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June 15, 2005

Our File No. 20670-00100-61

BY HAND

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-B204-C
Washington, DC 20554

**Reference: Quetzal Bilingual Communications, Inc.
325-NEW-20050406-00008**

Dear Madam Secretary:

Handed to you herewith are an original and four (4) copies of an Opposition to Petition to Deny.

Should you have any questions, please communicate with the undersigned.

Respectfully submitted,

QUETZAL BILINGUAL COMMUNICATIONS, INC.

By: 

Henry A. Solomon
Its Attorney

HAS:ar
Enclosure

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of)
)
QUETZAL BILINGUAL)
COMMUNICATIONS,) 325-NEW-20050406-00008
INC.)
)
For Section 325(c) Permit to deliver)
programming to Station XHBCE-FM, Class C1)
Tecate, B.C., Mexico)

To: Secretary
For: Chief, International Bureau

OPPOSITION TO PETITION TO DENY

Quetzal Bilingual Communications, Inc. (“Quetzal”), by its attorneys, opposes the Petition to Deny (the “Petition”), lodged May 16, 2005, by Lazer Broadcasting Corporation (“Lazer”), Citicasters Licenses, L.P. (“Citicasters”), and Emmis Communications Corporation (“Emmis”)¹ (Lazer, Citicasters and Emmis, collectively referred to as the “Petitioners”).

I. PETITIONERS LACK STANDING

Section 309(d) (1) of the Communications Act, 47 U.S.C. § 309(d) (1), permits any “party in interest” to file a petition to deny an application. In general, to prove standing a petitioner must allege sufficient facts to demonstrate that grant of the application would cause petitioner to suffer a direct injury.² *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470, 476-77

¹ Other undisclosed licensees also were involved in this matter. See Pet. 4: “To verify the facts regarding Quetzal’s illegal cross-border operations, Lazer, with the assistance of Citicasters, Emmis *and others*, commissioned...a field inspection” (emphasis supplied). Mr. Saxberg declares that his “field inspection” was commissioned by Lazer alone.

² See *Los Angeles Cellular Tel. Co.*, 13 FCC Rcd 4601, 4603-04 ¶3 (CWD 1998), citing *American Tel. Corp.*, 9 FCC Rcd 3993, 3995 (1994), citing *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972); see also *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Warth v. Selden*, 422 U.S. 490, 508 (1975).

(1940). In other words, a petitioner must establish a causal link between the claimed financial injury and the challenged action.³

Lazer's sales representative⁴ alleges that XHBCE is causing "interference" to his employer's station KXRS, Hemet, California. No empirical data are offered to support his claim which, under the circumstances, would not be justiciable at the FCC. Significantly, Joel T. Saxberg, Lazer's consultant, has not asserted that KXRS is experiencing interference from XHBCE's current or proposed operations.⁵ Quetzal, of course, is incapable of causing interference to KXRS because (a) it neither engages nor proposes to engage in FM broadcasting, and (b) it is not supplying programming to XHBCE at the station's C1 site—a site that has *not* been activated. XHBCE's *proposed* C1 operation has, in any event, been coordinated under international agreements. As such, XHBCE is obligated to protect KXRS's signal.⁶ Quetzal is relaying U.S. programming to XHBCE pursuant to Quetzal's Class B STA. However, Lazer has not offered measurements or other credible information to suggest that XHBCE's signal is interfering with KXRS in geographic areas where that station is entitled to protection.

Citicasters's standing claim is equally porous. Its engineer fails to verify that he read the Petition, but claims that his employer's KIOZ (FM), San Diego, "competes for advertising revenues with XHBCE." Pet. Exh. 2. The Petition claims (p. 2) that KIOZ (FM) competes with XHBCE "as a result of operation of that station from Quetzal's studio in Chula Vista, California." First, XHBCE is not "operated" from Chula Vista. It is a Mexican station operated by personnel in Mexico. Second, if XHBCE is "competing" with KIOZ (FM), Citicasters clearly

³ See *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 490, 508 (1975).

⁴ Declaration of Armando Gutierrez, Pet. Exh. 1.

⁵ The technical showing prepared by Joel T. Saxberg will be discussed below. See, e.g., p. 5 of Mr. Saxberg's "Report on Findings of Field Investigation of Radio Facilities."

⁶ All § 325 (c) Permits are conditioned on the requirement that that foreign stations comply "with applicable treaties and related provisions concerning electrical interference to U.S. Broadcast Stations."

lacks standing because XHBCE is licensed by the SCT, not the FCC. Third, as previously noted, Quetzal cannot compete with KIOZ, because Quetzal will not be providing a broadcast service. Finally, as a matter of law neither competition nor prospective competition confers standing absent a verified allegation that a petitioner “is likely to be injured by issuance of a license.” *Sanders Bros.*, at 476-77. Citicasters has no “concrete economic interest sufficient to confer standing.” *Mount Wilson FM Broadcasters, Inc. v. F.C.C.*, 884 F.2d 1462, 1465, n. 6 (D.C. Cir. 1989).⁷

Emmis also appears to have signed on to the Petition. *It does not allege that any of its stations (which it declines to identify) will be affected by a grant to Quetzal.* The Petition (p. 2) simply claims that Emmis is “participating” in this litigation as a “private attorney general,” but no officer of *Emmis* professes such status. Nor has Emmis tendered an affidavit or declaration, or affirmed that someone (anyone) at that company read and approved the Petition. Emmis’s standing claim is spurious.

The Petition should be treated as an informal objection and dismissed or denied.

II. PRELIMINARY STATEMENT

The Saxberg Report. Petitioners’ technical allegations are enumerated in Exhibit 3 to the Petition, the May 2005 report of “Joel T. Saxberg, Consulting Radio Engineer” (the “Saxberg Report”).⁸ Quetzal will show that the Saxberg Report is rife with errors and omissions.⁹

⁷ *Mt. Wilson* also held that potential future interference does not confer standing. 448 F.2d at 1465.

⁸ “Report on Findings of Field Investigation of Radio Facilities of XHBCE-FM, XESS (AM), XESDD (AM) & XEKTT (AM) All Located in Baja California North, Mexico.” The Petition declares that Saxberg’s field investigation was commissioned by Lazer, Citicasters and Emmis. Pet. 4. Curiously, the Saxberg Report states just the opposite on its second page; *i.e.*, that the report was “prepared for Lazer Broadcasting Corporation.”

⁹ For example, Saxberg does not disclose when he overflew the sites that are the subjects of his field investigation. He does not authenticate the photographs included in the Saxberg Report or claim to have taken the pictures. *See* Rules 901 & 1010(2), Federal Rules of Evidence. Nor does Saxberg, who is not a Mexican national, disclose whether he received a license from the *Instituto Nacional de Migracion en B.C.*, to work in Mexico. Finally, although Mr. Saxberg states that he is a Consulting Radio Engineer, there is no seal on the Saxberg Report

Quetzal's STA. Since early April, 2005, Quetzal has been supplying programming from Chula Vista to XHBCE, which is broadcasting on Channel 289B (105.7 MHz) from a site known as Cerro Grande, Matamoros, B.C. The Class B operation was coordinated under the 1992 FM Broadcasting Agreement between Mexico and the United States.¹⁰

Quetzal's Proposed C1 Operation. Quetzal's captioned application seeks authority under § 325(c) to relay programming from Chula Vista to XHBCE at Cerro Bola where it will operate with 8.2 kW ERP.¹¹ The C1 operation also was coordinated.

The Morton Report. Quetzal is principally relying on **Exhibit 1** hereto, the Engineering Report by Lawrence L. Morton, P.E. (the "Morton Report"), to counter the Saxberg Report.¹²

III. RESPONSE TO PETITION TO DENY

A. Quetzal is Supplying Programming to XHBCE's Transmitter Site at Cerro Grande.¹³

The Saxberg Report (p. 4) declares that "there is no physical evidence to suggest that a transmitter was ever built" at XHBCE's Class B STA site. To prove a negative, Mr. Saxberg submits an aerial photograph of a portion of Cerro Grande. No transmitter is visible.

Photographs do not always tell the whole story. Mr. Saxberg's photograph is deceptive.

indicating that Mr. Saxberg has complied with California's Rules for Professional Engineers and Land Surveyors; *i.e.*, that he is certificated as a Professional Engineer, Registered Professional Engineer or Licensed Professional Engineer. Mr. Saxberg operates from offices in Arcadia, California.

¹⁰ The FCC granted Quetzal an STA for cross-border operations on April 1, 2005. Frequency coordination was completed on May 21, 2004.

¹¹ See May 6, 2005 "assignment letter," from Sr. Jorge Rodriguez Castaneda, the SCT's Director General to Kathryn O'Brien of the International Bureau. This letter was filed with the Bureau and an English translation was provided.

¹² **Exhibit 2** is a copy of a May 19, 2005 permit issued by Mexico's *Subdirector de Control Migratorio, del Instituto Nacional de Migracion en B.C.*, to Mr. Morton. Aliens must obtain a permit to work in Mexico.

¹³ The Saxberg Report incorrectly identifies the Class B site as "Matamoros Jaramillo." Elsewhere, the site has been referred to as "Matamoros Jaramillo, B.N." (FCC letter of May 21, 2004, to SCT confirming coordination) and "Cerro Grande, Matamoros, B.C." (SCT Class B 50 kW license issued November 11, 2004). In fact, the two sites identified in those official communications are identical. Their identical coordinates appear in the FCC's letter and on the license. The site will be referred to hereinafter as the "Class B Site."

“Site 1” in the Saxberg Report is a photograph of two hills (*cerros*) separated by a ravine or *arroyo*. In fact, XHBCE is operational at Cerro Grande and its site was within the Mr. Saxberg’s visual field. *He could not have overlooked the installation if he tried. The recently-constructed road leading to the site is conspicuously visible at the middle-upper right-hand portion of his photograph.* Mr. Saxberg had to have seen the road; his apparent “blindness” bespeaks a troubling lack of candor. Morton Statement, pp. 9-16. *See especially Figs. 5 & 6.*

The Saxberg Report next alleges that when Mr. Saxberg over-flew the patch of airspace identified as “Site 1” he did not detect XHBCE’s signal or view any power lines. Mr. Saxberg does not reveal either the date, time or length of his flyover. Quetzal has learned that the flight in a rented helicopter occurred on Wednesday, May 11, 2005, and that the aircraft cleared Tijuana Customs late that morning. Power lines are not visible at the Class B Site because XHBCE relies on a diesel generator to run its transmitter. *See Figs. 7 & 8, of the Morton Report.*

Exhibit 3 hereto is the Declaration of Oscar Eguia. Mr. Eguia declares that he and his assistant were performing emergency maintenance on XHBCE’s generator during the late morning and early afternoon of May 11, 2005. It so happens that XHBCE’s transmissions were interrupted on several occasions because the maintenance crew had to disable the generator.¹⁴ Consequently, if Mr. Saxberg flew by the Class B Site about midday on May 11, it is unsurprising that he did not detect a signal: During that entire time period XHBCE was operating intermittently with its 20-watt exciter. It should be noted that the Class B Site is a temporary location for XHBCE, since the station intends to move to the Class C1 Site.

Regarding coordinates, a licensed surveyor plotted the coordinates of the Class B Site late last month. The site survey revealed that the actual Class B Site was built at a location 179.9

¹⁴ Mr. Eguias indicates that the generator has not been a reliable power source, pointing out that it has malfunctioned in the past and has had to be restarted manually.

meters (approximately 590 feet) from the site specified on the SCT license. The coordinate matter is addressed in detail at pages 13 & 16 of the Morton Report. The variations, Mr. Morton affirms, result in “no measurable impact to KXRS (FM)...” *Id.* at 16.

B. XHBCE is Not Broadcasting From the Class C1 Site (Cerro Bola).

The Saxberg Report (pp. 5 & 6) next claims that Mr. Saxberg flew over “Site 2” XHBCE’s Class C1 transmitter site also known as “Cerro Bola” (hereafter the “Class C1 Site”), The Class C1 Site is approximately 10 miles from the Class B Site.¹⁵ Unlike Mr. Morton, *Mr. Saxberg did not conduct a field inspection at the Class C1 Site: He conducted an aerial glance.*

Had Mr. Saxberg landed and conducted a proper field inspection he would have quickly discovered the absence of audio processing equipment and associated wiring. Until this equipment is installed, XHBCE cannot broadcast programming. *See* Morton Report, pp. 16-20.

During his fly-by Mr. Saxberg also should have observed the lack of auxiliary antennas or other equipment capable of receiving and downloading programming from Chula Vista, California.¹⁶ Morton Report, p. 17. Nevertheless, Mr. Saxberg insists that XHBCE is broadcasting from the Class C1 Site, alleging at page 5 of his report that the station’s operational status was “confirmed by signal strength measurements” taken from the air. This contention is refuted at pages 16 and 17 of the Morton Report.

Since XHBCE is not broadcasting from its Class C1 Site, it cannot be interfering with the reception of Lazer’s Hemet FM. Moreover, although Petitioners would have the FCC believe the

¹⁵ At page 2 of his report, Mr. Saxberg refers to “Cerro Bola” twice in the last sentence of the opening paragraph. It appears that the first reference is in error and was intended to refer to the Class B Site, 10 miles distant.

¹⁶ This equipment is currently deployed at the Class B Site.

opposite, they fail to offer a shred of evidence suggesting that XHBCE intends to violate the technical strictures on its SCT license.¹⁷

Finally, the Saxberg Report (p.6) proffers photographs of two antennas at the Class C1 Site. The 8-bay antenna depicted on the right belongs to XHBCE.¹⁸ The Petition (p.5) notes that the antenna is “far larger than would be required for the authorized maximum ERP of 8.2 kW, but which would accommodate [XHBCE’s] original 50 kW operation authorized by the SCT.” In fact, the SCT originally licensed XHBCE to operate with a maximum ERP of 50 kW at its Class C1 Site. It was not until April 15, 2005, that the SCT ordered XHBCE to operate with a maximum ERP of 8.2 kW. Thus, the 8-bay antenna contemplated at the Class C1 Site was acquired in contemplation of a 50 kW operation and was installed before XHBCE received the SCT’s April 15 order.¹⁹

Petitioners would have the Commission imply that Quetzal will violate § 325(c) by supplying programming to a 50 kW FM operation at the Class C1 Site. No such implication is permissible under § 309(d) (1) or justifiable. Petitioners utterly fail to raise a question of fact, let alone one that is substantial and material.

C. PSN is Operating a Non-Licensed Microwave System Under Part 15 of the Rules.

The Morton Report (pp. 26-28) and **Exhibit 4** hereto, the Declaration of Marco Antonio Villar, verify that Quetzal affiliate Pacific Spanish Network, Inc. (“PSN”), has been operating a Part 15 spread spectrum microwave system for which no FCC license is required, between Chula Vista and Mexico since late March, 2005. *See also* Morton Report, Figs 27 & 28. Petitioners’

¹⁷ Being duly licensed and having undergone international frequency coordination, XHBCE is free to commence operations at the Class C1 Site *at any time*.

¹⁸ The antenna on the left belongs to an unrelated FM station operating on 95.3 MHz.

¹⁹ XHBCE’s license was issued on November 11, 2004, and specified a 50 kW operation at Cerro Grande, Matamoros, B.C. Quetzal amended its captioned C1 application as soon as it learned of the SCT’s order directing XHBCE to operate at no more than 8.2 kW ERP.

unverified allegation at page 8 that there is an “illegal [microwave] facility” in place is unverified, inaccurate, and should be stricken.²⁰

D. The AM Stations Served by Quetzal.

(1) XEKTT-AM (1700 kHz) and the “Tijuana Airport Site.” Curiously, the Saxberg Report (pp. 7 & 8) comments on the absence of a 1700 kHz operation by XEKTT at the “Tijuana Airport Site.” However, Mr. Saxberg’s own photographs at page 8 show that the site is unconstructed.²¹

(2) XEKTT-AM’s Operation at “Site 4”-Cerro Jaramillo. The Saxberg Report (p. 6) refers to Site 4 as “Cerro Jaramillo” and states that there are two towers of “grossly unequal height” at that location. It points out that XEKTT’s license calls for two towers of equal height.

Quetzal first assures the Commission that it is supplying programming from Chula Vista to XESS’s 620 kHz transmitter *at Puerto Nuevo, and nowhere else. See photo at page 11 of the Saxberg Report and subsection (3) below.*

Nevertheless, Mr. Saxberg insists that he conducted “signal strength readings” purporting to show that one of the towers is being used to radiate XESS’s signal on 620 kHz. Saxberg Report at 9. The Morton Report refutes this conclusion by demonstrating that Mr. Saxberg’s investigative technique, a “fly-over inspection,” is flawed. Morton Report, p. 3. There is no truth to Mr. Saxberg’s statement. The taller tower is, as Mr. Morton points out, “available for rent.” *Id.* & Figs. 1 & 2.

The shorter tower in the photograph was constructed to accommodate XEKTT’s 1700 kHz operation. It is being used *exclusively* for that purpose, and directionalization is

²⁰ On June 6, 2005, the FCC granted PSN’s application for Private Operational Fixed facilities between Chula Vista and Mexico. That facility was placed in operation earlier this month.

²¹ Nor has Quetzal applied for a permit to supply programming to that location.

accomplished with a slant wire. Slant wires are permitted in Mexico and the FCC has been informed of this fact by the SCT's General Director. This matter is addressed in **Exhibit 5**, hereto, the Declaration of Oscar Rivera.²² *See also* Morton Report, pp. 5-6, wherein Mr. Morton discusses the efficacy of slant wires.

(3) XESS-AM's and XESDD-AM's Operations at "Site 5"-Puerto Nuevo. AM stations XESDD (1030 kHz) and XESS (620 kHz), broadcast from Puerto Nuevo, B.C., where they too operate directionally at reduced power utilizing slant wires as set forth in the Morton Report, pp. 21-22. Mr. Saxberg's claim that he only detected a 620 MHz signal at the site is refuted by Mr. Morton who was on the ground and who listened to both stations during his inspection.

IV. CONCLUSION

The Petition is long on aggressive rhetoric, but lacking in specific allegations of fact. It fails to establish that any of the three *disclosed* Petitioners is a bona fide party in interest. Nor do Petitioners advance specific allegations of fact sufficient to raise *prima facie* substantial and material questions of fact regarding Quetzal's captioned Class C1 application or its current service to XHBCE at the station's Class B Site. Quetzal is aware that Petitioners are fearful of new FM competition from XHBCE's proposed C1 operation at Cerro Bola, and that fear, not any craving to vindicate the public interest, is the driving force behind their Petition against Quetzal.

²² The procedures that are being followed in Mexico with respect to the slant wire installations are analogous to the procedures that can be adopted by U.S. permittees. *See* 47 C.F.R. § 73.1615 (Operation during modification of facilities). Indeed, under that regulation, the permittee of a directional station may temporarily operate in a nondirectional mode. § 73.1615 (b)(3).

The Petition should be dismissed or denied in its entirety. The captioned application should be granted forthwith.

Respectfully submitted,

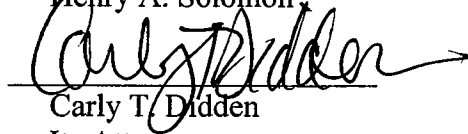
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