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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

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AUG 10 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

Dear Mr. Caton:

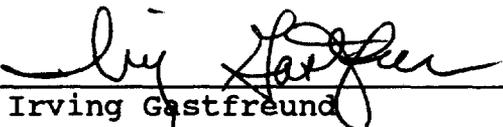
Submitted herewith for filing, on behalf of our client, Howard B. Dolgoff, an applicant in the above-referenced comparative hearing proceeding (MM Docket No. 93-178), are an original and six (6) copies of his Opposition To Counter-motion For Summary Decision in the proceeding. Kindly refer this submission 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

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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

In re Applications of)	MM Docket No. <u>93-178</u>
)	
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)	

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AUG 10 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

TO: Administrative Law Judge John M. Frysiak

OPPOSITION TO COUNTERMOTION FOR SUMMARY DECISION

HOWARD B. DOLGOFF ("Dolgoff"), by his attorneys, pursuant to Section 1.251(b) of the Commission's Rules, hereby opposes the Counter-motion For Summary Decision filed herein on July 26, 1993 on behalf of Mark and Renee Carter (the "Carters") with respect to the air hazard issue designated against Dolgoff in this proceeding. In support whereof, it is shown as follows:

I. Introduction

In Paragraph 4 of the Hearing Designation Order in this proceeding, ___ FCC Rcd ___, DA 93-700 (Mass Media Bureau released June 28, 1993), the Mass Media Bureau stated as follows:

"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."

Id. at ¶4.

Based on the foregoing, the Bureau designated Hearing Issue No. 1 in this proceeding as follows:

- "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."

In Paragraph 9 of its Hearing Designation Order in this proceeding, the Bureau ordered that the Federal Aviation Administration ("FAA") was to be made a party to this proceeding with respect to the air hazard issue.

On July 12, 1993, Dolgoff filed his Motion For Partial Summary Decision with respect to the air hazard issue. Dolgoff submitted with that Motion a copy of the Federal Aviation Administration's June 30, 1992 determination (Aeronautical Study No. 92-ASO-0942-OE), that the antenna tower proposed by Dolgoff in his May 4, 1992 amendment to his application in this proceeding would not constitute a hazard to air navigation. Dolgoff demonstrated that the FAA determination of no hazard appears not to have been received by the staff of the Mass Media Bureau that processed Dolgoff's application at the processing line.

Based on all the foregoing, Dolgoff demonstrated that there is no genuine issue of material fact as to whether Dolgoff's proposed antenna structure would constitute a hazard to air navigation and that, therefore, consistent with Commission policy, summary decision in Dolgoff's favor on the air hazard issue is warranted.

On July 26, 1993, the Carters filed a Motion To Enlarge Issues against Dolgoff. Among the issues which the Carters therein seek to have designated against Dolgoff is a site availability issue. According to the Carters' contentions, the particular coordinates of Dolgoff's proposed transmitter site, as specified in Dolgoff's application, do not lie on the real estate owned by the individual listed in Dolgoff's application as the owner of Dolgoff's proposed site.

Contemporaneously with the filing of their Motion To Enlarge Issues, on July 26, 1993, the Carters filed their Opposition To Partial Motion For Summary Decision And Countermotion For Summary Decision. If one follows the convoluted logic of the Carters as manifested in that pleading, it is the Carters' contention that there is a genuine issue of material fact on the designated air hazard issue which warrants evidentiary inquiry. Indeed, by filing their own Countermotion For Summary Decision on the air hazard issue, the Carters are essentially contending that there is no genuine issue of material fact as to the designated air hazard issue to be resolved at here -- i.e., that the facts are clear that Dolgoff's proposed site would constitute a hazard to air navigation. Based on their request for summary decision against Dolgoff on the designated air hazard issue, the Carters request that Dolgoff's application be denied and that their competing application be granted.

For the reasons set forth below, the Carters' Counter-motion For Summary Decision (as well as their Opposition to Dolgoff's Motion For Partial Summary Decision) is procedurally defective and patently frivolous. The Counter-motion should be rejected out of hand.

II. Argument

The Carters' Opposition And Counter-motion is procedurally defective. Section 1.251(b) of the Commission's Rules provides as follows:

"A party opposing the motion [for summary decision] may not rest on mere allegations or denials but must show, by affidavit or other materials subject to consideration by the presiding officer, that there is a genuine issue of material fact for determination at the hearing"

Similarly, with respect to the Carters' Counter-motion For Summary Decision, Section 1.251(a)(1) of the Commission's Rules provides as follows:

"The party filing the motion may not rest upon mere allegations or denials but must show, by affidavit or other materials subject to consideration by the presiding officer, that there is no genuine issue of material fact for determination at the hearing."

