

AUG 10 1993

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August 10, 1993

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: MM Docket No. 93-178
Howard B. Dolgoff
(File No. BPH-911223ME)

Dear Mr. Caton:

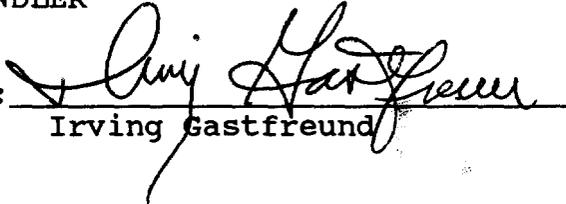
Submitted herewith for filing, on behalf of our client, Howard B. Dolgoff, an applicant in the above-referenced comparative hearing proceeding (MM Docket No. 93-178), are an original and six (6) copies of his Opposition To Contingent Motion To Enlarge Issues in the proceeding. Kindly refer this submission to Administrative Law Judge John M. Frysiak.

Please direct any inquiries concerning this submission to the undersigned.

Respectfully submitted,

KAYE, SCHOLER, FIERMAN, HAYS &
HANDLER

By:


Irving Gastfreund

Enclosures

Federal Communications Commission

AUG 10 1993

WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

TO: Administrative Law Judge John M. Frysiak

OPPOSITION TO CONTINGENT
MOTION TO ENLARGE ISSUES

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Date: August 10, 1993

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Summary

The Carters' Contingent Motion To Enlarge Issues is procedurally defective and substantively devoid of merit. Indeed, Carters' enlargement requests with respect to EEO and related issues and with respect to Section 73.215 of the Commission's rules are so devoid of merit as to be patently and flagrantly frivolous. Similarly frivolous is the Carters' July 26, 1993 Counter-motion For Summary Decision of the designated air hazard issue specified against Dolgoff. Accordingly, the Carters' Contingent Motion To Enlarge Issues should be summarily dismissed or denied.

To Certify Application For Review herein. In this connection, the Carters continue to press their now thoroughly rejected contentions that Dolgoff's application should have been dismissed for alleged failure to make a full Section 73.215 showing concerning WKNU(FM), Brewton, Alabama. Accordingly, the Carters now request that the Presiding Judge designate a hearing issue against Dolgoff to determine whether Dolgoff violated Section 73.215 of the Commission's Rules in connection with the filing of his May 4, 1992 amendment to his application, and to determine whether, as a result, Dolgoff's application should be dismissed.

Finally, the Carters seek designation against Dolgoff of hearing issues to determine: (a) whether Dolgoff, personally, was "guilty" of willful and repeated violations of the Commission's Equal Employment Opportunity rule (Section 73.2080 of the Rules); (b) whether Dolgoff violated Sections 1.65 and 73.3514 of the Commission's Rules by allegedly failing to disclose in his application that the Commission had determined that the licensee of Radio Station WUMX(FM) had violated Section 73.2080 of the Commission's Rules; and (c) whether, as a result, Dolgoff "has the basic qualifications to be a Commission licensee".

The Carters seek discovery as to any issue which may be designated against Dolgoff pursuant to their enlargement requests.

The Carters note in their Motion that, contemporaneously with the filing of their enlargement request, the Carters filed, on July 26, 1993, an Opposition To Partial Motion For Summary Decision and Countermotion for Summary Decision. The Carters therein opposed Dolgoff's July 12, 1993 Motion For Partial Summary Decision in which Dolgoff requested summary decision in his favor on the air hazard issue which has been designated against him in this proceeding. The Carters therein rely on the same arguments pressed by them in their instant Motion To Enlarge Issues -- viz., that Dolgoff's site is not and has not been reasonably available to him, because, according to the Carters, the particular coordinates specified in Dolgoff's May 19, 1992 amendment to his application are not on the property of the site owner upon whom Dolgoff is relying for reasonable assurance of site availability. Based on the foregoing, the Carters contend, in their Opposition To Partial Motion For Summary Decision And Countermotion For Summary Decision, that there is a "material question of fact as to whether Dolgoff has obtained FAA approval as to a relevant site." Id. at 2. Nonetheless, the Carters' request, in their Countermotion For Summary Decision, that the Presiding Judge grant the Carters summary decision against Dolgoff on the air hazard issue and that Dolgoff's application be denied and that the Carters' application be granted.

The Carters note in their Contingent Motion To Enlarge Issues that the enlargement request is made contingent on the denial of the Carters' Countermotion For Summary Decision against Dolgoff, and contingent on the denial by the Presiding Judge of the Carters' July 6, 1993 Request To Certify Application For Review.

For the reasons set forth below, the Carters' Contingent Motion To Enlarge Issues is procedurally defective and substantively devoid of merit. Indeed, Carters' enlargement requests with respect to EEO and related issues and with respect to Section 73.215 of the Commission's rules are so devoid of merit as to be patently and flagrantly frivolous. Similarly frivolous is the Carters' July 26, 1993 Countermotion For Summary Decision of the designated air hazard issue specified against Dolgoff. Accordingly, the Carters' Contingent Motion To Enlarge Issues should be summarily dismissed or denied.

II. Argument

A. The Carters' Motion To Enlarge Issues Is Procedurally Defective

Under Section 1.229(d) of the Commission's Rules, motions to enlarge issues must contain

"... specific allegations of fact sufficient to support the action requested. Such allegations of fact, except for those of which official notice may be taken, shall be supported by affidavits of a person or persons having personal knowledge thereof. [Emphasis added.]"

These procedural requirements are derived from Section 309(d)(1) of the Communications Act, which imposes the same procedural requirements with respect to petitions to deny.

These clear procedural requirements were not complied with by the Carters. In connection with their request for a site availability issue, the Carters rely on Attachment 1 (as revised) to their Motion, consisting of a July 22, 1993 "To Whom It May Concern" letter by a Mr. William S. Fountain, a property appraiser in DeFuniak Springs, Florida. Mr. Fountain therein suggests, from his visual inspection of three different documents, consisting of a copy of a page of a plat book and copies of two different maps of different scale, that "it would appear" that the "target" (presumably a reference to Dolgoff's proposed transmitter site coordinates) is not located on property owned by Mr. J.R. King, who is the individual listed as the site owner in Dolgoff's May 4, 1992 amendment to his application.

Mr. Fountain's "To Whom It May Concern" letter is unverified under oath, and does not constitute a substitute for the affidavit required under Section 1.229(d) of the Commission's Rules. Moreover, even if Mr. Fountain's "To Whom It May Concern" letter were verified or in the form of an affidavit, it would not suffice to meet the stringent standards of Section 1.229 of the Commission's Rules, since Mr. Fountain merely alleges that "it would appear" to him from a mere visual inspection of a plat book

page and of photocopies of two different maps of different scale, that Dolgoff's proposed transmitter site coordinates (the unspecified "target") are not located on property owned by Mr. J.R. King. Examination of the copies of the plat book page and of the two maps submitted as Exhibits to Mr. Fountain's "To Whom It May Concern" letter make it clear that no factual reliance can be placed on conclusions drawn by Mr. Fountain from mere visual inspection of those three documents, particularly where, as here, Mr. Fountain himself is unable to reach definitive conclusions, and, instead, states that his conclusion "would appear" to be as he suggests.

If the Carters had wished to establish, in a competent fashion and in the manner required under Section 1.229(d) of the Commission's Rules, that Dolgoff's proposed site is not located on property owned by Mr. J.R. King, the only way to establish the existence of a substantial and material question of fact as to these matters would have been to commission a site survey by a competent and qualified expert in land survey methodology. This the Carters have not done.

Even if it were to be assumed, arguendo, that the Carters had fully and properly established, by appropriate affidavits of land surveyors, that Dolgoff's proposed transmitter site coordinates do not lie on property owned by Mr. J.R. King, nonetheless, such showings would not suffice to establish that a

substantial and material question of fact exists as to whether Dolgoff has misrepresented facts to the Commission and as to whether Dolgoff lacks the requisite basic character qualifications to be a Commission licensee. The Review Board has held

"Misrepresentation and lack of candor charges are very grave matters. They ought not to be bandied about. The duty to come forward with a prima facie showing of deception is patently strong where a misrepresentation issue is sought. Alabama Citizens For Responsive Public Television, Inc., 73 FCC 2d 615, 46 RR 2d 408 (1979). The petitioner must also make a demonstration of a desire, motive, or logical reason to mislead in order to have an issue added. The Commission will not infer actual or attempted deceptions or improper motives from an enumeration of alleged application errors, omissions, or inconsistencies, accompanied by speculation or surmise but lacking factual support. Garrett, Andrews & Letizia, supra, 86 FCC 2d at 1180, 49 RR 2d at 1007."

Scott & Davis Enterprises, Inc., 88 FCC 2d 1090, 1099 (Rev. Bd. 1982).

The Carters' request for designation against Dolgoff of site misrepresentation and character qualification issues is completely devoid of any basis in fact or in law and fails to meet these strict standards.

Similarly, no affidavit of a competent person having first-hand knowledge of the pertinent facts is supplied in support of the Carters' request for designation of Section 73.215 and related issues. The only documents submitted in this connection by the Carters is a copy of their counsel's July 9, 1993 submission to the Presiding Judge in this proceeding of a July 8, 1993 unverified letter from Mr. Hugh Ellington, President of the

licensee of Radio Station WGNU(FM), Brewton, Alabama, to Chairman Quello. That letter contains nothing more than unsupported allegations of fact and engineering conclusions without any supporting affidavits by an individual with personal knowledge of the facts who is competent to testify to them (viz., a qualified consulting engineer). Significantly, the Carters conveniently neglect to mention, in their enlargement request, that the July 8, 1993 letter to Chairman Quello from Mr. Ellington was stricken as unauthorized by the Presiding Judge in his Memorandum Opinion and Order, FCC 93M-478 (ALJ released July 20, 1993) at n. 1.² Clearly, there is no competent factual support, in the form of affidavits, for the designation of the Section 73.215 and related issues sought by the Carters.

Moreover, there is absolutely no affidavit or other factual support for the Carters' request for designation against Dolgoff of EEO, reporting and character qualifications issues as the consequence of the Commission's decision, in December 1990, that the then licensee of Radio Station WTHZ(FM) (presently WUMX(FM)), Tallahassee, Florida, had violated the Commission's EEO rule. Letter to Howard B. Dolgoff, 5 FCC Rcd 7695 (1990). The

² Clearly, the Carters' submission of the Ellington letter to support their flimsy enlargement request on a Section 73.215 issue is merely another effort by the Carters to use a "back-door" approach to get Mr. Ellington's letter into the record in this proceeding in some fashion. Such effort is wholly improper and should be summarily rejected. The Ellington letter should be summarily stricken.

Commission therein concluded that Dolcom Broadcasting, Inc. (the former licensee of WTHZ(FM)), in which Dolgoff was a principal, had engaged in repeated violations of Section 73.2080 of the Commission's rules because of what the Commission determined were inadequate EEO efforts by WTHZ(FM). However, the Commission specifically found that there was "no evidence of discrimination". Id. at 7695. Therefore, the Commission granted WTHZ(FM)'s license renewal application for a short-term, subject to periodic EEO reporting conditions, and imposed an \$18,000 forfeiture on the licensee of the station.

These determinations provide absolutely no factual basis whatsoever for the Carters' instant request to designate a hearing issue to determine whether Dolgoff, personally, as a principal of Dolcom Broadcasting, Inc., is "guilty of willful and repeated violations of Section 73.2080 of the rules[Emphasis added.]" Motion at 9. There is absolutely no basis whatsoever for addition of any issue as to willful violation of Section 73.2080, and the Carters' assertions (Motion at 8 and 9) that the Commission found that Dolcom Broadcasting, Inc., had engaged in willful violations of the EEO rule are patently false. Moreover as noted above, the Commission specifically found that Dolcom had not engaged in any discrimination. 5 FCC Rcd at 7695. Importantly, the Commission found "... no substantial and material question of fact warranting a hearing [on the 1988 WTHZ-FM license renewal application]. Id. Although a short-term

renewal was granted, subject to periodic EEO reporting conditions, and although an \$18,000 forfeiture was assessed against the then licensee of WUMX(FM), only for the alleged repeated nature of the EEO rule violation, these facts do not support in any fashion whatsoever the designation of the EEO issues sought by the Carters (particularly as to alleged "willfulness" and as to Dolgoff's personal conduct). More importantly, given the Commission's specific findings and conclusions in Letter To Howard B. Dolgoff, supra, in which the Commission found no substantial and material question of fact warranting designation for hearing, the Carters' request for addition of a character qualifications issue in relation to the EEO issue is patently frivolous on its face.

For these reasons alone, the Carters' Motion to Enlarge Issues should be summarily stricken without consideration as procedurally defective, under Section 1.229(d) of the Commission's Rules and under Section 309(d) of the Communications Act. However, even if considered on its alleged "merits", the Carters' Motion should be expeditiously denied as devoid of merit.

B. The Carters' Motion To Enlarge Issues Is Substantively Devoid Of Merit

(1) Site Availability and Related Issues

Annexed hereto as Exhibit 1 is the Declaration of Mr. Howard B. Dolgoff, which sets forth the facts and circumstances

surrounding his selection of the transmitter site specified in his application, as amended.

As noted in Mr. Dolgoff's Declaration, in February, 1992, he undertook the task of locating and securing an alternate transmitter site to improve his coverage prior to the amendment-as-of-right deadline applicable to his application. These efforts were undertaken in consultation with counsel and with Mr. Dolgoff's consulting engineer. As noted by Mr. Dolgoff in his Declaration, his consulting engineer, Mr. William P. Suffa, P.E., prepared a site location map which designated the permissible areas in which a new transmitter site for Dolgoff's application could be located. Mr. Dolgoff notes that he also enlisted the services of a real estate broker, Mr. John G. Martin, President of Waterwood Properties, Inc., in Santa Rosa Beach, Florida. Mr. Martin had been referred to Mr. Dolgoff by Mr. Bruce Fults of Sandestin Realty in Destin, Florida, which is reputed to be the largest real estate developer in that area. Mr. Martin reviewed with Mr. Dolgoff the permissible area for a transmitter site shown on the map which had been supplied by Mr. Dolgoff's consulting engineer.

Mr. Dolgoff notes that, in February, 1992, Mr. Martin located a possible site that Mr. Martin believed was in the permissible site location area and would meet Mr. Dolgoff's needs. The property consisted of six lots in Mack Bayou Park,

plus 4.7 acres adjacent to the property. The asking price for the property was \$175,000.

Mr. Dolgoff notes that Mr. Martin then contacted a land surveyor (Mr. Russell D. Aldrich) for the precise geographic coordinates of the site that was ultimately selected. Mr. Aldrich is an experienced land surveyor and is the Executive Vice President of the land surveyor firm of Emerald Coast Associates, Inc. (formerly Raymond Richardson & Associates, Inc.), in Destin, Florida. The information as to the location of the site was relayed to Mr. Dolgoff's consulting engineer (Mr. Suffa) to ascertain whether the contemplated site was located in the permissible area. Mr. Suffa felt, upon review, that the site in question was clearly outside the boundaries of the permissible site area and that, therefore, Mr. Dolgoff needed to locate another site that would be suitable.

Mr. Dolgoff notes that on a subsequent weekend visit to Mr. Martin, Mr. Martin presented Mr. Dolgoff with two additional possible transmitter sites to consider. The first of these properties was owned by Mr. J.R. King (Lot 48); the second property was a parcel owned by Mr. Martin himself. Mr. Martin drove Mr. Dolgoff to Mr. King's property for an inspection. Thereafter, Mr. Dolgoff contacted Mr. Suffa for his advice, and Mr. Suffa advised Mr. Dolgoff to pursue the J.R. King property as a transmitter site because it appeared, from all the facts at

that time, to clearly be within the permissible area for location of a transmitter site for the Miramar Beach station. Mr. Suffa wanted the coordinates of the proposed site to be accurate, and for this reason, he asked Mr. Dolgoff to have the land surveyor (Mr. Russell D. Aldrich) confirm the precise geographic coordinates. Mr. Dolgoff thereupon followed up with Mr. Aldrich who provided the geographic coordinates of Mr. J. R. King's property to Mr. Dolgoff in a note dated April 11, 1992 and sent to Mr. Dolgoff by Mr. Aldrich via facsimile. A copy of that note is annexed to Mr. Dolgoff's Declaration.

As will be noted from the April 11, 1992 note from Mr. Aldrich to Mr. Dolgoff, two sets of coordinates were shown in the note; one set of coordinates was for Mr. John G. Martin's property ("Site No. 1"), and the other set of coordinates was for the property of Mr. J.R. King ("Site No. 2"). The note from Mr. Aldrich makes it clear that the J.R. King property corresponded to the coordinates 30° 23' 31" North Latitude, 86° 18' 25" West Longitude and was located on the "West 1/2 of Lot 48, Sec. 24 - 25, R. 21W [i.e., Section 24, Range 21 West]."

Upon receiving the April 11, 1992 note from Mr. Aldrich setting forth the coordinates for the proposed transmitter site on Mr. King's property, Mr. Dolgoff called Mr. Suffa once again to confirm with Mr. Suffa that the site in question was acceptable and was the site upon which Mr. Dolgoff should

proceed. Consequently, as noted by Mr. Dolgoff in his Declaration, on April 13, 1992, Mr. Dolgoff sent to Mr. King a letter in which Mr. Dolgoff offered to secure an option to purchase from Mr. King up to two acres (Lot 48, Section 24, Township 2 South) which Mr. King owns and which are located off of Mack Bayou Road in Miramar Beach, Florida. A copy of Mr. Dolgoff's April 13, 1992 letter to Mr. King is annexed to Mr. Dolgoff's Declaration. On April 17, 1992, Mr. King sent Mr. Dolgoff a letter confirming his willingness to sell Mr. Dolgoff two acres of his property on Lot 48, Section 24, Township 2 South, Range 21 West, on Mack Bayou Road for a price of \$40,000. Mr. Dolgoff was given a right of first refusal on the property, as well. A copy of Mr. King's letter of April 17, 1992 is annexed to Mr. Dolgoff's Declaration. A confirming letter was sent to Mr. King by Mr. Dolgoff on April 30, 1992 and a copy of that letter is also attached to Mr. Dolgoff's Declaration. Mr. Dolgoff confirms that he has periodically remained in touch with Mr. King since April 1992 to keep Mr. King apprised of progress on Mr. Dolgoff's application.

Although the information set forth above makes it clear that Mr. Dolgoff has never had any basis to doubt the accuracy of the site information contained in his application, nonetheless, Mr. Dolgoff notes, in his annexed Declaration, that, once the Carters raised a question as to site availability in their Contingent Motion To Enlarge Issues, he asked Mr. Russell Aldrich, the

professional land surveyor whose services he had used, to reconfirm that the site coordinates set forth in his application were, indeed, located on Lot 48 -- which is owned by Mr. J.R. King. As noted by Mr. Dolgoff, in a letter dated August 9, 1993, Mr. Aldrich reconfirmed that Mr. Dolgoff's transmitter site coordinates do, indeed, lie on Lot 48, which is owned by Mr. J.R. King. Mr. Aldrich confirmed the foregoing facts by rescaling Lot 48 on a 1970 quadrangle map. A copy of Mr. Aldrich's letter of August 9, 1993 is annexed as Attachment 5 to Mr. Dolgoff's attached Declaration.

In light of all the foregoing, it is clear that he coordinates specified in Dolgoff's application were ascertained by a professional land surveyor who provided those coordinates to Mr. Dolgoff and who has now reconfirmed that the coordinates do, indeed, lie on Lot 48, owned by Mr. J.R. King. Under these circumstances, the unverified "To Whom It May Concern" letter of July 22, 1993 from Mr. William S. Fountain provides absolutely no basis for designation of a site availability issue against Dolgoff. As noted above, Mr. Fountain, who is an appraiser, conducted a mere visual comparison of copies of two different-scale maps and of a page from a plat book -- documents that appear most difficult to reconcile visually with one another. From his visual inspection, Mr. Fountain concludes that "it would appear" to him that "the position of the target" (presumably the Dolgoff site coordinates) is north of Lot 48, which is owned by

Mr. J.R. King. This imprecise visual comparison of difficult-to-read and difficult-to-reconcile maps and a plat book page hardly begins to form the basis for designation of a site availability issue where, as here, Dolgoff has relied on specific site coordinates furnished to him by a professional land surveyor in the area in which the property is located. Designation of a site availability issue under these circumstances would be particularly unwarranted in light of the unverified nature of Mr. Fountain's submission.³

Even if it were to be assumed, arguendo, that Mr. Fountain were correct in his belief that the transmitter site coordinates specified in Dolgoff's application do not correspond to land owned by Mr. J.R. King, nonetheless, there would be no basis for designation against Dolgoff of site misrepresentation/character qualifications issues, as requested by the Carters. As shown above, Mr. Dolgoff has proceeded in complete good faith reliance

³ It is disingenuous for the Carters to claim, as they do, that Mr. Fountain's "To Whom It May Concern" letter is a "certificate". Motion at 2. In light of the procedural deficiencies (and factual unreliability) of Mr. Fountain's letter, the Presiding Judge should summarily reject the Carters' request that "official notice" be taken of Mr. Fountain's letter. Motion at 2 n. 3. Under Rule 201(b) of the Federal Rules of Evidence, a judicially noticed fact must be one which is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Clearly, the unverified visual estimations set forth in Mr. Fountain's July 22, 1993 letter hardly begin to meet these stringent standards.

on the site coordinates supplied to him by a professional land surveyor, who had been referred to Mr. Dolgoff by the real estate broker with whom Mr. Dolgoff was working to secure a transmitter site. Mr. Dolgoff coordinated with his consulting engineer, as well. Under these circumstances, even if it were assumed, arguendo, that there were an error in the coordinates of the J.R. King property, such a factual mistake alone hardly begins to form the basis for designation against Dolgoff of misrepresentation and character qualification issues. See Scott & Davis Enterprises, Inc., supra, 88 FCC 2d at 1099 and cases cited therein.

(ii) Section 73.215 and Related Issues

As noted above, the Carters' instant Motion To Enlarge Issues represents the third "bite at the apple" by the Carters with respect to the very same matters regarding Dolgoff's alleged violation of Section 73.215 in connection with the engineering portion of his May 4, 1992 technical amendment to his application. The very same issues were raised by the Carters in their June 4, 1992 Petition To Deny Dolgoff's application -- the Carters' "first bite at the apple".

In its Hearing Designation Order herein, the Mass Media Bureau rejected the Carters' contentions and denied their Petition To Deny. The Bureau there affirmed Dolgoff's contention that Dolgoff's amended application may properly be processed pursuant to Section 73.213(c)(1) with respect to WKNU(FM). In

this regard, the Bureau held in its Hearing Designation Order that Dolgoff's application, as amended, proposed no more than an effective radiated power/antenna height combination of 3 kW/100 meters above average terrain, or equivalent, in the arc toward WKNU(FM), and that, therefore, the Dolgoff proposal fully complied with Section 73.213 of the Commission's Rules. In this regard, the Hearing Designation Order contained the following reasoning for the Bureau's determination:

"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 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, the Carters' Petition To Deny filed against the Dolgoff application will be denied."

Hearing Designation Order at ¶3.

The "second bite at the apple" by the Carters came in their July 6, 1993 Request To Certify Application for Review, addressed to the Presiding Judge; the Carters therein raised the same issues that they had raised in their pre-designation Petition to Deny, dated June 4, 1992. By Memorandum Opinion and Order, FCC 93M-478 (ALJ released July 20, 1993), the Presiding Judge denied the Carters' Request To Certify Application For Review and affirmed the reasoned determination by the Mass Media Bureau, in its Hearing Designation Order herein that, 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 of the rules or to make any showing of the type normally required under Section 73.215 with respect to Radio Station WKNU(FM), Brewton, Alabama.

Dolgoff's counsel received a copy of the Presiding Judge's aforementioned Memorandum Opinion and Order in the mail from the Commission on July 26, 1993. One can reasonably assume that counsel for the Carters received a copy of the Memorandum Opinion and Order by mail on or prior to that date, as well. Yet, on July 26, 1993, the Carters nonetheless persisted in filing their request for designation a Section 73.215 issue in their Motion To Enlarge Issues.

Even if it were to be assumed, arguendo, that counsel for the Carters had not received a copy of the Presiding Judge's Memorandum Opinion and Order, supra, by July 26, 1993, when the Motion To Enlarge Issues was filed with the Commission, nonetheless, the filing by the Carters of a request for designation of a Section 73.215 issue is so totally devoid of merit as to be frivolous, in light of clearly established Commission precedent. As shown above, the Hearing Designation Order in this case contained a reasoned analysis by the Mass Media Bureau for its determination to deny the Carters' Petition To Deny Dolgoff's application.

It is well-established that, where, as here, the hearing designation order provides a "reasoned analysis" of the issues in question, the Presiding Judge is precluded from revisiting the determinations reached in the hearing designation order. 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).

In light of the foregoing precedent, it is simply inexplicable how the Carters could have rationally concluded that there was even the slightest basis for designation against Dolgoff of a Section 73.215 issue. Patently, there was no such legitimate basis, and the Carters must have known so. The Carters' request, in their Motion To Enlarge Issues, for designation of a Section 73.215 issue is frivolous, vexatious and an abuse of process. The Carters' request for such an issue represents desperation tactics by the Carters.

(iii) EEO And Related Reporting Issues

As noted by Dolgoff in his July 26, 1992 Integration And Diversification Statement, he has served as General Manager of Radio Station WUMX(FM) (formerly WTHZ(FM)), Tallahassee, Florida, from January 1986 to the present. From January 1986 to July 6, 1987 Dolgoff served as Vice President of Dolcom Broadcasting, Inc., then the licensee of WTHZ(FM). From July 7, 1987 to August

22, 1989, Mr. Dolgoff served as Vice President and a Director of Dolcom Broadcasting, Inc., and on August 23, 1989, Mr. Dolgoff also became a 40 percent stockholder of Dolcom Broadcasting, Inc.⁴

As shown above, in Letter To Howard B. Dolgoff, 5 FCC Rcd 7695 (December 26, 1990), the full Commission granted the September 28, 1988 application (File No. BRH-880928UB) for renewal of license of WTHZ(FM); however, that renewal was granted subject to periodic EEO reporting conditions and was granted for a short-term ending February 1, 1992. In addition, the Commission imposed on Dolcom Broadcasting, Inc. an \$18,000 forfeiture by virtue of what the Commission determined were repeated violations of Section 73.2080 of the Commission's Rules (the EEO rule). No willful violations of that rule were found by the Commission. Moreover, the Commission specifically found that there was no evidence of discrimination by the licensee of WTHZ(FM). Moreover, the Commission granted the 1988 WTHZ(FM) license renewal application, since the Commission found "no substantial and material question of fact to warrant a hearing". 5 FCC Rcd at 7695.

⁴ On May 1, 1991, Dolcom, Inc., acquired WUMX(FM) from Dolcom Broadcasting, Inc.; Mr. Dolgoff serves as President, Vice President, Treasurer, Director and sole stockholder of Dolcom, Inc.