

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

In the Matter of)	
)	
Amendment of Section 73.202(b))	MM Docket No. 02-76
Table of Allotments,)	RM-10405
FM Broadcast Stations.)	RM-10499*
(Crisfield, Maryland; Belle Haven, Cape)	
Charles, Exmore, Nassawadox, and Poquoson,)	
Virginia))	

**REPORT AND ORDER
(Proceeding Terminated)**

Adopted: September 25, 2003

Released: September 29, 2003

By the Assistant Chief, Audio Division:

1. In response to a Petition for Rule Making filed by Bay Broadcasting, Inc. (“Petitioner”) the Audio Division considers herein a *Notice of Proposed Rule Making*¹ proposing the substitution of Channel 250A for Channel 245A at Station WBEY(FM), Crisfield, Maryland. Petitioner states that by changing its frequency to Channel 250A, Station WBEY could avoid ducting interference that it receives from Station WFPG(FM), Atlantic City, New Jersey, and could operate with maximum Class A FM facilities. Petitioner filed Comments expressing its continued interest in implementing the change in the operating frequency of Station WBEY from Channel 245A to Channel 250A. Commonwealth Broadcasting, L.L.C., licensee of Station WEXM(FM), Exmore, Virginia, and Sinclair Telecable, Inc., d/b/a/ Sinclair Communications, licensee of Station WROX-FM, Cape Charles, Virginia, (collectively “Sinclair”) filed “Counterproposal and Comments” (“Counterproposal”). In response to a Public Notice, Report No. 2559, issued July 1, 2002, setting forth the details of Sinclair’s Counterproposal,² Tidewater Communications, Inc. (“Tidewater”)³ filed Reply Comments on Counterproposal and Sinclair filed Reply Comments. Petitioner also filed Comments and Supplementary Comments on Sinclair’s Counterproposal. Sinclair filed a Motion for Leave to File a Response to Tidewater’s Reply Comments⁴ and the Response itself, to which Tidewater filed an Opposition and an Erratum to that Opposition. Sinclair filed a Motion for Leave to File a Further Response to Tidewater’s Opposition⁵ and the Further Response, to which

¹ *Crisfield, Maryland*, 17 FCC Rcd 6671 (M. Bur. 2002).

² Sinclair’s Counterproposal is identified by the rulemaking number of RM-10499*.

³ Tidewater is the licensee of Station WJOI(AM), Norfolk, Virginia; Station WNOR(FM), Norfolk, Virginia; and Station WAFX(FM), Suffolk, Virginia.

⁴ For good cause shown, and in order to assure a complete record, this motion is granted.

⁵ For good cause shown, and in order to assure a complete record, this motion is granted.

Tidewater filed an Opposition. For the reasons stated below, we deny Petitioner's request to allot Channel 250A to Crisfield, Maryland, and we grant Sinclair's Counterproposal to the extent indicated.

2. Sinclair's Counterproposal proposes the allotment of Channel 250B1 to Belle Haven, Virginia,⁶ which would provide the first local aural transmission service to that community. To accommodate the foregoing allotment, Sinclair requests the substitution of Channel 290A for vacant Channel 252A at Nassawadox, Virginia. To accommodate this channel substitution, Sinclair requests the reallocation of Channel 291A from Exmore, Virginia, to Poquoson, Virginia,⁷ and the modification of the WEXM(FM) license to specify Poquoson, thus providing the first local aural transmission service to Poquoson. Because the reallocation of Channel 291A from Exmore to Poquoson would result in the removal of the only local FM station from Exmore, Sinclair proposes the reallocation of Channel 241B, Station WROX-FM, from Cape Charles to Exmore, Virginia.

3. In its Counterproposal, Sinclair also argues that the Petitioner has not specified a viable, adequately spaced site for its proposed facilities on Channel 250A. Sinclair's analysis of the transmitter site indicates that it is located in a tidal marshland area near the Chesapeake Bay, and that the site lies within a wildlife management area owned by the Commonwealth of Virginia and reserved for hunting and fishing. We have reviewed this matter, using detailed topographic maps available from the United States Geological Survey (USGS) internet site (www.usgs.gov). Utilizing these maps, we have determined that Petitioner's proposed transmitter site is located in marshland in the Saxis Marsh Waterfowl Management Area and Refuge, as suggested by Sinclair. If the transmitter site were changed so that it would be on dry land, it would then be short-spaced to other authorized radio broadcast facilities. Further, the proposed site would not place a 70 dBu contour over 100 percent of Crisfield, Maryland, as required by Section 73.315 of the Commission's Rules. At the time the *Notice of Proposed Rule Making* in this proceeding was adopted, it appeared that Petitioner's proposed 70 dBu contour would completely encompass Crisfield, but the more accurate, current map of Crisfield from the U.S. Census Bureau makes it clear that Petitioner's 70 dBu signal would not encompass all of Crisfield, Maryland. In light of the foregoing facts, Petitioner's request to substitute Channel 250A for 245A at Crisfield, Maryland, must be denied.

4. Tidewater filed Reply Comments on Counterproposal ("Reply Comments"), claiming that Sinclair's Counterproposal is fatally defective because (1) Belle Haven, Virginia, is not a community that qualifies for an FM radio broadcast allotment pursuant to Section 307(b) of the Communications Act of 1934, as amended ("the Act"); (2) the proposed transmitter site for Poquoson is over water and

⁶ The 2000 U.S. Census lists the population of Belle Haven at 480 persons.

⁷ The 2000 U.S. Census lists the population of Poquoson at 11,566 persons.

unsuitable; (3) Poquoson is a “bedroom community” for the Norfolk/Virginia Beach/Newport News Urbanized area and does not merit a first local service preference;⁸ and (4) there are no public interest benefits to removing the only commercial station from Cape Charles. Sinclair filed a Response to Tidewater’s Reply Comments in which it asserts that none of Tidewater’s arguments for denying Sinclair’s Counterproposal have merit. We will address each of these arguments.

5. In its Opposition to Sinclair’s Response, Tidewater argues that Sinclair may not amend and supplement its counterproposal to provide information it omitted from its counterproposal. Tidewater contends, *inter alia*, that the Commission should not consider Sinclair’s supplementary information concerning the community status of Belle Haven, Virginia, whether Poquoson should be considered a first local service under *Faye and Richard Tuck*,⁹ and whether Station WAZP(FM) is an adequate replacement for Station WROX–FM at Cape Charles, Virginia. Tidewater bases the foregoing argument on the principle that the Commission has stated many times that counterproposals must be technically correct and substantially complete when filed. This principle is usually cited when the technical engineering aspects of a counterproposal are incomplete or incorrect.¹⁰ We do not have to face the issue that Tidewater has attempted to raise in this proceeding, because the information submitted by Sinclair in its Counterproposal concerning the community status of Belle Haven, Virginia, Sinclair’s *Tuck* showing concerning Poquoson, and the information Sinclair submitted concerning the replacement of Station WROX-FM by Station WAZP(FM) were technically correct and substantially complete as filed. Since Tidewater questioned each of the foregoing showings, we permit Sinclair to answer those questions and provide a complete record on these matters.

6. We find that Belle Haven constitutes a community that qualifies for an FM allotment pursuant to Section 307(b) of the Act. Tidewater has failed to rebut the presumption, derived from the facts that Belle Haven is incorporated and listed in the 2000 U.S. Census, that Belle Haven is clearly a “distinct geographical population grouping,” *i.e.*, a grouping of residents with a common identity evidenced by a town government, local businesses, a post office and churches.¹¹ We observe that, without including businesses and other entities outside of the corporate boundaries of Belle Haven, Belle Haven has at least

⁸ The FM allotment priorities are: (1) First full-time aural service; (2) Second full-time service; (3) First local service; and (4) Other public interest matters. Equal weight is given to Priorities (2) and (3). See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982) (“*FM Priorities*”).

⁹ 3 FCC Rcd 5374 (1988) (“*Tuck*”).

¹⁰ See, e.g., *Broken Arrow and Bixby, Oklahoma, and Coffeyville, Kansas*, 3 FCC Rcd 6507, 6511 (M.M.Bur. 1988) and *Provincetown, Massachusetts et al.*, 8 FCC Rcd 19 (M.M.Bur. 1992).

