



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

November 29, 2017

**DA 17-1147**

***In Reply Refer to:***

**1800B3-CEG**

Released: November 29, 2017

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**In re: W251CA, Rolesville, North Carolina**  
File Nos. BMPFT-20150326AAS  
BMPFT-20150724ABS  
BLFT-20151112LPM  
Facility ID No. 143057

**W254AS, Rolesville, North Carolina**  
File Nos. BPFT-20150326AAW  
BLFT-20151112LPR  
Facility ID No. 143226

**W228CZ, Cary, NC**  
File No. BLFT-20161220AAZ  
Facility ID No. 156763

**Petitions for Reconsideration**

Dear Counsel:

We have before us two petitions for reconsideration<sup>1</sup> (Rolesville Modification Petitions) filed by Triangle Access Broadcasting, Inc. (Triangle), seeking reconsideration of the April 28, 2015, grant by the Audio Division, Media Bureau (Bureau) of the above-referenced modification applications (Rolesville Modification Applications) for FM translator stations W251CA and W254AS, both Rolesville, North Carolina (Rolesville Translators), filed by Eastern Airwaves, LLC (Eastern Airwaves) and FM 102.9 LLC (FM 102.9), respectively (collectively, Curtis Licensees), and related pleadings.<sup>2</sup> We also have two

<sup>1</sup> The Rolesville Modification Petitions were filed on the same day that the Rolesville Modification Applications were granted (April 28, 2015). Because processing staff had no opportunity to consider Triangle's arguments prior to grant, they are considered herein as petitions for reconsideration. *See, e.g., Alan Bishop, Esq., Letter, 25 FCC Rcd 4691, 4692 (MB 2010); Richard F. Swift, Esq., Letter, 24 FCC Rcd 12426, 12427 (MB 2009) (Saga).*

<sup>2</sup> *See* File Nos. BMPFT-20150326AAS and BPFT-20150326AAW; *Broadcast Actions*, Public Notice, Report No. 48480 (May 1, 2015). On May 11, 2015, the Curtis Licensees filed oppositions to the Rolesville Modification Petitions (Rolesville Modification Oppositions). On May 19, 2015, Triangle filed replies to the Rolesville Modification Oppositions (Rolesville Modification Replies). On July 24, 2015, Eastern Airwaves filed an application to modify the W251CA construction permit (File No. BMPFT-20150724ABS) (W251CA CP Modification). Triangle did not file an objection to the W251CA CP Modification, asserting that the "subsequent

petitions for reconsideration (Rolesville License Petitions) filed by Triangle on December 14, 2016, seeking reconsideration of the November 29, 2016, grant of the above-referenced applications for licenses to cover the Rolesville Translators (Rolesville License Applications), and related pleadings.<sup>3</sup> Finally, we have a petition for reconsideration (Cary License Petition) filed by Triangle on January 31, 2017, seeking reconsideration of the grant of the above-referenced application to license FM translator station W228CA, Cary, North Carolina (Cary Translator) (collectively with the Rolesville Translators, Translators), filed by Eastern Airwaves on December 20, 2016 (Cary License Application), and related pleadings.<sup>4</sup> For the reasons discussed below, we deny the Rolesville Modification Petitions, the Rolesville License Petitions, and the Cary License Petition, and uphold the grants of the above-referenced applications.

**Background.** On November 24, 2014, Eastern Airwaves filed an application for a minor modification to the Cary Translator construction permit, specifying a new translator site, channel change, and effective radiated power (ERP) (Cary Modification Application), which was granted on December 22, 2014.<sup>5</sup> On March 26, 2015, the Curtis Licensees filed the Rolesville Modification Applications, specifying new transmitter sites, channels, and ERP for the two Rolesville Translators. The Rolesville and Cary Modification Applications specified co-owned station WQDR-FM, Raleigh, North Carolina (WQDR) as the primary station.<sup>6</sup> On March 31, 2015, the Rolesville Modification Applications were placed on public notice as accepted for filing.<sup>7</sup> On April 28, 2015, the Audio Division, Media Bureau (Bureau), granted the Rolesville Modification Applications.<sup>8</sup> The same day, Triangle filed the Rolesville Modification Petitions. On August 26, 2015, WQDR-FM commenced in-band on-channel digital operations.<sup>9</sup> On November 12, 2015, the Curtis Licensees filed the Rolesville License Applications, which were placed on public notice as accepted for filing on November 16, 2015.<sup>10</sup> The Rolesville License Applications were granted on November 29, 2016, with public notice of grant issued on December 2, 2016.<sup>11</sup> On December 14, 2016, Triangle filed the Rolesville License Petitions.

