

BEFORE THE

Federal Communications Commission

JUL 12 1994

WASHINGTON, D.C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Applications of)	
)	MM Docket NO. 94-10
THE LUTHERAN CHURCH/ MISSOURI SYNOD)	
)	File Nos. BR-890929VC
)	BRH-890929VB
For Renewal of Licenses of)	
Stations KFYO/KFYO-FM)	
Clayton, Missouri)	

To: The Honorable Arthur I. Steinberg
Administrative Law Judge

CHURCH EXHIBIT 8

Testimony of Marcia A. Cranberg

Respectfully submitted,

THE LUTHERAN CHURCH -
MISSOURI SYNOD

By: Richard R. Zaragoza
Kathryn R. Schmeltzer
Barry H. Gottfried
Scott R. Flick

Its Attorneys

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Dated: June 1, 1994

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Docket No. 94-10 Exhibit No. 8

Presented by CHURCH

Disposition { Identified 6/24
Received 6/24
Rejected _____

Reporter BARBARA LORD

Date 6/24/94

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TESTIMONY OF MARCIA A. CRANBERG

A. BACKGROUND

1. I am an attorney licensed to practice law in the District of Columbia. I am employed as a Special Counsel by the law firm of Arnold & Porter in Washington, D.C. I joined the firm in 1982 as an Associate and have been with the firm since that year.

2. Throughout my years at Arnold & Porter, I have specialized primarily in representing the firm's broadcast clients before the Federal Communications Commission (the "FCC"). Radio Stations KFUO (AM and FM), Clayton, Missouri (collectively "KFUO"), owned and operated by the Lutheran Church - Missouri Synod (the "Church"), have been two of the law firm's broadcast station clients since the 1960's. I first began to represent KFUO under the guidance of Reed Miller, now a semi-retired partner of the firm. Since sometime in the mid-1980's, I have been the attorney at the law firm with primary day-to-day responsibility for serving the Church's FCC related regulatory needs.

3. During the license term February 1, 1983 to February 1, 1990, a substantial amount of our legal time was devoted to a contested antenna relocation dispute. We were successful. I worked closely with Dennis Stortz whom I found to be very cooperative and responsive. Another matter we were asked to

become involved in was to help the Church finalize its renewal applications due to be filed by October 1, 1989. Dennis Stortz asked me to review the FCC Forms 303-S and FCC Form 396 for the KFUE renewals. I suggested edits to the description of the Equal Employment Opportunity Program Statement and relayed the substance of those edits either to Mr. Stortz or Paula Zika. Based on my review of the materials and my conversations with Mr. Stortz, I had no reason to believe that in the final EEO Program Report the licensee was not being responsive or that the statements were untrue. I did not focus on the fact that KFUE(AM) had a religious program format, and that there were likely to be requirements for knowledge of Lutheran doctrine for certain positions. Thus, I did not question Mr. Stortz about whether we should have language in the applications to reflect this requirement.

B. CLIENT ADVISORIES

4. Over the course of the period 1983-1990, Arnold & Porter sent to various general managers at KFUE, as well as to our other broadcast clients, scores if not hundreds of letters notifying them of regulatory developments at the Commission. These letters related to topics as diverse as calculations of antenna heights, cut-off periods for various applications, remote control of TV transmitters, mobile satellite service, the multiple ownership rules, political advertising rules, and many other topics. In general, these letters were sent to all of the

firm's broadcast clients, as a way of keeping them up-to-date on developments.

5. Included among these many client advisories were letters relating to the Commission's EEO policies. Certain of the EEO letters related to the Commission's reporting procedures. For example, in December 1985, one of our advisories informed our clients about an FCC rulemaking concerning EEO reporting procedures. A copy of this letter is attached as Attachment 1.

6. In June 1987, we sent our clients, including KFUE, copies of the full text of the Report and Order released on June 12 of that year. In our cover letter, the subjects which we explicitly described related to new reporting requirements and forms. We explained that Appendix B of the Report and Order outlined in detail the EEO program which every station was required to adopt, but made no attempt to summarize those requirements. Instead, we referenced the appropriate pages, and urged the clients themselves to review the provisions so that they would know what was required. A copy of our cover letter is attached as Attachment 2.

7. Ten months later, in April 1988, we sent our broadcast clients (including KFUE) a one-page letter beginning: "While the FCC has in recent years taken a more relaxed approach to enforcement of a number of its rules, the enclosed FCC release indicates that the Commission is still prepared to enforce its equal opportunity requirements." In regard to a condition which the Commission had recently imposed on a station in North

Carolina, we noted that: "While the condition is not onerous.... it is inconvenient, and something of a 'black mark' on the station's record." A copy of this letter is attached as Attachment 3.

8. On November 1, 1988, we sent our broadcast clients, including KFUO, a letter informing them of the Court of Appeals' decision in Beaumont Branch of the NAACP v. FCC. We noted that "[t]he decision makes it likely that the FCC will consider more carefully in the future renewal challenges based on EEO grounds." A copy of this letter is attached as Attachment 4. Within weeks of this letter, I received inquiries from KFUO-FM General manager Tom Lauher concerning the FCC's renewal requirements. On December 20, 1988 -- apologizing for my delay -- I sent Mr. Lauher a copy of the FCC's rules setting forth its EEO requirements, and of KFUO's most-recently filed EEO related forms.

9. To the best of my knowledge, the letter of December 20, 1988 is the first letter in which we addressed any EEO issues specific to KFUO (as opposed to all our broadcast clients) during the License Term beginning in 1983. I told Mr. Lauher that I had been assured by FCC staff that it would be acceptable with the FCC if KFUO(AM) and KFUO-FM filed a single EEO program. A copy of my letter to Mr. Lauher is attached as Attachment 5. Again, up to this point Arnold & Porter had not to my knowledge become involved in matters relating to specific EEO issues peculiar to the stations. (I should note that neither before nor after this

letter, and indeed not until depositions were held in this case, had I ever met in person with Mr. Stortz or anyone else employed by the Church or by KFUO. Moreover, I have never visited the Stations.)

10. Mr. Lauher called me at least once thereafter to discuss the EEO requirements and their applicability to KFUO. Then, in early March 1989, I received a copy of a 10-page memorandum drafted by Mr. Lauher for his superior.

11. In late March or early April 1989, Mr. Lauher followed up on his earlier inquiries by requesting information from me on the relationship between KFUO's religious affiliation and the EEO requirements. To the best of my knowledge, we had not previously provided any information to KFUO concerning this issue during the License Term. By letter of April 4, 1989, a copy of which is attached, I explained the holdings of several FCC and Court of Appeals decisions from the early and mid-1970's and explained that I had been assured by FCC staff the "general guidelines described . . . [in the cases], although articulated some time ago, are still in force . . ." See Attachment 6.

C. RENEWAL PLEADINGS

12. I filed the KFUO renewal applications with the FCC on September 29, 1989, after reviewing them as explained in paragraph 3 above. Shortly after January 1, 1990, I received from my client a copy of a Petition to Deny these renewals, which the NAACP had apparently filed and served directly on my client

without serving me with a copy. After consultation with Mr. Stortz, I prepared and caused to be filed on February 23, 1990, an "Opposition to Petition to Deny and Response to Inquiry."

13. I want to address the misunderstanding which has arisen in connection with the Opposition to Petition to Deny and subsequent pleadings in which we cited statistics regarding the percentage of KFUCO-FM listeners who are Black, Hispanic and Asian.^{1/} The FCC's Hearing Designation Order alleged that the station had engaged in speculation about the qualifications of minorities with regard to knowledge of classical music,^{2/} and that it had failed to engage in recruitment efforts based upon that speculation. That interpretation is completely different from the limited point we sought to make.

14. To the contrary, we presented the statistics regarding the station's minority listeners solely in a preliminary effort

1/ The independent 1988 audit figures we cited indicated that approximately 3.7 percent of the station's listeners at that time were Black and 0 percent were Hispanic or Asian.

2/ I used as synonyms the terms "knowledge of classical music," "classical music training," "expertise in classical music," and a "working knowledge of classical music," to convey the same idea in the pleadings I drafted to defend KFUCO at the Commission. Specifically, all the terms meant that persons hired for the relevant positions had to have a fairly significant knowledge of classical music. I certainly did not intend to mislead the Commission by using these different expressions to refer to the same idea. Moreover, in crafting the Opposition, I implied that knowledge of classical music was a requirement for certain positions. As I acknowledged in later pleadings, especially at p. 12 of our December 28, 1992 Reply, I later learned that not all persons hired for certain positions I had mentioned had such expertise. Again, we had no intention whatsoever to mislead the Commission.

to argue that statistics should take into account the relevant pool of qualified individuals for particular specialized employment positions in order to have any meaning. In my view, this is a method of analysis the FCC specifically endorsed in Equal Employment Opportunity Guidelines, 47 R.R. 2d 1689 (1980). It is also a method of analysis which Arnold & Porter had previously employed before the Commission on behalf of other broadcast clients. We acknowledged in the Opposition that we were not aware of any statistics regarding the percentage of minorities with classical music training. Therefore, we cited to the statistic regarding minority listeners by rough analogy. Our intent was only to make the limited legal argument that comparing overall population statistics to individual employment statistics provides relatively a crude statistical comparison.

15. We did not state (and did not intend to imply) that KFYO-FM had not or would not continue to engage in affirmative action recruitment efforts because of these statistics. We also did not mean to imply that the station viewed such recruitment efforts as pointless. Indeed, we had no reason to believe based on our dealings with station personnel that either of these supposed implications of our statements was true. We believe that our Opposition has been misread, and hope that this Testimony clarifies the station's position regarding its affirmative action recruitment policy.

16. During the course of defending KFYO in pleadings, I spoke to Dennis Stortz frequently. I recall that on at least one

occasion, Mr. Stortz stated that it was apparent that the NAACP was angry about the argument citing statistics. I told Mr. Stortz that in my view the argument as stated was sound.^{3/}

17. I should add that in the course of defending KFUCO, I had occasion to discuss with both Dennis Stortz and Paula Zika the apparent disparity between the information provided to the Commission in Table 3 of our 1990 Opposition and the information in KFUCO's EEO program. Based on these discussions, I never had the slightest doubt that Mr. Stortz and Ms. Zika were acting in good faith in providing all the information in both documents, and that any discrepancy was the result of a good faith misunderstanding.

^{3/} I should also note that I may have been aware that the arrangement between Concordia Seminary and the Stations was not in writing and was perhaps not legally enforceable. I did not intend for the pleadings which I crafted to imply that there was a written, legally enforceable contract. Again, I had no intention of misleading the Commission.

DECLARATION

I, Marcia A. Cranberg, have read the foregoing Lutheran Church - Missouri Synod Exhibit entitled "Testimony of Marcia A. Cranberg," and I declare under penalty of perjury that it is true and correct to the best of my knowledge and belief.

Executed this ^{27th}27 day of May 1994.

Marcia Cranberg
Marcia A. Cranberg

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December 6, 1985

Rev. Rodger Abatie
General Manager
Station KFUD
801 DeMun Avenue
St. Louis, MO 63105

Dear Rev. Abatie:

The FCC has just released the full text of a Notice of Proposed Rulemaking to amend its rules and procedures regarding equal opportunities for employment in the broadcast industry. The changes proposed are not extensive, and go primarily to reporting procedures. The primary changes are these:

1. FCC rules governing EEO would be revised to include a number of the guidelines pertinent to EEO policies and practices included in the 5-point and 10-point EEO programs presently required to be submitted with applications for new stations and for renewal, respectively. This would not involve any substantial change in EEO obligations.

2. The 5-point program report form would be eliminated and the 10-point program report would be modified to include a good deal of descriptive information concerning the licensee's efforts to promote EEO objectives. It would also include labor force data. The new procedures would afford broadcasters an opportunity to provide information in addition to raw employee data pertinent to their efforts to achieve equal opportunity in employment.

3. Under the proposal, broadcasters would continue to file annual employment reports on FCC Form 395. These reports contain statistical data on the licensee's workforce. The reports would be modified slightly to conform to the reporting format used by the Equal Employment Opportunity Commission on its Form EEO-1.

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I am including a copy of an FCC news release which further describes the proposed changes. Let us know if you would like a copy of the full Notice of Proposed Rulemaking.

Very truly yours,



Reed Miller

Enclosure

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June 23, 1987

Mr. Dennis Stortz
Acting General Manager
Station KFUD
85 Founders Lane
St. Louis, MO 63105

Re: Amendment of EEO Rules; New Forms
395-B, 396 and 396-A

Dear Dennis:

On June 12, 1987, the FCC released the full text of its Report and Order adopted April 16, 1987, which amended its EEO rules and adopted a new Annual Employment Report and new Broadcast Equal Employment Opportunity Program reports.

I am now enclosing the full text of the Report and Order which is 51 pages in length. However, approximately half of the document, commencing at page 27, consists of Appendices B through E. Appendix B states the new provisions of Rule 73.2080 which now outlines in detail the EEO program which every station must adopt with detailed requirements and contents of such programs. Appendices C through E are copies of the newly adopted Forms 396-A, 395-B, and 396.

The newly adopted rules will require the new Form 396-A (Broadcast Equal Employment Opportunity Model Program Report) to be filed as a part of each original application and each transfer or assignment application.

The new Form 395-B, Annual Employment Report, will continue to be filed by May 31st of each year. (The old 395 will now be used for some common carriers.)

The new Form 396, Broadcast Equal Employment Opportunity Program Report, reporting on what the station has actually done, will be required to be filed with each renewal of license application.

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Mr. Dennis Stortz
June 23, 1987
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While much of the text of the Report and Order is devoted to describing the positions taken by the OMB and those who have filed comments in the proceeding, this area is an important part of broadcast regulation and one which, when violated in the past, has resulted in deferred renewals and renewal hearings. For that reason, we urge your careful attention to the Report and the new rules and forms. (Your attention is particularly directed to pages 9-12, paras. 17, 21, 22; pages 12, 13, 17-19, paras. 24, 25, 35-43; pages 20-22, paras. 44-50; Appendices B through E, pages 27-51).

The new rules will be effective August 3, 1987. However, until the newly revised Forms 395-B, 396 and 396-A are available for distribution, licensees and applicants may continue to use the old forms to satisfy Commission reporting requirements.

If you need further assistance or guidance in connection with these new rules and forms, please do not hesitate to call upon us.

Sincerely,



Reed Miller

Enclosure

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000001

April 6, 1988

Mr. Dennis Stortz
Acting General Manager
Station KFUD
85 Founders Lane
St. Louis, MO 63105

Dear Dennis:

While the FCC has in recent years taken a more relaxed approach to enforcement of a number of its rules, the enclosed FCC release indicates that the Commission is still prepared to enforce its equal employment opportunity requirements. The release describes the imposition by the FCC of a condition on the license renewal for Station WNCT-TV, Greenville, NC. as a result of that station's failure to comply with various EEO requirements. While the condition is not onerous (increased employment reporting to permit the FCC to monitor the station's performance) it is inconvenient, and something of a "black mark" on the station's record.

This action might serve as a reminder to review the FCC's rules pertaining to equal employment opportunities in order to ensure compliance with these requirements.

Very truly yours,



Reed Miller

Enclosure

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November 1, 1988

Mr. Dennis Stortz
Acting General Manager
Station KFUD
85 Founders Lane
St. Louis, MO 63105

Dear Dennis:

A recent decision by the United States Circuit Court of Appeals for the District of Columbia has directed the FCC to hold a hearing on challenges to a license renewal application based upon alleged violations of equal employment opportunity requirements. The decision makes it likely that the FCC will consider more carefully in the future renewal challenges based on EEO grounds.

The case, Beaumont Branch of the NAACP v. FCC, involved two Beaumont, TX radio stations which had lost a number of black employees within a two-year period. The stations were located in a market with a 21.7 per cent black work force, yet had added only three black employees out of 110 hires. The stations also had maintained incomplete EEO programs, and, in particular, failed to consult minority recruitment sources in attempting to identify potential employees. The problems were exacerbated by the stations' failure to maintain records on job applicants so as to enable them to reconstruct application and hiring statistics, and by their incomplete and often inconsistent responses to FCC inquiries concerning their EEO programs.

On the basis of these facts, the National Black Media Coalition (NBMC) filed a Petition to Deny the stations' renewal applications, alleging that the stations had both engaged in affirmative discrimination, and had failed to properly maintain EEO programs. While the FCC did send the stations three letters of inquiry and ultimately decided to grant them only a short-term

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Mr. Dennis Stortz
November 1, 1988
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license renewal, the Circuit Court determined that the FCC had violated its statutory mandate in failing to hold a hearing on the questions raised by the NBMC's Petition to Deny. The pertinent statutory provision, Section 309 of the Communications Act of 1934, provides that the FCC may act on a Petition to Deny without a hearing only if there is no substantial and material question of fact, and the grant of the application would be consistent with the public interest.

The Court stressed that its decision was based on the combination of the under-representation of blacks, the pattern of inconsistencies and misstatements that marked the licensee's communications with the FCC, and the licensee's deficient EEO program. It appears clear that occasional, isolated instances of deficient EEO programs or hiring discrepancies will not necessarily trigger the hearing requirements of the Communications Act.

If you have any questions about this decision, or about the Commission's EEO requirements generally, please feel free to call.

Very truly yours,

Reed Miller

