

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

In the Matter of)	
)	
ABC, Inc.)	File Nos. BLCDDT-20110503ACH,
)	BPCDDT-20110525ACX and
WPVI-TV, Philadelphia, Pennsylvania)	
Applications for Construction Permit and)	BPCDDT20110831ABM
License to Cover)	Facility ID No. 8616
)	
CBS Broadcasting, Inc.)	File Nos. BLCDDT-20090326ABH
)	Facility ID No. 25453
KYW-TV, Philadelphia, Pennsylvania)	
Application for License to Cover)	

MEMORANDUM OPINION AND ORDER

Adopted: July 16, 2015

Released: July 17, 2015

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration an Application for Review filed by Global Radio, LLC (Global), licensee of AM station WNWR, Philadelphia, Pennsylvania, seeking review of a decision by the Video Division of the Media Bureau¹ denying numerous pleadings filed by Global in conjunction with the above-captioned applications of ABC, Inc. (ABC), licensee of WPVI-TV, Philadelphia, Pennsylvania, and CBS Broadcasting, Inc., licensee of KYW-TV, Philadelphia, Pennsylvania.² In its decision, the Video Division denied Global's various pleadings, affirmed its previous decision in this case,³ and granted the above-captioned applications. For the reasons set forth below, we deny Global's Application for Review.

II. BACKGROUND

2. *First Decision.* WNWR, WPVI-TV and KYW-TV operate from nearby towers in Philadelphia, Pennsylvania. Global has claimed that the 1998 construction of WPVI-TV and KYW-TV's (referred to jointly herein as "the Stations") digital facilities adversely affected the directional antenna system of WNWR. In its *First Decision*, the Video Division of the Media Bureau found that Global failed to demonstrate that the directional array of WNWR was adversely affected by construction of the Stations' digital facilities.⁴ Specifically, the Video Division found "the data collected in this

¹ See Letter of Barbara A. Kreisman, Chief of the Video Division to Susan Fox, Esq., and Howard Jaeckel, Esq., October 4, 2011 (*Second Decision*).

² See Application for Review of Global Radio, LLC, filed November 1, 2011. Also before the Commission are ABC, Inc.'s Opposition to Application for Review filed November 16, 2011; and Global Radio, LLC's Reply filed November 21, 2011.

³ See Letter of Barbara A. Kreisman, Chief of the Video Division to Howard Jaeckel, Esq. and John W. Zucker, Esq., 25 FCC Rcd 12562 (*First Decision*).

⁴ See *First Decision*, 25 FCC Rcd at 12564.

proceeding inconclusive on the question of adverse effect.”⁵ Furthermore, the Video Division found that, “given the amount of construction that has occurred in the vicinity of the WNWR array over the past 40 years . . . Global has not specifically demonstrated” that the Stations’ digital facilities “were the cause of any purported problems the WNWR array may have experienced.”⁶ More importantly, the Video Division concluded that, “[e]ven if Global were able to conclusively show an adverse effect on the WNWR array, we find that issue no longer relevant.”⁷ The Video Division noted that in 2005 Global was granted a modification to the WNWR license specifying revised operating parameters for the station. In its modification application, Global represented that the operating parameters for WNWR were “in full compliance with the terms of the station’s authorization.”⁸ Based upon this representation, the Video Division found that “the 2005 WNWR license modification effectively incorporated the impacts of the various new towers on the AM station’s directional antenna system and thus, rendered issues relating to the 1998 tower construction moot.”⁹

3. *Second Decision.* Global sought reconsideration of the *First Decision* arguing that the staff erred by failing to consider fully its assertions that re-radiation¹⁰ from the Stations’ antennas has adversely impacted the WNWR directional array. In its *Second Decision*, the Video Division disagreed and concluded that the *First Decision* “contained a complete and thorough evaluation of the voluminous record in this case including Commission rules and precedent, the engineering showings submitted by all parties as well as all parties’ arguments and responses.”¹¹ The Video Division once again found that: (1) Global failed to demonstrate that the directional array of WNWR was adversely effected by construction of the Stations’ digital facilities; (2) Global has not specifically demonstrated that the Stations’ digital facilities were the cause of any purported problems the WNWR array may have experienced given the amount of construction that has occurred in the vicinity of the WNWR array over the past 40 years; and (3) Global represented in its 2005 modification application that it was no longer operating outside of its license parameters, and there is no longer any adverse effect to consider.¹² The Video Division concluded once again that “Global offers nothing new to persuade us that the previous decision was in error” and it affirmed its *First Decision*.¹³

