

JULIEN Y. BOAT

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AUDIO DIVISION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
Application of)
)
MAX OUT FOUNDATION)
)
)
For Construction Permit for a)
New LPFM Station at Springfield, IL)

File No. **BNPL-20131** **Accepted/Files**
Facility ID No. **192659**

OCT 14 2014
Federal Communications Commission
Office of the Secretary

To: Office of the Secretary
Attention: Chief, Audio Division, Media Bureau

PETITION TO DENY

Saga Communications of Illinois, LLC (“Saga”), by its attorneys and pursuant to 47 U.S.C. §§ 309(b)(1) and (d)(1), and 47 C.F.R. §§ 73.870(d) and 73.3584, hereby respectfully files this Petition to Deny against the above-captioned application of Max Out Foundation (“Max”) for a construction permit for a new low power FM (“LPFM”) station on FM Channel 272 at Springfield, Illinois.¹ As demonstrated herein, grant of the application would not serve the public interest, convenience, and necessity as required by 47 U.S.C. § 309(a). Therefore, the Audio Division should deny or dismiss the pending application.

Standing

Saga has standing to file this Petition to Deny. The irreducible constitutional minimum of

¹ This Petition to Deny is timely filed. This Petition is being filed on the first business day following 30 days after September 12, 2014, the date on which the application was accepted for filing (FCC Report No. 28323).

standing contains three elements: (1) injury-in-fact, (2) causation and (3) redressability.² That is, "to establish standing under Article III, a complainant must allege (1) a personal injury-in-fact that is (2) 'fairly traceable' to the defendant's conduct and (3) redressable by the relief requested."³ In this case, Saga will suffer injury if the Commission grants the captioned application because the application proposes to operate on Channel 272 and the applicant has requested a waiver of Section 73.807 of the rules toward WLFZ, Springfield, Illinois. (Saga is the licensee of WLFZ.) The Commission can prevent this injury by denying the captioned application. Therefore, Saga has shown with the required "substantial probability" that it has been injured, and that the FCC can redress the injury. *American Petroleum Inst. v. EPA*, 216 F. 3d 50, 63 (D.C. Cir. 1999).

**Max Has Failed Accurately to Describe its Proposal
and Has Possibly Falsely Certified its Application**

On November 14, 2013, Max filed the captioned application for a construction permit for a new LPFM station to operate on Channel 272 at Springfield, Illinois. The application requests a waiver of Section 73.807(e)(1) of the Rules as to WLFZ. As shown in detail in the attached Engineering Statement⁴, the Max application contains a serious error in description of its proposed facility and must be denied or dismissed. A question of false certification is also raised.

Max has proposed to install a 2-bay OMB Model MP-2 antenna. The Engineering Statement indicates the antenna would be 3 meters in length, with its center of radiation ("COR") at 15.5 meters above ground level ("AGL") on a tower that is 16.5 meters high AGL. As a result, the antenna

² *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

³ *Microwave Acquisition Corp. v. FCC*, 330 U.S. App. D.C. 340, 145 F.3d 1410, 1412 (D.C. Cir. 1998) (quoting *SunCom Mobile & Data, Inc. v. FCC*, 318 U.S. App. D.C. 377, 87 F.3d 1386, 1387-88 (D.C. Cir. 1996) (quoting *Branton v. FCC*, 301 U.S. App. D.C. 244, 993 F.2d 906, 908 (D.C. Cir. 1993) (quoting *Allen v. Wright*, 468 U.S. 737, 751, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984))), cert. denied, 511 U.S. 1052, 128 L. Ed. 2d 338, 114 S. Ct. 1610 (1994)).

⁴ The Engineering Statement is supported by a declaration under penalty of perjury (Attachment 2).

cannot be mounted on the tower without protruding above the 16.5 meter tower or without lowering the antenna COR below 15.5 meters. Either way, the antenna cannot be mounted as proposed and any change will affect Max's request for waiver of Section 73.807 of the Commission's rules.

As shown in the Engineering Statement, Max has miscalculated the "Interference Free Protection Threshold" relative to the location of its proposed antenna by assuming a five meter AGL calculated interference area, when the actual height should be at least 4 meters.

Moreover, it appears Max has falsely certified the veracity of its application. Saga's local engineer, Paul D. Figge, on September 29, 2014, visited the proposed site and did not observe a 16.5 meter (54 feet) high tower at the site capable of supporting a 2-bay LPFM antenna. Photos of the site are attached to the Engineering Statement. In its application, at Section VI, Question 10, Max certified that "the proposed facility is excluded from environmental processing under 47 C.F.R. Section 1.1306 (i.e., the facility will not have a significant environmental impact...).". The question invites an explanation in Exhibit 14. As no antenna supporting structure exists at the proposed site, this raises the question of whether Max has falsely certified a material fact to the Commission.

It appears that Max will be required to construct a new tower that is 16.5 meter AGL. In light of the apparent false certification, Max should be required to provide the Division staff with evidence to support its certification.⁵ Depending on Max's response, the Division can determine whether it is appropriate to investigate the basis of Max's certification of environmental compliance.⁶

⁵ This would include, at minimum, documents such as NEPA concurrence, NHPA Section 106 concurrence, State Historic Preservation Office concurrence, and tribal notification concurrence for the proposed tower.

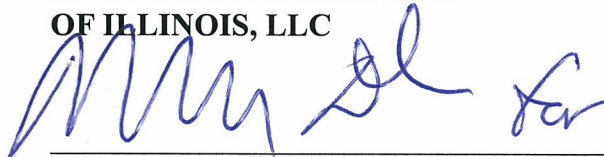
⁶ A false certification raises questions of whether the applicant possesses sufficient character to serve as a Commission licensee. See *Liberty Productions, A Limited Partnership*, 16 FCC Rcd 12061, 12079-80 (2001); *Georgia Public Telecommunications Commission*, 7 FCC Rcd 2942 (Rev. Bd. 1992), *review denied*, 7 FCC Rcd 7996 (1992).

In light of the foregoing, Saga requests the Bureau to either dismiss or deny the captioned application.

Respectfully submitted,

**SAGA COMMUNICATIONS
OF ILLINOIS, LLC**

By:



Gary S. Smithwick
Its Attorney

SMITHWICK & BELENDIUK, P.C.

5028 Wisconsin Avenue, N.W.

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October 14, 2014

ATTACHMENT 1

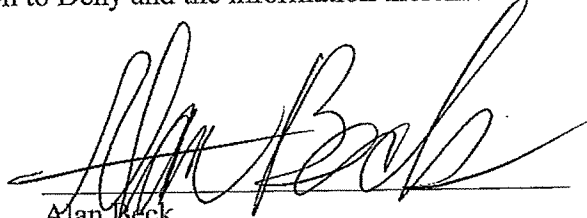
Declaration of Alan Beck, Vice President of Saga

Alan Beck, under penalty of perjury, declares as follows:

I am a vice president of Saga Communications of Illinois, LLC.

I have read a draft of the foregoing Petition to Deny and the information therein is true and correct to the best of my knowledge.

Executed this 14th day of October, 2014.



Alan Beck

ATTACHMENT 2

Copy of Supporting Engineering Statement

ENGINEERING STATEMENT TO SUPPORT A PETITION TO DENY

BNPL-20131114BQA
APP272L1 – Springfield, IL
Channel 272L1 – 102.3 MHz
(Facility ID No. 192659)

“§73.807(e)(1) Calculation Error”
“Antenna AGL Mounting Error”
“Clarification Sought on Environmental Certification”

October 2014

CERTIFICATION OF ENGINEERS

The firm of Munn-Reese, Inc., Broadcast Engineering Consultants, with offices at 385 Airport Drive, Coldwater, Michigan, has been retained for the purpose of preparing the technical data forming this report.

The data utilized in this report was taken from the FCC Secondary Database and data on file. While this information is believed accurate, errors or omissions in the database and file data are possible. This firm may not be held liable for damages as a result of such data errors or omissions.

The report has been prepared by properly trained electronics specialists under the direction of the undersigned whose qualifications are a matter of record before the Federal Communications Commission.

I declare under penalty of the laws of perjury that the contents of this report are true and accurate to the best of my knowledge and belief.

October 14, 2014

MUNN-REESE, INC.
385 Airport Drive, PO Box 220
Coldwater, Michigan 49036

Telephone: 517-278-7339

By Wayne S. Reese
Wayne S. Reese, President

By Justin W. Asher
Justin W. Asher, Project Engineer

MUNN-REESE, INC.
Broadcast Engineering Consultants
Coldwater, MI 49036

ENGINEERING STATEMENT

This Engineering Statement is being filed to support a Petition to Deny filed by Saga Communications of Illinois, LLC ("Saga"). This Petition to Deny is being filed against pending LPFM application BNPL-20131114BQA. Pending Application BNPL-20131114BQA requests a new APP272L1 - Springfield, IL (FAC ID: 192659) facility as filed by LPFM applicant Max Out Foundation ("Max").

At this time, discrepancies concerning the method of §73.807(e)(1) Calculation (Second Adjacent Channel Given Interference Waiver Request) are being raised. In addition, discrepancies concerning the requested Antenna Center of Radiation (COR) height in relation to the overall tower height are being raised as the COR height directly affects the Max §73.807(e)(1) showing. Finally, clarification is being sought on the MOF Environmental Certification specifically with regards to compliance with the NEPA, Nationwide Programmatic Agreement; NHPA Section 106 for Tower Siting; SHPO; and the Tribal notification process.

§73.807(e)(1) Calculation Error. The Max APP272L1 – Springfield, IL Application has requested §73.807(e)(1) processing toward Saga's WLFZ(FM) – Springfield, IL (CH270B) facility (FAC ID: 58549). Within this request, Max has indicated use of 2-Bay, OMB Model MP-2 antenna. Max has supplied manufacturer's vertical radiation pattern documentation which has been accepted at face value. No information concerning the antenna bay spacing was noted, therefore the antenna bay spacing has been assumed to be one wavelength (approximately 3 meters). The Max Application further indicates the antenna COR will be mounted 15.5 meters AGL on a 16.5 meter tower/structure with the calculated (U to D) interference area extending approximately 10.5 meters below the antenna or an Interference Free Threshold of five (5) meters above ground level (15.5 m – 10.5 m = 5.0 m). MOF further states, "*The highest occupiable floor beneath the interference zone is the second-story of a residence at approximately 3 m...*". No documentation was supplied to this effect. Presumably Max is believed to have accounted for a two (2) meter human occupying their three (3) meter second story residence (2.0 m + 3.0 m = 5.0 m) in certifying protection of WLFZ(FM) under their five (5) meter Interference Free Threshold.

Three (3) meters is not sufficient in establishing a standard second story floor. Four (4) meters is a more accurate second floor occupational height. In establishing a four (4) meter stand second story residence floor height, the following assumptions were made:

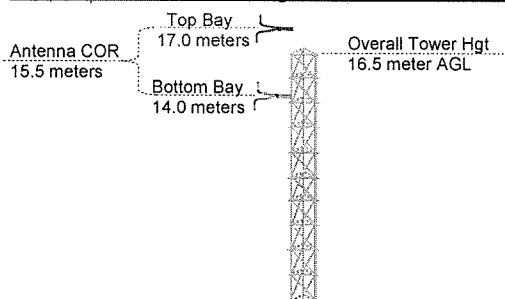
12 inches	Ceiling and Second Floor Infrastructure (drywall, girders/joist, subfloor and flooring)
108 inches	First Floor Living Area
12 inches	First Floor Infrastructure (girders/joist, subfloor and flooring)
24 inches	water/rodent barrier above grade (equivalent to two cement blocks)
156 inches Total or 13 feet Total or 4.0 meters Total	

Accounting for a two (2) meter human residing on a four (4) meter second floor, the required Interference Free Protection Threshold would be six (6) meters above ground level. This protection threshold of six (6) meters is one (1) meter above Max's calculated Interference area of five (5) meters AGL. In short, three (3) meters is not the height of a standard second story floor, three (3) meters is simply the height Max needs to make their study work.

ENGINEERING STATEMENT (continued)

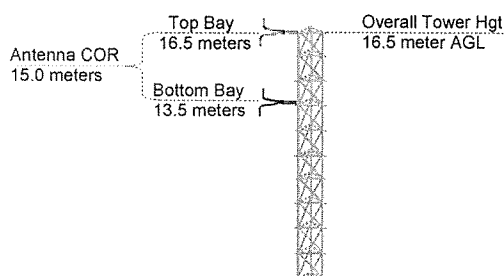
Antenna AGL Mounting Error. As previously noted, the Max APP272L1 – Springfield, IL Application indicated use of 2-Bay, OMB Model MP-2 antenna assumed to be three (3) meters in length¹. The Max Application further indicates the antenna COR will be mounted 15.5 meters AGL on a 16.5 meter tower/structure. As a result, the antenna cannot mathematically fit on the tower without either extending the height of the tower beyond 16.5 meters or lowering the antenna COR below 15.5 meters. In light of the §73.807(e)(1) processing request toward Saga's WLFZ(FM) station and the zero degree leeway Max has already afforded itself. Saga is keenly interested in how Max will address this situation as any further construction related decrease in antenna COR will additionally violate §73.807(e)(1) to the detriment of WLFZ(FM).

Antenna COR Mounting at 15.5 meters AGL



Top Bay exceeds proposed
16.5 meter AGL Tower Height!

Antenna COR Mounting at <15.5 meters AGL



Antenna COR violates §73.807(e)(1) Second
Adjacent Channel Processing Request!

OR

Clarification Sought on Environmental Certification. Further clarification is also being sought concerning the Form 318 Environmental Certification (Section VI; Question 10) made within BNPL-20131114BQA. The affirmative certification made by Max indicates the application, and its requested 16.5 meter AGL tower/structure, is excluded from further environmental processing under 47 C.F.R. Section 1.1306. The application gave no indication as to whether the requested 16.5 meter AGL tower/structure was existing or proposed. However, on September 29, 2014, Saga engineer Paul D. Figge visited the proposed site and found no structure or tower on the premises constructed to a height of 16.5 meters AGL. A signed statement and photographs taken by Mr. Figge have been included in **Exhibit 1.0**. Mr. Figge's photographs are consistent with a rudimentary aerial photograph included within the Max application (§73.807(e)(1) Request) itself. As a result of no existing tower construction noted, it has been inferred that BNPL-20131114BQA proposes construction of a new 16.5 meter AGL tower. It can also be inferred that a positive Form 318 Environmental Certification (Section VI; Question 10) indicates Max has already secured its NEPA: NHPA Section 106; SHPO; and Tribal Notification Concurrence. However, no NEPA; Section 106; SHPO and Tribal concurrence documentation was noted in the BNPL-20131114BQA filing. In accordance with its noted environmental certification, Max is respectfully requested to produce its Environmental Compliance documentation studies including NEPA Concurrence; NHPA Section 106 Concurrence; SHPO Concurrence; and Tribal Notification Concurrence² for its proposed new tower construction. The applicant is reminded that a failure to secure or perform the necessary environmental compliance studies prior to the affirmative environmental certification being made constitutes a false certification before the Commission.

¹ For operation on 102.3 MHz (CH272L1), one (1) wavelength is mathematically 2.93 meters or a nominal three (3) meters. While the Max Application BNPL-20131114BQA indicated use of a 2-Bay, OMB Model MP-2, no documentation or notation was noted indicating the actual antenna bay spacing. Therefore, a full wavelength spacing (three (3) meters) was assumed for the proposed 2-Bay OMB Model MP-2 antenna.

² **FCC Memorandum Opinion and Order; DA 09-660**; Adopted March 20, 2009; released March 23, 2009 "White Park Broadcasting Inc."

Exhibit 1.0 Statement of Paul D. Figge



I, Paul D. Figge, was at the site on September 29, 2014 at 8:40am c.s.t. and did not observe any 16.5 meter AGL (54 ft) tower or structure capable of housing a 2-bay low power FM antenna. The site is referenced as the corner of Milton and Converse in Springfield, Illinois.

Paul D. Figge

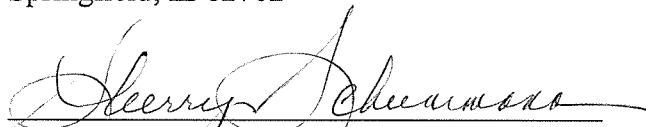


CERTIFICATE OF SERVICE

I, Sherry L. Schunemann, a secretary in the law office of Smithwick & Belendiuk, P.C., do hereby certify that a copy of the foregoing "Petition to Deny" was mailed by First Class U.S. Mail, postage prepaid (or via hand delivery if marked with an asterisk), this 14th day of October, to the following:

*Peter Doyle, Esquire
Chief, Audio Division
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554
(Email: peter.doyle@fcc.gov)

Racine Freeman
Director
Max Out Foundation
112 Westbrook Drive
Springfield, IL 62702


Sherry L. Schunemann