

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

DOCKET FILE COPY ORIGINAL

MM Docket No. 94-10

In re Applications of

The Lutheran Church/  
Missouri Synod

File Nos. BR - 890929VC  
BR - 890929VB

For Renewal of Licenses  
of Stations KFUA/KFUA-FM  
Clayton, Missouri

#### Appearances

*Richard R. Zaragoza, Esquire, Kathryn R. Schmeltzer, Esquire, Barry H. Gottfried, Esquire, Scott R. Fleck, Esquire, Lauren Ann Lynch, Esquire, and Sharon L. Tasman, Esquire,* on behalf of The Lutheran Church-Missouri Synod; *David E. Honig, Esquire, and David McCurdy, Esquire,* on behalf of the Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP, and the St. Louis County Branch of the NAACP; *Robert A. Zauner, Esquire, and Y. Paulette Laden, Esquire,* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission; and *Philip W. Horton, Esquire,* on behalf of witness Marcia A. Cranberg, Esquire.

#### INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE ARTHUR I. STEINBERG

Issued: August 30, 1995; Released: September 15, 1995

#### PRELIMINARY STATEMENT

1. By *Hearing Designation Order and Notice of Opportunity for Hearing*, 9 FCC Rcd 914 (1994) ("HDO"), the Commission designated for hearing the applications of The Lutheran Church-Missouri Synod ("Church" or "LCMS") for renewal of the licenses of Stations KFUA(AM) and KFUA-FM (collectively "Stations" or "KFUA"). The hearing issues specified in the HDO, as subsequently modified by *Memorandum Opinion and Order*, FCC 94M-191, released March 25, 1994, are as follows:

- (1) To determine the extent to which the licensee of Stations KFUA/KFUA-FM complied with the nondiscrimination and affirmative action provisions specified in Sections 73.2080(a) and 73.2080(b) of the Commission's Rules, 47 C.F.R. § 73.2080;
- (2) To determine whether the licensee of Stations KFUA/KFUA-FM made misrepresentations of fact or was lacking in candor in violation of Section 73.1015

of the Commission's Rules, 47 C.F.R. § 73.1015, with regard to the stations' EEO program and documents submitted in support thereof; and

(3) To determine whether, in light of evidence adduced pursuant to the foregoing issues, a grant of the subject license renewal applications would serve the public interest, convenience and necessity.

2. In accordance with Section 309(e) of the Communications Act of 1934, as amended ("Act"), the Commission assigned both the burden of proceeding with the introduction of the evidence and the burden of proof with respect to all of the issues to the Church. (HDO at para. 33.)

3. The HDO further stated that, irrespective of whether the hearing record warrants an order denying the renewal applications of the Church, it shall be determined pursuant to Section 503(b) of the Act whether an order of forfeiture in an amount not to exceed \$250,000 shall be issued against the Church for the willful and/or repeated violations of 47 C.F.R. § 73.2080 (establishing and maintaining an affirmative action policy), and 47 C.F.R. § 73.1015 (submitting truthful statements and responses to the Commission). (HDO at para. 37.)

4. A prehearing conference in this proceeding was held on March 16, 1994. Hearings were held in Washington, D.C., on June 20, 21, 22, 23, and 24, 1994. The record was initially closed at the conclusion of the June 24, 1994, hearing session. (Tr. 1117; *Order*, FCC 94M-423, released June 29, 1994.) The record was reopened on two occasions for the receipt of additional exhibits, and was reclosed for the final time on September 29, 1994. (*Order*, FCC 94M-443, released July 14, 1994; *Order*, FCC 94M-551, released September 29, 1994.)

5. Proposed findings of fact and conclusions of law were filed by the Mass Media Bureau ("Bureau") on September 2, 1994, and by the Church and the Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP, and the St. Louis County Branch of the NAACP (collectively "NAACP"), on September 6, 1994. Reply findings were filed by the Church and the Bureau on October 31, 1994, and by the NAACP on November 1, 1994.

#### FINDINGS OF FACT

##### I. Background

##### A. The Church's Mission for the Stations

6. The Church is the licensee of KFUA(AM) and KFUA-FM, licensed to Clayton, Missouri. KFUA(AM) went on the air in 1924 and is a 5,000 watt daytime-only AM station, operating noncommercially on 850 kHz and broadcasting religious programming. KFUA-FM went on the air in 1948 and is a full-time commercial FM station operating on 99.1 MHz and broadcasting classical music with a religious orientation and some religious programming. (Church Ex. 1, pp. 1, 3, 7; Church Ex. 4, p. 3; Church Ex. 7, p. 2.)

7. The Church, either directly or through Concordia Seminary ("Seminary"), has been the owner and operator of KFUA(AM) since 1924. According to the Church, KFUA(AM) has the "distinction" of being the "world's oldest religious broadcast facility"; it was the first daily

station to come on the air with and continuously maintain a religious format. (Church Ex. 7, p. 4.) In 1948, the Church put KFUO-FM on the air. KFUO-FM is the only full-time classical music format station in the St. Louis radio market. (Church Ex. 1, p. 1.) The studios of both KFUO(AM) and KFUO-FM are located in the same building on the campus of the Church's Concordia Seminary in Clayton, Missouri. (Church Ex. 4, p. 3.)

8. In the Church's view, both of the Stations "have been dedicated to the task of carrying out in their way the Great Commission which Christ gave to His Church, to preach the Gospel to every creature and to nurture and serve people in a variety of ways." (Church Ex. 7, pp. 1-2; Church Ex. 4, pp. 2-3.) During the period from February 1, 1983, to and including February 1, 1990 ("License Term") (Tr. 13-14), KFUO(AM)'s format was religious and KFUO-FM broadcast sacred as well as nonliturgical classical music. For example, KFUO-FM played Bach, Schuetz, Handel, Mendelssohn and others, and related them to the Church year. (Church Ex. 7, pp. 3, 5-6; Church Ex. 4, p. 3 and Att. 1.) Both of the Stations also served the mission of the Church's ministry by giving professional help and training to the students of Concordia Seminary. (Church Ex. 7, pp. 5-6.)

#### B. History of the Church's Involvement in Broadcasting

9. On February 19, 1923, the Chairman of the Board of Control of Concordia Seminary proposed the idea of operating a radio station either at the Seminary or at Concordia Publishing House. The funds for construction and the initial operating expenses of KFUO(AM) came from the Seminary and the Lutheran Layman's League ("League"), as well as from the St. Louis Lutheran Publicity Organization and the Walther League. The students of the Seminary, in addition to raising \$1,500 in donations from friends and relatives, also appropriated \$1,000 from the student treasury to help build the radio station. (Church Ex. 1, pp. 2-3.)

10. Station KFUO(AM) went on the air on December 14, 1924. It was officially dedicated to the "glory of God" during an evening broadcast on that day from an attic studio at the Seminary, located at that time in St. Louis. The station's commitment was to promote Gospel outreach and service to the listening audience through religious programming and "serious" music. (Church Ex. 1, p. 3.) The founders of the station were proponents of a ministry to the "whole man" and believed classical music was important to that ministry. Martin Luther had said: "After theology, I accord to music the highest place and greatest honor." Throughout its early years, the Church believed that KFUO(AM) was following Luther's tradition by using fine classical music, much of which was composed for use in church liturgy, to glorify the name of Jesus Christ. (Church Ex. 7, p. 2.)

11. KFUO(AM)'s first license was issued to Concordia Seminary by then Secretary of Commerce Herbert Hoover on January 29, 1925, for a term expiring January 25, 1926. The station began broadcasting with a 500-watt transmitter at 550 kHz, sharing that dial position with Station KSD(AM), St. Louis, Missouri. (Church Ex. 1, p. 3 and Att. 1.)

12. In 1924, when KFUO became operational, there were fewer than 600 radio stations in the United States and the station's broadcast signal extended from the east coast to the Rocky Mountains at certain times during the broadcast day. With the rise in the number of broadcast stations

and increased industry regulation through the Federal Radio Commission, the broadcast range of KFUO(AM) gradually diminished. Initially the station broadcast only two programs per week, on Sunday and Wednesday evenings. By 1928, KFUO(AM) was broadcasting 34 programs per week, approximately 21 hours of programming. (Church Ex. 1, pp. 3-4.)

13. In 1926, Concordia Seminary relocated from St. Louis to a new campus in suburban Clayton, Missouri, requiring relocation of KFUO(AM). The problem of moving the radio facility was resolved when the League offered to rebuild the station at the new Seminary and to provide funds for annual maintenance. In conjunction with the relocation, on June 15, 1926, the League submitted a resolution to the Missouri Synod ("Synod"). *i.e.*, the Church body in Convention, proposing that the Synod take over the station with control in the hands of the Board of Control of Concordia Seminary. KFUO(AM)'s new facility at the Seminary's Clayton campus was dedicated on May 29, 1927. At that time, KFUO began operating with a 1,000 watt transmitter. (Church Ex. 1, p. 4; Tr. 720, 850.)

14. In November 1940, the Commission approved the Church's application to operate on 830 kHz and for an increase in power to 5,000 watts. A few months later, the FCC modified KFUO(AM)'s frequency to 850 kHz, the position it currently occupies on the dial. (Church Ex. 1, p. 7.)

15. In 1948, the physical plant for KFUO(AM) was enlarged, and the Church, then called the "Evangelical Lutheran Synod of Missouri," applied for and received a license for Channel 256, 99.1 MHz in the FM band. The new station's call letters were KFUO-FM. Shortly thereafter, pursuant to an application, the licensee changed its name to the current "The Lutheran Church-Missouri Synod." With its new FM station, the Church gained the ability to broadcast around the clock. (Church Ex. 1, p. 7.)

16. From 1948 until 1974, religious and classical music programming was simulcast on KFUO(AM) and KFUO-FM, both of which were operated on a noncommercial basis. After 1974, because of a change in the FCC rules, KFUO(AM/FM) simulcast only on weekends. KFUO-FM became a full-power stereo broadcast operation in 1975, operating at 100,000 watts. (Church Ex. 7, pp. 2, 5.)

17. In March 1983, one month after the beginning of the License Term, the Church decided it would need to accept commercial advertising on the FM station. The AM station remained noncommercial. In the Church's view, voluntary contributions and bequests, which had been the source of both Stations' revenues up until then, were simply insufficient to support the Stations' operations. Throughout the License Term, however, members of the Board of Directors of the Church debated whether the Church should engage in commercial endeavors because the Directors believed that the main function of both Stations should remain as a ministry to support the Church and to nurture Christian faith. (Church Ex. 7, pp. 2, 5.)

18. The Church's Stations have had a spotless record with the FCC since commencing operation in 1924. With the exception of this proceeding, neither the FCC nor its predecessor agency had ever cited either of the Stations for any violations of rules or policies. (Church Ex. 7, p. 2; Tr. 796-98, 806-7.)

### C. Organization of the Church's Broadcast Ministry

19. From the beginning of the License Term until 1986, the Stations were operated by the Church through its Board for Lutheran Radio, a Board directly accountable to both the Church's Board of Directors and the Church's Membership in Convention. A general manager of both Stations (the top staff position) served as the "Chief Executive Officer" ("CEO") of the radio operations. Because of the religious nature of the radio operations, the general manager was required to have theological education and expertise. The general manager of both Stations from approximately January 1983 to January 1986 was in fact a Church minister, Reverend Roger Abatie. During that time, the Executive Director of the Church's Board for Communications Services ("BCS") was Reverend Paul Devantier, who served as a liaison to the Stations. (Church Ex. 7, p. 7 and Att. 1; Joint Ex. 1; Tr. 876.)

20. In 1986, the Church assigned responsibility for the radio operations of the Stations to the BCS. The Board for Lutheran Radio became a standing committee of the BCS. As Executive Director of the BCS, Reverend Devantier became CEO of the Stations. As a result, since 1986, the requirement that the top staff position at the Stations be filled by someone with theological education and expertise was fulfilled through the Executive Director position. (Church Ex. 7, p. 7 and Att. 1; Tr. 876.)

21. As the Stations' CEO, Reverend Devantier visited the Stations approximately once a week, beginning in 1986, to oversee the Stations and to ensure that the Church's policies were observed. (Church Ex. 4, p. 11.) Reverend Devantier reported to the seven-member BCS, which in turn reported to both the Church's Board of Directors and its Membership in Convention. (Church Ex. 7, pp. 7-8 and Att. 1.)

22. In a staff reorganization at the Stations in 1987, the position of Director of Broadcast Ministries was created to supervise a separate general manager for each radio station. The Director of Broadcast Ministries reported directly to Reverend Devantier. (Church Ex. 7, p. 8 and Att. 1.) The only person to hold the position of Director of Broadcast Ministries during the License Term was Kenneth Lombardi, who held the position from approximately July 1987 to November 1989. (Joint Ex. 1.)

### D. The Role of Concordia Seminary at the Stations

23. Since the inception of KFUA(AM), the Stations and Concordia Seminary have had a close relationship which, in the Church's view, has allowed each institution to play an integral role in the achievement of the other's goals. (Church Ex. 1, pp. 2-3; Church Ex. 7, p. 6.) KFUA(AM)'s first license was issued to the Seminary itself in 1925. (Church Ex. 1, p. 3 and Att. 1.) FCC records reflect that KFUA's license during the late 1920s was issued to the "Evangelical Lutheran Synod of Missouri, Ohio, and other States, through Board of Control of Concordia Seminary." (*Id.* at p. 4 and Att. 2, p. 5.) In an Order dated March 2, 1938, the Commission noted that KFUA(AM) was located on the grounds of the Seminary, and that the Station's operation was under the control of a radio committee of 10

members, 4 of whom were members of the faculty or Board of Control of Concordia Seminary. The Commission further observed that a sub-committee known as the KFUA Committee was in direct control of operations. (*Id.* at Att. 4, p. 5.) The Commission also noted in its Order that the talent used by KFUA(AM) was drawn almost entirely from the membership of the Church, the faculty and student body of the Seminary and prominent ministers, and the nationally known Concordia Seminary chorus was one of the two major sources of musical talent for KFUA. (*Id.* at Att. 4, pp. 6-7.)<sup>1</sup>

24. The Seminary has permitted KFUA and KFUA-FM to remain on its campus on a rent-free basis. (Church Ex. 1, pp. 4-5.) In addition, the Stations have obtained a supply of individuals with both Lutheran training and a personal commitment to the ministry of the Stations. Such individuals have been willing to work for the relatively low salaries that the Stations have been able to pay. (Church Ex. 7, p. 6.) KFUA(AM) and KFUA-FM have also been utilized for a work/study program for Seminary students in the use of radio as a medium in the Church's mission and ministry. (Church Ex. 1, pp. 7-8; MMB Ex. 24, p. 9; Tr. 783-84, 852-53.)

25. According to the Church, the history of the relationship between KFUA and the Seminary is exemplified by a May 1, 1928, issue of *The Gospel Voice*, a Station publication, describing how the musical talent of the Seminary had banded together into an organization which adopted the name "The Concordia Broadcasters." The express purpose of this group was to render regular services over KFUA(AM). In addition, the Concordia Seminary Publicity Committee cooperated with the Station in bringing KFUA radio activities before the public, members of the 1928 Postgraduate Class gave brief religious addresses over KFUA every Thursday afternoon at 3:00 p.m., and members of the Concordia Seminary Mission Society assisted KFUA in the work connected with the Bible class. (Church Ex. 1, pp. 4-5 and Att. 3.)

26. A June 1942 edition of *The Bond* stressed that KFUA "serves as a radio laboratory for the students, where they may acquire valuable radio experience which they can later employ in the local stations of their communities." (Church Ex. 1, p. 7 and Att. 5.) A September 1957 issue of the Church's *The Lutheran Witness* remarked that "[t]he Radio Student Training project, sponsored jointly by Concordia Seminary and the station, gives specialized instruction in radio and television to theological students." (*Id.* at p. 8 and Att. 6.) A May 1967 edition of *The Gospel Voice* stated that Seminary graduates "were reminded of the importance of radio in their total ministry to the needs of the people in their community." During the 1970s and into the 1980s, courses and workshops developed and taught by KFUA staff were offered by the Seminary to its students. (*Id.* at p. 8 and Att. 7.)

27. Throughout this relationship, including during the License Term, the Stations received letters in which Seminary students and other Church members expressed their desire to work at the Stations as an extension of their ministries. Even Seminary students or their spouses who lacked on-air skills offered their services. The Church be-

<sup>1</sup> The Church also applied for and received a license for a UHF television station in 1948. Although the facility was not constructed, the application highlighted the fact that the station

was located on the Seminary grounds and that KFUA was broadcasting the devotional services of the Seminary on a regular basis. (Church Ex. 1, p. 7 n.1.)

lieved that such dedication to the Stations' mission has proven vital to its continued operation of the Stations. (Church Ex. 4, p. 4 and Att. 2.)

