

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re Applications of  
Broadcast Associates, Inc. )  
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)  
For Renewal of Licenses of )  
Stations KFMS(AM)/KFMS-FM )  
North Las Vegas/Las Vegas, Nevada )

File Nos. BR-900517YB  
BRH-900517YF

MEMORANDUM OPINION AND ORDER  
AND NOTICE OF FORFEITURE

Adopted: November 12, 1996

Released: November 18, 1996

By the Commission:

I. INTRODUCTION

1. The Commission has under consideration: (1) its decision in Applications of Commonwealth Broadcasting of Northern California, 9 FCC Rcd 2108 (1994) ("Commonwealth") to grant the renewal applications of Stations KFMS(AM)/KFMS-FM, North Las Vegas/Las Vegas, Nevada; (2) a Petition for Reconsideration of that decision filed by the Idaho/Nevada/Utah and Arizona State Conferences of Branches of the NAACP, including its Las Vegas, Nevada and Tucson, Arizona Branches ("NAACP"); (3) a Petition For Reconsideration and Response to Notice of Apparent Liability filed by Broadcast Associates, Inc. ("BAI"), former licensee of Stations KFMS(AM)/KFMS-FM;<sup>1</sup> and (4) an opposition to the NAACP's Petition filed by BAI. For the reasons that follow, we deny the NAACP's Petition for Reconsideration; and grant BAI's petition for reconsideration and response to the Notice of Apparent Liability to the extent indicated herein and deny them in all other respects. We thus recalculate the forfeiture imposed by Commonwealth, and reduce it from \$25,000 to \$15,000.

II. BACKGROUND/PLEADINGS

2. In Commonwealth, we concluded that a hearing was not required because no substantial and material question of fact existed. The licensee had recruited, interviewed and

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<sup>1</sup> BAI assigned the licenses to Regent Broadcasting of Las Vegas, Inc. on October 6, 1994 (File Nos. BAL-940711EA and BALH-940711EB). Also, on April 26, 1995, the call letters of KFMS(AM) were changed to KKDD(AM); however, we will continue to refer to the station by its former call letters which were applicable during the license term under consideration.

hired minority applicants for full-time and upper-level job vacancies. We found, however, that KFMS(AM)/KFMS-FM's recruitment efforts were deficient and that the stations failed to conduct meaningful self-assessment of their EEO program. Accordingly, we granted short-term license renewals for KFMS(AM)/KFMS-FM and imposed reporting conditions upon the licensee.<sup>2</sup> Further, relying upon the guidelines set forth in Standards for Assessing Forfeitures for Violations of EEO Rules, 9 FCC Rcd 929 (1994) ("EEO Policy Statement"), we issued a Notice of Apparent Liability in the amount of \$25,000. Commonwealth, 9 FCC Rcd at 2110-2112.

#### The NAACP's Petition For Reconsideration

3. The NAACP urges in its petition that further inquiry into the licensee's EEO efforts is warranted because the licensee failed to keep complete records of its recruitment efforts and made inadequate efforts to ascertain the race or ethnicity of applicants. The NAACP asserts that this failure insulated the licensee from meaningful inquiry into its EEO record. It suggests that, as a result of the licensee's recordkeeping deficiencies, it cannot be determined whether the licensee recruited minorities for all positions or only for lower-level positions. BAI in its opposition notes that the NAACP has neither raised any new arguments nor presented any new evidence. It urges that its EEO record was fully considered in Commonwealth and the NAACP has presented no evidence that its recordkeeping deficiencies were intentional or that it recruited minorities only for certain positions.

#### BAI's Petition For Reconsideration and Response to Notice of Apparent Liability

4. BAI contends that the Notice of Apparent Liability was improperly issued based on the retroactive application of a 1992 amendment of the statute of limitations specified by Section 503(b)(6) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b)(6). Pub. L. No. 102-538, 106 Stat. 3543, enacted October 27, 1992. Section 503(b)(6) had previously provided, in pertinent part, that a forfeiture could be imposed for a violation within the current license term if the required notice was given within three years of the violation. As a result of the 1992 amendment, a notice of apparent liability for a forfeiture can be issued for a violation at any time within the current license term (or one year after the violation if grant of the renewal intervenes). BAI contends that the pre-1992 statute of limitations must apply in this case because its alleged misconduct occurred prior to the enactment of the 1992 amendment. Accordingly, BAI urges that the notice of apparent liability was improper since it was issued more than three years after the conduct in the record we reviewed.<sup>3</sup> In the alternative, BAI asserts that we could at most consider its conduct that occurred within three years prior to the effective date of the 1992 amendment. BAI claims that the amendment to Section 503(b)(6) of the Act did not

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<sup>2</sup> Applications for short term renewal of the licenses as required by Commonwealth were filed on June 1, 1995 by Regent Broadcasting of Las Vegas, Inc. (File Nos. BR-950601C3 and BRH-950601VR) and were granted on April 16, 1996.

<sup>3</sup> BAI was requested by an inquiry from the staff to provide information concerning its EEO record for the period from May 1, 1987, to May 1, 1990. 9 FCC Rcd at 2110. In fact, BAI volunteered information concerning hires up to September 11, 1990. The license term for KFMS(AM)/KFMS-FM expired October 1, 1990.

become effective until February, 1993, when an amendment to Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, became effective. BAI also urges that the Commonwealth ruling improperly applied the EEO Policy Statement to conduct that occurred prior to its adoption with the result that BAI was treated differently than licensees whose EEO efforts were evaluated under prior policy.

### III. DISCUSSION

#### The NAACP's Petition For Reconsideration

5. Reconsideration is appropriate only 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 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); Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106. Applying this standard, we conclude that the NAACP has alleged no basis for reconsideration of Commonwealth insofar as it relates to KFMS(AM)/KFMS-FM.

6. In seeking reconsideration, the NAACP does not dispute any factual findings concerning the stations. It merely urges that additional inquiry is warranted based on the licensee's recordkeeping deficiencies. However, we fully considered these matters in connection with our prior decision. As we have repeatedly stated, reconsideration will not be granted for the purpose of debating matters on which we have already deliberated and spoken. See, e.g., Isis Broadcast Group, 8 FCC Rcd 24 (Rev. Bd. 1992), citing WWIZ. This is particularly so since the NAACP's concerns are speculative and unsupported by any evidence.

#### BAI's Petition For Reconsideration and Response to Notice of Apparent Liability

7. With respect to BAI's arguments concerning the applicable statute of limitations, we reject its contention that this case is entirely governed by the pre-1992 statute of limitations. The effect of the amendment was merely to extend the time for the issuance of a notice of apparent liability with respect to conduct that remained subject to our forfeiture authority as of the date on which the amendment was enacted. In that circumstance, there is no impermissible retroactivity arising from application of the 1992 amendment. Landgraf v. USI Film Products, 114 S. Ct. 1483, 1501-05 (1994). With respect to BAI's alternate theory, we initially reject BAI's contention that the effective date of the amendment to Section 503(b)(6) should be determined by the effective date of the amendment to Section 1.80 of the Commission's Rules that conformed the language of that provision with the amended statutory language. The amendment to Section 503(b)(6) of the Act was adopted by Public Law 102-538, which was enacted on October 27, 1992. Nothing therein deferred the effectiveness of the amendment to Section 503(b)(6) pending further action by the Commission. A law takes effect on the date of its enactment, absent a clear direction by Congress to the contrary. Gozlon-Peretz v. United States, 498 US 395, 404 (1991). Further, we have reviewed BAI's conduct that occurred during the three year period prior to the enactment of the 1992 amendment and find, for the reasons discussed below, that it warrants a forfeiture, as was found in Commonwealth. It is accordingly unnecessary to further address the

merits of BAI's alternate theory because it would not in any event support BAI's contention that the notice of apparent liability was impermissible. Recalculation of the amount of the forfeiture imposed by Commonwealth is separately warranted based on the use of the EEO Policy Statement. In making this recalculation, we will focus only upon that portion of the period we considered in Commonwealth that occurred after October 27, 1989, three years prior to the effective date of the 1992 amendment.

8. In adopting the EEO Policy Statement, we proposed the use of non-binding guidelines for assessing forfeitures for violations of our broadcast EEO rule. We had issued general forfeiture guidelines to identify those situations that could lead to a forfeiture and to identify criteria that might be used to increase or decrease the base amount of the forfeiture and that might result in grant of renewal for less than a full term. Policy Statement, Standards for Assessing Forfeitures, 6 FCC Rcd 4695 (1991), recon. denied, 7 FCC Rcd 5339, revised, 8 FCC Rcd 6215 (1993) ("Policy Statement"). The EEO Policy Statement was issued because, in 1993, we had deleted the broadcast EEO violation category from our general forfeiture guidelines and announced that we would issue a further policy statement on broadcast EEO matters in the future. See Policy Statement, 8 FCC Rcd at 6215 n. 1. The EEO Policy Statement did not modify any part of the EEO rule. See Streamlining Broadcast EEO Rule and Policies, 11 FCC Rcd 5154 (1996).

9. In United States Telephone Ass'n v. FCC, 28 F.3d 1232 (D.C. Cir. 1994) ("USTA"), the court set aside our general forfeiture guidelines. The USTA decision concluded that the forfeiture schedule should have been put out for comment under the Administrative Procedure Act. Following the USTA decision, we have received requests to withdraw the EEO Policy Statement until it is likewise made available to the public for comment. See, e.g., Petition for Declaratory Ruling by Eagle Radio, Inc. (filed August 11, 1994); Letter from Henry L. Baumann to William E. Kennard, July 13, 1994. In Streamlining Broadcast EEO Rule and Policies, we vacated the EEO Policy Statement and advised licensees that we would follow our recent practice of making forfeiture decisions by relying on case precedent. Accordingly, we will recalculate the forfeiture imposed on the licensee.

10. In determining a forfeiture, we look to case precedent, taking into consideration the relevant statutory factors in Section 503(b)(2) of the Communications Act, including the nature, circumstances, extent and gravity of the violations, and BAI's record of compliance with our rules. In our evaluation, we consider the station's size, number of hiring opportunities, MSA size, recruitment patterns, applicant and interview pools, assessment and record-keeping. E.g., Stauffer Communications, Inc., 10 FCC Rcd 5060, 5061 (1995). After such consideration, we conclude that a forfeiture of \$15,000 is appropriate in the instant case.

11. The record in this case reflects that, of the 28 hires we considered in Commonwealth, 12 (10 for upper-level positions) occurred after October 27, 1989. The licensee could demonstrate no recruitment efforts for five (42%) of those positions (all upper-level). It reported only a single recruiting source for six of its hires, including either Radio & Records, a national trade journal (three upper-level hires), a nationwide computer billboard service (one upper-level hire), a local newspaper (one lower-level hire) and a temporary agency (one lower-

level hire). Two recruiting sources were used for one upper-level hire, a local newspaper and a women's organization.

12. BAI provided records of its applicants for only two of the 12 hires. It reported only one minority out of 45 applicants for these two positions. BAI also provided a list of 178 expressions of interest in announcer positions in 1990. It included only four minorities. However, it cannot be determined that any of the four minorities was considered in connection with any of the 12 hires. Three of the minority applicants had submitted unsolicited applications at times when no jobs were in fact available. The fourth applicant responded to a solicitation for a future position, but it is not indicated whether he was in fact considered in connection with any of the 12 hires. Accordingly, the presence of minority applicants can be confirmed for only three (25%) of the 12 hires, based on the fact that BAI reported that minorities were hired for two positions (one upper-level) and were present in one additional applicant pool. BAI provided no records concerning its interview pools for the 12 hires. Thus, we can conclude that minorities were present in only two (17%) interview pools (one upper-level), based on the two minority hires reported. There is no evidence of any efforts by BAI to identify or use recruiting sources that would be more productive in eliciting minority applicants during the period after October 27, 1989.

13. We found in Commonwealth that BAI had failed to demonstrate adequate recruitment efforts because minorities were present in only 25% of its applicant pools and 11% of its interview pools. After October 27, 1989, minorities were present in only three (25%) of 12 applicant pools and 2 (17%) of 12 interview pools. We also found that, notwithstanding the absence of minorities from its applicant and interview pools, BAI failed to make consistent efforts to attract minority applicants, including failing to recruit for a significant number of vacancies and failing to seek more productive sources likely to refer qualified minorities. 9 FCC Rcd at 2111. BAI failed to conduct any recruitment for five of the 12 hires under consideration here and used only a single general source for six of its hires. Despite the dearth of minority applicants, it did not employ any minority-specific sources. It made no effort to identify other sources that might be more productive in eliciting minority applicants.

14. We find BAI's record comparable to, but more egregious than, that of the licensee of WMMR(FM), Philadelphia, Pennsylvania,<sup>4</sup> in In re Applications of Group W Radio, Inc., 11 FCC Rcd 8942 (1996). The licensee of WMMR(FM) filled 11 vacancies (five upper-level) from January 22, 1990 through June 20, 1991. It recruited for six vacancies. It employed 43 general recruiting sources for one vacancy and 20 minority sources for one vacancy. Minorities were included in five (45.5%) applicant pools and one (9.1%) interview pool. The licensee of WMMR(FM) reported applicant and interviewee information for all 11 positions, although its minority referral information was incomplete. There was evidence that the licensee had engaged

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<sup>4</sup> WMMR(FM) is located in the Philadelphia, Pennsylvania, MSA, which has a labor force that is 18.2% minority (15.4% Black and 2.8% others). The labor force of the Las Vegas, Nevada, MSA, where KFMS(AM)/KFMS-FM are located, is 18.3% minority (8.4% Black, 7.1% Hispanic and 2.8% others). 9 FCC Rcd at 2110-11, n. 7 and 12.

in some self-assessment effort during the review period. We issued a notice of apparent liability for forfeiture in the amount of \$14,000, based on WMMR(FM)'s failure to adequately recruit so as to attract minority applicants.

15. Here, BAI, like WMMR(FM), failed to recruit for a significant number of its 12 vacancies. Minorities were present in only 25% of BAI's applicant pools, compared to 45.5% of WMMR(FM)'s applicant pools. Unlike WMMR(FM), BAI did not demonstrate extensive recruitment efforts for any of its vacancies and evidenced no effort to identify more productive recruiting sources. WMMR(FM) also maintained more complete records concerning its EEO efforts, which we consider essential for meaningful self-assessment, than did BAI. Accordingly, we find BAI's record to be more egregious than that of WMMR(FM). We therefore conclude that a forfeiture of \$15,000 is an appropriate sanction for BAI's violation of the Commission's EEO Rule.

#### IV. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED**, that the Petition for Reconsideration filed by the Idaho/Nevada/Utah and Arizona State Conferences of Branches of the NAACP **IS DENIED**.

17. **IT IS FURTHER ORDERED**, that the Petition For Reconsideration and Response to Notice of Apparent Liability filed by Broadcast Associates, Inc. **ARE GRANTED** to the extent indicated, and **ARE OTHERWISE DENIED**.

18. **IT IS FURTHER ORDERED**, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), that Broadcast Associates, Inc. **FORFEIT** to the United States the sum of fifteen thousand dollars (\$15,000) for violation of the Commission's EEO Rule. 47 C.F.R. § 73.2080. In regard to this forfeiture proceeding, the licensee may take appropriate action as set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, and Section 504(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 504(a), as summarized in the attachment to this Memorandum Opinion and Order and Notice of Forfeiture.

19. **IT IS FURTHER ORDERED**, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- copies of this Memorandum Opinion and Order and Notice of Forfeiture to the Idaho/Nevada/Utah and Arizona State Conferences of Branches of the NAACP, and Broadcast Associates, Inc.

#### FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary