

DOCKET FILE COPY ORIGINAL

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

RECEIVED

JUL 25 2005

In re)
)
Negotiated Channel Election Arrangements)
)
Second Periodic Review of the Commission's)
Rules and Policies Affecting the Conversion to)
Digital Television)

Federal Communications Commission
Office of Secretary

Docket No. 03-15

To: Secretary, Federal Communications Commission

OPPOSITION TO JOINT APPLICATION FOR REVIEW

ABC, INC.

Susan L. Fox, Esq.
Vice President, Government Relations
THE WALT DISNEY COMPANY
1150 17th St., N.W., Suite 400
Washington, DC 20036
(202) 222-4700

Tom W. Davidson, Esq.
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., N.W.
Suite 400
Washington, DC 20036
(202) 887-4011

July 25, 2005

Its Attorneys

ORIGINAL

No. of Copies rec'd
List ABCDE

DA

TABLE OF CONTENTS

EXECUTIVE SUMMARY	i
I. BACKGROUND	2
II. THE COMMISSION SHOULD UPHOLD THE BUREAU’S DECISION TO REJECT THE NCA	5
A. THE BUREAU’S REJECTION OF THE NCA WAS A PROPER APPLICATION OF THE COMMISSION’S PLAINLY ARTICULATED STANDARD	6
B. PETITIONERS’ CLAIMS REGARDING POTENTIAL BENEFITS OF THE NCA ARE NOT RELEVANT UNDER THE APPLICABLE STANDARD FOR REVIEWING NCAS	8
C. PETITIONERS’ CLAIMS REGARDING THE ALLEGEDLY DIFFICULT CIRCUMSTANCES FACING NBC, AS COMPARED TO ABC, ARE IMMATERIAL AND INAPPROPRIATE AT THIS TIME	9
D. PETITIONERS’ REVISED ANTENNA PATTERN DOES NOT ELIMINATE ALL UNACCEPTABLE INTERFERENCE CAUSED BY WYBE’S DIGITAL OPERATION ON CHANNEL 35	11
III. THE COMMISSION SHOULD NOT CONSIDER PETITIONERS’ ARGUMENTS BECAUSE THEY WERE NOT PRESENTED TO THE BUREAU	11
IV. CONCLUSION	12

EXECUTIVE SUMMARY

ABC, Inc. (“ABC”), by its attorneys, hereby submits this opposition (“Opposition”) to the joint application for review (“Application for Review”) filed by Independence Public Media of Philadelphia, Inc. (“Independence”) and NBC Telemundo License Co. (“NBC” and, together with Independence, “Petitioners”).

The Federal Communications Commission (“FCC” or “Commission”) should deny the Application for Review because the Bureau correctly applied the Commission’s clearly articulated standard for reviewing a negotiated channel election arrangement (“NCA”). The Bureau properly determined that Petitioners’ NCA would have an “adverse impact” on the channel election interests of ABC’s station, WPVI-DT (“WPVI”), because it deprives WPVI of the opportunity to select channel 34 or 35. Indeed, Petitioners do not challenge the Bureau’s application of the “adverse impact” standard but rather implicitly acknowledge that the NCA “disfavors” WPVI.

Petitioners focus their arguments on the potential benefits of the NCA. However, the legal standard in this case simply is not whether the NCA would result in some benefits but whether approval of the NCA would be *contrary* to the public interest. The Commission has explicitly stated that NCAs that adversely impact the channel election rights of another station, as does Petitioners’ NCA, are contrary to the public interest. Moreover, engaging in a case-by-case public interest comparison prior to the completion of the third round of channel elections would be premature. Thus, the Commission should deny the Application for Review.

As explained herein, the Commission should also reject Petitioners’ arguments that WYBE’s digital operation on channel 35 does not cause unacceptable interference to a protected DTV channel. In addition, the Commission should find the Application for Review procedurally defective to the extent it raises new facts or legal theories not presented to the Bureau.

