

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

In re Applications of

OPEN MEDIA CORPORATION File No. BPED-880527ML

For New FM Construction
Permit on Channel 213, 90.5 MHz
Chicago, Illinois

and

NORTHERN ILLINOIS UNIVERSITY File No. BPED-880122MU
and
ROCKFORD EDUCATIONAL BROADCASTING FOUNDATION

For New FM Construction
Permit on Channel 213, 90.5 MHz
Rockford, Illinois

MEMORANDUM OPINION AND ORDER

Adopted: June 4, 1993;

Released: June 15, 1993

By the Commission:

1. The Commission has before it for consideration (a) an application for review filed on June 23, 1989, by Open Media Corporation ("Open Media"); (b) a petition for reconsideration, filed on February 28, 1990, by Open Media; and (c) related pleadings. These pleadings have been consolidated in this *Memorandum Opinion and Order* because they are inter-related. Specifically, Open Media contests the staff actions of May 26, 1989, denying its request for a waiver of Section 73.509(a) (Prohibited overlap) of the Commission's Rules and returning its application, and the staff action of January 23, 1990, issuing a construction permit to the otherwise mutually exclusive application of Northern Illinois University ("NIU")/Rockford Educational Broadcasting Foundation ("REBF") (together "NIU/REBF"). For reasons which follow, we will affirm the staff actions.

BACKGROUND

2. On January 22, 1988, NIU/REBF filed an application for a new noncommercial educational FM ("NCE-FM") station to serve Rockford, Illinois.¹ On May 27, 1988, Open Media filed a mutually exclusive application for a new NCE-FM station to serve Chicago, Illinois.² By letter dated May 26, 1989, following an informal objection by NIU, the staff denied Open Media's request for waiver of Section 73.509(a) of the Commission's Rules and returned Open Media's application. On June 23, 1989, Open Media filed its application for review of the return of its application. On January 23, 1990, the staff, by delegated authority, granted the application of NIU/REBF conditioned on the final disposition of Open Media's administrative appeal. The grant of this construction permit appeared on Public Notice (Report No. 20776) of January 29, 1990. Thereafter, on February 28, 1990, Open Media filed its petition for reconsideration of the staff action granting the NIU/REBF application.

DISCUSSION

3. *Application for Review of Dismissal of Open Media Application.* In its application for review, Open Media argues: that the staff failed to consider the basic public interest questions under Section 307(b) of the Communications Act of 1934, as amended; that it has met the standard for waiver to receive interference by demonstrating the unavailability of alternative sites; that the staff ruling is premised on an inappropriate legal standard in that the staff took an absolutist view of the overlap rule; that the requested waiver is consistent with previous actions by the Commission; that the staff ruling is premised on an erroneous understanding of the nature of the overlap area; that under Section 307(b) Open Media's proposed new service to Chicago is to be preferred over NIU's duplicative service to Rockford; and that the station from which Open Media would receive interference, WAUS(FM), Berrien Springs, Michigan, would itself receive interference from yet another station. Accordingly, Open Media seeks to have the staff ruling vacated, grant of its requested waiver of Section 73.509 of the Commission's Rules, and *nunc pro tunc* acceptance of its application.

4. In its opposition, NIU argues that: Open Media's failure to comply with the Commission's rules is fatal and that waiver is not warranted because Open Media's inability to cover Chicago does not make other sites unavailable; the non-technical public service arguments should be ignored and should not be substituted for purely technical allocations questions; Open Media's application has not been subject to disparate treatment as evidenced by the fact that NIU/REBF's earlier application for a new FM facility at Rockford, Illinois had been returned because the proposal would receive objectionable interference to 1.3 percent of its protected 60 dBu contour;³ and, that Open Media's non-technical, service related arguments are irrele-

¹ By letter dated January 12, 1988, the staff returned an earlier filed application of NIU/REBF for this facility. See *Letter to Mr. Michael Lazar from Dennis Williams, Chief, FM Branch, Audio Services Division* (8920-WED).

² Previously, on January 20, 1988, Open Media had filed a request for waiver of Section 73.509(a) of the Commission's Rules and application for the same facility (ARN-880120MF). That waiver request was denied and Open Media's application was returned on April 20, 1988. See *Letter to Open Media*

Corporation from Dennis Williams, Chief, FM Branch, Audio Services Division (8920-WJG). Since this first application was returned and not denied or dismissed with prejudice, the staff determined that Open Media's May 27, 1988, application did not violate Section 73.3519 (Repetitious applications) of the Commission's Rules. See *Letter to Open Media Corporation from Larry D. Eads, Chief, Audio Services Division*, dated May 26, 1989 (8920-DT) ("*Eads letter*").

³ See n.1

vant and seek to shift the focus of inquiry away from the only proper issue, namely the acceptability of Open Media's application under Section 73.509 of the Commission's Rules. In summary, NIU argues that Open Media's voluntary non-compliance with Section 73.509 of the Commission's Rules militates against the requested relief and mandates affirmance of the staff action.

5. Open Media's application for review is essentially a restatement of arguments previously considered and rejected by the staff. See *Eads letter*. There the staff, citing *Board of Education of the City of Atlanta*, 48 RR 2d 637, 639 (1980), correctly noted that increased coverage at the expense of objectionable interference alone does not justify a waiver of the FM allocations rules. A comparison between the number of people served and the number precluded is not now and has never been the pertinent standard for judging the preclusionary effect of a NCE-FM proposal. It is the overall scheme of NCE-FM allocations which is paramount, and when faced with a choice between a larger service area with overlap received on one hand, and a lesser coverage with no prohibited overlap on the other, the Commission favors the latter. See *Educational Information Corporation*, 6 FCC Rcd 2207, 2208 (1991).

6. Moreover, citing *ICBC Corporation v FCC*, 716 F.2d 926 (D.C. Cir. 1983), the staff properly rejected Open Media's argument which focused on its providing the "first minority/female public radio service." Initially, the staff correctly noted that Open Media made no showing of a deficiency of NCE service to Chicago such that a waiver of the technical rules (which form the basis for the Commission's NCE-FM allocations scheme) was necessary to permit a basic level of NCE-FM service and therefore was warranted. Further, even though Open Media seeks to achieve what it believes to be a commendable objective, it is well established that our policy of refusing to base waivers of rules designed to prevent interference upon non-technical considerations such as ownership or programming is a rational implementation of our mandate to "[m]ake such regulations not inconsistent with law as [we] may deem necessary to prevent interference between stations...." 47 U.S.C. Section 303(f). This policy has been approved by the courts. See e.g. *ICBC, supra*; *North Texas Media, Inc. v FCC*, FCC 84-456 (released October 5, 1984), *aff'd* 778 F.2d 28 (D.C. Cir. 1985); *Walter F. Faber, Jr.*, 4 FCC Rcd 5492, 5493 (1989), *recon. denied*, 6 FCC Rcd 3601 (1991), *aff'd sub nom. Walter P. Faber, Jr. v. FCC*, No. 91-177 (D.C. Cir. June 4, 1992).

7. We further find that Open Media's supplemental public interest showing describing the history, planning and participation of its members in filing its application to be similarly unavailing. Simply stated, the fact that the applicant put in a great deal of time and effort to develop an application is not a consideration in evaluating a waiver and does not alter the staff's proper conclusion that Open Media failed to justify its requested waiver of Section

73.509 of our Rules. Since the waiver was not otherwise justified, Open Media's application was properly returned and Open Media is not a qualified applicant entitled to comparative consideration. It is well established that the Commission need not hold a hearing on applications it rejects for failing to meet its technical acceptance rules. *Columbia Communications Corporation v. FCC*, 832 F. 2d 189, 193 (D.C. Cir. 1987), citing *Storer Broadcasting*, 351 U.S. at 202, 205, 76 S. Ct. at 770, 771-72 (1950).

8. To the extent that Open Media argues that the staff's action is inconsistent with Commission precedent, we disagree. The staff properly concluded that our action in changing the method of calculating interference from a ratio to an overlap basis did not effectuate a policy change towards waivers of Section 73.509(a). See *Eads letter* at n.2. Moreover, the staff also correctly distinguished the cases cited by Open Media in support of its waiver request. With respect to *New Covenant Educational Ministries, Inc.*, No. 1982, released January 23, 1984 (M.M. Bur.) we have subsequently overruled the staff's holding therein which allowed applicants to negotiate acceptable interference. In our *Amendment of Part 73 of the Commission's Rules to Permit Short-Spaced FM Station Assignments by Using Directional Antennas*, 6 FCC Rcd 5356, 5361 (1991), we established that we were the sole arbiter in determining interference standards and disallowed applicants from negotiating interference standards on a case-by-case basis. Therein, we further noted that one station's acceptance of interference would preclude some future facility changes by the station which causes the interference.⁴ Furthermore, *New Covenant* involved third adjacent channel overlap, whereas this case involves first adjacent channel overlap. In *Educational Information Corporation*, 6 FCC Rcd at 2208, we distinguished first-adjacent channel overlap from second- or third-adjacent channel contour overlap:

Overlap of co-channel or first adjacent channel signals is a more serious matter since the interference that may occur results in the loss of service over a wide area. Second or third adjacent channel overlap may result in the replacement of one signal by another (not the complete loss of service) and is confined to a very small area around the transmitter of the interfering station. In addition, the potential for such interference to occur depends to a great extent on the quality of the receivers used within the affected area.

Finally, we note that in *New Covenant* the staff waived as *de minimis* third adjacent interference within 2.1% of the protected service area, whereas in the instant case applicants seek a waiver of first adjacent interference within 6.9% of the protected service area. In short, the *New Covenant* decision, to the extent it remains viable, is not analo-

⁴ Open Media's argument that the staff ruling was based on an erroneous understanding of the nature of the overlap area is decisionally insignificant. Though the staff's description of the interference area as "consist[ing] of the heavily populated cityscape of Chicago" may have been exaggerated, the fact is that Open Media's own exhibit (Appendix B) establishes that 35,494 people will be within the area of overlapping contours. Clearly the area of overlap cannot be characterized as uninhabitable

(e.g. covered by a lake), which has been a consideration in previous waivers. Finally, there is no significance to the fact that the station from which Open Media would receive interference receives interference from yet another station, as alleged by Open Media.

gous to the circumstances presented here. We conclude that a waiver in this case on grounds that the proposed overlap is *de minimis* is not warranted.

9. In summary, the operative facts are that Open Media's noncompliance with Section 73.509(a) of the Commission's Rules is voluntary and that Open Media has failed to demonstrate its entitlement to a waiver. Absent such a demonstration, its application was properly returned. Accordingly, we affirm the staff action.

10. *Reconsideration of Grant of NIU/REBF Application.* In its petition for reconsideration, Open Media argues that the staff violated its *Ashbacker*⁵ rights and Section 73.3591 (Grants without hearing) of the Commission's Rules in making an *ex parte* grant of a construction permit to NIU/REBF. Open Media also alleges that NIU/REBF misrepresented and failed to demonstrate its financial qualifications, failed to comply with Section 1.65 of the Commission's Rules and violated the Commission's *ex parte* rules. Open Media further argues that grant of the NIU/REBF application violates Section 307(b) of the Communications Act of 1934, as amended, as well as Sections 73.3517 (Contingent applications), 73.3518 (Inconsistent or conflicting applications) and 73.3520 (Multiple applications) of the Commission's Rules and is contrary to public policy. Finally, petitioner claims that inquiry is warranted to determine whether NIU/REBF falsely stated its intended community of license.

11. We deny reconsideration for the following reasons. Initially, there is no violation of Open Media's *Ashbacker* rights nor violation of Section 73.3591 of the Commission's Rules. In its letter issuing the construction permit to NIU/REBF while Open Media's application for review of the dismissal of its application was pending, the staff cited *Meridian Communications*, 2 FCC Rcd 5904 (Rev. Bd. 1987). Contrary to Open Media's contentions, we find that case to be apposite. *Meridian* holds that as a matter of law and Commission application processing policy, grant of an application cannot become final until the petition for reconsideration or application for review challenging dismissal of a mutually exclusive application is adjudicated. Simply stated, the cloud over the granted application will not dissipate until reconsideration or review is granted or denied. Thus, the grant to NIU/REBF does not prevent Open Media from having its application for review decided by the Commission and NIU/REBF are on notice that they proceed to construct at their own risk. Indeed, at page 4 of the January 23, 1990, construction permit to NIU/REBF the following statement appears:

The issuance of this permit is conditioned on the outcome of the application for review filed by Open Media Corporation. Accordingly, any construction undertaken pursuant to this permit is at the permittee's sole risk.