28. In the Church's opinion, the Seminary students' work for the Stations has been a part of their overall education as ministers. (Church Ex. 7, p. 6.) For example, Reverend Devantier, while a Seminary student, served as a part-time AM announcer at KFUE. After graduating, he became the Stations' Director of Development, served as general manager, and eventually became the Executive Director of the BCS, which oversaw the Stations for the Church. (Church Ex. 4, pp. 4-5.) Similar considerations applied, in the Church's view, to the spouses of Seminary students who were employed at the Stations. The Church believed that these individuals often played an important role as partners in their spouse's ministry after graduation, and that spouses have had the opportunity to learn and develop in that role as Station employees. (Church Ex. 7, p. 6.)

29. The general nature of the "arrangement" between the Stations and Concordia Seminary was summarized in the following answer by Reverend Dr. Ralph A. Bohmann, who was president of Concordia Seminary from 1974 to 1981 and then President of the Church during the License Term (Church Ex. 1, p. 1):

Q: Isn't it true that, that as president of Concordia Seminary, the seminary had an arrangement with the station to hire students and their spouses to work at the station?

A: Yes, it is, but the nature of that arrangement perhaps is not a matter of written record. . . . [T]he seminary has a campus of 72 acres and the stations have a beautiful building on that campus. The students, the faculty members live on the campus for the most part over the years an, quote, arrangement, to use your words, has developed from the very beginning of the station. The seminary moved to that campus at about the time the station went into operation in the mid '20's. It, it is, it's part of the campus family and part of a campus community. It's assumed by the, those who manage the station's affairs and those who serve at the seminary that students, student wives in some cases, will be employed by the station whenever opportunities for employment present themselves. So, yes, if that qualifies as an arrangement. It did not need to become a legally binding document and, and to my knowledge there, there is no such document in the history of the seminary and the station, but a kind of word of mouth, a moral commitment to do that was self-understood, I believe, both at the station and at the seminary. And then in my capacity as president, I assume my predecessors did the same thing. Regular visits with station personnel and, and terms of various arrangements, for example the daily worship of the seminary is broadcast on the stations and so there was consultation from time to time as to how that might be enhanced, but employment practices, too. We were very, very happy that the station, over the years, employed many of our students, and that was an arrangement of sorts.

(Tr. 288-89.)

30. On January 2, 1990, the NAACP filed a Petition to Deny the Stations' applications for renewal of their licenses. (MMB Ex. 3.) The Church filed an Opposition to Petition to Deny and Response to Inquiry ("Opposition") on February 23, 1990. (Church Ex. 4, Att. 7, pp. 2.) The Opposition was prepared by Marcia A. Cranberg, an attorney with the law firm of Arnold & Porter, which represented the Stations. Ms. Cranberg had the primary day-to-day responsibility for serving the Stations' FCC regulatory needs. (Church Ex. 8, pp. 1, 6.) In the Opposition, the Church explained its relationship to the Seminary as follows:

KFUE's studios are located on the campus of Concordia Seminary. KFUE pays no rent for these facilities. Given the noncommercial nature of the AM operation (and, until recently, of the FM as well), this arrangement is extremely important to KFUE's ability to continue to offer high quality broadcast service. Part of the arrangement has included reciprocal efforts by KFUE to provide broadcast training to Concordia students or their spouses through employment at the stations. Thus, as an accommodation to the Seminary, KFUE has tried to fill a number of the non-specialized positions at the stations with Seminary students or their spouses.

(Church Ex. 4, Att. 7, p. 17.)

31. In response to a Commission inquiry dated April 22, 1992 (MMB Ex. 5), the Church, in a letter dated May 12, 1992, stated: "[O]ur reciprocal arrangement with the Concordia Lutheran Seminary (which provides our office and studio space rent-free) requires that we make special efforts to employ Seminary students who have obtained the required knowledge of the religious format without resort to outside recruitment sources." (MMB Ex. 6, p. 3.)

32. In a Motion to Strike and Reply to Comments, filed September 21, 1992, the Church described the arrangement with the Seminary in the following manner:

KFUE's studios and offices are housed free-of-charge [at the Seminary]. . . . The materials submitted by KFUE in this proceeding show that, despite the incentive for maintaining a synergistic relationship with the Seminary so as to receive certain much-needed benefits, KFUE recruited or hired through the Seminary for only five of 35 full-time hiring opportunities from October 1986 through January 31, 1990. . . . [Footnote] The remaining 85 percent of full-time job positions were recruited for and hired through a variety of other sources.

\* \* \*

[Footnote] In addition, KFUE attempts to satisfy the terms of its reciprocal arrangement with the Concordia Lutheran Seminary by allowing Seminary students who are studying for a theological Lutheran career to train as part-time announcers on KFUE-AM.

(MMB Ex. 11, p. 20.)

33. According to Ms. Cranberg, the "arrangement" between Concordia Seminary and the Stations was not reduced to writing and may not have been legally enforceable. In crafting pleadings she filed on behalf of the Church, Ms. Cranberg testified that she did not intend to imply that there was a written, legally enforceable contract, and had no intention of misleading the Commission into believing that such a formal contract existed. (Church Ex. 8, p. 8 n.3.)

34. During the License Term, Concordia Seminary students and their spouses held 21 part-time positions and 8 full-time positions. Of the part-time positions, 17 were AM announcers who, according to the Church, needed religious training. (Church Ex. 4, pp. 3-4.) All but one of the part-time Seminary students were hired for on-air jobs. (*Id.* at Att. 6, pp. 9-15; Tr. 503-7.) The part-time workers generally worked only 6 to 12 hours a week. (Church Ex. 3, p. 4; Church Ex. 4, pp. 22-23.) Seven of the eight full-time hires were Seminary wives; one full-time hire was a Seminary student. (Church Ex. 4, Att. 6, pp. 1-8.)

35. In the fall quarter of 1989, there were 10 minority students at the Seminary out of a total enrollment of 482. Of the 10 minorities, 3 were "Black Non-Hispanic." (NAACP Ex. 30.) According to Reverend Bryant E. Clancy, an African American and Director of the Church's Commission on Black Ministry (Church Ex. 2, p. 1), the average number of African American students at the Seminary between 1983 and 1990 was five (Tr. 722-23).

#### E. The Church's Policy of Nondiscrimination

36. Reverend Dr. Bohlmann, President of the Church during the License Term, testified that in his view the Church's whole reason for being has been to proclaim the Word of God, nurture its members, meet the needs of people, and welcome into its fold men and women of every race, color, and national origin. According to Reverend Dr. Bohlmann, the Church has always wanted its membership to grow, and for all of its ministries, broadcasting being one of the most important, to include all qualified persons without regard to race, color, or national origin. (Church Ex. 1, pp. 1-2.) In the view of Reverend Clancy, the 117-year history of the Church's work with African Americans demonstrates an aggressive attitude against racism and continuous outreach toward African American families. (Church Ex. 2, pp. 1-2.)

37. In 1953, the Church formed the Lutheran Human Relations Association of America for the purpose of making efforts to eliminate any segregation and discrimination. To further the presence of African Americans in the Church, the African American Mission Models Task Force was created in 1975. In 1977, the Church created the Commission on Black Ministry, which was designed to expand the Church's African American membership. (Church Ex. 2, p. 3.) In 1981, the Church's Synod in Convention passed Resolution 8-07, resolving "[t]hat we reaffirm our earlier statements against racism and violence and call upon our congregations to reaffirm clearly their affirmation of human life and dignity for all persons and

all races." (Church Ex. 7, p. 8 and Att. 2.) In 1986, the Church publicly denounced apartheid as well as other forms of racial discrimination. (*Id.* at p. 8 and Att. 3.)

38. The Church has approximately 50,000 African American members out of total membership of 2.6 million. Approximately 86 African American Lutherans serve as pastors of congregations and 30 serve as college or seminary faculty and administrative staff members. The Church has approximately 100 white pastors who serve congregations with predominantly African American members and 3 Black pastors who serve congregations with predominantly white members. (Church Ex. 2, p. 1.)

39. For the past 20 years, the national Church leadership has included an African American Vice President of the Synod. African Americans have also served as Vice Presidents of regional districts, area circuit counselors and members of various district Boards of Directors. (Church Ex. 2, pp. 1-2.) Reverend Clancy believed the climate in the Church for his efforts on behalf of African Americans has been very supportive. (Tr. 723-24.)

40. There is minority representation at the primary and secondary schools operated by the Church. Specifically, the minority population of the Church's 1,079 early childhood centers, 988 elementary schools, and 62 high schools consists of 17% minorities, 7% of whom are African American. (Church Ex. 2, pp. 2-3.)

41. The Church has a long history of providing educational opportunities for minorities. For example, in 1888, Walther College, a Lutheran high school in St. Louis, was perhaps the first school in the city to make an effort to break down segregation by admitting an African American female student. She later graduated with honors. Currently, 17.9% of the students at the 12 campuses of Missouri Synod colleges, universities and seminaries are minorities, and more than half of these are African American. (Church Ex. 2, p. 2.)<sup>2</sup>

## II. Equal Employment Opportunity at KFUD

### A. Nondiscrimination and Affirmative Action at the Stations

42. From the beginning of the License Term, the Stations' personnel policies required employment on a racially nondiscriminatory basis. The Stations' personnel policies in effect in 1983 stated: "It is the policy of this Station, as set forth by the Board of Directors, to provide employment ... without regard to race, color, religion, national origin, sex or age, except where religious affiliation is a bona fide occupational requirement." The Stations' personnel policies also contained a commitment "to take affirmative actions to seek out individuals whose potential has not been developed, with the objective of assisting them to meet ... standards" at a level consistent with the healthy growth of the Stations. (Church Ex. 4, p. 5 and Att. 3.)

43. By 1987, the Stations' personnel policies were controlled by policies in force at the Church, and included a commitment to equal opportunity. The policies recognized

<sup>2</sup> The colleges and universities are: (1) Concordia College, Ann Arbor, MI; (2) Concordia Lutheran College of Texas, Austin, TX; (3) Concordia College, Bronxville, NY; (4) Christ College, Irvine, Irvine, CA; (5) Concordia University Wisconsin, Mequon, WI; (6) Concordia College, Portland, OR; (7)

Concordia University, River Forest, IL; (8) Concordia College, St. Paul, MN; (9) Concordia College, Selma, AL; and (10) Concordia Teachers College, Seward, NE. The seminaries are: (11) Concordia Seminary, Clayton, MO; and (12) Concordia Theological Seminary, Fort Wayne, IN. (Church Ex. 2, p. 2.)

two basic concepts, nondiscrimination and affirmative action, while acknowledging that for certain positions the Church needed to seek out "individuals with specific religious training." The EEO policy stated:

The recognition of nondiscrimination demands the elimination of all prohibited discriminatory conditions, whether purposeful or inadvertent. The Lutheran Church-Missouri Synod is pledged to the careful and systematic examination of all its employment policies to be certain that such policies do not operate to the detriment of any individual on the grounds of race, color, religion, sex, or national origin.

Our commitment to Affirmative Action prompts us to do more than ensure neutrality with regard to race, color, religion, sex, or national origin. The Synod is pledged to programs which place special emphasis on our efforts to recruit, employ, and promote qualified members of all such groups.

(Church Ex. 4, pp. 5-6 and Att. 4.)

44. When he assumed the position as CEO of the Stations in 1986, Reverend Devantier took steps to assure that the Church's policy of non-discrimination and equal opportunity was in effect at the Stations. For example, he assured that the Church's Employee Handbook, containing a statement concerning Equal Employment Opportunity, was put into effect at the Stations and was distributed to all employees. (Church Ex. 7, pp. 8-9 and Att. 4, pp. 1, 27-28.) The Employee Handbook was published in October 1985, more than two and one-half years after the License Term began. (*Id.* at Att. 4, p. 1.) Reverend Devantier also visited the Stations' facilities approximately once a week to oversee the Stations and to ensure that the Church's policies were observed. (Church Ex. 4, p. 11.) For the implementation of the details of the Stations' EEO policies, Reverend Devantier relied on the operational chiefs at the Stations. (Church Ex. 7, p. 9.)

45. From his vantage point, Reverend Devantier believed that the Stations' operational supervisors were assuring that the Stations did not discriminate and were implementing the affirmative action efforts required by the FCC. He based these beliefs on the following (Church Ex. 7, pp. 9-10 and transcript pages cited):

(a) He had been involved in hiring the Stations' managers and knew them to be competent, responsible people of good character. (Tr. 811-12.)

(b) The absence of any complaints of discrimination.

(c) When he had been general manager of the Stations in the 1970s, the Stations had always been committed to equal opportunity for all. Indeed, Reverend Devantier had promoted an African American woman, Lula Daniels, from secretary to a managerial position as Coordinator of Worship Programming. He had no reason to believe that the Stations' policies had changed from their commitment to equal opportunity employment at any time after his tenure as general manager.

(d) He discussed with each of the general managers during the License Term the Stations' commitment to equal employment opportunity and the desirability of hiring minority employees. (Tr. 823-24, 826.)

Based on these discussions, Reverend Devantier believed that the managers were committed to maintaining the EEO policies. Although no one was explicitly charged in a position description with noting the presence or absence of minority applicants at the Stations, managers were generally charged with day-to-day EEO compliance. (Tr. 819-21, 823-24.) The only manager who told Reverend Devantier that it was desirable to modify the Stations' EEO procedures was Thomas M. Lauher, who sent him two memorandums on the subject in March 1989.

(e) Reverend Devantier knew the Stations had highly respected communications counsel, the firm of Arnold & Porter, because that firm had been the Stations' counsel when he was general manager. He believed that he would hear directly from the firm if FCC rules or policies changed in a way which would have required dramatic changes in the Stations' EEO program. He did not receive any such communication from counsel.

46. Dennis Stortz, Operations Manager for both Stations from 1978 to 1991 and also acting general manager for both Stations from July 1986 to May 1987, testified that, based on his observation and involvement in the personnel activities of the Stations, he believed the Stations never discriminated against anyone because of his or her race during the License Term. (Church Ex. 4, pp. 1-2.) Mr. Stortz believed that the Church's theology taught and encouraged "all persons to achieve their fullest individual potential in the life in God." Establishing barriers to that achievement by discriminating on the basis of race would have been contrary to those teachings as Mr. Stortz understood them, as well as to Mr. Stortz's personal beliefs. (*Id.* at p. 2.) Thomas M. Lauher, general manager of KFUFM from May 1987 until July 1989, testified that he had never seen any overt or intentional discrimination on the part of anyone associated with either KFUFM(AM) or KFUFM-FM. (Church Ex. 6, pp. 1, 3.)

47. Reverend Dr. Bohlmann, President of the Church during the License Term, testified that he had known both Reverend Devantier and Mr. Stortz for many years and that, in his opinion, they were honest and were individuals of the highest integrity who would never discriminate. (Church Ex. 1, p. 8.) On cross-examination by the NAACP's attorney, Reverend Dr. Bohlmann explained the basis of his beliefs about Reverend Devantier and Mr. Stortz:

[A] president of a large organization like the Church body has to depend to a large extent on the character and demonstrated commitments, theological in this case as well as technical and professional, in choosing that particular person for that position. So the character and the quality of leadership that one can expect is, to a large extent, determined by the, the personal integrity and honesty and commitments of the designees. Paul Devantier, for example, was my student many years ago. When I was the president of the seminary, he was the manager . . . at the station with whom I consulted several times. And subsequently during my administration as president of the Church body, he served throughout most of that period as the, the Church body's chief executive in the entire area of communications, covering all of its, its districts, 30-some districts, its colleges, seminaries,

its various entities. I knew him both personally and professionally as a man of, of deep commitment to the Church's own policies of nondiscrimination. In his own family life, pardon me, Paul, for saying this, his commitment is demonstrated by the fact that two of the members of his own household are bi-racial children, one adopted, one a foster child. The kind of commitment he has toward fair and just hiring practices and all other dimensions of the Church's posture is demonstrable, and in my position and helping the board to choose its chief executive, questions of honesty, character, and the like are very important. And . . . then . . . [with] Dennis Stortz, and the kinds of individuals that Paul [Devantier] would select as administrators of the, the the stations, would be directly influenced by his own posture.

(Tr. 278-79.) Reverend Dr. Bohlmann also testified that he was briefed frequently by Reverend Devantier as well as by the Stations' legal counsel, and assured himself in a general way that the Stations were complying with EEO requirements. (Tr. 283-85.) However, Reverend Dr. Bohlmann was not consulted with respect to the hiring of announcers, salespersons, receptionists, or other station personnel. (Tr. 285-87.)

