



Federal Communications Commission
Washington, D.C. 20554

October 26, 2023

DA 23-1013
In Reply Refer to:
1800B3-CEG
October 26, 2023

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In re: **W288ED, Charlottesville, VA**
Facility ID No. 148345
Application File No. 202787

Informal Objection

Dear Applicant and Objector:

We have before us the above-referenced application (Modification Application) for a minor modification to FM translator station W288ED, Charlottesville, Virginia (Station) filed on October 24, 2022, by Piedmont Communications, Inc. (Piedmont).¹ We also have an informal objection (Informal Objection) to the Modification Application filed by Tidewater Communications, LLC (Tidewater) on November 2, 2022,² and related pleadings.³ For the reasons stated below, we deny the Informal Objection and grant the Modification Application.

Background. On March 28, 2019, the Bureau granted Clear Channel's application for a new FM translator station in Charlottesville, Virginia (Construction Permit).⁴ On May 20, 2020, Clear Channel

¹ See *Broadcast Applications*, Public Notice, Report No. PN-3-230424-01 (Apr. 24, 2023). The Modification Application specifies tower Antenna Structure Registration (ASR) No. 1018222.

² Pleading File No. 203198.

³ On December 19, 2022, Piedmont filed an opposition to the Informal Objection (Opposition) (Pleading File No. 205708). On January 13, 2023, Tidewater filed a reply to the Opposition (Reply) (Pleading File No. 206894). On April 5, 2023, Dayton Tybois Uphold (Uphold) filed an opposition to the Informal Objection styled as an additional informal objection (Uphold Opposition) (Pleading File No. 203559) (Uphold Opposition). On April 20, 2023, Tidewater filed a motion to strike the Uphold Opposition (Motion to Strike) (Pleading File No. 214056). The Uphold Opposition solely relates to previous unconnected instances of alleged "monopolizing and abusive behavior" by Tidewater/Saga and therefore will not be considered further here.

⁴ See *Marissa G. Repp, Esq.*, Letter Decision, Application File No. BNPFT-20130821ABF, Ref. No. 1800B3-TSN (MB Mar. 28, 2019). In 2014, Clear Channel changed its name to iHeartMedia, Inc. For convenience, we will refer

entered into an agreement with Piedmont to exchange the Construction Permit for Piedmont's licensed translator W262CC, Tallahassee, Florida (Exchange Agreement).⁵ On October 6, 2021, Clear Channel filed an application to assign the Construction Permit to Piedmont (Assignment Application).⁶ On November 18, 2021, in response to a petition to deny the Assignment Application filed by Tidewater,⁷ Clear Channel amended the Construction Permit to specify a site on the outskirts of Charlottesville.⁸ On February 25, 2022, Clear Channel filed another modification application, this time for a site about 16 miles north of Charlottesville on a tower owned by Piedmont (Licensed Site).⁹ On March 25, 2022, three days before the Construction Permit was due to expire, Clear Channel filed a timely application for license to cover (License Application), which was granted on April 12, 2022 (Station License).¹⁰ On June 6, 2022, the Bureau denied the Assignment Petition and granted the Assignment Application.¹¹ On July 27, 2022, Clear Channel and Piedmont consummated the assignment of the Station.¹²

On August 2, 2022, Piedmont requested special temporary authority (STA) to take the Station, which was then rebroadcasting primary station WKTR(AM), Earlysville, Virginia, licensed to CSN International, Inc., as a fill-in translator, silent "in light of anticipated programming and operational changes."¹³ On October 24, 2022, Piedmont filed the Modification Application, specifying new primary station WVCV(AM), Orange, Virginia, licensed to La Promesa Foundation, with a transmitter site in Charlottesville that would be "closer in proximity to the location specified in the underlying original [Construction Permit] granted to [Clear Channel]."¹⁴ On November 2, 2022, Tidewater filed the Informal Objection. On November 4, 2022, Piedmont resumed operation of the Station from its licensed location.¹⁵

In the Informal Objection, Tidewater contends that, by taking the Station silent in August 2022, Piedmont violated a condition of the Station License, which states that "grant of this license application is conditioned on the continuous operation of the licensed facility for the twelve-month period following grant . . . unless the licensee rebuts the resulting presumption that the authorized facilities were temporarily constructed" (License Condition).¹⁶ Tidewater argues that in order to rebut this presumption, Piedmont must demonstrate that the Station had operated continuously during its first year of operation

herein to Clear Channel, iHeartMedia, Inc., and subsidiary licensees, including the prior Station licensee, iHM Licenses, LLC, as "Clear Channel."

⁵ Application File No. 162971, Attach. entitled "Exchange Agreement."

⁶ Application File No. 162971.

⁷ Pleading File No. 166605.

⁸ Application File No. 169568 (specifying tower ASR No. 1017221) (granted Dec. 2, 2021).

⁹ Application File No. 185325 (specifying tower ASR No. 1017575) (granted Feb. 28, 2022).

¹⁰ Application File No. 187250.

¹¹ See *iHM Licenses, LLC*, Letter Decision, Application File No. 162971, Ref. No. 1800B3-KN (MB June 6, 2022).

¹² Notification of Consummation, File No. 196132, filed July 29, 2022.

¹³ Silent STA Request, Application File No. 196703, Attach. "Silent STA Request Exhibit" at 1 (granted September 14, 2022). Under 47 CFR § 74.1263(c), a translator licensee must request authority to remain silent for longer than 30 days. WKTR is now licensed to Piedmont. See Application File No. 194152 (granted September 13, 2022, consummated October 6, 2022).

¹⁴ See Opposition at 4-5, Exh. E.

¹⁵ Opposition at i, Notification File No. 203359 (received November 8, 2022).

¹⁶ Informal Objection at 1-2. In the pleadings, the parties also debate the nature of Tidewater's motivation in filing the Informal Objection and other pleadings. As the objector's intentions are not legally relevant short of an abuse of process issue, we do not address this issue further.

and therefore concede that it had misrepresented its silence in the Silent STA Request.¹⁷ Moreover, according to Tidewater, “circumstantial evidence” indicates that the construction was temporary—specifically, the fact that the License Application was filed just three days before the expiration of the Construction Permit and that Piedmont took the Station silent soon after assuming ownership of the Station four months later.¹⁸ Finally, Tidewater argues that Piedmont is “translator hopping” in violation of the policy set out in *Mattoon* and subsequent cases.¹⁹

In the Piedmont Opposition, Piedmont submits its rebuttal to the presumption of temporary construction triggered by the Silent STA Request. Specifically, Piedmont argues that the Station’s licensed facility is not temporary because it is built on an existing tower, owned by Piedmont, registered more than 30 years ago, and the longtime site of a full service AM station.²⁰ This tower, Piedmont states, is “permanently installed, supported by guy wires, and has a permanent source of power.”²¹ It also submits dated photos of the Station’s construction, emails from the relevant timeframe, a dated invoice from the installation contractor, and a sworn declaration from consulting engineer Alan E. Williams stating that he personally witnessed the Station’s timely construction at the authorized site.²² Piedmont argues that it would “defy logic and be counter to Piedmont’s interests to have consummated a transaction for facilities that had not been and remained constructed in line with [Clear Channel’s] certifications.”²³ It also argues that the grant of the Silent STA Request—now final—is “fatal” to the argument that it violated a condition of its license.²⁴

In the Reply, Tidewater argues that any period of silence during the first year of operation not only triggers the presumption but also forecloses rebuttal: “The temporary nature of the [Station]’s operation is based not on whether the tower . . . is a permanent structure, but rather on the violation of the License Condition, whereby operations were suspended just 6 days after Piedmont acquired the [Station].”²⁵ Acknowledging that the physical facilities were not temporary, Tidewater argues that this is just “one factor” in determining whether the facilities were temporarily constructed--“a more important factor is whether Piedmont *intended* for the use of the [facilities] to be temporary.”²⁶ Such an intention, according to Tidewater, is evidenced by the Silent STA Request and Modification Application proposing to move the facilities back to Charlottesville.²⁷ Finally, Tidewater argues that “the existence of the silent

¹⁷ Informal Objection at 4-5.

¹⁸ Informal Objection at 4-5 (citing *Powell Meredith Communications Co.*, Letter Decision, 37 FCC Rcd 7266 (MB June 14, 2022) (*Powell Meredith*)); see also *Powell Meredith Communications Co.*, Letter Decision on Reconsideration, 2022 WL 18107635 (MB Dec. 22, 2022) at 1); Reply at 3.

¹⁹ Informal Objection at 5; see generally, *John F. Garziglia*, Letter Decision. 26 FCC Rcd 12685, 12687 (MB 2011) (*Mattoon*) (holding that a translator licensee who effectuates a major change in antenna location by means of a succession of serial minor changes may be abusing the Commission's processes).

²⁰ Opposition at 3.

²¹ *Id.* at 11.

²² *Id.*, Exhs. B, C, and D.

²³ *Id.* at 8.

²⁴ Opposition at 9-10 (noting that in *Powell Meredith* at 1-2, n.8, the request for silent authority remained pending during the Bureau’s investigation of temporary construction).

²⁵ Reply at 4-5.

²⁶ *Id.* at 7 (emphasis added).

²⁷ *Id.* at 3-5.

STA has no bearing on the effectiveness of the License Condition mandating continuous operation for one year.”²⁸ For these reasons, Tidewater urges that the grant of the Construction Permit be rescinded.²⁹

Discussion. Informal objections, like petitions to deny, must allege properly supported facts that, if true, would establish a substantial and material question of fact that grant of the application would be inconsistent with the public interest.³⁰ Tidewater has not met this burden.

As a threshold matter, we find that both parties misunderstand the effect of the Silent STA Request on the License Condition. Grant of the Silent STA Request did not eliminate the presumption of temporary construction, as Piedmont contends. Nor did the Station’s silence create an “open and shut” case of temporary construction, as Tidewater contends. Rather, a station’s silence in the first twelve months of operation—whether authorized by silent STA or not—triggers a presumption that the station’s facilities were temporarily constructed. The licensee may then rebut this presumption with evidence that the facilities were not temporarily constructed, such as station logs, utility bills, lease documents, photographs of the installed antenna/transmitter/studio equipment, and other relevant documentation. We consider each rebuttal submitted on a case-by-case basis, taking into account all circumstances, including not only evidence directed to the physical construction of the station, but also the reason the station went silent and the purpose of the modification.

In this case, we find that Piedmont has presented facts that adequately rebut the presumption of temporary construction. First, it has demonstrated that the physical facility was permanently constructed in accordance with the technical parameters of the Construction Permit.³¹ The permanent nature of the physical construction is supported by use of a permanent antenna structure registered in the Commission’s Antenna Structure Registration (ASR) database, connection to the electrical grid, as well as photos, emails, an invoice for the installation from a third party tower service, and a sworn statement from an engineer with personal knowledge of the installation.³² Second, after licensing, the Station’s facilities were not dismantled but remained intact and operable, as evidenced by the resumption of the Station’s operations on November 4, 2022.³³ Third, because Piedmont owned the tower at the Licensed Site, there was no legal or practical impediment to long term operation at that location.³⁴ Based on these circumstances, we conclude that the Station was “ready for operation” within the meaning of section

²⁸ *Id.* at 5-6.

²⁹ *Id.* at 1-4.

³⁰ *See, e.g., WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990).

³¹ *See, e.g., Tango Radio, LLC*, Memorandum Opinion and Order, 30 FCC Rcd 10564, 10568-69, paras. 7-8 (2015) (*Tango*), (holding that temporary facilities are not licensable where facilities were dismantled shortly after license application filed, no permission was obtained from landowner, and evidence was adduced of brief “side of the road” operation of a nonconforming antenna); *Matinee Media Corp.*, Letter Decision, 33 FCC Rcd 6685 (MB 2018) (*Matinee*) (finding that a facility was not temporary where the licensee “obtained the landowner’s permission, built a durable, guyed antenna structure conforming to the terms of its construction permit, and maintained the facilities intact and operable after construction.”); *Centro de Intercesión y Adoación Inernacional*, Letter Decision, 30 FCC Rcd 4898, 4901 (MB 2015) (*Helendale*) (dismissing license application where facilities were dismantled after less than a week, no permission was obtained from landowner, and antenna was not constructed in accordance with the terms of the construction permit).

³² Opposition, Exhs. B, C, and D.

³³ *See, e.g., Broadcast Towers*, Order, 26 FCC Rcd 7681, 7684, 7686, paras. 4, 15 (MB 2011); *Matinee*, 33 FCC Rcd at 6690; *Helendale*, 30 FCC Rcd at 4901. According to Commission records since November 4, 2022, the Station has remained operational.

³⁴ *See, e.g., Helendale*, 30 FCC Rcd at 4901 (holding that construction and/or operation without the landowner’s permission is inconsistent with being “ready and able for operation” as required for licensing).

319(b) of the Communications Act of 1934, as amended, and the relevant prior decisions regarding temporary construction.³⁵

We also find that the reason for the Station's silence and proposed relocation was the implementation of a legitimate and reasonable business plan to transition the Station from rebroadcasting one primary station to another pursuant to an assignment and modify the facility to provide fill-in service for the new primary station's listeners. We reject Tidewater's argument that either Clear Channel's intention to sell the Station after licensing or Piedmont's intention to relocate the Station after acquiring it, alone, establishes that the Station was temporarily constructed. We have previously stated that "nothing in the Commission's decisions in *Tango* and related cases suggests that the Commission intended to disrupt legitimate and reasonable business plans to modify or upgrade an existing and operational facility."³⁶ The temporary construction condition was not intended to impede the transferability of commercial broadcast licenses or prohibit modifications, whether foreseen at the time of the transaction or not. In this case, although Piedmont could have avoided the presumption by continuing to rebroadcast its original primary station while preparing for its facility modification, it was not required to do so if it was willing to assume the risk and responsibility of going silent in order to facilitate an assignment and resulting modification to the Station to rebroadcast a new primary station and then rebutting the temporary construction presumption, which it has done.

We also reject Tidewater's allegation that the Modification Application was part of a series of translator "hops" intended to circumvent the major change rule.³⁷ We have held that serial modifications do not implicate abuse of process concerns if they ultimately return the relevant station's facilities to their original location, as here.³⁸ Moreover, when considering serial translator moves, the Bureau is careful to distinguish between modifications based on legitimate business or interference concerns and deliberate attempts to circumvent the Commission's rules and policies.³⁹ As discussed previously, we find that this modification was proposed in conjunction with a legitimate business transaction. Moreover, there is no Commission rule or policy that would be circumvented by Piedmont moving the Station closer to its community of license and originally authorized transmitter site.

Conclusion/Actions. For these reasons, **IT IS ORDERED** that the Informal Objection filed by Tidewater Communications, LLC on November 2, 2022, **IS DENIED** and the modification application

³⁵ See *Helendale*, 30 FCC Rcd at 4902 (citing 47 U.S.C. § 319(b) ("[A permit] will be automatically forfeited if the station is not ready for operation within the time specified"); *Pathfinder Communication Corporation*, Memorandum Opinion and Order, 18 FCC Rcd 9272, 9279, para. 13 (2003) ("[I]mplicit in the filing of any facility application is that the applicant stands 'ready, willing, and able' to construct and operate as proposed.")).

³⁶ *Matinee*, 33 FCC Rcd at 6685.

³⁷ In contrast, in the *Powell Meredith* case cited by Tidewater, the licensee mounted its antenna on a vehicle (an RV) under a short term verbal agreement with the RV owner and no agreement with the landowner. *Powell Meredith*, 37 FCC Rcd at 7221.

³⁸ *W256CL, Park Forest, Illinois*, 34 FCC Rcd 4594, 4599 (2019) (*Park Forest*); *W245BL, Branchport, NY*, Letter Decision, 28 FCC Rcd 15494, 15498 (MB 2013).

³⁹ *Park Forest*, 34 FCC Rcd at 4598 (citing *John C. Trent, Esq.*, Letter Decision, Ref. No. 1800B3-MM, File No. BPFT-20110829AAU (MB Oct. 29, 2015) (rejecting an abuse of process argument where the translator filed a modification application because of interference to a co-channel station)).

for FM translator station W288ED, Charlottesville, Virginia, filed on October 24, 2022, by Piedmont Communications, Inc., Application File No. 202787, **IS GRANTED**.

Sincerely,

Albert Shuldiner
Chief, Audio Division
Media Bureau

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Tidewater Communications, LLC
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5028 Wisconsin Ave NW Ste 301
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