

FCC MAIL SECTION

Federal Communications Commission

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

MM Docket No. 92-207 ✓

In Re Applications

Dixie Broadcasting, Inc. File Nos. BR-881201XN
BRH-881201XOFor Renewal of Licenses of
Stations WHOS(AM)/WDRM(FM)
Decatur, Alabama

HEARING DESIGNATION ORDER

Adopted: August 20, 1992; Released: September 3, 1992

By the Commission:

I. INTRODUCTION

1. Pending before the Commission are (i) applications for renewal of the licenses of Stations WHOS(AM)/WDRM(FM), Decatur, Alabama, filed by Dixie Broadcasting, Inc., (Dixie); (ii) a timely Petition to Deny filed by Region V of the NAACP (NAACP) and the National Black Media Coalition (NBMC); (iii) the licensee's responses to Commission inquiries and (iv) a Joint Request for Approval of Settlement Agreement between the NAACP and Dixie.¹

II. PROCEDURAL MATTERS

2. *Settlement Agreement*: We have reviewed the settlement agreement between the NAACP² and Dixie pursuant to *Formulation of Policies and Rules Relating to Broadcast Renewal Applications, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, 4 FCC Rcd 4780 (1989) (*Renewal Policies Order*). The *Renewal Policies Order* states that the Commission will review all citizens agreements reached in exchange for dismissing a petition to deny to determine whether they comply with the Commission's rules. We find that the subject settlement agreement complies with the Commission's rules and, therefore, we will approve it and allow the NAACP to withdraw its petition against these stations.

3. *Standing*: In challenging an application pursuant to 309(d) of the Communications Act, as amended, 47 U.S.C. 309(d), a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show ... that a grant of the application would be prima facie inconsistent with (the public interest, convenience, and necessity)." 47 U.S.C. 309(d); See also *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir.

1988); *Dubuque TVV. Limited Partnership*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. 309(d)(1). The licensee argues that the NBMC does not have standing against its stations because the NBMC did not submit a statement sufficient to satisfy the requirements of the Communications Act. We agree.

4. The NBMC timely submitted a statement from Pluria Marshall, Chairman of the NBMC and a resident of Washington, D.C. However, the Commission has previously held that the statement of a person, who is neither a listener of the challenged station nor a resident in the service area of the challenged station, does not satisfy the requirements of the Act. See *Michigan/Ohio Broadcast Renewals*, 3 FCC Rcd 6944 (1988); see also *KDEN Broadcasting Company*, 55 Rad. Reg. 2d (P&F) 1311, 1311-12 (1984). Accordingly, we hold that NBMC lacks standing to petition these stations and we will treat NBMC's pleading as an informal objection.

5. *EEO Rule*: Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified minorities and women and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee.

6. When the renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the renewal application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), (*petition for reconsideration pending*): see also 4 FCC Rcd 1715 (1989) (request for clarification by the National Association of Broadcasters). See e.g. *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988); *Bilingual - Bicultural Coalition on the Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978).

III. BACKGROUND

7. On December 1, 1988, Dixie Broadcasting, Inc. (Dixie) filed applications to renew the licenses of Stations WHOS(AM)/WDRM(FM), Decatur, Alabama. In its renewal applications, the licensee states that from November 1, 1987, through October 31, 1988, i.e. the reporting year, it contacted four general recruitment sources, including *Broadcasting Magazine*, *Radio and Records Magazine*, the National Career College, and the University of Alabama, none of which produced minority referrals. The licensee also indicated that during this period it had 16 vacancies, including two upper-level positions, but hired no minorities. In its 1988 renewal application, the licensee stated

that even though no Blacks are currently employed at the stations, "the staff's relatively small size and relatively small participation of Blacks in the local labor force makes their absence not unreasonable, as evidenced by the fact that the relevant employment targets for Black employment are less than one." The available labor force for Morgan County, Alabama is 8.2% minority (7.4% Black, .8% other). The 1989 Annual Employment Report lists one Black on the stations' overall staff of 24 (4.2%) and on its upper-level staff of 22 (4.5%). The 1983 through 1988 Annual Employment Reports list no minorities employed at the stations on staffs which ranged in size from 14 to 21.

8. In its challenge, the NBMC asserts that the licensee did not contact all the recruitment sources listed in its 1982 renewal application, did not hire any minorities during the reporting year, and did not adequately assess its program. In its opposition, the licensee states that it no longer contacts some of the organizations listed on its 1982 renewal application because they were unproductive. Instead it looks to other, more responsive sources, like local educational institutions and newspapers. The licensee indicates that it did employ minorities during the license term but, due to clerical error, they did not appear on the stations' Annual Employment Reports. Based on the amendments to the reports contained in the opposition, it appears that in 1987 the stations employed one Black on a staff of 21 (4.8%) and that person was in an upper-level position of which there were 17 (5.9%). In 1983, the stations employed three Blacks on an overall staff of 17 (17.6%) and all were in upper-level positions of which there were 16 (18.8%). In addition, the licensee indicates that another minority was hired in 1983 but did not remain at the stations long enough to be reflected on the Annual Employment Report. It also amended the number of hires for the reporting year, November 1, 1987, through October 31, 1988, to 12 rather than 16.³ The licensee also submitted declarations, under penalty of perjury, from J. Mack Bramlett, the Vice-President/Director of the licensee and the General Manager of the Stations (VP/GM). In his declaration, Bramlett states that he had worked at the stations since 1962 and had been responsible for the stations' EEO program since 1976. He states that he has read the opposition and "that, to the best of [his] knowledge and belief, all of the facts contained therein concerning the employment record and affirmative action efforts of WHOS and WDRM . . . are accurate and complete." The licensee also submitted a declaration, under penalty of perjury, from Nat Tate, a Black male employed at the stations in 1982 and rehired in 1989. In his declaration, he states that he referred two Blacks to the stations and that these two Blacks and another Black were hired by the licensee. The licensee reported hiring two of these individuals in 1982 and one in 1983.

9. To further evaluate the stations' EEO efforts, we directed the licensee, by letter dated July 3, 1989, to provide the following information for the period November 1, 1985, through November 1, 1988: the number of persons interviewed for each position, indicating those who were minority and female; the referral source, gender, race or national origin of the successful candidate; and the recruitment sources used to attract applicants for each position. On July 28, 1989, the licensee responded by re-submitting its opposition, stating that the requested information was contained therein. However, review of the opposition revealed that the only hire described during the

period under review was that of a Black female for an upper-level position in August 1986.⁴ The licensee states that she was among four applicants for the position, all referred by Manpower, Inc., an employment agency and temporary service.⁵ Because the opposition did not appear to contain all the requested information, we sent a second letter to the licensee, dated March 15, 1991, asking again that it detail all hires rather than just minority hires for the three year period. In its April 18, 1991, response, the licensee again claimed that it had complied with our request and had already supplied sufficient information to demonstrate the success of its efforts to attract Black employees. In support, the licensee reiterated that seven (35%) of approximately 20 new employees hired during the license term were Black.⁶ It also detailed the hiring of eight employees, three of whom were Black, from February 1989 through July 1990 as examples of its exemplary EEO program.⁷ This response included another declaration from the VP/GM attesting to the pleading's veracity.

10. Review of the hiring data contained in the response raised an additional concern regarding its accuracy. The VP/GM had attested to 20 hires during the entire seven year license term with 12 occurring during the last year prior to renewal. That record raised questions as to how the station could have had only eight vacancies over the preceding six year period. In an attempt to clear up this question, we placed a phone call to the licensee's attorney on October 7, 1991, to which the VP/GM responded in writing on October 15, 1991. In a sworn declaration, he states that "[t]he stations' staff has determined that the variation in the number of available vacancies during the years under scrutiny can only be attributed to the turnover rate at radio broadcast stations which often varies from year to year."

11. Our analysis of the Annual Employment Reports from 1982 to 1988 indicated that 20 could not have been the total number of hires in the license term based on the changes in staff size and composition reported on Forms 395-B during the term. This prompted our fourth query on November 5, 1991. We again placed a phone call to the licensee's attorney. We later confirmed this query in writing on January 2, 1992, after intervening clarifying conversations with the licensee's attorney. In a January 13, 1992, response, the licensee indicated that the previous information had been the "best information the licensee was able to provide based on available documentation of recruitment efforts," including staff recollections and information the licensee believed could be verified by records. However, based on recently discovered payroll records⁸ and the collective memory of the staff, the licensee stated that the station actually hired 83 persons, rather than only 20 employees from 1982 through 1988. Although the actual number of hires greatly exceeded those initially reported, the licensee continued to argue that its EEO program resulted in a substantial number of Black hires, *i.e.*, at least seven of 83 or 8.4%. In addition to the 83 hires, the licensee reported that 57 additional individuals worked at the stations during the license term but were not considered employees because they were either independent contractors (36 individuals) or were terminated after a two or three month probationary period (21 individuals). Minorities were not hired for any of the 57 positions.⁹ As with prior submissions, this response was accompanied by a declaration from the VP/GM attesting to the accuracy and completeness of the response.

IV. DISCUSSION

Misrepresentation/Lack of Candor

12. In the renewal application, opposition pleading and three responses to Commission inquiries, the licensee appears to have misrepresented critical facts about its EEO program. In response to a Commission inquiry requesting recruitment and hiring information, the licensee asserted, and the VP/GM confirmed under penalty of perjury, that the stations' EEO program was effective because 35% (7 of 20) of the hires during the license term were Black. In response to another Commission inquiry, the VP/GM again confirmed in a sworn declaration that the hiring figure was correct. It was not until responding to a fourth inquiry that the licensee disclosed a total of 104 hiring opportunities during the license term with only seven Black hires.¹⁰ While the accuracy of the contention that the stations had 20 hires during the license term was on its face dubious, the licensee and VP/GM, who had been in charge of the stations' EEO program throughout the entire license term, persisted in this contention when, in fact, there had been 104 hires. Because we must rely on truthful reporting by our licensees in assessing the success of an EEO program, we are particularly concerned when we find the actual number of hires is over five times greater than the number of hires repeatedly reported. Only after four inquiries did the licensee provide a reply that was seemingly accurate. Even that reply did not contain information regarding the recruitment sources contacted, the interviewee pool composition of each position or the referral source of each hiree as previously requested. Given these circumstances, we find that a substantial and material question of fact exists as to whether and to what extent the licensee engaged in misrepresentation or lack of candor with respect to responses to Commission inquiries regarding the above matters in violation of Section 73.1015 of the Commission's Rules, 47 C.F.R. Section 73.1015.

EEO Implementation

13. We also believe, particularly in light of the licensee's inconsistent and erroneous responses, that a substantial and material question exists as to whether the stations complied with Section 73.2080(b) of the Commission's Rules, 47 C.F.R. Section 73.2080, which states that "[e]ach broadcast station shall establish, maintain, and carry out a positive and continuing program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practice." Review of all submissions reflect that the licensee had 104 hiring opportunities during the license term. The licensee reported contacting seven general sources during the license term and receiving some minority applicants. However, the frequency of contacts with recruitment sources as well as the number, race, or gender of applicants for positions during the license term is unclear because the licensee reported recruitment and applicant data only for positions for which it considered and/or hired Blacks. The licensee has presented little evidence that it consistently contacted recruitment sources likely to refer minorities when vacancies occurred or that it evaluated its employment profile and job turnover against the availability of minorities in its recruitment area pursuant to Sections 73.2080(b)(2) and (3) of the Commission's Rules, 47 C.F.R. Sections 73.2080. It is unclear how it could meaningfully self-assess its EEO program, including the productivity of its recruitment sources as it claimed, with such limited and incomplete

information. In addition, we question the licensee's self-assessment of its EEO efforts when, in one response, it argues the success of a program that resulted in the hiring of seven minorities out of 20 hires during the license term and, in a later response, still claims success although it had only recently discovered that it had 84 more hires than previously reported.

V. CONCLUSION

14. Based on the foregoing, we conclude that the licensee's submissions raise substantial and material questions of fact as to whether the licensee misrepresented or lacked candor in providing information to the Commission concerning the licensee's recruitment and employment history and practices; and whether, particularly in light of the licensee's inconsistent and erroneous responses, the licensee complied with Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080. We conclude that these renewal applications should be designated for hearing.

VI. ORDERING CLAUSES

15. Accordingly, IT IS ORDERED that, pursuant to Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. Section 309(e), the above-captioned applications ARE DESIGNATED FOR HEARING at a time and place to be specified in a subsequent Order, upon the following issues:

- (1) To determine whether the licensee of Stations WHOS(AM)/WDRM(FM) made misrepresentations of fact or was lacking in candor and violated Section 73.1015 of the Commission's Rules, 47 C.F.R. Section 73.1015, with regard to the station's EEO program and documents submitted in support thereof;
- (2) To determine the extent to which the licensee of Stations WHOS(AM)/WDRM(FM) complied with the affirmative action provisions specified in Section 73.2080(b) of the Commission's Rules, 47 C.F.R. Section 73.2080(b);
- (3) To determine whether, in light of evidence adduced pursuant to the foregoing issues, a grant of the subject license renewal applications would serve the public interest, convenience and necessity.

16. IT IS FURTHER ORDERED that, in accordance with Section 309(e) of the Communications Act, as amended, the burden of proceeding with the introduction of the evidence upon issues (1), (2), and (3) and the burden of proof with respect to all issues shall be upon the licensee Dixie Broadcasting, Inc.

17. IT IS FURTHER ORDERED that, to avail themselves of the opportunity to be heard, the parties respondent herein, pursuant to Section 1.221 of the Commission's Rules, 47 C.F.R. Section 1.221, file with the Commission, within twenty (20) days of the mailing of this Order, a written appearance in triplicate, stating an intention to appear on the date filed for the hearing and present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED that Dixie Broadcasting, Inc. shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, 47 U.S.C. Section 311(a)(2), and Section 73.3594 of the Commission's Rules,

47 C.F.R. Section 73.3594, give notice of the hearing within the time and in the manner prescribed in that rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594 of the Commission's rules.

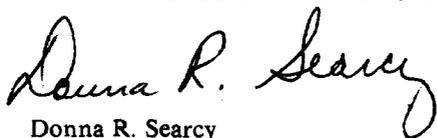
19. IT IS FURTHER ORDERED that the Joint Request for Approval of Settlement Agreement filed by the NAACP and Dixie, Broadcasting, Inc. IS GRANTED.

20. IT IS FURTHER ORDERED that if it is determined that the hearing record does not warrant an Order denying the renewal applications of Dixie Broadcasting, Inc., for Stations WHOS(AM)/WDRM(FM), it shall also be determined if Dixie Broadcasting, Inc. has willfully or repeatedly violated Section 73.1015 (submitting truthful written statements and responses to the Commission). If so, it shall also be determined whether an Order for Forfeiture shall be issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, in an amount up to \$50,000 for the willful or repeated violation of Section 73.1015.¹¹

21. IT IS FURTHER ORDERED that, in connection with the possible forfeiture liability noted above, this document constitutes notice pursuant to Section 503(b)(3) of the Communications Act of 1934, as amended. The Commission has determined that, in every case designated for hearing involving revocation or denial of assignment, transfer, or renewal of license for alleged violations which also come within the purview of Section 503(b) of the Communications Act of 1934, as amended, it shall, as a matter of course, include this forfeiture notice so as to maintain the fullest possible flexibility of action. Accordingly, we stress that the inclusion of this notice is not to be taken as in any way indicating what the initial or final disposition of this case should be.

22. IT IS FURTHER ORDERED that the Secretary send by Certified Mail -- Return Receipt Requested -- one copy of this Order to each of the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION



Donna R. Searcy
Secretary

FOOTNOTES

¹ Also pending before the Commission are applications requesting transfer of control of Dixie Broadcasting, Inc. to Mountain Lakes Broadcasting, Inc. We will defer action on these applications pending the outcome of the hearing.

² We note that although NBMC joined in the petition to deny with the NAACP, it did not participate in the settlement agreement.

³ The licensee explains that it counted as hires "four individuals who had been paid talent fees for production work they performed on a one-time basis as independent contractors."

⁴ The licensee details its recruitment efforts for another position in October 1986. Its efforts included seeking referrals from Calhoun Community College and advertising in a local newspaper. It received "five to six referrals from the college . . ." and several referrals, including a Black male, from the newspaper. It states that it did not fill the position because none of the people who applied were qualified.

⁵ We note that the licensee reports hiring a Black female for an upper-level position in February 1989. For this position, it reports contacting the National Career College, A & M University, Calhoun College and local African-American owned radio stations. Two Black females and three white females applied for the position. The licensee states that it initially offered the position to another Black female in December 1988, but she declined the offer. It also states that it offered another upper-level position to a Black female in June 1987 but she declined as well.

⁶ The licensee had detailed in its opposition the recruitment and hiring of these seven individuals, which took place from 1982 through February 1989.

⁷ We note that all but one of these hires occurred after the license term expired. As to the post-term hires, the record fails to establish that such hires were an outgrowth of an EEO program implemented during the license term. Therefore, these hires will not be considered in our analysis of the licensee's EEO efforts. As we stated in *Rust Communications Group, Inc.*, "we will not consider post-term actions, . . . which exist independently of license-term conduct." 73 FCC 2d 39, 54 (1979).

⁸ The payroll records were discovered in a warehouse off-site, and "according to the staff, apparently had been stored there during a move of the stations' studios."

⁹ We note that this information was contained in the licensee's February 11, 1992, response to our inquiry requesting more detailed information regarding these 57 employees.

¹⁰ We derived this figure by adding 83, the number of hires claimed by the licensee, and 21, the number of individuals that the licensee stated that it hired but found to be unqualified after a probationary period. Although the licensee did not consider these individuals as employees, the Commission does.

¹¹ This figure reflects the \$25,000 statutory maximum for each of the two instances of possible misrepresentation/lack of candor occurring after the December 1989, increase in the Commission's statutory authority (the April 18, 1991 and October 15, 1991, responses to the Commission).