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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

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

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To: The Commission

APPLICATION FOR REVIEW

THE LUTHERAN CHURCH-MISSOURI SYNOD

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The Lutheran Church-Missouri Synod (the "Church") hereby applies for review of the Review Board Decision, FCC 96R-23, released May 3, 1996 (the "Board Decision" or "Bd. Dec.").

I. Preliminary Statement

1. While the Church is gratified that its renewals for KFUO(AM) and KFUO-FM (collectively "KFUO") have been granted, it must appeal the decisions below -- their rationale for sanctions violates the fundamental freedoms of the Church and of all religious broadcasters.^{1/} In deciding that the Government had the right to second-guess the Church's judgments about which positions at KFUO were sufficiently religious to warrant religious hiring preferences, the Initial Decision, FCC 95D-11, released September 15, 1995 (the "ID") inextricably entangled itself in religious affairs and chilled the free exercise of religion -- in unlawful conflict with the First and Fifth Amendments, the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 (the "RFRA"),^{2/} and the policy promulgated by Congress in section 702 of Title VII, 42 U.S.C. § 2000e-1(a) ("section 702").^{3/} For example, the process below chilled the Church's willingness to continue a decades old on-air internship program for its seminary students. The Review Board (the "Board") then failed to rectify the violation of rights guaranteed by the Constitution and controlling statutes.

2. The ALJ and Board also erroneously concluded that the Church lacked candor with the Commission. The principal reason for designation of the issue was a difference in the number of hires reported by the Church, which the ALJ correctly found inadvertent and a simple oversight that did not

^{1/} The National Religious Broadcasters ("NRB") has recently raised in the rulemaking context the same concerns the Church has raised in this case. The NRB has urged the Commission to modify its EEO regulations to permit religious organizations to establish religious belief or affiliation as a bona fide occupational qualification for all station employees. This is necessary to accommodate the legitimate needs of religious broadcasters and to avoid the serious legal problems of a more restrictive rule. Comments of National Religious Broadcasters in MM Docket No. 96-16, FCC 96-49 (filed April 30, 1996).

^{2/} In the RFRA, Congress provided that agencies can substantially burden the free exercise of religion only if they can demonstrate a "compelling governmental interest" and can show that the burden is the "least restrictive means of furthering that compelling interest." The FCC has not reevaluated its EEO Rule to ensure compliance with the RFRA.

^{3/} Section 702 provides that: "The subchapter shall not apply ... to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on ... of its activities."

constitute a lack of candor. ID ¶¶ 224-29. Rather than resolving the issue in favor of the Church, the decisions below instead focused on a substantially true paragraph in the Church's statement of its EEO program and tried to transform it into a lack of candor. The Commission's assertion that the Church lacked candor impugns the good name of a religious organization with over two million members and creates a terrible stigma. The FCC must have very clear evidence before branding a religious organization as deceitful. See, e.g., Fox Television Stations, Inc., 10 FCC Rcd 8452 (1995) ("Fox"). The evidence in this proceeding not only failed to meet this standard, it failed even to *suggest* an intentional lack of candor.

3. In short, the decisions below contain prejudicial errors of substantive law, are arbitrary and capricious, and raise novel and important issues of law and policy. Thus, they warrant Commission consideration and reversal under the terms of 47 C.F.R. § 1.115(b)(5).

II. Questions Presented for Review

1. Whether the holding that the Church did not fully comply with the FCC's EEO requirements unlawfully conflicts with the policy enacted by Congress in section 702, violates the First and Fifth Amendments of the Constitution, and is inconsistent with the RFRA.
2. Whether the evidentiary record and Commission case precedent mandate a favorable resolution of the lack of candor issue.
3. Whether the sanctions imposed are arbitrary and capricious.

III. Argument

A. The Decisions Below Violated the Church's Religious Freedoms

4. The Church is committed to nondiscrimination and affirmative action, and has a long history of fighting racial discrimination. ID ¶¶ 36-49, 111; Bd. Dec. ¶¶ 9, 15. During the license term at issue, KFUE recruited for minorities through its own minority employees and through Lutheran sources such as local parish networks, The Lutheran Witness magazine (targeted to Church members, including 50,000 African-Americans), the Church's International Center, and the Lutheran Employment Project of St. Louis (a clearinghouse run by various Lutheran churches for employment of members of minority groups). ID ¶¶ 63, 76-77, 81-82, 126. The stations also used secular recruitment

sources such as the St. Louis Post Dispatch, Broadcasting, the Broadcast Center in St. Louis, the St. Louis American and the St. Louis Sentinel. ID ¶¶ 79, 83, 91, 130. KFUE sought referrals for 30 of its 43 full-time hires (69.8%). Of those full-time hires, 25 (58.1%) were female and 7 (16.3%) were minority. ID ¶ 68. KFUE hired minorities at 104.5% of minority representation in the local workforce. Church Prop. Findings ¶ 156.^{4/}

5. Nonetheless, while the ALJ found that the Church substantially complied with the EEO Rule for the majority of the license term (ID ¶ 205) and credited the Church with minority recruitment throughout the term (ID ¶¶ 75-78, 88, 91, 120, 126, 130), he concluded that KFUE's affirmative action efforts were unsatisfactory. The ID reached this conclusion largely by according the FCC the role of deciding which jobs were "reasonably connected with the espousal of the Church's views," and then penalizing the Church for: (a) failing to use secular minority referral sources to recruit for all jobs the Government deemed not sufficiently religious (ID ¶ 220); (b) failing to hire for all the jobs deemed not sufficiently religious without regard to applicants' knowledge of Lutheran doctrine (ID ¶¶ 193, 200, 252); and (c) using an application form that noted that the Church reserved the right to give preference to its members and that did not contain the standard EEO notice. ID ¶ 219.^{5/} The decision that the

^{4/} The Board Decision erroneously contended (at ¶ 5) that the Church submitted a supplement to its license renewal application indicating that it "received no minority referrals" during the license term. However, as the ALJ found, the stations received minority referrals and hired some of those referrals. ID ¶¶ 76-77, 81, 126. The supplement cited by the Board says merely that none of the six institutions *listed therein* referred minority applicants. MMB Ex. 2 at 3. The Board Decision also erred (in ¶ 13) in criticizing the Church for failing to contact recruitment sources after July 1989 when filling full-time and part-time positions. First, the FCC has never been clear about whether the EEO Rule applies to part-time positions. See Streamlining Broadcast EEO Rules and Policies, FCC 96-49, released February 16, 1996, ¶ 44. Second, for many of the full-time positions, the Church did contact organizations such as the St. Louis Broadcast Center, the Lutheran Employment Project and the St. Louis Post Dispatch. ID ¶¶ 126, 130; Church Ex. 4, p. 4, Att. 6, p.8, Att. 9.

^{5/} The Board Decision erroneously suggested that the Church's employment application never had the standard EEO notice until July 1989. In fact, the application for KFUE during the
(continued...)

Church's EEO affirmative action efforts were unsatisfactory was inextricably intertwined with these rulings regarding the Government's role in religious matters.

6. Because this ruling unlawfully conflicts with the Congressional policy permitting religious entities to use religious knowledge as a qualification for all jobs, as promulgated in section 702, and violates the First and Fifth Amendments and the RFRA, the Commission should reverse. The Church had the right to give preference to Lutherans for any and all job positions it deemed appropriate. See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) ("Amos"). The Church's minority outreach efforts through Lutheran sources therefore fully complied with any affirmative action obligations that can be legally imposed. The underpinning of the ALJ's decision to the contrary, King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974) ("King's Garden"), is no longer sound law.^{6/}

7. The Board failed even to *consider* whether the ID represented an unlawful entanglement with religion.^{7/} Chairman Marino's separate statement that the Church's invocation of religious

^{5/} (...continued)

early years of the license term contained an EEO notice. See NAACP Ex. 31 at 4. Indeed, there is uncontested testimony that the content of the standard EEO notice "was a clear part of the policy but it had been in some manner inadvertently dropped from this application" when it was revised. Tr. 164 lines 22-25; Church Ex. 7, Att. 5, p.9. When Thomas Lauher pointed out the inadvertent omission, the application was immediately revised to include it. Tr. 184.

^{6/} As explained more fully in ¶¶ 44-45 of the Church's Exceptions, the King's Garden panel's opinion that Congress did not intend the FCC to grant an exemption similar to section 702 was based in large part on the concern that this exemption would violate the Establishment Clause. Amos holds that this concern is unfounded. The King's Garden opinion is also based on the position that the Government can interfere without chilling religious freedoms in decisions concerning jobs determined to be unconnected to religion. 498 F.2d at 61. This is wrong according to Amos -- it fails to recognize the untenable chilling effects on a religious community's process of self-definition which result from the *process* of governmental line-drawing itself. 483 U.S. at 336, 343-44.

^{7/} The Board Decision quoted with apparent approval (at ¶ 7) the HDO's allegation that KFUO's preference for Lutherans had a "direct adverse impact on Blacks." But there is no evidence
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freedoms was “game playing” is astonishing. His quotation of Scripture to the Church in an effort to get the Church to abandon its due process and Constitutional rights is wholly inappropriate. The Government should have no role in telling churches what Holy Scripture requires of them. Chairman Marino was also wrong to claim that the Church invoked its rights “belatedly”: the Church invoked Amos in a reply to a Commission inquiry, over a year before the HDO. MMB Ex. 14 at 40-41. And, contrary to Chairman Marino’s suggestion (Tr. 1150), the Church had no right, much less a duty, to seek reconsideration of the HDO on constitutional grounds prior to the hearing. See 47 C.F.R. § 1.106(a)(1) (reconsideration may be sought only with respect to participation in the proceeding); 47 C.F.R. § 1.115(e)(3) (deferring applications for review of an HDO until the filing of an application for review of final Board decision).

8. The reasons why the Supreme Court’s decisions in Amos and Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995) (“Adarand”), the RFRA, and section 702 mandate that the ID be reversed are fully explained in the Church’s Limited Exceptions at 18-25. Any case-by case analysis of job functions at stations operated by religious organizations, and any Governmental determination as to which positions at those stations are sufficiently religious to warrant religious hiring preferences, unlawfully conflicts with the standards established by Congress in section 702. The underpinning of the EEO Rule, the Commission’s desire to promote programming diversity,^{8/} certainly provides no

^{7/} (...continued)

whatsoever in the record to this effect. Indeed, recruitment through a network of Lutheran congregations proved to be one of the most fertile sources of minority employees. Tr. 865: Church Ex. 4, Att. 6, p. 1; Church Ex. 7, p. 9; Tr. 746-49, 864-65. The Commission has always made it clear that an HDO does not constitute findings but merely contains unproved allegations. Cleveland Television Corp. v. FCC, 732 F.2d 962, 973 n.13 (D.C.Cir. 1984); see Black Television Workshop of Los Angeles, Inc., 4 FCC Rcd 3871 at ¶¶ 14-15 (1989). Any use by the Board of the contention in the HDO as a “finding” is reversible error.

^{8/} See Streamlining Broadcast EEO, supra at ¶ 3. The Supreme Court viewed this justification favorably as authority for an FCC EEO rule in dicta 21 years ago. NAACP v. Federal Power

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authority for a more restrictive rule than section 702. There is no reason to believe that diversity of programming will somehow be diminished if the FCC maintains its prohibitions on race and gender discrimination but ceases to usurp the role of determining which jobs at religious organizations can be subject to a religious job criterion. Indeed, an exemption similar to section 702 will *increase* diversity by permitting religious organizations to keep a unified sense of organizational mission without fear of Government interference, and thus to add a unique perspective to the programming universe. The NRB's comments in the rulemaking context describe at pages 8-11 some of the serious problems caused for religious broadcasters by the King's Garden ruling. Commission acknowledgment of an exemption similar to section 702 would be race and gender neutral, particularly if accompanied with the requirement to use at least religious sources to seek minorities and women.

9. The decisions below also violate the First and Fifth Amendments and the RFRA. A substantial burden on free exercise results when, as here, adherents of a religion are forced to refrain from religiously motivated conduct. See Mack v. O'Leary, 80 F.3d 1175 (7th Cir. 1996). Churches do not waive their constitutional rights when they are licensed broadcasters. The Governmental entanglement that results from the second-guessing of religious organizations' judgments about how best to serve their missions leads to the constitutionally untenable situation where a religious "community's process of self-definition ... [is] shaped in part by the prospects of litigation." Amos, 483 U.S. at 343-44 (Brennan, J., concurring).^{2/} Under the First Amendment and the RFRA, this substantial burden could

^{8/} (...continued)
Commission, 425 U.S. 662 (1975). Recent case law casts doubt on whether it would now be found sufficient to justify affirmative action requirements. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (O'Connor, J. for four justices) (affirmative action must be "strictly reserved for remedial settings"); see Adarand Constructors, Inc. v. Peña, 115 S.Ct 2097 (1995) (overruling Metro Broadcasting v. FCC, 497 U.S. 547 (1990)).

^{2/} The record below shows that Justice Brennan's fears were prophetic. The staff asked the Church to explain what aspects of particular positions required theological training. MM Bur. Ex. 13 at 1. And, both FCC trial counsel and the ALJ engaged in constitutionally unsavory
(continued...)

be imposed only if there were a compelling Governmental interest that could justify it. See Mack v. O’Leary, 80 F.3d 1175. Under the Fifth Amendment, the Commission would need a compelling justification for affirmative action requirements, especially when they interfere with free exercise judgments. Adarand. But no such compelling justification exists.

B. The Evidentiary Record and Commission Case Precedent Mandate a Favorable Resolution of the Lack of Candor Issue

10. The Board Decision reviewed the two areas in which the ALJ claimed that the Church lacked candor. It correctly recognized that a word used in pleadings drafted by counsel could not justify a lack of candor finding. Bd. Dec. ¶17, citing Fox at 1066. Thus, after examining a voluminous documentary record and the transcript of a week-long hearing, the Board based its conclusion that the Church lacked candor solely on a paragraph in the Church’s EEO program statement attached to the license renewal applications, containing an overview of the stations’ efforts to hire minorities and women. (The four sentences at issue are set forth in ¶230 of the ID.) The Board believed that this paragraph “conveyed the *impression* that the stations regularly sought out qualified minority and female applicants” and that this somehow indicated a “lack of candor.” Bd. Dec. ¶ 22 (emphasis added).

11. The Board was wrong: the passage was substantially true and certainly did not evidence an intent to deceive. Mr. Stortz testified that he made the statement that it “is the policy of [the Church] to seek out qualified minority and female applicants when vacancies occur” because at the time the renewals were filed, this was generally the case. ID ¶50. The Church had indeed taken significant steps to improve its hiring and recruitment practices prior to completing and filing the renewal applications. ID ¶¶ 119-20, 126. The Judge found Mr. Stortz’s testimony credible (ID ¶ 259) and there was no

^{2/} (...continued)
questioning of a Church witness about whether it was helpful for certain station personnel to have knowledge of the Lutheran calendar, an inquiry that necessarily delved into theological matters. Tr. 734-37. These invasive questions had concrete effects on the Church’s free exercise religious activities, causing the Church to discontinue a decades old on-air internship program for its seminary students for fear of continued unlawful intrusion.

evidence that Mr. Stortz had any intent to deceive. There was no evidence that Mr. Stortz intended to imply that the policy had been applied during the entire license term -- even the FCC's form speaks only to the twelve-month period preceding the filing of the license renewal application.^{10/} The overview passage was not misleading in this context

12. Despite the fact that an "intent to deceive" is an "essential element" of a violation of the duty of candor, Fox, 10 FCC Rcd at ¶ 60, the Board Decision contended (at ¶ 23) that it did "not need to divine Stortz's mental state of mind at the time of the renewal filings." Instead, the Board proffered a new legal theory, claiming that "where, as here, a licensee displays a continued pattern of indifference to Commission requirements," it rises to the level of a lack of candor "even if Stortz did not deliberately intend to subvert the Commission's processes." Bd. Dec. ¶ 23. The problem with this new theory, aside from the fact that it is entirely unprecedented,^{11/} is that there simply was no "continued pattern of indifference." To the contrary, the ALJ correctly found substantial compliance with the EEO rule from February 1, 1983 to August 3, 1987 (ID ¶205) and credited the Church with minority recruitment and hires throughout the license term. ID ¶¶ 75-78, 88, 91, 120, 126, 130.

13. It defies both common sense and FCC precedent to transform an isolated and substantially true passage in the EEO program into a "continuing pattern of indifference to Commission requirements." See, e.g., Calvary Educational Broadcasting Network, Inc., 9 FCC Rcd 6412 (Rev. Bd. 1994) (inaccurate information resulting from exaggeration is insufficient to demonstrate deceptive intent). Indeed, by the Board's reasoning, any licensee that stated it followed the EEO Rule but whose program

^{10/} Although the Board treats this argument dismissively, the FCC has indeed stated that the Form 396 "Report requests general information concerning the hiring practices of the licensee during the renewal year, i.e., the 12-month period prior to the filing of the renewal application." Streamlining Broadcast EEO, supra at ¶8.

^{11/} The cases cited by the Board in support of its new theory are entirely inapposite. They relate to repeated misstatements of specific facts (e.g., the identity of the owners of a station) constituting a pattern of indifference to the truth that amounted to deceit.

was later found to be inadequate in any respect could be held -- untenably -- to have lacked candor. Never before or since has the FCC found a lack of candor based on the supposed "impression" conveyed by a single paragraph, much less by the overview in a licensee's EEO program statement.

14. In an attempt to find a new "lack of candor" not contemplated in the HDO, the Board claimed that had the Church responded to certain questions on the Form 396, its defective recruitment efforts would have been revealed. The Board also contended that submitting a "sample reply form" without the letter soliciting the reply "significantly buttressed" a supposedly false impression created by the overview passage. Bd. Dec. ¶ 22. But the Church did not hide either the specifics of its recruitment efforts or the letter in question -- the information and letter were contained in a supplement to the license renewal applications filed *prior to* the filing of the petition to deny. MMB Ex. 2, Att. 1. Neither the Bureau nor the NAACP ever asked about why this material was in a supplement rather than the applications. The Board's claims are therefore mere speculation. Nothing in the record even suggests an intentional lack of candor. The Board's conclusion must be reversed.

C. The Sanctions Imposed by the Board are Arbitrary and Capricious

15. In ¶ 33 of its Exceptions, the Church demonstrated that the FCC lacked authority in the HDO to impose a fine for activity that occurred more than three years earlier. The 1992 amendment to the Communications Act extending the Commission's forfeiture authority did not apply retroactively. The Board's contention that this issue is outside of its jurisdiction was belied by its evaluation and *affirmance of the forfeiture*, an acknowledgment that the matter was indeed within its jurisdiction.

16. On the merits, the Board was wrong to claim that a lack of candor in a filing is a continuing violation that does not end until it is corrected. The Board cites no precedent for this new legal theory which would, in practice, unfairly require any licensee alleged to have lacked candor to effectively admit its guilt -- even when there was none -- for fear of "continuing the violation" and remaining subject to forfeiture forever. The Board was also wrong to contend that the Church's

argument was made too late -- the FCC's rules did not permit the Church to seek reconsideration of the HDO prior to the filing of its Exceptions. See ¶ 7, supra. Also, it would be anomalous to request reconsideration of a sanction that had not been and might never be imposed.

17. In addition, there is no case precedent to support the excessive fine of \$50,000. The ID in Dixie Broadcasting, Inc., FCC 93-12, (released July 7, 1993) has no precedential value and was not based on any case precedent. Moreover, unlike here, that case involved repeated misrepresentations. The Board contends that Eagle Radio Inc., 9 FCC Rcd 836, 854-56 (1994) suggests a comparable sanction. However, Eagle Radio was based on the same flawed 1994 EEO Policy Statement that led to the designation of the Church's renewal applications for hearing, and which was subsequently vacated by the Commission. See Streamlining Broadcast EEO, supra. ¶2. ^{12/}

IV. Conclusion

Based on the foregoing, the Commission should rule: (1) that the Church acted properly in giving a religious preference in hiring at KFUE; (2) that the Church fulfilled its affirmative action obligations; (3) that the Church did not lack candor; (4) that the KFUE renewals should be granted for full terms; and (5) that the \$50,000 forfeiture should be vacated.

Respectfully submitted,

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^{12/} Even the vacated 1994 Policy Statement on which Eagle Radio was premised would have required a downward adjustment based on the Board's modified lack of candor finding here, yet the Board failed even to do that. Nor did the Board consider the Church's exemplary 70 year broadcast record in evaluating the forfeiture imposed.

CERTIFICATE OF SERVICE

I, Marionetta Holmes, a secretary for the firm of Fisher Wayland Cooper Leader & Zaragoza L.L.P., do hereby certify that I have this 3rd day of June 1996, mailed by First Class, United States mail, postage paid, the foregoing “**APPLICATION FOR REVIEW**” to the following:

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***VIA HAND DELIVERY**