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

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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**MOTION TO VACATE OR DELETE REPORTING CONDITIONS**

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 (collectively, "the NAACP") respectfully moves for an order vacating or deleting the EEO reporting conditions in The Lutheran Church/Missouri Synod (MO&O), 12 FCC Rcd 2152, 2165-66 ¶23 and 2168-69 ¶29 (1997) ("MO&O") (appealed, D.C. Cir. No. 97-1116 (oral argument scheduled January 12, 1998)).

The Church has objected to these conditions, which have been stayed by the D.C. Circuit for reasons unrelated to those discussed below as grounds for vacating or deleting them.<sup>1/</sup> With a view to fairly resolving the matter in the interest of justice, the NAACP has reviewed the EEO history of the radio stations from the last date of the record evidence in this case<sup>2/</sup> through the present.

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- 1/ The Lutheran Church/Missouri Synod v. FCC, No. 97-1116, Order, November 13, 1997 (per curiam).
- 2/ The record closed on September 29, 1994. The Lutheran Church/Missouri Synod (Initial Decision) 10 FCC Rcd 9880 ¶4 (1995) ("I.D.") The record did not include EEO data for any year after 1990. Id. at 9891, Table 2.

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Normally, when a broadcast station has consistently hired minorities, the Commission draws the obvious inference that the station must have been successful in recruiting them.<sup>3/</sup> After all, the minorities hired by a station had to come from somewhere. Thus, the NAACP examined the minority employment record of KFUCO-AM-FM after 1990, as reported on Form 395. That record is as follows.<sup>4/</sup>

**Minority Employment at KFUCO-AM-FM, 1990 - 1996**

<u>Month and Year</u>	<u># Mins./ # Empls., Top 4 Categs.</u>	<u># Mins./ # Empls., Total Fulltime</u>	<u>% of Parity, Top 4 Categs.</u>	<u>% of Parity, Total Fulltime</u>
1996	4/26	6/30	93%	120%
1995	3/26	4/28	70%	86%
1994	0/24	3/27	0%	67%
1993	0/23	3/26	0%	70%
1992	1/21	4/26	31%	99%
1991	0/24	3/27	0%	71%
1990	0/20	3/27	0%	71%

3/ The converse is not always true: if a station has not hired minorities, it may nonetheless have recruited them. But if it did not hire minorities, the cause of such failure to hire might be that the station did not recruit minorities. See Bilingual Bicultural Coalition on the Mass Media v. FCC, 492 F.2d 656, 658 (D.C. Cir. 1974) ("a disparity that is reasonable in light of a recruitment policy might not be reasonable in its absence.") That is why the Commission was justified in inquiring into the KFUCO-AM-FM EEO record in the 1983-1990 license term in the first instance.

4/ This data reflects a reporting week in the spring of each year. The term "top four job categories" refers to officials and managers, professionals, technicians and salespersons. "Parity" refers to the level of minority employment which, as a percentage of the stations' top four category or total fulltime employment, would equal the percentage of minorities in the workforce of the MSA. The percentage of minority representation in the total civilian labor force of the St. Louis MSA should be taken to be 16.6% for 1993-1996 (1990 Census Data Summary Report, (P)MSA Total Percentages for Total Civilian Labor Force (FCC, released March 31, 1993)) and 15.6% for 1991 and 1992 (I.D. at 9891 n. 9). The last year for which Form 395 data was available is 1996.

The inference that the Church has been successful in recruiting minorities is buttressed by the fact that, unknown to the Commission and unheralded generally, the Church two years ago took the NAACP up on its suggestion that the stations develop a program of classical music outreach to the St. Louis Black community. To implement this initiative, the stations hired a Black female music educator, who holds a Master's Degree and was given a senior position at the stations. The program has done much to repair the station's former poor reputation in the St. Louis Black community and to remedy the perception of many Blacks in St. Louis that a career in classical music, and at KFYO-FM specifically, was neither accessible nor available to them.

In addition, the Church's Board for Black Ministry Services has increased its outreach capacity by establishing a page on the Internet.<sup>5/</sup>

This is the kind of outreach the Commission encourages. In Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices (Report and Order), 18 FCC2d 240, 245 (1969), the Commission urged broadcasters to

consider the adoption of special training programs for qualifiable minority group members, cooperative action with other organizations to improve employment opportunities and community conditions that affect employability, and other measures in addition to the employment practices suggested in the proposed rules. These voluntary measures may well be the chief hope of achieving equal employment opportunity at the earliest possible time, and the decision to take such action rests with the individual broadcaster.

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<sup>5/</sup> During the hearing, the NAACP was critical of the Church for failing to use the Board for Black Ministry Services to recruit minorities. The Board's expanded outreach role appears responsive to this concern.

See also 47 CFR §73.2080(b)(4) (which requires licensees to "[c]onduct a continuing program to exclude all unlawful forms of prejudice or discrimination ...from its personnel policies and practices and working conditions").<sup>6/</sup>

In retrospect, it is unfortunate that reporting conditions were not imposed promptly after the 1983-1990 renewal term. Had reporting conditions been imposed in 1991, they would have had the beneficial effect of accelerating the stations' minority recruitment efforts at a time when the Church was not focused on the need for minority recruitment.<sup>7/</sup> However, the Commission cannot entirely be faulted for the delay between the end of the renewal term and the time when the reporting conditions were imposed. The Commission was obligated by Section 309 of the Act to hold a hearing on serious allegations that the Church discriminated in employment.

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<sup>6/</sup> When a post-term EEO efforts are usually not predictive of future EEO compliance, they are usually not considered in evaluating whether to impose a sanction. NEMC v. FCC, 775 F.2d 342 (D.C. Cir. 1985) ("NEMC"). NEMC is inapplicable here, for two reasons. First, the record in this case had closed when the EEO improvements commenced, so no litigation benefit could probably have been gained by pointing to the EEO improvements. Second, the Church has not presented its post-term EEO record to the Commission in mitigation of the reporting conditions -- indicating that the Church did not undertake these EEO initiatives for litigation strategy purposes.

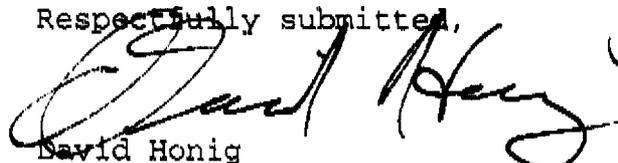
<sup>7/</sup> The NAACP notes that in 1990, the time span between the filing of a petition to deny and the imposition of a remedy following a Bilingual investigation was usually about three years. Now it is about nine months. Thus, the time lapse between an EEO deficiency and the remedy for that deficiency has been virtually eliminated through efficient management of the EEO Branch.

The timing by which the reporting conditions were imposed in this case was sui generis. The reporting conditions were imposed after the only EEO hearing the Commission has held in the past six years. Although the reporting conditions were intended to cure deficiencies which obtained from 1983-1990, the reporting conditions were not scheduled to take effect until 1997.

The EEO progress of KFUC-AM-FM since the last renewal term stands here as new, decisionally-significant information, not previously before the Commission. This information, as shown above, demonstrates that the reporting conditions, if implemented now, would be a useless exercise. The Commission has never imposed reporting conditions on a station whose minority employment is at workforce parity and which has a meaningful program of minority recruitment.

Consequently, in the interest of justice, the NAACP respectfully moves that the reporting conditions imposed in the MO&O be vacated or deleted.<sup>g/</sup>

Respectfully submitted,



David Honig  
3636 16th Street N.W. #B-366  
Washington, D.C. 20010  
(202) 332-7005

Counsel for 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

December 23, 1997

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<sup>g/</sup> Having already manifested its objection to the reporting conditions, the Church certainly would not be heard to argue in favor of retaining them. Consequently, this motion is ripe for action immediately.

**CERTIFICATE OF SERVICE**

I, David Honig, hereby certify that I have this 23rd day of December, 1997 caused a copy of the foregoing "Motion to Vacate or Delete Reporting Conditions" to be delivered by fax and by U.S. First Class Mail, postage prepaid, to each of the following:

Roy J. Stewart, Esq.  
Chief  
Mass Media Bureau  
Federal Communications Commission  
1919 M Street N.W. #314  
Washington, D.C. 20554

Y. Paulette Laden, Esq.  
Chief, EEO Branch, Enforcement Division  
FCC Mass Media Bureau  
2025 M Street N.W. #7218  
Washington, D.C. 20554

Richard Zaragoza, Esq.  
Kathryn Schmeltzer, Esq.  
Fisher Wayland Cooper Leader & Zaragoza  
2001 Pennsylvania Avenue N.W., Suite 400  
Washington, D.C. 20006

  
David Honig