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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 KFUD/KFUD-FM Clayton, Missouri)	
)	
To: The Commission)	

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MASS MEDIA BUREAU'S
CONSOLIDATED OPPOSITION TO APPLICATIONS FOR REVIEW

Respectfully submitted,
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Introduction

1. On June 3, 1996, The Lutheran Church/Missouri Synod (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 applications for review of the Review Board's Decision, FCC 96R-23 (released May 3 1999) ("Decision"). Pursuant to Section 1.115(d) of the Commission's Rules, the Mass Media Bureau hereby files its consolidated opposition to the applications for review.

Background

2. On September 15, 1995, Administrative Law Judge (ALJ) Arthur I. Steinberg released his Initial Decision ("ID"), FCC 95D-11, granting the applications of the Church for renewal of licenses of Stations KFUE(AM) and KFUE-FM subject to EEO reporting conditions and a forfeiture in the amount of \$50,000. In its Decision, the Review Board ("Board") affirmed the ALJ's ID, which it described as "carefully crafted" and "fully supported by his record evidence."¹ (at para. 1). The Mass Media Bureau did not file exceptions to the ID nor did it file an application for review of the Board's Decision.

Questions Presented by the Church

3. In its Decision, the Board affirmed the Initial Decision's imposition of reporting conditions on the Church for its noncompliance with the Commission's EEO program requirements

¹ The Board's Decision expanded the sanctions imposed on the Church by the ID to include a short term renewal.

and for its preferential hiring of Lutherans for positions that were not reasonably connected to the espousal of the Church's religious views. The Church contends that the decisions preempt its right to hire those who share its religious views; unlawfully conflict with the policy promulgated by Congress in Section 702 of Title VII, 42 U.S.C. Section 2000bb-1(a); violate the First and Fifth Amendments of the Constitution; and are inconsistent with the Religious Freedom Restitution Act ("RFRA"). Moreover, the Church contends, the reliance of the Board and the ALJ 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"). Finally, the Church claims the sanctions imposed below are arbitrary and capricious.

4. 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 nondiscrimination requirements for other positions at a station, the Court held, do 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.

5. 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 (Section 702) is constitutional as applied to a non-profit organization. Neither the Communications Act nor the Commission's Rules contains 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.²

6. The Church's reliance on Adarand Constructors, Inc. v.

² 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.

Pena, 115 S.Ct. 2097 (1995), is similarly misplaced. In Streamlining Broadcast EEO Rules and Policies, FCC 96-49, released February 16, 1996, the Commission tentatively concluded that "Adarand does not implicate our EEO program..." (at para. 15). This is so because 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. What the Commission's Rule requires is that licensees provide equal opportunity for employment to all citizens.

7. The Church faults the decisions below for finding that it lacked candor in its description of the Stations' EEO program contained in its renewal application. In each instance, the Church argues, its EEO program statements were "substantially true" at the time they were made. The Church's arguments might have some merit had the decisions below concluded that the Church was guilty of misrepresentation instead of lack of candor. The decisions, 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, KFUC-FM sent out a number of letters to various organizations seeking minority referrals, there is no evidence that this was anything but a one-time

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 the Church 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. Moreover, the Board's finding that there had been a "continued pattern of indifference" to the Commission's EEO rule by the Church is amply supported by the record. ID, paras. 217 thru 222. Thus, the Board correctly concluded that even if the Church did not deliberately intend to subvert the Commission's process there was ample evidence to permit a finding of lack of candor. Decision, para. 23.

8. The Church argues that there is no precedent to support the fine imposed in the decisions below. The Church contends that the Board's reliance on the fine imposed in Eagle Radio, Inc., 9 FCC Rcd 836, 854-56 (1994) was in error because that fine was based on the 1994 EEO Policy Statement, which was subsequently vacated by the Commission. See Streamlining Broadcast EEO. The Church is wrong. The Board cited Eagle Radio in support of its imposition of a short term renewal, not the forfeiture amount.

NAACP's Application for Review³

9. The main thrust of the NAACP's filing is an attack on the Administrative Law Judge who heard this case. The NAACP describes his procedural rulings as "unprecedented" and as evidencing a "curious neutrality-in-favor-of-the-licensee."⁴ After complimenting the Judge for his good humor and grace in conducting the proceeding and for having produced a well written opinion, the NAACP complains of his "refusal to referee a fair fight and his concentration on irrelevant factors as long as they favored [the licensee]." The NAACP concludes its attack on the ALJ with a request that, in the case of a remand, he be disqualified from any further dealings with this case ("the case must be remanded to a different ALJ."). In fact, there is no basis for disqualification of the presiding judge in this case.

³ The NAACP's Application for Review fails to comply with Sections 1.115(b)(1) and (b)(5) of the Commission's Rules which require that applications for review "concisely and plainly state the questions for review" and specify with particularity the factor(s) which warrant Commission consideration of the questions presented. The NAACP has presented a mishmash of claims and allegations that often fail to relate back to any alleged error by the Review Board and are not identified with any of the factors which the Commission has said would warrant review. Moreover, the NAACP's Application for Review violates the 10 page limitation on Applications for Review by the use of numerous and, occasionally, voluminous single-spaced footnotes. (The NAACP's 10 page document contains a total of 28 footnotes, one of which, footnote 19, contains 11 subparts and runs over two pages in length). Dismissal of the NAACP's pleading on these grounds would be justified.

⁴ Many of the complained of procedural rulings relate to rulings on discovery. It should be noted that there was extensive discovery in this proceeding with the result that the Church produced over 4,000 pages of documents, including payroll records. Consequently, it is clear that the NAACP had full access to the records necessary to make its case.

As demonstrated below, his rulings were firmly based on the facts and the law. Moreover, even if there were an arguable basis for disqualification, the NAACP has not followed the proper procedure for seeking disqualification. See Section 1.245 of the Commission's Rules. In any case, these charges were not presented to the Review Board and therefore may not be raised now.⁵ See Section 1.115(c) of the Commission's Rules.

10. The NAACP takes issue with the Presiding Judge's striking the testimony of each of its "expert" witnesses. These witnesses, however, were "classical music experts" who were proffered by the NAACP to testify that qualified minorities with classical music training were available in the job market. 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. Nowhere, however, does the NAACP demonstrate that the Judge's ruling was in error. In fact, the Judge was clearly correct. The availability of qualified minorities is not relevant to the Church's recruitment efforts which were in issue in the

⁵ At Oral Argument the following colloquy occurred:

CHAIRMAN MARINO: But to the extent that you quote from the United Church of Christ, I mean you don't say it yourself in so many words, but are you alleging that this Judge was biased?

MR. HONIG: No. I don't think the Judge was biased in the sense of racially biased or -- and certainly not in the sense of favoring one side over another for impermissible reasons. Absolutely not. (Tr. 1132).

proceeding.⁶

11. The NAACP also protests the ALJ's rejection of the testimony of Ms. O'Halloran, a former KFUCO employee. The Presiding Judge's ruling was based on the ground that she was not proffered as a witness until the very last day of hearing. However, while the NAACP claims that it had difficulty locating her, it has never detailed its efforts to do so. In any case, the facts contained in the testimony of O'Halloran (NAACP Ex. 14) are either part of the record already or not relevant to the issues. O'Halloran's recollection, for example, as to the number of minorities who worked or were interviewed for positions at the station is not material because the stations' employment records are already a part of the record. Also, under any circumstances, her feelings as to why KFUCO hired her are speculative and irrelevant.

12. The NAACP also attributes to bias the Judge's unwillingness to consider 71 alleged misrepresentations on the part of the licensee. The NAACP's Application for Review fails to note that each of these 71 alleged misrepresentations were raised for the first time in the NAACP's Proposed Findings of Fact and Conclusions of Law filed well after the record in this

⁶ Moreover, even if this matter was relevant, the NAACP did not establish that these classical music experts were also experts in the availability of minority job applicants. In any case, this subject is moot. 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.

proceeding was closed. Raising them at that time precluded the Church from defending itself against the charges. Consideration of these matters, as noted in the ID (at n. 23), would have been unfair and a denial of the Church's due process rights. While it is true that at hearing candor is always at issue, Nick J. Chaconas, 28 FCC2d 231,233 (1971), 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). That is not the case here. In fact, the alleged misrepresentations do not appear to be misrepresentations at all. Many are based on semantic differences (for example, whether the Stations operated rent free if they were on property owned by the Church). Others are simply based on misinterpretations of the record. In any case, neither the Presiding Judge, nor the Bureau, nor the Review Board, nor the Commission's staff should be compelled to rake through 71 alleged misrepresentations to determine which are "the most palpable ones." NAACP brief at n. 8.

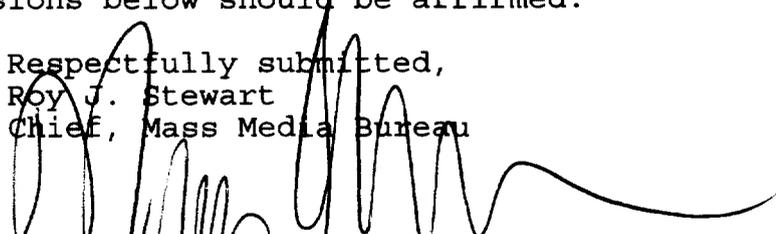
13. The NAACP argues that the ID and the Decision failed to follow the longstanding precedent that discrimination must result in nonrenewal. In support of this statement, the NAACP cites Bilingual Bicultural Coalition, 595 F.2d at 621, 629 (D.C. Cir. 1978) where the court stated that "[I]ntentional discrimination almost invariably would disqualify a broadcaster from a position of public trusteeship." However, no intentional discrimination

was found in this case. See ID, paras. 200 and 254. To the extent that the NAACP infers discrimination because the Church granted a preference to Lutherans, it is simply wrong. The ALJ found that the Church's grant of such a preference for certain specified positions violated the principles set forth in King's Garden. See discussion, infra, at para. 3, et seq. This is far different from a specific finding of discrimination against a particular individual or group.

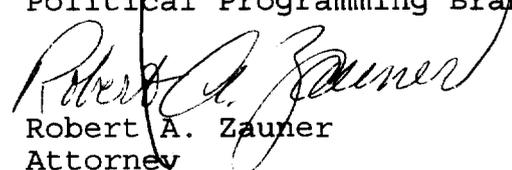
14. As a final matter, the NAACP throughout its brief, refers to this case as a civil rights case (a Title VII case). In fact, this not a civil rights case. As the ID pointed out, the courts and the Commission have consistently distinguished the Commission's EEO requirements from those of Title VII. See ID, para. 202, and cases cited therein.

15. In conclusion, the decisions below should be affirmed.

Respectfully submitted,
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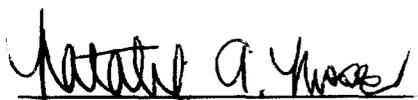
June 18, 1996

CERTIFICATE OF SERVICE

Natalie Moses, a secretary in the Complaints and Political Programming Branch of the Mass Media Bureau, certifies that she has on this 18th day of June 1995, sent by regular United States mail, copies of the foregoing **"Mass Media Bureau's Consolidated Opposition to Applications for Review"** to:

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