

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

In re Applications of

Holiday Broadcasting Company,
Debtor-in-Possession
(Assignor)

and

KRSP, Incorporated
(Assignee)

For Assignment of License for
Station KRSP-FM
Salt Lake City, Utah

File No. BALH - 931130GI

Simmons Family, Inc.

For Renewal of Licenses for
Stations KDYL/KSFI-FM
Salt Lake City, Utah

File Nos. BR - 900601D8
BRED - 900601ZI

MEMORANDUM OPINION AND ORDER

Adopted: December 15, 1995; Released: February 1, 1996

By the Commission:

I. INTRODUCTION

1. The Commission has under consideration: (1) our decision in *Holiday Broadcasting Company*, 10 FCC Rcd 4500 (1995) (*Holiday*), where we granted the renewal applications for Stations KDYL/KSFI-FM, Salt Lake City, Utah, subject to reporting conditions and an \$8,000 forfeiture, and granted the assignment application for Station KRSP-FM; (2) a petition for reconsideration of that decision filed by the Idaho/Nevada/Utah State Conference of Branches of the NAACP ("NAACP");¹ and (3) an opposition filed by Simmons Family, Inc., licensee of Stations KDYL/KSFI-FM ("Simmons") and parent company of KRSP, Incorporated, assignee of Station KRSP-FM.² For the reasons that follow, we deny the petition.

II. BACKGROUND

2. In *Holiday*, we reviewed the equal employment opportunity program of the licensee of Stations KDYL/KSFI-FM and concluded that the licensee had engaged in some efforts to recruit minorities during the li-

cense term. However, because the licensee had not engaged in consistent recruitment efforts, and failed to self-assess adequately, we granted the renewal applications subject to reporting conditions and a Notice of Apparent Liability for \$8,000. In that *Order* we also granted the application to assign the license of Station KRSP-FM from Holiday Broadcasting to KRSP, Inc. KRSP Inc. is a subsidiary company of Simmons Family, the licensee of KDYL/KSFI-FM. *Holiday*, 10 FCC Rcd at 4504.

3. In support of its petition for reconsideration, the NAACP argues that the Commission erred by not considering Simmons' failure to adhere to its EEO program as evidence of discrimination. The NAACP notes that for two years after the petition to deny the renewal applications was filed, the licensee reported no minority full-time employees. Further, the NAACP asserts that the Commission did not consider its argument that the licensee's explanations of its obstacles in recruiting minorities are suggestive of discriminatory intent. Specifically, the NAACP refers to the licensee's statements that its nostalgia and light rock formats "have a reduced appeal to the younger demographic segments from which entrance-level minorities would most likely come", and that its pay scales are comparatively lower than those of other stations in the market. Finally, the NAACP contends that the record in this case is "virtually identical" to the facts of *The Lutheran Church/Missouri Synod*, (KFUO/KFUO-FM) 9 FCC Rcd 914 (1994) (*Lutheran*). The NAACP states that in *Lutheran*, the licensee also argued that it experienced difficulties in attracting minority applicants because of its format, and the Commission found that the licensee had an ineffective EEO program. The renewal applications of KFUO/KFUO-FM were designated for hearing.

III. DISCUSSION

4. Reconsideration is appropriate where the petitioner shows either a material error or omission or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters. See *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom.*, *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. § 1.106(c). Applying this standard, we conclude that reconsideration is not warranted in this case. The NAACP has not provided any additional facts that were not known or not existing until after its last opportunity to present such facts. Moreover, we find unpersuasive its argument that the decision in *Holiday* constituted material error.

5. We find to be without merit the NAACP's argument that the licensee's equal employment opportunity program warranted designation of its renewal applications for hearing. Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(e), requires designation for hearing only where there is a substantial and material question of fact as to whether it would be in the public interest to grant the renewal application. See *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). It is undisputed that the licensee contacted general and minority recruitment sources, received minority referrals, and interviewed a minority applicant for a full-time position.

¹ Although *Holiday* addressed the renewal applications of two other radio stations, the NAACP's petition for reconsideration concerns only the qualifications of Simmons Family, Inc. as

licensee of KDYL/KSFI-FM, and as parent of the assignee of KRSP-FM.

² Simmons paid the forfeiture in full.

Further, our primary focus is on the licensee's EEO efforts, and our EEO rule does not require licensees to hire or employ a specific number of minorities. See *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987). Thus, there was no evidence of discrimination, and the licensee was correctly found to be qualified, despite deficiencies in its EEO program. Accordingly, there is no substantial and material question of fact compelling a hearing. See *Florida State Conference of Branches of the NAACP v. FCC*, 24 F.3d 271, 273 (D.C. Cir. 1994) (*Florida*) (A statistical disparity is not sufficient evidence by itself to force a hearing).

6. We disagree that *Lutheran* requires designation of the instant applications for hearing. In finding that a sanction was warranted against KDYL/KSFI-FM, we rejected the licensee's claims that the stations' formats and pay scale justified their poor EEO record. In *Lutheran*, as in numerous other cases, we rejected arguments based on format as well. See, e.g. *Certain Broadcast Stations - State of Louisiana*, 7 FCC Rcd 1503 (1992); *Applications of Certain Broadcast Stations in the Florida Area*, 5 FCC Rcd 5683 (1990); *Certain Broadcast Stations Serving the State of Texas*, 4 FCC Rcd 6685 (1989); *Ohio and Michigan License Renewals*, 3 FCC Rcd 6944 (1988). In *Lutheran*, we found that the requirements of "classical music expertise" and Lutheran training were vague and unascertainable, thus having a direct adverse impact on Blacks. Indeed, the evidence raised the question of whether the requirements were bona fide. Despite the specialized formats, the Commission found that not all of the positions at KFUE/KFUE-FM in fact required classical/religious training and not all of the persons in those specialized jobs had the requisite training. The licensee in *Lutheran* made no attempt to recruit minorities who did have the desired training, and urged that evaluation of its EEO efforts be based on the alleged unavailability of minority applicants with the desired training. Also, we concluded that the licensee in *Lutheran* violated our EEO rule by failing to recruit based on its agreement with Concordia Seminary to employ Seminary students and their spouses. Finally, we specified a misrepresentation issue in *Lutheran*.

7. The facts of *Lutheran* are not analogous to the record in *Holiday*. In *Holiday*, the licensee did not specify any format or religious training as the basis for a job requirement. In addition, KDYL/KSFI-FM's alleged difficulties with recruiting minorities were based on actual recruitment efforts, and the licensee did not use any statistics in an effort to limit the potential number of available minority applicants. Finally, there was no evidence suggesting misrepresentation in *Holiday*.

8. The EEO record in *Lutheran* was not the sole basis for designating that renewal application for hearing. See, *Lutheran*; *Florida*. In any event, we disagree that the EEO record of KDYL/KSFI-FM is virtually identical to the EEO record presented in *Lutheran*. In *Lutheran*, Station KFUE(AM) failed to recruit for 50% of 14 vacancies, and KFUE-FM failed to recruit for 78% of 18 vacancies. Indeed, the licensee in *Lutheran* began to recruit only after its renewal applications and EEO programs were questioned. In the instant case, the licensee established stronger recruitment efforts during its license term than did KFUE/KFUE-FM. Specifically, we found that the licensee of Stations KDYL/KSFI-FM recruited for 14 (88%) of 16 vacancies throughout the license term. Consequently, the NAACP's reliance on *Lutheran* is misplaced.

IV. CONCLUSION

9. Upon review of the NAACP's petition for reconsideration and the licensee's opposition, we find that reconsideration is not appropriate here. The NAACP failed to show additional facts not known or not existing until after its last opportunity to present such facts. In addition, although the NAACP argued material error in *Holiday*, for the above-stated reasons we do not find that argument persuasive. Accordingly, the NAACP petition for reconsideration is denied.

V. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by the Idaho/Nevada/Utah State Conference of Branches of the NAACP IS DENIED.

11. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- copies of this *Memorandum Opinion and Order* to Holiday Broadcasting Company, KRSP, Inc., Simmons Family, Inc., and the NAACP.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary