

COPY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of

CHANNEL 51 OF SAN DIEGO, INC.

For Displacement Construction Permit for
LPTV Station K12PO,
Temecula, California

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LMS File No. 0000052518
Facility ID No. 41601

Accepted / Filed

JAN 15 2020

To: Marlene H. Dortch, Secretary

Attn: The Commission

Federal Communications Commission
Office of the Secretary

**REPLY TO OPPOSITION TO
APPLICATION FOR REVIEW**

Submitted by

CHANNEL 51 OF SAN DIEGO, INC.

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January 15, 2020

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REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

Channel 51 of San Diego, Inc. ("CSD"), by its attorneys, hereby replies to the Opposition filed on January 2, 2020 by the County of Los Angeles, California ("LA County"), to the Application for Review ("AFR") filed by CSD on December 17, 2019. The AFR seeks Commission review of the unpublished letter decision of the Media Bureau, dated November 18, 2019 ("Letter Decision"), dismissing the above-referenced application.¹

I. NEITHER SECTION 73.687 NOR SECTION 74.709 OF THE COMMISSION'S RULES APPLIES TO DIGITAL LPTV OPERATIONS ON CHANNEL 15.

As an initial matter, it should be noted that LA County expressly agrees with CSD's assertion that the Letter Decision improperly relied on Section 73.687(e)(3) of the Commission's rules.² This fact alone shows that the Commission should grant the AFR and review the entire underlying record in this proceeding.

¹ Letter to Channel 51 of San Diego, Inc. from Hossein Hashemzadeh, Deputy Chief, Video Division, Media Bureau (Nov. 18, 2019).

² Opposition at 2.

LA County nevertheless concludes that the Commission's decision should stand because the Commission purportedly "agreed with LA County's analysis" that CSD failed to meet the requirements of Section 74.709 of the Commission's rules, which sets forth Low Power TV requirements to protect land mobile stations.³ This line of reasoning is rife with inaccuracies and unfounded assumptions. First, as CSD explained in its previous filings, that rule provision is inapposite because it applies to analog, not digital, LPTV stations. Second, unless LA County has a crystal ball, it cannot know what facts the Commission relied upon because the Letter Decision failed to include any meaningful analysis to support its conclusions, in clear violation of the Administrative Procedure Act ("APA"). This is yet another reason the Commission should review the Letter Decision.

Even if Section 74.709 were to apply to digital LPTV operations, it should not impact CSD's application. That Section does not specify a methodology for determining interference potential on Channel 15. While it is true that LA County was granted authority to operate on that channel pursuant to a waiver in 2008,⁴ it is axiomatic that waivers are only binding upon the parties requesting them.⁵ The Commission cannot (and did not) amend its rules in a footnote in a decision merely granting an application.

Finally, as a precautionary measure, CSD requested a waiver of Section 74.709 and has amply justified the need for its grant. LA County claims that a waiver is not justified because

³ Opposition at 3.

⁴ See *County of Los Angeles, California, Request for Waiver of the Commission's Rules to Authorize Public Safety Communications in the 476-482 Mhz Band*, Order, 23 FCC Rcd 18389, 18404 (PSHSB 2008) ("*LA County Waiver*").

⁵ A waiver exempts only certain parties based on a determination that application of the rule is unwarranted due to special circumstances in particular, individualized cases. See e.g., *WAIT Radio v. FCC*, 418 F.2d 1153, 1159, 135 U.S. App. D.C. 317 (D.C. Cir. 1969).

CSD can operate on VHF Channel 3 and therefore has a “reasonable alternative.”⁶ This argument has no merit. The Commission acknowledged that VHF is inferior to UHF when it offered to pay TV broadcasters to move from UHF to VHF channels during the Incentive Auction.⁷ Thus, operation on Channel 3 is not a “reasonable alternative” because reception on that channel would be far inferior to reception on UHF Channel 15.

II. GRANTING CSD’S APPLICATION BEST SERVES THE PUBLIC INTEREST.

The public interest would be best served by allowing CSD to operate on Channel 15 so it can resume providing the residents of Temecula with a free, over-the-air means of viewing KUSI-TV. Conversely, the public interest benefits that formed the basis of the *LA County Waiver* no longer ring true. The Commission granted the waiver based on a vision that it would result in the creation of a vast public safety network in LA. Nearly a decade later, that vision has yet to materialize.⁸ Whether it ever can materialize is questionable, since LA County’s operations on Channel 15 have been compromised by interference from XHTJB (much worse than CSD’s ever would cause) – essentially rendering the channel unusable for LA County’s proposed operations.⁹

⁶ Opposition at 4.

⁷ *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Report and Order, 30 FCC Rcd 3253 ¶ 165 (2015) (“Broadcasters that wish to remain in the business also have an opportunity to strengthen their finances through the cash infusion resulting from a winning reverse auction bid to channel share, to move from an UHF to a VHF channel or to move from a high-VHF to a low-VHF channel.”)

⁸ To CSD’s knowledge, LA County has not yet filed its required Annual Report with the Commission, which was to be filed by December 31, 2019.

⁹ See CSD’s “Opposition to Petition to Deny,” submitted June 26, 2019, pp. 3-6, and the Engineering Statement attached thereto.

The Commission also concluded that grant of the *LA County Waiver* would not have a negative impact on the digital transition.¹⁰ Clearly, that is not the case; today's congested spectrum landscape is vastly different than it was twelve years ago. LA County's land mobile authorization for broadcast Channel 15 has remained largely unconstructed for over a decade -- and may never be constructed -- thus needlessly tying up much-needed spectrum. On balance, the public interest would be much better served by allowing CSD to operate on Channel 15 so it can resume service to the residents of Temecula.

III. CONCLUSION

For the reasons discussed above, the Commission should reject LA County's arguments, grant the Application for Review, review the Letter Decision and the entire underlying record, and reinstate and grant CSD's application.

Respectfully submitted,

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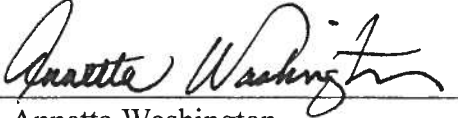
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¹⁰ Indeed, in granting LA County's waiver, the Public Safety and Homeland Security Bureau noted that "permitting the county's land mobile use of TV Channel 15 would not deplete the pool of DTV spectrum." See *LA County Waiver*, 23 FCC Rcd at 18404.

CERTIFICATE OF SERVICE

I, Annetta Washington, a legal secretary with the law firm of Wilkinson Barker Knauer, LLP, hereby certify that on this 15th day of January, 2020, I served copies of the foregoing Reply to Opposition to Application for Review on the following via first-class United States mail, postage prepaid:

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