Thus, Open Media's *Ashbacker* rights were not violated by issuance of the construction permit to NIU/REBF. Moreover, since Open Media has not been prejudiced by the grant of the construction permit, its allegations with respect

to noncompliance with Section 73.3591 of the Commission's Rules are immaterial. Similarly, to the extent that there may have been a technical violation of the Commission's *ex parte* rules in that Open Media was not sent a copy of the January 23, 1990, construction permit issued to NIU/REBF, it was harmless error. We note that a Public Notice (Report No. 20776) of the action granting the construction permit was released on January 29, 1990. Accordingly, Open Media was not prejudiced as is evidenced by the fact that it timely filed its petition for reconsideration.⁶

12. We also reject Open Media's allegations that NIU/REBF was not financially qualified, misrepresented facts and failed to comply with Section 1.65 of the Commission's Rules with respect to its financial qualifications. NIU/REBF, in their application, answered "no" to the question about their dependence upon a Public Telecommunications Facilities Program ("PTFP") grant. However they apparently had also applied for a PTFP grant. The staff interpreted the application for a PTFP grant as implying some degree of financial dependence on a PTFP grant to establish NIU/REBF's financial qualifications. Accordingly, the Chief, FM Branch, in a letter dated November 16, 1989, asked NIU/REBF to provide an amendment demonstrating that it was financially qualified. In its response dated December 5, 1989, NIU/REBF noted that the inquiry was based upon an "erroneous factual assumption" namely, that NIU/REBF had indicated that it was dependent "on a Federal matching grant from the Public Telecommunications Facilities Program of the National Telecommunications and Information Administration (NTIA)." To the contrary, NIU/REBF stated that the applicant was not dependent on an unfunded PTFP grant to construct and operate its facility and that it had so stated in its application. Furthermore, in response to Open Media's instant petition, NIU reiterated that NIU/REBF has been financially qualified at all times, and has the requisite funds to construct and operate a facility on Channel 213 without revenue, independent of any PTFP funding. Open Media's attempts to challenge NIU/REBF's financial qualifications, and to charge NIU/REBF with misrepresenting facts by referring to NIU/REBF's applications for funding from PTFP, and alleging that these actions are inconsistent with the NIU/REBF affirmation of being financially qualified, do not raise specific allegations of fact warranting further inquiry. An application filed with us specifying that it does not depend upon NTIA/PTFP funding does not preclude and is not inconsistent with a separate application to NTIA for a PTFP grant that may include equipment and facilities in addition to the facilities specified in its FCC application. NIU/REBF avers that such is the case here.

13. As in its application for review challenging the dismissal of its application, Open Media alleges that grant of NIU/REBF's application violated Section 307(b) of the Communications Act of 1934, as amended. As noted in paras. 5-9, *supra*, the dispositive facts are that Open Media failed to demonstrate its entitlement to a waiver of Section 73.509(a) of the Commission's Rules and thus was not qualified for comparative consideration. Accordingly, we again affirm the staff ruling that absent acceptance and designation, Open Media was not entitled to a hearing on

established that where an *ex parte* violation is a single incident, which is not repeated and does not cause prejudice, it does not raise a substantial and material question of fact warranting further inquiry.

⁵ *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 (1945).

⁶ Similarly, NIU/REBF's failure to serve Open Media with its December 5, 1989, response to the Commission inquiry does not raise a substantial and material question of fact. It is well

the comparative Section 307(b) ramifications of its proposal. Furthermore, Open Media's allegation that NIU's proposal in a separate proceeding to co-locate a Channel 202 operation with the existing Channel 207 facility licensed to Northern Illinois University (WNIU-FM) violates the Commission's multiple ownership rules and is germane to this proceeding is simply wrong. Section 73.3555(f) (Multiple ownership) of the Commission's Rules exempts NCE-FM stations from the strictures of our multiple ownership rules.

14. Open Media further alleges that NIU/REBF does not put a 1mV/m signal over a majority of Rockford, its proposed community of license and therefore that inquiry is warranted as to whether NIU/REBF has falsely stated its community of license. We reject this contention. The note to Section 73.315 (FM Transmitter location) of the Commission's Rules exempts NCE-FM stations operating on reserved channels (Channels 200-220) from the city-grade requirements of Section 73.315. Accordingly, the requested investigation is not warranted.

15. Finally, Open Media claims that grant of the NIU/REBF application for Channel 213 would be contrary to Sections 73.3517, 73.3518 and 73.3520 of the Commission's Rules because NIU and REBF have each already filed applications for NCE-FM stations to serve Rockford on Channel 202.⁷ This contention is rejected. The parties have entered into an agreement of understanding, the purpose of which is to determine which frequency each would obtain. NIU/REBF have explained that the purpose of their joint application for Channel 213 was to resolve the mutual exclusivity between their respective applications for Channel 202. Pursuant to the agreement, should the joint application for Channel 213 pass a cut-off list unopposed, REBF would withdraw from that joint applicant, and NIU would request the dismissal of its application for Channel 202.⁸

16. As noted, Section 73.3555(f) of the Commission's Rules provides that the multiple ownership rules do not apply to NCE-FM stations. Accordingly, it is clear that both NIU and REBF may each have more than one noncommercial educational station in the Rockford market. With respect to the alleged violation of Section 73.3517 of the Commission's Rules, there are no contingent applications. If either NIU or REBF had filed individually for Channel 213, the application could have been granted. The only reason that neither the NIU nor REBF application for Channel 202 could have been granted was because they were mutually exclusive with one another for that channel. Thus, there is no violation of Section 73.3517. Furthermore, the purpose of Section 73.3518 "is to avoid the waste of Commission resources, prejudice to other

applicants, and delay of service which arises when the Commission must process applications by the same person or entity." *Valley Broadcasting Co.*, 58 RR 2d 945, 948(1985) It is designed to prevent the filing of multiple applications "not all of which can be granted." *Id.* Since we have before us NCE-FM applications, all of which may be granted, Section 73.3518 is simply inapplicable. Nor is there any violation of Section 73.3520 of our Rules. Rule 73.3520 is premised on there being a limit to the number of stations which may be owned by any one licensee in the same community. However, since the multiple ownership rules do not apply to NCE-FM operations, neither NIU nor REBF is precluded from owning and operating more than one NCE-FM facility in the market. Thus, it follows that each may have more than one application pending at the same time for a given market. Accordingly, the proposals of NIU and REBF do not violate Sections 73.3517, 73.3518 and 73.3520 of our Rules.⁹

17. In summary, Open Media has failed to demonstrate that reconsideration of the grant of NIU/REBF's application is warranted.

CONCLUSION

18. ACCORDINGLY, IT IS ORDERED. That the application for review filed by Open Media on June 23, 1989, and petition for reconsideration filed by Open Media on February 28, 1990, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

⁷ The Administrative Law Judge dismissed NIU's application and granted REBF's application for Channel 202 by *Memorandum Opinion and Order*, FCC 90M-3525, released November 6, 1990. However, a construction permit for the facility was not issued until July 29, 1991. On June 17, 1991, REBF filed an application to assign the construction permit to Faith Academy d/b/a WFEN. The assignment application was granted on October 2, 1991, and the transaction was consummated on October 8, 1991.

⁸ Although Open Media's timely filed application created doubt about bringing NIU and REBF's plan to fruition, the

return of the Open Media application made implementation of the plan possible. However, subsequent events have made the plan moot, as explained in n.7.

⁹ Open Media claims that co-location of the NIU/REBF directional antenna for Channel 213 at 127.4 meters above ground on the same tower as NIU's proposed directional antenna for Channel 202 at 128.7 meters above ground is physically impossible and in violation of the Commission's rules. However, the staff examined NIU's Channel 202 application and found it to be in compliance with the Commission's technical rules. Hence, Open Media's contention is rejected. Moreover, since NIU has dismissed its application for Channel 202, the matter is now moot.