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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

JUN 18 1996

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 KFUA/KFUA-FM)	
Clayton, Missouri)	

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To: The Commission

OPPOSITION TO NAACP'S APPLICATION FOR REVIEW

THE LUTHERAN CHURCH-MISSOURI SYNOD

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The Lutheran Church-Missouri Synod (the "Church"), by its attorneys and pursuant to Section 1.115 of the Commission's rules, hereby opposes the Application for Review^{1/} filed June 3, 1996 by 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 (the "NAACP").^{2/}

I. PRELIMINARY STATEMENT

1. It remains a source of consternation and bewilderment to the Church, a nationally recognized religious institution with 2.6 million members, that the NAACP would conduct what can only be called an unfair and mean-spirited attack upon the Church's integrity. As both the Presiding Judge and the Review Board have recognized, the Church has a longstanding commitment to nondiscrimination and the Church's membership includes 50,000 African Americans, 86 African American pastors, and 30 African American faculty and administrative members of its colleges and seminars. As the Review Board succinctly found: "[W]e agree with the A.L.J. that the history of the Lutheran Church and Missouri Synod demonstrates an aggressive attitude against racism, and a continuous outreach toward African American families, including creating a Commission on Black Ministry that was designed to

^{1/} In this Opposition, the Church has focused on the major arguments advanced in the NAACP's Application. Silence in this Opposition on a particular point in the NAACP's Application should not be considered a concession on the part of the Church. Rather, the Church submits that its Proposed Findings and Conclusions, its Exceptions and its Application for Review accurately describe the record evidence and the pertinent case precedent.

^{2/} The NAACP's Application contains lengthy single-spaced footnotes -- consuming approximately 296 lines in a pleading that contains only 61 lines of text in the body (*i.e.*, outside footnotes). Thus, approximately 83% of the material is contained in footnotes! Section 1.49(a) of the Commission's rules provides in relevant part: "Counsel are cautioned against employing ... excessive footnotes to evade prescribed pleading lengths. If single-spaced ... footnotes are used in this manner the pleading will, at the discretion of the Commission, either be rejected as unacceptable for filing or dismissed with leave to be filed in the proper form." Since the NAACP pleading makes a mockery of Section 1.49(a), the Commission should take appropriate action. Moreover, the NAACP's Exceptions were similarly defective, so this conduct is repeated.

expand the Church's African American membership: *and that the policy was applicable to the radio stations.*" Review Board Decision, FCC 96R-23 at ¶ 30 (released May 3, 1996) (the "Board Decision" or "Bd. Dec.") (emphasis supplied).^{3/} Moreover, as the ALJ found: "There is not one scintilla of evidence in the record to indicate that any adverse discriminatory act ever occurred, or that any individual ever made an allegation of racial or other discrimination regarding the Stations' employment practices." Initial Decision, FCC 95D-11 at ¶ 194 (released September 15, 1995) (the "ID").

2. Lacking any evidence to contest these findings, the NAACP's Application instead attempts to inflame the political sensibilities of the Commission by making (in its lengthy footnotes) a disorganized set of false and indeed libelous accusations of "racism." These wild charges are unsupported by record evidence and were firmly and properly *rejected* by both the ALJ and the Board.^{4/} The NAACP

^{3/} The NAACP tries to pretend that it is merely attacking a "rogue subsidiary" of the Church. But there is no such subsidiary -- KFUE(AM) and FM ("KFUE") are owned and operated by the Church itself through one of its boards and are dedicated to the Church's mission. ID ¶¶ 6, 8, 19-22.

