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

DISPATCHED BY
Docket No. 92-207 ✓

In re Applications of

DIXIE
BROADCASTING, INC.

File Nos. BR-881201XN
BRH-881201XO

For Renewal of Licenses of
Stations WHOS(AM)/WDRM(FM)
Decatur, Alabama

Appearances

Thomas Schattenfeld, Esquire, and Gerald P. McCartin, Esquire, on behalf of Dixie Broadcasting, Inc., and James W. Shook, Esquire, and Gary P. Schonman, Esquire, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

**INITIAL DECISION OF ADMINISTRATIVE
LAW JUDGE ARTHUR I. STEINBERG**

Issued: June 22, 1993;

Released: July 7, 1993

PRELIMINARY STATEMENT

1. By *Hearing Designation Order*, 7 FCC Rcd 5638 (1992) ("*HDO*"), the Commission designated for hearing the above-captioned applications of Dixie Broadcasting, Inc. ("*DBI*"), for renewal of licenses of Stations WHOS(AM) and WDRM(FM), Decatur, Alabama ("*the Stations*"). The following issues were specified:

- (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 stations' 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 the evidence adduced pursuant to the foregoing issues, a grant of the subject license renewal applications would serve the public interest, convenience and necessity.

(*HDO* at para. 15.) In accordance with Section 309(e) of the Communications Act of 1934, as amended, the burden of proceeding with the introduction of evidence and the burden of proof with respect to all of the issues were placed on *DBI*. (*HDO* at para. 16.)

2. The *HDO* further stated that if it is determined that the hearing record does not warrant denial of the above-captioned renewal applications, it shall also be determined if *DBI* has willfully or repeatedly violated Section 73.1015 of the Commission's Rules (submitting truthful written statements and responses to the Commission) and, if so, whether a monetary forfeiture should be imposed on *DBI* in an amount up to \$50,000. (*HDO* at para. 20.) The *HDO* did not provide for a forfeiture contingency under the EEO Program Issue (Issue 2).

3. A prehearing conference in this proceeding was held on October 21, 1992. Hearings were held in Washington, D.C., on February 17, 23, 24, 25 and 26, 1993, and on March 1 and 2, 1993. The record was closed on March 2, 1993. (Tr. 819; *Order*, FCC 93M-89, released March 5, 1993.)

4. Proposed findings of fact and conclusions of law were filed by both *DBI* and the Mass Media Bureau ("*Bureau*") on April 30, 1993. Reply findings were filed by *DBI* on May 14, 1993.

FINDINGS OF FACT

Background

5. On December 1, 1988, *DBI* filed applications for the renewal of the licenses of the Stations. On March 1, 1989, a Petition to Deny the renewal applications was filed by Region V of the NAACP and the National Black Media Coalition (the "*Petition*"). (MMB Ex. 2.) *DBI* filed an Opposition to Petition to Deny (the "*Opposition*") on April 14, 1989. (MMB Ex. 4, pp. 2-34.) Thereafter, between July 1989 and February 1992, the Commission conducted an investigation into the EEO practices of the Stations in accordance with *Bilingual-Bicultural Coalition on the Mass Media, Inc. v. FCC*, 595 F. 2d 621 (D.C. Cir. 1978) ("*Bilingual*"). The investigation consisted of a series of written and oral inquiries to *DBI* and responses thereto from *DBI*. On February 3, 1992, *DBI* and the NAACP filed a Joint Request for Approval of Settlement Agreement based upon an agreement entered into between them on January 22, 1992, resolving the allegations in the *Petition*. (*DBI* Ex. 5A, pp. 16-23.) The Joint Request was granted by the Commission, and the NAACP was allowed to withdraw the *Petition* against the Stations. (*HDO* at paras. 2 and 19.)

6. The Stations are a family-run business. J. Mack Bramlett ("*Mr. Bramlett*") has worked at the Stations full time since 1962, when he took his first job out of school as the Stations' Chief Engineer. Since 1976, Mr. Bramlett has been the full time General Manager of the Stations, and Vice President, director and 10 percent voting stockholder of *DBI*. As such, Mr. Bramlett has had supervisory responsibility over all facets of the Stations' day-to-day operations, including hiring and firing, programming, engineering, sales, and compliance with FCC rules and regulations, including those pertaining to EEO. During the period from 1982 to February 1989 (the "*License Period*"), Mr. Bramlett oversaw the operation of the Stations himself. There were no separate department heads, other than a Sales Manager and nighttime Program Director, Nathan W. Tate, Sr. ("*Mr. Tate*"), in 1982 and 1983, and a National Sales Manager, Mark Goodwin, starting in the fall of 1986. Mr. Bramlett devoted most of his waking hours to this task and rarely took vacations. (*DBI* Ex. 1, p. 1; *DBI* Ex. 3, pp. 26, 32-33.)

7. Mr. Bramlett graduated from high school and went on to DeVries Technical Institute, receiving a certificate in electronics in 1961. He has held a First Class Radiotelephone Operator's License from the FCC since 1961. While Mr. Bramlett has worked continuously at the Stations since 1962, he has held other broadcast and nonbroadcast positions and participated in business ventures during this period. In the early 1960's, Mr. Bramlett provided maintenance and emergency services to other broadcast facilities on a contract basis. In the mid-1970's, Mr. Bramlett was the station manager of WYUR(TV) in Huntsville, Alabama. Mr. Bramlett formed his own engineering and electronics company, Bramlett Engineering (later changed to Bramlett Electronics), for a few years in the mid-1980's and participated as a passive investor in a mining venture. Bramlett Engineering designed and manufactured traffic control systems. For two to three years in the late 1970's Mr. Bramlett organized and had an interest in a local bank and held the title Chairman of the Board. However, the bank's president and compliance officer were responsible for ensuring compliance with banking laws. (Tr. 296-301, 652.)

8. Mr. Bramlett's wife, Rebecca B. Bramlett ("Mrs. Bramlett"), worked at the Stations from 1978 until 1983 on a part-time basis, and from 1983 until June 1991 on a full-time basis, as her husband's assistant, handling book-keeping and payroll duties, aiding in the preparation of the Stations' annual employment reports and the renewal applications and otherwise helping her husband as requested. (DBI Ex. 1, pp. 1-2; DBI Ex. 3, pp. 5-8; Tr. 497-99.) Mr. Bramlett's son, Timothy, also worked at the Stations as a full time announcer from August 1986 through August 1989 and his son, Jim, has worked at the Stations since 1988. Other Bramlett children, and a daughter-in-law, have worked at the Stations as well. (DBI Ex. 1, p. 2.)

9. The Stations have a clean record over the last 20 years, that is, there have been no violations of the FCC's rules or policies during that time period. (Tr. 817.)

10. Beginning sometime in 1984 or 1985, the Stations' communications lawyer was Daniel F. Van Horn of the law firm of Arent Fox Kintner Plotkin & Kahn ("Arent Fox"). Mr. Van Horn commenced employment with Arent Fox as an associate in 1979 and became a partner on January 1, 1986. He practiced communications law and dealt with EEO matters throughout his tenure at Arent Fox, and worked in non-communications areas as well. Mr. Van Horn left Arent Fox in April 1992 and has been an Assistant United States Attorney for the District of Columbia since May 11, 1992. (DBI Ex. 4, pp. 3-6, 8-9.) Commencing in early 1989, Susan A. Marshall, a senior attorney at Arent Fox, also worked on DBI matters under Mr. Van Horn's supervision, primarily with respect to the *Bilingual* inquiry and the preparation of the Opposition. The Opposition was one of the first responses to a petition to deny a broadcast license that Ms. Marshall worked on, although she worked on similar pleadings for other clients at around the same time. Ms. Marshall became associated with Arent Fox in 1978. She practiced communications law and dealt with EEO matters involving broadcast clients. (DBI Ex. 2, p. 1; Tr. 132-33.)

Issue 2 -- EEO Program Issue

11. The Stations are licensed to Decatur, Alabama, which is located in Morgan County and is not a part of any Metropolitan Statistical Area ("MSA").¹ The relevant work force in evaluating the Stations' employment profile during the License Period was, therefore, Morgan County. According to 1980 United States Census data, the civilian labor force in Morgan County was 39.8 percent female and 7.4 percent Black, with other racial minorities represented in statistically insignificant numbers. (MMB Ex. 4, p. 10.)

12. DBI hired a total of 140 individuals to work at the Stations during the License Period. Eighty-three of these hires were considered by DBI to be "employees" for FCC purposes. (MMB Ex. 11, pp. 2, 5-6.) DBI did not consider the remaining 57 people to be "employees." They included 21 individuals hired on a permanent basis who were asked to leave their employment after a 60 to 90-day probationary period because they were found to be unqualified for the positions for which they were hired, and 36 individuals hired as independent contractors on a purely temporary or "fill-in" basis who were not hired to work on a permanent basis. (*Id.* at pp. 3, 8-9.) The FCC, however, held that the 21 probationary employees should be deemed "employees" for FCC purposes. Therefore, there were 104 "employees" hired by DBI during the License Period. (*HDO* at para. 12 and note 10.)

13. Nine of the 140 (6.43 percent) individuals hired by DBI during the License Period were Black. Eight of the 104 (7.69 percent) "employee" hires were Black. All Blacks were hired for upper-four positions. (MMB Ex. 12, pp. 5-6.) During the License Period, Mr. Bramlett also offered upper-four positions at the Stations to three Blacks, and offered a promotion to one Black, Mr. Tate, from Sales Manager to General Manager. (DBI Ex. 1, p. 5; MMB Ex. 4, pp. 11-12, 15; Tr. 365, 782-83.)

14. Mr. Bramlett was responsible for establishing and implementing the Stations' EEO Program during the License Period. The Stations' EEO policy was informal. It was implemented by Mr. Bramlett so there were no formal procedures for others to follow. During the License Period, Mr. Bramlett did not have a sophisticated understanding of what DBI's EEO obligations were as a Commission licensee. (DBI Ex. 1, p. 2.) He was not well versed in the detailed procedures required by the Commission's rules. Throughout the License Period, however, Mr. Bramlett made an effort to obtain minority applicants and to employ minorities, and was careful to be nondiscriminatory with respect to job openings. Mr. Bramlett testified that this was not difficult because he does not discriminate and never has. Recruitment sources relied upon throughout the License Period on an irregular basis included Broadcasting Magazine, Radio and Records, Decatur Daily, Huntsville Times, Speaking Out News, University of Alabama, Alabama A&M College, National Career College, Oakwood College, Manpower, Inc., local Black leaders, and employee referrals. Mr. Bramlett believed that his efforts, coupled with the results they produced, satisfied DBI's EEO obligations. (DBI Ex. 1, pp. 2-3; Tr. 325-26, 337, 347, 365, 385, 412, 416.)

¹ In 1988, a new MSA was created by Congress consisting of Morgan County and part of adjacent Lawrence County. This MSA was not created by the U. S. Census Bureau, however, and was therefore not reflected in U.S. Census data. Because the

FCC relies on the U.S. Census as the source of its labor force data, DBI also relied on U.S. Census data and thus utilized Morgan County as its frame of reference for local civilian work force data. (MMB Ex. 4, p. 10.)

15. DBI did not maintain complete records of the Stations' recruitment efforts. DBI did retain certain job applications of minorities and applications for certain positions at the Stations, mostly sales related, for the period 1986 to 1988. As a rule, job applications were kept for 6 to 12 months before being discarded and, with a few exceptions, no written record was maintained as to the race of job applicants. (DBI Ex. 1, p. 3; Tr. 345, 388-89, 412.)

16. In the early part of the License Period, from 1982 to the beginning of 1986, WDRM(FM) had a small coverage area serving a population of approximately 90,000 in Decatur and Morgan County. It was not a desirable place to work, especially for experienced radio people, because DBI was not making any money and the wages were low. Decatur and Huntsville, a larger municipality approximately 25 miles away, were two different markets. The going hourly rate for employees at radio stations was approximately \$3.25 in Decatur and approximately \$4.00 in Huntsville. (DBI Ex. 1, p. 3.)

17. From September 1982 to September 1983, WDRM(FM) operated with an "urban format," one which was designed to attract minority listeners. In August 1982, in anticipation of this change, Mr. Bramlett hired Mr. Tate, an experienced Black broadcaster. Mr. Tate was given the titles of Program Director and Sales Manager. (DBI Ex. 1, pp. 3, 5; DBI Ex. 19; Tr. 327-28.)

18. In April 1983, after only eight months, Mr. Tate left DBI to start a fast-food business. (Tr. 261, 781, 784.) Absent Mr. Tate's guidance, the urban format lost momentum and, in September 1983, was discontinued. (Tr. 360.) During the approximately one-year period that WDRM(FM) utilized an urban format, DBI hired six minority individuals, in addition to Mr. Tate. Mr. Tate solicited the personnel for the urban format and recommended them to Mr. Bramlett. (MMB Ex. 12, p. 5; DBI Ex. 4, pp. 12-14; Tr. 342-47, 776.) All of the minority employees who were hired during the urban format period voluntarily left DBI either before or shortly after the format on WDRM(FM) was changed to country music on a full-time basis. (MMB Ex. 12, p. 5.) At the same time, WHOS(AM), which had been operating with a country-music format in 1982, changed to a gospel format. (Tr. 360.)

19. During the period 1982 to 1986, most job openings for on-air positions at the Stations presented a crisis situation. Openings needed to be filled immediately because DBI was unable to maintain a staff large enough to fill vacancies while a search was conducted for a replacement. When an announcer left the station, a "warm body" was needed immediately to fill the next shift. Replacements were usually found from an ever-changing group of people who regularly contacted the Stations to ascertain whether there were any job openings, or Mr. Bramlett would just grab someone off the street. In either case, due to the nature of the Stations and the minimal wages DBI could afford to pay, the replacement was usually inexperienced in radio or announcing. Such a situation sometimes resulted in the replacement leaving on his or her own accord in short order when it became apparent that the person was unable to do the job. Many of these replacements were hired on a temporary fill-in basis. From the period 1982 through the end of 1985, 23 of the "fill-in" hires were for announcer positions and 7 of the "probationary" hires were for announcer positions. On occasion, in the early part of the License Period, newspaper advertisements were

run announcing job openings, but this was the exception rather than the rule. (DBI Ex. 1, pp. 3-4; Tr. 335-37; MMB Ex. 12, pp. 5-6.)

20. During the early part of the License Period, recruitment of salespersons and other staff persons, other than announcers, was mostly accomplished through networking and referrals from station personnel, although newspaper advertisements and other notices were used as well. (DBI Ex. 1, p. 4.) Due to the number of job applicants available through the networking process, Mr. Bramlett could have hired employees solely out of this applicant pool. Nonetheless, in those non-emergency situations where he was given sufficient notice by departing employees, he solicited job applicants from other recruitment sources, such as Calhoun College, in order to fulfill what he understood his EEO obligation to be. For example, Carla Snell, a Black female, was referred by Calhoun College and hired by DBI as a news reporter. (Tr. 331-34, 335-37.)

21. Mr. Bramlett sought out minorities from the minority community based on networking efforts and his personal knowledge. As discussed above, in August 1982 Mr. Bramlett hired Mr. Tate, a Black male who was a friend of his and well known in the local Black community, as the Stations' Sales Manager and nighttime Program Director. When Mr. Tate was preparing to leave the Stations in 1983, Mr. Bramlett offered him the General Manager's position, which he declined. During Mr. Tate's tenure at the Stations, word of job openings was circulated by him throughout the Black community. Mr. Tate referred Bruce E. Hill and Ricky Patton in 1982 and Willie Acklin in 1983, all of whom were Black males hired by the Stations. Mr. Tate also referred Gary Harris, a Black male who did part-time production work at the Stations in 1982 or 1983. From the time Mr. Tate left the Stations in 1983, through 1988, Mr. Bramlett contacted him to solicit minority referrals to work at the Stations and Mr. Tate in fact referred potential employees in response to Mr. Bramlett's requests. (DBI Ex. 1, pp. 4-5; DBI Ex. 8, p. 1; DBI Ex. 19, p. 1; Tr. 331, 342-43, 784-87, 790, 792-94, 803.)

22. Although Mr. Bramlett claimed that DBI's EEO program remained effective in terms of recruitment efforts during the period from September 1983 to July 1986, he conceded that it was not effective in terms of the number of minorities who were hired during that time. Indeed, DBI hired no minorities in any capacity, either full-time or part-time, during the nearly three-year period following the change in format on WDRM(FM) from urban to country music. (DBI Ex. 12, pp. 5, 8; Tr. 365-66.) By contrast, 37 persons, all white, joined DBI during this time in a variety of professional, managerial, clerical, and sales positions. (MMB Ex. 12, pp. 5, 8.) This number included 29 persons identified as "hires" (MMB Ex. 12, p. 5) as well as 8 others identified as "trainees" (*id.* at p. 8). Mr. Bramlett blamed the lack of minority hires from 1983 to 1986 on DBI's inability to find qualified people. (Tr. 366.)

23. Mr. Bramlett believed the Stations' EEO program improved beginning in 1986. The impetus for this improvement was an upgrade of the FM Station's facilities through an increase in antenna height and a relocation of its transmitter site closer to Huntsville in January 1986. Because of these changes, the FM station's signal covered three counties and approximately 350,000 people and became better known and a more desirable place to work. As a result of the FM station's expanded coverage area and new-found appeal, job advertisements were placed in

Huntsville newspapers more often, including a local Black publication, job announcements were sent to Alabama A&M, a Black college, and better results, as evidenced by increased minority applicants and a better quality of minority applicants, were obtained. Prior to this time, recruitment efforts during the License Period had not as a rule extended to Huntsville because it was a different market, the Stations were not well known there, and Huntsville residents were unlikely to work in Decatur. (DBI Ex. 1, p. 5; Tr. 378, 384, 389-94.)

24. Another by-product of the Stations' enhanced image was better pay, with a resultant decrease in job turnover and an improvement in the quality and dedication of the staff. Because existing staff or on-call fill-in workers were increasingly available to fill vacancies on a temporary basis, the Stations were better able to keep vacancies open over a longer period of time while a less hurried search was undertaken for qualified applicants. There was time to utilize a "hiring window." (DBI Ex. 1, p. 6.) From 1986 through the end of the License Period there were virtually no minority "walk-in" or "networking" applicants. Rather, minority applicants were obtained as a result of the Stations' recruitment efforts. (Tr. 385.)

25. In an attempt to take advantage of WDRM(FM)'s expanded coverage, DBI opened a Huntsville sales office. In August 1986, Dixie hired its first minority employee in nearly three years, Gwen Stephenson. However, Ms. Stephenson left DBI's employ seven months later, in March 1987, when DBI closed its Huntsville office. At that time, Ms. Stephenson was offered a position in DBI's Decatur office but declined for personal reasons. (MMB Ex. 4, p. 14; MMB Ex. 12, p. 5.) DBI did not hire another minority until February 1989. (MMB Ex. 12, p. 6.) During the 30-month period from August 1986 to February 1989, 37 persons, all white, joined the Stations in a variety of professional, managerial, technical, clerical, and sales positions. (MMB Ex. 12, pp. 6, 8-9.) This number included 31 "hires" (MMB Ex. 12, p. 6) and 6 "trainees" (*id.* at pp. 8-9).

26. Mr. Bramlett evaluated the effectiveness of the Stations' EEO program on an ongoing informal basis throughout the License Period. He judged the effectiveness of his EEO efforts by whether or not minority applicants were produced. Mr. Bramlett believed the Stations' EEO program was very effective because of its results, namely, DBI hired a number of Blacks in a community where, to his knowledge, few if any Blacks were ever hired by non-minority stations. (DBI Ex. 1, p. 6; Tr. 347-51, 365-66, 385.)

27. During the License Period, Mr. Bramlett read the trade press and perhaps an Arent Fox memo or two regarding EEO obligations. He found counsel's instructions too complicated to follow. He did not ask communications counsel, the National Association of Broadcasters, or the Alabama Broadcasters Association how to implement a more formal EEO program, nor did he attend any EEO seminars. On or about the time of the filing of the renewal applications, Mr. Bramlett did briefly discuss with Mr. Van Horn in general terms the need to implement a more formalized program. As a result of this conversation, Mr. Bramlett in January 1989 ordered from the National Association of Broadcasters its Legal Guide and certain EEO materials. Mr. Bramlett did not remember whether the Stations' formal EEO program was implemented before or after the NAACP's Petition to Deny was filed. (DBI Ex. 1, pp. 6-7; Tr. 410-11.)

28. Except for 1982, the Annual Employment Reports (FCC Form 395) during the License Period were prepared in draft form by Mrs. Bramlett and reviewed by Mr. Bramlett. In preparing the drafts, Mrs. Bramlett would review the payroll records for the two-week period covered by the report in question, prepare a list of employees during that period, categorize those employees as best she could in accordance with the Annual Employment Report's instructions, and then show the draft report to her husband. In the earlier part of the License Period, the reports were then typed up, signed, and mailed to the Commission. After Arent Fox began representing DBI, the executed reports were usually sent to Mr. Van Horn for his review before they were filed. (DBI Ex. 1, p. 7; DBI Ex. 3, pp. 27-30; Tr. 400-01.)

Issue 1 -- Misrepresentation/Lack of Candor Issue

Renewal Applications

29. On December 1, 1988, the above captioned applications for renewal of license of the Stations were filed with the Commission. Attached to the renewal applications was DBI's Broadcast Equal Employment Opportunity Program Report (FCC Form 396), dated November 23, 1988. The renewal applications, including the Form 396, were prepared by Mr. and Mrs. Bramlett and transmitted to Mr. Van Horn for filing. (DBI Ex. 1, pp. 7-8.)

30. The Form 396 reflected, *inter alia*, that there were 16 total hires during the period from November 1, 1987, to November 2, 1988 (the "Reporting Year"), that two of these hires were for positions in the upper-four job categories, and that none of these hires was a minority. The Form 396 further indicated that DBI had received no minority referrals during the Reporting Year from advertisements or from any of the educational institutions that it contacted, and that DBI had not contacted any minority organizations. (MMB Ex. 1, pp. 3-4.) The recruitment information in the Form 396 was based solely on recollection because DBI had not maintained extensive records of its recruitment efforts. (DBI Ex. 1, p. 7; Tr. 401-02.)

31. On December 7, 1988, Mr. Van Horn sent Mr. Bramlett a letter memorializing a conversation they had about DBI's affirmative action program. Mr. Van Horn stated in the letter that he would not be surprised if the Commission were to question DBI's program because of the absence of minorities on the staff and the apparent absence of substantial outreach efforts to attract minority applicants. Mr. Van Horn urged Mr. Bramlett to compile mitigating information and develop a plan so that the Stations would be more affirmative in their future recruitment efforts. (MMB Ex. 16.)

32. Mr. Bramlett was not "overly concerned" with Mr. Van Horn's advice at the time because he believed DBI had "a good EEO program." (Tr. 408.) Nevertheless, in January 1989, in direct response to Mr. Van Horn's letter, Mr. Bramlett ordered "A Broadcasters EEO Handbook" from the National Association of Broadcasters and thereafter formalized the Stations' EEO procedures in accordance with the handbook. (DBI Ex. 1, p. 6; Tr. 411.)

Petition to Deny and DBI's Opposition

33. As noted earlier, a Petition to Deny the Stations' renewal applications was filed on March 1, 1989. The petitioners alleged, based upon a review of the Stations'

Annual Employment Reports (FCC Form 395) and the Form 396, that the Stations failed to employ any minorities and failed to implement an adequate EEO program during the license term. The petitioners therefore urged the Commission to conduct a *Bilingual* investigation and, if need be, a hearing "to determine whether the licensee discriminates against minorities or otherwise violates the EEO rule." (MMB Ex. 2, p. 6.)

34. Mr. Bramlett learned of the filing of the Petition from Mr. Van Horn, and reacted viscerally. Mr. Bramlett understood the Petition to allege that he was a racist and guilty of discrimination. He was horrified, surprised, hurt, and angry. (DBI Ex. 1, p. 8; DBI Ex. 4, pp. 31-32; Tr. 184-85, 421-27, 540.) In Mr. Bramlett's mind, he had never discriminated against anyone because of race or anything else. His only goal in hiring employees at the Stations was to find talented workers regardless of race. (DBI Ex. 1, pp. 8-9.) In his own mind, Mr. Bramlett believed the Stations' EEO program was very effective because he had never discriminated against anyone and the Stations had employed many minorities. He set out immediately to gather evidence to prove that the Stations had employed minorities during the License Period. Mr. Bramlett, his wife, his son, Jim, and Mark Goodwin, the Stations' National Sales Manager since 1986, met to search their collective memory and the few records available to identify minority hires during the License Period. Mr. and Mrs. Bramlett separately devoted a substantial amount of time and effort to this issue over the next few days both at work and at home.

35. Mr. Van Horn introduced Mr. Bramlett to Ms. Marshall by telephone in connection with her preparation of an Opposition to the Petition to Deny. (Tr. 134-35, 431.) Ms. Marshall initially familiarized herself with DBI by examining Mr. Van Horn's DBI file. She also reviewed DBI's 1988 renewal applications and Form 395's for the License Period. (Tr. 138.)

36. Ms. Marshall discussed the Petition with Mr. Bramlett. Mr. Bramlett told her that DBI had in fact interviewed and hired minorities during the License Period. (Tr. 143.) Ms. Marshall asked Mr. Bramlett to compile information about the *minority* persons whom DBI had employed during the License Period, and this became Mr. Bramlett's objective. (Tr. 430-32.)

37. On March 17, 1989, Mr. Bramlett telecopied to Mr. Horn a three-page factual recitation concerning the Stations' License Period minority hiring. (DBI Ex. 1, pp. 9-10 and Att. 2; DBI Ex. 2, p. 2 and Att. 1; Tr. 433-34.) Most of the information was derived from recollection. (Tr. 434-37.) During the course of amassing the information, Mr. Bramlett discovered that the representation in DBI's Form 396 about having 16 total hires during the Reporting Year was incorrect. During the Reporting Year, DBI had in fact hired 12 persons and 10, not 2, of those 12 hires were for positions in the upper-four job categories. (DBI Ex. 1, p. 8; Tr. 153, 438-39.) Mr. Bramlett also discovered that DBI had failed to report the presence of minority employees in its 1983 and 1987 Form 395's. (Tr. 424-25.)

38. Mr. Bramlett did not recall receiving any specific instructions from Ms. Marshall or Mr. Van Horn in connection with the preparation of the Opposition. He was sure he informed Ms. Marshall that DBI had in fact hired minorities during the License Period and he understood his task was to provide information describing these hires. (Tr. 431-32, 447-48.) Ms. Marshall recalled focusing with Mr. Bramlett on refuting the allegations in the Petition concerning the absence of minority hires and the

recruitment sources used in the Reporting Year. She did not recall discussing with Mr. Bramlett before the Opposition was filed the possible outcome of the petition to deny process or the possibility that sanctions could be imposed on DBI even though it had minority hires. (Tr. 143-45.)

39. DBI's Opposition was drafted by Ms. Marshall and filed with the Commission on April 14, 1989. The factual portion of the Opposition, paragraphs 4 through 17, was based upon information contained in the Stations' Annual Employment Reports, the Form 396, and minority hiring information supplied by Mr. Bramlett, as supplemented by him in telephone conversations with Ms. Marshall. (MMB Ex. 4, pp. 2-34; DBI Ex. 2, p. 2; Tr. 134-39, 143.) The remainder of the Opposition, the sections entitled "Introduction" and "Conclusion," were prepared by Ms. Marshall based upon the facts set forth in paragraphs 4 through 17 without any further input from or discussion with Mr. Bramlett. (DBI Ex. 1, p. 10; DBI Ex. 2, p. 2.) Ms. Marshall did not ask Mr. Bramlett for documentation to support the information he had supplied. She understood in a general fashion that the minority hiring information supplied by Mr. Bramlett was based in part upon records (the nature of which she did not know) and in part upon recollection. (Tr. 187-88.) At the time of the filing of the Opposition, Ms. Marshall had no understanding as to the total number of hires during the License Period. She concentrated solely on refuting the specific allegations of the Petition. (Tr. 183-84.) Ms. Marshall did not remember reviewing the EEO portion of DBI's 1981 renewal applications (MMB Ex. 17) in preparing the Opposition. She viewed the EEO information in the 1981 renewal applications as a description of DBI's past performance, not as a proposal for the future. (Tr. 139-41.) A draft of the Opposition was first reviewed and edited in a nonsubstantive manner by Mr. Van Horn, then forwarded to Mr. Bramlett for his review. (DBI Ex. 2, p. 2; DBI Ex. 4, pp. 24-25.)

40. Attached to the Opposition as Exhibit C was a "Statement" signed by Mr. Bramlett under penalty of perjury on April 14, 1989, which read in pertinent part:

I have read the foregoing "Opposition to Petition to Deny" and all of the exhibits attached thereto and have determined that, to the best of my knowledge and belief, all of the facts contained therein concerning the employment record and affirmative action efforts of WHOS and WDRM were gathered and supplied by me and my staff and are accurate and complete.

(MMB Ex. 4, p. 33; MMB Ex. 5, p. 7; Tr. 443-44.) The facts Mr. Bramlett was referring to in this portion of his Statement were the facts set forth in paragraphs 4 through 17 of the Opposition. He had no input with respect to the balance of the Opposition, which he considered to be the legal argument of his attorneys upon whom he relied to advocate DBI's position before the FCC. (DBI Ex. 1, p. 10.)

41. In its Opposition, DBI discussed its minority recruitment efforts and overall hiring record during the Reporting Year and thereafter through February 1989 (MMB Ex. 4, pp. 8-12), and its minority recruitment efforts and minority hiring record during the balance of the License Period (*id.* at pp. 12-16). In doing so, DBI corrected certain inaccuracies in earlier EEO-related FCC filings. Specifically, DBI noted that there were 12 hires during the Reporting Year, not 16 as had been reported in the Form

396. Four persons who had worked at the Stations as independent contractors, not employees, were improperly included in the "new hire" total. (*Id.* at p. 9, note 5.) This mistake was discovered by Mr. Bramlett in the course of the preparation of the Opposition. (DBI Ex. 1, p. 11; DBI Ex. 2, p. 2; Tr. 153-54.) DBI also noted that three minority employees had been omitted by oversight from the Stations' 1983 Annual Employment Report and that a fourth minority employee had been omitted from the 1987 Annual Employment Report because the Report, which was not prepared correctly, failed to provide the requisite racial breakdown. (MMB Ex. 4, pp. 15-16, note 10.) These discrepancies were discovered by Ms. Marshall when she compared the minority hiring information supplied by Mr. Bramlett with the Stations' Annual Employment Reports. The explanations for the discrepancies were provided by Mr. Bramlett. (DBI Ex. 1, p. 11; DBI Ex. 2, pp. 2-3; Tr. 143-45.)

42. Ms. Marshall testified that the Opposition was structured like any other pleading. It included a statement of facts supplied by the client and legal argument, based on those facts, prepared by Arent Fox. She said similarly structured pleadings concerning EEO matters had been filed by Arent Fox on many occasions. According to Ms. Marshall, the conclusory statements concerning DBI's compliance with the FCC's EEO rules were not intended to be factual assertions. Rather, they were legal conclusions based on the facts set forth in the Opposition. (DBI Ex. 2, p. 3.)

The July 3, 1989, Letter and DBI's July 28, 1989, Response

43. By letter dated July 3, 1989, from Glenn A. Wolfe, Chief of the Mass Media Bureau's EEO Branch, to Mr. Bramlett, it was stated there was "insufficient information to make a determination that efforts were undertaken to attract minority applicants whenever there were job openings." The following information was requested for *each position filled* during the three-year period from November 1, 1985, to November 1, 1988: "job title, 395-B job classification, the full or part-time status of the position, the date the position was filled, the referral sources contacted, the number of persons interviewed (indicating those that were minority and female), and the referral source, gender and race or national origin (e.g., Hispanic) of the successful candidate." A copy of this letter was sent to Mr. Van Horn. (MMB Ex. 3; DBI Ex. 4, p. 35.)

44. The July 3 letter was received by Mr. Van Horn before it was received by Mr. Bramlett. (DBI Ex. 4, p. 36; Tr. 455-56.) Mr. Bramlett had one brief conversation with Mr. Van Horn concerning the letter and DBI's response. (DBI Ex. 1, p. 12; DBI Ex. 4, pp. 36-37; Tr. 459-60, 746.) Mr. Bramlett believed the conversation took place before he received a copy of the letter. (DBI Ex. 1, p. 12; Tr. 455-56.) Mr. Van Horn did not ask Mr. Bramlett any questions concerning the specific categories of information requested in the July 3 letter. (Tr. 459-60, 745.) The letter asked for specific statistical information which Mr. Van Horn understood the Stations did not have because the pertinent documents had been lost or destroyed. (DBI Ex. 4, pp. 37-39, 41-43; Tr. 746-47.) Mr. Van Horn recalled asking Mr. Bramlett whether he had any additional in-

formation he could provide that was not already in the Opposition. (Tr. 745.) Mr. Bramlett could not recall the specifics of his conversation with Mr. Van Horn, although he did remember that his understanding as a result of the conversation was that the Commission was seeking information only about DBI's *minority* hires and that DBI had already provided such information in the Opposition. (DBI Ex. 1, p. 12; Tr. 460-61.)

45. Mr. Bramlett received a copy of the July 3 letter before DBI's response thereto was filed on July 28, 1989. He did not read the letter carefully because he had already discussed it with his attorney who he assumed had reviewed it carefully himself. He felt comfortable in following his attorney's advice and instructions. He responded to his attorney's questions to the best of his ability. (DBI Ex. 1, p. 12; Tr. 462-65.)

46. By letter dated July 28, 1989, from Mr. Van Horn to Donna R. Searcy, Secretary of the FCC, DBI responded to the July 3 letter by submitting a copy of the Opposition and stating that "[t]he information requested by Mr. Wolfe's office is contained in the text of the Opposition." (MMB Ex. 4 p. 1.)² Mr. Van Horn, referring to himself as a "bumbling idiot," acknowledged that the foregoing statement was not phrased as carefully as it should have been. The statement should have read: "The information requested by Mr. Wolfe's office to the extent available, is contained in the text of the Opposition." (DBI Ex. 4, pp. 67-68.) The July 28 response was prepared by Mr. Van Horn. Ms. Marshall had no involvement in its preparation. (DBI Ex. 2, pp. 4-5; Tr. 189.)

47. Mr. Van Horn made the decision to file a copy of the Opposition in response to the July 3 letter. Mr. Bramlett received a copy of the July 28 response after it was filed. He glanced through it and put it in the Stations' public file. He did not read the July 28 response to see if the questions in the July 3 letter had been answered. (Tr. 465-66.) Mr. Bramlett recognized for the first time when he read the *HDO* that in attempting to prove he was not a racist he had not fully responded to the July 3 letter. He later learned that his counsel believed he had provided all the information available because counsel did not realize Mr. Bramlett had directed his attention solely to minority hires. (DBI Ex. 1, pp. 12-13.)

The March 15, 1991, Letter and DBI's April 18, 1991, Response

48. No communications between the FCC and DBI occurred with respect to the Stations' EEO program for the next 18 months. Then, on February 20, 1991, Hope G. Cooper, a staff person in the Bureau's EEO Branch, telephoned Ms. Marshall regarding the information submitted with the July 28 response. This conversation was followed by a letter dated March 15, 1991, from Mr. Wolfe to Mr. Bramlett, with a copy to Ms. Marshall. The March 15 letter was characterized as a "follow up" to the February 20 conversation between Ms. Cooper and Ms. Marshall, and read, in pertinent part:

² In this connection, it is noted that, although the July 3 letter sought specific information about *all* hires over a particular 3-year period (MMB Ex. 3), the Opposition covered only *minor-*

ity hires over the 7-year License Period (MMB Ex. 4, pp. 2 *et seq.*).

In your inquiry response, you provided information only for positions for which you considered and/or hired minorities. However, we requested recruitment and hiring information for *all full-time and part-time hires* during the reporting period. Because we do not have enough information to determine whether sufficient efforts were undertaken to attract Black applicants when job openings occurred, we are again requesting the following information.

(MMB Ex. 6; emphasis added.) The letter went on to request the same seven categories of information requested in the July 3 letter for each position filled during the one-year period November 1, 1987, to November 1, 1988. (*Id.*)³ This was different in scope from the July 3 letter, which covered the three-year period November 1, 1985, to November 1, 1988. (MMB Ex. 3.)

49. Ms. Marshall did not recall the specific conversation with Ms. Cooper on February 20, 1991, although she did recall that as a general matter each letter from the FCC received in connection with this project was preceded by a telephonic inquiry from Ms. Cooper. (DBI Ex. 2, pp. 5-6.) When Ms. Marshall first received the March 15 letter she examined DBI's file to ascertain what it had submitted in response to the July 3 letter. She determined that the Commission's assessment that DBI's July 28 response did not provide the requested information was accurate. (Tr. 196-98.) She also noticed that the March 15 letter was similar to letters sent by the FCC to other clients seeking additional EEO information. She thought it unusual, however, that the letter only sought information with respect to the one-year period from November 1, 1987, to November 1, 1988. In her experience, most letters of a similar nature from the FCC covered periods of three years or more. (DBI Ex. 2, pp. 5-6; Tr. 192, 196-97.)

50. It was Ms. Marshall's belief at the time she received the March 15 letter that the information included in the Opposition was all the information available to DBI, with respect to the Reporting Year and the License Period, that was responsive to the categories of information requested. This belief was based upon her recollection that in preparing the Opposition "we had obtained as much information as we could from Mr. Bramlett because he did not have complete records." (DBI Ex. 2, p. 6.) This belief was also based upon her review of the July 3 letter, which requested the same categories of information as the March 15 letter for the three-year period November 1, 1985, to November 1, 1988, and the July 28 response thereto, which merely resubmitted the Opposition and provided no additional information. (*Id.*; Tr. 196-97, 213, 215.) It had been two years since the Opposition was filed and, especially in view of the nature of the July 28 response, Ms. Marshall did not understand that Mr. Bramlett had fixed only on minorities and had not provided information relative to all hires. (Tr. 216.)

51. Ms. Marshall recalled talking to Mr. Bramlett in the course of preparing DBI's response to the March 15 letter and mentioning it was unusual that the Commission had just asked for one year's worth of information. (DBI Ex. 2, p. 6; Tr. 196-97.) In one conversation, she asked Mr. Bramlett in a general fashion without going through each category of information requested, whether he had any

more information to add with respect to the Stations' EEO efforts. Mr. Bramlett said he did not. (DBI Ex. 2, pp. 6-7; Tr. 198-99, 213.) Ms. Marshall did not ask how many job openings there were in the Reporting Year, how many applicants there were for such jobs, what the nature of such jobs were, or what the recruitment efforts were with respect to such jobs. Nor did she ask whether DBI had employment applications or interview records, or ask or know whether DBI had payroll records. (Tr. 204-05.) The balance of her conversations with Mr. Bramlett related to gathering information concerning the period commencing February 1989. (DBI Ex. 2, p. 7.) This information was gathered by Mr. Bramlett at Ms. Marshall's suggestion to show the FCC that, although DBI could not provide the requested information with respect to the period specified in the letter, it could provide such information in connection with the post-license term period. (Tr. 199-200, 213, 565, 577-78.)

52. Mr. Bramlett recalled speaking with Ms. Marshall about the March 15 letter two or three times before he actually received a copy of it. In the first conversation, Ms. Marshall told him that the information sought only covered the one-year period from November 1, 1987, to November 1, 1988. In response to Ms. Marshall's questioning, he said he had nothing more to add with respect to that time period. He thought the information sought had already been provided in the renewal applications and the Opposition. The renewal applications and the Opposition did provide referral sources contacted, the number of total hires and the race or national origin of such hires during the Reporting Year. But the renewal applications and the Opposition did not provide for each position filled the job title, the date the position was filled, the referral sources contacted or the number of persons interviewed, including minority or female status where applicable. Based upon the Stations' computer records, Mr. Bramlett could have provided, for each of the 12 positions filled, the job title, 395-B job classification, full or part-time status and the date of hire. There were no written records, however, of the referral sources contacted or the minority status of persons interviewed for each position. In view of the more than two years that had elapsed since the Reporting Year, even if Mr. Bramlett had noted it at the time, he would not have been confident in his ability to accurately recall recruitment information other than in a general fashion as set forth in the Opposition. At the time of this telephone conversation with Ms. Marshall, Mr. Bramlett had not yet read the March 15 letter and Ms. Marshall did not review with him the seven categories of information requested in the letter. (DBI Ex. 1, pp. 13-14; Tr. 467-69, 473-75, 487-88, 653-55.)

53. The balance of Mr. Bramlett's conversations with Ms. Marshall with respect to the March 15 letter centered on gathering information regarding the period commencing February 1989. Mr. Bramlett received a copy of the March 15 letter sometime before DBI's response was filed with the FCC on April 18, 1991. By that time, he had hashed and rehashed the subject matter with Ms. Marshall over the telephone, and he was already gathering information, pursuant to her instructions, toward the preparation of a response. (DBI Ex. 1, p. 14; Tr. 471, 653-55.)

³ This was the Reporting Year covered by the renewal applications and addressed in the Opposition. The *HDO*, at paragraph

9, incorrectly stated that the period covered by the March 15 letter was a three-year period.

54. Mr. Bramlett glanced at the March 15 letter when he received it and filed it away. He did not read it carefully. Nor did he focus on any part of the letter because he thought Arent Fox had already done so and he felt secure in that fact. Based on his conversations with Ms. Marshall, Mr. Bramlett was not concerned by the fact that DBI had received a second inquiry letter from the FCC. He was confident that Arent Fox was doing the legal work and that he had answered every question posed by his attorneys. (Tr. 471-74.)

55. DBI responded to the March 15 letter by letter dated April 18, 1991, with attachments, from Ms. Marshall to Mr. Wolfe. The April 18 response included Ms. Marshall's cover letter and a six-page Supplemental Report to which there were attached Exhibit A (a one-page Statement dated April 18, 1991, signed by Mr. Bramlett), Exhibit B (a letter dated April 8, 1991, from Mr. Tate to Mr. Bramlett), and Exhibit C (a letter dated April 7, 1991, from Hundley Batts to Mr. Bramlett). (MMB Ex. 7.)

56. The Supplemental Report was divided into two basic parts. The first part (MMB Ex. 7, pp. 2-4) consisted of an introduction and what purported to be a summary of the information set forth in the July 28, 1989, response (*i.e.*, the Opposition), preceded by the following statement:

In response to the instant request, the licensee has reviewed the stations' records and determined that it has nothing more to add. All of the information which is available for the 1982 through February 1989 period concerning the stations' EEO efforts was supplied in its July 28 response.

(*Id.* at pp. 2-3.) The first part of the Supplemental Report concluded with the following paragraph ("Concluding Paragraph"):

As a result of their contact with these recruitment sources, from 1982 through February 1989, the stations hired *approximately 20 new employees* of which 7, or 35%, were African-Americans. Therefore, the stations' efforts were very successful despite the fact that there are only 7.4% African-Americans in the local labor force.

(*Id.* at p. 4; footnotes omitted; emphasis added.)⁴

57. The second part of the Supplemental Report (MMB Ex. 7, pp. 5-7) provided new information concerning the Stations' recruitment efforts and minority and non-minority hiring record with respect to the period commencing February 1989. The new information consisted of a description of eight hires at the Stations from February 1989 through July 30, 1990, including two Black males and one Black female, along with the number of minority and non-minority referrals, the referral sources and the job classification for each position. (*Id.*)

58. The Supplemental Report was prepared by Ms. Marshall based on her review of the Opposition and information supplied by Mr. Bramlett. The Supplemental Report

was reviewed by Mr. Van Horn before it was sent to Mr. Bramlett for his review. (DBI Ex. 2, p. 8; DBI Ex. 4, pp. 48-49; Tr. 211.)

59. The statement in the Supplemental Report that there was "nothing more to add" was based upon Ms. Marshall's mistaken belief about the facts, as set forth in paragraph 50 above. The Concluding Paragraph was added by Ms. Marshall with the intention of summarizing the preceding two pages of the Supplemental Report and pertinent portions of the Opposition. Ms. Marshall did not discuss the Concluding Paragraph with Mr. Bramlett. The statement that there were "approximately 20 new employees" hired during the License Period was based upon the statements in the Opposition that there were 12 new hires in the Reporting Year and 7 minority hires in the balance of the License Period. At the time of the preparation of the Supplemental Report, Ms. Marshall believed that the information set forth in the Opposition represented all the information available for the License Period. While the total number of hires discussed in the Opposition equalled 19, Ms. Marshall wrote "approximately 20" to account for the fact that DBI did not have complete records and that some of the information in the Opposition was based on memory. (DBI Ex. 2, pp. 8-9; Tr. 215-17.)

60. During the period in question, Ms. Marshall never doubted the accuracy of the statement that there had been "approximately 20 new employees" hired during the License Period. She testified:

I didn't question the number 20 . . . because I pictured this as a small station, as a Mom and Pop organization, and as a very stable organization where few people came and left. And even if it was a larger organization, I listen to WMAL, Harden and Weaver, every morning and those two people have been there for 20 or 30 years and nobody has left. They're the same engineers -- and I have never visited radio stations, and the fact that there were only 20 people that they hired during that seven year period didn't strike me as being unusual and I never questioned it in my own mind. I never questioned Mr. Bramlett about it.

(DBI Ex. 2, p. 9.) Ms. Marshall did not pay heed to the composition of the "approximately 20" hires, *i.e.*, 12 non-minorities in one year, the Reporting Year, and 7 minorities for the balance of the 7-year License Period. She recognized in hindsight that she should have questioned Mr. Bramlett further about this scenario, but she believed the number 20 was correct. (*Id.*) Mr. Van Horn had a similar understanding of the nature of the Stations and the size, composition, and stability of its staff. He had no reason to doubt the accuracy of the number of hires. (DBI Ex. 4, pp. 44-45, 51-53.)

61. Mr. Bramlett confirmed that the Concluding Paragraph was not prepared by him and not discussed with him. Mr. Bramlett did not provide Ms. Marshall with this information. Mr. Bramlett testified:

approximately 20 new employees were Black. The record establishes that this was the first time DBI made this representation.

⁴ The HDO, at paragraph 9, incorrectly stated that DBI "reiterated" in its April 18 response that seven (35 percent) of

I would never purport to tell anybody in the radio business with a straight face that you hire 12 people in one year, 8 people in the next year and a half and only 7 people, all of whom were minorities, in the previous six years in Decatur, Alabama, or at any radio station. I know it's not true and I would never try to get anybody to believe it.

(DBI Ex. 1, p. 16.)

62. Mr. Bramlett's Statement, Exhibit A of the Supplement Report, was made under penalty of perjury and read, in pertinent part:

I have read the foregoing Supplemental Report relative to the employment practices of Stations WHOS and WDRM and have determined that, to the best of my knowledge and belief, all of the facts contained therein concerning the employment record and affirmative action efforts of WHOS and WDRM were gathered and supplied by me and my staff and are accurate and complete.

(MMB Ex. 7, p. 9.) Before signing this Statement, Mr. Bramlett flipped through the April 18 response in order to locate the information he had supplied to Ms. Marshall with respect to the eight new post-February 1989 hires. Mr. Bramlett read such information (MMB Exhibit 7, pp. 6-7) carefully and confirmed its accuracy. Mr. Bramlett did not read the Concluding Paragraph where it was represented that DBI had approximately 20 new hires during the License Period, and was unaware that DBI had made any representation as to the total number of hires at the Stations during the License Period. As was his habit, when he saw a page with a lot of footnotes he believed there was no sense reading it because it was "legal arguments and legal stuff" which he would not be able to comprehend.⁵ Mr. Bramlett was asked by Ms. Marshall to review the draft and let her know if any changes were necessary. However, at the time, it was Mr. Bramlett's practice to sign anything his lawyers sent to him to sign. (Tr. 478-83, 560-64, 570-71.)

63. Ms. Marshall confirmed that, in reviewing the draft of the Supplemental Report with Mr. Bramlett, she concentrated specifically on the facts set forth about the eight new post-February 1989 hires (MMB Ex. 7, pp. 5-7), and did not discuss the materials preceding those pages, which represented her attempt to summarize the information set forth in the Opposition. (DBI Ex. 2, p. 8; Tr. 212.)

The October 7, 1991, Telephone Call and DBI's October 15, 1991, Response

64. The next communication between the FCC and DBI took place on or about October 7, 1991, when Ms. Cooper of the EEO Branch telephoned Ms. Marshall. Ms. Marshall recalled that Ms. Cooper, in a brief conversation, questioned the variation in the Stations' hiring rate, noting that for the Reporting Year there were 12 hires and that this was more than other years either before or after. After her conversation with Ms. Cooper, Ms. Marshall telephoned Mr. Bramlett, informing him of Ms. Cooper's question. Mr. Bramlett explained that the turnover rate at radio stations

varied from year to year. During this short conversation, Ms. Marshall directed her attention to the variation in turnover rate. She did not focus at all on the number 20 because she had no doubt as to its accuracy. (DBI Ex. 2, p. 10; Tr. 231-33.)

65. According to Mr. Bramlett's recollection of this conversation, Ms. Marshall simply asked him how DBI could have had 12 hires in the Reporting Year and then have had 8 hires in the year and a half thereafter; why was there a difference? Mr. Bramlett answered that employee turnover was different from one year to another. He was perplexed as to why Ms. Cooper had asked such a question, but in his mind it did relate to the one-year period addressed in the March 15 letter and the new information for the period commencing February 1989 supplied in DBI's April 18 response. (DBI Ex. 1, p. 17; Tr. 566-70.) Mr. Bramlett viewed his response as favorable to DBI because even though the turnover rate was going down, DBI's EEO efforts had produced more minority applicants and hires. (Tr. 569.) Mr. Bramlett recalled that there was only one call from Ms. Marshall and that she asked only that one question. His response did not require a lot of concentration. In this conversation, Ms. Marshall never mentioned the number 20 and never discussed the total hires over the License Period. (DBI Ex. 1, p. 17; Tr. 575-76.)

66. Ms. Marshall prepared a draft response and sent it to Mr. Bramlett for his review and signature. (Tr. 572-73.) The draft was in the form of a "Statement" executed under penalty of perjury which consisted of five numbered paragraphs. (MMB Ex. 8, p. 2.) Ms. Marshall showed the draft to Mr. Van Horn before sending it to Mr. Bramlett. (DBI Ex. 2, p. 10; DBI Ex. 4, pp. 55-58; Tr. 235.)

67. When Mr. Bramlett received the draft Statement, he scanned it and found the paragraph which discussed the turnover rate (paragraph 4). Mr. Bramlett read that paragraph, and only that paragraph, before signing the Statement on October 10, 1991. (Tr. 573, 651; MMB Ex. 8, p. 4.)⁶ Paragraph 5 of Mr. Bramlett's Statement read:

I have read the foregoing and have determined that, to the best of my knowledge and belief, all of the facts contained herein concerning the employment record of Stations WHOS and WDRM are accurate and complete.

(MMB Ex. 8, p. 4.) Although Mr. Bramlett had read only paragraph 4, he testified that he believed that his October 10 Statement was accurate and responsive to the FCC's request. (DBI Ex. 1, pp. 17-18.)

68. On October 15, 1991, Ms. Marshall filed DBI's response to Ms. Cooper's telephone inquiry. The response consisted of Ms. Marshall's cover letter, to which was attached the five-paragraph Statement of Mr. Bramlett referred to above. (MMB Ex. 8; DBI Ex. 1, p. 18.) At paragraph 3 of Mr. Bramlett's Statement, Ms. Cooper's informal request was described as follows:

Ms. Cooper has requested information concerning the number of new hires at the stations during the period 1982 through 1989 and thereafter. Specifically,

⁵ In this connection, it is noted that approximately three-fourths of the page on which the Concluding Paragraph appeared (MMB Ex. 7, p. 4) consisted of footnotes.

⁶ Mr. Bramlett initially testified that he did not read any of this Statement before signing it. (Tr. 571-73.) He later corrected this testimony as reflected in the text. (Tr. 651.)

Ms. Cooper is questioning why so few new hires (20) were reported for that seven-year period when the stations had as many as eight, almost one-half that number, job openings during the 15-month period from February 1989 through mid-April 1991, alone.

(MMB Ex. 8, pp. 2-3.) DBI's response to this request was set forth at paragraph 4 of Mr. Bramlett's Statement, as follows:

In response to this request, the stations' staff has again reviewed the stations' records and determined that there is nothing more to add. All of the information which is available for the 1982 through April 1991 period concerning the stations' EEO efforts has been provided to the Commission in various filings, including the licensee's July 28, 1989 response to the FCC's earlier request for EEO information and the licensee's April 18, 1991 Supplement thereto. The 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.

(*Id.* at p. 3.)

69. In hindsight, it was clear to Mr. Bramlett that paragraph 3 of his Statement assumed DBI had previously reported there were 20 new hires during the License Period. Mr. Bramlett had not discussed that point in his conversation with Ms. Marshall and missed it in his limited review of the Statement, having read only paragraph 4 thereof. As a rule, Mr. Bramlett did not pick apart or question statements prepared by his attorneys for his signature. (DBI Ex. 1, pp. 18-19; Tr. 651.) Rather, it was his practice at the time to sign anything his attorneys asked him to sign. (Tr. 563-64.) Mr. Bramlett admitted he made a "terrible mistake -- the biggest mistake of my career." From the time of his receipt of the Petition to Deny until December 1991, Mr. Bramlett directed his efforts to documenting the Stations' EEO efforts and *minority* hiring, not the total number of hires, because of his obsession with the accusation that he had discriminated against Blacks. (DBI Ex. 1, p. 19.)

70. The facts set forth in Mr. Bramlett's Statement were consistent with Ms. Marshall's understanding at the time. She did not question the accuracy of the representation that there were 20 new hires during the License Period. She therefore did not question Mr. Bramlett about that fact in connection with her preparation of his Statement. (DBI Ex. 2, p. 11; Tr. 234.)

The Period From October 15, 1991, Through Early January 1992

71. Between October 15, 1991, and mid-December 1991, there were a series of telephone calls between Ms. Marshall and Ms. Cooper and, on one occasion, Mr. Wolfe. The purpose of the conversations was to clarify the number of total hires during the License Period. Ms. Cooper had concluded, based on her review of the Stations' Annual Employment Reports, that the number of hires during such period must have been more than 20. At first, Ms.

Marshall did not agree with Ms. Cooper's analysis. Ms. Marshall did her own analysis of the Annual Employment Reports and had arrived at a total of 20 new hires for the period. Ms. Marshall calculated the change from year to year in the number of full-time and part-time employees at the Stations as reflected in the Stations' Annual Employment Reports, after modifying the numbers to reflect the corrections made in DBI's Opposition to Petition to Deny. She counted any increase in the total number of full-time and part-time employees from one year to the next as an increase in the number of hires. She added all such increases from year to year during the License Period and came up with 20. She did not subtract any decreases in such employees from year to year. After follow-up clarifying conversations with Ms. Cooper, Ms. Marshall realized that under her analysis, based solely on the Annual Employment Reports, there were no new hires between 1987 and 1988 because the number of full-time and part-time employees in the 1988 Report was less than the corresponding number in the 1987 Report. In fact, however, as had been reported in the renewal application, as corrected in the Opposition, there had been 12 hires during that period. Ms. Marshall therefore came to agree with Ms. Cooper's analysis and concurred that there must have been at least 32 new hires during the License Period, *i.e.*, 20 based on Ms. Marshall's analysis of the Annual Employment Reports plus 12 in the Reporting Year. (DBI Ex. 2, pp. 11-12; Tr. 236-40.)

72. Ms. Marshall discussed with Mr. Bramlett her conversations with Ms. Cooper. (DBI Ex. 2, p. 12.) While Ms. Marshall did not have a specific recollection of telling Mr. Bramlett that DBI had represented there were approximately 20 hires at the Stations during the License Period, the premise of their discussion was that there must have been more than 20 hires in the License Period, so the number 20 must have been discussed at this point. (Tr. 236-42.) Because she believed that the information previously provided to the Commission was based upon all available documents, Ms. Marshall asked Mr. Bramlett, probably in mid-December 1991, to have his staff members search their collective recollection to see whether they could remember additional hires, and related recruitment information, during the License Period. (DBI Ex. 2, pp. 12-13.) Ms. Marshall could not recall Mr. Bramlett's reaction to her request, nor could she recall Mr. Bramlett commenting as to the accuracy or inaccuracy of the number 20. One comment made by Mr. Bramlett during their discussion about the total number of hires in the License Period did stick in her mind.⁷ Mr. Bramlett said something to the effect of, "Oh, you mean now I have to do more than one year," or "go back beyond a year." Ms. Marshall thought the comment was odd at the time, but she did not question it. She just tried to coax Mr. Bramlett to remember additional hires. (*Id.* at p. 13; Tr. 238, 241, 257, 286-87.)

73. Mr. Bramlett recalled the following concerning his conversations with Ms. Marshall in December 1991, regarding her telephone calls with Ms. Cooper. Ms. Marshall said that Ms. Cooper had convinced her there must have been at least 30 new hires at the Stations during the License Period. Ms. Marshall noted that this was more than the "approximately 20" hires that DBI had described previously, and she asked Mr. Bramlett to see whether he or his

⁷ Mr. Bramlett may have said other things as well, but Ms.

Marshall could not recall them. (Tr. 257.)

staff could remember additional hires, and related recruitment information, during the License Period. This was the first time Mr. Bramlett became aware that DBI had made statements in its April 18 and October 15, 1991, responses about the total number of hires during the License Period. (DBI Ex. 1, p. 20; Tr. 579-81, 589-90.) He was "surprised and a little bit shocked" to learn this, but he did not have a fear that DBI had "done some terrible wrong." (Tr. 580, 590.) He knew that DBI had made representations as to the number of minority hires in the License Period (in the Opposition) and the total number of hires in the Reporting Year (in the renewal applications and the Opposition), and that the FCC had asked for Reporting Year hires in the March 15 letter. At some point in his conversations with Ms. Marshall, Mr. Bramlett asked her by way of clarification whether the FCC wanted information beyond the Reporting Year and she answered in the affirmative. Once he learned the FCC wanted such information, he directed his attention to gathering it. He did not dwell on what had been represented, nor did he tell Ms. Marshall at this time or any time prior to the release of the HDO that he had never intended to make a representation as to the total number of hires during the License Period. (DBI Ex. 1, pp. 20-21; Tr. 579-82, 589-90.)

74. After the holidays in late December 1991, or early January 1992, Mr. Bramlett and his wife gathered, pursuant to Ms. Marshall's instructions and based solely upon their recollections, hiring and recruitment information with respect to an additional 17 hires during the License Period. Mr. Bramlett's focus in this initial search was on additional hires with respect to whom he could also recall recruitment information, such as source, number, and racial breakdown of interviewees. He transmitted this information to Ms. Marshall in early January 1992. In discussing this information with her, she asked Mr. Bramlett for the first time whether he could provide similar recruitment information for the 12 hires during the Reporting Year. Mr. Bramlett said he could try, but that it too would be based only upon recollection. He provided this information to Ms. Marshall shortly thereafter. (DBI Ex. 1, p. 21; Tr. 672-73.)

75. After Mr. Bramlett sent the information about the 17 additional hires to Ms. Marshall, he thought further about whether he could identify any additional hires. At this point, he decided he needed to review payroll records, not just rely on memory of recruitment efforts, to do the search properly. He asked his wife to search for payroll records for the period prior to 1988, although he believed that the payroll records had been lost or destroyed as a result of previous studio moves.⁸ Payroll records for 1988 were available on the Stations' computer. (DBI Ex. 1, pp. 21-22.)

76. Mr. Bramlett had not looked for payroll records before this time because he did not think he needed them. He had only reviewed EEO-related documents because his

efforts had been directed to gathering recruitment and minority hiring information to deal with the discrimination charge, and the payroll records contained no such information. (DBI Ex. 1, p. 22.) It never occurred to Mr. Bramlett, and it was never suggested to him, that payroll records might be useful merely to identify who worked at the Stations during the License Period in order to help trigger his recollection as to the universe of minority hires or other EEO-related information. Up until December 1991 Mr. Bramlett was not aware that the FCC wanted information about all hires during the License Period. Mr. Bramlett's mindset was locked in on EEO-related information, by which he meant minority hires, recruitment efforts, applicants and interviewees, and he searched the Stations' EEO records only. Ms. Marshall never told him to search for payroll records even if they did not contain EEO information. (Tr. 669-84.)

The January 2, 1992, Letter and DBI's January 13, 1992, Response

77. By letter dated January 2, 1992, from Mr. Wolfe to Mr. Bramlett, Mr. Wolfe summarized the prior communications between the FCC and DBI through the October 15, 1991, response, and then stated as follows:

Upon review of the stations' Annual Employment Reports during the license term and your inquiry responses, we determined that the number of hires occurring during this period must have been greater than 20 just to account for the changes in staff size and composition from 1982 through 1988. Ms. Cooper therefore again spoke with your attorney concerning the number of hires that you reported at the station during the license term and requested an explanation for the above-noted discrepancy.

(MMB Ex. 9, pp. 1-2.) Mr. Bramlett received the January 2 letter sometime prior to January 8, 1992, the initial deadline for responding to the FCC's telephonic request. (DBI Ex. 1, p. 23.) Mr. Bramlett briefly glanced over the letter, but did not read it carefully. He thought it was a rehash of Ms. Cooper's telephonic request to Ms. Marshall. (Tr. 592-93, 595.) Mr. Bramlett did not ponder the January 2 letter or solicit help in understanding it fully because he did not fear that DBI's license was in jeopardy. His mindset was that errors had been made and efforts were then underway to develop the information that Ms. Marshall requested. (Tr. 596-97.) Ms. Marshall did not review the contents of the letter with Mr. Bramlett. In her view the January 2 letter summarized the substance of her conversations with Ms. Cooper, including her request as to the accuracy of the number 20. Ms. Marshall and Mr. Bramlett were in the process of responding to Ms. Cooper's telephonic request when the letter was received. (Tr. 242-47.)

⁸ When Mr. Bramlett first thought about old payroll records in December 1991, he believed all such records had been thrown away when the upstairs storage area in the building where the Stations' studios were previously located had been cleaned out in early to mid-1988. At that time, three one-and-one-half ton truckloads of material were taken to the dump. Mr. Bramlett had shown his son and one of his friends, who were involved in the clean-up, what he wanted saved, but they became aggressive in their work and threw away a lot of the things he intended for them to keep. It was in that context that Mr. Bramlett

thought that all the records were probably gone. The storage area where the files were ultimately found was a commercial storage locker, not an organized area. It was full of boxes of materials, old microphones, old air conditioners, and other discarded equipment thrown in, in a disorganized way. There was no record or inventory of its contents. It was not a place one could go to and spot what one was looking for without stepping over and around the various items stored there and going through boxes to see what they contained. (DBI Ex. 1, p. 22; DBI Exs. 12-18.)

78. Early on January 8, just prior to the time DBI's response to the January 2 letter, disclosing 17 additional hires, was to be filed, the payroll records for the period 1982 through 1987 were located. Mr. Bramlett telephoned Ms. Marshall and told her that payroll records had been located which he believed could clarify the total number of hires during the License Period. Ms. Marshall then spoke with Mr. Van Horn, called Mr. Bramlett back, and directed him to review the records and provide her with accurate and complete hiring information as soon as possible for submission to the FCC. (DBI Ex. 1, p. 23; DBI Ex. 2, p. 14.) Ms. Marshall then called Ms. Cooper and requested an extension of time within which to respond to the January 2 letter. It was agreed that the response would be filed by January 13. (DBI Ex. 2, p. 14.) In the interim, Mr. and Mrs. Bramlett reviewed the payroll records. (DBI Ex. 1, p. 23.) Midday on Friday, January 10, 1992, Mr. Bramlett telecopied to Ms. Marshall information based on the payroll records with respect to the hiring of 83 "employees" and 57 "non-employees." (DBI Ex. 1, p. 23; DBI Ex. 2, p. 14.) Although Ms. Marshall believed there had to have been more than 20 total hires during the License Period, she was "surprised" to learn that the total was quite a bit more than 20. Ms. Marshall spoke to Mr. Van Horn about this matter and his reaction was that a mistake had been made. He instructed Ms. Marshall to concentrate with Mr. Bramlett on getting accurate information to the FCC. (Tr. 261-62.)

79. At some point after the discovery of the payroll records and before the filing of DBI's response to the January 2 letter, Mr. Bramlett and Mr. Van Horn spoke by telephone. Mr. Van Horn told Mr. Bramlett that the disclosure of the discovery of payroll records and the existence of a substantial number of additional hires would probably have a serious negative impact on DBI. Mr. Bramlett was aware that disclosure of this information could result in the designation of the renewal applications for hearing. (DBI Ex. 1, p. 23; Tr. 597, 736-37.) Mr. Bramlett believed, however, that if he provided the FCC with all the information they requested DBI would not have any problem. (Tr. 597.) There was never any consideration given by Mr. Bramlett, Ms. Marshall, or Mr. Van Horn to not disclosing the newly discovered information. (DBI Ex. 1, pp. 23-24; DBI Ex. 2, pp. 14-15; DBI Ex. 4, pp. 60-61, 68-69; Tr. 757.)

80. By letter dated January 13, 1992, from Ms. Marshall to Mr. Wolfe, DBI submitted in response to the January 2 letter a Supplemental Report (the "Second Supplemental Report") consisting of four pages of text, attached to which were Exhibit A (titled "New Hires at Stations WHOS/WDRM During 1982 - February 1989"), and Exhibit B (a "Statement" under penalty of perjury executed on January 13, 1992, by Mr. Bramlett). (MMB Ex. 10.) Exhibit B, Mr. Bramlett's Statement, read in pertinent part:

I have read the foregoing [Second] Supplemental Report relative to the employment practices of Stations WHOS and WDRM and have determined that, to the best of my knowledge and belief, all of the facts contained therein concerning the employment record and affirmative action efforts of WHOS and WDRM were supplied by me and my staff and are accurate and complete.

(*Id.* at p. 9.) The January 13 response was prepared by Ms. Marshall based upon her review of DBI's previous filings, her understanding of the facts, and information supplied by Mr. Bramlett. (DBI Ex. 2, p. 15.)

81. The text of the Second Supplemental Report consisted of a summary of the January 2 letter with the following two paragraphs:

In response to the instant request, the licensee has again reviewed the stations' records. As a result of its review of the existing records, the licensee has determined that the information previously provided to the Commission was the best information the licensee was able to provide based on available documentation of recruitment efforts. The licensee has not, prior to the instant report, provided recruitment information which goes beyond that which could be verified from contemporaneous records maintained at the stations.

However, in view of the FCC's concern in its most recent letter that the stations had a greater number of new hires during the 1982 through February 1989 period than previously reported, the stations' staff has searched its collective memory and determined that 83 new hires, including the seven minority new hires described in the licensee's July 28 Report, rather than the "approximate [sic] 20," should have been reported. [Footnote 2 omitted.] It must be noted that the recruitment information for these additional new hires is based almost entirely on the collective memory of the staff. With the exception of some payroll lists [Footnote 3], no documentation exists to support the information provided about the additional new hires.

Footnote 3 read as follows:

The existence of payroll lists were discovered last week. The lists were discovered in a warehouse off-site, and, according to the staff, apparently had been stored there during a move of the stations' studios. The staff was unaware of the existence of these payroll lists and believed that they had been lost or destroyed during the move. Consequently, the staff had relied on the few records which remain on site at the stations to support their prior estimate that there were "approximately 20" new hires. With the discovery of the warehoused lists, the staff can now more accurately determine the number of new hires. However, any information provided herein about the stations' efforts to recruit the additional new hires is based on the collective memory of the staff.

(MMB Ex. 10, pp. 3-4.)

82. The foregoing portions of the Second Supplemental Report were prepared by Ms. Marshall based upon and consistent with her understanding of the pertinent facts. She did not discuss with Mr. Bramlett the use of the terms "available documentation" or "contemporaneous records." Nor did she discuss with him to what they might refer. In her mind they were generic references to the information available to Mr. Bramlett concerning the Stations' recruitment efforts. She also did not discuss with Mr.

Bramlett the explanation set forth in Footnote 3 as it pertained to the prior estimate of approximately 20 new hires. (DBI Ex. 1, p. 25; DBI Ex. 2, pp. 16-17; Tr. 610.)

83. Exhibit A of the Second Supplemental Report set forth hiring information for each year from 1982 through 1988 and for the first two months of 1989, and listed the recruitment sources relied upon during the License Period. Exhibit A further provided the following information with respect to certain "non-employee" hires and recruitment:

During the period 1982 through 1988, WDRM/WHOS had a total of 57 people who worked from 1 day up to 60 days as talent only and were not employees of the stations, although a certain number of these were considered part-time employees at the time of the filing of the Annual Employment Reports. It is the policy of WHOS/WDRM that any hire does not become permanent until after 60 days.

(MMB Ex. 10, p. 7.) The facts set forth in Exhibit A were provided by Mr. Bramlett. (DBI Ex. 1, p. 26; DBI Ex. 2, p. 17; Tr. 605-06.) The last sentence of the paragraph quoted above represented Ms. Marshall's understanding of the Stations' policy. Ms. Marshall did not herself consider or discuss with Mr. Bramlett the FCC's policy concerning whether or not an individual working at a broadcast station was considered an employee. No breakdown was provided at the time of the filing of the January 13 response as to the number of individuals within the 57 who were on probation versus those considered temporary. Exhibit A was prepared in a short period of time in order to meet the extended January 13 filing deadline. The objective of both Ms. Marshall and Mr. Bramlett was to ensure that the facts set forth therein were as accurate as possible. (DBI Ex. 1, p. 26; DBI Ex. 2, pp. 17-18.)

84. Mr. Bramlett acknowledged, after carefully reviewing Footnote 3, that the fourth sentence thereof implied that DBI had intended to state in earlier filings that there had been approximately 20 hires during the License Period. However, Mr. Bramlett did not take notice of the facts set forth in the textual portion of the Second Supplemental Report and therefore was not cognizant of the explanation set forth in Footnote 3. This was so because Mr. Bramlett received for his review by facsimile a draft of the January 13 response at approximately 3:30 p.m. on the day it was due, *i.e.*, January 13. (DBI Ex. 1, pp. 26-27; Tr. 606.) Mr. Bramlett "had about 20 minutes to turn this around" and get it back to Ms. Marshall. Consequently, the only thing he looked at, and was confident about, was Exhibit A. (Tr. 606.) Indeed, except for the contents of Exhibit A, Mr. Bramlett had no idea as to the meaning of the Second Supplemental Report. In attesting to the accuracy of the Second Supplemental Report, he was attesting to the accuracy of the facts he had provided, as set forth in Exhibit A, which he did in fact review. (Tr. 605-09, 650-52.)

85. Ms. Marshall explained how the textual portion of the Second Supplemental Report came to be prepared. The two paragraphs quoted at paragraph 81, *supra*, were prepared and ready to be sent to Mr. Bramlett for his review on January 8, 1992, in connection with the contemplated disclosure of the 17 additional hires which Mr. Bramlett

had developed based solely on his memory. This disclosure included Mr. Bramlett's best recollection of the recruitment sources and the number, race and gender of interviewees, for each of the 17 positions filled. When Mr. Bramlett provided the revised hiring information based upon the payroll records, Ms. Marshall marked up her draft of the January 8 filing in preparing the January 13 response. No change was made to the first paragraph and the second paragraph was modified to change the number of new hires to 83 from 37 and to add Footnote 3 and the reference to the payroll lists in the final sentence. (DBI Ex. 2, p. 18.)

86. At the time the explanation set forth in Footnote 3 as to the basis for the earlier estimate of approximately 20 new hires was prepared, it reflected what Ms. Marshall believed to be the truth. When Ms. Marshall learned that there were at least 83 new hires during the License Period, she never asked Mr. Bramlett directly how he ever could have represented in the April 18 and the October 15, 1991, responses that there were only 20 hires during that period. Instead, she concentrated on what she thought was the most important matter, getting the new information to the Commission as quickly and accurately as possible. She assumed, without confirming her assumption with Mr. Bramlett, that the explanation provided with respect to the basis for the recruitment information, that it had previously been based upon available documentation, also applied to hiring information. Ms. Marshall later learned this was not the case. (DBI Ex. 2, pp. 18-19; Tr. 247-49.)

The January 24, 1992, Letter and DBI's February 7, 1992, Response

87. On January 24, 1992, Ms. Cooper telephoned Ms. Marshall regarding the January 13 response. This conversation was memorialized by a follow-up undated letter to Mr. Bramlett from Mr. Wolfe, with a copy to Ms. Marshall,⁹ requesting in substance the following: (a) with respect to the 83 hires and the 57 "non-employees" listed in Exhibit A to the Second Supplemental Report, state whether the 57 non-employees were included in the 83 hires or whether they were in addition to the 83 hires, and explain what these individuals did at the Stations and why they were not considered employees; (b) provide for all hires, regardless of the length of employment, the exact date of hire, the title, the 395-B classification, and full or part-time status of the position and the name, race, gender and date of termination of the hiree; and (c) explain the status in more detail of the four individuals originally listed in the Form 396 as hires during the Reporting Period but subsequently listed in the Opposition to Petition to Deny as non-employees. Mr. Bramlett did not read the January 24 letter carefully when he received it because he had already spoken with Ms. Marshall about its contents. (MMB Ex. 18; Tr. 611-12.)

88. By letter dated February 7, 1992, from Ms. Marshall to Mr. Wolfe, DBI submitted "Supplementary Materials" in response to the January 24 letter. (MMB Ex. 11.) The Supplementary Materials consisted of two pages of text, Exhibit 1 ("Explanation of 83 Hires 1982 - Feb 1989 by Date"; two pages), Exhibit 2 ("Explanation of 57 Non-hires 1982 - Feb 1989 by Date"; two pages), Exhibit 3 (payroll records which documented information provided in Exhib-

⁹ For ease of reference, this undated letter will be referred to as the January 24 letter because it was sent at or shortly after

the January 24, 1992, telephone conversation.

its 1 and 2; 303 pages), and Exhibit 4 (a "Statement" under penalty of perjury executed by Mr. Bramlett on February 6, 1992; one page). Exhibit 1 contained a list of the 83 new employee hires during the License Period, including the names of the hirees, their dates of hire, the titles of their positions, the FCC Form 395-B classification of their positions, the full or part-time status of their positions, the race and gender of the hirees, and their dates of termination. (*Id.* at pp. 5-6.) Exhibit 2 contained a list of the 57 people who were hired during the License Period but who were not considered "employees" of the Stations, including their names, the dates of their hires, the titles of their positions, the FCC Form 395-B classification of their positions, the trainee or temporary status of their positions, the race and gender of the individuals, and their dates of termination. (*Id.* at pp. 8-9.) The Supplementary Materials also clarified that the 57 "non-employees" were in addition to the 83 hires listed in Exhibit 1. (*Id.* at p. 3.) Exhibit 4, Mr. Bramlett's Statement, read in pertinent part:

I have read the foregoing Supplemental Report [sic] relative to the employment practices of Stations WHOS and WDRM and have determined that, to the best of my knowledge and belief, all of the facts contained therein concerning the employment record and affirmative action efforts of WHOS and WDRM were supplied by me and my staff and are accurate and complete.

(*Id.* at p. 310.)

89. The text of the Supplementary Materials (the first two pages) was prepared by Ms. Marshall. The lists included as Exhibits 1 and 2 were prepared by Mr. and Mrs. Bramlett, with the assistance of the computer expertise of the Stations' National Sales Manager, Mark Goodwin, and were reviewed by Ms. Marshall. The payroll records attached as Exhibit 3, including handwritten payroll records for the period 1982 through 1987 and computer printouts for the year 1988, were provided by Mr. Bramlett. (DBI Ex. 1, p. 29; DBI Ex. 2, p. 20.)

90. The text of the Supplementary Materials provided the following explanation for the non-employee status of the 57 individuals listed in Exhibit 2:

These 57 individuals were not considered by the licensee to be employees of the stations because either (a) they were hired as independent contractors on a purely temporary or "fill-in" basis and were not intended to work on a permanent basis, or (b) they were hired on a permanent basis, but were asked to leave their employment after a 60 to 90-day probationary period because they were found not to be qualified for the positions for which they were hired.

(MMB Ex. 11, p. 3.) It was also noted that the four individuals hired during the Reporting Year but not counted as "employee" new hires on the Form 396 as amended, were listed in Exhibit 2 and were hired on a temporary fill-in basis. (*Id.*) Mr. Bramlett was the source of these explanations. (DBI Ex. 1, p. 29.)

91. Footnote 2 to the text of the Supplementary Materials noted, *inter alia*, that there were "some inconsistencies" between the number of female new hires and the number of new hires in the Stations' upper-level job positions as reflected in the Form 396 for the Reporting Year and as

reflected in Exhibit 1, and there were "slight inconsistencies" in the new hires in the License Period as reflected in the January 13 response and in Exhibit 1. The footnote stated that the inconsistencies were "due to the fact that the members of the stations' staff who prepared the renewal did not prepare the data as carefully as they should." It was also explained that the staff members who prepared the January 13 response did so based on a manual count of the payroll records, and that once the data reflected in the payroll records was entered into the Stations' computer, a more accurate list of the new hires was generated, and was attached (as Exhibit 1). The footnote concluded as follows:

As noted in the January 13 filing, the existence of payroll records was discovered only a few weeks ago in a warehouse off-site. The licensee had been previously unaware of the existence of those records and believed that they had been lost or destroyed during a move of the stations' studios. Consequently, in prior filings to the Commission, the licensee had relied on the few records which remained on site to support its prior estimates of new hires and on the collective memory of the stations' current staff members.

(MMB Ex. 11, p. 2.) The members of the Stations' staff referred to in this footnote included Mr. Bramlett and his wife. Exhibits 1 and 2 were derived from the handwritten payroll sheets, the 1988 computer print-out, and certain canceled checks. (DBI Ex. 1, p. 30.)

92. Prior to the filing of the Supplementary Materials, Mr. Bramlett reviewed only the payroll sheets and the summaries thereof contained in Exhibits 1 and 2. He "glanced at" the remainder of the Supplementary Materials but did not read them. In particular, Mr. Bramlett did not read Footnote 2, or, if he did read it, did not read it carefully enough to understand it. (Tr. 613-15.)

93. By letter dated February 11, 1992, from Ms. Marshall to Mr. Wolfe, DBI submitted revised Exhibits 1 and 2 to the Supplementary Materials. The revised exhibits corrected certain typographical errors and provided additional explanatory information. (MMB Ex. 12.)

Mr. Bramlett's Mindset

94. Mr. Bramlett had been dealing with the FCC since 1962 when he started work as the Stations' engineer. He testified he had always paid meticulous attention to the Stations' operating parameters to ensure that they complied with the FCC's technical rules. Having dealt with the FCC for 30 years, Mr. Bramlett was acutely aware of a licensee's responsibility to comply with the Commission's rules and to be accurate and complete in all submissions to the Commission. (DBI Ex. 1, pp. 30-31.)

95. Mr. Bramlett retained a respected communications law firm to represent DBI before the FCC to ensure that DBI did not run afoul of the FCC's rules. With respect to inquiries from the FCC, he expected his law firm to review each inquiry carefully and to tell him what information he needed to provide in response. Because he was represented by counsel, he did not feel it was necessary or appropriate to second-guess their interpretation or advice with respect to such inquiries. Throughout this *Bilingual* investigation, he felt secure in the fact that his interests were being protected by counsel. Mr. Bramlett at all times responded promptly and fully to his counsel's inquiries and instruc-

tions, to the best of his ability. In responding to these queries, however, he did not refer back to previous DBI filings to make sure the responses fit together and were consistent. He expected his counsel to do that. In hindsight, Mr. Bramlett realized he should have reviewed the entire statements prepared for his signature more carefully. He assumed, however, that the statements reflected the facts he had provided to counsel and nothing more. He also realized in hindsight that he should not have assumed this. As a bottom line, however, Mr. Bramlett testified that he never knowingly provided inaccurate information or concealed information from the FCC. (DBI Ex. 1, pp. 31-32.)

96. Mr. Bramlett described his preoccupation with countering the NAACP's discrimination charge as follows:

It is hard for me to explain my reaction to the fact that I was being charged with racial discrimination by the NAACP and how it affected me both physically and mentally. I have always treated Blacks just as I would Whites. When growing up, I had Black friends. I worked with Blacks. I never saw any difference between us. As the years passed, when I saw acts of prejudice, I would do what I could to make things right. I always hired station employees who could do the job, whether Black or White. In the mid-1970's I owned an engineering and manufacturing company and hired a Black as President. As the operator of a successful radio station, I make myself available to other radio people for advice, counsel and information including Blacks such as Nat Tate, Jr., Ricky Patton and Hundley Batts, who is one of the owners of an AM Station in Huntsville. Over the years, I have met regularly with Mr. Batts to consult and review market data with him so that he can better serve clients and increase his business and also advise him as to techniques and approaches to increasing sales. I know there is prejudice in my town just as there is in every town but I comport myself in a way consistent with my beliefs that all people are equal. That is why when I read the charge from the NAACP I became so upset and almost obsessed in my efforts to prove the charge wrong.

(DBI Ex. 1, pp. 33-34.)

Mr. Bramlett's Reputation in the Community for Truthfulness

97. Six witnesses testified as to Mr. Bramlett's reputation in the community for truthfulness.

98. *Julian D. Butler.* Mr. Butler is a 27-year resident of Huntsville, Alabama, and has engaged in the practice of law in that community for all of those years. Mr. Butler has served as County Attorney for Madison County, Alabama, for the past 16 years. He served as Chairman for the Center of Public Law and Service at the University of Alabama and is a member of the Chancellor's Public Affairs Advisory Group. Mr. Butler represents America's Counties on the Advisory Board of the State and Local Legal Center in Washington, D.C. He has served as Chairman of the Leadership Huntsville/Madison County Program of the Huntsville/Madison County Chamber of Commerce and in leadership positions with a variety of other civic, charitable and political organizations, including as General Counsel of the Alabama Democratic Party and the Madison County Democratic Party, statewide Chairman

of the Unified Democratic Campaign in 1976, and District Chairman for the Boy Scouts on three different occasions. Mr. Butler has been involved in fund drives for the United Way and other charitable organizations, taught Sunday School for 20 years, and was a Deacon in his church. He has been involved in Bar activities, including as a founder and the second chairman of the Environmental Law Section of the Alabama State Bar. (DBI Ex. 11, p. 1; Tr. 694.)

99. Mr. Butler has been acquainted with Mr. Bramlett since February 1988, when he represented DBI in litigation concerning the proposed sale of the Stations. Mr. Butler last did substantive work for DBI a year to a year and a half prior to his testimony in this case. Mr. Butler has never represented Mr. Bramlett personally. Over a period of three years Mr. Butler was in contact with Mr. Bramlett on an average of at least once a week and has had periodic casual contacts with him since then. (DBI Ex. 11, p. 1; Tr. 696-99.)

100. In Mr. Butler's opinion, Mr. Bramlett's honesty and integrity are as high as anyone he has ever dealt with, both personally and professionally. Mr. Butler testified that in the course of his representation of DBI, when it would have been to Mr. Bramlett's advantage to shade the truth, Mr. Bramlett never suggested that be done. Mr. Bramlett was always open with the facts, good or bad. (DBI Ex. 11, p. 1; Tr. 703-04.) In Mr. Butler's words:

If he didn't remember what occurred, he didn't remember what occurred. If something occurred that was adverse to whatever position we were pursuing, he told it that way. He never became[,] as witnesses sometimes do, advocates in attempting to shape their description of the facts to advocate their position. Whatever he remembered, he remembered. What he didn't remember, he didn't remember.

(Tr. 699-700.) Mr. Butler has heard people in the Huntsville/Decatur community discuss Mr. Bramlett and his reputation for honesty and integrity. Mr. Bramlett's reputation is outstanding, both with respect to his ability as an operator of a radio station and his honesty and integrity as a local businessman. (DBI Ex. 11, p. 2; Tr. 700-02.)

101. *Hundley Batts, Sr.* Mr. Batts, an African American, was born and raised in Huntsville, Alabama, and still resides there. Mr. Batts serves as a Commissioner of the Huntsville/Madison County Railroad Authority, and was a former Chairman of the Volunteer Center, an agency funded by the United Way, that handles volunteers for non-profit organizations. Mr. Batts has been an owner of WEUP(AM), Huntsville, Alabama, since the fall of 1987. (DBI Ex. 10, p. 1.)

102. Mr. Batts has known Mr. Bramlett since January 1988, and became personally acquainted with him in mid-1989. In January 1988 Mr. Bramlett provided helpful information concerning the operation of Station WEUP to Mr. Batts' program director, information with respect to the station's format and how to keep the music flowing. At that time Mr. Batts was surprised that Mr. Bramlett would help a competitor in the market. (DBI Ex. 10, p. 1.)

103. Mr. Batts sees Mr. Bramlett at least once a month and talks with him more frequently on the telephone. Mr. Batts relies on Mr. Bramlett as an advisor/mentor. In Mr. Batts' opinion, Mr. Bramlett is above and beyond reproach

with respect to his honesty and integrity; "anything he tells you you can take to the bank." (DBI Ex. 10, pp. 1-2; Tr. 712.)

104. Mr. Batts is active in the radio broadcasting industry in the Huntsville/Decatur area and has been present at various functions and meetings when radio people have talked about Mr. Bramlett. According to Mr. Batts, Mr. Bramlett is thought of as a unique individual in terms of his fairness; since he struggled to become successful, he reaches out a helping hand to people. Mr. Bramlett has a reputation for honesty and great integrity; he brings integrity to the entire radio business in the Huntsville/Decatur area. (DBI Ex. 10, p. 1; Tr. 711.)

105. *B. Lynn Layton*. Mr. Layton is the sole owner of Lynn Layton Chevrolet in Decatur, Alabama. Mr. Layton is active in various community organizations, including the Rotary Club, and was on the Board of the Decatur Chamber of Commerce in the mid-1980's. (DBI Ex. 9, p. 1.)

106. Mr. Layton has known Mr. Bramlett for approximately 10 years. He meets with Mr. Bramlett as many as three or four times a month concerning advertising and promotions on the Stations. According to Mr. Layton, almost everybody active in the Decatur community knows Mr. Bramlett. Mr. Bramlett is civic minded; any time there is a community event, he is there donating his stations' time and services. Mr. Layton has never heard anything but praise for Mr. Bramlett's honesty and integrity. (DBI Ex. 9, p. 1.)

107. Mr. Layton could not think more highly of anyone. In his opinion, Mr. Bramlett is "straight up." Mr. Layton has never had a written contract with Mr. Bramlett. If Mr. Bramlett says something, that's the way it is in Mr. Layton's experience. In trade deals, when a product is provided in exchange for future time, it is important to be confident that the radio station will provide the agreed-upon time. Mr. Layton does not trade with any radio stations other than Mr. Bramlett's. (DBI Ex. 9, p. 1.)

108. Mr. Layton has been present at various times when Mr. Bramlett's name has come up in conversations. Mr. Bramlett's reputation among civic-minded business people in Decatur is that he is a man you can trust; he is honest, a man of integrity. (DBI Ex. 9, pp. 1-2.)

109. *Frank Allan Harris*. Mr. Harris is a resident of Old Hickory, Tennessee, and president and sole stockholder of Impact International, a manufacturer of lubricants. Mr. Harris served as Deacon of his church for many years and is in charge of his church's choir. (DBI Ex. 6, p. 1.)

110. Mr. Harris has known Mr. Bramlett since 1950-51 when they attended the sixth grade together in Falkville, Alabama, located just south of Decatur, Alabama. He currently sees Mr. Bramlett every month or two while traveling through Decatur, and Mr. Bramlett visits Mr. Harris in Nashville. Mr. Harris also talks to Mr. Bramlett frequently on the telephone. (DBI Ex. 6, p. 1.)

111. In Mr. Harris' opinion, Mr. Bramlett is a man whose integrity is absolutely impeccable. He believes Mr. Bramlett is honest, and there is not a person in the world other than his father and brother-in-law who have as much integrity. Mr. Harris would trust his life to Mr. Bramlett. Mr. Harris described one incident in ninth grade in support of his opinion. One week the teacher handed out tests which were to be completed and turned in. The next week the teacher returned the tests to each of the students to grade. Some days later he announced to the class that Mr. Bramlett and Mr. Harris were the only students who had

honestly graded their papers and had not cheated. Apparently, all the other students made sure that they had all the correct answers. Unbeknownst to them, the teacher had graded the papers before he handed them back to the class. Mr. Harris testified that Mr. Bramlett would not cheat then and he knows he would not do that now. He believes Mr. Bramlett has inner strength and beliefs that have stayed with him throughout his life. (DBI Ex. 6, pp. 1-2.)

112. *Nathan W. Tate, Sr.* Mr. Tate is an African American who is a current employee of DBI. Mr. Tate has resided in Decatur, Alabama, all his life. He has been President of the Decatur-Morgan County NAACP since 1991, and was currently serving his second two-year term. (DBI Ex. 19, p. 1.)

113. Mr. Tate has been a friend of Mr. Bramlett's since the 1960's. In Mr. Tate's opinion, Mr. Bramlett is truthful and honest; if Mr. Bramlett tells you something, you can rely on his word. In addition, in the Decatur/Huntsville radio market and in the Decatur/Huntsville Black community, Mr. Bramlett is looked upon as a man of integrity. (DBI Ex. 19, pp. 1-2.)

114. *Ricky Patton*. Mr. Patton is an African American and a current and former employee of DBI. In Mr. Patton's opinion, based upon his experience with Mr. Bramlett over the last decade, Mr. Bramlett is an honest man. (DBI Ex. 8, pp. 1-2.)

CONCLUSIONS OF LAW

115. This proceeding involves the applications of DBI for renewal of its licenses for Stations WHOS(AM) and WDRM(FM), Decatur, Alabama. The Commission designated these license renewal applications for hearing because of various questions raised as a result of a Petition to Deny those applications and a *Bilingual* investigation into the EEO practices of the Stations conducted by the staff of the Mass Media Bureau's EEO Branch.

Issue 1 -- Misrepresentation/Lack of Candor

116. Issue 1 requires a determination of whether DBI made misrepresentations to or lacked candor with the Commission in responses to inquiries regarding DBI's EEO program. In specifying this issue, the Commission stated:

In response to a Commission inquiry requesting recruitment and hiring information, the licensee asserted, and the VP/GM [Mr. Bramlett] 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. 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.

(HDO at para. 12; footnote omitted.)

117. It must also be determined whether there was a willful or repeated violation of Section 73.1015 of the Commission's Rules, and whether a forfeiture in an amount of up to \$50,000 should be assessed against DBI. (HDO at para. 20.) Section 73.1015 provides, in pertinent part:

No ... licensee ... shall in any response to Commission correspondence or inquiry or in any application, pleading, report or any other written statement submitted to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.

In a "Note" to this rule, it is emphasized that licensees have an obligation "in all instances to respond truthfully" to the Commission's requests for information.

118. While misrepresentations and willful omissions have always been proscribed by the Commission, in 1986 the prohibition was embodied for the first time in a rule, Section 73.1015, in order to allow the Commission greater flexibility to levy sanctions short of disqualification. *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1233-34 (1986) (subsequent history omitted). In this connection, the Commission has stated that its focus in assessing the sanction due a licensee for the violation of its rules, including Section 73.1015, is the predictive value such misconduct has with respect to a licensee's future truthfulness and reliability. In making this predictive judgment, the Commission considers the willfulness of the misconduct, its frequency, and the licensee's overall record of compliance with the Commission's rules and policies. *Id.* at 1225-29.

119. The findings of fact establish, and it is concluded, that DBI did not respond to the Commission's inquiries in a complete, accurate, and truthful manner and that, consequently, DBI made misrepresentations to the Commission in violation of Section 73.1015 of the Rules. It is further concluded that the circumstances surrounding this rule violation establish that the misrepresentations were caused by gross negligence and wanton carelessness, rather than any intent to deceive.¹⁰ They do not, therefore, rise to a level justifying the denial of DBI's renewal applications.

However, the violations were repeated and sufficiently egregious so as to warrant the imposition of a \$50,000 forfeiture, the maximum amount permitted by the HDO.

120. DBI's misrepresentations may be divided into three general categories. The first category related to the number of hires DBI had during the License Period. Thus, in DBI's April 18, 1991, response to the Commission's March 15, 1991, letter, DBI represented that from 1982 through February 1989, it had hired "approximately 20 new employees...." The accuracy of the number "20" was implicitly affirmed by DBI on two additional occasions, in its October 15, 1991, response to the Commission's October 7, 1991, letter, and in DBI's January 13, 1992, response to the Commission's January 2, 1992, letter. It is uncontroverted, however, that the actual number of total hires during the License Period was 104.

121. The second category of misrepresentation was made in connection with DBI's explanation for the discrepancy between the number of hires initially reported and twice affirmed, and the actual number of hires. In DBI's January 13, 1992, response to the Commission's January 2, 1992, letter, the inaccuracy of the number "20" was explained in terms of the Stations' inadequate records, and the ability to determine the actual number was attributed to the recent discovery of payroll lists. This explanation was repeated in DBI's February 7, 1992, response to the Commission's January 24, 1992, letter. This explanation was disingenuous. It is clear that the discrepancy between the number "20" and the actual number of hires was caused by Mr. Bramlett's lack of awareness or understanding, prior to December 1991, that the Commission had requested information about *all* hires during the License Period, not just minority hires. However, this was not the explanation the Commission was given.

122. The third category of misrepresentation concerned the Statements under penalty of perjury executed by Mr. Bramlett and submitted in support of DBI's April 18, 1991, October 15, 1991, January 13, 1992, and February 7, 1992, responses. In each of these Statements, Mr. Bramlett declared that he had read DBI's response, and that the facts contained therein were complete and accurate." Mr. Bramlett's Statements contained no qualifying language allowing for the possibility that he had not read, and was not sponsoring, the entire document. However, the record establishes beyond dispute that Mr. Bramlett read none of DBI's responses in its entirety; it simply was not his practice to do so. The record further establishes that not all of the "facts" contained in DBI's responses were "complete and accurate." It is also significant that this category of misrepresentation continued even after DBI voluntarily reported to the Commission the actual number of hires.

123. The cumulative effect of DBI's misconduct was to mislead the Commission for a prolonged period of time as to the true state of affairs with regard to DBI's EEO efforts. As a result, the Commission, which must of necessity rely on the truth, accuracy and completeness of its licensees' representations,¹¹ was repeatedly led to believe that DBI

¹⁰ In this regard, the Commission has held in *Golden Broadcasting Systems, Inc.*, 68 FCC 2d 1099, 1106 (1978), that gross negligence and wanton carelessness are functionally equivalent to an affirmative and deliberate intent to deceive and, consequently, the licensee's conduct herein constitutes a violation of Section 73.1015 of the Rules.

¹¹ The Commission's demand for unalloyed candor is the *sine*

qua non for licenseeship. This is so because it is primarily upon a licensee's uninvestigated representations that this agency must routinely rely. The Commission has an exceedingly limited budget and staff, and its everyday resources even for spot-checking are minuscule compared to the enormous industry under its purview. Practically the entire scheme of regulatory control is based, of utter necessity, on a system that presupposes

had hired a total of only 20 new employees during the License Period, and that 7, or 35 percent of those new hires were African American. Further, when DBI was finally able to provide the Commission with an accurate figure for the total number of hires, its explanation for the discrepancy was not completely candid. Moreover, this misconduct was exacerbated by the fact that all of the licensee's representations were supported by the Statements under penalty of perjury of Mr. Bramlett, a DBI principal, who, contrary to the explicit language of his Statements, did not read (or completely understand) the entirety of DBI's responses to the Commission's numerous inquiries.

124. DBI attributed its errors to innocent mistakes and misunderstandings arising from a failure of communication between Mr. Bramlett and Ms. Marshall, one of his attorneys. DBI claimed that Mr. Bramlett and Ms. Marshall "were like two ships passing in the night" and "were on different wavelengths."¹² While there is some validity to this assertion, the ultimate responsibility for DBI's misconduct must rest squarely on the shoulders of Mr. Bramlett.¹³ Specifically, the Commission's letters of inquiry were addressed to Mr. Bramlett, and he received them all. However, the record establishes that he did not read them in sufficient detail, if he read them at all, to discern exactly what information the Commission was seeking.

125. Similarly, the record establishes that Mr. Bramlett did not read or review DBI's responses with sufficient care to know or understand the entirety of the representations the licensee was making, or to know whether DBI was addressing all of the Commission's concerns. The Commission's letters were clear enough so that, had Mr. Bramlett read them carefully and thoroughly, he would (or should) have learned what information was required. Likewise, had Mr. Bramlett carefully and thoroughly read DBI's submissions, he would (or should) have discovered that they contained inaccuracies, misstatements, and/or were not wholly responsive.

126. The cause for this was Mr. Bramlett's practice at the time of signing anything his attorneys sent to him to sign, after only a cursory review. In this connection, the circumstances surrounding Mr. Bramlett's sponsorship of DBI's January 13, 1992, response to the Commission's January 2, 1992, letter are illustrative. Mr. Bramlett received a draft of the response prepared by Ms. Marshall on the afternoon of the day it was due to be filed and had about 20 minutes to review and return it to her. As a result, he only looked over one portion of the response, and admitted to having had no idea as to the meaning of the remainder of the document. Nevertheless, Mr. Bramlett signed a Statement under penalty of perjury attesting to the accuracy and completeness of the entirety of DBI's response.

127. Although DBI's misconduct was serious, it is concluded that such conduct does not rise to a level justifying the "ultimate sanction" of denial of its renewal applications. Numerous mitigating factors contribute to this conclusion. First, the record establishes, as shown above, that the misconduct resulted from gross negligence and wanton

carelessness, not from any deliberate intent to mislead or deceive the Commission. Thus, in its January 13, 1992, response to the Commission's January 2, 1992, inquiry, DBI voluntarily disclosed the existence of over five times the number of hires during the License Period than had previously been reported to the Commission. Further, this response was filed after Mr. Van Horn, another of Mr. Bramlett's attorneys, advised him of the negative impact to which the additional disclosure could (and did) lead. It would have made no sense for Mr. Bramlett to have attempted to deceive the Commission by reporting only 20 hires, and then to have given up this ruse or changed his mind in January 1992 and reported that DBI hired over five times that number. The surest way to have exposed deception was to have done what DBI did. This scenario is completely inconsistent with an intent to mislead or deceive.

128. Second, the findings establish that there was no logical motive for DBI to have underreported the total number of hires during the License Period. The statistical guideline utilized by the Commission in evaluating the effectiveness of an EEO program is a comparison of the percentage of minority hires during the relevant period to the percentage of minorities in the applicable labor force. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967, 3974 (1987) (subsequent history omitted). Under the so-called "50 percent of parity test," a licensee complies with the guideline if the percentage of minorities hired during the relevant period equals or exceeds 50 percent of the percentage of minorities in the applicable labor force. *EEO Processing Guidelines for Broadcast Renewal Applicants*, 46 RR 2d 1693 (1980) (subsequent history omitted). In the instant case, the labor force in the relevant area was 7.4 percent Black, and "50 percent of parity" equalled 3.7 percent. Under the worst-case scenario, assuming all 140 of DBI's hires during the License Period were "employees" for FCC purposes, the percentage of minority hires during that period (9 of 140, or 6.43 percent) substantially exceeded the 50 percent of parity benchmark. Moreover, assuming, as the Commission concluded in the *HDO*, that DBI hired 104 "employees" during the License Period, the percentage of minority hires during that period (8 of 104, or 7.69 percent) exceeded 100 percent of parity. (See paras. 11-13, *supra*.)

129. Third, it is concluded that DBI can be relied upon in the future to be truthful with the Commission and to comply with its rules and policies. DBI's violation of Section 73.1015 was not intentional, but was the product of gross negligence and wanton carelessness. It was also an isolated occurrence confined to a single FCC investigation. In this connection, DBI's record of compliance with the FCC's rules and policies over the last 20 years has been otherwise exemplary. Finally, the Presiding Judge has assessed Mr. Bramlett's credibility and has concluded that he testified truthfully and with complete candor, even when his testimony had a deleterious effect on DBI. Mr. Bramlett

the honor of the Commission's regulatees. *Tri-State Broadcasting Co., Inc.*, 5 FCC Rcd 1156, 1173 (Rev. Bd. 1990) (subsequent history omitted).

¹² DBI's Proposed Findings and Conclusions, at paras. 121 and 128.

¹³ This is not meant to imply that DBI's attorneys bear no

responsibility whatsoever for the misconduct. Portions of pleadings and statements were drafted which were not based upon fact, but upon unverified assumptions. Also, it does not appear that Mr. Bramlett was asked all of the "right" questions, that is, questions which would (or should) have elicited more accurate and complete answers to the Commission's inquiries.

was genuinely contrite, and it is highly unlikely that the misconduct in question will be repeated. Under these circumstances, no useful purpose would be served by denying DBI's renewal applications. However, as noted above, DBI's misconduct was repeated and sufficiently egregious so as to warrant the imposition of a forfeiture in the amount of \$50,000 for its violation of Section 73.1015 of the Commission's Rules.

Issue 2 -- EEO Program Issue

130. Issue 2 requires a determination of the extent to which DBI complied with the provisions of Section 73.2080(b) of the Commission's Rules. This rule requires licensees to "establish, maintain, and carry out a positive continuing program of specific practices designed to ensure equal opportunity in every aspect of station employment policy and practice." To effectuate such a program, a licensee must, among other things, communicate its employment needs to sources of qualified applicants and solicit their recruitment assistance on a continuing basis, and conduct a continuing review of its employment practices and adopt positive recruitment measures to ensure genuine equality of opportunity. Sections 73.2080(b)(3) and (5) of the Rules. These basic obligations have existed since 1970. *Nondiscrimination Employment Practices of Broadcast Licensees*, 23 FCC 2d 430, 435 (1970).

131. In specifying Issue 2, the Commission stated:

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 [sic] 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.

132. The findings of fact establish, and it is concluded, that DBI failed to comply with Section 73.2080(b) of the Commission's Rules. Thus, DBI did not dispute that there

were deficiencies in its EEO program during the License Period. Specifically, DBI conceded that it failed to maintain adequate records documenting its recruitment efforts, failed to consistently contact recruitment sources likely to refer minorities when vacancies occurred, and failed to evaluate its employment profile and job turnover against the availability of minorities in its recruitment area. DBI also admitted that Mr. Bramlett had no formal evaluation process in place, and performed no statistical analysis of the Stations' EEO performance.¹⁴

133. On the other hand, there was not even the remotest scintilla of evidence that DBI or Mr. Bramlett ever discriminated against African Americans in their hiring or employment practices. Further, DBI's overall hiring of minorities during the entire License Period exceeded 100 percent of parity. In addition, Mr. Bramlett did attempt, albeit informally, to obtain minority applicants and to hire qualified minorities, and was attentive to his obligation to be nondiscriminatory in hiring. Although Mr. Bramlett did not formally evaluate DBI's EEO efforts, he authentically believed those efforts to be effective because the Stations did, in fact, hire qualified minorities.

134. Given the above, it is concluded that, on balance, DBI's violation of Section 73.2080(b) of the Rules does not warrant denial of its renewal applications. However, in order to allow the Commission to monitor DBI's EEO efforts, DBI's renewal applications will be granted for a "short term" with the imposition of EEO reporting conditions. *KDEN Broadcasting Co.*, 55 RR 2d 1311 (1984).

ULTIMATE CONCLUSION

135. In view of all of the foregoing, it is ultimately concluded that the public interest, convenience and necessity would be served by a grant of DBI's applications for renewal of the licenses of Stations WHOS(AM) and WDRM(FM), Decatur, Alabama. However, it is also ultimately concluded, for the reasons stated above, that DBI violated Sections 73.1015 and 73.2080(b) of the Commission's Rules. Consequently, DBI's renewal applications will be granted for a "short term" ending on January 1, 1995, subject to EEO reporting conditions, and a forfeiture in the amount of \$50,000 will be assessed against DBI.

Accordingly, IT IS ORDERED that, unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules, the applications of Dixie Broadcasting, Inc., for renewal of the licenses of Stations WHOS(AM) and WDRM(FM), Decatur, Alabama, ARE GRANTED for a "short term" ending on January 1, 1995, subject to the EEO reporting conditions specified herein.¹⁵

IT IS FURTHER ORDERED that Dixie Broadcasting, Inc., SHALL SUBMIT two reports containing the following information, the first report being due six months after this Initial Decision becomes final, and the second report being due on September 1, 1994, with the Stations' next renewal applications:

¹⁴ DBI's Proposed Findings and Conclusions, at paras. 134-35.

¹⁵ In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not

review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d) of the Rules.

(a) a list of all persons hired as well as all persons who applied for each position filled (i) during the six months preceding the first report, and (ii) during the period between the first and second reports, indicating their referral or recruitment source, job title, part-time or full-time status, FCC Form 395 classification, date of hire, sex and race or national origin;

(b) a list of all employees as of the most recent payroll period prior to each filing date, by job title with part-time or full-time status indicated (ranked from the highest paid to the lowest paid), FCC Form 395 classification, date of hire, sex and race or national origin;

(c) a narrative statement detailing the Stations' efforts to recruit minorities for each position filled during the specified periods, including identification of sources used, and indicating whether any of the applicants declined actual offers of employment; and

(d) any additional information the licensee believes relevant regarding the Stations' EEO performance and efforts.

IT IS FURTHER ORDERED that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, this Initial Decision SHALL CONSTITUTE an Order of Forfeiture in the amount of \$50,000.

IT IS FURTHER ORDERED that, within 30 days after the date this Initial Decision becomes final, Dixie Broadcasting, Inc., SHALL PAY the full amount of the forfeiture by check or money order made payable to "Federal Communications Commission." The remittance should identify the payor, be marked "NAL Control No. FCC 92-391; NOF Control No. FCC 93D-12," and be sent to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, IL 60673-7482

FEDERAL COMMUNICATIONS COMMISSION

Arthur I. Steinberg
Administrative Law Judge