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In re: KSDS(FM), San Diego, CA
Facility ID: 10542
File No.BPED-19940802MA, as amended on
November 17, 1994, and November 25, 1996

Application for Modification of Facilities

Dear Counsel:

This letter concerns the above-referenced application (the "Application") of San Diego Community College District ("SDCCD"), licensee of noncommercial educational ("NCE") Station KSDS(FM), San Diego, CA. For the reasons set forth below, we deny various objections to the Application, accept the referenced amendment, and grant the Application with conditions.

Background. On August 2, 1994, SDCCD filed an application to increase the station's effective radiated power ("ERP") from .83 kW to 3 kW at the licensed transmitter site. SDCCD subsequently filed amendments to modify the facilities of Station KSDS from Class A to Class B1, and to increase the station's ERP to 22 kW. On March 10, 1995, Bay City Television, Inc. ("Bay City") filed a petition to deny the application. Bay City is the programming and sales representative for Radio Televisión, S.A. de C.V. ("RTSA"), licensee of XETV(TV), Channel 6, Tijuana, Baja California, Mexico.

KSDS is licensed to operate on Channel 202, 88.3 MHz. In its petition to deny, Bay City alleged that the initially-filed application failed to protect Channel 6 station XETV(TV) as required by Section

73.525 of the Commission's rules.¹ It also claimed that the proposed KSDS facilities would result in "massive interference" to viewers in the United States. Moreover, it contended that the Commission had previously acknowledged the service that XETV(TV) provides in the border zone to domestic viewers by granting the Section 325(c)² application of Fox Television Stations, Inc. to permit the retransmission of XETV(TV) programming back into the U.S. It also alleged that the proposed KSDS facilities did not protect a first-adjacent channel allotment on Channel 201A at Tecate, Mexico, as required by treaty.³ Finally, Bay City claimed that grant of the application would violate Article 1202 of the North American Free Trade Agreement.⁴

SDCCD filed an opposition, contending that Bay City lacked standing to file the petition to deny. It argued that Bay City or RTSA would have standing to object to the application only on the basis of some international treaty. It argued that NAFTA was inapplicable and that the initially-filed application complied with the provisions of the 1992 FM Broadcast Agreement.

On October 25, 1996, the staff issued a decision (the "Staff Decision") denying in part and granting in part the Bay City petition to deny. It found that Section 73.525 does not apply to foreign Channel 6 stations. Moreover, it found that the 1992 FM Broadcast Agreement contains no provision which requires a domestic FM station to protect the domestic coverage area of a Mexican television station located near the border. The Staff Decision also concluded that Section 1202 of NAFTA is inapplicable to broadcast stations. Finally, it concluded that the proposal did not fully protect the previously coordinated Tecate allotment. The Staff retained the application in pending status to permit SDCCD to file an amendment reducing ERP toward the Tecate allotment.

On November 25, 1996, SDCCD filed the requested amendment. In April and May 1997, various parties filed objections (the "1997 Objections") to the grant of the application, as amended. These included a joint objection from RTSA and Bay City (collectively "XETV"), and separate objections from Fox Broadcasting Company ("Fox")⁵ and Cox Communications, Inc. ("Cox").⁶ Each argued that the proposed facility would cause interference to Station XETV(TV).

In May and June 1997, SDCCD filed oppositions to each of these objections. It argued that the filings were untimely petitions for reconsideration. It reiterated its contention that neither Section 73.525 of the rules nor the 1992 FM Broadcast Agreement is applicable. It claimed that subscribers to a properly functioning CATV system should not experience widespread interference from its proposed power

¹ 47 C.F.R. § 73.525. Channel 6 stations broadcast at 82 – 88 MHz. NCE FM stations use spectrum in the immediately adjacent 88 – 92 MHz band. This rule is designed to limit the interference which NCE FM stations may cause to Channel 6 stations operating in the same area.

² 47 U.S.C. § 325(c).

³ See *1992 Agreement Between the Government of the United States of America and the Government of the United Mexican States Relating to the FM Service in the Band 88-108 MHz*, August 11, 1992 ("1992 FM Broadcast Agreement").

⁴ See U.S.-Can.-Mex., H.R. Treaty Doc. No. 159, 103rd Cong., 1st Sess. (1993) ("NAFTA").

⁵ XETV(TV) has been the Fox affiliate in the San Diego television market since 1986.

⁶ Cox provides cable television service in San Diego County.

increase. Finally, it contended that cable system operators, XETV, and the Mexican government could take additional steps not within SDCCD's control to mitigate potential interference from KSDS operations at 22 kW.

On June 13, 1997, the International and Mass Media Bureaus jointly issued a letter (the "Joint Bureau Letter") addressed to SDCCD, Fox, Bay City, and Cox. The Joint Bureau Letter noted that the Mexican government had intervened to express its objections based on potential interference problems to XETV(TV). It also noted that the 1992 FM Broadcast Agreement was inapplicable to the current dispute and that the Mexican objection, in any event, was untimely. Nevertheless, to promote a satisfactory resolution of this matter and as a show of good faith to the Mexican government, the Joint Bureau Letter disclosed that the Mass Media Bureau had agreed to withhold further action on the Application at the request of the International Bureau. The Joint Bureau Letter urged the parties to undertake discussions with a view toward reaching agreement on the best technical methods for alleviating interference to Station XETV(TV) reception in the San Diego area and the sharing of financial responsibilities for implementing the methods which they identified to alleviate interference.

Shortly thereafter, SDCCD and XETV commenced negotiations. Seventeen months later, SDCCD and XETV agreed to a test plan. The November 6, 1998-dated "Plan for KSDS/XETV Testing" set forth the terms of a voluntary testing and reporting program which SDCCD and XETV agreed to "for purposes of settlement." On November 11, 1998, the Audio Service Division issued the first of many special temporary authorizations ("STA") to SDCCD to operate at 3 kW ERP. Testing began in late November 1998. Two years later, on October 12, 2001, SDCCD and XETV completed the testing process.

On February 21, 2002, SDCCD submitted an application for a construction permit for the facilities specified in its then-in effect STA. SDCCD requested a permanent power increase to 3 kW and proposed to operate with a vertically polarized antenna.⁷ On March 5, 2002, the Audio Division granted without additional conditions this construction permit (the "3 kW Construction Permit"). On April 8, 2002, XETV filed a petition for reconsideration of that action. That petition remains pending.

Between September 2004 and January 2005, SDCCD and XETV each filed several letters (the "2004-2005 Letters") with regard to the Application. SDCCD, noting that the application had been pending almost ten years, urged immediate action. It observed that Mexico had approved the allotment in 1996 and that the February 27, 1997, Mexican objection was untimely. It argued that the Mexican objection should have no impact on the processing of the Application because its objection was outside the scope of the 1992 FM Broadcast Agreement. It stated that the testing had served no purpose and that the test results were immaterial to the licensing decision before the Commission. It also contended that the Commission's staff lacked the ability to bind the U.S. to new international standards, and that only the Department of State and the Executive Branch could pursue such changes. Finally, it contended that the delay in acting on the application disserved the San Diego community.

XETV responded that the pending test record must be decided "on the record" prior to any action on the Application. In addition, XETV claimed that SDCCD previously had accepted a condition to subject the Application to bilateral negotiations. In support, XETV stated that KSDS did not challenge the "condition" on the 3 kW Construction Permit which stated that "[p]rocessing on [the Application] is awaiting resolution of international matters." It argued that Section 1.110 of the Commission's rules

⁷ See File No. BPED-20020219ABE.

requires an applicant which objects to a condition on its authorization to reject the construction permit within 30 days of the date of grant.⁸ Because SDCCD did not so act, XETV contended that the Application accordingly became subject to U.S.-Mexico negotiations. It also asserted that XETV(TV) is protected under 1962 U.S.-Mexico VHF Television Agreement. In addition, XETV rejected as unpersuasive SDCCD's claim that KSDS should be considered more "local" than XETV(TV). Finally, it renewed its claim that XETV(TV) is protected under NAFTA.

Discussion. The 1997 Objections. SDCCD contends that the XETV, Cox, and Fox objections, which were filed approximately five to six months after the Staff Decision, seek "reconsideration" of the Staff Decision. Accordingly, SDCCD asserts that they are untimely. We disagree. The Staff Decision retained the initially-filed application in pending status. The rules permit any person to file informal objections at any time "[b]efore FCC action on any application for an instrument of authorization"⁹ Accordingly, we will consider the 1997 Objections as timely-filed informal objections. The 1997 Objections argue that the Commission should deny the Application due to the potential interference to XETV(TV) reception within the United States. For the reasons set forth in the Staff Decision and more fully below, we conclude that this contention is without merit.

The 2004-2005 Letters. XETV contends that before the Application can be processed the "test proceeding . . . must be decided on the record." We disagree. The "Plan for KSDS/XETV Testing" was crafted for the sole purpose of reaching an amicable settlement of this interference dispute. Eight years have elapsed since that plan was finalized. The testing process was completed more than five years ago. XETV and SDCCD have reached different conclusions on the results of those tests and the 2004-2005 Letters establish that this settlement effort has failed. Moreover, it is unclear exactly on what basis the Commission could or should "decide" this application proceeding on the testing "record." This dispute lacks established treaty, statutory, or rule standards. We conclude that further consideration of the test plan is unwarranted.¹⁰

We also conclude that XETV's Section 1.110 argument is without merit. The 3 kW Construction Permit was issued out of a separate application proceeding commenced in 2002.¹¹ Although such language was wholly unnecessary, the 3 kW Construction Permit condition makes this point explicitly. "This construction permit is independent of the [Application]," Accordingly, SDCCD's alleged failure to object to a condition included in the 3 kW Construction Permit does not impose any limitations on the authorization it seeks in this proceeding.

⁸ See 47 C.F.R. § 1.110.

⁹ *Id.* § 73.3587.

¹⁰ Assuming *arguendo* that SCDDC and XETV had agreed to undertake testing and reporting to permit the Commission to establish interference limits or standards for KSDS operations, we note that no data was submitted regarding the specific facility proposal now before us. The test plan did provide an opportunity for SDCCD to request KSDS testing at power levels exceeding 3 kW. SDCCD, however, did not do so. At this point, it seems extremely unlikely that any additional testing would lead to an amicable settlement whereby XETV would agree to such higher powered operations.

¹¹ See n.7, *supra*.

We also reject XETV's claim that the XETV(TV) signal is entitled to protection from interference caused by U.S.-based FM transmissions to viewers within the United States. Operation of U.S. FM broadcast stations located in the common border area with Mexico, such as KSDS, is governed by the 1992 FM Broadcast Agreement.¹² The United States also has an Agreement with Mexico governing the operation of television broadcasting in the border area.¹³ There is currently no agreement between the United States and Mexico governing interference situations between FM radio stations and TV stations.

KSDS's proposed power increase fully complies with the terms of the 1992 FM Broadcast Agreement. That is, the proposed operation protects the Mexican FM allotments and assignments pursuant to the 1992 FM Broadcast Agreement.¹⁴ Under the terms of the current Agreements with Mexico, XETV's Channel 6 operation is only entitled to protection from interference caused by other U.S. licensed television operations in accordance with the terms of the 1962 TV Agreement. Because that agreement does not factor FM radio station operations into our coordination analysis, XETV(TV) is not afforded protection from U.S. FM stations.

Although there is no agreement between Mexico and the United States governing the situation of interference between FM radio stations and TV stations, our domestic rules recognize the possibility of such interference relationships.¹⁵ As a practical matter, the United States and Mexico typically cooperate to reach mutually agreeable solutions on particular interference cases that fall outside of the details of the specific agreements. In this case, we have been particularly sensitive to Mexico's concerns about possible interference to XETV(TV) service in the San Diego area. In view of this concern, we have analyzed KSDS's proposed power increase pursuant to our domestic rules concerning FM radio to television interference and find that KSDS's proposed operation would not cause any interference to XETV(TV) service in Mexico and would fully comply with the underlying principles and terms of all relevant bilateral agreements.

Lastly, we must consider our obligations under Section 309(a) of the Communications Act of 1934, as amended. Under this provision, the Commission must determine whether grant of the Application would serve the public interest. SDCCD argues that the Staff Decision previously established that grant of the Application is in the public interest and, therefore, that Section 309(a) mandates a grant in these circumstances. It also notes that KSDS, one of only two public radio stations in the San Diego market, provides local programming and promotes numerous local performing arts events. It provides information regarding numerous prestigious national awards that KSDS has received for its programming. SDCCD urges grant of the Application to permit KSDS to attract new listeners and new sources of funding.

XETV, in turn, claims that it provides "a more local service" to San Diego than KSDS. It points to its coverage of local issues, the local documentaries it has produced, its receipt of 30 Golden Mike

¹² See n.3, *supra*.

¹³ *1962 United States-Mexico VHF Television Agreement*, April 18, 1962.

¹⁴ The proposal was coordinated with Mexico by letter dated April 9, 1996. By letter dated July 10, 1996, Mexico's Secretaria De Comunicaciones Y Transportes ("SCT") accepted the proposal. The SCT subsequently withdrew the proposal because of concerns of possible interference to XETV operations in the United States.

¹⁵ 47 C.F.R. § 73.525.

Awards, 70 Emmy Statuettes, and national and regional Edward R. Morrow Awards. XETV concludes that it “would be unconscionable for the FCC to permit thousands of U. S. viewers of XETV FOX 6 to suffer interference in order to permit a sevenfold power increase to a college radio station” SDCCD disputes XETV’s localism claim, noting that the station is licensed to Tijuana.

We find merit in the arguments of both SDCCD and XETV. Both stations provide valued and high-quality programming to San Diego residents. Thus, our public interest analysis must take into account the impact of the proposed KSDS facilities on both listeners and viewers. Although the Application is not subject to the distance separation requirements of Section 73.525, we cannot ignore the potential for interference in this context. Importantly, this rule permits certain levels of interference to domestic Channel 6 reception.¹⁶ Thus, the rule itself recognizes that promoting additional NCE FM service can outweigh limited additional amounts of Channel 6 interference. We believe that it is appropriate to impose several conditions on the grant of the Application, consistent with the rule’s balancing approach.

KSDS will be limited to operations with a vertically polarized antenna. It is our experience that this restriction can limit the extent of Channel 6 interference without materially impacting radio service. We will require KSDS to take reasonable steps to help viewers mitigate Channel 6 interference. Moreover, SDCCD will be required to provide the Audio Division of the Media Bureau with copies of any interference complaints that it cannot resolve.¹⁷ We reserve the right to direct SDCCD to take further additional steps to mitigate interference should circumstances warrant. We note that San Diego has one of the highest cable television household penetration rates in the nation.¹⁸ In this regard, we clarify KSDS’s responsibilities to protect cable television reception. Under the Commission’s FM blanketing interference rule,¹⁹ KSDS must prevent interference to a cable system at the cable headend. However, it is the responsibility of the cable system operator to otherwise prevent ingress of a radio station signal into the cable system. This includes preventing interference caused by unintentional radiators such as cable television converter equipment and other television terminal devices attached to the cable system.

Conclusion. Accordingly, it is ordered, that the April 28, 1997, objection of Cox Communications, Inc., the May 6, 1997, objection of Radio Televisión, S.A. de C.V. and Bay City Television, Inc., and the May 20, 1997 objection of Fox Broadcasting Company ARE DENIED. It is further ordered that the September 22, 1997, and January 5, 2005 objections of Radio Televisión, S.A. de C.V. and Bay City Television, Inc. ARE DENIED. It is further ordered, that the November 25, 1996, San Diego Community College District amendment IS ACCEPTED and the application, as amended (BPED-940802MA) with vertical polarization only IS GRANTED. This authorization is conditioned on San Diego Community College District taking reasonable steps to assist XETV(TV) viewers in San Diego in mitigating interference from KSDS(FM) operations in accordance with this authorization and providing copies of all interference complaints it cannot resolve to the Audio Division, Media Bureau. In the event that San Diego Community College District desires to reject any term or condition of this authorization, it

¹⁶ See *id.* § 73.525(c) (permitting NCE FM interference to 3,000 persons receiving Channel 6 service).

¹⁷ Copies of complaints should be sent to Federal Communications Commission, Media Bureau, Audio Division, 445 12th Street, NW, Washington, D.C. 20554, Attn: Dale Bickel, Room 2-A324.

¹⁸ San Diego has the sixth highest cable penetration rate, at 85 percent of all households, among all Nielsen Media Research Designated Market Areas. See *Broadcasting and Cable Yearbook 2006*, p. C-11 (2005).

¹⁹ See 47 C.F.R. § 73.318.

shall file a written request rejecting the grant as made in accordance with Section 1.110 of the Commission's rules.²⁰ These actions are taken pursuant to Sections 0.61 and 0.283 of the Commission's rules.²¹

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

²⁰ *Id.* § 1.110.

²¹ 47 C.F.R. §§ 0.61 and 0.283