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BEFORE THE
Federal Communications Commission
WASHINGTON, D. C. 20554

MAY 19 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re)	
)	
Amendment of 73 CFR §73.202(b),)	MM Docket No. _____
FM Table of Allotments)	RM- _____
(Glen Arbor, Michigan))	

TO: Allocations Branch, Policy and Rules Division
Mass Media Bureau

**REPLY TO OPPOSITION TO
PETITION FOR RULEMAKING**

WKJF Radio, Inc., by its attorney, hereby respectfully submits its Reply to the "Opposition to Petition for Rulemaking to Delete FM Channel" filed by George S. Flinn, Jr. on May 9, 2000. In support whereof, the following is shown:

1. There is appended hereto and incorporated by reference herein the "Reply to Opposition to Motion to Dismiss" filed this date by WKJF Radio, Inc. against Flinn's application for Channel 227A at Glen Arbor. This pleading states the reasons why Flinn's application must be dismissed and Channel 227A deleted from Glen Arbor, Michigan.

WHEREFORE, WKJF Radio, Inc. urges that the Commission **ISSUE A NOTICE OF PROPOSED RULEMAKING** looking toward the deletion of FM Channel 227A from Glen Arbor, Michigan.

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Respectfully submitted,

WKJF RADIO, INC.

By 

Dennis J. Kelly
(D. C. Bar #292631)
Its Attorney

LAW OFFICE OF DENNIS J. KELLY
Post Office Box 6648
Annapolis, MD 21401
Telephone: 410-280-6290

May 19, 2000

BEFORE THE
Federal Communications Commission
WASHINGTON, D. C. 20554

In re Application of)
)
GEORGE S. FLINN, JR.) File No. BPH-970724M4
)
For a Construction Permit for a New FM)
Broadcast Station at Glen Arbor, Michigan)

TO: Audio Services Division, Mass Media Bureau

**REPLY TO OPPOSITION TO
MOTION TO DISMISS APPLICATION**

WKJF Radio, Inc., by its attorney, hereby respectfully submits its Reply to the "Opposition to Motion to Dismiss Application" filed by George S. Flinn, Jr. on May 9, 2000. In support whereof, the following is shown:

1. At the outset, it is to be pointed out that Flinn's application at Glen Arbor has been on file at the FCC for almost 34 months. This would not necessarily be out of the ordinary, except that Flinn's application is a **singleton!!!** While Flinn's attorney attempted to point out the shortcomings in WKJF's request for dismissal of the Flinn application, he advanced no reasons why the Flinn application should be granted. For example, Flinn's attorney failed to address the matters of FAA clearance and FCC tower registration, matters which Flinn has failed to successfully deal with to date.

2. Section 73.3568(a)(1) of the FCC Rules provides in pertinent part: **"Failure to prosecute an application . . . will be cause for dismissal"**. Flinn has had 34 months since the filing of his application to prosecute it so that it can be granted. For reasons which are known only to Flinn, he hasn't done so. The Commission needs to deal with the Flinn application; the public interest is not served by the *status quo*. The Commission should immediately request Flinn to give it a full and fair status report on the FAA proceedings involving its proposed site. If the FAA will not approve Flinn's site, the Commission must then dismiss Flinn's application and delete Channel 227A from Boyne City. **FM Table of Allotments, La Fayette, Georgia**, 13 FCC Rcd 2093 (1998).

3. Section 73.315(b) of the FCC Rules provides in pertinent part: **"The location of the antenna should be so chosen that line-of-sight can be obtained from the antenna over the principal city or cities to be served; in no event should there be a major obstruction in this path."** Flinn's engineering consultant, in his statement appended to the "Opposition to Motion to Dismiss Application", argues on the basis of an alternative calculation that Flinn's 70 dBu contour covers 80 percent of the community of Glen Arbor. However, Flinn's engineering consultant never comes to grips with Section 73.215(b). As was demonstrated by WKJF's

consulting radio engineer, Robert Guill, there is a significant terrain barrier between Flinn's proposed transmitter site in the village of Empire, Michigan and the community of Glen Arbor: the Sleeping Bear Dunes. The cases are clear that where there is a terrain barrier which precludes line-of-sight coverage of the proposed community, the proposal will be denied. **FM Table of Allotments, Jonesville, Virginia and Cumberland Gap, Tennessee**, 60 Fed. Reg. 57368 (1995).