On December 20, 2016, Eastern Airwaves filed the Cary License Application. On December 23, 2016, public notice of the Cary License Application's acceptance for filing was issued.<sup>12</sup> On December

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application cured none of the issues that [Triangle] raised" and that it "had no reason to make repetitious filings to continue its prosecution." Rolesville License Reply (W251CA) at 2. *See infra*, note 3.

<sup>3</sup> On December 27, 2016, the Curtis Licensees filed oppositions to the Rolesville License Petitions (Rolesville License Oppositions). On January 4, 2017, Triangle filed replies to the Rolesville License Oppositions (Rolesville License Replies).

<sup>4</sup> On February 6, 2017, Triangle filed a supplement to the Cary License Petition (Cary License Supplement). On February 13, 2017, Eastern Airwaves filed an opposition to the Cary License Petition and Cary License Supplement (Cary License Opposition). Because of the similar issues involved and the common ownership of the Curtis Licensees (100 percent of the voting and equity interest held by Donald W. Curtis), we consider the Rolesville and Cary pleadings together.

<sup>5</sup> *See* File No. BMPFT-20141124ADG; *Broadcast Actions*, Public Notice, Report No. 48394 (Dec. 29, 2014). On January 20, 2015, Triangle filed a petition for reconsideration of the grant of the Cary Modification Application, which was dismissed by letter decision on March 10, 2016. *See Coe W. Ramsey, Esq.*, Letter Order, Ref. No. 1800B3-JDB (MB Mar. 10, 2016).

<sup>6</sup> WQDR is licensed to Carolina Media Group, Inc. (80 percent voting and equity interest held by Donald J. Curtis , 20 percent of the equity and voting interest held by Donna C. McClatchey. *See* File No. BOA-2011114BIK.).

<sup>7</sup> *Broadcast Applications*, Public Notice, Report No. 28457 (MB Mar. 31, 2015).

<sup>8</sup> *Broadcast Actions*, Public Notice, Report No. 48480 (May 1, 2015).

<sup>9</sup> *See* File No. BDNH-20170111AAF (filed Jan. 11, 2017).

<sup>10</sup> *Broadcast Applications*, Public Notice, Report No. 28612 (MB Nov. 16, 2015).

<sup>11</sup> *Broadcast Actions*, Public Notice, Report No. 48873 (Dec. 2, 2016).

<sup>12</sup> *Broadcast Applications*, Public Notice, Report No. 28888 (Dec. 23, 2016).

30, 2016, the Bureau granted the Cary License Application.<sup>13</sup> On January 31, 2017, Triangle filed the Cary License Petition. The Cary Translator did not commence broadcasting until February 3, 2017.<sup>14</sup>

*Procedural issues.* Triangle is the licensee of station WRLY-LP, Raleigh, North Carolina (WRLY-LP). Triangle claims standing as a “direct economic competitor to the licensee of common primary input channel, WQDR-FM.”<sup>15</sup> Specifically, Triangle states that it operates in the “same Raleigh-Durham Nielsen Audio radio market as WQDR-FM . . . [and] competes for its funds in the same area as WQDR-FM’s 60 dB $\mu$  contour encompasses WRLY-LP’s 60 dB $\mu$  contour.”<sup>16</sup> Triangle states that it could not have participated in the Cary License proceeding earlier because the Cary License Application was granted only seven days after public notice that it was accepted for filing and because the “fact that the [Cary] Translator would remain silent could not have been known or presented before grant of the [Cary License] Application.”<sup>17</sup>