^{4/} The NAACP's outrageous and unfounded accusations -- all of which have been refuted in the prior filings of the Church and Mass Media Bureau -- are too numerous to fully address in the limited number of pages afforded the Church. While attempting to paint the Church as "racist," the NAACP would have the Commission disregard the evidence to the contrary, such as the fact that the stations' Executive Director had adopted a bi-racial child. ID ¶¶ 47, 195. Among the NAACP's allegations are the claims that all of the African Americans KFUE hired "worked in subordinate jobs," that "KFUE's stereotypes about classical music expertise targeted Blacks specifically," and that KFUE former general manager Lauher sent a "condescending, dishonest" letter to a "handful" of organizations and colleges with "an insulting response form." However, the record reflects that KFUE employed minorities in the top four job categories (ID ¶¶ 76-77, 88); that the stations made efforts to hire minorities (ID ¶¶ 78-80, 88); and that the NAACP's arguments about racial stereotyping had no merit. ID ¶ 198. The letter and response form about which the NAACP complains were adopted from a widely disseminated and well recognized handbook published by the National Association of Broadcasters. ID ¶ 119. If the Commission is inclined to consider any of the ridiculous contentions made in the NAACP's over-long Application, the Church must be given an opportunity to respond beyond the

(continued...)

also attempts to analogize this case to such landmark cases as Plessy v. Ferguson, 163 U.S. 537 (1896). These claims are so overblown that they are self-refuting. It is unfortunate indeed that the NAACP's counsel has taken such a divisive approach at a time when harmony and healing are badly needed. The Church trusts that the Commission will reject these horribly unfair allegations and affirm, on the basis of the overwhelming record evidence, the findings by the ALJ and Board that the stations are not racial discriminators.

3. The NAACP's Application fails to meet the requirements of Section 1.115(b)(5) of the Commission's rules. It is not specific as to which parts of the Board Decision it questions. It essentially repeats the arguments previously made in the NAACP's Exceptions to the Review Board without in any way discussing how the Board erred in its treatment of the issues. It is quite clear, however, that the Commission does not afford rehearing "merely for the purpose of again debating matters on which the [agency] has once deliberated and spoken." WWIZ, Inc., 37 FCC 685 at ¶ 2 (1964).

4. Moreover, the NAACP's Application is inconsistent, to say the least, in terms of the relief it purports to request. For instance, on the one hand, the NAACP appears to suggest that the FCC should conduct the entire hearing all over again. Application at 5. On the other hand, the NAACP erroneously asserts that the decisions below should be reversed because they are a "de facto overruling of the HDO." Application at 5 n.19. But this would mean that retrying the case would be a useless exercise -- the NAACP would have the Commission deny the Church's licenses on the basis of the *allegations* in the HDO rather than the *showings* at hearing. See Cleveland Television Corp. v. FCC, 732 F.2d 962,

^{4/}(...continued)

limitations of this pleading.

The NAACP is wrong when it argues that the ALJ failed to consider its contention that certain arguments made in the Church's pleadings were evidence of discriminatory intent. The Judge appropriately rejected the NAACP's contention for a variety of reasons. ID ¶¶ 197-99. The Review Board affirmed. Bd. Dec. ¶¶ 14-15.

973 n.13 (D.C. Cir. 1984) (statements in HDO are mere allegations rather than showings). It is difficult to imagine a prejudgment by the Commission that would be a more grave violation of well established principles of administrative law and the Communications Act of 1934, as amended.

5. In its Exceptions to the ID, the NAACP raised the same procedural and evidentiary arguments that it now raises in its Application. The Board Decision stated at ¶32 that “we have carefully reviewed its [the NAACP’s] contentions and have concluded that the ALJ did not abuse his discretion or commit substantial or prejudicial error. in conducting the hearing.” The Board further noted that for the reasons fully set out by the ALJ in his ID, and by the Church and the Bureau in their respective Reply Exceptions, the matters raised by the NAACP were not decisional. The NAACP has not even attempted to demonstrate any error in the Board’s ruling.

