

ORIGINAL

DOCKET FILE COPY ORIGINAL

Before the
Federal Communications Commission
Washington, DC 20554

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))

MD Docket No. 02-76
RM-10405

RECEIVED

AUG 14 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Assistant Chief, Audio Division
Media Bureau

**COUNTERPROPONENTS' RESPONSE TO REPLY
COMMENTS ON COUNTERPROPOSAL**

No. of Copies rec'd
List ABCDE

014

Howard M. Weiss, Esq.
FLETCHER, HEALD & HILDRETH, P.L.C.
1300 North 17th Street, 11th Floor
Arlington, Virginia 22209
(703) 812-0400

August 14, 2002

TABLE OF CONTENTS

	<u>Page</u>
I. Introduction.....	1
II. Counterproponents' Reference Point for Poquoson Is Not Offshore, and, In Any Event, There is A Sufficient Area Available For A Poquoson Transmitter Site.....	2
III. The Counterproposal Would Not Eliminate FM Transmission Service To Cape Charles.....	6
IV. Poquoson Is An Independent City Entitled to Its Own Local Service.....	8
V. Belle Haven Is A Cognizable Community For Section 307(b) Purposes.....	14
VI. Conclusion.....	17

SUMMARY

Sinclair Telecable, Inc., dba Sinclair Communications and Commonwealth Broadcasting, L.L.C., counterproponents in the instant rulemaking ("Counterproponents") respond to reply comments filed by Tidewater Communications, Inc. ("Tidewater").

Counterproponents demonstrate that their proposed Poquoson, Virginia reference point is, in fact, not offshore. They further establish that there exists an area in which a suitable site for the proposed station can be located, meeting their burden under applicable case law.

Counterproponents proffer legal precedent and a coverage map demonstrating that Station WAZP(FM), a noncommercial FM, covers Cape Charles with a city-grade signal. It is therefore a cognizable service for Section 1.420(i) purposes, permitting Station WROX(FM) to change communities to Exmore, Virginia.

Counterproponents demonstrate that Poquoson is an independent city within the Norfolk Urbanized Area, like Chesapeake and Williamsburg, previously held by the Commission to be deserving of a first local service preference under Section 307(B). They rely, in part, on a letter from the Virginia Peninsula Chamber of Commerce supporting the allotment.

Finally, Counterproponents submit that Belle Haven, Virginia, is a community entitled to its own FM radio outlet. An incorporated town listed in the U.S. Census, it enjoys a rebuttable presumption of community status. Moreover, it has a Town government, numerous businesses, churches and civic and arts organizations.

Counterproponents also submit declarations supporting the Belle Haven allotment firm its Mayor and Town Constable.

The Counterproposal should be adopted.

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of)	
)	
Amendment of Section 73.202(b))	MD Docket No. 02-76
Table of Allotments)	RM-10405
FM Broadcast Stations)	
(Crisfield, Maryland, Belle Haven,)	
Nassawadox, Exmore and Poquoson,)	
Virginia))	

To: Assistant Chief, Audio Division
Media Bureau

**COUNTERPROponents' RESPONSE TO REPLY
COMMENTS ON COUNTERPROPOSAL**

Commonwealth Broadcasting, L.L.C., and Sinclair Telecable, Inc., dba Sinclair Communications (collectively the "Counterproponents"), hereby submit their Response to Reply Comments, filed by Tidewater Communications, Inc. ("Tidewater"). In support hereof, Counterproponents state as follows:

I. Introduction.

1. Tidewater opposes adoption of the Counterproposal on a number of grounds, including its assertions that Counterproponents' reference site for the Poquoson, Virginia allotment is offshore, Belle Haven, Virginia is not a "community" for Section 307(B) purposes, Poquoson is not entitled to a first local service preference, and Cape Charles, Virginia will not be "served" for Section 307(B) purposes by a

noncommercial station. Counterproponents will address these frivolous contentions, and the misstatements that underlie them, seriatim.

2. However, it must be noted at the threshold that, as Tidewater candidly admits at page 2, its objection is a classic case of strike pleading déjà vu. From mid-1994 through late 1995, Tidewater vigorously and unsuccessfully fought construction of an FM translator (see BPFT-940404TD) within Sinclair's contour. There as here, Tidewater acknowledged that Sinclair's proposal was technically compliant with the Commission's rules,¹ but sought nevertheless to apply an obsolete "de facto reallocation policy" based on Sinclair's alleged intent, to defeat the proposal. Tidewater's arguments, pursued through a petition for reconsideration, never had a chance of success. But Tidewater did succeed in delaying competitive service enhancement for well over a year. Counterproponents ask that Tidewater not be permitted to do likewise here. Prompt action is critical to prevent encouragement of a competitively-motivated attack without factual or legal basis designed to delay two first FM local transmission services and new reception service to almost 500,000 persons.

II. Counterproponents' Reference Point for Poquoson Is Not Offshore, and, In Any Event, There is A Sufficient Area Available For A Poquoson Transmitter Site

3. Based on a Technical Exhibit prepared using a USGS topographic map, Tidewater submits that Counterproponents' reference site is "off the shoreline in the water." (See Attachment 2 to the Reply Comments.)

¹ There, for example, Tidewater conceded that Sinclair's translator complied in all respects with the requirements of Section 74.1232(d). Here, putting aside the dispute about the location of the Poquoson reference point, Tidewater acknowledges, inter alia, that Belle Haven is presumed to be a community because it is an incorporated town listed in the Census, that Poquoson is a city of over 11,000 persons, and that the Commission has repeatedly stated that noncommercial FM's like WAZP in Cape Charles do provide a cognizable 307(B) service.

4. Attached hereto as Exhibit 1 are Technical Comments prepared by Graham Brock, Counterproponents' consultants. They explain that a computer mapping program, Delorme Street Atlas USA version 8.0, was utilized to confirm the site was on land. This was verified by reference to Delorme Topo USA version 3.0, which was the basis for the certification in the Technical Statement attached to the Counterproposal.

5. In order to resolve the apparent discrepancy, subsequent to receipt of the Reply Comments, Counterproponents' station engineer was instructed to visit the reference site. Under the direction of Graham Brock, he was asked to verify the location of the reference point. (See Exhibit 2, the Declaration of L. Joseph Hardin.) Utilizing a Garmin Global Positioning System ("GPS") receiver, he concluded that the site reflected by the reference point coordinates is in fact "located on land, with a sufficient buffer of land between the site and the water line." Mr. Hardin attaches a copy of the cover page of the brochure for the Garmin GPS receiver. Further, Mr. Hardin attaches photographs of himself taken at the site which demonstrate that the reference point is not in the water.

6. Counterproponents submit that Mr. Hardin's GPS analysis and photographs are conclusive, constituting the "best evidence." Actual survey measurements trump Tidewater's topographical map. As Counterproponents' consultants point out, the 1983 typographic map used by Tidewater's consultant, unfortunately the most recent available, is nevertheless inaccurate. In any event, however, Graham and Brock point out that if the coordinates for the proposed Poquoson site in the Counterproposal were revised by a mere two seconds longitude, the reference site would plot on land, even on the topographical map relied upon by

Tidewater. These revised coordinates would still be within the adequately-spaced area available for a transmitter for the proposed Poquoson station. That area, much of which is clearly on land, is depicted in Exhibit 4 to Graham Brock's comments.

7. Tidewater urges that a defect in the reference site is "fatal since Sinclair may not amend its proposal to attempt to specify a different site." (At 5.) But Tidewater's statement of the law here is as baseless as its statement of the facts. The Commission has not applied the hypertechnical, "go-no go" test Tidewater would impose on proponents' reference coordinates. For example, in Monck's Corner, Kiawah Island and Sampit, South Carolina, 15 FCC Rcd 8973 (Chief, Allocations Branch 2000), the Commission acknowledged that the reference coordinates for the channel were located in a swamp. However, the counterproposal was nevertheless adopted on reconsideration because the Commission was able to confirm that an alternate, suitable site five miles away was available on dry land. The Commission also relied on Section 1.429(b)(3) of the rules, allowing it to consider new matters not raised previously if consideration is in the public interest. The same flexible approach was followed in Randolph and Brandon, Vermont, 6 FCC Rcd 1760, 1761 (Acting Chief, Allocations Branch 1991). See also Rockport, Gregory, Alice and Armstrong, Texas, 4 FCC Rcd 8075, 8076 (Chief, Allocations Branch 1989); Homerville, Lakeland and Statenville, Georgia, 8 FCC Rcd 2953, 2954 (Chief, Policy and Rules Division 1993) (reference coordinates located in an area of wet and dry land with enough dry land to construct transmitter).

8. While counterproposals generally may not be "amended" after the comment deadline, a two second coordinate adjustment does not constitute an

“amendment” or a “change in site.” Licensees do not require FCC authorization to make corrective changes to their transmitter site coordinates for “changes” this minuscule. See 47 C.F.R. §73.1690(c)(11)(2001) (a correction of geographic coordinates of less than three seconds in both latitude and longitude may be made without prior authorization).² It would be illogical to impose a stricter standard on hypothetical reference coordinates in a rulemaking, and, again, the Commission has not. In Monck’s Corner, *supra*, the proponent suggested a new site more than five miles away from its original site. The Commission approved what it characterized as an “adjustment.” 15 FCC Rcd at 8977. See also, Rockport, Texas, 4 FCC Rcd 8075 (1989) (original reference coordinates in the water; allotment made at alternate coordinates 16.5 miles away); Boalsburg, Pennsylvania, 7 FCC Rcd 7653, 7654, n.7 (Chief, Policy and Rules Division 1992) (“minor curative submission “permitted”); Brightwood, Oregon, DA 01-2484 (released October 26, 2001).³

9. In sum, the Poquoson reference point is in fact on dry land, based on a GPS survey and photographs of the site. And, even if Tidewater wishes to prolong that dispute, a two second correction would allow plotting of the site on land even on Tidewater’s topographic map. Counterproponents have met their burden to demonstrate a suitable site area under controlling law.

² The rule requires that the corrected coordinates not create any new short spacings or worsen any existing short spacings, a condition that is of course met here.

³ Broken Arrow and Bixby, Oklahoma, 3 FCC Rcd 6507 (Deputy Chief, Policy and Rules Division 1988), and Springdale, Arkansas, 4 FCC Rcd 674 (Deputy Chief, Policy and Rules Division 1989), recon. denied, 5 FCC Rcd 1241 (Acting Chief, Policy and Rules Division 1990), cited by Tidewater (at 5), are inapposite. Broken Arrow’s statement of the policy on counterproposals involved a fundamental failure to place a city-grade signal over the community of license, not a two second coordinate correction. Springdale involved a dramatically short-spaced counterproposal and an attempted amendment changing those coordinates significantly, which was still short-spaced. See n.7.

III. The Counterproposal Would Not Eliminate FM
Transmission Service To Cape Charles.

10. In another example of Tidewater's preference for what it thinks the law should be over what it is, Tidewater argues that Counterproponents' request to change WROX(FM)'s city of license to Exmore from Cape Charles defeats the Counterproposal. (At 13.) The heading to Tidewater's Section V -- "Sinclair's Proposal Would Eliminate the Only Commercial Station in Cape Charles" -- demonstrates that its bottom line is that a noncommercial station does not constitute a cognizable service under Section 1.420(i) of the rules.

11. Tidewater is simply wrong. When the Commission reconsidered the rule in 1990, it stated that "both commercial and noncommercial stations are relevant to our analysis." Modification to Specify New Community of License, 68 RR2d 644, 650 (1990). The Commission cited Valley Broadcasters, Inc., 5 FCC Rcd 2785, 2787 (1990), wherein it reversed itself and held that noncommercial service is relevant for Section 307(B) purposes, observing that all noncommercial stations have an obligation to serve significant programming needs of their communities, in light of FCC rule changes. In Oceanside, California, 1999 FCC Lexis 439 (DA 99-837, September 10, 1999), the Commission held that service from a noncommercial AM satisfied the requirement that a transmission service remain in a community in order to permit a community switch. And in Giddings, Texas, 1999 FCC Lexis 930 (DA 99-446, March 5, 1999), the Commission permitted a switch where only a noncommercial FM remained in the community which would lose the proponent's station.

12. Tidewater ignores this line of authority. It asserts that WAZP is not an "equivalent service" because of its relatively low power. (At 14.) Further, Tidewater

relies on a declaration from its President (Attachment 1) which, based on two hours of monitoring WAZP, asserts that the station provides no local programming.

13. This is truly grasping at straws. The Commission has not applied an “equivalent service” analysis. WAZP’s coverage is relevant to reception analysis under Section 307(b), not the issue at hand -- transmission service. Nor is there any precedent for evaluating the noncommercial station’s programming or compliance with the Commission’s station identification rule in Section 1.420(i) cases. And, even if there were, two hours of monitoring a radio station’s broadcasts proves absolutely nothing.

14. Tidewater relies heavily on Alva, Mooreland, Tishimingo, Tuttle and Woodward, Oklahoma, 16 FCC Rcd 1525, recon. denied, 16 FCC Rcd 7979 (Chief, Allocations Branch 2000), recon. granted, DA 02-1877 (Assistant Chief, Audio Division August 2, 2002). But in that case the noncommercial station initially did not provide a 70 dBu signal to any portion of the city of license. (At 7980.) The decision denying reconsideration stated:

“It is for this reason that the current KAZC service is not an adequate substitute and that the removal of station KTSH would be analogous to the removal of a sole local service.” (Id.)

15. Subsequently, the noncommercial station at issue in Alva was upgraded and reconsideration granted on that basis. While the noncommercial station’s signal now replicates that of the commercial station in that case, there is again no authority for the proposition that replication is required either in Alva or Tidewater’s pleading. In the instant case, as demonstrated by the attached map prepared by Graham Brock (Exhibit

3), WAZP places a city-grade signal over all of Cape Charles.⁴ Further, since WROX presently provides city-grade service to Cape Charles, and also would provide city-grade service to Cape Charles from its proposed allocation reference site, Tidewater's concern about abandonment of Cape Charles is unfounded.⁵ Thus, Cape Charles will retain a station which will cover its city limits with a 70 dBu signal, and be obligated to serve its needs and interests. That is all the Commission should require to find that a community remains served by a broadcast outlet, and all that it does.

IV. Poquoson Is An Independent City Entitled to Its Own Local Radio Service.

16. Convinced that Counterproponents' site for the Poquoson allotment is fatally defective, Tidewater nevertheless attacks Poquoson's status as an independent community under Faye and Richard Tuck, 3 FCC Rcd 5374 (1988). In light of the numerous cases cited by Counterproponents in the Counterproposal and the massive documentation of Poquoson's status therein, this argument is frivolous.

17. Tidewater cites only two authorities applying the Tuck tests in its favor -- Fairfield and Norwood, Ohio, 7 FCC Rcd 2377 (1992) and Greenfield and Del Rey Oaks, California, 11 FCC Rcd 12681 (1996). Contrary to Tidewater's analysis, however, neither is comparable, much less "on all fours in the instant case." (At 11.)

18. Norwood was "completely surrounded by Cincinnati." (at 2378.) While it was incorporated, the decision stated only that it had one bank, a post office and a zip

⁴ Tidewater's engineering showing (Attachment 2) conveniently omits this critical fact. Nor does it mention that WAZP has been granted a construction permit to upgrade its facilities substantially by doubling its power and going omnidirectional. (See BPED-20010725AFM.)

⁵ The other cases cited by Tidewater on Pages 13-15 are not worthy of analysis. They did not involve a first local service proposal.

code. In stark contrast, Poquoson is not contiguous with Norfolk, Portsmouth, Chesapeake or Virginia Beach. It borders Hampton but is “surrounded” in any sense only by York County, from which it seceded in 1952, and water. Poquoson shares certain municipal facilities (sheriff, courts, jail) only with York County, not with any of the core cities in the Urbanized Area. Poquoson has a comprehensive governmental structure housed in a new municipal complex, a separate school system, police and fire departments, a library system, and numerous businesses and churches. Poquoson is not Norwood.

19. Nor is Poquoson, in any material respect, reminiscent of Del Rey Oaks, California, a town of 1,661 persons, “directly between and contiguous with” the two Urbanized Area central cities of Seaside and Monterey. (At 12683.) Del Rey Oaks’ mayor, city council and police were all part-time. The community did not collect taxes, had only one church, one civic organization, and “limited business activity.” (At 12684.) It had no post office, zip code or newspaper, all of which it shared with Seaside and Monterey. (Id.) Compare Poquoson’s full-time governmental officials and staff, post office, zip code, full taxing authority, newspaper, and over four hundred licensed businesses.

20. Tidewater is no more persuasive when it addresses the Tuck tests and the facts in the instant case. Below, Counterproponents respond to Tidewater’s mangled construction of those standards and the facts about Poquoson.

21. Signal Population Coverage. Tidewater offers slightly higher numbers for the proposed Class A’s coverage of the Urbanized Area and Newport News than did Counterproponents. However, Tidewater offers no map or engineering explanation to

support its figures. In any event, even utilizing Tidewater's data, the Poquoson station would serve only 15% of the Urbanized Area and 25% of Hampton. This weighs heavily in the Counterproposal's favor. See cases cited at pp 13-14 of the Counterproposal.⁶

22. Size and Proximity of the Suburban Community Relative to the Core Community. Tidewater offers no authority for the proposition that "this factor is of paramount importance." (At 6.) As noted in the Counterproposal (see cases cited at 14), the Commission has repeatedly said just the opposite. In any event, it is not Counterproponents, but the Commission itself, which has opined that "the [Norfolk Urbanized Area] is not a typical core city/suburban city situation," in that "there is not one identifiably dominant community within the Urbanized Area." Elizabeth City, North Carolina, and Chesapeake, Virginia, 9 FCC Rcd 3586, 3587 (Chief, Allocations Branch 1994). See also Bon Air, Chester, Mechanicsville, Ruckersville, Williamsburg and Fort Lee, Virginia, 11 FCC Rcd 5758 (Chief, Policy and Rules Division 1996) (holding that Williamsburg, a city of 11,998 persons within the Norfolk Urbanized Area, was an independent community under Tuck.)

23. Poquoson is clearly smaller than some of the other cities in the Norfolk Urbanized Area, and is to a great degree a "bedroom community." (At 7.) But Tidewater has failed to establish any interdependent relationship between Poquoson and any "core city" within the Urbanized Area. Moreover, Poquoson (population 11,566) is not "little" (id.), in the abstract or relative to other communities which have been allotted channels. Based on U.S. Census and FCC data (copies of which are attached as Exhibit 4), Poquoson is one of only two cities in the Commonwealth of Virginia without a radio station. It is the largest city in the state without a local radio outlet.

⁶ In Greenfield and Del Rey Oaks, supra, the proposed station covered the entire Urbanized Area.

24. The Extent to Which Community Residents Work in the Larger Metropolitan Area, Rather than the Specified Community. Tidewater dismisses counsel's recitation of what he was told by the director of the Poquoson City Planning Commission as "inadmissible hearsay." (At 7.) But this not an adjudication and, if the rules of evidence were to be applied strictly, Tidewater's President's own declaration (Attachment 1) would be unacceptable. Tidewater has not established any "relationship with Newport News." (Id.) The bottom line is that Poquoson's residents have made a deliberate choice to preserve the primarily residential character of their community, underlining their independence (except for commuting) from Hampton, Newport News, and York County. This is but one factor in the Tuck analysis, and pursuant to the authorities cited at page 5 of the Counterproposal, it is not a critical factor.

25. Whether the Smaller Community Has Its Own Weekly Newspaper or Other Media That Cover the Community's Local Needs and Interests. Poquoson has a weekly newspaper that focuses on its needs and interests. It also has a website, the content of which has been submitted to the Commission, a cable access channel that broadcasts City meetings and events,⁷ and a city government newsletter. Tidewater disputes none of this, but relies on the absence of a specific reference to the need for a radio station in one paragraph of Poquoson's Plan. This is nonsense.

⁷ Tidewater attempts to undercut the significance of the access channel by questioning where the cable community unit is located. What possible relevance does this have to the Poquoson access channel?

26. Whether Community Leaders and Residents Perceive the Specified Community as Being an Integral Part of, or Separate From, the Larger Metropolitan Area. Tidewater claims Counterproponents offer no acceptable evidence here. But Tidewater ignores Counterproponents' June 4, 2002, Errata and Supplement, attached hereto for reference as Exhibit 5. It includes a copy of a letter from Clyde R. Hoey, II, President and CEO of the Virginia Peninsula Chamber of Commerce.⁸ Mr. Hoey states that the Chamber "supports the concept that the City of Poquoson should have its own FM radio station to enlighten its community." He describes Poquoson as a thriving, full service, independent city...." He cites the "need for a local, full-time media outlet...to serve the needs and interest of Poquoson residents and institutions." Mr. Hoey explains that Poquoson became independent of York County in 1952 and was chartered as a City in 1975 because of its "distinctive character." "Poquoson is a growing community with a high quality of life focus...a local radio station would assist this process by promoting the community, marketing its businesses, and contributing to its separate community identity," says Mr. Hoey. He concludes: "We believe the FCC should give strong consideration to the proposed radio station for the City of Poquoson." (Emphasis added.)

27. Thus, Mr. Hoey echoes the Poquoson website and Plan, which point out that the City's emancipation and incorporation were triggered by a referendum of residents who wanted a separate status in order to preserve what they considered the best school system in Virginia from absorption into York County's system. (See

⁸ Lest Tidewater argue this letter was late-filed, Counterproponents' counsel was advised by Mr. Hoey that he mailed it to the FCC on May 31, 2002. It was included in the Supplement to ensure that it was included in the record. There is no need for counsel to submit an affidavit on this score or as to other representations in the Counterproposal which were covered by counsel's signature on the pleading.

Counterproposal at Exhibit 2, page 2-3.) Tidewater demeans this declaration of independence as meaningless (at 9), but the record here says otherwise.

28. Whether the Specified Community Has Its Own Local Government and Elected Officials. Poquoson cannot seriously be compared to Belle Haven. (See Reply Comments at 10.) Belle Haven, while it is a cognizable community,⁹ is not a City. It does not have the comprehensive, full-time City government that Poquoson has, including everything from a City Assessor to a City Manager to a Finance and Planning Department to a City Attorney.

29. Whether the Community Has Its Own Commercial Establishments, Health Facilities and Transportation Systems. Tidewater relies on one paragraph in the declaration of its President here, which is worthless. Mr. Paulus' thumbnail geography lesson is of little relevance. His "opinion," based on "conversations with various [unidentified] people within the community" about Poquoson's ability to stand alone is undocumented and contradicted by the huge body of evidence offered by Counterproponents. Most outrageous is Tidewater's assertion that "Poquoson only has a few commercial establishments to serve the residents...." (At 10.) Exhibit 3 to the Counterproposal names hundreds of businesses in Poquoson.

30. Summary of Tuck Analysis. Counterproponents maintain their position that on Tuck factors 2, 3, 4, 5 and 8, Poquoson meets the Commission's tests. Moreover, on factor 6, Poquoson's substantial business community should secure it some credit. Poquoson is a separate and vibrant city with a government, civic

⁹ See V, infra.

organizations and an independent community spirit which led to its emancipation fifty years ago. Under the authorities cited in the Counterproposal (at 8-16), particularly the two decisions focused on Chesapeake and Williamsburg in the Norfolk Urbanized Area, a holding in Counterproponents' favor is dictated.

V. Belle Haven Is A Cognizable Community For Section 307(b) Purposes.

31. Relying on Mr. Paulus' declaration, Tidewater further asserts that Belle Haven is not a community for allotment purposes. (At 3-4.) Based on a perfunctory drive through and visit to Belle Haven and descriptions of conversations with "[unidentified] occupants of an insurance agency", Mr. Paulus asserts that Belle Haven has only four businesses and 250-300 people. Mr. Paulus offers that Belle Haven is "a very, very small community." (At Exhibit 1, para. 3-4.)¹⁰

32. In an effort to ensure a complete record concerning Belle Haven, Counterproponents instructed their Operations Manager, David Morgan, to visit Belle Haven and conduct a thorough investigation of the community.¹¹ Mr. Morgan did so on July 24 and 29, 2002. Attached as Exhibit 6 hereto is Mr. Morgan's declaration summarizing his findings, which includes a map, Verizon and Yellow Page business listings, and photographs of the town. Also attached are declarations secured by Mr. Morgan from Belle Haven's Mayor, H.A. Floyd, III, and a Town Councilman who is also Town Constable, Herbert Thom, Jr. (Exhibits 7 and 8, respectively.)

¹⁰ Tidewater cites only one case, Gretna, Florida, 6 FCC Rcd 633 (1991). But, as Tidewater acknowledges, the community there at issue was not incorporated, and as it neglects to mention, it was not listed in the Census or recognized by the State, as Belle Haven is. The case is simply not on point.

¹¹ This was not necessary at the counterproposal stage because of the rebuttable presumption that Belle Haven was a community because of its legal status. Tidewater's attempt to rebut the presumption now warrants a comprehensive response.

33. Mr. Morgan finds that Mr. Paulus' half-baked, result-oriented sweep through Belle Haven yielded substantially inaccurate and incomplete information. Mr. Morgan states that Belle Haven was incorporated in 1895 pursuant to a Town Charter, a copy of which is attached to his declaration. The Charter provides a mayor, recorder, and five councilpersons, an election process, town ordinances, resolutions and by-laws, regularly-scheduled meetings and a journal of the proceedings. It also provides for a Town Constable to assist the County Sheriff and collect taxes. According to Mr. Morgan, Belle Haven has adhered to this Charter, and the declarations of the two Town officials buttress this assertion.

34. Both officials report they were elected in an election on May 7, 2002, and they meet with the rest of the Town Council monthly. Mr. Thom enforces Town ordinances regarding the maintenance of housing in the Town and performs the Town Constable function. Both officials "consider Belle Haven to be a separate and distinct community whose residents identify themselves as living in Belle Haven." They cite the Town's government, many businesses, post office, churches and regional arts center as evidence of its identity and vitality. They note the Town provides garbage collection and street lights. And the Mayor and Town Constable agree that "a new radio station would potentially improve the economic and cultural vitality of our town and surrounding areas."

35. Mr. Morgan provides a map he prepared based on local maps which "illustrates the actual configuration of the recognized Belle Haven community." This includes the incorporated Town's boundaries and adjacent commercial districts, including the Colonial Square shopping and professional center on Route 13 (the

Eastern Shore's main arterial) and nearby streets. He adds a legend of businesses and institutions which identify with Belle Haven and service its residents. These number in excess of 40 different entities. The Mayor and Town Constable agree that these "adjoining areas" and the incorporated Town combine to form the 'community' generally known as 'Belle Haven.' "

36. In addition to the businesses, Mr. Morgan found several churches, an arts center, a Moose Lodge, and other non-commercial or governmental offices in Belle Haven. Based on his research and the Town officials' declarations; he concludes that "Belle Haven is a separate and distinct community fully deserving of its own local radio outlet."

37. Belle Haven may be small. But Tidewater has failed to rebut the presumption derived from its incorporation and Census status that Belle Haven is clearly a "distinct geographical population grouping,"¹² i.e., a grouping of residents with a common identity evidenced by a town government, businesses, churches and civic and arts organizations. The Commission has held that even the smallest communities deserve local radio outlets where this showing is made. See, e.g., Everglades City, Florida, 15 FCC Rcd 9427 (2000) (town with 321 persons held community where incorporated with post office, zip code, and other indices of community); Kearnsville, Florida, 10 FCC Rcd 9831, 9833 (1995) (on application for review, television channel allotted to community with population between 170 and 450 persons with no town government, no subjective evidence (like affidavits) of "identifiable grouping," and only one gas station apparent, based on number of business licenses, fire department,

¹² Implementation of BC Docket No. 80-90, 5 FCC Rcd 934 (1990) (community of 150 persons granted channel).

community center and church with town's name); Harrodsburg and Keene, Kentucky, DA 02-1652 (Assistant Chief, Audio Division, July 19, 2002) (community of 200 persons held community for allotment purposes based on post office, zip code, road sign, businesses within its borders¹³ and petition from residents.)¹⁴

VI. Conclusion.

Tidewater has made a valiant attempt to obfuscate the record and distract the Commission, but the facts are clear. Counterproponents' Poquoson site is viable. Station WAZP will serve Cape Charles in WROX's absence. Poquoson is an independent community within the Norfolk Urbanized Area. And Belle Haven is a cognizable 307(B) community. The Counterproposal should be adopted.

¹³ In the instant case, some of Belle Haven's businesses are outside its corporate borders, but they are plainly Belle Haven businesses, based on the Mayor's and Town Constable's declarations, Postal Service addresses and Yellow Page Listings.

¹⁴ Counterproponents submit that they have made a powerful case for Belle Haven's allotment. They again state that they remain interested in the channel should it be allotted. However, in the unlikely event that the Commission disagrees, Counterproponents still ask that the allotment of Channel 291A to Poquoson be addressed in this rulemaking. Tidewater has not disputed that the Counterproposal was a properly filed, mutually exclusive counterproposal, and with the Poquoson allotment now having been put on public notice and challenged, it is ripe for resolution regardless of whether a channel is allotted to Belle Haven.

Respectfully submitted,
COMMONWEALTH BROADCASTING, L.L.C.
and
SINCLAIR TELECABLE, INC.,
DBA SINCLAIR COMMUNICATIONS

By: 
Howard M. Weiss, Esquire
FLETCHER, HEALD & HILDRETH, P.L.C.
1300 North 17th Street, 11th Floor
Arlington, Virginia 22209
(703) 812-0400
Their Counsel

August 14, 2002

CERTIFICATE OF SERVICE

I, Evelyn M. Ojea, hereby certify that on this 14th day of August, 2002, I caused copies of the foregoing Response to Reply Comments on Counterproposal to be delivered, via United States Postal Service, or as otherwise specified, to the following individuals:

Gary S. Smithwick, Esquire
Smithwick & Belendiuk, P.C.
5028 Wisconsin Avenue, N.W., Suite 301
Washington, D.C. 20016

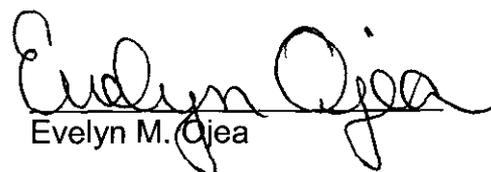
Lauren Colby, Esquire
Law Offices of Lauren A. Colby
10 East Fourth Street
P.O. Box 113
Frederick, Maryland 21705-0113

Hand Delivery

John Karousos
Media Bureau
Federal Communications Commission
The Portals II
445 Twelfth Street, S.W.
Washington, D.C. 20554

Hand Delivery

H. Barthen Gorman, Esquire
Media Bureau
Federal Communications Commission
The Portals II
445 Twelfth Street, S.W.
Washington, D.C. 20554


Evelyn M. Ojea