

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

In re Application of	)	
	)	
WXTU License Limited Partnership	)	
	)	
For Renewal of License of	)	
Station WXTU(FM)	)	File No. BRH-910329YV
Philadelphia, PA	)	

**MEMORANDUM OPINION AND ORDER  
AND FORFEITURE ORDER**

Adopted: April 1, 1998

Released: April 9, 1998

By the Commission:

**I. INTRODUCTION**

1. The Commission has under consideration its Memorandum Opinion and Order and Notice of Apparent Liability in Group W Radio, Inc., 11 FCC Rcd 8942 (1996) ("Group W") granting the renewal application of Station WXTU(FM), Philadelphia, Pennsylvania, subject to reporting conditions and a Notice of Apparent Liability ("NAL") for forfeiture in the amount of \$12,000, and a request for rescission or reduction of the NAL filed by WXTU License Limited Partnership, the licensee of WXTU(FM). For the reasons that follow, we find the arguments in support of the licensee's request for rescission of the NAL levied in Group W to be unpersuasive. Therefore, we deny the licensee's request and impose a forfeiture in the amount of \$12,000.<sup>1</sup>

**II. BACKGROUND/PROCEDURAL MATTERS**

2. In Group W, we concluded that a hearing was not warranted because no substantial and material questions of fact existed. We also found that there was no evidence of employment discrimination. The licensee recruited, interviewed, and employed minorities. Specifically, we found that, due to the licensee's incomplete recruitment records, it could document that it recruited for only seven (35%) of 20 full-time vacancies and had no records on minority referrals. However, the licensee had records of referral sources of hires, which revealed that a local newspaper referred four minority hires. Furthermore, the licensee used seven general sources for two to six openings and four minority sources for five to six openings. The licensee was able to report applicant and interview data for five of its 20 openings, which revealed that it interviewed all 62 of its applicants for those positions, including 24 minorities. Also, minorities were present in all five applicant/interview pools for which the licensee maintained data. Because minorities were hired for three other positions for which interview data were not reported, we concluded that minorities were in at least eight applicant/interview pools (40%) out of the 20 openings.

3. Based on the above, we concluded that the licensee's recruitment efforts were deficient

<sup>1</sup> The licensee did not contest the imposition of reporting conditions.

because it failed to recruit for 13 of 20 vacancies, contacted minority sources for only six vacancies despite inadequate minority applicant flow, maintained insufficient information to self-assess adequately because it kept applicant and interview pool information for only five openings, and there were no minorities in 12 of 20 applicant pools. We also noted that it failed to keep records of minority referrals but improved its record-keeping in the last years of the license term. Consequently, after reviewing case precedent, we granted the station's renewal application subject to an NAL for \$12,000 and reporting conditions for two years.

4. In its request for rescission, the licensee argues that the NAL is unwarranted and should be rescinded or reduced to an amount no greater than \$1,000. In support of its argument, the licensee contends that it employed women and minorities at or above 50% of parity with their representation in the available labor force every year of the prior license term and that its employment of women exceeded parity every year of the term. The licensee further maintains that, because it hired minorities at a level that exceeded parity with the available labor force, the Commission erred in finding that the station had deficient minority recruitment efforts during the term at issue. The licensee also argues that it actively recruited women and minorities during the license term at issue in Group W and that any deficiencies it may have had in its EEO program were corrected before it filed its renewal application. More specifically, the licensee contends that there were no deficiencies in its efforts, but that "there were deficiencies in the paperwork maintained and retained by the station regarding specific data on recruits." The licensee further argues that, because it corrected record-keeping problems, these "historical record-keeping deficiencies should not, in and of themselves, provide the basis for a monetary forfeiture." Finally, the licensee asserts that the Commission erred in finding that the station had unproductive minority sources while ignoring both its attempts to obtain minority referrals from such sources and the minority referrals it did receive from non-minority sources.

### III. DISCUSSION

5. Once an NAL for forfeiture has been issued, the respondent must show in writing why a forfeiture penalty should not be imposed, why it should be reduced, or, in the alternative, pay the forfeiture. Any showing by the respondent must include a detailed factual statement and such documentation and affidavits as may be pertinent. 47 C.F.R. § 1.80(f)(3).

6. Regarding the licensee's arguments about minority and female hiring and employment, we disagree with its statistics concerning upper-level employment. Our review indicates that it employed minorities above 50% of parity for only four of seven years and employed women above 100% of parity for six of seven years. Regardless, the Commission focuses on recruitment and self-assessment efforts of licensees and does not require minimum percentages of minority hires or employment in evaluating licensees' EEO programs. See Channel 5 Public Broadcasting, Inc., 10 FCC Rcd 10388, 10389 (1995). See also, 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). Therefore, in finding the licensee's recruitment efforts deficient in Group W, the Commission did not focus on the percentage of minority hires, but rather on the recruitment and self-assessment efforts of the licensee. Furthermore, meeting our processing guidelines is not viewed as a safe harbor excusing licensees from compliance with our EEO Rule. See D.W.S., Inc., 7 FCC Rcd 7170, 7172 n.8 (1992); Catawba Valley Broadcasting Company, Inc., 3 FCC Rcd 1913 (1988). In addition, it was not clear that all of the licensee's EEO deficiencies had been corrected by the end of the license term. In any event, we imposed the sanction because the licensee violated the Commission's EEO Rule during the term, regardless of whether the licensee had made adequate corrections by the time it filed its renewal application.

7. The licensee contends that it had no deficiencies in its recruitment efforts, only in its

paperwork regarding those efforts. Because its paperwork problems were allegedly remedied by the end of the license term, the licensee maintains that there is no basis for a forfeiture. Contrary to the licensee's assertion, the relevant period of review is the entire license term, and even if the licensee had remedied its record-keeping problems by the end of the license term, while commendable, that would not alter our judgment that its record-keeping was inadequate. Finally, it argues that the Commission considered only its lack of minority referrals from minority sources and ignored its minority source contacts and other minority referrals. As we previously determined in Group W, the licensee demonstrated that it recruited for only seven of 20 openings and provided recruitment records for only five of those openings. Without more, the Commission could not conclude that the licensee's mere assertion that it had recruited was adequate evidence of recruitment for all openings. As we held in Emmis AM License Corporation of Indianapolis, FCC 97-278 (Released August 13, 1997) ("Emmis"), licensees must document their recruitment efforts in order for us to conclude that they actually recruited for specific openings. This documentation is also crucial for the licensee to assess the adequacy of its outreach efforts on an ongoing basis, as required by the EEO Rule. In addition, our EEO Rule requires a licensee to contact "potential sources of minority and female applicants, to supply referrals whenever job vacancies are available in its operation," not for just seven out of 20 openings. See 47 C.F.R. § 73.2080(c)(iv)(2).

8. Moreover, the licensee acknowledges that its record-keeping was deficient. Even so, we did not find that the licensee violated our EEO Rule solely because it had too few records. We found the licensee's self-assessment to be inadequate after considering that the licensee had no records on referrals to evaluate the effectiveness of its sources and had no records on applicants or interviewees for 15 of 20 openings to evaluate the effectiveness of its recruitment efforts. It is well settled that a failure to maintain records renders self-assessment difficult, if not impossible. See Emmis, FCC 97-278, para. 11; Price Broadcasting Company, FCC 97-237, para. 8 (Released August 12, 1997); NAB Report and Order, 4 FCC Rcd 1715 (1989). In addition, the licensee presented no evidence that any of its minority sources produced minority referrals. We did consider that a general source produced some minority referrals, but these referrals were inadequate in light of the fact that the licensee could show the presence of minorities in only eight out of 20 applicant pools. Use of unproductive minority sources does not, per se, evidence inadequate EEO efforts, but continued reliance on unproductive sources without attempts to identify other sources shows a failure of self-assessment. Finally, the licensee has offered no reason to suggest error in the Commission's reliance on the case precedent cited in Group W in deciding the forfeiture. After considering all of the above factors, we conclude that a forfeiture of \$12,000 is appropriate in this case.

#### IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED** that the request for rescission or reduction of the forfeiture filed by the licensee of WXTU(FM) **IS DENIED**.

10. **IT IS FURTHER ORDERED**, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), that the licensee **FORFEIT** to the United States the sum of twelve thousand dollars (\$12,000) 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 Order.

11. **IT IS FURTHER ORDERED** that a copy of this Memorandum Opinion and Order and Forfeiture Order be sent to the licensee by Certified Mail -- Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary