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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

In the Matter of)	MM Docket No. 94-70
)	
Amendment of section 73.202(b))	RM-8474
Table of Allotments)	RM-_____
FM Broadcast Stations)	
(Moncks Corner, Kiawah Island)	
and Sampit, South Carolina)	

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

OPPOSITION TO MOTION FOR SUMMARY DISMISSAL

Sampit Broadcasters ("SB") by its attorneys, hereby respectfully files its opposition to the "Motion for Summary Dismissal" ("Motion") filed September 12, 1994, by Orville Ronald Brandon ("Brandon"). Brandon seeks "summary" dismissal of SB's timely-filed August 26, 1994, Comments and Counterproposal in the above-captioned Docket. Brandon's motion is factually and legally deficient and must be denied.¹ Brandon claims that SB's Counterproposal must be dismissed as a "result of its numerous fundamental deficiencies..." SB shows herein that its Counterproposal is legally acceptable, and must be considered with Brandon's proposal.

Background

1. Brandon is the court-appointed Receiver for the former licensee of WJYQ(FM), Moncks Corner. Brandon has proposed to allot FM Channel 288C2 to Kiawah Island, South Carolina, and delete FM Channel 287C3 from Moncks Corner,

¹ Brandon served his Motion by hand on September 12, 1994, thus, SB's Opposition is due by September 22, 1994.

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South Carolina, with a concurrent modification of the license of WJYQ to operate at Kiawah Island.

2. SB timely counterproposed the allotment of Channel 289A to Sampit, South Carolina, as its first local service. The allotment of Channel 289A to Sampit can coexist with the existing allotment of Channel 287C3 at Moncks Corner, but is mutually exclusive with Brandon's proposal to allot Channel 288C2 to Kiawah Island. Had SB done nothing more than propose the allotment of Channel 289A to Sampit, the Commission would have had a very simple choice to make between (a) first local service to Sampit, or (2) first local service to Kiawah Island counterbalanced by the loss of the only local FM service to the residents of Moncks Corner. SB instead tried to formulate a "middle ground" that could provide local FM service to three communities instead of only one. Brandon has attacked this middle ground position, arguing that SB's Counterproposal is deficient and should be dismissed. Brandon's Motion must be denied.

3. In 1992, the former licensee of WJYQ previously attempted this identical relocation of WJYQ from Moncks Corner to Kiawah Island, but the Commission rejected the proposal. See the Commission's Report and Order, *Blackville, Branchville, Estill, Georgetown, Kiawah Island, Moncks Corner, and Walterboro, South Carolina, and Richmond Hill, Georgia* (herein "*First Attempt Order*"), 7 FCC Rcd 6522 (1992). SB, in studying the Report and Order, noted that the Commission was reluctant to add channel 288C2 to Kiawah Island while deleting Channel 288A from Moncks Corner, because of the loss of service to Moncks Corner. Instead, the Commission allotted Channel 287C3 to Moncks Corner. In its Counterproposal, SB

suggested the allotment of Channel 287A to Moncks Corner to provide an allotment proposal that would allow the communities of Kiawah Island and Sampit to benefit from first local service, while providing a channel for continued service to the residents of Moncks Corner. It is this suggestion that Brandon so viciously attacks.

4. SB did not express an interest in operating a station at Moncks Corner. SB hoped that Brandon would see the wisdom of this middle ground and embrace it in his Reply. Under SB's plan, Brandon could possibly have had two stations - his modified WJYQ as a Class A station at Kiawah Island, and he also could apply for a construction permit for a new Class A FM station at Moncks Corner. This made imminent sense to SB, but makes none to Brandon, who apparently will settle only for a 50,000 watt station that, while unnecessary to serve Kiawah Island, will serve the Charleston market.

5. Brandon argues that SB's Counterproposal is subject to dismissal since SB did not express interest in the Kiawah Island channel or the Moncks Corner channel. However, even a cursory review of Brandon's motion reveals that Brandon's motion is not based upon legal precedent. Simply stated, even if SB's proposals to allot Channel 287A to Moncks Corner and Channel 288A at Kiawah Island are withdrawn or ignored by the Commission, the central component of its Counterproposal, allotment of Channel 289A to Sampit, can be granted without any modification of WJYQ's facilities. That is the linchpin of the matter: the crucial element of this proposal that Brandon has chosen not even to address.

6. The FCC need not consider allotment of Channel 287A to Moncks Corner or Channel 288A to Kiawah Island. It can compare the allotment of Channel 288C2

to Kiawah Island and the simultaneous loss of local FM service to Moncks Corner, against the allotment of Channel 289A to Sampit. The Commission can ignore SB's suggested allotment without affecting SB's proposal of first service to Sampit. Therefore, SB's Counterproposal is not deficient in any aspect.

SB's Counterproposal Is Technically and Legally Sufficient

7. SB was required only to express interest in Sampit. Brandon argues that SB failed to provide a required expression of interest for each of its proposed allotments, so SB's Counterproposal must be dismissed. Brandon is wrong. SB was required to express interest in only the Sampit allocation, and that was timely done. SB was precluded from expressing an interest in the Kiawah Island allotment since Brandon is seeking modification of the WJYQ license for operation at Kiawah Island. See, §1.420(i) of the Rules.

8. Attached hereto as Attachment 1 is a Technical Statement that shows that FM Channel 287C3 at Moncks Corner can coexist with FM Channel 289A at Sampit, South Carolina, with a clearance of 20.17 kilometers. SB timely expressed its interest in allotting Channel 289A to Sampit and constructing a station there. Since the allotment of Channel 289A to Sampit is mutually exclusive with the allotment of FM Channel 288C2 to Kiawah Island, SB suggested a compromise position that would permit service to the tiny resort community of Kiawah Island (pop. 718) at a more realistic level than the allotment of a new 50,000 watt Class C2 station. Also, SB was mindful of the FCC's concerns expressed in the ***First Attempt Order*** that the allotment of Channel 288C2 to Kiawah Island would leave Moncks Corner without a competitive radio voice. In light of these clear public interest considerations, SB

suggested the allotment of Channel 287A to Moncks Corner, while disclaiming any intention to apply for the channel. This was done simply to provide the FCC with an alternative allotment scheme, and SB believed it had clearly signaled this intent in the Counterproposal. SB's proposal for Moncks Corner and Kiawah Island does not ipso facto render SB's Sampit Counterproposal defective, and Brandon has cited no applicable precedent to support dismissal. Brandon cites Epworth, Iowa, et al., 7 FCC Rcd 106 (1992), Wellington, Kansas, et al., 7 FCC Rcd 2195, 2196 (1992) and Carolina Beach, North Carolina, et al., 7 FCC Rcd 544, 545 (1992) for the proposition that the Commission will not allot a new channel absent an expression of interest. See Motion at p. 3. However, in the Epworth and Carolina Beach cases, the allotments in question were at the center of the party's proposal and a grant of the proposal could not be made without them. In the Wellington case, the allotment was only an additional alternative suggested by the party. While the alternative allotment was not considered by the Commission, in the absence of an expression of interest, the party's underlying proposal was considered. The Commission has not penalized petitioners that suggest alternative allotments in their rulemaking proposals, as long their underlying proposal remains valid.² SB's additional allotment suggestions are not at the center of its Counterproposal and were merely advanced as a way to easily resolve this proceeding. Therefore, like the proponent in the Wellington case, SB's

² See, Llano and Kerrville, Texas, 3 FCC Rcd 648 (1988) and 4 FCC Rcd 7900 (1989), where the petitioner's suggestion that the Commission reallocate a deleted channel to various other communities (none of which had received an expression of interest) did not prevent the Commission from granting its underlying rulemaking proposal. See also, Wellington, et al., Kansas, 7 FCC Rcd 2195 (1992), where a petitioner's suggestion made in his Reply Comments that another channel be allotted to resolve a rulemaking conflict did not prevent the Commission from considering his original rulemaking proposal in the absence of an expression of interest for the alternate channel.

Counterproposal should be considered by the Commission. Further, an expression of interest has now been made for Channel 287A at Moncks Corner. (See ¶14, supra.)

9. No involuntary downgrade will occur. Second, Brandon claims that SB's Counterproposal is dependent on an involuntary downgrade of WJYQ. Nothing could be further from the truth. SB's Counterproposal to add Channel 289A to Sampit can coexist with Channel 287C3 at Moncks Corner as it currently being used by WJYQ.

10. Upon the effective date of the allotment of Channel 288A or 288C2 to Kiawah Island and the modification of WJYQ's authorization, Channel 287C3 at Moncks Corner will no longer exist. (Channel 288C2 at Kiawah Island is mutually exclusive with Channel 287C3 at Moncks Corner.) Therefore, WJYQ could not be forced to take an involuntary downgrade at Moncks Corner, since it would no longer occupy the non-existent channel. If WJYQ does not agree to move to Kiawah Island as a Class A station, it can stay in Moncks Corner as a Class C3 station, and no downgrade will occur. Brandon cites Flora and Kings Mississippi and Newellton, Louisiana, 7 FCC Rcd 5477, n. 5 (1992), to support its claim that SB's Counterproposal is unacceptable. However, Flora was a case of a petitioner proposing an involuntary downgrading in order for its proposal to be implemented. Here, the Sampit proposal can be implemented even if Brandon's WJYQ remains at Moncks Corner as a Class C3 station.

11. When WJYQ sought to change its community of license to Kiawah Island, it faced the possibility that the FCC might allot to Kiawah Island a channel of a lesser class than a Class C2 channel. In Fisher, et al., Illinois, 7 FCC Rcd 5223 (1992), the Commission allotted an alternate lower class channel than the one originally

proposed by the petitioner. The petitioner sought a Class B1 allotment and another party countered with a Class A allotment. The Commission accepted a late-filed expression of interest for the Class A allotment and granted it, holding that the public interest warranted its decision. *Id.* at fn. 5. Here, The Commission can allot Channel 288A to Kiawah Island instead of 288C2 and resolve this proceeding. While SB was precluded from expressing interest for the lower-class channel at Kiawah Island, given the constraints of §1.420(i) of the Rules, the Commission could resolve this question by determining whether Brandon or another party would accept the allotment of a lower class channel at Kiawah Island. The Commission could seek clarification of Brandon's views pursuant to §1.1204(b)(7) of the Rules³ or issue a Further Notice of Proposed Rulemaking to determine whether Channel 288A is acceptable to Brandon, under the circumstances. *See*, §1.421 of the Rules.

12. No forced relocation of WJYQ site. Finally, Brandon argues that SB's Counterproposal is dependent on the forced involuntary relocation of the WJYQ transmitter site. For the same reason as set forth in ¶12 above, there can be no involuntary relocation of WJYQ's transmitter site, since, if WJYQ moves to Kiawah Island, it will have no transmitter site at Moncks Corner to relocate. For this reason, none of the cases cited (at Motion, p. 7) by Brandon in support of its position are apposite.

13. Expression of Interest for Moncks Corner. After Brandon filed his Motion, SB contacted Clary K. Butler, president of Berkeley Broadcasting Corp., licensee of daytime only AM station WCMJ, at Moncks Corner, and described SB's

³ *See, Dyersburg, Tennessee, et al.*, 5 FCC Rcd 2579, ¶14 (1990).

proposal. Mr. Butler asked whether it would be possible for him to express interest in the allotment of Channel 287A to Moncks Corner. He was told that such an expression of interest might not be accepted by the Commission at this time, but he insisted on attempting to express an interest anyway. Therefore, at Mr. Butler's request, his statement of interest is attached hereto as Attachment 2. Mr. Butler, an African-American entrepreneur, states that if Channel 287A is allotted to Moncks Corner, he will apply for a construction permit on the channel, and will build a station on the channel if authorized. The Commission should entertain this late-filed expression of interest from Mr. Butler. In *Fisher, et al., Illinois, supra*, the Commission accepted a late filed expression interest and allotted a lower class channel than the one originally proposed. As noted above, the original petitioner requested a Class B1 allotment. Another party stated that a Class A allotment could be made that would resolve the rulemaking conflict. The Commission then accepted a late-filed expression of interest in the Class A allotment and granted it. *See, Fisher, et al., Illinois, 7 FCC Rcd at 5224, fn 5.* In doing so, the Commission stated "[W]e realize that the Commission has stated that it will not accept expressions of interest...that are filed after the deadline for filing counterproposals... (citation omitted). However, when, as here, we have received a timely expression of interest in a higher class channel and the later filed expression of interest in the lower class channel removes the conflict between the proposals, we believe the public interest warrants acceptance." *Id.*

14. Here, the Commission now has an expression of interest for Channel 287A at Moncks Corner. While this expression of interest was late filed, the public

interest benefits warrant its acceptance. Acceptance of Mr. Butler's expression of interest for Moncks Corner will assist the Commission in developing a resolution to this proceeding that will inevitably benefit the public interest by the initiation of local FM service to two communities and the retention of local FM service at a third. It will also provide the opportunity to apply for an FM station to an African-American who is already operating an AM daytimer in Moncks Corner. The public interest benefits are obvious.

15. Other Matters. It should also be noted at this juncture that WJYQ has been off the air since at least November 20, 1992. The licensee is in receivership. Brandon's construction permit for Channel 287C3 expires on November 23, 1994, and Brandon has apparently done nothing to initiate construction of the Class C3 facilities. It appears that Brandon is merely warehousing the WJYQ frequency hoping that it will eventually ripen into a 50,000 watt Charleston station. Such conduct does not serve the public interest. This also imparts a hollow ring to Brandon's arguments about forced transmitter site relocation, since WJYQ apparently has no facilities to relocate.

