

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

In the Matter of)	
)	
Eastern Airwaves, LLC)	
)	
Applications for Construction Permits for)	File No. BMPFT-20150326AAS
Minor Modifications to W251CA,)	File No. BMPFT-20150724ABS
Rolesville, North Carolina)	
)	
Application for a License to Cover W251CA,)	File No. BLFT-20151112LPM
Rolesville, North Carolina)	Facility ID No. 143057
)	
FM 102.9 LLC)	
)	
Application for a Construction Permit for a)	File No. BPFT-20150326AAW
Minor Modification to W254AS,)	
Rolesville, North Carolina)	
)	
Application for a License to Cover W254AS,)	File No. BLFT-20151112LPR
Rolesville, North Carolina)	Facility ID No. 143226
)	
Application for a License to Cover W228CZ, Cary,)	File No. BLFT-20161220AAZ
North Carolina)	Facility ID No. 156763

MEMORANDUM OPINION AND ORDER

Adopted: July 5, 2018

Released: July 6, 2018

By the Commission:

1. In this Memorandum Opinion and Order, we deny the Application for Review (Application for Review) filed by Triangle Access Broadcasting (Triangle) on December 29, 2017. Triangle seeks review of a November 29, 2017, letter decision by the Audio Division, Media Bureau (Bureau) upholding on reconsideration the Bureau's grants of the above-referenced applications (Applications).¹

2. In the *Reconsideration Decision*, the Bureau found that Eastern Airwaves, LLC, and FM 102.9 LLC (collectively, Curtis Licensees),² were not required to submit a technical need showing to hold licenses for seven "fill-in" FM translators, i.e., translators located within the protected 60 dB μ contour of co-owned primary station WQDR-FM, Raleigh, North Carolina (WQDR Translators).³ Section 74.1232(b) provides that "[m]ore than one FM translator may be licensed to the same applicant, whether or not such translators serve substantially the same area, upon an appropriate showing of technical need

¹ *Coe W. Ramsey, Esq.*, Letter, 32 FCC Rcd 10105 (MB 2017) (*Reconsideration Decision*).

² 100 percent of the voting and equity interest in each Curtis Licensee is held by Donald W. Curtis.

³ The seven WQDR Translators and the respective digital subchannels they rebroadcast are: W228CZ, Cary, North Carolina (HD-2); W251CA, Rolesville, North Carolina (HD-2); W254AS, Rolesville, North Carolina (HD-3); W228CV, Chapel Hill, North Carolina (HD-2); W227CZ, Durham, North Carolina (HD-2); W284CD, Youngsville, North Carolina (HD-2); and W284CP, Raleigh, North Carolina (HD-2).

for such additional stations.”⁴ When the Commission adopted this rule in 1970, it explained that a showing of technical need is “required only where the same programming would be provided to substantially the same area.”⁵ In acting on the Applications, the Bureau relied on a longstanding staff processing standard to interpret “substantially the same area” to mean a 50 percent or more contour overlap between the relevant translators’ 60 dBu signal contours.⁶ The Bureau also concluded that each digital subchannel constitutes a separate “signal” for the purposes of the technical need rule, meaning that a showing of technical need is not required for two or more co-owned translators that serve substantially the same area but rebroadcast different digital subchannels.⁷ In this case, the only two WQDR Translators with a more than 50 percent overlap (W254AS and W251CA) rebroadcast different digital subchannels (HD-3 and HD-2, respectively). Therefore, the Bureau found that no technical need showings were required in order to grant the Applications.

3. In the Application for Review, Triangle argues based on the text of Section 74.1232(b) that an applicant’s first application for an FM translator within the primary station’s service contour does not require a showing of technical need but any subsequent application from the same applicant for an additional FM translator within such contour must include a showing of technical need.⁸ Triangle also contends that the Bureau erred by interpreting “substantially the same area” as a 50 percent or more contour overlap between the subject translators. Triangle suggests two alternative definitions for “substantially the same area”: (1) each co-owned translator is within the protected service contour of the common primary station; or (2) there is “almost no overlap” between the co-owned translators.⁹ In support of these definitions, Triangle cites to language in the *1990 Translator Order*, the *2009 Translator Order*, and a 2005 Bureau decision (*Bennett Letter*).¹⁰ Triangle asks the Commission to “resolve what ‘substantially the same area’ really means so that a correct, fair, and consistent policy may be applied.”¹¹ Triangle also argues that the WQDR Translators, collectively, form a “*de facto*” full service FM station and thus should not be permitted under the *2009 Translator Order*, which states, “We would consider it an abuse of our rules for a licensee to use two or more cross-service translators to effectively create a *de facto* FM station.”¹² Finally, Triangle argues that a translator modification application cannot be accepted for filing unless the primary station signal proposed to be rebroadcast is on the air at the time of filing.¹³

⁴ 47 CFR § 74.1232(b) (Section 74.1232(b) or technical need rule).

⁵ *FM Translator and Booster Stations*, Report and Order, 20 RR 2d 1538, para. 5 (1970) (*1970 Translator Order*). See also *Operation of Low Power FM Broadcast Translator and Booster Stations*, 35 FR 15383, 15390 (Oct. 2, 1970) (Federal Register publication of Section 74.1232(b)).

⁶ *Reconsideration Decision*, 32 FCC Rcd at 10111-12.

⁷ *Reconsideration Decision*, 32 FCC Rcd at 10112. Triangle does not challenge this aspect of the Bureau’s decision. See Application for Review at 3-4.

⁸ Application for Review at 5-6; Reply at 3.

⁹ Application for Review at 5-7.

¹⁰ Application for Review at 5-8 (citing *Amendment of Part 74 of the FM Commission’s Rules Concerning Translator Stations*, Report and Order, 5 FCC Rcd 7212, 7222 (1990) (*1990 Translator Order*) (“We also proposed to clarify that in order for a primary station to demonstrate the need to own a second translator within its coverage contour, it must only show that a technical necessity exists for the additional translator.”); *Amendment of Service and Eligibility Rules for FM Broadcast Translator Stations*, Report and Order, 24 FCC Rcd 9642, 9655, para. 30 (2009) (*2009 Translator Order*) (declining to impose certain limits on cross-service translators in part because the technical need rule “limits the ability to hold ‘same area’ translator authorizations, requiring a showing of ‘technical need’ for an additional translator serving substantially the same area as the first.”); *John Jason Bennett*, Letter, 20 FCC Rcd 17193, 17194 (MB 2005) (finding that a Section 74.1232(b) issue was resolved by modifying the relevant construction permit to “eliminate the vast majority of the contour overlap.”) (*Bennett Letter*)).

¹¹ Application for Review at 7-8.

¹² Application for Review at 5 (citing *2009 Translator Order*, 24 FCC Rcd at 9655, para. 30).

4. Upon review of the Application for Review and the entire record, we conclude that Triangle has not demonstrated that the Bureau erred. We reject Triangle's argument that the phrase "whether or not such translators serve substantially the same area" as used in Section 74.1232(b) means a showing of technical need is required with every application for an additional FM translator within the primary station's service contour beyond the applicant's first such application, even when the translators' contours do not overlap.¹⁴ When the Commission adopted Section 74.1232(b) in 1970, it made clear that the phrase "whether or not such translators serve substantially the same area" refers to the potential for the same applicant to obtain licenses for more than one FM translator even if the translators serve substantially the same area.¹⁵ The Commission went on to clarify that an "appropriate" showing of need for such additional translator stations may be, but is not always, required.¹⁶ The Commission explained that a showing of need is not required when "the translators will rebroadcast different primary stations," even if they serve substantially the same area.¹⁷ Rather, a showing of need is "required only where the same programming would be provided to substantially the same area or where the question of need is raised by a party in interest who objects to grant of the application and makes a prima facie showing of the lack of need for the proposed new FM translator."¹⁸ In adopting the rule, the Commission did not define the phrase "substantially the same area."

5. The orders adopted after the *1970 Translator Order* cited by Triangle did not change the meaning of Section 74.1232(b). The statements from the *1990 Translator Order* cited by Triangle were designed to paraphrase without revising the existing requirements set forth in the *1970 Translator Order* that a showing of technical need is required only where the same programming would be provided to "substantially the same area."¹⁹ Rather than changing the existing requirements, the *1990 Translator Order* clarified that a showing of "need" should focus on the technical necessity for the additional facilities and not programming considerations and that fill-in translators will be subject to the technical need requirement the same as translators providing service to other areas.²⁰ Likewise, in the *2009 Translator Order*, the Commission declined to impose a numeric limit on fill-in FM translators used by AM stations, reasoning that such translators would in any case be subject to the technical need rule. Again, the *2009 Translator Order* did not change the meaning of Section 74.1232(b).²¹ Finally, the Bureau-level *Bennett Letter* is not binding on the Commission and, in any event, is consistent with Section 74.1232(b) as adopted in the *1970 Translator Order*.²² The Bureau found that a showing of technical need was not required after the applicant had eliminated the "vast majority" of contour overlap. It does not follow from this factual description of what the applicant did in that case that "substantially the

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¹³ Application for Review at 8. Triangle claims that the Bureau erroneously relied on a language in a Form 349 certification in the *Reconsideration Decision*. Application for Review at 5-6. In the *Reconsideration Decision*, the Bureau cited to Form 349, Section III-A, Question 14, as part of its discussion of whether a digital subchannel constitutes a "signal" for the purposes of the technical need rule. *Reconsideration Decision*, 32 FCC Rcd at 10111-12. That issue is not under review and Form 349 does not define "substantially the same area." Thus, we do not further consider Triangle's objection to this citation.

¹⁴ Application for Review at 5-6; Reply at 3.

¹⁵ *1970 Translator Order*, 20 RR 2d 1538, para. 5.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *1990 Translator Order*, 5 FCC Rcd at 7222, paras. 70-71.

²⁰ *Id.* at 7222-23, para. 75.

²¹ See *supra* note 10.

²² See *Comcast Corp. v. FCC*, 526 F.3d 763, 769-70 (D.C. Cir. 2008) ("[A]n agency is not bound by the actions of its staff if the agency has not endorsed those actions.").

same area” must in all cases be equivalent to “almost no overlap.”

6. We affirm the Bureau’s conclusion that no showing of technical need was required here because the translators at issue do not provide the same programming to “substantially the same area.”²³ The Bureau’s existing processing practices in applying the “substantially the same area” standard are based on a need for clearly defined and objective criteria. We uphold the Bureau’s determination that “more than 50 percent” is a reasonable and appropriate interpretation of “substantially the same area.” This interpretation is in keeping with the Commission’s focus, in the *1990 Translator Order*, on the role of translators providing signal coverage that would otherwise be lacking due to factors such as terrain obstructions.²⁴ As the Commission made clear in the *1990 Translator Order*, unless a translator serves substantially the same area as another translator, the need for the translator is presumed.²⁵ The greater the contour overlap with another translator rebroadcasting the same primary signal, the weaker the presumption that the translator is needed, because the lesser the likelihood that the translator will fulfill the goal of providing additional coverage. Moreover, the term “substantial” is inconsistent with Triangle’s suggestion that *de minimis* overlap is sufficient to require a showing of technical need.²⁶ For these reasons, we conclude that the Bureau’s interpretation of “substantially the same area” is in accordance with both the language and underlying rationale of the rule. Consistent with the policy underlying the rule, it allows translators some flexibility in translator siting while limiting substantially duplicative coverage unless the applicant can demonstrate technical need. Accordingly, we affirm the Bureau’s interpretation of “substantially the same area” as a greater than 50 percent overlap and remind applicants that the rule also provides the option of demonstrating technical need on a case-by-case basis despite apparent substantial duplicate coverage. In this case, the 60 dB μ contours of W228CZ and W284CP, which rebroadcast the same digital subchannel, overlap by approximately 30 percent; therefore, these two translators do not serve substantially the same area. Although the 60 dB μ contours of W254AS and W251CA overlap by approximately 95 percent, these two translators rebroadcast different digital subchannels and thus do not provide the same programming. For these reasons, we uphold the Bureau’s determination that a showing of technical need was not required for either set of stations.

7. Regarding Triangle’s “*de facto*” FM station claim, we first note that the relevant discussion in the *2009 Translator Order* is, on its face, inapplicable to the WQDR Translators, which rebroadcast an FM station and thus are not “cross-service translators.”²⁷ Second, although the Commission did not describe specific factors that might suggest the creation of a “*de facto*” FM station, the mere fact of one party owning multiple translators that rebroadcast the same programming, as here, does not in and of itself raise concerns regarding abuse of the Commission’s Rules. Indeed, despite expressing concerns with the creation of *de facto* FM stations in the *2009 Translator Order*, the Commission declined to impose a numerical limit on the number of FM translators used by a single AM station.²⁸ Here, Triangle has not alleged any facts other than the Curtis Licensees’ ownership of several translators rebroadcasting the same programming that would raise an issue as to whether the Curtis

²³ In the *1970 Translator Order*, the Commission provided that a showing of technical need is required only where the same programming would be provided to substantially the same area or “where the question of need is raised by a party in interest who objects to grant of the application and makes a prima facie showing of the lack of need for the proposed new FM translator.” *1970 Translator Order*, 20 RR 2d 1538, para. 5. Triangle relies solely on its claim that the FM translators at issue will provide the same programming to substantially the same area. It does not contend that it made a prima facie showing of a lack of need for the FM translators at issue here.

²⁴ *1990 Translator Order*, 5 FCC Rcd at 7222, paras. 70-71.

²⁵ *1990 Translator Order*, 5 FCC Rcd at 7222, para. 70.

²⁶ Merriam-Webster Dictionary, definition of “substantial,” https://www.merriam-webster.com/dictionary/substantial?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (“considerable in quantity: significantly great” or “largely but not wholly that which is specified”) (last visited June 1, 2018).

²⁷ *2009 Translator Order*, 24 FCC Rcd at 9655, para. 30.

²⁸ *Id.* at 9654-55, para. 29.

Licensees have abused our rules to create a “*de facto*” FM station. For these reasons, we reject Triangle’s claim that the WQDR Translators constitute a “*de facto*” FM station.

8. Lastly, we reject Triangle’s unsupported assertion that a translator modification application is not acceptable for filing—or grantable—if the primary station signal it proposes to rebroadcast is not yet on the air. A modification application seeks authority to construct a facility; it is not until the licensing stage that the applicant certifies that the facilities are “in satisfactory operating condition and ready for regular operation.”²⁹ Here, the digital subchannels each of the subject translators sought to rebroadcast were on the air by the time the Curtis Licensees filed their license applications.³⁰

9. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended,³¹ and Section 1.115(g) of the Commission’s Rules,³² the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

²⁹ FCC Form 350, *Application for an FM Translator or FM Booster Station License*, Section II, Question 5; 47 CFR § 73.3598 (e) (“Any construction permit for which construction has not been completed and for which an application for license has not been filed, shall be automatically forfeited upon expiration without any further affirmative cancellation by the Commission.”). In the Reply, Triangle withdrew its argument that the construction permit for W228CZ, Cary, North Carolina, had expired under 47 U.S.C. § 319(b). Reply at 2.

³⁰ See File No. BDNH-20170111AAF (filed Jan. 11, 2017) (indicating that digital broadcasting commenced on August 26, 2015).

³¹ 47 U.S.C. § 155(c)(5).

³² 47 CFR § 1.115(g).