

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

In the Matter of	)	
Second Periodic Review of the	)	
Commission's Rules and Policies	)	MB Docket No. 03-15
Affecting the Conversion	)	
To Digital Television	)	
	)	
First-Round Digital Television	)	
Channel Election of	)	File No. BFRECT-20050209AKQ
WABC-DT, New York, NY	)	
	)	
First-Round Digital Television	)	
Channel Election of	)	File No. BFRECT-20050210ATK
WPIX-DT, New York, NY	)	

To: Media Bureau

**COMMENTS IN OPPOSITION TO  
"EMERGENCY REQUEST FOR WAIVER"**

Lawrence M. Miller  
Malcolm G. Stevenson  
SCHWARTZ, WOODS & MILLER  
1233 20<sup>th</sup> Street, N.W.  
Suite 610  
Washington, D.C. 20036

Its Attorneys

September 12, 2005

## TABLE OF CONTENTS

	<u>Page</u>
Summary.....	i
I. Background .....	3
II. ABC's Showing Entirely Fails to Justify Its Extraordinary Waiver Request .....	6
A. WNJB-DT Service Losses Would Be Substantial.....	6
B. Channel 45 Is a Reasonable Alternative .....	9
C. Colocation of Channel 8 Is a Vastly Superior Alternative .....	11
1. Colocation is Spectrum-Efficient.....	11
2. Colocation Is Cost-Effective .....	12
3. Colocation Is Technically Feasible .....	15
D. ABC's Refusal to Negotiate in Good Faith .....	15
with NJPBA Undercuts Its Claim Regarding the Lack of Alternatives	
III. Conclusion.....	16

## SUMMARY

The New Jersey Public Broadcasting Authority (NJPBA), license of public Station WNJB-DT, New Brunswick, New Jersey, hereby files its Comments in Opposition to the “Emergency Request for Waiver” (Request) filed by American Broadcast Companies (ABC), licensee of Station WABC-TV/DT, New York, New York (WABC), with the support of WPIX, Inc. (Tribune), licensee of Station WPIX-TV/DT, New York, New York. The Request seeks a waiver of the Commission’s 0.1 percent interference standard applicable to first-round digital television (DTV) conflicts in order to allow 28 times the maximum level of permitted interference.

Preliminarily, ABC’s claims that it has negotiated in good faith with NJPBA or that NJPBA has been unreasonable in responding to ABC are without merit. Among other things, despite knowing of the issue for months if not years, ABC chose to wait until just days before the deadline imposed by the FCC’s “60-day” letter to make a substantive proposal to NJPBA, and that proposal was patently unacceptable.

On the merits, ABC’s showing falls far short of the standard applicable to waiver requests. Notwithstanding ABC’s characterization to the contrary, WNJB-DT service losses resulting from the waiver would be substantial; in this regard, NJPBA rejects the assertion that NJPBA alone among New York-area broadcasters is or should be a “New Jersey” licensee with limited, parochial interests. Moreover, the fact is that Channel 45 is a reasonable DTV allotment for WABC to the extent that it more than replicates its analog service area and, in

contrast to DTV Channel 7, does not result in lost service to some 93,000 existing viewers, almost all of whom reside in New Jersey.

In any event, colocation of Channel 8 with Channels 7 and 9 provides the best solution for all interested parties. It would: 1) eliminate all interference and allow every licensee to maximize service; 2) eliminate all concerns regarding the loss of a VHF presence in the New York market; and 3) free up at least two additional channels for DTV use in the congested mid-Atlantic region, thereby affording the FCC some much needed flexibility. Moreover, colocation is both feasible and cost effective.

Under these circumstances, the FCC should either dismiss ABC's Request or require colocation subject to reimbursement of NJPBA expenses as a condition of any licensee desiring to use Channel 7 or 9 in the New York area for DTV purposes.

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

In the Matter of	)	
Second Periodic Review of the	)	
Commission's Rules and Policies	)	MB Docket No. 03-15
Affecting the Conversion	)	
To Digital Television	)	
	)	
First-Round Digital Television	)	
Channel Election of	)	File No. BFRECT-20050209AKQ
WABC-DT, New York, NY	)	
	)	
First-Round Digital Television	)	
Channel Election of	)	File No. BFRECT-20050210ATK
WPIX-DT, New York, NY	)	

To: Media Bureau

**COMMENTS IN OPPOSITION TO "EMERGENCY REQUEST FOR WAIVER"**

The New Jersey Public Broadcasting Authority (NJPBA), through its attorneys and pursuant to Section 1.45 of the rules <sup>1</sup>, hereby files its Comments in Opposition to the "Emergency Request for Waiver" (Request) filed on August 15, 2005 by American Broadcasting Companies, Inc. (ABC), licensee of Station WABC-TV/DT, New York, New York (WABC) with the support of WPIX, Inc. (Tribune), licensee of Station WPIX-TV/DT, New York, New York. In support thereof, the following is shown:

Preliminarily, ABC's extraordinary pleading mischaracterizes its interaction with NJPBA and trivializes NJPBA's legitimate concerns in protecting a DTV allotment that it has carefully planned for several years. ABC's claims that it has

---

<sup>1</sup> Although it is unclear whether any deadline applies to the instant pleading, NJPBA on August 24, 2005 requested an extension of time through September 12, 2005 to the extent that the general rules governing the filing of pleadings might apply.

engaged in “negotiations” with NJPBA or that NJPBA has been unreasonable in responding to ABC are disingenuous. On the merits, ABC’s showing falls far short of that needed to justify the waiver of the rules that it requests.

Notwithstanding ABC’s claims to the contrary, its assigned DTV Channel 45 is entirely satisfactory, if not superior, to its targeted Channel 7, inasmuch as Channel 45 satisfies all of the FCC’s rules and policies governing DTV allotments. ABC seeks to arrogate to itself a DTV channel that it deems preferable at the expense of NJPBA’s legitimate expectations and the public interest. In the latter regard, while NJPBA has not objected to the area DTV allotments, ABC has an obvious technical solution to its alleged problem -- collocation of Channels 7 and 8. Contrary to ABC’s suggestion, this solution would entail relatively modest cost from the viewpoint of a New York Metro commercial broadcaster, would eliminate all interference concerns without reducing the service of any licensee and would afford the FCC additional flexibility in making DTV allotments in the congested mid-Atlantic region. That flexibility could permit the allotment of additional VHF channels in New York in accordance with the apparent preference of other licensees. Rather than granting a waiver whose only sure benefit is saving ABC substantially increased construction and operating costs, the FCC should require ABC, as well as any other broadcaster that might be allotted Channel 9 for DTV purposes at New York City, to collocate with NJPBA’s Channel 8 as a condition of its use in New York City.

## I. Background

For many months if not years, ABC and all of the New York-area licensees have been well aware of the potential for interference between DTV Channel 8 and Channels 7 and 9 to the extent that the latter frequencies might be desired for DTV use. Contrary to ABC's suggestion (Request, p. 7), NJPBA's Channel 8 is by no means "newly allotted". NJPBA secured Channel 8 in 1999 as the result of a channel swap with Mountain Broadcasting Company, licensee of WMBC-TV, Newton, New Jersey, a New Jersey commercial licensee hobbled with an inferior DTV allotment. Pursuant to the FCC's rules encouraging licensees to maximize facilities, NJPBA in 2000 proposed maximization of Channel 8; that application (FCC File No. BNPEDT-20000425AAM) was granted on May 14, 2001. At the bottom line, the channel swap enabled NJPBA to secure the first reserved VHF channel ever allotted to a noncommercial licensee in New Jersey<sup>2</sup> and two New Jersey stations to vastly expand service to millions of additional viewers in a historically underserved state. At the same time the swap effectively eliminated a serious interference problem affecting use of Channel 19 for public safety purposes in the Central New Jersey area. Although unforeseen at the time, the efficacy of this swap has been amplified by the events of September 11, 2001.

Shortly after September 11, 2001, New York-area broadcasters, including ABC, as well as Tribune and the licensees of public Station WNET, Newark, New

---

<sup>2</sup> Noncommercial educational Station WNET(TV), Channel 13, though licensed to Newark, New Jersey, operates on an unreserved channel which was made available for noncommercial use pursuant to an arrangement in the early 1960s involving New York licensees which expanded public broadcast service while reducing potential commercial competition in the area.

Jersey, and WWOR-TV, Secaucus, New Jersey, joined to form the Metropolitan Television Alliance (MTA) with a view toward rebuilding devastated broadcast facilities.<sup>3</sup> Soon after MTA's formation, NJPBA asked to be included in the plan for rebuilding the New York stations in light of the obvious potential benefits of colocation of Channel 8 with other area VHF facilities. MTA declined NJPBA's request.

In February 2005, MTA for the first time approached NJBPA with a comprehensive channel allotment proposal affecting the mid-Atlantic region. Among other things, MTA proposed that NJPBA relinquish Channel 8 in exchange for a UHF frequency. The purpose of this proposed exchange was simple – to allow colocation of Channel 8 at the Empire State Building (ESB) and, later, at the Freedom Tower (FT) planned for the World Trade Center site, so that Channel 8 could be used by another New York licensee and NTSC Channels 7 and 9 could be used by ABC and Fox for their DTV operations. Colocation of Channel 8 – although not under NJPBA's stewardship – was thus an integral part of the common plan that was floated for rebuilding New York facilities. Notably, MTA never fully disclosed the specifics of its plan, despite repeated requests by NJPBA for this information. The alternate channel proffered to NJPBA was inferior to Channel 8, whether Channel 8 was located at its current site in New Brunswick or at the ESB. NJPBA responded by suggesting that colocation of Channel 8 at MTA expense could be the basis of an agreement which would

---

<sup>3</sup> As observed by ABC (Request, p. 7), NJPBA assisted ABC in the immediate aftermath of September 11<sup>th</sup> by airing ABC programming on NJPBA facilities.

allow MTA to accomplish some, if not all, of its objectives while maximizing use by NJPBA of Channel 8. MTA rejected this proposal, claiming that construction and operation of NJPBA Channel 8 would be “cost prohibitive.”<sup>4</sup>

On June 7, 2005, the FCC sent its “60-day” letter to ABC rejecting ABC’s election of Channel 7 for DTV use due to interference to NJPBA’s Channel 8 and directing ABC to attempt to resolve the problem by 1) reducing facilities to eliminate the objectionable interference; 2) reaching a negotiated arrangement with NJPBA as the affected licensee; or 3) electing its in-core DTV channel. For some 56 days, ABC did nothing. It did not contact NJPBA in any way during this period to even attempt to resolve the issue in a mutually agreeable manner.

Then, on August 2, 2005, six days before the deadline for filing its conflict resolution decision on FCC Form 383,<sup>5</sup> ABC for the first time contacted NJPBA with a letter proposing that NJPBA 1) waive the interference; 2) reduce Channel 8 power; and 3) install a directional antenna. ABC did not suggest any consideration of any kind to NJPBA in exchange for these dramatic concessions. See Request, p. 15, Exhibit 9. If accepted, this proposal obviously would have undermined the fundamental value to NJPBA of Channel 8 as a maximized VHF facility providing outstanding coverage to Northern New Jersey and the New York Metropolitan area. NJPBA responded within two days to ABC’s proposal. It rejected the evisceration of its authorized Channel 8 service area at its own

---

<sup>4</sup> NJPBA understands that this MTA plan, which involved many more issues than that of Channel 8, did not succeed for a variety of reasons.

<sup>5</sup> On August 2, 2005, this deadline was extended for one week by the FCC (see Public Notice, “DTV Channel Election: First Round Conflict Decision Extension and Guidelines for Interference Conflict Analysis,” DA 05-2233, released August 2, 2005).

expense and rejected ABC's suggestion of unilateral reduction of NJPBA service for the sole benefit of ABC. It reiterated the possibility of collocation of Channel 8 at the expense of ABC and other licensees that would benefit. See Request, Exhibit 10. Some six days after NJPBA's response, ABC responded to NJPBA (Request, Exhibit 11), offering nothing new. In its response, delivered the very next day (Request, Exhibit 12), NJPBA reiterated its willingness to discuss collocation "which would greatly benefit [ABC]," and also stated NJPBA's view that ABC's allotted DTV Channel 45 was an acceptable alternative in any event, and that it therefore had no compelling basis for extraordinary relief. Four days thereafter, ABC without notice filed its voluminous Request.

