BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In re	)	
	)	
Edgewater Broadcasting, Inc.	)	
Licensee of FM Translator	)	File No. BPFT-20171229ABE
W256CL	)	
Park Forest, IL	)	

To: Secretary
Attn. The Commission

MOTION FOR STAY

Sound of Hope Radio NFP ("SOH"), licensee of low power FM radio station WQEG-LP, Chicago, Illinois, by its attorneys, submits this Motion for Stay of the Bureau's January 29, 2020 letter decision ("*Second Letter Decision*") denying SOH's Petition for Reconsideration[1] and granting the modification application of Edgewater Broadcasting, Inc. ("EBI"), seeking to relocate the transmitter site of FM translator station W256CL, Park Forest, Illinois ("Station") into downtown Chicago. Simultaneously with the filing of this Motion for Stay, SOH is submitting the attached Application for Review ("AFR") of the *Second Letter Decision*. SOH hereby incorporates the AFR into this Motion for Stay.

In *Rates for Interstate Inmate Calling Services*, 31 FCC Rcd. 10936 (WB 2016),[2] the Commission set out the four parts of the test to obtain a stay: (1) Has the petitioner shown that it is likely to prevail on the merits? (2) Has the petitioner shown that without such relief, it will be irreparably injured? (3) Would the issuance of a stay substantially harm other parties interested

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[1] SOH Petition for Reconsideration, filed July 1, 2019.
[2] The Commission follows the test set forth in *Wash. Metro. Area Transit Commission v. Holiday Tours, Inc.,* 559 F.2d 841 (D.C. Cir. 1977).

in the proceedings? (4) Where lies the public interest?[3] Applying the Commission's test to this case demonstrates clearly that the Bureau should grant the requested stay and order EBI to cease any efforts to construct at its Modification Application site until the Commission has ruled on SOH's AFR.

I. Likelihood to prevail on the merits

In the attached AFR, SOH shows that:

1. The Bureau correctly concluded that EBI engaged in a series of translator hops that demonstrate a straight-line march from rural Illinois to downtown Chicago, which is evidence of an abuse of process.

2. The Bureau correctly concluded that there was no clearly legitimate reason for any of the translator hops other than to march into downtown Chicago, which is evidence of an abuse of process.

3. SOH has demonstrated that the Bureau failed to give proper weight to the purpose of Section 74.1233(a), which is to prevent licensees from moving rural translators into more populous urban areas.

4. SOH has demonstrated that the Bureau failed to explain how its decision to allow licensees to move rural translators into urban areas slowly, but not quickly, is in the public interest and does not subvert the purpose of Section 74.1233(a).

5. SOH has demonstrated that the Bureau's decision permits EBI to complete a major modification of its facilities: (1) in violation of Section 74.1233(a), which requires publication pursuant to Section 73.3580, and (2) in violation of Section 74.1233(d)(2)(i), which permits the filing of major modification applications only in Commission established filing windows.

6. SOH has demonstrated that the Section 73.3580 notice requirement established by Section 74.1233(a) is the method established by the Commission to protect the *Ashbacker* rights of other potential applicants, and the Bureau's determination that operation at the Third Application site for three months satisfies the *Ashbacker* doctrine violates Section 74.1233(a).

For the above reasons, SOH is very likely to prevail on the merits of its AFR.

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[3] 31 FCC Rcd 10936, par. 9.

II. Irreparable Injury to Party Requesting the Stay

In its AFR, SOH explains that, in its Informal Objection, SOH stated it is interested in applying to modify its facilities in a manner that is precluded by the grant of the EBI Application.[4] Each day that EBI is allowed to prevent SOH from filing to modify its facilities is a day that SOH is required to operate with less than optimal facilities. The operation with less than optimal facilities limits the ability of SOH to serve the Chinese-speaking community of Chicago. Thus, SOH will attract a smaller audience and fewer donors than it would if it were allowed to modify its facilities. This is irreparable harm to SOH for which there is no remedy available other than the requested stay.

III. Harm to Other Parties

The only party affected by this stay request is EBI. EBI can operate from its Third Application site and grant of the stay will not impact EBI's ability to operate at that site. As demonstrated above, the Bureau's decision to permit EBI to begin operation at its Modification Application site is likely to be reversed by the Commission. Therefore, EBI is not entitled to operate from its Modification Application site. As EBI should not be allowed to operate from the Modification Application site, EBI will suffer no harm from grant of the stay.

IV. Where lies the Public Interest

SOH has demonstrated that in Section 74.1233(a) the Commission determined that the public interest is served by preventing licensees from abandoning rural communities by moving translators from rural communities to populous urban areas through a series of hops which constitute an abuse of process. SOH demonstrated that Section 74.1233(a) established a policy that major modification applications for translators must be publicly announced pursuant to

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[4] AFR at 19, citing SOH Informal Objection, filed January 19, 2018, at 3-4.

Section 73.3580 and can only be filed in established filing windows pursuant to Section 74.1233(d)(2)(i). SOH demonstrated that the Bureau's decision violates the requirements of Section 74.1233(a) and violates the *Ashbacker* doctrine. SOH demonstrated that the Bureau has failed to demonstrate how its decision would serve the public interest. SOH has demonstrated that the public interest is served by reversal of the Bureau decision.

V. Conclusion

SOH has demonstrated that applying the Commission's test for a stay to this case shows clearly that the Commission should grant the requested stay and order EBI to cease any efforts to construct at its Modification Application site until the Commission has ruled on SOH's Application for Review.

Respectfully submitted,

SOUND OF HOPE RADIO NFP

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February 27, 2020

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In re	)	
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Edgewater Broadcasting, Inc.	)	
Licensee of FM Translator	)	File No. BPFT-20171229ABE
W256CL	)	
Park Forest, IL	)	

To: The Secretary
Attn.: The Commission

APPLICATION FOR REVIEW

SOUND OF HOPE RADIO, NFP

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February 27, 2020

TABLE OF CONTENTS

EXECUTIVE SUMMARY

Sound of Hope Radio NFP ("SOH"), licensee of low power FM radio station WQEG-LP, Chicago, Illinois, by its attorneys, submits this Application for Review of the Bureau's January 29, 2020 *Second Letter Decision* denying SOH's Informal Objection and granting the modification application of Edgewater Broadcasting, Inc. ("EBI") seeking to relocate the transmitter site of FM translator station W256CL, Park Forest, Illinois into downtown Chicago. The *Second Letter Decision* did no more than affirm the *First Letter Decision* with no new discussion of the issues raised. Therefore, SOH directs its arguments to the *First Letter Decision.*

The Bureau concluded that EBI engaged in a series of translator site hops that demonstrate a straight-line march from rural Illinois to downtown Chicago, which the Bureau concludes is evidence of an abuse of process. The Bureau concluded that there was no clearly legitimate reason for any of these translator hops, other than to march into downtown Chicago, which the Bureau concluded is evidence of an abuse of process. Amazingly however, the Bureau places form over substance by ruling that the period of time that these hops took, February 9, 2015 to December 29, 2017, and the limited operations that the Station undertook at two of these sites, somehow excuses EBI's clear abuse of process. The Bureau's decision subverts, undermines and violates Section 74.1233(a) and gives EBI and other licensees a blueprint for circumventing that rule in the future.

Similarly, the Bureau's analysis of the *Ashbacker* doctrine fails to recognize that Section 74.1233(a) sets forth the Commission's determination of how the *Ashbacker* rights of other potential applicants are to be protected from a major modification. Section 74.1233(a) requires

that an applicant for a major modification must comply with the public notice requirements of Section 73.3580 and the filing window requirement of Section 74.1233(d)(e)(i). The Bureau cannot allow EBI and future applicants to circumvent the major change public notice requirement and filing window requirement by a stealth process of using a series of minor change hops. Section 74.1233(a) and *Ashbacker* require that the major change public notice requirements of Section 73.3580 and the filing window requirement of Section 74.1233(d)(2)(i) be followed.

The Bureau began its analysis by defining an abuse of process. In very key ways it determined that EBI has committed an abuse of process. The Bureau's decision improperly excuses this abuse of process. The Bureau has failed to explain how the public interest is served by excusing an abuse of process and undermining the purpose of Section 74.1233(a). The Bureau has failed to provide reasons and a basis for its decision, as required by Section 557 of the Administrative Procedure Act, 5 U.S.C. § 557, and the decision is arbitrary, capricious and an abuse of discretion and is therefore subject to judicial reversal pursuant to Section 706 of the Administrative Procedure Act 5 U.S.C. § 706. The *Second Letter Decision* should be reconsidered and reversed. The EBI Modification Application should be dismissed or denied.

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To: The Secretary
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APPLICATION FOR REVIEW

Sound of Hope Radio NFP ("SOH"), licensee of low power FM radio station WQEG-LP, Chicago, Illinois, by its attorneys, submits this Application for Review ("AFR") of the Media Bureau's January 29, 2020 letter decision ("*Second Letter Decision*")[1] denying SOH's Petition for Reconsideration,[2] affirming the Bureau's *First Letter Decision*[3] denying SOH's Informal Objection[4] and granting the modification application of Edgewater Broadcasting, Inc. ("EBI"), seeking to relocate the transmitter site of FM translator station W256CL, Park Forest, Illinois ("Station") into downtown Chicago, Illinois.

I. QUESTIONS PRESENTED FOR REVIEW

1. Did the Bureau give proper weight to the evidence regarding abuse of process?

2. Having found that two of the four elements of abuse of process were present, did the Bureau fail to hold EBI accountable?

3. How is the public interest served by allowing EBI to move its translator 40 miles into

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[1] Letter from Albert Shuldiner, Chief, Audio Division, Media Bureau, January 29, 2020.
[2] SOH Petition for Reconsideration, filed July 1, 2019.
[3] *Letter to Aaron P. Shainis, Esq., and James L. Winston, Esq.,* 34 FCC Rcd 4594 (MB 2019).
[4] SOH Informal Objection, filed January 19, 2018.

downtown Chicago through a series of four transmitter site hops?

4. Did the Bureau fail to enforce the purpose of Section 74.1233(a) by allowing EBI to circumvent it in the manner permitted here?

5. Did the Bureau deny other potential applicants their *Ashbacker* rights by permitting the EBI relocation in this manner?

II. FACTORS WARRANTING COMMISSION CONSIDERATION OF THE QUESTIONS PRESENTED

In the *Second Letter Decision*, the Bureau affirmed the *First Letter Decision* with very little discussion. In the *Second Letter Decision*, the Bureau ruled that SOH had reiterated arguments it had made previously, and therefore the Bureau would rely upon the reasoning in the *First Letter Decision* and not discuss SOH's arguments.[5] The Bureau added that the *First Letter Decision* did not violate Section 557 of the Administrative Procedure Act, because the *First Letter Decision* "provided a reasoned determination as to why SOH's *Ashbacker* rights were not violated."[6] The Bureau then concluded:

> 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.[7]

As the Bureau relied almost exclusively upon the analysis in the *First Letter Decision* to support the *Second Letter Decision*, SOH shall demonstrate below that the *First Letter Decision* can best be described as a "Blueprint for how to evade the letter and spirit of Section 74.1233(a) of the Commission's Rules, 47 CFR § 74.1233(a)." The *First Letter Decision* discusses the

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[5] *Second Letter Decision* at 4.
[6] *Id.*

relevant evidence and case law but fails to place proper weight on the purpose of Section 74.1233(a). The *First Letter Decision* concludes that EBI's conduct provides clear evidence of an abuse of process in two fundamental ways. But it fails to hold EBI accountable for that abuse of process. In particular, the *First Letter Decision* fails to address the fundamental question: how is the public interest served by allowing EBI to use a series of four transmitter site hops to move a translator 40 miles from Beecher, Illinois (population 4,460)[8] to the center of Chicago (population 2,705,994)[9]? By failing to place proper weight on the purpose of Section 74.1233(a), the *First Letter Decision* fails to recognize that EBI has engaged in an abuse of the Commission's processes that must not be condoned. Moreover, the Bureau decision violates the requirements in: (1) Section 74.1233(a), which requires public notice pursuant to Section 73.3580 of major modification applications, and (2) Section 74.1233(d)(2(i), which limits the filing of major modification applications to Commission designated filing windows. Failure to comply with these notice requirements deprived other potential applicants of their *Ashbacker* rights those rules established. This leaves the *Second Letter Decision* and *First Letter Decision* in violation of the Administrative Procedure Act. For this reason, the *Second Letter Decision* should be reconsidered and reversed, and the Modification Application should be dismissed or denied.

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[7] *Id.*

[8] Beecher, Illinois population data, 4,460, U.S. Census Bureau, retrieved June 26, 2019. The EBI translator is licensed to Park Forest, but the Bureau noted that the original transmission site as near Beecher. *First Letter Decision* at 1. The significance of the move to Chicago is just as significant if the population of Park Forest, 21,429, is compared with the population of Chicago.

[9] Chicago, Illinois population data, 2,705,994, U.S. Census Bureau, retrieved June 26, 2019.

III. BACKGROUND

A. Prior Related Background

The issues in this AFR have their origin in a number of prior decisions issued by the Bureau and Commission. Because of those prior decisions, SOH's only opportunity to modify its facilities so that it may provide better service to the Chinese-speaking community is to move its facilities in the direction precluded by grant of the EBI translator. Those prior decisions relate to the process through which SOH was precluded, by misrepresentation and deception on the part of another applicant - which the Commission ignored - from entering into a timeshare agreement after filing its initial construction permit application. Ultimately, the party that engaged in the misrepresentation failed to construct, but its illegal conduct ignored by the Bureau, had the effect of precluding SOH from operating at its preferred construction permit site, which would have permitted it to adequately serve the Chinese-speaking community. The specific facts surrounding that related situation are detailed in note 10 below to provide a more comprehensive understanding to the Commission of the facts leading to SOH's current position.[10]

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[10] On November 14, 2013, SOH, Urbanmedia One, Inc. ("UM"), Morton College ("Morton") and others filed mutually exclusive applications for a low power FM station to serve Chicago. The Bureau compared the competing applications and concluded that SOH, UM and Morton scored equally. The three entities were offered an opportunity to negotiate a timeshare agreement. Thereafter, a representative of SOH and a representative from UM entered into negotiations and the two entities agreed that the UM representative would coordinate negotiations. SOH authorized UM to arrange negotiation sessions with Morton. The UM representative thereafter commenced settlement discussions with Morton. However, instead of advising Morton of the true intent of SOH, the UM representative falsely advised Morton that it was unable to communicate with SOH and that SOH was not interested in negotiating a

B. EBI Series of Translator Hops

Attached to this AFR as Exhibit A[11] is a printout of the Commission's CDBS system, which shows the pattern of successive modification applications filed by EBI, moving closer to the center of Chicago:

1. On December 27, 2013, EBI was granted a construction permit for translator W256CL.

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timeshare agreement. The UM representative on repeated occasions advised SOH that it was unable to arrange timeshare discussions among UM, SOH and Morton. As the deadline approached to file a timeshare settlement agreement, the UM representative agreed with SOH to file a timeshare agreement on behalf of the two entities by the deadline date. However, days before the deadline, on December 2, 2015, UM filed with the Commission a timeshare agreement on behalf of UM and Morton. Two days later the Bureau approved the filed timeshare agreement, granted a construction permit pursuant to the timeshare agreement to UM and thereafter to Morton. Concurrently, the Bureau dismissed the SOH application. On January 7, 2015, SOH filed with the Bureau its Petition for Reconsideration and Rescission ("First Petition"), adding a Supplement on January 21, 2015, providing in minute detail the circumstances described above together with supporting affidavits and exhibits, citing precedents in support of its position that the grant to UM, given its misrepresentations and deceptive conduct, was inconsistent with precedent and applicable statutory provisions. In addition, SOH provided additional information demonstrating that UM was not qualified to be a Commission licensee because: (1) UM had operated a pirate radio station, (2) UM did not have reasonable assurance of its antenna site availability, and (3) the timeshare agreement was not valid. On March 4, 2015, the Bureau dismissed the petition as untimely, declining to address the merits. On April 2, 2015, SOH filed its Second Petition for Reconsideration ("Second Petition"), detailing why the original petition was not untimely. On July 20, 2016, the Bureau issued the Second Dismissal, dismissing the SOH Second Petition and *astonishingly ruling that "good faith" was not required of applicants in timeshare negotiations.* Following the filing of an AFR, the Commission ruled that, because, SOH had been granted a construction permit for a site that was not mutually exclusive with UM or Morton, SOH was no longer an aggrieved party and had no standing to challenge the timeshare agreement. On December 26, 2017, UM without detailing any reasons, asked to have its construction permit dismissed. The Commission cancelled it on December 28, 2017. As SOH shall demonstrate below, the facts surrounding the move of the EBI translator into Chicago have left SOH victimized once again by the failure of the Commission to enforce its rules.

[11] Exhibit A was filed as an exhibit to SOH's Informal Objection, filed January 19, 2018, and as an exhibit to its Petition for Reconsideration.

2. On January 29, 2014, EBI filed its first modification application to move its translator closer to downtown Chicago.

3. On July 25, 2014, EBI's first modification application was granted.

4. On February 9, 2015, EBI filed its second modification application to move its translator closer to downtown Chicago. ("First Application"[12])

5. On March 6, 2015, EBI's second modification application was granted.

6. On January 27, 2016, EBI filed its first license application for its translator.

7. On January 28, 2016, EBI filed its third modification application to move its translator closer to downtown Chicago.

8. On February 4, 2016, EBI's third modification application was granted.

9. On February 8, 2016, EBI's first license application was granted.

10. On April 14, 2017, EBI filed its fourth modification application to move its translator closer to downtown Chicago. ("Second Application").[13]

11. On May 10, 2017, EBI's fourth modification application was granted.

12. On July 17, 2017, EBI filed its second license application for its translator.

13. On July 28, 2017, EBI's second license application was granted.

14. On July 18, 2017, EBI filed its fifth modification application to move its translator closer to downtown Chicago. ("Third Application")[14]

15. On July 31, 2017, EBI's fifth modification application was granted.

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[12] The *First Letter Decision* identifies this as the First Application. 34 FCC Rcd at 4594-95. The Bureau does not explain why it ignored the January 29, 2014 modification application, which was the first to start the march into downtown Chicago. For purposes of this AFR, SOH will use the application identifications used by the Bureau.

[13] Again, without explanation, the *First Letter Decision* identifies this as the Second Application. *Id.*

[14] Again, without explanation, the *First Letter Decision* identifies this as the Third Application. *Id.*

16. On August 25, 2017, EBI filed its third license application for its translator.

17. On September 11, 2017, EBI's third license application was granted.

18. On December 29, 2017, EBI filed its sixth modification application to move its translator closer to downtown Chicago. That sixth modification application is the subject of this AFR. The Bureau simply refers to it as the present "Modification Application."

Attached as Exhibit B is an exhibit prepared by the engineering firm of Smith and Fisher. Exhibit B shows on a map the six applications that EBI filed to bring its translator to the heart of Chicago.[15] Exhibit B shows the moves have been a virtual straight line toward the heart of Chicago. Exhibit B also shows that four of the six construction permits did not place a 60 dBu contour over the entirety of the Park Forest, Illinois, the W256CL community of license. This is further evidence that the moves have not been made to improve service to its community of license. A review of Exhibits A and B together shows that this pattern of successive modification applications filed by EBI, moving closer to the center of Chicago, has taken place over a very short period of time, further evidence that these modifications have been part of a concerted series of "hops." Such a series of "hops" in such a short period of time cannot reasonably be considered necessary – a fact the Bureau concedes.

IV. STANDARD OF REVIEW

The Administrative Procedure Act, 5 U.S.C.§ 550 *et. seq.* ("APA"), details how the Commission is held accountable to the public and to review by the courts. *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992). The APA provides that a person suffering legal wrong

[15] Exhibit B was filed as an exhibit to SOH's Informal Objection and as an exhibit to its Petition for Reconsideration.

because of agency action is entitled to judicial review thereof. 5 U.S.C. § 701, *et seq*. In a challenge to Commission action brought pursuant to the APA, the statute provides that "[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be," among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] without observance of procedure required by law." 5 U.S.C. § 706(2)(A)-(D); *See*, *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 413-14 (1971). ("In all cases agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' or if the action failed to meet statutory, procedural, or constitutional requirements."). (rev'd. on other grounds, *Califano v. Sanders*, 430 U.S. 99 (1977)).

Through its provisions, the APA "establishes a scheme of 'reasoned decision making.'" *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 374 (1998) (*quoting Motor Vehicle Mfrs. Ass'n. v. State Farm Mut. Automobile Ins. Co*., 463 U.S. 29, 52 (1983) ("*State Farm*"). The Commission process by which it reaches a result must be "logical and rational." *Ibid.* Under the APA, courts must "hold unlawful and set aside" agency action that is "arbitrary and capricious." 5 U.S.C. 706(2)(A). An agency rule is arbitrary and capricious if the agency has relied on factors where Congress has intended otherwise, or where the Commission entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before it, or is implausible. *State Farm*, *supra,* 463 U.S. at 43. Further, an agency decision can be held arbitrary and capricious if it fails to provide a "coherent

explanation" of its decision, *Clark County. v. FAA*, 522 F.3d 437, 443 (D.C. Cir. 2008), or fails to justify departures from past practice by failing to persuasively distinguish contrary precedent. *Manufacturers Ry. Co. v. Surface Transp. Bd.*, 676 F.3d 1094, 1096 (D.C. Cir. 2012) ("*Manufacturers*"). In short, an agency decision will fail the APA's arbitrary and capricious review standard unless "that agency's exercise of its authority be reasonable and reasonably explained." *Ibid.*; *Laccetti v. SEC,* 885 F.3d 724, 725 (D.C. Cir. 2018).

All the above provisions are "separate standards" operating cumulatively as independent constraints on agency action. *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 284 (1974). An agency decision that survives review under one provision may be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law under another provision. *Association of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of Fed. Reserve Sys.,* 745 F.2d 677, 683 (D.C. Cir. 1984). Critically, it is a "foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action." *Michigan v. EPA*, 135 S. Ct. 2699, 2710 (2015). Thus, *post hoc* rationalizations cannot serve as a sufficient predicate for Commission action. *American Textile Mfrs. Institute, Inc. v. Donovan*, 452 U.S. 490, 539 (1981).

V. ARGUMENT

A. ***The Bureau's Decision failed to give proper weight to the evidence and the law***

In the *First Letter Decision*, the Bureau examined the evidence and law, but failed to give proper weight to either. The Bureau began by noting that the first construction permit

application filed by EBI to move toward Chicago was filed on February 9, 2015.[16] The Bureau then proceeded to describe the three construction permit applications that were filed, granted and licensed between February 9, 2015 and September 11, 2017.[17] The Bureau noted that the Modification Application at issue in this proceeding was filed December 29, 2017, just three months[18] after the third construction permit was granted.

After describing this string of hops, the Bureau began its analysis of the applicable law. The Bureau stated:

> *Abuse of process analysis.* In *Mattoon* and *Broadcast Towers*, we articulated the policy that a 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. *'Abuse of process' has been defined as 'the use of a Commission process, procedure or rule to achieve a result which that process, procedure or rule was not designed or intended to achieve or, alternatively, use of such process, procedure, or rule in a manner which subverts the underlying intended purpose of that process, procedure, or rule.'* An abuse of process ordinarily involves an intent to gain some benefit by manipulating the Commission's procedures. (emphasis added, footnotes omitted)[19]

The Bureau then presented what it explained to be an important point to be considered in its decision:

> Because the Commission has considered allegedly abusive serial translator modifications in both the waiver and enforcement contexts, it is important to note that these two types of proceedings are governed by different standards and

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[16] As noted above, although the Bureau dd not discuss all of the modification applications, SOH will use the application designations used by the Bureau in the *First Letter Decision,* 34 FCC Rcd at 4594-95.

[17] *Id.*

[18] The *First Letter Decision* incorrectly describes this as four months later. *Ibid.*

[19] *First Letter Decision* 34 FCC Rcd at 4596-97, *citing John F. Garziglia*, 26 FCC Rcd 12685, 12687 (MB 2011) ("*Mattoon*"), and *Broadcast Towers, Inc.*, Order, 26 FCC Rcd 7681, 7684, paras. 3-5 (MB 2011) ("*Broadcast Towers*").

> procedures. In an enforcement proceeding, as here, the Commission determines whether the conduct at issue violates a Commission rule or policy, and, if so, what sanctions or other actions would be appropriate. In a waiver proceeding—although the Commission must carefully consider all waiver requests—the requesting party is by no means entitled to a waiver grant and faces a "high hurdle even at the starting gate." The burden is on the waiver requestor to show that (1) special circumstances warrant a deviation from the general rule, and (2) such deviation better serves the public interest.[20]

The Bureau then stated:

> Therefore, the same set of circumstances (or public interest considerations) that might lead the Commission to deny a waiver request may not equally warrant an enforcement action. This distinction is crucial, because while the decisions cited by Sound of Hope are waiver cases, including *Mattoon* itself, in this case Edgewater is not requesting a waiver. Rather, Sound of Hope urges us to take enforcement action based on abuse of process, as discussed above. (footnotes omitted)[21]

In that statement, the Bureau explained that the standard for imposing an enforcement action is higher than the standard for denying a waiver. The Bureau then discussed the two previous cases where it reviewed serial translator moves as an enforcement matter, discussing first *Broadcast Towers*:

> In its only previous enforcement action based on serial modifications, *Broadcast Towers*, the Bureau entered into a consent decree resolving various violations including the "abuse of Commission processes committed by BTI as it migrated the Translators north to Miami." After reiterating this policy in *Mattoon* (in the context of a waiver request), the Bureau has considered only one other non-waiver serial modification case.[22]

The Bureau then discussed *Branchport*:

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[20] *Id.* at 4597.
[21] *Id.*
[22] *Id.*

> In *Branchport*, the Bureau determined that it would not pursue an enforcement action where the serial modifications at issue ultimately *returned the station's antenna to its approximate starting location*, explaining that in such circumstances enforcement was not necessary "(1) to protect the *Ashbacker* rights of potential applicants to comparative consideration for the 'same' license (i.e. that are mutually exclusive with the final destination of the 'hopping' station), and (2) to prevent, in the public interest, FM translator stations from abusing Commission processes in order to 'abandon[] their present service areas' in favor of more populous locations." Based on the reasoning of *Mattoon* and *Branchport*, we first analyze the potential abuse of process issue and then consider the *Ashbacker* implications of the Edgewater serial modifications. (emphasis added, footnotes omitted)[23]

Thus, the Bureau emphasized that its review was "to prevent, in the public interest, FM translator stations from abusing Commission processes in order to abandon their present service areas in favor of more populous locations." Importantly, in *Branchport*, the licensee ended up where it started. Here, the licensee has moved from a rural community into the third most populous city in the country.

The Bureau then proceeded to analyze the EBI series of hops based upon four criteria:

1. Temporary construction
2. Duration of operation
3. Alternative purposes
4. Pattern of translator relocations

Unfortunately, the Bureau's analysis of the four criteria was flawed.

1. Temporary Construction

With respect to temporary construction, the Bureau concluded that there was no abuse of process, because EBI operated at the First and Third Application Sites for over a year. The

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[23] 34 FCC Rcd at, citing *Gary S. Smithwick, Esq.*, 28 FCC Rcd 15494, 15497-98 (MB 2013) ("*Branchport*").

Bureau somehow concluded that operating a translator at a site for slightly over a year negates the conclusion that the construction was temporary. This conclusion failed to acknowledge that broadcasters ordinarily construct facilities for much longer periods. Indeed, the common practice in the industry is to lease tower facilities under long-term leases for five, ten or more years.[24] Hopping from one site to another in a year indicates that EBI entered into no long-term leases at any of the sites it used. Thus, each and every site that EBI used was a temporary site.

Indeed, the hopping from one site to another suggests that EBI may have entered into no leases at some of these sites and instead was only a month-to-month tenant. Therefore, at a minimum, the Bureau should have investigated the nature of EBI's relationships with the site owners at each of the sites. The Bureau should have directed EBI to submit copies of all leases and other agreements that it signed at each of the sites. It is most likely that such an investigation would demonstrate that EBI arranged for each site to be a temporary site.

Similarly, the fact that EBI did not use telescoping antennas transported by vehicle to public roadside sites powered by portable generators is not evidence that these were not temporary facilities. The difference between the facilities used by EBI and the applicant in *Broadcast Towers* is only a matter of cost. With the prize objective being a translator in downtown Chicago, the purchase of durable facilities and construction on third-party sites was a

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[24] An industry sector leader details its business model as "Typical contract terms include an initial term of 5 to 10 years with multiple 5-year renewal periods. *See Introduction to the Tower Industry & American Towe*r, The Business Model, Long Term Customers' Leases, at 8. Available online at file: http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MTEwMDI2fENoaWxkSUQ9LTF8VHlwZT0z&t=1

small investment in obtaining the desired objective. The facility investment could be moved to each successive site without purchasing new equipment. The additional cost of moving these facilities in comparison to the cost of portable facilities should have little weight in considering whether an abuse of process has been perpetrated by EBI.

2. Duration of Operation

The Bureau said the following about the duration of operation:

> Here, as noted above, Edgewater operated the station at the First Application Site for more than a year. Although it operated the Station at the Second Application site for only one month, which is a red flag that the Second Application site could represent simply a waystation, Edgewater then broadcast from the Third Application site for more than a year, from August 2017 to the present. The prolonged periods of service at the First and Third Application sites indicate that these facilities were not temporarily constructed and that Edgewater in fact served the public from each location. Therefore, although it partially cuts both ways, this factor overall does not support an enforcement action based on abuse of process.[25]

The Bureau's balancing of the periods of operation is clearly misguided. As SOH has demonstrated above, operation for a year should not be regarded as long-term operation. On the other hand, operation at the Second Application site for only one month must be given great weight. The Second Application site was clearly only a waystation on the path to downtown Chicago. In addition, the only reason EBI operated at its Third Application site for more than a year was because of SOH's Informal Objection. EBI filed its Modification Application after operating at its Third Application site for only three months. EBI should be given no credit for operating at its Third Application site for over a year. This series of hops is an abuse of the Commission's processes.

3. Alternative Purposes

The Bureau's treatment of this criteria is the most perplexing part of the *First Letter Decision*. The Bureau stated:

> Alternative purposes. As mentioned above, our policy against serial modifications is based on potential abuse of the Commission's licensing procedures, i.e., intentional efforts to evade rule restrictions. An application that is filed for a demonstrably legitimate purpose—e.g., that is the result of unexpected tower damage, or to resolve interference issues that are outside the translator licensee's control—does not raise abuse of process concerns. In this case, however, ***there is no evidence that Edgewater filed any Application due to interference or any other clearly legitimate reason***, so this factor does not remove ***any*** of the Applications from further scrutiny regarding potential abuse of process. (emphasis added)[26]

This is the most correct and most damning conclusion in the *First Letter Decision*. "[T]here is no evidence that Edgewater filed any Application due to interference or any other clearly legitimate reason." Case closed! The purpose of Section 74.1233(a) is to prevent precisely the conduct engaged in here. As the Bureau explained:

> Some translator licensees have attempted to accomplish what would otherwise be dismissed as an impermissible major change under Section 74.1233(a) by filing serial minor modification applications to "hop" to new locations that are sometimes over 100 miles away. *We believe the filing of serial modification applications represents an abuse of process*. We recently entered into a consent decree with a party that acknowledged this practice was an abuse of process and agreed to forfeit several authorizations.[27] (emphasis added)

The Bureau then discussed the purpose of Section 74.1233(a):

> The purpose of the overlap requirement is "[t]o prevent ... FM translator stations from abandoning their present service areas." The evident purpose of the serial

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[25] 34 FCC Rcd at 4599.
[26] *Id.*
[27] *Id.* at 4595.

> applications is to achieve the prohibited result. No rule specifically prohibits such a practice, but *the Commission can take appropriate enforcement action, including denial of applications that are intended to evade the requirement or subvert its purpose* pursuant to Section 308(a) of the Communications Act of 1934, as amended, on the ground that grant would not serve the public interest.[28] (emphasis added)

The Bureau concludes that EBI had **no clearly legitimate reason** to file **any** of the Applications. In other words, the only purpose for EBI filing any of the Applications was to make a steady march into downtown Chicago. How the Bureau could reach this overwhelming conclusion and reach its contrary final decision is unfathomable. The Bureau's finding of no alternative purpose should be the lynchpin of its determination that this entire procession of site hops was an abuse of process. Especially, where, unlike in *Branchport*, the licensee did not end up where it had started. EBI ended up exactly where it could only arrive by abusing the modification process.

4. Pattern of Translator Relocations

The Bureau added to the perplexing nature of its ultimate conclusion with its analysis of the pattern of translator relocations. The Bureau began:

> Pattern of translator relocations. The purpose of the overlap requirement of the major change rule is "[t]o prevent . . . FM translator stations from abandoning their present service areas." The Commission has long been concerned that its statutory goal of distributing radio service fairly and equitably may be undermined by the financial incentive for broadcasters to move their stations from rural areas into heavily populated urban areas. *In Branchport, we concluded that serial modifications do not implicate abuse of process concerns if they ultimately return the relevant station's facilities to their original location.*[29] (Emphasis added.)

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[28] *Id.*
[29] *Id.* at 4599.

The Bureau then pointed out the important parallel between the instant case and the *Broadcast Towers* case:

> In contrast, in *Broadcast Towers*, we found that abuse of process existed where the licensee migrated its translators straight north from the Florida Keys area into Miami. Such straight-line "marches" are clearly indicative of an intention to circumvent the major change rule by moving the station to a distant location that would otherwise be considered a major change. This is particularly the case in the presence of a clear incentive for avoiding the major change rule—such as increasing signal coverage in a densely populated area. ***In this case, the Station modifications moved the station directly from the rural outskirts of Chicago into the center of the (presumably) more lucrative urban area. Therefore, this factor weighs in favor of a finding of abuse of process***. (emphasis added) (footnotes omitted)[30]

Once again, the Bureau reached what should be a decisionally controlling conclusion of abuse of process. The Bureau correctly concluded that EBI's straight-line march "from the rural outskirts of Chicago into the center of the (presumably) more lucrative urban area … weighs in favor of finding an abuse of process."

B. *The Bureau's failure to find an abuse of process is contrary to the evidence and the law*

The Bureau's conclusions with respect to: (1) the lack of a legitimate alternative purpose for any of the site moves and (2) the clear pattern of moving into downtown Chicago, demonstrated that the ultimate conclusion should have been that EBI has engaged in an abuse of process. Amazingly however, the Bureau concluded as follows:

> Based on the above, although we agree that the pattern of translator relocations in this case raises concerns regarding potential abuse of process, we conclude that the record evidence taken as a whole does not support a finding that

[30] *Id.* at 4599-4600.

> Edgewater deliberately and abusively attempted to evade the major change rule. Critical to this conclusion are the facts that (1) none of the Station facilities were temporarily constructed, and (2) Edgewater operated the Station for more than a year at two of the relevant interim locations. We are not persuaded that such gradual changes are the functional equivalent of a single major change and therefore evidence of an attempt to evade the major change rule. Taking the totality of the circumstances into account, we conclude that the serial modifications at issue here ... do not warrant an enforcement action based on abuse of process. However, we will continue to monitor the actions of Edgewater and other licensees to ensure that they are not abusing our application processes to relocate facilities in a manner that is not permitted and inconsistent with the minor modification rules.[31]

This conclusion is inconsistent with the evidence before the Bureau and the law. The Bureau's decision provides a blueprint for evading the major change rule. The Bureau has concluded that EBI's conduct shows no purpose other than to evade the major change rule. Thus, the Bureau's decision guides EBI and future translator licensees that, if you are willing to spend two or three years and a little money, you too can evade the major change rule and bring a rural translator into any large city in the U.S. The Bureau's decision mistakenly suggested that the only purpose of Section 74.1233(a) is to keep licensees from abandoning rural communities in one step. This is incorrect. The purpose of Section 74.1233(a) is to keep licensees from abandoning rural communities period. The *First Letter Decision* completely undermines the purpose of Section 74.1233(a).

C. ***The Bureau's decision violates the Administrative Procedure Act***

The *First Letter Decision* completely undermined Section 74.1233(a) without providing any public interest justification for doing so. The *First Letter Decision* provided no explanation for why allowing licensees to evade the major change rule is in the public interest. The Bureau

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[31] *Id.* at 4600.

has concluded that Section 74.1233(a) prevents licensees from abandoning rural communities *quickly*, but it does not prevent them from abandoning them *in slow motion.* However, the Bureau has not explained what public interest benefit is derived from allowing licensees to abandon their rural communities *slowly*. The public interest established by Section 74.1233(a) is that translator licensees should continue to serve their licensed communities. The *First Letter Decision* eviscerates that rule.

An additional public interest issue the Bureau has failed to consider is the waste of the Commission's time and resources involved in processing the long list of clearly temporary modification applications filed by EBI. The Bureau has not explained why it is in the public interest for the Commission's resources to be expended processing a long series of temporary modification and license applications. This is especially true where the Bureau has conceded that *there was no clearly legitimate reason for any of these applications*.

Section 557 of the Administrative Procedure Act ("APA") 5 U.S.C. § 557 requires that the decisions of an administrative agency must contain the reasons and basis for its findings on the evidence and the law. Where the agency decision fails to provide an adequate explanation of the reasons and basis for its conclusions, the decision is rendered arbitrary, capricious and an abuse of discretion and will be reversed by a reviewing court, pursuant to Section 706 of the APA 5 U.S.C. § 706.[32] The *Second Letter Decision*, by simply affirming the *First Letter Decision*, fails to meet the requirements of the APA and is subject to reversal by a reviewing

court.

D. *The Bureau's decision deprives SOH and other potential applicants of their Ashbacker rights*

The *First Letter Decision* concludes with an analysis of whether EBI's serial modifications raise *Ashbacker*-related procedural concerns. On this issue the Bureau concludes:

> We conclude that grant of the Modification Application is consistent with the *Ashbacker* doctrine. Absent a waiver request, Edgewater is subject to the same procedural rules as any other potentially competing applicant, including the overlap requirement of Section 73.1233(a), and is 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.[33]

The Bureau then states:

> Because Edgewater operated the Station at the Third Application site for four months[34] before filing the Modification Application, 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. For these reasons, we conclude that grant of the Modification Application does not unfairly preclude potentially competing applications in violation of the *Ashbacker* doctrine.[35]

The Bureau's *Ashbacker* analysis rests on the assumption that EBI's operation from the Third Application site for three months provided adequate notice to other potential applicants.

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[32] See, *Prometheus Radio Project v. FCC,* 824 F.3d 33, 40, 57-60 (3d Cir. 2016); *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501, 507, 510 (D.C. Cir. 1988); *National Black Media Coalition v. FCC,* 775 F.2d 342, 355-358 (D.C. Cir. 1985).

[33] 34 FCC Rcd at 4600.

[34] As noted above, the Station was operated at the Third Application site for only three months, not four months, before the Modification Application was filed.

[35] 34 FCC Rcd at 4600-01.

The Bureau has failed to apply the applicable law in reaching this conclusion. EBI has completed a major change of its service area: (1) without complying with the public notice requirements of Section 73.3580, as required by Section 74.1233(a), and (2) without filing in a Commission designated filing window, as required by Section 74.1233(d)(2)(i). It is the public notice requirement of Section 73.3580 and the filing window requirement of Section 74.1233(d)(2)(i) that provide protection of the *Ashbacker* rights of other potential applicants. Potential competitors are not placed on adequate notice by the mere filing of a minor change application. The Bureau's determination that operating for three months at a minor change site is sufficient for other potential applicants to be put on notice violates Section 74.1233(a) and the *Ashbacker* doctrine. The *Ashbacker* doctrine requires adequate notice to SOH and other potential applicants. The Commission determined in Section 74.1233(a) that adequate notice for a major change application requires compliance with the public notice requirement of Section 73.3580 and the filing window requirement of Section 74.1233(d)(2)(i). The Bureau's determination, that it is permissible to complete a major change without providing the public notice required by Section 73.3580 and without applying in a filing window pursuant to Section 74.1233(d)(2)(i), violates Section 74.1233(a) the Commission's rules and fails to meet the requirements of the *Ashbacker* doctrine. This also violates the requirements of the APA.

SOH has explained that it is one of the potential applicants whose *Ashbacker* rights have been infringed by the Bureau's decision.[36] Grant of the EBI Modification Application precludes SOH from applying to modify its license to move its transmitter site closer to the Chinese-

speaking community it serves. Thus, the Bureau's decision directly impacts SOH's *Ashbacker* rights.

VI. CONCLUSION

The Bureau has concluded that EBI engaged in a series of translator site hops that demonstrate a straight-line march from rural Illinois to downtown Chicago, which the Bureau concluded is evidence of an abuse of process. The Bureau has concluded that there was no clearly legitimate reason for any of the translator hops other than to march into downtown Chicago, which the Bureau concludes is evidence of an abuse of process. Amazingly however, the Bureau places form over substance by ruling that the period of time that these hops took, February 9, 2015 to December 29, 2017, and the limited operations that the Station undertook at two of these sites, somehow excuses EBI's clear abuse of process. The Bureau's decision undermines and violates Section 74.1233(a) and gives EBI and other licensees a blueprint for circumventing that rule in the future.

Similarly, the Bureau's analysis of the *Ashbacker* doctrine fails to recognize that Section 74.1233(a) sets forth the Commission's determination of how the *Ashbacker* rights of other potential applicants are to be protected from a major modification. Section 74.1233(a) requires that an applicant for a major modification must comply with: (1) the public notice requirements of Section 73.3580, and (2) the filing window requirement of Section 74.1233(d)(2)(i). The Bureau cannot allow EBI and future applicants to circumvent the major change public notice requirement and the filing window requirement by a stealth process of using a series of minor

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[36] SOH Informal Objection at 3-4.

change hops. Section 74.1233(a) and *Ashbacker* require that the major change public notice requirements of Section 73.3580 and the filing window requirement of Section 74.1233(d)(2)(i) be followed. The Bureau has improperly infringed upon SOH's *Ashbacker* rights. The decision violates the Administrative Procedure Act and is subject to reversal upon appellate review.

The Bureau began its analysis by defining an abuse of process. In very key ways it determined that EBI has committed an abuse of process. The Bureau's decision improperly excuses an abuse of process. The Bureau has failed to explain how the public interest is served by excusing an abuse of process and undermining the purpose of Section 74.1233(a). The *Second Letter Decision* should be reconsidered and reversed. The EBI Modification Application should be dismissed or denied.

Respectfully submitted,

SOUND OF HOPE RADIO NFP

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February 27, 2020

EXHIBIT A

W256CL APPLICATION SERIES
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FCC Federal Communications Commission

Application Search Details

Search returned: 11 matching applications

Application Search Results

File Number	Form	Paper/ Elect	Call Sign	Facility Id	Service	Status	Status Date	Details
BPFT 20171229ABE	349	E	W256CL	152811	FX	ACCEPTED FOR FILING	01/02/2018	Info | Application
BLFT 20170825ABG	350	E	W256CL	152811	FX	GRANTED	09/11/2017	Info | Application
BPFT 20170718ACW	349	E	W256CL	152811	FX	GRANTED	07/31/2017	Info | Application
BLFT 20170717ACV	350	E	W256CL	152811	FX	GRANTED	07/28/2017	Info | Application
BMPFT 20170414AAB	349	E	W256CL	152811	FX	GRANTED	05/10/2017	Info | Application
BPFT 20160128BEG	349	E	W256CL	152811	FX	GRANTED	02/04/2016	Info | Application
BLFT 20160127AFF	350	E	W256CL	152811	FX	GRANTED	02/08/2016	Info | Application
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BNPFT 20030317EUO	349	E	W256CL	152811	FX	GRANTED	12/27/2013	Info | Application

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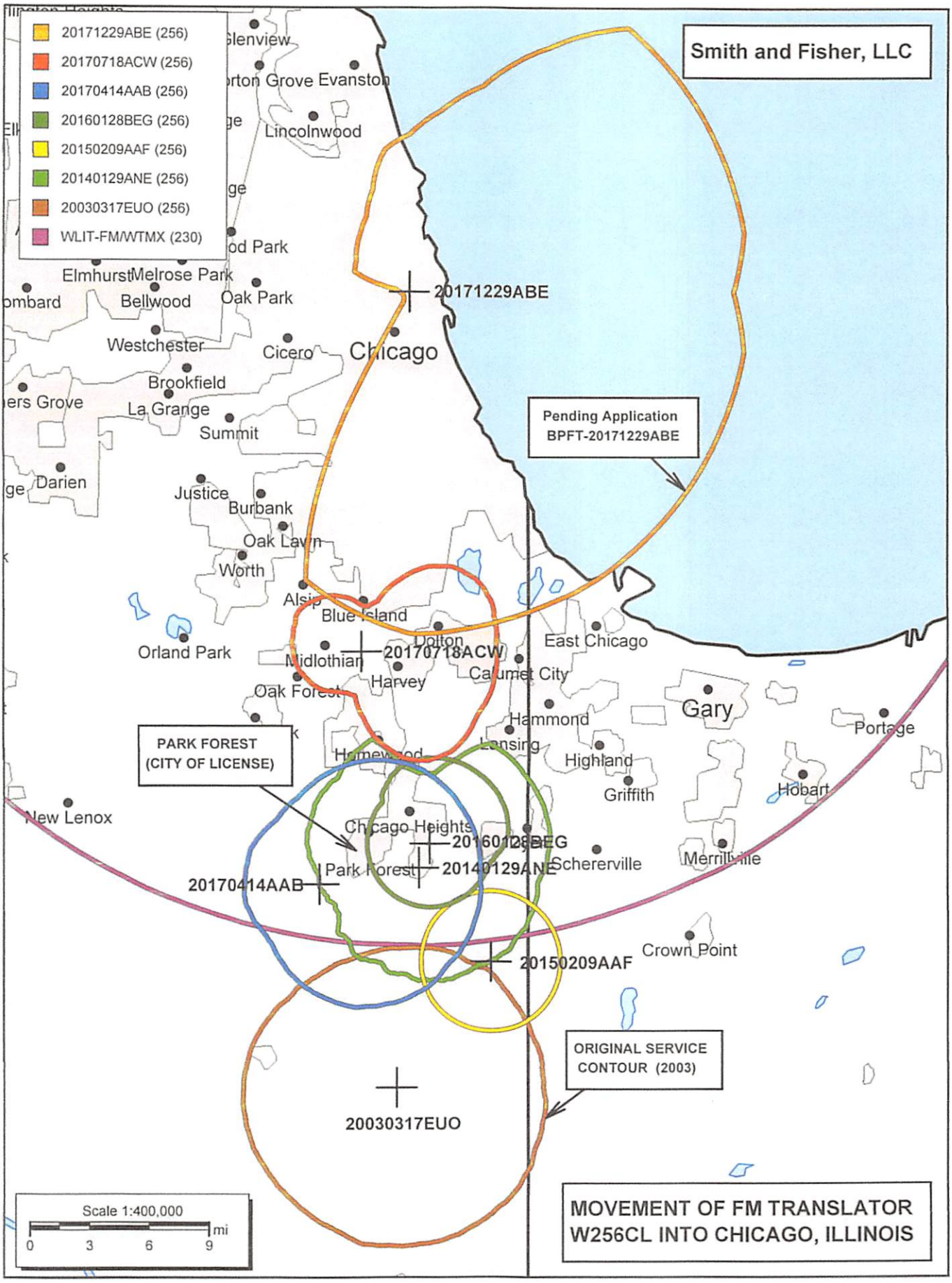
EXHIBIT B

ENGINEERING MAP
PREPARED BY
SMITH & FISHER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Melrose Park
Bellwood
Oak Park
Westchester
Cicero
Brookfield
La Grange
Summit
Darien
Justice
Burbank
Oak Lawn
Worth
Orland Park
Midlothian
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Oak Forest
Blue Island
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Gary
Hammond
Lansing
Highland
Griffith
Hobart
Portage
Chicago Heights
Park Forest
Schererville
Merrillville
Crown Point
New Lenox

CERTIFICATE OF SERVICE

I, Sheree Kellogg, do hereby certify that I sent via U.S. mail (except where indicated), on this 27th day of February, 2020, copies of the foregoing APPLICATION FOR REVIEW to the following:

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