

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

QUINNIPIAC COLLEGE File No. BPED-841031IG
Hamden, Connecticut

For a Construction Permit
to Modify the Facilities of
Noncommercial Educational
FM Station WQAQ

MEMORANDUM OPINION AND ORDER

Adopted: August 20, 1993;

Released: August 30, 1993

By the Commission:

1. The Commission has before it the Application for Review filed on December 5, 1988, by Quinnipiac College ("Quinnipiac") the licensee of noncommercial educational ("NCE") FM station WQAQ, Hamden, Connecticut. Quinnipiac seeks review of the action of the Chief, FM Branch, Mass Media Bureau ("Bureau"), denying its short-spacing waiver request and dismissing the captioned application.

BACKGROUND

2. Quinnipiac operates WQAQ as a Class D NCE FM station with 16 watts effective radiated power ("ERP"). Quinnipiac seeks to increase its power to 100 watts so that it can upgrade the station to Class A status. Quinnipiac originally filed an application in March 1980 to change its operation from Channel 202D to Channel 251D. Later, however, Quinnipiac filed a major amendment to specify its existing channel (202) with Class A facilities (100 watts ERP). That proposal was given a new file number and is currently before the Commission.

3. Quinnipiac's presently licensed Class D facility is at a site located 4.8 kilometers from FM station WPLR, New Haven, Connecticut. WPLR operates on FM Channel 256, which is intermediate frequency ("IF")-related to Channel 202.¹ As a Class D facility, WQAQ currently violates no

rule section since Class D stations outside of the Mexican Border zone do not have IF spacing requirements.² However, Quinnipiac's proposal to increase its ERP to 100 watts would violate the IF spacing requirements of Section 73.207(a). This Section mandates that a spacing of 14 kilometers be maintained between WPLR and WQAQ if WQAQ is operated as a Class A facility.³

4. In denying Quinnipiac's waiver request, the Bureau stated that the facts and circumstances set forth by Quinnipiac were insufficient to justify the requested short-spacing. *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). The Bureau stated that showings such as Quinnipiac's, which were based on contour overlap, were irrelevant. The Bureau also stated that the case cited by Quinnipiac, where a similar short-spacing waiver was granted, was not a valid precedent.

DISCUSSION

5. In its application for review, Quinnipiac argues that it has been treated unfairly by the Commission. Quinnipiac states that its problems began in 1979 when the Commission promulgated certain changes in the rules pertaining to Class D FM stations. *See Changes in the Rules Pertaining to Noncommercial Educational FM Broadcast Stations*, 70 FCC 2d 972 (1979) ("*Educational FM Changes*"). Class D stations were given several alternatives including: (1) moving to open space on commercial channels; (2) moving to newly created FM Channel 200; (3) moving to the least preclusive noncommercial channel. Contrary to Quinnipiac's assertion, Class D stations were not ordered to upgrade their stations to Class A status on existing frequencies. Rather, the Commission stated that it "has no desire to terminate the operation of 10-watt stations, and as explained above in footnote 11, Section 73.512 needs to be clarified to make it clear that the Commission has taken every possible step to protect the ability of these stations to continue their operation." *Educational FM Changes*, 70 FCC 2d at 980.

6. Quinnipiac claims that it was "prodded" and "urged" by the Commission to abandon its initial request to change channel and instead seek the instant power increase on its present channel. On Channel 251D, WQAQ's original application (then assigned File No. BPED-800304AK) was mutually exclusive with the application of another NCE station (WEBR, Wallingford, Connecticut). In such situations, it is standard Bureau procedure to notify the applicants of the mutually exclusive situation and invite them to amend to eliminate the conflicts and, thus, avoid a comparative hearing. Quinnipiac chose to avoid a com-

¹ Two FM stations are considered to be IF-related when their assigned frequencies are separated by 10.6 or 10.8 MHz (53 or 54 channels). IF interference to FM broadcast receivers causes increased background noise which degrades reception of a desired signal. In more severe cases, it is characterized by reception of the audio, often distorted, of one or both of the two stations, regardless of the position of the receiver's tuner dial. Thus, when it occurs, this phenomenon can prevent reception by the affected receiver of most, or all, of the FM stations in the area. *See Report and Order* in Docket No. 15934, 45 FCC 2541 (1965).

² When the IF spacing provisions of Section 73.207(a) of the Commission's Rules were adopted, the Commission stated that with respect to Class D NCE FM stations "[w]e do not expect ... that there will be the same [IF interference] problem with the

10 watt educational stations and are not proposing any mileage separation rules for these stations." *Report and Order* in Docket No. 15934, 45 FCC at 2542. Class D IF situations are handled on a case-by-case basis.

³ At the time Quinnipiac's application was dismissed, the spacing requirement between WPLR and WQAQ was 16 kilometers. This IF spacing requirement was later modified to 14 kilometers, a distance consistent with preventing overlap of the predicted 36 mV/m median field strength contours of the respective stations. *See Third Report and Order* in MM Docket No. 86-144, 4 FCC Rcd 3557 (1989).

parative hearing. Quinnpiciac was not coerced by the Bureau into filing any amendment to vacate its original proposal on Channel 251D.

7. Additionally, Quinnpiciac argues that it was "treated shabbily" because the staff requested two different amendments to demonstrate compliance with the Channel 6 interference rules. However, just prior to the time that the staff requested the Channel 6 interference amendments from WQAO, the Commission had promulgated new rules (47 CFR Section 73.525) concerning such interference. See *Memorandum Opinion and Order* in Docket 20735, 58 RR 2d 629, 50 Fed. Reg. 27954 (1985). These rules, which became effective on June 27, 1985, applied to all applications for construction permits, including those already on file. Therefore, the staff directed deficiency letters to all pending NCE applicants (including Quinnpiciac) to require amendments demonstrating that the pending proposals met the rule. Since compliance with the new rule section required many applicants to make substantive engineering changes in their respective applications, other potential deficiencies were not addressed at that time. Quinnpiciac's application was processed in a manner consistent with all other NCE FM applications. Moreover, the Bureau's actions were reasonable in light of regulatory changes which were occurring at that time.

8. Quinnpiciac next contends that the Bureau did not give its waiver request the "hard look" mandated by *WAIT Radio v. FCC*, 418 F.2d 644 (D.C. Cir. 1969). It contends that the Bureau should have considered the "anomalous facts" in the instant case, rather than applying the usual criteria established by the Commission for considering short-spacing requests. Quinnpiciac faults the Bureau for rejecting its argument that "in reality there would be no interference" caused by the short-spacing between WQAO and WPLR. However, Quinnpiciac has offered absolutely no evidence that interference would not occur if it increased its power from 16 watts ERP to 100 watts ERP, other than its own speculation that it was "extremely unlikely." Moreover, just because no interference complaints have been received while WQAO has operated as a Class D station does not mean that no interference would be caused if the power were significantly increased as proposed.

9. Quinnpiciac argues that Section 73.207 of the Rules should not necessarily apply to all NCE FM stations. Rather than use the minimum station separation requirements of this Rule, it suggests that field strength contours should be used to determine whether actual IF interference would occur. However, even Quinnpiciac admits that there is a contour overlap between WQAO and WPLR.⁴ Thus, it can not argue that there will be no contour overlap.

10. Quinnpiciac also argues that the Commission should change its policy and consider IF short-spacing waiver requests for 100 watt Class A NCE FM stations the same way it considers such waiver requests for Class D NCE FM stations, i.e., on a case-by-case basis. A proposal similar to this was considered and rejected by the Commission in the *Third Report and Order* in MM Docket No. 86-144, 4 FCC Rcd 3557 (1989). Moreover, as Quinnpiciac concedes, the purpose for its proposed increase to 100 watts is to gain protected status as a Class A FM station. However, in order

for a Class D FM station to achieve this protected status, it must comply with the appropriate Commission rules for Class A stations. See *Educational FM Changes*, 70 FCC 2d 972. If Class D FM stations, such as WQAO, are unable to increase their power to 100 watts and comply with applicable Commission rules, they may remain as secondary Class D FM stations and continue to provide the service they have always provided unless and until it causes interference to another primary NCE station. Thus, the denial of Quinnpiciac's application will not preclude it from continuing its present operation.

11. Quinnpiciac next argues that grant of its waiver request and application would be consistent with precedent established in a similar situation involving WCRX, Chicago, Illinois. In that case, WCRX was granted a construction permit (BPED-791228AM) to operate with 100 watts ERP despite being located only 3.6 kilometers from the station with which it had the IF problem. Quinnpiciac claims that the Bureau provided no justifiable explanation for treating it differently from WCRX.

12. We agree with the Bureau that the WCRX case is not valid precedent in support of Quinnpiciac's waiver request. It appears that the application of WCRX was granted in violation of the IF spacing requirements of Section 73.207 without a proper waiver showing. However, the Commission is not required to treat as binding precedent waivers granted by staff action. *North Texas Media, Inc. v. FCC*, 778 F.2d 28 (D.C. Cir. 1985). Specifically, we have held that prior erroneous grants of waivers of IF spacing deficiencies by the staff, in the absence of a threshold showing, will be given no precedential weight. *Walter P. Faber, Jr.*, 4 FCC Rcd 5492, 5493 (1989), *recon. denied*, 6 FCC Rcd 3601 (1991), *aff'd sub nom. Walter P. Faber, Jr. v. FCC*, No. 91-177 (D.C. Cir. June 4, 1992); *Edens Broadcasting, Inc. (WRBQ-FM)*, 5 FCC Rcd 2576, 2578 (1990), *recon. denied*, 6 FCC Rcd 4327 (1991). The Commission has now clearly stated the criteria for waivers of IF spacing deficiencies and may apply these criteria to pending applications. See *Walter P. Faber, Jr. v. FCC*, *supra*. Accordingly, the WCRX case is of no precedential value.

13. Quinnpiciac's final argument is that it meets the standard criteria for granting short-spacing waivers. In this regard, it seeks to submit an engineering showing with its Application for Review to make, for the first time, the threshold showing required for a short-spacing waiver. However, Section 1.115(c) of the Commission's Rules provides that "[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." Quinnpiciac's attempt to submit new engineering information along with its application for review without affording the Bureau an opportunity to consider the new factual questions violates this rule provision. See *Kenny D. Hopkins*, 5 FCC Rcd 604 (1990). While Quinnpiciac could have submitted new engineering information to the Bureau in connection with a petition for reconsideration, see Note to Section 1.115(c), it chose not to do so. Accordingly, its threshold showing in connection with its waiver request remains defective.

⁴ At the time Quinnpiciac filed its Application for Review, the IF-related spacing requirements in Section 73.207 were based on preventing an overlap of the relevant stations' 20 mV/m median field strength contours. The distance separation requirements

were subsequently changed to prevent overlap of the predicted 36 mV/m contours. Because WQAO's 36 mV/m contour is completely encompassed by WPLR's 36 mV/m contour, overlap will exist.

14. Even if we were to consider Quinnipiac's new engineering submission, we would still conclude that it has not justified a waiver of the Commission's IF spacing requirements. Quinnipiac has failed to meet the threshold test for an IF short-spacing waiver. Quinnipiac admits that its present site is suitable for continued operation with its currently licensed facilities. Quinnipiac has based its desire to increase class, in part, on its concern about the *potential* for service disruption from or to a future primary NCE station. Such speculation is an insufficient justification to create an IF short-spacing violation.

15. Quinnipiac also has failed to demonstrate that no fully spaced sites are available or that its site is the least short-spaced site available. Quinnipiac contends that it is restricted from moving to the northeast by WESU, Middletown, Connecticut, and to the south-southwest by WNHU, West Haven, Connecticut. Quinnipiac also claims to have considered, and rejected, other lesser short-spaced sites because of cost or because the topography would cause shadowing of WQAQ's signal on the Quinnipiac College campus. However, no data was provided to support these claims. Quinnipiac also argues that moving the WQAQ site away from Hamden to avoid short-spacing would preclude it from covering its community of license with a 1 mV/m contour. However, there is no city coverage requirement for NCE FM stations. Based on this meager showing, Quinnipiac has not demonstrated that lesser short-spaced sites are not available.

16. In addition to failing to meet the threshold test, Quinnipiac has failed to show that a grant of its waiver request would serve the public interest. See *Third Report and Order* in MM Docket No. 86-144, 4 FCC Rcd at 3563, n.21. Quinnipiac's mere desire to increase power and coverage is not a valid public interest factor which would warrant the waiver. *Board of Education of the City of Atlanta (WABE-FM)*, 82 FCC 2d 125, 127 (1980). See also, *Walter P. Faber, Jr.*, 4 FCC Rcd at 5493. Finally, Quinnipiac concedes that there would be overlap of the 36 mV/m contours of WQAQ and WPLR. Thus, even after the Commission relaxed the IF separation requirements, based on use of 36 mV/m contours, the Quinnipiac proposal is still significantly short-spaced and would create the type of overlap the rules are designed to avoid. *Third Report and Order* in MM Docket No. 86-144, *supra*. Quinnipiac's claim that no interference will occur, supported only by its bare speculation, is not persuasive.

17. ACCORDINGLY, IT IS ORDERED that the application for review filed by Quinnipiac College IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary