

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

21 February 2017

Application of)
)
Eastern Airwaves, LLC) FCC File No.
For FM Translator License) BLFT-20161220AAZ
Facility ID 156763)
Call Sign W228CZ)

To: The Secretary
Attn: Media Bureau, Audio Division

REPLY TO OPPOSITION

Triangle Access Broadcasting, Inc. (“Triangle”), pursuant to 47 C.F.R. §1.106, submits its reply to the February 13, 2017, Opposition to Petition for Reconsideration and Supplement To Petition for Reconsideration (“Opposition”) of the application denoted above (the “Application”) by Eastern Airwaves, LLC (“Eastern”) for an FM translator license for facility ID 156763, call sign W228CZ (the “Translator”, or “Station”). The Opposition was filed in response to Triangle’s January 31, 2017, Petition for Reconsideration (“Reconsideration Petition”) and February 6, 2017, Supplement To Petition For Reconsideration (“Supplement”, and collectively with the Reconsideration Petition, the “Petition”).

I. Eastern’s claim that the Translator was ready for operation

In its Petition, Triangle cited evidence that the Translator remained silent for an extended period of time including silence beyond deadlines where actual operation was required.¹ Without direct access and internal knowledge of Eastern’s operation, the fact that the Translator was not on the air beyond

¹ Reconsideration Petition at 1-2 through 2-4.

critical deadlines, and without application updates or silent notifications, Triangle had little choice but to inquire as to the Station's readiness. Eastern has re-certified that the Station was technically ready to begin operation when the Application was filed.² In light of Eastern's response, Triangle has no reason to believe that the Translator was not *technically* ready for operation. Triangle still disputes, however, that a translator being strictly only "ready for operation" substitutes for actual operation, as demonstrated below.

II. Eastern's claim that the Translator was not required to operate

In response to Triangle's claim that W228CZ should have been operating since at least December 30, 2016,³ Eastern offers that actual operation is not a requirement and that a licensee "may"⁴ conduct service or program tests at its option after filing an application for license to cover. Triangle does not dispute that such operation is optional before other deadlines pass where operation becomes mandatory; the time of filing the an application for a license marks when a station may permissibly begin operating (whereas operation is disallowed before the time such application is filed). The period of time where operation is optional covers from an application filing and the earliest of the license grant and expiration of the construction permit.

At issue here is that the Translator was neither operating after the license was granted nor even later upon expiration of the underlying construction permit.⁵ Triangle can show that this operation is indeed required as it claimed.⁶

Eastern was required to begin operating the Translator when licensed even by the rule they cited.⁷ Section 74.1263(a)⁸ calls for dependable operation by a licensee. Even if the number of required

² Opposition at 2-1.

³ *Id.* at 2 n.3.

⁴ See 47 C.F.R. § 74.14(a) ("Section 74.14(a)").

⁵ The underlying construction permit is FCC File No. BMPFT-20141124ADG ("Underlying Permit").

⁶ Petition at 2-2.

⁷ Opposition, at 2 n.3.

⁸ 47 C.F.R. § 74.1263(a) ("Section 74.1263(a)"). Triangle appreciates Eastern's correction of the applicability of this rule, rather than 47 C.F.R. § 74.1740, to FM translators.

hours required is fewer than Triangle understood in the Reconsideration Petition, the Translator was required to actually operate and serve.

A second deadline for actual operation is upon expiration of a construction permit. This is clear in federal law:

Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.⁹

The law is clear that a station is to be in service before its construction permit expires. Eastern was expected to operate its translator by the time its construction permit expired. By its own admission,¹⁰ Eastern did not operate the translator until February 3, 2017, significantly beyond the January 8, 2017, expiration.

We therefore have two separate dates that passed. When Eastern became the licensee on December 30, 2016, service was required per Section 74.1263(a). Upon expiration of the construction permit actual operation was required per Section 219(b). The Opposition does not successfully rebut Triangle's argument.

III. Eastern's claim that the Translator's Current Operation is Proper

In the Opposition at 2-2, Eastern asserts that it is proper to rebroadcast WQDR-FM HD3 on the Translator because it sought to rebroadcast WQDR-FM (for clarity, an analog-only signal at the time of application¹¹) in its construction permit application. One justification presented is that translators are

⁹ 47 U.S.C. § 319(b) ("Section 319(b)") (emphasis added).

¹⁰ Opposition at 2-1.

¹¹ Eastern certifies that it commenced digital broadcasts on August 26, 2015 in its Digital Notification (FCC File No. BDNH-20170111AAF).

allowed to rebroadcast FM2 or FM3 digital programming streams.¹² Triangle does not dispute that translators are allowed to rebroadcast digital programming streams and has never made a claim that they cannot. This argument is moot. Eastern also claims that WQDR-FM and WQDR-FM HD3 are the same primary station, a claim that is problematic.

Triangle raised the issue of changing the primary station in conjunction with a need for a technical showing when a commonly-owned translator will rebroadcast the same primary on more than one translator, a requirement that is in place to prevent what Eastern and its common ownership is trying to accomplish with this Translator and others mentioned in the Supplement.¹³ Eastern's claim that WQDR-FM and WQDR-FM HD3 are the same only reinforces Triangle's claim of a *de facto* FM station in an abuse of the Commission's rules.

Of note, Eastern pleaded in FCC File Number BMPFT-20150326AAS that "[u]nder the plain language of Commission regulations, HD subchannels are different 'signals' for purposes of the FM Translator rules," and that "[Eastern and 102.9 FM LLC] fully disclosed that they intend to rebroadcast *different* HD subchannel signals on each FM translator." The argument made at that time would treat WQDR-FM, WQDR-FM HD2, and WQDR-FM HD3 as separate signals.¹⁴ As this is paradoxical to the Opposition argument that they are the same signal, Triangle is curious to know which of the contradicting positions Eastern truly embraces.

If Eastern now wishes to claim that WQDR-FM and WQDR-FM HD3 are the same primary station, then Triangle must point out that Eastern operates W284CP¹⁵, rebroadcasting WQDR-FM HD2 (which would also have to be regarded as the same primary), with overlap to the Station as a "same area" translator and with the Station's antenna even being located within the W284CP 60 dBμ

¹² Opposition at 3 n.4.

¹³ Supplement at 2-2.

¹⁴ See Opposition To Petition To Deny, FCC File No. BMPFT-20150326AAS at 2-2.

¹⁵ FCC File No. BLFT-20150820AAZ, Facility ID 148876 ("W284CP").

contour.¹⁶ A valid technical need statement is required before W228CZ can broadcast the same primary station.

With regards to Eastern's showing to W228CZ and W254AS, Triangle does not dispute that these translators have zero 60 dBμ contour overlap.¹⁷ Unfortunately for Eastern, contour overlap simply is not a factor in triggering a technical need showing. Eastern focuses on Section 74.1232(b), the Instructions for Form 349, and the Application question itself where references to "same area" are made. First, as Triangle presented in its Supplement at 2-2, Section 74.1232(b) states quite specifically that a technical need showing is required "whether or not" (emphasis added) the translators are same area translators. This language is echoed in a Commission's Report and Order with sufficient discussion to know with certainty that the rule is written as intended.¹⁸ Instructions and form questions are not considered reliable guidance and are not rules. Eastern has made no counterargument as to why "same area" is demonstrated only by overlapping contours and thus why W228CZ does not need to make a valid technical showing before ever rebroadcasting WQDR-FM HD3 on the Translator.

IV. Eastern's Claim That Will Resolve Any Bona Fide Actual Interference Complaints

Triangle accepts that Eastern is aware of its obligations regarding actual interference and will work with Eastern directly to resolve *bona fide* actual interference complaints.

16 See Exhibit A. Eastern has also discussed this in *FCC File No. BMPFT-20141124ADG*, Opposition to Petition for Reconsideration at 8-2 and the included Engineering Exhibit at 5-2 and 8 (not numbered). The overlap should have been disclosed in the application for the Underlying Permit. It is interesting that Triangle was expected to understand this (see Letter from James D. Bradshaw, March 10, 2016, Reply Reference 1800B3-JDB, FCC File No. BMPFT-20141124ADG at 2-3) when the applicant himself did not and certified in question 14 that there were no same area translators. Due to the dubious certification along with Eastern's opposition position making the overlap of W228CZ with W284CP relevant, Triangle should fairly be able to raise this issue at this time. Eastern's hands are not clean with regards to this certification since the modification was filed on Eastern's behalf as part of assignment (see BAPFT-20141006ABM).

17 Opposition at 3-1.

18 See Report and Order, In the Matter of Amendment of Part 74 of the FM, Commission's Rules Concerning Translator Stations, 5 FCC Rcd 25 7212 (1990) at ¶70.

V. Conclusion

Eastern has not addressed Triangle's objections. The Translator's authorization and operation are not in the public interest and are in disregard of several the Commission's rules as well as U.S. Code. The Petition should be granted.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Steven L. White", with a long, sweeping horizontal line extending to the right.

Steven L. White
Director; *Triangle Access Broadcasting, Inc.*

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Raleigh, NC 27613-4109

EXHIBIT A

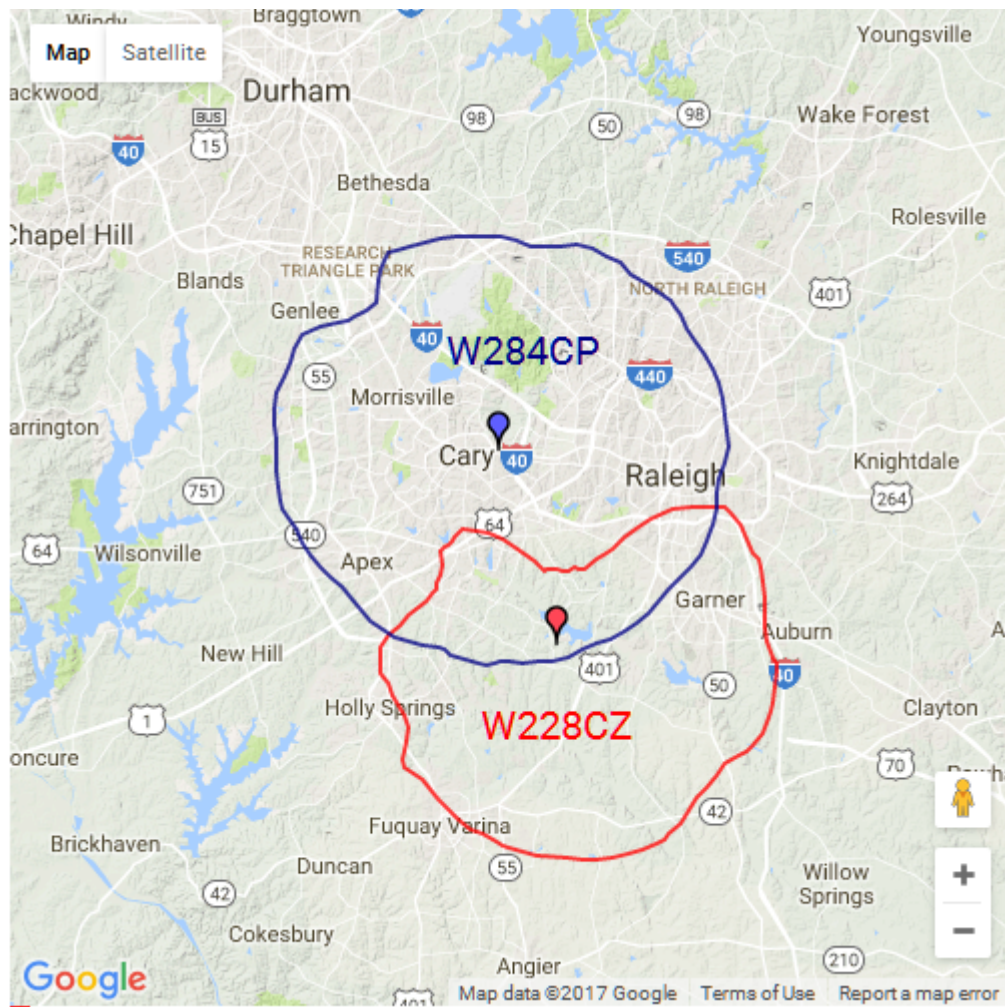


Exhibit A: W228CZ and W284CP 60 dBμ F(50,50), February 2017, based on FCC data

Certification of Steven L. White

I, Steven L. White, declare under penalty of perjury that I have reviewed the foregoing Petition For Reconsideration and, to the best of my knowledge, the facts set forth therein are true and correct.

By: [Electronically Signed]_____
Steven L. White

Dated: February 21, 2017

Certificate of Service

I, Steven L. White, certify that a true and correct copy of the foregoing Petition For Reconsideration was sent, this 21st day of February, 2017, by first-class, postage paid mail to the following:

Eastern Airwaves, LLC (Licensee)
3012 Highwoods Blvd Ste 201
Raleigh, NC 27604-1031

Brooks, Pierce et al. (Counsel to Licensee)
Coe W. Ramsey
PO Box 1800
Raleigh, NC 27602-1800

By:



Steven L. White