4. *WPVI-TV Construction Permit and Modification Applications.* In its *Second Decision*, the Video Division, also reviewed its grant of the above-captioned application for construction permit filed by WPVI-TV on May 25, 2011, wherein the station proposed to relocate its post-DTV transition broadcast transmission facility on channel 6 from its current position on its former analog tower, to a nearby tower that was formerly utilized for WPVI-TV’s pre-transition channel 64 digital facility. Global alleged that the modified facilities will cause adverse harm to the WNWR directional array. In denying

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ In AM radio, the tower itself functions as the antenna. Consequently, a nearby tower may become an unintended part of the AM antenna system, “reradiating” the AM signal and distorting the authorized AM radiation pattern. Our rules contain several sections concerning tower construction near AM antennas that are intended to protect AM stations from the effects of such tower construction, specifically, Sections 73.1692, 22.371, and 27.63. *See Inquiry into the Commission’s Policies and Rules Regarding AM Radio Service Directional Antenna Performance Verification*, Third Report and Order and Second Order on Reconsideration, 28 FCC Rcd 12555, 12556 (2013) (*Third Report and Order*).

¹¹ *See Second Decision* at 2.

¹² *Id.*

¹³ *Id.*

Global's petition to deny, the Video Division found that WPVI-TV had included with its May 25, 2011 application "a thorough engineering study demonstrating that WPVI-TV had complied with its obligations under Section 73.1692 of the rules to evaluate the potential impact on the WNWR directional array."¹⁴ The Video Division noted that WPVI-TV's study showed that its proposed construction will have no measurable influence on the directional antenna pattern of WNWR. The Video Division noted that, in keeping with its request in its *First Decision*, WPVI-TV conducted a study utilizing "moment method modeling" techniques¹⁵ for determining any adverse impact on the WNWR directional array. The Video Division also noted that, by contrast, Global "has not offered any additional proof or engineering documentation to substantiate its claim and relies solely on studies submitted with its previous filings."¹⁶ Based upon this record, the Video Division concluded that "grant of the May 25, 2011 application for construction permit was proper."¹⁷ The Video Division also concluded that "[w]ith respect to the August 31, 2011 modification application, "because WPVI-TV is only proposing a reduction in power, we conclude that there will be no adverse impact on WNWR as a result of this change."¹⁸

5. *Application for Review.* In its Application for Review, before us now, Global argues that the Video Division erred by failing to consider its allegations that re-radiation from the Stations' 1998 digital construction caused interference to the WNWR directional antenna pattern and that this failure constitutes "reversible error".¹⁹ Global argues that the Video Division should have provided a more detailed analysis of the record before rendering its decision.²⁰ Global maintains that had it done so, the Video Division would have found that WNWR "suffered and continues to suffer adverse effects from" the Stations' 1998 digital construction.²¹

6. Global also alleges that the Video Division's use of the terms "conclusively"²² and "inconclusive"²³ has held Global to a new evidentiary standard.²⁴ Global argues that the correct evidentiary standard a party must meet in an administrative proceeding is a "preponderance of the evidence standard."²⁵ Global maintains that the Video Division "abused its discretion by applying an unprecedented standard in weighing the evidence"²⁶

7. Global also argues that the Video Division's consideration of other construction subsequently occurring in the vicinity of the WNWR array was an erroneous application of a "novel

¹⁴ *Id.* at 2-3.

¹⁵ Moment method modeling is a computer modeling technique that can be used to verify that an AM directional antenna performs as authorized. See *Third Report and Order*, 28 FCC Rcd at 12558 n.14.

¹⁶ See *Second Decision* at 3.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Global Application for Review at 7.

²⁰ *Id.*

²¹ *Id.* at 2.

²² See, e.g., *Second Decision* at 2 (reaffirming the *First Decision*'s conclusion that "Global failed to conclusively demonstrate that the directional array of WNWR was adversely affected by construction of the Stations' digital facilities").

²³ See, e.g., *First Decision*, 25 FCC Rcd at 12564 ("We find the data collected in this proceeding inconclusive on the question of adverse effect").

²⁴ Global Application for Review at 2, 6-7.

²⁵ *Id.* at 8 (citing *Steadman v. SEC*, 450 U.S. 91, 95 (1980)).

²⁶ *Id.* at 8.

antenna farm limitation” to the applicability of Section 73.1692 of the Commission’s rules to AM stations located in the vicinity of an antenna farm.²⁷ Global argues that application of the “antenna farm limitation” “is at odds with the express language of the Commission’s own rules which provide, in Section 73.1692, for the protection of AM radio stations in the near vicinity of new tower construction.”²⁸

8. Finally, Global maintains that the grant of its 2005 modification application should have no bearing on the interference it purportedly suffered as a result of the Stations’ digital construction in 1998.²⁹ Global argues that it “did not and cannot solve the problem [of interference to the WNWR array from the Stations’ 1998 digital construction] itself because it does not have the authority or the ability to detune [the Stations’ tower].”³⁰ Global claims it made repairs in 2005 to the WNWR array and, “in so doing, adjusted the antenna array to restore WNWR to operation in conformance with the bare minimum pattern tolerances specified by the Commission.”³¹ Global claims that WNWR’s operations are still adversely affected by the Stations’ 1998 digital construction and “the coverage contour of WNWR has never been restored to its pre-1998 condition. . . .”³²

III. DISCUSSION

9. For the reasons described below, we deny the Application for Review. After a complete analysis of the record in this proceeding, we conclude that Global has failed to show that the Stations’ digital construction in 1999 and again in 2011 had an adverse effect on the WNWR array.

10. Global has failed to show that the Stations’ digital construction had an adverse effect on the WNWR antenna array. On the other hand, the Stations, on two occasions in 1999 and 2011, have submitted engineering evidence showing no adverse effect. In 1998, the Video Division first considered the possible impact that the Stations’ digital construction might have upon the WNWR array. Despite finding that “Global has failed to demonstrate that an immediate grant of the Stations’ applications for DTV facilities would adversely affect the operation of WNWR,” the Video Division added a condition to each of the Stations’ digital construction permits concerning protection to nearby AM directional stations.³³ With their license applications, the Stations submitted their showing as to the possible effect their digital construction may have upon the WNWR array.³⁴ The showing included “before and after” measurements performed by a consulting engineer jointly-selected by the Stations and Global that were taken based upon WNWR’s then most recent “full proof of performance.”³⁵ These measurements showed

²⁷ *Id.* at 9 (arguing that the Media Bureau applied a “novel antenna farm limitation”, *i.e.*, “that the existence of an adjacent antenna farm effectively extinguishes any claim of harm”, however, “[i]f the 40 years of longstanding presence of the antenna farm, which existed in 1998, is now supposed to represent a barrier to any relief for WNWR, why did the Media Bureau not apply this reasoning in the *1998 Bureau Letter Ruling*” or reference it in the stations’ construction permits?).

²⁸ *Id.*

²⁹ *Id.* at 12.

³⁰ *Id.* at 13.

³¹ *Id.*

³² *Id.*

³³ See Letter to Barry A. Friedman, Esq., from Barbara A. Kreisman, Chief of the Video Division, 1800E4-SAM, June 24, 1998, File Nos. BPDCT-980319KE, 980402KE, 980408KE, 980422KE, a copy of which was included with Global’s Application for Review.

³⁴ See “Further Engineering Report on Pre and Post Construction Partial Proof of Performance Measurements on Radio Station WNWR(AM) prepared by Larry H. Will, P.E.(Will Report) a copy of which was included with the Stations license applications. See File Nos. BLCDDT-19981212KE and BLCDDT-19981112KK.

³⁵ *Id.* In order to determine the possible effect on the WNWR array, the Stations were required to take field strength measurements on the array before undertaking the proposed modifications to their nearby television facilities. Field strength measurements determine the performance of an array at different radial points. See 47 C.F.R. § 73.151.

(continued....)

that the Stations' digital construction did not cause any impermissible re-radiation and did not have any adverse effect on the WNWR directional antenna pattern.³⁶ This conclusion was based upon the fact that the WNWR antenna pattern was "out of tolerance both before and after the construction of the Stations' digital facilities."³⁷ The Video Division agreed with this finding in its *First Decision* and affirmed this finding in its *Second Decision*.³⁸ Based on our review of the record, we agree with the Video Division's findings that the Stations' technical showing (that we note was prepared by a consulting engineer that was jointly-selected by the Stations and Global) demonstrated no adverse effect from the Stations' digital construction upon the WNWR array.

11. Global argues that its own separate technical showing submitted in 1999 shows an adverse effect.³⁹ However, as ABC points out in its Opposition to Application for Review, Global's 1999 engineering study included results based on its erroneous use of a 1969 partial proof of performance⁴⁰ as a baseline for analysis.⁴¹ ABC argues that Global should have performed a new contemporaneous full proof of performance.⁴² We agree. Global's use of the 1969 partial proof as a baseline to show the effect of construction on the WNWR array in 1998 was not appropriate given that construction of another tower occurred in 1980-1981 in the vicinity of the WNWR after the 1969 partial proof. Global should have conducted a full proof in 1998 to use as a baseline to determine the effect of the Stations' construction on the WNWR array. Furthermore, Global's use of a partial proof, as the baseline for comparison, did not comply with the Commission's rules which require use of a full (rather than partial) proof of performance in such cases.⁴³ Therefore, we give no weight to Global's flawed alternative engineering showing. That leaves only the 1998 showing prepared by a consulting-engineer jointly chosen by the Stations and Global as the only reliable and contemporaneous evidence of the effect of the Stations' 1998 digital construction on the WNWR array. Since that evidence shows no adverse effect, we deny Global's Application for Review.

12. We also affirm the ruling in the Video Division's *Second Decision* that, because WPVI-TV was only proposing a reduction in power, there will be no adverse effect on WNWR as a result of the

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After completing the modifications to their television facilities, the Stations were required to again take measurements to determine if there were any changes in the field strength measurements.

³⁶ See Will Report at 6.

³⁷ See ABC's Opposition to Application for Review at 5; see also Will Report at 10-11. The Will Report found that the WNWR(AM) array "has been unstable for a period of 30 years and this instability is directly responsible for the changes in the measured values" *Id.* at 11.

³⁸ *First Decision* at 4 and *Second Decision* at 3.

³⁹ Global Application for Review at 2 (citing "Engineering Exhibit in Support of Informal Objections to Form 302 License Applications of Station WCAU-DT; Station KYW-DT, Philadelphia, PA" prepared by James B. Hatfield, PE (Hatfield Report)).

⁴⁰ "Partial proof of performance" requires fewer measurements than a full proof and is occasionally used to show that an AM array continues to operate properly. Partial proof of performance measurements must be made whenever the licensee has reason to believe that the radiated field may be exceeding the limits for which the station was most recently authorized to operate. See *Third Report and Order*, 28 FCC Rcd at 12558 n.15; see also 47 C.F.R. § 73.154.

⁴¹ ABC Opposition to Application for Review at 5, n. 9.

⁴² *Id.* citing Global's Consolidated Objections filed February 19, 1999 and Consolidated Reply filed January 12, 2000.

⁴³ See 47 C.F.R. § 73.151.

grant of WPVI-TV's 2011 modification application.⁴⁴ The Video Division found that the modification application included a thorough engineering study demonstrating that the proposed modification would have no measurable influence on the directional antenna pattern of WNWR.⁴⁵ Given that Global offered no additional proof or engineering documentation to substantiate its claim and relied solely on its previous flawed 1998 technical study, we affirm the Video Division conclusion that "grant of the May 25, 2011 application for construction permit was proper."⁴⁶

13. Citing to language in the decisions below, Global also alleges that the Bureau erred by requiring Global to "conclusively show an adverse effect on the WNWR array" caused by the 1998 construction of the Stations' digital facilities, an evidentiary standard that it argues "is patently in error."⁴⁷ In the *First Decision*, the Video Division, in discussing the effect that other construction may have had upon the WNWR array, stated that "even if Global were able to conclusively show an adverse effect on the WNWR array, we find that issue no longer relevant."⁴⁸ Global also points to the fact that, in the *First Decision*, the Video Division stated that it found "the data collected in this proceeding inconclusive" on the question of adverse effect.⁴⁹ Global further points to the fact that, in the *Second Decision*, the Video Division stated that "Global failed to conclusively demonstrate that the directional array of WNWR was adversely affected by construction of the Stations' digital facilities."⁵⁰ Although the Video Division incorrectly applied a "conclusive" evidentiary standard, we find the error to be harmless. Based on our independent review of the record under the applicable preponderance of the evidence standard,⁵¹ we find that Global failed to show an adverse effect to the WNWR array.⁵² The only reliable and contemporaneous evidence in the record – the 1998 showing prepared by a consulting engineer jointly-chosen by the Stations and Global - showed no adverse effect on the WNWR array as a result of the Stations' digital facilities. We therefore deny the Application for Review.

⁴⁴ *Second Decision* at 3.

⁴⁵ *Id.* at 2-3.

⁴⁶ *Id.* at 2.

⁴⁷ Global Application for Review at 6-8.

⁴⁸ *First Decision* at 3.

⁴⁹ Global Application for Review at 8.

⁵⁰ Global Application for Review at 7 citing *Second Decision* at 2.

⁵¹ See *In the Matter of Universal Service Contribution Methodology*, Order on Reconsideration, 29 FCC Rcd 9715 ¶ 12 (2014) ("Absent statutory requirements to the contrary or factors warranting a heightened standard, the Commission generally applies the 'preponderance of the evidence' standard in informal adjudications").

⁵² Global raises two other arguments in its Application for Review. First, Global argues that the Video Division applied a novel "antenna farm limitation" in this case and as a result it was improperly obligated to show that 40 years of construction in the area was not "the proximate cause of harm to the WNWR array." Global Application for Review at 8-9. Global also argues that the Video Division should not have considered the grant of the 2005 WNWR modification application as having mooted any issues concerning the impact of the Station's 1998 digital construction. Global Application for Review at 10-14. Because both arguments are based on the premise that an adverse effect occurred in this case, our conclusion to the contrary - that no adverse effect to the WNWR array as a result of the Station's digital construction was shown - renders these arguments moot.

14. Finally, we deny Global's Motion to Remand⁵³ this proceeding to the Media Bureau for a determination based on the new rules adopted in 2013, with respect to AM directional arrays.⁵⁴ The Commission concluded that the new rules will apply only to towers constructed or modified after the effective date of the new rules,⁵⁵ a requirement that is not satisfied here.⁵⁶ Likewise, since no adverse effect was shown, we need not consider, as Global suggests, the Commission's new policy with respect to AM directional arrays, as it applies only to "an AM station [that] has been *adversely affected* by tower construction or modification authorized and either commenced or completed before or on the effective date of the new rules."⁵⁷ ACCORDINGLY, IT IS ORDERED that, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and section 1.115(g) of the Commission's rules, 47 C.F.R. § 1.115(g), the Application for Review of Global Radio, LLC, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁵³ See Global's Motion to Remand, filed December 4, 2014.

⁵⁴ See *Inquiry into the Commission's Policies and Rules Regarding AM Radio Service Directional Antenna Performance Verification*, Third Report and Order, 28 FCC Rcd 12555, 12565 (2013).

⁵⁵ *Id.*, 28 FCC Rcd at 12565 ¶¶ 18-19.

⁵⁶ See ABC's Opposition to Motion to Remand, filed December 17, 2014, at 4 ("the Commission clearly stated that the rule change 'does not impose any new obligations on licensees with respect to disturbances caused to AM antenna patterns' and that any complaints claiming interference prior to the effective date of the new rules 'will be resolved in accordance with any pre-existing rules that are applicable to the service in question'").

⁵⁷ *Id.*, 28 FCC Rcd at 12565 ¶ 20.