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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Applications of)	MM Docket No. 94-10
)	
The Lutheran Church/ Missouri Synod)	File Nos. BR - 890929VC BRH - 890929VB
)	
For Renewal of Licenses of Stations KFUE/KFUE-FM Clayton, Missouri)	

To: The Review Board

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MASS MEDIA BUREAU'S
REPLY TO EXCEPTIONS

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Introduction

1. On September 15, 1995, Administrative Law Judge Arthur I. Steinberg released his Initial Decision (ID), FCC 95D-11, granting the applications of the Lutheran Church/Missouri Synod ("Church") for renewal of licenses of Stations KFUA(AM) and KFUA-FM subject to EEO reporting conditions and a forfeiture in the amount of \$50,000. On November 1, 1995, the Church and the Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP and the St. Louis County Branch of the NAACP ("NAACP") filed exceptions to the ID. The Mass Media Bureau, which did not file exceptions to the ID, hereby replies to the exceptions filed by the Church and the NAACP.

Counter Statement of the Case

2. By Hearing Designation Order and Notice of Opportunity for Hearing, 9 FCC Rcd 914 (1994) ("HDO") the Commission designated the Church's applications for hearing on issues to determine whether the Church had complied with the nondiscrimination and affirmative action provisions of Section 73.2080(b) of the Commission's Rules and whether the Church had misrepresented or lacked candor with regard to the Stations' EEO program in violation of Section 73.1015 of the Commission's Rules. The HDO further specified that, irrespective of whether the hearing record warrants an order denying the Church's applications, it shall be determined whether an order of forfeiture shall be issued against the Church in an amount not to

exceed \$250,000 for the willful and/or repeated violations of Section 73.2080(b) and 73.1015 of the Rules. Subsequently, the Presiding Judge enlarged the issues to include an inquiry into whether the Church had violated Section 73.2080(a) of the Commission's Rules. Memorandum Opinion and Order, FCC 94M-191, released March 25, 1994.

3. The ID found that the Church had lacked candor in its communications with the Commission concerning its minority recruitment program. As a consequence, the ID imposed a forfeiture of \$50,000 against the Church. In so doing, the ID found that the lack of candor did not rise to the level of disqualifying misrepresentation and that the misconduct was largely the product of one individual who, at the hearing, had testified truthfully. In light of the Church's otherwise unblemished 70 year record as a licensee, the ID viewed the lack of candor as an aberration, unlikely to be repeated and ordered renewal of the Church's licenses.¹

4. In its Proposed Findings and Conclusions of Law the NAACP presented over 70 examples of what it argued were misrepresentations by the Church. The ID noted that the NAACP had raised these misrepresentations for the first time in its

¹ No exceptions were taken to the ID's conclusion that the Church had not misrepresented or lacked candor with regard to the number of hires reported by the Stations for the October 1, 1988, to September 30, 1989, time period. See ID paras. 224, et seq.

findings and conclusions. The ID, therefore, dismissed the NAACP's 70 plus examples on the ground that the Church had not been provided notice that the subject matter could be considered a misrepresentation (ID fn. 23).

5. The ID concluded that the Church had violated the Commission's EEO rules and policies by giving preferential hiring treatment to individuals with knowledge of Lutheran doctrine and to active members of the Lutheran Church for positions which were not reasonably connected with the espousal of the Church's religious views. The ID also concluded that during the period from August 3, 1987, to the end of the license term, the Stations were not in substantial compliance with the Commission's EEO rules. In light of these violations, the ID imposed reporting conditions on the Church. The ID concluded that, in the absence of even a scintilla of evidence that the Church intentionally discriminated against minorities, the Church's violation of the EEO rules, did not warrant denial of renewal. In fact, the ID noted, the Station's hiring during the license term had exceeded the Commission's 50% of parity guidelines.

Argument

The Church's Exceptions

1. The evidentiary record supports the Initial Decision's conclusion that the Church lacked candor.

6. The Church, at paras. 8, et seq. of its exceptions, citing a number of cases, argues that an "intent to deceive" is

an essential element of lack of candor and that the Commission will not infer an improper motive from errors, omissions, inconsistencies, carelessness, exaggeration, faulty recollection, etc. The Church contends that more than speculation, innuendo or hearsay evidence is required to find an intent to deceive. See also the Church's argument at paras. 28-32.

7. The Bureau does not dispute the Church's case analysis. It is true that such things as errors or carelessness do not constitute lack of candor because they do not include the necessary element of intent to deceive. This does not mean, however, that the Commission may not infer a lack of candor from circumstances. In this regard, the Commission has held, "[i]ntent is a factual question that can be inferred if other evidence shows that motive or logical desire to deceive exists...." Black Television Workshop, 8 FCC Rcd 4192, 4198, fn. 41 (1993).

8. In the instant case, the evidence amply indicates that the Church had a motive or logical desire to be less than candid with the Commission. For example, Stortz' use of the word "required" rather than "preferred" in describing KFUCO-FM's policy towards hiring persons who possessed classical music knowledge, when combined with the Church's argument that minorities did not have such knowledge, was designed to mislead the Commission into believing that the Commission should exclude minorities from the

pool of qualified workers in evaluating the Stations' EEO performance. See ID para. 251. Similarly, the Stations' 1989 EEO Program contained statements exaggerating the Stations' EEO recruiting efforts. See ID paras. 230-234. Thus, by its lack of candor, the Church sought to make the Stations' EEO effort appear to the Commission better than it actually was. Where, as here, there was a logical motive to conceal, the ID did not err by inferring intent. Black Television Workshop.

9. At paragraphs 13 through 24 of its exceptions, the Church faults the ID for finding that the Church lacked candor in its description of the Stations' EEO program. In each instance, the Church argues, its EEO program statements were literally true at the time they were made. Moreover, the Church claims, they were directly responsive to the Commission's Broadcast Equal Employment Opportunity Model Program Report, FCC Form 396, which seeks only current information.

10. The Church's arguments would have some merit had the ID concluded that the Church was guilty of misrepresentation instead of lack of candor. The ID, however, did not find misrepresentation but rather concluded that the Church's description of its EEO program lacked candor in that it created a false image of that program. Illustrative of this point is the Church's claim that, when vacancies occur, its policy was to seek out qualified minority and female applicants. While it is true

that two months prior to the filing of its renewal application, KFYO-FM sent out a number of letters to various organizations seeking minority referrals, there is no evidence that this was anything but a one shot effort. Moreover, those letters did not seek minority employees for specific vacancies. Rather, they stated that KFYO-FM would be contacting the recipients as job openings arose. Church Ex. 4, Att.14. The ID, thus, properly found that the Church's statement, that it had a policy of contacting minorities when vacancies arose, was concocted to create the impression that the Church had sought out minority employees as part of its "usual policy and practice," ID, para 231.²

11. At paras. 24 through 27, the Church appears to argue that the lack of candor concerning the requirement for classical music training was the fault of counsel who suggested the word "requirement." This argument has no merit. One need not be a lawyer to know the difference between the words "requirement" and "preference." As the ID put it: "Either something is a requirement or it is not." At para. 250. Mr. Stortz, the individual who reviewed the Stations' opposition to the NAACP's Motion to Deny and supplied an affidavit attesting to the truth of the facts asserted therein, knew that classical music training

² At para. 18, the Church argues that the "response did not attempt to discuss every hire over the entire license term." In fact, the response did not discuss any hire over the license term. There was no showing that anyone was ever recruited or hired pursuant to this policy.

was not a requirement, yet he permitted the Church to represent to the Commission that it was. ID para. 250. Clearly, the ID was correct in finding lack of candor under these circumstances.

2. The Initial Decision's imposition of a \$50,000 forfeiture is fully warranted and reflects a careful weighing of the relevant facts.

12. The Church further argues, at paras. 32 through 34, that the ID's imposition of a \$50,000 forfeiture is precluded by the statute of limitations. This argument is without merit. There is no question but that the forfeiture is timely because lack of candor in a filing with the Commission is a continuing violation which does not end until it is corrected. The Church never has amended its filing to correct the statements which were the subject of the ID's lack of candor findings. Thus, to this day, the lack of candor continues and the statute of limitations would not bar an action by the Commission. Finally, the amount of the forfeiture was clearly within the discretion of the Presiding Judge to whom the Commission granted the authority to impose a forfeiture in an amount not to exceed \$250,000.³

³ The Church claims that Dixie Broadcasting, Inc., FCC 93-12, released July 7, 1993, does not have any precedential value for a \$50,000 forfeiture because it is only an Initial Decision and the facts in that case were much worse than the facts in this case. What the Church fails to note is that in Dixie the \$50,000 forfeiture assessed was the maximum permitted by the HDO in that case. 7 FCC Rcd 5638 (1992). Here, the \$50,000 forfeiture assessed is only one-fifth of the maximum permitted in this case.

3. The Initial Decision's conclusion that the Church acted unlawfully by discriminating on the basis of religion in the hiring of employees whose duties did not involve the espousal of the Church's religious beliefs is consistent with the Constitution and with federal statutes and policies.

13. The Church, at paras. 35 through 49, argues that it alone has the right to determine which positions at its stations require knowledge of Lutheran doctrine and that for the Judge to preempt that right by determining which particular positions were properly considered religious violates the Free Exercise Clause of the First Amendment to the Constitution and the Religious Freedom Restitution Act ("RFRA"). Moreover, the Church contends, the ID's reliance on King's Garden, Inc., 34 FCC 2d 937 (1972), aff'd 498 F.2d 51, 61 (D.C. Cir.), cert denied, 419 U.S. 996 (1974) ("King's Garden") is misplaced because that case has, in effect, been overruled by Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) ("Amos").

14. In King's Garden the Court of Appeals affirmed the Commission's decision to permit religious organizations to discriminate on the basis of religion in their employment practices only as to those hired to espouse the licensee's religious philosophy over the air. The imposition of EEO requirements for other positions at a station, the Court held, did not violate religious broadcasters' First Amendment rights. A religious sect, the court noted, "confronts the FCC's rules only because the sect has sought out the temporary privilege of

holding a broadcasting license." 498 F.2d at 60. "A religious sect has no constitutional right to convert a licensed communications franchise into a church." Id. Thus, "[w]here 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 61. The Court further observed:

The Commission has set itself the difficult task of drawing lines between the secular and religious aspects of the broadcasting operations of its sectarian licensees. Though this is a delicate undertaking, it is one which the First Amendment thrusts upon every public body which has dealings with religious organizations.

Id. Citations omitted.

15. The Amos case 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 a non-profit organization. Neither the Communications Act nor the Commission's Rules contain an exemption similar to that in Title VII. Amos simply does not apply to an adjudicatory proceeding before a licensing agency such as the FCC. The Church voluntarily sought a license and therefore must take that license under the same conditions as any other licensee.

16. The Church further argues, at para. 45, that the King's Garden decision is no longer viable because it relies on a right-privilege distinction which the courts rejected long ago.

Citing, American-Arab Anti-Discrimination Committee v. Reno, 883 F. Supp. 1365 (C.D. Calif. 1995). The FCC, the Church says, cannot require it to give up its religious freedom rights as a condition of receiving a license. In the American Arab case, however, the right to which the court was referring was the right to due process. Thus, the Court disagreed that Congress did not have to provide illegal aliens who were seeking amnesty with due process rights because citizenship was a privilege rather than a right. In holding that aliens had a right to due process, the Court cited Willner v Committee on Character, 373 U.S. 96 (1963) which held that because denial of admission to a state bar is the denial of right, due process is required. Here, there is no complaint by the Church that it has been denied due process. In accepting a license from the government, broadcasters are burdened with certain free speech limiting public interest obligations, such as providing time for political announcements and limits on the number of commercials that can be broadcast in children's programs. The acceptance of these obligations, including the obligation of complying with the Commission's EEO Rules, are required in exchange for the privilege of holding a license.

17. Finally, the fact that the Title VII exemption was held constitutional in Amos does not mean that it constitutes a national policy that is applicable to a licensing agency such as the FCC. What the Court in King's Garden said remains true

today: "...Congress has given absolutely no indication that it wished to impose the exemption upon the FCC." 498 F.2d at 53. In the absence of such a Congressional mandate, it is wishful thinking on the part of the Church to assert that the exemption applies to the FCC.

18. The Church, at paragraphs 48 and 49, contends that the FCC's EEO Rule and policies use racial classifications that have not been shown to be justified under the strict scrutiny test set forth in Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995). This is especially so, the Church claims, where the use of racial classifications must be weighed against the Church's right to hire members of its own faith. Adarand, however, is not relevant to this case. Adarand, involved the practice of giving contractors on government projects a financial incentive to hire subcontractors controlled by "socially and economically disadvantaged individuals" who were identified by race based presumptions. The Commission's EEO Rule, with which the Church has been found to be in non-compliance, does not grant any economic or other advantage to any group based upon race-based presumptions. All that the Commission's Rule requires is that licensees provide equal opportunity for employment to all citizens. To insure that minorities are made aware of openings at broadcast stations, the Commission's Rule requires that licensees make employment opportunities known to minority members of the community. See generally Section 73.2080 of the

Commission's Rules. Nowhere in the Commission's Rule are licensees required to set aside positions for minorities or to hire anyone because of race. Consequently, the Commission's Rule is not analogous to the race based incentives which the Court in Adarand ruled were subject to strict scrutiny.

NAACP'S EXCEPTIONS

4. The Judge did not err either by refusing to receive irrelevant testimony or by refusing to order the production of documents that were neither relevant nor likely to lead to the discovery of relevant information.

19. At paragraphs 8 through 10, the NAACP complains about the Presiding Judge's failure to permit the testimony of five NAACP witnesses. Four of these witnesses were "classical music experts" who were proffered by the NAACP to testify concerning the ease with which KFUCO could have found minorities with classical music training. The Presiding Judge refused to receive their testimony on the grounds of relevance, competency and because the testimony did not rebut anything in the direct case of the Church. Tr. 351. The Judge should be sustained for each of these reasons. The ease with which qualified minorities could be located is not relevant to the Church's recruitment efforts which were in issue in the proceeding. Moreover, even if this matter was relevant, an expert in classical music will not necessarily be an expert in the availability of minorities with classical music training in the local job market. In any case, this subject is moot because it is not disputed that the Stations

only had a preference for people with such training not a requirement and did, in fact, hire employees without such knowledge. Finally, the rejected evidence did not rebut anything in the Church's direct case exhibits.

20. The NAACP, at paragraph 10, argues that the Judge erred by rejecting the written testimony of its "star witness," Cari Perez O'Halloran on the ground that it was not exchanged in a timely manner. The NAACP does not deny that the testimony was not timely exchanged. Rather, it argues that it had difficulty locating O'Halloran because she had married and changed her name. It was known almost from the beginning of this proceeding that KFUE had hired an Hispanic saleswoman who was no longer with the station. The NAACP had months to locate her, but claims it could only do so on the day before the hearing was to end. Presiding judges are delegated the authority to regulate the course of Commission proceedings. Section 1.244 of the Commission's Rules. Here, the determination of whether to receive O'Halloran's late exchanged testimony lay squarely within the Judge's discretion and should be affirmed.⁴

⁴ Even assuming that O'Halloran's testimony might have some relevancy to the issues in this proceeding, the NAACP has not shown that it would affect the outcome. Much of the substance of O'Halloran's proffered testimony is already part of the record. In this regard, Halloran's recollection as to the number of minorities who worked, or were interviewed for positions, at the station is not necessary. Also, under any circumstances, her feelings as to why KFUE hired her are speculative and irrelevant.

21. At paragraphs 11 through 15, the NAACP argues that the documents it sought would have been made routinely available in any other EEO case. Apparently, the NAACP has failed to consider that it is not trying a Title VII case. The designated issues govern this proceeding. Under those issues, questions such as why Blacks were hired or not promoted and whether they were paid equally to whites, are simply not relevant. Also documents the Church may have filed with other government agencies are not relevant absent some basis for believing that the documents would have some bearing on the issues. It is clear that the NAACP was attempting to launch a fishing expedition in the hope of uncovering some dirt it could use against the Church. Wisely, the Judge precluded this from happening.

5. The Judge correctly found that there was no record evidence that the Church had discriminated against any individual because of race, color, religion, national origin or sex.

22. At paragraphs 16 through 30, the NAACP accuses the Presiding Judge of making eleven errors in concluding that there was no evidence of the Church having discriminated against any individual based upon that individual's race, color, religion, national origin or sex. In essence, the NAACP claims, all eleven of these "errors" are based on the refusal of the Presiding Judge to infer discrimination from other record facts.

23. The Bureau recognizes that "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). In this case, however, the Presiding Judge is absolutely correct: there is no record evidence that KFUCO discriminated against any individual. While it may be true that the record warrants a conclusion that the Church's practices had the result of excluding minorities from consideration for employment, the NAACP provided no instance of an individual having applied for a job at the Stations and being rejected because of his or her race.⁵ Moreover, other than claim that the Judge should have inferred discrimination, the NAACP does not cite any record evidence that would support a conclusion that the Stations intentionally discriminated against minorities. In fact the overwhelming weight of the evidence, as pointed out in the ID, is to the contrary. See ID at para. 254.

6. The Judge acted correctly in summarily disposing of the NAACP's seventy plus claimed misrepresentations by the Church many of which were fanciful on their face.

24. At paragraphs 31 through 40, the NAACP claims it was error for the Presiding Judge to summarily dismiss, because of lack of notice to the Church, 71 misrepresentations by the Church

⁵ At paragraph 29 and in footnote 29, the NAACP finds it "shocking" that the Presiding Judge would find that the family life of a church employee could have anything to do with this case. Yet the information about which the NAACP complains was developed on cross-examination by the NAACP's counsel who asked a witness the basis for his belief that Rev. Devantier would never discriminate. (Tr. 278-79). The fact that Rev. Devantier had adopted one bi-racial child and provided a foster home for another, seems highly relevant to this question. What is shocking is that the NAACP is willing to ignore this fact, brought out by its own counsel, in its blind pursuit of the Church's license.

which the NAACP identified in its Proposed Findings of Fact and Conclusions of Law. Although these misrepresentations were not set forth in the HDO or the subject of a petition to enlarge, the NAACP contends the Presiding Judge should have considered them anyway because candor is always in issue in Commission proceedings. Citing, Nick J. Choconas, 28 FCC 2d 231, 233 (1971).

25. The NAACP overstates the law with regard to candor. In order for an applicant to be disqualified for lack of candor in the absence of an issue, the lack of candor must be so glaring as to amount to an open contempt of the forum. RKO General, Inc. v. FCC, 670 F.2d 215, 225-226 (D.C.Cir 1981), cert denied, 456 U.S. 927 (1982). Candorless testimony can also be the subject of disqualification in the absence of an issue where "the lack of candor happens before the Judge's own eyes.'" Old Time Religious Hour, Inc., 95 FCC 2d 713, 719 (Rev. Bd. 1983) (quoting RKO General 670 F.2d at 234), recon. denied, 96 FCC 2d 551 (Rev. Bd. 1984) (subsequent history omitted). Here, because the matters raised by the NAACP were not the subject of an issue and did not evidence contempt for the forum, the Presiding Judge did not need to consider them in his ID.

26. In any case, the examples relied on by the NAACP to establish lack of candor by the Church do not support that conclusion. Some of the examples have been considered in the ID.

(NAACP Misrepresentations #14-15). Others do not appear to be misrepresentations at all. (NAACP Misrepresentation #21). Still others appear to be based on semantic differences (whether the Stations operated rent free if they were on property owned by the Church). (NAACP Misrepresentation #55-57). Neither the Presiding Judge nor the Bureau, nor the Review Board, should be compelled to rake through 71 alleged misrepresentations to determine whether any of them have merit. If the NAACP found a misrepresentation, it should have filed a petition to enlarge. This would have given the Church an opportunity to reply and if an issue was added, to present evidence at hearing. In the absence of such a petition, the ID. was absolutely correct to summarily dispose of the NAACP's alleged misrepresentations for lack of notice. ID at n. 23.

7. The Church's legal counsel did nothing improper in receiving a transcript of a witness interview conducted by an agent of the NAACP

27. At paragraph 41 et. seq., the NAACP argues that a hearing issue is needed to determine whether the Church's attorneys engaged in "sharp practice" when a witness provided them with a transcript of an interview he had given to an agent of the NAACP. This argument is just plain silly. The NAACP cites no authority for the proposition that the witness was under an obligation to keep either the NAACP's questions or the answers he provided confidential. The agent of the NAACP knew the interview was being tape recorded and went ahead and asked the questions anyway. The fact that the NAACP did not anticipate

that the witness would provide a copy of the interview to the Church's attorneys does not imply wrongdoing by those attorneys. Every time an attorney asks a witness who is not under his control a question, he takes the risk that his question and the resultant answer may be disclosed to the other side.

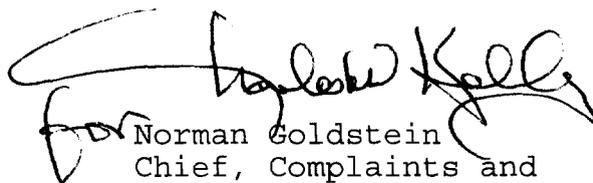
8. In declining to disqualify the Church and in ordering a short term renewal, reporting conditions and a forfeiture, the Judge fashioned appropriate sanctions which reflect the level of wrongdoing found in this case and are within the range of sanctions specified in the Hearing Designation Order

28. The NAACP argues at paragraphs 47 and 48, that the ID failed to follow the "immutable principle" that discrimination must result in loss of license. In support of this statement, the NAACP cites Bilingual Bicultural Coalition, 595 F.2d at 621, 629 (D.C. Cir. 1978) where the court stated that "[I}ntentional discrimination almost invariably would disqualify a broadcaster from a position of public trusteeship." Aside from the fact that the Court's language does not support the principle for which it is cited, the NAACP's argument lack merit. The NAACP simply ignores the fact that no intentional discrimination was found in this case. See ID, para 200 and 254.

Summary

29. In sum, the Bureau supports the findings and conclusions contained in the ID and recommends that the Review Board affirm the ID.

Respectfully submitted,
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December 6, 1995

CERTIFICATE OF SERVICE

Michelle C. Mebane, a secretary in the Complaints and Investigations Branch, Mass Media Bureau, certifies that she has on this 6th day of December 1995, sent by regular United States mail, U.S. Government frank, copies of the foregoing "**Mass Media Bureau's Reply to Exceptions**" to:

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