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In re: KPBS-FM, San Diego, CA
State of California, San Diego State University
Facility ID No. 58823

Petition for reconsideration of CP
BPED-19970211IA

Construction permit application
BMPED-20010321ABF

Dear Counsel:

This letter refers to the granted construction permit and pending permit modification application of San Diego State University ("SDSU"), licensee of FM station KPBS-FM, San Diego, CA, and the petition for reconsideration and other pleadings filed by Radio Television S.A. de C.V., ("XETV"), licensee of XETV, Channel 6, Tijuana, Mexico.

Construction Permit BPED-19970211IA. This construction permit was granted by the staff on July 21, 1997, for a new transmitter site on Mt. Soledad, approximately 33 km to the north of the present and currently proposed transmitter site. On August 25, 1997, XETV timely filed a petition for reconsideration of the grant, contending that the site change would adversely impact Channel 6 reception in the San Diego area.

Because of the lengthy and complex international issues raised by XETV, as well as the unresolved petition for reconsideration, the expiration date of this construction permit has been “tolled.”¹ However, the present modification application BNPED-20010321ABF (as amended December 18, 2002) proposes to use a site immediately adjacent to the licensed KPBS-FM transmitter site on San Miguel Mountain.² In the amendment, SDSU concedes that it is no longer actively pursuing the Mt. Soledad construction permit site due to international issues and “site lease issues.”

With the grant of construction permit BNPED-20010312ABF (as explained below), the international issues and pending petition for reconsideration which encumbered the original construction permit are resolved and the petition for reconsideration is DISMISSED AS MOOT. Further tolling of construction permit BNPED-19970211IA is unnecessary and IS TERMINATED. However, because these matters encumbered the original permit from the date the permit was initially granted, KPBS-FM will be afforded the full three year construction period on its modification construction permit.

Application BNPED-20010321ABF (San Miguel Mountain site). This application was amended on December 18, 2002 to specify a site on San Miguel Mountain, 0.21 km from the licensed transmitter site of KPBS-FM. The application requests authority to operate with an effective radiated power (ERP) of 4.4 kW at an antenna height above average terrain (HAAT) of 550 meters. At this power level, KPBS-FM would exceed maximum Class B facilities.³ Recognizing this violation, SDSU requests waiver of Section 73.211 of the Commission’s rules to permit “superpowered” operation. The proposal protects existing domestic (U.S.) FM stations, and also protects Mexican stations and allotments in accordance with internationally negotiated limits.

Comparisons with Mt. Soledad construction permit will not be considered in support of waiver. A significant part of SDSU’s justification for waiver of Section 73.211 consists of comparisons with what KPBS-FM would have or might have obtained had the station actually moved to Mt. Soledad. Such comparisons must be considered conjectural. In effect, SDSU is attempting to claim rights to “existing” service which the station has never implemented.

It is not unusual for an applicant to obtain a construction permit for a favored site only to find that site unusable due to other constraints. But unless operation is actually implemented via a construction permit or license, it has been our consistent practice not to consider hypothetical service areas.⁴ Given the material provided by SDSU, we see no compelling reason why an

¹ 1998 Biennial Regulatory Review – Streamlining of mass Media Applications, Rules and Processes, 14 FCC Rcd 17525 (1989) at paragraph 84 (construction period may be tolled when a construction permit is subject to administrative or judicial review).

² KPBS-FM has been operating from the proposed site at 1.80 kW ERP since October 2001 under special temporary authority (STA) after losing its space on the tower structure on which it was licensed. The licensed and STA transmitter sites on San Miguel Mountain are 0.21 km apart.

³ At 550 meters HAAT, an ERP of 2.7 kW would achieve maximum Class B operations. KPBS-FM is presently operating with 1.80 kW ERP under Special Temporary Authority at this site.

⁴ Allowing applicants to compare proposed service to that obtained by a hypothetical operation could encourage the filing of sham applications that cannot be constructed and whose sole purpose is to afford additional protection to the filing party at the expense of other qualified applicants. Such applications are inimical to efficient processing of construction permit applications.

exception should be made here. Consequently, our evaluation of SDSU's superpower waiver request is made without reference to the Mt. Soledad construction permit.

Contour / Population Comparisons. At the proposed superpowered facilities of 4.4 kW ERP / 550 meters HAAT, the reference distance to the 60 dBu service contour is 57.0 km. In contrast, maximum Class B facilities of 2.7 kW ERP / 550 meters HAAT generate a reference distance to the 60 dBu contour of 52.2 km. Thus, grant of the requested waiver would extend KPBS-FM's 60 dBu contour by 4.8 km (3.0 miles) over maximum Class B facilities, and 8.9 km over the present STA operation. The proposed superpowered operation would cover 2,410,348 persons within 5,028 sq. km (U.S. land area) inside the 60 dBu contour, while maximum Class B facilities would cover 2,335,871 persons in 4,431 sq. km (U.S. land area). Translating these figures, KPBS-FM at maximum Class B operation would cover 88.1% of the U.S. land area but 97% of the population which would be covered by the proposed superpowered operation.⁵ These minor service advantages, when compared to maximum Class B facilities, do not provide a compelling justification for waiver. SDSU does not reference any instance where waiver of Section 73.211 was granted to allow an FM station a small gain in population covered comparable to that requested here.

To buttress its waiver request, SDSU provides a supplemental analysis based on National Bureau of Standards Technical Note 101 (Longley-Rice) to show that the population within the present 60 dBu contour will receive increased signal strength at various threshold levels. This analysis is intended to show that the increased signal strength will help overcome loss of signal within the station's service area caused by "building penetration and urban clutter." It is generally true that stronger signals will better penetrate buildings and overcome reflections and other types of signal degradation, but this result is not unique to KPBS-FM: it could equally apply to any station in the country operating in a metropolitan area. Accordingly, we are not persuaded that such reception benefits warrant a waiver of Section 73.211.

Reception Complaints. In a supplement to the pending construction permit application, SDSU provided the Commission with copies of 18 letters and 229 e-mails it had received between 1999 and 2002, apparently in response to a station request seeking feedback about the station's signal quality. SDSU claims that 289 of the respondents were from persons within the station's 54 dBu contour.⁶ Many of these refer to dropouts in the station's signal at specific locations by mobile receivers or particular radios at fixed locations. However, no comprehensive analysis was undertaken of these complaints. We cannot readily tell whether the complaints are grouped in particular areas or distributed throughout the KPBS-FM service area, or which complaints come from locations inside the station's 60 dBu contour.⁷ Additionally, we do not have any information concerning local factors that might affect reception, e.g., listener is inside a modern

⁵ KPBS-FM also indicates that its proposed superpowered operation would provide a first noncommercial educational service to 165,290 persons, while maximum Class B facilities would provide the same service to 90,897 persons. However, SDSU has not cited any case in which a waiver of Section 73.211 was granted to a noncommercial educational station on the ground that the increase would provide a first noncommercial educational service to a population without such service.

⁶ The discrepancy in the counts is taken from the cover sheet entitled "Poor Reception." We have not attempted to resolve the discrepancy.

⁷ The service contour for noncommercial educational Class B stations is the 60 dBu, not the 54 dBu. Locations outside the 60 dBu service contour may receive interference from other noncommercial educational stations.

concrete-and-steel building, underneath a highway overpass, etc. Also, for much of this period, KPBS-FM has been operating under Special Temporary Authority: we cannot tell whether the STA installation has contributed to the reception problems in some way. It is not apparent from the information provided that an increase to 4.4 kW – or any other power level -- will significantly improve signal quality at these locations. By no means do these poor reception reports show patently defective coverage by KPBS-FM's licensed or STA operations, and therefore these reports are of limited utility in support of this waiver request.

Other superpowered stations in the San Diego area. SDSU notes that there are other superpowered Class B stations in the San Diego area that have greater coverage than would KPBS-FM, even if the requested waiver of Section 73.211 is granted. SDSU suggests that the proposed operation would make KPBS-FM a “comparable, competitive facility, which would still result in less extensive coverage than many of the other Class B stations in the market.”⁸

However, these superpowered stations are commercial FM stations that were authorized before the Class B limits of 50 kW ERP/152 meters (500 feet) HAAT (or the equivalent) were imposed in 1962. Under policies then in effect, those stations operating in excess of the new limits were permitted to continue operation as authorized. KPBS-FM does not qualify for such “grandfathered” treatment.⁹ Since that time, and absent compelling circumstances, the Commission has refused to grant waivers for superpowered operations even where the service provided by the proposed facility would not exceed that expected for the station's class.¹⁰ Accordingly, we are unpersuaded that a waiver to correct an alleged competitive imbalance is warranted, especially when grant of the waiver would provide service to only approximately 3% more persons than would receive service from maximum Class B facilities.

SDSU's request materially differs from the commercial superpowered stations in another way. Commercial FM superpowered stations can continue to operate in excess of the Class B limit, but the spacing rules in Section 73.207 afford that station no greater protection from interference than it would receive as a maximum Class B facility. This does not preclude the establishment of new services at the appropriate distances from the superpowered station. However, a noncommercial educational station is governed by the provisions of Section 73.509 of the Commission's rules, which affords protection to the 60 dBu contour. A superpowered noncommercial educational station receives protection *in excess* of that specified for the station's class. This extra protection diminishes the potential for establishment of new or expanded service from other stations in outlying communities on the same channel as well as adjacent channels.