In response, the Curtis Licensees argue that Triangle lacks standing to challenge the Rolesville Modification Applications because Triangle failed to “make a concrete showing that it is, in fact, likely to suffer financial injury as a result of the grant of the Applications.”<sup>18</sup> Curtis Licensees contend that, as a noncommercial educational (NCE) licensee, Triangle cannot be a direct economic competitor of the Translators.<sup>19</sup> In addition, Curtis Licensees describe the Rolesville Modification Petitions as “moot” because they were filed “too late” and “did not demonstrate any error or omission in the Bureau’s grant of the [Rolesville Modification Applications].”<sup>20</sup> Moreover, according to the Curtis Licensees, rescission of the grants would “strip [Curtis Licensees] of the protection from a delayed adverse decision . . . [causing them to] suffer financial losses of the monies spent on constructing and operating the [Translators].”<sup>21</sup> Finally, the Curtis Licensees argue that the Rolesville Modification Petitions should be “considered dismissed” under Section 1.106(j) of the Commission’s Rules, which states that “[w]here the petition for reconsideration relates to an instrument of authorization granted without hearing, the Commission or designated authority will [grant the petition for reconsideration in whole or in part or deny or dismiss the petition] within 90 days after the petition is filed.”<sup>22</sup>

In the License Replies, Triangle contends that Section 1.106(j) does not prescribe a “particular disposition where action is not taken within 90 days” and that a petition to deny “should only be resolved by an act of the Commission or delegated authority, not by inaction.”<sup>23</sup> It also argues that the Curtis Licensees were on notice of the pending Rolesville Modification Petitions and thus carried out any modifications solely at their own risk.

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<sup>13</sup> *Broadcast Actions*, Public Notice, Report No. 48895 (Jan. 5, 2017).

<sup>14</sup> Cary License Opposition at 2.

<sup>15</sup> Rolesville Modification Petitions at 1.

<sup>16</sup> Cary License Petition at 3. Triangle also claims standing on the basis that “if [the Cary Translator] is “allowed to operate as previously authorized that it will create areas of interference with WRLY-LP.” *Id.* Eastern Airwaves states that if *bona fide* interference occurs, it will “take appropriate action as required under the Commission’s rules.” Cary License Opposition at 4.

<sup>17</sup> Cary License Petition at 3-4.

<sup>18</sup> Rolesville Modification Oppositions at 4-5 (citing *KERM, Inc. v. FCC*, 353 F.3d 57, 60-61 (D.C. Cir. 2004) (*KERM*)).

<sup>19</sup> Rolesville Modification Oppositions at 5.

<sup>20</sup> Rolesville Modification Oppositions at 4; Rolesville License Oppositions at 2.

<sup>21</sup> Rolesville License Oppositions at 3.

<sup>22</sup> Rolesville License Oppositions at 3; 47 CFR § 1.106(j); *see also* 47 U.S.C. 405(b)(1).

<sup>23</sup> Rolesville License Replies at 2-3.

*Technical need rule.* Triangle’s primary objection to the Rolesville and Cary Modification Applications is that the Curtis Licensees failed to include a showing of technical need, in violation of Section 74.1232(b) of the Rules, which requires such a showing for multiple translators licensed to the same applicant and serving substantially the same area.<sup>24</sup> The technical need exhibit submitted with the Rolesville Modification Applications, according to Triangle, does not satisfy this requirement because it does not discuss the quality of the received signal or include a description of terrain obstructions.<sup>25</sup> Triangle also argues that the Curtis Licensees’ technical need showing must include additional co-owned translators that do not overlap the 60 dBμ contours of the Translators but are located within WQDR’s 60 dBμ contour.<sup>26</sup> Triangle further argues that rebroadcast of a digital subchannel violates the terms of any authorization that specifies only the primary station.<sup>27</sup> Triangle alleges that W251CA, WQDR HD-3, and AM station WPTF, Raleigh, North Carolina,<sup>28</sup> broadcast the same programming to the same area.<sup>29</sup> The public interest is not served, Triangle argues, by “identical programming [] being served to this area using three channels of limited spectrum.”<sup>30</sup> Triangle concludes that the Curtis Licensees have no technical need for the Translators but rather are attempting to “create at least one *de facto* FM station via a network of translators.”<sup>31</sup>

The Curtis Licensees emphasize that they are, as a general rule, permitted to rebroadcast digital subchannels on FM translators.<sup>32</sup> They claim that they provided a technical need showing, in Exhibit 16 of the Rolesville Modification Applications.<sup>33</sup> In its entirety, Exhibit 16 reads: “This application is one of a coordinated pair of two applications listing the same primary station, WQDR, and the same general coverage area. The intent for these applications is to broadcast different HD Radio subchannels. The primary signals to be rebroadcast are not the same. These two applications therefore are not providing duplicate coverage.”<sup>34</sup> By letter dated July 18, 2017, the Curtis Licensees confirmed that W251CA rebroadcasts WQDR HD2 and W254AS rebroadcasts WQDR HD3.<sup>35</sup> Regarding compliance with the

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<sup>24</sup> Rolesville Modification Petitions at 2 (citing 47 CFR § 74.1232(b)).

<sup>25</sup> Rolesville Modification Petitions at 2 (citing *Amendment of Part 74 of the FM Commission’s Rules Concerning Translator Stations*, Report and Order, 5 FCC Rcd 7212, 7222 (1990) (“[S]howings of ‘need’ should focus upon the technical necessity for the additional facilities as determined by the quality of signal received from the intended primary station or any operating translators for both ‘fill-in’ as well as ‘other area’ FM translators. We believe that the technical interpretation of ‘need’ is appropriate given the role of translators as a reception service. To support their applications for multiple translators in the same area, applicants will be required to describe any relevant terrain obstruction as a means of showing ‘technical need’, and if useful, may include a shadowing study. . . FM translators are intended to resolve reception problems, the ‘need’ for which should be determined on technical grounds alone.”)

<sup>26</sup> Rolesville Modification Petitions at 2-3; Cary License Supplement at 2.

<sup>27</sup> Cary License Supplement at 1.

<sup>28</sup> WPTF is licensed to First State Communications (100 percent voting interest held by Donald J. Curtis. *See* File No. BOA-20151110AHP.).

<sup>29</sup> Rolesville License Petitions at 2.

<sup>30</sup> Rolesville License Petitions at 2.

<sup>31</sup> Rolesville Modification Petitions at 3.

<sup>32</sup> Rolesville Modification Oppositions at 2; Rolesville License Oppositions at 4.

<sup>33</sup> Rolesville License Oppositions at 4.

<sup>34</sup> Rolesville Modification Applications, Exh. 16; *see also* Rolesville Modification Oppositions at 2 (citing 47 CFR § 74.1231) (“[The Curtis Licensees] fully disclosed that they intend to rebroadcast *different* HD subchannel signals on each FM translator . . . HD subchannels are different ‘signals’ for the purposes of the FM translator rules”).

<sup>35</sup> Letter from Coe W. Ramsey, Esq., Brooks, Pierce, McLendon, Humphrey & Leonard, LLP, to Christine Goepp, Attorney Advisor, Audio Division, FCC Media Bureau (July 18, 2017).

terms of their authorizations, the Curtis Licensees argue that rebroadcasting HD subchannels of the primary station does not impermissibly “switch” the primary station.<sup>36</sup> Finally, a showing of technical need is not necessary, according to the Curtis Licensees, for any application, such as the Cary Modification Application, not involving contour overlap between the subject translators.<sup>37</sup>

*Cary Translator silence.* Triangle argues that the silence of the Cary Translator between the filing of the Cary License Application and the commencement of broadcast operations on February 3, 2017, violated the minimum operating schedules set out in Section 73.1740 of the Rules.<sup>38</sup> In response, Eastern Airwaves argues that; (1) translators may, but are not required to, commence operations upon filing a license application;<sup>39</sup> (2) it was “not required to adhere to any regular schedule of operations” under Section 74.1263(a) of the Rules;<sup>40</sup> and (3) “at the time Eastern Airwaves filed the [Cary License] Application, the Station was in satisfactory operating condition and ready for regular operation.”<sup>41</sup> However, Eastern Airwaves admits that it “inadvertently failed to notify the Commission that the [Cary Translator] was not on the air [until February 3, 2017] pending implementation of the alternative feed.”<sup>42</sup>

**Discussion.** The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order or raises facts not known or existing at the time of the petitioner's last opportunity to present them.<sup>43</sup> With respect to the Rolesville and Cary License Applications, the Curtis Licensees are entitled to a high degree of protection and a presumption that the public interest determination made during the underlying construction permit proceedings continues in effect unless circumstances have arisen that would make operation of the Translators against the public interest.<sup>44</sup> We are traditionally reluctant to designate license applications for hearing in these circumstances and, in most instances, consider the grant of such application to follow almost automatically from the issuance of a construction permit and the completion of construction in accordance therewith.<sup>45</sup>

*Standing.* In the broadcast regulatory context, standing is generally shown in one of three ways: (1) as a competitor in the market subject to signal interference; (2) as a competitor in the market subject to economic harm; or (3) as a resident of the station's service area or regular listener of the station.<sup>46</sup> The

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<sup>36</sup> Rolesville Modification Oppositions at 2; Cary License Opposition at 3, n.44.

<sup>37</sup> Cary License Opposition at 3.

<sup>38</sup> Cary License Petition at 2 (arguing that these minimum operating requirements apply to periods “during which the station is operated pursuant to temporary authorization or program tests, as well as during the license period”); *see* 47 CFR § 73.1740.

<sup>39</sup> Cary License Opposition at 2, n.3 (citing 47 CFR § 74.14(a)).

<sup>40</sup> Cary License Opposition at 2, n.3. (citing 47 CFR § 74.1263(a)).

<sup>41</sup> Cary License Opposition at 1 (internal quotation omitted).

<sup>42</sup> Cary License Opposition at 2.

<sup>43</sup> *See* 47 CFR § 1.106(c)(1) (Section 1.106(c)(1)); *WWJZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964).

<sup>44</sup> *See* 47 U.S.C. § 319(c) (requiring the Commission to issue a license where a construction permit has been granted and it appears that the terms of such permit have been met, and “that no cause or circumstance arising or first coming to the knowledge of the Commission since the granting of the permit would, in the judgment of the Commission, make the operation of such station against the public interest...”); *Focus Cable of Oakland, Inc.*, Memorandum Opinion and Order, 65 FCC 2d 35, 39-40, para. 11 (1977).

<sup>45</sup> *See, e.g., Meyer Broadcasting Company*, Memorandum Opinion and Order, 65 FCC 2d 438, 441 (1977).

<sup>46</sup> *See, e.g., Entercom License, LLC*, Hearing Designation Order, 31 FCC Rcd 12196, 12205 (2016); *Melodie Virtue, Esq.*, Letter Decision, 30 FCC Rcd 6045 (MB 2015) (holding that a party to an administrative proceeding may either satisfy one of the three traditionally-accepted categories of standing for broadcast petitioners: (1) competitors

Commission has held that noncommercial and commercial licensees in the same market are competitors for the purposes of administrative standing.<sup>47</sup> A petitioner whose standing is based on competitor status is not also required to meet the stricter three-prong test for judicial review in a federal court; specifically, it “does not need to demonstrate that it will suffer a direct injury from grant” of an application to establish standing under Section 309(d) of the Act.<sup>48</sup> The case cited by Curtis Licensees, *KERM*, illustrates this distinction. In that proceeding, the Commission granted administrative standing as a competitor to a party that was later denied Article III standing by the reviewing federal court.<sup>49</sup> Here, as the licensee of WRLY-LP, a station within the boundaries of the Greensboro-Raleigh-Winston Salem-Durham-High Point Nielsen Arbitron Metro (in fact, within the 60 dBμ signal contour of primary station WQDR-FM), Triangle has administrative standing based on its status as a competitor in the relevant market.<sup>50</sup> There is no merit to the Curtis Licensees’ argument that the licensees of NCE stations lack standing simply because they operate on a noncommercial basis. NCE licensees can and do routinely participate in licensing proceedings involving commercial licensees.<sup>51</sup> Finally, we find that the expeditious grant of the Cary License Application effectively precluded Triangle from participating earlier in that proceeding.<sup>52</sup>

*90-day rule.* While the Commission “endeavors to act on all timely and proper requests for reconsideration at all levels of authority as quickly as practicable,”<sup>53</sup> it is well settled that it retains the authority and the obligation to act even where the statutory ninety-day limit has passed.<sup>54</sup> Therefore—even assuming that the 90-day limit applies to pleadings that are later construed as petitions for

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suffering signal interference; (2) competitors suffering economic harm; or (3) residents of the Station's service area, or satisfy the “stricter” Article III standard). To satisfy the Article III standard, a party must prove three elements: (1) it has suffered or will suffer injury-in-fact; (2) there is a causal link between the proposed assignment and the injury-in-fact; and (3) redressability, meaning that not granting the assignment would remedy the injury-in-fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

<sup>47</sup> See, e.g., *Hammock Environmental and Educational Community Services*, Letter Decision, 25 FCC Rcd 12804, 12805 n.5 (MB 2010) (finding that a commercial licensee had standing to object to the application of an NCE license “by virtue of its status as a potential competitor”); *Dry Prong Educational Broadcasting Foundation*, Hearing Designation Order, 7 FCC Rcd 496, 496 (ASD 1992) (rejecting NCE applicant’s argument that commercial objector lacked standing as a competitor with an NCE licensee proposing “noncommercial service only”).

<sup>48</sup> See, e.g., *John F. Garziglia, Esq.*, Letter 28 FCC Rcd 12622, 126223 (MB 2013) (citing *CAPH v. FCC*, 778 F.2d 823, 826 n.8 (D.C. Cir. 1985) (“The Article III restrictions under which this court operates do not, of course, apply to the FCC. The Commission may choose to allow persons without Article III ‘standing’ to participate in FCC proceedings, as it did in this case.”); *National Welfare Rights Org. v. Finch*, 429 F.2d 725, 732 n.27 (D.C. Cir. 1970) (“Standing to sue depends on more restrictive criteria than standing to appear before administrative agencies ... ”)).

<sup>49</sup> *KERM*, 353 F.3d at 59 (“That a petitioner participated in administrative proceedings before an agency does not establish that the petitioner has constitutional standing to challenge those proceedings in federal court.”).

<sup>50</sup> See, e.g., *Jeffrey D. Southmayd, Esq.*, Letter Decision, 31 FCC Rcd 10912, 10924 (2016).

<sup>51</sup> See, e.g., *Church Planters of America*, Memorandum Opinion and Order, 31 FCC Rcd 3607 (MB 2016); *Masconomet Regional School District*, Order, 31 FCC Rcd 2166 (MB 2016).

<sup>52</sup> See, e.g., *Ted and Jana Tucker*, Memorandum Opinion and Order, 4 FCC Rcd 2816, 2816 (1989) (standing to file a petition for reconsideration found when application granted four days after public notice issued); *Aspen FM, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 17852, 17854-55 (1997) (standing to file a petition for reconsideration found when application granted five days after acceptance).

<sup>53</sup> *Mobile Telephone*, Memorandum Opinion and Order, 91 FCC 2d 907, 909 (1982).

<sup>54</sup> See *Qwest Communications Corporation v. Farmers and Merchants Mutual Telephone Company*, Third Order on Reconsideration, 25 FCC Rcd 3422, 3424-25 (2010) (citing *Gottlieb v. Pena*, 41 F.3d 730, 733 (D.C. Cir. 1994) (“It is well settled ... that where Congress has placed an agency under a legal obligation to render a decision within a stated time period but has not set forth the consequences of exceeding that period, ordinarily the time period is directory rather than mandatory, and an agency will not lose jurisdiction over the matter upon expiration of that period.”)).

reconsideration due to the time of filing—we reject the Curtis Licensees’ contention that any of the subject Petitions should be “considered dismissed” under Section 1.106(j) of Rules or Section 405(b)(1) of the Act.

*Technical need rule.* Section 74.1232(b) is a “spectrum efficiency rule based on our experience that parties rarely need such multiple translators.”<sup>55</sup> In relevant part, it 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 for such additional stations.” The Commission has interpreted Section 74.1232(b) to require a technical need showing only when the same party proposes to own more than one translator rebroadcasting the same signal and serving substantially the same area.<sup>56</sup> “Substantially the same area” is generally applied by Bureau engineering staff as a more than 50 percent overlap in the subject translators’ 60 dBu signal contours.<sup>57</sup>

As a preliminary matter, we confirm that, generally, a licensee may use its additional digital bit rate capacity as it wishes<sup>58</sup> and is permitted to use FM translators to rebroadcast digital signals.<sup>59</sup> The Commission has rejected arguments that rebroadcasting digital subchannels over FM translators impermissibly creates “new FM stations” in the subject market.<sup>60</sup> However, the Commission has not yet adopted specific rules governing the technical details of rebroadcasting digital subchannels over FM translators. In 2007, the Commission stated that a fuller record was needed before promulgating specific rules regarding “use of FM translators and boosters to rebroadcast multiplexed audio streams.”<sup>61</sup> Pending further Commission action on this matter, we rely on existing rules and precedent to dispose of the subject Applications and Petitions, as follows.

When the Commission adopted Section 74.1232(b) in 1970, it explained that “need will be presumed where the translators will rebroadcast different primary stations; a showing of need will be 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.”<sup>62</sup> Similarly, when applying the technical need rules in the context of the FCC Form 349 (for a new or modified translator station), the Commission requires applicants to certify that they do not have “any interest in an application or an authorization for an FM translator station that *serves substantially the same area* and rebroadcasts the *same signal* as the proposed FM translator station.”<sup>63</sup> Based on this precedent, we conclude that the

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<sup>55</sup> *Creation of a Low Power Radio Service*, Fourth Report and Order and Third Order on Reconsideration, 27 FCC Rcd 3364, 3392, para. 59 (2012).

<sup>56</sup> *FM Translator Stations*, Report and Order, 5 FCC Rcd 7212, 7222-23 (1990) (*Translator Order*).

<sup>57</sup> See *Creation of a Low Power Radio Service*, Fifth Order on Reconsideration and Sixth Report and Order, 27 FCC Rcd 15402, 15419 n.106 (2012) (clarifying that the technical need rule is triggered by applications proposing “substantial contour overlap”); *John Jason Bennett*, Letter, 20 FCC Rcd 17193, 17194 (MB 2005) (explaining that a Section 74.1232(b) issue could be resolved by modifying the relevant construction permit to “eliminate the vast majority of the contour overlap.”)

<sup>58</sup> *Saga*, 25 FCC Rcd at 4692-93 (citing *Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcasting Service*, Second Report and Order, First Order on Reconsideration and Second Further Notice of Proposed Rulemaking, 22 FCC Rcd 10344 (2007) (*Digital Audio Broadcasting Order*)).

<sup>59</sup> See *Digital Audio Broadcasting Order*, 22 FCC Rcd at 10682 (holding that the Commission will “permit the use of digital translator and booster stations during interim [digital audio broadcasting] operations”).

<sup>60</sup> *Saga*, 25 FCC Rcd at 4692-93.

<sup>61</sup> *Digital Audio Broadcasting Order*, 22 FCC Rcd at 10381.

<sup>62</sup> *FM Translator and Booster Stations*, Report and Order, 20 RR.2d 1538 (1970) (emphasis added).

<sup>63</sup> FCC Form 349, Section III-A, Question 14 (emphasis added).

technical need rule applies only when the “same programming” or “same signal” is implicated. With the advent of digital audio broadcasting, each primary station is capable of broadcasting multiple individual programming streams. Because each FM translator can rebroadcast the signal from only one such digital subchannel, it is logical to conclude that each digital subchannel, rather than the primary station’s signal as a whole, constitutes a “signal” for the purposes of the technical need rule. This conclusion is consistent with the definition of a translator as a station that rebroadcasts the “*signals* of an AM or FM radio broadcast station,” as opposed to rebroadcasting the “station.”<sup>64</sup> For these reasons, we find that a showing of technical need is not necessary for the Curtis Licensees to rebroadcast *different* digital subchannels on the subject Translators, whether or not those Translators overlap by more than 50 percent.<sup>65</sup>

However, we emphasize that a technical need showing is necessary whenever the same party seeks to rebroadcast the same signal—e.g., the same digital subchannel—on more than one translator serving substantially the same area. Our rules require a translator permittee or licensee to submit a written notification of any change in primary station designation, so that Bureau staff can verify that the change complies with the Commission’s translator rules (such as the signal delivery and technical need rules).<sup>66</sup> Under this requirement, if the Curtis Licensees seek in the future to change any of the primary signals being retransmitted so that more than one co-owned translator will rebroadcast the same digital subchannel to substantially the same area, they must submit a notification letter containing a technical need showing so that the Bureau can ascertain compliance with Section 74.1232(b). We remind the Curtis Licensees that “technical need” for the purposes of this rule refers to the “quality of the signal received and not to the programming content, format, or transmission needs of an area.”<sup>67</sup>

*Cary Translator silence.* Although the Curtis Licensees are correct that the licensee of an FM translator station is not required to adhere to any regular schedule of operation, Section 74.1263(c) of the Rules requires an FM translator licensee to notify the Commission of its intent to discontinue operations for 30 or more consecutive days.<sup>68</sup> Notification must be made within 10 days of the date on which the station first discontinues operation, and Commission approval is required for such discontinued operation to continue beyond 30 days. FM translator or booster stations that are silent for 30 or more consecutive days without STA are considered to have permanently discontinued operations and the station’s authorizations can be cancelled at the Commission’s discretion.<sup>69</sup> A period of silence immediately following license grant may raise concerns whether the subject translator station was in fact fully built and ready for operation. In this case, we do not find that the totality of circumstances indicates that the Cary Translator was not timely constructed as authorized. Moreover, we find that Eastern Airwaves’ failure to notify the Commission within 10 days of the discontinuance of operation, or to obtain Commission approval for the month it was silent after authorization, does not rise to the level of requiring a forfeiture or other formal sanction. In this respect, we take into account the length and severity of the offense, as well as the fact that public notice of the grant of the Cary Translator’s license did not issue until January 5, 2017, less than 30 days before the station commenced operation on February 3, 2017. However, we caution Eastern Airwaves to be more attentive to these requirements in the future.

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<sup>64</sup> 47 CFR § 74.1201(a) (emphasis added); *see also* 47 CFR § 74.1201(b) (describing a primary station as “radiating the signals which are retransmitted by an FM broadcast translator station”); 47 CFR § 74.1231(a) (“FM translators provide a means whereby the signals of AM or FM broadcast stations may be retransmitted to areas in which direct reception of such AM or FM broadcast stations is unsatisfactory”); 47 CFR § 74.1231(b) (“An FM translator may be used for the purpose of retransmitting the signals of a primary AM or FM radio broadcast station . . .”).

<sup>65</sup> Because we conclude that no technical need showings are necessary, we need not address the adequacy of Exhibit 16 of the Modification Applications in this respect.

<sup>66</sup> 47 CFR § 74.1251(c); *Processing of Broadcast Applications*, First Report and Order, 56 RR.2d 941 (1984).

<sup>67</sup> Note to 47 CFR § 74.1232(b).

<sup>68</sup> 47 CFR § 74.1263(c).

<sup>69</sup> 47 CFR § 74.1263(e).

**Conclusion/Actions.** For the reasons set forth above, IT IS ORDERED that the Petitions for Reconsideration filed by Triangle Access Broadcasting on April 28, 2015 (Rolesville Modification Petitions), December 14, 2016 (Rolesville License Petitions), and January 31, 2017 (Cary License Petition), ARE DENIED.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau