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June 12, 1993

Ms. Donna R. Searcy
Secretary
FEDERAL COMMUNICATIONS COMMISSION
1919 M Street NW - Room 222
Washington, DC 20054

RE: RESPONSIVE COMMENTS PERTAINING TO MM DOCKET NO. 93-47

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JUN 14 1993
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the matter of	)	MM Docket No. 93-47
	)	
Amendment of Section 73.202(b)	)	
Table of Allotments	)	
FM Broadcast Stations	)	
	)	
Camden, Latta and Marion,	)	RM-8188
South Carolina	)	
Blythewood, South Carolina	)	RM-8243

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To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

RESPONSIVE COMMENTS

Joseph Adams Ranke

June 12, 1993

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Table Of Contents

Summary..... i

Background..... 1

Community Status..... 3

Additional Delays In Effectuating An Outcome.....10

Monetary Considerations.....11

Motives.....13

Service From Nearby Communities.....14

Existing "Service" at Blythewood.....15

Population Served.....19

Conclusion.....23

Summary

By Public Notice, the Commission has accepted the counterproposal of Joseph Adams Ranke ("Ranke"), the allocation of Channel 232A to Blythewood, South Carolina, and the modification of facilities of WPUB-FM, Camden, South Carolina, from Channel 232A to Channel 274A, in MM Docket No. 93-47. This proposal is mutually exclusive to the proposed upgrade of WWPD(FM), Marion, South Carolina, from Channel 232A to Channel 232C3 at Latta, South Carolina, proposed by Winfas of Belhaven, Inc. ("Winfas").

Winfas has filed Reply Comments to Ranke's counterproposal, and has attempted to i) depict Blythewood as a community that is both unfit for and undeserving of an FM allotment; ii) rationalize that an long-unbuilt AM Daytimer at Blythewood should be considered reasonable first local service; iii) paint Ranke as a shadowy, deceptive character whose only interest is in Columbia; iv) put forth the notion that Winfas is deserving of preferential treatment by the Commission.

Ranke is filing these comments herein as a response to Winfas' misstatements, exaggerations and misapplication of case law and the Commission's Rules. In fact, Ranke conclusively proves herein that (1) Blythewood, which is incorporated and is located outside of the Columbia Urbanized Area, indeed qualifies as a community for allotment purposes; that service from surrounding communities is NOT a substitute for a local transmission service. Blythewood is deserving of its own local full-time broadcast transmission service; (2) the unique circumstances surrounding the

unbuilt AM daytimer at Blythewood (and its permitte) indicate that there are sufficient grounds to consider Ranke's counterproposal a first local service; (3) that Ranke's counterproposal would bring additional aural service to 386,910 persons, while Winfas' upgrade at WWPD(FM) would show a net service gain of only 106,059 persons; and (4) that Winfas must be held to the same process that affects any other party in a rule making proceeding.

When examined under the totality of the evidence, Ranke's counterproposal to allot Channel 232A to Blythewood is unquestionably superior to Winfas' proposed upgrade and change in city of license proposal for WWPD(FM).

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RESPONSIVE COMMENTS

Joseph Adams Ranke ("Ranke"), hereby respectfully submits these comments in response to the Reply Comments Of Winfas of Belhaven ("Winfas")[1], in MM Docket No. 93-47. As set forth herein, Ranke continues to support his previously-filed counterproposal in the above-referenced proceeding (RM-8243), which seeks to allot Channel 232A to Blythewood, South Carolina its first local FM service[2].

Background

1. Winfas seeks the upgrade of its WWPD(FM), Channel 232A,

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[1] These Responsive Comments are timely filed on June 14, 1993, under Sections 1.4(h) and 1.45(a) of the Commissions' Rules. A response to Winfas' Reply Comments would be required within 10 days after the filing date of May 28, 1993 (June 10, 1993), but since Winfas served Ranke by mail, an additional three days is added, excluding holidays and weekends (June 14, 1993).

[2] The original Comments and Counterproposal of Joseph Adams Ranke were filed May 13, 1993, and public notice of his Counterproposal was given by Report No. 1942, released May 25, 1993.

Marion, South Carolina, to Channel 232C3, through the concurrent change in city of license of the station to Latta, South Carolina.[3] In order to accomplish its upgrade, it is necessary to substitute Channel 274A for Channel 232A at Camden, South Carolina, and modify the license of WPUB-FM (BMLH-910305KA) to specify operation on the new Channel.[4] Although not required, Winfas entered into an agreement with the licensee of WPUB-FM, Kershaw Radio Corporation ("Kershaw"), stating that Winfas would not only pay $22,000.00 for Kershaw's estimated costs associated with the channel change, but would give Kershaw a new transmitter capable of allowing operation of WPUB-FM at the Class A maximum of 6 kilowatts. This agreement was undertaken in an effort to effectuate a rapid upgrade of WWPD(FM).

2. On May 13, 1993, Ranke requested in his Comments and Counterproposal that the Commission allot Channel 232A to Blythewood, South Carolina,[5] instead of granting the proposed upgrade of WWPD(FM). The proposed allotment at Blythewood would be made possible utilizing the same channel substitution for WPUB-FM

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[3] The reference coordinates at Latta are 34°25'33"N / 79°29'57"W.

[4] At WPUB-FM's current site location, 34°13'31"N / 80°40'44"W.

[5] An allocation reference point of 34°05'30"N / 80°55'30"W was chosen at a spot which maximizes the distance between the proposed reference coordinates at Latta, but where an allotment to Blythewood could still be reasonably expected to completely encompass the community with a city grade signal. This choice was made on the off-chance that the Commission's engineering staff could find a way to accomodate both the Winfas proposal and the Ranke counterproposal on Channel 232.

at Camden, as proposed by Winfas. Ranke clearly stated in his Comments and Counterproposal that he "fully recognizes and accepts responsibility to reimburse the licensee of WPUB-FM for the reasonable costs of modification to its facilities in moving to the new channel, should the Commission grant his proposal and should he be awarded a construction permit to build the new facility at Blythewood".

3. On May 28, 1993, Winfas filed Reply Comments in this Docket, responding to Ranke's Counterproposal. In brief, Winfas objects to the acceptance of Ranke's Counterproposal on the grounds that: i) That Winfas believes Blythewood does not meet Commission allotment criteria; ii) Acceptance of Ranke's Counterproposal would harm Winfas by extending its upgrade timetable; iii) Kershaw would be financially harmed if Ranke's Counterproposal was ultimately favored over that of Winfas; iv) That Winfas believes Ranke intends to serve Columbia, not Blythewood, and thereby it considers Ranke to be some sort of nefarious character seeking gain at Winfas' expense; v) That an existing CP for an AM Daytimer which has been extended numerous times constitutes adequate first local service; that vi) the residents of Blythewood don't need a full-time radio station; and that vii) Winfas will serve 131,815 additonal persons.

Community Status

4. According to Winfas, Blythewood, South Carolina is not a community worthy of an FM allotment. Winfas asserts that Ranke was required to prove conclusively that Blythewood is a community

[illegible]

political boundary, nor do any businesses claim East Hemet in their name. In fact, East Hemet was found to be a part of Hemet itself. Winfas asserts that East Hemet applies because Ranke did not provide affidavits from persons with knowledge of Blythewood to support Ranke's conclusion of community status.

7. Winfas attempts to add further "proof" that Ranke failed to supply the requisite information to support Blythewood's community status, by noting, in Teche, that "the test for community status encompasses consideration of the totality of the circumstances". To wit, Winfas claims that Ranke failed to supply in-depth information to support his claim that Blythewood is a community for allotment purposes, and therefore he has failed to give the Commission enough information on which to base an informed decision. Also to this end, Winfas cites Beacon's "quiet village" doctrine, however, Winfas fails to note that Beacon dealt with the comparative hearing process regarding mutually exclusive construction permit applications, where one sought a dispositive 307(b) preference for bringing a first local service to a community which would ultimately require additional rural service

Tuck, both of which also dealt with comparative hearings of mutually exclusive AM construction permit applications. In each instance, a party (or parties) attempted to claim a 307(b) preference for communities *within* the Urbanized area of a major city in order to gain advantage over other applicants whose proposals would serve virtually the same geographic area. Again, this is not the case with Blythewood and Latta. In fact, Tuck clarifies the Commission's reliance upon the Urbanized area as its determining factor.

9. What Winfas most importantly fails to note is that the Commission, in its own Revision of FM Assignment Policies and Procedures, 90 FCC 2d 101 (1982), states that:

> "...section 307(b) requires that we continue to require assignments to "communities" as geographically identifiable

11. In keeping with that doctrine, Ranke not only indicated that Blythewood is an incorporated community, he provided the

however, with Blythewood, South Carolina, is a giant leap away from common sense.

14. First of all, Blythewood, unlike Richmond, is NOT in an Urbanized area. This fact is supported by Winfas' own "Technical" exhibits and its own pleading. Simply because Blythewood is ten miles or so from the Columbia Urbanized Area should not at all be construed as equivalent to being inside of it. Indeed, the Commission has delineated the Urbanized Area as a defining factor. It would be folly to arbitrarily equate "close to" with "inside of" an Urbanized Area. Winfas attempts just this kind of blurring of the lines by stating that the Blythewood *Census Division* is *partially* included in the Urbanized area. Ranke is not seeking allotment of Channel 232A to the "Blythewood Census Division", he seeks allotment only to Blythewood itself.

15. Secondly, Winfas ludicrously asserts that Blythewood, a community some 700 times smaller than Richmond, California, should be expected to have the amenities that Richmond did not have in order to qualify for an allotment. Such a requirement would absolutely NOT be in the public interest. Many communities in the state of South Carolina, which are lacking certain amenities which Winfas deems absolutely necessary for Blythewood, have been allotted stations in the past: Ravenel (which has no local hospital, newspaper, or transportation services, relies on Charleston County); and Pawleys Island, 1990 population 176, roughly the size of Blythewood (which has no local hospital, fire, police, or public transportation services, relies on Georgetown County), are prime examples. Pawleys Island has TWO FM allotments.

In fact, if these stringent qualifications were necessary, as Winfas asserts, such South Carolina communities as McClellanville, South Congaree, Hanahan, Port Royal, Murrells Inlet, Bucksport, and Ladson, among others, would not have qualified as communities for allotment purposes and would not have FM stations today. Winfas' assertion that Blythewood can be evenly compared to Richmond, California, and held to the same requirements for allotment purposes simply does not hold water.

16. Third, Ranke again clearly states that Blythewood, an incorporated community located over ten miles north of Columbia, and not in the Columbia Urbanized Area, meets the Commission's criteria as a community for allotment purposes. If Winfas truly believes that Huntington should be invoked, it should bear in mind that the burden of invoking Huntington (if applicable) is on it, not Ranke [See Tuck, eg. at paragraph 24; also see New Radio, 804 F. 2d at 760], additionally, since Blythewood is outside of the Urbanized Area, Winfas must be held to a higher standard of proof. [See Tuck, at paragraph 51.]

17. Finally, Winfas charges that Blythewood is merely a "bedroom community" for Columbia, yet offers no credible proof. Winfas attributes that statement to "Blythewood's new town administrator", Ms. Connie Wenstrom. Winfas offers an affidavit of a Mr. Dennis Murphy, whose only apparent credentials are his status as a "resident of Richland County", who is "personally familiar with Blythewood". Such "residency" and "personal familiarity" do not make him an expert on Blythewood. Ranke, on the other hand, spoke personally with the Mayor of Blythewood, the

honorable Roland Ballow on June 10, 1993. Mr. Ballow indicated that, in addition to the facts presented by Ranke, Blythewood has its own Fire Station, manned by full-time paid firemen and supplimented by local volunteers. The Blythewood Garden Club and the Blythewood Community Center are two active local orgainzations. Mr. Ballow also stated that residents of Blythewood and the immediate area, do *not* perceive themselves as part of Columbia, rather they identify strongly with Blythewood. Mr. Ballow is sending additional follow-up information to Ranke, which, in turn, will be forwarded to the Commission upon receipt.

Additional Delays in Effectuating an Outcome

18. Winfas argues that should the Commission accept Ranke's Counterproposal, a final outcome in this proceeding would be delayed because Kershaw would "vigorously oppose" any Commission Order to Show Cause against it pertaining to Blythewood. Also it notes that "the result of allotting a new channel to Blythewood would be a serious delay, and perhaps termination of the allotment procedure with no allotment made". Winfas conveniently forgets that *any* rule making proceeding carries with it the potential for delay or denial. There is simply no such thing as a "sure thing" when it comes to amendment of Section 73.202(b). Ranke stands behind his counterproposal as steadfastly as Winfas supports its proposal. The fact that a delay is possible is just part of the process, and Winfas cannot expect that the Commission will expedite the proceedings, or exempt it from conflict, merely because its proposal could be effectuated more rapidly than Ranke's. If the Commission took such matters into consideration,

it would have a chilling effect upon broadcasters seeking to

Kershaw relative to the channel change. If this were the case, existing licensees could extort large sums of money or services, at will, from prospective petitioners seeking modification of Section 73-202(b). Such activity most certainly would have a chilling effect on maximizing use of the spectrum.

21. It should be noted that in its Reply Comments Winfas (and Kershaw) refer to the enhancement of facilities of WPUB-FM to the full 6 kilowatts as an "upgrade". This is clearly a misstatement of facts. WPUB-FM presently operates under the old rules due to grandfathered short-spacing with respect to Winfas' WWPD(FM), which is in turn short-spaced to both WPUB-FM and a vacant and unapplied for allotment on Channel 231A at Kingstree, South Carolina. Kershaw and Winfas could have resolved this situation by one of several methods: WWPD(FM) could have relocated to an antenna location which was fully spaced from the allotment at Kingstree and sought an agreement with Kershaw to accept each others mutual interference; Winfas could have petitioned the Commission to delete Channel 231A at Kingstree and worked out an agreement with Kershaw; or Winfas could have relocated to a site fully spaced from both the Kingstree allotment and WPUB-FM. Therefore, it is folly to insinuate that the only hope for enhancement to 6kw at Camden is through a channel change. Kershaw has, through Winfas' impatience, has set itself up for a free ride to an enhanced 6 kilowatt facility -- by agreeing to assist Winfas only in exchange for $22,000.00 and a new transmitter. Since this agreement is entirely between Kershaw and Winfas, Kershaw should not be allowed to force the same requirement upon a third party in

return for its agreement to move. If the Commission ultimately rules in favor of Ranke, Kershaw must be compensated subject to Commission mandate as to reasonable expenses, not to some arbitrary agreement Kershaw had previously worked out with Winfas.

Motives

22. Winfas, in its Reply Comments, questions Ranke's motivation in seeking allotment of a first local FM service at Blythewood. Winfas claims it is a "cynical attempt to provide Columbia with a 13th city-grade FM signal". Ranke finds it interesting that Winfas should question his motives regarding Blythewood. In fact, Ranke asserts that Winfas should not be so quick to throw stones in its own glass house. As noted above, Winfas appears to be in an all-fired hurry to ramrod the upgrade of WWPD(FM) through the rule making process. Perhaps this is because Winfas had to take back WWPD(FM) from the party it sold it to several years before. Perhaps Winfas merely wants to upgrade WWPD(FM) as quickly as possible so that it can get on with the business of selling the property once again. It could be argued that appears Winfas' primary interest in this matter is the upgrade to C3, rather than the change in city of license to Latta.

23. If Winfas is so all-consumed with providing Latta with its first local service, then it could have effectuated such a change in a manner which would have not required the assistance of Kershaw, and which would have likely passed-through the rule making process on a faster track than its present proposal. If the sole intent was serving Latta, Winfas could have requested to move

spaced to both WPUB-FM and the vacant allotment at Kingstree. If, on the other hand, the upgrade of WWPD(FM) is the primary motivator, then Winfas may have chosen Latta simply because it was convenient, and not because Winfas had any overwhelming desire to serve that particular community. It is a simple matter of fact that WWPD(FM) cannot be upgraded to Class C3 near enough to Marion to remain licensed to that community.

24. In any instance, Ranke notes that the Commission has long ruled that intent is totally beyond the scope of the rule making process. In this regard, the Commission clearly states this policy in Revision of FM Policies and Procedures, that:

> "As to any question about the *bona fides* of the party involved, we believe that it cannot be effectively resolved in rule making where none of the relevant particulars about the actual use of the channel are available...In any event, we don not believe it is appropriate to question the intent of the party seeking an assignment to a particular community in the rule making process."

25. Under these guidelines it is plain to see that Ranke has no more right to question Winfas' motives in regard to Latta than Winfas has to question Ranke's motives in regard to Blythewood.

Service From Nearby Communities

26. As stated above, Winfas attempts to paint Blythewood as undeserving of *any* local service, by attempting to prove Blythewood is not a community for allotment purposes. Winfas also opines that in any instance, Blythewood receives "adequate coverage" from at least ten stations. This is clearly a departure from stated Commission precedence.

27. The Commission has ruled numerous times that service from surrounding communities is no substitute for a local broadcast outlet. [See, eg, Bartow, Chauncey, Dublin, et al., 4 FCC Rcd 6876 (1989), at paragraph 17; also Clinton, Louisiana, 45 RR 2d, 1587 (1979) and Westover and Grafton, West Virginia, 46 FR 10737 (1981), to name but a few]. Therefore, the fact that it receives additional coverage from nearby communities should not disqualify Blythewood from its own local broadcast outlet.

Existing "Service" at Blythewood

28. As was stated by both Ranke and Winfas, there is an existing construction permit for a daytime AM at Blythewood (WBAJ). Winfas notes that the permit is active, and that the

29. Glinter has asked for extensions of time on all six of these CPs on numerous occasions, additionally, he allowed the CP at Fairview to expire twice and the CPs at Winston-Salem and Gladstone to expire once each. Glinter's license for WPSC(AM), Pageland, South Carolina, was revoked for his repeated failure to inform the Commission why the station was kept off the air for an indefinite period of time (See MM Docket No. 92-37). Also, Glinter's application for license renewal of WTNX(AM), Lynchburg, Tennessee was dismissed by the Commission last month.

30. It is important to note that at the time Glinter filed applications for the six as yet unbuilt AM daytimers in North and South Carolina and Missouri, he was not required to show he had the financial means to put these facilities on the air and operate them for three months with no revenue. Indeed, at the time he filed the original applications, the Commission did not even require a filing fee.

31. It appears obvious that Glinter, contrary to public interest, is "warehousing" these Daytime AM CP's, for some reason of his own. Ranke seriously questions whether any of these facilities will actually be constructed. The simple fact of the matter is that Glinter has made no effort, short of extending the construction permit numerous times, to construct and operate any of his six daytime-only AM CPs. The Commission must not reward activities which are so contrary to the public interest. In fact, the Commission, and the residents of Blythewood, have absolutely no assurance whatsoever that Glinter's oft-extended CP will ever go on the air. Given these factors, the Commission should consider

Ranke's counterproposal for a new FM a first local broadcast service at Blythewood.

32. In any regard, Ranke asserts that the "potential" for service from an existing construction permit, specifically in the

present allotment priorities. The original third priority (from which the present "first local service" simplification was derived) read:

> "Insofar as possible, to provide each community with at least one FM broadcast station, *especially where the community has only a daytime-only or local (Class IV) AM station,* and especially where the community is outsied of an urbanized area." See Revision of FM Assignment Policies and Procedures, *supra*, at 91. (emphasis added)

Granted, the Commission further stated that at the time of the revision it believed that "recognition needs to be given to the fact that AM and FM have become joint components of a single aural medium". In 1982, the case for this assumption was easily made. FM had gained near-equal footing with AM in the marketplace. However, eleven years later circumstances dictate that an exception in the case of unbuilt daytime-only AM CPs is logical. Economic and competitive factors in conjunction with wide-spread consumer preference of FM over AM (with limited exceptions), has caused the balance to tip heavily in favor of FM. These factors may combine to adversely impact those as-yet-unbuilt Daytime-only AM CPs, like WBAJ, more than any other broadcast outlet. Regardless of the reasons that WBAJ has yet to be constructed, Ranke asserts that just because the CP is "active" is no indication that local service from it will ever be provided to Blythewood. In the absence of such proof, and in the light of objective evidence of avoidance of construction on the part of the permittee, it is reasonable to assume that local service to Blythewood from WBAJ indeed may *never* materialize.

35. As a matter of Commission order, applications for new Daytime-only AM stations are no longer accepted for filing -- all applications for New AM stations must propose some nighttime coverage. This factor additionally restricts the future applicability of any policy deviation applied to Blythewood. Clearly, the circumstances in existence at Blythewood should in no way be confused with requests for New FM service for communities with existing Daytime AM service. In those instances, as noted above, the existing AM Daytimer would satisfy allotment priority 3, as it does now, and no future exception would result. In any case, given the circumstances, there is ample reason to believe that Ranke's counterproposal indeed warrants consideration as a first local service for Blythewood, and should be considered as satisfying allotment priority 3.

36. Should the Commission agree with Ranke, both the Winfas proposal and Ranke's counterproposal must be analyzed on their relative satisfaction of the public interest.

Population Served

37. Winfas claims its proposal will bring new service to 131,815 additional persons over what it currently serves. In order to accurately assess both proposals, the methodology outlined in Greenup, Kentucky and Athens, Ohio, 4 FCC Rcd 3843 (1989), reversed, 6 FCC Rcd 1493 (1991)("Greenup") must be utilized.

existing facilities or 24.2 km radius (3.0 kw at 100 meters). For Class A stations, which meet the current spacing requirements, as would the Ranke counterproposal at Blythewood, the assumption is a 1.0 mV/m contour of 28.3 km radius (6.0 kw at 100 meters). The WWPD(FM) proposal at Latta would be figured at a 1.0 mV/m radius of 38.4 km (25.0 kw at 100 meters).

38. Because the 1.0 mV/m coverage contour at Latta does not completely encompass the 1.0 mV/m coverage contour at Marion, certain persons who would now be considered to recieve service from WWPD(FM) will not under Winfas' proposed move/upgrade. Winfas and its technical consultant attempt to downplay this factor.

39. Ranke, in his Comments and Counterproposal noted that "a significant number of persons" would lose service from WWPD(FM) by