

(e) the Church's requirement for knowledge of Lutheran doctrine (*id.*); and

(f) the Church's requirement for knowledge of classical music for sales positions at the FM station (*id.* at paras. 29-30).

The Church's outreach and recruiting program, the arrangement with Concordia Seminary, and the requirements for Lutheran and classical music knowledge have been discussed in earlier sections of the Findings of Fact and need not be repeated at this point. Therefore, this section will concentrate on the discrepancy between the number of total hires initially reported to the Commission and the actual number of hires, and the Church's explanation for the discrepancy.

171. The FCC Form 396 Broadcast EEO Program which was included with the 1989 license renewal applications was prepared by Paula Zika, the Director of Business Affairs at the Stations. Ms. Zika had been employed at the Stations since January 1971 working in a variety of positions relating to station operations. Since the early-to-mid 1980s, Ms. Zika served in the capacity of Director of Business Services, although the title of that position changed several times over the years. From 1987 to 1991, her title was Director of Station Operations. With the exception of the Stations' Chief Engineer and the Assistant Engineer, Ms. Zika had worked at the Stations longer than any other employee. (Church Ex. 3, p. 1; Tr. 325-26.)

172. Over the years, Ms. Zika's responsibilities included handling administrative and business matters for the Stations, including personnel matters. She also prepared FCC forms for the Stations. When the 1989 license renewal packet arrived, Ms. Zika was given the responsibility of gathering the necessary information and typing the applications. During her time at the Stations, she had prepared FCC filings for a number of different general managers and acting general managers. In preparing the FCC Form 396 Broadcast EEO Program to be included with the 1989 license renewal applications, Ms. Zika reviewed the EEO Program filed with the Stations' 1982 renewals and typed the 1989 EEO information using the Stations' 1982 Program as the basis. (Church Ex. 3, p. 1; Tr. 326-29.)

173. In responding to the questions on the Form 396, Ms. Zika went through the Stations' employment records, which she maintained as part of her duties, to provide the employment figures requested by the FCC. Ms. Zika compiled the data regarding the question in the Form 396 asking about "Job Hires." (Church Ex. 3, pp. 1-2.) This question asked for the following information. *inter alia*:

During the twelve-month period prior to filing this application beginning (Month-Day-Year) \_\_\_\_\_ and ending (Month-Day-Year), \_\_\_\_\_ we hired:  
Total hires \_\_\_\_\_ Minorities \_\_\_\_\_ Women \_\_\_\_\_

(Church Ex. 9, p. 4.) Neither the form nor the Filing Instructions specified whether the response should include part-time as well as full-time employees, or whether the renewal applicant should count people hired who thereafter departed before the end of the period. (Church Ex. 9.)

174. Ms. Zika testified that she misinterpreted the question. (Tr. 341-42.) Specifically, she thought that the question was asking only for full-time hires during the past 12

months who were still employed at the Stations at the time the renewal applications were being prepared. She did not believe the question was asking for hires who were no longer working at the Stations. (Church Ex. 3, p. 2; Tr. 341-42.) Although Ms. Zika had worked on the 1982 FCC Form 396 which had a similar question, she had not made the calculations to answer the "Job Hires" question in the 1982 application. (Church Ex. 3, pp. 1-2.)

175. Based on her understanding of the question on "Job Hires" in the Form 396, Ms. Zika answered: "During the twelve month period beginning October 1, 1988 and ending September 30, 1989, we hired a total of six persons, two white males and four white females." She reached this figure by adding the full-time hires in the previous 12 months who were still working at the Stations in September 1989. (Church Ex. 3, p. 2; Tr. 330-31.)

176. Mr. Stortz, the general manager in September 1989, recalled reading through the Form 396 EEO Program during the preparation of the renewal applications, but he did not ask Ms. Zika about the information on "Job Hires." He was aware that, in completing the applications, she had reviewed the employment records which she kept. (Church Ex. 4, p. 19.)

177. After the EEO Program for the renewal applications was prepared, Mr. Stortz asked Ms. Zika to send it to Ms. Cranberg for review. Ms. Cranberg did not suggest any material changes. Nor did she state that the Stations needed to enumerate explicitly all the criteria used to hire personnel, such as religious training, or to "remind" the Commission of the Stations' relationship to Concordia Seminary. (Church Ex. 4, pp. 18-19.) In this regard, neither Reverend Devantier, nor anyone at his instruction, kept Arnold & Porter apprised of the Stations' EEO policies, programs, and practices. Rather, Reverend Devantier "trusted those individuals in positions of responsibility at the station to do what was appropriate." (Tr. 810-11.)

178. After the renewal applications were completed, they were forwarded to Reverend Devantier so that he could have them signed by the Reverend Dr. Bohlmann, who was then President of the Church. (Church Ex. 4, p. 19.) Reverend Dr. Bohlmann signed the Stations' renewal applications and sent them on for filing with the Commission. He stated that they "appeared to be in order[,] [and] [w]e have always been proud of the Stations' track record of programming service and their commitment to non-discrimination." (Church Ex. 1, p. 2; Tr. 278.)

179. The KFUA(AM) and FM renewal applications were filed with the Commission on September 29, 1989. (Church Ex. 4, Att. 16.) The Commission requested that the Church provide certain supplemental information, and the Church filed an EEO Supplement on December 29, 1989. (MMB Ex. 2.) That Supplement, like the renewal applications, stated that during the 12-month period beginning October 1, 1988, and ending September 30, 1989, the Stations hired a total of 6 persons, 2 white males and 4 white females. (*Id.* at p. 5.) Mr. Stortz assisted Ms. Cranberg in the preparation of the Supplement. (Church Ex. 4, p. 19.)

180. On January 2, 1990, the NAACP filed its Petition to Deny the Church's license renewal applications. (MMB Ex. 3.) On January 4, 1990, the Commission sent a letter to Reverend Devantier asking for detailed information concerning full-time and part-time job hires at KFUA during the three-year time period from October 1, 1986, to October 1, 1989. (MMB Ex. 4.) At the direction of Reverend Devantier, Ms. Zika and Mr. Stortz gathered the informa-

tion requested for that three-year period. (Church Ex. 4, p. 20.) Ms. Zika and Mr. Stortz reviewed the Stations' records and collected the names, dates of hires, and the full-time or part-time status of hires over the previous three years. (Church Ex. 3, p. 2.) They sent the information to Ms. Cranberg for inclusion in the Opposition that was filed by the Church on February 23, 1990, as a response to the Petition to Deny and to the January 4, 1990, FCC letter. (Church Ex. 4, p. 20.)

181. Included in the information submitted with the Opposition was a document entitled "Table Three," which supplied the information requested by the Commission for each position filled at the Stations during the three-year period in question. When Ms. Zika and Mr. Stortz compiled the data in Table Three for the Opposition, they did not notice any disparity between that information and the information contained in the EEO Program that was appended to the 1989 license renewal applications. (Church Ex. 4, p. 20 and Att. 7 pp. 26-33.)

182. There was no further mention of the hire data until the FCC requested additional information in a June 26, 1992, letter to the Reverend Dr. Bohlmann. Therein, for the first time in more than two years, the FCC sought clarification as to why the original renewal applications listed 6 hires for the time period October 1, 1988, to September 30, 1989, while the February 1990 Opposition indicated that there had been 14 hires (10 full-time and 4 part-time) during that time period. (Church Ex. 4, p. 21; MMB Ex. 8.)

183. Upon reviewing this letter, Mr. Stortz examined the renewal applications and the Opposition to ascertain the reasons for the discrepancy. He sent Ms. Cranberg a letter stating that he did not "have a ready explanation [sic]." (Church Ex. 4, p. 21 and Att. 17.) Mr. Stortz asked Ms. Zika how she had arrived at the number six for the total number of hires in completing the renewal applications. (*Id.* at p. 21.) Ms. Zika told Mr. Stortz that she believed the difference in the answers was probably the result of the two different questions asked by the FCC. In the license renewal applications, the FCC had requested the number of "total hires," which Ms. Zika interpreted to mean the "net gain" of full-time hires. She had not counted employees who were hired in 1989 but who had already left by mid-September 1989 when the renewal applications were completed, since such employees had no impact on the Stations' minority or female employment profile as of the time the renewal applications were filed. Because of this, Ms. Zika told Mr. Stortz that the Stations had a "net gain" of six persons during this period and the Stations, in the license renewal applications, had referred to this "net gain" as the total number of persons hired. (Church Ex. 3.) Ms. Zika wrote a note to Mr. Stortz at the time stating that the relevant portion of the EEO Program should have stated that the Stations had a "net gain of six persons" rather than "hired" six persons. (*Id.* at Att. 1; Tr. 343-44.) At the hearing, Ms. Zika testified:

[T]he statement [in the renewal applications that the stations "hired" 6 persons] was correct insofar as I, I had understood the question. In, in checking, I realized that I had used only full time hires and people

that were still working at the station. I did not count part-time, and I did not count the hires that had come and gone in that particular period.

(Tr. 335.)

184. In contrast, the January 4, 1990, letter from the Commission had asked for specific information for "each position filled" between October 1, 1986, and October 1, 1989, including its "full or part-time status." (MMB Ex. 4.) When Ms. Zika and Mr. Stortz gathered the information for Table Three in the Opposition, they reviewed all payroll and personnel records for the time period for both full-time and part-time employees and listed every hire, as requested in the January 4 letter, as opposed to the total hires, as requested in the renewal applications. (Church Ex. 4, pp. 21-22.)

185. On July 13, 1992, the Church filed a letter with the FCC in response to a June 26, 1992, letter of inquiry from the Commission. (MMB Exs. 8 and 9.) In this response, Mr. Stortz indicated that, as he now understood the FCC to interpret the question in the renewal applications, the number six included under the "Job Hires" section was inaccurate, and that section should have stated there was "a Net Gain of six persons during this period" rather than six persons "hired." (Church Ex. 4, pp. 22.) The Church's December 28, 1992, reply to an FCC letter of inquiry dated November 17, 1992, repeated Mr. Stortz's understanding that there had been a "net gain" of six employees during the time period beginning October 1, 1988, and ending September 30, 1989. (MMB Ex. 13; MMB Ex. 14, pp. 28-30.)

186. Subsequent to the February 1, 1994, release of the *HDO* in this proceeding, Ms. Zika and Mr. Stortz once again examined the Stations' records to try to confirm exactly how the discrepancy in the number of total hires had occurred. (Church Ex. 3, p. 3; Church Ex. 4, p. 22.) Ms. Zika had interpreted the question in the renewal applications to encompass only full-time hires. Consequently, she had not counted the four part-time employees who were listed in the Opposition.<sup>21</sup> Most of the Stations' part-time employees were from Concordia Seminary. They typically worked only 6 to 12 hours per week and received no employee benefits. In effect, they were paid interns. For this reason, Ms. Zika and Mr. Stortz testified that they believed the discrepancy referred to by the FCC should have been 6 versus 10 rather than 6 versus 14. (Church Ex. 3, pp. 3-4; Church Ex. 4, pp. 22-23.)

187. Ms. Zika reached the number six set forth in the license renewal applications because she did not count employees who were hired in 1989 but who had left the Stations before mid-September 1989 when she prepared the applications. There were two such employees. She also did not count a third employee, Reverend David Schultz, who was hired to be the new AM general manager on September 25, 1989, but who did not actually start work until after October 1, 1989. At the time Ms. Zika prepared the renewal applications in mid-September 1989, she had not been told that Reverend Schultz had been hired and did not count him among the hires for that time period. (Church Ex. 3, p. 4; Church Ex. 4, pp. 23-24; Tr. 338-39.)

<sup>21</sup> As noted above, neither the FCC Form 396 nor the Filing Instructions specifically requested information on part-time hires. In this regard, the Filing Instructions indicated that it was

only necessary to complete and file the Form 396 with the Commission if the station employed five or more full-time employees. (Church Ex. 9.)

188. Based on her review of the Stations' records after the *HDO* was released, Ms. Zika discovered that the only full-time employee who was hired between October 1, 1988, and September 30, 1989, that she inadvertently failed to list was Robert Thomson, a white male, who was hired as a salesperson on October 24, 1988. (Church Ex. 3, p. 4; Tr. 339.) Since the Stations did not have computerized employee records during the license renewal period, and Ms. Zika had not remembered any hires in the last quarter of 1988 when she was preparing the license renewal applications, she did not check Mr. Thomson's hire date in his personnel record and inadvertently failed to count him. Ms. Zika explained that the "net gain" of full-time hires between October 1, 1988, and September 30, 1989, was therefore actually seven rather than the six stated in the license renewal applications. Three of the hires were white males and four were white females. (Church Ex. 3, pp. 4-5.)

189. When it came time in January and February 1990 to review the payroll records to answer the detailed questions about each hire as requested in the Commission's January 4, 1990, letter, it was found that Reverend Schultz was added to the payroll on September 25, 1989, and so that date was used in Table Three of the Opposition. When Ms. Zika and Mr. Stortz reviewed the 1986, 1987, 1988, and 1989 payroll records to create Table Three, Mr. Thomson was also included. (Church Ex. 4, pp. 23-24.)

190. In Mr. Stortz's opinion, the discrepancy between the number of hires in the renewal applications and Table Three of the Opposition was "unfortunate" because it caused "much confusion and expenditure of effort." However, Mr. Stortz believed it was the result of Ms. Zika's good faith effort to answer the question that she believed the FCC had posed in the renewal applications. (Church Ex. 4, p. 25.) Ms. Zika testified that she never intended to deceive the Commission in any way. She stated that the discrepancy was simply the result of her confusion regarding the question posed in Form 396, her failure to recall that Mr. Thomson had been hired during the relevant 12-month period, and her lack of knowledge that Reverend Schultz was to be hired during the relevant period (Church Ex. 3, p. 5.)

191. Similarly, according to Mr. Stortz, while the explanation for the discrepancy proved to be more complicated than the simple "net gain" of employees that he originally understood it to be, that "misunderstanding" resulted from confusion between Mr. Stortz and Ms. Zika as to what was meant by "net gain." Because of the complexity of the events that occurred, the misunderstanding went undetected until the matter was re-examined after the *HDO* was released. Although the information concerning "total hires" submitted to the FCC in the license renewal applications may not have been fully accurate, Mr. Stortz testified that any inaccuracies were unintentional and the result of a good-faith misinterpretation. According to Mr. Stortz, there was no intent to deceive the FCC on these or any other matters. (Church Ex. 4, pp. 25-26.)

#### CONCLUSIONS OF LAW

192. This proceeding involves the applications of The Lutheran Church-Missouri Synod for renewal of its licenses for Stations KFUA(AM) and KFUA-FM, Clayton, Missouri. Issues were specified to determine whether the Church complied with the nondiscrimination and affirmative action provisions of the Commission's EEO rule.

whether the Church made misrepresentations of fact or was lacking in candor with regard to the Stations' EEO program, and whether a grant of the renewal applications would serve the public interest, convenience and necessity.

#### I. Issue 1 -- Compliance with the EEO Rule and Policies

193. The findings establish, and it is concluded, that the Stations, while not discriminating against any person because of race or color, improperly gave preferential hiring treatment to individuals with knowledge of the LCMS or Lutheran doctrine, and to active members of Christian or LCMS congregations, for positions which were not reasonably connected with the espousal of the Church's religious views. It is also concluded that, during the period from February 1, 1983, to August 3, 1987, the Stations' overall affirmative action efforts, though flawed, were acceptable. However, it must additionally be concluded that, during the period from August 3, 1987, to February 1, 1990, the Stations' overall affirmative action efforts were unsatisfactory, and were not in substantial compliance with Sections 73.2080(b) and (c) of the Commission's Rules.

#### A. Nondiscrimination Aspect of the EEO Rule

194. The findings establish that no individual was discriminated against by the Stations because of race, color, religion, national origin, or sex. There is not one scintilla of evidence in the record to indicate that any adverse discriminatory act ever occurred, or that any individual ever even made an allegation of racial or other discrimination regarding the Stations' employment practices. In this regard, not a single exhibit was submitted indicating that any employee, or applicant for employment at the Stations, had alleged that he or she had been the victim of discrimination. Nor was any evidence produced that any potential applicant was ever discouraged from applying to the Stations because of his or her race or religion. Similarly, several witnesses testified that they were not aware of any acts of racial discrimination at the Stations or allegations to that effect. Where allegations of discrimination have been made but, as here, investigation revealed no complaints or other evidence of discrimination, the questions have been resolved in favor of the licensee. *Applications of Certain Television Stations Serving Communities in the State of California*, 6 FCC Rcd 2340, 2343 (1991), *recon. denied* 8 FCC Rcd 417 (1993); *CBS, Inc.*, 88 FCC 2d 649, 668-69 (1991).

195. Further, the Church has made efforts throughout the years to eliminate racism and discrimination, and to further the presence of African Americans in the Church. The Church has approximately 50,000 African American members out of a total membership of 2.6 million, has African American Lutheran pastors serving both African American and white congregations, and has African Americans serving in the national, regional, district, and area Church leadership. There is also African American representation at the schools operated by the Church, and the Church has a history of providing educational opportunities for minorities. Moreover, Reverend Devantier, the "CEO" of the Stations during the License Term, has two bi-racial children in his own household, one adopted, and one a foster child.

196. During the course of the License Term, and prior to the filing of the NAACP's Petition to Deny, the Stations hired one Hispanic (Caridad Perez), and four African American employees (Ruth Clerkly, Helen Richardson,

Lisa Harrison, and Cynthia Blades).<sup>22</sup> Ms. Perez was hired for a Top Four job category position. The Stations also employed one other African American (Lula Daniels) in a Top Four position until her death, and considered another African American (Ruth Clerkly) for promotion to a management-level position. If the Church had been bent on racial discrimination, it is highly unlikely that these African American or Hispanic individuals would have filled any position at the Stations.

197. The NAACP contends that the FM station's classical music knowledge employment criterion is an indicator of a discriminatory intent on the part of the Church. However, the record reflects no evidence of a racially discriminatory intent behind that criterion. The evidence establishes that the Church was advised by Peter J. Cleary, the founder of CMBS and the Stations' outside consultant, that classical music experience was a valuable job qualification for salespersons. Mr. Cleary's rationale for his view was completely reasonable and logical, and is fully credited. In addition, there was no evidence that any minority applicant was turned away or discouraged from applying for a job at KFUE-FM because of a lack of classical music expertise. It does not, therefore, appear that the criterion was ever used as a pretext for discrimination.

198. In its Opposition to Petition to Deny, the Church argued that any lack of minorities at KFUE-FM should be excused because there were a minuscule number of minorities in the service area who were interested in classical music. The HDO apparently considered this argument as "inherently discriminatory." (HDO at paras. 25-26.) However, the advancement of such an argument, in and of itself, does not establish a discriminatory mind-set on the part of the Church. In *License Renewal Applications of Pasco Pinellas Broadcasting Co.*, 8 FCC Rcd 398, 399 (1993), *aff'd sub nom. Florida State Conference of NAACP v. FCC*, 24 F.3d 271 (D.C. Cir. 1994), the Commission specifically rejected a contention by the NAACP that it should analyze an EEO defense concerning the availability of minority job applicants to determine whether it was indicative of a discriminatory intent on the part of the licensee. The Court of Appeals agreed with the Commission, stating that "[w]e do not understand [the NAACP's] argument. . . . The [licensee] was only submitting an explanation to meet the inference of discrimination that [the NAACP] sought to draw from the statistics." 24 F. 3d at 274. Similar defenses have also been raised by licensees in a number of other EEO proceedings, and in none of them has the Commission even questioned the appropriateness of making the defense, much less found that it indicated a discriminatory mind-set. *E.g.*, *Sun Mountain Broadcasting, Inc.*, 9 FCC Rcd 2124, 2125-26, 2126 n.11 (1994); *San Luis Obispo Limited Partnership*, 9 FCC Rcd 894, 903 n.20 (1994); *Winfas, Inc.*, 5 FCC Rcd 4902, 4902-03, 4904-05 (1990), *recon. denied* 8 FCC Rcd 3897 (1993); *Delaware Broadcasting Co.*, 58 RR 2d 1297, 1299 n.6 (1985); *Voice of Charlotte Broadcasting Co.*, 77 FCC 2d 299, 300 (1980).

199. In this regard, when the EEO processing guidelines were revised in 1980, the Commission itself stated that if a broadcaster's minority hires were low,

[t]he Commission will, in its in-depth reviews, take cognizance of a licensee's inability to employ women or minorities in positions for which the licensee documents that only a very limited number of women or minority group members have the requisite skills. The licensee should show in its EEO program that the skills are in fact required, and provide Census or similar data indicating that, as to women or minorities, individuals possessing these skills are as yet in short supply. . . .

*Equal Employment Opportunity Processing Guideline Modifications for Broadcast Renewal Applicants, supra*, 79 FCC 2d at 932, 47 RR 2d at 1697. *See also Equal Opportunity Rules for Broadcasters, supra* at 3973. Whether or not the Commission accepts such a defense on the merits, a licensee cannot be faulted for making the very argument that the Commission invited it to make.

200. Although there was no evidence that the Stations intentionally discriminated against any particular individual on the basis of race, color, religion, national origin or sex, the findings establish that the Stations improperly gave preferential hiring treatment to individuals with knowledge of the LCMS or Lutheran doctrine, and to active members of Christian or LCMS congregations, for positions which were not reasonably connected with the espousal of the Church's religious views. In this category were receptionist, secretarial, engineering, and business manager positions. In addition, the Stations' employment application in use from 1986 or 1987 to the end of April 1989, clearly stated that the Church's policy was to give preference to "persons who are members in good standing of an LCMS congregation."

201. These hiring practices are contrary to the holding in *King's Garden, supra*, that a station licensed to a religious organization may discriminate on the basis of religion in its employment practices only as to those hired to espouse the licensee's religious philosophy over the air. Conversely, religious licensees may not discriminate "in the employment of persons whose work is not connected with the espousal of the licensee's religious views." 34 FCC 2d at 938.

202. The Church argues that *King's Garden* has been, in effect, overruled by *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). This is erroneous. *Amos* did not overrule *King's Garden*. *Amos* held that the blanket exemption for religious institutions in Title VII of the Civil Rights Act is constitutional "as applied to the nonprofit activities of religious employers." 483 U.S. at 339. Neither the Communications Act nor the Commission's Rules contain such an exemption, and the Commission and the courts have consistently distinguished the Commission's EEO requirements from those of Title VII. *See, e.g., Florida State Conference of NAACP v. FCC, supra* at 274 n.4; *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC,*

<sup>22</sup> The Stations also hired Bridget Williams and Timothy Meeks, both African Americans, after the NAACP filed its Petition to Deny and after the January 4, 1990, Commission letter of inquiry. Since the Church then knew that the Stations' hiring practices with respect to African Americans were under

review, the hiring of these two minorities is not probative and the Church will be given no credit therefor. *Cf. Rust Communications Group, Inc.*, 73 FCC 2d 39, 53-54 (1979); *Alabama Educational Television Commission*, 50 FCC 2d 461, 475-76 (1975)

595 F.2d 621, 628 (D.C. Cir. 1978) ("the FCC is not the Equal Employment Opportunity Commission . . . , and a license renewal proceeding is not a Title VII suit").

203. The Church's reliance on *dicta* in *King's Garden*, which opined that the Title VII exemption was unconstitutional, is misplaced. The analysis and holding of the *King's Garden* majority was not based on the premise that the Title VII exemption was unconstitutional. Rather, *King's Garden* held that the exemption was not relevant to the Commission's EEO requirements. 498 F.2d at 58. Indeed, it was for this very reason that Judge Bazelon did not join in the opinion. His concurrence was based on his view that the exemption was applicable, but unconstitutional. *Id.* at 61.

204. The Church also contends that its own judgement as to which employment positions require religious knowledge, training or expertise may not be subjected to second-guessing by a government agency such as the Commission. This position is without merit. As the Commission stated in *Faith Center, Inc.*, 82 FCC 2d 1, 21 (1980), *recon. denied* 86 FCC 2d 891 (1981), such an interpretation "would tend to create a favored class of licensees immune from Commission scrutiny although questions justifying inquiry into other licensees existed." The Commission also noted that "evenhanded inquiry into allegations of misconduct by both religious and secular licensees places the government in a less objectionable posture." *Id.* Further, the *King's Garden* court observed:

A religious sect has no constitutional right to convert a licensed communications franchise into a church. A religious group, like any other, may buy and operate a licensed radio or television station. . . . But, like any other group, a religious sect takes its franchise "burdened by enforceable public obligations."

\* \* \*

[A religious sect] confronts the FCC's rules only because the sect has sought out the temporary privilege of holding a broadcasting license. . . . But the Constitution does not obligate the FCC to relinquish its regulatory mandate so that religious sects may merge their licensed franchises completely into their ecclesiastical structures.

\* \* \*

Where a job position has no substantial connection with program content, or where the connection is with a program having no religious dimension, enforcement of the Commission's anti-bias rules will not compromise the licensee's freedom of religious expression.

498 F.2d at 60-61 (citations omitted).

#### B. Affirmative Action Aspect of the EEO Rule

205. **February 1, 1983, to August 3, 1987.** The findings establish that, during the period from February 1, 1983, to August 3, 1987, the Stations' overall affirmative action efforts, though flawed, were in substantial compliance with the Commission's rules. In reaching this conclusion, it has been recognized that a significant amount of time has passed since the occurrence of the activities under review and that the Commission's EEO policies have evolved both

during and after this time period. Consequently, it is necessary to construct the appropriate historical context by which to judge the affirmative action efforts of the Stations.

206. From February 1, 1983, to August 3, 1987, the standard being used by the Commission for processing renewal applications was result-oriented. See *EEO Processing Guidelines for Broadcast Renewal Applicants*, 46 RR 2d 1693 (1980), *recon. denied* 79 FCC 2d 922 (1980). Licensees were generally free to craft their own approach to affirmative action as long as they could demonstrate that it resulted in minority hires. *Id.* For stations such as KFUE(AM) and KFUE-FM, the *EEO Processing Guidelines* provided that:

Stations with 11 or more full-time employees will have their EEO programs reviewed if minority groups and/or women are not employed full-time at a ratio of 50 percent of their availability in the workforce overall and 50 percent in the upper-four job categories.

*Id.* at 1693.

207. Licensees were further guided by the provisions of Section 73.2080(b) of the Commission's Rules which, with very minor changes not pertinent here, continued in effect throughout the License Term. Compare Section 73.2080(b) as adopted in *FCC Form 395--EEO*, 70 FCC 2d 1466, 1480 (1979), with the current Section 73.2080(b) of the Rules. This section required each broadcast station to "establish, maintain, and carry out, a positive continuing program of specific practices designed to assure equal opportunity in every aspect of station employment policy and practice." Under the terms of such a program, a station was required to: (1) define management responsibility for the application and enforcement of the EEO policy and establish a procedure to review the performance of management (Section 73.2080(b)(1)); (2) inform its employees and prospective employees of the EEO policy (Section 73.2080(b)(2)); (3) communicate its EEO policy and program and its employment needs to nondiscriminatory sources of qualified applicants and solicit their recruitment assistance on a continuing basis (Section 73.2080(b)(3)); (4) conduct a continuing campaign to exclude every form of prejudice and discrimination from the station's personnel practices and policies (Section 73.2080(b)(4)); and (5) conduct a continuing review of job structure and employment practices and adopt positive recruitment, job design and other measures needed to ensure genuine equality of opportunity (Section 73.2080(b)(5)).

208. Although the Stations' 1982 and 1983 EEO Programs touched on all of the elements included in Section 73.2080(b) of the Rules, there does not appear to have been any consistent, continuing, or systematic effort made by the Stations to follow through on most of these elements. First, despite the statement that Mr. Anderson, and later Reverend Abatie, was responsible for the Stations' EEO program, there was no evidence establishing that either of these individuals, or any other management-level employee, took any steps to truly oversee, administer or implement a coherent, organized, consistent, or continuous EEO program. Similarly, no evidence was produced that any management-level employee was instructed to implement the Commission's EEO requirements. In this regard, Reverend Devantier admitted that no one was explicitly charged in a position description with noting the presence

or absence of minority applicants. There was also no evidence that the Stations established any procedures for reviewing the EEO performance of management.

209. Second, it does not appear that employees and prospective employees were continuously and routinely kept informed of the Stations' EEO policies. The Stations did not distribute to its employees an Employee Handbook, which reflected the Stations' EEO policies, until 1986. The Handbook was published in October 1985, more than two and one-half years after the License Term began. In addition, not all of the Stations' employment advertisements contained a statement that the Stations were Equal Opportunity Employers. Indeed, of the four advertisements contained in the record which were placed prior to the date the NAACP filed its Petition to Deny, three did not contain this statement. Even though the record reflects that these omissions may have been the result of inadvertent errors, the fact remains that the statements were not in the advertisements.

210. Third, it appears that the Stations made some effort to solicit the assistance of likely sources of qualified minority applicants. However, those efforts were sporadic, and were unsuccessful in attracting minorities to the Stations. Indeed, the evidence establishes that the major source of African American employees during the period between February 1, 1983, and August 3, 1987, was Ms. Daniels, who referred two of the three African American hires the Stations made during that time frame. The Stations' other efforts went for naught. Although the Stations placed advertisements for a few positions in the *St. Louis Post Dispatch*, a newspaper which the NAACP's witness, Richard J. Miller, believed was a good source for minority recruitment, no minority hires resulted. In addition, such advertisements commenced more than two and one-half years after the License Term began, and the record does not establish that this newspaper was used on any consistent basis. Similarly, advertisements in *The Lutheran Witness* were not consistently placed and, when they were utilized, resulted in no minority hires. Likewise, even though job openings were posted at the International Center, such postings did not begin until about four years after the commencement of the License Term, and resulted in no minority hires. Nor did the use of the Broadcast Center in St. Louis, a major source of minority referrals for Mr. Miller's stations, result in any minority hires. Even then, the Broadcast Center was not utilized until about four years after the start of the License Term. Fourth, the

record does not establish that there was a continuing review, or any review, of the Stations' job structure and recruitment efforts during the period under consideration.

211. Despite the infirmities discussed above, and considering "all the facts of the case," *Bilingual Bicultural, supra* at 627 n.15, the Stations' minority representation for most of the years within the February 1, 1983, to August 3, 1987, time period was satisfactory. Table 3, below, which is based upon the Stations' FCC Form 395s, summarizes the percentage of parity statistics for the Stations during the time period under consideration.

212. Although the percentages appear to be low, the figures are quite misleading. Specifically, for the years 1983, 1984 and 1986, the addition of 0.3 or 0.4 employees would have brought the Stations' overall minority representation up to 50% of parity. For the year 1987, the addition of 1.4 employees would have achieved that result. Similarly, for the years 1983 through 1987, the addition of 0.1 or 0.2 employees at the Top Four job level would have brought that category up to 50% of parity. Further, the parity statistics derived from the FCC Form 395s understate the Stations' overall minority representation in 1984 and 1985 because the Stations hired three full-time African Americans who were not employed during the weeks used to complete some of the Form 395s. Moreover, the Stations hired 19 full-time employees between February 1, 1983, and August 3, 1987. Of the 19 new full-time hires, 3 were African American. Thus, 15.8% of the full-time hires in this period were minorities. This figure actually exceeded 100% of parity. It is clear that, on balance, the Stations' affirmative action efforts during the period from February 1, 1983, to August 3, 1987, while flawed, were acceptable because they resulted in minority hires.

213. **August 3, 1987, to February 1, 1990.** The findings establish that, during the period from August 3, 1987, to February 1, 1990, the Stations' overall affirmative action efforts were unsatisfactory. In reaching this conclusion, the historical context of the Commission's EEO policies has again been considered.

214. Effective August 3, 1987, the Commission amended its EEO rule to incorporate the recruitment guidelines that had previously appeared only in its Model EEO Program Reports. *Equal Opportunity Rules for Broadcasters, supra* at 3968-69. The Commission also de-emphasized the use of statistics to evaluate a licensee's EEO program and emphasized the overall efforts made by the licensee to operate in a nondiscriminatory manner. To this end, the Commis-

**TABLE 3**

As of January 31	Overall Minority Representation	Top Four Job Category Minority Representation
1983	37.7% of parity	45.8% of parity
1984	35.6% of parity	42.7% of parity
1985	75.4% of parity	42.7% of parity
1986	37.7% of parity	0% of parity
1987	0% of parity	0% of parity

sion adopted a new two-step approach for processing renewal applications. Under that approach, the Commission's procedure was first to examine the EEO information submitted with the renewal application to determine whether the licensee's overall EEO efforts had been satisfactory. If the Commission was unable to make that determination, an investigation of the deficiencies was to be initiated. The investigation was to involve requests that the licensee submit additional information concerning the specific areas of its EEO program that appeared deficient. *Id.* at 3968, 3973-74.

215. The Commission's new rule, Section 73.2080(c), stated that a station's EEO program "should reasonably" address itself, to the extent possible and to the extent appropriate to the station's size and location, to the following areas: (1) disseminating its EEO program to job applicants and employees (Section 73.2080(c)(1)); (2) using minority organizations, organizations for women, media, educational institutions, and other potential sources of minority and female applicants to supply referrals whenever job vacancies are available in its operation (Section 73.2080(c)(2)); (3) evaluating its employment profile and job turnover against the availability of minorities and women in its recruitment area (Section 73.2080(c)(3)); (4) undertaking to offer promotions of qualified minorities and women in a nondiscriminatory fashion to positions of greater responsibility (Section 73.2080(c)(4)); and (5) analyzing its efforts to recruit, hire, and promote minorities and women and addressing any difficulties encountered in implementing its EEO program (Section 73.2080(c)(5)).

216. The new rule gave several "suggestions" under each subsection of ways in which each of these requirements could be met. The Commission stressed, however, that these suggestions were "not intended to be either exclusive or inclusive," but were made "simply to provide guidance." *Equal Opportunity Rules for Broadcasters, supra* at 3969. Minor changes, not pertinent to this proceeding, were also made in Section 73.2080(b). *Id.* at 3976.

217. The record reflects that, during the period August 3, 1987, to February 1, 1990, the Stations, once again, failed to make any consistent, continuing, or systematic effort to follow through on most of the elements contained in their 1982 and 1983 EEO Programs. This is true despite the laudable efforts of Thomas M. Lauher, the general manager of the FM station from May 1987 to July 1989, to review that station's compliance with the Commission's EEO requirements, and his attempt to correct the deficiencies he found. Mr. Lauher's review began in the fall of 1988 and culminated in March 1989, at which time he sent two memorandums to Reverend Devantier, the Stations' CEO. Although certain EEO program reforms were begun as a consequence of Mr. Lauher's efforts, many were not utilized after his departure in July 1989. Therefore, it cannot be concluded that the Stations were substantially compliant with Sections 73.2080(b) and (c) of the Commission's Rules.

218. First, until the arrival of Mr. Lauher, and after his departure, no management-level employee of the Stations made any attempt to implement a continuous or consistent EEO program. Nor was any management-level employee specifically instructed to put into effect the Commission's EEO requirements. Indeed, after Mr. Lauher left, EEO compliance became the responsibility of both Reverend Devantier and Dennis Stortz. However, there was no discussion of how that responsibility was to be apportioned, and it does not appear that either of these individuals took

any steps to carry out the Stations' EEO Program or Mr. Lauher's reforms. Further, the two new general managers of the AM and FM stations did not even know about EEO noncompliance problems until the filing of the NAACP's Petition to Deny in January 1990.

219. Second, during this period, the employment application in use at the Stations did not contain a notice informing prospective employees that discrimination was prohibited and that they could notify the appropriate agencies if they believed they had been the victims of discrimination. On the contrary, the employment application forms contained a statement that the Church retained the right to give hiring preferences to persons who were members in good standing of an LCMS congregation. Although Mr. Lauher corrected these shortcomings, the fact remains that, until he did so, prospective employees were given no notice of the Stations' EEO policies, and the employment application contained a statement that was squarely contrary to the Commissions' EEO policies.

220. Third, although the Stations made an effort to solicit the assistance of likely sources of qualified minority applicants, these efforts were irregular, and were generally unsuccessful in attracting minorities to the Stations. Thus, Mr. Lauher, in initiating the process of hiring salespersons, contacted the St. Louis Broadcast Center and placed advertisements in the *St. Louis Post Dispatch*. As noted earlier, Mr. Miller, the NAACP's witness, identified these as promising sources for minority candidates. In July 1989, about six months prior to the end of the License Term, Mr. Lauher sent letters to 10 local universities and personnel agencies requesting minority and female referrals. The letters mentioned no specific job openings, and stated that the Stations would be contacting the addressees as job openings arose. Although the Stations filled nine full-time and five part-time positions after these letters were sent, no further contacts were made with these organizations, and none of the letters resulted in any referrals of minority applicants. In 1989, the last year of the License Term, the Stations sought referrals from the Lutheran Employment Project of St. Louis, a clearinghouse run by various Lutheran churches for employment of members of minority groups. These efforts were successful in that, in late 1989, three minority referrals were interviewed and one minority was hired (Cynthia Blades).

221. Fourth, there is no evidence that the Stations formally evaluated their employment profile and job turnover against the availability of minorities and women in their recruitment area. In this regard, it does not appear that the composition of the relevant labor area was compared with the composition of the Stations' workforce. Nor were the Stations' policies and practices examined to determine whether qualified minorities were being inadvertently screened out. However, from the beginning of his term as FM general manager in May 1987, Mr. Lauher did notice that there were no minorities working at the station, and he determined that he wanted to hire minorities. But none were hired until March 1988, nearly a year later, when Caridad Perez, an Hispanic, was hired as a salesperson. There is no indication that Mr. Lauher's desire to hire minorities, or that Ms. Perez' hire in particular, resulted from the type of evaluation contemplated in the Commission's rules.

222. Fifth, the record does not reflect that, from the time of Mr. Lauher's departure to the time the Petition to Deny was filed, there was a continuing review of the Stations' job structure, or that their efforts to recruit and hire minorities

were analyzed. In addition, until corrected by Mr. Lauher, the Stations used a selection technique that gave hiring preferences to members in good standing of an LCMS congregation.

## II. Issue 2 -- Misrepresentation/Lack of Candor

223. This issue was specified to inquire into the discrepancy between certain hiring figures reported to the Commission by the Church and the Church's explanation for that discrepancy, questions relating to the Church's representations of its outreach efforts and recruitment program, questions regarding the Church's arrangement with Concordia Seminary, and questions concerning the Church's requirement for knowledge of Lutheran doctrine or classical music for certain positions at the Stations. The findings establish, and it is concluded that, while the Church's responses to the Commission's various inquiries were not models of clarity or complete accuracy, none of those responses rises to the level of a disqualifying misrepresentation. However, it must also be concluded that the Church lacked candor in describing the Stations' minority recruitment program in their 1989 renewal applications, and in informing the Commission that knowledge of classical music was a requirement for the position of salesperson at the FM station. These instances of lack of candor constituted willful and repeated violations of Section 73.1015 of the Commission's Rules.<sup>23</sup>

### A. Discrepancy in the Number of Job Hires

224. The HDO questioned a discrepancy in the number of hires reported by the Stations for the October 1, 1988, to September 30, 1989, time period. The Stations' renewal applications, and a supplement thereto, reported a total of 6 hires, while a February 23, 1990, Opposition to Petition to Deny indicated that there had been 14 hires during this time period (10 full-time and 4 part-time).

225. The findings establish that the discrepancy between the number of hires reported in the renewal applications and supplement, and the number reported in the Opposition, was the result of innocent and inadvertent errors made by Paula Zika, the Stations' Director of Business Affairs. Ms. Zika understood the renewal applications to be asking only for full-time hires during the 12 months preceding the filing of the applications who were still employed at the Stations at the time of filing. She did not believe the question was asking for hires who were no longer working at the Stations, reasoning that no credit could be claimed for hiring employees that had already left and were not part of the Stations' then-current EEO profile.

226. Nor did Ms. Zika believe that part-time hires should be included, because most were students working only 6 to 12 hours per week. In this connection, neither the FCC Form 396 nor the Filing Instructions specified whether the response to the pertinent question should include part-time as well as full-time employees, or whether the renewal application should count people hired who thereafter departed before the end of the filing period. Indeed, the Filing Instructions indicated that it was only necessary to complete and file the Form 396 if a station employed five or more *full-time* employees. There was, therefore, a reasonable and logical basis for Ms. Zika's beliefs.

227. Excluding part-time employees and full-time employees who left the Stations before the end of the reporting period, the findings show that Ms. Zika understated the Stations' total hires by only two employees. Of the two, one employee was hired just before the end of the reporting period, and Ms. Zika had not been informed of his hiring. The remaining employee was simply overlooked by Ms. Zika. None of these errors suggest intentional deceit, or reflect adversely on the basic qualifications of the Church. *See, e.g., National Capital Christian Broadcasting, Inc.*, 3 FCC Rcd 1919, 1922 n.6 (1988); *Radio Station WABZ, Inc.*, 90 FCC 2d 818, 825-27 (1982); *Kaye-Smith Enterprises*, 71 FCC 2d 1402, 1414-16 (1979).

228. The HDO also questioned the Church's failure to submit an explanation for the discrepancy at the time it reported the accurate information to the Commission. The record reflects, however, that the reason for this failure was both simple and innocuous. Specifically, at the time the Opposition containing the correct data was filed by the Church, neither Ms. Zika nor Mr. Stortz noticed that there was a discrepancy between the information contained therein and the hiring data reported with the Stations' renewal applications and supplement.

229. It is important to recognize in this regard that the hiring data contained in the Opposition was submitted in direct response to the Commission's January 4, 1990, letter of inquiry. That letter requested detailed information concerning each and every full-time and part-time position filled during the three-year time period from October 1, 1986, to October 1, 1989. On the other hand, the time frame covered in the renewal applications was the one-year period from October 1, 1988, to September 30, 1989, and Ms. Zika had not counted part-time employees and employees who left the Stations prior to the end of the reporting period. Moreover, there appeared to have been no reason for Mr. Stortz or Ms. Zika to have compared the hiring data in the Opposition with the data in the renewal applications; the time periods covered by the two submissions were different, the information sought by the Commission was different, and the former encompassed all hires including part-timers, whereas the latter did not. Ms. Zika's testimony that the discrepancy probably resulted

<sup>23</sup> In its proposed findings of fact and conclusions of law, the NAACP alleges, for the first time, numerous additional misrepresentations which were not raised in the HDO in this proceeding. No conclusions will be reached with regard to these new allegations. Suffice it to say, since these matters were initially raised in the NAACP's findings and conclusions, the Church had no notice or opportunity to introduce evidence thereon. In this connection, it is noted that the vast majority of the misrepresentations alleged by the NAACP relate to matters about which it did not cross-examine the witnesses. Therefore, the Church could not even address these matters on re-direct

examination. It is axiomatic that the purpose of a hearing designation order is to provide the licensee with notice of the misconduct alleged so that it may have an adequate opportunity to prepare a defense. *Cf. Faith Center, supra* at 9. It would be manifestly unfair and a denial of due process to reach conclusions on matters about which the Church was given no prior notice. *Cf. Algreg Cellular Engineering*, 9 FCC Rcd 5098, 5146 (Rev. Bd. 1994), *recon. denied* 9 FCC Rcd 6753 (Rev. Bd. 1994); *Garrett, Andrews & Leizia, Inc.*, 88 FCC 2d 620, 625 (1981). Nevertheless, to assist the reviewing authorities, findings of fact have been made on these matters.

from the two different questions being asked by the Commission is completely credible. Consequently, the failure to notice the discrepancy or to explain it in the Opposition is understandable. This simple oversight does not constitute a misrepresentation or lack of candor. *Kaye-Smith Enterprises, supra*; *Gary D. Terrell*, 59 RR 2d 1452, 1454 (Rev. Bd. 1985).

#### B. Outreach Efforts and Recruitment Program

230. The findings establish that the Church was lacking in candor when describing portions of the Stations' minority recruitment program in the 1989 EEO Program contained in their renewal applications. Specifically, the Church described the Stations' EEO recruitment program, in pertinent part, as follows:

[1] When vacancies occur, it is the policy of KFUD and KFUD-FM to seek out qualified minority and female applicants. [2] 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. [3] 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. [4] See sample reply form attached.

As will be shown below, these statements were highly misleading.

231. The first sentence of the quoted paragraph clearly connoted that it was the Stations' usual policy and practice to seek out qualified minorities on a regular and systematic basis whenever vacancies occurred. However, the record reflects that this was not the case. On the contrary, as discussed earlier, the Stations' minority recruitment efforts were sporadic, irregular, and inconsistent. The Stations certainly did not affirmatively seek out minority applicants as a matter of routine, or on a regular or systematic basis, as implied in their applications. This sentence failed to provide the Commission with a complete and fully informative depiction of the Stations' License Term minority recruitment efforts and, therefore, lacked candor. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983).

232. The Church argues that this sentence was literally true because it did *not* state that the Stations sought out minorities "for each job opening throughout the License Term." (Church's Proposed Findings and Conclusions, at p. 134, emphasis omitted.) This argument is without merit. Put simply, it completely ignores the plain meaning of the language contained in the Stations' EEO Program, and the obvious implication of that language.

233. The second sentence of the quoted paragraph is also inaccurate. The only employment service which the Stations utilized during the License Term was the Lutheran Employment Project of St. Louis. Even then, it was not utilized until the final year of the License Term. Yet the Church used the plural word "services" in this sentence. Further, the record does not reflect that the Stations ever dealt with, or sought referrals from, state employment agencies. This sentence exaggerated the Stations' efforts and, once again, was not fully informative.

234. The third and fourth sentences of the quoted paragraph are the most misleading. As discussed in the findings, the third sentence was added to the EEO Program by

Mr. Stortz because the Stations "generally" publicized openings and had sent recruitment letters in July 1989 to 10 local universities and personnel agencies. However, what the Church did not reveal was that the various employment services were contacted on only one occasion, that such contact was not made with respect to any specific job opening, and that the Stations never again communicated with those services in connection with the nine full-time or five part-time positions they filled during the remainder of the License Term. Mr. Stortz was in a unique position to know these facts inasmuch as he was the Operations Manager of the Stations during the entire License Term, and was given the responsibility for the day-to-day operation of the FM station in July 1989, after Mr. Lauher left. Those responsibilities included sending out notices of job openings and notifying job sources of the FM stations' EEO policies. As a result, he had direct knowledge that the representations contained in this sentence were misleading. The fourth sentence only compounded the deceptive nature of the third sentence because it purported to provide evidence of the Stations' contacts. Thus, the portrayal of key aspects of the Stations' minority recruitment program was not totally accurate, and significant information which could have illuminated the Stations' program was omitted. This is the essence of lack of candor. *Fox River, supra*.

235. The Church maintains that a conclusion that language in an EEO Program, in and of itself, could constitute a misrepresentation or lack of candor is unprecedented, and that the Commission has never previously suggested that a licensee's failure to live up to its EEO program could raise misrepresentation or lack of candor questions. (Church's Reply Findings and Conclusions, at p. 27.) This argument is rejected for the simple reason that the *HDO* itself, at paragraph 28, raised such questions about the minority recruitment representations made by the Church in its renewal applications. The possibility that adverse conclusions could be reached as a consequence of statements made by the Church in the Stations' EEO Program should, therefore, come as no surprise.

236. The Church further contends that no misrepresentation or lack of candor can be found because the Form 396 is unclear as to whether its questions cover the preceding or upcoming license term. (Church's Reply Findings and Conclusions, at pp. 27-28, 29-30.) This contention is irrelevant. The language used in the pertinent paragraph of the Stations' 1989 EEO Program, on its face, speaks in terms of what the Stations did in the past and were continuing to do as of the date of filing in connection with their recruitment of minorities. That language was misleading in that it omitted significant information. If the purpose of the Church's language was to speak only in terms of then-current (*i.e.*, July to September 1989) or future practice, then the paragraph under consideration should have contained some language explaining that fact. It did not. Moreover, it is significant to note that the practices referred to in the third and fourth sentences of the quoted paragraph were no longer being used by the Stations in late September 1989, when their renewal applications were filed. In other words, they were not the then-current practices, as Mr. Stortz well knew, yet they were cited by the Church. Even assuming that the Commission's forms were ambiguous, the Church's representations were not.

237. The Church also alleges that there was no intent to deceive and that no misrepresentation or lack of candor may be found without such intent. (Church's Reply Find-

ings and Conclusions, at pp. 21-22, 28-29.) However, an intent to deceive may be found under the circumstances of this case. As noted above, Mr. Stortz was the Operations Manager of the Stations throughout the License Term, and was responsible for the daily management of the FM station beginning in July 1989. In those capacities, Mr. Stortz was in a singular position to know all of the facts pertaining to the actual manner in which the Stations implemented their EEO program, including their recruitment efforts. Specifically, Mr. Stortz knew that the Stations did not seek out qualified minority job applicants on anything resembling a regular or systematic basis. He knew that employment "services" (plural) and state employment agencies were not used as referral sources. And he knew that the 10 local universities and personnel agencies which had received recruitment letters were never contacted while he was in charge of the FM station. Yet Mr. Stortz allowed the misleading and incomplete information referred to above to be filed with the Commission. In fact, the most misleading statement of all, the third sentence, was even accompanied by a "sample" reply form in a transparent attempt to support the Stations' assertions. Mr. Stortz testified that he had no intention of misleading the Commission by attaching the sample. But what else could his intention have been, other than to create an erroneous impression of the Stations' actual recruitment efforts. It is abundantly clear that the Church, through Mr. Stortz, was fully aware of all the facts, but the renewal applications only revealed selected portions of those facts, *i.e.*, those portions which were entirely favorable to the Church. Consequently, it must be concluded that there was a willful intent to mislead.<sup>24</sup>

238. The evidence further establishes that there was, as well, a motive to mislead. Mr. Stortz had knowledge of Mr. Lauher's memorandums to Reverend Devantier concerning the FM station's EEO compliance problems. Mr. Stortz had received copies of those documents. Because of this, Mr. Stortz knew that failure to take corrective action "could create significant jeopardy [sic] in license retention"; that "[i]f the concerns are not addressed quickly, the worst possible consequence is loss of license"; that EEO compliance was "the most critical area in license renewal"; that "[n]umbers do not work anymore"; that "[t]he question is: Is the station following its own plan?"; that "broadcasters are held to a higher EEO standard than most other private employers"; that "the FCC reviews station [EEO] compliance as part of the . . . renewal process"; that Mr. Lauher discovered that "we are operating in violation of our own [EEO] policy as currently on file"; and that Mr. Lauher had "reason to believe this applies to the AM operation as well as the FM operation." Mr. Stortz also knew that, after Mr. Lauher's departure, many of the EEO reforms initiated by his predecessor were not implemented or utilized, and the Stations' EEO efforts were still deficient. As a result, it is reasonable to conclude that had the Church given the Commission a complete and accurate description of the Stations' recruitment efforts, questions were likely to have been raised, as Mr. Lauher

predicted, concerning their renewal applications. By giving only a partial and favorable picture, the Church hoped to avoid careful scrutiny.

### C. The Arrangement with Concordia Seminary

239. The HDO questioned the silence of the renewal applications regarding the arrangement with Concordia Seminary, and the Bureau concludes that it should have been reported, stating that "the Commission could not have guessed that recruitment was affected by an arrangement for the employment of Concordia Seminary students and their spouses." (Bureau's Proposed Findings and Conclusions, at p. 58.) The findings establish that there was no misrepresentation or lack of candor in connection with the Seminary.

240. The record reveals that the arrangement with the Seminary was a decades-old work/study training program. Students and their spouses were paid to work at the Stations part-time, only 6 to 12 hours a week, while being trained in the use of radio as a medium in the Church's mission and ministry. The FCC Form 396 did not request information on whether a broadcast facility was being used for training purposes, unless the training program was specially designed to train women and minorities. Even then, the provision of information on such a program was optional. Further, the Commission had previously considered the EEO programs of a number of licensees that were affiliated with a school and that either utilized their station to train students, or utilized the school as a favored source for station hiring. In none of these cases had the Commission questioned the propriety of such an arrangement. *See Seattle Public Schools*, 4 FCC Rcd 625, 632 (Rev. Bd. 1989); *Catawba Valley Broadcasting Company, Inc.*, 3 FCC Rcd 1913, 1916 (1988); *University of North Carolina at Chapel Hill*, 79 FCC 2d 248, 255 (1980). The Church, therefore, had no reason to believe that information about the training program at the Seminary would be of interest to the Commission.

241. Further, because the EEO Program included with the renewal applications discussed only full-time employees, there would have been no reason for the Church to have mentioned the arrangement with the Seminary. Indeed, the FCC Form 396 Filing Instructions did not request information on part-time hires. Rather, the Instructions indicated that it was only necessary to complete and file the form if the Stations employed five or more *full-time* employees. Given the focus of the Form 396 on full-time employees, it is understandable that the Church did not discuss the arrangement with the Seminary. Moreover, as soon as the Commission requested, as part of its expanded inquiry, information beyond the raw employment data contained in the renewal applications, the Church provided information about its training program.

<sup>24</sup> Even assuming, *arguendo*, that Mr. Stortz did not have direct knowledge of all of these matters, it must be concluded that, as the individual responsible for the daily management of the FM station during the critical time period, he should have known these things. That being the case, his failure to ascertain the true, complete and accurate facts pertaining to the Stations'

recruitment program, and the failure of the Church to report all such facts in the Stations' renewal applications, constituted gross negligence and wanton carelessness, which are the functional equivalents of an intent to deceive. *See Golden Broadcasting Systems, Inc.*, 68 FCC 2d 1099, 1106 (1978).

#### D. Knowledge of Lutheran Doctrine or Classical Music

242. "Qualified" Minorities and Females. The EEO Program contained in the Church's renewal applications stated that the Stations sought out "qualified minority and female applicants," and requested referral sources to provide them with "qualified female and minority referrals." The HDO questioned the failure of the renewal applications to reveal that the Stations had a requirement that employees have Lutheran or classical music training in order to qualify for certain positions. The Bureau concludes that these requirements should have been specifically disclosed in the renewal applications because the use of the modifier "qualified" could not reasonably have alerted the Commission that the Stations' recruitment efforts were limited by employment criteria such as Lutheran training or knowledge of classical music. (Bureau's Proposed Findings and Conclusions, at p. 58.)

243. The findings establish that there was no misrepresentation or lack of candor with respect to the use of the phrases in question in the renewal applications. The FCC Form 396 Filing Instructions state: "Broadcast station licensees are required to afford equal opportunity to all *qualified persons* . . ." (Church Ex. 9, p. 1, emphasis added.) Similarly, the Form 396 itself, under the heading "Recruitment" states: "A broadcast station must make efforts to attract *qualified minority and women applicants* for all types of jobs at the station whenever vacancies occur." (*Id.* at p. 3, emphasis added.) Throughout the years, the Commission's Model EEO Programs have contained similar language. *E.g.*, *Nondiscrimination in Employment Practices*, 60 FCC 2d 226, 249-50 (1976) ("It is our policy to provide equal employment opportunity to all *qualified individuals*"; "We attempt to maintain systematic communication . . . with a variety of minority and women [sic] organizations to encourage the referral of *qualified minority and female applicants*"; emphasis added); *Equal Employment Opportunity*, 49 RR 2d 1295, 1299-1300 (1981) ("It will be our policy to provide equal employment opportunity to all *qualified individuals*"; "We will attempt to maintain systematic communication . . . with a variety of minority and women's organizations to encourage the referral of *qualified minority and female applicants*"; emphasis added.)

244. However, nowhere in the Filing Instructions, the Form 396, or the Commission's Model EEO Programs are the phrases "qualified individuals," "qualified persons," "qualified minority and female applicants," or "qualified minority and women applicants" defined. Likewise, nowhere in the Filing Instructions, the Form 396, or the Model EEO Programs does the Commission require a licensee to provide a detailed explanation, or indeed any explanation, of the criteria that the licensee uses to determine whether minority or female applicants are "qualified." Under these circumstances, the Church can hardly be faulted for following the language of the Commission's own forms and models, or for failing to include information not requested by the Filing Instructions or the Form 396. In this vein, it may be argued that job requirements such as a bachelor's or postgraduate degree may have a disproportionate impact upon minority job applicants. But the Form 396 has never requested from licensees information on these requirements, nor has the Commission ever apparently found the failure to disclose such requirements to be an issue. There is no reason to treat the Church's religious and classical music criteria any differently.

245. Moreover, the Church disclosed these job qualification criteria at the first possible opportunity after its EEO program was questioned, and there is no evidence in the record that the Church sought to conceal that information by not including it in the renewal applications. Supposing that the Church had believed that the employment criteria were requested by the renewal applications and had wanted to conceal them, there would have been no reason for the Church to have then revealed that information at the very first opportunity. *Dixie Broadcasting, Inc.*, 8 FCC Rcd 4386, 4403 (ALJ 1993); *Emerald Broadcasting Co.*, 30 FCC 2d 879, 883 (1971). There is no hint of misrepresentation or lack of candor in the Church's actions.

246. "Requirement" for Knowledge of Classical Music. The findings establish that the Church was lacking in candor when it stated in its February 23, 1990, Opposition to the NAACP's Petition to Deny, and again in its September 21, 1992, Motion to Strike and Reply to Comments, that classical music knowledge was a requirement for a position as a salesperson at the FM station. While the Opposition was drafted by Marcia A. Cranberg, the Stations' former legal counsel, it was reviewed by Mr. Stortz, who provided an affidavit concerning the truth of the facts asserted therein.

247. The language in the Opposition concerning the classical music knowledge requirement was derived from a number of conversations and written communications between Ms. Cranberg and Mr. Stortz. Ms. Cranberg had asked Mr. Stortz whether there were any particular positions at the Stations that required any specialized skills or background. Mr. Stortz responded that there were, and the two discussed them and the reasons why specialized skills were necessary. Mr. Stortz sent a memorandum to Ms. Cranberg in which he stated that: "KFUO-FM's format is 'Classical,' with many of its [sic] positions *requiring* a knowledge of classical music . . ." (Emphasis added.) Ms. Cranberg used the representation concerning the requirement for specialized skills as an integral part of the Church's argument urging the Commission to employ alternative data to the labor force statistics in judging the results of the Stations' recruitment efforts. The law firm for which Ms. Cranberg worked had apparently used a similar argument successfully in an earlier EEO case involving another classical music broadcast station client.

248. The record reflects, however, that classical music knowledge, although desirable, was not a requirement for a sales position at the FM station. On the contrary, giving the Church the benefit of all possible doubts, only 8 of the 15 individuals hired for the position of Sales Worker during the License Term had some classical music background or experience. In other words, 7 of the 15, or nearly half, did not.

249. As Operations Manager for the Stations during the entire License Term, Mr. Stortz knew that knowledge of classical music was not an absolute requirement for the position of salesperson at the FM station. Indeed, he admitted this in an affidavit appended to the Church's December 28, 1992, Reply to FCC Letter of Inquiry. In his affidavit, Mr. Stortz claimed, in essence, that when he advised the Commission that knowledge of classical music was a requirement, he did so because he was not an attorney and was "not accustomed to providing the level of detail and precision with which attorneys, and those who deal with them frequently, may be more familiar." He denied any intention to mislead.

250. But he did mislead, and it must be concluded that his actions were deliberate. Thus, an individual does not have to be an attorney, or deal with attorneys frequently, to know the usual and customary meaning of the words "required," "requiring," or "requirement."<sup>25</sup> Either something is a requirement or it is not. Classical music knowledge was not a job requirement, and Mr. Stortz knew it. Yet he permitted the Church to represent to the Commission, on two occasions, that it was. By concealing the complete facts, by failing to be fully forthcoming and informative, the Church lacked candor. *Fox River, supra*.<sup>26</sup>

251. The Church maintains that this dispute is a matter of semantics, that there was no motive to deceive the Commission through the use of the word "required," and that there was no motive for Mr. Stortz to have used the word "requirement" rather than the word "preferred." (Church's Reply Findings and Conclusions, at pp. 31-32.) This is erroneous. Initially, it must be noted that "required" and "requirement" were not the only questionable words used in the Church's Opposition. The Church also represented that the jobs in question "can *only* be filled" by persons with expertise in classical music, and that certain employees "must have" specialized skills. (Emphasis added.) Consequently, this issue involves more than simple semantics. Further, as demonstrated earlier, Mr. Stortz, a recipient of Mr. Lauher's memorandums, knew that the Stations' EEO efforts were deficient and knew that a Commission review of those efforts could place the Stations' licenses in jeopardy. By representing that classical music knowledge was a requirement for sales positions, and by maintaining that few minorities had the required expertise, the Church was attempting to show that the labor pool from which it could draw qualified minorities was extremely small, and that the Church's "minority employment record must be considered in that context." Use of words such as "preferred" or "preference" would not have conveyed the same meaning or carried nearly the same weight, and would have significantly weakened the Church's position.<sup>27</sup>

### III. Sanctions

#### A. Issue 1 -- EEO Violations

252. It has been concluded that the Stations violated the Commission's EEO rules and policies by improperly giving preferential hiring treatment to individuals with knowledge of LCMS or Lutheran doctrine, and to active members of Christian or LCMS congregations, for positions which were not reasonably connected with the espousal of the Church's religious views. Further, the Stations were not substantially compliant with the EEO rules and policies during the period from August 3, 1987, to the end of the License Term.

253. These deficiencies are sufficiently severe so as to warrant the imposition of EEO reporting conditions. The reporting conditions will afford the Stations the opportu-

nity to design and put into practice an EEO program which is fully consistent with all aspects of the Commission's rules and policies. They will also enable the Commission to review the Stations' EEO program periodically to ensure that it is being utilized on a consistent, continuing, and systematic basis. The necessity for the imposition of reporting conditions is manifested by the fact that, throughout the License Term, the Stations' former legal counsel kept the Stations apprized of developments in the Commission's EEO rules and policies, often emphasizing the seriousness with which the Commission viewed EEO matters. However, with the exception of Mr. Lauher, there is no evidence that any management-level employee of the Stations ever heeded former counsel's advice and admonishments. Therefore, there appears to be a need for a formal mechanism to monitor the Stations' EEO compliance efforts.

254. Contrary to the arguments of the NAACP and the Bureau, denial of the renewal applications would not be appropriate under the circumstances of this case. There is not one scintilla of evidence that the Stations intentionally discriminated against minorities. On the contrary, during the period between February 1, 1983, and August 3, 1987, the Stations hired 19 full-time employees, of which 3 were African American. As a result, 15.8% of the full-time hires during this period were minorities, a figure which exceeded 100% of parity. Similarly, during the period from August 3, 1987, to January 2, 1990, the date the Petition to Deny was filed, the Stations hired 22 full-time employees, of which 2 were minorities (1 Hispanic and 1 African American). Further, one of those minorities was hired for a Top Four position. Thus, 9.1% of the full-time hires during this period were minorities, a figure which exceeded the Commission's 50% of parity guideline.

255. Moreover, the Stations, through Mr. Lauher, did conduct a review of their EEO efforts on their own initiative and without prompting or threat from either the Commission or the NAACP. The Stations also made a genuine and good-faith attempt to begin to correct the deficiencies found during that review. In addition, there is no evidence that anyone at the Stations or the Church attempted to impede either the review or the corrective measures which were initiated. Unfortunately, no one continued the work Mr. Lauher had begun. The imposition of reporting conditions should cause the Stations to complete their EEO reform efforts.

256. Finally, the Stations' EEO derelictions do not warrant non-renewal of their licenses because the imposition of such a draconian sanction would be contrary to all precedents in which the Commission has even remotely considered similar factual situations. *See, e.g., United Communications Corp.*, 54 RR 2d 22 (1983) (AM license renewed without reporting conditions but licensee asked to file a revised EEO program where no minorities were employed or hired during the license term and licensee failed to seek referrals from any minority sources); *Auburn Broadcasting Co.*, 57 RR 2d 1427 (1985) (AM and FM

<sup>25</sup> The American Heritage Dictionary (New College Ed. 1976), defines "requirement" as: "1. That which is required; something needed. 2. Something obligatory; a prerequisite."

<sup>26</sup> There is no evidence indicating that Ms. Cranberg, prior to the preparation of the Church's December 28, 1992, Reply, knew that the FM station hired individuals without classical music knowledge for Sales Worker positions.

<sup>27</sup> The American Heritage Dictionary, *supra*, defines "prefer" as: "1. To select in preference to another or others; value more highly; like better." "Preference" is defined as: "1.a. The selecting of someone or something over another or others. . . . 2. The state of being better liked or more valued. . . . 4. The granting of precedence or advantage to one over all others. . . ."

station licenses renewed with reporting conditions where licensee failed to contact minority referral sources or to hire minorities in parity with the local labor force, but had hired some minority employees during the license term); *National Capital Christian Broadcasting, Inc., supra* (television license renewed with reporting conditions where licensee made few, if any, efforts to contact minority referral sources, failed to monitor the results of its EEO program, omitted information from 2 sections of the EEO program filed with the FCC, but hired 2 minorities out of 18 hires during the last 12 months of the license term); *Letter to Allan W. Roberts*, 4 FCC Rcd 3463 (1989) (FM license renewed with reporting conditions where licensee had contacted a minority referral source only once during its ownership of the station without mentioning any specific job opening, failed to maintain any records to allow evaluation of the program, and had no minorities on the station's staff); *Applications of Certain Broadcast Stations Serving Communities in the State of Texas*, 4 FCC Rcd 6685, 6687 (1989) (television license renewed with reporting conditions where licensee only contacted a single minority referral source in the last year of the license term and failed to evaluate its EEO program until the end of the license term, but hired 2 minority employees out of 17 hires during the last 2 years of the license term); *Letter to Pegram Harrison*, 4 FCC Rcd 8255 (1989) (AM and FM licenses renewed for a full term and \$18,000 forfeiture and reporting conditions imposed where licensee failed to contact minority recruitment sources for specific job openings, failed to evaluate its EEO program, hired only 1 minority in filling 53 job openings despite the fact that 10.5% of the local labor force was minority, and that one minority employee left after only 6 weeks); *Letter to Kerby Confer*, 5 FCC Rcd 579 (1990) (FM license renewed for a full term and \$10,000 forfeiture and reporting conditions imposed where licensee contacted no minority referral sources until the end of the license term, failed to evaluate its EEO program, and had only 1 minority applicant for 11 job openings despite the fact that 51.1% of the local labor force was African American); *Letter to John P. Healy*, 5 FCC Rcd 3745 (1990) (FM license renewed for a full term and \$10,000 forfeiture and reporting conditions imposed where licensee used no minority recruitment sources, failed to evaluate its EEO program, and had no minority applicants despite 32 upper-level job openings); *Applications of Certain Broadcast Stations Serving Communities in the Miami, Florida Area*, 5 FCC Rcd 4893, 4895 (1990) (FM license renewed with reporting conditions where licensee made no specific efforts to recruit minorities during the license term, did not evaluate the effectiveness of its EEO program, and hired no African Americans, the dominant minority in the labor force, for any of the 32 openings during the last 2 years of the license term); *Winfas, Inc., supra* at 4902-03 (where FM licensee argued that station's country and western format made it difficult to attract minority applicants, license renewed with reporting conditions where licensee used no minority referral sources prior to the filing of its renewal application, interviewed only 7 minorities for 31 openings over a 3-year period, and failed to evaluate its EEO program); *Application for Renewal of License of Certain Broadcast Stations Serving Melbourne, Florida and Other Communities in the Florida Area*, 5 FCC Rcd 6738, 6739 (1990), *recon. denied* 7 FCC Rcd 6045 (1992), 8 FCC Rcd 4223 (1993), *appeal pending* No. 92-1546 (D.C. Cir.) (AM and FM licenses renewed with reporting conditions where licensee contacted no minority referral sources, had minority applicants apply for only 4

of 36 job openings, and failed to evaluate its EEO program); *Certain Broadcast Stations Serving Communities in the State of Arkansas*, 6 FCC Rcd 4938, 4939-40 (1991) (Commission noted that "it is apparent that the licensee in fact engages in significant efforts to recruit and hire minorities" and granted an unconditional license renewal where 6 of 7 Annual Employment Reports filed by licensee were inaccurate, the licensee contacted minority-specific referral sources for only 21 of 70 job openings, and only 4 of 70 hires (5.7%) were minority in a market with a 17.3% minority labor force); *Application of Group Six Communications, Inc.*, 7 FCC Rcd 1815, 1816 (1992) (FM license renewed for a full term and \$20,000 forfeiture and reporting conditions imposed where licensee "rarely activated its EEO program," reported no minority applicants, interviewees, or hires for any of its 26 job openings, failed to keep records necessary to assess its program, and failed to modify its EEO program until just prior to filing its renewal application); *Radio Seaway, Inc.*, 7 FCC Rcd 5965, 5968 (1992) (FM license renewed with reporting conditions where licensee failed to contact outside referral sources for 20 of 31 job openings, and failed to recruit for any job openings prior to the reporting year that preceded the filing of its renewal application); *Goodrich Broadcasting, Inc.*, 7 FCC Rcd 6655, 6656-57 (1992) (AM and FM licenses renewed with reporting conditions where licensee failed to keep any applicant flow data, thereby leaving it unable to determine the referral sources contacted for 29 of 42 job openings, failed to evaluate its EEO program, and appeared to have had no minority applicants in the interview pools for 35 of 38 job openings).

#### B. Issue 2 -- Lack of Candor

257. It has been concluded that the Church lacked candor, in violation of Section 73.1015 of the Rules, in describing the Stations' minority recruitment program in its 1989 renewal applications, and in informing the Commission that knowledge of classical music was a requirement for the position of salesperson at the FM station. This lack of candor warrants the imposition of a forfeiture in the amount of \$50,000.

258. Prior to 1986, the only appropriate sanction for a lack of candor such as that demonstrated in this case would have been denial of license renewal. However, in 1986 the Commission added to its rules Section 73.1015. It did so in order to allow greater flexibility to level sanctions short of disqualification. *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1233-34 (1986); see also *Proposals to Reform the Commission's Comparative Hearing Process*, 6 FCC Rcd 157, 164 (para. 51) (1990), and Section 1.229(f) of the Commission's Rules. In this connection, the Commission has stated that its focus in assessing the sanction due a licensee for the violation of its rules, including Section 73.1015, is the predictive value such misconduct has with respect to a licensee's future truthfulness and reliability. In making this predictive judgment, the Commission considers the willfulness of the misconduct, its frequency, and the licensee's overall record of compliance with the Commission's rules and policies. *Policy Regarding Character Qualifications, supra* at 1225-29.

259. Both the NAACP and the Bureau maintain that the Church's misconduct warrants the denial of the Stations' renewal applications. Their position must be rejected. While the Church's lack of candor is a serious matter, it is not sufficiently egregious so as to justify the "ultimate sanction" of denial of renewal. This is so because the

misconduct was largely the product of the actions of one individual, Mr. Stortz. There is no indication that Reverend Devantier, the Stations' CEO during the License Term, or Reverend Dr. Ralph Bohlmann, the President of the Church during the License Term, had any prior knowledge of the misconduct. Similarly, there was no evidence that Reverend Devantier or Reverend Dr. Bohlmann participated in the misconduct. The testimony of Reverend Devantier also reveals that he was genuinely embarrassed and troubled by the situation in which the Church found itself. He expressed sincere contrition, and his testimony in this regard was entirely credible. For his part, Mr. Stortz testified truthfully at the hearing, even when that testimony was likely to have had an adverse effect on the Church's case. It is highly unlikely, therefore, that the Church will deal with the Commission in the future in anything less than a fully forthright, candid, and truthful manner.

260. Moreover, the Church has been a Commission licensee for more than 70 years. Station KFUD(AM) went on the air in December 1924, and its first license was issued to Concordia Seminary in January 1925. Over the course of that 70-year period, the Stations have had a spotless record with the Commission. With the exception of this proceeding, the Stations have never been cited for any violations of the Commission's rules or policies. Thus, the Church's overall record of compliance has been exemplary. Viewed in this light, the Church's misconduct may be seen as an isolated occurrence, an aberration, confined to a single Commission investigation.

261. Under all of these circumstances, no useful purpose would be served by denying the Church's renewal applications. However, as noted above, the Church's misconduct was serious and warrants the imposition of a forfeiture in the amount of \$50,000 for its willful and repeated violation of Section 73.1015 of the Commission's Rules. *Dixie Broadcasting, supra* at 4404.

#### MOTION TO ENLARGE ISSUES

262. On June 20, 1994, the very day the hearing began, the NAACP filed a Motion to Enlarge, and for Injunctive Relief.<sup>28</sup> The NAACP seeks, *inter alia*, the addition of the following issues to this proceeding:

(3) To determine whether The Lutheran Church/Missouri Synod abused the Commission's processes by using a person under its control to obtain, by trickery and under false pretenses, the attorney work product of the NAACP's attorney, which work product constitutes virtually the NAACP's entire trial strategy; and

(4) To determine whether The Lutheran Church/Missouri Synod abused the Commission's processes by interfering with an NAACP witness and improperly attempting to induce such witness not to provide testimony in this proceeding.

For the reasons which follow, the NAACP's Motion will be denied.<sup>29</sup>

#### I. Requested Issue 3 -- Alleged "Theft" of Attorney Work Product

263. The NAACP argues that the Church used Mr. Lauher to obtain information regarding the NAACP's trial strategy, and that this constituted a "theft" of the work product of the NAACP's counsel. In support, the NAACP recites the following facts. The NAACP retained the services of Michael C. Blanton, a third-year law student, to conduct an interview of Mr. Lauher. Mr. Blanton called Mr. Lauher on or about May 19, 1994, and told Mr. Lauher that he worked for the NAACP's counsel and that the NAACP was "looking for witnesses to testify and give Declarations on behalf of the NAACP in its lawsuit against [the Church]." Mr. Lauher agreed to the interview, which took place on May 23, 1994. The interview was tape-recorded by Mr. Lauher after obtaining Mr. Blanton's permission. Mr. Blanton asked Mr. Lauher approximately 20 questions about the two memorandums he had written to Reverend Devantier. The questions had been prepared by the NAACP's counsel. After reviewing a lengthy memorandum from Mr. Blanton relating to the interview, the NAACP's counsel determined that Mr. Lauher "would not be a particularly useful witness." On the date the direct case exhibits were exchanged, the NAACP's counsel learned that Mr. Lauher was going to appear as a witness for the Church, and that Mr. Lauher's declaration had been executed on May 21, 1994, two days prior to the interview with Mr. Blanton. Mr. Lauher never informed Mr. Blanton that he had already given a declaration to the Church or that he would be a witness in their behalf. (Motion to Enlarge at pp. 2-5 and Annex 1.)

264. From this scenario, the NAACP alleges that Mr. Lauher was "in a difficult position" with the Church because he knew that his two memorandums "deeply incriminated" the Church. The NAACP maintains that Mr. Lauher was "in need of remaining in [the Church's] continued good graces" because he was "still in the market in the advertising business." The NAACP asserts that Mr. Lauher "evidently made a pact" with the Church pursuant to which he would renounce and repudiate his memorandums, interview with the NAACP, and "fraudulently pos[e] as a potential NAACP witness." The NAACP contends that Mr. Lauher was under the Church's control, "had to have" told the Church that he was meeting with Mr. Blanton, and made the tape recording "at [the Church's] direction." In this regard, the NAACP states that it would be

<sup>28</sup> An Opposition to Motion to Enlarge and Request for Injunctive Relief was filed by the Church on July 8, 1994; Comments on Motion to Enlarge and for Injunctive Relief were filed by the Bureau on July 8, 1994; a Motion for Acceptance of Reply *Nunc Pro Tunc* was filed by the NAACP on July 25, 1994; a Reply to Opposition to Motion to Enlarge was filed by the NAACP on July 25, 1994; and Comments on NAACP's "Motion for Acceptance of Reply *Nunc Pro Tunc*" was filed by the Church on August 3, 1994. In its Motion for Acceptance, the

NAACP requests that its Reply, which was filed one working day late, be accepted *nunc pro tunc*. Although the Church takes umbrage at the tone and certain language contained in the Reply, it does not oppose the acceptance of that pleading. Therefore, the Reply will be accepted.

<sup>29</sup> Those portions of the NAACP's motion which requested injunctive relief were taken up and ruled on at the June 20, 1994, hearing session. See Tr. 79-89, 93-100. Consequently, no further consideration will be given to those matters.

"amazing" if Mr. Lauher did not give the Church a copy of the tape. In addition, the NAACP claims that the written direct case testimony of Mr. Stortz and Reverend Devantier show that the Church "must have had and used" Mr. Lauher's tape recording. Further, the NAACP avers that its "trial strategy" was "embedded" within its questions for Mr. Lauher, and that this incident constituted a "theft" of its attorney's work product. The NAACP also suggests that attorneys in the law firm of Fisher Wayland Cooper Leader & Zaragoza, the Church's counsel, may have been implicated in "what amounts to a conspiracy to obstruct justice." (Motion to Enlarge at pp. 2, 5-7. emphasis omitted.)

265. In its Opposition, the Church states that, in preparing for the hearing, Kathryn R. Schmeltzer and Barry H. Gottfried, two of the Church's counsel, talked with many individuals whom the Church believed had knowledge of the facts relevant to the hearing issues. One of the individuals interviewed was Mr. Lauher. When it came time to select witnesses for the hearing, the Church decided that Mr. Lauher's testimony would be useful. Consequently, Ms. Schmeltzer and Mr. Gottfried obtained a declaration from Mr. Lauher on May 21, 1994, for its direct case presentation. On that date, Mr. Lauher informed the Church's counsel for the first time that he had agreed to talk to a representative of the NAACP.

266. After obtaining Mr. Lauher's declaration, the Church's counsel contacted Mr. Lauher by telephone to determine his availability for the hearing. Mr. Lauher told the Church's counsel during that conversation that he had talked to the NAACP's representative. Mr. Lauher reported that he had been asked whether he had been fired from his job at KFUD-FM because of the memorandums he had written on the station's employment practices, and that he had told the NAACP's representative that his dismissal was not connected with those memorandums. Mr. Lauher mentioned that he had taped the interview. There was no further discussion of the NAACP's interview.

267. Mr. Lauher arrived in Washington, D.C., at about 9:30 p.m. on Sunday, June 19, 1994, approximately 12 hours before the beginning of the hearing. At a meeting with Ms. Schmeltzer and Mr. Gottfried that evening, Mr. Lauher provided them with a transcript of the interview with the NAACP. Both counsel "glanced over" the 10-page transcript, noted the "routine nature" of the questions and answers, but did not discuss the contents of the transcript with Mr. Lauher. No further attention was given to the transcript until the next morning, when counsel for the NAACP raised the matter at the commencement of the hearing. (Opposition to Motion to Enlarge at Ex. A, declaration under penalty of perjury of Mr. Gottfried.)

268. The requested issue will not be added to this proceeding. Section 1.229(d) of the Commission's Rules requires that petitions to enlarge the issues be supported by "affidavits of a person or persons having personal knowledge" of the facts alleged therein. The NAACP's motion fails in this regard. Specifically, its key factual allegations that Mr. Lauher was under the Church's control, that he tape-recorded the interview "at [the Church's] direction," that he "evidently made a pact" with the Church, the nature of that "pact," and that the tape recording was used in connection with the direct case testimony of Mr. Stortz and Reverend Devantier, are supported by nothing more than pure, unadulterated speculation, conjecture, innuendo, and surmise. It is well settled that issues will not be

added on this basis. *E.g., Folkways Broadcasting Co., Inc.*, 33 FCC 2d 806, 811 (Rev. Bd. 1972); *West Central Ohio Broadcasters, Inc.*, 1 FCC 2d 1178 (Rev. Bd. 1965).

269. Moreover, the facts which were supported by sworn testimony at the hearing establish that Mr. Lauher was independent of the Church, and that there was no conspiracy to steal the work product of the NAACP's counsel or to obstruct justice. Thus, Mr. Lauher testified that he owned Station WRYT, Edwardsville, Illinois, and that his station did not do any business of any kind with the Church or the Stations. (Tr. 111-12.) Mr. Lauher testified that he was not a Lutheran. (Tr. 134.) Mr. Lauher testified that it was his idea to tape-record the interview with Mr. Blanton, and that no one at the Church suggested that he do so. (Tr. 127-28.) Mr. Lauher testified that he did not tell Mr. Stortz or Reverend Devantier that he had made the tape. (Tr. 131-32.) Mr. Lauher testified that he did not tell Mr. Blanton about the May 21, 1994, declaration he provided to the Church because "Mr. Blanton didn't ask" and "It didn't appear to be relevant at the time[.]" (Tr. 127.) Mr. Lauher testified that he personally prepared the transcript of the tape recording, that it was made at his own expense, and that Ms. Schmeltzer did not ask him to make the transcript. (Tr. 132-33.)

270. In addition, Mr. Stortz testified that, although he did not know of the Blanton-Lauher interview at the time of its occurrence, one of the Church's attorneys mentioned it to him prior to the time he signed his direct case testimony. However, the attorney did not tell Mr. Stortz what was said during the interview, and Mr. Stortz had never heard the tape recording or seen the transcript of that recording. (Tr. 460-63.) Similarly, Reverend Devantier testified that he had not heard the tape recording or seen the transcript of the Blanton-Lauher interview, and that neither the contents of the tape nor the transcript had been described to him. (Tr. 794.)

