

**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."<sup>1</sup>

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.<sup>2</sup> Section 4.3 of that treaty specifically provides that the 34 dB $\mu$  interfering contour of an LPFM station, including an FM translator, may not exceed 60 kilometers.<sup>3</sup>

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 $\mu$  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 $\mu$  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 $\mu$  interfering contour of this FM translator does not cross the border into Canada, I concur.

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<sup>1</sup> 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.").

<sup>2</sup> 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>.

<sup>3</sup> *Id.* §§ 4.1, 4.3.