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In re: W254BQ, Olean, NY
Facility ID No. 146562
File No. BMPFT-20090720AAQ
File No. BLFT-20090728AAS

**Petition for Reconsideration
Informal Objection**

Dear Counsel:

We have before us a petition for reconsideration ("Petition") filed by Backyard Broadcasting Olean Licensee, LLC ("Backyard")¹ on July 23, 2009. We also have an opposition filed by Colonial Radio Group, Inc. ("Colonial") on August 3, 2009 ("Opposition"). Backyard seeks reconsideration of the grant of Colonial's above-referenced application for a construction permit to modify FM translator W254BQ, Olean, New York ("Station"), to increase power to 250 watts and make frequency, height, and antenna changes ("CP Application").² We also have before us Colonial's above-referenced application for a license to cover the Construction Permit ("License Application") and related pleadings.³ For the reasons set forth below, we deny the Petition and Informal Objection and grant the License Application.

Background. Backyard's sole objection is that the Station's facility violates Section 74.1235(d)(3) of the Commission's rules ("Rules"), which states that, for translator stations within 320 kilometers of the Canadian border, "[t]he distance to the 34 dB μ contour may not exceed 60 km in any direction."⁴ The Station's 34 dB μ contour, Backyard states, "exceeds 60 kilometers in nearly every direction."⁵ Therefore, Backyard argues, the Station's facilities are in clear violation of Section 74.1235(d)(3) of the Rules and the CP Application was therefore granted in error.

¹ Backyard is the licensee of Stations WPIG(FM) and WHDL(AM), both Olean, New York.

² File No. BMPFT-20090720AAQ. The CP Application was granted and a construction permit issued on July 21, 2009 ("Construction Permit").

³ File No. BLFT-20090728AAS. On July 30, 2009, Backyard filed an informal objection to the License Application ("Informal Objection"). On August 3, 2009, Colonial filed an opposition to the Informal Objection ("Opposition to Informal Objection").

⁴ 47 C.F.R. § 74.1235(d)(3).

⁵ Petition at 1; Informal Objection at 1.

In its Opposition, Colonial argues that the Station is not in violation of Section 74.1235(d)(3), “as applied by FCC staff,” because its 34 dB μ contour does not cross the Canadian border.⁶ In support of this argument, Colonial cites to various granted translator applications whose 34 dB μ contours exceeded 60 kilometers but did not cross the Canadian border.⁷

Discussion. *Petition for Reconsideration.* The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order, or raises additional facts not known or existing at the time of the petitioner's last opportunity to present such matters.⁸ If the petitioner is not a party to the proceeding, it must state with particularity the manner in which its interests are adversely affected and show good reason why it was not possible to participate in the earlier stages of the proceeding.⁹ In this case, Backyard has properly alleged that its interests are adversely affected because it competes in the Olean Arbitron Metro with Station W254BQ's primary station, WBYB(FM), Eldred, Pennsylvania. Backyard has also shown that its failure to participate earlier in the proceeding was justified by the fact that the CP Application was granted one day before public notice of its acceptance; thus, there was no opportunity to file a petition to deny before grant.¹⁰ Therefore, Backyard has standing to petition for reconsideration of the grant of the CP Application.

We have consistently applied the 60-kilometer limitation of Section 74.1235(d)(3) only in circumstances where an FM translator station's proposed 34 dB μ interference contour does cross the U.S.-Canada border. This practice results from our understanding of our treaty obligations and furthers the public interest by providing maximum flexibility for FM translators. The relevant provisions of the governing agreement with Canada, the *FM Working Arrangement*,¹¹ state:

4.3 LPFM stations¹² may be allowed an effective radiated power not to exceed 250 watts in any direction and an interference contour (34 dBu) not to exceed 60 km subject to 4.1 and 4.2 above [relating to LPFM secondary status and available channels].

4.4 For coordination purposes, all proposals for such stations whose interference contour (34 dBu) would extend beyond the common border need to be referred for concurrence.

⁶ Opposition at 1-2; *see* Opposition to Informal Objection at 1-2.

⁷ Opposition at 2-3.

⁸ *See* 47 C.F.R. § 1.106(c),(d); *see also* *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

⁹ 47 C.F.R. § 1.106(b)(1).

¹⁰ The CP Application was granted on July 21, 2009, and was placed on public notice on July 22, 2009. *See Broadcast Applications*, Public Notice, Report No. 27032 (July 22, 2009). In similar circumstances, the Commission has found that a brief or non-existent filing opportunity effectively precludes participation during the initial consideration of an application. *See, e.g., Richard J. Hayes, Esq.*, Letter, 28 FCC Rcd 12166, 12170, n.28 (MB 2013).

¹¹ *Working Arrangement for the Allotment and Assignment of FM Broadcasting Channels under the Agreement between the Government of Canada and the Government of the United States of America Relating to the FM Broadcasting Service*, available at http://transition.fcc.gov/ib/sand/agree/can_broad_agree.html (executed in 1991, amended in 1997).

¹² FM translators fall within the *FM Working Arrangement's* definition of a “low power FM station.” *See FM Working Arrangement*, Section 4.

In applying these provisions, the Commission has consulted with its Canadian counterpart, Industry Canada, in accordance with the agencies' mandate to "exchange information and cooperate . . . for the purpose of minimizing interference and obtaining maximum efficiency in the use of FM broadcasting radio channels."¹³ On the basis of that consultation, the Commission determined that Section 4.3 of the *FM Working Arrangement*, which does not otherwise specify a geographic scope, applies only in situations where Section 4.4 is implicated: i.e., to FM translators whose 34 dBμ contours cross the Canadian border. Because Section 74.1235(d)(3) directly implements the terms of the *FM Working Arrangement*, we properly look to the terms of that agreement when interpreting the scope of the rule.¹⁴ Therefore, we find that the CP Application was not granted in error.

Conclusion. For the reasons stated, IT IS ORDERED that the petition for reconsideration filed by Backyard Broadcasting Olean Licensee, LLC on July 23, 2009, IS DENIED.

IT IS FURTHER ORDERED that the informal objection filed by Backyard Broadcasting Olean Licensee, LLC on July 30, 2009, is DENIED and the application of Colonial Radio Group, Inc. for a license to cover the Construction Permit (File No. BLFT-20090728AAS) IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

¹³ Note from James A. Baker III to Derek H. Burney, *Ambassador of Canada*, Note No. 149 (Nov. 26, 1990), at 1.

¹⁴ The ERP and interfering contour distance limitations set out in Section 74.1235(d)(3) were updated in 1998 to reflect the 1997 amendment to the *Working Arrangement*. See *1998 Biennial Regulatory Review—Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules*, Notice of Proposed Rulemaking and Order, 13 FCC Rcd 14849, 14881 (1998) ("The rule revisions conform the rule to the Agreements").