**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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In re Applications of

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| The Lutheran Church/Missouri Synod | ) | MM Docket No. 95-[illegible] |
| | ) | |
| For Renewal of Licenses of Stations KFUO/KFUO-FM, Clayton, Missouri | ) | File Nos. BR-890829VC<br>BRH-890929VB |

TO THE REVIEW BOARD

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**EXCEPTIONS OF THE MISSOURI STATE CONFERENCE OF BRANCHES OF THE NAACP, THE ST. LOUIS BRANCH OF THE NAACP AND THE ST. LOUIS COUNTY BRANCH OF THE NAACP**

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1. The Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP and the St. Louis County Branch of the NAACP ("NAACP") respectfully request the Board to overrule the I.D., FCC 95D-11 (released September 15, 1995).

## I. STATEMENT OF THE CASE AND QUESTIONS PRESENTED FOR REVIEW

2. The I.D. found that KFUO discriminated on the basis of religion but not race. It also found that KFUO committed multiple deliberate misrepresentations but held them nondisqualifying.

3. The ALJ struck all five NAACP experts, struck the NAACP's star witness, and prevented the NAACP from obtaining, inter alia, any germane internal documents written by KFUO managers about KFUO's minority employees. While these rulings rendered the outcome a foregone conclusion, the ALJ made three major additional errors:

4. First, in concluding that KFUO did not discriminate by race, the ALJ misunderstood the nature of discrimination and overruled the HDO's holding that KFUO's conduct was "inherently discriminatory."

5. Second, in a nondiscursive footnote, the ALJ dismissed evidence of dozens of misrepresentations on notice grounds, although every licensee is always on notice to tell the FCC the truth.

6. Third, contrary to years of precedent, the ALJ held that repeated material misrepresentations and repeated acts of deliberate discrimination do not require nonrenewal.

7. The reviewable questions are:

A. Was so much essential evidence ruled nondiscoverable, ruled to be nonadmissible, or ignored that it was impossible to render complete findings and conclusions on the specified issues?

B. Did KFUO discriminate on the basis of race?

C. Did KFUO commit deliberate misrepresentations and otherwise exhibit bad character?

D. Are discrimination and misrepresentations disqualifying?

## II. ARGUMENT

### A. The Trial Record Is Beyond Repair

8. The FCC has not conducted a contested civil rights trial in over a decade. After deregulation, EEO is all that's left of the public interest standard for radio applicants. Thus, it was essential that this trial match federal EEO trial standards.[1/] Instead,

> [a] curious neutrality-in-favor-of-the-licensee seems to have guided the Examiner in his conduct of the evidentiary hearing.

Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543, 547 (D.C. Cir. 1969) ("UCC II").[2/] The ALJ's evidentiary rulings fell well outside the boundaries of his discretion.

9. First, he struck all five NAACP experts. KFUO's prehearing defense was that few Blacks have the skills to work at a classical music station because few Blacks listen to classical music. Using admirable understatement, the HDO, 9 FCC Rcd 914, 923 ¶25 (1994), found this "inherently discriminatory." To show that KFUO's statement fell far outside the range of nonracist legal argumentation, the NAACP offered the testimony of five distinguished St. Louis African American classical music experts. They each stated that finding qualified African Americans would have been easy; most of them named several outstanding candidates. However, the ALJ struck all five on relevance

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1/ The EEOC itself expects as much from the FCC. Its worksharing arrangement with the FCC is predicated on the close congruence between Title VII and 47 CFR §73.2080(a). FCC/EEOC Agreement, 70 FCC2d 2320, 2330 (1978).

2/ In UCC II, the Examiner deemed UCC's seven day monitoring survey "worthless and therefore completely discounted" in evaluating a fairness complaint; cut off testimony about a fairness violation only to later hold that "[t]here is not one iota of evidence in the record that supports any such allegation" and belittled evidence of racial slurs by a WLBT-TV commentator because the witness did not know the precise time the slurs occurred. Id. at 547-48. Holding that these rulings reflected "a suprisingly strict standard of proof [with] plain errors in rulings and findings", the Court concluded that "it will serve no useful purpose to ask the Commission to reconsider the Examiner's actions...[t]he administrative conduct reflected in this record is beyond repair." As shown infra, the record contains the same kind of mistakes discussed in UCC II, but many more of them.

and competence[3/] grounds (see Tr. 351, 354, 356, 357, and 399, striking NAACP Exs. 1-5)[4/] and also struck a supportive exhibit[5/] -- then later treated the issue as highly relevant by holding that the FCC had invited KFUO's argument. I.D. ¶199. He overruled the HDO's finding that KFUO's argument was "inherently discriminatory," finding that there was not a "scintilla of evidence" of discrimination. I.D. ¶194.

10. Second, the ALJ refused to hear the testimony of the NAACP's star witness, Cari Perez O'Halloran. Tr. 1085 (rejecting NAACP Ex. 14). Her testimony, proffered the last day of the trial, was rejected because the ALJ felt the NAACP could have located her earlier because it had been provided her last known St. Louis address in discovery. Yet the NAACP had very good cause for proferring her testimony late,[6/]

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3/ Seldom do so many high quality good samaritan witnesses come forward to testify in an FCC hearing. These witnesses included a Fulbright Scholar who is the Concertmaster of the St. Louis Symphony (NAACP Ex. 1); the Director of the University of Missouri-St. Louis' University Chorus (NAACP Ex. 2); the Director of the College Choir at the mostly African American Harris-Stowe State College (NAACP Ex. 3); the President of the St. Louis Branch of the National Association of Negro Musicians (NAACP Ex. 4) and the Chairperson of the St. Louis NAACP's annual classical music youth competition (NAACP Ex. 5). The worst that can be said is that no NAACP expert has worked in St. Louis classical radio. That is is not surprising given KFUO-FM's hiring practices.

4/ In fairness, it must be said that the relevance of a proffer may not be completely clear to a finder of fact until he is writing his decision. But that is all the more reason to err on the side of admissibility rather than taking so extreme a step as striking all of one side's experts and its star witness. As Judge Steinberg correctly recognized when making an unrelated ruling, an erroneous interlocutory ruling which results in there being too much evidence in the record can be cured by a reviewing tribunal; it may simply disregard the evidence. MO&O, FCC 94-244 (released April 8, 1994) ¶3. However, erroneous rulings barring discovery or excluding relevant and decisionally significant evidence cannot be cured without a second trial.

5/ Tr. 1058 (rejecting NAACP Ex. 61, which contained numerous classical music columns in St. Louis' largest Black newspaper.)

6/ A courtroom had been reserved for St. Louis for three days the following week, but the St. Louis trip was cancelled because the NAACP's experts had been stricken. Ms. O'Halloran was willing to be deposed or crossexamined at once telephonically. Thus, at most, the effect of not allowing Ms. O'Halloran to testify was not to extend this four year old case for one more of the three days the trial had originally been scheduled for anyway.

she was the only late-proferred witness, and there was no good reason not to hear her testimony.7/ Since she was the only minority hired in a significant position during the license term, the record could not have been complete without her testimony.8/

11. Third, the ALJ refused on relevance grounds to allow the production of documents written by KFUO managers about the stations' minority employees, or by the minority employees about their working environment at KFUO, or concerning rates of compensation; or white employees' similar files for comparative purposes, on the basis that they would not lead to the discovery of admissible evidence.9/ Thus, NAACP couldn't determine why the Blacks KFUO hired were the only ones hired, why all of them worked in subordinate jobs, whether they were

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7/ Finding Ms. O'Halloran was "dumb luck." She had married, had changed her name and moved to Tampa.

8/ Mrs. O'Halloran, who worked at KFUO from February, 1988 to February, 1989, would have testified that "[a] background in classical music, in itself however, is not an advantage or a needed requirement to sell [classical] radio time"; that "[a]lthough I am Hispanic, I don't feel that KFUO hired me or actively pursued me for the sales position because of my heritage or because they wanted to hire a minority"; that thanks to her sales experience, she had to train two White KFUO salespeople because "neither of them had a background in selling commercial airtime for a radio station, much less a background in classical music"; and that "[c]ontrary to KFUO's assertions of running a radio station where people are treated equally, during my time at the radio station, I felt that women, in general, had little chance for advancement into positions of management or authority. Also, I can never recall a black person working in sales or management for whatever reason. Nor can I ever recall a black person being interviewed for a job at KFUO." See NAACP Ex. 14. This testimony squarely contradicts the ALJ's conclusion that KFUO didn't discriminate and that KFUO's employment of Ms. O'Halloran shows KFUO practiced affirmative action. See I.D. ¶¶194, 196.

9/ See Petitioners' Initial Request for Production of Documents, filed March 16, 1994 ("NAACP Production Request"), at 6-8 (Requests 12, 17 and 30) and Motion to Compel Production of Documents, filed April 7, 1994 ("Motion to Compel") at 4-7, denied by MO&O, FCC 94M-282 (released April 21, 1994) ("MO&O") at 2; ALJ's oral ruling during the Deposition of Rev. Paul Devantier, 5/19/94, Tr. 81-94.

10/ KFUO opposed other production requests on the basis that none of the documents sought existed, but KFUO never denied that these documents existed. Indeed, it is likely that KFUO's unsettling assertions about Blacks and classical music (see pp. 6-7 infra) were said in earshot of someone not controlled by KFUO who would have been troubled by them. NAACP was denied the discovery tools it needed to find such persons.

treated or paid equally to whites, why they were never promoted, or what KFUO managers thought of them.10/ In any other EEO case, these documents would have been produced routinely. Memos exchanged between employer and employee at time of termination, and personnel file memoranda containing the contemporaneous thoughts of white managers about minority employees, are almost always the smoking guns which make or break employment discrimination cases or disclose previously unknown witnesses who do.11/

12. Fourth, NAACP was prevented from obtaining documents filed by KFUO with other agencies on matters relating to race, color, sex, national origin, religion or age on the theory that such documents would "not appear reasonably related to the discovery of admissible evidence." See NAACP Production Request at 8 (Request #26), Motion to Compel at 7, MO&O at 2. These documents were critical to a test of their policies. See, e.g., Fox Television Stations, Inc., 10 FCC Rcd 8452, 8519-22 (1995) ("Fox") (disparities between FCC and SEC filings deemed relevant.)

13. Although each of these proffers (except Ms. O'Halloran's testimony) was rejected on relevance grounds, conclusions adverse to

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10/ The ALJ's suggestion (Devantier Dep. Tr. 91) that the NAACP could contact the minority employees to see if they were happy with their experience at KFUO reflects his lack of understanding of how discrimination works. While a discriminator doesn't tell minorities what he think of them, discriminators often commit these thoughts to writing.

11/ Indeed, the only occasion in which the FCC has ever found a broadcaster to have discriminated was in Catoctin Broadcasting Corp. of New York v. FCC, 4 FCC Rcd 2553, 2554-55 (1989), recon denied, 4 FCC Rcd 6312 (1989), aff'd per curiam by Memorandum, No. 89-1552 (released December 18, 1990) ("Catoctin"). Like KFUO, the licensee in Catoctin piously disclaimed any discriminatory intent. Catoctin shows how powerful a role can be played in a discrimination case by witnesses the licensee does not control. In Catoctin, a well qualified Black woman was sent away from the station by its owner, who called the referring agency and said "don't you have any white girls to send me?" and "she would make charcoal look white." The licensee went to hearing and lost its license because the referring agency's caseworker had the presence of mind to put her supervisor on the line, and the licensee was stupid enough to repeat his "charcoal" statement verbatim to the supervisor.

NAACP were reached on the very issues addressed in each of them.

14. In addition, the ALJ admitted, then disregarded, five critical and highly relevant NAACP exhibits. These exhibits showed that KFUO waited until the NAACP filed its petition to deny to contact St. Louis' largest Black newspaper and a Black Lutheran community organization about job openings (NAACP Exs. 10, 11 and 15); that KFUO's contentions that it's hard to find "qualified" minorities are belied by the success in hiring minorities enjoyed by every other comparable commercial classical station in the United States (NAACP Ex. 21) and that relatively few KFUO-FM commercial accounts are classical music oriented (NAACP Ex. 65).

15. Judges have wide discretion to regulate trials, but this was far from a fair exercise of discretion. The trial did not even come close to the standards of discovery and admissibility developed by the federal courts in civil rights cases over the past thirty years.

**B. KFUO Committed Race Discrimination**

16. The HDO, 9 FCC Rcd at 924-25 ¶¶25-26, found that KFUO's policies were "inherently discriminatory."

17. KFUO had the burden of proof to show that its policies and practices were nondiscriminatory. Id. at 926 ¶33; I.D. ¶2.

18. Nonetheless, the ALJ concluded that there was "not a scintilla of evidence" of discrimination. I.D. ¶¶194, 254. He based this astonishing conclusion on eleven errors or omissions, each of which reflects deep confusion about what discrimination is and how discriminators implement discrimination and evade detection.

19. First, the ALJ found no discriminatory intent in KFUO's suggestion that it should be excused from having hired no Blacks (except as secretaries and janitors) because of a classical music "requirement." I.D. ¶197. He has missed the point: there was no

such "requirement" at all (I.D. ¶136-168), and even had there been such a requirement, KFUO could have found well qualified Blacks with minimal effort -- as the NAACP's five experts would have testified if they had been permitted to do so. See p. 2-3 supra. KFUO's Blacks-don't-listen-to-classical-music argument was invented for only one purpose: to excuse KFUO's hiring of Whites only for years. In addition to being a fraud, the argument is "inherently discriminatory" on its face, as the Commission realized. Unfortunately, the ALJ's holding that this isn't a "scintilla" of evidence of discrimination purports to overrule the HDO.[12/] The suggestion that the FCC actually "invited" this racist statement is just astounding.[13/]

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12/ An ALJ cannot overrule an HDO absent "new facts or circumstances. Atlantic Broadcasting Co. (WUST), 5 FCC2d 717, 720 (1966). The HDO is the law of the case. The ALJ's only duty was to determine whether the racist statements were attributable to KFUO, and, if they were, deny the applications.

13/ EEO Processing Guidelines, 79 FCC2d 922, 932 (1980), cited in the I.D. at §199, certainly never invited this argument -- especially to justify a record of zero protected group hires. After rejecting the NAB's argument for a "skills availability" test (an argument which never suggested that skills availability should be determined by a station's audience composition), the Commission conceded only that "there are certain highly specialized areas of broadcast industry employment in which few women and minorities have as yet acquired the requisite professional skills. This is the case particularly as to college graduate electronic engineers. The 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. Evidence of efforts at recruitment should also be presented. The Commission expects that the cases in which such a showing can properly be made will be few" (emphasis supplied). Nor did any of the cases cited at I.D. ¶198 "accept" this argument. Florida NAACP v. FCC, 24 F.3d 271 (D.C. Cir. 1994) involved demographic factors (commuting distance, agricultural employment) affecting who should be included as a member of the pool, not objectionable racial stereotypes about the "qualifications" of those who are acknowledged to be members of the pool. See also Sun Mountain Broadcasting, Inc., 9 FCC Rcd 2124, 2125-26, 2126 n. 11 (1994) (high school diplomas); San Luis Obispo Limited Partnership, 9 FCC Rcd 894, 903 n. 20 (1994) (no specific factor associated with high skills and no suggestion of a skills/race nexus) Winfas, Inc., 5 FCC Rcd 4902, 4902-03, 4904 n. 7 (1990), recon. denied, 8 FCC Rcd 3897 (1993) and Delaware Broadcasting Co., 58 RR2d 1297, 1299 n. 6 (1985) the Commission expressly rejected the suggestion that a country-western format was relevant. Voice of Charlotte Broadcasting Co., 77 FCC2d 299, 300 (1980) preceded the supposed "invitation" in EEO Processing Guidelines.

20. Second, the ALJ treated the fact that no Blacks were rejected for want of a classical background as affirmative evidence of nondiscrimination. I.D. ¶197. This was a nonsequitur. No Blacks applied for nonsecretarial jobs. Tr. 514, 820, 822-26, 880.

21. Third, the ALJ found that KFUO couldn't have discriminated because nobody complained. I.D. ¶194. Apart from the fact that no discovery was permitted to determine whether this was even true,[14/] this astonishing holding ignores thirty years of civil rights law holding that discrimination commonly involves practices aimed at groups rather than at specific individuals.[15/] Discrimination frequently does not give rise to individual complaints because of fear of retaliation, because the victims are unaware of what's been done to them,[16/] or because the discriminatory policy is so obvious that potential employees don't waste time applying for work.[17/] Thus, the

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14/ See discussion at pp. 4-5 supra.

15/ See, e.g., Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973).

16/ "Discrimination may be a subtle process which leaves little evidence in its wake." Bilingual Bicultural Coalition on the Mass Media v. FCC, 492 F.2d 656, 659 (D.C. Cir. 1974). For example, in this case, Rev. Devantier could recall no letter to a nonselectee for a job which notified that person of the reason he or she was not chosen. Tr. 813. Thus, no applicant could have known that she was subjected to discrimination. A thorough discussion of the many procedures KFUO used to keep minorities unaware of job openings is provided in NAACP F&C, pp. 50-59.

17/ Community reputation reinforces discrimination. Black diners know, and avoid, restaurants that seat Blacks by the kitchen. In the close-knit radio industry, Black professionals are well aware which stations have never hired Blacks. Not surprisingly, they don't waste time filing futile job applications. If a Black non-Lutheran had mistakenly walked into KFUO seeking employment, she would have seen Blacks holding no responsible positions. She would have seen openly discriminatory position guides posted on the wall. She might have been handed an application form which, unlike virtually every employment application form used anywhere else, contained no EEO notification but instead inquired into her religious beliefs and expressly advised her that if she wasn't a Lutheran she could not expect "preference" for a job. Mercifully, she might not have been told that KFUO defined her qualifications for employment based on a false racial stereotype about her private choice of a musical preference, a qualification not used for those who don't look like her. [fn. continuned on p. 9]

I.D. simply rewards a discriminator for being clever enough not to put a sign on the door announcing its discriminatory policy.[18]

22. Fourth, the ALJ relied on KFUO's hiring of secretaries as evidence of a lack of discriminatory intent.[19] I.D. ¶196. Actually, the opposite inference was compelled, especially where KFUO harbored stereotypes about Blacks' classical abilities. The hiring of Blacks in subordinate positions exclusively is hardly evidence that Blacks would have been considered for responsible positions.

23. Fifth, the ALJ erroneously read into KFUO's hiring of a Hispanic woman a desire to hire Blacks. I.D. ¶196. That is a reach. Recall that KFUO's stereotype about classical music addressed Blacks specifically. HDO, 9 FCC Rcd at 923 ¶26.[20] Minorities are not fungible, and animus against one minority group is often specific to that group. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 506 (1989) (remedial minority contracting program was not narrowly tailored when applied to racial groups not shown on the record to have been victimized by discrimination specific to their group.)

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17/ [continued from p. 8] Nor would she have been informed that the only surefire ways to get a job at KFUO were to enroll in 99% White Concordia Seminary or to marry a Concordia student. See discussion in NAACP F&C ¶¶110, 51-65, 152-53, 250-278.

18/ California Renewals, 8 FCC Rcd 417 (1993) and CBS, Inc., 88 FCC2d 639 (1981), relied on in the I.D. at ¶194, are inapposite. Those are predesignation cases, where the burden is on the petitioner and the absence of complaints may be used as a defense to the argument that discrimination did occur. But where, as here, the Commission has already designated a discrimination issue for hearing and assigned the burden to the applicant, the absence of complaints cannot be converted into an affirmative showing leading to the inference that discrimination did not occur.

19/ The ALJ's refusal to allow access to personnel files patently obstructed the search for truth on this critical point. See pp. 5-6 supra.

20/ Cari Perez O'Halloran, the Hispanic woman hired as a salesperson, did not feel she was hired because she was a minority, and she was troubled by the absence of Black workers or interviewees. NAACP Ex. 14 (rejected at Tr. 1085).

24. Sixth, the ALJ failed to draw adverse inferences of likely discrimination from the statistical record[21/] -- the bread and butter of EEO jurisprudence for years.[22/] In cases concerning race discrimination, "statistics often tell much and Courts listen." Alabama v. U.S., 304 F.2d 583, 586 (5th Cir.), aff'd, 371 U.S. 37 (1962). "[S]tatistical evidence of an extremely low rate of minority employment could constitute a prima facie showing of discrimination." Stone v. FCC, 466 F.2d 331 at 329-330 (D.C. Cir. 1972).

25. Seventh, the ALJ failed to draw any adverse inference from KFUO's failure to comply with the Commission's incredibly moderate affirmative recruitment requirements. Deliberate and systematic failure to comply with an affirmative action plan is strong evidence of an intent to practice discrimination. See Craik v. Minnesota State University Board, 731 F.2d 465, 472 (8th Cir. 1984)[23/] The point of

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21/ This is puzzling, because the ALJ has not hesitated to draw statistical inferences in the past. See Dixie Broadcasting, Inc., 8 FCC Rcd 4386, 4404 ¶133 (ALJ, 1993) (crediting licensee for exceeding 100% of parity in overall hiring).

22/ That record could not have been more extreme: KFUO hired no African Americans except as secretaries, receptionists or janitors; KFUO did not even receive an application from an African American except for a position as a secretary, receptionist or janitor. In no case did an African American compete against more than token White opposition for a job -- showing that the receptionist, secretarial and janitor jobs for which African Americans were considered were essentially set aside for them. See KFUO Ex. 4, Tab 6. No more complete shut-out of African Americans from broadcast opportunity has appeared in the Commission's annals in this generation. See discussion in NAACP F&C ¶¶43-47. Extreme patterns of employing only Blacks in low-skill jobs and only whites in high-skill jobs compel an inference of discrimination. See, e.g., U.S. v. Hayes International Corp., 415 F.2d 1038 (5th Cir. 1969).

23/ See also Garland v. USAir, 767 F.Supp. 715, 726 (W.D. Pa. 1991). At a minimum, the ALJ should have considered the provative value of such evidence. Gonzalez v. Police Dept., City of San Jose, California, 901 F.2d 758 (9th Cir. 1990); Yatvin v. Madison Metropolitan School District, 840 F.2d 412, 415-416 (7th Cir. 1988); Taylor v. Teletype Corp., 648 F.2d 1129, 1135 n. 14 (8th Cir.), cert denied, 454 U.S. 969 (1981); Chang v. University of Rhode Island, 606 F.Supp. 1161, 1183 (D.R.I. 1985).

Craik is that when affirmative action compliance is ministerial and is still deliberately ignored, the employer is probably trying to keep minorities out. To comply with the affirmative recruitment obligations of §§73.2080(b) and (c), all KFUO had to do was send letters to a few organizations when jobs were open, and say in its advertising that it's an equal opportunity employer. What could possibly have been easier? Instead, KFUO advertised for jobs three times without an EEO notice. I.D. ¶80. As for minority recruitment, KFUO did virtually nothing.[24/] I.D. ¶210.

26. Eighth, the ALJ credited KFUO, through Lauher, with making a "good faith attempt" to correct its deficiencies. There was no such correction. All Lauher did was send a condescending, dishonest, one-shot letter to a handful of organizations and colleges.[25/] I.D. ¶119. After firing Lauher, KFUO didn't even bother sending more of those letters, and it did nothing else either until the Petition to Deny was filed. Then, in a flurry of activity in the last two days of the license term, KFUO set aside two low level jobs for Blacks. After that -- even while under investigation! -- KFUO continued to prevent

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24/ An indication of how hard KFUO tried not to do affirmative recruitment was its failure even to recruit minorities from the Lutheran Church's own Commission on Black Ministry. Although KFUO wasn't ashamed to have the Commission's Director, Rev. Bryant Clancy, testify at the hearing, KFUO thought so little of him that it never asked him to refer Black Lutherans to work at the stations. Tr. 718-20 (Testimony of Rev. Clancy).

25/ Lauher's letters did not notify the universities and personnel agencies of any actual jobs. Instead, the letters said that KFUO would be contacting them as openings arise -- which never happened. I.D. ¶122. The letters enclosed an insulting "response form" asking the recipient "to acknowledge that I have received a letter from Station KFUO-FM seeking female and minority referrals for job openings at the station." Not surprisingly, the letters did not yield any minority referrals; any self respecting civic organization job placement counsellor would have thrown such a letter in the garbage. The letters' only true purpose was to save the licenses.

Blacks from learning of job openings.[26/]

27. Ninth, the ALJ failed to consider that KFUO's dozens of EEO-related misrepresentations (discussed at pp. 13-17 supra) constitute overwhelming evidence of discriminatory intent. See, e.g., Beaumont NAACP v. FCC, 854 F.2d 501, 508 (D.C. Cir. 1988). These misrepresentations are astounding considering their source: a very experienced, sophisticated, long tenured licensee, and a church at that -- the type of licensee the FCC would least expect to lie. After 70 years, KFUO knew very well that the very basis for regulation is the truthfulness of licensees' reports, since the FCC has neither the time nor the resources to look behind every licensee's every statement to independently ascertain its truthfulness.[27/]

28. Tenth, the ALJ failed to consider that discriminatory intent can be inferred from pretextual excuses. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 255 and n. 10 (1981).[28/]

29. Eleventh, the ALJ relied on the parent religious body's liberal politics and the private life of a church official as evidence of the

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26/ In 1991, KFUO did not contact minority sources, although it filled at least two positions that year -- an AM announcer and a secretary. MMB Ex. 6, p. 5; (KFUO used the Lutheran Employment Project in 1991 for a secretarial but not an announcer vacancy.) Continuing through June, 1994, other than the secretary/receptionist and janitor positions filled in January, 1990, KFUO never placed an ad in the St. Louis Sentinel. NAACP Ex. 10.

27/ These misrepresentations came in the face of an EEO Branch investigation which involved an unprecedented four inquiry letters. Imagine the Commission having to write four letters to every renewal applicant to get at the truth. It would be doing nothing else.

28/ As the NAACP F&C explains in detail, KFUO trotted out virtually every pretext known to EEO law: our managers turned over (see NAACP F&C ¶¶168-202); we had no money (see NAACP F&C ¶¶159-167); we didn't pay much (see NAACP F&C ¶¶61-65); our lawyer didn't stop us (see NAACP F&C ¶¶203-217); Blacks don't listen to our stations anyway (see NAACP F&C ¶¶250-278); you have to be a Lutheran to answer our phones properly (see NAACP F&C ¶¶70-107); we get free rent from a 99% white school (see NAACP F&C ¶¶51-60). There was neither substance nor evidence supporting any of these pretexts.

church subsidiary's lack of discriminatory intent.[29] How the ALJ could find the parent body's liberal politics and the race of a church official's children decisionally relevant, while finding the testimony of all five NAACP experts and the only minority nonsecretarial employee KFUO hired too irrelevant even to admit for findings and conclusions, we do not understand at all.

30. These eleven errors and the discovery errors discussed at pp. 2-6 supra reduced this to a routine affirmative action forfeiture case. That explains ¶256 of the I.D., a Brandeis Brief of nonhearing cases imposing forfeitures for not recruiting minorities. That's the wrong line of cases. Those licensees didn't lie or discriminate.[30]

**C. KFUO Committed Dozens Of Disqualifying Acts**

31. The I.D. found KFUO to have misrepresented the Stations' recruiting program in their 1989 renewal applications, and in informing the Commission that classical music knowledge was a requirement for sales positions. I.D. ¶223.

32. But there was so much more. KFUO committed material misrepresentations of elephantine weight and rabbitlike numerosity

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29/ The ALJ's suggestions that church politics and the family life of a church employee have anything to do with this case are shocking, especially in light of his rulings that other internal church business, which was related to EEO (e.g., KFUO employees' writings about KFUO minority employees) have nothing to do with this case. See pp. 4-5 supra. Nothing is more private and less deserving of state involvement than the race of one's loved ones. Loving v. Virginia, 388 U.S. 1 (1967). People have children for a wide variety of reasons, none of which is any of the FCC's business. The state may infer not a whisper from a person's choice of whom to love.

30/ Ironically, having cited four forfeiture cases, and having concluded that KFUO had grossly violated 47 CFR §73.2080(b) and (c), the ALJ did not explain why he assessed no EEO forfeiture and awarded full term renewals. Although these penalties are arguably redundant when renewal is denied, NAACP preserves its objection to fulltime renewals, and to renewals without $250,000 forfeitures for each of KFUO's proven violations of all twelve sections of the affirmative action sections of the EEO Rule. Those violations are explained in detail in NAACP F&C, pp. 128-144.

during the investigation and hearing. See NAACP F&C, pp. 93-127, listing 71 such examples, including by way of illustration:31/

> Misrepresentations #14-15. KFUO's 1982 and 1989 renewal applications state that "[w]e deal only with employment services, including state employment agencies, which refer job candidates without regard to their race, color, religion, national origin or sex." MMB Ex. 1, p. 6; KFUO Ex. 4, Tab 16, p. 7. As shown at KFUO Ex. 4, Tab 6, KFUO did not deal with secular employment services. KFUO Ex. 4, Tab 6. There is no evidence that it ever told a state employment agency that it had a job vacancy. Id.
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> Misrepresentation #21. KFUO's December 29, 1989 EEO Supplement stated that KFUO "has created a new policy of advertising all job openings in the St. Louis Argus, the local newspaper with the highest black readership in St. Louis." MMB Ex. 2, p. 5. Actually, the Argus was only used for two lower level jobs during the last week of the license term. MMB Ex. 6, pp. 4-5; KFUO Ex. 4, p. 15 and Tab 9.
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> Misrepresentation #22. KFUO's December 29, 1989 EEO Supplement stated that KFUO had instituted a "data form" which "provides information concerning the sex and race of the applicant, and disposition of the application." MMB Ex. 2, p. 6; the form itself is at MMB Ex. 2, pp. 11-14. The form carries the notation at its foot, "Effective July, 1989." Yet KFUO Manager Dennis Stortz knew the form was never used. Tr. 618.
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> Misrepresentation #46. KFUO's February 23, 1990 Opposition to Petition to Deny stated that "KFUO has drawn on multiple referral sources throughout its license term." KFUO Ex. 4, Tab 7, p. 16. KFUO knew that this was not true. KFUO Ex. 4, Tab 6.
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> Misrepresentations #55-57. Three KFUO pleadings referred to the arrangement with Concordia Seminary as an exchange of training for rent. February 23, 1990 Opposition, KFUO Ex. 4, Tab 7, p. 17; May 12, 1992 Letter, MMB Ex. 6, p. 3; September 21, 1992 Motion to Strike, MMB Ex. 11, p. 20. However, KFUO's employees are themselves employees of the International Center, which is the Lutheran Church's main headquarters. MMB Ex. 14, p. 24, n. 6; see also MMB Ex. 11, p. 12. The "rent free" theory was ridiculous. The Lutheran Church could hardly owe itself rent.
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> Misrepresentation #67. According to Stortz, the Stations "did little or no employment advertising during the first several years of the License Term" because the stations "struggled financially throughout the license term." KFUO Ex. 4, p. 6. As discussed at NAACP F&C ¶¶159-166 supra, the stations did not "struggle financially." Stortz admitted that KFUO could have afforded postage stamps to send job notices to community groups. Tr. 486-87.

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31/ The misrepresentations occurred in every context: statements in the 1982 applications which were never amended when they were clearly inoperative; statements in the 1989 applications which were not true during the preceding year and were not followed during the remainder of the license term; statements in response to the Petition to Deny; statements in response to the EEO Branch's investigation; and statements in testimony. None was made by counsel without the knowledge of KFUO officials.

Misrepresentation #69. One reason Stortz gave for placing ads in African American newspapers in the last month of the license term was that "[w]e began to recruit more vigorously." Tr. 544. However, KFUO had not begun "to recruit more vigorously." See NAACP F&C, p. 60, Table 5 (summarizing KFUO Ex. 4, Tab 6).

Misrepresentation #70. Stortz maintained that KFUO-FM had "made a concerted effort to hire a minority salesperson and did in fact hire Caridad Perez, a Hispanic female, in March 1988." KFUO Ex. 4, p. 12. There was no such "concerted effort." For the position filled by Perez, no recruitment source was contacted; Perez' resume was on file. KFUO Ex. 4, Tab 6, p. 5.

33. In some cases, the ALJ considered and erroneously rejected allegations of misrepresentation.[32/] But the ALJ dismissed most of the NAACP's alleged misrepresentations in a nondiscursive footnote, holding that KFUO had no notice that it might have to answer for these misrepresentations. I.D. ¶223 n. 23. Here is why the ALJ should have considered these allegations:

34. First, the misrepresentation issue designated in the HDO is a general issue, without the need for motions to enlarge for each individual misrepresentation. See HDO at 925, ¶¶30-32. A general misrepresentation issue applies to all evasions and omissions of the applicant.[33/]

35. Second, misrepresentations during a hearing require no motion to enlarge because candor is always in issue. See, e.g., Nick J. Choconas, 28 FCC2d 231, 233 (1971). An applicant has notice of its own misrepresentations.

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32/ For example, the I.D. holds that KFUO "had no reason to believe that information about the training program at [Concordia] Seminary would be of interest to the Commission." I.D. ¶240. The ALJ relied on three cases involving training programs. But these training programs did not advance discrimination on the basis of religion. Another example is the ALJ's rejection of the allegation that KFUO's use of the term "qualified" minorities was not a misrepresentation. I.D. ¶242. A reading of the word "qualified" to include racial stereotypes deprives the word of any meaning. Implicit in the word "qualified" is that the "qualification" is genuine.

33/ In another context, the ALJ correctly articulated this principle, observing that "[t]he possibility that adverse conclusions could be reached as a consequence of statements made by the Church in the Stations' EEO Program should...come as no surprise." I.D. ¶235.

36. Third, an applicant has notice of the requirement that it not commit misrepresentations. Character Policy Statement, 102 FCC2d 1179, 1201-11 (1986).

37. Fourth, KFUO had an enhanced awareness of the need to exercise care to be candid, because the NAACP had assiduously complained of misrepresentations throughout these five year proceedings. Indeed, KFUO was obsessed with license retention even before the NAACP entered the picture. See I.D. ¶¶119-123 (discussing Lauher's memoranda.)

38. Fifth, KFUO had the Burden of Proof. NAACP was not required to crossexamine KFUO witnesses about misrepresentations or anything else.

39. It is no defense, as suggested in the I.D. at ¶245, that KFUO admitted some of its misrepresentations after it was caught. The degree of candor expected of a public trustee is more than a willingness to confess after being caught red-handed.

40. The best that can be said is that KFUO officials did not commit criminal perjury while under oath on the witness stand, after four staff investigative letters, an HDO and full discovery, and in the presence of the Judge, two Bureau attorneys and the NAACP's attorney. If this is the floor for licensee conduct, the FCC truly is irrelevant.

41. Unfortunately, KFUO's misrepresentations were not its only actions reflecting lack of character. In one of the more troubling episodes to occur in an FCC hearing, KFUO attorneys obtained from Tom Lauher, its leadoff and most critical witness[34/] a transcript of an interview that Lauher fraudulently induced the NAACP's law clerk to

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34/ Having written deeply inculpatory memoranda about KFUO's EEO noncompliance, Lauher was the only potential crack in KFUO's armor.

undertake for the purpose of making Lauher an NAACP witness.[35/]

42. Whether or not this dirty document was legally privileged,[36/] KFUO's attorneys, who controlled Lauher,[37/] should have refused to touch it.[38/] Instead, they promptly received an oral summary.[39/]

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35/ Lauher's behavior is analogous to that described in David Ortiz Radio Corp. v. FCC, 941 F.2d 1253, 1261 (D.C. Cir. 1991), where an applicant's agent concealed his true identity while conducting an investigation on behalf of the applicant. See also Lewel Broadcasting, Inc., 44 RR2d 39, 42 (Conlin, ALJ, 1978) (former employee allegedly stole station documents and made copies available to a competing applicant.) The Lewel allegations were not supported by a declaration, which is not the case here.

36/ The privilege does not die simply because a witness has seen the privileged material. See Hodges, Grant & Kaufmann v. U.S. Government, 768 F.2d 719, 721 (5th Cir. 1985) ("[t]he privilege is not, however, waived if a privileged communication is shared with a third person who has a common legal interest with respect to the subject matter of the communication). If NAACP's Michael Blanton "waived" the privilege, he did so because he was deceived by Lauher into thinking Lauher shared NAACP's legal interest. At the end of the interview, when Blanton correctly discerned that Lauher would be useless to the NAACP as a witness, Blanton told Lauher he could be called by any party. An honest witness, hearing this, would have realized that Blanton did not suspect, and should be told, that the witness was already pledged to KFUO. Blanton was deceived, and "[d]eception...may nullify a waiver." S.E.C. v. Forma, 117 F.R.D. 516, 523 (S.D.N.Y. 1987).

37/ A neutral witness, acting purely on his own, does not agree to be interviewed by Party A to be its witness; then sign on as the Party B's witness without telling Party A; then be interviewed by Party A, tape recording the interview; then physically transcribe the tape himself; and then turn over the transcript to Party B. On May 21, 1994, when he became KFUO's witness, Lauher told KFUO counsel he was going to meet with the NAACP's representative. Barry Gottfried Declaration of July 8, 1994 at 1 (attached to KFUO Opposition to Motion to Enlarge, filed July 8, 1994) ("KFUO Opp.") Lauher, who appeared at trial without counsel of his own, relied on KFUO counsel to defend his interestss. In his written and oral testimony, Lauher followed the KFUO line, including distancing himself from the plain meaning of his two internal KFUO memoranda which were highly critical of KFUO's EEO compliance. Tr. 104-202.

38/ Even nonprivileged communications by litigants are surrounded by a penumbra of confidentiality. See ABA Formal Opinion 92-368 (1992) ("a lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should (1) refrain from examining the materials (2) notify the sending lawyer and (3) abide by the instructions of the lawyer who sent them" (emphasis supplied)).

39/ Lauher briefed KFUO's counsel well before trial, at a time when KFUO was contacting witnesses for scheduling purposes. KFUO Opp., Gottfried Declaration at 1; Tr. 74.

They later obtained and digested Lauher's transcript of the interview, and didn't tell the NAACP they had it.[40/]

43. The standard of licensee character isn't so loose that only the breach of a legal privilege is disqualifying. The FCC has a higher standard for lawyer conduct than caveat emptor. It is a sad day when a party in a Commission case is told to blame itself for not asking a potential witness, who had been fired by the other side and who had written extremely inculpatory memoranda, "are you already a witness for the opposition?" The question would have been deeply insulting and chilling of inquiry if the true answer were "no."[41/] Yet it would have been completely unhelpful if the true answer (as here) were "yes" because, if the I.D. is correct in its analysis of the privilege question, there would still have been third party disclosure, and hence no privilege. That would have been true even if witness had answered with a lie.[42/]

44. It is utterly irrelevant that the NAACP's pretrial questions of Lauher were "routine." See I.D. at ¶272. It is every bit as valuable to a trial lawyer to know what her opponent doesn't know as it is to

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40/ KFUO counsel read the transcript of Lauher's interview with Blanton the evening before the trial began. KFUO Opp. at 3.

41/ No task in a race discrimination case requires more delicacy, and more expression of trust, than an interview with a white witness who might be seen by his friends and colleagues as a "traitor to his race." Furthermore, an honest person being asked if he's a spy would hardly develop trust with his questioner. Blanton reasonably believed that he could trust a professional broadcaster, fired by KFUO, who had written critically of KFUO's EEO programs. Obviously, the NAACP now knows that Lauher is untrustworthy, but onliy "[t]hrough hindsight one may conceive of further precautions that might have prevented an inadvertent disclosure. Under the circumstances in this case the precautions were reasonable." Kansas City Power v. Pittsburg & Midway Coal Mining Co., 153 F.R.D. 171, 172 (D. Kansas 1989).

42/ That likely would have happened. Some idea of Lauher's lack of candor may be found in his testimony that "it didn't seem relevant at the time" he interviewed for the NAACP that he was already KFUO's witness. Tr. 127. What else could have been more relevant to someone who had actually thought to carry a tape recorder to the interview, intending to transcribe it and show the transcript to KFUO's lawyers?

know what she does know.[43] Cf. FCC v. WOKO, 329 U.S. 223, 227 (1946) (the "fact of concealment" is of greater import than the "facts concealed").[44]

45. NAACP's lack of "personal knowledge" was a Kafkaesque reason not to have added a hearing issue. I.D. ¶268. Recall that the same KFUO lawyers who received Lauher's transcript had made Lauher KFUO's first witness. They knew from him, in advance, that he was going to interview with the NAACP. I.D. ¶265. How could the NAACP possibly have had personal knowledge of what Lauher and the lawyers told each other? Without further scrutiny, this affair is akin to "the "perfect crime." But the law is otherwise. An investigation is required where one party has exclusive access to all the facts. Stone, 466 F.2d at 332; Bilingual Bicultural Coalition on the Mass Media v. FCC, 595 F.2d 621, 630 (D.C. Cir. 1978); see also Fox, supra.

46. The ALJ should have granted the NAACP's sequestration request and stopped the proceedings from going forward until he was able to ascertain how much damage was done and determine how to control that damage. The fact that the tainted record "can't be put back in the box" is all the more reason for the Board to condemn KFUO's sharp practice in the strongest terms -- by remanding for a hearing to

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43/ The transcript (attached to KFUO Opp.) shows that the questions and answers were hardly trivial, having gone to whether Lauher put KFUO on notice that it was violating the EEO Rule; the role of former KFUO counsel Marcia Cranberg in suggesting that certain job requirements were BFOQ's; and the extent to which records on hiring and recruitment had been maintained. KFUO certainly acted as though the transcript had value, for KFUO refused to provide it to the NAACP until after the trial was over. Cf. Opinion 93-11 (Ohio Supreme Court Board of Commissioners on Grievances and Discipline, December 3, 1993) (while lawyer need not refrain from reading memorandum inadvertently disclosed to him, he does have an ethical duty to return a copy of the memo upon request).

44/ See U.S. v. Barfield, 999 F.2d 1520, 1523 (11th Cir. 1993), construing the most analogous federal statute to the Commission's abuse of process policy, 18 U.S.C. §1503, which deals with a person who "corruptly...endeavors to influence, obstruct, or impede, the due administration of justice" and holding that "[s]uccess is not a necessary component of a sufficient section 1503 violation", citing, e.g., Osborn v. U.S., 385 U.S. 323 (1966).

determine whether Lauher was KFUO's agent, and whether the actions of KFUO's counsel[45/] (and Lauher, if he was KFUO's agent) represent a disqualifying abuse of process. If the Board denies the renewals on this record, it should state that a hearing on this issue is required in the event of a Commission remand. The Commission cannot tolerate a licensee which "'would stop at nothing' to secure renewal[.]" Chronicle Broadcasting Co., 19 FCC2d 240, 241 (Rev. Bd. 1969).

**D. The Penalty For Discrimination Or Misrepresentation Is Nonrenewal**

**1. A Discriminator Is Never Entitled To Renewal**

47. While finding that KFUO had a policy of religious discrimination, I.D. ¶¶193, 200, the I.D. failed even to mention the immutable principle that discrimination must result in loss of license.[46/]

48. Renewal is not permitted simply because the discrimination was based on religion, not race. The EEO Rule contains no hierarchy of acceptable or unacceptable types of discrimination. Indeed, if a broadcaster can keep his license after using a job application form saying "Lutherans are given preference", the next case will be an application form saying "Catholics and Jews are disfavored" or "Aryans are preferred."

**2. Misrepresentations Similar To KFUO's Have Always Resulted In Nonrenewal**

49. The I.D., ¶257-58 concludes that a licensee can commit repeated material misrepresentations and still keep its license.

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45/ KFUO's "win by any means" behavior is far afield from the manner in which counsel should behave before an administrative agency. It is conduct "prejudicial to the administration of justice." D.C. Rules Prof. Conduct 8.4(d) (incorporating former DR-102(a)(5); see Comment 2).

46/ "[I]ntentional discrimination almost invariably would disqualify a broadcaster from a position of public trusteeship." Bilingual Bicultural Coalition, 595 F.2d at 629.

Nothing in the Character Policy Statement, 102 FCC2d 1179, 1233-24 (1986), relied on by the I.D., changed that. When it is presented with serious substantive misdeeds followed by a massive coverup, the Commission must deny renewal. RKO General, Inc. v. FCC, 670 F.2d 231, 233 (1981); Sea Island Broadcasting Corp. v. FCC, 627 F.2d 240 (D.C. Cir.), cert denied, 449 U.S. 834 (1980); Lorain Journal v. FCC, 351 F.2d 524 (D.C. Cir. 1965). Nonrenewal is particularly compelled when the misrepresentations were "result-oriented and not the product of confusion or innocent error." Evansville Skywave, Inc., 9 FCC Rcd 2539, 2541-42 ¶20 (1994).

50. Nor is there any merit to the suggestion that KFUO deserves a renewal expectancy because of its long tenure as a licensee. I.D. ¶260.[47/] Such an expectancy would violate §304 of the Act. Pre-renewal term compliance, even if proven,[48/] does not excuse gross renewal term noncompliance.

51. If adopted, the I.D.'s suggestion that KFUO's wrongdoing is an "isolated occurrence, an aberration, confined to a single Commission investigation" (I.D. ¶260) would excuse every licensee which commits minconduct only in one license term.[49/] It would amount to a seven year "Get out of Jail Free" card for every new licensee in its first license term, because a new licensee wouldn't have had enough time to repeat its misconduct in a successive term. Indeed, the effect of

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47/ If anything, the reverse is true. Anyone holding a license for 70 years has had more than enough time to learn to tell the truth. And a licensee only 15 years younger than the NAACP, which has witnessed America's transition from apartheid to modest remediation, should have learned not to discriminate. KFUO Radio is no backwater operation run by ignoramuses. If the FCC can't trust a national church to obey the rules, who can it trust?

48/ The absence of previous sanctions means little. The Commission relies almost almost entirely on listener complaints for renewal time enforcement. How would listeners know who is using misrepresentations to conceal rule violations?

49/ KFUO's conduct was anything but "isolated" or an "aberration." As shown herein, it involved massive, repeated misconduct.

this theory is that the FCC would have to try an applicant twice before taking its license away. Only a licensee with a death wish would commit the same misconduct twice.[50/] Such a regulatory scheme would convey no incentive to licensees to be law abiding in the first instance, since they would know that, if caught, they could either clean up their acts in the next license term or sell the stations. See Jefferson Radio Corp. v. FCC, 340 F.2d 781 (D.C. Cir. 1964).

52. Even more troubling is the I.D.'s unique suggestion that KFUO's behavior is excusable because it was attributable only to one person, Dennis Stortz.[51/] I.D., ¶258. Stortz was not a low level functionary -- he was the chief operating officer! Nor was Stortz the kind of executive who deceives his supervisors, conceals his actions from them, or prevents them from supervising him. While there is plenty of evidence that Stortz wasn't truthful with the FCC, there's no evidence that he was ever untruthful to any Lutheran Church official, and KFUO nowhere denies that Stortz was fully authorized to act in its behalf, serve as the primary point of contact with counsel, and sign declarations supportive of pleadings. Under well established rules of agency, Stortz' actions were the licensee's actions.[52/]

53. Not only did KFUO not supervise Stortz during the license term, it never deemed Stortz to be responsible for the misconduct. There is no evidence that it even disciplined him. He is still the General

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50/ Ironically, KFUO has already done that, as shown from its EEO violations from 1991-1994 even during an EEO investigation. See n. 26 supra. So much for the I.D.'s prediction that KFUO, having been chastened, is unlikely to repeat the same conduct again. See I.D. ¶259.

51/ If more than one person must be involved in licensee misconduct before an application may be denied, no licensee could ever be held accountable for discrimination. Form 396 only requires stations to place a single person in charge of EEO.

52/ See, e.g., King v. Horizon Corp., 701 F.2d 1313, 1318-19 (10th Cir. 1983); Thomas v. Colorado Trust Deed Funds, Inc., 366 F.2d 140, 143 (10th Cir. 1966).

Manager. Broadcasting & Cable Yearbook 1995, p. B-235 (official notice requested).[53/]

54. Finally, the contention that a KFUO witness told the truth at the hearing is, at most, the absence of an additional argument for nonrenewal. See I.D. ¶259. It is hardly an affirmative argument for renewal. A broadcast license is not conveyed as a reward for coming to court, after a night of preparation with experienced counsel, and not committing perjury under oath with a judge and a table full of attorneys in the room. Broadcasting isn't so trivial, and a license isn't so cheap, that the value of a renewal is telling the whole truth on the fifth try.[54/]

**E. The Importance -- And The Limitations -- Of This Case**

55. This case is important because of the grave damage it could do to the public interest standard generally and to EEO enforcement specifically. If it is affirmed, the I.D. would drive a stake in the heart of the EEO Rule by excusing all but those stupid enough to come right out and tell minorities that their kind is unwanted.

56. But this case is not a referendum on religious radio.[55/] As the ALJ points out, a religious institution is not exempt from the

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53/ Compare TelePrompTer Cable Systems, Inc., 40 FCC2d 1027 (1973) (after misconduct surfaced, a new board of directors was elected as expeditiously as possible. The new board initiated a special study to inform it on how to prevent recurrences, and management began a housecleaning to purge itself of past misconduct.)

54/ There were an unprecedented four prehearing inquiry letters in this case. It only went to trial when the FCC had no other choice.

55/ As the Board knows, intense political pressure has been brought to bear on the Commission specifically to torpedo this adjudicative case. See Statement of Senator Conrad Burns on FCC Rules on Religious Broadcasters, September 28, 1995 and accompanying draft amendment to prohibit the use of funds to enforce §73.2080(a) as to religious stations; Report and Additional Views Accompanying H.R. 2076, Report No. 104-196, 104th Cong., 1st Sess., July 19, 1995, pp. 184-85 (additional views submitted by Mr. Taylor) (threatening to amend appropriations bill to bar enforcement of §73.2080(a) as to religious stations). We are confident that the Board will disregard any extrajudicial pressures.