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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

AUG 25 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

_____)
 In re Applications of)
)
 Howard B. Dolgoff)
)
 Mark and Renee Carter)
)
 For Construction Permit for a New)
 FM Station on Channel 292A in)
 Miramar Beach, Florida)
 _____)

MM Docket No. 93-178

File No. BPH-911223ME

File No. BPH-911224MD

To: Administrative Law Judge
John M. Frysiak

OPPOSITION TO PETITION TO ENLARGE ISSUES AS CLARIFIED BY ERRATUM

Applicants Mark and Renee Carter ("the Carters"), by their attorneys, hereby respectfully oppose Howard B. Dolgoff's ("Dolgoff's") Petition to Enlarge Issues of August 10, 1993, as "clarified" by his Erratum of August 11, 1993.

Dolgoff seeks financial and site availability issues. Dolgoff has made clear by way of an "Erratum" filed August 11, 1993, that he does not contend that the Carters' lack reasonable assurance of adequate financing or of their proposed site; instead, he asserts only that a question has arisen as to whether their financing and site, which are both concededly available to them, were reasonably available to them at the time they filed their application.

Financial Qualifications. Documentation supplied by the Carters pursuant to discovery herein, and appended to Dolgoff's Petition, shows that on December 12, 1991, prior to

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filing their application, the Carters met with two representatives of AmSouth Bank in Destin, Florida. See letter dated December 12, 1991 appended to Dolgoff's Petition. According to letters dated July 23, 1993 from one of the bank officers present at the December 12, 1991 meeting (see short and long letters dated July 23, 1993, appended to Dolgoff's Petition), AmSouth Bank was, on December 12, 1991, willing to make available up to \$250,000 to the Carters on specified terms, based on discussions held with the Carters on that day (December 12, 1991). The letters make clear that the bank's loan commitment in December 1991 was based, not only on discussions held that day, but also on the bank's review at that time of the Carters' FCC application, their budget for the proposed station^{1/}, and of the Carters' personal financial statements, and on the bank's prior experience with the Carters' as customers. (See long letter of July 23, 1993, appended to Dolgoff's Petition).

The foregoing facts obviously support a conclusion that the Carters had reasonable assurance of financing when they filed their application. However, Dolgoff argues the contrary: he asserts that these facts actually raise a question as to whether the Carters could have had reasonable assurance of their financing when they filed their application. Dolgoff first argues without citing any supporting authority, that since all

^{1/} It is of note that Dolgoff's documents supplied to the Carters pursuant to production do not include a budget.

the terms of the \$250,000 commitment were not set out in writing in the bank's first letter, a substantial and material question of fact is raised as to whether the Carters' attestation of their willingness to comply with the bank's terms (implied by their certification) could have been valid (Petition at 7-10). This argument fails for the obvious reason that the rather ordinary terms in question, none of which would give any reasonable person pause, obviously could be comprehended and acceded to whether or not they had yet been committed to writing.

Dolgoff's second argument is equally lame: that the bank could not have based its decision to extend the loan to the Carters on the Carters application, because the application was not filed until after the December 12 meeting [on December 24], or on "know[ledge]" that the Carters would have ownership of, and thus would be in a position to give a second mortgage on, their proposed Mack Bayou Road site, because the written option whereby they now have a legal right to acquire the site had not yet been obtained. Obviously, the later filing date does not mean that the Carters could not, and did not, show the bank the application they intended to file. As for the point about the second mortgage, the bank certainly could know, and apparently did know, of the Carters' intention to acquire the site, and could, and did, make the taking of a second mortgage thereon one of the terms of the loan commitment.

It is submitted that Dolgoff's arguments are without merit, and that there is no indication at all that the Carters

could not have had, or did not have, reasonable assurance of the availability of their proposed financing at the time their application was filed.

Site Availability. The Carters' application shows that before the application was filed the Carters had "reasonable assurance in good faith," based on contact with Gregory Meyer, owner of their proposed site, that the same would be "available to them" for use as a transmitter site. FCC Form 301, Section VII, paras. 2-3. Documentation supplied by the Carters to Dolgoff pursuant to discovery, and appended to Dolgoff's instant Petition, shows that, pursuant to their previously obtained reasonable assurance of the availability of the site, the Carters in due course, on May 1, 1992, obtained a legal right to acquire the site from Mr. Meyer and his wife.

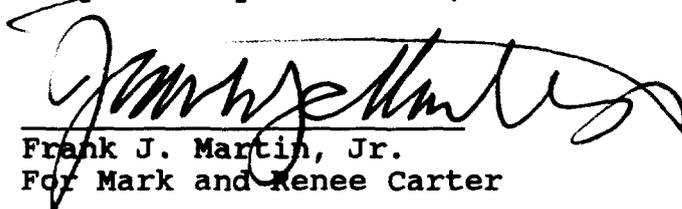
Once again, Dolgoff contends that the foregoing supports -- not the natural inference of the existence of reasonable assurance, albeit not yet a legal right, at the time the application was filed -- but a material and substantial inference that before the legally binding document was concluded there could not have been any reasonable assurance. This simply does not follow and must be rejected. Dolgoff points to no evidence that there was not a meeting of the minds as to availability of the site which in fact was available. Cases cited by Dolgoff at page 4 of his petition are all distinguishable because they all involve affirmative showings

that there was no meeting of minds with respect to sites that were not in fact available.

Conclusion. Dolgoff does not seek issues against the Carters based on an alleged failure to comply with any explicit rules, regulations, or instructions, or on any other "technical" failing; instead Dolgoff's allegations go only to the heart of the substantive question of reasonable availability: he alleges that the documents produced to it in discovery affirmatively raise material questions of fact as to the existence of reasonable assurance at the time the application was filed. They do not, but instead are consistent with, and support the opposite inference that reasonable assurance did exist when the Carters application was filed.

WHEREFORE, it is respectfully requested that Dolgoff's Petition to Enlarge Issues, as amplified by his Erratum, be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

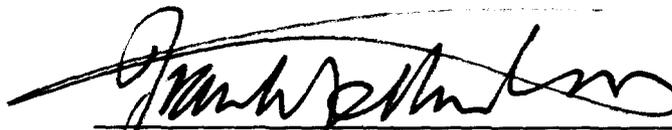
I hereby certify that on this 25th day of August, 1993,
a copy of the foregoing Opposition to Petition to Enlarge Issues
as Clarified by Erratum has been served by U.S. mail, postage
paid, upon the following:

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