

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

In the Matter of
Shaw Communications, Inc.
Application for a New FM Translator Station
Berlin, New Hampshire
File No. BNPFT-20030825AML
Facility ID No. 141693

MEMORANDUM OPINION AND ORDER

Adopted: May 29, 2008

Released: May 22, 2009

By the Commission: Commissioners Copps and Adelstein concurring and issuing separate statements.

I. INTRODUCTION

1. We have before us an Application for Review filed on February 1, 2005, by Barry P. Lunderville ("Lunderville"). Lunderville seeks review of the Media Bureau's ("Bureau") January 5, 2005, letter decision ("Letter Decision") granting the captioned application of Shaw Communications, Inc. ("Shaw") for a permit to construct a new FM translator station serving Berlin, New Hampshire. Lunderville simultaneously filed a Motion for Stay of the Letter Decision. For the reasons discussed below, we deny both Lunderville's Application for Review and his Motion for Stay.

II. BACKGROUND

2. On August 25, 2003, Shaw applied for a construction permit to build a new, independently owned FM translator station in Berlin, New Hampshire, to receive the signal of Station WVMJ(FM), Conway, New Hampshire (the "Application"). On January 1, 2004, Lunderville filed a Petition to Deny and Request for Declaratory Ruling ("Petition"), arguing that: (1) Shaw's proposed translator would be incapable of receiving a signal direct off-air and therefore would be in violation of Section 74.1231(b) of the Commission's Rules ("Rules"); (2) Shaw's proposed translator would violate Section 74.1235(d) of the Rules by failing to operate at reduced power within 320 kilometers of the Canadian border; and (3) grant of Shaw's Application would be contrary to the Commission's policy prohibiting FM translators from directly competing with full-service broadcast stations. In his Petition, Lunderville also requested a declaratory ruling with respect to the Commission's translator policies and rules. On January 5, 2005, the Bureau denied the Petition and granted the Application. Lunderville timely filed the Application for Review and a Motion for Stay. On February 8, 2005, Shaw filed Oppositions to both the Application for Review and the Motion for Stay. Lunderville submitted a Reply on February 23, 2005.

1 Lunderville is the licensee of Station WMOU(AM), Berlin, New Hampshire, the community of license of the subject Shaw translator station.

2 Letter to Stephen T. Yelverton, Esq., Ref. No. 1800B3 (MB Jan. 5, 2005).

3 File No. BNPFT-20030825AML.

4 See Letter Decision at 2.

III. DISCUSSION

3. *Application for Review.* In his Application for Review, Lunderville reiterates past arguments raised and rejected at the Bureau level. With the exception of Lunderville's request for a declaratory ruling and his policy arguments which we discuss below, we find that these contentions were correctly decided in the Bureau's Letter Decision.

4. Lunderville contends that the Bureau erred in concluding that Shaw's proposed translator would be able to receive its primary station's signal direct off-air, as required by Section 74.1231(b) of the Rules, asserting that such a signal would be blocked by an intervening mountain terrain.⁵ In support of his argument, Lunderville submits a topographic chart indicating several tall mountains that allegedly "block line-of-sight to the Station WVMJ(FM) tower located some 40 miles to the south, and which is at an elevation of no more than 1,600 feet."⁶

5. Section 73.313 of the Rules generally provides for the determination of a station's coverage contour based on the average terrain, at a distance of three to sixteen kilometers from the proposed antenna site, along a set of radials.⁷ Audio Division staff analyzed Shaw's proposal using this methodology and concluded that the proposed translator would be within the primary station's 20 dBu contour and that, as such, would be able to receive the primary station's signal direct off-air.⁸ While the Commission allows the use of alternate prediction methods which take into account mountainous terrain under 47 C.F.R. § 73.313(e), it does so only in limited circumstances, namely, to demonstrate adequate coverage of license or to establish that the main studio location would be within the principal community contour.⁹ However, where a proposal in an application conforms to the Rules utilizing the standard prediction method set forth in Section 73.313 of the Rules, alternative prediction methods will not be accepted.¹⁰ As such, the staff was precluded from considering Lunderville's topographic chart. Accordingly, we find that the Bureau's Decision Letter correctly concluded that Shaw's proposed translator would be in compliance with Section 74.1231(b) of the Rules. Moreover, even if we were to consider Lunderville's supplemental showing, it would be found inadequate because he has not submitted the information required by Section 73.313(e) of the Rules.¹¹

⁵ Application for Review at 4.

⁶ *Id.*

⁷ See 47 C.F.R. § 73.313.

⁸ Letter Decision at 1.

⁹ 47 C.F.R. § 73.313(e). See also *In the Matter of Grandfathered Short-Spaced FM Stations*, Report and Order, 12 FCC Rcd 11840, 11846 (1997) (discussing circumstances in which an alternative prediction study may be considered). In addition, showings of a supplemental method must describe the procedure used and should include sample calculations and coverage maps containing predicted contour plots using both the standard and the supplemental methods. See 46 C.F.R. § 73.313(e).

¹⁰ See, e.g., *Letter to Lee Shubert, Esq.*, 10 FCC Rcd 3159, 3160 (MMB 1995). There, Commission staff rejected a petitioner's attempt to apply (Longley-Rice) Tech Note 101 calculations in order to disqualify an assignment application that had demonstrated compliance with 47 C.F.R. § 73.3555 using standard calculation methods set forth in 47 C.F.R. § 73.313, holding that requiring applicants with conforming applications to defend applications against alternative prediction methodologies would result in unreasonable delay to the applicants and unnecessary administrative burden upon the limited technological resources available to the Commission for evaluating alternative prediction studies. *Id.*

¹¹ 47 C.F.R. § 73.313(e). See also note 9, *supra*.

6. Next, Lunderville claims that, because Shaw's predicted 34 dBu contour extends, at the maximum, 48.2 kilometers, the Bureau erred in finding that the proposed translator complies with Section 74.1235(d) of the Rules.¹² That Section provides that:

Applications for FM translator stations located within 320 km of the Canadian border will not be accepted if they ... have a dBu interference contour operating with a 34 dBu contour ... that exceeds 32 kilometers.

In its Opposition, Shaw states that its proposal complies with Section 74.1235(d)(3) of the Rules, which provides that the 34 dBu interference contour cannot exceed 60 kilometers.¹³ In his Reply, Lunderville focuses on Section 74.1235(d)'s requirement that an FM translator application will not be acceptable for filing unless it is in compliance with that provision, which contains the 32 kilometer limitation. As to the more generous 60 kilometer limitation provided for in Section 74.1235(d)(3), Lunderville contends that the Rules do not otherwise indicate that Section 74.1235(d)(3) "trumps compliance with the other provisions in [Section 74.1235](d)."¹⁴

7. We find Lunderville's interpretation of Section 74.1235(d) unpersuasive. Sections 74.1235(d) and 74.1235(d) clearly conflict with one another. To reconcile these provisions, we reviewed the history of this Section and found that, on July 9, 1997, the United States and Canada formally agreed to amend their "FM Agreement" to reflect an increase of the 34 dBu interfering contour distance for translators within 320 kilometers of the Canadian border from 32 kilometers to 60 kilometers.¹⁵ Section 74.1235(d)(3) was added to the Rules shortly thereafter to reflect the terms of the amended FM Agreement.¹⁶ Therefore, Section 74.1235(d)(3) is the governing provision and 60 kilometers the appropriate limitation. The Commission's failure to revise or delete the first sentence of Section 74.1235(d) was mere oversight.¹⁷ In accordance with Section 74.1235(d)(3), Shaw's predicted 34 dBu interference contour does not exceed 60 kilometers. As such, we find the Letter Decision properly concluded that that Shaw's proposal is in compliance with the Rules.

8. Lunderville next claims that the Letter Decision did not properly consider his argument that Shaw's retransmission of a distant commercial FM station on its proposed translator would be contrary to Commission policy. He maintains that the role of FM translators is to facilitate reception of radio signals to areas deprived of such service. He further argues that allowing the importation of a distant commercial station by an FM translator to a well-served market would "subvert full-service broadcast stations by redistributing advertising revenues away from them and thus reducing the overall level of service to the public."¹⁸

9. We reject these arguments. The Commission, in modifying the rules pertaining to translators, was fully cognizant of "the possible competitive impact such translators could have on FM

¹² Application for Review at 4-5.

¹³ Opposition to Application for Review at 7.

¹⁴ Reply to Opposition at 4-5. Lunderville also refers to 47 C.F.R. § 74.1204(h), which states that an FM translator application must be in compliance with Section 74.1235(d) to be acceptable for filing. *Id.*

¹⁵ *U.S.-Canada FM Agreement Modified to Permit Added Flexibility for FM Translators*, Public Notice, Ref. No. IN97-22 (rel. Jul. 28, 1997).

¹⁶ *1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules*, Final Rule, 63 FR 33875, 33879 (Jun. 22, 1998).

¹⁷ We will correct this oversight through a technical correction to our rules in the near future.

¹⁸ Application for Review at 2-3.

radio broadcast stations and the effect their authorization could have on the licensing of those stations.”¹⁹ It was against this backdrop that the Commission concluded that independent translators may import distant commercial FM stations in “any area desired.”²⁰ In support of this conclusion, the Commission noted that “independent ownership of translators is indicative of a legitimate need for service,” and that as such, such service “should be authorized without creating an additional requirement for demonstrating that need.”²¹ Given these considerations, we conclude that Shaw’s proposal to construct an independently owned FM translator serving Berlin, a community with existing radio stations (including Lunderville’s WMOU(AM)), is not inconsistent with Commission policy.²²

10. Finally, Lunderville asserts that the Letter Decision failed to address his request for a declaratory ruling contained in his Petition. Specifically, Lunderville requests the Commission: (1) to declare that the rules and policies applicable to licensee-owned or operated FM translators carrying distant commercial stations apply equally to independently owned or operated FM translators; and (2) to require that applicants for FM translators provide complete information regarding their ownership and control.²³

11. Under Section 1.2 of the Rules, the Commission may issue a declaratory ruling to either terminate a controversy or to remove an uncertainty.²⁴ The Commission has broad discretion whether to issue such a ruling.²⁵ In the instant case, Lunderville is asking us to reconsider translator regulations and policies that have been in effect for almost 20 years.²⁶ The Rules applicable to translators are clearly established and have a sound policy basis, as discussed above. As such, we find that there is no pressing controversy to be terminated and no uncertainty to be removed. Accordingly, we decline to grant the requested ruling.

12. *Motion for Stay.* Finally, in his Motion for Stay, Lunderville asks us to postpone the “effectiveness of the Letter Decision.” Lunderville’s Motion is grantable if he can show that: (i) he is likely to prevail on the merits; (ii) he will suffer irreparable harm, absent a stay; (iii) other interested parties will not be harmed if the stay is granted; and (iv) the public interest would favor a grant of the stay.²⁷ Lunderville fails to meet this standard for a stay of the Letter Decision. Because Lunderville’s Application for Review is herein denied for the reasons discussed above, we have already found that Lunderville is not likely to prevail on the merits.²⁸ Accordingly, we need not inquire further into the other factors necessary for a grant of stay.²⁹ For this reason, we hereby deny Lunderville’s stay Motion.

¹⁹ *In the Matter of Amendment of Part 74 of the FM Commission's Rules Concerning Translator Stations*, Report and Order, 5 FCC Rcd 7212, 7212 (1990), *recon. denied*, Memorandum Opinion and Order, 8 FCC Rcd 5093 (1993) (“*FM Translator Rulemaking*”).

²⁰ *FM Translator Rulemaking*, 8 FCC Rcd at 5095.

²¹ *FM Translator Rulemaking*, 5 FCC Rcd at 7223.

²² See 47 C.F.R. § 74.1204(f).

²³ Application for Review at 7-8.

²⁴ See 47 C.F.R. § 1.2.

²⁵ See *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973).

²⁶ See *FM Translator Rulemaking*, 8 FCC Rcd at 5093.

²⁷ See *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); see also *Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977).

²⁸ See *Sainte Partners II, LP*, Memorandum Opinion and Order, 20 FCC Rcd 14723, 14725 (WTB 2005).

²⁹ *Id.*

IV. ORDERING CLAUSE

13. For the foregoing reasons, IT IS ORDERED that Lunderville's Application for Review and his Motion for Stay ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

**CONCURRING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: *Application of CMP Houston-KC, LLC for Minor Modification of Construction Permit of Station KFME-FM, Garden City, MO, File No. BMPH-20010420ABA; Shaw Communications, Inc., Application for a New FM Translator Station, Berlin, NH, File No. BNPFT-20030825AML*

These cases provide another example of how the Commission tips the playing field against local interests—particularly local *rural* interests. Standing alone, the cases may seem unremarkable. When juxtaposed, however, they reveal how even arcane broadcast engineering rules can be manipulated to make it easier to loosen the bonds between broadcast stations and the local communities they are licensed to serve.

The first case deals with an FM station’s application to move its transmitter to Independence, Missouri (part of the Kansas City, Missouri metropolitan area). The station is not licensed to Kansas City but to Garden City, a rural community of about 1,500 residents approximately 40-50 miles to Kansas City’s southeast. Because of the distance, the station would not cover Garden City with the requisite city grade signal strength using the Commission’s standard prediction methodology. Specifically, using the Commission’s standard methodology, the station’s city grade contour falls some 13.5 km short of providing adequate coverage to Garden City.

Nevertheless, the Commission approves the site move under Section 73.313(e) of our rules, which permits alternative coverage calculations where the topography in question “departs widely” from the average terrain assumed by our standard methodology. The station seeking the site change demonstrated that the terrain in the direction of Garden City is particularly smooth, and therefore that its coverage extends beyond what the Commission’s standard model would predict. Commission staff analyzed the data and confirmed that Garden City will, in fact, receive a city grade signal due to the flat terrain.

The lesson of *Garden City* therefore seems to be that we will use our standard prediction methodology to assess signal coverage, but if the terrain varies significantly from our baseline assumptions, we will be guided by the facts on the ground. The rule itself gives the example of a mountain ridge that “may indicate the practical limit of service although the prediction method may indicate otherwise.” See 47 CFR §73.313(e).

Which brings us to the Berlin, New Hampshire case. There, the issue is whether a proposed FM translator station in Berlin, New Hampshire can—as required by our rules—receive the off-air signal of the “main station” located in Conway, New Hampshire. An objecting party asserts that, in reality, several tall mountains preclude the signal of the Conway station from reaching the proposed translator in Berlin. Under the reasoning of *Garden City*, one would expect the Commission: (1) to examine whether the mountainous New Hampshire terrain “departs widely” from our baseline assumptions, and, if so, (2) to assess whether, in fact, the intervening mountains prevent the Conway signal from reaching Berlin.

But that’s where the Commission pulls a quick one. While it *permits* the station in *Garden City* to use unusual terrain to show that its signal actually reaches *farther* than the standard prediction model, it *refuses* to permit the objecting party in *Berlin* to use unusual terrain to show that the Conway station’s signal actually travels *less far* than predicted. In essence, the Commission recognizes the reality of the flat Missouri terrain but then assumes away the existence of mountains in New Hampshire. The only way to make sense of this approach is that the Commission permits alternative showings where they enable

broadcasters to move farther from their local communities, but bars them where they could keep broadcasters closer to home.

I want to make clear that I am not concluding that the broadcasters in these cases cannot and will not serve their local communities. Perhaps the Missouri station can fully serve the needs and interests of the people of Garden City from its distant Kansas City tower site.¹ Perhaps the Berlin translator will be just as “local” as if it actually received an off-air signal from the main station in Conway. But I fear—over time and over similar cases—our approach takes its toll.

Ultimately, the erosion of localism is not the result of a particular rule change or single event. It is the result of countless steps—some large, some small—that incrementally shift the center of gravity until we wake up one day and wonder where we are and how we ever got here. That’s why the localism problem can’t be fixed overnight and why the issues can’t be cordoned off in a single “localism” proceeding. Localism must infuse everything we do—including, perhaps surprisingly, our choice of engineering methodologies.

I reluctantly concur in these items because they arguably adhere to existing Commission precedent. But we can and should revisit our technical and allotment rules as they relate to localism, some of which are raised here (including the more general policies regarding distant FM translators raised in *Berlin*). The localism dam may have been breached, but that doesn’t mean it’s not repairable and all we can do is watch the water level continue to rise. It’s time to roll up our sleeves and get to work.

¹ On the other hand, one cannot glean much comfort from the station’s branding on its website as “Jack FM Kansas City” and the fact that the station’s main studio is located some 50 miles from Garden City in Mission, Kansas.

**CONCURRING STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: *Shaw Communications, Inc., Application for a New FM Translator Station, Berlin, New Hampshire, File No. BNPFT020030825AML*

It has been more than 15 years since the Commission has had a proceeding to review, thoroughly and comprehensively, and, if necessary, to update our policies regarding translators. While we have had numerous proceedings to address specific concerns, these piecemeal changes are no substitute for a broad review to examine whether our existing translator rules and regulations continue to advance the objectives of the Communications Act, specifically localism, competition and diversity, in light of the changed media landscape.

Broadly speaking, some of the specific questions this proceeding could examine include: whether our rules and policies for licensee-owned translator stations and independently-owned stations should be the same; whether independently-owned translators should be allowed to import distant signals to compete with local broadcasters; should there be a local origination requirement on independently-owned translator stations; or whether there should be a limit on the number of translators a single entity can own, nationally and locally. They are many, many more questions worthy of discussion.

I encourage my colleagues to launch such a proceeding in the near future.