

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

In the Matter of )  
 )  
Second Periodic Review of the Commission’s ) MB Docket No. 03-15  
Rules and Policies Affecting the Conversion to )  
Digital Television )

To: The Commission

**CONSOLIDATED REPLY TO OPPOSITIONS**

At stake in this matter is the continuation or loss of service to nearly 350,000 viewers of existing DTV service. As New York Times Management Services (“NYTMS”), licensee of WHNT-TV, ch. 19 and WHNT-DT, ch. 59, Huntsville, AL (“WHNT”) explained in its Request for Preservation of Maximized Service, by ensuring that WHNT’s maximized service area is preserved in the Final DTV Table of Allotments, the Commission will uphold core public interest mandates: protecting consumers from loss of service and the promotion of digital television service to the public. Moreover, viewers in WHNT’s maximized service area can be protected without materially affecting viewers’ access to any other DTV service.

In opposing WHNT’s request, WDBB-TV, Inc., licensee of WDBB(TV) and permittee of WDBB-DT, Bessemer, AL (“WDBB”), and ETC Communications, Inc., licensee of WYLE(TV) and permittee of WYLE-DT, Florence, AL (“WYLE”), seek to elevate their claim to a “tentative channel designation” to a level that is inconsistent with the Commission’s rules and its core public interest mandate.<sup>1</sup> As discussed below, these tentative channel designations do

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<sup>1</sup> See ETC Communications, Inc., Opposition to Request of WHNT-DT for Preservation of Maximized Service Area, MB Docket No. 03-15 (filed April 18, 2006) (“WYLE Opposition”); WDBB-TV, Inc., Opposition, MB Docket No. 03-15 (filed April 18, 2006) (“WDBB Opposition”).

not bind the Commission to abandon hundreds of thousands of viewers within WHNT's current DTV service area. During the rulemaking to adopt a Final DTV Table, the Commission is free to make adjustments to tentative designations as necessary to fulfill the public interest. NYTMS accordingly reiterates its request that the Commission preserve WHNT's maximized service area in the Final DTV Table of Allotments.

**I. THE COMMISSION SHOULD NOT PLACE THE TENTATIVE CHANNEL DESIGNATIONS OF WDBB AND WYLE ABOVE THE PUBLIC INTEREST.**

Were the Commission to fail to preserve WHNT's maximized service area in the Final DTV Table, on Feb. 17, 2009, nearly 350,000 viewers would lose access to WHNT's CBS-affiliated and local DTV programming. These viewers – many of whom have no other access to CBS programming, and all of whom have no other access to WHNT's 32 hours per week of local news – will have enjoyed access to this free, over-the-air DTV service for nearly five years. In contrast, as discussed below, grant of WHNT's Request will cause only *de minimis* interference to WDBB and no interference whatsoever to WYLE. Accordingly, the Commission should reject those stations' attempt to force WHNT to abandon the viewers in its maximized service area. As discussed further in Section II, it was precisely to avoid the absurd results advocated by WDBB and WYLE that the Commission retained discretion to adjust results of the channel election rounds in the rulemaking for the Final DTV Table.

**WDBB:** Aside from its baseless contention that as a matter of principle the Commission should never allow any maximized service to create more than 0.1 percent interference to another station's DTV service, WDBB does not defend its claim to block continued service to viewers within WHNT's maximized service area. This lack of substantive

opposition is not surprising, given that WHNT's maximized operation on channel 19 would not materially impact WDBB.

First, interference to WDBB from WHNT's maximized service equals only 1.3 percent. This amount is well below the two percent *de minimis* standard which the industry and Commission have recognized to be acceptable for DTV-to-DTV interference throughout the transition, and which the Bureau has already determined to be permissible in the case of interference from certain stations' replicated service in the first and second channel election rounds. Use of a 0.1 percent standard may have been appropriate to facilitate the tentative election process, but it cannot substitute for the Commission's mandate to adopt a Final DTV Table that serves the public interest.

Second, within WDBB's DMA of Birmingham, only 0.07 percent of WDBB's overall service population would receive interference from WHNT's maximized service – and these viewers already receive the primary signal of WTTO(TV), which broadcasts the *same* programming on the *same* schedule as WDBB. Although WDBB in its Opposition asserts that WDBB is not technically a “satellite” of WTTO, a quick review of program schedules for the Birmingham market reveal that WDBB merely repeats the signal of WTTO.<sup>2</sup> Regardless of what term WDBB uses to describe itself, the fact remains that no viewers within the Birmingham market would lose access to programming broadcast by WDBB's duplicative service.

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<sup>2</sup> Attached as an exhibit is a sample primetime schedule showing that WDBB (identified as “WB 17”) merely repeats the programming of WTTO (identified as “WB 21”). As noted above, within the Birmingham DMA, all of WDBB's viewers within the zone of interference from WHNT receive the unimpeded signal of WTTO. *See* NYTMS, Request for Preservation of Maximized Service Area, MB Docket No. 03-15, Att. A at 2 (filed April 3, 2006).

Third, contrary to WDBB's counterintuitive allegation that WHNT wishes to preserve service to its maximized viewers to save money,<sup>3</sup> the sole motive of WHNT's Request is to avoid the abrupt and permanent cessation of existing DTV service to nearly 350,000 viewers. In fact, WHNT would save thousands in annual operating costs by reducing power from maximized to replication facilities. It does not believe, however, that such action would be in the best interest of its viewers or the overall DTV transition.

**WYLE:** In its Opposition, WYLE acknowledges that (1) it has not built out DTV facilities on its elected channel 20;<sup>4</sup> (2) there is at least one other channel, channel 46, on which it could construct and operate DTV facilities without any concern of interference to or from another station;<sup>5</sup> (3) channel 19 is the only channel on which WHNT could continue to serve the viewers within its maximized service area.<sup>6</sup> Nevertheless, based on its perceived entitlement to eventually construct on channel 20, WYLE opposes WHNT's operation of maximized facilities on channel 19. The public would be ill served were WYLE's claim to prevail.

By assigning WYLE a different channel on which to construct and operate its DTV service, the Commission can both preserve the DTV service enjoyed today by WHNT's viewers *and* allow WYLE to construct DTV facilities that will serve its entire service area without interference from WHNT. WYLE claims that WHNT is trying to "bully the Media Bureau" into abandoning the "wealth of unique programming" it offers, when in fact WHNT's

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<sup>3</sup> See WDBB Opposition at 3 ("WHNT's real reason for not wanting to operate with replication facilities is that it invested prematurely in a non-directional antenna."). WHNT's existing antenna will, of course, accommodate reduced operation on channel 19, but, as noted above, such operation will deprive nearly 350,000 viewers of existing DTV service.

<sup>4</sup> See WYLE Opposition at 4.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 3.

Request proposes a solution that would serve the best interests of *all* viewers, including those of WYLE.<sup>7</sup> There is thus no merit to the false decision which WYLE's Opposition places before the Commission, in which it must either allow WHNT to operate maximized facilities on channel 19 while sacrificing access to 6.1 percent of whatever DTV service WYLE might build, *or* force WHNT to abandon nearly 350,000 viewers to ensure that there is no interference to WYLE's hypothetical DTV service.

Indeed, despite WYLE's refusal to consider a reasonable solution to the interference conflict between it and WHNT, WHNT has not opposed WYLE's request for a fifth extension of its DTV construction permit – even though denial of that long-pending request would facilitate resolution of its conflict with WYLE. WYLE's continued failure to construct DTV facilities is, however, relevant in considering the equities of WHNT's Request for preservation of its maximized service area in the Final DTV Table. As the Commission has explained, in resolving channel election conflicts, it will be favorably disposed towards stations which have been “early adopter[s]” of DTV technology,<sup>8</sup> and will look to “the length of time the station has been operating on DTV” as well as “the impact on the public's access to DTV services.”<sup>9</sup> WHNT completed construction of its DTV facilities well before the construction deadline, and is operating maximized facilities per its longstanding commitment to promote a robust DTV transition in Alabama, despite the relief available to it as a station with an out-of-core DTV allotment.

