

ORIGINAL

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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MAR 1 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Amendment of Section 73.202(b)) MM Docket No. 98-207
Table of Allotments) RM-9408
FM Broadcast Stations) RM-____
(Canaseraga and Wellsville, New York))

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

RESPONSE TO REPLY COMMENTS

RJ Communications ("RJ"), by its attorneys, hereby submits its Response to the Reply Comments that were filed by RP Communications ("RP") in the above-captioned allotment proceeding ("Reply Comments").¹

As a preliminary matter, it should be noted that RP's Reply Comments were not timely filed with the Commission. The Commission's Notice of Proposed Rule Making established February 9, 1999 as the Reply Comment Date in this proceeding. RP's Reply Comments were filed with the Commission after this date, on February 10, 1999. There is no evidence that RP requested an extension of time to file its Reply Comments or that the Commission authorized such

¹Because the comment cycle in this proceeding has ended, RJ Communications is filing simultaneously herewith a motion for leave to file this response pursuant to Section 1.415(d) of the Commission's Rules. 47 C.F.R. § 1.415(d) (1997).

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an extension. Accordingly, RP's Reply Comments should not be considered by the Commission.² In the event the Commission decides to consider RP's Reply Comments despite this procedural defect, RJ submits the following response.

In its Reply Comments, RP urges the Federal Communications Commission (the "Commission" or the "FCC") to dismiss RJ's Petition for Rule Making and Counterproposal ("Petition") on two grounds. First, RP states that the reference coordinates proposed in the Petition are short-spaced to an occupied Canadian FM allotment. Second, RP alleges that an FM station operating within RJ's proposed reference coordinates will not be able to provide city grade coverage of the proposed city of license due to shadowing concerns. For the reasons set forth below, these arguments have no merit and do not warrant dismissal of RP's proposal.

Fatal to its opposition, RP does not, nor can it, contest that Canaseraga is a community for FM allotment purposes; that Canaseraga has no radio broadcast station allocated to it; that RJ's proposal represents a first transmission service for Canaseraga; that RJ's proposal represents a comparatively superior first local service credit over the RP's third local aural, albeit first competitive FM, service credit for a community that is already served by an AM station and an FM station. Further, RP cannot contest the fact that the "law" dictates the allotment result proposed by RJ. Thus, RP has attempted to divert the Commission's attention from the real issue in this case by urging the Commission to summarily disregard the "public interest" based on two non-meritorious technical objections. In short, the Commission should focus on the central issue in this proceeding, which is whether the public interest would be better served by allotting FM

²The Commission's Rules do not contemplate the acceptance of comments filed beyond the comment cycle unless specifically requested or authorized by the Commission. See Section 1.415(d) of the Commission's Rules. 47 C.F.R. § 1.415(d) (1997).

Channel 246A to Wellsville or to Canaseraga.

RP first argues that RJ's proposal violates Section 73.207(b)(2) of the Commission's Rules and the 1991 Agreement Between the Government of Canada and the Government of the United States of America Relating to the FM Broadcasting Service, as modified on July 9, 1997 (the "Agreement"), because the reference coordinates proposed by RJ are short-spaced to a Canadian FM allotment occupied by station CIGL-FM, Belleville, Ontario. RP argues that this alleged violation requires that RJ's Petition be dismissed as defective. RP's position is flawed for at least the following reasons.

RP fails to recognize that short-spacing issues involving Canadian and U.S. stations are treated differently than those involving two domestic stations.³ This differential treatment results from the fact that FM broadcasting agreements between the United States and Canada have historically allowed the Commission to submit for clearance to the appropriate Canadian authority technical data of proposals that are short-spaced to a Canadian FM broadcast facility. The Canadian Agreement specifically provides for shorter separations than those set forth in the Table of Minimum Separations in the Agreement (the "Table") when agreed upon by the FCC and the appropriate Canadian authority.⁴ The Commission routinely accepts and adopts proposals for

³See Mountain Media, Inc., et al., 6 FCC Rcd 410 at para. 6 (1988).

⁴Agreement at Section 2.5. Section 5.2.2 of the Agreement provides that proposed allotments not conforming with the Table "shall normally be considered acceptable for technical coordination if objectionable interference would not be caused within the protected service contour of the existing . . . adjacent channel allotments or assignments." As shown in the attached Engineering Exhibit, RJ's proposed allotment will not cause interference to the protected service contour of the Canadian station at issue here, nor would the interfering contour of a station located within RJ's proposed reference coordinates even cross the Canadian border. It should also be noted that implementation of RJ's proposal would not result in any unacceptable interference within the United States. See attached Engineering Exhibit.

allotments that are short-spaced to Canadian stations pursuant to this provision of the Agreement.⁵ Accordingly, RP's claim that RJ's proposal violates the Agreement and the Commission's Rules because its proposed reference coordinates are located nearer to the site of Canadian station CIGL-FM than contemplated in the Table has no merit.

In any event, if the concern is to protect Canadian interests pursuant to the Agreement, and the Commission does not wish to enter into special negotiations with Canada, the Commission need only impose a site restriction that meets the applicable spacing guidelines. The Commission routinely adds such restrictions, even on its own initiative.⁶ RJ's engineering consultant has conducted a study and determined that a site restriction could be imposed upon an allotment to Canaseraga that would meet all spacing guidelines and comply with the Commission's city grade coverage rule, and RJ would be willing to accept any such site restriction.⁷

There are strong public interest and equitable factors favoring consideration and grant of RJ's proposal for a first local transmission service to Canaseraga. The Commission's Rules

⁵See Albion New York, et al., Report and Order, DA 98-1574, RM-9178 (released August 14, 1998); Old Forge, New York, et al., Report and Order, DA 98-1516, RM-9064 (released August 7, 1998); Hague, New York, et al., Notice of Proposed Rule Making, DA 98-691, RM-9239 (released April 17, 1998); Hilton, New York, et al., Report and Order, DA 97-475, RM-8861 (released March 14, 1997); Lockport, New York, Notice of Proposed Rule Making, DA 96-1991, RM -8946 (released December 6, 1996).

⁶See Albion New York, et al., Report and Order, DA 98-1574, RM-9178 (released August 14, 1998); Levan, Utah, et al., Report and Order, DA 97-1885, RM-8911 (released September 5, 1997); Wellington, Texas, Report and Order, DA 98-364, RM-9048 (released February 27, 1998); Corinth, New York, et al., Memorandum Opinion and Order, FCC 90-185, RM-5614 (released May 25, 1990); Machias, Maine, Notice of Proposed Rule Making, DA 95-2280, RM-8722 (released November 20, 1995).

⁷See attached Engineering Exhibit.

expressly contain the mileage separations for FM stations along the Canadian border area that were established in the Agreement when it was adopted in 1991.⁸ As pointed out by RP in its Reply Comments, the mileage spacings negotiated by the United States and Canadian governments were amended in 1997.⁹ However, the Commission never amended its rules to incorporate the changes brought about in 1997, and its rules neither make any mention of the changes nor incorporate any of the spacing distances that were affected thereby. Accordingly, the Commission's Rules are highly misleading.¹⁰

Pursuant to the Administrative Procedures Act ("APA"), the Commission generally is required to go through a notice and comment period before it can change its rules, and at the very

⁸See 47 C.F.R. § 73.207(2) (1997).

⁹Through an exchange of Diplomatic Notes in July 1997, the United States and Canadian governments agreed to amend the version of the agreement that had been adopted in 1991. Most significantly, as the title of the Public Notice that announced the exchange suggests, the revisions primarily affected the allocation criteria for FM translator stations. The exchange, however, also affected the separation requirements for some classes of FM stations, including domestically-allocated Class A stations operating at greater than 3 kilowatts. See U.S. - Canada FM Agreement Modified To Permit Added Flexibility For FM Translators, Public Notice, IN 97-22, DA 97-1595 ("Public Notice") (released July 28, 1997).

¹⁰Contrary to RP's assertion, the Commission did not afford parties proper notice that the Agreement had been modified with respect to the spacing requirements for FM stations. The Commission has acknowledged that a Public Notice does not constitute legally adequate notice of technical requirements of international agreements. Malkan FM Associates v. FCC, 935 F.2d 1313 at note 5 (1991). It follows, then, that the citation to such a public notice in a private, commercial, supplementary source, such as *Pike & Fischer's Radio Regulation*, could not possibly be deemed to constitute such notice. It should be noted that the language of the Public Notice itself implies that until the pertinent FCC Rules are modified to incorporate the changes, the criteria that applied prior to the exchange of diplomatic notes in 1997 would govern the spacing requirements, although "applications that seek facilities that comply with the terms of the revised criteria would [also] be considered acceptable." See Public Notice. It should also be noted that while the "Rules" section of *Pike & Fischer's Radio Regulation* may include reference to the Public Notice, the "Treaties" section lists only the 1991 version of the Agreement.

least must publish in the Federal Register any new or modified rules.¹¹ While the Commission has begun this process with respect to the spacing revisions that were agreed upon with respect to FM translator stations near the Canadian border,¹² there is no evidence that the Commission has taken any such steps regarding the agreed upon changes that affect similarly-situated FM stations.

Further, the case cited by RP to support its position that the 1997 revisions to the Agreement are controlling is distinguishable from the instant situation.¹³ The Court in Malkan held that the Commission was not bound by the procedural requirements of the APA in enforcing the terms of an international agreement where the actual terms of the agreement being enforced were not specifically made a part of the Commission's Rules. However, in this case, the terms of the pertinent rule are expressly a part of the Commission's Rules. In any event, the Commission can avoid having to resolve this issue either by simply negotiating RJ's proposal with the Canadian government pursuant to the Agreement or imposing a site restriction on the proposal and granting RJ's Petition.

As to RP's second technical argument, RP has not shown that any terrain obstruction would prevent compliance with the Commission's technical rules concerning city-grade service to Canaseraga from RJ's proposed reference coordinates. RP has merely alleged that line-of-sight is blocked by significant terrain features from potential areas for allotment. However, there is no requirement that the proponent of an FM allotment must demonstrate that line-of-sight coverage

¹¹See 5 U.S.C. §§ 552(a)(1)(D), 553 (1996).

¹²See 1998 Biennial Regulatory Review -- Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, Notice of Proposed Rule Making and Order, FCC 98-117, MM Docket No. 98-93 at para. 71 (released June 15, 1998).

¹³See Malkan FM Associates v. FCC, 935 F.2d 1313 (1991).

of the proposed city of license is at least achievable from the proposed reference coordinates. The Commission has held that “where it appears that a site cannot be found that allows line-of-sight coverage over the community or a transmission path free of major obstructions . . . the proponent must demonstrate that the received signal strength as transmitted from that site will exceed 70 dBu and encompass the entire principal community.”¹⁴ Suitability, therefore, is determined by whether a 70 dBu signal can be provided over Canaseraga from a site within the reference coordinates.

As demonstrated in the attached Engineering Exhibit, there are a number of potential sites within the coordinates proposed by RJ from which RJ could provide all of Canaseraga with an unobstructed signal that exceeds 70 dBu and otherwise conform with the Commission’s technical rules from an antenna height of 100 meters above ground level. In making its calculations, RJ’s engineering consultant employed a point-to-point prediction methodology, which accounts for terrain factors and their effect on signal propagation.¹⁵

As demonstrated herein, RJ’s proposal is not defective in any way nor was the proposal technically or procedurally incorrect at the time of filing. Accordingly, summary dismissal of RJ’s Petition cannot be legally justified.

¹⁴Creswell, Oregon, 4 FCC Rcd 7040 at para. 8 (1989). See also, Eugene, Oregon, 10 FCC Rcd 9793 at para. 4 (1995), citing Creswell, Oregon, supra, “[g]enerally, a rule making proponent only needs to show that a theoretical site exists which complies with the Commission’s minimum distance separation and other technical requirements. However, where . . . a showing has been made that a terrain obstruction exists which would prevent compliance with the Commission’s technical requirements concerning city-grade and line-of-sight service, the Commission requires the proponent to provide an engineering study showing that the allotment can indeed be made in conformance with the technical rules.

¹⁵See Engineering Exhibit, attached hereto.

Based upon the foregoing, the Commission should accept RJ's Petition for Rule Making and Counterproposal and either seek concurrence by the Canadian government in the allotment of Channel 246A to Canaseraga as a specially negotiated allotment or impose a site restriction that meets any applicable mileage separation requirements while still allowing the allotment to be used to serve Canaseraga. The Commission should not allow RP's technical allegations to prevail over the clear public interest that would be served by affording the community of Canaseraga its first aural broadcast service. Accordingly, the Commission should grant RJ's proposal to allot Channel 246A to Canaseraga, New York and deny the mutually exclusive proposal of RP to allot Channel 246A to Wellsville, New York.

Respectfully submitted,

RJ COMMUNICATIONS

By: _____


Richard R. Zaragoza
Colette M. Capretz
Its Attorneys

FISHER WAYLAND COOPER LEADER
& ZARAGOZA L.L.P.
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006
(202) 659-3494

Dated: March 1, 1999

ENGINEERING EXHIBIT

TECHNICAL NARRATIVE

This narrative supports RJ Communications reply comments proposing the allocation of FM Channel 246A to Canaseraga, New York which is mutually exclusive with Docket 98-207.

1. RJ Communications' proposed reference coordinates protect Canadian FM Station CIGL-FM in Belleville, Ontario, Canada. The Exhibit shows the 34 dB μ "flat-earth" contour of RJ Communications' as fully protecting the 54 dB μ contour of CIGL-FM over the Great Lakes area. Therefore, this proposal should be acceptable to the Canadian government. Further, RJ Communications' proposed allotment would receive no prohibited interference from the Canadian FM Station. In this regard, this Exhibit shows the 40 dB μ "flat-earth" contour of CIGL-FM as fully protecting the 60 dB μ contour of RJ Communications' proposed allotment.

2. The issue was raised about the reference coordinates not providing "line-of-sight" to the city of license. FCC §73.315(b) suggests a transmitter site should have the highest elevation available in sparsely populated area with line-of-sight toward the city of license.

There has been no policy or rule requiring any coverage that contemplates terrain for allocation purposes. The allocations branch of the FCC has only required uniform coverage (16.2 km for Class A). See MM Docket 92-159.

So as to resolve any issue that the proposed site provides service to Canaseraga, NY, a City Grade coverage exhibit is included:

- Dashed line is required 16.2 km contour. Complete coverage is achieved
- Solid line is the 8 cardinal radials with a 9th radial at 350° over the city as would be required in FCC 301 application. Complete coverage is achieved.
- A short "arc" over the 350° radial is 16.1 km as calculated by the new FCC Point-to-Point program
- For the 350° radial, a graphical presentation of the terrain and the dB μ contour is provided as an additional exhibit.

FCC §73.313(e) states "However, where the actual contour distances are critical factors, a supplemental showing of expected coverage must be included together with a description of the method used in predicting such coverage...." Here the FCC allows the use of supplemental methods, with none codified in the Rules. The new FCC Point-to-Point program proposed in recent rule changes has originated with the FCC staff and therefore can be relied on as

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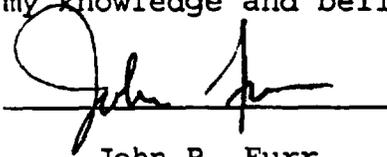
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NARRATIVE

having acceptance by the FCC, although not official at this time. The program shows in the graphical presentation that 70 dB μ or greater signal will provided within 16.1 km radius.

An alternative site is shown at 42-19-38N, 77-43-47W. This site meets the 210 km spacing referenced by the opposition and the same three city grade contours (as described above) provide complete coverage of Canaseraga, NY.

The information contained in this report is true and correct to the best of my knowledge and belief.

March 1, 1999



A handwritten signature in black ink, appearing to read "John R. Furr", is written over a horizontal line.

John R. Furr

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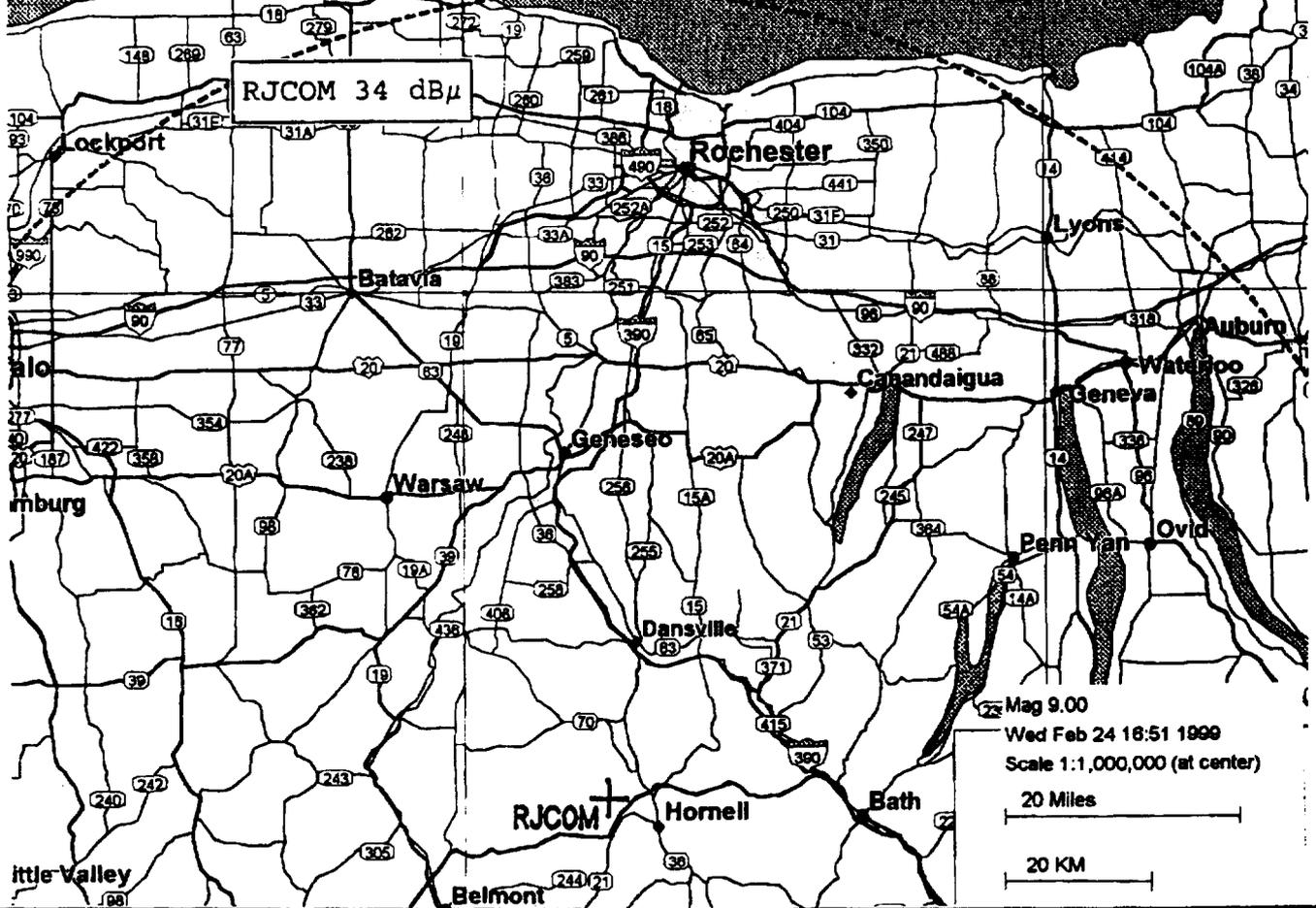
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CANASERAGA, NY
NARRATIVE

MAP SOURCE:
DELORME 1996

CIGL+

CIGL 54 dB μ

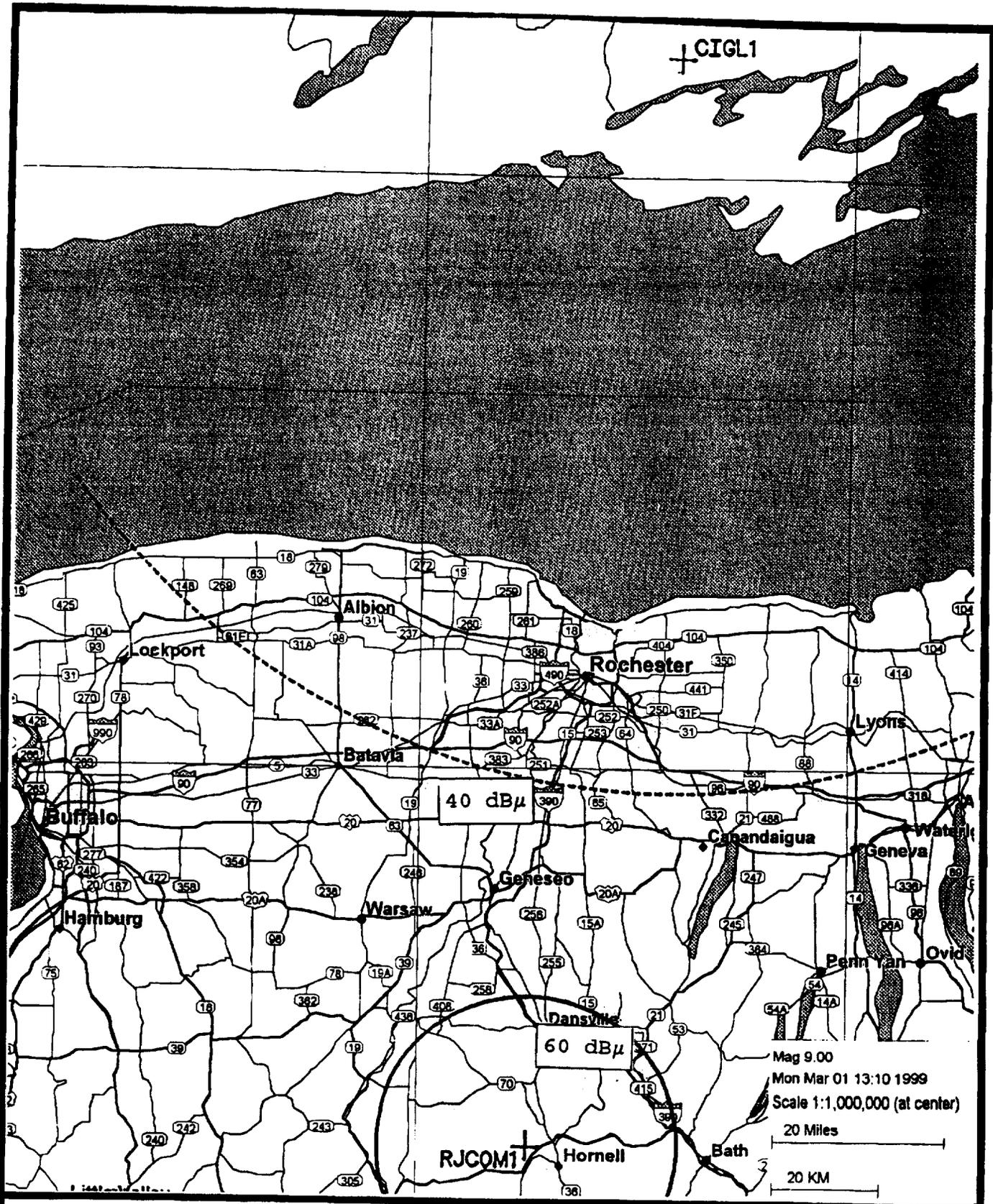
RJCOM 34 dB μ



Mag 9.00
Wed Feb 24 16:51 1999
Scale 1:1,000,000 (at center)
20 Miles
20 KM

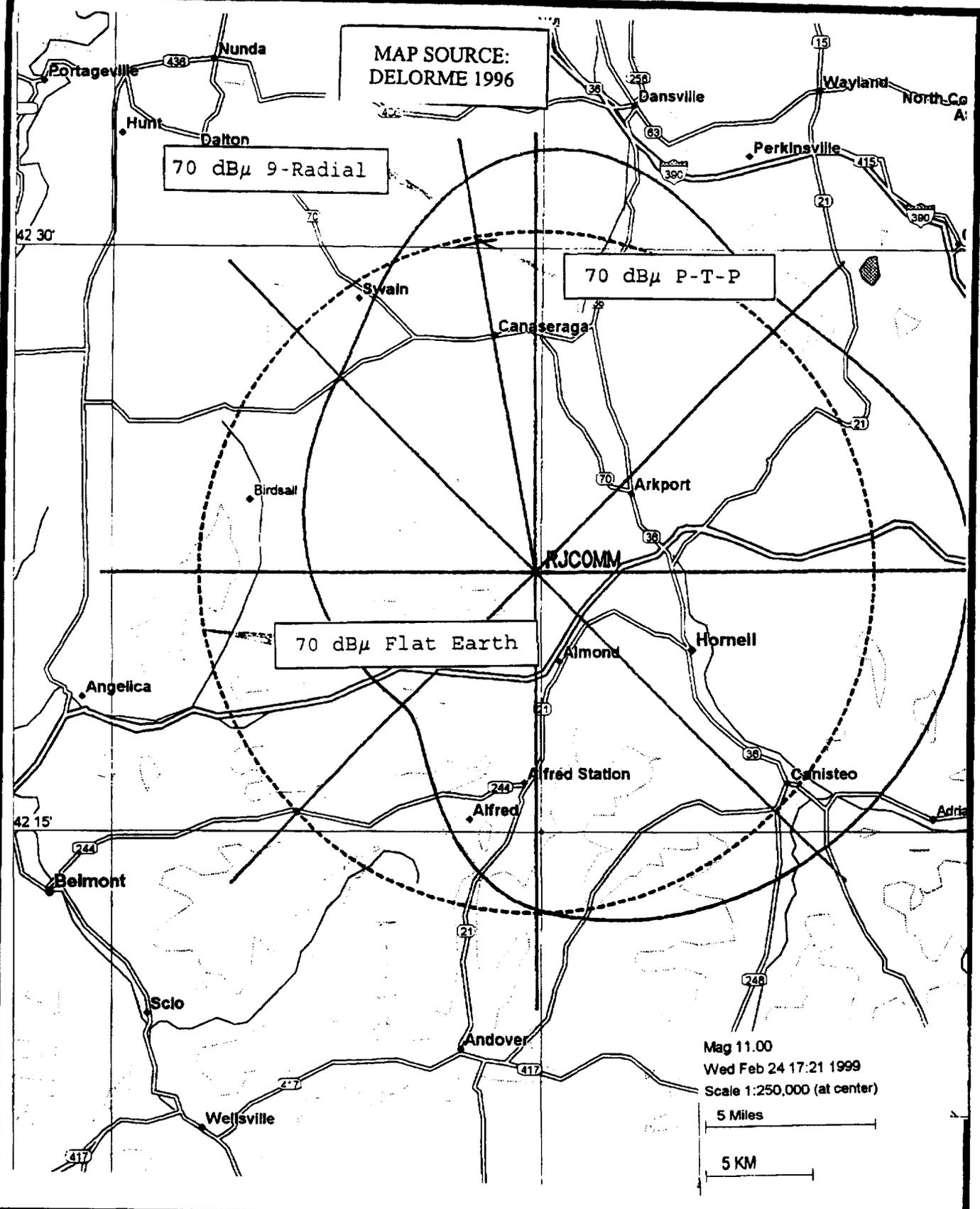
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PROTECTION TO CIGL



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 PROTECTION TO RJCOM



MAP SOURCE:
DELORME 1996

70 dBμ 9-Radial

70 dBμ P-T-P

70 dBμ Flat Earth

RJCOMM

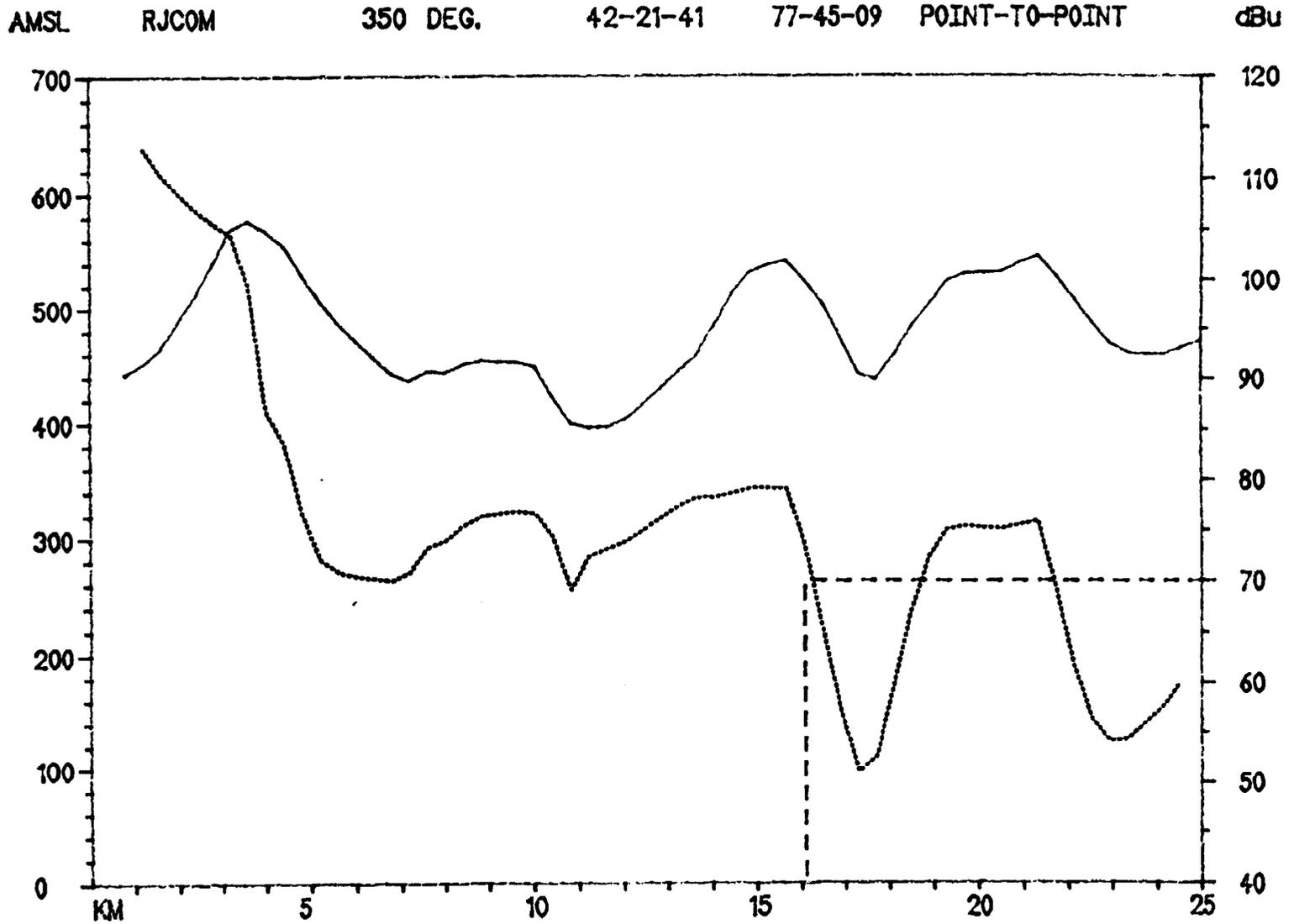
Mag 11.00
Wed Feb 24 17:21 1999
Scale 1:250,000 (at center)
5 Miles
5 KM

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CITY GRADE CONTOUR

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POINT TO POINT STUDY



02-18-1999

John Furr & Associates Inc.

PAGE 1

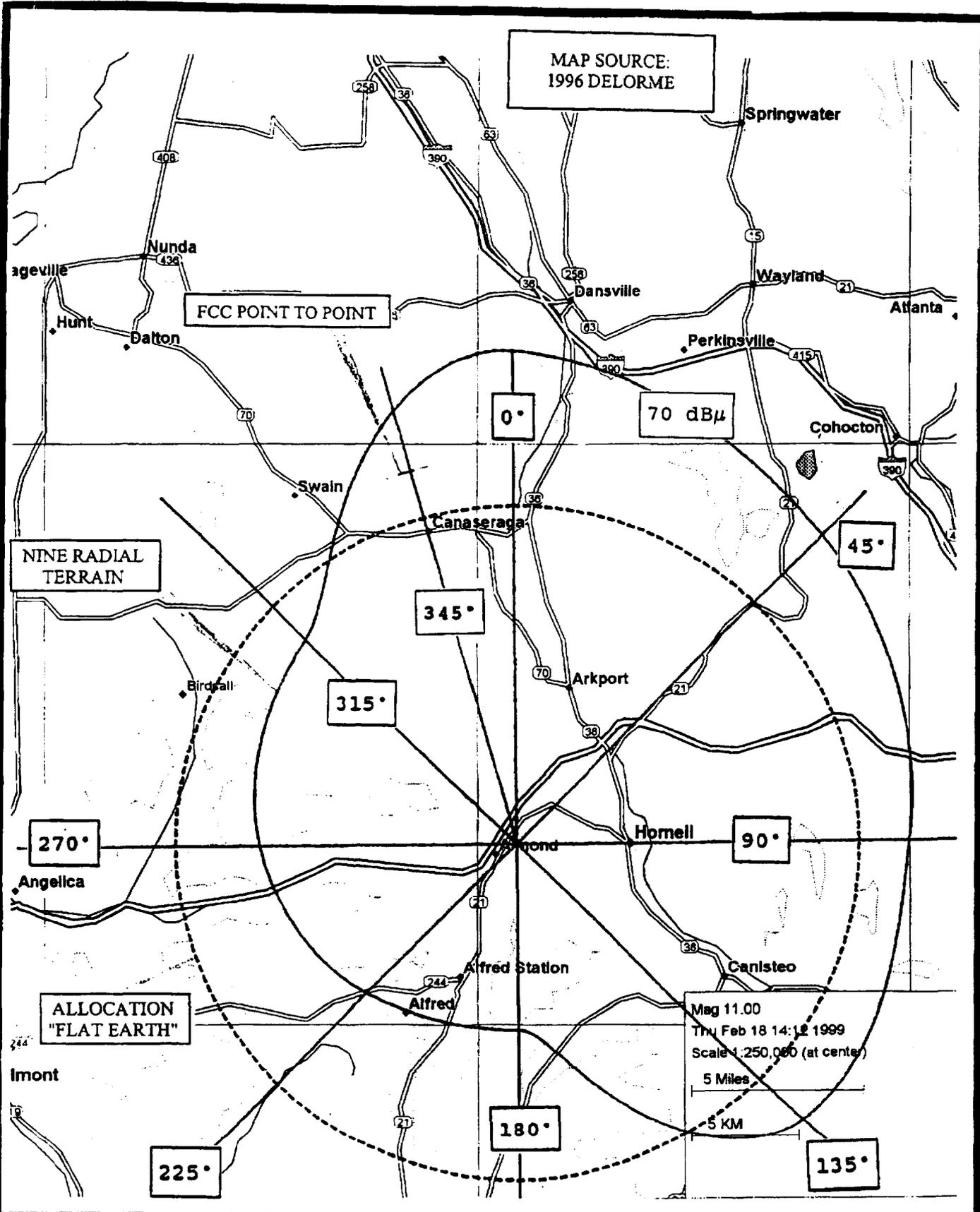
FM Study for: RJ COMMUNICATIONS FCC Database Date: 1/99 42-19-38
 Location: CANASERAGA, NY Channel Class: A 77-43-47
 Call City, State Chan Class Freq kW Latitude Dist. Required
 Status Proponent File Number HAAT Longitude Azm. Clear (km)

>>>>>>> Study For Channel 246 97.1 MHz <<<<<<<

ALLOC	WELLSVILLE, NY	246 A	97.1		42-07-12	29.3	115	
ADD	RP COMMUNICATIONS	Docket-98-207	0		77-56-54	218.2	-85.7	SHORT
		Use of 73.215 for short spacing requires:				92	-62.7	SHORT
Canadian concurrence required								
CIGLFM	BELLEVILLE, ON	246 B	97.1	50.	44-11-56	209.56	210	
		-		49	77-24-18	7.1	-0.44	CLOSE
WYXL	ITHACA, NY	247 B	97.3	26.0	42-27-54	112.75	113	
LIC	EAGLE BROADCASTING CO	BLH-6385	268		76-22-23	81.7	-0.25	CLOSE
GRANDFATHERED AT 26KW @ 268M HAAT.								
WGRF	BUFFALO, NY	245 B	96.9	24.+	42-57-13	117.0	113	
LIC	BUFFALO LICENSE L.L.C	BLH-970523KC	217		78-52-36	306.9	+4.0	CLOSE
WMKB	RIDGEBURY, PA	245 A	96.9	1.55	41-55-43	90.0	72	
LIC	MARKEY BROADCASTING C	BLH-890728KC	131		76-46-58	119.2	+18.0	CLEAR
Accepted by Canada on 940222								
WCMFFM	ROCHESTER, NY	243 B	96.5	50.	43-08-07	90.6	69	
LIC	STONER BROADCASTING S	BLH-840501CZ	137		77-35-02	7.5	+21.6	CLEAR
SPECIAL NEGOTIATED SHORT-SPACED ALLOCATION								
WGMM	BIG FLATS, NY	249 A	97.7	.61+	42-08-31	57.6	31	73.215
CP	EOLIN BROADCASTING, I	BPH-980710IE	220		77-04-40	110.7	+26.6	CLEAR
WGMM	BIG FLATS, NY	249 A	97.7	1.30	42-09-43	60.0	31	
LIC	CULVER COMMUNICATIONS	BLH-890502KD	147		77-02-15	107.6	+29.0	CLEAR
Accepted by Canada on 931206-Specially negotiated, short-spaced allotment								
ALLOC	TORONTO, ON	247 C1	97.3		43-38-33	199.0	168	
		-		0	79-23-15	317.8	+31.0	CLEAR
Specially negotiated, short-spaced allotment-Accepted by Commission 930405								
WFRMFM	COUDERSPORT, PA	244 A	96.7	1.45	41-45-11	67.6	31	
LIC	FARM & HOME BROADCAST	BLH-931019KB	203		78-00-03	199.5	+36.6	CLEAR
Proposed to Canada as B1-Accepted by Canada 910415								

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 ALLOCATION STUDY



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ALTERNATE SITE

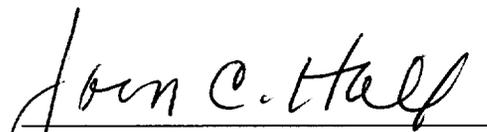
R. J. COMMUNICATIONS
 CANASERAGA, NY
 CITY GRADE CONTOURS

CERTIFICATE OF SERVICE

I, JOAN C. HALL, do hereby certify that I have this 1st day of March, 1999, mailed by first class United States mail, postage prepaid, a copy of the foregoing "RESPONSE TO REPLY COMMENTS" to the following:

Robert N. Felgar
Fletcher, Heald & Hildreth, P.L.C.
11th Floor
1300 North 17th Street
Arlington, VA 22209-3801

Leslie K. Shapiro
Federal Communications Commission
Mass Media Bureau
Policy and Rules Division
2000 M Street, N.W., Room 564
Washington, D.C. 20554



Joan C. Hall