



FOX TELEVISION STATIONS, INC.

444 North Capitol Street, NW
Suite 740
Washington, DC 20001

A Unit of Fox Television

November 2, 2012

Via Email and Hand Delivery

Mr. Robert Baker
Ms. Hope Cooper
Political Programming Branch
Policy Division
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Response to Randall Terry Reasonable Access Complaint against WTTG(TV) filed
November 1, 2012

Dear Mr. Baker and Ms. Cooper:

Fox Televisions Stations, Inc. ("FTS"), licensee of WTTG(TV), Washington, DC ("WTTG"), hereby responds, at the informal request of Commission staff, to the above-referenced complaint filed by counsel to Randall Terry on November 1, 2012 ("Complaint").¹ The Complaint alleges that WTTG is required to grant reasonable access to Terry based on a Memorandum Opinion and Order released by the Media Bureau on October 31, 2012 ("Bureau Order").² The Bureau Order held that Terry – a candidate for President in West Virginia – was entitled to reasonable access on Washington, DC television station WUSA-TV because that station's publicly-available Noise Limited Service Contour ("NLSC") covered at least one entire county and part of another county in West Virginia.³ Thus, the Bureau determined that WUSA-TV reached more than a de minimis portion of the West Virginia population.⁴ In stark contrast, WTTG's NLSC does *not* cover the entirety of any county in West Virginia.⁵ Accordingly, the Bureau Order does not require WTTG to grant reasonable access to Terry.

¹ See Letter from A. Wray Fitch III and Patrick D. Purtill, Counsel to Randall Terry for President, to Robert Baker and Hope Cooper, Federal Communications Commission, dated Nov. 1, 2012.

² See *In re Complaint of Randall Terry for President And Pro-Life Candidates Against Station WUSA(TV) Washington, D.C.*, Memorandum Opinion and Order, DA 12-1734 (rel. October 31, 2012).

³ See *id.* at 5.

⁴ See *id.*

⁵ Counsel for Terry confirmed by telephone to counsel for FTS on November 1 that Terry does not dispute that, under the Bureau Order, in order for a candidate to be entitled to reasonable access, a station's NLSC must cover at least an entire county of the state in question.

Joseph M. Di Scipio
Vice President
Legal and FCC Compliance
Phone: (202) 715-2350

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Federal Communications Commission
Bureau / Office

Terry's Complaint asserts that the Bureau Order requires WTTG to grant reasonable access because:

“[L]ike WUSA-TV, WTTG-TV's NLSC *appears* to cover all of Jefferson County, WV. See WTTG-TV's NLSC map at <https://stations.fcc.gov/station-profile/wttg/contour-maps/>. WTTG-TV's NLSC encompasses more than a *de minimis* portion of the population of West Virginia.” (emphasis supplied)⁷

Putting aside that even the Complaint fails to make an unqualified claim about WTTG's service in West Virginia, the simple fact is that the station's NLSC does *not* cover all of Jefferson County. For that matter, WTTG's NLSC does not cover any of Berkeley County. Attached hereto as Attachment 2 is the map filed by WTTG as part of its application for the construction permit that resulted in its current license; see BLCDDT-20080507AAA. The map is publicly available at https://licensing.fcc.gov/cgi-bin/ws.exe/prod/cdbs/forms/prod/cdbsmenu.htm?context=25&appn=101238593&formid=301&fac_num=22207 (see Exhibit D). The map clearly shows that WTTG's NLSC (its 41 dBu contour) does not encompass all of Jefferson County.⁸ Therefore, under the standard set forth in the Bureau Order, WTTG does not cover more than a *de minimis* area of West Virginia, and Terry is not entitled to reasonable access on the station.⁹

The Complaint does not assert otherwise. As noted, Terry does no more than allege that it “appears” from a contour map on the Commission web site that WTTG's NLSC covers all of Jefferson County in West Virginia. The map relied upon by the Complaint, however, does not even purport to show county boundaries. Moreover, the map is labeled as showing WTTG's 36 dBu contour. But that contour has no bearing on the station's NLSC and is therefore irrelevant to the standard set forth in the Bureau Order. It cannot be that the standard for reasonable access is determined by an allegation that a map produced on the Commission website, without legible (if any) county boundaries, and using the wrong signal contour, *appears* to cover all of a given county outside of a station's market.¹⁰

Quite the contrary, the Commission historically has made clear that it defers to licensees' reasonable and good faith judgment in determining whether a station has made a reasonable choice about access: “The test of whether a licensee has met the requirement of [47 U.S.C. § 312(a)(7)] is one of reasonableness. The Commission will not substitute its judgment for that of the licensee but, rather, it will determine in any case that may arise whether the licensee can be said to have acted reasonably and in good faith in fulfilling his obligations under this section.”¹¹ In upholding 47 U.S.C. § 312(a)(7) against a constitutional challenge, the Supreme Court emphasized that “[i]f broadcasters take the appropriate factors into account and act reasonably and in good faith, their decisions will be entitled to deference

⁷ Complaint, at 2. The map referenced in the Complaint is attached hereto as Attachment 1.

⁸ Pursuant to 47 C.F.R. § 73.622(e), the NLSC for digital television stations operating on channels between 14-69 is the 41 dBu contour. WTTG operates on digital channel 36.

⁹ The Bureau Order also indicated that WUSA-TV's signal reached approximately 3% of West Virginia's population, a number the FCC said could not be considered *de minimis*. See Bureau Order, at 5. Since WTTG does not cover all of Jefferson County with its NLSC, the station reaches materially less than 3% of the population of West Virginia and is therefore *de minimis*.

¹⁰ The map, attached at Attachment 1, purports to show the “36 dBu Service Contour for WTTG, Washington, DC FCC File No. BLCDDT-20080507AAA.” FTS has no guess as to what this map represents, but it is not WTTG's NLSC. Because WTTG broadcasts on digital channel 36, the NLSC is the 41dBu contour.

¹¹ *Political Broadcasting Primer*, 100 F.C.C.2d 1476, 1523 (1984) (quoting *Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 F.C.C.2d 510, 536 (1972)).

even if the Commission's analysis would have differed in the first instance."¹² Given that WTTG does not serve West Virginia under the standard set forth in the Bureau Order, FTS' good faith determination not to grant access to Terry is eminently reasonable.

Fox Televisions Stations, Inc., for the reasons cited above, respectfully requests that the Media Bureau deny the Complaint. Put simply, Terry has not established that the Bureau Order entitles him to the relief sought. FTS believes that there are other statutory and constitutional bases for denying the Complaint. In the interest of time, however, and given the Commission's request that FTS respond to the Complaint less than 24 hours after it was filed, FTS limits this response to the standard set forth in the Bureau Order. Among other things, FTS does not concede that the NLSC is the appropriate metric for determining compliance with the reasonable access rules. Instead, FTS believes that a proper analysis of its signal would demonstrate that it does not provide any service to viewers in West Virginia, the state in which Terry is a qualified candidate for office.

Sincerely,



Joseph M. Di Scipio

cc: A. Wray Fitch III
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McLean, VA 22102-3807
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¹² *CBS, Inc. v. FCC*, 453 U.S. 367, 387 (1981).

ATTACHMENT 1



TV Station Profiles & Public Inspection Files

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- [FOR BROADCASTERS](#)
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STATION PROFILE

WTTG WASHINGTON, DC

Virtual Channel **5** | RF Channel **36** | Facility ID **22207**



FIND A STATION

You may enter a call sign (e.g. WXYZ), network affiliation (e.g. NBC), channel number (e.g. 25) or facility ID number (e.g. 123456)

Search WTTG Station Profile

CONTOUR MAPS



RECENT HISTORY

- Uploaded 1 file in Issues and programs lists 3 weeks ago
- Uploaded 1 file in Records concerning commercial limits in childrens programs 3 weeks ago
- Created 1 new folder in Political File 2 months ago
- Created 1 new folder in Political File 2 months ago
- Uploaded 1 file in Political File 2 months ago
- Uploaded 1 file in Political File 2 months ago

GENERAL RESOURCES

[The Public and Broadcasting Manual](#)

For help or assistance please contact us at 1-877-480-3201 or 1-717-338-2824 (TTY) or you may submit requests online via e-support

Federal Communications Commission
445 12th Street SW
Washington DC 20554

Phone: 1-888-225-5322
TTY: 1-888-835-5322
Fax: 1-866-418-0232
E-mail: fccinfo@fcc.gov

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- [Privacy Policy](#)
- [Moderation Policy](#)
- [Website Policies & Notices](#)
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- [FOIA](#)
- [No Fear Act Data](#)
- [Open Government Directive](#)
- [Plain Writing Act](#)
- [2009 Recovery and Reinvestment Act](#)

GET EMAIL UPDATES

ATTACHMENT 2

CONTOUR POPULATION
48 DBU : 6,811,881
41 DBU : 7,163,895

SMITH and FISHER

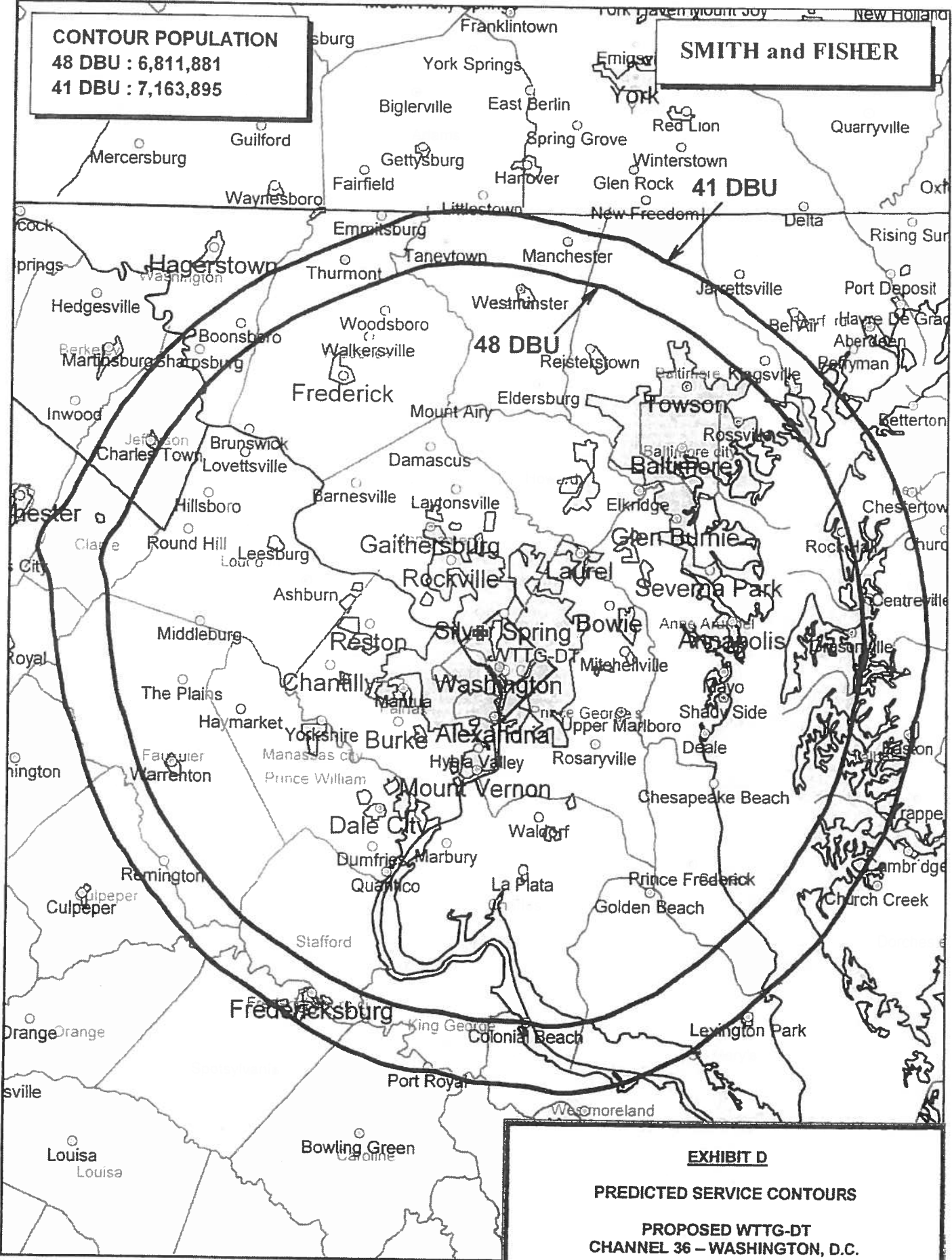


EXHIBIT D
PREDICTED SERVICE CONTOURS
PROPOSED WTTG-DT
CHANNEL 36 – WASHINGTON, D.C.
SMITH AND FISHER