

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

In the Matter of)	
)	
Amendment of section 73.202(b), Table of Allotments, FM Broadcast Stations (South Padre Island, Texas))	MB Docket No. 22-373 RM-11933
)	
Application for Construction Permit to Modify Station KRIX(FM), Port Isabel, Texas)	File No. 0000195197 Facility ID No. 198768
)	

REPORT AND ORDER

Adopted: March 28, 2023

Released: March 28, 2023

By the Assistant Chief, Audio Division, Media Bureau:

I. INTRODUCTION

1. The Audio Division has before it the Notice of Proposed Rule Making issued in response to a Petition for Rulemaking (Petition) filed by Eduardo Gallegos (Petitioner).¹ The Notice proposed the substitution of Channel 288A for vacant Channel 237A at South Padre Island, Texas. Comments were separately filed by Petitioner and Laura Cisneros (Cisneros).² Petitioner filed Reply Comments. No counterproposals or other comments were received in response to the *Notice*. For the reasons discussed below, we: (1) substitute Channel 288A for vacant Channel 237A at South Padre Island, Texas; (2) grant the above-captioned hybrid modification application (Application) for Station KRIX(FM), Port Isabel, Texas; and (3) modify the license for Station KRIX(FM), Port Isabel, Texas to specify operation on Channel 237A in lieu of Channel 288A.

II. BACKGROUND

2. The *Notice* proposed the substitution of Channel 288A for vacant Channel 237A at South Padre Island, Texas to accommodate the hybrid Application requesting the modification of Station KRIX(FM)'s facilities. The hybrid Application proposes the substitution of Channel 237A for Channel 288A at Port Isabel, Texas, and modification of the Station KRIX(FM) license to specify operation on Channel 237A at Port Isabel, Texas. As stated in the *Notice*, Petitioner claims that grant of the proposal will permit Station KRIX(FM) to immediately provide enhanced service to the community of Port Isabel.³

3. Petitioner filed Comments stating that the hybrid Application will be implemented expeditiously, if the proposal is adopted. Cisneros filed an Express Comment in ECFS opposing the approval of a license to Petitioner due to what Cisneros alleges is private debt of \$12,000 Petitioner owes for breach of contract relating to radio advertising. Cisneros states that it was unable to attach the proper documentation to support its claim. Cisneros further states that it will file additional letters with the State

¹ See *South Padre Island, Texas*, Notice of Proposed Rule Making, DA-22-1167 (MB Nov. 9, 2022) (*Notice*); see also 87 FR 70765 (published Nov. 21, 2022).

² Cisneros timely filed an Express Comment in the Commission's Electronic Comment Filing System (ECFS) that violates 47 C.F.R. § 1.420(a) and (c) because the Express Comment were not served on Petitioner or its counsel nor did it include a certificate of service.

³ See *Notice*, para. 2; see also Petition at 2.

of Texas Attorney General's Office regarding the alleged private contractual matter.

4. Petitioner filed Reply Comments arguing that Cisneros' Express Comment must be rejected and disregarded because it is without merit and provides no argument that is relevant to the issues under consideration in this proceeding. Petitioner claims that the alleged private contractual matter is unsupported by proof or affidavit and is not within the Commission's purview or jurisdiction. Petitioner states that consideration of the Express Comment is inconsistent with Paragraph 8 of the *Notice* since it was not properly served upon Petitioner or its counsel.⁴ Petitioner states also that Cisneros provides no mailing address to serve its Reply Comment.⁵ Petitioner contends that the Express Comment is unacceptable under Commission precedent,⁶ because it violates the Commission's *ex parte* and procedural rules.⁷

III. DISCUSSION

5. Section 316(a) of the Communications Act of 1934, as amended, (Act) permits us to modify a license or construction permit if such action is in the public interest.⁸ We find that grant of the hybrid Application is in the public interest because it would enhanced service for Station KRIX(FM), Port Isabel, Texas. Accordingly, we: (1) substitute Channel 288A for vacant Channel 237A at South Padre Island, Texas;⁹ (2) grant the KRIX(FM) hybrid Application; and (3) modify the KRIX(FM) license to specify operation on Channel 237A in lieu of 288A at Port Isabel, Texas.¹⁰

6. A staff engineering analysis indicates that Channel 288A can be allotted to South Padre Island, Texas, consistent with the minimum distance separation requirements of the Commission's rules (Rules), with a site restriction of 11 km (7 miles) south of the community. The reference coordinates are 26-01-30 NL and 97-09-15 WL.¹¹ As stated in the *Notice*, the 70 dBu city-grade signal only covers 98% of the entire community.¹² Commission practice is generally to deny allocation requests in situations where the principal city-grade coverage does not meet the requirements of Section 73.315(a).¹³ We conclude that under these unique circumstances the proposal is in "substantial compliance" with section

⁴ See *Notice*, para. 8.

⁵ See 47 C.F.R. § 1.420(b).

⁶ Citing *Lebanon and Bolivar, MO*, Report and Order, 2 FCC Rcd 6786, 6788 n.3 (MMB 1987).

⁷ 47 C.F.R.. §§ 1.1201(g); 1.1207(d); 1.1229; and 1.420(a).

⁸ 47 U.S.C. § 316(a).

⁹ On December 8, 2021, the Audio Division cancelled the license of station DKZSP, Fac. ID No. 56473, Channel 237A, South Padre Island, TX. See *Broadcast Actions*, Report No. 50134, rel. December 13, 2021. Channel 237A at South Padre Island, Texas is therefore considered a vacant allotment resulting from the license cancellation of FM station DKZSP. Channel 237A at South Padre Island is not currently listed in the FM Table of Allotments.

¹⁰ Channel 237A at Port Isabel, Texas is located 320 kilometers from the Mexican Border. Mexican concurrence has been received.

¹¹ Channel 288A at South Padre Island, Texas is located 320 kilometers from the Mexican Border. Mexican concurrence has previously been received.

¹² See *Notice*, para. 3. South Padre Island is a resort town that is a barrier island off the southern coast of Texas near the Gulf of Mexico. The staff engineering analysis confirms that the small unserved area is unpopulated, very flat, and has no distinguishing labels located across from Ocean Boulevard near the beach access north of Edwin King Atwood Park.

¹³ 47 C.F.R. § 73.215(a); see also *Greenwood, Seneca, Aiken and Clemson, South Carolina, and Biltmore Forest, North Carolina*, Memorandum Opinion and Order, 3 FCC Rcd 4108 (1988) corrected, 3 FCC Rcd 4374 (1988) (stating that it is standard Commission practice to deny waivers of Section 73.315(a) of the Rules at the allotment stage, and requests for waiver of the city grade coverage requirement of Section 73.315 is generally limited to the application context).

73.315(a) given the fact that the unserved area is considered unpopulated and that the 70 dBu signal would provide coverage to 98% of South Padre Island encompassing the entire population of the community.¹⁴

7. The *Notice* stated in paragraph 8 that comments and reply comments shall be served on Petitioner or its counsel, and that certificate of service must accompany such comments pursuant to section 1.420 of the rules.¹⁵ Cisneros failed to serve Petitioner or its counsel with a copy of the Express Comment or to provide a certificate of service as required by section 1.420(a) and (c) of the rules.¹⁶ We agree with Petitioner that, pursuant to section 1.1208 of the rules, this proceeding is considered restricted, and *ex parte* presentations are prohibited.¹⁷ An *ex parte* presentation is any communication that concerns the merits or outcome of a proceeding and is not served on the parties to the proceeding or, if oral, is made without their opportunity to be present.¹⁸ Moreover, section 1.420(a) specifically prescribes that comments in an FM allotment rulemaking proceeding initiated by a petition for rulemaking shall be served on the petitioner.¹⁹ We therefore find that Cisneros violated section 1.420(a) and (c), and that the Express Comment represents a prohibited *ex parte* presentation that cannot be considered in this proceeding, pursuant to sections 1.1202(b)(1) and 1.1208 of the rules.²⁰ In any event, it is the Commission's policy not to adjudicate private contractual matters, and thus we would not consider Cisneros's Express Comment even had it been properly served.²¹

8. *Paperwork Reduction and Regulatory Flexibility.* The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980, as amended, do not apply to a rulemaking proceeding to amend the FM Table of Allotments, section 73.202(b) of the Rules. This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995. In addition, therefore, it does not contain any proposed information collection burden "for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, that the Petition for Rulemaking filed by Eduardo Gallegos, LLC, on July 18, 2022, IS GRANTED.

10. IT IS FURTHER ORDERED, that the hybrid Application for Station KRIX(FM), Port Isabel, Texas, filed by Eduardo Gallegos, on July 18, 2022 (FCC File No. 0000195197), IS GRANTED.

11. IT IS FURTHER ORDERED, that the license of station KRIX(FM), Port Isabel, Texas,

¹⁴ See *Willows Creek, California*, Report and Order, 26 FCC Rcd. 1986 (MB 2011) (allotment approved, where the 70 dBu city-grade signal contour would not cover the entire Census Designated Place of Willow Creek but would provide coverage to the entire population); see also, *Beatty and Goldfield, Nevada*, Notice of Proposed Rule Making, 23 FCC Rcd 14851 (MB 2008), and Report and Order, 24 FCC Rcd 2225 (MB 2009) (together, "*Beatty*") (allotment approved, where 70 dBu city-grade signal contour would not cover entire census-designated boundary, but would encompass entire town site); see also cases cited in *Beatty*, Notice of Proposed Rule Making, 23 FCC Rcd 14851, n.5).

¹⁵ *Notice*, para. 8.

¹⁶ 47 C.F.R. § 1.420(a) and (c).

¹⁷ 47 C.F.R. § 1.1208.

¹⁸ 47 C.F.R. § 1.1202(a).

¹⁹ 47 C.F.R. § 1.420(a).

²⁰ 47 C.F.R. §§ 1.1202(b)(1) and 1.1208.

²¹ See *Arecibo Radio Corp.*, Memorandum Opinion and Order, 101 FCC 2d 545, 548 (1985) (local court of competent jurisdiction, not the FCC, is the proper forum to resolve private contractual disputes).

IS MODIFIED to specify operation on Channel 237A in lieu of Channel 288A.

12. IT IS FURTHER ORDERED, that pursuant to authority found in 47 U.S.C. sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c)(1), 303(g), (r), and 307(b) and sections 0.61, 0.204(b), and 0.283 of the Rules, 47 CFR §§ 0.61, 0.204(b), and 0.283, effective May 12, 2023, the FM Table of Allotments, 47 CFR § 73.202(b), IS AMENDED, with respect to the community listed below, to read as follows:

<u>Community</u>	<u>Channel No.</u>
South Padre Island, Texas	288A

13. The window period for filing applications for Channel 288A at South Padre Island, Texas will not be opened at this time. Instead, the issue of opening this allotment for filing will be addressed by the Commission in a subsequent order.

14. IT IS FURTHER ORDERED, that the Commission will send a copy of this *Report and Order* in a report to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. § 801(a)(1)(A).

15. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

16. For further information concerning this proceeding, contact Rolanda F. Smith, Media Bureau, (202) 418-2054.

FEDERAL COMMUNICATIONS COMMISSION

Nazifa Sawez
Assistant Chief, Audio Division
Media Bureau