**II. ABC's Showing Entirely Fails to Justify Its Extraordinary Waiver Request**

**A. WNJB-DT Service Losses Would Be Substantial**

Initially, NJPBA resists any suggestion that its core or intended audience is limited to New Jersey. Indeed this characterization of NJPBA as a provincial licensee with limited interests is particularly offensive in light of the historical treatment of New Jersey and its licensees, both commercial and noncommercial, as second-class citizens in the broadcast world. Throughout the history of television broadcasting, the State of New Jersey has been deprived of adequate local television service. The course of this regrettable development was set long ago with the initial licensing of VHF television stations in the 1940s in New York, New York and Philadelphia, Pennsylvania, and the FCC's development of a Table of Allocations in the early 1950s that precluded allocation of desirable VHF channels to New Jersey. In spite of its substantial population and autonomous

commercial, political and cultural identity, New Jersey was allocated only UHF frequencies, and NJPBA in particular was assigned four UHF frequencies. This circumstance has impeded NJPBA's efforts to develop complete coverage of the state.<sup>6</sup>

Against this backdrop of inadequate allocations, the FCC in the 1970s considered alternative means to bring effective VHF service, albeit commercial, to New Jersey. For a number of reasons, it declined to change the VHF allocations scheme, instead imposing special service obligations on out-of-state commercial broadcasters. In the 1980s, the FCC reallocated WWOR from New York City to Secaucus as the result of Congressional legislation which essentially allowed the then licensee to avoid losing its license because of misconduct in exchange for agreeing to the move.

Obviously, stations' signals and their audiences extend well beyond state borders. Though licensed to New York City, ABC serves millions of viewers in New Jersey and Connecticut, many of whom reside outside of the New York DMA. No one would question ABC's desire and right to do so.<sup>7</sup> Like any broadcaster, NJPBA wants to maximize service, disseminating programming to the widest possible audience. It serves all viewers within its predicted service area. NJPBA rejects the premise that NJPBA is a parochial licensee whose legitimate audience consists solely of New Jersey residents or that only New

---

<sup>6</sup> In the late 1970s, NJPBA tried to improve its coverage by seeking to move WNJB-TV, New Brunswick, to the World Trade Center, but this proposal was rejected on technical grounds.

<sup>7</sup> Nor would anyone question either Fox's or WNET's right and interest in serving, as they do, millions of viewers in New York and Connecticut, though Station WWOR-TV is licensed to Secaucus, New Jersey, and Station WNET(TV) is licensed to Newark, New Jersey.

Jersey residents have an interest in NJPBA programming. NJPBA is charged by the FCC with providing service throughout its service area, without reference to political boundaries. Many of its potential viewers live outside of New Jersey but work in New Jersey or have regular commerce with New Jersey. Many problems facing the tri-state area rely on knowledge of developments throughout the area, but while New Jersey residents are presented with an extraordinary flow of information about New York, their counterparts in New York have precious little access to television programming about developments in New Jersey.

Moreover, notwithstanding ABC's contention (Request, pp. 10-11), NJPBA's program service is in no way duplicated by other stations; in fact, 75% of its schedule is not broadcast on other stations serving areas also served by NJPBA. Further, ABC's argument (Request, p. 10) that service overlap within the NJPBA network supports the extraordinary relief it seeks is similarly without merit. NJPBA for some time has planned to differentiate programming on its channels by splitting operations. This differentiation will not be possible if it results in significant service area losses.<sup>8</sup>

The FCC must likewise reject ABC's self-serving speculation (Request, pp. 14-15) that protection of WNJB-DT's maximized service area is unwarranted because NJPBA has or will not implement maximized facilities. NJPBA's current

---

<sup>8</sup> ABC's related contention (Request, p. 5, fn. 8) that NJPBA will receive interference in any event from Fox operations is similarly without merit. Fox has elected Channel 38 for DTV use, not Channel 9; obviously, there is no masking of interference resulting from operation of Fox's elected DTV channel.

reduced power operation, like that of over 700 other stations,<sup>9</sup> both commercial and noncommercial, is entirely within the rules and was encouraged by the FCC as a means to facilitate the difficult task of DTV implementation. In this regard, ABC's suggestion (Request, p. 15) that NJPBA has "failed to accomplish" maximization or that it will not do so in the future is absurd. NJPBA fully intends to maximize Channel 8.

The Commission's rules clearly define interference that would be deemed *de minimis*. ABC's waiver proposes to cause interference 28 times that standard; under no circumstances may this loss of service be reasonably deemed either *de minimis* or, as ABC contends, "immaterial". Indeed, WNJB-DT, Channel 8, represents a dramatic improvement in the State's and NJPBA's channel allotments that will enable it to provide high-quality service to millions more viewers than ever before, including viewers in and out of the state of New Jersey.

#### **B. Channel 45 Is a Reasonable Alternative**

Contrary to ABC's claim (Request, pp. 18-19), Channel 45 more than replicates ABC's analog service area. Attached hereto is an Engineering Response to WABC's Request prepared by NJPBA's consulting engineer. That Response shows that Channel 45 would serve several hundred thousand more people than are served by ABC's current Channel 7 analog facility, thereby achieving predicted coverage in excess of replication. In addition, while not

---

<sup>9</sup> See "Digital Television (DTV) Stations with Active Temporary Authorities (STAs) to Operate (stations not yet licensed) (742 Stations), July 18, 2005," <http://www.fcc.gov/mb/video/files/dtvstas.html>

discussed by ABC, a non-colocated Channel 7 DTV facility would result in a troubling loss of service to almost 93,000 viewers in WABC's existing service area, almost all of whom reside in New Jersey. On the other hand, colocation of Channel 7 with Channel 8 would provide ABC with the greatest coverage, eliminate all objectionable interference, notably eliminate the critical service losses that would arise from non-colocated Channel 7 and free up an additional channel for possible DTV use in the New York area. Colocation of WWOR using Channel 9 for DTV operations with Channel 8 would have a similarly desirable effect on the allocations scheme in this congested region.

ABC's intent is quite clear: to secure a desirable VHF channel at the expense of NJPBA notwithstanding the fact that its current allotted UHF channel provides replication in accordance with the FCC's standards in this area and does not create additional interference to any other licensee. From the specific standpoint of coverage, allotment of Channel 45 to ABC entails no particular hardship. Against these facts, ABC's claim (Request, pp. 11-12, 14) that the additional coverage achieved by NJBPA through maximization of Channel 8 is inconsistent with Section 307(b) is nonsensical. Indeed, the viability of Channel 45 in conjunction with predicted service losses arising from a non-colocated DTV Channel 7 and the history of channel allotments in the area heavily favoring New York and Philadelphia with desirable VHF channels compels the contrary conclusion.

### **C. Colocation of Channel 8 Is a Vastly Superior Alternative**

There is an obvious solution to ABC's concerns, a solution which would serve the public interest rather than ABC's narrow pecuniary interest. That solution is colocation, and it would address a variety of problems, whether real or merely perceived, that attend DTV implementation in the New York market and its surrounding areas.

#### **1. Colocation is Spectrum-Efficient**

From the FCC's perspective, colocation of Channels 7 and 9 with Channel 8 would free up at least two additional channels (45 and 38) for DTV use in this congested region, thereby affording the agency some much-needed flexibility in the DTV allocation scheme. Colocation would also address the concern expressed by some existing New York-area licensees other than ABC that the diminution of New York as a "VHF" market (see Request, p. 6)<sup>10</sup> will adversely affect them. Colocation would presumably provide ABC and Fox with their preferred DTV channels.<sup>11</sup> Colocation would maximize service in the market and eliminate every interference issue that has been raised in this matter without requiring any licensee to suffer service losses. Colocation would allow NJPBA to realize a longtime goal to locate a facility on an ideal site so as to achieve maximum service to its constituents.

---

<sup>10</sup> See also Comments supporting ABC's Request filed September 2, 2005, by Educational Broadcasting Corporation, licensee of public Station WNET, Newark, New Jersey. Colocation of NJPBA's Channel 8 would presumably benefit NJPBA in the same manner.

<sup>11</sup> In this regard, NJPBA understands that Fox has emailed the FCC expressing a preference for Channel 9, although it formally elected Channel 38, and stating that it is doing so because NJPBA has refused to negotiate meaningfully with Fox. See E-mail from Molly Parker to [Form383@FCC.gov](mailto:Form383@FCC.gov) re BFRCCCT-29959815AAP (August 15, 2005). That claim is not true, and Fox does not provide a scintilla of evidence to support it.

While NJPBA is entirely satisfied with Channel 8 as concurrently configured, it would gladly cooperate in a colocation plan in order to further these broader objectives, recognizing that colocation would afford New York licensees and the FCC additional flexibility to accommodate DTV operations in the region. The cost-savings by the directly affected licensees would offset additional costs of paying NJPBA's expenses of colocation.

**2. Colocation Is Cost-Effective**

In the latter regard, ABC makes much of the additional financial burden that colocation would place on it and claims that it should not bear any cost of securing the NTSC channel it desires. However, ABC does not provide a shred of evidence to support the notion that the cost is prohibitive or that colocation is otherwise infeasible. Indeed, when measured against the potential benefit to ABC and others, the cost of colocation in fact is decidedly modest and cost-efficient.

Following MTA's approach to NJPBA earlier this year, NJPBA commissioned a study by BIA Financial Network, Inc. (BIA) to analyze, among other things, the benefits and costs to NJPBA of exchanging DTV Channel 8 with New York-area broadcasters for a UHF channel as proposed by MTA. This analysis was designed to address issues of value wholly ignored by MTA arising from the colocation of Channel 8 with other New York-area operations so that it could be used by another broadcaster and so that ABC and Fox could operate Channels 7 and 9, respectively, as digital facilities. At the same time, it crystallized various cost and benefit issues involving colocation of Channel 8, whether at ESB or at

FT. Using WNET's reported reconstruction costs as a baseline, BIA estimated for the ESB site that the construction savings to the New York stations, including ABC (Channel 7) and Fox (Channel 9), arising from construction of DTV VHF facilities when compared with construction of equivalent DTV UHF facilities, would range from \$6.0 million to \$13.1 million per station. For the FT site, the estimated cost savings range from \$7.0 million to \$14.7 million per station. The variance in per-station costs depends to some extent on the amount of effective radiated power required to achieve replication. In addition, BIA estimates that annual electrical power cost savings from VHF operation for each station at ESB would be in the \$100,000 range and substantially less at FT. With respect to construction costs, again extrapolating from WNET's reported expenditures, BIA estimates that the cost of constructing VHF replication facilities at ESB would range from approximately \$1.4 million to \$2.8 million depending upon an individual station's power requirements. ABC's replication cost for a VHF station on Channel 7 at the ESB colocated with other VHF facilities would be approximately \$1.75 million; an NJPBA Channel 8 facility would be estimated to cost approximately \$2.2 million. VHF replication costs at FT would range from less than \$1.0 million to \$1.3 million per station. It would be reasonable to anticipate reduced annual operating costs as well. Overall, these estimates by BIA provide a reliable indication of the range and scale of the relative costs of DTV implementation in the New York City environment, and those costs are by no means prohibitive. In fact, against the backdrop of a multi-million dollar commercial licensee operating as a subsidiary of a multi-billion dollar

entertainment conglomerate in the nation's number one television market, these numbers are a minimal burden. While ABC complains that NJPBA is realizing a coverage "windfall" from its maximized VHF channel, ABC provides no justification for the financial windfall of millions of dollars it would save via construction and operation of Channel 7 at the expense of reduced NJPBA coverage and reduced ABC service to existing New Jersey viewers.

And, to the extent that Fox wants to operate DTV facilities on Channel 9, the already modest cost of colocation (given the economics of the New York commercial television market) could be divided. Perhaps most sensible would be allocation of the colocation costs among all of the New York-area commercial licensees that are party to a common plan for colocation of their analog and digital facilities. In any event, as shown above, claims by ABC and others that colocation is prohibitively expensive for them are palpably untrue. Given the manifest benefits of colocation, there is no justification for the Commission to waive interference standards and award New York-area licensees with financial windfalls without requiring their financial cooperation in implementing such a proposal.<sup>12</sup>

---

<sup>12</sup> Whatever reluctance the FCC may have in the instant case to require reimbursement of a licensee's expenses, the fact is that it has not hesitated in the recent past to require it—and on a much larger scale-- when the public interest in efficient spectrum allocation demanded it. So, for example, it has rebanded the 800 MHz spectrum to enhance public safety operations and facilitate Nextel's ability to develop its business while requiring Nextel to reimburse public safety operations many hundreds of millions, if not billions, of dollars. In the broadcast arena, it has required Nextel to reimburse broadcast auxiliary licensees for the costs of relocating their auxiliary operations so as to create greater efficiencies in the 1990-2110 MHz band.

### **3. Colocation Is Technically Feasible**

NJPBA anticipates that ABC and/or other interested parties may complain that colocation of Channel 8 on Empire is not technically feasible. However, as noted above, the MTA as putative architect of the common plan for rebuilding analog and digital service in the New York area clearly contemplated precisely such a configuration. Further, it appears from NJPBA's informal contacts with ESB management that the current facilities are adequate to accommodate a colocated DTV Channel 8 operation.

Other than objections on the grounds of cost, no party has presented clear and convincing evidence that colocation is technically infeasible or otherwise undesirable. Indeed, it appears that New York-area broadcasters do not object to colocation in principle; they merely object to NJPBA's participation in such a plan. Discrimination against NJPBA in this manner to avoid an efficient and effective technical solution to the difficulties of DTV implementation in this region is clearly contrary to the public interest and should not be condoned or endorsed by the Commission.

#### **D. ABC's Refusal to Negotiate in Good Faith with NJPBA Undercuts Its Claim Regarding the Lack of Alternatives**

ABC's claim (Request, pp. 15-17) that NJPBA has refused to negotiate a reasonable solution to ABC's alleged problem is at best disingenuous. Preliminarily, NJPBA was surprised by ABC's inclusion in the Request of NJPBA's letters articulating private positions. It is obvious in light of the timing and substance of ABC's approach to NJPBA that its tactics were no more than a

ploy designed to enable ABC to portray NJPBA as an unreasonable party, and an unsuccessful ploy at that. Moreover, whatever ABC may claim to the contrary, there is no doubt that it was well aware of the issue for many months, if not years, and made no substantive contact with NJPBA until days before the Form 383 filing deadline. It is obvious that ABC had no intention to negotiate in good faith unless NJPBA accepted its patently unreasonable proposal to waive interference, reduce power and directionalize with no consideration of any kind.<sup>13</sup> The FCC simply cannot expect that any licensee would reach a negotiated solution on an issue of such importance and complexity within six days. ABC's proposal was fundamentally unfair to NJPBA. Would the FCC expect any commercial licensee to accept a proposal to accept substantial interference not permitted by the rules and to do so gratuitously? In short, ABC's claim that NJPBA has been unreasonable is without merit. The history of this matter, including the timing and substance of ABC's approach to NJPBA, belies its self-serving claim.

### **III. Conclusion**

Under all of the circumstances, ABC's showing falls well short of the high hurdle even at the starting gate that faces any waiver request. Cf., WAIT Radio v. FCC, 418 F. 2d 1153 (D.C. Cir. 1969). Taken as a whole, ABC's conclusory and incorrect claims regarding coverage losses, its patronizing assertions that deny the relevance of NJPBA's programming beyond New Jersey's borders and its unsupported allegations that NJPBA has refused to negotiate constitute

---

<sup>13</sup> While ABC indicates in its pleading (Request, p. 16) that it offered to pay for a directional

nothing more than the calculated attempt by a New York licensee to arrogate for itself a DTV frequency it deems superior at no cost to itself and at the expense of the legitimate expectations of another licensee that secured its desired DTV allotment in accordance with the rules. The FCC accordingly should either: 1) deny ABC's waiver request or 2) require ABC, as well as any broadcaster which might be allotted DTV Channel 9 in the New York DMA to colocate with Channel 8 as a condition of its use and to pay the costs of such colocation. In the latter regard, NJPBA remains willing to negotiate a reasonable agreement collocating Channel 8 at ESB and at any future common location with other VHF DTV operations in New York City.

Respectfully submitted,

NEW JERSEY PUBLIC  
BROADCASTING AUTHORITY

By: Lawrence M. Miller  
Lawrence M. Miller

By: Malcolm G. Stevenson  
Malcolm G. Stevenson

SCHWARTZ, WOODS & MILLER  
1233 20<sup>TH</sup> STREET, NW,  
SUITE 610  
WASHINGTON, DC 20036  
(202) 833-1700

Its Attorneys

---

antenna, its correspondence with NJPBA contains no such offer.

# TechWare, Inc.

## Engineering Response from WNJB to Waiver Request by WABC September 8, 2005

### Background

In the first round of the DTV channel election process station WABC (analog channel 7 / DTV Channel 45) New York, NY elected to return to its analog channel 7 for post transition DTV operation. An analysis by the FCC indicated that this election would be in conflict with the first round election of channel 8 by station WNJB (analog channel 58 / DTV channel 8) New Brunswick, NJ. The FCC determined that WABC's operation on channel 7 would cause 2.8% new interference to WNJB which is well above the permitted 0.1% limit specified by the FCC.

In response to a conflict notification from the FCC, WABC elected to resolve the conflict by remaining on its allotted DTV channel 45. However, WABC also filed a request for a waiver of the FCC interference criteria and asked the FCC to permit the additional interference to WNJB and to allow WABC to keep its initial round 1 channel 7 election.

It should be noted that all of the coverage and interference analyses that have been conducted with respect to this conflict have been based on WABC's certified DTV facility. That facility is the original WABC DTV allotment on the World Trade Center

(WTC) that no longer exists. Likewise, the “current” service of the WABC analog channel 7 discussed in this statement are with respect to its licensed facility with application reference number BLCT-19800730KG that is also for the former WTC site.

