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Before the
Federal Communications Commission
Washington, DC 20554

JUL 16 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)
)
Amendment of Section 73.202(b))
Table of Allotments)
FM Broadcast Stations)
(Crisfield, Maryland, Belle Haven, Nassawadox,)
Exmore, and Poquoson, Virginia)
)
)
To: Assistant Chief, Audio Division
Media Bureau

MB Docket No. 02-76
RM-10405
RM-10499

REPLY COMMENTS ON COUNTERPROPOSAL

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July 16, 2002

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SUMMARY OF PLEADING

The following pleading is being filed by Tidewater Communications, Inc. (“Tidewater”) in reply to the Counterproposal and Comments “Counterproposal” filed June 3, 2002 by Commonwealth Broadcasting, L.L.C. and Sinclair Telecable, Inc. dba Sinclair Communications (jointly referred to herein as “Sinclair”) proposing (1) the allotment of Channel 250B1 to the hamlet of Belle Haven, Virginia; (2) the substitution of Channel 290A for vacant Channel 252A at Nassawadox, Virginia; (3) re-allotment of Channel 291A from Exmore, Virginia, to Poquoson, Virginia, with concurrent modification of the license of Sinclair’s WROX, Cape Charles, to operate at Poquoson; and the reallocation of Channel 241B from Cape Charles, Virginia, to Exmore, Virginia and the removal of the only commercial radio station from Cape Charles. Tidewater shows herein that Sinclair’s proposal is fatally defective because (1) Belle Haven is not a community for allotment purposes; (2) the Poquoson Reference Site is over water and unsuitable, (3) Poquoson is merely a “bedroom community” for the Norfolk/Virginia Beach/Newport News Urbanized Area and does not merit a first local service preference, and (4) there are no public interest benefits to removing the only commercial station from Cape Charles to allot the 40th service to the Norfolk/Virginia Beach/Newport News Urbanized Area. As the counterproposal was defective when filed, it must be dismissed and the competing proposal of Bay Broadcasting, Inc., to exchange Channel 250A for Channel 245A at Crisfield, Maryland, should be granted.

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To: Assistant Chief, Audio Division
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REPLY COMMENTS ON COUNTERPROSAL

Tidewater Communications, Inc. (“Tidewater”) by its attorneys and pursuant to Section 1.420 of the Commission’s Rules, and the Commission’s Public Notice, Report No. 2559, released July 1, 2002,¹ hereby files its reply comments to the Counterproposal and Comments “Counterproposal” filed June 3, 2002 by Commonwealth Broadcasting, L.L.C. and Sinclair Telecable, Inc. dba Sinclair Communications (jointly referred to herein as “Sinclair”). The Counterproposal proposes (1) the allotment of Channel 250B1 to the hamlet of Belle Haven, Virginia; (2) the substitution of Channel 290A for vacant Channel 252A at Nassawadox, Virginia; (3) re-allotment of Channel 291A from Exmore, Virginia, to a bedroom community in the Norfolk/Virginia Beach/Newport News, Virginia, Urbanized Area called Poquoson with concurrent modification of the license of Sinclair’s WROX, Cape Charles, to operate at Poquoson; and (4) the reallocation of Channel 241B from Cape Charles, Virginia, to Exmore, Virginia resulting in the removal of the only commercial radio station from Cape Charles. Sinclair’s ambitious and radical

¹ Interested parties were afforded 15 days, or until July 16, 2002, within which to file Comments, so these Reply Comments are timely filed.

scheme was filed in conflict with a proposal by Bay Broadcasting, Inc. (“BBI”), licensee of WBEY(FM), Crisfield, Maryland, to substitute Channel 250A for Channel 245A at Crisfield as described in the Commission’s *Notice of Proposed Rule Making*, DA 02-864, released April 12, 2002 (“NPRM”). Sinclair’s proposal is fatally flawed. As it is defective, it need not be compared to BBI’s proposal and BBI’s proposal may be adopted without making a comparison. Tidewater respectfully requests the Commission to dismiss or deny Sinclair’s Counterproposal. In support whereof, the following is shown:

I. Preliminary Statement

Tidewater is an interested party and, to the extent it may be necessary, has standing to file these Reply Comments. Tidewater is licensee of three commercial radio stations² in the Norfolk/Virginia Beach/Newport News, Virginia, Urbanized Area and competes for audience and revenue with Sinclair’s stations, which include WROX(FM), Cape Charles.³ Sinclair has gone so far as to set up an FM translator in downtown Norfolk in its attempt to improve WROX’s weak signal emanating from a tower across the Chesapeake Bay from Norfolk on the Eastern Shore of Virginia. Frustrated with this band-aid approach, under the cover of allotting a first local service to Belle Haven, Sinclair has now concocted this Counterproposal for the sole reason of moving WROX closer to downtown Norfolk! This is nothing more than a proposal to add the **40th** signal to the already over-radioed Norfolk Arbitron market. To accomplish this, Sinclair must allot a new channel to the hamlet of Belle Haven, which does not meet the Commission’s criteria as a community for allotment purposes. Of paramount importance, the reference

² WJOI(AM), Norfolk, WNOR(FM), Norfolk, and WAFX(FM), Suffolk, VA.

³ Sinclair is licensee of WROX, Cape Charles, WTAR, Norfolk, and WEXM, Exmore, VA.

site selected for the allotment of Channel 291A at Poquoson is over water and unusable. Moreover, Sinclair intends to abandon Cape Charles and leave it with only a noncommercial educational station that cannot be considered an equivalent service.

II. Belle Haven, Virginia, Is Not a Community for Allotment Purposes

Sinclair claims that Belle Haven is “undeniably a cognizable community entitled to a first local service preference under FM priority 3.” Tidewater strongly disagrees with this statement. Belle Haven is nothing more than a crossroads with a 2000 population of 480 that could not possibly support a radio station. The best Sinclair can say about Belle Haven is that it has “over two hundred houses,” its own post office/zip code, **numerous** businesses and two churches [emphasis supplied].”⁴ Predictably, Sinclair did not identify the businesses or churches. Based on an in person visit to Belle Haven by the president of Tidewater, there are apparently only four businesses in Belle Haven excluding the post office and a church (the second church was not apparent). Belle Haven’s mayor is part time and works out of an office at the fuel company. There is no town hall. The city does not provide any municipal services. See Attachment 1, the Declaration of David Paulus, Tidewater’s President, who visited Belle Haven on July 15, 2002. In *Gretna, Quincy and Tallahassee, Florida*, 6 FCC Rcd 633 (1991), the Commission refused to find that the community of Steinhatchee, Florida, was a community even though it has a post office, its own zip code, a grade school, six

⁴ In its *Notice of Proposed Rule Making*, DA 02-1344, released June 7, 2002, in MB Docket No. 02-141, the Commission proposed allotting Channel 291B to Belle Haven at Sinclair’s request. The Commission at paragraph 3 and footnote 4 accepted Sinclair’s representations of community status for Belle Haven. As shown herein, the Commission’s statement in MB Docket 02-141 was erroneous, as Belle Haven is not a community for allotment purposes. By letter dated June 21, 2002, Sinclair withdrew its petition for rulemaking and expression of interest.

churches, a business district with restaurants and other retail outlets and a population of approximately 1,500. Steintachee was listed in the 1988 edition of the Rand McNally Commercial Atlas with a population of 800. The only difference between Steinhatchee and Belle Haven is that Belle Haven is incorporated, which generally settles the matter. But, this presumption is rebuttable. The Commission should not in a vacuum find that Belle Haven is a community for allotment purposes just because it is incorporated. Here, Tidewater has shown that Belle Haven is incorporated in name only, with a part-time mayor whose office is at the local fuel store; a place with apparently only four operating businesses, that provides no municipal services. Under these circumstances, it would be absurd for the Commission to find that Belle Haven is a community for allotment purposes.

III. The Reference Site for Poquoson Is Over Water and the Counterproposal Is Defective as a Result

The reference site Sinclair specified for the proposed allotment of Channel 291A at Poquoson, Virginia, is **North Latitude 37° 12' 30" and West Longitude 76° 25' 05"**⁵. Sinclair submitted as Exhibit #5 to its Technical Statement a map depicting the area to locate Channel 291A at Poquoson. The map shows an arrow pointing to the intersection of two curves depicting constraints. Attachment 2 is a Technical Statement that provides a 7.5 minute topographic map of the area where Sinclair designated its reference coordinates. The intersection of the coordinates is clearly offshore within a body of water which renders the site unsuitable. In *Clewiston, Fort Myers Villas, Indiantown, Jupiter, Key Colony Beach, Key Largo, Marathon and Naples, Florida*, 10 FCC Rcd 6548 (1995), the Commission explicitly said: "We have consistently rejected

⁵ These coordinates are also listed on the Commission's July 1, 2002, Public Notice.

any proposed reference sites that fall within bodies of water.” In *St. Maries, Idaho and Spokane, Washington, inter alia*, 14 FCC Rcd 17012 (1999), the Commission concluded that there was no site available for a channel allotment at St. Maries, Idaho: “Generally, the suitability of a site area is determined by whether a site can be located within an area that meets the minimum distance separation requirements of Section 73.207 and the city grade coverage and other requirements of Section 73.315. See *Creswell, Oregon*, 4 FCC Rcd 7040 (1989). The suitability of a site area also relates to the feasibility of using a particular area to accommodate an actual transmitter site, the theoretical or reference site also lying within that area.” Here, there is no question that an offshore site is unsuitable.⁶ This is a fatal defect since Sinclair may not amend its proposal to attempt to specify a different site. It is well established that counterproposals must be technically correct and substantially complete when filed and that counterproposals will be considered only if they are filed by the deadline date for comments. See Section 1.420 (d) of the Commission’s Rules, *Broken Arrow and Bixby, Oklahoma*, 3 FCC Rcd 6507 (1988) and *Springdale Arkansas et al.*, 4 FCC Rcd 674 (1989), *recon.*, 5 FCC Rcd 1241 (1990).

IV. Poquoson Is Not Entitled to a First Local Service Preference

Even though Sinclair’s selection of an offshore reference site is fatal to its counterproposal, in an abundance of caution, Tidewater also submits its comments on the other flaws in Sinclair’s counterproposal. Under controlling precedent, *Fairfield and*

⁶ Even if Sinclair could respond (which it is prohibited from doing) it could not argue with this principle, since Sinclair stated at Counterproposal par. 11 while attacking BBI’s proposal, “The alternate site proposed in the Petition for Reconsideration, albeit hypothetical, must nevertheless constitute a viable, suitable site. Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations, Moncks Corner, Kiawah Island and Sampit, South Carolina, 11 FCC Rcd 8630 (Chief, Allocations Branch (1996).”

Norwood, Ohio, 7 FCC Rcd 2371 (1992), as a small community completely surrounded by a larger metropolitan area with an abundance of radio service, Poquoson is not entitled to a preference over Cape Charles on Section 307(b) grounds. Since Poquoson is within an Urbanized Area, under *Headland, Alabama, and Chattahoochee, Florida*, 10 FCC Rcd 10352 (1995), Sinclair submitted a showing pursuant to *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988) and *RKO General, Inc. (KFRC)*, 5 FCC Rcd 3222 (1990), *vacated as moot*, 6 FCC Rcd 1808 (1991) (“KFRC”), but that showing falls far short of demonstrating that Poquoson is entitled to a first local service preference. Following is an exposition of the deficiencies in Sinclair’s proposal:

A. Signal Population Coverage.

As Sinclair notes, the Commission examines “‘signal population coverage’, i.e., the degree to which the proposed station could provide service not only to the suburban community, but also to the adjacent metropolis.” Sinclair claims that the Class A channel which would serve Poquoson will cover only 9.57% of the Norfolk Urbanized Area, 25% of Hampton and 50% of Newport News. The attached Technical Statement indicates that the 70 dBu contour of the proposed Poquoson station would cover 15% of the Urbanized Area. It would cover 56.2% of Newport News.

B. Size and Proximity of the Suburban Community Relative to the Core Community.

Sinclair attempts to downplay this factor, claiming, “proximity and relative populations, is of limited utility here where there is no one central city in the Urbanized Area.” Tidewater submits that this factor is of paramount importance. Little Poquoson is

right in the midst of the Urbanized Area adjacent to Hampton and only a short distance from Newport News. The population differences are striking:

Poquoson 2000 Population: **11,566** persons;

Newport News 2000 Population: **180,150** persons; and

Hampton 2000 Population: **146,437** persons; and

Norfolk/Virginia Beach/Newport News Urbanized Area 2000 Population: **1,355,872**.⁷

Poquoson is a self-described “bedroom community” where residents work in the larger cities. If we focus on Poquoson’s relationship with Newport News, it is easy to see that the size and proximity of Poquoson and Newport News alone require a negative finding on this factor.

C. Interdependence of the Suburban Community.

Sinclair relies on the third *Tuck* criterion, but a careful examination of the evidence yields the inescapable conclusion that Poquoson is not independent of the cities that surround it. Even the documents Sinclair submitted in an attempt to shore up its house of cards reveal that Poquoson is merely a “bedroom community.”

Factor 1 --The Extent to which Community Residents Work in the Larger Metropolitan Area, rather than the Specified Community. Sinclair would have the Commission believe that as many as 30% of the residents of Poquoson are employed in the community based on inadmissible hearsay “conversations with the City Planning Commission.” The fact is Sinclair’s own evidence reveals that only about 19% of the residents of Poquoson work in the community (See Page 11-34 of the City of Poquoson Comprehensive Plan—1,136 persons worked in the City while 4,564 residents worked

⁷ This is the sum of the 2000 populations of the communities in the Urbanized Area. The 1990 population of the Urbanized Area according to U. S. Census data is 1,275,305.

outside (Sinclair Exhibit 2). The Comprehensive Plan indicates that the “the ratio of out-commuters to people who live in the City was the second highest on the Peninsula to James City County which had a ration of 7 to 1.” Page 11-1 of Comprehensive Plan sets this issue to rest:

The population of Poquoson, is essentially at full employment; however, these jobs are not located in Poquoson, with the City having the highest ration of out-commuting of any jurisdiction on the Peninsula. While Poquoson is under-represented in manufacturing employment, it is questionable how aggressively the City wants to pursue increased industrialization due to transportation and environmental concerns. Notwithstanding its location on the doorstep of NASA and Langley Air Force Base, the City has not captured any of the regions numerous defense contractors.

To repeat for emphasis Poquoson’s own employment characterization submitted by Sinclair: “**these jobs are not located in Poquoson** [emphasis added].” Sinclair’s attempt to manufacture out of whole cloth a higher percentage of persons working in Poquoson fails.⁸

Factor 2--Whether the Smaller Community Has Its Own Weekly Newspaper or Other Media that Cover the Community’s Local Needs and Interests. Sinclair states that Poquoson has a weekly newspaper, but it is published outside Poquoson and in conjunction with a York County newspaper⁹. Sinclair also notes that Poquoson has its own local access channel on the cable system (but neglects to reveal where that cable system community unit is located), a website and a newsletter published by the city government. But Sinclair ignores the evidence it submitted in the Comprehensive Plan. Page 11-44 of the plan identifies as communications needs, high bandwidth

⁸ See Declaration of David Paulus, Attachment 1.

⁹ The weekly paper, *The Yorktown Crier/Poquoson Post*, is published in Yorktown, Virginia (See Attachment 1, Declaration of David Paulus).

communications capabilities, strong alliances with local communication service providers (ISDA service, cellular service, fiber optic networks, and research and development/office parks with ample capacity for office utilization and communication connectivity. Conspicuously absent from the Comprehensive Plan is any mention of a need for a new local radio station. Sinclair has failed to show that the needs and interests of Poquoson's residents are being not being adequately met by broadcast media licensed to the other communities in the Urbanized Area.

Factor 3--Whether Community Leaders and Residents Perceive the Specified Community as Being an Integral Part of, or Separate from, the Larger Metropolitan Area. The only information Sinclair proffered on this factor is the fact that Poquoson became a city in 1975, and the fact that there is a website and Comprehensive Plan, as well as "comments made to Counterproponent's counsel during the preparation of this pleading." This falls far short of the degree of evidence the Commission can consider in a rule making proceeding. The fact that Poquoson is a city proves nothing about whether the residents perceive themselves as part of the larger Urbanized Area. The Comprehensive Plan, cited by Sinclair in support of this factor, states just the opposite ("Poquoson is certainly a "bedroom community." Sinclair Exhibit 2, page 11-34.) People who leave their bedrooms to work in another part of the house generally perceive that they live in the other part of the house as well as the bedroom, and that is the case here. The existence of a website proves nothing, and unspecific general hearsay comments to counsel are less than probative. No affidavits from community residents were submitted to provide evidence on this factor, and no affidavit of counsel was submitted as evidence of what he learned while he prepared his pleading.

Factor 4--Whether the specified community has its own local government and elected officials. Sinclair submits evidence that Poquoson is an incorporated city, which Tidewater does not dispute. However, Tidewater does dispute Sinclair's argument that this is "powerful evidence of its independence." No, it is not evidence of anything except that Poquoson is a city. (So is Belle Haven with its part-time mayor and apparently only four businesses.)

Factor 5--Whether the smaller community has its own telephone book provided by the local telephone company or zip code. Poquoson has its own ZIP code, but it does not have its own telephone book. Poquoson is just another community in the phone book for Hampton, Newport News, Seaford and Yorktown.

Factor 6--Whether The Community Has Its Own Commercial Establishments, Health Facilities And Transportation Systems. Even Sinclair has to admit Poquoson fails on this Factor. Poquoson does not have its own health facilities, since they are "served by regional institutions shared with other communities on the Peninsula." Poquoson does not have its own sheriff or courts since it shares them with York County. Poquoson only has a few commercial establishments to serve the residents of this bedroom community. (See Declaration of David Paulus, Attachment 1.)

Factor 7--The Extent to Which the Specified Community and the Central City Are Part of the Same Advertising Market. Sinclair must also admit that Poquoson is included in the Norfolk Arbitron market, but muses that the entire Urbanized Area may be at least two or more "markets" because of the size of the Urbanized Area. This borders on lack of candor. Sinclair is operating radio stations in the Norfolk Arbitron market and knows full well that there is only one radio market in which Sinclair

sells advertising. It is the opinion of Tidewater's president that there is no significant economic base in Poquoson on which a local radio station could depend for advertising. (See Declaration of David Paulus, Attachment 1.) Table 32 and pages 11-35 and 11-36 of the Comprehensive Plan (Sinclair Exhibit 2) reveals that from 1985 to 1994, Poquoson lost ground with regard to per capita retail sales. Total retail sales for 1994 was only \$24.5 million. Compare that with retail sales of approximately \$1.8 Billion in the Peninsula (Table 33, page 11-36, Sinclair Exhibit 2). This reveals how tiny is Poquoson's share of the retail market.

Factor 8--The Extent to which the Specified Community Relies on the Larger Metropolitan Area for Various Municipal Services such as Police, Fire Protection, Schools and Libraries. It appears that Poquoson does provide police, fire protection, schools and libraries to its citizens.

Summary of Tuck Analysis—Sinclair argues that on Factors 2, 3, 4, 5 and 8, Poquoson is eligible for first local service preference and on factors 1, 6, and 7, the records is inconclusive or tipped in Sinclair's favor. Tidewater begs to differ. Only on Factors 4 and 8 does Poquoson prevail. That means on Factors 1, 2, 3, 5 and 7, Poquoson fails the test. Even applying a liberal standard, the Commission should find that this is a proposal to add the 40th signal for the Norfolk Arbitron market, not a first local service to Poquoson. The Commission must consider the proposal to move FM Channel 291A to Poquoson is really a choice between the loss of Cape Charles' only commercial radio service and the 40th service to be added to the Norfolk/Virginia Beach/Newport News Urbanized Area. The case of *Fairfield and Norwood, Ohio*, 7 FCC Rcd 2377 (1992) is on all fours with the instant case. There, the Commission refused to make the reallocation

of Channel 235B from Fairfield, Ohio, to Norwood, Ohio, because it found that Norwood was completely surrounded by Cincinnati, Ohio, which, at the time had 17 local services, and that Norwood was not entitled to a first local service preference. Norwood, like Poquoson, was an incorporated city. Norwood had a 1990 population of 23,674, but was dwarfed by Cincinnati with a 1990 population of 364,040—approximately fifteen times larger. Norwood, like Poquoson, was located within the Urbanized Area in question. Poquoson, with a 2000 population of 11,566, must be compared to the Norfolk/Virginia Beach/Newport News Urbanized Area which had a 2000 population of approximately 1,355,872 persons. Even if Poquoson were compared only to Newport News, which has a population of 180,150, there would be a vast difference in population since Newport News is over 15 times larger in population than Poquoson.

In the case of Norwood, Ohio, the Commission refused to make the reallocation because it would be removing a second local transmission service from Fairfield in order to provide an eighteenth such service to the Cincinnati Urbanized Area. Here, the Commission would be removing the only commercial radio station from Cape Charles, Virginia, to add a 40th service to the Norfolk/Hampton/Newport News Urbanized Area. The Commission should follow the precedent in *Fairfield and Norwood, Ohio, supra*, and deny the Counterproposal.

In *Greenfield and Del Rey Oaks, California*, 11 FCC Rcd 12681 (1996), the Commission refused to allot a Channel to Del Rey Oaks, California, because under Criterion One, signal population coverage, the station would cover 100% of the Urbanized Area; under Criterion Two, size and proximity of the community relative to the main city of the Urbanized Area, Del Rey (1990 population 1,661) is directly between

and contiguous to the two central cities of Seaside (population 38,901 and Monterey (population 31,954); and under Criterion Three, Del Rey Oaks was found to be interdependent with the larger Urbanized Area of Seaside-Monterey (“Although it is incorporated, has elected government, and a police department, the mayor and city-council are all part time positions. The city does not collect taxes. It has only one church, one known civic organization and limited business activity. The majority of residents work in surrounding communities.”) Poquoson is similar in many respects to Del Rey Oaks, so Sinclair’s Counterproposal must suffer the same fate as the proposal for Del Rey Oaks.

V. Sinclair’s Proposal Would Eliminate the Only Commercial Station in Cape Charles

Sinclair’s proposal to eliminate the only commercial service in Cape Charles does not constitute a preferential arrangement of allotments under *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982) (Priorities are (1) First fulltime aural service; (2) Second fulltime aural service; (3) First local service; and (4) Other public interest matters. [Co-equal weight is given to priorities (2) and (3)]). In *Sumter, Orangeburg, and Columbia, SC*, 11 FCC Rcd 6376 (1996) the Commission denied a proposal to reallocate and to change the community of license of a Class C1 FM station from the smaller community of Orangeburg (population 13,739) to the larger community of Columbia (population 98,052) because retention of Orangeburg’s sixth station outweighed providing Columbia with its fourteenth local transmission service where there would be no actual improvement in technical facilities by the rulemaking petitioner.

In *Royston and Commerce, GA*, 15 FCC Rcd 5676 (2000), under priority (4), the Commission retained an FM station and allotment in the smaller community of Royston

(population 2,758) as a first night-time and second local service rather than change the community of license to the larger community of Commerce (population 4, 108) as a second full-time station because the larger population did not justify removing the smaller community's only local night-time service.

Moreover, WAZP does not provide equivalent service to WROX. Noncommercial FM station WAZP, Cape Charles, should not count as a station that will continue to provide local service to Cape Charles as a replacement for WROX. The Technical Statement (Attachment 2) shows that WAZP serves only 198,994 persons in 4,324 square kilometers with its licensed facilities (57 dBu signal) while WROX, the station that would abandon Cape Charles, serves 1,465,965 persons in 13,393 square kilometers with its licensed facilities (54 dBu signal). WAZP serves only 13% of the population served by WROX. In *Alva, Mooreland, Tishomingo, Tuttle and Woodward, Oklahoma*, DA 00-2885, released December 22, 2000, 65 Fed. Reg. 82296, published December 28, 2000, *recon. denied* Memorandum Opinion and Order, released April 13, 2001, 66 Fed. Reg. 21681, published May 1, 2001, the Commission refused to permit the licensee of Station KTSH, Tishomingo, Oklahoma, to relocate the station to Tuttle, Oklahoma, where the only service remaining in Tishomingo would be a noncommercial station. There, the Commission stated, "where the only remaining station in a community is one which operates within the reserved portion of the FM band, the Commission cannot assume that the population will indeed retain a local transmission service." The Declaration of David Paulus (Attachment 1) indicates that Mr. Paulus listened to WAZP for two hours on July 15, 2002, and noted that all programming was Christian music apparently delivered by satellite with no local programming. With regard to evaluating proposals to change

community of license, the Commission has stated: “The public has a legitimate expectation that existing service will continue, and this expectation is a factor which we must consider independently against the service benefits that may result from reallocating a channel from one community to another. *See Modification of FM Licenses (on reconsideration)*; 5 FCC Rcd 7094, 7097 (1990); *see also Amendment of Section 73.202(b)(Eatonton and Sandy Springs, Georgia; and Anniston and Lineville, Alabama)*, 6 FCC Rcd 6580 (1991), *application for review pending.*” The Commission must consider the legitimate expectation of the residents of Cape Charles that service from WROX will continue. WAZP is not an adequate substitute for the removal of WROX from Cape Charles, and the counterproposal should be denied on this ground as well.

VI. Conclusion

As the Commission taught in *Amendment of the Commission’s Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License, recon. granted in part*, 5 FCC Rcd 7094 (1990): “If, however, after examining the factors enumerated in our decision in *RKO General (KFRC)*, 5 FCC Rcd 3222, [footnote omitted] we were to conclude that awarding a first local service preference to the proposed allotment in the urban area would appear to condone an artificial and unwarranted manipulation of the Commission’s policies, no such preference would be awarded. Instead, the allotment would be considered as simply an additional allotment to the urban area. In such cases, therefore, no waiver to allow the change would be granted. Retention of the sole local service in the rural community would be preferred, since a first local service is generally a higher priority than an additional allotment to a community that already enjoys local service.” Contrary to the picture Sinclair paints, this

is a defective and highly problematic proposal. Sinclair's proposal is fatally defective because (1) Belle Haven is not a community for allotment purposes; (2) the Poquoson Reference Site is over water and unsuitable, (3) Poquoson is merely a "bedroom community" for the Norfolk/Virginia Beach/Newport News Urbanized Area and does not merit a first local service preference, and (4) there are no public interest benefits to removing the only commercial station from Cape Charles to allot the 40th service to the Norfolk/Virginia Beach/Newport News Urbanized Area. As the counterproposal was defective when filed, it must be dismissed and the competing proposal of BBI to exchange Channel 250A for Channel 245A at Crisfield, Maryland, should be granted.

Respectfully submitted,

TIDEWATER COMMUNICATIONS, INC.

A handwritten signature in black ink, appearing to read "Gary S. Smithwick", written over a horizontal line.

Gary S. Smithwick
Its Attorney

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July 16, 2002

ATTACHMENT 1

DECLARATION OF DAVID PAULUS

David Paulus, under penalty of perjury, declares as follows:

1. I am President of Tidewater Communications, Inc., licensee of Stations WJOI, WNOR, Norfolk, and WAFX, Suffolk, Virginia.
2. On July 15, 2002, I traveled to Belle Haven, Virginia, the community to which Commonwealth Broadcasting, LLC, and Sinclair Telecable d/b/a Sinclair Communications have proposed that the Commission allot FM Channel 29.1B.
3. Belle Haven is a very, very, very small community about 90 minutes from Norfolk on the Eastern shore. The town has very few people living in it. I visited the tiny post office (See Photo No. 1 attached) and drove through the area within city limit signs. I saw only four apparently functioning businesses excluding the post office and a church within the city limits. They were an insurance agency, a general store, a fuel company, and a movie theatre. I stopped into the insurance company on the "main street" and they directed us to the "mayor's place," that also serves as a fuel company. (See attached Photos No. 2, 3, and 4 of the general store, theatre, and insurance agency).
4. The occupants of the insurance agency told me that there is no functioning police department for the city, nor fire department, and no city hall. The mayor was not available at the fuel company, but a woman at the desk directed me to the Chamber of Commerce for the entire eastern shore, in Melfa, Virginia, which was about 10 miles up the road, (not in the Belle Haven city limits). A woman at the Chamber of Commerce said they have no information of the city of Belle Haven to distribute, and that "no-one ever asks about information for that city." Her best guess as to population for Belle Haven was around 250-300 people.
5. I also monitored a radio station on 90.7 MHz, which is the frequency occupied by WAZP, Cape Charles, Virginia. I did not hear the call sign while I monitored it, but I was without question monitoring 90.7. It broadcasts Christian music, with a completely satellite format. Other than the top of the hour identifier, there was no local reference during the 2 hours I monitored the station.
6. Poquoson is a small community about 25-35 minutes from Chesapeake. It is off of Oyster Point Road and I-64, before you get to the Newport News-Williamsburg airport. To get to the community, you must pass through the cities of Hampton and Newport News, Virginia. The city has a fully functioning city government, as well as a weekly newspaper called the "Yorktown Crier/The Poquoson Post, that is actually published in Yorktown. I spoke to various people within the community, including the city manager's office, who told us that most people who live in Poquoson, do NOT work within that city. They work at NASA Langley or the Newport News Shipyard, which are both outside the city limits. There is no question in my mind that while Poquoson is a nice little city, it is FAR from a "stand alone" city and without the support and jobs from the surrounding Hampton Roads cities, could not function on its own. In my opinion, there is no significant economic base in Poquoson on which a local radio station could depend for advertising.

Executed this 16th day of July, 2002.



David Paulus