4. Turning to reasonable assurance of Flinn's original site, affiant D. C. Williams' account of his conversation with National Park Service employee Duane Pearson simply does not provide a *bona fide* basis for Flinn to have affirmatively certified that he had reasonable assurance of the availability of his site. In fact, Williams concedes that Pearson "did not know whether any proposed structure would or would not be allowed and that such determination could only be reached upon consideration of a formal application to be filed". In other words, the mere possibility of the Flinn proposal being considered was subject to the filing of some kind of application with the National Park Service. Williams' affidavit is silent as to whether Flinn filed such an application. Furthermore, Williams' affidavit is silent as to whether he had any understanding whatsoever with any employee of the National

Park Service on the range of monthly (or annual) lease payments that Flinn could have expected to pay for use of the Sleeping Bear Dunes National Lakeshore site.

5. It appears that Williams misapprehended the concept of "reasonable assurance", or attempted to confuse it with the concept of "misrepresentation". We don't have to reach the question of whether Flinn's site certification was knowingly false (a misrepresentation) to be able to answer the preliminary question of whether or not Flinn had "reasonable assurance" of the availability of the Sleeping Bear Dunes site at the time he signed his application. The law is well settled at the Commission that "a mere possibility, assumption or hope that the site will be available" does not constitute "reasonable assurance". **Shoblom Broadcasting, Inc.**, 93 FCC 2d 1027, 53 RR 2d 1203 (Rev. Bd. 1983) [subsequent history omitted]. Indeed, **Shoblom** is on all fours with the instant case. Therein, an applicant proposed a site within California's Joshua Tree National Monument after an alleged conversation with a National Park Service employee; as with the Sleeping Bear Dunes National Lakeshore, the land within the Joshua Tree National Monument was not available for the purpose. The applicant was not entitled to amend to a new site.

6. In **El Camino Broadcasting, Inc.**, 12 FCC Rcd 720, 722 (Rev. Bd. 1968), the Commission stated that "the mere

fact that the property owner has indicated that he would discuss the possibility of a lease at some future date does not, absent some indication that he is favorably disposed toward making such an arrangement, provide any more assurance than an unrejected offer". This was the state of the Flinn discussions as to the Sleeping Bear Dunes site on July 24, 1997: Flinn's representative had a conversation with a National Park Service employee, whose authority to even entertain such a conversation is in doubt. This employee had no authority to extend "reasonable assurance" to Flinn. Rather, Flinn's representative was told that Flinn would have to file an application before his proposal would even be considered. Certainly, no lease terms were ever discussed, and no "meeting of the minds" ever took place. Simply stated, Flinn did not have reasonable assurance as to the use of his original transmitter site at the time he filed his application. The case law is clear that he is not entitled to amend to a new site, and his application must be dismissed. **62 Broadcasting, Inc.**, 4 FCC Rcd 1768 (Rev. Bd. 1989).

WHEREFORE, WKJF Radio, Inc. urges that the application of George S. Flinn, Jr. for a construction permit for a new FM Broadcast Station on Channel 227A at Glen Arbor, Michigan **BE DISMISSED**.

Respectfully submitted,

WKJF RADIO, INC.

By

A handwritten signature in black ink, appearing to read "D. Kelly", written over a horizontal line.

Dennis J. Kelly
(D. C. Bar #292631)
Its Attorney

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May 19, 2000

CERTIFICATE OF SERVICE

It is hereby certified that a true copy of the foregoing "Reply" was served by first-class United States mail, postage prepaid, on this 19th day of May, 2000 upon the following:

Stephen C. Simpson, Esquire
1090 Vermont Avenue, N. W., Suite 800
Washington, DC 20005
Counsel for George S. Flinn, Jr.


Dennis J. Kelly

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Dennis J. Kelly