

PHILES DIVISION

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Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUN 20 2006

Federal Communications Commission
Office of Secretary

In re Application of

Lazer Licenses, LLC¹
Hemet, California

For Minor Changes to
Station KXRS(FM)

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File No. BPH-20040205AAK
Facility ID No. 36829

TO: Marlene H. Dortch, Secretary

For transmission to: Donna C. Gregg, Chief
Media Bureau

OPPOSITION TO PETITION FOR RECONSIDERATION

1. Lazer Licenses, LLC ("Lazer") hereby opposes the Petition for Reconsideration filed by LBI Radio License Corp. ("LBI") with respect to the action of the Audio Division ("Division") which, *inter alia*, rejected LBI's informal objection to the above-captioned application and granted that application. The Division's action is reflected in a letter ("Letter Ruling"), dated May 3, 2006, from Rodolfo F. Bonacci, Assistant Chief of the Division, to Lazer. As set forth below, LBI's Petition can and should be summarily rejected because it fails to present any question warranting reconsideration.

2. In its application, Lazer proposed certain modifications to the facilities of Station KXRS(FM). LBI objected to Lazer's application in a four-paragraph Informal Objection

¹ On May 26, 2006, the Commission granted the FCC Form 316 application (File No. BALH-20060518ABQ) for consent to the assignment of the license of Station KXRS(FM) to Lazer Licenses, LLC. See Broadcast Actions, Report No. 46247, released June 1, 2006, at 24. That assignment has been consummated.

barely two and one-half pages in length. In its concluding paragraph, LBI summarized the argument it presented. We quote that paragraph *in toto*:

In sum, the proposed KXRS facilities fail to meet the Commission's requirements for principal community coverage under either the allotment or application standards. The Commission must dismiss the application.

LBI Informal Objection at (unnumbered) 3. In its Letter Ruling, the Division addressed LBI's claim of inadequate city-grade coverage. As described in the Letter Ruling, the Division referred that claim to the Commission's propagation expert in the Office of Engineering and Technology, which performed its own independent study and concluded that, contrary to LBI's self-serving supposition, "there is no major terrain obstruction and [Lazer's] application demonstrates compliance" with the city-grade coverage rules. *See* Letter Ruling at 1.

3. Unsurprisingly, the Division denied LBI's Informal Objection and granted Lazer's application. Surprisingly, LBI now seeks reconsideration of that decision. This is surprising for several reasons.

4. First, while LBI reiterates its claim of inadequate city-grade coverage, its argument is no more than that – a rote reiteration of arguments which it previously advanced, unsuccessfully. Apparently, LBI so fervently believes in the persuasiveness of its showing that it simply cannot comprehend that anyone could possibly reach a different conclusion. Obviously, though, reasonable minds – and reasonable technical analyses – can and do differ. In this case, the Commission, declining to adopt either LBI's analysis *or* Lazer's, referred the matter to the Commission's propagation expert, who undertook an independent analysis. That expert independently concluded that Lazer's application complies with the city-grade coverage requirement. In response, in its Petition for Reconsideration LBI does nothing more than refer the Commission, again, back to LBI's originally-tendered, since-rejected, analysis. It is well-

established, however, that a petition for reconsideration must present more than a repetition of already-rejected arguments.² Since LBI does nothing more than that, this argument must be rejected.

5. A second surprising aspect of LBI's Petition is the fact that the primary argument presented for "reconsideration" – or, at least, the first one presented and the one to which LBI devotes the most space – is an argument which LBI declined to make in its Informal Objection. According to LBI, the Commission must ignore its own longstanding rules, procedures and policies and, instead, accept LBI's claims concerning possible interference which would supposedly be caused by Lazer's proposed facilities. In support of this novel suggestion, LBI cites *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). See LBI Petition at 4.

6. *WAIT* does provide that, when a party expressly seeks a waiver, the Commission must give at least some consideration to that request. But here, LBI did *not* request any waiver at all in its Informal Objection. To the contrary, as noted above, the terse totality of LBI's Informal Objection was devoted to the city-grade coverage claim which the Division properly considered and rejected. LBI's new-found emphasis on claimed interference is nowhere to be found in the Informal Objection. At most, that issue was alluded to in LBI's Footnote 2 to the Informal Objection, which began with LBI's candid, grudging (and correct) admission that:

The proposed KXRS Class A facilities technically satisfy the minimum distance separation requirements of Section 73.207 of the Commission's rules. . . .

² "Reconsideration is appropriate only where the petitioner either shows a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. § 1.106(c). A petition that simply reiterates arguments previously considered and rejected will be denied. *Id.*; *Gaines, Bennett Gilbert*, 8 FCC Rcd 3986 (Rev. Bd. 1993)." *EZ Sacramento, Inc.*, 15 FCC Rcd 18257 (Enforcement Bureau 2000).

Lazer's compliance with separation requirements, conceded by LBI, resolves any question of potential interference, and resolves it favorably to Lazer.

7. Presumably aware of that fact, LBI declined in its Informal Objection to ask the Commission to ignore its separation rules. Instead, in the footnote cited above LBI grumbled that, even though Lazer is proposing a Class A facility, Lazer's facility should really be treated as if it were a Class B facility, in which case, under the separation rules, Lazer's putative Class B station would be short-spaced to LBI's. The flaw in LBI's grumbling, of course, is that Lazer's proposal is for a Class A station, *not* a Class B station. So whether or not LBI's claim of short-spacing is true, it is irrelevant and immaterial here because that claim is based on an assumed Class B operation which is not now and never has been proposed.³

8. *WAIT* does not require the agency to gather up and sift through dribs and drabs of argument and inspect, re-arrange and assemble them, jigsaw-puzzle-like, until some potentially discernible argument appears – especially when those dribs and drabs of argument are isolated to

³ In fairness, LBI's Informal Objection included an Engineering Statement which also alluded to concerns about potential interference. But there again, LBI plainly conceded the fact that Lazer's showing complied with the Commission's rules and policies. For example, LBI's Engineering Statement flatly asserted that:

[T]he Commission's procedure for determining the 8-radial antenna HAAT is well established, and the proposed KXRS conforms to a Class A station for minimum distance separation purposes.

LBI Informal Objection, Engineering Statement at 2. The Statement further acknowledged that where – as here – the separation requirements are satisfied, the Commission “typically ignores any resulting interference or contour overlap which may otherwise be prohibited.” *Id.* The Engineering Statement did not, explicitly or otherwise, request a waiver or other extraordinary departure from the Commission rules and policies which the Statement expressly acknowledged. Under such circumstances, it is bizarre in the extreme that LBI should now criticize the Commission for failing to recognize that, even though LBI conceded in 2004 that (a) Lazer's proposal conforms with well-established procedures and (b) the FCC typically ignores any interference that might arguably arise notwithstanding such conformity, LBI would two years later suggest that its earlier language should have been read as a request for extraordinary treatment inconsistent with the Commission's “well-established” and “typical” standards.

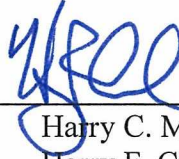
a footnote which (a) concedes the technical correctness of the challenged proposal and (b) then attempts to get around that stumbling block by positing a wholly-imagined set of facts. If LBI believed that potential interference warranted denial of Lazer's application, LBI should have presented that argument clearly, forthrightly and with sufficient analysis (and citation to authority) to enable the Commission to evaluate it. It did not do that. Instead, in a footnote it griped about possible interference – alleged interference which, as it turns out, would in any event be consistent with the Commission's technical rules – and that was that. Having failed to raise this argument prior to the Division's action below, LBI cannot now be heard to complain that the Division could have or should have done more.

9. In its penultimate paragraph, LBI advances a third claim, *i.e.*, that grant of Lazer's application prior to receipt of Mexican concurrence was inconsistent with established Commission policy. But LBI in fact cites no policy statement, decision, rule or other authority in support of its notion that there is some "established Commission policy" which may have been ignored here. To the contrary, in a footnote without explanation or elaboration, LBI merely cites several application file numbers. Review of the construction permits associated with each of those file numbers does not reveal any Commission policy inconsistent with the grant of Lazer's application. Thus, this aspect of LBI's Petition for Reconsideration can and should be dismissed without further discussion.

10. LBI's Petition for Reconsideration fails to meet the criteria for the relief LBI seeks. LBI does not demonstrate any error in the Division's action, nor does LBI present any new information which was unavailable to it earlier in this matter. Moreover, to the extent that LBI relies primarily on allegations of potential interference, it is clear from its Informal Objection that even LBI recognizes that those allegations are ordinarily insufficient to warrant

the extraordinary step of reconsideration. Under these circumstances, LBI's Petition for Reconsideration must be denied.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "H. Martin", is written over a horizontal line.

Harry C. Martin
Harry F. Cole

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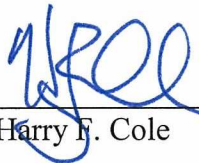
June 20, 2006

CERTIFICATE OF SERVICE

I, Harry F. Cole, hereby certify that, on June 20, 2006, I caused a copy of the foregoing "Opposition to Petition for Reconsideration" to be placed in the U.S. mail, first class postage prepaid (or sent by electronic mail, as indicated below), addressed to the following:

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