International clearance. After protracted negotiations with Mexico, the FCC's International Bureau secured Mexico's approval for KPBS-FM to operate with increased facilities at the San Miguel Mountain site, including the superpowered facilities requested by SDSU. Nevertheless, Mexican approval for operation with greater facilities under an international agreement and domestic licensing are distinct matters. The former is simply not relevant to our consideration of the requested domestic rule waiver.

⁸ SDSU here indicates its belief that the requested additional power would allow it to provide expanded service. However, this conclusion is general enough to be nearly universal. Increased power or antenna height almost always extends an FM station's signals so that it can reach more people.

⁹ KPBS-FM is not the only station licensed to San Diego with less than maximum Class B facilities. For example, noncommercial educational station KSDS (FM), San Diego, CA, is licensed to operate with 0.83 kW ERP at 27 meters HAAT, corresponding to Class A facilities.

¹⁰ *Crain Broadcasting Inc.*, 8 FCC Rcd 4406 (1993).

Programming / Radio Reading Service. In support of the waiver request, SDSU refers to its specialized programming aimed at segments of the population, and its operation of a radio reading service on subcarrier for the blind and visually impaired. However, it is well established that Commission will not, absent extraordinary circumstances, waive core technical rules based on ownership or programming considerations.¹¹ For that reason, neither the pledge of particular program offerings, nor the specific audience demographic of KPBS-FM, justifies waiver of Section 73.211.

Receiver-Induced Third Order Intermodulation Effect (RITOIE) at Mt. Soledad site. SDSU indicates that a combination of stations presently on Mt. Soledad – KXYX and KPLN are specifically referenced – can generate intermodulation interference within some receivers. This interference would theoretically fall on 89.3 MHz, first-adjacent channel to KPBS-FM. An increase in KPBS-FM’s signal strength at Mt. Soledad, SDSU suggests, would help overcome any such interference. However, SDSU have provided no evidence that any adverse RITOIE effects exist, even at the present KPBS-FM ERP of 1.80 kW. Accordingly, a waiver on this basis is unwarranted.

PTFP Funding. SDSU received a grant of \$216,168 in federal funds from PTFP in 1997 to implement the Mt. Soledad operation authorized in construction permit BPED-19970211IA. SDSU is in jeopardy of losing this funding if it cannot implement improvements in KPBS-FM’s service. However, economic matters are not considered when waivers of the technical rules are being considered.¹² Consequently, we have not considered the issue of funding in evaluating this waiver request.

Conclusion. When an applicant seeks waiver of the rules, it must plead with particularity the facts and circumstances which warrant such action. *Columbia Communications Corp. v. FCC*, 832 F.2d 139, 192 (D.C. Cir. 1987), quoting *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 644, 666 (D.C. Cir. 1968 (per curiam)). We have afforded SDSU’s waiver request the “hard look” called for under *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), but find that the facts and circumstances presented are not sufficient to warrant waiver of 47 CFR Section 73.211. Accordingly, SDSU’s request for waiver of this rule IS DENIED.

Grant of Construction Permit with Maximum Class B facilities. Although we have denied SDSU’s request for superpowered operation, we agree that a power increase can be beneficial to KPBS-FM and the listening public. With maximum Class B facilities, KPBS-FM will realize nearly all of the service it sought in its waiver request, and a grant will comply with the FCC’s rules and will be in consonance with the international clearance for this station. Accordingly, IT IS ORDERED, that the petition for reconsideration filed by Radio Television S.A. de C.V. IS DISMISSED AS MOOT and the application of San Diego State University, BPED-

¹¹ *Open Media Corp.*, 8 FCC Rcd 4070 (1993) at 4071 (citing U.S.C. § 303(f)). See also *North Texas Media v. FCC*, FCC 84-456 (released October 5, 1984), *aff’d*, 778 F.2d 28 (D.C. Cir. 1985); *Pyramid Radio and Television Co, Inc*, 20 RR 2d 341 (1970); *Broadcasters, Inc.*, 23 FCC 2d 155 (1970).

¹² Requests for waiver of the Commission’s rules based on non-technical considerations has been routinely rejected in the past. *North Texas Media v. FCC*, FCC 84-456 (released October 5, 1984), *aff’d*, 778 F.2d 28 (D.C. Cir. 1985); *Pyramid Radio and Television Co, Inc*, 20 RR 2d 341 (1970); *Broadcasters, Inc.*, 23 FCC 2d 155 (1970). See also *Open Media Corporation*, 8 FCC Rcd 4070, 4071 (1993) and cases cited therein.

20010312ABF, IS GRANTED IN PART with the facilities specified in the application, but with the effective radiated power (ERP) limited to 2.70 kW. This action is taken pursuant to 47 CFR Section 0.283.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: San Diego State University (KPBS-FM)