recorders ("VCRs") is insufficient under the Commission's public interest mandate to substantiate the proposed channel change. The Division properly rejected Clear Channel's proposition that the proposed reallotment should be adopted in order to eliminate interference to VCRs that typically operate on channels 3 or 4.[3] According to the Division, United identified the intent and effect of the Commission's development of the DTV table of allotments with respect to channels 3 and 4, *i.e* , avoidance of any instances of channels 3 and 4 both being in use in the same area.[4] Because no DTV channel 3 was allotted to Albany, the Division correctly concluded that there should be no conflict with VCRs or other similar devices designed to provide output signals on either channel 3 or 4 [5] Thus, Clear Channel's initial proposition – that the proposed channel change would eliminate potential interference to VCRs and other similar devices – was wholly rejected by the Division.

The Division should similarly have rejected Clear Channel's belated, brief, and unsupported proposition that a move from channel 4 to channel 7 is necessary to decrease the

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[3] Order at ¶ 5 ("[W]e reject Clear Channel's proposition that its channel change should be adopted in order to 'eliminate potential interference to video cassette recorders that typically operate on channels 3 or 4' . . .").

[4] Id.

[5] Id

station's susceptibility to impulse noise interference.[6] Clear Channel suggested this basis for the channel change in a passing discussion in its reply comments only after ABC and United demonstrated in their comments that Commission precedent clearly did not support Clear Channel's original proposition that a channel change was warranted by the need to eliminate potential interference to VCRs.[7] Clear Channel offers absolutely no factual support for its claim that operation on DTV channel 7, rather than DTV channel 4, would better serve the public interest. Specifically, Clear Channel does not provide any evidence that DTV facilities on channel 4 would suffer from impulse noise interference or that any such interference would hamper Clear Channel's ability to provide DTV service on channel 4. Significantly, the DTV table of allotments indicates that DTV stations in more than 30 communities have received allotments on DTV channels 2 through 6.[8] If lower VHF channels were not acceptable for use by DTV licensees, the Commission would not have included DTV channels 2 through 6 in the DTV table of allotments. Allotment of such channels to more than 30 communities nationwide demonstrates Commission recognition that such allocations serve the public interest. Clear Channel not only failed to raise this impulse noise interference proposition in its underlying Petition supporting the channel change, but also failed to support the proposition once it was raised. With absolutely no facts on the record to support the need to move from DTV channel 4 to DTV channel 7 due to impulse noise interference, and a Commission determination that lower VHF channels are acceptable for use by DTV licensees, the Division clearly erred in approving a

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[6] Reply Comments of Clear Channel Broadcasting Licenses, Inc., MM Docket No. 02-92, RM-10363 (filed Jul. 10, 2002) ("Clear Channel Reply Comments") at 1-2.

[7] Id. ("[I]t is widely acknowledged, *although not explicitly stated in the comments*, that the 'RF energy from impulse noise generally decreases as the DTV channel number increases. Therefore, there is significantly more impulse noise energy contained in the low VHF band (channels 2 through 6)'") (emphasis added).

[8] See 47 C.F.R. § 73.622(b).

move from a low VHF channel on the basis of a purported attempt to "decrease . . . susceptibility to impulse noise interference."[9]

Finally, in authorizing the reallotment, the Division erred in relying, in part, on Clear Channel's second belated and unsupported attempt to justify the proposed channel change, *i e* , Clear Channel's assertion that by moving to DTV channel 7, WXXA will be able to share an antenna and tower with another high VHF station and thus save costs. Again, Clear Channel offered this proposition in a one-sentence discussion only in its reply comments and, again, Clear Channel has failed to support the proposition.[10] Specifically, Clear Channel makes no factual showing that it cannot collocate or otherwise expeditiously construct facilities on its assigned DTV channel 4. Clear Channel also fails to demonstrate that collocation of DTV channel 7 facilities will result in cost savings or that any such savings will allow Clear Channel to initiate DTV service in Albany more expeditiously than would occur if Clear Channel were to operate on DTV channel 4. Although the Division was "persuaded" that Clear Channel's collocation with another DTV station would "expedite Clear Channel's completion of construction" of the WXXA facilities,[11] expediting construction and initiating the provision of DTV service clearly were not driving forces behind Clear Channel's Petition. This is demonstrated in large part by the fact that Clear Channel failed to assert any benefit of collocation, or even the possibility of

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[9] Order at ¶ 7 In addition, ABC submits that grant of Clear Channel's Petition on the basis of a move from a lower VHF channel will establish a precedent that will result in: (i) an unnecessary expenditure of Commission and Division resources to process subsequent applications to move from channels below DTV channel 7; (ii) uncertainty for viewers regarding channel assignments in their local markets; and (iii) the inefficient use of spectrum, because lower VHF channels will be vacant in all or most markets.

[10] Clear Channel Reply Comments at 2 ("[B]y moving to DTV channel 7, WXXA-DT will be able to share an antenna and tower with another high VHF DTV station . . . resulting in appreciable cost savings and thereby speeding the initiation of DTV service to the Albany area").

[11] Order at ¶ 7.

collocating facilities, in its Petition or in the comments it filed in the instant proceeding. If Clear Channel seeks to expedite the initiation of DTV service on its Albany station, Clear Channel is free to prosecute its pending application for DTV channel 4 and construct the facilities proposed therein. Clear Channel has not demonstrated that it lacks the funds to build facilities on DTV channel 4 or that there is any reason – beyond the specious claims of VCR interference and lower VHF susceptibility to impulse noise interference – that the proposed DTV channel 4 facilities would not allow Clear Channel to provide DTV service to the Albany area expeditiously. The only demonstrated delay with respect to the initiation of DTV service on channel 4 in Albany is the instant proceeding, by which Clear Channel has delayed construction of DTV facilities on an acceptable channel. Even assuming, *arguendo*, that collocation and related cost savings are only feasible on DTV channel 7, and further assuming that cost savings to Clear Channel in the Albany market would serve the public interest in some minimal way, any such minor benefit could not offset the loss of local ABC service to more than 25,000 people in the New York metropolitan area.

B WABC's Full-Power Operations Have Been Diminished as a Result of the WTC Destruction and the Relocation of WABC's Transmitter, and Allowing Additional Interference to WABC Would be Contrary to the Public Interest

The destruction of the World Trade Center ("WTC") resulted in severe disruption to television operations in New York City because there is an extreme shortage of sites in the New York area that are appropriate for the provision of analog or digital television services. Since the destruction of the WTC facilities, WABC has been operating at reduced power from the Empire State Building ("ESB") pursuant to a special temporary authorization ("STA").[12] ABC has

[12] See FCC File No. BSTA-20011026ABD.

worked diligently to identify a site from which an approximate replication of its licensed contour is possible, and ultimately has determined that the ESB is one of the only sites from which it feasibly can restore its previous level of analog service. The ESB presently is the tallest building in New York and has long been recognized as a site that is uniquely suited for television transmission. In fact, WABC operated from the ESB from the early 1950's until completion of the WTC facilities in 1980. Thus, after more than two years of reduced-power operation while conducting numerous technical studies and participating in lengthy negotiations with other New York broadcasters, ABC recently filed an application seeking authority to recommence the provision of analog service to the New York metropolitan area from the ESB at the level it previously provided from the WTC.[13] However, the height of the proposed antenna atop the ESB is approximately 80 meters less than the height of the WABC antenna atop the WTC; as a result, WABC operating from the ESB will suffer a loss of approximately 20,000 people compared with the population served by the WTC licensed facilities.[14]

Coupled with the limited number of potential sites is the congested nature of the television spectrum in the northeast United States and the New York metropolitan area in particular. The Commission's method of calculating the percentage of new interference does not take into account the population density of the northeastern United States.[15] The crowding has

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[13] See FCC File No. BPCT-20040305ACT. ABC intends to request STA to operate from the ESB at the parameters specified in the application during the pendency of the application.

[14] Engineering Statement of Richard H. Mertz (Apr. 9, 2004) ("Engineering Statement") at 1-2.

[15] For example, the 26,893 people within the Grade B contour of the ESB facilities that will receive interference from WXXA constitute only 0.15% of the total population within the WABC ESB Grade B contour. However, in a mid-sized television market such as Little Rock, Arkansas, which is ranked 56th in size out of 210 Nielsen Designated Market Areas, a population of 26,893 would constitute nearly 3% of the total population within the NTSC channel 7 Grade B

been even worsened by DTV channel changes and swaps that have in some cases resulted in the siting of DTV facilities some distance from DTV allotments, both of which are required to be protected from interference under the Commission's rules. In addition, such facilities may be predicted to cause interference within the Commission's de minimis limits, but each portion of the WABC population receiving interference from new surrounding facilities adds up to a significant number of persons receiving interference. This is particularly true where new DTV interference is coupled with existing NTSC interference. WABC is seeking merely to restore a prior level of coverage lost due to catastrophic and unforeseeable events – not to make any major change to the DTV table of allotments – yet WABC faces a reduction of 20,000 people within its Grade B contour.

Forcing WABC to accept unnecessary additional interference from WXXA on top of the substantial interference caused by the congestion in the New York area and the unavoidable recent reduction in coverage is contrary to the public interest. Although the level of interference that would be caused to WABC by WXXA operations on channel 7 technically meets the two percent de minimis criterion specified in the Commission's rules, the proposed operations, if authorized, would substantially harm the ability of significant populations dependent on WABC to receive ABC network programming and local news and information, including emergency announcements.[16] This interference is not de minimis. Because the population in the New York metropolitan area is so large, even a very small percentage of the population within the service

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contour. See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Memorandum Opinion and Order on Reconsideration of the Sixth Report and Order*, MM Docket No. 87-268, 13 FCC Rcd. 7418 (1998), Appendix B (final DTV table of allotments).

[16] See Comments of American Broadcasting Companies, Inc., MB Docket No. 02-92 (filed Jun. 24, 2002) at 6-7.

contour of a New York television station generally constitutes a significant number of people, which can hardly be considered de minimis. In this case, the proposed WXXA operations would cause interference to a population of 26,893 within the WABC Grade B contour.[17] Further, ABC is considering electing to use channel 7 for WABC's permanent digital operations. If it does so, the interference that would be caused by WXXA under the proposed reallotment would not be temporary and limited only to WABC's analog operations, but would be permanent. ABC explicitly noted this consideration in its reply comments.[18] However, the Division inexplicably and erroneously concluded that "[t]o the extent that there may be some loss of NTSC service in this case, we note that such service loss is temporary and will likely be restored after completion of the DTV transition."[19] Given the population loss – potentially permanent – that WABC will suffer if the proposed change is authorized, ABC urges the Bureau to reverse the Division's Order and deny Clear Channel's Petition as against the public interest.

[17] Engineering Statement at 2

[18] Reply Comments of American Broadcasting Companies, Inc., MB Docket No. 02-92 (filed Jul. 10 2002) at 7.

[19] Order at ¶ 7.

III. CONCLUSION

Based on the foregoing reasons, and the reasons set forth in the comments and reply comments filed by ABC and United in this proceeding, ABC respectfully requests that the Bureau reverse the Division's Order, deny Clear Channel's Petition, and refrain from amending the DTV table of allotments to substitute channel 7 for channel 4 at Albany.

Respectfully submitted,

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Dated: April 9, 2004

CERTIFICATE OF SERVICE

I, Judie Johnson, an employee of Akin Gump Strauss Hauer & Feld LLP, hereby certify that a copy of the foregoing Petition for Reconsideration was served this 9th day of April, 2004, by first class United States Mail, postage prepaid, except where otherwise indicated, upon the following:

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Engineering Statement
PETITION FOR RECONSIDERATION
prepared for
American Broadcasting Companies, Inc.
WABC-TV New York, New York
Facility Id 1328

The *American Broadcasting Companies, Inc* ("*ABC*") is the licensee of television station WABC-TV, NTSC Channel 7, New York, NY. The instant engineering statement was prepared in support of *ABC*'s Petition for Reconsideration ("Petition") in the matter of *Amendment of Section 73 622(b) of the FCC Rules to modify the Table of Allotments to specify DTV Channel 7 in place of DTV Channel 4 at Albany, New York* (see MB Docket No 02-92, RM-10363). *ABC* is requesting the Commission reverse its March 10, 2004 decision to authorize Clear Channel Broadcasting Licenses, Inc. ("Clear Channel"), licensee of WXXA-DT, to employ DTV Channel 7.

As the Commission is aware, WABC-TV has been operating with reduced facilities (see BSTA-20011026ABD) from the Empire State Building ("ESB") as a result of the terrorist attack on the World Trade Center ("WTC") on September 11, 2001 when the WABC-TV licensed facility was destroyed. *ABC* presently has an application pending before the Commission (BPCT-20040305ACT) requesting the equivalent of full high band VHF facilities from ESB. While the WABC-TV facility proposed in the application will greatly improve WABC-TV's service to the public over the STA facility, it falls short of the formerly licensed facility.

A detailed interference study was conducted in accordance with the terrain dependent Longley-Rice point-to-point propagation model, per the Commission's Office of Engineering and Technology Bulletin number 69, *Longley-Rice Methodology for Evaluating TV Coverage and Interference*, July 2, 1997 ("OET-69")[1] to determine the impact of the WXXA-DT Channel 7 operation on the licensed and proposed WABC-TV facilities. The result of the study is as follows

Facility Studied	Grade B Population (1990 Census)	New Interference Population attributed to WXXA-DT	
WABC-TV LIC	18,267,656	34,816	0.19%
WABC-TV APP	18,247,293	26,893	0 15%

[1]The implementation of OET-69 for this study followed the guidelines of OET-69 as specified therein A cell size of 1 km was employed Comparisons of various results of this computer program (run on a Sun processor) to the Commission's implementation of OET-69 show excellent correlation

As shown, the proposed WABC-TV full power facility from the ESB, covers 20,363 less persons than the former WTC facility. The interference population attributable to WXXA-DT and the associated percentage of the WABC-TV Grade B population are also shown.

Certification

The undersigned hereby certifies that the foregoing statement was prepared by him or under his direction, and that it is true and correct to the best of his knowledge and belief. Mr. Mertz is a principal in the firm of *Cavell, Mertz & Davis, Inc.*, holds a Bachelor of Science degree from Oglethorpe University, and has submitted numerous engineering exhibits to the Federal Communications Commission His qualifications are a matter of record with that agency.

Respectfully submitted,

Richard H Mertz
April 9, 2004

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