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<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Report and Order, 19 FCC Rcd 18279, 18307 ¶ 64 (2004) (“*Second DTV Biennial Review R&O*”).

<sup>9</sup> *Id.*

In contrast, WYLE is one of a handful of stations in the country that, despite a lack of zoning or international coordination concerns, has failed to construct DTV facilities some four years after expiration of the construction deadline. Although WYLE's Opposition asserts that only the "removal of three previously unknown liens on the property that will serve as WYLE-DT's tower site and that will serve as collateral for a commercial loan" prevent it from building DTV facilities,<sup>10</sup> this is the same rationale it offered in its Nov. 2004 and July 2005 CP extension requests.<sup>11</sup> As the Commission explained last year in admonishing another station for failure to construct its DTV facilities: "Stations may not simply rely on financial hardship as their excuse for failing to complete DTV construction in a timely fashion. We expect that even stations with financial difficulties will provide a timetable for construction, and make at least some progress in constructing their DTV facilities."<sup>12</sup>

While WHNT believes that WYLE should have a place in the Final DTV Table of Allotments, particularly in light of its failure to build out, it should not be allowed to block service to hundreds of thousands of viewers of an *existing* DTV service. Other channels are available on which it could construct DTV facilities, and the Commission should assign WYLE one of those channels in the Final DTV Table.

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<sup>10</sup> WYLE Opposition at 6.

<sup>11</sup> See WYLE, FCC Form 337, BEPCDT-20041124ABU (filed Nov. 22, 2004); WYLE, FCC Form 337, BEPCDT-20050714ACE (filed July 13, 2005).

<sup>12</sup> See *Requests for Extension of the Digital Television Construction Deadline, 40 Commercial Television Stations with May 1, 2002 Deadline*, 20 FCC Rcd 5773, 5777 ¶ 26 (2005).

## II. THE PRE-RULEMAKING, CHANNEL ELECTION PROCESS DOES NOT BIND THE COMMISSION TO ADOPT A FINAL DTV TABLE THAT WOULD HARM THE PUBLIC INTEREST.

Unable to raise substantive objections to WHNT's Request, WDBB and WYLE claim that policies employed in the pre-rulemaking, channel election process prohibit the Commission from preserving WHNT's existing DTV service regardless of the consequences to the public interest. The Commission's rules provide, however, that in promulgating a final DTV Table, if a "tentative channel designation" and the public interest collide, the latter will prevail.

As suggested by the term "*tentative* channel designation," the Commission has long made clear that the results of a channel election round do not confer a legal right upon any station. For example, in 2001, during the *First DTV Biennial Review*, the Commission announced, "In all cases, including stations with both channels in-core, we reserve the right to select the final channel of operation in order to minimize interference and maximize the efficiency of broadcast allotments in the public interest."<sup>13</sup> It emphasized, "we intend to review the channel elected to ensure that its use furthers these goals."<sup>14</sup> The Bureau has echoed this principle, reminding licensees participating in the channel election process that "tentative channel designations do not guarantee final allotments."<sup>15</sup>

Rather than rigidly decide what the Commission *must* propose and adopt in the rulemaking for the Final DTV Table of Allotments, the policies of the channel election process are intended to assist the Commission in proposing a Final Table that will "provid[e] the best

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<sup>13</sup> *Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television*, Report and Order, 16 FCC Rcd 5946, 5953 ¶ 16 (2001)

<sup>14</sup> *Id.*

<sup>15</sup> *DTV Channel Election Issues*, Public Notice, DA 05-273, at 1 (rel. Feb. 1, 2005).

possible service to the public.”<sup>16</sup> Certainly, in most cases, the tentative channel designations announced at the end of a given round – and the service areas proposed to be associated with those tentative designations – will fulfill this public interest goal. But if the results of the channel election process for a given station would harm the public interest, the Commission has discretion to make adjustments.

WDBB and WYLE are thus mistaken in claiming that policies followed by the Bureau in the first and second rounds require the Commission to adopt a Final DTV Table that will abandon hundreds of thousands of viewers within WHNT’s existing DTV service area. For example, despite acknowledging that at least one other channel exists at which it could operate its still unconstructed facilities, WYLE claims that because WHNT’s maximized facilities would create interference of more than 0.1 percent to WYLE, the Commission *must* sacrifice service to existing DTV viewers within WHNT’s maximized service area. WYLE adds without citation that the Commission has ruled any interference in the Final DTV Table that exceeds 0.1 percent to be “*intolerable*.”<sup>17</sup> Yet as described above, the 0.1 percent standard used in the first and second channel election rounds does not bind the Commission in the rulemaking context.

Similarly, WDBB argues that the Commission can only provide for WHNT’s maximized service area in the Final DTV Table if WHNT pleads for waiver of the 0.1 interference standard used in the first and second rounds. WDBB’s claim mistakenly transposes the 0.1 percent standard used in these initial rounds on the Commission’s discretion in a notice-and-comment rulemaking. Such hyperbolic elevation of these two stations’ tentative channel designations would harm the public interest and undermine the DTV transition in Huntsville.

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<sup>16</sup> *Second DTV Biennial Review R&O*, 19 FCC Rcd at 18307 ¶ 65.

<sup>17</sup> WYLE Opposition at 4 (emphasis in original).

As WHNT explained in the Supplemental Showing concerning its First Round election, based on the discretion provided to it by the Commission for stations with only one in-core channel, the Bureau had discretion to grant WHNT a tentative channel designation with its maximized facilities.<sup>18</sup> However, WHNT recognizes and respects the Bureau's decision to apply a somewhat stricter policy during the first and second channel election rounds. The policy devised by the Bureau for the initial channel election rounds, however, does not overrule or limit the Commission's discretion to adjust results of those rounds in the rulemaking for the Final DTV Table.

Moreover, even if WHNT's Request were evaluated as a request for waiver of the 0.1 percent interference standard used during the first and second channel election rounds, it would merit grant. In general, a rule should be waived if the underlying purpose of the rule would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest.<sup>19</sup> First, as demonstrated above, the underlying purpose of the channel election process – to “provide the best possible DTV service to the public ... [and] take into account overall spectrum efficiency”<sup>20</sup> – would be frustrated if WHNT were required to shut off existing DTV service to hundreds of thousands of viewers merely to “protect” WYLE's unbuilt DTV service on channel 20 and a *de minimis* number of viewers in WDBB's service area. Second, allowing WHNT to operate maximized facilities that exceed the 0.1 percent “limit” with respect to WDBB, and assigning WYLE a different channel for its unbuilt DTV service, would serve the public interest; such action would preserve existing service to nearly 350,000 viewers

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<sup>18</sup> See Supplemental Showing in Support of the First Round DTV Channel Election of WHNT-TV, MB Docket No. 03-15 (filed Aug. 15, 2005).

<sup>19</sup> See, e.g., *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

<sup>20</sup> *Second DTV Biennial Review R&O*, 19 FCC Rcd at 18291 ¶ 31.

with only *de minimis* effect on WDBB's service and without creating *any* interference to WYLE's eventual DTV service.

### **CONCLUSION**

Notwithstanding the exaggerated claims of WDBB and WYLE to their tentative channel designations, the Commission has both the authority and obligation to adopt a Final DTV Table that will best serve the public and provide for a seamless conclusion to the DTV transition in February 2009. Accordingly, WHNT reiterates its request that the Commission take steps necessary to preserve WHNT's existing, maximized DTV service in the Final DTV Table of Allotments.

Respectfully Submitted,



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April 28, 2006

**CERTIFICATE OF SERVICE**

I, Matthew S. Delnero, of the law firm of Covington & Burling, do hereby certify that on this 28th day of April, 2006, I caused a copy of the foregoing "Consolidated Reply to Oppositions" to be served via electronic mail to the following:

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Matthew S. DelNero

# ATTACHMENT A

## WTTO/WDBB (Birmingham DMA)

### Program Schedule for April 27, 2006\*

Time	WTTO (ch. 21)	WDBB (ch. 17)
12:00a.m.	Sex and the City	Sex and the City
12:30a.m.	South Park	South Park
1:00a.m.	Yerby Bauer	Yerby Bauer
1:30a.m.	Will and Grace	Will and Grace
2:00a.m.	The King of Queens	The King of Queens
2:30a.m.	Yes, Dear	Yes, Dear
3:00a.m.	Cheaters	Cheaters
3:30a.m.	Entertainment Studios.com	Entertainment Studios.com
4:00a.m.	Just Shoot Me	Just Shoot Me
4:30a.m.	Becker	Becker
5:00a.m.	SMC Promo Offer	SMC Promo Offer
5:30a.m.	Winsor Pilates 5, V1	Winsor Pilates 5, V1
6:00a.m.	Viewpoint	Viewpoint
6:30a.m.	Decision Guide	Decision Guide
7:00a.m.	Liberty's Kids	Liberty's Kids
7:30a.m.	Home Improvement	Home Improvement
8:00a.m.	Eye for an Eye	Eye for an Eye
8:30a.m.	Eye for an Eye	Eye for an Eye
9:00a.m.	The People's Court	The People's Court
10:00a.m.	I Love Lucy	I Love Lucy
10:30a.m.	I Love Lucy	I Love Lucy
11:00a.m.	Matlock	Matlock
12:00p.m.	Family Feud	Family Feud
12:30p.m.	Family Feud	Family Feud
1:00p.m.	Who Wants to Be a Millionaire	Who Wants to Be a Millionaire
1:30p.m.	Who Wants to Be a Millionaire	Who Wants to Be a Millionaire
2:00p.m.	Mad About You	Mad About You
2:30p.m.	The Nanny	The Nanny

\*Source: Yahoo TV Listings,

[http://tv.yahoo.com/grid/?\\_crumb=&title=&subtit=&desc=&contrib=&search=&starthour=&startdate=&range=&src=&setlineupcookie=true&.intl=us&zip=35202&.done=&lineup=us\\_DMA630](http://tv.yahoo.com/grid/?_crumb=&title=&subtit=&desc=&contrib=&search=&starthour=&startdate=&range=&src=&setlineupcookie=true&.intl=us&zip=35202&.done=&lineup=us_DMA630)

## WTTO/WDBB Program Schedule for April 27, 2006\*

3:00p.m.	ER	ER
4:00p.m.	8 Simple Rules	8 Simple Rules
4:30p.m.	8 Simple Rules	8 Simple Rules
5:00p.m.	The Simpsons	The Simpsons
5:30p.m.	Friends	Friends
6:00p.m.	Friends	Friends
6:30p.m.	Everybody Loves Raymond	Everybody Loves Raymond
7:00p.m.	Smallville	Smallville
8:00p.m.	Supernatural	Supernatural
9:00p.m.	WB21 News at 9	WB21 News at 9
9:30p.m.	Everybody Loves Raymond	Everybody Loves Raymond
10:00p.m.	The Andy Griffith Show	The Andy Griffith Show
10:30p.m.	The Andy Griffith Show	The Andy Griffith Show
11:00p.m.	Frasier	Frasier
11:30p.m.	That '70s Show	That '70s Show

\*Source: Yahoo TV Listings

[http://tv.yahoo.com/grid/?crumb=&title=&subtit=&desc=&contrib=&search=&starthour=&startdate=&range=&src=&setlineupcookie=true&.intl=us&zip=35202&.done=&lineup=us\\_DMA630](http://tv.yahoo.com/grid/?crumb=&title=&subtit=&desc=&contrib=&search=&starthour=&startdate=&range=&src=&setlineupcookie=true&.intl=us&zip=35202&.done=&lineup=us_DMA630)