

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

In re Application of

RADIO LOMPOC File No. BPH-900516MS  
LIMITED PARTNERSHIP

For Construction Permit  
for a New Station on Channel 285A  
in Lompoc, California

MEMORANDUM OPINION AND ORDER

Adopted: May 29, 1992

Released: June 17, 1992

By the Commission:

1. The Commission has under consideration an application for review filed on August 23, 1991 by Radio Lompoc Limited Partnership ("RLLP"). John Walton Smith, Jr. d/b/a NOE-WAL Broadcasting ("Smith") filed an opposition to the Application for Review, to which RLLP replied. By way of background, RLLP's application for a construction permit for a new commercial FM station in Lompoc, California, was returned by the Commission staff as not sufficient for tender, because it lacked a full scale transmitter site map.<sup>1</sup> See *Letter from the Chief, FM Branch, Audio Services Division*, September 18, 1990 (reference 8920-F. Hodge). Subsequently, on October 18, 1990, RLLP submitted an amendment containing a full scale site map and a petition for reconsideration. The reconsideration request was denied in the context of a Mass Media Bureau ("Bureau") *Hearing Designation Order* ("HDO"), which set for comparative hearing the four remaining applicants for this Lompoc allotment. See *Lion's Share Broadcasting*, 6 FCC Rcd 4465 (1991).

2. RLLP argued in its petition for reconsideration that: (1) the deficiency in its application is more analogous to incorrect, as opposed to missing, information and that its site map was merely incorrect as to form; (2) terrain obstructions could be observed from the reduced scale map; (3) information as to nearby communications facilities not shown on its map is provided elsewhere in its application; and (4) its proposed site elevation could be obtained from the site maps of other mutually exclusive applications. Alternatively, RLLP argued that since *Appendix D* to the *Report and Order* ("*Appendix D*") did not clearly distinguish between tenderability and acceptability defects, its curative amendment should be accepted, citing *Rochelle C. Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985).

3. In rejecting the above arguments and denying the petition, the Bureau noted that RLLP's application, lacking the full-scale site map required by the *Public Notice*,<sup>2</sup> was not substantially complete pursuant to the Commission's "hard look" processing rules, and stated the rationale for adopting such strict rules: to deal expeditiously with the "influx of thousands of applications for new allotments." 6 FCC Rcd at 4465. The Bureau also noted, alternatively, that RLLP's map submission, a photocopy of a full scale map reduced to a "regular size page," was too imprecise to allow the staff to verify the engineering data. Consequently, the Bureau concluded, it was not possible to ascertain the geographic coordinates and ground elevation of the proposed transmitter site "confidently and reliably drawing on the application as a whole." *Id.* at 4465-66.

4. In its application for review, RLLP argues that the hard look policy, as applied, lacks both clarity and consistency and that there are "substantial questions" as to whether treatment of the instant deficiency as a tenderability defect violates its right to clear notice and consistent treatment, referencing *Salzer* and *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965). RLLP notes that a conflict between site coordinates depicted on a map and as denoted elsewhere in an application constitutes an acceptability defect, citing *Steven B. Courts*, 4 FCC Rcd 4764 (1989). RLLP argues that, had it committed a substantive error, as did Courts, by plotting its transmitter site erroneously, it would have been permitted to submit a

<sup>1</sup> In order to be deemed tenderable pursuant to the FM "hard look" processing standards instituted by the Commission in the *Report and Order* in MM Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985) ("*Report and Order*"), all commercial FM applications must include a transmitter site map meeting requirements set forth in an April 5, 1985 *Public Notice* ("*Public Notice*"). The requirement that applicants submit a full scale map, or portion thereof, is set forth in the *Public Notice*. See 51 Fed. Reg. 45,945 (December 23, 1986).

<sup>2</sup> The *Public Notice* states, in pertinent part:

In order to allow the Commission's processing staff to verify the correctness of the geographic coordinates provided in an application, it is necessary for this site map to show along the printed margin of both axes at least two coordinates markings, specifically labeled by the USGS, one on either side of the marked site. Additionally, a scale of kilometers or miles (kilometers, if available) and all of the identifying map information must be included. *The site should be plotted on a full scale map*, and all of the contour lines should be clearly visible. Faded, smudged or otherwise illegible maps are unacceptable. Photocopies are acceptable in lieu of actual USGS Maps, provided they are clear, dark and legible. It is not necessary to

submit an entire map (although this is perfectly acceptable), but only as much as necessary to fully comply with the requirements described above.

In certain cases it may be inconvenient to provide a full scale photocopy which includes both the site and the margins. This can occur when the site lies towards the center of the map. In this case the following alternative is acceptable. Provide a *full scale* copy of the section of the map containing the site. This copy must include either four of the standard printed cross-marks or one margin and two cross-marks. Fine lines should be drawn between the marks in such a fashion as to enclose the site. Each of these lines should be labeled with the appropriate latitude or longitude. This *full scale* map section must include all the information specified in the previous paragraph. In addition, a reduced copy of the entire map must be included to allow the Commission's staff to verify that the lines have been correctly labeled.

*If the above requirements are not met, the application will be returned without further review....*

51 Fed. Reg. at 45,945. (emphasis supplied)

curative amendment during the amendment as of right period. RLLP states that a policy permitting correction of an error of substance, such as a site plotting error, but not one of form, such as omission of a particular scale of map, cannot be justified. In this regard, RLLP states that equal treatment would not adversely affect expeditious application processing, since uncorrected errors would still result in dismissal at the acceptability stage. Additionally, RLLP argues that the Commission's "apparent" policy reflected in *Appendix D* limiting the resolution of errors to the four corners of the application itself has also been undermined by the Commission's practice of taking official notice of its licensing records when an applicant specifies the site of an existing licensee, referencing *Courts* and *Carta Corp.*, 3 FCC Rcd 798 (MM Bur. 1988). It argues that there is no justification for this "clear departure from the apparent policy" of the "hard look" processing rules, since there are situations where an applicant may intend to correct erroneous Commission engineering records. Application, at 6. RLLP also notes that the Bureau has in the past erroneously distinguished between a tenderability and an acceptability defect, citing *Courts*. Further, RLLP asserts, the *HDO* reflects additional Bureau uncertainty in that two other applications were found technically unacceptable due to violations of our technical acceptance criteria, yet curative amendments were allowed because the pertinent rule failed to give adequate notice of the requirement in question. RLLP contrasts this treatment to its own, stating that there was no reasoned attempt to square this disparate treatment. RLLP concludes that the test applied to it -- whether its site location could be determined confidently and reliably from the application as whole -- is "vague and subjective" and cannot meet the criteria of *Salzer* and *Melody*. *Id.*, at 7.

5. RLLP's application was properly returned. The Commission's "hard look" processing standards regarding tenderability of FM broadcast applications have always required the submission of a full scale site map or a portion thereof. *FM Transmitter Site Map Submissions*, 1 FCC Rcd at 381.<sup>3</sup> That policy has been consistently applied by the Commission and the staff since the initiation of these standards<sup>4</sup> and RLLP's application, because it lacked the requisite full scale map, is clearly untenderable. As we stated in *Appendix D*, after enumerating each of the approximately two dozen tenderability items necessary to begin processing:

*If any of the above information is missing, the application will be returned as not sufficient for tender. If any of the above information is present but, on the face of the application, visibly incorrect or inconsistent, the application will be treated in accordance with the following guidelines. If the needed information can be derived or the discrepancy resolved, confidently and reliably, drawing on the application as a whole, such defect will not render the application not sufficient for tender....*

50 Fed. Reg. at 19,946. (emphasis supplied) Thus, in *Appendix D*, the Commission specifically limited the policy of examining the four corners of an application to incorrect or inconsistent information.

6. However, even assuming *arguendo* that *Appendix D* requires that RLLP's reduced map be deemed "information... present but... visibly incorrect," we affirm the Bureau's alternative finding in that regard. The Bureau concluded that RLLP's map, having been reduced to a "regular size page," did not permit the staff to derive "confidently and reliably" the needed information, *i.e.*, highly accurate independent verification of the correctness of the site coordinates listed in the application. We require submission of a full scale map because the Commission desires *maximum* verification accuracy in determining transmitter site location. As the scale is reduced, the accuracy of any site verification study is correspondingly reduced. Viewed in this context, the requirement for a full scale map is not a matter of mere form, as RLLP contends. Rather, it substantively furthers the "hard look" processing system's goal of providing expeditious service while enhancing processing certainty and efficiency.

7. As RLLP correctly notes, the Commission's processing procedures do permit an applicant for a new facility to incorporate by reference certain engineering data contained in the Commission's records relating to an existing license. As we stated in *Courts*:

Because the applicants clearly proposed to locate their antennae on existing towers to which specific reference was made in each application, the staff could, drawing on the applications as a whole and on Commission records for the licensed facilities, confidently and reliably verify [the requisite site information] in order to complete an acceptability study which verified each proposal's compliance with Commission rules. In particular, using the accepted coordinates for the existing towers, the staff could verify the exact locations of the proposed transmitter sites. Therefore, amendment of those applications was not essential to the processing of those applications for acceptability purposes. 4 FCC Rcd at 4766. Contrary to RLLP's assertion, the practice of allowing an applicant to incorporate by reference an existing licensed site does not "undermine" the "hard look" standards. In that situation, the critical coordinate information concerning that site has been previously verified as being in compliance with our processing requirements. In contrast, the ascertainment of RLLP's critical data from maps of competing applicants requires the staff to look beyond the four corners of RLLP's application to information that is not incorporated by reference and is not analogous to the policy of taking official notice of prior-licensed data within the Commission's official records. In effect, RLLP is arguing that the Commission should undertake to assemble for it a

<sup>3</sup> In a recent Notice of Proposed Rule Making in MM Docket No. 91-347, we proposed to modify or eliminate the FM "hard look" processing rules, but stated that any such change would only apply to applications filed after the effective date of the rule changes. *Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications*, 6 FCC Rcd 7265 (1991).

<sup>4</sup> *Apple Communications*, 7 FCC Rcd 1467 (1992); *Lamoille Broadcasting and Communications Limited Partnership*, 7 FCC Rcd 2700 (1992); *WCCR Broadcasting Limited Partnership*, 6 FCC Rcd 2554 (M. M. Bur. 1991).

composite application by piecing together sections from competing applications. Although an applicant specifying a prior-licensed site may intend to correct errors in Commission records, the Commission presumes the regularity of licensed facilities and, absent an indication that this presumption is incorrect, we believe it is appropriate to rely upon it.

8. RLLP further contends that the "hard look" policy as applied here lacks clarity and consistency in its treatment of similar deficiencies. RLLP references *Courts* to signify the confusion between whether its application was dismissed for a tenderability or acceptability defect. RLLP is correct in pointing out that in *Courts* the Commission indicated that conflicting geographic coordinates as denoted in a site map and as indicated elsewhere in an application constitute an acceptability and not a tenderability defect. 4 FCC Rcd at 4766, note 3. In this regard, the Bureau in *Courts* had erred in its initial characterization of the defect in question. However, it does not follow from that case that the Commission's tenderability criteria as set forth in *Appendix D* are insufficient in clarity. Here, RLLP's submission, lacking a full scale site map, clearly failed to comply with the *Public Notice* and thus made it impossible for the staff to perform a technical acceptability study. There is no confusion regarding the characterization of RLLP's defect. RLLP, unlike the applicant in *Courts*, failed to submit *any* map meeting the formal requirements for tenderability. Thus, *Courts* offers no support for RLLP's position. We have previously held that the *Report and Order* satisfied the notice requirement regarding the institution of the "hard look" processing standards. See, e.g., *Star Signal Corporation*, 1 FCC Rcd 450, 451 (1986). Accordingly, *Salzer* offers no support for RLLP's position.

9. Similarly, we reject RLLP's allegation of disparate treatment in the HDO resulting from the Bureau having permitted the engineering defects in two mutually exclusive applications to be corrected by untimely amendments. As the Bureau explained in the *HDO*, those defects related to deficiencies in contour overlap showings by the two applicants who utilized the provisions of 47 C.F.R. Section 73.215.<sup>5</sup> Those technical deficiencies ordinarily would have rendered the applications in question unacceptable for filing. However, unlike RLLP's situation, the wording of Section 73.215 of the rules does not afford applicants full and explicit notice of certain technical requirements necessary to avoid dismissal under the hard look policy. Thus, consistent with *Salzer*, those applicants were allowed to amend. 6 FCC Rcd at 4467. In contrast, *Appendix D*'s prerequisites are clear, and RLLP was afforded explicit notice. Since, as previously noted, RLLP has been treated as other similarly situated applicants failing to submit the requisite full scale site map, the Commission has not applied the same hard look processing standard arbitrarily or unfairly. See *New Orleans Channel 20, Inc.*, 830 F.2d. 361 (D.C. Cir 1987).<sup>6</sup>

10. Accordingly, for the foregoing reasons, IT IS ORDERED, that the Application for Review filed on August 23, 1991, by Radio Lompoc Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy  
Secretary

<sup>5</sup> Section 73.215 of the Commission's Rules permits the acceptance of applications proposing short-spaced antenna locations if they afford protection to the affected station.

<sup>6</sup> Although RLLP asserts, without citing supporting authority, that reduced scale maps have been found sufficient in other

non-broadcast services, we have held that such practices are of no precedential value in the FM service, and that, in any event, cellular applications have been dismissed where a full scale map was not provided. See *Apple Communications*, 7 FCC Rcd at 1468.