

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

In the Matter of

FM Transmitter Site Map Submissions
Required by FCC Forms 301 and 340

MEMORANDUM OPINION AND ORDER

Adopted: October 24, 1986 Released: November 4, 1986

By the Commission:

1. Applicants for AM, FM and TV station construction permits have long been required by FCC Forms 301 and 340 to submit a 7.5 minute series U.S. Geological Survey ("USGS") Topographic Quadrangle map specifying the proposed antenna and transmitter site.¹ Specifically, these forms require that this map show: (i) the proposed transmitter location accurately plotted with the latitude and longitude lines clearly marked and showing a scale of statute miles and (ii) the transmitter location and call letters of all AM, FM and TV broadcast stations within two miles of the proposed antenna location.²

2. Pursuant to a Commission *Public Notice*, Mimeo 3693 (released April 5, 1985), applicants for FM station construction permits, unlike applicants for other broadcast services, thereafter were required to submit either the entire full scale 7.5 minute map, or a legible photocopy thereof, containing at least two USGS coordinate markings, one on either side of the marked site, placed along the printed margins of both axes. If, however, the provision of a full scale map or photocopy was "inconvenient", the *Public Notice* provided that the applicant could submit a reduced topographic map so long as it was accompanied by a full scale copy of the section of the map containing the site. Finally, the *Public Notice* stated that applications which failed to comply with one of these alternative requirements would be returned without further review. Thereafter, in adopting the "hard look" approach to the processing of FM applications, the Commission indicated that in order to be deemed sufficient for tender, an application must, among other things, be accompanied by a transmitter site map as described in the April 5, 1985 *Public Notice, Report and Order* in Docket 84-750, 50 Fed. Reg. 19936, 19945 (Appendix D) (May 13, 1985). The specific contents of the *Public Notice* were not, however, contained in either the text or Appendices of the *Report and Order*.

3. As a practical matter, the information called for in the *Public Notice* has always been needed by the staff to verify fundamental and critical information contained in the application. See note 1, *supra*. However, prior to adoption of the *Public Notice*, applicants were allowed to submit photocopies of any portion of the 7.5 minute map containing the proposed site without reference to any requirement that *pre-printed* axes must be photocopied from original USGS maps. Applications which did not contain a transmitter site map whose accuracy could be independently verified by the staff were held in abeyance until the applicant furnished any necessary information by amendment. Recognizing the significant processing delays caused by this practice and anticipating a marked increase in the number of FM applications as a result of

BC Docket 80-90, the *Public Notice* was designed to eliminate any confusion as to what was required in a transmitter site map and thereby facilitate processing of all applications.

4. Section 552(a)(1)(C) and (D) of the Administrative Procedure Act, 5 U.S.C. § 552 (a)(1)(C) and (D), requires that the Commission "separately state and publish in the Federal Register rules of procedure [and] substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretation of general applicability formulated and adopted by the agency." It is well settled that an agency "regulation imposing specific obligations upon outside interests in mandatory terms, is required to be published in the Federal Register in its entirety, or in the alternative, to be both reasonably available and incorporated by reference with the approval of the Director of the Federal Register". *Appalachian Power Company v. Train*, 556 F.2d 451, 455 (1977). (emphasis added) See also 5 U.S.C. § 552(a)(1).³ The District of Columbia Circuit Court of Appeals has held in *Rochelle C. Salzer v. FCC*, 778 F.2d 869 (D.C. Cir. 1985), that the mere summarization of new form requirements in the Federal Register, without publication of a new or supplemental form therein, did not constitute adequate notice to pending applicants for low power television construction permits that they were thereafter required to file appropriate amendments to comply with those new form requirements. As stated in *Salzer*:

The *quid pro quo* for stringent acceptability criteria is explicit notice of all application requirements: "[w]hen the sanction is as drastic as dismissal without any consideration whatever of the merits, elementary fairness compels clarity in the notice of the material required as a condition for consideration." [*Radio Athens, Inc. (WATH) v. FCC*, 401 F.2d 398, 404 (D.C. Cir. 1968)]. The less forgiving the FCC's acceptability standard, the more precise its requirements must be. (Footnote omitted quoting *Bamford v. FCC*, 535 F.2d 78, 82 (D.C. Cir.), *cert. denied*, 429 U.S. 895 (1976)).

Id. at 875.

5. In view of the foregoing, it is clear that incorporation by reference in the Federal Register did not constitute adequate notice of the contents of the *Public Notice*. Therefore, it would not be proper to impose the requirements set forth in that *Public Notice* upon applicants who were not provided adequate notice thereof. Accordingly, as to all applicants who have preserved their rights at various levels of appeal, applications which were returned for failure to comply with the requirements in the *Public Notice* shall be reaccepted *nunc pro tunc*.⁴

However, in the interest of administrative finality, such treatment will not be afforded those applicants whose applications contained defective transmitter site maps but who failed to preserve their rights on appeal. "A reversal on appeal does not inure to the benefit of those who did not join in the appeal, although it may control subsequent actions on the part of the Commission." *Windber Broadcasting Company*, 44 FCC 2790 (1962). Those applicants who did not protest the staff's action returning their applications have failed to avail themselves of prescribed administrative procedures to protect their rights

and, therefore, should not now be permitted to disrupt the processing or final decision in proceedings involving applications for the same frequencies.

6. Accordingly, IT IS ORDERED That, as to all applicants who have preserved their rights at various levels of appeal, the staff is directed to reinstate *nunc pro tunc* those applications returned for failure to comply with the requirements of the *Public Notice*.⁵

7. IT IS FURTHER ORDERED That, given the necessity of the information called for in the *Public Notice* and in order to avoid further delay in the processing of FM applications, the requirements set forth in the *Public Notice*, Mimeo 3693 (released April 5, 1985), appended hereto, shall be effective seven days after publication in the Federal Register.

8. Finally, we take this opportunity to note that submission of the *entire*, original 7.5 minute map has always been acceptable. We emphasize that this practice continues to be acceptable and is, in fact, the best method of accurately indicating transmitter and antenna site data. Accordingly, we encourage all applicants, where possible in the future, to submit the entire 7.5 minute map.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX

PUBLIC NOTICE

April 5, 1985

FCC CLARIFIES TRANSMITTER SITE MAP REQUIREMENTS

This notice is part of the Commission's continuing effort to expedite the processing of FM applications in order to bring new broadcast service to the public as rapidly as possible.

When applying for an FM station construction permit, one of the submissions required by FCC forms 301 and 340 is a 7.5 minute series U.S. Geological Survey topographic quadrangle map upon which is marked the transmitter site.

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 coordinate 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 must 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 it 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. Prospective applicants should understand that the Commission cannot process an application to grant without being able to verify the correctness of the site elevation and site coordinates. These coordinates serve as the reference point for all calculations of spacing, coverage and interference.

Questions concerning the above should be directed to Bob Greenberg, FM Branch, (202) 632-7166.

FOOTNOTES

¹ This information enables the staff to verify the stated geographic coordinates of the proposed site, the presence of other nearby communications facilities and/or obstructing terrain (See 47 C.F.R. § 73.315), and the ground elevation of the transmitter site. This final value is paramount in determining radiation center heights above ground and mean sea level from which, with other data, antenna height above average terrain is derived. FM site data is also used for the purpose of air safety approval, environmental analyses, the determination of proper spacing and the licensing of other co-located communications services.

² See e.g. FCC Form 301 (January 1982 and April 1985) Item V-A, Item 11 (AM); Section V-B, Item 13 (FM); and Section V-C, Item 13 (TV).

³ The regulations of the Office of the Federal Register pertaining to incorporation by reference are found in 1 C.F.R. Part 51. § 51.7 requires that each incorporation by reference include an identification and subject description of the matter incorporated. A brief description is required to inform the user of the potential need to refer to the material incorporated. Under § 51.3 the approval of the Director for incorporation by reference shall only be granted when the material is eligible, its incorporation will substantially reduce the volume of material published in the Federal Register, the material is sufficiently available to afford fairness and uniformity, and the incorporating document is drafted and submitted for publication in accordance with the applicable regulations. The above requirements were not followed in the present case.

⁴ We note that with regard to two applications which also contain additional tenderability defects, the Commission has affirmed the action of the staff in dismissing those applications for reasons stated in two separate *Memorandum Opinion and Orders* adopted this day. These applications are: Joanne Brehm, Channel 265A, Apalachicola, Florida (BPH-850709MV) and Matthew D. Wiggins, Channel 288A, Apalachicola, Florida (BPH-850709MU).

⁵ All applications pending as of the effective date of this *Memorandum Opinion and Order* that do not comply with the requirements for FM transmitter site maps set forth in the

attached Appendix shall be retained and the applicants will be permitted to amend their applications to correct this deficiency only.