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

In re)	
)	
Negotiated Channel Election Arrangements)	Docket No. 03-15
)	
Second Periodic Review of the Commission's)	
Rules and Policies Affecting the Conversion to)	
Digital Television)	

OPPOSITION TO JOINT APPLICATION FOR REVIEW

Pursuant to Section 1.115 of the rules of the Federal Communications Commission (“FCC” or “Commission”),¹ ABC, Inc. (“ABC”), by its attorneys, submits this opposition (“Opposition”) to the joint application for review (“Application for Review”) filed by Independence Public Media of Philadelphia, Inc. (“Independence”) and NBC Telemundo License Co. (“NBC” and, together with Independence, “Petitioners”). The Application for Review seeks Commission review of a Media Bureau (“Bureau”) order rejecting the negotiated channel election arrangement (“NCA”) between Independence and NBC (“*Bureau Order*”).² In the *Bureau Order*, the Bureau rejected the NCA because it adversely impacted the channel election rights of ABC’s station, WPVI-TV, a station that was not a party to the NCA. As further set forth herein, the Commission should deny the Application for Review because the Bureau’s rejection of the NCA was a correct application of the Commission’s clearly articulated standard for reviewing NCAs. The Petitioners’ public interest-based arguments are not relevant

¹ 47 C.F.R. § 1.115.

² Negotiated Channel Election Arrangements, *Report and Order*, DA 05-1619 (rel. June 8, 2005) (“*Bureau Order*”).

or probative under the articulated standard and, in any event, are not properly considered at this stage of the channel election process. Further, Petitioners' arguments were not first presented to the Bureau and, as such, cannot be relied upon to support the Application for Review.³ For all these reasons, ABC urges the Commission to deny the Application for Review and uphold the *Bureau Order*.

I. BACKGROUND

The parties to this proceeding all are licensees of television stations in the Philadelphia, Pennsylvania Designated Market Area, as follows:

- (i) ABC is the licensee of WPVI-TV, channel 6, and permittee of WPVI-DT, channel 64;
- (ii) NBC is the licensee of WCAU-TV, channel 10, and WCAU-DT, channel 67; and
- (iii) Independence is the licensee of WYBE-TV, channel 35, and WYBE-DT, channel 34.

Channel Elections. In the Commission's first round of channel elections in February 2005, WPVI elected to participate in the second round because its DTV channel 64 was out-of-core and its NTSC channel 6 was a low-VHF channel. Thus, at the end of the first-round, WPVI had no post-transition DTV channel. Independence and NBC filed first-round digital channel elections for their stations notifying the FCC that they had entered into the NCA, pursuant to which, among other things, Independence would retain channel 35 for WYBE and would release channel 34 to NBC for use by WCAU as its post-transition channel.⁴ If the NCA was not

³ See 47 C.F.R. 1.115(a). Such arguments should have been presented to the Bureau in a timely petition for reconsideration.

⁴ See File Nos. BFRECT-20050210AKW (for WCAU-DT); BFRECT-20050210ALF (for WNJU-DT); and BFRECT-20050210ARR (for WYBE-DT). The NCA also involved NBC-owned station WNJU-DT, who agreed to elect DTV channel 36 for its post-transition DTV operation. The remaining terms of the agreement are unknown because the parties to the NCA have refused to provide a copy to ABC. ABC requested a copy of the NCA from NBC's legal counsel but this request was refused. On March 4, 2005, ABC submitted a letter to the

approved, Independence instead would retain channel 34 for WYBE and release channel 35 for selection by another licensee in the second round. The NCA did not include ABC as a party.⁵

Standard of Review. In its decision authorizing NCAs, the Commission explicitly stated that all NCAs would be subject to Commission approval.⁶ This approval process would “include[e] particular consideration of the effect on the channel election rights of...any licensee not a party to the negotiated channel election agreement.”⁷ The Commission also stated that it would consider the interference impact on non-party licensees.⁸ The Bureau re-stated this standard in a March 2005 public notice, adding that it also would reject an NCA that “is otherwise not in the public interest.”⁹

Commission formally requesting that the Commission obtain a copy of the NCA and make it available for public inspection. NBC and Independence filed oppositions to this request on March 9, 2005. To date, the Commission has not acted on ABC’s request.