Conclusion

16. Brandon's Motion reveals a fundamental lack of understanding of the Commission's rule making procedures and elemental physics. SB's Counterproposal is neither technically nor legally deficient. It proposes to allot Channel 289A to Sampit, South Carolina, which is mutually exclusive with Brandon's proposal to delete Channel 287C3 from Moncks Corner and allot Channel 288C2 to Kiawah Island. The Commission can choose between SB's Counterproposal for Channel

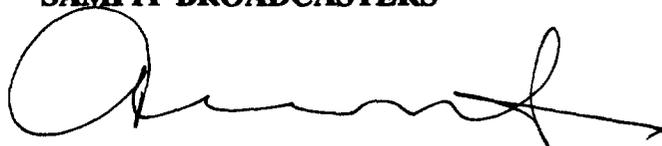
289A at Sampit, or Brandon's proposal, but not both. The allotment of Channel 288A to Kiawah Island and/or Channel 287A to Moncks Corner are not central elements of SB's counterproposal, but were merely a part of its Comments on how the public interest can best be served by a preferential arrangement of allotments. Brandon obviously wants a 50,000 watt station to serve the already well-served (perhaps, over-served) Charleston market. He apparently has no real interest in serving Kiawah Island. Evidence of this is Brandon's unequivocal refusal to consider even Channel 288A at Kiawah Island, and the legal maneuvers that have permitted WJYQ to remain off the air for a long period, denying service to the residents of the area. Brandon wants all or nothing. His selfish desires are inconsistent with the public interest, and his latest Motion seeking to frustrate the public interest should be disregarded.

WHEREFORE, SB respectfully requests the Commission to deny Brandon's September 12, 1994, Motion for Summary Dismissal, and to routinely process SB's Counterproposal.

Respectfully submitted,

SAMPIT BROADCASTERS

By:



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September 22, 1994

ATTACHMENT 1

OPPOSITION TECHNICAL STATEMENT
IN SUPPORT OF
OPPOSITION TO MOTION FOR SUMMARY DISMISSAL
NPRM MM Doc N. 94-70 (RM-8474)
Sampit Broadcasters
Sampit, Moncks Corner & Kiawah Island, SC
September 1994

BROMO
COMMUNICATIONS, INC.
P. O. Box 1588
Clayton, Georgia 30525-1588
(706) 782-7222

**OPPOSITION TECHNICAL STATEMENT
IN SUPPORT OF
OPPOSITION TO MOTION FOR SUMMARY DISMISSAL
NPRM MM Doc N. 94-70 (RM-8474)
Sampit Broadcasters
Sampit, Moncks Corner & Kiawah Island, SC
September 1994**

INTRODUCTION

This Technical Statement is in response to the motion for Summary Dismissal filed against the Reply to Comments by Sampit Broadcasters (SB) to the Notice of Proposed Rulemaking, MM Docket No. 94-70, RM-8474. The motion was filed by the original petitioner, Orville Ronald Brandon¹ (ORB), the licensee of radio station WJYQ(FM) at Moncks Corner, South Carolina (*Currently Dark*). ORB and his predecessors have proposed to add Channel 288C2 to Kiawah Island, South Carolina and delete the only full-time broadcast service Channel 287C3 to Moncks Corner, South Carolina. WJYQ has a Construction Permit to build Channel 287C3 at Moncks Corner (*Currently Unbuilt*). SB counter proposed that instead of allocating Channel 288C2 to Kiawah Island that Channel 289A be allocated to Sampit. Additionally, Channel 288A can be allocated to Kiawah Island and Channel 287A can be allocated to Moncks Corner.

NOT TECHNICALLY DEFICIENT

SB has acknowledged all along that ORB is the licensee of WJYQ (FM) at Moncks Corner, South Carolina and that WJYQ holds a Construction Permit for Channel 287C3 at Moncks Corner. The SB proposal and statement of interest were mainly to add Channel 289A to Sampit. SB recognizes that ORB has the right to drop the Channel 288C2 proposal and continue with Channel 287C3 at Moncks Corner. There is nothing in this proposal that would make WJYQ downgrade its Class C3 facility if the Channel 288C2 proposal is dropped. If the ORB plan was adopted then the Moncks Corner Channel will not be downgraded but dropped entirely. Under

¹ Orville Ronald Brandon is the successor-in-interest to Ceder Carolina Limited Partnership, the original petitioner in MM Docket 94-70.