271. Further, while the Motion to Enlarge alleges the "theft" of attorney work product, the work product doctrine is not applicable under the circumstances surrounding this incident. This is so because the NAACP's questions to Mr. Lauher, a third-party, were not privileged. Mr. Lauher was neither a principal nor an agent of the NAACP; he was nothing more than a potential witness. No reasonable expectation of confidentiality attaches in such a situation. What occurred, therefore, was not the theft of attorney work product, but rather the voluntary disclosure by a third-party potential witness of his conversation with an NAACP representative, which conversation was tape-recorded with the NAACP's consent. Even assuming, *arguendo*, that the NAACP's questions to Mr. Lauher did reveal the NAACP's "trial strategy" and did constitute work product, any privilege which might have attached was waived when the questions were intentionally disclosed to an individual, such as Mr. Lauher, who was not a principal or an agent of the NAACP. Consequently, the NAACP interviewed Mr. Lauher, and asked its 20 questions, at its own peril. *See, generally, Data General Corporation v. Grumman Systems Support Corporation*, 139 F.R.D. 556 (D. Mass. 1991).

272. Finally, an analysis of the transcript of the Blanton-Lauher interview reveals that the NAACP's "trial strategy" could not possibly have been discerned from the questions Mr. Blanton asked Mr. Lauher. Indeed, nearly all of the questions Mr. Lauher was asked related to the two memorandums he wrote to Reverend Devantier, and the ques-

tions were both predictable and routine. Asking Mr. Lauher questions of that nature can hardly be described as disclosing the NAACP's "trial strategy."

## II. Requested Issue 4 -- Alleged Witness Interference

273. In its February 23, 1990, Opposition to Petition to Deny and Response to Inquiry, the Church stated that Reverend Otis D. Woodard, a Lutheran lay minister who was the director of Lutheran North St. Louis Outreach, had referred several minority applicants to the Stations. In its Motion to Enlarge, the NAACP argues that the Church contacted Reverend Woodard, "an NAACP witness," and attempted to induce him not to testify in this proceeding. The NAACP maintains that these contacts constituted an abuse of process. In support, the NAACP relies on the following facts. Mr. Stortz called Reverend Woodard on the morning of June 15, 1994, and offered to let him make public service announcements on the Stations. According to Reverend Woodard, Mr. Stortz also "inferred" the possibility of a future job at the Stations. That same afternoon, Reverend Woodard executed a declaration to be used in the NAACP's rebuttal case in which he stated that the Stations never approached him as a referral source for minority applicants. On June 17, 1994, Reverend Woodard received a second call from Mr. Stortz. Mr. Stortz told Reverend Woodard that whoever had told him that the Church had mentioned him as a minority referral source had been misinformed, and that it had been his former wife, Katherine Woodard, who had been the Stations' minority referral source.

274. From these facts, the NAACP contends that Mr. Stortz's contacts, taken together, were improper. Specifically, the NAACP asserts that the first call constituted "a tangible inducement not to come forward to be a witness for the other side," and the second call was "an implication that if Rev. Woodard testified, he would be embarrassed with questions . . . about his former wife." (Motion to Enlarge at pp. 11-12, Annex 5, and Annex 6.)

275. In a declaration appended to the Church's Opposition, Mr. Stortz states that in February 1994 he received a letter from Reverend Woodard, whom he had met several times before, expressing an interest in working on a regular basis as on-air talent at the Stations. Mr. Stortz interviewed Reverend Woodard for an on-air job on March 1, 1994. Reverend Woodard stated during the interview that he wanted "to be part of the KFUE family," that he wanted to "retire" at the Stations, and that his interest was based on the fact that he was a life-long Lutheran. Reverend Woodard left his "General Resume." Mr. Stortz told Reverend Woodard that he would be considered for an on-air job at the Stations as openings occurred. Several weeks later, Mr. Stortz received a message that Reverend Woodard had called him. He returned the call, but was unable to reach Reverend Woodard. Later that day, Reverend Woodard's wife called Mr. Stortz. When Mr. Stortz told her that he had received a message earlier in the day that Reverend Woodard had called, Reverend Woodard's wife said that she was sure the call was about Reverend Woodard's desire to work at the Stations. In May 1994, Mr. Stortz received another call from Reverend Woodard asking if he would be interested in receiving an "air check tape." Mr. Stortz said he would be happy to have it and Reverend Woodard delivered the tape to him at the Stations.

276. On June 15, 1994, Mr. Stortz received a telephone message from Reverend Woodard asking him to call Reverend Woodard "immediately." Mr. Stortz called and was told by Reverend Woodard that the NAACP had contacted him to discuss the Stations. Reverend Woodard wanted to know what it was about. Mr. Stortz told Reverend Woodard that the NAACP had raised an EEO matter against the Stations. The next day, June 16, 1994, Mr. Stortz called Reverend Woodard to ask how the interview with the NAACP had gone. Reverend Woodard stated that the NAACP had asked about "some referral source" and that he did not know what was meant by that. During that call, Reverend Woodard again reminded Mr. Stortz that he wanted to work at KFUE and to "retire" at the Stations. He did not tell Mr. Stortz that he had given a statement to the NAACP, nor did Mr. Stortz ask whether he had done so.

277. On June 17, 1994, at about 3:00 p.m. Central Time, Mr. Stortz telephoned Reverend Woodard in reference to his "referral source" comment of the previous day. Mr. Stortz told Reverend Woodard that the Stations' records indicated that his Outreach Ministry had been used as an employment referral source, and that the records showed that the specific person talked to at the Outreach Ministry was Kathy Woodard. When asked, Reverend Woodard stated that Kathy Woodard was his ex-wife, and that it was quite possible that his ex-wife would have handled a referral contact without discussing it with him. Mr. Stortz and Reverend Woodard continued to converse, and Mr. Stortz told him that he would be glad to air public service announcements for his organization if Reverend Woodard would send them over. According to Mr. Stortz, "[t]his was hardly unusual, particularly given [Reverend] Woodard's prior appearances on KFUE to promote his organization and its needs." During the call, Reverend Woodard reminded Mr. Stortz once again of his desire to work and "retire" at the Stations, and Mr. Stortz reiterated his earlier statement that he would be considered for any on-air openings as they arose. Mr. Stortz again did not ask whether Reverend Woodard had signed a statement for the NAACP, and Reverend Woodard did not tell him that he had done so.

278. At about 5:30 p.m. Central Time on June 17, 1994, subsequent to all of the conversations described above, Mr. Stortz learned for the first time that Reverend Woodard had in fact given a signed statement to the NAACP. Mr. Stortz had no further contacts with Reverend Woodard after that time. (Opposition to Motion to Enlarge at Ex. C.)

279. The issue requested will not be added. It is well established that the proponent of a motion to enlarge issues has the burden of coming forward with a *prima facie* showing in support of the requested issue. *Scott & Davis Enterprises*, 88 FCC 2d 1090 (Rev. Bd. 1982). The NAACP has failed to meet this standard. Put simply, no factual basis exists for the addition of Issue 4 since it does not appear that Mr. Stortz attempted to interfere with or improperly influence Reverend Woodard's testimony. Thus, Reverend Woodard's declarations do not state that Mr. Stortz made any reference in his telephone calls to the possibility of Reverend Woodard's testifying in this case. Similarly, those declarations do not state that Mr. Stortz attempted to dissuade Reverend Woodard from testifying, or that Mr. Stortz tried to influence his possible testimony.

280. Further, the declaration of Mr. Stortz indicates that it was Reverend Woodard, not Mr. Stortz, who first brought up the subject of employment at the Stations

during their telephone calls. The NAACP had the opportunity to challenge this assertion in its Reply to the Church's Opposition by providing a further declaration from Reverend Woodard. However, it did not do so. Therefore, Mr. Stortz's account of these aspects of the telephone conversations will be credited. Moreover, even assuming that Mr. Stortz initially raised the subject, the fact that he and Reverend Woodard discussed employment at the Stations during the calls in question does not establish that Mr. Stortz was attempting to influence or interfere with Reverend Woodard's testimony. This is so because Reverend Woodard had applied for employment at the Stations, had interviewed with Mr. Stortz, had discussed the matter with Mr. Stortz in several previous telephone calls, and the Stations had Reverend Woodard's resume and air check tape on file.

281. Next, the NAACP has provided no support for its contention that Mr. Stortz impliedly threatened Reverend Woodard with embarrassing questions about his former wife. On the contrary, Reverend Woodard did not even state in his declarations that he inferred this from his second conversation with Mr. Stortz. Consequently, the NAACP's argument must be rejected since it is based on nothing more than sheer speculation. *Folkways Broadcasting, supra; West Central Ohio Broadcasters, supra*. Finally, Mr. Stortz's offer to broadcast public service announcements for Reverend Woodard's Outreach Ministry does not appear to have been unusual, particularly since Reverend Woodard had previously appeared on KFUE to promote his ministry. Once again, the NAACP had the opportunity in its Reply to provide a declaration from Reverend Woodard disputing these facts, but failed to do so. In this connection, the mere opinion of the NAACP as to the significance of the facts alleged in its Motion to Enlarge is not a sufficient basis for the addition of issues. *Erway Television Corp.*, 2 FCC 2d 1037 (Rev. Bd. 1966).

#### ULTIMATE CONCLUSION

282. In view of all of the foregoing, it is ultimately concluded that the public interest, convenience and necessity would be served by a grant of the Church's applications for renewal of the licenses of Stations KFUE(AM) and KFUE-FM, Clayton, Missouri. However, it is also ultimately concluded that the Church violated Sections 73.1015 and 73.2080 of the Commission's Rules. Consequently, the Church's renewal applications will be granted subject to EEO reporting conditions, and a forfeiture in the amount of \$50,000 will be assessed against the Church.

Accordingly, IT IS ORDERED that the Motion for Acceptance of Reply *Nunc Pro Tunc*, filed by the NAACP on July 25, 1994, IS GRANTED, and the Reply to Opposition to Motion to Enlarge, filed by the NAACP on July 25, 1994, IS ACCEPTED.

IT IS FURTHER ORDERED that the Motion to Enlarge, and for Injunctive Relief, filed by the NAACP on June 20, 1994, IS DENIED.

IT IS FURTHER ORDERED that, unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules, the applications of

The Lutheran Church-Missouri Synod, for the renewal of the licenses of Stations KFUE(AM) and KFUE-FM, Clayton, Missouri, ARE GRANTED subject to the EEO reporting conditions specified herein.<sup>30</sup>

IT IS FURTHER ORDERED that The Lutheran Church-Missouri Synod SHALL SUBMIT four reports containing the following information, the first report being due six months after this Initial Decision becomes final, and the second, third, and fourth reports being due at six-month intervals thereafter:

- (a) a list of all persons hired as well as all persons who applied for each position filled (i) during the six months preceding the first report, and (ii) during the period between the first and second, second and third, and third and fourth reports, indicating their referral or recruitment source, job title, part-time or full-time status, FCC Form 395 classification, date of hire, sex and race or national origin;
- (b) a list of all employees as of the most recent payroll period prior to each filing date, by job title with part-time or full-time status indicated (ranked from the highest paid to the lowest paid), FCC Form 395 classification, date of hire, sex and race or national origin;
- (c) a narrative statement detailing the Stations' efforts to recruit minorities for each position filled during the specified periods, including identification of sources used, and indicating whether any of the applicants declined actual offers of employment; and
- (d) any additional information the licensee believes relevant regarding the Stations' EEO performance and efforts.

IT IS FURTHER ORDERED that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, this Initial Decision SHALL CONSTITUTE an Order of Forfeiture in the amount of \$50,000.

IT IS FURTHER ORDERED that, within 30 days after the date this Initial Decision becomes final, The Lutheran Church-Missouri Synod SHALL PAY the full amount of the forfeiture by check or money order made payable to "Federal Communications Commission." The remittance should identify the payor, be marked "NAL Control No. FCC 94-23; NOF Control No. FCC 95D-11," and be sent to the following address:

Federal Communications Commission  
Post Office Box 73482  
Chicago, IL 60673-7482

FEDERAL COMMUNICATIONS COMMISSION

Arthur I. Steinberg  
Administrative Law Judge

<sup>30</sup> In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall

become effective 50 days after its public release pursuant to Section 1.276(d) of the Rules.