



**Federal Communications Commission
Washington, D.C. 20554**

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In Reply Refer to:
1800B3-SS

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In re: W256CL, Park Forest, Illinois
Facility ID No. 152811
File No. BPFT-20171229ABE

Petition for Reconsideration

Dear Counsel:

This letter concerns: (1) the referenced, granted modification application (Modification Application) filed by Edgewater Broadcasting, Inc. (Edgewater) on December 29, 2017, seeking to relocate the transmitter site of FM translator station W256CL, Park Forest, Illinois (Station);¹ (2) a Petition for Reconsideration (Petition) and a Motion for Stay (Stay Request) filed on July 1, 2019, by Sound of Hope Radio NFP (SOH);² and (3) related responsive pleadings.³ For the reasons set forth below, we deny the Petition and dismiss the Stay Request.

Background. The Modification Application was the fourth in a series of modification applications (collectively, Applications) filed by Edgewater that, taken together, relocated the Station's facilities approximately 40 miles from its originally authorized location near Beecher, Illinois, to downtown Chicago, Illinois.⁴ None of the Applications filed by Edgewater prior to the Modification Application were contested.

¹ See *Broadcast Applications*, Public Notice, Report No. 29145 (MB rel. Jan. 4, 2018); see also *Letter to Aaron P. Shainis, Esq., and James L. Winston, Esq.*, 34 FCC Rcd 4594 (MB 2019) (*Staff Decision*).

² SOH is licensee of low-power FM station (LPFM) WQEG-LP, Chicago, Illinois.

³ On July 16, 2019, Edgewater filed a Request for Additional Time to respond to the Stay Request. On July 24, 2019, Edgewater filed an Opposition to Motion for Stay and an Opposition to Petition for Reconsideration (Opposition).

⁴ See File No. BNPFT-20130828AFF (granted December 27, 2013. *Broadcast Actions*, Public Notice, Report No. 18147 (MB rel. Jan. 1, 2014)). The history of Edgewater's modifications and licensed operations is detailed in the *Staff Decision*, 34 FCC Rcd at 4594-5.

On January 19, 2018, SOH filed an Informal Objection (Objection) to the Modification Application on the grounds that the series of minor changes described above effectively circumvented the major change rule (Section 74.1233(a) of the FCC's rules (Rules)),⁵ and thus, should have been disallowed as an abuse of process.⁶

On June 5, 2019, the staff denied SOH's Objection and granted the Modification Application. Applying four relevant evidentiary factors for an abuse of process analysis based on serial modification applications,⁷ the staff found that the Applications here did not warrant an enforcement action based on abuse of process and that grant of the Modification Application did not unfairly preclude competing applications in violation of *Ashbacker* due process protections.⁸ In so doing, the staff acknowledged that not every factor weighed in Edgewater's favor but, on balance, enforcement action was not warranted because (1) none of the Station's facilities were temporarily constructed; and (2) Edgewater operated the Station for more than one year at two of the three prior locations. On July 1, 2019, SOH filed the Petition and Stay Request.

In its Petition, SOH argues that the *Staff Decision* fails to give proper weight to the evidence and the law, particularly, Section 74.1233(a) of the Rules.⁹ Specifically, SOH claims that the series of minor changes here circumvents the major change rule (Section 74.1233(a)). Additionally, although it does not challenge the four criteria utilized by the staff, (Temporary Construction; Duration of Operation; Alternative Purposes; and Pattern of Translator Relocations),¹⁰ it claims that the staff's analysis under those criteria for determining abuse of process was flawed. For instance:

- Regarding Temporary Construction, SOH argues that the staff erred in finding that the Station's operating at a site for slightly over a year negates the conclusion that the construction was temporary. SOH asserts that common practice is to lease tower facilities under long-term leases for five to 10 or more years.¹¹
- Concerning Duration of Operation, SOH claims that the staff's balancing of the periods of operation is clearly misguided. SOH argues that operation of the Station at the Second

⁵ 47 CFR § 74.1233(a) (Section 74.1233(a) characterizes a major change as "any change in antenna location where the station would not continue to provide 1 mV/m service to some portion of its previously authorized 1 mV/m service area.").

⁶ Objection at 1-4 citing *John F. Garziglia*, Letter Order, 26 FCC Rcd 12685, 12687 (MB 2011) (*Mattoon*); *Educational Media Foundation*, Letter Order, 29 FCC Rcd 15051 (2014) (*EMF*) (*Mattoon* waiver request denied because FM translator station did not propose to rebroadcast an AM station); and *Harry C. Martin*, Letter Order, 29 FCC Rcd 12718, 12719-20 (MB 2014) (*Trenton*) (*Mattoon* waiver denied because applicant did not satisfy the first *Mattoon* criterion regarding a history of filing serial minor modification applications).

⁷ The four factors are: (1) temporary construction, *see Broadcast Towers, Inc.*, Order, 26 FCC Rcd 7681, 7684, 7686, paras. 4, 15 (MB 2011) (*Broadcast Towers*); (2) duration of operation, *see Broadcast Towers*, 26 FCC Rcd at 7686, para 15, and *Matinee Media Corporation*, Letter Order, 33 FCC Rcd 6685, 6690 (MB 2018) (*Matinee*); (3) alternative purposes for the tower, such as to unexpected tower damage or interference issues, *see John C. Trent, Esq.*, Letter Order, Ref. No. 1800B3-MM, File No. BPGT-20110829 AAU (MB Oct. 29, 2015); and (4) pattern of translator relocations, *see Gary S. Smithwick, Esq.*, Letter Decision, 28 FCC Rcd 15494, 15498 (MB 2013), *Broadcast Towers*, 26 FCC Rcd at 7684, para. 2.

⁸ *See Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) (*Ashbacker*); *see also* n.1, *supra*.

⁹ Petition at 3.

¹⁰ *See Staff Decision*, pages 5-6.

¹¹ Petition at 6, citing *Introduction to the Tower Industry & American Tower*, a promotional publication of American tower. Available online at file: <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTEwMD12fENoaWxkSUQ9LTF8VHlwZT0z&t=>.

Application's site for only one month and operation at the Third Application's site for only three months is evidence of a series of "hops" and an abuse of the Commission's processes.¹²

- Regarding Alternative Purposes, SOH argues that although the staff acknowledged that none of the Applications were filed due to interference or any other legitimate reason, the staff unfathomably ignores the fact that "the only purpose for [Edgewater's] filing any of the Applications was to make a steady march into downtown Chicago."¹³
- Concerning Pattern of Translator Relocations, SOH argues that although the staff concluded that moving the Station from the rural outskirts of Chicago to downtown Chicago weighs in favor of a finding of abuse of process, the staff erred in not finding so.¹⁴

Next, SOH argues that the *Staff Decision* violates Section 557 of the Administrative Procedure Act (APA)¹⁵ because it does not contain the reasons and basis for the staff's findings on the evidence and the law and that the *Staff Decision* is subject to reversal pursuant to Section 706 of the APA.¹⁶ Finally, SOH disputes the staff's determination that the Station's operation for three months at a minor change site is sufficient for other potential applicants to be put on notice that a modification application affecting nearby areas might be filed. Rather, SOH reiterates that Edgewater has completed a "major change of its service area," which requires compliance with the public notice requirements of Section 73.3580, as required by Section 74.1233(a), and the filing of the Modification Application in a Commission designated filing window, as required by Section 74.1233(d)(2)(i).¹⁷ SOH asserts that by failing to provide adequate notice to other potential applicants, Edgewater has also violated the *Ashbacker* doctrine.¹⁸

In its Opposition, Edgewater argues that the staff correctly concluded, based on "reasoned analysis," that no major change occurred here and that there was no abuse of process in this case.¹⁹ In addition, Edgewater argues that neither the APA nor SOH's *Ashbacker* rights were violated.²⁰ Next, Edgewater asserts that SOH's major change argument is premised on "sophistry" and that the Modification Application filing appeared on *Public Notice*, giving SOH adequate notice for it to file its Objection.²¹ Finally, Edgewater claims that SOH makes no attempt to explain why its desired modification²² is of greater public interest value than Edgewater's Modification Application.²³

Discussion. 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

¹² *Id.* at 7-8.

¹³ *Id.* at 8-9.

¹⁴ *Id.* at 10.

¹⁵ See 5 U.S.C. § 557.

¹⁶ Petition at 12-13; see also 5 U.S.C. § 706.

¹⁷ *Id.* at 14; see also 47 CFR §§ 73.3580, 74.1233(a) and (d)(2)(i).

¹⁸ *Id.*

¹⁹ Opposition at 3.

²⁰ *Id.* at 4.

²¹ *Id.*

²² SOH states in its Objection that Edgewater's granted Modification Application has thwarted SOH's ability to file a modification to move its station closer to the Chinese community of Chicago. See Objection at 4.

²³ Opposition at 4.

existing at the time of the petitioner's last opportunity to present such matters.²⁴ As discussed below, SOH has not met this burden.

Although it clearly disagrees with the staff's ultimate determination regarding Edgewater's Applications here, SOH has not shown error in that determination, nor has it presented us with any new facts or arguments that either arose or were discovered since its last opportunity to present them to the Commission. The staff concluded that the record evidence taken as a whole did not support a finding that Edgewater deliberately and abusively attempted to evade the major change rule and that the serial modifications at issue here did not warrant an enforcement action based on abuse of process. The staff also concluded that grant of the Modification Application was consistent with the *Ashbacker* doctrine.²⁵ SOH essentially re-argues the points made in its Objection, which are premised on SOH's assertion that the Modification Application is the fourth in a series of legally countenanced modification applications filed by Edgewater that, taken together, relocate the Station's facilities approximately 40 miles from its authorized location to downtown Chicago circumventing Section 74.1233(a) of the Rules and thus should be disallowed as an abuse of process and a violation of the adequate notice requirements of *Ashbacker*. These contentions were addressed in the *Staff Decision*, and the public interest does not require us to repeat our reasoning. It is well established that reconsideration will not be granted merely for the purpose of again debating matters on which the staff has once deliberated and spoken.²⁶

We also reject SOH's claims in the Petition that the *Staff Decision* violates Section 557 of the APA because the staff did not fully explain the reasons and basis for its findings on the evidence and the law; *i.e.*, SOH claims the staff has undermined Section 74.1233(a) without providing any public interest justification for doing so. We disagree. The staff provided a fairly extensive analysis under each for the four pertinent factors and provide a more than adequate explanation of the methods it used to determine that there was no abuse of process. It also provided a reasoned determination as to why SOH's *Ashbacker* rights were not violated. Taking the totality of the circumstances into account, we affirm the staff's finding that Edgewater's gradual changes are not the functional equivalent of a single major change and evidence of an attempt to evade the major change rule thus warranting an enforcement action based on abuse of process.

In light of our actions here denying reconsideration, we will dismiss SOH's Stay Request as moot.

Conclusion/Actions. For these reasons, IT IS ORDERED that the Petition for Reconsideration filed by Sound of Hope Radio NFP on July 1, 2019, IS DENIED.

²⁴ 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).

²⁵ The staff found that absent a waiver request, Edgewater was subject to the same procedural rules as any other potentially competing applicant, including the overlap requirement of Section 74.1233(a)(1), and was therefore "competing on an equal basis" as required by *Ashbacker*. This situation is distinguishable from the *Mattoon* waiver situation, in which a proposed "long-distance, one-step move" could take "even a vigilant competitor" by surprise. It is likewise distinguishable from the *Broadcast Towers* situation, in which a rapid series of modifications could have effectively precluded potential competitors from filing mutually exclusive applications. Because Edgewater operated the Station at the Third Application site for four months before filing the Modification Application, the staff found that other potentially competing applicants had ample notice that a modification application affecting nearby areas might be filed and sufficient time to file mutually exclusive modification applications, if desired. See *Staff Decision*, 34 FCC Rcd at 4600-01.

²⁶ See *WWIZ, Inc.*, 37 FCC at 686, para. 2.

IT IS FURTHER ORDERED that the Motion for Stay filed by Sound of Hope Radio NFP on July 1, 2019, IS DISMISSED as moot.

Sincerely,

A handwritten signature in blue ink, appearing to read "A. Shuldiner", with a long horizontal flourish extending to the right.

Albert Shuldiner
Chief, Audio Division
Media Bureau