

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

3 January 2022

In re Applications of)
UNIVERSITY OF WYOMING)
For NEW Reserved Channel NCE Broadcast Station) FCC File No. 0000167729
Facility ID 762743 in Kemmerer, WY)
For NEW Reserved Channel NCE Broadcast Station) FCC File No. 0000167730
Facility ID 762746 in Kemmerer, WY)

To: Marlene H. Dortch, Secretary
Federal Communications Commission
Attn: Media Bureau, Audio Division

REPLY TO OPPOSITION

Triangle Access Broadcasting, Inc. (“Triangle”), hereby replies to University of Wyoming's (“UW”) Opposition to Informal Objection (“Opposition”) filed December 22, 2021.¹ UW filed its Opposition in response to Triangle's December 6, 2021, Informal Objection in regards to the above-captioned applications (“Kemmerer Applications”).² For the reasons stated below, UW's Kemmerer Applications should be found to be Multiple Applications.

I. The regulatory code clearly applies the Multiple Applications Rule to noncommercial services.

Section 73.3520, organized in Subpart H of the rules, prohibits multiple applications, without exception, and Section 73.1001(a) unambiguously explains that the rule applies to noncommercial

¹ LMS Pleading File No. 0000177660 attached to File No. 0000167730. Also, Pleading File No. 0000178379 filed January 1, 2022, attached to File No. 0000167729.

² LMS Pleading File Nos. 0000176830 and 0000176831.

services.³ A finding that the Kemmerer Applications are acceptable would be plainly inconsistent with the rules. Under the *Auer* deference principle, an agency interpretation is inapplicable when a regulation is unambiguous, and, also, deference is not given to an agency's interpretation of its own regulations when the interpretation is “plainly erroneous or inconsistent with the regulation.”⁴

II. The Section 73.3520 conclusion in *Open Media Corporation* is out of date and in apposite.

UW cites *Open Media Corporation* to argue that the Multiple Applications Rule does not apply to NCE stations.⁵ When the Commission interpreted in 1993 that Section 73.3520 was premised on ownership limits, the 1997 *Auer* deference principle (upheld in 2019) had not yet been established.⁶

Also, Triangle cited several other examples, besides ownership, in the Objection that are also influenced by application of the rule.⁷ These examples follow from orders promulgated since *Open Media Corporation*.⁸ The effects of eliminating the applicability of the Multiple Applications Rule to noncommercial services have never received fair and considered judgment.

Finally, the NIU/REBF application of relevance in *Open Media Corporation*, BPED-19880122MU, was filed pursuant to an agreement of joint applicants that inherently addressed Sections 73.3517, 73.3518, and 73.3520 of the Commission's Rules as part of an agreement to resolve mutually exclusive applications BPED-19850909MA and BPED-19860512MJ for channel 202 near Rockford, IL. If the joint application was unopposed, REBF would withdraw from the joint application and NIU would withdraw its application for channel 202 such that there would neither be conflicting nor

³ See 47 C.F.R. §§ 73.3520 (“Multiple Applications Rule”, or “Section 73.3520”) and 73.1001(a) (“Section 73.1001(a”). Future “Section” references refer to regulations in Title 47 of the U.S. Code.

⁴ *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

⁵ Opposition, at II.

⁶ *Id* 4. See also *Kisor v. Wilkie*, 588 U.S. ____ (2019).

⁷ Objection, at 2.

⁸ See, e.g., *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, Report and Order, 15 FCC Rcd 7386 (12) (2000), replacing the comparative hearing process with new procedures, including the establishment of local diversity points “if the principal community contour of the proposed NCE station does not overlap the principal community contour of any commonly controlled broadcast station.”

multiple applications.⁹ The circumstances are not the same for the Kemmerer Applications that neither disclose nor prevent a rule violation, nor propose diverse service.

III. The Multiple Applications Rule applies regardless of hindsight.

When UW tendered the Kemmerer Applications, it could not have known that its applications would be singletons. However, UW now wants to justify acceptance of both Kemmerer Applications based on them both being singletons.¹⁰ Just as a commercial operator's later-filed multiple application would be denied even if there was absolutely no chance (known *a priori*) that its grant would cause the applicant to exceed ownership limits, the hindsight of now knowing that there are no mutually exclusive applications or potential opportunities modify other facilities into the spectrum reserved by a multiple application does not retroactively make the rule inapplicable. The administrative burdens associated with processing comparative analysis on alternative proposals in the presence of other common proposals has not been considered. It is inappropriate to be changing policy in this proceeding versus what the rules currently implement, which is an avoidance of the need to further refine processing steps and suffer the resulting processing inefficiencies in order to grant a tree of possibilities.¹¹

IV. Objection arguments are relevant to the Kemmerer Applications.

As recent as 2020, the Commission has reiterated that one of the fundamental bases underlying the NCE licensing process is to maximize the quality of grantees, not simply to grant the maximum number of licenses.¹² Application of the Multiple Applications Rule allows Kemmerer, Wyoming, to

⁹ *Open Media Corporation*, Memorandum Opinion and Order, 8 FCC Rcd 4070 (1993), at ¶¶ 15-16.

¹⁰ Opposition, at III.

¹¹ See, e.g., *Reexamination of the Comparative Standards and Procedures for Licensing Noncommercial Educational Broadcast Stations and Low Power FM Stations*, Order on Reconsideration, 35 FCC Rcd 10180 (2020), at ¶ 3, referring to secondary grants within MX groups, but applicable to any grant that causes a need for repetitive comparative analysis.

¹² *Id.*, at ¶ 10.

gain an additional service now while also leaving spectrum available for a qualified, and potentially diverse, applicant in the future.

UW's conclusion that “[t]he only result of application of the Multiple Applications Rule in this case would be to deny the people of Kemmerer new noncommercial service [...]” is inadequately supported.¹³ UW has not demonstrated that Kemmerer, Wyoming, would be unable to become additionally served in the future when UW can again stand ready to serve, and it fails to recognize and consider diversity goals.

V. The Multiple Applications Rule and a ten-application limit accomplish different objectives.

Triangle does not believe that the sole primary purpose of the Multiple Applications Rule is to prevent gamesmanship or speculation, as suggested by UW.¹⁴ Instead, it also prevents monopolization of spectrum in an area by a single voice, it eliminates the need for more complex rules and procedures to conduct a comparative analysis where the grant of a proposal affects the comparative standing of another common proposal, and it prevents increased processing complexity of evaluating changes of more than one at a time towards ownership limits, where applicable. A ten-application limit cannot address that there are at most only a few reserved-band NCE opportunities in any given community. Summarily, local diversity protections are not resolved simply with a numerical application limit conceived at a national level. The Multiple Applications Rule is applicable and necessary.

VI. A waiver to grant both Kemmerer Applications is not justified.

As UW has alternatively requested a waiver of the Multiple Applications Rule should it be found to apply to its applications,¹⁵ the Bureau should deny the request. UW has not demonstrated special circumstances justifying a waiver of a rule that prevents the simultaneous grant of two stations

¹³ Opposition, at III.

¹⁴ *Id.*

¹⁵ *Id.*, at 7 n.16.

in the same area to the same applicant and would encourage additional applications, seeking equal treatment, for alternate opportunities to serve a focus market. The result would be to reduce settlement opportunities and to bog down the Bureau with more complex MX groups in future windows.

VII. Triangle's objection is not a “blanket” objection.

UW has positioned Triangle's objection against its applications as a blanket objection.¹⁶ “Blanket” objections are described as those not limited to individualized, specific allegations that grant of the application would harm the public interest.¹⁷ The fact that several entities may have violated the same rule does not itself confer “blanket” status to ensuing objections. Triangle has specifically identified the rule UW violated due to the tendering of the Kemmerer Applications, and it has explained why it believes the rule is applicable. Rule violations harm the public interest, for that is the reason for regulations. Thus, Triangle has established a substantial and material question that grant of the applications would be inconsistent with the public interest.¹⁸

VIII. Conclusion.

The Kemmerer Applications violate the Multiple Application Rule on its face. Whether the rule should be applicable for noncommercial services can be debated under APA procedures, but the current rule is clear. The Bureau should continue its strict enforcement of the rule, especially when future opportunities for ownership and service diversity hang in the balance, and the Bureau should dismiss file no. 0000167730 as the apparently later-filed application.

Respectfully Submitted,



¹⁶ Opposition, at I.

¹⁷ *Id.*, at 3 n.7. The disfavoring of “blanket” protests seeks to ensure “that the objections raised are directly and suitable applicable to each and every one of the applications it is directed against.” *Bernard Koteen, Esq.*, Letter, 14 FCC 2d 383 (1968).

¹⁸ Section 73.3573(e).

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Certification of Steven L. White

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

By: [Electronically Signed]_____
Steven L. White

Dated: January 3, 2022

Certificate of Service

I, Steven L. White, certify that a true and correct copy of the foregoing Reply to Opposition was sent, this 3rd day of January, 2022, by first-class, postage paid mail to the following:

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