

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

OCT - 1 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Assistant Chief, Audio Division
Media Bureau

**COUNTERPROponents' FURTHER RESPONSE TO TIDEWATER'S
OPPOSITION TO COUNTERPROponents' MOTION**

Commonwealth Broadcasting, LLC and Sinclair Telecable, Inc., dba Sinclair Communications (collectively "Counterproponents") hereby submit their Further Response To Tidewater's Opposition To Counterproponents' Motion for Leave To File Response To Reply Comments on Counterproposal. In support hereof, they state as follows:

1. Tidewater's Opposition is not limited to responding to Counterproponents' Motion for leave to file the Response. Instead, it is an improper blunderbuss response on the merits. Nevertheless, Counterproponents will not burden the Commission with a reply on the issue of whether the Response should be considered, which is fully pleaded. However, Counterproponents must respond to Tidewater's unfair exploitation of an obvious typographical error to attack a phantom hypothetical site, Tidewater's late-filed zoning argument, and Tidewater's transparent effort to sabotage this proceeding

and dramatically delay consideration of the Counterproposal by asking for severance of the Counterproposal and initiation of a needless additional rulemaking. Tidewater no doubt would then reinstitute its anti-competitive objections to the Poquoson proposal therein.

I. Tidewater's Request For Another Rulemaking Should Be Rejected And Bay Broadcasting's Proposal That Channel 252 Should Be Allotted To Belle Haven Should Be Adopted

2. Seizing on a footnote in Counterproponents' Response to the effect that, even if the Belle Haven proposal fails, the Poquoson component of the Counterproposal is ripe for resolution, Tidewater argues that the Counterproposal is somehow not mutually exclusive with Bay Broadcasting's initial proposal for Channel 250. (At 13.) But the Counterproposal was and is most certainly "mutually exclusive" with the initial proposal -- both could not be granted when submitted to the Commission. That is all the rules require.

3. Moreover, there is now available a compromise which will permit channels for Crisfield and Belle Haven. On July 11, 2002, Bay Broadcasting submitted Comments and an engineering report which demonstrated that Channel 252B1 or A can be allotted to Belle Haven instead of Channel 250. This would permit the substitution of Channel 250A for Channel 245A for WBEY at Crisfield. Counterproponents have no objection to this compromise, which will serve both parties' interests and the public interest.¹

4. Adoption of this compromise would not undercut the initial mutual exclusivity of Bay Broadcasting's proposal and the Counterproposal. None of the cases

¹ It will not of course serve Tidewater's anti-competitive interest in blocking or delaying WROX from serving more persons. (See n. 23 at 14.) But that should not concern the Commission in the slightest.

cited by Tidewater requires dismissal of a Counterproposal which, although properly mutually exclusive when filed, is later resolved consistent with the initial proposal through a channel or site switch, whether Commission-initiated or not. Indeed, the public interest and Section 307(B) require that, if both proposals can be accommodated, resulting in more service to the public, the Commission should take that approach.

**II. Tidewater's Cynical Effort to Exploit An
Obvious Typographical Error Is Unavailing;
The Poquoson Reference Site Is Viable**

5. Tidewater states that the declaration of L. Joseph Hardin regarding Counterproponents' Poquoson reference site is "irrelevant." (At 8.) The coordinates provided by Mr. Hardin are for a site that is short-spaced and unusable, according to Tidewater. (Id.)

6. However, as the attached declarations of Messrs. Hardin and Jefferson Brock explain, the coordinates in Mr. Hardin's July 24 declaration reflect an obvious typographical error. Mr. Hardin's intent was to have typed the coordinates for the Poquoson reference site proposed in the Counterproposal -- 37°12'30", 76°25'05" (NAD 1927) -- which he in fact studied. However, a typist presented Mr. Hardin with a draft with the following incorrect coordinates -- 37°12'30", 76°29'05". He failed to catch the error, nor did anyone else prior to the coordinates' submission to the FCC. Mr. Hardin apologizes for any inconvenience this may have caused and "reaffirm[s] that the site I analyzed was the original reference site specified in the Counterproposal."

7. Mr. Brock adds that in typing his Technical Statement attached to the Response, he erroneously referred to the incorrect coordinates -- 37°12'30", 76°29'05" -- used in Mr. Hardin's declaration. Further, when Mr. Brock studied an alternative site

based on a change of two seconds longitude, he incorrectly typed 37°12'30", 76°29'07", rather than the alternative site two seconds away that he had actually studied -- 37°12'30", 76°25'07". That this is the case is plainly demonstrated by the fact that Mr. Brock included the correct coordinates for the original and alternative sites in Exhibits 1, 2, 3 and 4 to his Technical Statement, including the maps and spacing study that he submitted. Further, Mr. Brock reaffirms "that the alternative site is on land and is adequately spaced, and that Counterproponents' proposed facility would place a city grade signal over Poquoson from this site [37°12'30", 76°25'07" (NAD 1927)]." (At 2.)

8. The above circumstances are unfortunate. Counterproponents regret the misunderstanding, but a typographical error certainly does not constitute a fatal defect. Moreover, it must be inferred that Tidewater well knows that its attack on pages 8 and 9 of the Opposition and William Brown's Technical Exhibit directed at a phantom site are misplaced. Tidewater's own Reply Comments on the Counterproposal and Mr. Brown's July 2002 Technical Exhibit focused on the site at 37°12'30", 76°25'05". That is the site Counterproponents defended in the Response and that is the site for which Mr. Brock developed an alternative two seconds -- not four minutes -- away for which he submitted a spacing study. Thus, upon reviewing Counterproponents' Response, Tidewater had to know that there was an innocent mistake here. Tidewater's cynical exploitation of the error disserves the rulemaking process and underlines Tidewater's motivation to obfuscate and delay, rather than resolve and clarify.

**III. Tidewater's Inexplicably Late Zoning
Argument Fails To Rebut The Presumption
Of Suitability At The Rulemaking Stage**

9. Doing exactly what it criticizes Counterproponents for, Tidewater exploits its latest pleading to raise an entirely new argument -- the alleged unsuitability of the Poquoson site for zoning reasons. (At 9-10; Attachment B.) In support of this last minute objection, Tidewater proffers a hearsay declaration from its Chief Operator, who has no obvious qualifications to opine on the matter. He asserts that a special use permit and various other governmental approvals would be required for construction of a tower at the specified site. Moreover, he quotes a County Planning Commission official who says an attempt to build there "would cause him 'real concern.'"

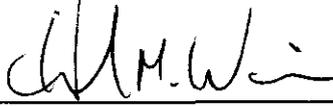
10. Tidewater's argument here is too little, too late. The argument could easily have been made in Tidewater's earlier Reply. Plainly, it was unfairly held in abeyance in the hope that Counterproponents' opportunity to respond could be preempted. In any event, the Commission has emphatically held that, in rulemakings, as long as a theoretical site is shown to exist, the agency will "presume that it is theoretically available and will use it as a basis for making the allotment." Beverly Hills, Chiefland, Holiday, Micanopy and Sarasota, Florida, 8 FCC Rcd 2197, 2198 (Chief, Allocations Branch 1993).

11. While the Commission will entertain showings that no theoretical site exists because of zoning or other similar issues, conclusory statements and a hearsay showing that a site may not be available are not sufficient. Id. Objector must overcome the presumption in favor of acceptance with "a detailed analysis demonstrating that [the channel] is an unusable channel." Lake Crystal, Madelia, Mankato and Vernon Center,

Minnesota, 13 FCC Rcd 5269 (Chief Allocations Branch 1998). Further, objections must address not only the theoretical rulemaking site, as Tidewater has done here, but also available alternative sites. Albion, Lincoln and Columbus, Nebraska, 10 FCC Rcd 11931, 11934 (1995).

12. Tidewater merely alleges, based on rank hearsay, that Counterpoponents' theoretical site might not be approved by local land use authorities. But even if it is true that the site would have to be approved by various authorities and is on property zoned residential, this proves nothing. Nor does the allegation that a local official says the theoretical site causes him "real concern" overcome the presumption of approval at the allotment stage. Compare Manitowoc and Two Rivers, Wisconsin, 11 FCC Rcd 14569, 14570 (Chief Allocations Branch) (Commission approves allotment despite letters from mayor and manager of airport urging rejection on environmental grounds and fact that site in residential area, and letter from property owner of theoretical site stating that he did not intend to allow tower on his property, holding that "none of the above arguments sufficiently demonstrates that no sites exist....") Tidewater has utterly failed to make its case.

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

October 1, 2002

EXHIBIT NO. 1

DECLARATION OF L. JOSEPH HARDIN

I, L. Joseph Hardin, hereby declare as follows under penalty of perjury:

1. I am employed by Commonwealth Broadcasting, LLC and Sinclair Telecable, Inc., as Chief Engineer for Stations WNIS, WTAR, WROX-FM, WKOC and WEXM.

2. On July 24, 2002, I prepared a declaration which was submitted as Exhibit 2 to Counterproponents' Response to Reply Comments on Counterproposal, filed on August 14, 2002. My declaration described my survey of the original reference point site utilized by Counterproponents at Poquoson, Virginia which had been attacked by Tidewater Communications, Inc., as deficient because it was not on land. My GPS survey demonstrated that Tidewater was wrong. I established that the site was in fact on land.

3. In my previous declaration, I referred to the coordinates for the site at issue as 37°12'30", 76°29'05" (NAD 1927). This was incorrect. The coordinates for Counterproponents' original reference site and the one that I studied were 37°12'30", 76°25'05" (NAD 1927). I apologize for any inconvenience this error may have caused. It was inadvertent and resulted from a typing error by a secretary and inadequate proofreading on my part. No one discovered the error before the statement was submitted to the Commission. I reaffirm here that the site I analyzed was the original reference site specified in the Counterproposal.

4. I affirm that the foregoing is true based on my knowledge and belief.

Date:

9/24/02

L. Joseph Hardin
L. Joseph Hardin

EXHIBIT NO. 2

GRAHAM BROCK, INC.

BROADCAST TECHNICAL CONSULTANTS

DECLARATION OF JEFFERSON G. BROCK

I, Jefferson G. Brock, hereby declare as follows under penalty of perjury:

1. I am a consulting engineer. I prepared a Technical Exhibit which was attached to the Response to Reply Comments on Counterproposal submitted by Commonwealth Broadcasting, L.L.C., and Sinclair Telecable, Inc., in MM Docket No. 02-76 on August 14, 2002.

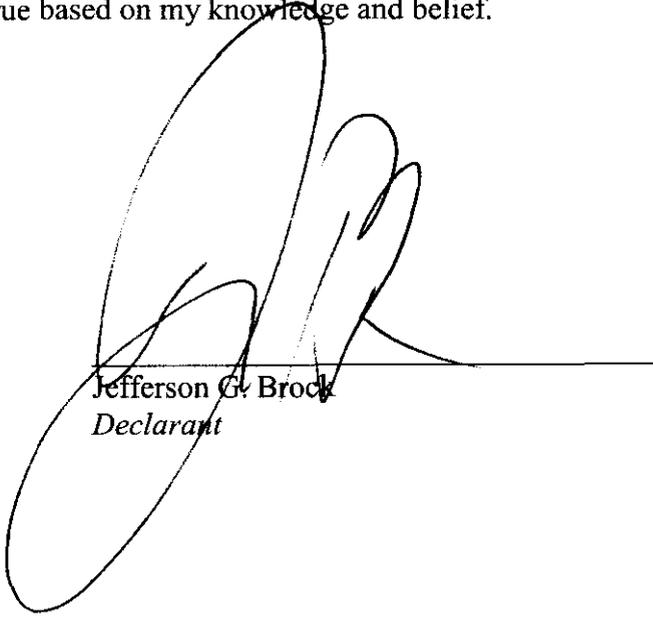
2. The Technical Exhibit contains a typographic error reflecting a similar error in the Declaration of L. Joseph Hardin, which was Exhibit 2 to the pleading. Mr. Hardin's declaration mistakenly uses the coordinates 37° 12' 30", 76° 29' 05" (NAD1927) for the Poquoson, Virginia, allocation reference site at issue which he surveyed (site actually located in the vicinity of Seaford, Virginia). As he states in his declaration attached hereto, however, he meant to have typed 37° 12' 30", 76° 25' 05"(NAD1927), the coordinates for the site that he surveyed. The latter are the coordinates for the original reference point specified in Counterproponents' Counterproposal and attached in the Reply Comments filed by Tidewater Communications, Inc., on July 16, 2002.

3. Unfortunately, in preparing my Technical Statement on the word processor, I focused on Mr. Hardin's erroneous coordinates. I stated that the alternate reference site analyzed was 37° 12' 30", 76° 29' 07"(NAD1927), a change of two seconds longitude from the incorrect original reference point cited by Mr. Hardin's declaration. However, in Exhibits 2, 3 and 4 to my Technical Statement, I consistently referred to the correct alternate site as 37° 12' 30", 76° 25' 07"

(NAD1927). This was in fact the site I analyzed, as to location (on land v. water), spacing and city grade coverage. I again affirm here that the alternative site is on land, is adequately spaced, and that Counterproponents' proposed facility would place a city grade signal over Poquoson from this site.

4. I affirm that the foregoing is true based on my knowledge and belief.

This the 23rd day of September, 2002.



Jefferson G. Brock
Declarant

CERTIFICATE OF SERVICE

I, Evelyn M. Ojea, hereby certify that on this 1st day of October, 2002, I caused copies of the foregoing "Counterproponents' Further Response To Tidewater's Opposition To Counterproponents' Motion" to be delivered, via United State 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, DC 20016

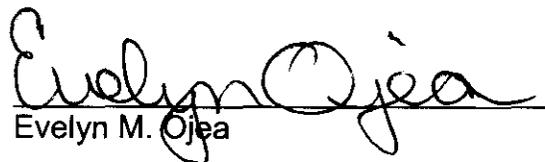
Lauren Colby, Esquire
Law Offices of Lauren A. Colby
10 East Fourth Street
P.O. Box 113
Frederick, Maryland 21705-0113

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