¹¹ See, e.g., *Implementation of BC Docket No. 80-90 to Increase the Availability of FM Broadcasting Assignments (Semora, North Carolina)*, 5 FCC Rcd 934 (1990); *Everglades City, Florida*, 15 FCC Rcd 9427, 9429 (M.M. Bur. 2000); *Kenansville, Florida*, 10 FCC Rcd 9831 (1995); and *Harrodsburg and Keene, Kentucky*, 17 FCC Rcd 13506 (MB 2002).

9 businesses and six non-business institutions, including a U.S. Post Office, a Head Start facility, two churches with “Belle Haven” in their names, and an arts center, within its corporate boundaries.

7. Second, in reply to Tidewater’s allegation that Sinclair’s proposed transmitter site for Poquoson is over water and unsuitable, Sinclair’s Response pleading asserts that its transmitter site is on dry land. We have reviewed this matter, 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.¹² They clearly show that the referenced site is on dry land. In making this finding, we do not rely on Exhibits 1 and 2, which are attached to Sinclair’s Response. Exhibit 1 uses computer mapping programs and Exhibit 2 is based on the use of a “Garmin Global Positioning System” (“GPS”) receiver. There is no basis in the record for the Commission to evaluate the accuracy or reliability of these submissions. Moreover, those two exhibits, as originally submitted, used an incorrect longitude reference of “76-29-05,” rather than the correct reference of “76-25-05.” Tidewater’s Opposition to Sinclair’s Response and Tidewater’s Opposition to Sinclair’s Further Response make several arguments concerning this error which we need not consider since we are not relying on Exhibits 1 and 2 of Sinclair’s Response. Sinclair admitted that it made the foregoing incorrect longitude reference in its Further Response by mistake. In any event, we have made a determination, based on the USGS data, that the specified transmitter site is on dry land.

8. In its Opposition to Sinclair’s Response, Tidewater argues that even if the Commission were to allow Sinclair to specify a new set of reference coordinates for the proposed Poquoson transmitter site in the area near its original reference site, the proposed area would be unsuitable for a radio tower. Specifically, Tidewater explains that one of its employees consulted with the York County Department of Environmental and Developmental Services (“Department”) and was told that the the proposed Poquoson transmitter site is zoned “residential” and a tower could not be built without a special use permit. Further, the employee was told that the proposed transmitter site would require approval from the Department because it falls within the Chesapeake Bay Preservation Area. The Department contact also explained that approvals would have to be obtained from the “Wetlands Board” and the Army Corp of Engineers. Lastly, Tidewater’s employee contacted the York County Planning Commission, which is the organization that would handle any application for any tower in York County, the county in which Sinclair’s proposed transmitter site is located, and was informed that any attempt to build a tower at Sinclair’s proposed transmitter site would cause “real concern.”

9. As long as a theoretical transmitter site is shown to exist, the Commission will presume, at the allotment stage, “that it is theoretically available and will use it as a basis for making the allotment.”¹³ Tidewater has not overcome the presumption in favor of accepting the site as available with a “detailed analysis demonstrating that [the channel] is an unusable channel.”¹⁴ In this regard, Tidewater merely

¹² When viewing either the topographic map or navigational photo, coordinate information (latitude and longitude) is simultaneously displayed for any particular point chosen on the map or photo.

¹³ This quotation is from *Beverly Hills, Florida, et al.*, 8 FCC Rcd 2197, 2198 (M.M. Bur. 1993)

¹⁴ See *Lake Crystal, Minnesota, et al.*, 13 FCC Rcd 5269, 5272 (M.M. Bur. 1998). The case defines “unusable channel” as a channel for which there are no suitable or available sites in the fully spaced area.

alleges, based on hearsay, that Sinclair's theoretical site might not be approved by local land use authorities. Even if the site might have to be approved by various authorities, and is on property zoned residential, these allegations do not prove that the site is unavailable. Lastly, the allegation that a local official believes the theoretical site causes "real concern" does not overcome the presumption that the site is available at the allotment stage.¹⁵ We conclude that Tidewater has not demonstrated that Sinclair's proposed transmitter site at Poquoson and the area surrounding that transmitter site is unsuitable for a transmitter or that a transmitter site is unavailable in that general area.

