



Federal Communications Commission
Washington, D.C. 20554

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In Reply Refer to:
1800B3-RFB

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In re: KXRS(FM), Hemet, CA
Facility ID No. 36829
Lazer Broadcasting Corporation
File No. BPH-20040205AAK

Petition for Reconsideration

Dear Counsel:

We have before us a Petition for Reconsideration ("Petition") filed by LBI Radio License Corp. ("LBI"), licensee of KBUE(FM), Long Beach, California, on June 7, 2006.¹ LBI seeks reconsideration of the May 3, 2006, letter decision by the Audio Division, Media Bureau ("Bureau") denying the March 25, 2004 Informal Objection ("Objection") filed by LBI and granting Lazer's above-referenced minor modification application ("Application") to modify Station KXRS(FM) ("Station") from Channel 289A to Channel 288A and increase effective radiated power and antenna height at a different location.² For the reasons stated below, we deny the Petition.

Background. On March 25, 2004, LBI filed an informal objection stating that KXRS's application was in violation of Section 73.315 of the Rules.³ Specifically, LBI argued that KXRS's proposed Longley-Rice signal level predictions indicated that signal levels of at least 70 dBu would only cover 72.9% of the area and 67.4% of the population of Hemet, well below the 80% coverage to achieve substantial compliance with Section 73.315(a). In the *Letter Decision*, the Bureau stated that the objection was forwarded to our propagation expert at the Office of Engineering and Technology ("OET") to perform an independent study. OET concluded that there was no major terrain obstruction and that the application demonstrated compliance with Section 73.315. Therefore, LBI's Objection was denied and Lazer's application granted in the *Letter Decision*.

¹ Lazer Broadcasting Corporation ("Lazer") filed an Opposition to Petition for Reconsideration ("Opposition") on June 20, 2006, and LBI filed a Reply to Opposition on June 30, 2006.

² See *Lazer Broadcasting Corporation*, Letter, Ref. No. 1800B3 (May 3, 2006) ("*Letter Decision*"); Both Stations, KBUE and KXRS, will be operating on Channel 289.

³ 47 C.F.R. § 73.315.

Petition for Reconsideration. In its Petition, LBI contends that, in the *Letter Decision*, the Bureau failed to address LBI's claim that the operation of KXRS with the fully spaced facilities specified in the construction permit will cause massive interference to KBUE. Specifically, LBI claims that KXRS's "modified operations will result in considerable contour overlap with KBUE, such that 100 percent of the land area and 100 percent of the population within the KBUE 60 dBu contour will be encompassed by the KXRS interfering contour."⁴ LBI attributes this substantial degree of interference "due to the location of KXRS's new transmitter site on a mountain slope, which allows KXRS to factor the negative heights above average terrain in some directions (toward the rising mountain) into its overall height above average terrain, thereby allowing an increase in antenna height..."⁵ Finally, LBI claims that the Bureau is "obligated to take a "hard look" at its showing of interference, and to depart from its ordinary processing guidelines."⁶

In addition, LBI repeats its claim that the KXRS proposal would fail to provide the requisite level of community coverage. Specifically, LBI claims that the Bureau failed to address its showing that 14 of the 27 KXRS radials that pass through Hemet are totally terrain blocked.⁷ Furthermore, LBI believes that the Bureau was required to provide a more detailed explanation of the reasons for its conclusion.

Finally, LBI states that the grant of the KXRS application prior to the receipt of Mexican concurrence conflicted with established Commission policy under which the Bureau not grant a construction permit until the required foreign approvals have been received. Moreover, LBI claims that the Bureau provided no explanation in the *Letter Decision* regarding any reason for applying a different rule.⁸

Opposition to Petition for Reconsideration. In its Opposition, Lazer claims that LBI failed to properly make its interference argument in the Objection. Furthermore, Lazer believes that its compliance with the separation requirements, conceded by LBI, resolves any question of potential interference.⁹ In addition, Lazer states that LBI's argument regarding the inadequate community coverage is a "rote reiteration of arguments which it previously advanced unsuccessfully."¹⁰ Finally, Lazer argues that LBI fails to cite any "policy statement, decision, rule or other authority in support of its notion that the grant of Lazer's application prior to receipt of Mexican concurrence was inconsistent with established policy."¹¹

⁴ Petition at 2.

⁵ *Id.* at 3. LBI also provides an alternative site which it believes would cause significantly less interference.

⁶ *Id.* at 4. *Wait Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (subsequent history omitted).

⁷ *Id.* at 5.

⁸ *Id.* at 6.

⁹ Opposition at 3.

¹⁰ *Id.* at 2.

¹¹ *Id.* at 5.

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order, or raises additional facts, not known or existing at the time of the petitioner's last opportunity to present such matters.¹² LBI has failed to meet this burden.

Although LBI's interference claim was arguably not adequately presented to the Bureau in the Objection,¹³ we will nevertheless address it here in the interest of a complete record.¹⁴ We agree with Lazer that, if an FM application meets the distance-separation criteria in Section 73.207 of the Rules,¹⁵ claims of interference, no matter how characterized or calculated, are not accepted.¹⁶ Thus, we do not give any consideration to LBI's allegations of interference based on its contour overlap showings. It is well established that variations in terrain along a specific path may result in a contour that exceeds the distance separation requirements. The "hard look" requested by LBI would apply to a formal request for waiver of a specific rule, which is not present here. Finally, Lazer's application, being fully spaced and otherwise rule compliant with respect to KBUE, is not required to propose an alternate site that would provide less interference.

With regard to community coverage, LBI relies on the same facts and arguments that it advanced in the Objection. These arguments were expressly addressed and disposed of in the *Letter Decision*, which properly relied on an independent study by OET, concluding that although there was terrain obstruction, it did not limit service to the entire community, and was therefore not a major obstruction. It is settled Commission policy that petitions for reconsideration are not to be used for the mere re-argument of points previously advanced and rejected.¹⁷ Therefore, we deny these arguments on procedural grounds.

Finally, we disagree with LBI's argument regarding Mexican concurrence. The International Bureau, following guidelines outlined in the *Agreement between the Government of the United States of America and the Government of the United Mexican States Relating to the FM Broadcasting Service in the Band 88-108 MHz*, available at <http://transition.fcc.gov/ib/sand/agree/files/mex-bc/fmbc.pdf>,

¹² See 47 C.F.R. § 1.106(c),(d). See also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

¹³ We disregard any legal arguments made in the engineering exhibit submitted with the Objection. See "Engineering Statement in Support of an Informal Objection." A person who is neither a party nor legal counsel may not act as legal counsel before the Commission. 47 C.F.R. § 1.23(a). Any argument put forth by such a person may be disregarded. See *Calvary Chapel of Costa Mesa, Inc.*, Letter, 27 FCC Rcd 557, 559 n.13 (MB 2012).

¹⁴ 47 U.S.C. § 1.115(c).

¹⁵ 47 C.F.R. § 73.207.

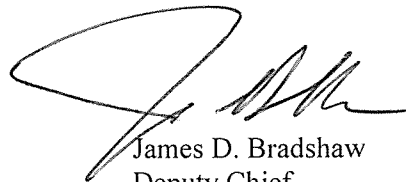
¹⁶ See *Amendments of Parts 73 and 74 of the Commission's Rules to Permit Certain Minor Changes in Broadcast Facilities Without a Construction Permit*, Report and Order, 12 FCC Rcd 12371, 12396 (1997) ("Minor Change in Facilities") ("Stations assigned in this manner are protected from interference from new or modified assignments solely on the basis of these distance separation requirements"); see also *Florissant Broadcasting Co., Inc.*, 63 FCC 2d 1041, 1043 (1977) ("the nature and extent of interference protection accorded commercial FM broadcast stations have been determined solely by the mileage separation, power, and antenna height limitations set forth in the Commission's Rules, without regard to the concept of protected and interfering contours."); *Fishers, Lawrence, Indianapolis, and Clinton, Indiana*, Report and Order, 22 FCC Rcd 11660, 11662 (MB 2007) (citing 47 C.F.R. §§ 73.207, 73.209; *Cordele, Georgia, et al.*, Report and Order, 12 FCC Rcd 9777, 9780 (MMB 1997)).

¹⁷ See, e.g., *John F. Garziglia, Esq.*, Letter, 28 FCC Rcd 15738 (MB 2013).

frequently authorizes the Bureau to grant applications with a Special Operating Condition¹⁸ before receiving clearance from Mexico. Thus, the granting of Lazer's application with Special Operating Condition No. 4 was consistent with Commission policy.¹⁹

Conclusion/Actions. For the reasons stated above, IT IS ORDERED that the Petition for Reconsideration filed by LBI Radio License Corp. on June 7, 2006, IS DENIED.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Bradshaw', is written over the printed name.

James D. Bradshaw
Deputy Chief
Audio Division
Media Bureau

¹⁸ This condition typically states, "This application is being granted prior to the completion of the international notification process. Therefore, any construction of and operation with the facilities specified herein is at applicant's own risk and subject to modification, suspension or termination without right to hearing, if objected to by the Comisión Federal de Telecomunicaciones (COFETEL) in Mexico or if found by the Commission or the COFETEL to be necessary in order to conform to the 1992 USA-Mexico FM Broadcasting Agreement. This condition will be removed if formal acceptance of the facilities granted herein is received from COFETEL."

¹⁹ Furthermore, Mexican concurrence was received on December 21, 2006.