

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

MM Docket No. 85-376

In the Matter of

Amendment of Section 73.202(b),	RM-4988
Table of Allotments,	RM-5378
FM Broadcast Stations.	
(Ponte Vedra Beach, Florida) ¹	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: December 14, 1988; Released: January 27, 1989

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration filed by General Broadcasting of Florida, Inc. (General Broadcasting), licensee of Station WCAT-FM (formerly WHLY), Channel 294C1, Leesburg, Florida directed against the *Report and Order* in this proceeding, 2 FCC Rcd 1182 (1987), which allotted Channel 293A to Ponte Vedra Beach, Florida. Emission de Radio Balmaseda, Inc. (Emission de Radio), an applicant for the Channel 293A allotment at Ponte Vedra Beach, filed an Opposition to Petition for Reconsideration. General Broadcasting filed a Reply to the Opposition, a Motion to Consolidate and a Motion for Stay. Emission de Radio filed an Opposition to the Motion for Stay.² We are granting the petition for reconsideration to the extent of substituting Channel 227A in lieu of Channel 293A at Ponte Vedra Beach. We will provide a background and the reasons for this action below.

BACKGROUND

2. This proceeding commenced with the filing of a petition for rule making by Emission de Radio to allot Channel 293A to Ponte Vedra Beach, Florida. In response to the *Notice of Proposed Rule Making* in this proceeding,³ General Broadcasting filed a counterproposal on February 3, 1986 proposing the allotment of Channel 227A to Ponte Vedra Beach in lieu of Channel 293A. In its counterproposal, General Broadcasting stated that the proposed Channel 293A allotment would preclude grant of its application to maintain full Class C status for Station WCAT-FM (File No. BPH-860310II). While noting that a Channel 227A allotment would require a site restriction south of Ponte Vedra Beach, General Broadcasting argued that the public interest would be better served by full Class C facilities for Station WCAT-FM and a Channel 227A allotment at Ponte Vedra Beach compared to the originally proposed Channel 293A allotment. General Broadcasting also asserted that the captioned community of "Ponte Vedra" in the *Notice of Proposed Rule Making* is not a recognizable community for allotment purposes.

3. The *Report and Order*, released February 20, 1987, rejected this argument and the counterproposal. First of all, the *Report and Order* determined that Ponte Vedra is a recognizable community for allotment purposes. Specifically, it noted that Ponte Vedra is an established Municipal Service District within St. John's County and may be viewed as homogeneous in character and an independent community within St. John's county. However, the *Report and Order* noted that the appropriate appellation in this proceeding is Ponte Vedra Beach. The coordinates and the boundaries are the same. In addition, the *Report and Order* denied the counterproposal advanced by General Broadcasting proposing Channel 227A to Ponte Vedra Beach. The stated reason for that action was that allotting Channel 227A to Ponte Vedra Beach would preclude a Channel 227A allotment to nearby Baldwin, Florida as a first local service.

4. In regard to Baldwin, Florida, there was no Channel 227A proposal for Baldwin before the Commission during this proceeding. Instead, there was pending a petition for rule making by Radio Representatives, Inc. proposing Channel 287A for Baldwin (RM-5213). There was also pending a conflicting petition for rule making filed by Northeast Florida Radio, Inc. proposing Channel 287A to Fernandina Beach, Florida (RM-5133). Neither of these petitions had yet been placed on a Commission Public Notice or had been subject to public comment. Shortly before the February 20, 1987 release of the *Report and Order* in this proceeding, we released on February 6, 1987, the *Notice of Proposed Rule Making* in MM Docket No. 86-487 proposing the allotment of Channel 287A to Fernandina Beach.⁴ Subsequently, in our *Report and Order* in this proceeding allotting Channel 293A to Ponte Vedra Beach, we advised interested parties for the first time that we would be considering Channel 227A for Baldwin. Thereafter, on April 8, 1987, we released the *Notice of Proposed Rule Making* in MM Docket No. 87-77 for Baldwin, Florida.⁵ That *Notice* proposed Channel 227A instead of Channel 287 as originally proposed by the petitioner. In doing so, the *Notice* specifically stated that we were proposing Channel 227A instead of Channel 287A in order to accommodate Channel 287A at Fernandina Beach. This procedure would have avoided the need to institute a comparative rule making proceeding with respect to the conflicting rule making petitions for Channel 287A at Baldwin and Fernandina Beach, Florida.

PETITION FOR RECONSIDERATION

5. In support of its petition for reconsideration, General Broadcasting states that the proposal to allot Channel 227A to Baldwin was never subject to notice and comment. Instead, General Broadcasting asserts that while the Ponte Vedra Beach proceeding was pending, the staff "conjured up" an alternative Channel 227A for Baldwin which was in conflict with its counterproposal at Ponte Vedra Beach. As such, General Broadcasting argues that the *Report and Order* did not comply with the Commission's statutory obligation to give interested parties prior notice and an opportunity for meaningful participation in this proceeding. In a separate vein, General Broadcasting argues that changing the community appellation to Ponte Vedra Beach was arbitrary and capricious in that Ponte Vedra Beach had never been the subject to comment in this proceeding.

6. In its Opposition to Petition for Reconsideration, Emission de Radio argues that General Broadcasting had sufficient notice and the opportunity to comment on the merits of the proposed allotment at Ponte Vedra Beach. In addition, Emission de Radio refers to the policy set forth in *Andalusia, Alabama*, 49 Fed. Reg. 32201, published August 13, 1984, of favoring a new service over the improvement of an existing service. With respect to the rejection of the Channel 227A counterproposal in this proceeding, Emission de Radio contends that this action is consistent with *Andalusia, supra*, in that it maintained the option of allotting Channel 227A to Baldwin, Florida as a first local service which would be favored over the proposed upgrade at Station WCAT-FM.

DISCUSSION

7. We will grant the petition for reconsideration to the extent of substituting Channel 227A in lieu of Channel 293A at Ponte Vedra Beach.⁶ In this regard, it will also be necessary to issue a *Further Notice of Proposed Rule Making* in a separate proceeding to consider the conflicting proposals for Channel 287A at Baldwin and Fernandina Beach, Florida. We discuss the reasons for this action below.

8. After careful consideration of this matter, we are of the view that we did not afford General Broadcasting the required notice that its Channel 227A counterproposal for Ponte Vedra Beach could be precluded by the petition for rule making proposing Channel 287A for Baldwin. There was no notice to the public or any interested party that a Channel 287A petition for rule making for Baldwin was pending or that we were considering Channel 227A to Baldwin as an alternative channel. General Broadcasting was not afforded an opportunity to comment on the merits of a Channel 227A proposal in Baldwin in connection with its Channel 227A counterproposal at Ponte Vedra Beach. This procedure was not consistent with the statutory obligation to afford interested parties a meaningful opportunity to comment on and participate in a rule making proceeding. See 5 U.S.C. Section 553(b) and (c). This opportunity must occur prior to the action allotting the channel. See *e.g. Mobil Oil Corporation v. Department of Energy*, 610 F.2d 796,804, N.9 (Temp. Emerg. Ct. of Appeals 1979). We are also of the view that the timely filed counterproposal for Channel 227A at Ponte Vedra was entitled to consideration on its merits separate from any alternative use of Channel 227A which was neither included in this proceeding nor pending in a separate proceeding. In this situation, the comment date in the Ponte Vedra Beach proceeding effectively cut-off such consideration. In order to have maintained the flexibility of allotting Channel 227A to Baldwin, the appropriate procedure would have been to adopt a *Further Notice of Proposed Rule Making* in this proceeding including a Channel 227A proposal at Baldwin. We did not do so in this instance.

9. After a further review of the timely filed submissions in this proceeding, we believe that the appropriate allotment to Ponte Vedra Beach was Channel 227A. This channel will provide a first local service and is preferable over a Channel 293A allotment in that it will permit the grant of an application by Station WCAT-FM, Leesburg, Florida to maintain full Class C facilities. In a related vein, we do not believe that clarifying the appellation to read "Ponte Vedra Beach" deprived any party of notice

and an opportunity to file appropriate comments in this proceeding. Moreover, in view of the fact that the coordinates for "Ponte Vedra" and "Ponte Vedra Beach" are the same and the boundaries are apparently identical, any argument that we substituted communities is not well taken.

10. 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 March 13, 1989, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED as follows:

City	Channel No.
Ponte Vedra Beach, Florida	227A

11. IT IS FURTHER ORDERED, That the aforementioned petition for reconsideration and motion to consolidate by General Broadcasting of Florida, Inc. ARE GRANTED to the extent indicated above.

12. IT IS FURTHER ORDERED, That the motion for stay by General Broadcasting of Florida, Inc. IS DISMISSED.

13. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

14. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

¹ "Ponte Vedra" has been clarified to specify "Ponte Vedra Beach" in the caption.

² Mattox Guest Broadcasting, Inc., licensee of FM Station WKUB, Blackshear, Georgia filed a Motion for Extension of Time through April 27, 1987 to oppose the Motion for Consolidate. Mattox Guest Broadcasting, Inc. has not filed such an opposition.

³ 50 Fed. Reg. 51433, published December 17, 1985.

⁴ 2 FCC Rcd 741 (1987).

⁵ 2 FCC Rcd 2033 (1987).

⁶ This is an equivalent channel in that it would permit principal city coverage of Ponte Vedra Beach in compliance with Section 73.315 of the Rules. This Channel 227A allotment will require a site restriction of 2.2 kilometers south. The reference coordinates are 30-13-3 and 81-22-12. In this connection, we note that these are 14 applications for the Channel 293A Ponte Vedra Beach allotment. These applicants will be permitted to amend their applications without loss of cut-off protection.