48. Reverend Bryant Clancy, himself an African American and Director of the Church's Commission on Black Ministry, testified that, based on his experience in the Church, his opinion was that the Church would not discriminate on the basis of race in any of its ministries including the radio ministry, although he did not know the specifics as to how the Stations did their hiring during the License Term. (Church Ex. 2, pp. 1, 3; Tr. 719-20.) Reverend Clancy had been a guest on KFUO radio programs to inform the listeners of the goals and activities of the Commission on Black Ministry. In his contact with the Stations, he had not been aware of any instance of racial discrimination. Reverend Clancy also testified that he had known Reverend Devantier personally for years and that he believed Reverend Devantier to be "a man of outstanding integrity, fairness and service to the Church and all of God's children." (Church Ex. 2, p. 3.)

49. During the License Term, no past or then present employee or job applicant complained that the Stations discriminated against him or her on the grounds of race or religion. (Church Ex. 7, p. 10.)

#### **B. Knowledge of Lutheran Doctrine as a Job Requirement**

50. The Church believed during the License Term that many of the positions at KFUO(AM), as well as positions that served functions at both of the Stations, required a knowledge of Lutheran doctrine and philosophies. For example, in the Church's judgment, the station manager of KFUO(AM) needed to be familiar with the mission and doctrine of the Church because part of the manager's job was to ensure that the station presented Lutheran doctrine accurately. In the Church's view, the Director of Development and Assistant Director of Development also needed to understand the ministry of KFUO and its relation to doctrine and to the Bible because these people created the AM station's fund-raising letters and generally did fund raising. Indeed, it was the Church's position that it was desirable that a Lutheran pastor hold the Director of Development position. (Church Ex. 4, p. 7; Tr. 871-72.)

51. The Church's judgment was that it was also essential to have knowledge of Lutheran doctrine to be an announcer of religious programming on KFUO(AM). (Church Ex. 4, p. 7.) Virtually all announcers on the AM station presented worship events, religious discussion programs, or call-ins. (Tr. 871.) Again, the Church believed there was no substitute for knowledge of Lutheran doctrine for selecting and presenting program materials and for responding to caller inquiries. The Director of Audio Resources (title changed to Manager of Religious Programming in 1988) also needed substantial knowledge of the Lutheran mission and doctrine, in the Church's view. This person was responsible for managing the broadcasts of live worship services on KFUO(AM) from area Lutheran congregations, for producing that station's Christian music programs, for arranging for daily worship programs produced by that station, and for creating other worship program features produced and broadcast by KFUO(AM). (Church Ex. 4, pp. 7-8.)

52. The Church's position was that it was desirable to be an active member of an LCMS congregation for many jobs which, it believed, had a connection to the espousal of religious views. For example, Mr. Stortz testified that Church membership and resulting knowledge about the Church calendar and Church-related events was considered desirable for any receptionist, who would have worked for and served both of the Stations, because the receptionist interacted with religious listeners and potential donors, and sometimes scheduled people who were going to be on the air. (Church Ex. 4, p. 8; NAACP Ex. 39, pp. 1-2, 7-8; Tr. 494-98.) Other secretarial, clerical and engineering positions, as well as positions in management and the business department, also served both KFUO(AM) and KFUO-FM. (Church Ex. 4, p. 3; Tr. 618-19.)

53. It was also helpful, in the Church's view, for certain secretaries to be familiar with the Lutheran Church because part of their job was to contact pastors to enlist volunteers for "Share-A-Thons," which were on-the-air fund raising events. (Church Ex. 4, p. 7; Tr. 488.) Mr. Stortz believed that it was more effective to have Lutherans solicit donations from other Lutherans in connection with fund raising. (Tr. 500.) However, he acknowledged that a caller wishing to give money would not necessarily know if the person answering the telephone was a Lutheran. (*Id.*) Moreover, Mr. Stortz testified that certain secretaries gathered and conveyed information to pastors about the matters which they would be addressing on worship programs. (Tr. 734-35.) These secretaries also sometimes made decisions as to which pastor to schedule for a specific week, and it was "helpful" if the secretaries were familiar with the Lutheran calendar and teachings. (Tr. 734-36.) Although Mr. Stortz recognized that a person who was not familiar with the Lutheran Church could be trained to perform the Stations' secretarial and receptionist duties, he testified that such training could not be accomplished "in a day or a week or a couple of weeks[;] . . . to become comfortable with it[,] it would take longer than that." (Tr. 498-500.)

54. The record in this proceeding contained four job descriptions for the position of "Receptionist" (NAACP Ex. 35, pp. 4, 25; NAACP Ex. 36, p. 16; NAACP Ex. 39, pp. 7-8), six job descriptions for various secretarial positions (NAACP Ex. 35, p. 17; NAACP Ex. 36, p. 2; NAACP Ex. 39, pp. 1-2; NAACP Ex. 40, pp. 21-22, 23-24; NAACP Ex. 41, pp. 9-10), and one job description for "Secretary/Receptionist" (NAACP Ex. 41, pp. 16-17). None of these job descriptions referred to the secretary or reception-

ist performing any functions or having any responsibilities of a religious nature. One receptionist job description (dated October 1986) listed as an "Essential" position qualification: "An active member of a Lutheran Church-Missouri Synod congregation." (NAACP Ex. 39, pp. 7-8.) Two secretarial job descriptions (dated October 1986 and June 1989) listed as "Other Desirable" position qualifications:

1. A working knowledge of The Lutheran Church-Missouri Synod.
2. An active member of a Christian congregation, able to understand and demonstrate support for the purpose of The Lutheran Church-Missouri Synod.

(NAACP Ex. 39, pp. 1-2; NAACP Ex. 41, pp. 9-10.) Two other secretarial job descriptions (dated December 1985 and March 1987) listed as an "Other Desirable" position qualification: "Member of a congregation of The Lutheran Church-Missouri Synod." (NAACP Ex. 40, pp. 21-22, 23-24.) The Secretary/Receptionist job description (dated July 1989) listed as "Other Desirable" position qualifications:

1. An active member of a Lutheran Church-Missouri Synod congregation.
2. A working knowledge of The Lutheran Church-Missouri Synod.

(NAACP Ex. 41, pp. 16-17.)<sup>3</sup>

55. Mr. Stortz testified that familiarity with or membership in the Church would be "a desirable happening" for the Stations' engineers

because the engineers go out to churches and do all the remote set-up of church services. They interact with the pastors at the church and schedule when things are going to happen and how they're going to happen and discuss the engineering technical venue of the operation so that the pastor knows what's going on and that the radio station knows what's going on.

(Tr. 500-1; *see also* Tr. 741-43.) However, Mr. Stortz was of the opinion that someone without a Lutheran background could also perform these duties. (Tr. 743.)

56. The record contained four job descriptions for the position of Chief Engineer (NAACP Ex. 35, pp. 14-15; NAACP Ex. 36, pp. 17-18; NAACP Ex. 39, pp. 9-11; NAACP Ex. 40, pp. 14-16), and two job descriptions for the position of Engineer (NAACP Ex. 35, p. 16; NAACP Ex. 36, p. 19). None of these job descriptions referred to the Chief Engineer or Engineer performing any functions or having any responsibilities of a religious nature. One

Chief Engineer job description (dated October 1986) listed as an "Other Desirable" position qualification: "An active member of a Lutheran Church-Missouri Synod congregation." (NAACP Ex. 39, pp. 9-11.) Another Chief Engineer job description (dated June 1987) listed as an "Other Desirable" position qualification: "An active member of a Christian congregation." (NAACP Ex. 40, pp. 14-16.)

57. Mr. Stortz was also of the opinion that it was "desirable," but not absolutely necessary for the Stations' Business Manager to have Lutheran training or be a member of a Lutheran congregation. This was so, he stated, because the Business Manager "interacted on a daily basis with the . . . Lutheran church headquarters." (Tr. 744.)

58. The record contained three job descriptions for the position of "Business Manager" (NAACP Ex. 35, p. 1; NAACP Ex. 37, pp. 1-4; NAACP Ex. 39, pp. 12-13), two job descriptions for the position of "Manager-Business Services" (NAACP Ex. 35, pp. 23-24; NAACP Ex. 36, pp. 14-15), and one job description for the position of "Manager of Business Affairs" (NAACP Ex. 40, pp. 1-2). None of these job descriptions referred to these employees performing any functions or having any responsibilities of a religious nature. One Business Manager job description (dated October 1986) listed as an "Essential" position qualification: "An active member of a Christian congregation, able to understand and demonstrate support for the purposes of the Lutheran Church-Missouri Synod." (NAACP Ex. 39, pp. 12-13.) The job description for Manager of Business Affairs (dated March 1987) listed as a "Desirable" position qualification: "An active member of a Christian congregation, able to understand and demonstrate support for the purposes of the Lutheran Church-Missouri Synod." (NAACP Ex. 40, pp. 1-2.)

59. Mr. Stortz testified that he did not think it was necessary for a janitor to be a member of the Lutheran Church. However, he believed it would be a "desirable" attribute and would be "a minor consideration" in hiring. (Tr. 501-2.)

60. The Church's February 23, 1990, Opposition to the NAACP's Petition to Deny contained a listing of those positions within the Stations' Top Four job categories for which theological training or background was an employment requirement.<sup>4</sup> These positions were: General Manager of KFUA(AM); Director of Religious Programming of KFUA(AM); Director of Development of KFUA(AM); Announcer/Program Director of KFUA(AM); Announcer for KFUA(AM); and Director of Broadcast Ministries for KFUA(AM). (Church Ex. 4, Att. 7, pp. 13-14, 24-25.)

61. However, the job descriptions contained in the record indicate that there were other Top Four positions, not mentioned in the Opposition, for which religious knowledge or active membership in a Christian or LCMS congregation was an "Essential" or "Other Desirable" employment qualification. These positions were: General Manager, KFUA-FM (NAACP Ex. 40, pp. 7-9; NAACP Ex. 41, pp. 1-3); Manager of Business Affairs for KFUA-FM

<sup>3</sup> There was no evidence that Mr. Stortz had any role in drafting these, or any of the other job descriptions contained in the record. With respect to the job descriptions in general, it is noted that no questions were asked about their adoption or contents, there was no testimony as to why some duties and functions were not included in the descriptions, and there was no evidence as to why certain qualifications were listed as "Essential" or "Other Desirable." Similarly, there was no evi-

dence that all of the positions for which job descriptions existed were filled during the License Term, or that the descriptions were actually used for, or had a bearing on, any specific hiring decision.

<sup>4</sup> The term "Top Four job category" as used herein has the same meaning as in FCC Form 395-B, that is, Officials and Managers, Professionals, Sales, and Technicians.

(NAACP Ex. 40, pp. 1-2); Program Director, KFUE-FM (NAACP Ex. 39, pp. 16-18; NAACP Ex. 41, pp. 7-8); and Director of Administration for KFUE(AM) (NAACP Ex. 39, pp. 5-6). With the exception of one of the FM Program Director's job descriptions (NAACP Ex. 41, p. 7), none of the other job descriptions referred to these employees performing any functions or having any responsibilities of a religious nature (NAACP Ex. 39, pp. 5-6, 16-18; NAACP Ex. 40, pp. 1-2, 7-9; NAACP Ex. 41, pp. 1-3).

62. The Opposition also stated that the Chief Engineer and Business Director positions did not require religious training. (Church Ex. 4, Att. 7, p. 13 n.3.) However, as indicated above, two Chief Engineer and one Business Manager job descriptions included religious requirements. (NAACP Ex. 39, pp. 9-13; NAACP Ex. 40, pp. 14-16.)

63. Because of the need for knowledge of Lutheran principles for many positions, KFUE(AM) in particular relied heavily on employment advertising in Lutheran periodicals such as *The Lutheran Witness*. This newspaper was widely distributed to members of Church congregations, including its African American members. (Church Ex. 4, p. 12 and Att. 6, pp. 4, 5, 7; Tr. 750-51.)

64. In preparing and reviewing the Equal Employment Opportunity Program in the Stations' 1989 license renewal applications, Mr. Stortz did not believe that he needed to state explicitly that the Stations required knowledge of Church doctrine for certain positions. (Church Ex. 4, p. 18.) A sentence in the Program stated: "When vacancies occur, it is the policy of KFUE and KFUE-FM to seek out qualified minority and female applicants." (*Id.* at p. 17 and Att. 16, p. 7.) Mr. Stortz believed that this sentence was consistent with the use of various employment criteria, such as religious training or knowledge of classical music, to find "qualified" applicants. (*Id.* at p. 18.) Moreover, Mr. Stortz believed that the Commission was well aware that the Stations were licensed to a church, and it therefore never occurred to him that he needed to mention that theological training was necessary for certain jobs. Similarly, it did not occur to Mr. Stortz that he needed to mention explicitly the Stations' arrangement with Concordia Seminary. Again, in his view, the Commission was well aware that the Stations had a connection with the Seminary, especially given that KFUE(AM) had originally been licensed to the Seminary. (*Id.*)

65. Ms. Cranberg reviewed the EEO Program which had been sent to her by Mr. Stortz with the 1989 renewal applications for filing with the FCC. (Church Ex. 8, p. 2.) Although she was aware that, late in the License Term, the Stations raised questions with her about EEO requirements for religious stations (Tr. 1016-18), she did not focus on the fact that KFUE(AM) had a religious program format and there were likely to be requirements for knowledge of Lutheran doctrine for certain positions (Church Ex. 8, p. 2). Consequently, she did not question Mr. Stortz about whether KFUE should have language in the applications to reflect that likelihood. (*Id.*)

### C. The Stations' Affirmative Action Efforts

66. The Equal Employment Opportunity Program filed by the Stations with their September 22, 1982, renewal applications stated, in pertinent part:

#### I GENERAL POLICY

It is the policy of KFUE and KFUE-FM to provide equal employment opportunity to all qualified individuals without regard to their race, color, religion, national origin or sex in all personnel actions including recruitment, evaluation, selection, promotion, compensation, training and termination.

It is also our policy to promote the realization of equal employment opportunity through a positive, continuing program of specific practices designed to ensure the full realization of equal employment opportunity without regard to race, color, religion, national origin or sex.

\* \* \*

#### II RESPONSIBILITY FOR IMPLEMENTATION

Maurice Anderson, General Manager, is responsible for the administration and implementation of our Equal Employment Opportunity Program. It is also the responsibility of all persons making employment decisions with respect to recruitment, evaluation, selection, promotion, compensation, training and termination of employees to ensure that our policy and program is adhered to and that no person is discriminated against in employment because of race, color, religion, national origin or sex.

#### III POLICY DISSEMINATION

To assure that all members of the staff are cognizant of our equal employment opportunity policy and their individual responsibilities in carrying out this policy, the following communication efforts are made:

The station's employment application form contains a notice informing prospective employees that discrimination because of race, color, religion, national origin or sex is prohibited and that they may notify the appropriate local, state, or federal agency if they believe they have been the victims of discrimination.

\* \* \*

#### IV RECRUITMENT

With a small staff of employees, job vacancies occur infrequently. (During the past twelve months, for example, only two vacancies occurred and one part-time employee became a full-time employee. Consequently, little recruitment efforts were required.) When vacancies do occur, it is the policy of KFUE and KFUE-FM to seek out qualified minority and female applicants. We deal only with employment services, including state employment agencies, which refer job candidates without regard to their race, color, religion, national origin or sex.

When utilizing media for recruitment purposes, help-wanted advertisements always include a notice that we are an Equal Opportunity Employer and contain no indication, either explicit or implied, of a preference for one sex over another.

We encourage present employees, particularly minority and female employees to refer minority and female candidates for existing and future job openings.

(MMB Ex. 1, pp. 5-6.) An EEO Program apparently filed by the Church sometime in 1983 included statements identical to those quoted above, except the name of "Rev. Roger Abatie" replaced that of Mr. Anderson. (Church Ex. 8, Att. 5, pp. 3-4.)

67. The Equal Employment Opportunity Program filed by the Stations in their September 29, 1989, renewal applications contained identical statements to those quoted above under the headings "General Policy," "Responsibility for Implementation," and "Policy Dissemination." However, Reverend Devantier's name and title were substituted for those of Reverend Abatie. Similarly, the second and third paragraphs under the heading "Recruitment" were identical in the 1982, 1983 and 1989 Programs, but the first paragraph under "Recruitment" in the 1989 Program stated:

When vacancies occur, it is the policy of KFUO and KFUO-FM to seek out qualified minority and female applicants. We deal only with employment services, including state employment agencies, which refer job candidates without regard to their race, color, religion, national origin or sex. We contact the various employment services and actively seek female and minority referrals and we specifically request them to provide us with qualified female and minority referrals. See sample reply form attached.

The "sample" reply form stated: "This is to acknowledge that I have received a letter from Station KFUO-FM seeking female and minority referrals for job openings at the station[.]" and was signed on July 21, 1989, by a representative of Snelling & Snelling, Personnel Consultants, St. Louis, Missouri. (Church Ex. 4, Att. 16, pp. 6-8.)

68. Over the course of the License Term, the Stations' staff averaged 20 full-time employees. (NAACP Ex. 24; Church Ex. 10.) The Stations made 43 full-time hires during the License Term, and sought referrals for 30 (69.8%) of those hires, including 9 referrals from station employees. (Church Ex. 4, Att. 6, pp. 1-8.) KFUO-FM hired a minority female full-time salesperson for a Top Four job category position during the License Term. (*Id.* at p. 12; Tr. 762-63.) Of the Stations' 43 full-time hires, 25 (58.1%) were female and 7 (16.3%) were minority. (Church Ex. 4, Att. 6, pp. 1-8.) Of the 7 minority hires, 2 were hired after January 2, 1990, the date the NAACP filed its Petition to Deny. (MMB Ex. 3; Church Ex. 4, Att. 6, p. 8.)

69. During the License Term, KFUO(AM) hired to fill the following full-time positions: Acting Director of Development; Announcer (3 hires); Announcer/Program Director; Assistant Director, Development; Associate Director, Development; Director, Audio Resources; Director of Development and Public Relations; Receptionist; Religious Secretary; Secretary (3 hires); Secretary/Receptionist; and Station Manager. During the License Term, KFUO-FM hired to fill the following full-time positions: Announcer; Sales Worker (14 hires); Sales Worker/Manager; Secretary; and Station Manager. During the License Term, the following full-time positions, which served both KFUO(AM) and

KFUO-FM, were filled: Assistant to Business Manager; Business Manager; Director of Broadcast Ministries; Maintenance; and Receptionist (5 hires). (Church Ex. 4, Att. 6, pp. 1-8.)

70. Over the course of the License Term, the Stations' staff averaged 11 part-time employees. (NAACP Ex. 24; Church Ex. 10.) The Stations made 41 part-time hires during the License Term, and sought referrals for 26 (63.4%) of those hires. (Church Ex. 4, Att. 6, pp. 9-15.) Of the 26 referrals, 21 (80.7%) were from Concordia Seminary. Of the Stations' 41 part-time hires, 41 (100%) were white, 7 (17%) were female, and none (0%) was a minority (*Id.*)

71. As noted above, the Stations sought referrals for 30 of its 43 full-time hires during the License Term, and for 26 of its 41 part-time hires during that term. The number of referrals from secular sources (excluding referrals from station employees) is summarized in Table 1, below. (Church Ex. 6, Att. 6.)<sup>5</sup>

72. The FCC Form 395s filed by the Stations during the License Term reflected the data shown in Table 2, which appears on the next page. (NAACP Ex. 24, pp. 2, 5, 8, 12, 16, 20, 24, 28, 31, 33.) Also shown is data from the FCC Form 395 for the year 1990, which was filed after the close of the License Term. (Church Ex. 10, p. 3.)<sup>6</sup>

73. February 1, 1983, to August 3, 1987.<sup>7</sup> According to the Church, the Stations struggled financially during the License Term. (Church Ex. 4, p. 6.) For example, in the fiscal year ("FY") ending June 30, 1983, the Stations had a \$120,383.74 operating deficit on gross revenues of \$465,131.46. (*Id.* at Att. 5, pp. 1-2.) In the FY ending June

30, 1984, the operating deficit was \$148,972.23 on gross revenues of \$584,356.94. (*Id.* at Att. 5, p. 4.) In the FY from July 1, 1984, to June 30, 1985, income on commercial KFYO-FM was less than \$250,000 while total expenditures on both stations exceeded \$819,000. Legacies and bequests of approximately \$475,000 allowed the Stations to show a surplus of about \$318,000. (*Id.*) Mr. Stortz testified that due to these financial problems, the Stations did little or no employment advertising during the first several years of the License Term. This was so because there were fewer job openings and fewer resources. Instead, the Stations relied on "informal sources" such as referrals by current employees or contacts at local Lutheran churches or agencies to find applicants who were willing to work for jobs that paid less than the broadcast norm at the time. (*Id.* at pp. 6-7; Tr. 485-87.)<sup>8</sup>

TABLE 1

Year	Full-time Hires	Part-time Hires	Total Hires	Full-time Hires for which Secular Sources were Contact-ed	Part-time Hires for which Secular Sources were Contact-ed	Total Hires for which Secular Sources were Contact-ed
1983	1	1	2	0	0	0
1984	3	4	7	0	0	0
1985	5	9	14	1	0	1
1986	3	3	6	1	0	1
1987	10	6	16	4	1	5
1988	7	10	17	0	0	0
1989	11	7	18	2	1	3
1990	3	1	4	3	0	3
<b>Total</b>	<b>43</b>	<b>41</b>	<b>84</b>	<b>11</b>	<b>2</b>	<b>13</b>

<sup>5</sup> Data for 1983 includes only the period from February 1 through December 31. Data for 1990 includes only the period from January 1 through January 31.

<sup>6</sup> The Stations used a two-week reporting period ending January 31 of each year. The first such period during the License Term was reported in the Stations' 1984 FCC Form 395-B. (Church Ex. 4, p. 14.)

<sup>7</sup> This period runs from the beginning of the License Term until the effective date of the FCC's *Report and Order* amending its rules regarding Equal Employment Opportunity in MM

Docket No. 85-350. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) ("*Equal Opportunity Rules for Broadcasters*").

<sup>8</sup> One of the NAACP's rebuttal witnesses, Richard J. Miller, former owner of station KRJY(FM), St. Louis, Missouri, executed an affidavit on February 5, 1990, in which he vouched for the accuracy of the facts contained in an opposition to a petition to deny filed by the NAACP against KRJY ("*KRJY Opposition*"). (NAACP Ex. 12; Church Ex. 12, p. 60.) In the

TABLE 2

Year	Full-time, Top Four Category	Full-time, Top Four Category	Total Full-time	Total Full-time	Full-time and Part-time	Full-time and Part-time
	Number of Minorities	Number of Employees	Number of Minorities	Number of Employees	Number of Minorities	Number of Employees
1983	1	14	1	17	1	24
1984	1	15	1	18	1	26
1985	1	15	2	17	2	27
1986	0	14	1	17	1	29
1987	0	16	0	18	0	28
1988	0	19	0	23	0	33
1989	1	22	1	26	1	41
1990	0	20	2	27	2	45

74. However, the record also reflected that in the FY ending June 30, 1986, the Stations had a positive operating balance of \$254,212.19 on gross revenues of \$1,248,245.99. (Church Ex. 4, Att. 5, p. 6.) Similarly, in the FY ending June 30, 1987, the Stations earned \$147,128 on gross revenues of \$1,090,656. (*Id.* at Att. 5, p. 13.) In the 1982-83 FY, the Stations expended \$152,035 for administrative and general services. (*Id.* at Att. 5, p. 2.) In the FY 1983-84 such expenditures totalled \$93,049; in FY 1984-85 they totalled \$114,765; in FY 1985-86, the total was \$71,436; and in FY 1986-87, the administrative and general expenditures were \$62,492. (*Id.* at Att. 5, pp. 4, 6, 13.)

75. The Stations hired 19 full-time employees between February 1, 1983, and August 3, 1987. Included among these employees were three African American women, Ruth Clerkly, Helen Richardson, and Lisa Harrison, who were hired in July 1984, March 1985, and August 1985, respectively. (Church Ex. 4, p. 6 and Att. 6, pp. 1-4.) Thus, over 15% of the full-time hires in this period were minorities.

76. Lula Daniels, an African American woman who served as Coordinator of Worship Programming from before the beginning of the License Term until she died on April 17, 1985, referred Ms. Clerkly and Ms. Richardson through contacts at a local parish Church. Ms. Daniels had

been promoted from a secretarial position by Reverend Devantier. (Church Ex. 4, Att. 6, p. 1; Church Ex. 7, p. 9; Tr. 746-49, 864-65.) Ms. Daniels and others were "part of a network of congregations and Lutherans in the community . . . who by word of mouth would identify individuals who may be qualified for positions at KFUD or who would alert those looking for positions to apply at KFUD." (Tr. 865.) Ms. Harrison's referral source was "Station Employee" (Church Ex. 4, Att. 6, p. 2.)

77. Using these Lutheran sources and minority and nonminority staff referrals, as of January 31, 1983, the representation of minorities on the KFUD staff was 37.7% of the minority representation in the local work force overall (37.7% of "parity"), and 45.8% of parity in the Top Four job categories.<sup>9</sup> As of January 31, 1984, the Stations were at 35.6% of parity overall for minorities and 42.7% of parity for minorities in the Top Four job categories. By January 31, 1985, the Stations were at 75.4% of parity overall for minorities and 42.7% of parity for minorities in the Top Four job categories. On January 31, 1986, the Stations slipped to 37.7% of parity overall and, with the death of Ms. Daniels, no longer had any African American employees in the Top Four job categories (0% of parity). As of January 31, 1987, the Stations had no minority

KRJV Opposition, it was stated that KRJV, in filling vacancies for full-time positions, recruited by consulting resumes on file, hiring individuals who applied just before openings became available, hiring former employees, accepting the recommendations of other companies in the industry, or seeking the recommendations of employees. (Church Ex. 12, p. 8.) KRJV

argued that these efforts succeeded in creating opportunities for minorities. (*Id.* at p. 9.)

<sup>9</sup> The St. Louis, Missouri-Illinois Metropolitan Statistical Area, where the Stations are located, included 43.2% females and 15.6% minorities. (HDO, 9 FCC Rcd at 917 n.6, official notice taken.)

employees and were, therefore, at 0% of parity overall and in the Top Four job categories. (Church Ex. 4, Att. 12, pp. 1-2.)

78. During this period, the Stations employed three full-time African American employees who were not employed during the weeks used to complete FCC Forms 395-B, *i.e.*, the last two weeks of January of each year. Consequently, the parity analyses above understate the Stations' minority hiring. The minority employees were: Ruth Clerkly, who was hired July 30, 1984, and left KFUE on December 26, 1986 (did not appear in the 1984 employment report); Helen Richardson, who was hired on March 25 or 26, 1985, and left KFUE on August 31, 1985 (did not appear in any employment report); and Lisa Harrison, who was hired on August 28, 1985, and left KFUE on January 10, 1986 (did not appear in any employment report). (Church Ex. 4, p. 14 and Att. 6, pp. 1-2; MMB Ex. 6, pp. 6-7.) All three left for job opportunities outside the field of broadcasting. (Church Ex. 4, Att. 7, p. 10 n.2.)

79. Beginning in mid-to-late 1985, the Stations began to use commercial advertising to recruit employees. (Church Ex. 4, Att. 6, p. 2.) From mid-to-late 1985 to August 3, 1987, the Stations placed advertisements in the *St. Louis Post Dispatch* and *Broadcasting* magazine for 4 of their 11 full-time hires. (*Id.* at Att. 6, pp. 2-4.)<sup>10</sup> In mid-to-late 1985, for example, the Stations advertised their Business Manager opening in the *St. Louis Post Dispatch*. (*Id.* at Att. 6, p. 2.) Likewise, in August 1987, the Stations advertised in the *St. Louis Post Dispatch* for salespersons. The Stations also advertised in *Broadcasting* magazine for a Sales Worker/Manager for the FM station, a Station Manager for the FM, and a Director of Broadcast Ministries for both stations. (*Id.* at Att. 6, pp. 3-4.)

80. Mr. Stortz testified that the Stations' policy was to state "in every advertisement" that they were Equal Opportunity Employers. (Church Ex. 4, p. 12 n.3.) A similar representation was made in the Equal Employment Opportunity Programs filed by the Stations in 1982 and 1983. (Church Ex. 8, Att. 5, p. 4.) The record in this proceeding contained the texts of four advertisements apparently placed prior to the date the NAACP filed its Petition to Deny. (Church Ex. 4, Att. 9, pp. 1, 2, 3, 8; MMB Ex. 6, p. 4.) Only one of the four included a statement that the Stations were an Equal Opportunity Employer. (Church Ex. 4, Att. 9, p. 2.) According to Mr. Stortz, any omission of the notice was "an inadvertent error." (*Id.* at p. 12 n.3; Tr. 776-81.)

81. The Stations continued to have their need for knowledge of Lutheran principles for certain positions. Accordingly, KFUE(AM) in particular relied heavily on employment advertising in periodicals such as *The Lutheran Witness*, which was widely distributed to members of LCMS congregations, including the Church's African American members. (Church Ex. 4, p. 12; Tr. 750-51.) *The Lutheran Witness* was used as one of the recruitment sources for the following three full-time positions: Director of Broadcast Ministries; Announcer/Program Director of the AM station; and AM Station Manager. All three of the

individuals hired to fill these positions were white (Ken Lombardi, Reverend Mark Spitz, and Reverend David Schultz). (Church Ex. 4, Att. 6, pp. 4, 5, 7.)

82. Beginning in January 1987, the Stations also posted all openings at the Church's International Center ("Center"), whose employees were approximately 11.5% minority. (*Id.* at p. 12 and Att. 6, pp. 3 and 11 n.\*.) The Center was the Church's headquarters (*HDO* at para. 12, official notice taken), and all of the employees of the Stations were themselves employees of the Center (MMB Ex. 14, pp. 23-24 n.6). The Center was used as one of the recruitment sources in filling three full-time and two part-time positions. The full-time positions were: Assistant to Business Manager of both stations; Business Manager of both stations; and Sales Worker/Manager of the FM station. The part-time positions were: Office Support for both stations; and AM Announcer. All five of the individuals hired for these positions were white (Steven Benko, Daryl Haake, Bern Hentze, Eric Dingler, and Steve Myrick). (Church Ex. 4, Att. 6, pp. 1-3, 10, 11.)

83. Beginning no later than 1987, the Stations also used the Broadcast Center in St. Louis as one of the recruitment sources for two full-time sales workers for the FM station, one part-time announcer for the AM station, and one part-time announcer for the FM station. All four of the individuals hired for these positions were white (James Bebo, Sharisse Bush, Steve Myrick, and Robert Armbruster). (Church Ex. 4, pp. 14-15 n.5 and Att. 6, pp. 6, 7, 11, 14.) According to Mr. Stortz, the Broadcast Center was the only broadcast trade school in St. Louis and was approximately 7% minority (5.9% African American) in 1989. (*Id.* at pp. 14-15 n.5; Tr. 613-14.)<sup>11</sup>

84. The Stations were unable to attract new African American employees in 1986 or in the period January 1 to August 3, 1987. As noted above, as of the pay period ending January 31, 1987, the Stations no longer had any African American employees. (Church Ex. 4, Att. 12, p. 3; NAACP Ex. 24, pp. 22-29.) This resulted from the death of Ms. Daniels in April 1985, the departure of Ms. Richardson in August 1985, the departure of Ms. Harrison in January 1986, and the departure of Ms. Clerkly in December 1986. (Church Ex. 4, Att. 6, pp. 1-2 and Att. 7, p. 10; Church Ex. 7, p. 9; MMB Ex. 6, pp. 6-7.) In this connection, Ms. Clerkly was recommended and "considered for a management-level position at the station but unfortunately left [KFUE's] employ before [it was] able to" promote her. (Tr. 883.)

85. During the License Term, the Stations' communications counsel, Arnold & Porter, sent to various general managers at KFUE, as well as to other broadcast clients, several letters relating to the Commission's EEO policies. The EEO letters were included among a large number of letters over the years notifying Arnold & Porter's clients of regulatory developments at the Commission. 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. (Church Ex. 8, pp. 2-3.) According to Mr. Stortz, the Stations paid the law firm for these letters. (Tr. 550.)

<sup>10</sup> In the KRJY Opposition, Richard J. Miller cited advertisements in the *St. Louis Post Dispatch* as a good source for minority recruitment. The KRJY Opposition stated that the weekday edition of the *Post Dispatch* reached 51.2% of the St. Louis African American population, and the weekend edition

reached 59.3% of that population. (Church Ex. 12, p. 7.)

<sup>11</sup> In the KRJY Opposition, the Broadcast Center was cited as a "major source" of minority referrals for Mr. Miller's station in the St. Louis market. (Church Ex. 12, p. 7.)

86. Certain of the Arnold & Porter letters related to the Commission's EEO reporting procedures. For example, in December 1985, the law firm wrote to Reverend Roger Abatie, then the general manager of the Stations, informing him about an FCC rulemaking concerning EEO reporting procedures. (Church Ex. 8, pp. 2-3 and Att. 1; Joint Ex. 1.) A March 1986 letter to Emil Wilde, then an interim co-manager of the Stations, enclosed information from the National Association of Broadcasters ("NAB") regarding its employment clearinghouse for minority and female hiring. (NAACP Ex. 42; Joint Ex. 1.) A November 1986 letter to Mr. Stortz enclosed the Commission's proposal for a new form of EEO reporting. (NAACP Ex. 43, p. 5.) In June 1987, the law firm sent to Mr. Stortz copies of the full text of the *Report and Order in Equal Opportunity Rules for Broadcasters*, released on June 12, 1987, and effective on August 3, 1987. In its cover letter, the subjects which were explicitly described related to new EEO reporting requirements and forms. The law firm 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, Arnold & Porter referenced the appropriate pages, and urged the clients themselves to review the provisions so that they would know what was required. (Church Ex. 8, p. 3 and Att. 2.)

87. In Mr. Stortz's view, all of Arnold & Porter's letters appeared to be form letters, presumably sent to all of the law firm's FCC clients. Mr. Stortz believed that most dealt with changes in the forms to be used when making EEO filings. Nothing in them appeared to Mr. Stortz to alert the Stations to any particular EEO deficiency they had or to deal with the subject of religious qualifications for certain jobs. (Church Ex. 4, p. 13; Tr. 549-50.) Mr. Stortz testified that he read the letters addressed to him and passed them on to the station managers. (Tr. 610-11.)

88. **August 3, 1987, to February 1, 1990.** For approximately the first year after the effective date of the FCC's revised EEO rules, i.e., from August 3, 1987, to September 1, 1988, the Stations continued to rely principally on employee referrals, resumes on file, Lutheran publications, and advertisements in *Broadcasting* magazine in making nine full-time hires. (Church Ex. 4, Att. 6, pp. 4-5.) As of the pay period ending January 31, 1988, the Stations had no minority employees. (*Id.* at Att. 12, p. 3; NAACP Ex. 24, pp. 30-31.) However, the FM station made an effort to hire an African American or Hispanic salesperson, and did in fact hire Caridad Perez, a Hispanic female, in March 1988. (Church Ex. 4, p. 12 and Att. 6, p. 5; Tr. 762-63.) Ms. Perez's referral source was a "Resume on File." (Church Ex. 4, Att. 6, p. 5.)

89. During this period, the Stations continued to struggle financially. In the FY ending June 30, 1989, the Stations' expenses exceeded their revenues by \$143,472. The Stations' total operating loss was reduced by the receipt of \$441,598 in legacies and bequests. (Church Ex. 4, Att. 5, p.

43.) The FY ending 1988 was similar. The Stations had an operating loss of \$173,851 even considering legacies and bequests of \$341,094. (Church Ex. 4, Att. 5, p. 33.)

90. Thomas M. Lauher was the general manager of the FM station from approximately May 1987 to July 1989. (Church Ex. 6, p. 1; Joint Ex. 1.) Mr. Lauher was a non-Lutheran whose background was in broadcasting and advertising. He had a "strong interest" in classical music. (Church Ex. 6, p. 1; Tr. 134-35.) Mr. Lauher did not recall being given any instructions when he was first hired that minorities, Lutherans, persons with Lutheran training, Seminary students, or their spouses should be given preferences in hiring. (Tr. 134-35, 139-40.) Mr. Lauher testified that from the beginning of his term as general manager he noticed that, although there were a variety of men and women working at the station, there were no minorities. (Tr. 143-44.) He determined that he wanted to hire minorities. (Tr. 140.)<sup>12</sup>

91. In initiating the process of hiring salespersons for the FM station, Mr. Lauher contacted the St. Louis Broadcast Center and placed advertisements in various publications including *Broadcasting* magazine and the *St. Louis Post Dispatch*. (Church Ex. 6, p. 1.) In Mr. Lauher's view, the Broadcast Center was the best of its kind in training people to become broadcasters and was an Equal Opportunity Employment source. (Tr. 141.) He recalled referrals of applicants from the St. Louis Broadcast Center, and noted that he had talked to a variety of candidates in an effort to hire a variety of people, including minorities. (Church Ex. 6, p. 1.)

92. In April 1988, Arnold & Porter sent to Mr. Stortz 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 employment opportunity requirements." With regard to a condition which the Commission had recently imposed on a station in North Carolina, the law firm noted that:

... While the condition is not onerous . . . 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.

(Church Ex. 8, pp. 3-4 and Att. 3.)

93. In the fall of 1988, Mr. Lauher attended a Missouri Broadcasters Association meeting. The meeting was essentially a license renewal seminar to inform broadcasters of the FCC's then-current requirements, including EEO requirements. According to Mr. Lauher, the message that came through during that seminar was "don't be lulled into complacency because there is deregulation." After attending this seminar, Mr. Lauher decided to review the

<sup>12</sup> Mr. Lauher's original written testimony stated, in connection with the hiring of salespersons at KFUE-FM, that the Stations "wanted to hire a variety of people and wanted to hire a minority." (Church Ex. 6, p. 1, emphasis added.) At the hearing, Mr. Lauher testified that the draft of his testimony, which he had prepared, stated that the Stations wanted to hire "minorities" for sales positions, and that the language, "a mi-

nority," was a typographical error. (Tr. 103-6, 125-26.) This testimony was credible, especially because a later sentence in Mr. Lauher's testimony states: "As I have mentioned, we had minority and female employees during the period that I worked at KFUE-FM and the station actively sought to obtain minority and female employees." (Church Ex. 6, p. 3, emphasis added.)

station's compliance status, which included compliance with the FCC's EEO requirements. Mr. Lauher also had discussions with Ms. Cranberg concerning the Commission's EEO requirements. (Church Ex. 6, p. 2; Church Ex. 4, p. 12; Tr. 144.)

94. During Mr. Lauher's review, continuing from the fall of 1988 until April 1989 (Church Ex. 6, pp. 2-3), the Stations continued to rely on employee referrals, resumes on file, and the St. Louis Broadcast Center for five full-time hires (Church Ex. 4, Att. 6, pp. 5-6). None of the five was a minority. (*Id.*) As of the pay period ending January 31, 1989, however, after Ms. Perez was hired as a salesperson, the Stations' full-time minority employment was at 29.1% of parity in the Top Four job categories and 24.7% of parity overall. (*Id.* at Att. 12, p. 4; NAACP Ex. 24, pp. 32-33.)

95. On November 1, 1988, Arnold & Porter sent to the Stations a letter informing them of the decision of the U.S. Court of Appeals for the D.C. Circuit in *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988), wherein the Court ordered the Commission to hold a renewal hearing on EEO and misrepresentation issues. The law firm noted that "[t]he decision makes it likely that the FCC will consider more carefully in the future renewal challenges based on EEO grounds." (Church Ex. 8, p. 4 and Att. 4.)

96. After receiving Arnold & Porter's November 1, 1988, letter, Mr. Lauher made inquiries to Ms. Cranberg concerning the FCC's renewal requirements. (Church Ex. 8, p. 4; Tr. 1008-9, 1035.) On December 20, 1988, Ms. Cranberg sent Mr. Lauher a copy of the FCC's EEO rules, copies of KFUE's Annual Employment Reports for the years 1986 to 1988, and a copy of the Stations' most recent EEO Program. Ms. Cranberg told Mr. Lauher in this letter that she had been assured by FCC staff that a single EEO program filed by KFUE(AM) and KFUE-FM would be acceptable. (Church Ex. 8, p. 4 and Att. 5.) Mr. Lauher then reviewed the Stations' existing EEO program. (Tr. 136-39.) Ms. Cranberg believed that Arnold & Porter's letter of December 20, 1988, was the first time that the firm had addressed any EEO issues specific to KFUE, as opposed to its other broadcast clients, during the License Term. (Church Ex. 8, p. 4.)

97. On February 28, 1989, Arnold & Porter sent a letter to Mr. Stortz enclosing a Commission order concluding that broadcasters were permitted to maintain information concerning the race and sex of job applicants, and clarifying that licensees were required to report the number of qualified female and minority referrals they received. The letter also noted that stations which received applications by mail should make an effort to determine the race or sex of the applicant. The penultimate paragraph of the letter stated:

You should be aware that the FCC is increasingly scrutinizing the recruitment practices of licensees to determine whether stations are complying with applicable equal employment opportunity requirements. Consequently, it would be wise for all licensees to carefully review their procedures for recruiting qualified minority and female applicants, and for retaining information on the sex and race of referrals to ensure that these procedures are effective and in compliance with applicable law.

(NAACP Ex. 46.)

98. As a result of his "on-going personal review and reading, attendance at two different renewal seminars, consultation and communication with Arnold & Porter and conversations with employees regarding past practices," Mr. Lauher prepared a memorandum to Reverend Devantier, the Stations' CEO, dated March 9, 1989, regarding "License Renewal." (Church Ex. 7, Att. 5, p. 1; Church Ex. 6, p. 2.) The memorandum attempted to give a "comprehensive review of performance, recommendations for improvements, and an outline of areas in which there [was] concern" in connection with the forthcoming license renewal. (Church Ex. 7, Att. 5, p. 1.) All such concerns were included in his report: Mr. Lauher knew of no others. (*Id.*) Mr. Lauher continued:

The report and accompanying material provides background, outlines potential problems, addresses implications and offers solutions as we move into the critical license renewal time. We are taking action now to address specific concerns outlined below. Failure to do so could create significant jeopardy [sic] in license retention. If the concerns are not addressed quickly, the worst possible consequence is loss of license.

(*Id.* at Att. 5, p. 2.)

99. With respect to "EEO Compliance," the memorandum stated:

This is the most critical area in license renewal. As Matthew Leibowitz said at the Missouri Broadcasters Association fall seminar on renewal: "Numbers do not work anymore. Now the FCC looks for affirmative action based on the EEO program model currently on file as developed by the station. The question is: Is the station following its own plan?" Marsha [sic] Cranberg agrees with the seminar view. As described below there are plenty of areas for improvement in our compliance. At the time the AM and FM operations were absorbed into the Synod[,] certain procedures, forms, job descriptions, etc. were introduced which inadvertently put the stations in a non-compliance situation.

At the very least separate employment applications and hiring criteria should be in place for KFUE-FM (also KFUE-AM). Cranberg stated that even a requirement that an individual be a Christian would be deemed to have racial overtones.

\* \* \*

All commercial broadcast license holders are subject to the same rules and regulations. As Marsha [sic] Cranberg of Arnold & Porter indicated in a telephone conversation: "The better part of safety is to comply with EEO for both FM and AM unless a reasonable argument with respect to AM can be advanced *and* the commission [sic] has previously waived requirements for similar situations." She knows of no similar situations that might apply.

Cranberg recommends separate EEO Programs for FM and AM. She says that although a single EEO Program could suffice it "would make sense, espe-

cially in light of specific AM religious considerations in hiring" to separate the EEO Programs at the next filing (May [sic], 1989).

The NAB Legal Guide states: "... broadcasters are held to a higher EEO standard than most other private employers. Unlike most other businesses, broadcasters must comply with EEO requirements, not only as a matter of federal law, but also because the FCC reviews station compliance as part of the license application and renewal process." The guide explains the FCC can and does review broadcasters' EEO records periodically. If the record is thought to be inadequate, the FCC may take various actions, including denial of license renewal.

I have discoverd [sic] we are operating in violation of our own policy as currently on file. I have reason to believe this applies to the AM operation as well as the FM operation.

I have taken steps in good faith to assure full compliance in FM. I shared with Jerry Housholder those steps taken on FM.

(Church Ex. 7, Att. 5, pp. 5-8, emphasis in original.)<sup>13</sup>

100. Mr. Lauher specified in his memorandum three areas in which he believed that the Stations' "performance" differed from their "EEO promises." (Church Ex. 7, Att. 5, p. 8.) Each specified area related to forms and job descriptions, and not to the Stations' recruitment efforts or their policy of nondiscrimination. The areas specified were:

(a) First, the station's EEO Program on file at the FCC continued to show that Reverend Abatie, a former general manager of KFUE(AM) and KFUE-FM, was responsible for administration and implementation of the EEO program. A new person or persons needed to be named, and a decision needed to be made about whether one person should be responsible for both stations. (Church Ex. 8, Att. 5, p. 3; Church Ex. 7, Att. 5, p. 8; Tr. 151-52.)

(b) Second, the employment application form in use at the Stations did not contain the statement which the EEO Programs on file at the Commission represented the form would contain. (Tr. 156.) Specifically, the Stations' 1982 and 1983 EEO Programs had stated: "The station's employment application form contains a notice informing prospective employees that discrimination because of race, color, religion, national origin or sex is prohibited and that they may notify the appropriate local, state, or federal agency if they believe they have been the victims of discrimination." (Church Ex. 8, Att. 5, p. 9.) As Mr. Lauher stated in his memorandum, however: "Somehow, this was dropped at some point when revised application forms were printed." (Church Ex. 7, Att. 5, p. 9.)<sup>14</sup> Mr. Lauher testified at the hearing that the quoted statement "was a clear part of the policy but it had been in some manner inadvertently dropped from this application." (Tr. 164.)

(c) Third, there was a problem with job descriptions, which needed to be "job specific, held to a minimum and . . . completely objective." According to Mr. Lauher, the job descriptions at the Stations were reviewed and changed where necessary to be sure none included subjective considerations and all essential position qualifications were job specific. (Church Ex. 7, Att. 5, pp. 9-10.)

101. At the hearing, Mr. Lauher testified that he had another area of concern. That is, the employment application form in use at both Stations stated: "Because we are a church body, the Lutheran Church-Missouri Synod retains the right to give preference in the hiring of persons who are members in good standing of an LCMS congregation." In addition, the form asked applicants to state their religious affiliations. Mr. Lauher was concerned because these portions of the application appeared to violate the Stations' stated policy to give all qualified applicants an equal opportunity for employment. (MMB Ex. 25, p. 1; NAACP Ex. 32, pp. 2, 14, 20; Tr. 153-56, 161.)

102. Mr. Lauher further testified that his "concern at the time [he] prepared the memorandum was that a common application form was used for both the AM and FM stations and that within the form there was some language relating to theological experience that might not be appropriate for all hires." He testified that he was "also concerned that some of the job descriptions for the FM station might not reflect [the Stations'] EEO policies because the opening paragraphs spoke about serving the Lutheran Church." (Church Ex. 6, p. 2.) In general, Mr. Lauher was concerned in 1989 that a joint EEO program for both KFUE(AM) and KFUE-FM "might create a difficulty in impression, confusion because there were some, as Marcia [Cranberg] suggested, legitimate reasons for the AM station to ask questions of a religious nature, nature for certain . . . positions . . . , although the FM would not be hiring people with, with that kind of background or requirement." (Tr. 152.)

103. Mr. Lauher also stated in his testimony that his March 9, 1989, memorandum did not deal with recruiting efforts. He explained that KFUE-FM had increased the number of women employees at the station and had "minority representation," namely, Ms. Perez, who was Hispanic. (Church Ex. 6, p. 2; Tr. 193-94.) Mr. Lauher testified: "I think in the, in the few hires that had been made at the time I was there that [the Stations] . . . had hired a minority and we had hired women . . . I think the FM station had, had been doing what it should do." (Tr. 175.) He testified that when he stated in his memorandum that "we are operating in violation of our own policy as currently on file," he did not mean that the Stations were violating FCC policies but simply that if there was to be a combined EEO policy for the AM and FM stations, there appeared to be a contradiction with the requirement for religious training for a number of the positions. He noted that his reference to inadvertent noncompliance referred to the same issue. (Church Ex. 6, p. 2.)

<sup>13</sup> Jerry Housholder was an employee of KFUE-AM. It appeared to Mr. Lauher that Mr. Housholder "was assuming certain responsibilities" with respect to the AM operation in light of the fact that the positions of Director of Broadcast Ministries

and AM general manager were vacant at the time. (Tr. 162-63.)

<sup>14</sup> See NAACP Ex. 31, p. 4, for an example of an earlier application form which did contain the statement in question.

104. Mr. Lauher sent copies of his March 9, 1989, memorandum to Ms. Cranberg, Mr. Stortz, Bob Thomson (the FM Sales Manager), Ron Klemm (the FM Program Director), Paula Zika (the Director of Business Affairs), and Jim Rice (unidentified in the record). (Church Ex. 7, Att. 5, p. 10; Church Ex. 3, p. 1; Tr. 185.)

105. On March 15, 1989, six days after his first memorandum, Mr. Lauher forwarded another memorandum to Reverend Devantier concerning the Stations' EEO compliance. (Church Ex. 4, Att. 11; Church Ex. 6, pp. 2-3.) Copies of the second memorandum were sent to Messrs. Stortz, Klemm, Thomson, and Rice, and Ms. Zika. (Church Ex. 4, Att. 11, p. 1.)

106. In his second memorandum, Mr. Lauher reviewed the list of "defensive measures" contained in the *EEO Handbook, A Practical Guide for Broadcasters*. Mr. Lauher stated:

Out of the 130 measures listed, KFUE-FM has implemented or completed 79. Ten of the measures appear to be "Not Applicable" to our situation. The remaining 41 measures are currently being reviewed to see whether the action has been taken, needs to be taken or is not applicable to our situation.

(Church Ex. 4, Att. 11, p. 1; Church Ex. 6, pp. 2-3.) Among the items Mr. Lauher check marked as "implemented or completed" by KFUE-FM were: (a) taking "EEOC" matters seriously; (b) evaluating all employment practices, and eliminating those that have an adverse impact on minorities; and (c) conducting "a continuing campaign to exclude every form of prejudice or discrimination based upon race, color, religion, national origin, or sex from the station's personnel policies and practices and working conditions." (Church Ex. 4, Att. 11, pp. 2, 4; Tr. 166-67.)

107. Among the items which Mr. Lauher did not check mark were:

Establish an EEO officer to implement your station's EEO program and to keep current on developments in the law. (Church Ex. 4, Att. 11, p. 2.)

Include a copy of your EEO program in personnel manuals and employee handbooks. (*Id.* at Att. 11, p. 3.)

Communicate your station's EEO policy and program and your employment needs to sources of qualified applicants without regard to race, color, religion, national origin or sex, and solicit their recruitment assistance on a continuing basis. (*Id.*)

Maintain a list of the recruitment sources you will use in seeking qualified female and minority applicants. (*Id.*)

Maintain written records of all the referrals made by your recruitment sources, and inform recruitment sources, in writing, of the disposition of applicants they have referred. (*Id.* at Att. 11, p. 4.)

Conduct a continuing review of your job structure and employment practices, and adopt positive recruitment, training, job design, and other measures to ensure genuine equality of opportunity to participate fully in all organizational units, occupations, and levels of responsibility throughout the station. (*Id.*)

Where appropriate, post notices of vacancies in the station, and afford current employees the opportunity to apply for promotion. (*Id.* at Att. 11, p. 7.)

Contact minority organizations, organizations for women, media, educational institutions, and other potential sources of female and minority applicants, for referrals. (*Id.*)

Interview all applicants who appear to be qualified. If you decide that an applicant has insufficient qualifications to be interviewed, document and inform the applicant, in writing, of your reasons. (*Id.*)<sup>15</sup>

108. Mr. Lauher testified that he did not check mark "Establish an EEO officer . . ." because no decision had yet been made as to a replacement for Reverend Abatie. (Tr. 167.) He did not check mark "Maintain a list of the recruitment sources . . ." because the station had not yet evaluated its current sources. (Tr. 168-69.) In this regard, Mr. Lauher believed that the Station maintained such a list, but he had never actually seen it. (Tr. 168-69.) Mr. Lauher did not check mark "Conduct a continuing review . . ." because he did not recall such a formal review at the station. (Tr. 171.) He did not check mark "Contact minority organizations . . ." because he had not yet ascertained whether the station was doing that. (Tr. 178-79.) In this connection, the fact that there was no check mark next to an item did not mean that a step had not been taken, but that personnel were still "double-checking" whether the station was in compliance. (Church Ex. 4, Att. 11, p. 1; Tr. 178-79.)

109. Between March 15, 1989, the date of the second memorandum, and February 1, 1990, the end of the License Term, the Stations hired 13 full-time and 7 part-time employees. (Church Ex. 4, Att. 6, pp. 6-8, 14-15.) Of the 13 full-time hires, 9 were hired without the use of either minority or nonminority secular recruitment sources. However, such sources were contacted in connection with the hiring of 4 employees (Sharisse Bush, Cynthia Blades, Bridget Williams, and Timothy Meeks). Of these four, three were African American (Ms. Blades, Ms. Williams, and Mr. Meeks). Of these three, two were hired after the NAACP filed its Petition to Deny (Ms. Williams and Mr. Meeks). (*Id.* at Att. 6, pp. 7-8.) Similarly, of the seven part-time hires, six were hired without the use of either minority or nonminority secular recruitment sources, and none of the seven was a minority. (*Id.* at Att. 6, pp. 14-15.)

110. Subsequent to receiving these memorandums, Reverend Devantier and Mr. Lauher engaged in discussions in which a question was raised about whether some of the items on the checklist pertained to religious stations. Reverend Devantier advised Mr. Lauher to do whatever was needed to assure "continuing [EEO] compliance." (Church Ex. 7 p. 10; Church Ex. 6, p. 3; Tr. 180, 855.)

<sup>15</sup> Reverend Devantier testified that unsuccessful applicants who were interviewed were notified by letter that they had not been selected. Some of these letters were signed by Reverend

Devantier. He could not recall any letter signed by him in which the reasons for non-selection were given. (Tr. 813.)

111. As a result of Mr. Lauher's memorandums and their conversations, Reverend Devantier, at a meeting on April 5, 1989, notified the Standing Committee of the Church's Board for Communications Services of the "importance of adhering to laws and regulations pertaining to the Federal Equal Employment Opportunity programs." (Church Ex. 7, p. 10 and Att. 7, p. 2; Tr. 858-59.) The portion of the Minutes of the Standing Committee which related to EEO stated:

In the matter of Radio Station Licensing, Rev. Devantier pointed out the importance of adhering to laws and regulations pertaining to the Federal Equal Employment Opportunity programs. Following discussion it was resolved that:

KFUO-AM & FM operate under a single EEO program and that positions [sic] descriptions be reviewed and revised as necessary to assure that the special background and experience for entry level into the individual position be specified.

(Church Ex. 7, Att. 7, p. 2.) According to Reverend Devantier, the Standing Committee took this action because it believed that since KFUE(AM) and KFUE-FM had similar purposes, and were both affiliated with the Church, a single EEO policy would suffice. (*Id.*; Tr. 856-57.)

112. Shortly after his meeting with Reverend Devantier, Mr. Lauher requested information from Ms. Cranberg concerning the relationship between KFUE's religious affiliation and the EEO requirements. (Church Ex. 8, p. 5.) Arnold & Porter had not addressed this issue in any of its client advisories during the License Term. (Church Ex. 4, p. 13; Church Ex. 8, p. 5.)

113. By letter of April 4, 1989, Ms. Cranberg advised Mr. Lauher that in the *King's Garden* case,<sup>16</sup> the Court of Appeals determined that it was permissible for the Stations to use a religious criterion for "certain limited employment categories" consisting of persons "whose work [was] connected with the espousal of the licensee's religious views." Ms. Cranberg continued:

Generally, . . . the court held[] that in delineating the appropriate employment categories, the Commission should "fix upon the nexus between the employment position in question and the religious content of the programs aired by the sectarian licensee". [sic] Specifically, said the court, "[w]here a job position has no substantial connection with program content, or where the connection is with a program having no religious dimension", [sic] discrimination will not be permitted.

(Church Ex. 8, Att. 6.)

114. As examples of positions where the Commission found a religious employment requirement permissible, Ms. Cranberg gave writers and research assistants hired for

the preparation of programs espousing the licensee's religious views, and those hired to answer religious questions on a call-in program. She stated, however, that:

The Commission concluded . . . that announcers, as a general category, would not be exempt from the nondiscrimination rules, because there is no reason why an announcer must be of a particular faith in order to introduce a program or insert news, commercial announcements, or station identifications during or adjacent to any program.

(Church Ex. 8, Att. 6.)

115. Ms. Cranberg further stated that, although *King's Garden* dated from the mid-1970s, she had been assured by FCC staff that its "general guidelines" were still in force. Ms. Cranberg concluded her letter as follows:

In sum, while a religious affiliation requirement may be permissible in certain circumstances, it is clear that the FCC and the courts are likely to restrict such limitations to very narrow situations where the employee is directly connected with the production of programming which espouses a religious viewpoint. Given the undeveloped nature of the FCC's requirements in this area and the fact that the FCC enforces its employment requirements fairly rigorously, if, during the process of revising employment guidelines for its broadcast stations, the Lutheran Church/Missouri Synod so desires, we shall be happy to confer with you further in an effort to develop guidelines acceptable to the FCC.

(Church Ex. 8, Att. 6.)

116. On April 26, 1989, following the letter from Ms. Cranberg, Mr. Lauher circulated a packet of updated materials to be used in the hiring process. Mr. Lauher was concerned that the FM station should be sure that it had made very clear to recruitment sources that it was actively seeking minority and female applicants. (Church Ex. 6, p. 3.) The materials included a revised employment application form. The form began with the following language:

Discrimination because of a person's race, color, creed, religion, sex, national origin, or age in employment and personnel practices is prohibited by the Federal Communications Commission. If you believe your equal employment rights have been violated, you may contact the appropriate local, state or federal agency.

The form also deleted the question asking for religious affiliation, and deleted the statement about the preference for members of the LCMS. (Church Ex. 4, p. 14 and Att. 13, pp. 8-11; Tr. 184-85.) The package also contained, *inter alia*, a KFUE-FM EEO Policy Statement, a Notice to Employees and Applicants for Employment Regarding Station EEO Policy and Program, an EEO Data Form, and an Applicant Flow Chart. (Church Ex. 4, p. 14 and Att. 13.) The Notice stated that the policy of KFUE-FM was to

<sup>16</sup> *In re Complaint by Anderson*, 34 FCC 2d 937 (1972), *aff'd sub nom. King's Garden, Inc.*, 38 FCC 2d 339 (1972), *aff'd sub*

*nom. King's Garden, Inc. v. FCC*, 498 F.2d 51 (D.C. Cir. 1974), *cert. denied* 419 U.S. 996 (1974).

provide equal employment opportunity to all qualified individuals without regard to race, color, religion, national origin or age. It also requested that, if current employees knew of qualified women and minorities who might be interested in working at the station, they refer them to the station. (*Id.* at Att. 13, p. 16.)

117. On May 9, 1989, Arnold & Porter sent a letter to Mr. Stortz in which it was stated:

It was brought out [at a recent NAB Convention] that under today's FCC policies, the contacts with minority and female referral sources must be genuine and substantial; referral sources should be regularly checked and the licensee should keep good records of its contacts with such sources in order to demonstrate to the FCC, if challenged, that it has used its "best efforts."

(MMB Ex. 22.)

118. On June 21, 1989, Arnold & Porter wrote to Mr. Stortz reporting that there had been an increasing number of cases in which sanctions for EEO violations were issued "even in situations where no petitions to deny had been filed." The letter advised that

licensees should utilize both female and minority recruitment sources for each job opening at the station. . . . Moreover, if the recruitment sources used by the station fail to turn up minority or female applicants, the licensee must make efforts to determine why this is so, and attempt to develop more effective minority and female recruitment alternatives. The licensee's contacts with minority and female recruiters must be meaningful and genuine.

(NAACP Ex. 47.)

119. In July 1989, Mr. Lauher took sample letters from an "NAB guidelines reference book" and edited them to suit the Stations' circumstances. (Church Ex. 4, p. 14; Tr. 188-89.) As edited, the letters read:

Station KFUE-FM is an Equal Opportunity Employer. From time to time, we have job openings at our station which require a variety of skills and talents. We encourage members of minority groups and women to apply for these positions, and we seek your help in referring minorities and women to us.

We will be contacting you as job openings arise at our station. In the meantime, if you know of minority group members and/or women who might be interested in working at our station, please do not hesitate to refer them directly to me [Mr. Lauher]. In the event you do not presently know of any such candidates, please refer them to me whenever they come to your attention.

If you are aware of any other organization which may be of assistance to us in this regard, I would also appreciate having its name and address. I am enclosing a reply form, and ask that you complete and return it to me to acknowledge receipt of this letter.

Thank you for your assistance.

The "reply forms" stated: "This is to acknowledge that I [the addressee] have received a letter from Station KFUE-FM seeking female and minority referrals for job openings at the station." Spaces for a signature and the date, among other things, were provided. (Church Ex. 4, pp. 14-15 and Att. 14; MMB Ex. 2, pp. 1-2, 8-9.)

120. The letters were signed by Mr. Lauher and sent by the FM station to at least 10 local universities and personnel agencies including: Roth Young Personnel Service of St. Louis, University of Missouri at St. Louis, Meramec Community College, The Broadcast Center, Southern Illinois University at Edwardsville, Lindenwood College, John N. Olin School of Business at Washington University, St. Louis Community College, Snelling & Snelling of Clayton, and Sales Recruiters Irvin-Edwards. (Church Ex. 4, p. 14 and Att. 14.)<sup>17</sup> Mr. Lauher selected these organizations because he believed they would send him applicants with minimal experience, and those were the kind of employees the station usually hired. (Tr. 189-90.)

121. Mr. Lauher testified that the letters were sent because the lawyer conducting the EEO seminar at the fall Missouri Broadcasters Association meeting

led me to feel regardless of what had been done at any prior time that it was best to err on the side of making sure, and that's all I felt that we were doing there was just making sure . . . that we had in writing to these various agencies . . . what the letter states.

(Tr. 123, 189.) None of the letters resulted in any referrals of minority applicants. (MMB Ex. 2, p. 2; MMB Ex. 6, pp. 5-6.)

122. Between the time these letters were sent and the end of the License Term, the Stations filled nine full-time positions and five part-time positions. (Church Ex. 4, Att. 6, pp. 6-8, 14-15.) None of the local universities and personnel agencies enumerated above was contacted in connection with any of these job openings. (*Id.*)

123. According to Mr. Stortz, the EEO forms developed by Mr. Lauher were not used during the remainder of 1989 because of turnover in managerial personnel which took place in the summer of that year. (Church Ex. 4, p. 15; Tr. 616-18.) Indeed, Mr. Lauher himself left KFUE-FM in July 1989. His departure had nothing to do with his efforts concerning EEO, but related to the station's failure to meet sales expectations. (Church Ex. 6, p. 3; Tr. 867-68.)

124. After Mr. Lauher left, Reverend Devantier became acting general manager of the FM station and Mr. Stortz remained as Operations Manager of that station. (Tr. 616.) EEO compliance became the responsibility of both Reverend Devantier and Mr. Stortz, but there was no discussion of how that responsibility was to be apportioned. (Tr. 616,

<sup>17</sup> Mr. Lauher believed that Meramec College had a high enrollment of minorities. (Tr. 189-90.) In the KRJY Opposition, Mr. Miller stated that Meramec Community College was a rela-

tively "fertile" source of minority referrals. (Church Ex. 12, p. 8.)

618, 815-16.) According to Reverend Devantier, the routine day-to-day responsibility for the operation of the station was assigned to Mr. Stortz, and that responsibility included, for example, sending out notices of job openings and notifying job sources of the station's EEO policies. (Tr. 816.) Reverend Devantier "did not become heavily involved in the day-to-day functioning and detail of the operation" of the FM station. (*Id.*)

125. In a memorandum drafted after receiving the NAACP's January 2, 1990, Petition to Deny (MMB Ex. 3; Tr. 660), Mr. Stortz stated that the two new managers of KFUA(AM) and KFUA-FM in October 1989 had no way of knowing about any previous problems of noncompliance with Stations' EEO program other than by studying the records, and they learned of the problems by way of the Petition to Deny (NAACP Ex. 48, p. 1).

126. The Stations further augmented their efforts to comply with EEO requirements in 1989. (Church Ex. 4, p. 15; NAACP Exs. 46, 47; MMB Exs. 22, 23.) For example, the Stations began seeking referrals from the Lutheran Employment Project of St. Louis, a clearinghouse run by various Lutheran churches for employment of members of minority groups. In late 1989, KFUA interviewed three minority persons referred by the Lutheran Employment Project, and hired one of them, Ms. Cynthia Blades, an African American, on November 1, 1989. (Church Ex. 4, p. 15 and Att. 6, p. 7; Tr. 754.) The Stations also continued to utilize employee referrals and resumes on file to fill some openings during 1989. (Church Ex. 4, Att. 6, pp. 6-7.)

127. On November 21, 1989, Arnold & Porter sent a letter to Mr. Stortz containing a "quick review" of two recent Commission decisions wherein forfeitures and conditional renewals were imposed on licensees for EEO violations. The law firm again advised "that in filling job openings, stations *must* regularly utilize recruitment sources which are likely to refer qualified minority applicants." (MMB Ex. 23, emphasis in original.)

128. As discussed earlier, Mr. Stortz believed that all of Arnold & Porter's letters were form letters sent to all of their clients. Nothing in them alerted him to any particular EEO deficiency of the Stations, or dealt with the subject of religious qualifications for particular jobs. (Church Ex. 4, p. 13; Tr. 549-50.) Mr. Stortz read the letters and passed them on to the station managers. (Tr. 610-11.) During the License Term, Mr. Stortz never initiated any communication with Arnold & Porter with respect to the Stations' EEO program. (Tr. 767-68.) Mr. Stortz and Ms. Cranberg had never met in person until the depositions in this proceeding were taken. (Church Ex. 8, pp. 4-5.)

129. In the second half of January 1990, Mr. Stortz used EEO Data Forms and EEO Recruitment Program Forms in connection with new hires. (Church Ex. 4, p. 15 and Att. 15.) Moreover, at that time, the Stations continued to contact the Lutheran Employment Project and also contacted an Outreach Ministry for minority employment in northern St. Louis. (Church Ex. 11, p. 1; Tr. 539-40.) The Outreach Ministry referred prospective candidates, but none chose to fill out applications. (Church Ex. 11, p. 1.)

130. In January 1990, the Stations also advertised in newspapers, such as the *St. Louis American* and the *St. Louis Sentinel*, whose target audiences were African American, for the then-existing job vacancies. (Church Ex. 4, p. 15 and Att. 9, pp. 9-12; Tr. 538-39.) An African American male, Timothy Meeks, was hired through the *St. Louis American* for a "Maintenance" position serving both Sta-

tions, and an African American female, Bridget Williams, was hired through the *St. Louis Post Dispatch* for a "Secretary/Receptionist" position at the AM station. (Church Ex. 4, Att. 6, p. 8.) By that time, the Stations had received the NAACP's Petition to Deny and had begun to recruit more vigorously. (Tr. 534-44.)

131. In making the hires in January 1990, the Stations used a rating form developed by Angela Burger, the Stations' Assistant Director of Development, who performed the job interviews for these positions. Ms. Burger brought the format of the form with her from a prior job and had not done job interviews for the Stations before January 1990. (Tr. 520-22, 726-27.) The rating form for the Secretary/Receptionist position scored applicants on scales of 1 to 10 on such factors as "punctual," "good appearance," "good guest greeter," and "works well with people." (*E.g.*, NAACP Ex. 63, p. 1.) The applicants for the Maintenance position were similarly scored on such factors as "clean," "legible [sic] writing," and "follows orders." (*Id.* at p. 3.) Three of the four Secretary/Receptionist applicants and five of the six Maintenance applicants were African American. (Church Ex. 4, Att. 6, p. 8.) Mr. Stortz testified that the factors considered in evaluating these candidates had been used before, but he could not recall other instances in which candidates had been scored numerically on a rating form. (Tr. 727-30, 789-90.)

132. During the approximately 10-month period after the Stations reviewed their EEO policies, *i.e.*, from March 1989 to January 1990, the Stations hired 13 full-time employees of whom 3 (22%) were African American. (Church Ex. 4, Att. 6, pp. 6-8.) Two of the three minorities, however, were hired after the NAACP filed its Petition to Deny the renewal applications of the Stations. (*Id.* at Att. 6, p. 8; MMB Ex. 3.) The Stations sought referrals, including Lutheran publications and employee referrals, for at least 9 of the 13 full-time hires. (Church Ex. 4, Att. 6, pp. 6-8.)

133. During the last two-and-one-half-year period of the License Term after the FCC revised its EEO rules, *i.e.*, from August 3, 1987, to January 31, 1990, the Stations hired 24 full-time employees, of whom 4 (16%) were minority. (Church Ex. 4, Att. 6, pp. 4-8.) As noted above, however, two of the four minorities were hired after the NAACP filed its Petition to Deny. (*Id.* at Att. 6, p. 8; MMB Ex. 3.) The Stations sought referrals, including Lutheran publications and employee referrals, for at least 14 of these 24 hires. (Church Ex. 4, Att. 6, pp. 4-8.) As of the pay period ending January 31, 1990, the Stations' overall minority employment was at 71.2% of parity, but there were no minority employees in Top Four category jobs. (Church Ex. 4, Att. 12, p. 4.)

134. In the Stations' 1989 renewal applications, Mr. Stortz added a sentence to the section on "Recruitment" in the EEO Program stating that the Stations "actively seek female and minority referrals." Mr. Stortz also attached a sample of a part of one of the Stations' July 1989 recruitment letters. According to Mr. Stortz, this was done because the Stations had "generally" publicized openings for much of the License Term and had sent recruitment letters in July 1989 to at least 10 local universities and personnel agencies stating that KFUA-FM encouraged minority applications and was seeking help in recruiting minorities. Mr. Stortz believed that the letters were evidence of the Station's then-current, *i.e.*, July to September 1989, active efforts to recruit minorities and females. KFUA-FM

had in fact sent the letters and Mr. Stortz testified that he had no intention of misleading the Commission by attaching the sample. (Church Ex. 4, pp. 17-18.)

135. In the Stations' 1989 renewal applications, Reverend Devantier was identified as the person responsible for implementation of the Stations' EEO program. (Church Ex. 4, Att. 16, p. 6.) He was so identified because as of the date of the application, September 29, 1989, he was the Stations' CEO, the newly-hired general manager of KFUEO(AM) had not yet started working, and no permanent general manager of KFUEO-FM had been hired. (Church Ex. 4, pp. 16-17; Church Ex. 7, pp. 10-11; Tr. 860-61.) In his testimony, Reverend Devantier expressed regret that the Stations had not done more to pursue sources specializing in the referral of minorities. (Church Ex. 7, p. 11.)

#### D. The "Requirement" for Knowledge of Classical Music

136. During the License Term, the Stations believed that it was essential or highly desirable for announcers and salespersons for the FM station to be knowledgeable about classical music. However, toward the end of the License Term, the thinking of station management evolved and they began to believe that general experience in sales was perhaps as or more important than knowledge of classical music as a qualification for salespersons at KFUEO-FM. (Church Ex. 4, p. 9; Tr. 873-74.)

137. According to the Church, the FM station's views about salespersons' knowledge of classical music is best understood by reviewing the history of the station's sales efforts. Between 1983 and 1986, KFUEO-FM did not hire its own salespersons but instead relied on an outside consultant, Concert Music Broadcast Sales ("CMBS"), to sell both national and local advertising time on the station. CMBS was an advertising representative firm devoted exclusively to sales of the classical radio format. In addition to its headquarters in New York City, CMBS had sales offices in Chicago, Dallas, Los Angeles, Atlanta, Detroit, and San Francisco. (Church Ex. 4, p. 9; Church Ex. 5, p. 2.)

138. In the early 1980s the founder of CMBS, Peter J. Cleary, had discovered that KFUEO-FM was operating on a commercial frequency. CMBS had wanted a full-time classical music radio outlet in the St. Louis market, so Mr. Cleary contacted the Church to urge it to change KFUEO-FM from a noncommercial operation. According to Mr. Cleary, it took him about three years of "arm twisting" before the Church began to sell time on KFUEO-FM in July 1983. (Church Ex. 5, p. 1; Tr. 209.)

139. When the Church decided that KFUEO-FM would sell advertising in 1983, there was no sales staff either on KFUEO-FM or KFUEO(AM). In fact, the Church had no previous experience in radio sales. Accordingly, CMBS agreed itself to become KFUEO-FM's initial sales force, both nationally and locally. CMBS opened a St. Louis office and hired Tom Jackson, who was experienced in radio and television sales and had an interest in and an understanding of classical music. (Church Ex. 5, p. 4; Tr. 509.) Mr. Jackson was an employee of CMBS. (Tr. 212.)

140. In 1986, KFUEO-FM took over its own sales efforts and looked to CMBS and Mr. Cleary for guidance. Mr. Cleary believed that because KFUEO-FM was a previously noncommercial station with little audience and no

advertiser brand-name recognition, the Station's "formatic [sic] image" had to be developed and conveyed to the universe of advertisers. Also, because of its modest billing levels, KFUEO-FM was not able to attract truly experienced radio salespeople. This meant that there was very little depth within KFUEO-FM's selling ranks for on-the-job training. Hence, CMBS advised Reverend Devantier and station management that KFUEO-FM should look for salespeople who were comfortable with classical music, people who could talk credibly about the music. (Church Ex. 5, p. 6; Tr. 216-17, 219-21, 873.)

141. Reverend Devantier also believed that knowledge of classical music would be a desirable trait in the station's salespeople, although he conceded that "a working knowledge" of that music could be learned on-the-job over a period of time. (Tr. 817-18, 873.) This was in accord with Mr. Cleary's opinion that KFUEO-FM needed people in sales who had knowledge of classical music because the station "had to establish a new identity and then market it." (Church Ex. 5, p. 5.) According to Mr. Cleary, the station needed salespeople who were comfortable with classical music and could effectively project the essence of KFUEO-FM's format to potential advertisers. (*Id.*)

142. When it came time to hire KFUEO-FM's own initial sales manager, Mr. Stortz proceeded on the same premise, that is, that people with knowledge of classical music would be the best salespersons because they would know their "product." (Church Ex. 4, p. 10.) Mr. Stortz defined the "product" as a combination of the format of KFUEO-FM and the demographics of the audience. (Tr. 510-11; see also Tr. 216, 230-31, NAACP Exs. 8, 12.) The station hired Bern Hentze, who had classical music knowledge and experience. (Tr. 647-48.)

143. Mr. Stortz testified that at times during the years 1986 to 1989, the turnover in KFUEO-FM's sales force was great and economic pressures forced the station to hire replacements quickly. (Church Ex. 4, p. 10.) Mr. Lauher confirmed in his testimony that it was "a struggle" to find anyone to work in a sales position from May 1987 to July 1989 because the salary structure was low and KFUEO-FM was just initiating a sales effort. KFUEO-FM was not doing well financially and had difficulty competing for job applicants with the more profitable St. Louis commercial stations. (Church Ex. 6, p. 1.) Thus, there were instances in which the station had "to settle" for people who had less knowledge about the "product" than it might ideally have liked and, in some cases, persons with no such knowledge were hired. (Church Ex. 4, p. 10; Tr. 874.) Nevertheless, classical music knowledge was considered a desirable trait for an applicant for a sales position at KFUEO-FM and, provided everything else was equal, the station would select an individual with that knowledge, experience, or background. (Tr. 818.)

144. Towards the end of the License Term, at least some members of the KFUEO-FM staff began to believe that general experience in sales was an equal or more important criterion. (Church Ex. 4, p. 9; Tr. 873-74.) Mr. Cleary acknowledged that among sales/marketing circles, there developed in the late 1980s and into the 1990s the viewpoint that good, experienced salespeople could sell anything and that a comfortable knowledge of the "product" could be learned on-the-job. (Church Ex. 5, pp. 5-6.)<sup>18</sup>

<sup>18</sup> The view that an experienced salesperson could sell an

audience to an advertiser was shared by the NAACP's witnesses,

145. During the License Term, KFUE-FM hired 15 individuals for the position of Sales Worker. (Church Ex. 4, Att. 6, pp. 3-7.) Giving the Church the benefit of all possible doubts, 8 of the 15 had some classical music background, or experience working at a classical music station, or listened to KFUE-FM at the time they were hired. These were: Charlotte Akin (NAACP Ex. 32, p. 4), Wynn Bressler (Tr. 646), Sharisse Bush (Tr. 646-47), Bern Hentze (Tr. 647-48), Jan Hutchinson,<sup>19</sup> Caridad Perez (Tr. 649-50), Glynelle Wells (NAACP Ex. 32, p. 25; Tr. 650), and Frank Wood (MMB Ex. 14, pp. 71-72). The record does not reflect that any of the remaining seven Sales Workers had such a background at the time they were hired. These were: James Bebo (Tr. 201), Beverly Brandt (Tr. 646), Tom Koon (Tr. 200, 649), Judy McMurty (Tr. 649), Carolyn Miller (Tr. 649), Bob Thomson (Tr. 650), and Lucy Walker (Tr. 201).

146. The recruitment or referral source for 11 of the 15 Sales Workers who were hired by the station was "Resume on File" (Ms. Akin, Ms. Brandt, Mr. Bressler, Ms. Bush, Mr. Koon, Ms. McMurty, Ms. Miller, Ms. Perez, Mr. Thomson, Ms. Walker, and Mr. Wood). Other recruitment or referral sources utilized for these positions were *Broadcasting* magazine (Mr. Hentze's position), a posting at Church headquarters (Mr. Hentze's position), the St. Louis Broadcast Center (Mr. Bebo and Ms. Bush's positions), and referrals from station employees (Ms. Miller, Ms. Walker and Ms. Wells' positions). One employee transferred from CMBS's payroll to the station's (Ms. Hutchinson). (Church Ex. 4, Att. 6, pp. 3-7.)

147. The record in this proceeding contained two job descriptions for the position of Account Representative (NAACP Ex. 40, pp. 10-11; NAACP Ex. 41, pp. 11-12), and two job descriptions for Sales Managers positions (NAACP Ex. 40, pp. 17-18; NAACP Ex. 41, pp. 14-15).<sup>20</sup> One of the Account Representative job descriptions (dated June 1987) and one of the Sales Manager job descriptions (also dated June 1987) included no mention of classical music knowledge, expertise, appreciation, or experience as an "Essential" or "Other Desirable" position qualification. (NAACP Ex. 40, pp. 10-11, 17-18.) The second Account Representative job description (dated June 1989) listed as "Other Desirable" position qualifications: "Knowledge of and appreciation for classical music," and "Experience with a classical music radio station." (NAACP Ex. 41, pp. 11-12.) Similarly, the second Sales Manager job description (also dated June 1989) listed as an "Other Desirable" position qualification: "Knowledge of the classical music format." (*Id.* at pp. 14-15.)

148. In addition, two of the Chief Engineer job descriptions (dated October 1986 and June 1987) listed as an "Other Desirable" position qualification: "Knowledge of and appreciation for classical music." However, neither of

these job descriptions referred to the Chief Engineer performing any functions or having any responsibilities relating to the format of, or the type of music or programming broadcast by, the FM station. (NAACP Ex. 39, pp. 9-11; NAACP Ex. 40, pp. 14-16.) In this connection, in its February 23, 1990, Opposition to the NAACP's Petition to Deny, the Church stated that the Chief Engineer's position did not require classical music training. (Church Ex. 4, Att. 7, p. 13 n.3.)

149. According to Mr. Stortz, the need for classical music knowledge for various positions, including salespersons, did not in any way affect the Stations' willingness to recruit individuals of any race. The Stations had no sense that the requirement for familiarity with classical music would single out minorities for negative effect or would disqualify members of any race. Moreover, to the best of Mr. Stortz's knowledge, no minority applicant was ever rejected for any position at KFUE-FM because he or she lacked knowledge of classical music. (Church Ex. 4, pp. 10, 16; Tr. 511-12.) Further, in a January 23, 1990, memorandum to Ms. Cranberg, Mr. Stortz, in response to the NAACP's Petition to Deny, indicated that the Stations planned to hire an additional minority during 1990, and stated:

As KFUE & KFUE FM searches for qualified people to fill its employment needs, there will be no racial barriers to block any applicants. However, applicants must qualify for positions requiring theological or classical music backgrounds. We will certainly seek any minorities having that background. It is the firm resolve of both stations to be in compliance with the EEO program submitted.

(NAACP Ex. 49, p. 3.)

150. On September 29, 1989, the Stations filed with the Commission their applications for renewal of license. (Church Ex. 4, Att. 16, p. 1.) Included in that application was the Stations' Broadcast Equal Employment Opportunity Program. (*Id.* at Att. 16, pp. 4-8.) The Program was prepared in draft form by Paula Zika, the Stations' Director of Business Affairs, and was reviewed by Mr. Stortz, the general manager. (Church Ex. 3, pp. 1-2; Church Ex. 4, p. 16.) A sentence in the Stations' EEO Program relating to "Recruitment" stated: "When vacancies occur, it is the policy of KFUE and KFUE-FM to seek out qualified minority and female applicants." (Church Ex. 4, Att. 16, p. 7.) Mr. Stortz believed that this sentence needed no change, and was accurate, "because at that time the Stations generally sought qualified minorities and females for openings on their staff." (*Id.* at p. 17.) Mr. Stortz admitted, however, that this was actually done "toward the end of the license period." (Tr. 774-75.) Although Mr. Stortz was aware that

Richard J. Miller and Jan Hutchinson. (NAACP Exs. 7, 8, 12.) Mr. Miller conceded, however, that some "rudimentary familiarity" with the music would be helpful, but stated that it could be learned easily and quickly on-the-job or by taking "a course on classical music appreciation at a junior college." (NAACP Ex. 12, p. 1.) Ms. Hutchinson, too, acknowledged that it might be important for a classical music salesperson to know the difference between a symphony and an opera, but was of the opinion that any good radio salesperson could learn everything he or she would need to know about classical music in order to service an advertiser's needs "in a couple of hours or less." (NAACP Ex. 8, p. 3.)

<sup>19</sup> Jan Hutchinson began selling commercial time for KFUE-FM in 1984. (NAACP Ex. 7, p. 1.) She was originally an employee of CMBS. (Church Ex. 5, p. 5; Tr. 222-23, 225, 648-49.) On September 29, 1986, KFUE-FM hired Ms. Hutchinson for a Sales Worker position at the station. (Church Ex. 4, Att. 6, p. 3; Tr. 225-26.) At the time she began working for CMBS in 1984, Ms. Hutchinson had no classical music knowledge. (NAACP Ex. 7, p. 1.) However, she was familiar with the format of KFUE-FM at the time she was hired by the station. (Tr. 648-49.)

<sup>20</sup> With respect to job descriptions generally, see note 3, *supra*.

the Stations had certain job qualifications, such as theological or classical music training, he did not believe that this made the sentence in question misleading. Mr. Stortz explained that the sentence stated that the Stations sought "qualified" minority and female applicants, and he viewed this as consistent with the Stations' use of various employment criteria such as religious training or knowledge of classical music. Moreover, since the Commission had not questioned the Stations' 1982 or any prior renewal, Mr. Stortz testified that he had no reason to believe the Stations needed to enumerate the various job qualifications that the Stations used, as opposed to just stating that the Stations sought "qualified" applicants. (Church Ex. 4, p. 18.)

151. As noted earlier, on February 23, 1990, the Church filed an Opposition to the NAACP's Petition to Deny. (Church Ex. 4, Att. 7, p. 2.) The Opposition was prepared by Ms. Cranberg. (Church Ex. 8, p. 6.) Mr. Stortz reviewed the Opposition and provided an affidavit concerning the truth of the facts asserted therein, but did not formulate or draft the legal arguments. (Church Ex. 4, Att. 7, p. 53.)

152. The Opposition stated:

Given the specialized nature of KFUO's formats, nearly all of the positions within KFUO's top four job categories can only be filled by persons who have either expertise in classical music (for KFUO-FM) or theological training in the doctrine of the Lutheran church (for KFUO-AM).

\* \* \*

Clearly nearly all of KFUO's employees must have specialized skills. However, relatively few minorities in the St. Louis area possess these skills.

(Church Ex. 4, Att. 7, pp. 13-14.)

153. Ms. Cranberg testified that, in drafting this portion of the Opposition, she used this language on the basis of a number of conversations and written communications from Mr. Stortz. Ms. Cranberg had asked Mr. Stortz whether there were any particular positions at the Stations that required certain specialized skills or background. Mr. Stortz had stated that there were such requirements, and the two discussed them and the reasons why specialized skills were necessary. (Tr. 990-91, 1020-22, 1033.) Mr. Stortz had also faxed Ms. Cranberg a two-page memorandum in which he wrote: "KFUO-FM's format is 'Classical,' with many of its [sic] positions requiring a knowledge of classical music and foreign language, with a hope that the sales people can relate and talk knowledgeably about the format. These are not easy positions to fill." (NAACP Ex. 49, p. 3.)

154. The Opposition also contained an argument that because of KFUO-FM's classical music format, and the resulting need for certain employees to be knowledgeable about that format, the Commission should consider using alternative data to the general labor force statistics in judging the results of certain of the Station's recruitment efforts. (Church Ex. 4, Att. 7, pp. 14-16.) In this regard, the Opposition stated:

... KFUO is not aware of any specific statistics showing classical music training among members of minority groups. However, one measure is the popularity of KFUO-FM (the only full-time classical music station in the area) among persons who are

members of minority groups. In October and November 1988 (the most recent figures available to KFUO), only 3.7 per cent of KFUO-FM's 72,800 listeners -- or 2,693 -- were black; 0 per cent were Hispanic or Asian. This is approximately .1 per cent of the population of the St. Louis Metropolitan Statistical Area. Figures as to persons *in the labor market* with classical music *expertise* -- as opposed to simply interest -- would, of course, be even lower.

Thus, KFUO's highly specialized employment needs make reliance upon overall minority labor force availability meaningless. In fact, there is but a small number of minority persons in the St. Louis SMSA -- or, for that matter, nationwide -- who possess the qualifications KFUO requires for nearly every job position at the station. By one estimate, only about .1 per cent of the St. Louis population consists of members of minority groups with classical music training; roughly two per cent of the population consists of members of minority groups with Lutheran theological training. KFUO's minority employment record must be considered in that context.

(*Id.* at pp. 15-16, emphasis in original, footnote omitted.) Similar arguments were made by the Church in a Motion to Strike and Reply to Comments, filed on September 21, 1992 (MMB Ex. 11, pp. 10-11, 16-18), and in a Reply to FCC Letter of Inquiry, filed December 28, 1992 (MMB Ex. 14, pp. 31-32).

155. In the Church's view, the argument did not describe KFUO-FM's hiring practices, and said nothing about KFUO-FM's willingness to recruit for and hire minority individuals. (Church Ex. 4, Att. 7, pp. 10-11 n.2.) Rather, as Ms. Cranberg testified, although the argument was discussed with Mr. Stortz, it was Arnold & Porter's idea to use the argument in the Opposition. (Tr. 991-92, 1022-23.) Ms. Cranberg further testified that the statistics regarding the station's minority listeners were presented solely in a preliminary effort 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. (Church Ex. 8, pp. 6-7.) Ms. Cranberg described her intent as follows:

The arguments were part of an overall discussion of a number of factors that I felt the Commission should take into account in assessing the stations' employment profile, including the small number of employees overall at the stations, the fact that the stations had a greater number of minority employees over the license period than were reflected in the annual employment reports, and the fact that a significant number of positions required very specialized skills such that relying on overall labor forces -- didn't seem to be a very precise way of measuring the stations' performance. That was my purpose in, in making the argument.

(Tr. 992.)

156. Ms. Cranberg was of the view that the Opposition did not state, and did not intend to imply, that KFUO-FM had not or would not continue to engage in affirmative action recruitment efforts because of these statistics. Arnold & Porter also did not mean to imply that the station viewed such recruitment efforts as pointless. Indeed, Ar-

nold & Porter had no reason to believe, based on its dealings with personnel at the Stations, that either of these supposed implications of its statements were true. (Church Ex. 8, p. 7.)

157. In Ms. Cranberg's view, this was a method of analysis the FCC had specifically endorsed in *Equal Employment Opportunity Processing Guideline Modifications for Broadcast Renewal Applicants*, 79 FCC 2d 922, 47 RR 2d 1689 (1980). It was also a method of analysis which Arnold & Porter had previously employed before the Commission on behalf of another broadcast client, classical music station WFLN in Philadelphia. (Church Ex. 8, p. 7; Joint Ex. 2, pp. 26-27.) WFLN had represented to the Commission in response to an inquiry concerning its EEO program, *1972 License Renewal Applications*, 53 FCC 2d 104, 118 (1975), that the job description for the position of "Programmer/Cataloguer" required a "love" of classical music, and the job description for the position of "Announcer" required "a working knowledge of classical music" and "a reading knowledge of French, German, Italian and Spanish as well as English." (Joint Ex. 2, Ex. 1, pp. 20, 21.) WFLN had argued that it was the only classical music station in the market, and that because its format was "highly specialized[,] [o]ver the years, it has been difficult to find any employees with the skills required in musical knowledge and foreign languages." (*Id.* at Ex. 1, p. 25, emphasis in original.) In denying the EEO challenge to WFLN and renewing its license, the Commission did not comment on this argument by WFLN. (*Id.* at Ex. 2; *Franklin Broadcasting Company*, 57 FCC 2d 130 (1975).) Reed Miller, the Arnold & Porter partner who had been involved in the WFLN case, may have discussed that case with Ms. Cranberg or mentioned it to her as a precedent. (Joint Ex. 2, pp. 26-30.)

158. Arnold & Porter acknowledged in the Opposition that the Stations were unaware of any statistics regarding the percentage of minorities with classical music training. (Church Ex. 4, Att. 7, p. 15.) Therefore, the law firm cited to the statistic regarding minority listeners "by rough analogy." (Church Ex. 8, p. 7.) Ms. Cranberg testified that this was an attempt to establish

a measure that would overstate the availability, would be a measure of persons who listen to the only full-time classical music station in the city. I assumed that persons who have expertise or interest or knowledge about classical music would likely in many cases listen to the only full-time classical music station in the city.

(Tr. 1025-26.)

159. Ms. Cranberg testified that in drafting the Opposition and subsequent pleadings, she used as synonyms the terms "knowledge of classical music," "classical music training," "expertise in classical music," and a "working knowledge of classical music." Specifically, all of the terms meant that persons hired for the relevant positions had to have a "fairly significant knowledge of classical music." Ms. Cranberg testified that she did not intend to mislead the Commission by using these different expressions to refer to the same idea. (Church Ex. 8, p. 6 n.2.)

160. Ms. Cranberg later learned that while the station sought salespeople with knowledge of classical music, it did hire people without such knowledge. (Tr. 1028-30.) According to Ms. Cranberg, the statement in the Opposition

that knowledge of classical music was a "requirement" was "probably an overstatement," and Ms. Cranberg commented: "I wish that I had used another word." (Tr. 1027-28.) Ms. Cranberg testified that there was no intention to mislead the Commission by using the word "requirement" in the Opposition. (Church Ex. 8, p. 6 n.2.)

161. Ms. Cranberg further testified that she did not believe the fact that the station hired people without a classical music background negated the argument she had formulated, stating:

I think it's still a legitimate point to make. The, the very point is that it's difficult to find people with that background and that there is not a great availability of any race, and so the fact that the station hasn't been able to find people with, with this background in all cases I don't think undermines the point that was being made.

(Tr. 1028.)

162. However, the Church's February 23, 1990, Opposition also contained the following statement:

[T]he specialized nature of KFUF's program formats have resulted in the stations' receiving a large number of qualified "write-in" applicants each year. The reason is clear -- because there are relatively few classical music or Lutheran religious stations in the country, those persons with a particular expertise in classical music, or a Lutheran theological background, actively solicit positions at stations such as KFUF. When a given job vacancy occurs, KFUF typically has available to it some 20 resumes on file for persons with the specific qualifications KFUF seeks. [Footnote]

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[Footnote] Indeed, a number of KFUF's employees originally came to the stations as dedicated volunteers with a special interest in theology and/or classical music.

(Church Ex. 4, Att. 7, pp. 16-17.)

163. Similarly, in a May 12, 1992, letter in response to an April 22, 1992, Commission letter of inquiry (MMB Ex. 5) the Church stated:

As noted in our [Opposition,] we do not use outside recruitment sources for every opening at the stations (although we have used them increasingly in recent years in an effort to increase our minority employment . . .). This is due to the fact that the religious and classical music formats of our stations attract numerous unsolicited applications from prospective employees around the country with a particular interest/expertise in these areas[.]

(MMB Ex. 6, p. 3, emphasis in original.)

164. In addition, in a Motion to Strike and Reply to Comments, filed on September 21, 1992, the Church maintained that "[b]ecause there are relatively few classical music and Lutheran religious stations, KFUF receives many unsolicited resumes from qualified applicants around the

country with special expertise in classical music or Lutheran theology." (MMB Ex. 11, p. 13 n.3.) The Motion to Strike and Reply also stated that "nearly all of the full-time hiring opportunities which occurred at the stations during the license term required particular training either in classical music or Lutheran theology." (*Id.* at p. 11.) In this regard, the Motion represented that "[o]f the 35 full-time hires made from October 1, 1986 through January 31, 1990, 26 required either Lutheran theological background or classical music knowledge." (*Id.* at p. 11 n.5.)

165. On November 17, 1992, the Commission asked the Church for an explanation of "those aspects of the duties and responsibilities of the salespersons (14 positions) which require knowledge of classical music." The Church was also asked to "indicate the classical music background of persons hired for the above noted 14 FM sales positions." (MMB Ex. 13, pp. 1-2.)

166. In its December 28, 1992, Reply to FCC Letter of Inquiry, the Church stated:

The Commission has requested additional information concerning the requirement that KFUE-FM salespeople be knowledgeable about classical music. KFUE-FM enforces this requirement by making every effort to hire such persons whenever it can; it only employs salespeople who do not possess this expertise on those occasions when it is unable to secure suitable persons with the requisite classical music background.

(MMB Ex. 14, p. 14.) The Reply only identified classical music background for 2 of the 14 salespersons hired by the Church up to that point (Frank Wood and Glynelle Wells). (*Id.* at pp. 19-20, 70-72.) The Reply also noted that most of the salespersons hired had since left the station, that KFUE-FM did not have resumes for these former employees, and that Mr. Stortz knew "from personal experience that a large number of our sales staff during the license term were knowledgeable about classical music, although not all were." (*Id.* at pp. 19, 61.) The Reply was drafted by Ms. Cranberg based on information supplied to her by station staff. (Tr. 975.)

167. In an affidavit appended to the Reply, Mr. Stortz stated, in pertinent part:

We have tried in good faith to supply the information requested [by the Commission], and have not intended to mislead the Commission in any way. I would point out that I am not an attorney, and am perhaps not accustomed to providing the level of detail and precision with which attorneys, and those who deal with them frequently, may be more familiar. For example, when I advised the FCC that it is a requirement that KFUE-FM salespeople possess a background in classical music, I believed and continue to believe that that was true, because KFUE-FM wants its salespeople to possess a background in classical music, and only when we are unable to locate such prospective employees do we hire salespeople without that background. Once the Commission raised a question about our employment practices in this regard, I recognized that I might have provided further detail about our hiring policies in this respect to ensure that the Commission under-

stood that while we seek only salespeople with a classical music background, we are not always successful.

(MMB Ex. 14, pp. 63-64.)

168. Reverend Devantier did not object to Arnold & Porter's use of the argument about the need for "very specialized skills" (MMB Ex. 14, p. 44) because it was prepared by the Stations' legal counsel "in whom we had some confidence to know about such things" (Tr. 834). When offense was apparently taken to the arguments about knowledge of classical music and the use of alternative statistics, Dennis Stortz faxed Ms. Cranberg a note, dated September 17, 1992, making it clear to her that, while the FM station's classical music knowledge requirement was real, he did not want it to be construed as an "excuse." Mr. Stortz stated in his fax note: "While all of this information about classical music knowledge and Lutheran requirements is true and applicable, I don't want to make it sound like an excuse. It is what we do as radio stations, and there is no bent toward discrimination." (Church Ex. 4, pp. 10-11 n.2 and Att. 8.)

#### E. Management Turnover

169. The February 23, 1990, Opposition to Petition to Deny contained the additional argument that the Stations "experienced a tremendous degree of management turnover" during the License Term, and that this "lack of consistent leadership" increased the difficulties in maintaining "a consistent recruitment program." The Opposition noted that there were seven different managers between the two stations during the License Term, and that they were typically Lutheran ministers without broadcasting experience. The Opposition stated that a new "lay" manager with "significant broadcast experience" had been hired in 1988, and that the Church was "hopeful" that a "more stable management" would afford the opportunity to focus on a number of areas requiring attention, "including employee recruitment." (Church Ex. 4, Att. 7, pp. 7, 17-18.) According to Ms. Cranberg, Arnold & Porter originated the argument that "the management turnover should be taken into account in assessing a station's compliance with EEO requirements." (Tr. 996-97.)

#### III. Misrepresentation/Lack of Candor Issue

170. In specifying the misrepresentation/lack of candor issue against the Church, the *HDO* cited the following matters:

- (a) the discrepancy between the number of total hires during the 12 months preceding renewal reported in the Church's renewal application and renewal supplement, and the actual number of hires (*HDO* at para. 27);
- (b) the Church's explanation of that discrepancy (*id.*);
- (c) the Church's responses to Commission inquiries regarding the specifics of its EEO outreach efforts, particularly the representations regarding its recruitment program (*id.* at paras. 28-29);
- (d) the Church's arrangement with Concordia Seminary (*id.* at para. 29);