

FCC MAIL SECTION

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

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32021

DISPATCHED BY

In re Applications of	)	MM Docket No. 93-178
	)	
HOWARD B. DOLGOFF	)	File No. BPH-911223ME
	)	
MARK AND RENEE CARTER	)	File No. BPH-911224MD
	)	
For Construction Permit for a New	)	
FM Station on Channel 292A in	)	
Miramar Beach, Florida	)	

MEMORANDUM OPINION AND ORDER

Issued: July 16, 1993 ; Released: July 20, 1993

1. Under consideration are Request to Certify Application for Review, filed July 6, 1993, by Mark and Renee Carter ("Carters"), Opposition to Request to Certify Application for Review, filed July 12, 1993, by Howard B. Dolgoff ("Dolgoff") and Mass Media Bureau's Opposition to Request to Certify Application for Review, filed July 14, 1993.<sup>1</sup>

2. Both of the above-specified applications were filed pursuant to Section 73.213(c)(1), which grandfathers proposals for pre-October 2, 1989 FM allocations rendered short spaced by the new minimum spacing rules provided such proposals do not exceed 3 kW and 100 meters HAAT or equivalent. Carter argues that Dolgoff proposed a 6 kW directional antenna reducing radiation to 3 kW in the general direction of WKNU(FM). According to Carter, Dolgoff should have asked to be processed pursuant to the directional FM antenna rules of Section 73.215, and because he didn't, his application should have been rejected.

3. Dolgoff responds that there is no merit to the Carters' claim that Dolgoff was required to request processing pursuant to Section 73.215 in connection with Dolgoff's May 4, 1992 amendment to his application. The Commission has made it clear that "Sections 73.213 and 73.215 represent two separate approaches to obtaining a power increase." Memorandum Opinion and Order in MM Docket No. 88-375, 6 FCC Rcd 3417, 3419 (1991). Since Section 73.213 of the Commission's Rules governs the processing of Dolgoff's application, there was absolutely no need for Dolgoff to invoke Section 73.215

<sup>1</sup>In a mailing dated July 9, 1993, Carters submitted for consideration a copy of a letter addressed to Chairman James H. Quello. To the extent this was intended as a pleading herein, it is deemed to be unauthorized and, therefore, is rejected.

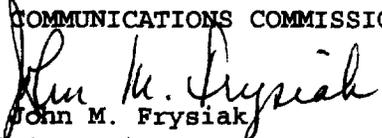
or to make any showing of the type normally required under section 73.215 with respect to WKNU(FM). Since Dolgoff applied for a grandfathered allotment in this proceeding, the "old" Commission spacing rules (i.e., pre-October 2, 1989) governed spacing to and protection of WKNU(FM) by Dolgoff. See Hearing Designation Order ("HDO") at footnotes 2 and 3 and accompanying text. Under the "old" Commission spacing rules, WKNU(FM) was not entitled to contour protection as if WKNU(FM) were operating with an ERP of 6 kW, since the "old" rules did not allow for, or recognize, any greater technical facilities for equivalent of 3 kW ERP/100 meters HAAT, and since the "old" spacing requirements were predicated on the fact that maximum technical facilities for Class A FM stations, under the "old" rules, was the equivalent of 3 kW ERP at 100 meters HAAT. Thus, because of the "grandfathering" applicable to the Miramar Beach allotment and, in turn, to Dolgoff's application for the allotment, there would have been no rational basis for requiring Dolgoff to request processing under Section 73.215 with respect to WKNU(FM), pursuant to which WKNU(FM) would have been assumed to be operating at the maximum ERP and HAAT combination for Class A FM stations under the new Commission Rules (i.e., the equivalent of an ERP of 6 kW at an HAAT of 100 meters).

4. For the reasons set forth in Dolgoff's Opposition, the Mass Media Bureau ("Bureau") was correct in its conclusion that Dolgoff's May 4, 1992 amendment was acceptable under Section 73.213(c) of the Commission's Rules. The Carters have not demonstrated that the Bureau erred or did not follow applicable precedent in reaching this determination.

5. The Request to Certify will be denied. The HDO contained a reasoned analysis by the Bureau for its determination to deny the Carters' Petition To Deny Dolgoff's application. It is well-established that, where, as here, the HDO provides a "reasoned analysis" of the issues in question the Presiding Judge is precluded from revisiting the determinations reached in the HDO. See Atlantic Broadcasting Co., 5 FCC 2d 717 (1966); George E. Cameron, Jr., Communications, 91 FCC 2d 870 (Rev. Bd. 1982); Simon Geller, 90 FCC 2d 250 (1982); Central Alabama Broadcasters, Inc., 88 FCC 2d 1501 (Rev. Bd. 1982).

Accordingly, IT IS ORDERED that the Request to Certify Application for Review, filed July 6, 1993, by Mark and Renee Carter IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

  
John M. Frysiak  
Administrative Law Judge