10. Further, as Sinclair demonstrated in its Response pleading, changing the longitude reference by two seconds to "76-25-07" results in a transmitter site that is further from the water than the initial transmitter site, thus providing greater opportunity for a prospective licensee to find a transmitter site. We have the discretion to make such a minor change in an allotment site.¹⁶ Therefore, the coordinates for the Channel 291A Poquoson allotment will be: 37-12-30 North Latitude and 76-25-07 West Longitude.

11. Third, since Poquoson is within the Norfolk-Virginia Beach-Newport News, Virginia Urbanized Area ("Norfolk Urbanized Area"), Sinclair was required to submit a *Tuck* analysis demonstrating that Poquoson is sufficiently independent of that urbanized area that it would be justified in receiving a first local preference under priority (3) of the *FM Priorities*.¹⁷ Under *Tuck*, we examine such proposals by considering three criteria: (1) the signal population coverage, (2) the size and proximity of the proposed community to the central city of the urbanized area, and (3) the interdependence of the proposed community to the urbanized area.¹⁸ The interdependence factor is the most important criteria

¹⁵ Sinclair requests that the Commission compare this case with the agency's decision in *Manitowoc and Two Rivers, Wisconsin*, 11 FCC Rcd 14569, 14570 (M.M.Bur. 1995). In that case, the Commission approved an allotment site despite letters from a local mayor and the manager of a local airport urging rejection of the allotment and a letter from a property owner in the general area of the theoretical site stating that he did not intend to allow a tower on his property.

¹⁶ This change is also consistent with Section 73.1690(c)(11) of the Rules which now permits a licensee to change its coordinates (latitude and/or longitude) by 3 seconds without prior Commission authorization. See *Streamlining of Radio Technical Rules in Part 73 and 74 of the Commission's Rules*, 15 FCC Rcd 21649 (2000). See also *Moncks Corner, South Carolina et al.*, 15 FCC Rcd 8973 (M.M.Bur. 2000); *Randolph and Brandon, Vermont*, 6 FCC Rcd 1760 (M.M.Bur. 1991), and *Rockport, Texas, et al.*, 4 FCC Rcd 8075 (M.M.Bur. 1989).

¹⁷ See note 8, *supra*.

¹⁸ In *Tuck*, the Commission set forth eight factors in assessing the independence of a specified community: (1) the extent to which community residents work in the larger metropolitan area, rather than the specified community; (2) whether the smaller community has its own weekly newspaper or other media that cover the community's local needs and interests; (3) whether the community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area; (4) whether the specified community has its own local government and elected officials; (5) whether the smaller community has its own telephone book provided by the local telephone company or zip code; (6) whether the community has its own commercial establishments, health facility and transportation systems; (7) the extent to which the specified community and the central city are part of the same advertising market; and (8) the extent to which the specified community relies on the larger metropolitan

considered in making an allotment decision involving the proposed reallocation of a station to an urbanized area. Under criterion (1), the signal population coverage, Sinclair asserts that the 70 dBu contour of the proposed Poquoson channel will cover only 9.57 percent of the Norfolk Urbanized Area. Focusing on the two larger cities in the urbanized area nearest to Poquoson, namely Hampton and Newport News, Sinclair claims that the 70 dBu contour of the proposed Poquoson channel will cover only 25 percent of Hampton and 50 percent of Newport News. Under criterion (2), the size and proximity of the proposed community to the central city of the urbanized area, Sinclair argues that although Poquoson's population is less than one-tenth that of Hampton and is substantially smaller than some of the other cities in the Norfolk Urbanized Area, it is 9.5 miles from Norfolk and 14 miles from Virginia Beach. Norfolk (2000 U.S. Census population of 234,403 persons) and Virginia Beach (2000 U.S. Census population of 425,257 persons) are the two largest cities in the Norfolk Urbanized area. Sinclair claims that Poquoson's distance from Norfolk and Virginia renders the "size and proximity" criterion under *Tuck* inconclusive. Sinclair maintains that, as to *Tuck* interdependence factors 2, 3, 4, 5, and 8, Poquoson is manifestly eligible for a first local service preference. As to factors 1, 6, and 7, Sinclair claims that the record is inconclusive or tipped in Poquoson's favor. In conclusion, Sinclair argues that the Commission should find that Poquoson qualifies for a first local service preference under the *FM Priorities*.

12. With respect to "signal population coverage," Tidewater argues that the 70 dBu contour of the proposed Poquoson station would cover 15 percent of the Norfolk Urbanized Area and 56.2 percent of Newport News. These figures differ only slightly from Sinclair's figures of 9.57 percent and 50 percent, respectively, and make little difference. The 60 dBu contour will encompass only about 45 percent of the Norfolk Urbanized Area. Given the foregoing facts, we do not draw any adverse conclusions against Poquoson under this criterion. With respect to the "size and proximity" of Poquoson to the Norfolk, Virginia Urbanized area, Tidewater observes that given Poquoson's proximity to Newport News and given that the population of Newport News is 180,150 persons, these facts alone require a negative finding on this consideration. We disagree. As the Commission has determined on previous occasions, the Norfolk Urbanized Area is a peculiar urbanized area in that "there is not one identifiably dominant community within the Urbanized Area."¹⁹ In this light, and given the considerable distance between Poquoson and the cities of Norfolk and Virginia Beach, which are the two largest cities in the Norfolk Urbanized Area, we refuse to make any adverse conclusions against Sinclair under the "size and proximity" *Tuck* criterion.

13. Under *Tuck* criterion (3), the interdependence of the proposed community to the Norfolk Urbanized Area, Tidewater concedes that Poquoson has its own local government and elected officials (*Tuck* factor 4) and that Poquoson provides various municipal services to its citizens, including police,

area for various municipal services such as police, fire protection, schools and libraries. The Commission has considered a community as independent when a majority of these factors demonstrate that the community is distinct from the urbanized area. See *Parker and St. Joe, Florida*, 11 FCC Rcd 1095 (M.M.Bur. 1996).

¹⁹ *Elizabeth City, North Carolina, and Chesapeake, Virginia*, 9 FCC Rcd 3586, 3588 (M.M.Bur. 1994). Sinclair also cites *Bon Air, Virginia, et al.*, 11 FCC Rcd 5758 (M.M.Bur. 1996), which held that Williamsburg, a city of 11, 998 persons within the Norfolk Urbanized Area, was an independent community under *Tuck*.)

fire protection, schools, and libraries (*Tuck* factor 8). We agree. Under *Tuck* factor 1, the extent to which community residents work in the larger metropolitan area, Sinclair's Counterproposal states that the last official employment figures for Poquoson indicate that 5,600 of its citizens were employed, of whom 1,200 worked within the city. This percentage of workers who are employed in Poquoson is rather substantial and precludes an unfavorable finding against Poquoson under *Tuck* factor 1.²⁰ Under *Tuck* factor 2, whether the smaller community has its own weekly newspaper or other media that cover the community's local needs and interests, however, Poquoson has a weekly newspaper that is published outside Poquoson in conjunction with a York County newspaper, a local access channel on the cable television system, a website and a newsletter published by the city government. Thus, we must make a favorable finding for Poquoson under *Tuck* factor 2. As for *Tuck* factor 3, whether community leaders and residents perceive the specified community as being an integral part of, or separate from, the larger metropolitan area, Poquoson's leaders and residents view it as a separate, independent community, as evidenced by Poquoson's decisions in 1952 to leave York County and to become a City in 1975. In its Response, Sinclair includes a copy of a letter from Clyde R. Hoey, II, the President and CEO of the Virginia Peninsula Chamber of Commerce, in which Mr. Hoey describes Poquoson as a thriving, full service, independent city and in need of an FM radio station to enlighten the community.²¹ We conclude that Poquoson's leaders and residents have demonstrated that they perceive Poquoson as being separate from the Norfolk Urbanized Area. We also believe that the complex, multi-tiered City Government as well as its various activities, including the construction of a new library and a twelve million dollar expansion of the city's sewerage system, are strong evidence of Poquoson's independence.

14. As to *Tuck* factor 5, whether the smaller community has its own telephone book provided by the local telephone company or zip code, Poquoson has its own post office and zip code. Poquoson's telephone listings are published in a Verizon regional directory that includes Hampton, Newport News, Poquoson, Seaford and Yorktown, while listings for several other major cities in the Norfolk Urbanized Area, including Norfolk, Virginia Beach, Chesapeake and Suffolk, are in a different directory. Accordingly, Poquoson deserves a favorable finding under *Tuck* factor 5.

15. Under *Tuck* factor 6, whether the community has its own commercial establishments, health facilities, and transportation systems, Poquoson's transportation and hospital needs are served by regional institutions shared with other communities. Poquoson has its own Health Department shared with York County. Poquoson has several hundred of its own commercial establishments and the city government provides certain health related services, including waste management and rodent and insect control. Therefore, given Poquoson's extensive local commercial establishments and health-related governmental services, Poquoson deserves a favorable finding under *Tuck* factor 6.

16. Sinclair admits that Poquoson is included in the Norfolk Arbitron market, under *Tuck* factor

²⁰ See *Anniston and Ashland, Alabama, and College Park, Georgia, et al.*, 16 FCC Rcd 3411 (M.M.Bur. 2001).

²¹ Sinclair included this letter in Exhibit 5 to its Response. The letter is part of Sinclair's "Errata and Supplement" to its Counterproposal filed June 4, 2002. Sinclair also observes that Mr. Hoey informed him that he mailed this letter to the Commission on May 31, 2002. Sinclair included the letter in the Supplement to ensure that the letter would be included in the record.

7, which asks the extent to which the specified community and the central city are part of the same advertising market. Nevertheless, the facts that there are several major cities within the Norfolk Urbanized Area, that Poquoson is a considerable distance from Norfolk and Virginia Beach, and that Poquoson has a local newspaper in which local businesses can advertise, mitigate against any adverse finding against Poquoson under this *Tuck* factor.

17. Thus, under *Tuck* factors, 2, 3, 4, 5, 6, and 8, Poquoson is clearly eligible for a first local preference, despite inconclusive findings under *Tuck* factors 1 and 7. Considering our analysis under the three *Tuck* criteria, of which the interdependence of the proposed community to the urbanized area is the most important, we conclude that Sinclair's proposal to provide Poquoson with its first local aural transmission service deserves a preference under priority 3 of the *FM Priorities*.

18. The fourth argument made by Tidewater in its Reply comments is that the reallocation of Station WROX-FM from Cape Charles to Exmore, Virginia, leaves Cape Charles without any commercial station, which does not constitute a preferential arrangement of allotments under *FM Priorities*.²² In this regard, Tidewater claims that Station WAZP(FM), which will be the only local radio transmission service remaining in Cape Charles once Station WROX-FM is reallocated to Exmore, Virginia, is a noncommercial educational FM station that serves only 13 percent of the population served by Station WROX-FM. Tidewater also notes that its president listened to Station WAZP's programming for two hours on July 15, 2002 and heard no local programming, but only Christian music that was apparently delivered by satellite. In conclusion, Tidewater alleges that Station WAZP is not an adequate substitute for the removal of Station WROX-FM from Cape Charles.

19. Tidewater's arguments are unpersuasive. Sinclair's counterproposal would not eliminate FM transmission service to Cape Charles, Virginia. Noncommercial stations are relevant for purposes of analyzing local service to a community under Section 307(b) of the Act, and all noncommercial stations have an obligation to serve significant programming needs of their communities.²³ Although Station WAZP has a smaller service area than Station WROX-FM, it covers the city limits of Cape Charles with a 70 dBu signal and will be obligated to serve the community's needs and interests.²⁴ Moreover, Station WAZP has been granted a construction permit to upgrade its facilities substantially by increasing its effective radiated power and undertaking omnidirectional broadcasting. Further, we agree with Sinclair that two hours of monitoring a radio station's programming is not sufficient to evaluate the extent to which that station is fulfilling its duty to provide local programming. We conclude that Station WAZP will provide fulltime local radio transmission service to Cape Charles after Station WROX-FM is

²² In support of this assertion, Tidewater cites *Alva, Oklahoma, et al.*, 16 FCC Rcd 1525 (M.M.Bur. 2000), *recon. denied*, 16 FCC Rcd 7979 (M.M.Bur. 2001) ("Alva").

²³ See *Valley Broadcasters, Inc.*, 5 FCC Rcd 2785, 2787-88 (1990). See also *Oceanside, California*, 14 FCC Rcd 15302 (M.M.Bur. 1999).

²⁴ In *Alva, supra*, the Commission found that a noncommercial station did not provide a 70 dBu signal to any portion of the city of license. See 16 FCC Rcd at 7980. For this reason, the Commission concluded that the service provided by the noncommercial station was not an adequate substitute for the removal of the sole local radio station providing a city grade signal to the city of license.

reallotted to Exmore, Virginia.

20. We conclude that the public interest would be served by granting Sinclair's Counterproposal because both Belle Haven and Poquoson, Virginia, would receive their first local aural transmission services. Channel 250B1 can be allotted to Belle Haven consistent with the engineering requirements of the Commission's Rules at coordinates of 37-32-49 NL and 75-49-48 WL, with a site restriction of 1.1 kilometers (0.7 miles) southwest of Belle Haven. Channel 290A can be substituted for Channel 252A at Nassawadox, Virginia, consistent with the Commission's engineering requirements at coordinates of 37-33-43 NL and 75-44-24 WL, with a site restriction of 14.3 kilometers (8.9 miles) northeast of Nassawadox. Channel 291A can be allotted to Poquoson consistent with the engineering requirements of the Commission's Rules at coordinates of 37-12-30 NL and 76-25-07 W, with a site restriction of 8 kilometers (4.9 miles) north of Poquoson. Lastly, Channel 241B can be allotted to Exmore, Virginia, consistent with the engineering requirements of the Commission's Rules at coordinates of 37-18-02 NL and 75-59-05 WL.

21. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective November 13, 2003, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, as follows:

<u>Community</u>	<u>Channel Number</u>
Belle Haven, Virginia	250B1
Cape Charles, Virginia	-----
Exmore, Virginia	241B
Nassawadox, Virginia	290A
Poquoson, Virginia	291A

22. Filing windows for Channel 250B1, Belle Haven, Virginia, and Channel 290A, Nassawadox, Virginia, will not be opened at this time. Instead, the issue of opening these allotments for auction will be addressed by the Commission in a subsequent order.

23. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Commonwealth Broadcasting, L.L.C. for Station WEXM(FM), Exmore, Virginia, IS MODIFIED to specify operation on Channel 291A at Poquoson, Virginia, subject to the following conditions:

(a) Within 90 days of the effective date of this Report and Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1260 of the Commission's Rules upon activation of Channel 241B at Exmore, Virginia.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

24. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Sinclair Telecable, Inc., d/b/a/ Sinclair Communications, for Station WROX-FM, Cape Charles, Virginia, IS MODIFIED to specify operation on Channel 241B at Exmore, Virginia, subject to the following conditions:

(a) Within 90 days of the effective date of this Report and Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Commission's Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

25. IT IS FURTHER ORDERED That the Petition for Rule Making (RM-10405) filed by Bay Broadcasting, Inc. in MM Docket No. 02-76 IS DENIED.

26. IT IS FURTHER ORDERED That the counterproposal filed by Commonwealth Broadcasting, L.L.C., and Sinclair Telecable, Inc., d/b/a/ Sinclair Communications IS GRANTED to the extent indicated.

27. Pursuant to Commission Rule Section 1.1104(3)(1), any party seeking a change of community of license of an FM allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Commonwealth Broadcasting, L.L.C., licensee of Station WEXM(FM), and Sinclair Telecable, Inc., d/b/a/ Sinclair Communications, licensee of Station WROX-FM, are required to submit rule making fees in addition to the fees required for the applications to effect the changes in their communities of license.

28. IT IS FURTHER ORDERED, that MM Docket No. 02-76 IS TERMINATED.

29. For further information concerning this proceeding, contact R. Barthen Gorman, Media Bureau, (202) 418-2180.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Assistant Chief, Audio Division
Media Bureau