

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

In re Application of

LELAND
BROADCASTING
GROUP, INC.

File No. BPH-890313MP

For Construction Permit
for a New FM Station on Channel 231A
in Leland, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: October 28, 1994; Released: November 15, 1994

By the Commission:

1. This *Memorandum Opinion and Order* responds to a *Judgment* of the United States Court of Appeals for the District of Columbia Circuit in *Leland Broadcasting Group, Inc. v. FCC*, No. 92-1444 (November 15, 1993). In the order on appeal in that case, the Commission affirmed the Mass Media Bureau's refusal to reconsider a staff action dismissing the application of Leland Broadcasting Group, Inc. ("Leland") for a new FM broadcast station in Leland, North Carolina. *Leland Broadcasting Group, Inc.*, 7 FCC Rcd 6049 (1992). Leland's application was originally dismissed because it did not comply with the Commission's site map requirements. *WCCR Broadcasting Limited Partnership*, 6 FCC Rcd 2554 (MM Bur. 1991).¹ In dismissing the application, the Commission stated that without the map, "the staff cannot confidently and reliably verify an applicant's site information." *Leland Broadcasting*, 7 FCC Rcd at 6050. The Court remanded the case for an explanation "why the location of Leland's proposed transmitter site could not be verified using the allocation table and aeronautical map included with Leland's application, as discussed in the technical report ... prepared by [Leland's consulting engineer] Raymond E. Rohrer." The technical report did not accompany Leland's application, but was subsequently submitted with Leland's petition for reconsideration and application for review.

2. *Background.* The Commission was faced in 1985 with the influx of thousands of commercial FM applications for 689 FM channel allotments that had been made available by the Commission proceeding in MM Docket No. 80-90. *See Modification of FM Broadcast Station Rules to Increase the Availability of Commercial FM Assignments*, 94 FCC 2d 152 (1983); *First Report and Order* in MM Docket No. 84-231, 50 Fed. Reg. 3514 (January 25, 1985). Accordingly, it adopted a new processing regime, the "hard look" procedures, intending to expedite the provision of new radio services and to provide certainty and efficiency to its processing of applications. *See Processing of FM and TV Broadcast Applications ("FM Processing Order")*, 50 Fed. Reg. 19,936, *affirmed sub nom. Hilding v. FCC*, 835 F.2d 1435 (9th Cir. 1987).² The *FM Processing Order* provided potential applicants with a list of specific items required in order for an application to be considered "substantially complete" and, thus, acceptable for tender. *See* 50 Fed. Reg. at 19,945 (Appendix D). It stated unambiguously that "[i]f any of the ... [specified] information is missing, the application will be returned as not sufficient for tender" 50 Fed. Reg. at 19,946 (Appendix D) (emphasis added). This policy was intended to spare the staff from having to write applicants requesting missing information, and it in fact resulted in decreasing significantly the burden imposed on Commission resources by applicants who failed to exercise care in preparing their applications. This, in turn, could permit the allocation of additional staff resources to authorization of service functions and thus benefit the public by speeding the initiation of new service. As the Court recently noted in *Russian River Vintage Broadcasting v. FCC ("Russian River")*, 5 F.3d 1518, 1520 (D.C. Cir. 1993), before adoption of the "hard look" rules, the staff found it necessary to return nearly 40 percent of FM applications. In contrast, under the "hard look" regime only approximately five percent had to be returned. *Public Notice: Processing of Commercial FM Construction Permit Applications for New Facilities*, 5 FCC Rcd 990 (1990).

3. Among the requirements specified in the *FM Processing Order* was the one involved here, submission of an entire 7.5-minute series U.S. Geological Survey ("USGS") Topographical Quadrangle map containing certain specified information, including "at least two coordinate markings, specifically labelled by the U.S.G.S., one on either side of the marked site." 50 Fed. Reg. at 19,945 (Appendix D, Item 4(b)); FCC Form 301, Section V-B, Item 15; *FM Transmitter Site Map Submissions Required by FCC Forms 301 and 340 ("Site Map Requirements Order")*, 1 FCC Rcd 381, 382 (1986), summary published, 51 Fed. Reg. 45,945, 45,946 (December 25, 1986).³ The Commission also permitted two variations of the map requirement.⁴ With submission of any of the variations, the

¹ A comparative hearing, action by the Review Board, and approval of a settlement agreement between competing applicants subsequently resulted in issuance of a permit to Hara Broadcasting, Inc.

² The Commission recently modified its "hard look" processing rules, effective August 7, 1992. *Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications*, 7 FCC Rcd 5074 (1992). The rule changes apply only to newly filed applications. Accordingly, Leland's application is considered under the rules previously in effect.

³ The *Site Map Requirements Order* includes as an appendix a *Public Notice*, Mimeo 3693, which was initially released April 5,

1985. That *Notice*, describing the required site map, was referenced in the *FM Processing Order*, 50 Fed. Reg. at 19,945 (Appendix D, Item 4(b)) and was subsequently printed in full in the Federal Register summary of the *Site Map Requirements Order*. *See* 51 Fed. Reg. at 45,945-46.

⁴ As one variation, applicants could submit only a portion of a full scale topographic map (or a legible copy thereof), provided that the portion showed "along the printed margin of both axes at least two coordinate markings, specifically labeled by the USGS, one on either side of the marked site." *Site Map Requirements Order*, 51 Fed. Reg. at 45,946. As a second variation, recognizing that it may be inconvenient to provide a full scale photocopy including both the proposed site and the margins, 51

Commission could verify quickly and accurately the coordinates of the applicant's tower site and, in turn, ascertain critical engineering data, such as the ground elevation of the transmitter site and the presence of other nearby communications facilities and/or obstructing terrain. The margins and coordinate markings are the map elements that establish the latitude and longitude of the map segment from which the latitude and longitude of the tower site are determined.

4. Leland, despite the clearly articulated processing guidelines, did not submit a map in any of the three forms the Commission indicated would be acceptable. Specifically, though apparently trying to utilize the alternative which permits an applicant to submit a full scale copy of only that section of the map containing its site, the full scale 7.5-minute section map submitted by Leland lacked fine lines drawn between the cross marks (or tick marks) enclosing the designated site and labeled with appropriate latitude and longitude designations. See note 4, *supra*. Leland also failed to submit the requisite accompanying reduced copy of the full scale quadrangle map that permits the staff to verify quickly, by direct observation, that the lines drawn on the full scale section map are correctly labeled, see *id*. Instead, Leland substituted a much less detailed aeronautical map.⁵ Thus, in accordance with the plain language of the *FM Processing Order*, the application was returned because Leland omitted required information.

5. In contrast to the situation here, where required information was *omitted*, in cases where the information is *complete* but *inconsistent* or *incorrect*, the Commission will accept the application, if relevant engineering information can be confidently and reliably verified from the application taken as a whole.⁶ The Court has asked us to explain why the location of Leland's proposed transmitter site could not be verified confidently and reliably, using the allocation table and aeronautical map, as discussed in Rohrer's technical report, which was submitted after the application was dismissed.

6. *Discussion.* For the reasons stated below, we believe that, although the staff could have eventually confidently and reliably verified the correct coordinates of the trans-

mitter site using the method suggested in Rohrer's report, because such verification would have been difficult, time-consuming, and directly at odds with the fundamental purposes of the "hard-look" procedures, it is not in the public interest to extend the verification exception to this situation. As noted above, pursuant to the "hard look" procedures, applications with visibly *inconsistent* or *incorrect* components are examined to determine if relevant engineering information can be confidently and reliably verified from the application as a whole and, if so, the application is accepted despite the inconsistency or inaccuracy. The Commission reasonably determined that permitting amendments to such applications would balance the need to conserve Commission resources with a desire to be fair to applicants whose filings were substantially complete but contained obvious, minor errors that could readily be corrected.⁷ In contrast, as noted *supra*, if an application is *missing* specified information, it is returned. See 50 Fed. Reg. at 19,945 (Appendix D) and *Leland Broadcasting*, 7 FCC Rcd at 6050, Paragraph 8. This distinction reflects the Commission's general view that its resources should not be used to, in essence, complete an applicant's filing for him, a process which could potentially involve lengthy delays unfairly affecting other applicants.

7. In our prior order, in explaining why a map is required, we indicated that without a map, "the staff cannot confidently and reliably verify an applicant's site information." *Leland Broadcasting*, 7 FCC Rcd at 6050. Our use of the "confidently and reliably" phrase was not intended to suggest that applicants who fail to submit a map or other required material may avoid dismissal if the necessary information can be confidently and reliably determined from the other information in the application or that we had in fact made a determination that Leland's coordinates could not confidently and reliably be verified from Leland's application taken as a whole. Rather, we were simply saying that the transmitter site map is required under our rules to verify coordinates and avoid dismissal. We recognize that use of the "confidently and reliably" phrase in the *Order* may have been confusing, and we clarify, consistent with the cases cited immediately follow-

Fed. Reg. at 45,946, the Commission allowed applicants to submit full scale copies of merely the section of the map containing the site, provided that the section included either four of the standard printed cross-marks or one margin and two cross-marks. Applicants opting for this second alternative were required to draw fine lines between the marks to enclose the site, with each line labeled to denote latitude or longitude. They were also required to furnish a reduced copy of the entire quadrangle map so that the staff could confirm that the lines were accurately labeled. *Id*. Every printed feature on the reduced map copy -- each cross mark, road, elevation contour line, text, etc. -- is identical (except for scale) to that on the full-scale map section; one map would essentially be a "thumbprint" of the other. Therefore, the latitude and longitude of the cross marks connected by the fine lines can be verified accurately by direct observation. Parties unable to comply with the map requirements (or any of the Commission's rules) may, for good cause, request a waiver to substitute alternative material. Leland did not request such a waiver.

⁵ The topographic map format required by the "hard look" rules is in excess of eight times as detailed as Leland's aeronautical map. Additionally, the aeronautical map does not contain the printed features that the required map provides. See note 4, *supra*. The aeronautical map does not have sufficient information on the map itself to allow confirmation, by direct observa-

tion, of the latitude and longitude of the coordinate markings on the USGS 7.5-minute map section included with Leland's application.

⁶ "If any [specified information] is *present* but ... visibly incorrect or inconsistent," the defect will not render the application not sufficient for tender if the needed information can be derived "confidently and reliably, drawing upon the application as a whole." 50 Fed. Reg. at 19,946 (Appendix D) (emphasis added). Leland's failure to submit a 7.5-minute topographic map rendered the material not "present" for purposes of processing.

⁷ The policy was intended to and has permitted the staff to avoid obviously inequitable outcomes without imposing undue burdens on those who process applications. See, e.g., *Donna M. Mavriue*, 6 FCC Rcd 6752 (MMB 1991) (permitting an applicant to amend application where site location gratuitously described in engineering exhibit did not agree with coordinates otherwise specified and plotted consistently throughout the application); *VOB, Incorporated*, 3 FCC Rcd 6750 (MMB 1988) (rejecting petition to deny an application containing a typographical error of channel designation as C2 when only a Class A channel was available).

ing that quoted phrase, that we did not intend to apply or extend the verification exception to applications that do not include required information. *See also Lamoille Broadcasting and Communications General Partnership*, 7 FCC Rcd 2700 (1992); *Apple Communications*, 7 FCC Rcd 1467 (1992). To apply the "confidently and reliably" standard to applications such as Leland's that are missing required information and to thereby accept the application would be, as demonstrated below,⁸ inconsistent with the core purpose of the "hard look," *i.e.*, efficiency in processing thousands of FM applications, in order to expedite the provision of new broadcast service to the public.⁹ Instead of the required map Leland substituted materials of its own choosing that are a significant departure from standard, readily available materials required of all applicants. Its suggestion that the Commission has an obligation to derive critical information from that material is not reasonable, and, furthermore, as discussed *infra*, would establish a precedent for other parties to disregard the Commission's standardized filing requirements, thus creating grave inefficiencies in processing.

8. The procedure suggested by Rohrer to obtain the information which Leland failed to provide would require the staff to follow no less than six separate steps. Because the USGS 7.5-minute section map and Leland's aeronautical map differ significantly in scale, there is no one-to-one correspondence that enables the staff to move directly from the aeronautical map to the section map. Instead, the staff would be required first to refer to the "Channel 231A Allocation Study" (Annex 7.0) which indicates the distance and bearing from Leland's proposed site to Station WDZD, Shallotte, North Carolina, as well as the WDZD transmitter site coordinates.¹⁰ Next, based on the distance and direction from Shallotte to the WDZD tower, the staff would be required to identify the WDZD tower on the aeronautical map. Notably, the WDZD tower is not marked as such on the aeronautical map. Since all that appears is an unlabeled symbol designating a tower with elevation notations corresponding to the relevant elevations specified in WDZD's authorization, the staff would be required to examine the WDZD license file before it could assume that it has identified the relevant tower symbol as WDZD's. Once WDZD's tower site has been identified on the aeronautical map, the staff would be required to measure eastward in order to ascertain that an unmarked vertical line corresponds to a certain longitude, in this case 78 degrees west. Leland notes that a line depicted towards the bottom on the aeronautical map is designated as 34 degrees north latitude. Next, the staff would be required to utilize the

"tick marks" along the 78 degree longitude line and the 34 degree latitude line, proceeding north and west, respectively, at intervals of one second, to determine the relevant 7.5-minute USGS quadrangle map within which the proposed site is situated.¹¹ Having thus identified the boundaries of the relevant quadrangle from the aeronautical map, the staff could ascertain the coordinates of the tick marks surrounding the proposed site and draw fine lines connecting the tick marks on the 7.5-minute section map. It is only after completing that six-step process that the staff could perform the measurements necessary to verify the site coordinates listed elsewhere in the application.

9. Leland's application, necessitating as it would the expenditure of significant staff time and resources to compensate for applicant omission, exemplifies the exact problem the "hard look" system was designed to avoid. Leland omitted required information and instead substituted materials of its own choice -- an aeronautical map and allocations table. The original application left it to the staff to derive a methodology to verify Leland's coordinates based on these submissions; Rohrer's explanatory report, referenced by the court, was submitted only with Leland's petition for reconsideration. Furthermore, although Leland correctly maintains that its site coordinates can ultimately be derived from the submitted information,¹² such derivation would require the staff both to formulate and utilize a cumbersome, time-consuming, multi-step process. A similar expenditure of time and resources would be required of other applicants for the Leland, North Carolina allotment and other interested parties attempting to evaluate Leland's proposal.¹³ The convoluted process, by its very nature, is significantly less reliable than contemplated by the Commission when it adopted its "hard look" regime.¹⁴ Further, since Leland's proposed methodology is only one of many methodologies that could conceivably be used to verify coordinates, consideration of Leland's application would be tantamount to inviting all potential applicants to submit their applications without regard for the standard requirements already formally established by the Commission, after notice and comment, regardless of the burden whatever idiosyncratic materials they might choose to submit would impose on the staff and other parties. In contrast, when all required information is included but is merely inaccurate or inconsistent and can be quickly and accurately corrected from the face of the application, no comparable burdens are imposed. *See para. 6, supra.*

10. In sum, because Leland omitted the required information which allows the staff to verify both expeditiously and accurately the coordinates of its site, the staff

⁸ See paragraph 8 *et seq.* M

⁹ See, e.g., *FM Processing Order*, 50 Fed. Reg. at 19,940 "[S]treamlining our processing procedures will minimize the Commission's administrative costs, enabling us to make more efficient use of our limited staff and other resources. These benefits are critical to making the window filing and first come/first serve process work smoothly and with minimal delay in processing large numbers of applications."

¹⁰ In addition to WDZD, the table lists Stations WZZU, Burlington, and WZKB, Wallace, North Carolina. However, only the WZKB and WDZD towers appear on the aeronautical map. Thus, verification of listed coordinates would likely involve a futile expenditure of resources inquiring into the geographic relationship of the facilities of the other two stations.

¹¹ Rohrer's report contains some inaccuracies. The report indicates that the tick marks on USGS quadrangle maps are separated by seven minutes, thirty seconds. This is incorrect, as

the separation is two minutes, thirty seconds. The report further indicates that the east set of tick marks on its 7.5-minute site map is determined as 78 degrees, five minutes, thirty seconds. In fact, proceeding with the methodology suggested by Leland yields a boundary of 78 degrees, five minutes, zero seconds.

¹² We note that, given sufficient time, the staff could eventually have verified Leland's site coordinates without the benefit of Rohrer's directions. Again, however, requiring the staff to do so would be contrary to the purpose of the "hard look."

¹³ Each of the other applicants designated for hearing in the Leland proceeding complied with the Commission's requirements for transmitter site maps.

¹⁴ Indeed, Leland's convoluted method arguably does not satisfy the ordinary meaning of "reliable," *i.e.*, it does not lend itself to consistent dependability of results. *See notes 10 and 11, supra.*

properly dismissed its application as not sufficiently complete, consistent with the clear mandate of the *FM processing Order*. Even though the staff ultimately could have confidently and reliably determined the coordinates, if, as a matter of policy, it were required to follow such complex multi-step processes as proposed by Leland or as might be submitted by other applications in the future, reliability would be diminished and the processing burden (as well as the burden on competing applicants) would be significantly increased, a result at variance with the core purposes of the *FM Processing Order*, i.e., the expeditious processing of applications. Thus, we decline to extend our verification exception to applications, such as Leland's, that lack required information. We continue to believe Leland's application was properly dismissed under the "hard look" rules.

11. ACCORDINGLY, IT IS ORDERED, That this *Memorandum Opinion and Order* shall constitute the Commission's explanation in response to the November 15, 1993 *Judgment* of the United States Court of Appeals for the District of Columbia Circuit in the matter of *Leland Broadcasting Group, Inc. v. Federal Communications Commission*, Case No. 92-144.

12. IT IS FURTHER ORDERED, That the General Counsel, on behalf of the Commission, shall file a copy of this *Memorandum Opinion and Order* with the Court.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary