

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

In re Applications of)	
)	
SUNSHINE WIRELESS CO., INC. ¹)	File Nos. BR-881003UJ
)	BRH-881003UZ
For Renewal of Licenses of Stations)	
WQAM(AM), Miami, Florida, and)	
WKIS(FM), Boca Raton, Florida)	

MEMORANDUM OPINION AND ORDER

Adopted: August 30, 1996

Released: October 28, 1996

By the Commission:

I. INTRODUCTION

1 The Commission has before it a petition by Sunshine Wireless Co., Inc. ("Sunshine") for limited reconsideration of the Commission's decision in Broadcast Stations Serving the Miami, Florida Area, 5 FCC Rcd 4893 (1990) ("Miami"), granting the renewal applications of Stations WQAM(AM), Miami, and WKIS(FM) Boca Raton, Florida, ("WQAM/WKIS(FM)"), subject to reporting conditions.² Sunshine argues that the Commission erred in determining that the Miami, Florida, MSA (then known as the Miami-Hialeah, Florida, MSA) and not the Fort Lauderdale, Florida, MSA (then known as the Fort-Lauderdale-Hollywood, Florida, MSA) is the appropriate labor force for the evaluation of the stations' future EEO efforts. Sunshine requests that we reconsider the Miami decision only on the issue of the relevant labor force by which WQAM(AM)/WKIS(FM)'s EEO efforts should be evaluated. For the reasons which follow, we deny Sunshine's petition.

II. BACKGROUND

2. Stations WQAM(AM) and WKIS(FM) are licensed to different communities (Miami, and Boca Raton, Florida, respectively) within two different MSAs (Miami and West Palm Beach-Boca Raton, Florida, respectively). However, both stations operate from a studio

¹ Applications to assign the licenses for WQAM(AM)/WKIS(FM) to Beasley-Reed Acquisition, L.L.C. (File Nos. BAL-960315HN and BALH-960315HM) were granted on June 6, 1996. The assignee has indicated a desire to pursue the same relief sought by Sunshine. We will accordingly resolve the issues raised by Sunshine, which will also apply to the assignee. For purposes of clarity, we will continue to refer to the petitioner as Sunshine.

² In the original proceeding, the Florida State Conference of Branches of the NAACP ("NAACP") filed a petition to deny the stations' renewal applications. The Commission denied the petition in Miami. On November 5, 1990, NAACP and Sunshine filed a joint request for approval of a settlement agreement, which was approved by our staff on October 9, 1993.

in Hollywood, Florida, which is located within a third MSA (Fort Lauderdale, Florida). Initially, Sunshine operated WKIS(FM) with WLQY(AM), the latter of which was licensed to Hollywood, and conducted most of the stations' operations from the Hollywood studio. The main studio for WKIS(FM), however, remained in Boca Raton. In 1985, when it sold WLQY(AM) and purchased WQAM(AM), Sunshine received Commission authorization to operate Station WQAM(AM) from its existing Hollywood studio location. In 1987, Sunshine notified the Commission that it was moving the main studio location for WKIS(FM) to Hollywood pursuant to an amendment to Section 73.1125 of the Commission's Rules which permits a station to locate its main studio outside of the community of license as long as the studio is located within the station's principal community contour. See 47 C.F.R. §73.1125

3. Having received permission from the Commission to move its main studios for WQAM(AM)/WKIS(FM) from Miami and Boca Raton, to Hollywood, Florida, and having informally inquired as to which labor force it should use,³ Sunshine, in its 1988 renewal application EEO program for the stations, compared the stations' work force with labor force data for the Fort Lauderdale MSA. The Fort Lauderdale MSA had an aggregate minority labor force of 15.8%. By comparison, the Miami MSA had an aggregate minority labor force of 54.0%, and the West Palm Beach-Boca Raton MSA, had an aggregate minority labor force of 20.2%.

4. In Miami, the Commission used the Fort-Lauderdale MSA in the evaluation of Sunshine's 1988 renewal application. The Commission also stated that the Miami MSA would serve as the relevant labor force for Sunshine's future EEO performance evaluations.⁴ In choosing the Miami MSA the Commission noted that: 1) Miami had the largest minority labor force; 2) although most of the stations' personnel activity occurs in the Fort Lauderdale-Hollywood area, some of Sunshine's recruitment occurred in Miami; 3) the stations broadcast to the Miami area; and 4) WQAM(AM)'s transmitter is located in Miami. The Commission applied the principles set forth in Michigan/Ohio only to Sunshine's future efforts because Michigan/Ohio was released after Sunshine filed its renewal application. See Miami, 5 FCC Rcd at 4900, n.14.

III. SUNSHINE'S PETITION

5. Sunshine argues that Miami is procedurally and substantively deficient because the decision failed to address a number of material issues raised by its pleadings. Specifically,

³ Specifically, Sunshine refers to a meeting with a Commission staff member in 1986, in which an attorney for Sunshine was told by the staff member that the Commission would look to the labor force for the area where the stations are co-located as long as the co-location was due to legitimate business reasons. Thus, the staff member allegedly informed Sunshine's attorney that it was reasonable for Sunshine to rely on Fort Lauderdale labor force statistics.

⁴ The Commission chose the Miami MSA as the relevant labor force based upon its decision in Michigan and Ohio TV stations, 3 FCC Rcd 6944 (1988) (Michigan/Ohio). In Michigan/Ohio, we ruled that where a station is licensed to a community in one MSA but locates its main studio in a different MSA, the MSA with the "largest minority presence" is the relevant labor force for EEO efforts' evaluation. See Michigan/Ohio, 3 FCC Rcd at 6950, n.22.

Sunshine argues that the Commission failed to consider that the consolidation of the stations' studios continued a practice of combined operation of commonly-owned radio stations which Sunshine has followed since 1982. It also argues that the Commission failed to address the benefits for the AM station which flow from combined operation with a stronger FM station. In addition, Sunshine argues that the Commission did not address its good faith efforts to seek guidance from Commission staff as to the filing of combined Annual Employment Reports for the two stations and its reliance on the Fort Lauderdale MSA labor force statistics for the past several years. Sunshine concludes that our decision to use Miami labor force statistics in the future departs from the Commission's prior practice in dealing with Stations WQAM(AM)/WKIS(FM), citing our 1985 approval of WQAM(AM)'s studio re-location to Hollywood.

6. Second, Sunshine contends that the Commission's reliance on Michigan/Ohio, in determining the appropriate labor force for WQAM(AM)/WKIS(FM), is misplaced. Specifically, it notes that Michigan/Ohio dealt with a single television station whereas this case involves two commonly-owned radio stations licensed to two different MSAs and choosing to co-locate their studios in a third MSA. Further, it argues that the logic of Michigan/Ohio should have compelled approval of the continued reliance by the stations on the Fort Lauderdale MSA. Sunshine argues that it located its main studio in Hollywood for legitimate business reasons and not to avoid EEO responsibilities.

7. Third, Sunshine argues that the Commission's decision to use Miami statistics is arbitrary and capricious because Miami statistics are the least relevant. In this regard, Sunshine claims that its recruitment efforts in Miami have been unproductive, that there is an absence of public transportation to Sunshine's studio, and that job applicants from Miami would have to travel from 15 to 25 miles to the stations. Sunshine also states that the vast majority of its workforce is drawn from the Fort Lauderdale, Hollywood and Boca Raton areas, not the Miami MSA.

8. Finally, Sunshine argues that the Commission's use of Miami statistics is at odds with its deregulatory policies and, in particular, its efforts to ease the plight of AM broadcasters.⁵ It argues that our decision in Miami deprives it of the full efficiency benefits (including the filing of consolidated annual employment reports) it has been able to enjoy for its AM station by co-locating it with a stronger FM station.

IV. DISCUSSION

9. Reconsideration is appropriate where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after

⁵ Sunshine specifically cites to the following cases: Notice of Proposed Rulemaking, MM Docket No. 87-267, 5 FCC Rcd 4381 (1990) (technical assignment criteria for AM broadcast stations); First Report and Order, MM Docket No. 87-7, 4 FCC Rcd 1723 (1989) (broadcast multiple ownership rules); Report and Order, MM Docket No. 86-406, 2 FCC Rcd 3215 (1987) (main studio rules).

the petitioner's last opportunity to present such matters. See WWIZ, Inc., 37 FCC 685, 686 (1964), aff'd sub nom. Lorain Journal v FCC, 351 F.2d 824 (D.C. Cir. 1965), cert denied, 383 U.S. 967 (1966); 47 C.F.R. §1.106(c). Sunshine has failed to make such a showing.

10. Sunshine's argument that Miami did not address material issues is without merit. The licensee relies on Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970), cert. denied, 403 U.S. 923 (1971), where the court held that an agency must articulate the crucial facts and the rationale for its decisions. The decision at issue here is the Commission's choice of the relevant labor force for future evaluations of the stations' EEO efforts. In accordance with Greater Boston Television Corp., the Commission did state the crucial facts and the rationale for its decision in Miami. See Miami at 4900, n.14. The Commission supported its decision by citing Michigan/Ohio and noting where the stations recruited, their service areas, and the location of WQAM(AM)'s transmitter. The allegedly material issues referenced by Sunshine had and have no significant bearing on the Commission's decision as to the proper labor force for future evaluations of the stations' EEO efforts. Nothing in our decision in Miami affects Sunshine's authority to operate these stations from a single main studio in Hollywood. Moreover, Sunshine's voluntary operation of these stations from a Hollywood studio and the benefits to the AM station are irrelevant to the issue of the relevant labor force for EEO purposes. With respect to Sunshine's inquiries as to which labor force data would be used to evaluate its EEO efforts, it is well settled that a person relying on informal advice given by Commission staff does so at its own risk. See Texas Media Group, Inc., 5 FCC Rcd 2851, 2852 (1990), aff'd sub nom. Malkan FM Associates v. FCC, 935 F.2d 1313 (D.C. Cir. 1991). At any rate, as noted at paragraph 4, supra, the Fort Lauderdale FL MSA was used by the Commission to evaluate the subject renewal applications. Thus, Sunshine was not penalized for its reliance on Fort Lauderdale labor force data.

11. Sunshine's argument that our reliance on Michigan/Ohio is misplaced lacks merit. Initially, we note that Sunshine's argument is premised on its misinterpretation of the Commission's decision in Michigan/Ohio. Contrary to Sunshine's interpretation, it is not the location of a broadcast station's main studio, in and of itself, which determines the relevant labor force to be used in evaluating a station's EEO efforts. Rather, the essence of the Commission's ruling in Michigan/Ohio was that, where a station is licensed to and/or operated from more than one MSA, the Commission will use the labor force statistics for the MSA which has the larger minority labor force in its initial evaluation of the station's EEO efforts. See Michigan/Ohio, 3 FCC Rcd at 6950, n.21. The reason is that the Commission will not permit licensees to evade their EEO responsibilities because of the location of their studios.

12. A station's community of license is considered its geographic location. See 47 C.F.R. §73.1120. To determine the relevant labor force for EEO purposes, the Commission looks to the MSA in which the station's community of license is located. If a station is not licensed to a community located within an MSA, the Commission looks to the labor force statistics for the county in which the community is located. In Michigan/Ohio, Station WUAB(TV) was licensed to a community in the Lorain-Elyria, Ohio MSA, which had a 10.7% minority labor force, but its main studio was located within the Cleveland, Ohio, MSA, which had a 17.8% minority labor force. The Commission used Lorain-Elyria, Ohio labor force statistics in its initial

evaluation of WUAB's EEO efforts. However, we advised the licensee that if the station's main studio continued to be located near the area with the larger minority labor force, the Commission would review future EEO efforts in light of the larger minority presence. See Michigan/Ohio, 3 FCC Rcd at 6950, n.22. The Commission also stated that, where a station voluntarily moves its studio location, including its main studio, from its community of license to an area of higher minority concentration, we would take cognizance of that fact in assessing the adequacy of the station's overall EEO efforts. See Michigan/Ohio, 3 FCC Rcd at 6950, n.21. In addition, the Commission noted that it would not permit licensees to avoid their EEO responsibilities by claiming that their new location includes fewer minorities.⁶ *Id.* Thus, contrary to Sunshine's erroneous interpretation of Michigan/Ohio, it is the size of the minority labor force within the various MSAs involved, and not the location of the main studio *per se*, which determines the relevant labor force for EEO purposes. Moreover, contrary to Sunshine's apparent assumptions, the fact that this case involves two commonly-owned radio stations which are licensed to communities in two MSAs and operated from a studio in a third MSA also is irrelevant. The principles set forth in Michigan/Ohio are not limited to cases involving single television stations which are licensed to communities in one MSA but which choose to locate their main studios in different MSAs. Regardless of the number and type of broadcast stations or the number of MSAs in which the stations' communities of license and/or studios are located, the Commission, in determining the appropriate labor force for EEO purposes, will look to the MSA which has the more significant minority labor force

13. Sunshine's criticism that the Miami MSA does not correspond to the community of license for the FM station is irrelevant. Because the AM and the FM stations file consolidated annual employment reports, they must, by necessity, be evaluated by reference to only one MSA, even though the stations are licensed to communities in two different MSAs and their common studio is located in a third MSA.⁷ The principles enunciated in Michigan/Ohio require the single MSA to be the one with the larger minority presence. Accordingly, we reject Sunshine's arguments that our reliance on Michigan/Ohio is misplaced and that application of the decision in Michigan/Ohio should have resulted in the use of Fort Lauderdale labor force statistics in the future

14. Next, we find that Sunshine's argument that Miami labor force statistics are the least relevant because of the unproductiveness of its Miami recruitment sources also lacks merit. Sunshine argues that, despite contact with several recruitment sources in Miami, the vast majority of its workforce is drawn from the Fort Lauderdale, Hollywood and Boca Raton, areas. The

⁶ In Michigan/Ohio and in Miami, the Commission did not explore why the main studio for these stations was moved to an area outside of the stations' community of license. Thus, there is no support for any argument that EEO obligations in these situations will be changed merely because there is an identifiable business justification for the studio relocation.

We will evaluate two stations as a single unit for EEO purposes where the stations operate from a common location for the entire license term; where the same person has overall responsibility for the implementation of both EEO programs; and where many of the staff perform work for both stations. See Alabama/Georgia Broadcast Stations, 95 FCC 2d 115 (1983).

Commission has previously held that the standard for use of an alternative labor force is a "three-part test: distance of the station from areas with significant minority population in the MSA, commuting difficulties, and the lack of success of previous recruitment efforts. [citations omitted]." Buckley Broadcasting Corporation, 9 FCC Rcd 2099, 2101 (1994). Sunshine did not specifically request use of alternative labor force data nor could it.⁸ Our review of its inquiry response reveals that Sunshine apparently did not use sources aimed at the minority population of Miami for 34 of its 78 full-time vacancies, including 33 of its 56 upper-level positions from February 1985 through October 1, 1988. Thus, Sunshine apparently had not engaged in extensive recruitment efforts aimed at areas of minority concentration in Miami. Nonetheless, Sunshine had hired a Hispanic male referred by Miami-Dade Community College for a promotion assistant position. In addition, Sunshine's 1990, 1991 and 1992 EEO Progress Reports, filed pursuant to the Commission's order in Miami, indicate that a Black female referred by Miami Tech was hired as a Public Affairs Director in December 1990,⁹ and a Hispanic female referred by the Miami Herald was hired as a traffic assistant in November 1991.¹⁰ Accordingly, it appears that, contrary to Sunshine's assertions, its Miami recruitment sources have been somewhat productive.

15. Finally, Sunshine's argument that our decision to use Miami labor force statistics is inconsistent with our policies to ease the plight of AM broadcasters lacks merit. Nothing in our decision in Miami deprives Sunshine of its authority to continue to operate WQAM(AM) and WKIS(FM) from its main studio in Hollywood or to continue to file consolidated annual employment reports.¹¹ Thus, our decision to use Miami labor force statistics for EEO purposes does not deprive Sunshine of the benefits that the Commission intended to result from the modification of its main studio, multiple ownership, and technical criteria rules with respect to AM broadcasters. Moreover, nothing in any of the cases cited by Sunshine modifies the EEO obligations of licensees who choose to take advantage of the opportunities provided by these policies. Lastly, nothing in these cases modifies the Commission's standard of review in determining whether a licensee of any broadcast station has complied with our broadcast EEO Rule.

⁸ Sunshine apparently assumed that the Fort Lauderdale MSA was the appropriate labor force as an initial matter. Thus, it did not specifically request that this MSA be used as an alternative. In its opposition to NAACP's petition to deny and inquiry response, however, Sunshine did assert that its Miami sources were unproductive.

⁹ See EEO Progress Report dated October 1, 1991.

¹⁰ See Amended EEO Progress Report dated December 11, 1992. Our review of Sunshine's 1990, 1991, and 1992 EEO reports, which were filed pursuant to the Commission's order in Miami, indicates that Sunshine failed to list the gender, recruitment source, and race or national origin of all of its applicants as required in the reporting conditions set forth in Miami. Thus, the extent to which Sunshine was able to attract minorities from recruitment sources aimed at the areas of minority concentration in Miami is unclear.

¹¹ The telegram dated November 25, 1985, in which the Commission notified Sunshine of its approval of WQAM(AM)'s studio re-location, does not address the relevant labor force issue or any other aspect of Sunshine's EEO program with respect to either station WQAM(AM) or WKIS(FM).

V. CONCLUSION

16. After consideration of all arguments put forth in Sunshine's petition for limited reconsideration, as addressed above, we find that the conclusion in Miami that the Miami labor force is the relevant labor force by which we will evaluate WQAM(AM)/WKIS(FM)'s EEO efforts in the future is appropriate.¹²

17. As we did in Michigan/Ohio, "[w]e reiterate, however, that comparison of a station's employment profile to the appropriate labor force is only the initial step of our review in order that our attention will be directed to those stations needing closer scrutiny. Our principal focus is on the station's efforts to recruit and promote qualified minorities and females, and to assure that equal opportunities are afforded to employees and job applicants." 3 FCC Rcd at 6945.

VI. ORDERING CLAUSES

18. Accordingly, **IT IS ORDERED** that the Petition for Limited Reconsideration filed by Sunshine Wireless Company, Inc. **IS DENIED**.

19. **IT IS FURTHER ORDERED**, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- copies of this Memorandum Opinion and Order to all parties.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

¹² An issue relating to the appropriate labor force to be used by broadcast stations in the Miami, Florida, area has also been raised in a Joint Request filed on June 15, 1994, by CBS Inc., Channel 39 Licensee Inc., Viacom International Inc. (formerly Combined Broadcasting of Miami, Inc.), NBC Subsidiary (WTVJ) Inc., Post-Newsweek Stations of Florida, Inc. and Sunbeam Television Corporation, each of which is the licensee of a television station licensed to Miami. The matters raised by the television licensees will be resolved in a separate proceeding.