

FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, DC 20554

IN REPLY REFER TO:  
1800B3-DEB

October 27, 1995

Sounds Good, Inc.  
4000 Fifth Avenue  
Altoona, Pennsylvania 16602

In re: WBXQ-FM, Cresson, PA  
Sounds Good, Inc.  
BPH-941019IA

Gentlemen:

By letter dated February 6, 1995 the staff sent a letter to Sounds Good, Inc., licensee of WBXQ, Cresson, PA, regarding the pending application BPH-941019IA to change transmitter site. That letter indicated that a deficiency existed in the application and requested a corrective amendment. On March 20, 1995, Sounds Good's counsel filed a response contending that the staff's conclusions were in error. The March 20, 1995 document also requested waiver on a contingent basis in case the staff should not agree with Sounds Good, and alternatively provided a contour protection amendment in case the staff could not grant the request for waiver.

Background. The application as originally filed proposed to relocate the transmitter site of WBXQ by 6.9 km from its present location. As indicated in the staff's February 6, 1995 letter, that would place WBXQ at a site located only 99.4 km from the cochannel facilities of WKSL, Greencastle, PA.<sup>1</sup> The staff's letter concluded that WBXQ was permitted by 47 CFR § 73.213(c) to move to a transmitter site located no closer than 103.9 km to WKSL, corresponding to the grandfathered short-spacing which exists from the licensed WBXQ operation.<sup>2</sup> The

---

<sup>1</sup> To be fully spaced under 47 CFR § 73.207, these stations would need to be separated by at least 115 km. In addition, to be properly spaced under 47 CFR § 73.213(c)(1), these stations would need to be at least 105 km apart. The licensed present WBXQ site is 103.9 km from WKSL.

<sup>2</sup> Specifically, the staff's letter quoted § 73.213(c):

Stations that became short-spaced on or after November 16, 1964 (including stations that do not meet the minimum distance separation requirements of paragraph (c)(1) of this section [here, WBXQ-FM] and that propose to *maintain or increase existing distance separations*) may be modified or relocated in accordance with paragraphs (c)(1) or (c)(2) of this section... (italics added)

Thus, the staff concluded that those stations which already do not meet the minimum separation requirements in the § 73.213(c)(1) table may not further decrease the separation between the short-spaced stations. The February 6, 1995

staff advised Sounds Good that it must either (1) specify a new transmitter site spaced at least 103.9 km from WKSL or (2) employ contour protection pursuant to 47 CFR § 73.215 with respect to WKSL.

The March 20, 1995 response disagrees with the staff's conclusions. Sounds Good employs two arguments in support of its conclusion that the staff erred. First, Sounds Good argues that the staff has misread the rule under the English language's grammar rules and the rules of statutory construction. In sum, Sounds Good concludes that the parenthetical phrase in the second sentence of § 73.213(c) (prior to the start of subsection (c) (1)) does not specifically exclude stations who propose to decrease the spacing between the grandfathered stations (like WBXQ and WKSL) from applying § 73.213(c) and thus the parenthetical phrase can be ignored.<sup>3</sup> Having done so, Sounds Good notes that as subsection (c) (2) does not refer to subsection (c) (1), WBXQ need not consider the spacing table in subsection (c) (1) nor any other spacing limit whatsoever with respect to WKSL. Thus, Sounds Good maintains that WBXQ's proposal to decrease the separation to WKSL by 4.5 km is acceptable for filing.

Second, Sounds Good asserts that Class A stations seeking mutual increases under § 73.213(c) (2) are not required to show that lesser-short-spaced sites do not exist. Thus, Sounds Good contends that Class A stations seeking mutual increases are exempt from any minimum separation requirements with respect to the short-spaced station.<sup>4</sup>

Analysis. Although Sounds Good asserts that the parenthetical phrase in the opening statements to § 73.213 can be effectively deleted since its application does not fit the mould (i.e., the application proposes to decrease the existing spacing to WKSL rather than improving (increasing) or maintaining the existing spacing referred to by the phrase), we do not agree. Nor can the quoted parenthetical phrase be simply characterized as an example of the classes of stations which fall under the rule.<sup>5</sup> Rather, the phrase is used in the rule to advise the reader that not all grandfathered short-spaced stations are covered,

---

letter stated that before § 73.213(c) can apply to WBXQ-FM, that station must increase the proposed spacing to WKSL-FM to at least 103.9 km, referring to Paragraphs 37, 38 of the Memorandum Opinion and Order in Docket 88-375, 6 FCC Rcd 3417 (1991).

<sup>3</sup> The indented portion of Footnote 2 to this letter contains the disputed sentence.

<sup>4</sup> The March 20, 1995 amendment also complains about WKSL's continued "irrational obstinacy" to enter into a mutual increase agreement with WBXQ, which Sounds Good believes would be in the public interest and in the interest of both FM stations. However, it is up to WKSL, and not Sounds Good or the Commission, to decide whether or not WKSL should participate in a mutual increase agreement. Accordingly, we will not pursue further any of Sounds Good's remarks in this vein. (We note that Sounds Good has filed a petition for reconsideration against the grant of WKSL's construction permit BMPH-930818IF, which remains pending.)

<sup>5</sup> Were that so, no such reference in the rule would be necessary, as Sounds Good has noted.

and further that the test for application of the rule lies in the § 73.213(c) (1) spacing table. By this means, the spacing table is made applicable to both § 73.213(c) (1) and (c) (2). Consequently, the staff did not err in the February 6, 1995 letter when it advised Sounds Good that it could not locate closer than 103.9 km (the existing spacing) with respect to WKSL if the application were to be processed pursuant to § 73.213(c).

In addition, the plain language of § 73.213(c) (2) states that it is necessary for applications filed pursuant to § 73.213(c) (2) to contain the consent of the affected short-spaced station. However, Sounds Good has admitted that it cannot obtain the written consent of WKSL.<sup>6</sup> Written consent is an essential predicate under § 73.213(c) (2) to grant of Sounds Good's application. See The Livingston Radio Company, 10 FCC Rcd 574, released January 12, 1995; Paragraph 52, Second Report and Order in MM Docket 88-375, 4 FCC Rcd 6375 (1989); Paragraph 19, Memorandum Opinion and Order in MM Docket 88-375, 6 FCC Rcd 3417 (1991). Without such consent, Sounds Good's application cannot be characterized as a mutual increase application with respect to WKSL, and § 73.213(c) (2) is not applicable with respect to WKSL.<sup>7</sup>

Also, where an applicant changes transmitter site under § 73.213(c) (2), the rule requires that the applicant demonstrate that there are no lesser-short-spaced sites or non-short-spaced transmitter sites.<sup>8</sup> Sounds Good is correct in its assertion that **mutual increase** applicants need not submit such a showing. However, as noted in the paragraph above, WBXQ is not a mutual increase applicant with respect to WKSL and thus is subject to this requirement. Sounds Good has not provided this information.<sup>9</sup>

---

<sup>6</sup> We note that on August 21, 1995, WSKL granted license BLH-940513KB to operate as a contour protection station with respect to WBXQ-FM. Consequently, WKSL has now given up the rights it previously held to apply § 73.213(c) with respect to WBXQ-FM, including the negotiation of mutual or unilateral increase agreements.

<sup>7</sup> Sounds Good has obtained the consent of another short-spaced station (WKBI-FM, St. Marys, PA) covered by § 73.213(c) with respect to WBXQ. This consent makes WBXQ eligible for § 73.213(c) (2) processing with respect to WKBI-FM only. It does not imply that WBXQ is eligible as a mutual increase applicant with WKSL (which as indicated has withheld written consent). Each pair of short-spaced FM stations must be considered individually to determine what provisions of § 73.213, §73.207, § 73.215, or other Commission rule applies to that particular short-spacing.

<sup>8</sup> The exclusion to this provision for Class A mutual increase applicants does not apply here since WKSL has not filed a mutual increase application corresponding to WBXQ's, nor has it given its written consent to this proposal. See Paragraph 27, MO&O, 6 FCC Rcd 3417.

<sup>9</sup> The staff's February 6, 1995 letter did not address this deficiency because the original application contained no reference to § 73.213(c) (2) toward WKSL, nor did the application at any point reference a mutual increase with respect to WKSL. Indeed, the cover letter to the application specifically stated that WBXQ was seeking processing pursuant to § 73.213(c) (1) with respect to WKSL.

Moreover, even assuming arguendo that the parenthetical phrase at the beginning of §73.213(c)(2) could be removed and the rule section read as Sounds Good suggests, the application would still violate § 73.213(c)(2) for the reasons noted in the previous two paragraphs, and would also not comply with § 73.213(c)(1) since the present site does not comply with the spacing table therein. Thus WBXQ would be prevented from exceeding the equivalent of 3.0 kW ERP/100 meters HAAT from its present site in any event.

Consequently, the application simply is not eligible for consideration under § 73.213(c)(2). Since the § 73.213(c) violation has not been corrected, the application remains unacceptable for filing and is subject to dismissal.

The Contingent Waiver request. The March 20, 1995 document requests waiver, on a contingent basis, of any "uncodified processing policy" that the staff finds necessary. The filing states that the Commission "will waive any rule or other requirement (other than an ironclad provision of the Act) for good cause shown, see 47 C.F.R. § 1.3" after giving the waiver request the "hard look" called for by WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969).

The "policy" to which the March 20, 1995 response refers is apparently a reference to the staff's determination that WBXQ is not eligible under § 73.213(c)(1) to further decrease the existing spacing to WKSL. Under that assumption, we have afforded the application as amended by the March 20, 1995 filing the "hard look" called for by WAIT, but find that the facts and circumstances therein do not warrant the waiver of § 73.213(c)(1) requested by the applicant.

The application contends that grant of the proposal pursuant to § 73.213(c) would reduce the existing level of interference to WKSL and allow WBXQ to eliminate an existing short-spacing with second adjacent channel station WBRX, Patton, PA and significantly reduce an existing short-spacing with the licensed facilities of second adjacent channel station WKBI, St. Marys, PA.<sup>10</sup> However, these reasons are not sufficient to warrant grant of a spacing waiver to allow decreased spacing to WKSL. First of all, another mechanism exists for applicants to seek use of a short-spaced transmitter site, through the use of the contour protection rule 47 CFR § 73.215. (We will address the contour protection matter for the proposed site in greater detail below.) The adoption of the contour protection rule allowed the Commission to discontinue spacing waiver requests. Report and Order in MM Docket 87-121, 4 FCC Rcd 1681 at Paragraph 33(1989), recons. granted in part and denied in part, 6 FCC Rcd 5356, Paragraphs 24-27 (1991). Moreover,

---

<sup>10</sup> The licensed facilities of WBXQ are 3.4 km short-spaced pursuant to § 73.207 with the Class A facilities of WBRX; the instant proposal would eliminate this short-spacing. With respect to WKBI-FM's licensed operation, the existing short-spacing would be reduced from 9.4 km to 2.5 km.

even under the former process which permitted the filing of spacing waiver requests, we are not aware of any case where the Commission has granted a cochannel spacing waiver of this magnitude.<sup>11</sup>

Footnote 7 of the cover letter to the March 20, 1995 amendment compares grandfathered short-spaced stations which do not meet the § 73.213(c) (1) to those grandfathered stations governed by § 73.213(a), in that the latter have no minimum separation requirements. However, the two cannot be equated. Section 73.213(a) applicants are governed by a contour rule which simply prohibits the extension of the 1 mV/m (60 dBu) contour toward the 1 mV/m contour of the opposite station. This automatically restricts the amount of additional short-spacing an applicant can specify, even with the use of a directional antenna. On the other hand, § 73.213(c) is primarily a spacing rule, in which short-spaced applicants are limited to the spacing criteria defined by the table in § 73.213(c) (1).<sup>12</sup> Consequently, the comparison of §§ 72.213(a) and 213(c) is unpersuasive.

The amended application indicates that the proposed operation would improve WBXQ's line-of-sight to its community of license, Cresson, PA. However, Sounds Good has not shown that its present coverage of Cresson is patently defective. We note that lack of line-of-sight coverage does not always imply deficient coverage. Rush County Broadcasting Co., Inc., 26 FCC 2d 480, 482, 20 RR 2d 783 (1970). Thus, this factor is of limited utility in evaluating the request for waiver.

Two other factors are briefly advanced in support of the present application. These are (1) WBXQ would be able to own its transmitter site, and (2) moving WBXQ would allow the site owner to recover coal deposits beneath the station. However, the Commission has previously refused to base waivers of rules designed to prevent interference on non-technical considerations or economic grounds. Open Media Corporation, 8 FCC Rcd 4070, 4071 and cases cited therein; Pyramid Radio Broadcasting and Television, Inc., 20 RR 2d 341 (1970), Broadcasters, Inc., 23 FCC 2d 155 (1970). Therefore, the spacing waiver sought by the application is not justified on these grounds.

---

<sup>11</sup> We note too that, prior to the adoption of § 73.213(c) in the Report and Order in MM Docket 88-375, stations which were short-spaced already (either by means of a prior spacing waiver or the change in the spacing rules adopted by Docket 80-90) could not relocate to a more short-spaced site without providing sufficient justification for waiver of the total amount of short-spacing with respect to § 73.207, not just the additional short-spacing. Thus, all prior spacing waiver precedents have been referenced to § 73.207, not the table in § 73.213(c). Even if we were willing to entertain a spacing waiver request here (which we are not), Sounds Good would need to provide a compelling justification for a waiver of 15.6 km (that being the total amount from the 115 km requirement of § 73.207), and not just the additional 4.5 km sought from the existing transmitter site.

<sup>12</sup> In other words, an applicant under § 73.213(c) need not evaluate protected and interfering contours toward the grandfathered stations, but can instead comply just by meeting the spacing requirements of the table.

Accordingly, grant of a request for waiver to WBXQ to decrease the existing spacing to WKSL is not warranted and will be denied.

Contingent request for contour protection processing pursuant to 47 CFR § 73.215. As indicated above, Sounds Good has provided a § 73.215 contour protection analysis as an alternative to be used in case the staff did not accept its position regarding use of § 73.213(c). However, where the staff has denied a waiver request (as this letter does), an applicant is not afforded an opportunity to amend any defects resulting from denial of the waiver request, even if the information is given in the application as an alternative. Relaxed FM Processing Procedures, Docket 91-347, 7 FCC Rcd 5074 at Paragraph 22, 57 Fed. Reg. 34872 (1992). Thus, the March 20, 1995 contingent amendment cannot be accepted for filing and will be dismissed.

However, because the contour protection analysis may be used as the basis of a refiled application, we will take a moment to address some glaring faults with the proposal which would preclude grant of a refiled application. We note that the March 20, 1995 amendment fails to comply with the Commission's rules and procedures regarding such stations. Specifically, pursuant to 47 CFR § 73.215(b)(2)(ii), WKSL must be protected as if it were operating with reference Class A facilities of 6.0 kW effective radiated power (ERP) and 100 meters antenna height above average terrain (HAAT).<sup>13</sup> However, the March 20, 1995 amendment does not do so. Instead, it requests that WBXQ be permitted to protect WKSL only to the facilities authorized by WKSL's construction permit BPH-930818IF.

WKSL is legally entitled under the rule to be protected as if it were operating with 6.0 kW ERP/100 meters HAAT. Thus, WBXQ is compelled to consider WKSL as if it were already operating in this manner.<sup>14</sup> Employing the rule against the present proposal, we find that the proposed WBXQ operation would increase the existing prohibited contour overlap with WKSL. Specifically, the existing overlap of the 40 dBu interfering contour of WKSL with the 60 dBu protected contour of WBXQ would be increased significantly, in violation of § 73.215 and the modified policy explained in Paragraph 54, Memorandum Opinion and Order, Docket 87-121, 6

---

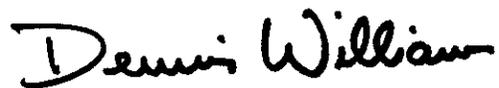
<sup>13</sup> We note that the staff's letter of February 6, 1995 specifically stated that WKSL was to be protected as if it were operating nondirectionally with 6.0 kW ERP and 100 meters HAAT, should Sounds Good decide to pursue contour processing under § 73.215.

<sup>14</sup> This also addresses the question raised by Sound Good's consulting engineer in the March 20, 1995 amendment as to how Paragraph 54 of the Memorandum Opinion and Order in MM Docket 87-121, 6 FCC Rcd 5356 (1991) applies. WBXQ must consider WKSL as if the latter station were "existing" with 6.0 kW ERP/100 meters HAAT at its present transmitter site, notwithstanding any terrain or other factors which might preclude such facilities in real life. Paragraph 42, Report and Order, Docket 87-121, 4 FCC Rcd 1681 (1989). Existing contour overlap is thus determined by projecting the corresponding protected and interfering contours from WBXQ's licensed operation and WKSL's adjusted parameters.

FCC Rcd 5356 (1991). Thus, if we had found it necessary to rule on the contour protection proposal specified in the amendment today, the proposal would have been denied.<sup>15</sup>

Conclusion. As we have indicated above, the application as amended on March 20, 1995 has been afforded the "hard look" called for by WAIT, supra, but remains unacceptable for filing. The contingent request for waiver to allow WBXQ to decrease the existing spacing to WKSL IS HEREBY DENIED, and application BPH-941019IA, along with the March 20, 1995 contingent amendment, ARE HEREBY DISMISSED. These actions are taken pursuant to 47 CFR § 0.283.

Sincerely,



Dennis Williams  
Chief, FM Branch  
Audio Services Division  
Mass Media Bureau

cc: Multinational Legal Services, P.C.  
: Gallagher & Associates  
: Kaye, Scholer, Fierman, Hays & Handler  
: Borsari & Paxon

---

<sup>15</sup> Sounds Good's March 20, 1995 amendment complains that if the station is compelled to protect WKSL at 6.0 kW ERP/100 meters HAAT as required by § 73.215, the station would be forced to lose significant service area. However, we note that it is the licensee's responsibility, not the Commission's, to determine the advantages and disadvantages of a proposed short-spaced transmitter site. Paragraph 26, Report and Order, Docket 87-121, 4 FCC Rcd 1681 (1989).