## **Discussion**

In its waiver request, WABC indicated that one of the reasons for returning to channel 7 instead of staying on channel 45 is that it would have less service on channel 45. An analysis, however, indicates that the predicted post transition service on channel 45 would actually be greater than the service currently provided by the WABC analog channel 7. The post transition analysis, based on the FCC’s OET Bulletin 69 methodology of WABC channel 45, indicates that it would provide service to 19,036,790 people versus 18,515,602 people served by the current channel 7 analog facility.

A potential solution to the interference problem on channel 7 would be to collocate the facilities of WABC and WNJB. An analysis shows that placing both stations at the WTC site completely eliminates the interference from WABC to WNJB<sup>1</sup>. It is also noted that collocating these stations would eliminate the predicted interference to the proposed WABC’s channel 7 DTV from WNJB. That interference reduction would

---

<sup>1</sup> This analysis assumed an omni-directional facility for WNJB operating at 5.3 kW from the WTC site with a center of radiation of 525 m. An omni-directional antenna was used to simplify the analysis and provide a worst case scenario for interference to other stations. The purpose of this analysis was to show that collocation is a very viable solution to this complicated problem. It is also noted that the elevation used in this analysis was arbitrarily based on one of the “existing” facilities at the WTC site and is not critical to this analysis.

allow WABC to provide service to an additional 92,928 people in an area covering 483.1 square kilometers that would be mostly within the WABC city grade contour and almost entirely within the state of New Jersey. Furthermore, if station WWOR Secaucus, NJ (analog channel 9 / DTV channel 38) was to also operate on channel 9 (its desired channel) from the same site (also its certified DTV site) the interference conflict it has with WNJB (5.15% new interference) would also be eliminated. Not only would collocating solve the interference problem for both WABC and WWOR but it would have the added benefit of freeing up channels 38 and 45 that would otherwise be occupied by WWOR and WABC.

It has also been determined that the service contour of the proposed WNJB facility operating from the WTC location would encompass all areas now served by its existing analog facility and at the same time not cause interference in excess of that permitted to any other stations. Therefore, collocation at a common site appears to be a spectrum efficient solution to a problem in an area where there is a recognized shortage of channels.

Prepared by:  
William R. Meintel  
President TechWare, Inc.

**DECLARATION**

I declare under penalty of perjury that, except for the facts of which the Federal Communications Commission may take official notice or which may be supported by the declarations of others, all of the facts of the foregoing pleading are true and correct to the best of my knowledge, information and belief.

Executed on September 9, 2005

By:   
William Schnorbus  
Director of Engineering  
New Jersey Public Broadcasting  
Authority

## CERTIFICATE OF SERVICE

I, Nancy Marie Cassady, Administrative Assistant in the law offices of Schwartz, Woods & Miller, do hereby certify that I have on this 12<sup>th</sup> day of September, 2005, sent by First Class United States mail, postage prepaid, copies of the foregoing **COMMENTS IN OPPOSITION TO "EMERGENCY REQUEST FOR WAIVER"** to the following:

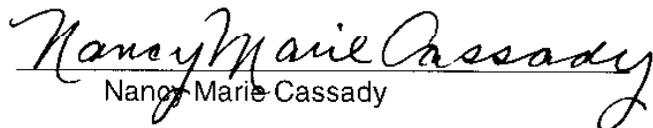
Susan L. Fox, Esquire  
Vice President, Government Relations  
The Walt Disney Company  
1150 17th Street, N.W., Suite 400  
Washington, D.C. 20036  
Attorney for the American Broadcasting Companies, Inc.

Tom W. Davidson, Esquire  
Akin Gump Strauss Hauer & Feld, LLP  
1333 New Hampshire Avenue, N.W.  
Washington, D.C. 20036  
Attorney for the American Broadcasting Companies, Inc.

Thomas P. Van Wazer, Esquire  
Sidley Austin Brown & Wood, LP  
1501 K Street, N.W.  
Washington, D.C. 20005  
Attorney for WPIX, Inc.

Rick Chessen, Esquire  
Media Bureau, Room 3C-754  
Federal Communications Commission  
The Portals Building  
445 12th Street, S.W.  
Washington, D.C. 20554

Barbara K. Gardner, Esquire  
Leventhal Senter & Lerman, PLLC  
2000 K Street, N.W., Suite 600  
Washington, D.C. 20006

  
Nancy Marie Cassady