⁵ Independence retained BIA Capital Strategies, LLC to broker the sale of its digital channel rights and approached WPVI concerning a possible NCA. Specifically, in a letter dated January 24, 2005, WPVI’s broker stated in part: “[T]here is at least one other party who is interested in purchasing [Independence’s] digital channel rights and filing this decision in the upcoming election. We assume that a purchaser of the Company’s digital channel rights will also cover all related equipment and out-of-pocket costs. Therefore, the only question is how much you are willing to pay in cash to the Company for their digital channel rights.” See Letter from Thomas J. Buono, BIA Capital, to Rebecca Campbell, WPVI(TV), at 2 (Jan. 24, 2005). In an attachment to its letter, Independence’s broker indicated that “a purchaser in this situation assuming a 1% audience loss would be willing to pay between \$16 million and \$19.2 million for WYBE’s digital channel election rights.” See *id.* at 4. ABC informed Independence’s broker that it did not intend to participate in a competitive bidding process pursuant to which Independence expected to receive millions of dollars in exchange for its released channel. In its Joint Opposition, NBC asserts that it negotiated directly with Independence and not through its broker. See *Joint Opposition* at 10, n.25.

⁶ See Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion To Digital Television, *Report and Order*, 19 FCC Rcd 18279, at ¶45 (2004) (“*Order*”).

⁷ *Id.*

⁸ *Id.*

⁹ See DTV Channel Election Issues – Proposed Negotiated Channel Election Arrangements and Procedures for Filing Associated Pleadings, *Public Notice*, DA 05-519, at 1 (rel. Mar. 1,

Bureau Decision. ABC filed a timely objection to the NCA on March 15, 2005 (“Objection”). In its Objection, ABC demonstrated that the NCA would have a clear and direct adverse impact on WPVI’s channel election rights.¹⁰ Specifically, either of the channels assigned to Independence would be a realistic and viable option for post-transition DTV operation by WPVI.¹¹ Without the NCA, WPVI—a station without a channel—would be able to select the channel released by Independence; with the NCA, however, WPVI would not have such an opportunity because the channel would be assigned to WCAU. In a Joint Opposition, Petitioners argued that there was no adverse impact on ABC’s channel election rights because its interest in the released Independence channel was “speculative.”¹² The Bureau disagreed with Petitioners’ alternative interpretation of adverse impact and instead described the result of the NCA as follows:

Licensees such as ABC, which have an out-of-core channel and a low VHF channel which has been released, as well as licensees with two out-of-core channels, have second round channel election rights to all channels remaining after completion of the first round. The NCA between Independence and NBC, which removes one of Independence’s channels from the pool of channels available for round two selectors, clearly has an adverse impact on ABC.¹³

2005) (“*March Public Notice*”) (“If, after review of the record, including but not limited to oppositions and replies, we find that the NCA reasonably could be construed to have an adverse impact on the interests of a station not a party to the NCA, or is otherwise not in the public interest, the NCA will be rejected.”).

¹⁰ *Objection* at 5-6. ABC also showed other ways in which approval of the NCA would be contrary to the public interest. However, the Bureau did not address these arguments because it agreed with ABC’s fundamental argument regarding adverse impact. *Bureau Order* at 6, n.18.

¹¹ *Objection* at 3; *see also* Engineering Statement at 1 (attached to *Objection* as Exhibit A).

¹² *Joint Opposition* at 3-5. Petitioners also challenged ABC’s public interest-related arguments. However, as stated above, the Bureau did not address these arguments.

¹³ *Bureau Order* at 6, ¶16.

Given this adverse impact, the Bureau rejected the NCA.¹⁴ The Bureau also found that Independence's proposed channel 35 operations would result in impermissible interference.¹⁵ Petitioners subsequently filed their Application for Review of the *Bureau Order* on July 8, 2005.

II. THE COMMISSION SHOULD UPHOLD THE BUREAU'S DECISION TO REJECT THE NCA

The Commission should uphold the decision of the Bureau to reject the NCA. In rejecting the NCA, the Bureau correctly applied the Commission's clearly articulated standard for reviewing NCAs, and Petitioners do not effectively challenge this standard or the Bureau's application thereof. Instead, Petitioners' arguments focus on the potential benefits of the NCA to Petitioners themselves and to the public. These claimed benefits are not material or relevant in the context of consideration of the NCA because the Commission's standard for reviewing NCAs already assumes that NCAs generally are in the public interest for the reasons stated by Petitioners. Thus, the only question relevant to the Bureau was whether this particular NCA otherwise is contrary to the public interest, *e.g.*, because of its adverse impact on the channel election rights of, or interference to, another station. Petitioners' other arguments, which compare NBC's need for a channel to that of ABC, are both immaterial and inappropriately raised at this time because the Commission has stated that it will not engage in such case-by-case comparisons until after the conclusion of the third round of channel elections. Regardless of the relevancy of Petitioners' public interest arguments, these arguments are based on facts that were not presented to the Bureau and cannot be considered by the Commission here under the legal

¹⁴ *Bureau Order* at 6, ¶ 15 (agreeing with ABC's position in part because "if not for the NCA, one of Independence's assigned channels would be available for selection by ABC in the second round").

¹⁵ *Id.*

standard for applications for review.¹⁶ The facts and supporting arguments regarding each of these positions are set forth below.

A. THE BUREAU'S REJECTION OF THE NCA WAS A PROPER APPLICATION OF THE COMMISSION'S PLAINLY ARTICULATED STANDARD

The Commission should deny the Application for Review because the Bureau's rejection of the NCA was a proper application of the Commission's plainly articulated standard for reviewing such arrangements. As indicated above, the Commission stated that it would reject any negotiated channel election arrangement that would have an adverse impact on another station's channel election rights.¹⁷ Thus, the principal issue in this proceeding is whether approval of the NCA between Independence and NBC would have an adverse impact on the channel election rights of WPVI.

The adverse impact on WPVI's channel election rights is both clear and direct. ABC's internal studies revealed that either of the channels allotted to Independence could serve as a viable post-transition channel for WPVI-DT.¹⁸ Without the NCA, one of Independence's channels would be available for selection in the second round by WPVI-DT.¹⁹ With the NCA, however, Independence's released channel automatically is assigned to WCAU-DT, and thus would not be available for selection by WPVI-DT. In sum, the NCA would have an "adverse impact" on the channel election interests of WPVI-DT because it deprives WPVI-DT, a station with no current post-transition channel, of the opportunity to select channel 34 or 35. The

¹⁶ 47 C.F.R. § 1.115(c).

¹⁷ The Commission also indicated that it would consider prohibited interference and whether the NCA was otherwise not in the public interest. These elements of the standard are discussed *infra*.

¹⁸ See Engineering Statement at 1.

¹⁹ Order at ¶ 46.

Bureau agreed with ABC's position, stating that the NCA "clearly has an adverse impact on ABC."²⁰

Petitioners do not challenge the merits of the Commission's "adverse impact" standard; nor do Petitioners state how the Bureau's application of that standard was flawed. At most, Petitioners mention, in passing, that the Bureau's interpretation of channel election rights, which included future channel preferences, was "expansive and unjustified."²¹ However, Petitioners offer little further discussion of, or support for, this conclusory statement. As indicated above, the "adverse impact" prong of the Commission's standard was neither expansive nor unjustified. Rather, this part of the standard involved a simple inquiry into whether the NCA had an adverse impact on the channel election rights of another station in the same market that was not a party to the agreement.²² In sum, the Commission's standard was valid, and Petitioners' failure to effectively challenge the standard mandates denial of the Application for Review.

Petitioners also do not challenge the Bureau's application of the standard to this case in so far as they do not contend that WPVI was not "adversely impacted." Instead, Petitioners effectively concede this fact when they state—on several occasions—that rejection of the NCA "favored" WPVI.²³ If rejection of the NCA "favored" WPVI, as Petitioners repeatedly posit,

²⁰ *Bureau Order* at 6, ¶16.

²¹ *Application for Review* at 7-8.

²² Petitioners allege, without basis, that "any station in any market could have blocked an NCA simply by claiming a preference for a channel allotment involved in the NCA." *Id.* at 7-8. There is no indication in any Commission or Bureau release that a station could block an NCA involving channels in another market on the basis of adverse impact to its channel election rights. Moreover, none of the NCAs rejected by the Bureau involved a station objecting to an NCA involving channels in another market on the basis of adverse impact to its channel election rights.

²³ *See Id.* at 2 ("In [rejecting the NCA], the Bureau has improperly favored [WPVI]"); *Id.* at 4 ("The *Bureau Order*...ultimately favors ABC by rejecting the NCA"); *Id.* at 10 ("By rejecting the NCA...the Bureau rewards ABC...") *Id.* at i ("The Bureau's decision protects the future

then it logically follows that approval of the NCA would have “disfavored” WPVI and thus had an adverse impact on WPVI’s channel election rights.²⁴ Regardless of Petitioners’ beliefs regarding “favor” and “disfavor,” the NCA’s adverse impact on WPVI’s channel election rights is simple and clear; “but for” the NBC-Independence NCA, WPVI could have selected Independence’s released channel in the second round. Because of the NCA, neither DT channel 34 or 35 would be available for selection by WPVI. In sum, the Bureau properly applied the correct standard in the NCA Decision, and Petitioners do not effectively challenge this standard or its application, and the Application for Review must be denied.²⁵

B. PETITIONERS’ CLAIMS REGARDING POTENTIAL BENEFITS OF THE NCA ARE NOT RELEVANT UNDER THE APPLICABLE STANDARD FOR REVIEWING NCAs

Instead of challenging the *Bureau Order* on the appropriate legal standard or its application, Petitioners focus their arguments on the potential benefits of the NCA to NBC, Independence, and the public.²⁶ Collectively, through these arguments, Petitioners attempt to

interests of ABC, Inc.”); *Id.* at ii (“By rejecting the NCA, the Bureau...rewards ABC...”); *Id.* at 3 (“The *Bureau Order*, while protecting ABC’s future interests...”).

²⁴ ABC does not believe that rejection of the NCA favored ABC in the way described by Petitioners. The Bureau did not take a channel from NBC and give it to ABC or award a channel to ABC instead of NBC. Rather, the Bureau refused to favor NBC, at the expense of ABC, absent an agreement from ABC. Thus, by rejecting the NCA, the Bureau maintained the *status quo*, the result being that NBC and ABC face similar channel election dilemmas.

²⁵ It also is relevant that the Bureau applied the Commission’s standard consistently. Specifically, the Bureau rejected an NCA in the Pine Bluff, Arkansas market because the parties failed to obtain the consent of a station that would be selecting a new channel in the second round. *See Bureau Order* at 5.

²⁶ These positions are set forth in greater detail in Petitioners’ first three arguments. *See Application for Review* at 4-8 (“The *Bureau Order*...fails to recognize or address the impossible circumstances imposed on NBC Telemundo and Philadelphia viewers.”); *Application for Review* at 8-10 (“The public interest is served by approving the NCA.”); *Application for Review* at 10-11 (“The Commission’s rejection of the NCA benefits no one and harms Independence and NBC Telemundo.”).

show that approval of the NCA would be in the public interest. However, the appropriate public interest-based standard in this case simply is not whether the NCA would result in some public interest benefits because the Commission presumes that NCAs generally are in the public interest, for the very reasons that Petitioners cite—furtherance of the DTV transition and creative resolutions of difficult channel-related problems. These are a given. The only relevant question remaining, then, is, despite those presumed benefits, whether approval of the NCA otherwise would be *contrary to* the public interest.