II. ARGUMENT

A. **There is No Merit to the NAACP’s Belated Claims of Bias in the Judge’s Procedural Rulings**

6. The Application complains that “[a]t every turn, the hearing was hopelessly one-sided and unfair,” as the result of several procedural rulings of the Judge. Application at 1. For a variety of reasons, the NAACP’s belated allegations of bias and error in the procedural rulings are unsupportable and must be rejected.^{5/}

^{5/} The Application contains inconsistent arguments concerning the actions of the Presiding Judge. On the one hand, the NAACP compliments the Judge because he “scrupulously avoided the interjection of extraneous factors into the proceedings, conducted the hotly contested proceedings with wonderful good humor and grace, and produced a well written opinion.” Application at 4. But the NAACP then charges that the Judge was “incapable of supervising *a civil rights case* fairly” (emphasis in original), and “exhibited a ‘curious neutrality-in-favor-of-the-licensee,’ yielding a record which is ‘beyond repair.’” The NAACP simply cannot have it both ways.

7. The NAACP's argument is highly suspect. At the Review Board oral argument, counsel for the NAACP was specifically asked if he was alleging that the Judge was biased. Counsel responded, "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 (emphasis added). Furthermore, there is simply no merit to the NAACP's allegations that the Judge's rulings were biased. The Commission has held that even a series of unfavorable interlocutory rulings against a challenger to a renewal applicant does not constitute evidence that the judge was biased against the challenger. WWOR-TV, Inc., 5 FCC Rcd 2845 (1990). Here the record demonstrates that the Judge granted a number of the NAACP's requests.

8. A party alleging the existence of bias must comply with Section 1.245 of the Commission's rules, which requires the party seeking disqualification to file *with the judge himself* an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification. No such affidavit has ever been filed by the NAACP. Moreover, complaints of bias and prejudgment by a judge cannot be raised for the first time on appeal. Aspen FM, Inc., 5 FCC Rcd 3196 (Rev. Bd. 1990), rev. denied, 6 FCC Rcd 1602 (1991). Thus, the NAACP's meritless accusations are untimely.

B. The Church Should Not Be Punished Because Of Any Alleged Failure to Adhere to the Guidelines of King's Garden

9. The NAACP contends that the Church should be stripped of the licenses for its 71-year old broadcast mission because KFYO preferred to hire individuals with knowledge of Lutheran doctrine for certain positions for which the Church believed it was appropriate, but which the Judge did not believe were "reasonably connected" with the espousal of the Church's religious views. For at least two reasons, the NAACP is wrong.

10. First, and most fundamental, the NAACP's argument is based on the 20 year-old decision in King's Garden v. FCC, 498 F.2d 51 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974) ("King's Garden") which is no longer good law after the Court's decision in Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) ("Amos"). As explained in detail in the Church's Exceptions and Application, the Court's reasoning in Amos makes it clear that any attempt by the Government to arrogate to itself the role of determining which particular job functions at the Stations were sufficiently religious to warrant religious hiring preferences violates the First and Fifth Amendments to the Constitution, the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb-1 ("RFRA"), and the federal policy adopted by Congress in promulgating an exemption for religious institutions from the requirements of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a).

11. Second, even assuming *arguendo* that the Commission could legally second-guess the Church's judgments about which job functions were sufficiently religious to warrant religious hiring preferences, the appropriate remedy for the Stations' conduct would be *at most*, as the Mass Media Bureau acknowledged at page 48 of its Proposed Findings, a report by the Church on how it intends to comply with the King's Garden guidelines in the future.^{6/} In the King's Garden case itself, the remedy imposed by the Commission for the licensee's use of religious qualifications for all jobs was to direct the licensee to submit a "statement of its future hiring practices and policies." King's Garden v. FCC, 498 F.2d at 52. And since the decision in King's Garden -- continuing past the Court's decision in Amos and the passage of RFRA -- the FCC has provided little, if any, guidance regarding the EEO

^{6/} It should be noted that the Judge found no evidence that the Stations ever rejected a particular applicant on grounds of religion, and the NAACP did not except to that finding. The Judge correctly concluded that "no individual was discriminated against by the Stations because of race, color, *religion*, national origin or sex." ID ¶¶ 194, 200 (emphasis supplied).

programs of religious licensees. Having done nothing to clarify how the requirements of King's Garden apply to particular positions in the last 20 years, the Commission should apply any standards it establishes prospectively only, and should not judge the Church's performance during the license term under any newly-developed standards. Greene v. United States, 376 U.S. 149 (1964). It would be patently unfair to accept the NAACP's suggestion that the Church lose its licenses where there has been a lack of Commission guidance and resulting uncertainty. The unfairness will be even more pronounced if the Commission accepts the arguments of the National Religious Broadcasters in the rulemaking context -- as the Church believes the Commission should do on the merits -- and modifies its EEO regulations to permit religious organizations to establish religious belief or affiliation as an occupational qualification for all station employees. Comments of National Religious Broadcasters in MM Docket No. 96-16, FCC 96-49 (filed April 30, 1996).

C. The NAACP's Arguments As to the Penalties for Misrepresentation Are Irrelevant

12. The NAACP's twisted argument that misrepresentations should be disqualifying is completely specious. After full discovery, including the production of some 4,000 documents by the Church and depositions of various Church personnel voluntarily brought to Washington at the request of the Bureau and the NAACP, as well as a full evidentiary hearing, the Judge found no evidence of misrepresentation. He found only a "lack of candor" which was *not* disqualifying. Moreover, the Review Board has *not* affirmed part of the so-called lack of candor, and its conclusion that the *impression* created by a paragraph in the Church's EEO program statement somehow constituted a "lack of candor" is not supported by the facts or Commission case precedent. See Church Application for Review, pp. 7-9; Fox Television Stations, Inc., 10 FCC Rcd 8452 (1995). The NAACP's Application does not and cannot show that the decisions below were wrong in finding that there was no misrep-

resentation and does not even address the question of lack of candor.^{7/} Therefore, the NAACP's arguments about the penalties for misrepresentation are irrelevant.

D. The Judge's Procedural Rulings Were Correct

13. The NAACP has not made the showing required to overturn the procedural rulings of the Judge, all of which were affirmed by the Review Board. It is well established that a Judge's ruling on an interlocutory motion or a discovery matter should not be overturned absent a showing that the Judge has acted in an arbitrary and capricious manner or has abused his discretion. WPIX, Inc., 23 F.C.C. 2d 786 at ¶3 (Rev. Bd. 1970); Chronicle Broadcasting Co., 20 F.C.C. 2d 728 at ¶3 (Rev. Bd. 1969). The Judge appropriately rejected the witness testimony in NAACP exhibits 1-5 on relevancy and competency grounds and because they did not rebut anything in the Church's direct case. Tr. 350-359, 399. The Commission's Mass Media Bureau supported exclusion of these exhibits. Id. The declaration of Cari O'Halloran (NAACP Ex. 14), provided for the first time on the last day of the hearing, was appropriately rejected as extremely untimely. Tr. 1081-1085. Furthermore, as the Judge observed, the NAACP had been directed in Memorandum Opinion and Order, FCC 94M-318 (released May 5, 1994) to respond to the Church's interrogatories seeking the identity of individuals with personal knowledge of the allegations against KFYO. The NAACP had never identified Ms. O'Halloran or anyone else. In any case, as the Mass Media Bureau showed in its Reply to Exceptions (at 13 n.4), Ms. O'Halloran's testimony was largely speculative and irrelevant and would certainly not have affected the decision in this case.

^{7/} The NAACP's allegation that the Church engaged in 71 misrepresentations is specious. Not only did the NAACP not even raise these matters until the filing of its proposed findings subsequent to the hearing, it never even questioned any witnesses about these matters. Therefore, the NAACP's allegation was appropriately rejected. In order to allay any possible concerns, however, in Appendix A to its Reply Findings and Conclusions, the Church responded to each of the NAACP's allegations about a "misrepresentation" and showed that they were all frivolous.

14. While the NAACP also complains about the Judge's rulings on several of its document production requests, it neglects to mention that the Bureau filed a Request for Production of Documents on March 17, 1994, requesting broad categories of documents relating to the designated issues which the Church did not oppose and in response to which it produced almost 4,000 pages of documents. Many of the NAACP's requests were covered by the Bureau's requests and those that were not were properly rejected by the Judge, who gave appropriate reasons for all of his rulings. See Memorandum Opinion and Order, FCC 94M-282 (released April 21, 1994) and Memorandum Opinion and Order, FCC 94M-311 (released May 2, 1994). Insofar as the NAACP sought information about complaints of discrimination, it should be noted that on May 10, 1994, the Church filed a Second Supplemental Response to the NAACP's Initial Interrogatories which reported: "to the best of the Church's knowledge and information (after a search through the relevant records and interviews with appropriate persons at the Stations) no past or present employee or job applicant complained that the Stations discriminated against him or her on the grounds of race or religion during the specified period."^{8/}

15. In its Application, the NAACP also alleges that "[a]nother procedural ruling permitted KFUE to obtain the NAACP's trial strategy through a subterfuge of questionable legality." Application at 4 and n.11. According to the NAACP, "this disgusting incident is nowhere mentioned in the [Board] Decision." However, a plain reading of the Board Decision reveals that this matter was indeed considered. At ¶32, the Board appropriately found the matter not decisional for the reasons set forth in paragraphs 262-281 of the ID, wherein the Judge firmly rejected the NAACP's unfounded allegation

^{8/} The NAACP has repeatedly argued that discovery in this proceeding should have been the same as in a civil rights case (see Application at 4), despite the fact that the courts have made it clear that a "license renewal proceeding is not a Title VII suit." Bilingual Bicultural Coalition on Mass Media v. FCC, 595 F.2d 621, 628 (D.C. Cir. 1978). If this were a Title VII suit, the Church would clearly be covered by the exemption for religious entities in section 702.

that its “trial strategy had been stolen” and noted that the NAACP had interviewed a third party witness “at its own peril.” ID ¶271.

16. The only other procedural matter of any remote significance raised in the NAACP’s Application is its argument that the HDO constituted a “core preliminary finding” from which the Judge and the Review Board could not deviate. As the Church has pointed out in its Application for Review, an HDO does not constitute findings but merely sets forth unproved allegations. It is the *showings* at the hearing that control, not the mere *allegations* in the HDO. See Cleveland Television Corp. v. FCC, 732 F.2d at 973 n.13 (D.C. Cir. 1984). The discussion during the Review Board oral argument (Tr. 1125-1130) and in the Board Decision at ¶15 clearly indicates the Review Board’s disagreement with the NAACP’s argument concerning the effect of the HDO. Once again, the NAACP has presented no case precedent in support of its argument or demonstrated any error on the part of the Judge or the Board.

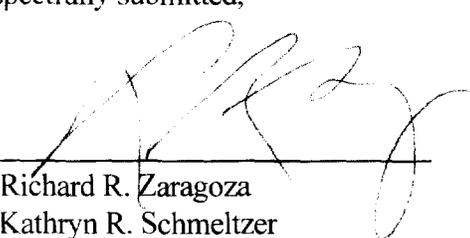
III. CONCLUSION

For the reasons set forth above, the NAACP’s Application for Review lacks any merit and should be dismissed or denied.

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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 18th day of June 1996, mailed by First Class, United States mail, postage paid, the foregoing **“OPPOSITION TO NAACP’S APPLICATION FOR REVIEW** the following:

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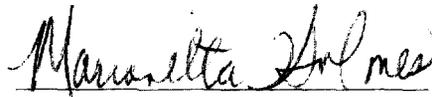
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***VIA HAND DELIVERY**