the SB plan, the channel will be downgraded to its original Class A status. It is true that if the SB plan were adopted, then ORB would receive a Class A instead of a Class C2 facility. However, if desired, ORB can file an application for Channel 287A at Moncks Corner. SB is within its rights to counterpropose the Class C2 proposal at Kiawah Island. The fact that WJYQ has a Construction Permit for Channel 287C3 at Moncks Corner does not give ORB propriety rights for Channel 288C2 at Kiawah Island. The proposal to add Channel 289A to Sampit can co-exist with the WJYQ Construction Permit and meet all FM Spacing Rules under Section 73.207 (See the attached allocation study, Exhibit #1).

WHY ADD CHANNELS TO KIAWAH AND MONCKS CORNER

As we pointed out in the SB counterproposal, this is not the first time it has been proposed by WJYQ to delete Channel 287C3 from Moncks Corner and add Channel 288C2 to Kiawah Island. The Commission denied the first proposal (see MM Docket No. 91-127, adopted September 22, 1992). The large loss area concerned the Commission by deleting the only full-time service at Moncks Corner. ORB simply moved the allocation site farther north into the Charleston Urbanized Area in order to reduce the loss area and then they re-made the same proposal. SB knows the history of this proceeding and the Commission's concerns for loss of service at Moncks Corner simply proposed to maintain service at Moncks Corner. Additionally, it is proposed to add new service to Kiawah Island as per the desires of ORB.

BROMO COMMUNICATIONS, INC.



William G. Brown
September 16, 1994

EXHIBIT #1
Sampit Broadcasters
September 1994

BROMO COMMUNICATIONS INC.
(706) 782-7222 - (202) 429-0600

Allocation Study for Sampit, SC
Using Proposed Allocation Point as Reference

REFERENCE			CLASS A			DISPLAY DATES	
33 18 20 N			Current rules spacings			DATA 07-28-94	
79 25 00 W			CHANNEL 289 -105.7 mHz			SEARCH 09-16-94	
CALL	CH#	CITY	STATE	BEAR'	D-KM	R-KM	MARGIN
AD288	288C2	Kiawah Island	SC	220.4	84.25	106.0	-21.75 ^{#2}
WZNY	289C	Augusta	GA	273.2	225.77	226.0	-0.23 *
WNMB.C	290C3	North Myrtle Beach	SC	46.9	89.05	89.0	0.05 <
WJYQ	287C3	Moncks Corner	SC	247.7	62.17	42.0	20.17 ³
WRHA.C	286A	Johnsonville	SC	354.9	53.20	31.0	22.20
WRHA.A	286A	Johnsonville	SC	345.3	58.60	31.0	27.60
WDAR	288C3	Darlington	SC	338.7	120.28	89.0	31.28
WSSX	236C	Charleston	SC	215.0	69.06	29.0	40.06
AP292	292A	Ladson	SC	237.8	75.22	31.0	44.22
WRLQ.C	292A	Ladson	SC	236.9	76.56	31.0	45.56
WDAR	288A	Darlington	SC	338.7	120.28	72.0	48.28

² SHORT SPACED As proposed in MM Docket No. 94-70

³ CLEAR to WJYQ Construction Permit for Channel 287C3, Channel 288A at Moncks Corner has been deleted.

ATTACHMENT 2



September 16, 1994

The Federal Communication Commission

To Whom It May Concern,

I have learned that there is a possibility the Federal Communication Commission might allot Channel 287A to Moncks Corner, South Carolina. I am an Afro-American Daytime AM operator/owner of WMCJ Radio Moncks Corner, S. C. I would like very much to be considered as a recipient of this frequency. If the FCC should allot FM Channel 287A to Moncks Corner, South Carolina, I will file an application for a construction permit for the channel and if the application is granted, I will build a new FM Station on this channel.

I am authorizing SAN-PIT Broadcasters to file this letter with its pleadings to the FCC,

Sincerely Yours,

A handwritten signature in cursive script that reads "Clary K. Butler".

Clary K. Butler, President
Berkeley Broadcasting Corp.
WMCJ AM Radio
P.O. Box 67
Moncks Corner, SC 29461
(803) 761-6010

PO BOX 67 MONCKS CORNER, SOUTH CAROLINA 29461 (803) 761-6010

CERTIFICATE OF SERVICE

I, Patricia A. Neil, a secretary in the law firm of Smithwick & Belendiuk, P.C., certify that on this 22nd day of September, 1994, copies of the foregoing were hand delivered to the following:

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Patricia A. Neil