Plainly, the Carters have ignored these stringent procedural requirements. The Carters have presented absolutely no affidavits, or other materials which may be properly considered by the Presiding Judge as a substitute for affidavits, which demonstrate either: (1) that there is a genuine issue of material fact as to whether Dolgoff's proposed site would constitute a hazard to air navigation; or (2) that there is no genuine issue

of material fact on the air hazard issue for evidentiary resolution and that there is not the slightest doubt that Dolgoff's proposed transmitter site would constitute a hazard to air navigation. Manifestly, neither of these two types of showings could be made by the Carters, in light of the Federal Aviation Administration's June 3, 1992 determination of no hazard with respect to Dolgoff's proposed transmitter site. See Exhibit 1 to Dolgoff's July 12, 1993 Motion For Partial Summary Decision.

All that the Carters offer, as a substitute for affidavits and compliance with the procedural requirements of Section 1.251 of the Commission's Rules, is their speculation that there is "a material question of fact as to whether Dolgoff has obtained FAA approval as to a relevant site." Countermotion For Summary Decision at 2. However, such speculation hardly begins to meet the stringent procedural requirements of Section 1.251 of the Commission's Rules.

For these reasons alone, the Carters' Opposition To Motion For Partial Summary Decision And Countermotion For Summary Decision should be summarily dismissed without consideration as procedurally flawed. However, even when considered on its alleged "merits", the Carters' submission is so devoid of merit as to be frivolous.

The Carters appear to rely on the purported "showing" which they claim they have made in their July 26, 1993 Motion to Enlarge Issues against Dolgoff in support of their claim that the coordinates of Dolgoff's proposed transmitter site do not lie on real property owned by the site owner specified in Dolgoff's application.

As a preliminary matter, this contention has been fully addressed by Dolgoff in his August 10, 1993 Opposition To Motion To Enlarge Issues; that Opposition is hereby incorporated herein by reference. As shown therein, Dolgoff's information as to site coordinates and as to the particular property lot on which those coordinates lie, was obtained from a professional land surveyor and from a real estate broker who work in the area in question. The purported "showing" by the Carters, based upon a property appraiser's unverified letter concerning the appraiser's visual inspection of two maps of different scale and of a plat book page, hardly begin to establish that the land surveyor and real estate broker relied upon by Dolgoff were in error as to site location. In short, the Carters have failed to establish that there is a substantial and material question of fact as to whether Dolgoff has reasonable assurance of the availability of his proposed transmitter site.

Even if it were to be assumed, arguendo, that the Carters were able to establish, in their Motion To Enlarge Issues, that a

substantial and material question of fact warranting evidentiary inquiry exists as to the reasonable assurance of the availability of Dolgoff's proposed transmitter site, nonetheless, this fact, standing alone, would not warrant denial of Dolgoff's pending Motion For Partial Summary Decision on the designated air hazard issue. In this regard, it must be emphasized that, unless and until Dolgoff amends his application to specify a transmitter site different from the one presently specified in his application, the presently-specified transmitter site is the only transmitter site upon which Dolgoff is relying, and it is the only transmitter site which the Commission and the Presiding Judge can presume to be part of Dolgoff's technical proposal. Even if there were a substantial and material question of fact as to whether Dolgoff has reasonable assurance of the availability of his proposed site, this, standing alone, would not in any way serve to demonstrate that there is a genuine issue of material fact requiring hearing as to whether the site specified by Dolgoff would constitute a hazard to air navigation. Plainly, the FAA's June 3, 1992 determination of no hazard completely resolves in Dolgoff's favor any question in this regard.

Simply stated, the Carters have attempted to "bootstrap" an inadequately supported request for designation of a site availability issue into a purported basis for filing a Counter-motion For Summary Decision against Dolgoff on the designated air hazard issue. This attempt should be summarily

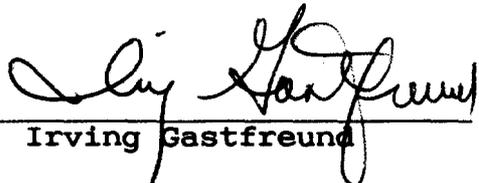
rejected as patently frivolous, since the Carters and their counsel must be deemed to know, from the FAA's determination of no hazard, that there is not the slightest doubt that the transmitter site proposed by Dolgoff will not constitute a hazard to air navigation. Under these circumstances, the filing by the Carters of a Counter-motion For Summary Decision Against Dolgoff on the air hazard issue, and the Carters' concomitant request that Dolgoff's application be denied, are so patently and thoroughly frivolous as to constitute abuse of process.

III. Conclusion

In light of all the foregoing, the Carters' Counter-motion For Summary Decision is patently defective and totally lacking in any substantive merit. The Counter-motion should be summarily dismissed without consideration 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

His Attorneys

August 10, 1993

CERTIFICATE OF SERVICE

I, Mary Odder, a secretary with the law firm of Kaye, Scholer, Fierman, Hays & Handler, hereby certify that on this 10th day of August, 1993, have caused a copy of the foregoing "Opposition To Countermotion For Summary Decision" be hand-delivered or to be sent via first-class United States mail, postage prepaid, to the following:

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Counsel for Mark and Renee Carter


Mary Odder

*/ Via Hand-Delivery