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Before the
Federal Communications Commission
Washington, DC 20554

JAN 23 2004
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Section 73.202(b))	MB Docket No. 02-76
Table of Allotments)	RM-10405
FM Broadcast Stations)	RM-10499
(Crisfield, Maryland, Belle Haven, Nassawadox,)	
Exmore, and Poquoson, Virginia)	
To	Assistant Chief, Audio Division	
	Media Bureau	

MOTION TO STRIKE

Tidewater Communications, LLC ("Tidewater"), by its attorneys hereby moves the Assistant Chief, Audio Division, to strike and not consider the pleading denominated "Sur-Reply to Reply to Consolidated Response to Petitions for Reconsideration" filed January 14, 2004, by Commonwealth Broadcasting, L.L.C. and Sinclair Telecable, Inc. dba Sinclair Communications (jointly referred to herein as "Sinclair"), with respect to Tidewater's petition for reconsideration of the Report and Order of the Audio Division, *Crisfield, Maryland; Belle Haven, Cape Charles, Exmore, Nassawadox, and Poquoson, Virginia*, DA 03-2980, released September 25, 2003 (*R&O*). In support of this motion, the following is shown.

**Sinclair's "Sur-Reply" is
Unauthorized and May Not Be Considered**

Sur-Replies are appropriate only when the Commission grants leave to file them.¹ Here, Sinclair did not even request leave to file its pleading. In most cases, the

¹ See, for example, *Media One Group, Inc. et al.*, 15 FCC Rcd 774 (2000)

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Commission has refused to accept such pleadings,² and almost always when leave was requested. Thus, to the extent necessary, Tidewater requests leave to accept this motion.

Sinclair claims that the Commission should consider its pleading pursuant to its discretion under Section 1.415(d) of the Rules. Sinclair claims that it is addressing “new matters” raised by Tidewater in its Reply. Sinclair is mistaken. It was Sinclair that raised the matters to which Tidewater properly replied. Sinclair at paragraph 10 of its Response opened the door to Tidewater’s reply: “And, even if applicable to an allocations issue of this nature, Section 73.312(a) expressly mandates the use of the USGS or other governmental maps, “whichever is latest” [emphasis in original].”

An Inexact Method Was Used to Determine the Coordinates of Sinclair’s Site

Sinclair misses the most important point of Tidewater’s Reply. The use of the map on the unofficial internet website, instead of an official government map, to plot Sinclair’s site resulted in an erroneous finding. Tidewater showed that a portion of the *R&O* was based on an error in fact. At *R&O* paragraph 7, it was determined that the transmitter site is on “dry land,” by “using detailed maps and other relevant material from the United States Geological Survey (USGS) internet site (www.usgs.gov).” These materials include a topographic map and a navigational photo of the area designated as Sinclair’s transmitter site at reference coordinates of 37-12-30 North Latitude and 76-25-05 West Longitude [footnote omitted]. They clearly show that the reference site is on dry land.” Tidewater has consistently argued that Section 73.312 of the Commission’s rules require the use of 7.5 minute USGS topographic maps in locating transmitter sites.

² See *Veracom, Inc.*, 14 FCC Rcd 16217 (1999); *North Pacific International Television, Inc.*, 17 FCC Rcd 879 (2002),

But, Tidewater showed that the decision in the *R&O* was not based on the examination of USGS or other governmental maps. Tidewater attached as Exhibit A a copy of documents provided by the Commission in response to Tidewater's Freedom of Information Act request for the materials the Audio Division reviewed in making its determination that Sinclair's site was on dry land. Those materials are copies of maps printed from a commercial website, maptech.com-- not governmental maps. Tidewater attached as Exhibit B and Exhibit C to its Reply the declarations of two experts in mapping. Sinclair complains that Tidewater should have submitted its evidence previously—at "the very least...at its Petition for Reconsideration and not at the end of the pleading cycle."

The short answer is that Tidewater couldn't submit the information until after the deadline for submitting petitions for reconsideration had elapsed. After the *R&O* was released, Tidewater's counsel electronically submitted a Freedom of Information Act Request seeking copies of materials and requested expedited consideration in light of the upcoming deadline for petitions for reconsideration. That deadline was November 17, 2003. The FCC's letter³ providing the maps is dated **November 19, 2003**—too late to include within the petition. The declarations submitted with Tidewater's reply were not necessary until Tidewater reviewed the FCC's response to Tidewater's FOIA request. But, in light of Sinclair's direct comments on the map issue, Tidewater's reply was appropriate and required.

Sinclair argues that the unofficial maps relied upon by the FCC are USGS maps, "merely distributed online by such private entities as the online map site, Maptech – and made accessible to the public by, *inter alia*, a link from the USGS website." The problem that arises from using

³ Sinclair cites the FCC's letter transmitting its work product as evidence that "the FCC itself has recognized here that online USGS maps are, in fact, government maps. The letter does nothing of the sort. It merely describes the process used by the staff engineer that "reached his conclusion by viewing the

unofficial electronic maps is that the Commission cannot know how the unofficial website developed the program to calculate the plotting of coordinates. The official map shows the coordinates as being offshore. The unofficial map shows the coordinates as being on dry land but there is no explanation for why there is a discrepancy. Tidewater has consistently argued these official maps are the only maps on which the FCC can rely in plotting transmitter sites. And, while Sinclair accuses Tidewater of attempting to “create a fog that obscures the truth,” let us not forget that it is Sinclair’s lack of attention in specifying an offshore transmitter site that created this problem in the first place. Sinclair has provided no evidence to rebut Tidewater’s evidence that Sinclair’s reference site, when plotted on a paper USGS map, is offshore.

Sinclair’s submission of a portion of an agreement with USGS map distributors proves nothing about the accuracy of using online versions of maps versus paper maps as required by Section 73.312 of the Rules. Nothing in the agreement prevents the vendor from enhancing the maps for electronic distribution. Even in Exhibit 4 to Sinclair’s Sur-Reply (Criteria for Listing on “View USGS Maps and Images Online”), it is stated that “data available for online viewing must represent a substantial proportion of the actual available coverage of the featured USGS dataset(s).” This leads to the conclusion that some editing may be permitted in the online versions of the maps or in plotting the intersection of coordinates. Where there is a discrepancy, as there is in this case, the official government paper map must take precedence over the unofficial commercial map even if it were derived from a USGS map in the first instance. Otherwise how can the FCC determine that the information provided by the unofficial commercial company is accurate? To uphold the Bureau’s ruling in this case the FCC must find that the commercial, unofficial version of the map is somehow more accurate than the official

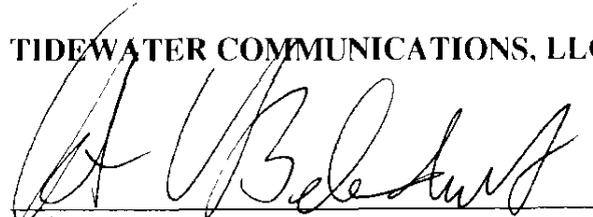
reference coordinates displayed on the USGS topographic map and navigational photo on-line at the USGS internet site.”

government version. Yet, there is no evidence in the record to suggest that the unofficial version of the map is somehow more accurate. On the contrary, it is clear that Section 73.312(a) of the Rules requires the use of a 7.5 minute USGS map to locate sites. Using such a map results in a finding that the site is over water as depicted on that map, and a determination that Sinclair's counterproposal was not technically correct and substantially complete on the date it was filed.

In light of Sinclair's discussion of the electronic maps in its Response, it was appropriate for Tidewater to reply to the argument. Sinclair's "Sur-Reply" is unauthorized and as such may not be considered. It should be stricken from this docket.

Respectfully submitted,

TIDEWATER COMMUNICATIONS, LLC

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

for Gary S. Smithwick
Its Attorney

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January 23, 2004

CERTIFICATE OF SERVICE

I, Sherry L. Schunemann, hereby certify that copies of the foregoing Motion to Strike were this 23th day of January, 2004, sent via First Class Mail, postage pre-paid (or by hand delivery, if so indicated), to the following:

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