

January 20, 2022

BY EMAIL

Marlene H. Dortch, Secretary
Federal Communications Commission
45 L St NE
Washington, DC 20554

Re: *K12PO, Temecula, CA, Fac. ID 41601*

Dear Ms. Dortch:

Channel 51 of San Diego, Inc. (“Channel 51”), by its attorneys, hereby submits its response to the December 21, 2021 letter from the Chief, Video Division, Media Bureau inquiring about the operational status of the above referenced station.

At the outset, Channel 51 notes that it submitted a “Request for Tolling or Waiver Regarding Section 74.15(f) of the Commission’s Rules” (“Tolling Request”) with regard to K12PO on October 31, 2019. That Tolling Request remains pending. A copy is attached hereto in Exhibit II.

Station K12PO was involuntarily displaced by the broadcast incentive auction and was forced to vacate Channel 12 in March 2019. Beginning in April 2018, after diligently pursuing a displacement channel for two years, Channel 51 finally received a three-year construction permit to construct K03JB-D on low-VHF Channel 3 in March 2020. Channel 51 seeks to confirm its understanding that its construction permit for K03JB-D remains valid until May 12, 2023.¹ The construction permit for Channel 3 was issued for three years and did not contain any conditions related to the status of the station, which had been forced to vacate its pre-auction channel 14 months prior to the grant of the construction permit.

¹ Channel 3 Construction Permit, K03JB-D, Temecula, CA, Fac. ID 41601, File No. 0000106809 (granted May 14, 2020).

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Section 312(g) provides that “the Commission may extend or reinstate such station license . . . for any reason to promote equity and fairness.”² In the *Incentive Auction R&O*, the Commission explained that it would be receptive to requests for reinstatement or extension of a station’s license under Section 312(g), “tak[ing] into account the extent to which a station has been involuntarily forced to remain dark as a result of the repacking process and whether, in light of the facts presented, equity and fairness dictate a license extension or reinstatement and a waiver.”³ Further, in the *Post-Incentive Auction Procedures PN* the Media Bureau stated that, in considering requests to extend or reinstate a station’s license under Section 312(g) in order to promote fairness and equity, it “will examine whether the station has demonstrated that its silence is the result of compelling reasons beyond the station’s control, including facts that relate to the post-auction transition process.”⁴

Finally, in the *Special Displacement Window PN*, the Bureau permitted stations to file a displacement application on a contingent basis for channels in the repacked television band (channels 2-36) that full power and Class A stations would be relinquishing as a result of the incentive auction and repacking process.⁵ The Bureau stated that, if a conditional grant would require an LPTV or TV translator station to be silent for a consecutive 12-month period prior to discontinuation of operation by the full power or Class A station, the Bureau would “consider a request for extension or reinstatement pursuant to Section 312(g) of the Communications Act and a request for waiver of the Commission rule.”⁶

Equity and fairness weigh heavily in favor of allowing Channel 51 to construct its new station on Channel 3. Channel 51 is not a licensee that voluntarily kept its station off-air for more than a year, but is a licensee that has worked diligently to get its station back on the air in the face of prolonged and extraordinary regulatory and global uncertainty caused by the broadcast incentive auction and COVID-19.

² 47 U.S.C. § 312(g).

³ *Expanding the Economic and Innovation Opportunities a/Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Rcd 6567, 6806-07, para. 585 (2014) (“*Incentive Auction R&O*”).

⁴ *Incentive Auction Task Force and Media Bureau Announce Procedures for the Post -Incentive Auction Broadcast Transition*, Public Notice, 32 FCC Rcd 858, 87 3-74, para. 49 (IATF/MB 2017) (“*Post-Incentive Auction Procedures PN*”); see also *Incentive Auction Task Force and Media Bureau Remind Repacked Stations of Certain Post-Auction Transition Requirements and Deadlines*, Public Notice, 33 FCC Rcd 8240, 88243, n.25 (MB/IATF 2018) (citing *Christian Broadcasting of East Point, Inc.*, 30 FCC Rcd 13975, 13976-77, para. 4 (2015)).

⁵ See *Incentive Auction Task Force and Media Bureau Announce Post-Incentive Auction Special Displacement Window April 10, 2018, Through May 15, 2018, and Make Location and Channel Data Available*, Public Notice, 33 FCC Rcd 1234, 1237, para. 7 (IATF/MB 2018) (“*Special Displacement Window PN*”).

⁶ *Id.* at n.25 citing 47 U.S.C. § 312(g); *The Incentive Auction Task Force and Media Bureau Announce Procedures for Low Power Television, Television Translator and Replacement Translator Stations During the Post-Incentive Auction Transition*, Public Notice, 32 FCC Rcd 3860, 3 865-66, para. 12 (IATF/MB 2017).

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The Public Interest is Best Served by Permitting Channel 51 to Construct K03JB-D

Preserving K03JB-D is in the public interest and benefits the residents of Temecula, California. Channel 51 has been the licensee of LPTV station K12PO since February 2004. The station rebroadcast the programming of licensee's full-power station KUSI-TV, San Diego, California and provided residents of the Temecula area with a free, over-the-air means of viewing KUSI-TV. The Temecula area is in a terrain-blocked valley and residents there do not receive over-the-air signals from the Los Angeles TV stations. Although Temecula is in Riverside County, which is in the Los Angeles DMA, the Temecula area has become a bedroom community for northern San Diego County's labor pool. Many residents of the Temecula area commute to the San Diego area for employment. In addition, the Temecula area has many residents who are retired and living on fixed incomes, and who might prefer free over-the-air television rather than paying for TV service.

KUSI-TV is an independent station that focuses on programming of interest to residents of the San Diego area, including locally-produced news. KUSI-TV produces and broadcasts 62.5 hours of local news each week, as well as a one-half hour weekly community affairs program. If there is an emergency situation in the area, KUSI-TV is in the unique position of being an independent station that can broadcast news of local events as they are occurring, without the constraints of a network affiliation agreement. Most, if not all, of this programming is of interest to residents of the Temecula area. Channel 51 intends to construct K03JB-D on Channel 3 so that it can restore the station's free, over-the-air broadcast service to viewers in the Temecula area, benefiting the residents of Temecula and the public interest.

Channel 51 Faced Prolonged Regulatory Uncertainty Beyond Its Control as a Result of the Broadcast Incentive Auction

Prolonged regulatory uncertainty – out of Channel 51's control – exacerbated by the global pandemic, hindered Channel 51's ability to keep K12PO on the air and construct K03JB-D before the one-year silent date. Below we briefly highlight the regulatory timeline associated with K12PO's displacement from Channel 12, its dedication to resolving any concerns around construction of a new facility on Channel 15, a pivot to inferior Channel 3, and its pending application for reimbursement from the TV Broadcaster Relocation Fund ("Fund").

Channel 51 Timely Filed a Displacement Application in April 2018. Station K12PO began broadcasting on Channel 12 in Temecula in February 2004. As part of the repack following the FCC's broadcast incentive auction, the Commission required station KDOC-TV, Anaheim, CA to change its over-the-air channel to Channel 12. In anticipation of that change, Channel 51 timely submitted, in April 2018, a displacement application proposing operations on Channel 15. The Media Bureau put the displacement application on public notice as accepted for filing on April 16, 2018. There were no other comparable channels available and no apparent reason why Channel 51 could not utilize Channel 15 for its displacement channel. The

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application was not mutually exclusive with any other applications and no objections were timely filed.

In March 2019, Channel 51 Was Asked to Further Document Lack of Interference to Land Mobile. Almost a year after Channel 51 filed its initial displacement application – and only four days before Channel 51 was required to take K12PO off the air – the Media Bureau requested that Channel 51 amend its displacement application to address concerns about land mobile operations.⁷ Channel 51 promptly amended its application to address those concerns, and no objections were timely filed.⁸

K12PO Was Forced Off the Air in March 2019. K12PO went silent on March 15, 2019 when KDOC-TV began broadcasting on its post-auction channel and requested that K12PO cease broadcasting.

County of Los Angeles Belatedly Filed in May 2019 a Petition to Deny Channel 51's Displacement Application. Despite more than a year's worth of notice that Channel 51 had applied to move from Channel 12 to Channel 15, the County of Los Angeles did not file any objection to the displacement application until May 30, 2019 – after Channel 51 had already been forced to take K12PO off the air, and after the deadline for submitting objections had passed. Channel 51 promptly opposed the County's petition to deny. Following a decision by the Media Bureau, Channel 51 filed an Application for Review in December 2019. During the pendency of the Media Bureau's review, Channel 51 requested a Special Temporary Authority to operate on Channel 15, which was denied.⁹

Tolling Request Timely Filed in October 2019. With Channel 51's displacement application still pending before the Media Bureau, Channel 51 timely filed its Tolling Request. That Tolling Request remains pending.¹⁰

Deadline to Submit Eligibility for Reimbursement Passes in October 2019. LPTV and translator stations that intended to seek reimbursement from the Fund were required to file a Reimbursement Form 399 by October 15, 2019.¹¹ Because Channel 51 did not yet have a

⁷ Letter from Media Bureau to Chanel 51 of San Diego, Inc. (Mar. 11, 2019).

⁸ Application to Amend Displacement Application, File No. 0000052518 (Apr. 4, 2019).

⁹ Application for Special Temporary Authority, File No. 0000082441 (Sept. 27, 2019).

¹⁰ When Channel 51 submitted its displacement application for Channel 3 in February 2020, Channel 51 requested that its pending Tolling Request remain on file and pending until the displacement application was processed and the resulting displaced facility began operating. See Email from Howard M. Liberman to Tyler Bridegan (Feb. 28, 2020).

¹¹ *The Incentive Auction Task Force And Media Bureau Announce Reimbursement Form Availability And Filing Deadline And Procedures For Reimbursement Of Low Power TV, TV Translator, And FM Stations*, GN Docket No. 12-268, DA 19-774 (IATF/MB Aug. 15, 2019).

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granted displacement application, it was unable to submit the Eligibility Certification and Form 399 in the LMS database – despite the fact that upon grant, Channel 51 would be eligible for reimbursement. Demonstrating its continued commitment to ensuring its station resumed operations, Channel 51 entered into discussions with Media Bureau staff to determine whether it needed to preemptively file a waiver request or some other filing to preserve its eligibility for reimbursement when its displacement application was ultimately resolved.

Channel 51 Attempted to Pivot to Channel 3 in Late 2019. While pursuing all of its legal options to obtain a grant of its displacement application for Channel 15, Channel 51’s engineers simultaneously worked with Media Bureau staff to come up with an alternate plan to get K12PO back on the air. There were no other comparable channels available, but nevertheless, in November 2019, Channel 51 submitted an STA application to operate on low-VHF Channel 3.¹² The STA was granted.¹³ In February 2020, during its ongoing discussions with Media Bureau staff concerning Channel 51’s reimbursement eligibility, staff informed Channel 51’s counsel that the Channel 3 STA was “granted in error” and the STA would not be renewed.¹⁴

Channel 51 Filed Displacement Application for Channel 3 in February 2020. On February 28, 2020, Channel 51 filed a displacement application for Channel 3.¹⁵ It amended that application on March 3, 2020 for the sole purpose of correcting an error in the out of channel emission mask.

Displacement Application Granted a Two Months After the 12-Month Silent Deadline. The Media Bureau granted Channel 51 a construction permit for Channel 3 on May 14, 2020 – nearly 14 months after K12PO was forced off the air by the post-auction repack. The three-year construction permit contained no conditions related to the status of station K12PO. At the time the Commission granted the construction permit, Channel 51 would have to already have constructed its displacement facility two months prior to the grant to comply with the 12-month deadline. Channel 51 understood that its Tolling Request remained pending, keeping K12PO’s license active while it constructed its new facility on Channel 3.

Media Bureau Modifies LMS to Permit Channel 51 to Submit a Reimbursement Request in June 2020. Even with the grant of the construction permit, Channel 51 was still facing regulatory uncertainty surrounding its ability to seek reimbursement from the Fund for K03JB-D once constructed. Channel 51 did not gain access to the Form 399 and Eligibility Certification until June 2020, and did not receive an allocation until January 7, 2021.

¹² Application for Special Temporary Authority, File No. 0000088770 (Nov. 12, 2019).

¹³ STA Authorization (granted Nov. 18, 2019).

¹⁴ Email from Dana Leavitt to Erin Griffith, Channel 51 K12PO (Feb. 12, 2020).

¹⁵ Application for Displacement Application, File No. 0000052518 (Apr. 4, 2019).

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Permitting Channel 51 to Keep its Construction Permit for K03JB-D is Fair and Equitable, and Doing So Will Not Open the Floodgates to Similar Requests

Every step of the way since the broadcast incentive auction began, Channel 51 has worked to ensure that its Temecula station remained on the air to serve the people of the Temecula area. Drawn-out regulatory uncertainty, coupled with supply chain shortages already in existence owing to the incentive auction repack and exacerbated by COVID-19, prevented Channel 51 from complying with the one-year silent deadline and subsequently immediately completing construction of its new facility on Channel 3 after receiving its construction permit. Channel 51 has demonstrated in its Tolling Request and this letter that K12PO's silence is a result of "compelling reasons beyond the station's control, including facts that relate to the post-auction transition process."¹⁶

When it received its three-year construction permit for its displacement channel – after working diligently for two years to obtain a displacement channel – Channel 51 was already two months past the 12-month silent deadline with a Tolling Request on file. Canceling the license for K12PO and voiding Channel 51's current construction permit for Channel 3 under these circumstances would be inequitable, unfair, and contrary to the public interest. There are not many, if any, stations similarly situated to Channel 51's station. K12PO went through an extended and unique journey to end up where it is today and extending or reinstating the license would not set a sweeping precedent for other stations in the future.

To the extent necessary to maintain its construction permit for K03JB-D, Channel 51 respectfully asks the Commission to grant its pending Tolling Request or extend or reinstate the license for K12PO, as appropriate, notwithstanding more than 12 months of station silence.

Please address any questions regarding this matter to the undersigned counsel for Channel 51 of San Diego, Inc.

Very truly yours,

/s/ Howard M. Liberman
Howard M. Liberman
Erin M. Griffith

Enclosures
cc: Shaun Maher (via email)

¹⁶ *Post-Incentive Auction Procedures PN* at para. 49.

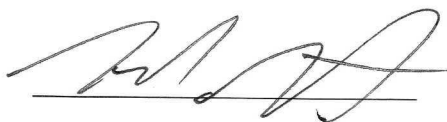
ATTACHMENT I

DECLARATION OF FRED SWIFT

DECLARATION OF FRED SWIFT

I, Fred Swift, Chief Engineer, have reviewed the attached letter responding to the December 21, 2021 letter from the Chief, Video Division, Media Bureau inquiring about the operational status of K12PO, Temecula, CA, Fac. ID 41601. The facts stated therein are true and correct to the best of my knowledge and belief.

I declare under penalty of perjury that the foregoing is true and correct.

A handwritten signature in black ink, appearing to be 'F. Swift', written over a horizontal line.

Fred Swift
Chief Engineer
Channel 51 of San Diego, Inc.

Executed on: January 20, 2022

ATTACHMENT II
COPY OF TOLLING REQUEST

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
CHANNEL 51 OF SAN DIEGO, INC.)
)
LPTV Station K12PO)
Temecula, California)
Facility I.D. 41601)
)
Request for Tolling or Waiver Regarding)
Section 74.15(f) of the Commission's)
Rules)

Accepted / Filed

OCT 31 2019

Federal Communications Commission
Office of the Secretary

To: Office of the Secretary
Attn: Chief, Media Bureau

**REQUEST FOR TOLLING OR WAIVER REGARDING
SECTION 74.15(f) OF THE COMMISSION'S RULES**

Channel 51 of San Diego, Inc. ("Channel 51"), the licensee of Low Power TV ("LPTV") station K12PO, Temecula, CA ("K12PO"), hereby submits this request for an extension of its license via tolling or waiver of Section 312(g) of the Communications Act, as amended, as implemented under Section 74.15(f) of the Commission's rules, which provides for automatic expiration of a broadcast station's license upon failure to transmit a broadcast signal for 12 consecutive months. As discussed in detail below, both equity and fairness support the grant of this waiver request.

I. BACKGROUND

Channel 51 has been the licensee of LPTV station K12PO since February 2004. Until March 15, 2019, the station was rebroadcasting the programming of Channel 51's full-power station KUSI-TV, San Diego, California, and providing residents of the Temecula area with a

free, over-the-air means of viewing KUSI-TV. The Temecula area is in a terrain-blocked valley and residents there do not receive over-the-air signals from the Los Angeles TV stations.

Although Temecula is in Riverside County, which is in the Los Angeles DMA, the Temecula area has become a bedroom community for northern San Diego County's labor pool. Many residents of the Temecula area commute to the San Diego area for employment. In addition, the Temecula area has many residents who are retired and living on fixed incomes, and who might prefer free over-the-air television rather than pay TV service.

KUSI-TV is an independent station that focuses on programming of interest to residents of the San Diego area, including locally-produced news. KUSI-TV produces and broadcasts 62.5 hours of local news each week, as well as a one-half hour weekly community affairs program. If there is an emergency situation in the area, KUSI-TV is in the unique position of being an independent station that can broadcast news of local events as they are occurring, without the constraints of a network affiliation agreement. Most, if not all, of this programming is of interest to residents of the Temecula area.

As part of the repack following the FCC's Incentive Auction (Auction 1000), the Commission ordered station KDOC-TV, Anaheim, CA to change its over-the-air channel to Channel 12. In anticipation of that change, Channel 51 submitted a displacement application (File No. 0000070343) ("Displacement Application") during the filing window for such applications, proposing operations on Channel 15. The Displacement Application is opposed by The County of Los Angeles ("LA County"), which claims that Channel 51's proposal will cause interference to its public safety Land Mobile Radio network operations on Channel 15. KDOC-TV began broadcasting on Channel 12 on March 14, 2019. The next day, Channel 51 took station K12PO off the air. The station has remained silent since that time.

II. EQUITY AND FAIRNESS REQUIRE GRANT OF THE INSTANT WAIVER REQUEST

Section 312(g) provides that "[i]f a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary, except that the Commission may extend or reinstate such station license ... for any reason to promote equity and fairness."¹ In the *Incentive Auction R&O*, the Commission explained that it would be receptive to requests for reinstatement or extension of a station's license under Section 312(g), "tak[ing] into account the extent to which a station has been involuntarily forced to remain dark as a result of the repacking process and whether, in light of the facts presented, equity and fairness dictate a license extension or reinstatement and a waiver."² Further, in the *Post-Incentive Auction Procedures PN* the Media Bureau stated that, in considering requests to extend or reinstate a stations license under Section 312(g) in order to promote fairness and equity, it "will examine whether the station has demonstrated that its silence is the result of compelling reasons beyond the station's control, including facts that relate to the post-auction transition process."³ Finally, in the *Special Displacement Window PN*, the Bureau

¹ 47 U.S.C. § 312(g). See, e.g., *V.I. Stereo Commc'ns Corp.*, Memorandum Opinion and Order, 21 FCC Rcd 14259 (2006) (reinstatement warranted where station's silence resulted from hurricane destruction); *Community Bible Church*, Letter Order, 23 FCC Rcd 15012 (MB 2008) (reinstatement warranted where licensee took all steps needed to return to air, but remained off air to promote air safety after discovering and reporting that FCC and FAA records contained incorrect tower information); and *Mark Chapman, Court-Appointed Agent*, Letter Order, 22 FCC Rcd 6578 (MB 2007) (reinstatement warranted where extended silence resulted from licensee's compliance with a court order).

² *Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Report and Order, 29 FCC Red 6567, 6806-07, para. 585 (2014) ("Incentive Auction R&O").

³ *Incentive Auction Task Force and Media Bureau Announce Procedures for the Post-Incentive Auction Broadcast Transition*, Public Notice, 32 FCC Red 858, 873-74, para. 49 (IATF/MB 2017) ("Post-Incentive Auction Procedures PN"); see also *Incentive Auction Task Force and Media Bureau Remind Repacked Stations of Certain Post-Auction Transition Requirements and Deadlines*,

permitted stations to file a displacement application on a contingent basis for channels in the repacked television band (channels 2-36) that full power and Class A stations would be relinquishing as a result of the incentive auction and repacking process.⁴ The Bureau stated that, if a conditional grant would require an LPTV or TV translator station to be silent for a consecutive 12-month period prior to discontinuation of operation by the full power or Class A station, the Bureau would "consider a request for extension or reinstatement pursuant to Section 312(g) of the Communications Act and a request for waiver of the Commission rule."⁵

The facts in the present situation warrant exercise of the Commission's discretion to extend K12PO's license and waive license expiration under Section 312(g) of the Act. K12PO is off-the-air through no fault of its licensee. K12PO cannot commence operations on Channel 15 until the Commission grants Channel 51's Displacement Application. Put simply, the fate of K12PO is entirely in the hands of the Commission. Without a grant of the instant request for tolling or waiver, Channel 51 risks losing its license if grant of its Displacement Application is too late, in which case residents of the Temecula area would be deprived of a valuable, free, over-the-air broadcast service.

Public Notice, 33 FCC Red 8240, 88243, n.25 (MB/IATF 2018) (citing *Christian Broadcasting of East Point, Inc.*, 30 FCC Red. 13975, 13976-77, para. 4 (2015)).

⁴ See *Incentive Auction Task Force and Media Bureau Announce Post-Incentive Auction Special Displacement Window April 10, 2018, Through May 15, 2018, and Make Location and Channel Data Available*, Public Notice, 33 FCC Red 1234, 1237, para. 7 (IATF/MB 2018) ("Special Displacement Window PN").

⁵ *Id.* at n.25 citing 47 U.S.C. § 312(g); *The Incentive Auction Task Force and Media Bureau Announce Procedures for Low Power Television, Television Translator and Replacement Translator Stations During the Post-Incentive Auction Transition*, Public Notice, 32 FCC Red 3860, 3865-66, para. 12 (IATF/MB 2017).

III. CONCLUSION

Allowing K12PO's license to terminate, when the station was forced to go silent through no fault of its licensee and solely as a result of the Incentive Auction, would be an unduly harsh outcome that would contravene the public interest and unnecessarily punish the residents of Temecula, who have benefited from K12PO's local news, public affairs, and other programming for many years. As such, Channel 51 respectfully requests that the Commission exercise its discretion under Section 312(g) of the Act and grant this request for tolling or waiver.

Respectfully submitted,

CHANNEL 51 OF SAN DIEGO, INC.

By: Howard M. Liberman
Howard M. Liberman
Kelly A. Donohue
Erin M. Griffith
WILKINSON BARKER KNAUER, LLP
1800 M Street, NW, Suite 800N
Washington, DC 20036
Telephone: (202) 783-4141

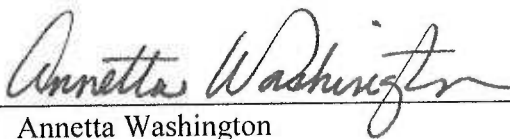
Its Attorneys

October 31, 2019

CERTIFICATE OF SERVICE

I, Annetta Washington, a secretary at Wilkinson Barker Knauer, LLP, certify that on this 31st day of October 2019, I caused the foregoing Request for Tolling or Waiver to be served by first-class mail on the following:

Alan S. Tilles
Shulman Rogers Gandal Pordy & Ecker, P.A.
12505 Park Potomac Avenue, 6th Floor
Potomac, MD 20854
Counsel to the County of Los Angeles


Annetta Washington