

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

FCC MAIL SECTION

JUL 22 4 13 PM '93

MM Docket No. 93-178

DISPATCHED BY

In re Applications of

HOWARD B. DOLGOFF File No. BPH-911223ME
(hereafter "Dolgoff")

MARK AND File No. BPH-911224MD
RENEE CARTER
(hereafter "Carter")

For Construction Permit for a New
FM Station on Channel 292A in
Miramar Beach, Florida.

HEARING DESIGNATION ORDER

Adopted: June 15, 1993;

Released: June 28, 1993

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Dolgoff*. A study of Dolgoff's application, as timely amended on May 4, 1992, reveals that it is short-spaced by 9.8 kilometers to the licensed facilities of co-channel station WKNU(FM), Brewton, Alabama.¹ Dolgoff recognizes this short spacing and requests processing pursuant to the provisions of 47 C.F.R. § 73.213(c)(1).²

3. The staff has concluded that Dolgoff's amended application may be processed pursuant to Section 73.213(c)(1) with respect to WKNU(FM).³ Section 73.213(c)(1) states, in pertinent part, that each application for authority to operate a Class A station with no more than 3000 watts ERP and 100 meters HAAT (or equivalent lower ERP and higher antenna HAAT based on the class contour distance of 24 kilometers) must specify a transmit-

ter site that meets the minimum distance separation requirement set forth in the paragraph.⁴ In order to comply with Section 73.213(c)(1), Dolgoff's application proposes a directional antenna to reduce the radiation in the arc towards WKNU(FM) to the equivalent of an "old" Class A station (3 kW/100 m HAAT). A staff study confirms that Dolgoff's application, as amended, proposes no more than 3 kW/100 meters HAAT, or the equivalent thereof, in the arc toward short-spaced station WKNU(FM). Therefore, the proposal falls within the limitations set forth in Section 73.213(c)(1) with respect to WKNU(FM). When applying Section 73.213(c)(1), it has been staff practice to accept radiation limitations equivalent to the old Class A limit (3 kW/100 m HAAT or equivalent) in the arc toward the short-spaced station. In the instant case, Dolgoff's application specifies 6 kilowatts ERP, but proposes only 3 kilowatts in the arc toward the short-spaced station (WKNU) by utilizing a directional antenna. Therefore, by applying the rule on a station-to-station basis, Dolgoff's proposal is not in violation of the provisions of Section 73.213(c)(1). Accordingly, Carter's Petition to Deny filed against the Dolgoff application will be denied.

4. Since no determination has been received from the FAA as to whether the antenna proposed by Dolgoff would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

¹ The required spacing for co-channel Class A to Class A stations pursuant to 47 C.F.R. § 73.207 is 115 kilometers while the actual spacing proposed in the application is 105.2 kilometers. This 9.8 kilometers short-spacing was created by the revision of 47 C.F.R. § 73.207 in the *Second Report and Order* in MM Docket No. 88-375, adopted July 13, 1989 and released on August 18, 1989. See 4 FCC Rcd 6375 (1989). Stations which became short-spaced as a result of the adoption of these new rules are now governed by 47 C.F.R. § 73.213(c), which permits such stations to make changes based upon the old spacing rules, provided that the short-spaced Class A stations do not exceed 3.0 kilowatts ERP and 100 meters HAAT, or the equivalent thereof.

² The *Report and Order* in MM Docket 89-126, note 5, indicated that applicants may avail themselves of the provisions of Section 73.213(c) with respect to Station WKNU(FM), Channel 292A, Brewton, Alabama. See *Miramar Beach, Florida*, 6 FCC Rcd 5778 (MM Bur. 1991). Since the Miramar Beach, Florida

rulemaking was initiated before the October 2, 1989 effective date of the new 47 C.F.R. § 73.207 rules, the allotment came under the "old" rules with respect to WKNU(FM). Under the old rules, the allotment met the distance separation requirement with respect to WKNU(FM). Under the new rules, however, the allotment is short-spaced to WKNU(FM). Accordingly, any application filed for the allotment could be processed under the "old" rules with respect to WKNU(FM).

³ On June 4, 1992, Carter filed a Petition to Deny against Dolgoff's application alleging that Dolgoff's proposal violates 47 C.F.R. § 73.213, and the amended application must be rejected as patently not in compliance with the section of the rules pursuant to which processing was requested. On July 9, 1992, Dolgoff filed an Opposition to Petition to Deny concluding that processing pursuant to Section 73.213(c) is proper, appropriate, and fully sanctioned by the Commission.

⁴ Dolgoff's application is in compliance with this minimum distance separation requirement.

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Dolgoff would constitute a hazard to air navigation.
2. To determine which of the proposals would, on a comparative basis, best serve the public interest.
3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That the Petition to Deny filed by Carter on June 4, 1992 IS DENIED.

9. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

10. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20054. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20054.

11. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau