

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

In the Matter of)
Colonial Radio Group, Inc.)
Applications for Minor Modification of) File Nos. BPFT-20091023AAW
Construction Permits) BPFT-20091102AAK
Application for License to Cover) File No. BLFT-20091029AAZ
FM Translator Station W230BO, Olean, New York) Facility ID No. 153162

MEMORANDUM OPINION AND ORDER

Adopted: August 6, 2014

Released: August 12, 2014

By the Commission: Commissioner Pai concurring and issuing a statement.

1. In this Memorandum Opinion and Order, we deny the Application for Review filed by Backyard Broadcasting Olean Licensee, LLC ("Backyard") on February 22, 2010. Backyard seeks review of a January 21, 2010, action by the Media Bureau ("Bureau") that: (1) granted the above-captioned minor modification application (File No. File No. BPFT-20091102AAK) of Colonial Radio Group, Inc. ("Colonial"); (2) denied Backyard's October 28, 2009, Petition for Reconsideration of the previous grant of the above-captioned minor modification (File No. BPFT-20091023AAW); and (3) denied Backyard's November 2, 2009, Informal Objection to application BPFT-20091102AAK and separate November 2, 2009, Informal Objection to the license to cover application BLFT-20091029AAZ (collectively, "Applications").

2. In the Applications, Colonial specified a 34 dBu interfering contour for FM Translator Station W230BO that exceeds 60 kilometers. Backyard argues that the Applications were therefore granted in violation of Section 4.3 of the governing agreement between the United States and Canada, the FM Working Arrangement, which states that the 34 dBu interference contour of FM translators may not exceed 60 kilometers. Backyard contends that the Commission lacks authority to waive this treaty provision and that the Bureau exceeded its delegated authority in doing so.

1 Because we deny the Application for Review, Backyard's pending "Petition for Reconsideration and Request for Rescission" of the grant of the application for a license to cover permit application File No. BPFT-20091102AAK (File No. BLFT-20100127AGQ), filed February 22, 2010, will be dismissed as moot. The sole ground for reconsideration was the pendency of the Application for Review.

2 Colonial Radio Group Inc., Letter, Ref. No. 1800B3-RG (MB 2010) ("Reconsideration Decision").

3 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) ("FM Working Arrangement").

3. In the *Reconsideration Decision*, the Bureau explains that it has consistently applied the 60-kilometer limitation of Section 4.3 only where an FM translator station's proposed 34 dB μ interference contour crosses the U.S.-Canada border. The Bureau noted that this policy is the result of negotiations regarding the relevant provisions of the *FM Working Arrangement*. These provisions state:

4.3 LPFM stations⁴ 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.

4. In the late 1990's, the Commission 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."⁵ On the basis of that consultation, officials from the Commission and Industry Canada determined that the maximum interference contour distance set out in 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 dB μ contours cross the common border.⁶ In adhering to this longstanding interpretation of the relevant *FM Working Arrangement* provisions, which has not been contested by Canadian authorities,⁷ the Bureau did not waive, but rather complied with, our treaty obligations.⁸

5. Upon review of the Application for Review and the entire record, we conclude that Backyard has not demonstrated that the Bureau erred. The Bureau, in the *Reconsideration Decision*, properly decided the matters raised, and we uphold its decision for the reasons stated therein.

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

⁵ *Diplomatic Note from James A. Baker III, U.S. Secretary of State, to Derek H. Burney, Ambassador of Canada*, Note No. 149 (Nov. 26, 1990), at 1. See also *U.S.-Canada FM Agreement Modified to Permit Added Flexibility for FM Translators*, Public Notice, 13 FCC Rcd 4795 (1997).

⁶ *Shaw Communications*, cited by Backyard, does not represent a departure from this policy. *Shaw Communications, Inc.*, Memorandum Opinion and Order, 24 FCC Rcd 5852, 5854 (2009). In that case, the relevant station was rule-compliant regardless of its distance from the Canadian border because its interfering contour did not exceed 60 kilometers. *Id.* Therefore, the Commission did not need to apply its policy regarding the geographic limitations of Section 4.3 of the *FM Working Arrangement* or consider a waiver of Section 74.1235(d)(3). See *infra* note 7.

⁷ As a practical matter, we note that under the *FM Working Arrangement*, FM service areas are not protected outside their home country in any case. *FM Working Arrangement*, Section 5.2.2.4.

⁸ The Bureau did, however, waive Section 74.1235(d)(3) of the Rules, 47 C.F.R. §74.1235(d)(3), which states that the distance to the 34 dB μ interfering contour of any FM translator within 320 kilometers of the Canadian border may not exceed 60 kilometers in any direction. The rule waiver was not contested on review and was within the scope of the Bureau's delegated authority. See 47 C.F.R. § 0.283.

6. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended,⁹ and Section 1.115(g) of the Commission's rules,¹⁰ the Application for Review IS DENIED. IT IS FURTHER ORDERED that the Petition for Reconsideration and Request for Rescission IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁹ 47 U.S.C. § 155(c)(5).

¹⁰ 47 C.F.R. § 1.115(g).

**CONCURRING STATEMENT
OF COMMISSIONER AJIT PAI**

Re: *Colonial Radio Group, Inc., Applications for Minor Modification of Construction Permits; Application for License to Cover FM Translator Station, W230BO, Olean, New York, FCC No. 14-120.*

When it comes to international diplomacy, matters are often not as simple as they seem. It is difficult to square today's Commission decision with the text of a bilateral agreement between the United States and Canada. But "[b]ecause a treaty is 'an agreement among sovereign powers,'" we must also consider "as 'aids to its interpretation' the . . . 'postratification understanding' of signatory nations."¹

To review the relevant particulars, the *FM Working Arrangement* is a bilateral agreement that applies to the allotment and assignment of FM broadcasting channels within 320 kilometers of the U.S.-Canada border.² Section 4.3 of that treaty specifically provides that the 34 dB μ interfering contour of an LPFM station, including an FM translator, may not exceed 60 kilometers.³

Thus, because there is no question that this dispute involves (1) an FM translator that (2) is located within 320 kilometers of the U.S.-Canada border and (3) has a 34dB μ interfering contour that extends more than 60 kilometers, it seems clear that our decision approving the FM translator minor-modification application at issue here runs afoul of Section 4.3 of the *FM Working Arrangement*.

However, the Commission relies upon an informal understanding among officials from the FCC and Industry Canada that section 4.3 of the *FM Working Arrangement* will apply *only* where a translator's 34 dB μ contour crosses the border. At my request, the Bureau produced evidence of this understanding dating back to 1999. The FCC has acted pursuant to this interpretation in the years since without any objection from our neighbors to the north.

It is therefore my view that both countries have acquiesced to this interpretation of the *FM Working Arrangement*, and that it wouldn't make sense for the Commission to reverse course now. As a result, since the 34 dB μ interfering contour of this FM translator does not cross the border into Canada, I concur.

¹ See *Medellin v. Texas*, 552 U.S. 491, 507 (2008) (quoting *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 226 (1996)); see also RESTATEMENT (SECOND) OF CONTRACTS § 202(4) (1979) ("Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.").

² See *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* § 1 (executed in 1991, amended in 1997), available at <http://go.usa.gov/PZuG>.

³ *Id.* §§ 4.1, 4.3.