

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

September 1, 1993

IN REPLY REFER TO:
1800E3-EPD

Maloney Broadcasting Company
Radio Station KRKN(FM)
2761 North Country Club Road
Tucson, AZ 85716

In re: KRKN(FM), Oro Valley, AZ
Maloney Broadcasting Company
BMPH-930429IF

Dear Applicant:

This letter is in reference to the above-captioned minor change application filed to modify outstanding construction permit BPH-920720IF. The application proposes to correct previously authorized antenna coordinates, decrease the antenna height above average terrain (HAAT) and decrease the effective radiated power (ERP).

By way of background, on February 12, 1991, KRKN(FM) was issued a construction permit (BPH-861002TA) to build a new FM station to serve Oro Valley, Arizona on channel 248A. On August 28, 1991, KRKN(FM) filed a minor modification application (BMPH-910828II) to change the transmitter location, the antenna height above average terrain and the antenna supporting-structure height. This application was dismissed on December 27, 1991 for a violation of 47 C.F.R. § 73.207 with respect to station KAVV(FM), Benson, Arizona. On January 21, 1992, KRKN(FM) filed a minor change modification application (BMPH-920121IE) to change antenna location, antenna supporting-structure height and antenna height above average terrain. The modification application was granted on February 19, 1992. On April 29, 1992, KRKN(FM) commenced operation pursuant to § 73.1620 and a covering license application (BLH-920511KC) was filed on May 11, 1992. The license application is currently pending. On July 20, 1992, KRKN(FM) filed a minor change application (BPH-920720IF) to increase the antenna supporting structure height and the antenna height above average terrain at its current site. On December 9, 1992, construction permit BPH-920720IF was granted. On December 3, 1992, the Commission's Douglas Arizona Field Office inspected KRKN(FM) and determined that the station was not constructed as authorized by its construction permit (BMPH-920121IE). Specifically, the coordinates of the antenna site were determined to be in error. On April 29, 1993, KRKN(FM) filed the above-captioned modification application to correct the antenna site coordinates.

An engineering study of your application reveals that it is in violation of § 73.207. Specifically, the proposed site is short-spaced by 0.6 kilometer to the licensed facilities of KAVV(FM), Benson, Arizona on Channel 249A. The required spacing pursuant to § 73.207 is 72 kilometers, while the actual spacing proposed in the application is 71.4 kilometers. You recognize this violation and have requested processing pursuant to the contour protection provisions of § 73.215.

A study of your application reveals that your proposal is in violation of § 73.215. Specifically, the 54 dBu interfering contour of your proposal will overlap the 60 dBu protected contour of KAVV(FM) by as much as 1.61 kilometers.

Conversely, the 54 dBu interfering contour of KAVV(FM) would overlap your proposed 60 dBu protected contour up to a maximum depth of 15.7 kilometers.¹ You recognize this prohibited contour overlap and request waiver of § 73.215.

You indicate that because of an error in the placement of KRKN(FM)'s tower, KRKN(FM) is now slightly short-spaced to KAVV(FM). As a result of this short-spacing, you propose to reduce the ERP in order to provide protection to KAVV(FM) equivalent to that of your fully-spaced outstanding construction permit (BPH-920720IF) under the contour protection provisions of § 73.215. In the application you have provided contour maps to support your equivalent protection claim. In your engineering exhibit, you define the "existing" overlap by plotting the protected and interfering contours which would have been created by KRKN(FM)'s outstanding construction permit (BPH-920720IF) versus KAVV(FM)'s licensed facilities at maximum Class A facilities. The protected and interfering contours for the facilities proposed in the instant application were then overlaid on these contours. Comparing the areas of prohibited overlap with those which would result from KRKN(FM)'s proposed facility, you conclude that the prohibited contour overlap will not be increased from that authorized by your outstanding construction permit (BPH-920720IF). Consequently, you believe waiver of § 73.215 is warranted.

When an applicant seeks waiver of the rules, it must plead with particularity the facts and circumstances which warrant such action. Rio Grand Family Radio Fellowship, Inc. v. FCC, 406 F.2d 644, 666 (D.C. Cir. 1968). We have afforded your waiver requests the "hard look" called for under the WAIT Doctrine, WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969), but find that the facts and circumstances set forth in your justification are insufficient to establish that granting waiver of the prohibited contour overlap requirements of § 73.215(a) would be in the public interest.

Commission's policy permits § 73.215 applicants to maintain or shift (but not increase) existing prohibited contour overlap. See Paragraph 54 of the Memorandum Opinion and Order in Docket 87-121, 5 FCC Rod 5356, released September 17, 1991. Paragraph 54 of the Memorandum Opinion and Order states the following:

dLR notes that many existing short-spacings occurred after November 1964, and therefore, are not covered under Section 73.213 of the Rules. dLR suggests that it is not clear to what extent and under what conditions those facilities may be short-spaced. Such short-spaced stations with existing overlap with another FM station may also seek modifications pursuant to Section 73.215. While the directional antenna provisions are primarily intended to maximize protection to the service of the non-encroaching station, we see no reason why existing short-spaced licensees seeking to relocate to another similarly short-spaced site should forfeit service already established in directions where some overlap exists. Therefore, we will permit such facility re-location provided the current overlap is not increased.

¹ KAVV(FM) is assumed to be operating at maximum Class A facilities (6 kw ERP at 100 meters HAAT) as required by § 73.215(b) (2) (ii).

Paragraph 54 carves out an exception to the prohibition against overlap set forth in § 73.215. This exception permits licensees which seek re-location to preserve existing service in directions where contour overlap is already present. It is quite clear that this exception applies only to existing short-spaced licensees where overlap currently exists.² Your reliance on Paragraph 54 is misplaced on two counts. First, the authorized site is not short-spaced to KAVV(FM).³ Second, since your outstanding construction permit (BPH-920720IF) has not been constructed, no new areas of service have been established. Under these circumstances, the exception provided for by Paragraph 54 does not apply. Therefore, waiver of § 73.215 is not justified. As a result, your application is unacceptable for filing for a violation of § 73.215 and the application will be dismissed.

Accordingly, for the reasons stated above, your request for waiver of 47 C.F.R. § 73.215 IS HEREBY DENIED. Consequently, your application, BMPH-930429IF, is unacceptable for filing for violation of 47 C.F.R. § 73.215 and IS HEREBY DISMISSED.⁴

² For example, two fully spaced stations may exist at one location with no actual overlap. These same two stations, at the same separation in a different location, may have significant prohibited contour overlap due to the effects of terrain (e.g., a valley between them). Therefore, merely complying with the spacing requirements of § 73.207 does not always result in interference-free operation, whereas the application of a contour overlap system will always avoid this result. Intermixing the two systems as proposed in this application eviscerates this feature of the contour overlap rules and would allow interference to occur which would not occur under strict application of those rules. Under § 73.215, existing stations choosing the contour overlap approach are prevented from increasing interference beyond the levels already being experienced. In contrast, the present proposal, by comparing contours with a non-existent hypothetical facility, will extend prohibited contour overlap (and hence interference) into areas not presently afflicted by this malady. This result is antithetical to the stated intent of the Commission to avoid the creation of new interference areas. See the Report and Order in Docket 87-121, 4 FCC Rcd 1681, 54 Fed. Reg. 09800 (1989), paragraphs 1, 16, 46; also the Memorandum Opinion and Order in Docket 87-121, supra, paragraphs 30, 31, 54. Moreover, we note that the situation set forth in this application is not unique, but would apply to a great number of applications for a new or upgraded allotment. Over time, authorizing stations by comparing their contour overlap to that of hypothetical facilities would result in a significant degradation of the FM broadcast service through increased interference.

³ Had you applied for the facilities requested in your outstanding construction permit at the short-spaced site under the contour protection provisions of § 73.215, the application would not have been granted.

⁴ The Commission has stated that in the interest of efficient use of our limited staff resources, applicants submitting waiver requests will not be given any opportunity to cure defects resulting from denial of their waiver requests. See Paragraph 22 of the Report and Order in MM Docket 91-347, 57 Fed. Reg. 34872,

in light of the above action, it would appear that the following options are available to KRKN(FM):

Option 1: KRKN(FM) could conform to the facilities authorized by construction permits BMPH-920121IE and BPH-920720IF (i.e. change transmitter location to coordinates authorized, 32° 20' 18" N.L. 111° 00' 50" W.L.).

Option 2: KRKN(FM) could file an application at a fully spaced site in compliance with § 73.207.

Option 3: KRKN(FM) could file an application to authorize its current operation under contour protection provisions of § 73.215. For example, KRKN(FM) could file an application to operate at the current short-spaced site with an ERP of 2.9 kilowatts at -35 meters HAAT or equivalent facilities.⁵ Be advised that, because of the anomalies in the terrain, any increase in antenna height will dramatically effect both the service and interference contours. Therefore, if KRKN(FM) were to pursue an increase in antenna height, a reduction in ERP would be required toward KAVV(FM) such that no prohibited contour overlap would occur beyond that authorized by construction permit BMPH-920121IE.

Accordingly, because we can not continue to allow KRKN(FM) to operate in excess of what the Commission's rules allow, KRKN(FM) is required to reduce the ERP immediately to 2.9 kilowatts until KRKN(FM) conforms to one of the above-mentioned options. Additionally, KRKN(FM) must exercise one of the above-mentioned options within thirty days from the date of this letter.

Sincerely,

Dennis Williams

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

cc: Shainis & Peltzman
Lieberman & Walisko
EIC, Douglas, AZ

7 FCC Rcd 5074, released July 27, 1992. Accordingly, you will not be afforded an opportunity to submit a corrective amendment pursuant to 73.3522.

⁵ The reduction in power is necessary in order to bring KRKN(FM)'s incorrectly constructed current facilities within the contours which would result with operation pursuant to construction permit BMPH-920121IE.