The Commission has stated explicitly that the two primary ways in which an otherwise beneficial NCA would be contrary to the public interest are if the NCA adversely impacts the channel election rights of another station or would result in prohibited interference to another station. Thus, the public interest-related burden on ABC was to show how approval of the NCA would be contrary to the public interest due to these adverse effects. In this case, the Bureau determined that the NCA had both kinds of effects—it adversely impacted WPVI’s second round channel election rights and would cause prohibited interference to two other stations. Petitioners’ arguments concerning other potential benefits of their NCA are misdirected, largely irrelevant, and, in any event, lacking any probative weight under the FCC’s legal standard for consideration of NCAs. Accordingly, the Commission should deny the Application for Review.

C. PETITIONERS’ CLAIMS REGARDING THE ALLEGEDLY DIFFICULT CIRCUMSTANCES FACING NBC, AS COMPARED TO ABC, ARE IMMATERIAL AND INAPPROPRIATE AT THIS TIME

Petitioners remaining arguments amount to little more than a statement that NBC “really wants and needs” Independence’s channel and that NBC is in a worse position than ABC.²⁷

²⁷ Specifically, Petitioners describe how NBC’s station, WCAU, allegedly cannot serve as many people using channel 10 as its digital channel as it present serves using channel 10 as its

Petitioners then ask the Commission to overturn the *Bureau Order* based on this comparison. Petitioners fail to show, however, how this comparison is relevant or material at this time. In actuality, the standard for approving an NCA does not include, let alone turn upon, a station's perceived "greater need" for a channel, at least not at this stage of the process.

At most, the Commission has stated that it may engage in the kind of case-by-case station comparison Petitioners suggest but that it will do so only after the third round of channel elections, only according to specific criteria, and only if absolutely necessary.²⁸ Petitioners recognized this accepted procedure in their *Joint Reply*, when they stated: "As the *Order* makes clear, the public-interest based procedure cited by ABC comes into play *only* following the third round of channel elections."²⁹ Because a case-by-case public interest comparison is proper only after the third round, engaging in such a comparison at this time would be premature and a potentially inefficient use of Commission resources.³⁰ Accordingly, the Commission should reject Petitioners' comparison arguments and deny the Application for Review.

analog channel, and that WCAU's position is in a comparably "worse" position than ABC's station, WPVI. *See Application for Review* at 4-7, 10-11. Petitioners also fault ABC for not providing evidence showing it would be difficult for WPVI to operate on channel 6. *See, e.g., Application for Review* at 7 (alleging lack of evidence that ABC could not serve more people on channel 6 than NBC could serve "on its severely comprised [sic] analog channel 10"). ABC did not provide any such evidence for two reasons: (i) ABC already released its rights to channel 6, thus making such an analysis moot; and (ii) ABC understood that its comparative need for a new channel was neither material nor appropriate to raise at this time. Thus, what Petitioners mischaracterize as ABC "offering no evidence" of its need for Independence's channel was, in reality, ABC's recognition that such "evidence" would be irrelevant at this time and would cloud the real issue at hand, *i.e.*, whether the NCA had an adverse impact on ABC's channel election rights.

²⁸ *Order* at ¶64.

²⁹ *Joint Reply* at 8 (emphasis in original).

³⁰ Petitioners previously acknowledged the advantage of avoiding such "time-consuming, individual adjudications" (albeit through approval of NCAs), yet their Application for Review now urges the Commission to engage in such a comparison before the need has arisen. *See Joint Reply* at 8.

D. PETITIONERS' REVISED ANTENNA PATTERN DOES NOT ELIMINATE ALL UNACCEPTABLE INTERFERENCE CAUSED BY WYBE'S DIGITAL OPERATION ON CHANNEL 35

The Commission should uphold the Bureau's rejection of the NCA on the ground that WYBE's digital operation on channel 35 would cause unacceptable interference to a protected DTV channel.³¹ Petitioners argue that the revised directional antenna pattern shown in its *Engineering Statement* fully protects WDCA and WITF-TV.³² However, the revised directional antenna pattern does not eliminate unacceptable interference caused by WYBE's digital operation on channel 35. As explained in the *ABC Engineering Statement*, attached hereto, the revised antenna pattern does not eliminate unacceptable interference to co-channel WVIT, channel 35, New Britain, Connecticut.³³ Accordingly, the Commission should reject Petitioners' argument that the Bureau's interference concerns are unfounded.

III. THE COMMISSION SHOULD NOT CONSIDER PETITIONERS' ARGUMENTS BECAUSE THEY WERE NOT PRESENTED TO THE BUREAU

Section 1.115(c) of the Commission's rules states as follows: "No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass."³⁴ Rather, new questions of law or fact should be presented to the Bureau in a petition for reconsideration, not to the Commission in an application for review.³⁵ Accordingly, the Commission should not review a party's arguments in an

³¹ See *Order* at ¶16.

³² *Application for Review* at 11-12.

³³ See Statement of Alfred E. Resnick, Carl T. Jones Corp. ("*ABC Engineering Statement*").

³⁴ 47 C.F.R. § 1.115(c).

³⁵ 47 C.F.R. § 1.115(c) note.

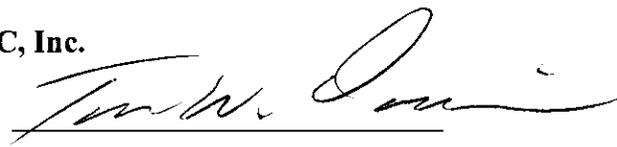
application for review if they rely upon factual or legal questions that were not first presented to the Bureau. In this case, none of Petitioners' arguments was presented to the Bureau other than its position that NCAs further the prompt resolution of the DTV transition.³⁶ Petitioners' remaining arguments all rely upon new facts or legal theories. Accordingly, the Commission should not consider Petitioners' arguments, and should dismiss the Application for Review as procedurally defective.

IV. CONCLUSION

For all of the foregoing reasons, ABC urges the Commission to deny the Application for Review and uphold the *Bureau Order*.

Respectfully submitted,

ABC, Inc.

By: 

Susan L. Fox, Esq.
Vice President, Government Relations
THE WALT DISNEY COMPANY
1150 17th St., N.W., Suite 400
Washington, DC 20036
(202) 222-4700

Tom W. Davidson, Esq.
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., N.W.
Washington, DC 20036
(202) 887-4011

July 25, 2005

Its Attorneys

³⁶ For example, the Bureau was not presented with an opportunity to review the alleged benefits to WYBE's programming service or Petitioners' factual assertions regarding the Commission's software and its availability (based on an entirely new engineering statement).

CERTIFICATE OF SERVICE

I, Dayle Jones, hereby certify that true and correct copies of the foregoing Objection have been forwarded by express U.S. Mail, postage prepaid, except as otherwise noted, on the 25th day of July, 2005 to the following parties:

NBC Telemundo License Co.
Attn: F. William LeBeau
1299 Pennsylvania Ave. N.W.
Washington, DC 20004
Bill.lebeau@corporate.ge.com

Licensee of WCAU(TV) and WNJU(TV)

Howard M. Liberman, Esq.
Elizabeth Hammond, Esq.
Drinker Biddle & Reath LLP
1500 K Street, NW, Suite 1100
Washington, DC 20005
hliberman@dbr.com
ehammond@dbr.com

Counsel for Independence Public Media of Philadelphia, Inc., Licensee of WYBE(TV)

Nazifa Sawez, Esq.*
Media Bureau
Federal Communications Commission
Room 2-A726
445 12th Street, SW
Washington, DC 20554
Nazifa.sawez@fcc.gov

Independence Public Media of Philadelphia, Inc.
8200 Ridge Avenue
Philadelphia, PA 19128

Licensee of WYBE(TV)

Margaret L. Tobey, Esq.
Morrison & Foerster LLP
2000 Pennsylvania Ave.
Washington, DC 20006-1888
mtobey@mofocom

Counsel for NBC Telemundo License Co., Licensee of WCAU(TV) and WNJU(TV)

Rick Chessen, Esq.*
Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554
Rick.chessen@fcc.gov

* Denotes hand delivery



Dayle Jones



Statement of Alfred E. Resnick

WPVI-DT - Philadelphia, Pennsylvania

DTV Initial Allotment: Channel 64, 1000 KW, 332 Meters HAAT

Present Operation: Channel 64, 500 KW, 390 Meters HAAT

Introduction

ABC, Inc. is the licensee of Television Station WPVI, Philadelphia, Pennsylvania. WPVI is licensed to operate on channel 6 with analog NTSC transmission, and holds an out-of-core initial allotment for DTV operation on Channel 64. WPVI-DT volunteered to be an early adopter and began DTV transmission on channel 64 on November 1, 1998.

Because channel 64 is out of core and channel 6 is contained in the low VHF band, WPVI authorized this office to study alternative channels that would be suitable for use after the DTV transition. The present DTV operation on channel 64 is a 'checklist-like' facility and closely replicates the service that would evince from the operating parameters found in the Initial Allotment for WPVI-DT of 1000 KW at 332 m HAAT.

As part of the evaluation of various channel studies associated with these candidate channels, a series of TV_Process runs were made. The evaluation of channel 35, with the revised antenna pattern for use by WYBE that was contained in an Engineering Statement of July 8, 2005, was used as a basis to

evaluate the potential service and calculate the interference generated by this proposal.

TV_Process calculated interference in 64 scenarios to WWIT, New Britain, Connecticut, (DTV channel 35, NTSC channel 30, Tentative Post-Transition Designation channel 35). These 64 interference scenarios predict unacceptable interference to WWIT from the newly proposed WYBE, channel 35 operation between 0.4 percent (21 scenarios) and 0.7 percent (4 scenarios) with 0.6 percent generating the greatest number (25) of scenarios.

In addition, the proposed azimuth pattern is truly a limit within which an actual pattern must be contained. This means that any population counted as service within coverage generated by this pattern will be counted optimistically – that is, the count will be greater than any population coverage that can be achieved with an actual antenna.

TV_Process calculates that WYBE-DT, operating under BLEDT-20030213AAD, 500 KW at 343 Meters HAAT, presently serves between 8,848,369 and 8,903,315 persons (depending on the scenario – with maximum and minimum limits from scenarios 29 and 21 respectively shown above). The proposed channel 35 operation with the revised directional antenna pattern serves a predicted audience of 8,579,075 to 8,646,392 persons, depending on the scenario that is chosen.

An argument was made to accept proposed digital operation on channels that cause unacceptable interference to allotted DTV channels that have not

been elected for post transition operation, but the Commission has indicated consistently since the release of the Report and Order on September 7, 2004, that due protection must be given to the DTV allotments and that these channels will be protected until it is clear that the protection is no longer needed (Report and Order released September 7, 2004 at 54 and 55).

With regard to channels that were chosen for post-transition DTV operation, both WDCA and WITF-TV chose to elect their NTSC channel. As of this writing, neither has received a tentative channel designation of their NTSC channel for post-transition DTV operation. WWIT has elected its digital channel, and has received a tentative channel designation on channel 35 for its post transition DTV operation.

Conclusion

The revised antenna pattern submitted by WYBE for use on channel 35 should be treated as an envelope pattern, and any actual antenna pattern must be fully subsumed within this envelope pattern. As such, any predicted population coverage will tend to be overstated. TV_Process output also shows that this revised antenna pattern still produces unacceptable interference to co-channel WWIT, channel 35, New Britain, Connecticut. The magnitude of the interference ranges between 0.4% and 0.7% in each of 64 scenarios.

From this, it can be concluded that all interference issues have not been resolved through use of the proposed directional antenna pattern by WYBE on channel 35 for post-transition DTV operation.

DATED: July 25, 2005



Alfred E. Resnick, P. E.

