

Before the
Federal Communications Commission
Washington, DC 20554

In re Application of)	
)	
OPUS Media Group, Inc.)	File No. BALH-950601GG
)	
Station KMYY(FM) ¹)	
Monroe, Louisiana)	
)	
For Assignment of)	
License from OPUS Media Group, Inc. to)	
Radioactive Images, Inc.)	

MEMORANDUM OPINION AND ORDER

Adopted: November 15, 1996;

Released: November 22, 1996

By the Commission:

I. INTRODUCTION

1. The Commission has before it an Application for Review timely filed on May 31, 1996, by New South Communications, Inc. ("New South") regarding the Memorandum Opinion and Order ("MO&O") of the Chief, Mass Media Bureau, released May 1, 1996. By that action, the Bureau denied New South's petition for reconsideration of its decision in Letter to James J. Popham, Esq., released October 2, 1995 ("Letter"), which granted the application to assign the license of KMYY(FM) from OPUS Media Group, Inc. ("OPUS") to Radioactive Images, Inc. ("Radioactive"). Also before the Commission are an opposition to New South's application for review filed by Radioactive, the assignee, and New South's reply thereto.

II. BACKGROUND

2. New South asserted in its petition for reconsideration that the Bureau did not possess delegated authority to address the allegations raised in its petition to deny. In support of its claim, New South argued that its petition to deny presented documented allegations demonstrating that OPUS, the assignor, and Radioactive violated the Commission's EEO Rule and policies. According to New South, the Bureau should have referred its petition to deny to the Commission pursuant to Section 0.283(b)(1) of the Commission's Rules, 47 C.F.R. § 0.283(b)(1). Finally, New South argued that the Letter did not address its allegations of apparent misrepresentations made by Bradley Wilkinson ("Wilkinson"), president and a principal shareholder of Radioactive.

¹ The assignment of license for Station KMYY(FM) was consummated on October 20, 1995.

3. The MO&O held that New South did not document its allegations that OPUS or Radioactive failed to comply with our EEO rule. Further, the MO&O found that although New South provided statements under penalty of perjury to support a misrepresentation allegation with its petition for reconsideration, this late submission could not provide a basis for reconsideration. 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) (WWIZ); 47 C.F.R. § 1.106(c). Finally, the MO&O concluded that there was no evidence that Wilkinson's submissions to the Commission demonstrated misrepresentation.

4. New South's application for review contends that review of the MO&O is warranted because it is in conflict with Commission precedent, and is based on an erroneous conclusion regarding an important and material fact, pursuant to Sections 1.115(b)(2)(i), (iv) of the Commission's Rules, 47 C.F.R. §§ 1.115(b)(2)(i), (iv). New South urges the Commission to review its "well documented allegations" regarding Wilkinson's lack of candor, misrepresentation, and noncompliance with our EEO rules. Specifically, New South argues that Wilkinson misrepresented the number of vacancies that occurred during his tenure as general manager of KYEA-FM, West Monroe, Louisiana. New South claims that it documented that Wilkinson had 17 hires during his tenure as general manager, contrary to Wilkinson's assertion of seven hires during this period. Moreover, New South argues that review of the MO&O is warranted because Wilkinson's explanation for his reporting of only seven hires constitutes misrepresentation. Specifically, in Radioactive's opposition to petition for reconsideration, Wilkinson claimed that he relied on Louisiana unemployment insurance requirements in counting only seven hires. Further, Wilkinson stated that, based on his understanding of those requirements, "only employees who worked for the stations for at least three calendar quarters were considered employees." However, New South submits with its application for review a letter from the Louisiana Department of Labor which states that such criteria of employment "is not required under Louisiana unemployment compensation law." Next, New South presents an affidavit from Gene Kelly ("Kelly"), KYEA-FM's former program director, who states that he was unaware of any efforts by Station KYEA-FM to recruit for vacancies.

5. In addition, New South asserts that Wilkinson failed to file 1993 and 1994 Annual Employment Reports for KYEA-FM, and alleges that Wilkinson's statements concerning the filing of Annual Employment Reports in 1993 and 1994 for Station KYEA-FM constitute misrepresentation. In particular, New South points to Wilkinson's statement that his responsibility for filing annual employment reports began in 1994, although Wilkinson states that he became general manager in 1993. Further, New South points out that Wilkinson asserts that a 1994 Annual Employment Report for KYEA-FM was mailed to the Commission, although Commission files do not indicate that the licensee of KYEA-FM filed a 1994 report. Also, New South states that the 1994 Annual Employment Report attached to Radioactive's opposition to petition to deny includes an incomplete Section III and seems to have a signature which differs from Wilkinson's signature on the 1995 Annual Employment Report. Further, New South alleges that there are inconsistencies between the 1995 Annual Employment Report filed with the Commission, and the report attached to Radioactive's opposition to the petition to deny.

6. New South also presents a declaration which indicates that Wilkinson has contacted only a few of the agencies listed in KMYF(FM)'s Model Program Report, and that one of the agencies listed in the Model Program Report does not exist. Also, New South contends that the instant case is distinguishable from Applications of Scott & Davis Enterprises, Inc., et al., 88 FCC 2d 1090 (1982) (Scott & Davis), which was cited in the MO&O. Finally, New South states that Wilkinson "should bear the burden of explaining" the apparent inconsistencies in his submissions to the Commission (citing In the Matter of TeleSTAR, Inc., 3 FCC Rcd 2860, 2861 (1988) (TeleSTAR); In re Application of Metroplex Communications of Florida, Inc., 96 FCC 2d 1090 (1984) (Metroplex)). In TeleSTAR, the Commission assigned the burdens of proof and proceeding with respect to charges of misconduct to the applicant. In Metroplex, the licensee's renewal application was designated for hearing.

7. In response to New South's claims concerning Radioactive's conduct as licensee of KMYF(FM), Radioactive argues that the post-grant activity of Radioactive as licensee of KMYF(FM) could not have had any bearing on the Commission's decision to grant the application which New South is challenging. Also, Radioactive states that New South's affidavit is based on hearsay, and that the organizations listed in its Program Report are illustrative, and do not represent any commitment to contact any particular organization. Radioactive also states that Wilkinson has already explained the apparent inconsistencies between his statements, and that New South has only speculated as to an intent to deceive by Wilkinson. Finally, Radioactive argues that if New South's allegations had been made concerning a licensee "attempting to avoid sanction from some serious wrongdoing," New South's contentions would have merit. In the instant case, argues Radioactive, New South has alleged a failure to comply by a "minority-owned, minority-programmed, and predominantly minority-staffed radio station." In reply, New South states that Radioactive has failed to rebut the evidence of misrepresentation, lack of candor, and EEO noncompliance by Wilkinson.

III. DISCUSSION

8. New South has not documented its allegation that Wilkinson misrepresented the number of vacancies which occurred during his tenure as general manager of KYEA-FM. New South's allegation was unsupported, as it did not provide a declaration or affidavit stating that there were 17 hires during Wilkinson's tenure. Rather, with its Reply to Opposition to Petition to Deny, New South provided 17 names on a list signed by three unidentified individuals.² Although New South provided statements under penalty of perjury to support its misrepresentation allegation with its Petition for Reconsideration, this late submission could not provide a basis for reconsideration. A petition for reconsideration may be granted where it presents facts not known or existing until after the petitioner's last opportunity to present such

² New South's petition for reconsideration included an attachment of three lists, again purporting to show (with numbers somewhat inconsistent with those in its previous submission) that Wilkinson had understated the number of hires. The lists purported to reflect the full-time employees hired during the general management of Wilkinson. The first list included 16 names, the second list included seven names, and the third list had eight names.

matters. 47 C.F.R. § 1.106(c); WWIZ. In this case, New South was aware of this evidence when it filed its Reply to Opposition to Petition to Deny, as the three individuals who submitted statements under penalty of perjury with the petition for reconsideration are the same three individuals who signed the list of names submitted with the Reply to Opposition to Petition to Deny. Accordingly, the MO&O was correct in finding that New South did not provide documentation in a timely manner regarding its allegation of misrepresentation.

9. We find to be without merit New South's argument that Wilkinson misrepresented to the Commission his basis for counting only seven hires when he cited requirements for inclusion as an "employee" that allegedly conflicted with the requirements used by the Louisiana Department of Labor. Although New South provides a letter from the Louisiana Department of Labor attesting to requirements that differ from the requirements as Wilkinson said he understood them, this submission cannot provide a basis for grant of the application for review. An application for review will not be granted where it relies on fact or law "upon which the designated authority" has not been afforded an opportunity to pass. 47 C.F.R. § 1.115(c); Kenny D. Hopkins, 67 RR 2d 580 (1990). Here, New South could have presented its misrepresentation allegation in a reply to Radioactive's opposition to petition for reconsideration. However, New South declined to file a reply. Accordingly, review of this allegation is denied.

10. Also, New South did not document its claim that Station KYEA-FM failed to recruit for each vacancy. The statement submitted in support of its allegation demonstrated only that Kelly, in his capacity as program director, was unaware of any recruitment efforts by Station KYEA-FM. Therefore, this statement does not support the alleged violation of our EEO rule. Accordingly, the staff correctly rejected this allegation.

11. Next, there is no evidence that Wilkinson's submissions to the Commission, particularly his assertions regarding the filings of Annual Employment Reports for KYEA-FM, demonstrate misrepresentation. Misrepresentation involves false statements of fact made with an intent to deceive. Fox River Broadcasting, Inc., 93 FCC 2d 127, 129 (1983). The proponent has the burden of proof to make a prima facie showing of an intent to deceive. See Scott & Davis. Here, New South did not demonstrate an intent on the part of Wilkinson to make misrepresentations to the Commission. Moreover, New South did not establish that this possible filing defect, standing alone, raised a substantial and material question of fact as to Radioactive's qualifications to become the licensee of KMYF(FM). Further, Radioactive explained that the inconsistencies in its 1995 Annual Employment Report were caused by a clerical mistake. Carelessness is not misrepresentation absent an intent to deceive. See Applications of Gary D. Terrell, 102 FCC 2d 787 (1985). Indeed, New South concedes that "it is not clear what motive" Wilkinson had for misrepresenting regarding the 1995 Annual Employment Report. Accordingly, New South has failed to establish that Wilkinson had any intent to deceive, and, thus, its claims of misrepresentation were properly rejected.

12. We find to be without merit New South's claim that KMYF(FM)'s use of only a few of the sources listed in its Model Program Report constitutes misrepresentation. The Model Program Report requires the listing of sources which the applicant "proposes" to use. See

Guidelines to the Model EEO Program, Form 395-A. Indeed, a licensee may modify its EEO program, and change its sources throughout the license term as part of its self-assessment. Therefore, we reject New South's allegations that Radioactive's contact with only some sources indicates misrepresentation. We also disagree that the MO&O improperly compared the facts herein to the record in Scott & Davis. The MO&O did not cite Scott & Davis to compare the underlying facts of this case to the record in Scott & Davis. The MO&O cited Scott & Davis for the proposition that the party alleging misrepresentation has the burden of proof to make a prima facie showing of an intent to deceive. See MO&O at 4-5.

13. Finally, we reject New South's contention that Wilkinson should bear the burden of proof with regard to the allegation of misrepresentation. As indicated earlier, New South, as the party raising the allegation, has the burden of proof. See Scott & Davis. Here, New South has failed to make a prima facie showing of an intent to deceive by Wilkinson. It concedes as much in stating that "it appears that Wilkinson has dissembled at best and perhaps, at worst, affirmatively misrepresented and lied to the Commission." Indeed, in the absence of a finding of failure to comply with our EEO rule, there is no basis for finding that Radioactive had an apparent motive to deceive. Moreover, the cases which New South cites are inapposite. In TeleSTAR, the Commission remanded a proceeding for further evidentiary hearing, and allocated the burden of proof to the applicant only after an Administrative Law Judge's finding in an Initial Decision that the applicant had made misrepresentations to the Commission. The assignment application herein was never designated for hearing. In Metroplex, evidence of conflicting statements, in addition to an intent to deceive the Commission, warranted designation for hearing. In this case, however, for the reasons stated supra, New South has not made a prima facie showing of misrepresentation on the part of Wilkinson. Accordingly, New South's reliance on TeleSTAR and Metroplex is misplaced.

IV. CONCLUSION

14. We accordingly find that New South has failed to establish that the MO&O is inconsistent with precedent or that it is based on an erroneous finding. We will therefore deny its application for review.

V. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** that, pursuant to Section 1.115(g) of the Commission's Rules, 47 C.F.R. Section 1.115(g), the Application for Review filed on May 31, 1996, by New South Communications, Inc. **IS DENIED**.

16. **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