

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

In re Application of

TRI-VALLEY BROADCASTERS, INC.

For Renewal of License of Station KKIQ-FM  
Livermore, California

BRH-900801UN

**MEMORANDUM OPINION AND ORDER  
AND NOTICE OF APPARENT LIABILITY**

Adopted: April 1, 1996;

Released: April 24, 1996

By the Commission:

**I. INTRODUCTION**

1. The Commission has before it for consideration: (i) a license renewal application for the above-captioned station; (ii) a Petition to Deny timely filed on November 1, 1990, by the California State Conference of Branches of the National Association for the Advancement of Colored People, the National Black Media Coalition, and the Bay Area Black Media Coalition (collectively "NAACP/NBMC"); (iii) an opposition from the licensee; and (iv) the licensee's response to a staff letter of inquiry.

2. The NAACP/NBMC alleges that KKIQ-FM violated our Equal Employment Opportunity (EEO) Rule and policies. Accordingly, it requests that we conduct an investigation of the station's employment practices pursuant to *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*), and designate the renewal application for hearing with a view toward denying it. The licensee charges that the NAACP/NBMC has not presented any evidence of discrimination, that the records indicate compliance with the Commission's EEO Rule, and that unconditional renewal is warranted.

**II. BACKGROUND**

3. *Standing*. In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit, "specific allegations of fact sufficient to show... that a grant of the application would be *prima facie* inconsistent with the [public interest, convenience, and necessity]." 47 U.S.C. § 309(d)(1); *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*); *Dubuque T.V. Limited Partnership*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with knowledge of the facts alleged. 47 U.S.C. § 309(d)(1).

4. Filed with the petition to deny was an unsigned declaration under penalty of perjury from the chairman of the National Black Media Coalition. A resident of the Washington, D.C. area, he does not claim to be a listener of the challenged station or a resident of the area. Addi-

tionally, the petition contained a statement under penalty of perjury from the president of the California State Conference of the National Association for the Advancement of Colored People. Likewise, he does not state that he is a listener of the station or a resident of the service area. The petition also included an unsigned declaration from the chairman of the Bay Area Black Media Coalition. The chairman states that he is a listener of KKIQ-FM, but his declaration was submitted after the expiration of the deadline for petitions to deny. See 47 U.S.C. § 309 (d)(1); *Golden West Broadcasters*, 10 FCC Rcd 1602 (1995). Accordingly, pursuant to 47 C.F.R. § 73.3587 we will treat the NAACP/NBMC's challenge as an informal objection. See *Lotus Communications, Inc. et al.*, 9 FCC Rcd 2117 (1994); see also *Michigan/Ohio Broadcast Renewals*, 3 FCC Rcd 6944 (1988); *KDEN Broadcasting Company*, 55 RR 2d 1311, 1311-1312 (1984).

**III. DISCUSSION**

5. *Prima Facie Case*. The NAACP/NBMC derived its factual allegations from the licensee's EEO program and annual employment reports. Review of the licensee's EEO record led us initially to conclude that the NAACP/NBMC presented a *prima facie* case against KKIQ-FM demonstrating that unconditional grant of the renewal application would have been inconsistent with the public interest. Section 309(d)(1) of the Communications Act of 1934, 47 U.S.C. § 309(d)(1). See *Astroline*.

6. Review of the NAACP/NBMC's allegations, as well as the licensee's inquiry response, leads us to conclude that there are no substantial and material questions of fact warranting designation for hearing. In addition, we find no evidence of employment discrimination. Thus, a grant of the application will serve the public interest. 47 U.S.C. § 309(d)(2); *Astroline*. However, we will grant renewal with appropriate remedies and sanctions for deficiencies in its EEO program.

7. Section 73.2080 of the Commission's Rules, 47 C.F.R. § 73.2080 requires that a broadcast licensee refrain from employment discrimination and establish and maintain an EEO program reflecting positive and continuing efforts to recruit and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit and promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified minorities and women are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. See Sections 73.2080(b) and 73.2080(c).

8. In its petition, the NAACP/NBMC maintains that KKIQ-FM failed to employ more than a token number of minorities during the license term. It indicates that the licensee's 1990 EEO narrative stated that it would seek new minority recruitment sources in the Oakland-San Francisco Bay area. However, according to the NAACP/NBMC, "neither these sources nor the time they began to be used are identified."

9. In response, KKIQ-FM denies that its EEO program is ineffective. The station claims difficulty in attracting minority applicants because of the small minority labor force in Livermore, California. Additionally, the licensee asserts that its minority recruitment is hampered by its inability to offer salaries that are competitive with those in the Oakland-San Francisco Bay area. KKIQ-FM claims that it re-

cruits in the Oakland-San Francisco Bay area, but has found it difficult to attract applicants because of the distance to the station, 31 miles.

10. Review of the licensee's renewal application, inquiry response, and opposition reveals 12 full-time hires, including 11 upper-level hires, during the period August 1, 1987, through July 30, 1990.<sup>1</sup> In its renewal application, KKIQ-FM indicates that it received minority referrals from the *Valley Times* (1), the California Broadcasters Job Bank (2), Bay Area Broadcast Skills Bank (2), station employees (1) and announcements on KKIQ-FM (1).

11. The licensee's records, submitted with its inquiry response, indicate that it recruited for 11 of its 12 full-time positions. It appears that KKIQ-FM used the following general and minority recruitment sources during the period under review: Bay Area Black Journalists Association (for two positions), Latinos in Communication (for two positions), California Association of Broadcasters Job Bank (for two positions), Bay Area Broadcast Skills Bank (for 11 positions), Training Resources Unlimited (for one position), National Management Corporation (for one position), a former employee (for one position), Chabot College (for one position), Ohlone College (for one position), California State University (for one position), Radio & Records (for one position), Gavin Report (for one position), advertising on KKIQ (for 11 positions) and Robert Haft & Associates (for one position). Additionally, KKIQ-FM states that it contacted the following sources, though no statistics were provided regarding the number of actual referrals from each source: National Association of Black Journalists, National Association of Hispanic Journalists, Native American Journalists Association, National Association of Broadcasters, Asian American Journalists Association, American Women in Radio and Television, Women in Communication, Bay Area Black Media Coalition, California Chicano News Media Association, Livermore High School and the Alameda Newspaper Group.

12. The licensee attracted nine minorities (seven Hispanics and two Asian/Pacific Islanders) among 68 upper-level applicants. It received three Hispanic and two Asian/Pacific Islander applicants from advertisements on KKIQ-FM and one successful Hispanic applicant was a former employee. The licensee did not provide the recruitment sources for three Hispanic applicants, including one Hispanic hire. The staff letter of inquiry requested information regarding interview data, but the licensee was unable to provide such information. Two hires resulted from employee referrals, five from advertisements on KKIQ-FM, one was a previous employee, one was a referral from another station and, in three cases referral sources

were unknown. A total of seven upper-level applicant pools included minorities. Three minorities (all Hispanics) were hired for upper-level positions.

13. The licensee argued in its renewal application, opposition and inquiry response that its relevant labor force should be changed from Oakland, California to Livermore-Pleasanton, California.<sup>2</sup> The licensee claims that Oakland's "labor statistics skew the picture regarding the amount of minorities in the rest of the county." Therefore, the licensee argues that it should be allowed to use the Livermore and Pleasanton labor force, rather than the relevant MSA, Oakland. The licensee's argument is based upon the distance between Oakland and Livermore, the difficulty in commuting through the mountainous terrain and the fact that KKIQ-FM's signal does not reach the Oakland area. The NAACP/NBMC finds the licensee's argument that Livermore, California, should be the correct labor force, rather than Oakland, California, to be "absurd." The NAACP/NBMC claims that Livermore is only 31 miles from Oakland and is considered a commuter suburb.

14. In certain circumstances, we permit licensees to use alternative labor force data if they can demonstrate that the use of such data is appropriate. The standard for such a request is a three part test: (1) the distance of the station from the areas with significant minority population is great; (2) commuting from those areas to the station is difficult (such difficulties may be based on distance but may also be based on other factors such as lack of public transportation); and (3) recruitment efforts directed at the MSA minority labor force have been fruitless. *Buckley Broadcasting Corporation*, 9 FCC Rcd 2099, 2101 (1994). The licensee did not fully articulate, nor did it fully substantiate the factors required to meet the standard. The licensee must show more than the actual mileage to Oakland and the existence of a mountainous terrain. It must show, for example, that the distance and difficulty in traveling between Oakland and Livermore has impeded its ability to attract employees from the Oakland MSA. *See Capital Christian Broadcasting, Inc.*, 3 FCC Rcd 1919, 1920, 1922 n.9 (1989). Moreover, the licensee did not document all of its referrals, interviews or hires, and thus was unable to meet the third prong of the test by demonstrating that recruitment efforts directed at the Oakland MSA proved fruitless. *See Gulf Atlantic Media Corporation*, 8 FCC Rcd 603 (1993). In light of these facts, we do not believe that the licensee has provided an adequate and reasoned basis for reliance upon an alternative labor force.

15. There are no substantial and material questions of fact warranting designation for hearing. *See Astroline*. The licensee attracted, hired and employed minorities and there

<sup>1</sup> The current license term ended December 1, 1990. The Oakland, California Metropolitan Statistical Area (MSA), in which the station is located, has a 29.2% minority labor force (12.5% Black, 9.5% Hispanic, 6.6% Asian/Pacific Islander, .6% American Indian). The station's 1984 Annual Employment Report lists two (13.3%) minorities (one Hispanic, one Asian/Pacific Islander) among 16 employees overall; both (14.3%) were among 14 upper-level employees. In 1985 the station reported two (11.8%) minorities (two Hispanic) on a staff of 17; both (13.3%) were among 15 upper-level employees. On its 1986 report, the station listed three (21.4%) minorities (two Hispanic, one Black) among 14 employees overall and all three (23.1%) were among 13 upper-level employees. In 1987 the station reported no minorities on a staff of 14 employees. The station's 1988 report listed one (6.7%) minority (Hispanic)

on a staff of 15; that minority (7.1%) was also among 14 upper-level employees. In 1989, the licensee reported a staff of 14, including one (7.1%) minority (Hispanic) who was also among an upper-level staff of 13 employees. The 1990 report lists one Hispanic (6.3%) among 16 overall employees and no minorities on the station's upper-level staff.

<sup>2</sup> The licensee uses the U.S. Department of Labor Training Administration 1980 Census data for Livermore-Pleasanton, California, which is 9.1% minority, of which 6.7% is Hispanic and .08% is Black. We apply U.S. Census data for the Oakland MSA to evaluate a station, such as KKIQ-FM, located in Livermore. *See* n.1, *supra*.

is no evidence of employment discrimination. In addition, the licensee contacted referral sources, including minority-oriented sources, for 11 of its 12 hiring vacancies. Therefore, renewal of the license is in the public interest.

16. However, we find KKIQ-FM's overall recruitment efforts deficient because minorities were absent from five of the licensee's 12 applicant pools, and the licensee failed to maintain adequate records for meaningful self-assessment. 47 C.F.R. § 73.2080.

17. In 1994, we adopted a Policy Statement regarding forfeitures to be assessed for violations of our EEO Rule. *Standards for Assessing Forfeitures for Violations of the Broadcast EEO Rules*, 9 FCC Rcd 929 (1994) ("EEO Policy Statement"). A court decision issued since the EEO Policy Statement indicated that our general policy statement,<sup>3</sup> on forfeitures must be put out for notice and comment. *United States Telephone Ass'n v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994). While the *USTA* case did not address our EEO Policy Statement, members of the broadcast community have called for the withdrawal of the EEO Policy Statement until it is likewise made available to the public for notice and comment.<sup>4</sup> 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*, FCC 96-49, released February 16, 1996, we vacated the *EEO Policy Statement* and advised licensee that we would follow our recent practice of making forfeiture decisions by relying on case precedent.

18. In determining a forfeiture, we would analogize the cases based on factors such as, but not limited to, station size, number of hiring opportunities, composition of the local labor force, recruitment patterns, applicant and interview pools, assessment and record-keeping. Using this approach, in determining appropriate sanctions and/or remedies, we have carefully considered the facts and circumstances of this case in light of pertinent case precedent. We believe that the record in the instant case is similar to, but more egregious than, that of the licensee of WYYN/WTNT-FM, Tallahassee, Florida, in *Applications of Certain Broadcast Stations Serving Communities in the Sarasota, Florida Area and Other Florida Communities*, 5 FCC Rcd 5683 (1990). The licensee therein recruited from local newspapers, two local colleges, *Broadcasting Magazine*, the Urban League, employee referrals, as well as local broadcast stations. The licensee knew the referral source of the successful applicant for nine of its 27 positions, and was able to ascertain the total number of interviewees for 17 of its 27 positions. The licensee did not keep adequate records and was unable to indicate how many of its referrals were minorities. Additionally, the licensee was able to recall the number of minority interviewees for only two positions. Minorities constituted 27.6% of the labor force in the Tallahassee, Florida MSA.<sup>5</sup> In that case, we concluded that the licensee failed to engage in adequate recruitment and

conduct meaningful self-assessment of its EEO program, given the lack of minority applicants and hires. The Commission issued a \$2,000 Notice of Apparent Liability for Forfeiture and imposed reporting conditions.

19. WYYN/WTNT-FM was decided under the former forfeiture authority. Under that standard, the forfeiture penalty assessed against a broadcaster could "not exceed \$2,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation could not exceed a total of \$20,000."<sup>6</sup> In 1989, Congress substantially increased the dollar amounts of our forfeiture authority. Pub. L. No. 101-239, 103 Stat. 2131. Pursuant to Section 503(b)(2), the forfeiture penalty assessed against a broadcaster may "not exceed \$25,000 for each violation or each day of a continuing violation, except that the amount assessed for any continuing violation shall not exceed a total of \$250,000 for any single act or failure to act."

20. The record here indicates that KKIQ-FM recruited for 11 of its 12 overall hiring opportunities. However, minorities were present in only seven upper-level applicant pools. Specifically, we are concerned about the licensee's efforts regarding Blacks, the dominant minority in the Metropolitan Statistical Area (12.5%). KKIQ-FM failed to attract any Black applicants, nor did it interview a Black during the inquiry period. Additionally, the licensee was unable to furnish any data regarding the number of interviewees for any of its vacancies. Thus, the licensee failed to maintain adequate records for meaningful self assessment. We conclude that KKIQ-FM's assessment was deficient because it failed to modify its recruitment efforts to attract qualified Black applicants.<sup>7</sup>

21. We believe that the deficiencies in the instant case are more serious than those in the case of WYYN/WTNT-FM. The station's location in an MSA in which minorities comprise a significant percentage of the population, 29.2%, should have prompted KKIQ-FM to utilize its minority specific sources more fully whenever vacancies occurred and to increase its outreach efforts within the community. In addition, the licensee's failure to maintain complete applicant and interview pool data in view of the high percentage of minorities is comparable to that of WYYN/WTNT-FM. We believe that maintaining such information would have better enabled the licensee to self-assess the effectiveness of its recruitment efforts, which was clearly necessary in light of the absence of any Black applicants during the three-year inquiry period. Given the facts of this case, broadcasters' familiarity with our long standing EEO rule, as well as our expanded forfeiture authority in this area, we feel that the circumstances in this case justify the issuance of a Notice of Apparent Liability for \$10,000. Accordingly, we will grant renewal subject to reporting conditions and issue a Notice of Apparent Liability for \$10,000.

<sup>3</sup> *Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *recon. denied*, 7 FCC Rcd 5339 (1992), *revised*, 8 FCC Rcd 6215 (1993).

<sup>4</sup> The Commission has, however, received authority to assess higher forfeitures for violations of its rules. Pub. L. No. 101-239, 103 Stat. 2131.

<sup>5</sup> The Tallahassee, Florida MSA is 25.7% Black, 1.2% Hispanic, 0.5% Asian/Pacific Islander and 0.2% American Indian.

<sup>6</sup> Section 503(b)(2) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b)(2), authorizes the Commission to

impose monetary forfeitures on broadcast station licensees or permittees for violations of the Act or of regulations promulgated thereunder.

<sup>7</sup> The licensee is reminded that under our EEO Rule, 47 C.F.R. § 73.2080, it has an obligation to recruit for females and minorities for each vacancy. To the extent that licensee fails to do so, female, as well as minority, employment is affected.

**IV. CONCLUSION**

22. Upon review of the record and the arguments submitted by all parties, we find no hearings are warranted and that renewal of the license is appropriate. However, we will grant the renewal subject to reporting conditions and issue a Notice of Apparent Liability for \$10,000.

**V. ORDERING CLAUSES**

23. Accordingly, IT IS ORDERED that the Informal Objections filed by the California State Conferences of Branches of the NAACP, National Black Media Coalition, and the Bay Area Black Media Coalition against the renewal application of KKIQ-FM ARE DENIED.

24. IT IS FURTHER ORDERED that the license renewal application filed by Tri-Valley Broadcasters, Inc. for Station KKIQ-FM IS GRANTED subject to reporting conditions as described herein and, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. § 503, a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of \$10,000.

25. IT IS FURTHER ORDERED that the licensee of Station KKIQ-FM submit to the Commission an original and one copy of the following information on August 1, 1996 and August 1, 1997:

(a) Two lists divided by full-time and part-time job vacancies during the twelve months preceding July 1, 1996 for the first report and July 1, 1997 for the second report, indicating the job title and FCC job category, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;<sup>8</sup>

(b) A list of all employees as of the July 1, 1996, payroll period for the first report and as of the July 1, 1997, payroll period for the second report, by job title, indicating full-time or part-time status (ranked from the highest paid classification), date of hire, sex and race or national origin; and

(c) Details concerning the station's efforts to recruit minorities for each position filled during the 12-month periods specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any information it believes relevant regarding the station's EEO performance and its efforts thereunder.

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

27. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch.

28. With respect to the forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, as summarized in the attachment to this Order. Any comments concerning the ability to pay should include those financial items set forth in the attachment.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary

<sup>8</sup> Such a list might start:

1) News Director: Officials and Managers; Full-time.	
3 Applicants:	1 White female      A.W.R.T
	1 Hispanic male      National Hispanic Media Coalition
	1 Black female      NAACP

Sources contacted - Local newspaper, A.W.R.T., National Hispanic Media Coalition and NAACP  
Selected - Hispanic male, National Hispanic Media Coalition, (10/12/96)