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PAS*

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER

THE McPHERSON BUILDING
901 FIFTEENTH STREET, N.W., SUITE 1100
WASHINGTON, D.C. 20005

425 PARK AVENUE
NEW YORK, N.Y. 10022
(212) 636-8000

1999 AVENUE OF THE STARS
SUITE 1600
LOS ANGELES, CA 90067
(213) 788-1000

WRITER'S DIRECT DIAL NUMBER

(202) 682-3526

(202) 682-3500

TELECOPY NUMBER
(202) 682-3580

12 10 10 05 AM '92

ADMIRALTY CENTRE
TOWER 1, 32ND FLOOR
18 HARBOUR ROAD
HONG KONG
18521 865-7676

SQUARE DE MEEÛS 30
1040 BRUSSELS, BELGIUM
(322) 514-4300

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FEDERAL COMMUNICATIONS COMMISSION



BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

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JUL - 9 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Application)
)
HOWARD B. DOLGOFF) File No. BPH-911223ME
)
For a Construction Permit For a)
New FM Radio Station on)
Channel 292A in Miramar Beach,)
Florida.)

TO: Chief, Mass Media Bureau

OPPOSITION TO PETITION TO DENY

HOWARD B. DOLGOFF ("DolgoFF"), by his attorneys, hereby submits his Opposition to the "Petition To Deny" filed in the above captioned matter against DolgoFF's application on behalf of Mark and Renee Carter (the "Carters").¹ In support whereof, it is shown as follows:

I. Introduction

The Carters' Petition To Deny contends that DolgoFF's application, as amended, is unacceptable for filing, based upon what the Carters believe to be certain deficiencies in DolgoFF's technical showing. More specifically, the Carters contend that DolgoFF's invocation of, and request for processing pursuant to, Section 73.213 of the Commission's Rules with respect to spacing

¹ On June 8, 1992, DolgoFF requested an extension of time to and including July 9, 1992 within which to respond to the Carters' Petition To Deny. On July 10, 1992, the Carters filed their Comments on DolgoFF's request for extension of time and stated therein that they would interpose no objection to the grant of the requested extension.

to Radio Station WGNU(FM), Channel 292A in Brewton, Alabama, is unauthorized and inappropriate. The Carters further claim that the Dolgoff application does not request processing pursuant to Section 73.215 of the Commission's Rules, and that the showings necessary to support a request for processing under Section 73.215 of the Rules have not been supplied by Dolgoff. Based on the foregoing, the Carters argue that Dolgoff's amendment to his application, filed with the Commission on May 4, 1992, should be rejected.

For the reasons set forth below, the arguments of the Carters are totally devoid of any merit whatsoever. As will be shown below, Dolgoff properly relied on processing pursuant to Section 73.213 of the Commission's Rules with respect to spacing in relation to WGNU(FM). The Carters' arguments to the contrary reflect, at best, a complete misunderstanding of applicable Commission rules (thereby reflecting on the Carters' ineptness) or, at worst, a willingness to engage in abuse of process by

filed pleading that they have no merit. The

The Miramar Beach allotment, which is the subject of Dolgoff's and the Carters' applications, was first proposed by the Carters themselves prior to October 2, 1989 -- i.e., before the adoption of the new distance separation requirements for Class A FM stations which are now embodied in Section 73.207 of the Commission's Rules. Indeed, the Commission so noted expressly in Miramar Beach, Florida supra, 6 FCC Rcd at 5779 n. 5. The old separation distances, now contained in Section 73.213(c) of the Rules, were based on maximum Class A station operations at an effective radiated power of 3.0 kW with an antenna height of 100 meters above average terrain. At the time that the Miramar Beach allotment was adopted on October 9, 1991, the allotment reference point did not satisfy the new 6 kW separations contained in Section 73.207, but did satisfy the old separations that are now contained in Section 73.213. The commission took cognizance of this in footnote 5 to Miramar Beach, Florida, supra, wherein the Commission stated as follows:

"Because this allotment is made as a result of a petition filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c) of the Commission's Rules with respect to Station WGNU(FM), Channel 292A, Brewton, Alabama"

6 FCC Rcd at 5779 n. 5.

This is exactly what Dolgoff has proposed in his amended application.

Clearly, the foregoing language completely disposes of the entirety of the Carters' petition, and it is significant that the

Carters certainly must have known about this language in Miramar Beach, Florida, supra, since, as noted above, the Carters themselves were expressly recognized by the Commission in Miramar Beach, Florida as the parties who had petitioned for the allotment of the FM channel in Miramar Beach.

It should also be noted that the Commission addressed the issue of such grandfathered short-spacings in its Memorandum Opinion and Order in Docket No. 88-375, 6 FCC Rcd 3417 (1991), issued with respect to requests for reconsideration of its decision to increase the maximum power of Class A FMm stations to 6 kW. The Commission therein expressly stated as follows:

"In a connected matter, we wish to clarify our policy regarding applications for construction permits filed to implement allotments resulting from petitions for rulemaking to amend the Table of FM Allotments filed prior to October 2, 1989 (the effective date of the new Class A spacing requirements). Such applications must meet the new spacing requirements with respect to all facilities and allotments except those to which the allotment reference coordinates were short-spaced on the effective date of the allotment. [Emphasis added.]"

6 FCC Rcd at 3418 n. 7.

Moreover, in Paragraph 40 of its Memorandum Opinion and Order in MM Docket No. 88-375, supra, the Commission stated that it

"... will permit facility enhancements sought pursuant to § 73.213 that retain current coverage in directions where overlap exists, provided no new predicted interference is created to the current service of any other short-spaced co-channel and adjacent channel licensees."

6 FCC Rcd at 3423.

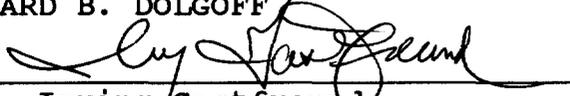
It should be noted that both Dolgoff and the Carters have requested processing of their respective applications pursuant to the provisions of Section 73.213 of the Commission's Rules with respect to the spacing toward WKNU(FM) in Brewton, Alabama. Annexed hereto as Exhibit 1 is the Engineering Statement of William P. Suffa, Dolgoff's consulting engineer, who notes that the Dolgoff proposed transmitter site is located at a distance which satisfies the spacing requirement of Section 73.213(c) with respect to WKNU(FM). Mr. Suffa further notes that Dolgoff's proposed transmitter site is fully-spaced with respect to all other stations under Section 73.207 of the Commission's Rules.

III. Conclusion

In light of all the foregoing, it is clear beyond question that there is no merit whatsoever to the Carters' Petition To Deny Dolgoff's application. Manifestly, processing pursuant to Section 73.213(c) is proper, appropriate and fully sanctioned by the Commission. The Carters clearly knew this, yet they proceeded to file their completely frivolous Petition To Deny. These facts raise substantial and material questions of fact either as to whether the Carters are inept, or whether the Carters have engaged in abuse of process, and the Commission should take cognizance of these issues in its hearing designation order in this proceeding. In all events, however, the Carters' Petition To Deny should be summarily dismissed or denied.

Respectfully submitted,

HOWARD B. DOLGOFF

By: 

Irving Gastfreund

Kaye, Scholer, Fierman, Hays &
Handler

The McPherson Building

901 15th Street, N.W.

Suite 1100

Washington, D.C. 20005

(202) 682-3526

His Attorneys

July 8, 1992

Exhibit 1

Engineering Statement

Opposition to Petition to Deny

prepared for

Howard B. Dolgoff
Miramar Beach, Florida

This statement has been prepared on behalf of Howard B. Dolgoff ("Dolgoff"), applicant for a new FM station to serve Miramar Beach, Florida in support of his opposition to the Petition to Deny his pending application filed by Mark and Renee Carter ("Carter").

Carter argues that use of Section 73.213 of the FCC Rules and Regulations is inappropriate in connection with Dolgoff's proposal. However, such treatment is permitted under the Rules, and is consistent with the public interest as it permits maximum coverage for the Miramar Beach allotment.

Allotment Criteria

The Miramar Beach allotment was first proposed prior to October 2, 1989, before the adoption of the new distance separation requirements for class A stations now embodied in Section 73.207. The old separation distances, now contained in Section 73.213(c) of the FCC Rules, were based on maximum class A station operation of 3.0 kilowatts at 100 meters above average terrain. At the time that the Miramar Beach allotment was adopted, the allotment reference point did not satisfy the new (6 kilowatt) separations, but did satisfy the old separations now contained in Section 73.213. The Commission took cognizance of this in footnote to the Miramar Beach Report and Order by stating "Because this allotment is made as a result of a petition filed prior to October 2, 1989, applicants may avail themselves of Section 73.213(c) of the Commission's Rules, which allows use of the old, 3 kilowatt, class A distance separation requirements, with respect to WKNV(FM), Channel 292A, Brewton, Alabama...". This is exactly what Dolgoff has proposed to do.

The Commission also addressed the issue of such grandfathered allotments in its May 30, 1991 Memorandum Opinion and Order (MO&O) issued on reconsideration of the decision to increase the maximum power of Class A stations to 6 kilowatts. In that MO&O,

the Commission stated that applications for new allotments which result from petitions for rulemaking filed prior to October 2, 1989 must meet new, 6 kilowatt, spacing requirements with respect to all facilities and allotments except those to which the allotment reference coordinates were short spaced on the effective date of the allotment (*See Footnote 7*). Further, paragraph 40 of the same MO&O states that the Commission will "...permit facility enhancements sought pursuant to Section 73.213 that retain current coverage in directions where overlap exists, provided no new predicted interference is created to the current service of any other short-spaced co-channel and adjacent channel licensees".

Both Dolgoff and Carter have applied for the Miramar Beach allotment pursuant to the provisions of Section 73.213 of the Commission's Rules. The Dolgoff site is located 105.2 kilometers from WKNU, Brewton, Alabama, which satisfies the spacing requirement of Section 73.213(c). As with Dolgoff, Carter is also seeking processing under the provisions of Section 73.213(c) with respect to WKNU. Dolgoff's site is located 105.2 kilometers from WKNU, where Section 73.213(c) requires separation of 105 kilometers. The Dolgoff site is fully spaced under Section 73.207 with respect to all other stations.

In addition to the Commission's explicit language in the Report and Order allotting the channel to Miramar Beach, Dolgoff relied on Paragraph 40 of the May 30, 1991 MO&O, which indicates that such coverage enhancement is permissible under Section 73.213 of the Commission's Rules. The Commission contemplated such enhancements by requiring applicants for new allotments to specify sites which meet the Section 73.207 (6 kilowatt) spacing requirement to all stations except those stations to which the new allotment reference point was short-spaced on the effective date of the allotment. Use of the provisions of Section 73.215 is not appropriate since Dolgoff is not proposing to offer protection to the contours of WKNU, as defined in that rule section. Dolgoff is, instead, relying on the protection afforded under the former distance separation requirements between 3 kilowatt class A stations which are now contained in Section 73.213(c). This is consistent with the treatment afforded non-directional facilities operating pursuant to that rule section. Operation of class A stations with directional antennas which restrict radiation

to 3 kilowatts was contemplated by the May 30, 1991 MO&O. Further, the ability to improve coverage in non-short spaced directions is in the public interest by virtue of the additional service which may be provided by higher power operation.

To satisfy the requirements of Section 73.213(c), Dolgoff has specified use of a directional antenna to restrict radiation from his facility to 3.0 kilowatts in the direction of WKNU. Since the Dolgoff proposal will radiate 3 kilowatts towards WKNU, at 100 meters above average terrain, it will not exceed the service or interference contours towards that station that would be created by a non-directional facility, such as that proposed by Carter. It should be noted that Carter's application specifies 3 kilowatt operation towards WKNU to meet the requirements of Section 73.213(c). Unlike non-directional antennas, which are subject to "pattern distortions" caused by side mounting, use of a directional FM transmitting antenna requires that the measured pattern be wholly contained within the proposed radiation envelope. In this case, since such measurements will ensure that the power radiated towards WKNU is 3 kilowatts or less, the Commission is assured that this facility will not create or receive interference greater than that contemplated in the Rules. By contrast, no such assurances exist with respect to the non-directional technical facilities proposed in Carter's application.

Conclusion

In sum, the Dolgoff technical proposal is consistent with the provisions of Section 73.213 of the Commission's Rules, the MO&O that adopted those Rules, Paragraph 40 of the Commission's May 30, 1991 MO&O, and the Report and Order allotting the channel to Miramar Beach.



William P. Suffa, P.E.

July 9, 1992

CERTIFICATE OF SERVICE

I, Mary Odder, a secretary in the law firm of Kaye, Scholer, Fierman, Hays & Handler, hereby certify that on this 9th day of July, 1992, I have caused a copy of the foregoing Opposition To Petition To Deny to be sent via first-class United States mail, postage prepaid, to the following:

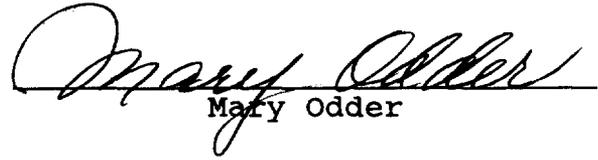
Edwin Jorgensen, Esq.
Assistant Chief (Legal)
FM Branch
Audio Services Division
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 332
Washington, D.C. 20554

Robert Greenberg
Assistant Chief (Engineering)
FM Branch
Audio Services Division
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 332
Washington, D.C. 20554

Charles Dziedzic, Esq.
Hearing Branch
Enforcement Division
Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W.
Room 7212
Washington, D.C. 20554

Chief, Data Management Staff
Audio Services Division
Mass Media Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 350
Washington, D.C. 20554

Frank J. Martin, Jr., Esq.
Sutherland, Asbill & Brennan
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2404


Mary Odder