BEFORE THE

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
ADVANCED TELEVISION	)	
BROADCASTING ALLIANCE	)	MB Docket No. 03-185
	)	
	)	

To: **Office of the Secretary**
Attention: The Commission

COMMENTS OF CHANNEL 51 OF SAN DIEGO, INC.

Cohn and Marks LLP, on behalf of Channel 51 of San Diego, Inc., (Channel 51), licensee of television station KUSI-TV, San Diego, CA, Low Power Television Station (LPTV) K12PO, Temecula, CA and permittee of LPTV station K12PO, Temecula, CA K26K-D, Banning, CA and K40LM-D, El Centro, CA hereby submits Comments in support of the Advanced Television Broadcasting Alliance Petition for Blanket Extensions or Waiver pertaining to the expiration of all outstanding construction permits for new digital LPTV and TV translator stations. LPTV station K12PO now operates analog. All three of the Channel 51 LPTVs have been granted construction permits for digital operation. The Temecula construction permit (K12PO) expires as of September 1, 2015. The Banning and the El Centro construction permits extend for a period of six months (through September 28, 2014).

There are two primary matters to be addressed:

1. The Commission should establish the same digital expiration date for licensees of analog LPTVs holding digital construction permits and for new permittees holding digital construction permits;

2. The prospective construction permit expiration date.

Same Expiration Date

The Second Report and Order (26 FCC Rcd 10732 (2011)) specifically identifies the rationale (the factors) for the automatic extension of construction permits held by existing analog LPTV stations as follows:

(a) "We agree that it would be preferable for these stations not to have to make the significant investment required for conversion to digital facilities, when such facilities may have to be substantially modified due to channel displacement or taken off the air altogether in connection with the implementation of a spectrum repacking scheme" (Id. at Para. 8);

(b) "A deadline four years in the future will give these low power television stations time to determine the best location. . . prepare and file an application, obtain a grant of their construction permit, order equipment. . . and carry out other necessary steps toward the transition" (Id. at Para. 9);

(c) ". . . we seek to bring the benefits of digital broadcast technology to low power television viewers. . . . Adopting a transition date of September 1, 2015 will allow low power television stations to have better understanding of the overall spectrum landscape when determining their final transition plan. . . ." (Id. at Para. 10);

(d) ". . . we conclude that setting the low power transition date to occur in the middle of the summer will maximize available construction time and minimize weather-related disruptions for low power television stations. . . . A September 1, 2015 transition date will ensure that all low power stations have ample time to complete their facilities prior to the deadline" (Id. Para 11);

(e) "We conclude that fairness dictates that stations with outstanding digital construction permits set to expire in the coming months or years be given until September 1, 2015 to complete their digital facilities. . . we do not believe that stations should be forced to transition before they are truly prepared to do so simply because their digital construction permits are set to expire. Stations with outstanding construction permits obtained them without knowing the final timetable for the completion of the digital transition. With a hard deadline now set, those stations should not be penalized. . . rather they should be permitted to revise their digital construction schedule to meet their own financial and market demands" (Id. Para. 14).

All of the above factors which justified an automatic extension to September 1, 2015 for construction permits held by existing analog LPTV licensees are equally applicable to construction permits held by permittees who are not licensees of existing analog LPTV stations.

The Commission's recognition (at paragraph 8) that licensees should not have to make the significant investment for a facility which subsequently may require substantial modification or worse, the possibility that there may be no spectrum available for continued LPTV operation is equally applicable to permittees. To treat new permittees differently effectively equates to punishment. More significantly, the question is what crime has the new permittee committed to warrant such treatment? The absence of a definitive spectrum impact study and a repacking plan for digital television stations creates great uncertainty for ALL digital LPTV permittees. More significant, the absence of a definitive impact study and a repacking plan is NOT the fault of the "new" permittees and, therefore, "new" permittees "should not be penalized". The Second Report and Order concluded,

> ". . . we do not believe that stations should be forced to transition before they are truly prepared to do so simply because their digital construction permits are set to expire" (Id. at Para. 14).

The same logic applies to new permittee construction permits.

The Commission's distinction between digital construction permits held by licensees of LPTVs and digital construction permits held by new permittees of LPTV facilities is based solely on footnote 37 of the Second Report and Order:

> "We note this change in expiration date applies only to digital construction permits for existing stations' flash-cut or digital companion channel facilities."

The distinction does not provide a reason/basis for excluding new permittees. With respect to the Commission's failure to provide a reason for the exclusion, the Commission's attention is directed to a long-standing Court of Appeals decision mandating that the Commission provide an explanation for its reasons (Melody Music, Inc. v. Federal Communications Commission, 345 F.2d 730, 732-733 (1965):

> "We think the Commission's refusal at least to explain its different treatment of Appellant and NBC was error. . . Whatever action the Commission takes on remand, it must explain its reasons and do more than enumerate factual differences, if any, between appellant and the other cases; it must explain the relevance of those differences to the purpose of the Federal Communications Act."

"We note" (footnote 37) does not meet the Melody Music mandate. The Second Report and Order, Ibid., failed to enumerate factual differences, failed to provide or explain the reasons for the "We note" in footnote 37 and failed to explain the reasons for different treatment accorded to the respective classes of permittees, contrary to the explicit

Melody Music precedent. The Second Report and Order made a mistake by wrongfully establishing different expiration dates. The Commission now has the opportunity to correct that mistake.

Prospective Construction Permit Expiration Date

The September 15, 2015 expiration date (for licensees of existing analogy LPTVs holding digital LPTV construction permits) was set forth in the Second Report and Order, released July 15, 2011. The basis for the 2015 "hard Deadline" date was set forth in Paragraph 8:

> "A transition deadline more than four years into the future will allow time for low power operators to learn more about the direction of the Broadband Innovation proceeding. Even if the reallocation is not concluded before the conversion deadline, a 2015 deadline will permit low power operators to take specific proposals into account when finalizing their transition plans... Thus we conclude that the overall low power television transition process would be better served by setting the transition date far enough in the future to increase the probability that low power television can avoid transitioning twice, once in connection with a future allocation and again when they complete their digital transitions, and at a minimum to enable stations to consider proposals in the Broadband Innovation proceeding when they finalize their transition plans. In addition, a 2015 deadline would be consistent with the Broadband Plan's recommendation to conclude the digital transition by the end of 2015" (footnote omitted).

As of the instant date, (1) the Report and Order (pertaining to the 2012 Incentive Auction Notice of Proposed Rulemaking) has not issued; (2) the Commission has not provided an indication of when the Report and Order will issue; (3) resolution of the Repacking problem apparently remains unresolved; and (4) the likelihood of an appeal to a Court of Appeals pertaining to the Report and Order cannot be overlooked. Indeed, the

Commission's prospective "hope" for a 2015 Incentive Auction is not realistic[1]. In determining a meaningful "hard deadline", the Commission must take into account a reasonable prospective date wherein LPTV licensees and permittees will precisely know "whether such facilities may have to be substantially modified due to channel displacement or taken off the air altogether in connection with the implementation of a spectrum repacking scheme" (Second Report and Order. Id at paragraph 8).

Respectfully submitted

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cc: Advanced Television Broadcasting Alliance

[1]The original "hope for date" was 2014.