

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
CHANNEL 51 OF SAN DIEGO, INC.) LMS File No. 0000052518
) Facility ID No. 41601
For Displacement Construction Permit for)
LPTV Station K12PO,)
Temecula, California)

To: Marlene H. Dortch, Secretary

Attn: The Commission

Accepted / Filed

DEC 17 2019

**Federal Communications Commission
Office of the Secretary**

APPLICATION FOR REVIEW

Submitted by

CHANNEL 51 OF SAN DIEGO, INC.

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December 17, 2019

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APPLICATION FOR REVIEW

Channel 51 of San Diego, Inc. ("CSD"), by its attorneys, pursuant to Section 1.115 of the Commission's rules, hereby submits this Application for Review of the unpublished letter decision of the Media Bureau, dated November 18, 2019 ("Letter Decision"), dismissing the above-referenced application.¹ The Commission should review and reverse the Letter Decision and grant CSD's application ("Displacement Application"). The Letter Decision improperly relied on Section 73.687(e)(3) of the Commission's rules, failed to include any meaningful analysis to support its conclusions, in clear violation of the Administrative Procedure Act ("APA"), and erroneously dismissed the Displacement Application. CSD is severely prejudiced by the outcome of the Letter Decision. Prompt review by the Commission is therefore warranted to conform to precedent, correct the Bureau's erroneous conclusions and avoid further prejudice

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

to CSD. Accordingly, CSD respectfully requests that the Commission review this matter, reverse the Letter Decision and reinstate and grant CSD's Displacement Application.

I. BACKGROUND.

CSD has been the licensee of analog LPTV station K12PO since February 2004. Until March 15, 2019, the station was rebroadcasting the programming of CSD's full-power DTV station KUSI-TV, San Diego, California and providing residents of the Temecula, California area with a free, over-the-air means of viewing KUSI-TV. The Temecula area is in a terrain-blocked valley and, although Temecula is within the Los Angeles DMA, residents there do not receive over-the-air signals from the Los Angeles TV stations.

As part of the repack following the Commission's Incentive Auction (Auction 1000), the Commission ordered DTV station KDOC-TV, Anaheim, California to change its over-the-air channel to Channel 12. In anticipation of that change, CSD submitted the Displacement Application on April 11, 2018, during the filing window for such applications, proposing LPTV DTV operations on Channel 15. The Displacement Application was not mutually exclusive with any other applications and was unopposed.² More than a year later, on May 30, 2019, the county of Los Angeles, California ("LA County") filed a pleading styled as a "Petition to Deny"

² CSD received a letter from the Bureau on March 11, 2019, stating that CSD's proposed operation on Channel 15 would cause interference with land mobile operations on Channels 14 and 16. *See* Letter to Channel 51 of San Diego, Inc. from Hossein Hashemzadeh, Deputy Chief, Video Division, Media Bureau (March 11, 2019). CSD amended its Displacement Application on April 4, 2019. As part of that amendment, CSD included an engineering showing demonstrating lack of interference to LA County's operations and a request for waiver of Section 74.709(b) of the rules to allow CSD to relocate its Temecula, CA LPTV DTV station to Channel 15.

regarding the Displacement Application, claiming that CSD's proposal would cause interference to LA County's public safety land mobile radio network operations on Channel 15.³

KDOC-TV began broadcasting on Channel 12 on March 14, 2019. The next day, CSD took station K12PO off the air. The station has remained silent since then.⁴

II. THE BUREAU IMPROPERLY RELIED ON SECTION 73.687(e)(3) OF THE RULES.

In dismissing the Displacement Application, the Bureau relied *solely* on Section 73.687(e)(3) of the Commission's rules to support its claim that CSD's proposed operations would not provide the necessary interference protection to land mobile operations as required by the rules. That rule section, however, pertains *only* to the protection of land mobile operations by television stations operating on Channels 14 and 69. Because the Displacement Application proposes operations on Channel 15, Section 73.687(e)(3) is inapplicable and was erroneously applied in the instant case. For this reason alone, the Commission should review the Letter Decision. In addition, it is worth noting that Section 73.687 of the rules was last updated in 1963⁵ and applies to analog TV station operation, as DTV stations were not added to the Commission's rules until technical parameters were implemented in 1997.⁶

³ CSD filed an Opposition to the Petition to Deny on June 26, 2019 ("Opposition"), which included an engineering study to rebut LA County's interference claims. LA County filed a Reply on July 9, 2019 ("Reply").

⁴ The Commission recently granted CSD's Request for Special Temporary Authority to operate K12PO on Channel 3 (Application No. 0000088770). However, this is not a permanent solution because of the inferior reception of VHF broadcast television transmissions in a digital environment.

⁵ See 28 Fed. Reg. 13660 (Dec. 14, 1963).

⁶ See 62 Fed. Reg. 26989 (May 16, 1997).

III. THE LETTER DECISION VIOLATES THE APA BECAUSE IT FAILS TO PROVIDE ANY MEANINGFUL ANALYSIS TO SUPPORT ITS FINDINGS AND DOES NOT ADDRESS ARGUMENTS RAISED BY CSD IN ITS PLEADINGS.

In addition to citing to an inapposite rule provision, the Bureau violated the APA by failing to provide a reasoned basis for its actions, consider all of the evidence presented to it, and articulate a rational connection between the presented facts and its decision. As such, the Letter Decision is arbitrary and capricious because it offers no details regarding the information upon which the Bureau based its decision and no clear standard for future applicants.

Actions of the Commission are governed by the APA, which instructs reviewing courts to set aside an agency action if it is “found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁷ The Media Bureau’s brief Letter Decision in this case is precisely that, as it provides no reasoned basis for its decision other than a cryptic and conclusory statement that the Bureau’s own engineering analysis “reveals that Channel 51’s proposal, as amended, does not provide the necessary interference protection to land mobile operations as required by the rules.”⁸ Such a brief, opaque statement is insufficient to satisfy the APA’s requirement that the Commission provide a reasoned basis for its actions, especially in light of the extensive record in this matter.

Under the APA, an agency is required “to examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’”⁹ Here, it is not even clear what facts the Media Bureau found, let alone how the facts support the conclusion that CSD’s proposal, as amended, would cause interference

⁷ 5 USC §706(2)(A).

⁸ See Letter Decision at 1.

⁹ *CBS Corp. v. FCC*, 663 F.3d 122, 137 (2nd Cir. 2011) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 US 29, 43 (1983)).

to LA County's operations, as the Letter Decision provides no details of its engineering analysis. Because the Bureau has failed to provide a reasoned basis for its conclusions, the Letter Decision is fundamentally flawed and must be reviewed.¹⁰

CSD provided extensive documentation over the course of this proceeding demonstrating that its LPTV DTV technical proposal on Channel 15 would not cause interference to LA County's operations. Moreover, CSD stated that LA County's system should not preclude grant of the Displacement Application because that system remains largely unbuilt (despite LA County having authority to construct for over 10 years) and may never be completed due to interference from DTV station XHTJB, Tijuana, Baja California, Mexico. CSD maintained that it should not be held hostage to LA County's indefinite plans to fully deploy on Channel 15, especially when CSD stands ready to deploy on that channel. By failing to afford any consideration to these issues raised by CSD – let alone resolving those issues – the Letter Decision is patently defective and cannot stand.¹¹

¹⁰ As the courts have warned in the past, "if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute." *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (1970) (subsequent history and citations omitted). See also *Home Box Office v. FCC*, 567 F.2d 9 (DC Cir 1977) (noting that the Commission's reliance on "conclusory phrases" without sufficient discussion of its actions can be problematic).

¹¹ See, e.g., *Iowa v. FCC*, 218 F.3d 756 (DC Cir. 2000) (stating "the Commission's failure to address [petitioner's] argument requires that we remand this matter for the Commission's further consideration"); *AT&T Corp. v. FCC*, 86 F.2d 242, 247 (DC Cir. 1997) (remanding where Commission "completely failed to address" argument raised in ex parte letter); *Motor Vehicle Mfg. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (stating that an agency rule "would be arbitrary and capricious if the agency . . . entirely failed to consider an important aspect of the problem").

V. CSD'S ENGINEERING SHOWINGS SUPPORT GRANT OF THE DISPLACEMENT APPLICATION.

The Letter Decision erroneously concluded that CSD's proposed operations would cause interference to LA County's land mobile operations on Channel 15. As CSD explained, the Commission's rules do not specify a methodology for determining interference potential between K12PO's proposed channel 15 DTV LPTV operations and land mobile facilities. In an analogous case, however, the Commission relied on Section 90.187(d)(1)(ii) of its rules (which expresses protection criteria for trunking operations in the 150 - 512 MHz band) to determine interference potential between a Channel 15 television facility and an Offshore Radio Service ("ORS") facility.¹² Specifically, the applicant used the criteria in Section 90.187(d)(1)(ii) to determine the extent of any overlaps between the broadcast station's contour and the ORS station's interference contour.

In the amendment to its Displacement Application, CSD used this same sensible approach to evaluate the interference potential of its proposed LPTV DTV operation, as modified, to LA County's operations and concluded that interference is unlikely, taking into account (1) that the proposed facility is low power and low antenna height; (2) that the proposed antenna pattern directs a null value in the direction of Los Angeles County, and (3) that there is extensive terrain blockage between the proposed facility and Los Angeles County. Given that CSD adequately demonstrated a lack of interference and that LA County's technical showings failed to rebut this demonstration, LA County's Objection should have been dismissed and the Displacement Application granted.

¹² LMS File No. 0000056548.

VI. CONCLUSION.

For the reasons discussed above, the Commission should grant this Application for Review, review the Letter Decision, and reinstate and grant CSD's Displacement Application.

Respectfully submitted,

CHANNEL 51 OF SAN DIEGO, INC.

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December 17, 2019

ATTACHMENT A

Letter Decision



Federal Communications Commission
Washington, D.C. 20554

November 18, 2019

Channel 51 of San Diego, Inc.
4575 View Ridge Avenue
San Diego, CA 92123

Re: Application For Minor Change
K12PO, Temecula, CA
Facility ID No. 41601
LMS File No. 0000052518

Dear Applicant:

This concerns the above-referenced application filed by Channel 51 of San Diego, Inc. (Channel 51) for a displacement construction permit for K12PO, Temecula, California, as amended (K12PO or Station). The County of Los Angeles (County of LA) filed an informal objection to the application.¹ For the reasons set forth below, we grant County of LA's informal objection and dismiss the application.

K12PO was licensed on channel 12 at Temecula, California; however, the Station's channel 12 operations were displaced when KDOC-TV, Anaheim, California, was reassigned to channel 12 as a result of the incentive auction and repacking process. Channel 51 filed the above-referenced displacement application specifying channel 15. County of LA objects to Channel 51's application for channel 15 arguing that it will cause impermissible interference to the County of LA's public safety land mobile system on channel 15 in violation of the rules. County of LA provides an engineering analysis to support its conclusion. Channel 51 responds with an engineering analysis of its own that it argues shows that interference is unlikely. Channel 51 also argues that County of LA's public safety land mobile facility on channel 15 has not been completely constructed and therefore should not be afforded protection.

Channel 51 attempted to amend its application to resolve the potential interference to County of LA's public safety land mobile facility, however, our engineering analysis reveals that Channel 51's proposal, as amended, does not provide the necessary interference protection to land mobile operations as required by the rules.² The fact that County of LA has not yet completed construction of all of its public safety land mobile facility on channel 15 is irrelevant as low power television stations are required by the rules to protect all authorized land mobile stations.³ Because it does not comply with the rules, Channel 51's application is defective.

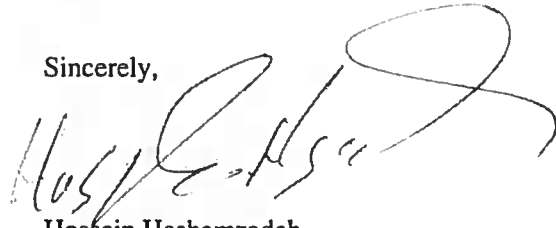
¹ Also before the Commission is Channel 51's opposition. Although styled a "Petition to Deny," County of LA did not submit its filing until more than a year after Channel 51's application was accepted for filing and it is therefore late-filed for a petition to deny. See 47 CFR 73.3584. We shall instead consider this filing as an informal objection. See 47 CFR 73.3587.

² 47 CFR 73.687(e)(3).

³ *Id.*

Accordingly, for the foregoing reasons, the informal objection filed by the County of Los Angeles **IS GRANTED** and the application for displacement construction permit (LMS File No. 0000052518) for channel 15 at Temecula, California **IS DISMISSED**.

Sincerely,

A handwritten signature in black ink, appearing to read 'Hossein Hashemzadeh', written in a cursive style.

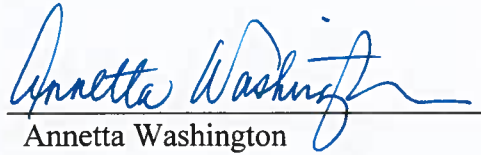
Hossein Hashemzadeh
Deputy Chief, Video Division
Media Bureau

cc (via electronic mail): Alan S. Tilles, Esq. – Counsel for County of LA
Howard M. Liberman, Esq. – Counsel for Channel 51

CERTIFICATE OF SERVICE

I, Annetta Washington, a legal secretary with the law firm of Wilkinson Barker Knauer, LLP, hereby certify that on this 17th day of December, 2019, I served copies of the foregoing Application for Review on the following via first-class United States mail, postage prepaid:

Alan S. Tilles
Shulman Rogers Gandal Pordy & Ecker, P.A.
12505 Park Potomac Ave., 6th Floor
Potomac, MD 20854


Annetta Washington