

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-10

In re Applications of

The Lutheran Church/ File Nos. BR - 890929VC
Missouri Synod BR - 890929VB

For Renewal of Licenses
of Stations KFUA/KFUA-FM
Clayton, Missouri

Appearances

Richard R. Zaragoza, Esquire, Kathryn R. Schmeltzer, Esquire, Barry H. Gottfried, Esquire, Scott R. Fleck, Esquire, Lauren Ann Lynch, Esquire, and Sharon L. Tasman, Esquire, on behalf of The Lutheran Church-Missouri Synod; David E. Honig, Esquire, and David McCurdy, Esquire, on behalf of 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; Robert A. Zauner, Esquire, and Y. Paulette Laden, Esquire, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission; and Philip W. Horton, Esquire, on behalf of witness Marcia A. Cranberg, Esquire.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
ARTHUR I. STEINBERG

Issued: August 30, 1995; Released: September 15, 1995

PRELIMINARY STATEMENT

1. By *Hearing Designation Order and Notice of Opportunity for Hearing*, 9 FCC Rcd 914 (1994) ("HDO"), the Commission designated for hearing the applications of The Lutheran Church-Missouri Synod ("Church" or "LCMS") for renewal of the licenses of Stations KFUA(AM) and KFUA-FM (collectively "Stations" or "KFUA"). The hearing issues specified in the HDO, as subsequently modified by *Memorandum Opinion and Order*, FCC 94M-191, released March 25, 1994, are as follows:

(1) To determine the extent to which the licensee of Stations KFUA/KFUA-FM complied with the nondiscrimination and affirmative action provisions specified in Sections 73.2080(a) and 73.2080(b) of the Commission's Rules, 47 C.F.R. § 73.2080;

(2) To determine whether the licensee of Stations KFUA/KFUA-FM made misrepresentations of fact or was lacking in candor in violation of Section 73.1015 of the Commission's Rules, 47 C.F.R. § 73.1015, with regard to the stations' EEO program and documents submitted in support thereof; and

(3) To determine whether, in light of evidence adduced pursuant to the foregoing issues, a grant of the subject license renewal applications would serve the public interest, convenience and necessity.

2. In accordance with Section 309(e) of the Communications Act of 1934, as amended ("Act"), the Commission assigned both the burden of proceeding with the introduction of the evidence and the burden of proof with respect to all of the issues to the Church. (HDO at para. 33.)

3. The HDO further stated that, irrespective of whether the hearing record warrants an order denying the renewal applications of the Church, it shall be determined pursuant to Section 503(b) of the Act whether an order of forfeiture in an amount not to exceed \$250,000 shall be issued against the Church for the willful and/or repeated violations of 47 C.F.R. § 73.2080 (establishing and maintaining an affirmative action policy), and 47 C.F.R. § 73.1015 (submitting truthful statements and responses to the Commission). (HDO at para. 37.)

4. A prehearing conference in this proceeding was held on March 16, 1994. Hearings were held in Washington, D.C., on June 20, 21, 22, 23, and 24, 1994. The record was initially closed at the conclusion of the June 24, 1994, hearing session. (Tr. 1117; *Order*, FCC 94M-423, released June 29, 1994.) The record was reopened on two occasions for the receipt of additional exhibits, and was reclosed for the final time on September 29, 1994. (*Order*, FCC 94M-443, released July 14, 1994; *Order*, FCC 94M-551, released September 29, 1994.)

5. Proposed findings of fact and conclusions of law were filed by the Mass Media Bureau ("Bureau") on September 2, 1994, and by 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 (collectively "NAACP"), on September 6, 1994. Reply findings were filed by the Church and the Bureau on October 31, 1994, and by the NAACP on November 1, 1994.

FINDINGS OF FACT

I. Background

A. The Church's Mission for the Stations

6. The Church is the licensee of KFUA(AM) and KFUA-FM, licensed to Clayton, Missouri. KFUA(AM) went on the air in 1924 and is a 5,000 watt daytime-only AM station, operating noncommercially on 850 kHz and broadcasting religious programming. KFUA-FM went on the air in 1948 and is a full-time commercial FM station operating on 99.1 MHz and broadcasting classical music with a religious orientation and some religious programming. (Church Ex. 1, pp. 1, 3, 7; Church Ex. 4, p. 3; Church Ex. 7, p. 2.)

7. The Church, either directly or through Concordia Seminary ("Seminary"), has been the owner and operator of KFUA(AM) since 1924. According to the Church, KFUA(AM) has the "distinction" of being the "world's oldest religious broadcast facility"; it was the first daily station to come on the air with and continuously maintain a religious format. (Church Ex. 7, p. 4.) In 1948, the Church put KFUA-FM on the air. KFUA-FM is the only

full-time classical music format station in the St. Louis radio market. (Church Ex. 1, p. 1.) The studios of both KFUE(AM) and KFUE-FM are located in the same building on the campus of the Church's Concordia Seminary in Clayton, Missouri. (Church Ex. 4, p. 3.)

8. In the Church's view, both of the Stations "have been dedicated to the task of carrying out in their way the Great Commission which Christ gave to His Church, to preach the Gospel to every creature and to nurture and serve people in a variety of ways." (Church Ex. 7, pp. 1-2; Church Ex. 4, pp. 2-3.) During the period from February 1, 1983, to and including February 1, 1990 ("License Term") (Tr. 13-14), KFUE(AM)'s format was religious and KFUE-FM broadcast sacred as well as nonliturgical classical music. For example, KFUE-FM played Bach, Schuetz, Handel, Mendelssohn and others, and related them to the Church year. (Church Ex. 7, pp. 3, 5-6; Church Ex. 4, p. 3 and Att. 1.) Both of the Stations also served the mission of the Church's ministry by giving professional help and training to the students of Concordia Seminary. (Church Ex. 7, pp. 5-6.)

B. History of the Church's Involvement in Broadcasting

9. On February 19, 1923, the Chairman of the Board of Control of Concordia Seminary proposed the idea of operating a radio station either at the Seminary or at Concordia Publishing House. The funds for construction and the initial operating expenses of KFUE(AM) came from the Seminary and the Lutheran Layman's League ("League"), as well as from the St. Louis Lutheran Publicity Organization and the Walther League. The students of the Seminary, in addition to raising \$1,500 in donations from friends and relatives, also appropriated \$1,000 from the student treasury to help build the radio station. (Church Ex. 1, pp. 2-3.)

10. Station KFUE(AM) went on the air on December 14, 1924. It was officially dedicated to the "glory of God" during an evening broadcast on that day from an attic studio at the Seminary, located at that time in St. Louis. The station's commitment was to promote Gospel outreach and service to the listening audience through religious programming and "serious" music. (Church Ex. 1, p. 3.) The founders of the station were proponents of a ministry to the "whole man" and believed classical music was important to that ministry. Martin Luther had said: "After theology, I accord to music the highest place and greatest honor." Throughout its early years, the Church believed that KFUE(AM) was following Luther's tradition by using fine classical music, much of which was composed for use in church liturgy, to glorify the name of Jesus Christ. (Church Ex. 7, p. 2.)

11. KFUE(AM)'s first license was issued to Concordia Seminary by then Secretary of Commerce Herbert Hoover on January 29, 1925, for a term expiring January 25, 1926. The station began broadcasting with a 500-watt transmitter at 550 kHz, sharing that dial position with Station KSD(AM), St. Louis, Missouri. (Church Ex. 1, p. 3 and Att. 1.)

12. In 1924, when KFUE became operational, there were fewer than 600 radio stations in the United States and the station's broadcast signal extended from the east coast to the Rocky Mountains at certain times during the broadcast day. With the rise in the number of broadcast stations and increased industry regulation through the Federal Radio Commission, the broadcast range of KFUE(AM) gradually diminished. Initially the station broadcast only two

programs per week, on Sunday and Wednesday evenings. By 1928, KFUE(AM) was broadcasting 34 programs per week, approximately 21 hours of programming. (Church Ex. 1, pp. 3-4.)

13. In 1926, Concordia Seminary relocated from St. Louis to a new campus in suburban Clayton, Missouri, requiring relocation of KFUE(AM). The problem of moving the radio facility was resolved when the League offered to rebuild the station at the new Seminary and to provide funds for annual maintenance. In conjunction with the relocation, on June 15, 1926, the League submitted a resolution to the Missouri Synod ("Synod"), *i.e.*, the Church body in Convention, proposing that the Synod take over the station with control in the hands of the Board of Control of Concordia Seminary. KFUE(AM)'s new facility at the Seminary's Clayton campus was dedicated on May 29, 1927. At that time, KFUE began operating with a 1,000 watt transmitter. (Church Ex. 1, p. 4; Tr. 720, 850.)

14. In November 1940, the Commission approved the Church's application to operate on 830 kHz and for an increase in power to 5,000 watts. A few months later, the FCC modified KFUE(AM)'s frequency to 850 kHz, the position it currently occupies on the dial. (Church Ex. 1, p. 7.)

15. In 1948, the physical plant for KFUE(AM) was enlarged, and the Church, then called the "Evangelical Lutheran Synod of Missouri," applied for and received a license for Channel 256, 99.1 MHz in the FM band. The new station's call letters were KFUE-FM. Shortly thereafter, pursuant to an application, the licensee changed its name to the current "The Lutheran Church-Missouri Synod." With its new FM station, the Church gained the ability to broadcast around the clock. (Church Ex. 1, p. 7.)

16. From 1948 until 1974, religious and classical music programming was simulcast on KFUE(AM) and KFUE-FM, both of which were operated on a noncommercial basis. After 1974, because of a change in the FCC rules, KFUE(AM/FM) simulcast only on weekends. KFUE-FM became a full-power stereo broadcast operation in 1975, operating at 100,000 watts. (Church Ex. 7, pp. 2, 5.)

17. In March 1983, one month after the beginning of the License Term, the Church decided it would need to accept commercial advertising on the FM station. The AM station remained noncommercial. In the Church's view, voluntary contributions and bequests, which had been the source of both Stations' revenues up until then, were simply insufficient to support the Stations' operations. Throughout the License Term, however, members of the Board of Directors of the Church debated whether the Church should engage in commercial endeavors because the Directors believed that the main function of both Stations should remain as a ministry to support the Church and to nurture Christian faith. (Church Ex. 7, pp. 2, 5.)

18. The Church's Stations have had a spotless record with the FCC since commencing operation in 1924. With the exception of this proceeding, neither the FCC nor its predecessor agency had ever cited either of the Stations for any violations of rules or policies. (Church Ex. 7, p. 2; Tr. 796-98, 806-7.)

C. Organization of the Church's Broadcast Ministry

19. From the beginning of the License Term until 1986, the Stations were operated by the Church through its Board for Lutheran Radio, a Board directly accountable to both the Church's Board of Directors and the Church's Membership in Convention. A general manager of both Stations (the top staff position) served as the "Chief Executive Officer" ("CEO") of the radio operations. Because of the religious nature of the radio operations, the general manager was required to have theological education and expertise. The general manager of both Stations from approximately January 1983 to January 1986 was in fact a Church minister, Reverend Roger Abatie. During that time, the Executive Director of the Church's Board for Communications Services ("BCS") was Reverend Paul Devantier, who served as a liaison to the Stations. (Church Ex. 7, p. 7 and Att. 1; Joint Ex. 1; Tr. 876.)

20. In 1986, the Church assigned responsibility for the radio operations of the Stations to the BCS. The Board for Lutheran Radio became a standing committee of the BCS. As Executive Director of the BCS, Reverend Devantier became CEO of the Stations. As a result, since 1986, the requirement that the top staff position at the Stations be filled by someone with theological education and expertise was fulfilled through the Executive Director position. (Church Ex. 7, p. 7 and Att. 1; Tr. 876.)

21. As the Stations' CEO, Reverend Devantier visited the Stations approximately once a week, beginning in 1986, to oversee the Stations and to ensure that the Church's policies were observed. (Church Ex. 4, p. 11.) Reverend Devantier reported to the seven-member BCS, which in turn reported to both the Church's Board of Directors and its Membership in Convention. (Church Ex. 7, pp. 7-8 and Att. 1.)

22. In a staff reorganization at the Stations in 1987, the position of Director of Broadcast Ministries was created to supervise a separate general manager for each radio station. The Director of Broadcast Ministries reported directly to Reverend Devantier. (Church Ex. 7, p. 8 and Att. 1.) The only person to hold the position of Director of Broadcast Ministries during the License Term was Kenneth Lombardi, who held the position from approximately July 1987 to November 1989. (Joint Ex. 1.)

D. The Role of Concordia Seminary at the Stations

23. Since the inception of KFUA(AM), the Stations and Concordia Seminary have had a close relationship which, in the Church's view, has allowed each institution to play an integral role in the achievement of the other's goals. (Church Ex. 1, pp. 2-3; Church Ex. 7, p. 6.) KFUA(AM)'s first license was issued to the Seminary itself in 1925. (Church Ex. 1, p. 3 and Att. 1.) FCC records reflect that KFUA's license during the late 1920s was issued to the "Evangelical Lutheran Synod of Missouri, Ohio, and other States, through Board of Control of Concordia Seminary." (*Id.* at p. 4 and Att. 2, p. 5.) In an Order dated March 2, 1938, the Commission noted that KFUA(AM) was located on the grounds of the Seminary, and that the Station's operation was under the control of a radio committee of 10

members, 4 of whom were members of the faculty or Board of Control of Concordia Seminary. The Commission further observed that a sub-committee known as the KFUA Committee was in direct control of operations. (*Id.* at Att. 4, p. 5.) The Commission also noted in its Order that the talent used by KFUA(AM) was drawn almost entirely from the membership of the Church, the faculty and student body of the Seminary and prominent ministers, and the nationally known Concordia Seminary chorus was one of the two major sources of musical talent for KFUA. (*Id.* at Att. 4, pp. 6-7.)¹

24. The Seminary has permitted KFUA and KFUA-FM to remain on its campus on a rent-free basis. (Church Ex. 1, pp. 4-5.) In addition, the Stations have obtained a supply of individuals with both Lutheran training and a personal commitment to the ministry of the Stations. Such individuals have been willing to work for the relatively low salaries that the Stations have been able to pay. (Church Ex. 7, p. 6.) KFUA(AM) and KFUA-FM have also been utilized for a work/study program for Seminary students in the use of radio as a medium in the Church's mission and ministry. (Church Ex. 1, pp. 7-8; MMB Ex. 24, p. 9; Tr. 783-84, 852-53.)

25. According to the Church, the history of the relationship between KFUA and the Seminary is exemplified by a May 1, 1928, issue of *The Gospel Voice*, a Station publication, describing how the musical talent of the Seminary had banded together into an organization which adopted the name "The Concordia Broadcasters." The express purpose of this group was to render regular services over KFUA(AM). In addition, the Concordia Seminary Publicity Committee cooperated with the Station in bringing KFUA radio activities before the public, members of the 1928 Postgraduate Class gave brief religious addresses over KFUA every Thursday afternoon at 3:00 p.m., and members of the Concordia Seminary Mission Society assisted KFUA in the work connected with the Bible class. (Church Ex. 1, pp. 4-5 and Att. 3.)

26. A June 1942 edition of *The Bond* stressed that KFUA "serves as a radio laboratory for the students, where they may acquire valuable radio experience which they can later employ in the local stations of their communities." (Church Ex. 1, p. 7 and Att. 5.) A September 1957 issue of the Church's *The Lutheran Witness* remarked that "[t]he Radio Student Training project, sponsored jointly by Concordia Seminary and the station, gives specialized instruction in radio and television to theological students." (*Id.* at p. 8 and Att. 6.) A May 1967 edition of *The Gospel Voice* stated that Seminary graduates "were reminded of the importance of radio in their total ministry to the needs of the people in their community." During the 1970s and into the 1980s, courses and workshops developed and taught by KFUA staff were offered by the Seminary to its students. (*Id.* at p. 8 and Att. 7.)

27. Throughout this relationship, including during the License Term, the Stations received letters in which Seminary students and other Church members expressed their desire to work at the Stations as an extension of their ministries. Even Seminary students or their spouses who lacked on-air skills offered their services. The Church be-

¹ The Church also applied for and received a license for a UHF television station in 1948. Although the facility was not constructed, the application highlighted the fact that the station

was located on the Seminary grounds and that KFUA was broadcasting the devotional services of the Seminary on a regular basis. (Church Ex. 1, p. 7 n.1.)

lieved that such dedication to the Stations' mission has proven vital to its continued operation of the Stations. (Church Ex. 4, p. 4 and Att. 2.)

28. In the Church's opinion, the Seminary students' work for the Stations has been a part of their overall education as ministers. (Church Ex. 7, p. 6.) For example, Reverend Devantier, while a Seminary student, served as a part-time AM announcer at KFUE. After graduating, he became the Stations' Director of Development, served as general manager, and eventually became the Executive Director of the BCS, which oversaw the Stations for the Church. (Church Ex. 4, pp. 4-5.) Similar considerations applied, in the Church's view, to the spouses of Seminary students who were employed at the Stations. The Church believed that these individuals often played an important role as partners in their spouse's ministry after graduation, and that spouses have had the opportunity to learn and develop in that role as Station employees. (Church Ex. 7, p. 6.)

29. The general nature of the "arrangement" between the Stations and Concordia Seminary was summarized in the following answer by Reverend Dr. Ralph A. Bohlmann, who was president of Concordia Seminary from 1974 to 1981 and then President of the Church during the License Term (Church Ex. 1, p. 1):

Q: Isn't it true that, that as president of Concordia Seminary, the seminary had an arrangement with the station to hire students and their spouses to work at the station?

A: Yes, it is, but the nature of that arrangement perhaps is not a matter of written record. . . . [T]he seminary has a campus of 72 acres and the stations have a beautiful building on that campus. The students, the faculty members live on the campus for the most part over the years an, quote, arrangement, to use your words, has developed from the very beginning of the station. The seminary moved to that campus at about the time the station went into operation in the mid '20's. It, it is, it's part of the campus family and part of a campus community. It's assumed by the, those who manage the station's affairs and those who serve at the seminary that students, student wives in some cases, will be employed by the station whenever opportunities for employment present themselves. So, yes, if that qualifies as an arrangement. It did not need to become a legally binding document and, and to my knowledge there, there is no such document in the history of the seminary and the station, but a kind of word of mouth, a moral commitment to do that was self-understood. I believe, both at the station and at the seminary. And then in my capacity as president, I assume my predecessors did the same thing. Regular visits with station personnel and, and terms of various arrangements, for example the daily worship of the seminary is broadcast on the stations and so there was consultation from time to time as to how that might be enhanced, but employment practices, too. We were very, very happy that the station, over the years, employed many of our students, and that was an arrangement of sorts.

(Tr. 288-89.)

30. On January 2, 1990, the NAACP filed a Petition to Deny the Stations' applications for renewal of their licenses. (MMB Ex. 3.) The Church filed an Opposition to Petition to Deny and Response to Inquiry ("Opposition") on February 23, 1990. (Church Ex. 4, Att. 7, pp. 2.) The Opposition was prepared by Marcia A. Cranberg, an attorney with the law firm of Arnold & Porter, which represented the Stations. Ms. Cranberg had the primary day-to-day responsibility for serving the Stations' FCC regulatory needs. (Church Ex. 8, pp. 1, 6.) In the Opposition, the Church explained its relationship to the Seminary as follows:

KFUE's studios are located on the campus of Concordia Seminary. KFUE pays no rent for these facilities. Given the noncommercial nature of the AM operation (and, until recently, of the FM as well), this arrangement is extremely important to KFUE's ability to continue to offer high quality broadcast service. Part of the arrangement has included reciprocal efforts by KFUE to provide broadcast training to Concordia students or their spouses through employment at the stations. Thus, as an accommodation to the Seminary, KFUE has tried to fill a number of the non-specialized positions at the stations with Seminary students or their spouses.

(Church Ex. 4, Att. 7, p. 17.)

31. In response to a Commission inquiry dated April 22, 1992 (MMB Ex. 5), the Church, in a letter dated May 12, 1992, stated: "[O]ur reciprocal arrangement with the Concordia Lutheran Seminary (which provides our office and studio space rent-free) requires that we make special efforts to employ Seminary students who have obtained the required knowledge of the religious format without resort to outside recruitment sources." (MMB Ex. 6, p. 3.)

32. In a Motion to Strike and Reply to Comments, filed September 21, 1992, the Church described the arrangement with the Seminary in the following manner:

KFUE's studios and offices are housed free-of-charge [at the Seminary]. . . . The materials submitted by KFUE in this proceeding show that, despite the incentive for maintaining a synergistic relationship with the Seminary so as to receive certain much-needed benefits, KFUE recruited or hired through the Seminary for only five of 35 full-time hiring opportunities from October 1986 through January 31, 1990. . . . [Footnote] The remaining 85 percent of full-time job positions were recruited for and hired through a variety of other sources.

* * *

[Footnote] In addition, KFUE attempts to satisfy the terms of its reciprocal arrangement with the Concordia Lutheran Seminary by allowing Seminary students who are studying for a theological Lutheran career to train as part-time announcers on KFUE-AM.

(MMB Ex. 11, p. 20.)

33. According to Ms. Cranberg, the "arrangement" between Concordia Seminary and the Stations was not reduced to writing and may not have been legally enforceable. In crafting pleadings she filed on behalf of the Church, Ms. Cranberg testified that she did not intend to imply that there was a written, legally enforceable contract, and had no intention of misleading the Commission into believing that such a formal contract existed. (Church Ex. 8, p. 8 n.3.)

34. During the License Term, Concordia Seminary students and their spouses held 21 part-time positions and 8 full-time positions. Of the part-time positions, 17 were AM announcers who, according to the Church, needed religious training. (Church Ex. 4, pp. 3-4.) All but one of the part-time Seminary students were hired for on-air jobs. (*Id.* at Att. 6, pp. 9-15; Tr. 503-7.) The part-time workers generally worked only 6 to 12 hours a week. (Church Ex. 3, p. 4; Church Ex. 4, pp. 22-23.) Seven of the eight full-time hires were Seminary wives; one full-time hire was a Seminary student. (Church Ex. 4, Att. 6, pp. 1-8.)

35. In the fall quarter of 1989, there were 10 minority students at the Seminary out of a total enrollment of 482. Of the 10 minorities, 3 were "Black Non-Hispanic." (NAACP Ex. 30.) According to Reverend Bryant E. Clancy, an African American and Director of the Church's Commission on Black Ministry (Church Ex. 2, p. 1), the average number of African American students at the Seminary between 1983 and 1990 was five (Tr. 722-23).

E. The Church's Policy of Nondiscrimination

36. Reverend Dr. Bohlmann, President of the Church during the License Term, testified that in his view the Church's whole reason for being has been to proclaim the Word of God, nurture its members, meet the needs of people, and welcome into its fold men and women of every race, color, and national origin. According to Reverend Dr. Bohlmann, the Church has always wanted its membership to grow, and for all of its ministries, broadcasting being one of the most important, to include all qualified persons without regard to race, color, or national origin. (Church Ex. 1, pp. 1-2.) In the view of Reverend Clancy, the 117-year history of the Church's work with African Americans demonstrates an aggressive attitude against racism and continuous outreach toward African American families. (Church Ex. 2, pp. 1-2.)

37. In 1953, the Church formed the Lutheran Human Relations Association of America for the purpose of making efforts to eliminate any segregation and discrimination. To further the presence of African Americans in the Church, the African American Mission Models Task Force was created in 1975. In 1977, the Church created the Commission on Black Ministry, which was designed to expand the Church's African American membership. (Church Ex. 2, p. 3.) In 1981, the Church's Synod in Convention passed Resolution 8-07, resolving "[t]hat we reaffirm our earlier statements against racism and violence and call upon our congregations to reaffirm clearly their affirmation of human life and dignity for all persons and

all races." (Church Ex. 7, p. 8 and Att. 2.) In 1986, the Church publicly denounced apartheid as well as other forms of racial discrimination. (*Id.* at p. 8 and Att. 3.)

38. The Church has approximately 50,000 African American members out of total membership of 2.6 million. Approximately 86 African American Lutherans serve as pastors of congregations and 30 serve as college or seminary faculty and administrative staff members. The Church has approximately 100 white pastors who serve congregations with predominantly African American members and 3 Black pastors who serve congregations with predominantly white members. (Church Ex. 2, p. 1.)

39. For the past 20 years, the national Church leadership has included an African American Vice President of the Synod. African Americans have also served as Vice Presidents of regional districts, area circuit counselors and members of various district Boards of Directors. (Church Ex. 2, pp. 1-2.) Reverend Clancy believed the climate in the Church for his efforts on behalf of African Americans has been very supportive. (Tr. 723-24.)

40. There is minority representation at the primary and secondary schools operated by the Church. Specifically, the minority population of the Church's 1,079 early childhood centers, 988 elementary schools, and 62 high schools consists of 17% minorities, 7% of whom are African American. (Church Ex. 2, pp. 2-3.)

41. The Church has a long history of providing educational opportunities for minorities. For example, in 1888, Walther College, a Lutheran high school in St. Louis, was perhaps the first school in the city to make an effort to break down segregation by admitting an African American female student. She later graduated with honors. Currently, 17.9% of the students at the 12 campuses of Missouri Synod colleges, universities and seminaries are minorities, and more than half of these are African American. (Church Ex. 2, p. 2.)²

II. Equal Employment Opportunity at KFUD

A. Nondiscrimination and Affirmative Action at the Stations

42. From the beginning of the License Term, the Stations' personnel policies required employment on a racially nondiscriminatory basis. The Stations' personnel policies in effect in 1983 stated: "It is the policy of this Station, as set forth by the Board of Directors, to provide employment ... without regard to race, color, religion, national origin, sex or age, except where religious affiliation is a bona fide occupational requirement." The Stations' personnel policies also contained a commitment "to take affirmative actions to seek out individuals whose potential has not been developed, with the objective of assisting them to meet . . . standards" at a level consistent with the healthy growth of the Stations. (Church Ex. 4, p. 5 and Att. 3.)

43. By 1987, the Stations' personnel policies were controlled by policies in force at the Church, and included a commitment to equal opportunity. The policies recognized

² The colleges and universities are: (1) Concordia College, Ann Arbor, MI; (2) Concordia Lutheran College of Texas, Austin, TX; (3) Concordia College, Bronxville, NY; (4) Christ College Irvine, Irvine, CA; (5) Concordia University Wisconsin, Mequon, WI; (6) Concordia College, Portland, OR; (7)

Concordia University, River Forest, IL; (8) Concordia College, St. Paul, MN; (9) Concordia College, Selma, AL; and (10) Concordia Teachers College, Seward, NE. The seminaries are: (11) Concordia Seminary, Clayton, MO; and (12) Concordia Theological Seminary, Fort Wayne, IN. (Church Ex. 2, p. 2.)

two basic concepts, nondiscrimination and affirmative action, while acknowledging that for certain positions the Church needed to seek out "individuals with specific religious training." The EEO policy stated:

The recognition of nondiscrimination demands the elimination of all prohibited discriminatory conditions, whether purposeful or inadvertent. The Lutheran Church-Missouri Synod is pledged to the careful and systematic examination of all its employment policies to be certain that such policies do not operate to the detriment of any individual on the grounds of race, color, religion, sex, or national origin.

Our commitment to Affirmative Action prompts us to do more than ensure neutrality with regard to race, color, religion, sex, or national origin. The Synod is pledged to programs which place special emphasis on our efforts to recruit, employ, and promote qualified members of all such groups.

(Church Ex. 4, pp. 5-6 and Att. 4.)

44. When he assumed the position as CEO of the Stations in 1986, Reverend Devantier took steps to assure that the Church's policy of non-discrimination and equal opportunity was in effect at the Stations. For example, he assured that the Church's Employee Handbook, containing a statement concerning Equal Employment Opportunity, was put into effect at the Stations and was distributed to all employees. (Church Ex. 7, pp. 8-9 and Att. 4, pp. 1, 27-28.) The Employee Handbook was published in October 1985, more than two and one-half years after the License Term began. (*Id.* at Att. 4, p. 1.) Reverend Devantier also visited the Stations' facilities approximately once a week to oversee the Stations and to ensure that the Church's policies were observed. (Church Ex. 4, p. 11.) For the implementation of the details of the Stations' EEO policies, Reverend Devantier relied on the operational chiefs at the Stations. (Church Ex. 7, p. 9.)

45. From his vantage point, Reverend Devantier believed that the Stations' operational supervisors were assuring that the Stations did not discriminate and were implementing the affirmative action efforts required by the FCC. He based these beliefs on the following (Church Ex. 7, pp. 9-10 and transcript pages cited):

(a) He had been involved in hiring the Stations' managers and knew them to be competent, responsible people of good character. (Tr. 811-12.)

(b) The absence of any complaints of discrimination.

(c) When he had been general manager of the Stations in the 1970s, the Stations had always been committed to equal opportunity for all. Indeed, Reverend Devantier had promoted an African American woman, Lula Daniels, from secretary to a managerial position as Coordinator of Worship Programming. He had no reason to believe that the Stations' policies had changed from their commitment to equal opportunity employment at any time after his tenure as general manager.

(d) He discussed with each of the general managers during the License Term the Stations' commitment to equal employment opportunity and the desirability of hiring minority employees. (Tr. 823-24, 826.)

Based on these discussions, Reverend Devantier believed that the managers were committed to maintaining the EEO policies. Although no one was explicitly charged in a position description with noting the presence or absence of minority applicants at the Stations, managers were generally charged with day-to-day EEO compliance. (Tr. 819-21, 823-24.) The only manager who told Reverend Devantier that it was desirable to modify the Stations' EEO procedures was Thomas M. Lauher, who sent him two memorandums on the subject in March 1989.

(e) Reverend Devantier knew the Stations had highly respected communications counsel, the firm of Arnold & Porter, because that firm had been the Stations' counsel when he was general manager. He believed that he would hear directly from the firm if FCC rules or policies changed in a way which would have required dramatic changes in the Stations' EEO program. He did not receive any such communication from counsel.

46. Dennis Stortz, Operations Manager for both Stations from 1978 to 1991 and also acting general manager for both Stations from July 1986 to May 1987, testified that, based on his observation and involvement in the personnel activities of the Stations, he believed the Stations never discriminated against anyone because of his or her race during the License Term. (Church Ex. 4, pp. 1-2.) Mr. Stortz believed that the Church's theology taught and encouraged "all persons to achieve their fullest individual potential in the life in God." Establishing barriers to that achievement by discriminating on the basis of race would have been contrary to those teachings as Mr. Stortz understood them, as well as to Mr. Stortz's personal beliefs. (*Id.* at p. 2.) Thomas M. Lauher, general manager of KFUFM from May 1987 until July 1989, testified that he had never seen any overt or intentional discrimination on the part of anyone associated with either KFUFM(AM) or KFUFM-FM. (Church Ex. 6, pp. 1, 3.)

47. Reverend Dr. Bohlmann, President of the Church during the License Term, testified that he had known both Reverend Devantier and Mr. Stortz for many years and that, in his opinion, they were honest and were individuals of the highest integrity who would never discriminate. (Church Ex. 1, p. 8.) On cross-examination by the NAACP's attorney, Reverend Dr. Bohlmann explained the basis of his beliefs about Reverend Devantier and Mr. Stortz:

[A] president of a large organization like the Church body has to depend to a large extent on the character and demonstrated commitments, theological in this case as well as technical and professional, in choosing that particular person for that position. So the character and the quality of leadership that one can expect is, to a large extent, determined by the, the personal integrity and honesty and commitments of the designees. Paul Devantier, for example, was my student many years ago. When I was the president of the seminary, he was the manager . . . at the station with whom I consulted several times. And subsequently during my administration as president of the Church body, he served throughout most of that period as the, the Church body's chief executive in the entire area of communications, covering all of its, its districts, 30-some districts, its colleges, seminaries,

its various entities. I knew him both personally and professionally as a man of, of deep commitment to the Church's own policies of nondiscrimination. In his own family life, pardon me, Paul, for saying this, his commitment is demonstrated by the fact that two of the members of his own household are bi-racial children, one adopted, one a foster child. The kind of commitment he has toward fair and just hiring practices and all other dimensions of the Church's posture is demonstrable, and in my position and helping the board to choose its chief executive, questions of honesty, character, and the like are very important. And . . . then . . . [with] Dennis Stortz, and the kinds of individuals that Paul [Devantier] would select as administrators of the, the the stations, would be directly influenced by his own posture.

(Tr. 278-79.) Reverend Dr. Bohlmann also testified that he was briefed frequently by Reverend Devantier as well as by the Stations' legal counsel, and assured himself in a general way that the Stations were complying with EEO requirements. (Tr. 283-85.) However, Reverend Dr. Bohlmann was not consulted with respect to the hiring of announcers, salespersons, receptionists, or other station personnel. (Tr. 285-87.)

48. Reverend Bryant Clancy, himself an African American and Director of the Church's Commission on Black Ministry, testified that, based on his experience in the Church, his opinion was that the Church would not discriminate on the basis of race in any of its ministries including the radio ministry, although he did not know the specifics as to how the Stations did their hiring during the License Term. (Church Ex. 2, pp. 1, 3; Tr. 719-20.) Reverend Clancy had been a guest on KFUE radio programs to inform the listeners of the goals and activities of the Commission on Black Ministry. In his contact with the Stations, he had not been aware of any instance of racial discrimination. Reverend Clancy also testified that he had known Reverend Devantier personally for years and that he believed Reverend Devantier to be "a man of outstanding integrity, fairness and service to the Church and all of God's children." (Church Ex. 2, p. 3.)

49. During the License Term, no past or then present employee or job applicant complained that the Stations discriminated against him or her on the grounds of race or religion. (Church Ex. 7, p. 10.)

B. Knowledge of Lutheran Doctrine as a Job Requirement

50. The Church believed during the License Term that many of the positions at KFUE(AM), as well as positions that served functions at both of the Stations, required a knowledge of Lutheran doctrine and philosophies. For example, in the Church's judgment, the station manager of KFUE(AM) needed to be familiar with the mission and doctrine of the Church because part of the manager's job was to ensure that the station presented Lutheran doctrine accurately. In the Church's view, the Director of Development and Assistant Director of Development also needed to understand the ministry of KFUE and its relation to doctrine and to the Bible because these people created the AM station's fund-raising letters and generally did fund raising. Indeed, it was the Church's position that it was desirable that a Lutheran pastor hold the Director of Development position. (Church Ex. 4, p. 7; Tr. 871-72.)

51. The Church's judgment was that it was also essential to have knowledge of Lutheran doctrine to be an announcer of religious programming on KFUE(AM). (Church Ex. 4, p. 7.) Virtually all announcers on the AM station presented worship events, religious discussion programs, or call-ins. (Tr. 871.) Again, the Church believed there was no substitute for knowledge of Lutheran doctrine for selecting and presenting program materials and for responding to caller inquiries. The Director of Audio Resources (title changed to Manager of Religious Programming in 1988) also needed substantial knowledge of the Lutheran mission and doctrine, in the Church's view. This person was responsible for managing the broadcasts of live worship services on KFUE(AM) from area Lutheran congregations, for producing that station's Christian music programs, for arranging for daily worship programs produced by that station, and for creating other worship program features produced and broadcast by KFUE(AM). (Church Ex. 4, pp. 7-8.)

52. The Church's position was that it was desirable to be an active member of an LCMS congregation for many jobs which, it believed, had a connection to the espousal of religious views. For example, Mr. Stortz testified that Church membership and resulting knowledge about the Church calendar and Church-related events was considered desirable for any receptionist, who would have worked for and served both of the Stations, because the receptionist interacted with religious listeners and potential donors, and sometimes scheduled people who were going to be on the air. (Church Ex. 4, p. 8; NAACP Ex. 39, pp. 1-2, 7-8; Tr. 494-98.) Other secretarial, clerical and engineering positions, as well as positions in management and the business department, also served both KFUE(AM) and KFUE-FM. (Church Ex. 4, p. 3; Tr. 618-19.)

53. It was also helpful, in the Church's view, for certain secretaries to be familiar with the Lutheran Church because part of their job was to contact pastors to enlist volunteers for "Share-A-Thons," which were on-the-air fund raising events. (Church Ex. 4, p. 7; Tr. 488.) Mr. Stortz believed that it was more effective to have Lutherans solicit donations from other Lutherans in connection with fund raising. (Tr. 500.) However, he acknowledged that a caller wishing to give money would not necessarily know if the person answering the telephone was a Lutheran. (*Id.*) Moreover, Mr. Stortz testified that certain secretaries gathered and conveyed information to pastors about the matters which they would be addressing on worship programs. (Tr. 734-35.) These secretaries also sometimes made decisions as to which pastor to schedule for a specific week, and it was "helpful" if the secretaries were familiar with the Lutheran calendar and teachings. (Tr. 734-36.) Although Mr. Stortz recognized that a person who was not familiar with the Lutheran Church could be trained to perform the Stations' secretarial and receptionist duties, he testified that such training could not be accomplished "in a day or a week or a couple of weeks[;] . . . to become comfortable with it[,] it would take longer than that." (Tr. 498-500.)

54. The record in this proceeding contained four job descriptions for the position of "Receptionist" (NAACP Ex. 35, pp. 4, 25; NAACP Ex. 36, p. 16; NAACP Ex. 39, pp. 7-8), six job descriptions for various secretarial positions (NAACP Ex. 35, p. 17; NAACP Ex. 36, p. 2; NAACP Ex. 39, pp. 1-2; NAACP Ex. 40, pp. 21-22, 23-24; NAACP Ex. 41, pp. 9-10), and one job description for "Secretary/Receptionist" (NAACP Ex. 41, pp. 16-17). None of these job descriptions referred to the secretary or reception-

ist performing any functions or having any responsibilities of a religious nature. One receptionist job description (dated October 1986) listed as an "Essential" position qualification: "An active member of a Lutheran Church-Missouri Synod congregation." (NAACP Ex. 39, pp. 7-8.) Two secretarial job descriptions (dated October 1986 and June 1989) listed as "Other Desirable" position qualifications:

1. A working knowledge of The Lutheran Church-Missouri Synod.
2. An active member of a Christian congregation, able to understand and demonstrate support for the purpose of The Lutheran Church-Missouri Synod.

(NAACP Ex. 39, pp. 1-2; NAACP Ex. 41, pp. 9-10.) Two other secretarial job descriptions (dated December 1985 and March 1987) listed as an "Other Desirable" position qualification: "Member of a congregation of The Lutheran Church-Missouri Synod." (NAACP Ex. 40, pp. 21-22, 23-24.) The Secretary/Receptionist job description (dated July 1989) listed as "Other Desirable" position qualifications:

1. An active member of a Lutheran Church-Missouri Synod congregation.
2. A working knowledge of The Lutheran Church-Missouri Synod.

(NAACP Ex. 41, pp. 16-17.)³

55. Mr. Stortz testified that familiarity with or membership in the Church would be "a desirable happening" for the Stations' engineers

because the engineers go out to churches and do all the remote set-up of church services. They interact with the pastors at the church and schedule when things are going to happen and how they're going to happen and discuss the engineering technical venue of the operation so that the pastor knows what's going on and that the radio station knows what's going on.

(Tr. 500-1; see also Tr. 741-43.) However, Mr. Stortz was of the opinion that someone without a Lutheran background could also perform these duties. (Tr. 743.)

56. The record contained four job descriptions for the position of Chief Engineer (NAACP Ex. 35, pp. 14-15; NAACP Ex. 36, pp. 17-18; NAACP Ex. 39, pp. 9-11; NAACP Ex. 40, pp. 14-16), and two job descriptions for the position of Engineer (NAACP Ex. 35, p. 16; NAACP Ex. 36, p. 19). None of these job descriptions referred to the Chief Engineer or Engineer performing any functions

or having any responsibilities of a religious nature. One Chief Engineer job description (dated October 1986) listed as an "Other Desirable" position qualification: "An active member of a Lutheran Church-Missouri Synod congregation." (NAACP Ex. 39, pp. 9-11.) Another Chief Engineer job description (dated June 1987) listed as an "Other Desirable" position qualification: "An active member of a Christian congregation." (NAACP Ex. 40, pp. 14-16.)

57. Mr. Stortz was also of the opinion that it was "desirable," but not absolutely necessary for the Stations' Business Manager to have Lutheran training or be a member of a Lutheran congregation. This was so, he stated, because the Business Manager "interacted on a daily basis with the . . . Lutheran church headquarters." (Tr. 744.)

58. The record contained three job descriptions for the position of "Business Manager" (NAACP Ex. 35, p. 1; NAACP Ex. 37, pp. 1-4; NAACP Ex. 39, pp. 12-13), two job descriptions for the position of "Manager-Business Services" (NAACP Ex. 35, pp. 23-24; NAACP Ex. 36, pp. 14-15), and one job description for the position of "Manager of Business Affairs" (NAACP Ex. 40, pp. 1-2). None of these job descriptions referred to these employees performing any functions or having any responsibilities of a religious nature. One Business Manager job description (dated October 1986) listed as an "Essential" position qualification: "An active member of a Christian congregation, able to understand and demonstrate support for the purposes of the Lutheran Church-Missouri Synod." (NAACP Ex. 39, pp. 12-13.) The job description for Manager of Business Affairs (dated March 1987) listed as a "Desirable" position qualification: "An active member of a Christian congregation, able to understand and demonstrate support for the purposes of the Lutheran Church-Missouri Synod." (NAACP Ex. 40, pp. 1-2.)

59. Mr. Stortz testified that he did not think it was necessary for a janitor to be a member of the Lutheran Church. However, he believed it would be a "desirable" attribute and would be "a minor consideration" in hiring. (Tr. 501-2.)

60. The Church's February 23, 1990, Opposition to the NAACP's Petition to Deny contained a listing of those positions within the Stations' Top Four job categories for which theological training or background was an employment requirement.⁴ These positions were: General Manager of KFUA(AM); Director of Religious Programming of KFUA(AM); Director of Development of KFUA(AM); Announcer/Program Director of KFUA(AM); Announcer for KFUA(AM); and Director of Broadcast Ministries for KFUA(AM). (Church Ex. 4, Att. 7, pp. 13-14, 24-25.)

61. However, the job descriptions contained in the record indicate that there were other Top Four positions, not mentioned in the Opposition, for which religious knowledge or active membership in a Christian or LCMS congregation was an "Essential" or "Other Desirable" employment qualification. These positions were: General

³ There was no evidence that Mr. Stortz had any role in drafting these, or any of the other job descriptions contained in the record. With respect to the job descriptions in general, it is noted that no questions were asked about their adoption or contents, there was no testimony as to why some duties and functions were not included in the descriptions, and there was no evidence as to why certain qualifications were listed as "Essential" or "Other Desirable." Similarly, there was no evidence that all of the positions for which job descriptions existed

were filled during the License Term, or that the descriptions were actually used for, or had a bearing on, any specific hiring decision.

⁴ The term "Top Four job category" as used herein has the same meaning as in FCC Form 395-B, that is, Officials and Managers, Professionals, Sales, and Technicians.

Manager, KFUE-FM (NAACP Ex. 40, pp. 7-9; NAACP Ex. 41, pp. 1-3); Manager of Business Affairs for KFUE-FM (NAACP Ex. 40, pp. 1-2); Program Director, KFUE-FM (NAACP Ex. 39, pp. 16-18; NAACP Ex. 41, pp. 7-8); and Director of Administration for KFUE(AM) (NAACP Ex. 39, pp. 5-6). With the exception of one of the FM Program Director's job descriptions (NAACP Ex. 41, p. 7), none of the other job descriptions referred to these employees performing any functions or having any responsibilities of a religious nature (NAACP Ex. 39, pp. 5-6, 16-18; NAACP Ex. 40, pp. 1-2, 7-9; NAACP Ex. 41, pp. 1-3).

62. The Opposition also stated that the Chief Engineer and Business Director positions did not require religious training. (Church Ex. 4, Att. 7, p. 13 n.3.) However, as indicated above, two Chief Engineer and one Business Manager job descriptions included religious requirements. (NAACP Ex. 39, pp. 9-13; NAACP Ex. 40, pp. 14-16.)

63. Because of the need for knowledge of Lutheran principles for many positions, KFUE(AM) in particular relied heavily on employment advertising in Lutheran periodicals such as *The Lutheran Witness*. This newspaper was widely distributed to members of Church congregations, including its African American members. (Church Ex. 4, p. 12 and Att. 6, pp. 4, 5, 7; Tr. 750-51.)

64. In preparing and reviewing the Equal Employment Opportunity Program in the Stations' 1989 license renewal applications, Mr. Stortz did not believe that he needed to state explicitly that the Stations required knowledge of Church doctrine for certain positions. (Church Ex. 4, p. 18.) A sentence in the Program stated: "When vacancies occur, it is the policy of KFUE and KFUE-FM to seek out qualified minority and female applicants." (*Id.* at p. 17 and Att. 16, p. 7.) Mr. Stortz believed that this sentence was consistent with the use of various employment criteria, such as religious training or knowledge of classical music, to find "qualified" applicants. (*Id.* at p. 18.) Moreover, Mr. Stortz believed that the Commission was well aware that the Stations were licensed to a church, and it therefore never occurred to him that he needed to mention that theological training was necessary for certain jobs. Similarly, it did not occur to Mr. Stortz that he needed to mention explicitly the Stations' arrangement with Concordia Seminary. Again, in his view, the Commission was well aware that the Stations had a connection with the Seminary, especially given that KFUE(AM) had originally been licensed to the Seminary. (*Id.*)

65. Ms. Cranberg reviewed the EEO Program which had been sent to her by Mr. Stortz with the 1989 renewal applications for filing with the FCC. (Church Ex. 8, p. 2.) Although she was aware that, late in the License Term, the Stations raised questions with her about EEO requirements for religious stations (Tr. 1016-18), she did not focus on the fact that KFUE(AM) had a religious program format and there were likely to be requirements for knowledge of Lutheran doctrine for certain positions (Church Ex. 8, p. 2). Consequently, she did not question Mr. Stortz about whether KFUE should have language in the applications to reflect that likelihood. (*Id.*)

C. The Stations' Affirmative Action Efforts

66. The Equal Employment Opportunity Program filed by the Stations with their September 22, 1982, renewal applications stated, in pertinent part:

I GENERAL POLICY

It is the policy of KFUE and KFUE-FM to provide equal employment opportunity to all qualified individuals without regard to their race, color, religion, national origin or sex in all personnel actions including recruitment, evaluation, selection, promotion, compensation, training and termination.

It is also our policy to promote the realization of equal employment opportunity through a positive, continuing program of specific practices designed to ensure the full realization of equal employment opportunity without regard to race, color, religion, national origin or sex.

* * *

II RESPONSIBILITY FOR IMPLEMENTATION

Maurice Anderson, General Manager, is responsible for the administration and implementation of our Equal Employment Opportunity Program. It is also the responsibility of all persons making employment decisions with respect to recruitment, evaluation, selection, promotion, compensation, training and termination of employees to ensure that our policy and program is adhered to and that no person is discriminated against in employment because of race, color, religion, national origin or sex.

III POLICY DISSEMINATION

To assure that all members of the staff are cognizant of our equal employment opportunity policy and their individual responsibilities in carrying out this policy, the following communication efforts are made.

The station's employment application form contains a notice informing prospective employees that discrimination because of race, color, religion, national origin or sex is prohibited and that they may notify the appropriate local, state, or federal agency if they believe they have been the victims of discrimination.

* * *

IV RECRUITMENT

With a small staff of employees, job vacancies occur infrequently. (During the past twelve months, for example, only two vacancies occurred and one part-time employee became a full-time employee. Consequently, little recruitment efforts were required.) When vacancies do occur, it is the policy of KFUE and KFUE-FM to seek out qualified minority and female applicants. We deal only with employment services, including state employment agencies, which refer job candidates without regard to their race, color, religion, national origin or sex.

When utilizing media for recruitment purposes, help-wanted advertisements always include a notice that we are an Equal Opportunity Employer and contain no indication, either explicit or implied, of a preference for one sex over another.

We encourage present employees, particularly minority and female employees to refer minority and female candidates for existing and future job openings.

(MMB Ex. 1, pp. 5-6.) An EEO Program apparently filed by the Church sometime in 1983 included statements identical to those quoted above, except the name of "Rev. Roger Abatie" replaced that of Mr. Anderson. (Church Ex. 8, Att. 5, pp. 3-4.)

67. The Equal Employment Opportunity Program filed by the Stations in their September 29, 1989, renewal applications contained identical statements to those quoted above under the headings "General Policy," "Responsibility for Implementation," and "Policy Dissemination." However, Reverend Devantier's name and title were substituted for those of Reverend Abatie. Similarly, the second and third paragraphs under the heading "Recruitment" were identical in the 1982, 1983 and 1989 Programs, but the first paragraph under "Recruitment" in the 1989 Program stated:

When vacancies occur, it is the policy of KFUO and KFUO-FM to seek out qualified minority and female applicants. We deal only with employment services, including state employment agencies, which refer job candidates without regard to their race, color, religion, national origin or sex. We contact the various employment services and actively seek female and minority referrals and we specifically request them to provide us with qualified female and minority referrals. See sample reply form attached.

The "sample" reply form stated: "This is to acknowledge that I have received a letter from Station KFUO-FM seeking female and minority referrals for job openings at the station[.]" and was signed on July 21, 1989, by a representative of Snelling & Snelling, Personnel Consultants, St. Louis, Missouri. (Church Ex. 4, Att. 16, pp. 6-8.)

68. Over the course of the License Term, the Stations' staff averaged 20 full-time employees. (NAACP Ex. 24; Church Ex. 10.) The Stations made 43 full-time hires during the License Term, and sought referrals for 30 (69.8%) of those hires, including 9 referrals from station employees. (Church Ex. 4, Att. 6, pp. 1-8.) KFUO-FM hired a minority female full-time salesperson for a Top Four job category position during the License Term. (*Id.* at p. 12; Tr. 762-63.) Of the Stations' 43 full-time hires, 25 (58.1%) were female and 7 (16.3%) were minority. (Church Ex. 4, Att. 6, pp. 1-8.) Of the 7 minority hires, 2 were hired after January 2, 1990, the date the NAACP filed its Petition to Deny. (MMB Ex. 3; Church Ex. 4, Att. 6, p. 8.)

69. During the License Term, KFUO(AM) hired to fill the following full-time positions: Acting Director of Development; Announcer (3 hires); Announcer/Program Director; Assistant Director, Development; Associate Director, Development; Director, Audio Resources; Director of Development and Public Relations; Receptionist; Religious Secretary; Secretary (3 hires); Secretary/Receptionist; and Station Manager. During the License Term, KFUO-FM hired to fill the following full-time positions: Announcer; Sales Worker (14 hires); Sales Worker/Manager; Secretary; and Station Manager. During the License Term, the following full-time positions, which served both KFUO(AM) and

KFUO-FM, were filled: Assistant to Business Manager; Business Manager; Director of Broadcast Ministries; Maintenance; and Receptionist (5 hires). (Church Ex. 4, Att. 6, pp. 1-8.)

70. Over the course of the License Term, the Stations' staff averaged 11 part-time employees. (NAACP Ex. 24; Church Ex. 10.) The Stations made 41 part-time hires during the License Term, and sought referrals for 26 (63.4%) of those hires. (Church Ex. 4, Att. 6, pp. 9-15.) Of the 26 referrals, 21 (80.7%) were from Concordia Seminary. Of the Stations' 41 part-time hires, 41 (100%) were white, 7 (17%) were female, and none (0%) was a minority. (*Id.*)

71. As noted above, the Stations sought referrals for 30 of its 43 full-time hires during the License Term, and for 26 of its 41 part-time hires during that term. The number of referrals from secular sources (excluding referrals from station employees) is summarized in Table 1, below. (Church Ex. 6, Att. 6.)⁵

72. The FCC Form 395s filed by the Stations during the License Term reflected the data shown in Table 2, which appears on the next page. (NAACP Ex. 24, pp. 2, 5, 8, 12, 16, 20, 24, 28, 31, 33.) Also shown is data from the FCC Form 395 for the year 1990, which was filed after the close of the License Term. (Church Ex. 10, p. 3.)⁶

73. February 1, 1983, to August 3, 1987.⁷ According to the Church, the Stations struggled financially during the License Term. (Church Ex. 4, p. 6.) For example, in the fiscal year ("FY") ending June 30, 1983, the Stations had a \$120,383.74 operating deficit on gross revenues of \$465,131.46. (*Id.* at Att. 5, pp. 1-2.) In the FY ending June

30, 1984, the operating deficit was \$148,972.23 on gross revenues of \$584,356.94. (*Id.* at Att. 5, p. 4.) In the FY from July 1, 1984, to June 30, 1985, income on commercial KFUE-FM was less than \$250,000 while total expenditures on both stations exceeded \$819,000. Legacies and bequests of approximately \$475,000 allowed the Stations to show a surplus of about \$318,000. (*Id.*) Mr. Stortz testified that due to these financial problems, the Stations did little or no employment advertising during the first several years of the License Term. This was so because there were fewer job openings and fewer resources. Instead, the Stations relied on "informal sources" such as referrals by current employees or contacts at local Lutheran churches or agencies to find applicants who were willing to work for jobs that paid less than the broadcast norm at the time. (*Id.* at pp. 6-7; Tr. 485-87.)⁸

TABLE 1

Year	Full-time Hires	Part-time Hires	Total Hires	Full-time Hires for which Secular Sources were Contact-ed	Part-time Hires for which Secular Sources were Contact-ed	Total Hires for which Secular Sources were Contact-ed
1983	1	1	2	0	0	0
1984	3	4	7	0	0	0
1985	5	9	14	1	0	1
1986	3	3	6	1	0	1
1987	10	6	16	4	1	5
1988	7	10	17	0	0	0
1989	11	7	18	2	1	3
1990	3	1	4	3	0	3
Total	43	41	84	11	2	13

⁵ Data for 1983 includes only the period from February 1 through December 31. Data for 1990 includes only the period from January 1 through January 31.

⁶ The Stations used a two-week reporting period ending January 31 of each year. The first such period during the License Term was reported in the Stations' 1984 FCC Form 395-B. (Church Ex. 4, p. 14.)

⁷ This period runs from the beginning of the License Term until the effective date of the FCC's *Report and Order* amending its rules regarding Equal Employment Opportunity in MM

Docket No. 85-350. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) ("*Equal Opportunity Rules for Broadcasters*").

⁸ One of the NAACP's rebuttal witnesses, Richard J. Miller, former owner of station KRJY(FM), St. Louis, Missouri, executed an affidavit on February 5, 1990, in which he vouched for the accuracy of the facts contained in an opposition to a petition to deny filed by the NAACP against KRJY ("*KRJY Opposition*"). (NAACP Ex. 12; Church Ex. 12, p. 60.) In the

TABLE 2

Year	Full-time, Top Four Category	Full-time, Top Four Category	Total Full-time	Total Full-time	Full-time and Part-time	Full-time and Part-time
	Number of Minorities	Number of Employees	Number of Minorities	Number of Employees	Number of Minorities	Number of Employees
1983	1	14	1	17	1	24
1984	1	15	1	18	1	26
1985	1	15	2	17	2	27
1986	0	14	1	17	1	29
1987	0	16	0	18	0	28
1988	0	19	0	23	0	33
1989	1	22	1	26	1	41
1990	0	20	2	27	2	45

74. However, the record also reflected that in the FY ending June 30, 1986, the Stations had a positive operating balance of \$254,212.19 on gross revenues of \$1,248,245.99. (Church Ex. 4, Att. 5, p. 6.) Similarly, in the FY ending June 30, 1987, the Stations earned \$147,128 on gross revenues of \$1,090,656. (*Id.* at Att. 5, p. 13.) In the 1982-83 FY, the Stations expended \$152,035 for administrative and general services. (*Id.* at Att. 5, p. 2.) In the FY 1983-84 such expenditures totalled \$93,049; in FY 1984-85 they totalled \$114,765; in FY 1985-86, the total was \$71,436; and in FY 1986-87, the administrative and general expenditures were \$62,492. (*Id.* at Att. 5, pp. 4, 6, 13.)

75. The Stations hired 19 full-time employees between February 1, 1983, and August 3, 1987. Included among these employees were three African American women, Ruth Clerkly, Helen Richardson, and Lisa Harrison, who were hired in July 1984, March 1985, and August 1985, respectively. (Church Ex. 4, p. 6 and Att. 6, pp. 1-4.) Thus, over 15% of the full-time hires in this period were minorities.

76. Lula Daniels, an African American woman who served as Coordinator of Worship Programming from before the beginning of the License Term until she died on April 17, 1985, referred Ms. Clerkly and Ms. Richardson

through contacts at a local parish Church. Ms. Daniels had been promoted from a secretarial position by Reverend Devantier. (Church Ex. 4, Att. 6, p. 1; Church Ex. 7, p. 9; Tr. 746-49, 864-65.) Ms. Daniels and others were "part of a network of congregations and Lutherans in the community . . . who by word of mouth would identify individuals who may be qualified for positions at KFUEO or who would alert those looking for positions to apply at KFUEO." (Tr. 865.) Ms. Harrison's referral source was "Station Employee." (Church Ex. 4, Att. 6, p. 2.)

77. Using these Lutheran sources and minority and nonminority staff referrals, as of January 31, 1983, the representation of minorities on the KFUEO staff was 37.7% of the minority representation in the local work force overall (37.7% of "parity"), and 45.8% of parity in the Top Four job categories.⁹ As of January 31, 1984, the Stations were at 35.6% of parity overall for minorities and 42.7% of parity for minorities in the Top Four job categories. By January 31, 1985, the Stations were at 75.4% of parity overall for minorities and 42.7% of parity for minorities in the Top Four job categories. On January 31, 1986, the Stations slipped to 37.7% of parity overall and, with the death of Ms. Daniels, no longer had any African American employees in the Top Four job categories (0% of parity).

KRJV Opposition, it was stated that KRJV, in filling vacancies for full-time positions, recruited by consulting resumes on file, hiring individuals who applied just before openings became available, hiring former employees, accepting the recommendations of other companies in the industry, or seeking the rec-

ommendations of employees. (Church Ex. 12, p. 8.) KRJV argued that these efforts succeeded in creating opportunities for minorities. (*Id.* at p. 9.)

⁹ The St. Louis, Missouri-Illinois Metropolitan Statistical Area, where the Stations are located, included 43.2% females and 15.6% minorities. (HDO, 9 FCC Rcd at 917 n.6, official notice taken.)

As of January 31, 1987, the Stations had no minority employees and were, therefore, at 0% of parity overall and in the Top Four job categories. (Church Ex. 4, Att. 12, pp. 1-2.)

78. During this period, the Stations employed three full-time African American employees who were not employed during the weeks used to complete FCC Forms 395-B, *i.e.*, the last two weeks of January of each year. Consequently, the parity analyses above understate the Stations' minority hiring. The minority employees were: Ruth Clerkly, who was hired July 30, 1984, and left KFUE on December 26, 1986 (did not appear in the 1984 employment report); Helen Richardson, who was hired on March 25 or 26, 1985, and left KFUE on August 31, 1985 (did not appear in any employment report); and Lisa Harrison, who was hired on August 28, 1985, and left KFUE on January 10, 1986 (did not appear in any employment report). (Church Ex. 4, p. 14 and Att. 6, pp. 1-2; MMB Ex. 6, pp. 6-7.) All three left for job opportunities outside the field of broadcasting. (Church Ex. 4, Att. 7, p. 10 n.2.)

79. Beginning in mid-to-late 1985, the Stations began to use commercial advertising to recruit employees. (Church Ex. 4, Att. 6, p. 2.) From mid-to-late 1985 to August 3, 1987, the Stations placed advertisements in the *St. Louis Post Dispatch* and *Broadcasting* magazine for 4 of their 11 full-time hires. (*Id.* at Att. 6, pp. 2-4.)¹⁰ In mid-to-late 1985, for example, the Stations advertised their Business Manager opening in the *St. Louis Post Dispatch*. (*Id.* at Att. 6, p. 2.) Likewise, in August 1987, the Stations advertised in the *St. Louis Post Dispatch* for salespersons. The Stations also advertised in *Broadcasting* magazine for a Sales Worker/Manager for the FM station, a Station Manager for the FM, and a Director of Broadcast Ministries for both stations. (*Id.* at Att. 6, pp. 3-4.)

80. Mr. Stortz testified that the Stations' policy was to state "in every advertisement" that they were Equal Opportunity Employers. (Church Ex. 4, p. 12 n.3.) A similar representation was made in the Equal Employment Opportunity Programs filed by the Stations in 1982 and 1983. (Church Ex. 8, Att. 5, p. 4.) The record in this proceeding contained the texts of four advertisements apparently placed prior to the date the NAACP filed its Petition to Deny. (Church Ex. 4, Att. 9, pp. 1, 2, 3, 8; MMB Ex. 6, p. 4.) Only one of the four included a statement that the Stations were an Equal Opportunity Employer. (Church Ex. 4, Att. 9, p. 2.) According to Mr. Stortz, any omission of the notice was "an inadvertent error." (*Id.* at p. 12 n.3; Tr. 776-81.)

81. The Stations continued to have their need for knowledge of Lutheran principles for certain positions. Accordingly, KFUE(AM) in particular relied heavily on employment advertising in periodicals such as *The Lutheran Witness*, which was widely distributed to members of LCMS congregations, including the Church's African American members. (Church Ex. 4, p. 12; Tr. 750-51.) *The Lutheran Witness* was used as one of the recruitment sources for the following three full-time positions: Director of Broadcast Ministries; Announcer/Program Director of

the AM station; and AM Station Manager. All three of the individuals hired to fill these positions were white (Ken Lombardi, Reverend Mark Spitz, and Reverend David Schultz). (Church Ex. 4, Att. 6, pp. 4, 5, 7.)

82. Beginning in January 1987, the Stations also posted all openings at the Church's International Center ("Center"), whose employees were approximately 11.5% minority. (*Id.* at p. 12 and Att. 6, pp. 3 and 11 n.*.) The Center was the Church's headquarters (*HDO* at para. 12, official notice taken), and all of the employees of the Stations were themselves employees of the Center (MMB Ex. 14, pp. 23-24 n.6). The Center was used as one of the recruitment sources in filling three full-time and two part-time positions. The full-time positions were: Assistant to Business Manager of both stations; Business Manager of both stations; and Sales Worker/Manager of the FM station. The part-time positions were: Office Support for both stations; and AM Announcer. All five of the individuals hired for these positions were white (Steven Benko, Daryl Haake, Bern Hentze, Eric Dingler, and Steve Myrick). (Church Ex. 4, Att. 6, pp. 1-3, 10, 11.)

83. Beginning no later than 1987, the Stations also used the Broadcast Center in St. Louis as one of the recruitment sources for two full-time sales workers for the FM station, one part-time announcer for the AM station, and one part-time announcer for the FM station. All four of the individuals hired for these positions were white (James Bebo, Sharisse Bush, Steve Myrick, and Robert Armbruster). (Church Ex. 4, pp. 14-15 n.5 and Att. 6, pp. 6, 7, 11, 14.) According to Mr. Stortz, the Broadcast Center was the only broadcast trade school in St. Louis and was approximately 7% minority (5.9% African American) in 1989. (*Id.* at pp. 14-15 n.5; Tr. 613-14.)¹¹

84. The Stations were unable to attract new African American employees in 1986 or in the period January 1 to August 3, 1987. As noted above, as of the pay period ending January 31, 1987, the Stations no longer had any African American employees. (Church Ex. 4, Att. 12, p. 3; NAACP Ex. 24, pp. 22-29.) This resulted from the death of Ms. Daniels in April 1985, the departure of Ms. Richardson in August 1985, the departure of Ms. Harrison in January 1986, and the departure of Ms. Clerkly in December 1986. (Church Ex. 4, Att. 6, pp. 1-2 and Att. 7, p. 10; Church Ex. 7, p. 9; MMB Ex. 6, pp. 6-7.) In this connection, Ms. Clerkly was recommended and "considered for a management-level position at the station but unfortunately left [KFUE's] employ before [it was] able to" promote her. (Tr. 883.)

85. During the License Term, the Stations' communications counsel, Arnold & Porter, sent to various general managers at KFUE, as well as to other broadcast clients, several letters relating to the Commission's EEO policies. The EEO letters were included among a large number of letters over the years notifying Arnold & Porter's clients of regulatory developments at the Commission. In general, these letters were sent to all of the firm's broadcast clients

¹⁰ In the KRJY Opposition, Richard J. Miller cited advertisements in the *St. Louis Post Dispatch* as a good source for minority recruitment. The KRJY Opposition stated that the weekday edition of the *Post Dispatch* reached 51.2% of the St. Louis African American population, and the weekend edition reached 59.3% of that population. (Church Ex. 12, p. 7.)

¹¹ In the KRJY Opposition, the Broadcast Center was cited as a "major source" of minority referrals for Mr. Miller's station in the St. Louis market. (Church Ex. 12, p. 7.)

as a way of keeping them up-to-date on developments. (Church Ex. 8, pp. 2-3.) According to Mr. Stortz, the Stations paid the law firm for these letters. (Tr. 550.)

86. Certain of the Arnold & Porter letters related to the Commission's EEO reporting procedures. For example, in December 1985, the law firm wrote to Reverend Roger Abatie, then the general manager of the Stations, informing him about an FCC rulemaking concerning EEO reporting procedures. (Church Ex. 8, pp. 2-3 and Att. 1; Joint Ex. 1.) A March 1986 letter to Emil Wilde, then an interim co-manager of the Stations, enclosed information from the National Association of Broadcasters ("NAB") regarding its employment clearinghouse for minority and female hiring. (NAACP Ex. 42; Joint Ex. 1.) A November 1986 letter to Mr. Stortz enclosed the Commission's proposal for a new form of EEO reporting. (NAACP Ex. 43, p. 5.) In June 1987, the law firm sent to Mr. Stortz copies of the full text of the *Report and Order in Equal Opportunity Rules for Broadcasters*, released on June 12, 1987, and effective on August 3, 1987. In its cover letter, the subjects which were explicitly described related to new EEO reporting requirements and forms. The law firm explained that Appendix B of the *Report and Order* outlined in detail the EEO program which every station was required to adopt, but made no attempt to summarize those requirements. Instead, Arnold & Porter referenced the appropriate pages, and urged the clients themselves to review the provisions so that they would know what was required. (Church Ex. 8, p. 3 and Att. 2.)

87. In Mr. Stortz's view, all of Arnold & Porter's letters appeared to be form letters, presumably sent to all of the law firm's FCC clients. Mr. Stortz believed that most dealt with changes in the forms to be used when making EEO filings. Nothing in them appeared to Mr. Stortz to alert the Stations to any particular EEO deficiency they had or to deal with the subject of religious qualifications for certain jobs. (Church Ex. 4, p. 13; Tr. 549-50.) Mr. Stortz testified that he read the letters addressed to him and passed them on to the station managers. (Tr. 610-11.)

88. August 3, 1987, to February 1, 1990. For approximately the first year after the effective date of the FCC's revised EEO rules, i.e., from August 3, 1987, to September 1, 1988, the Stations continued to rely principally on employee referrals, resumes on file, Lutheran publications, and advertisements in *Broadcasting* magazine in making nine full-time hires. (Church Ex. 4, Att. 6, pp. 4-5.) As of the pay period ending January 31, 1988, the Stations had no minority employees. (*Id.* at Att. 12, p. 3; NAACP Ex. 24, pp. 30-31.) However, the FM station made an effort to hire an African American or Hispanic salesperson, and did in fact hire Caridad Perez, a Hispanic female, in March 1988. (Church Ex. 4, p. 12 and Att. 6, p. 5; Tr. 762-63.) Ms. Perez's referral source was a "Resume on File." (Church Ex. 4, Att. 6, p. 5.)

89. During this period, the Stations continued to struggle financially. In the FY ending June 30, 1989, the Stations' expenses exceeded their revenues by \$143,472. The Stations' total operating loss was reduced by the receipt of \$441,598 in legacies and bequests. (Church Ex. 4, Att. 5, p. 43.) The FY ending 1988 was similar. The Stations had an operating loss of \$173,851 even considering legacies and bequests of \$341,094. (Church Ex. 4, Att. 5, p. 33.)

90. Thomas M. Lauher was the general manager of the FM station from approximately May 1987 to July 1989. (Church Ex. 6, p. 1; Joint Ex. 1.) Mr. Lauher was a non-Lutheran whose background was in broadcasting and advertising. He had a "strong interest" in classical music. (Church Ex. 6, p. 1; Tr. 134-35.) Mr. Lauher did not recall being given any instructions when he was first hired that minorities, Lutherans, persons with Lutheran training, Seminary students, or their spouses should be given preferences in hiring. (Tr. 134-35, 139-40.) Mr. Lauher testified that from the beginning of his term as general manager he noticed that, although there were a variety of men and women working at the station, there were no minorities. (Tr. 143-44.) He determined that he wanted to hire minorities. (Tr. 140.)¹²

91. In initiating the process of hiring salespersons for the FM station, Mr. Lauher contacted the St. Louis Broadcast Center and placed advertisements in various publications including *Broadcasting* magazine and the *St. Louis Post Dispatch*. (Church Ex. 6, p. 1.) In Mr. Lauher's view, the Broadcast Center was the best of its kind in training people to become broadcasters and was an Equal Opportunity Employment source. (Tr. 141.) He recalled referrals of applicants from the St. Louis Broadcast Center, and noted that he had talked to a variety of candidates in an effort to hire a variety of people, including minorities. (Church Ex. 6, p. 1.)

92. In April 1988, Arnold & Porter sent to Mr. Stortz a one-page letter beginning: "While the FCC has in recent years taken a more relaxed approach to enforcement of a number of its rules, the enclosed FCC release indicates that the Commission is still prepared to enforce its equal employment opportunity requirements." With regard to a condition which the Commission had recently imposed on a station in North Carolina, the law firm noted that:

. . . While the condition is not onerous . . . it is inconvenient, and something of a "black mark" on the station's record.

This action might serve as a reminder to review the FCC's rules pertaining to equal employment opportunities in order to ensure compliance with these requirements.

(Church Ex. 8, pp. 3-4 and Att. 3.)

¹² Mr. Lauher's original written testimony stated, in connection with the hiring of salespersons at KFUE-FM, that the Stations "wanted to hire a variety of people and wanted to hire a minority." (Church Ex. 6, p. 1, emphasis added.) At the hearing, Mr. Lauher testified that the draft of his testimony, which he had prepared, stated that the Stations wanted to hire "minorities" for sales positions, and that the language, "a minority," was a typographical error. (Tr. 103-6, 125-26.) This

testimony was credible, especially because a later sentence in Mr. Lauher's testimony states: "As I have mentioned, we had minority and female employees during the period that I worked at KFUE-FM and the station actively sought to obtain minority and female employees." (Church Ex. 6, p. 3, emphasis added.)

93. In the fall of 1988, Mr. Lauher attended a Missouri Broadcasters Association meeting. The meeting was essentially a license renewal seminar to inform broadcasters of the FCC's then-current requirements, including EEO requirements. According to Mr. Lauher, the message that came through during that seminar was "don't be lulled into complacency because there is deregulation." After attending this seminar, Mr. Lauher decided to review the station's compliance status, which included compliance with the FCC's EEO requirements. Mr. Lauher also had discussions with Ms. Cranberg concerning the Commission's EEO requirements. (Church Ex. 6, p. 2; Church Ex. 4, p. 12; Tr. 144.)

94. During Mr. Lauher's review, continuing from the fall of 1988 until April 1989 (Church Ex. 6, pp. 2-3), the Stations continued to rely on employee referrals, resumes on file, and the St. Louis Broadcast Center for five full-time hires (Church Ex. 4, Att. 6, pp. 5-6). None of the five was a minority. (*Id.*) As of the pay period ending January 31, 1989, however, after Ms. Perez was hired as a salesperson, the Stations' full-time minority employment was at 29.1% of parity in the Top Four job categories and 24.7% of parity overall. (*Id.* at Att. 12, p. 4; NAACP Ex. 24, pp. 32-33.)

95. On November 1, 1988, Arnold & Porter sent to the Stations a letter informing them of the decision of the U.S. Court of Appeals for the D.C. Circuit in *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988), wherein the Court ordered the Commission to hold a renewal hearing on EEO and misrepresentation issues. The law firm noted that "[t]he decision makes it likely that the FCC will consider more carefully in the future renewal challenges based on EEO grounds." (Church Ex. 8, p. 4 and Att. 4.)

96. After receiving Arnold & Porter's November 1, 1988, letter, Mr. Lauher made inquiries to Ms. Cranberg concerning the FCC's renewal requirements. (Church Ex. 8, p. 4; Tr. 1008-9, 1035.) On December 20, 1988, Ms. Cranberg sent Mr. Lauher a copy of the FCC's EEO rules, copies of KFUE's Annual Employment Reports for the years 1986 to 1988, and a copy of the Stations' most recent EEO Program. Ms. Cranberg told Mr. Lauher in this letter that she had been assured by FCC staff that a single EEO program filed by KFUE(AM) and KFUE-FM would be acceptable. (Church Ex. 8, p. 4 and Att. 5.) Mr. Lauher then reviewed the Stations' existing EEO program. (Tr. 136-39.) Ms. Cranberg believed that Arnold & Porter's letter of December 20, 1988, was the first time that the firm had addressed any EEO issues specific to KFUE, as opposed to its other broadcast clients, during the License Term. (Church Ex. 8, p. 4.)

97. On February 28, 1989, Arnold & Porter sent a letter to Mr. Stortz enclosing a Commission order concluding that broadcasters were permitted to maintain information concerning the race and sex of job applicants, and clarifying that licensees were required to report the number of qualified female and minority referrals they received. The letter also noted that stations which received applications by mail should make an effort to determine the race or sex of the applicant. The penultimate paragraph of the letter stated:

You should be aware that the FCC is increasingly scrutinizing the recruitment practices of licensees to determine whether stations are complying with applicable equal employment opportunity require-

ments. Consequently, it would be wise for all licensees to carefully review their procedures for recruiting qualified minority and female applicants, and for retaining information on the sex and race of referrals to ensure that these procedures are effective and in compliance with applicable law.

(NAACP Ex. 46.)

98. As a result of his "on-going personal review and reading, attendance at two different renewal seminars, consultation and communication with Arnold & Porter and conversations with employees regarding past practices," Mr. Lauher prepared a memorandum to Reverend Devantier, the Stations' CEO, dated March 9, 1989, regarding "License Renewal." (Church Ex. 7, Att. 5, p. 1; Church Ex. 6, p. 2.) The memorandum attempted to give a "comprehensive review of performance, recommendations for improvements, and an outline of areas in which there [was] concern" in connection with the forthcoming license renewal. (Church Ex. 7, Att. 5, p. 1.) All such concerns were included in his report; Mr. Lauher knew of no others. (*Id.*) Mr. Lauher continued:

The report and accompanying material provides background, outlines potential problems, addresses implications and offers solutions as we move into the critical license renewal time. We are taking action now to address specific concerns outlined below. Failure to do so could create significant jeopardy [sic] in license retention. If the concerns are not addressed quickly, the worst possible consequence is loss of license.

(*Id.* at Att. 5, p. 2.)

99. With respect to "EEO Compliance," the memorandum stated:

This is the most critical area in license renewal. As Matthew Leibowitz said at the Missouri Broadcasters Association fall seminar on renewal: "Numbers do not work anymore. Now the FCC looks for affirmative action based on the EEO program model currently on file as developed by the station. The question is: Is the station following its own plan?" Marsha [sic] Cranberg agrees with the seminar view. As described below there are plenty of areas for improvement in our compliance. At the time the AM and FM operations were absorbed into the Synod[,] certain procedures, forms, job descriptions, etc. were introduced which inadvertently put the stations in a non-compliance situation.

At the very least separate employment applications and hiring criteria should be in place for KFUE-FM (also KFUE-AM). Cranberg stated that even a requirement that an individual be a Christian would be deemed to have racial overtones.

* * *

All commercial broadcast license holders are subject to the same rules and regulations. As Marsha [sic] Cranberg of Arnold & Porter indicated in a telephone conversation: "The better part of safety is to comply with EEO for both FM and AM unless a reasonable argument with respect to AM can be ad-

vanced *and* the commission [sic] has previously waived requirements for similar situations." She knows of no similar situations that might apply.

. . . Cranberg recommends separate EEO Programs for FM and AM. She says that although a single EEO Program could suffice it "would make sense, especially in light of specific AM religious considerations in hiring" to separate the EEO Programs at the next filing (May [sic], 1989).

The NAB Legal Guide states: ". . . broadcasters are held to a higher EEO standard than most other private employers. Unlike most other businesses, broadcasters must comply with EEO requirements, not only as a matter of federal law, but also because the FCC reviews station compliance as part of the license application and renewal process." The guide explains the FCC can and does review broadcasters' EEO records periodically. If the record is thought to be inadequate, the FCC may take various actions, including denial of license renewal.

I have discovered [sic] we are operating in violation of our own policy as currently on file. I have reason to believe this applies to the AM operation as well as the FM operation.

I have taken steps in good faith to assure full compliance in FM. I shared with Jerry Housholder those steps taken on FM.

(Church Ex. 7, Att. 5, pp. 5-8, emphasis in original.)¹³

100. Mr. Lauher specified in his memorandum three areas in which he believed that the Stations' "performance" differed from their "EEO promises." (Church Ex. 7, Att. 5, p. 8.) Each specified area related to forms and job descriptions, and not to the Stations' recruitment efforts or their policy of nondiscrimination. The areas specified were:

(a) First, the station's EEO Program on file at the FCC continued to show that Reverend Abatie, a former general manager of KFUA(AM) and KFUA-FM, was responsible for administration and implementation of the EEO program. A new person or persons needed to be named, and a decision needed to be made about whether one person should be responsible for both stations. (Church Ex. 8, Att. 5, p. 3; Church Ex. 7, Att. 5, p. 8; Tr. 151-52.)

(b) Second, the employment application form in use at the Stations did not contain the statement which the EEO Programs on file at the Commission represented the form would contain. (Tr. 156.) Specifically, the Stations' 1982 and 1983 EEO Programs had stated: "The station's employment application form contains a notice informing prospective employees that discrimination because of race, color, religion, national origin or sex is prohibited and that they may notify the appropriate local, state, or federal agency if they believe they have been the victims of discrimination." (Church Ex. 8, Att. 5, p. 9.) As Mr. Lauher

stated in his memorandum, however: "Somehow, this was dropped at some point when revised application forms were printed." (Church Ex. 7, Att. 5, p. 9.)¹⁴ Mr. Lauher testified at the hearing that the quoted statement "was a clear part of the policy but it had been in some manner inadvertently dropped from this application." (Tr. 164.)

(c) Third, there was a problem with job descriptions, which needed to be "job specific, held to a minimum and . . . completely objective." According to Mr. Laufer, the job descriptions at the Stations were reviewed and changed where necessary to be sure none included subjective considerations and all essential position qualifications were job specific. (Church Ex. 7, Att. 5, pp. 9-10.)

101. At the hearing, Mr. Lauher testified that he had another area of concern. That is, the employment application form in use at both Stations stated: "Because we are a church body, the Lutheran Church-Missouri Synod retains the right to give preference in the hiring of persons who are members in good standing of an LCMS congregation." In addition, the form asked applicants to state their religious affiliations. Mr. Lauher was concerned because these portions of the application appeared to violate the Stations' stated policy to give all qualified applicants an equal opportunity for employment. (MMB Ex. 25, p. 1; NAACP Ex. 32, pp. 2, 14, 20; Tr. 153-56, 161.)

102. Mr. Lauher further testified that his "concern at the time [he] prepared the memorandum was that a common application form was used for both the AM and FM stations and that within the form there was some language relating to theological experience that might not be appropriate for all hires." He testified that he was "also concerned that some of the job descriptions for the FM station might not reflect [the Stations'] EEO policies because the opening paragraphs spoke about serving the Lutheran Church." (Church Ex. 6, p. 2.) In general, Mr. Lauher was concerned in 1989 that a joint EEO program for both KFUA(AM) and KFUA-FM "might create a difficulty in impression, confusion because there were some, as Marcia [Cranberg] suggested, legitimate reasons for the AM station to ask questions of a religious nature, nature for certain . . . positions . . . , although the FM would not be hiring people with, with that kind of background or requirement." (Tr. 152.)

103. Mr. Lauher also stated in his testimony that his March 9, 1989, memorandum did not deal with recruiting efforts. He explained that KFUA-FM had increased the number of women employees at the station and had "minority representation," namely, Ms. Perez, who was Hispanic. (Church Ex. 6, p. 2; Tr. 193-94.) Mr. Lauher testified: "I think in the, in the few hires that had been made at the time I was there that [the Stations] . . . had hired a minority and we had hired women . . . I think the FM station had, had been doing what it should do." (Tr. 175.) He testified that when he stated in his memorandum that "we are operating in violation of our own policy as currently on file," he did not mean that the Stations were

¹³ Jerry Housholder was an employee of KFUA-AM. It appeared to Mr. Lauher that Mr. Housholder "was assuming certain responsibilities" with respect to the AM operation in light of the fact that the positions of Director of Broadcast Ministries

and AM general manager were vacant at the time. (Tr. 162-63.)
¹⁴ See NAACP Ex. 31, p. 4, for an example of an earlier application form which did contain the statement in question.

violating FCC policies but simply that if there was to be a combined EEO policy for the AM and FM stations, there appeared to be a contradiction with the requirement for religious training for a number of the positions. He noted that his reference to inadvertent noncompliance referred to the same issue. (Church Ex. 6, p. 2.)

104. Mr. Lauher sent copies of his March 9, 1989, memorandum to Ms. Cranberg, Mr. Stortz, Bob Thomson (the FM Sales Manager), Ron Klemm (the FM Program Director), Paula Zika (the Director of Business Affairs), and Jim Rice (unidentified in the record). (Church Ex. 7, Att. 5, p. 10; Church Ex. 3, p. 1; Tr. 185.)

105. On March 15, 1989, six days after his first memorandum, Mr. Lauher forwarded another memorandum to Reverend Devantier concerning the Stations' EEO compliance. (Church Ex. 4, Att. 11; Church Ex. 6, pp. 2-3.) Copies of the second memorandum were sent to Messrs. Stortz, Klemm, Thomson, and Rice, and Ms. Zika. (Church Ex. 4, Att. 11, p. 1.)

106. In his second memorandum, Mr. Lauher reviewed the list of "defensive measures" contained in the *EEO Handbook, A Practical Guide for Broadcasters*. Mr. Lauher stated:

Out of the 130 measures listed, KFUE-FM has implemented or completed 79. Ten of the measures appear to be "Not Applicable" to our situation. The remaining 41 measures are currently being reviewed to see whether the action has been taken, needs to be taken or is not applicable to our situation.

(Church Ex. 4, Att. 11, p. 1; Church Ex. 6, pp. 2-3.) Among the items Mr. Lauher check marked as "implemented or completed" by KFUE-FM were: (a) taking "EEOC" matters seriously; (b) evaluating all employment practices, and eliminating those that have an adverse impact on minorities; and (c) conducting "a continuing campaign to exclude every form of prejudice or discrimination based upon race, color, religion, national origin, or sex from the station's personnel policies and practices and working conditions." (Church Ex. 4, Att. 11, pp. 2, 4; Tr. 166-67.)

107. Among the items which Mr. Lauher did not check mark were:

Establish an EEO officer to implement your station's EEO program and to keep current on developments in the law. (Church Ex. 4, Att. 11, p. 2.)

Include a copy of your EEO program in personnel manuals and employee handbooks. (*Id.* at Att. 11, p. 3.)

Communicate your station's EEO policy and program and your employment needs to sources of qualified applicants without regard to race, color, religion, national origin or sex, and solicit their recruitment assistance on a continuing basis. (*Id.*)

Maintain a list of the recruitment sources you will use in seeking qualified female and minority applicants. (*Id.*)

Maintain written records of all the referrals made by your recruitment sources, and inform recruitment sources, in writing, of the disposition of applicants they have referred. (*Id.* at Att. 11, p. 4.)

Conduct a continuing review of your job structure and employment practices, and adopt positive recruitment, training, job design, and other measures to ensure genuine equality of opportunity to participate fully in all organizational units, occupations, and levels of responsibility throughout the station. (*Id.*)

Where appropriate, post notices of vacancies in the station, and afford current employees the opportunity to apply for promotion. (*Id.* at Att. 11, p. 7.)

Contact minority organizations, organizations for women, media, educational institutions, and other potential sources of female and minority applicants, for referrals. (*Id.*)

Interview all applicants who appear to be qualified. If you decide that an applicant has insufficient qualifications to be interviewed, document and inform the applicant, in writing, of your reasons. (*Id.*)¹⁵

108. Mr. Lauher testified that he did not check mark "Establish an EEO officer . . ." because no decision had yet been made as to a replacement for Reverend Abatie. (Tr. 167.) He did not check mark "Maintain a list of the recruitment sources . . ." because the station had not yet evaluated its current sources. (Tr. 168-69.) In this regard, Mr. Lauher believed that the Station maintained such a list, but he had never actually seen it. (Tr. 168-69.) Mr. Lauher did not check mark "Conduct a continuing review . . ." because he did not recall such a formal review at the station. (Tr. 171.) He did not check mark "Contact minority organizations . . ." because he had not yet ascertained whether the station was doing that. (Tr. 178-79.) In this connection, the fact that there was no check mark next to an item did not mean that a step had not been taken, but that personnel were still "double-checking" whether the station was in compliance. (Church Ex. 4, Att. 11, p. 1; Tr. 178-79.)

109. Between March 15, 1989, the date of the second memorandum, and February 1, 1990, the end of the License Term, the Stations hired 13 full-time and 7 part-time employees. (Church Ex. 4, Att. 6, pp. 6-8, 14-15.) Of the 13 full-time hires, 9 were hired without the use of either minority or nonminority secular recruitment sources. However, such sources were contacted in connection with the hiring of 4 employees (Sharisse Bush, Cynthia Blades, Bridget Williams, and Timothy Meeks). Of these four, three were African American (Ms. Blades, Ms. Williams, and Mr. Meeks). Of these three, two were hired after the NAACP filed its Petition to Deny (Ms. Williams and Mr. Meeks). (*Id.* at Att. 6, pp. 7-8.) Similarly, of the seven

¹⁵ Reverend Devantier testified that unsuccessful applicants who were interviewed were notified by letter that they had not been selected. Some of these letters were signed by Reverend Devantier. He could not recall any letter signed by him in which the reasons for non-selection were given. (Tr. 813.)

part-time hires, six were hired without the use of either minority or nonminority secular recruitment sources, and none of the seven was a minority. (*Id.* at Att. 6, pp. 14-15.)

110. Subsequent to receiving these memorandums, Reverend Devantier and Mr. Lauher engaged in discussions in which a question was raised about whether some of the items on the checklist pertained to religious stations. Reverend Devantier advised Mr. Lauher to do whatever was needed to assure "continuing [EEO] compliance." (Church Ex. 7, p. 10; Church Ex. 6, p. 3; Tr. 180, 855.)

111. As a result of Mr. Lauher's memorandums and their conversations, Reverend Devantier, at a meeting on April 5, 1989, notified the Standing Committee of the Church's Board for Communications Services of the "importance of adhering to laws and regulations pertaining to the Federal Equal Employment Opportunity programs." (Church Ex. 7, p. 10 and Att. 7, p. 2; Tr. 858-59.) The portion of the Minutes of the Standing Committee which related to EEO stated:

In the matter of Radio Station Licensing, Rev. Devantier pointed out the importance of adhering to laws and regulations pertaining to the Federal Equal Employment Opportunity programs. Following discussion it was resolved that:

KFUO-AM & FM operate under a single EEO program and that positions [sic] descriptions be reviewed and revised as necessary to assure that the special background and experience for entry level into the individual position be specified.

(Church Ex. 7, Att. 7, p. 2.) According to Reverend Devantier, the Standing Committee took this action because it believed that since KFUE(AM) and KFUE-FM had similar purposes, and were both affiliated with the Church, a single EEO policy would suffice. (*Id.*; Tr. 856-57.)

112. Shortly after his meeting with Reverend Devantier, Mr. Lauher requested information from Ms. Cranberg concerning the relationship between KFUE's religious affiliation and the EEO requirements. (Church Ex. 8, p. 5.) Arnold & Porter had not addressed this issue in any of its client advisories during the License Term. (Church Ex. 4, p. 13; Church Ex. 8, p. 5.)

113. By letter of April 4, 1989, Ms. Cranberg advised Mr. Lauher that in the *King's Garden* case,¹⁶ the Court of Appeals determined that it was permissible for the Stations to use a religious criterion for "certain limited employment categories" consisting of persons "whose work [was] connected with the espousal of the licensee's religious views." Ms. Cranberg continued:

Generally, . . . the court held[] that in delineating the appropriate employment categories, the Commission should "fix upon the nexus between the employment position in question and the religious content of the

programs aired by the sectarian licensee". [sic] Specifically, said the court, "[w]here a job position has no substantial connection with program content, or where the connection is with a program having no religious dimension", [sic] discrimination will not be permitted.

(Church Ex. 8, Att. 6.)

114. As examples of positions where the Commission found a religious employment requirement permissible, Ms. Cranberg gave writers and research assistants hired for the preparation of programs espousing the licensee's religious views, and those hired to answer religious questions on a call-in program. She stated, however, that:

The Commission concluded . . . that announcers, as a general category, would not be exempt from the nondiscrimination rules, because there is no reason why an announcer must be of a particular faith in order to introduce a program or insert news, commercial announcements, or station identifications during or adjacent to any program.

(Church Ex. 8, Att. 6.)

115. Ms. Cranberg further stated that, although *King's Garden* dated from the mid-1970s, she had been assured by FCC staff that its "general guidelines" were still in force. Ms. Cranberg concluded her letter as follows:

In sum, while a religious affiliation requirement may be permissible in certain circumstances, it is clear that the FCC and the courts are likely to restrict such limitations to very narrow situations where the employee is directly connected with the production of programming which espouses a religious viewpoint. Given the undeveloped nature of the FCC's requirements in this area and the fact that the FCC enforces its employment requirements fairly rigorously, if, during the process of revising employment guidelines for its broadcast stations, the Lutheran Church/Missouri Synod so desires, we shall be happy to confer with you further in an effort to develop guidelines acceptable to the FCC.

(Church Ex. 8, Att. 6.)

116. On April 26, 1989, following the letter from Ms. Cranberg, Mr. Lauher circulated a packet of updated materials to be used in the hiring process. Mr. Lauher was concerned that the FM station should be sure that it had made very clear to recruitment sources that it was actively seeking minority and female applicants. (Church Ex. 6, p. 3.) The materials included a revised employment application form. The form began with the following language:

Discrimination because of a person's race, color, creed, religion, sex, national origin, or age in employment and personnel practices is prohibited by the Federal Communications Commission. If you be-

¹⁶ *In re Complaint by Anderson*, 34 FCC 2d 937 (1972), *aff'd sub nom. King's Garden, Inc.*, 38 FCC 2d 339 (1972), *aff'd sub nom. King's Garden, Inc. v. FCC*, 498 F.2d 51 (D.C. Cir. 1974), *cert. denied* 419 U.S. 996 (1974).

lieve your equal employment rights have been violated, you may contact the appropriate local, state or federal agency.

The form also deleted the question asking for religious affiliation, and deleted the statement about the preference for members of the LCMS. (Church Ex. 4, p. 14 and Att. 13, pp. 8-11; Tr. 184-85.) The package also contained, *inter alia*, a KFUFM EEO Policy Statement, a Notice to Employees and Applicants for Employment Regarding Station EEO Policy and Program, an EEO Data Form, and an Applicant Flow Chart. (Church Ex. 4, p. 14 and Att. 13.) The Notice stated that the policy of KFUFM was to provide equal employment opportunity to all qualified individuals without regard to race, color, religion, national origin or age. It also requested that, if current employees knew of qualified women and minorities who might be interested in working at the station, they refer them to the station. (*Id.* at Att. 13, p. 16.)

117. On May 9, 1989, Arnold & Porter sent a letter to Mr. Stortz in which it was stated:

It was brought out [at a recent NAB Convention] that under today's FCC policies, the contacts with minority and female referral sources must be genuine and substantial; referral sources should be regularly checked and the licensee should keep good records of its contacts with such sources in order to demonstrate to the FCC, if challenged, that it has used its "best efforts."

(MMB Ex. 22.)

118. On June 21, 1989, Arnold & Porter wrote to Mr. Stortz reporting that there had been an increasing number of cases in which sanctions for EEO violations were issued "even in situations where no petitions to deny had been filed." The letter advised that

licensees should utilize both female and minority recruitment sources for each job opening at the station. . . . Moreover, if the recruitment sources used by the station fail to turn up minority or female applicants, the licensee must make efforts to determine why this is so, and attempt to develop more effective minority and female recruitment alternatives. The licensee's contacts with minority and female recruiters must be meaningful and genuine.

(NAACP Ex. 47.)

119. In July 1989, Mr. Lauher took sample letters from an "NAB guidelines reference book" and edited them to suit the Stations' circumstances. (Church Ex. 4, p. 14; Tr. 188-89.) As edited, the letters read:

Station KFUFM is an Equal Opportunity Employer. From time to time, we have job openings at our station which require a variety of skills and talents.

We encourage members of minority groups and women to apply for these positions, and we seek your help in referring minorities and women to us.

We will be contacting you as job openings arise at our station. In the meantime, if you know of minority group members and/or women who might be interested in working at our station, please do not hesitate to refer them directly to me [Mr. Lauher]. In the event you do not presently know of any such candidates, please refer them to me whenever they come to your attention.

If you are aware of any other organization which may be of assistance to us in this regard, I would also appreciate having its name and address. I am enclosing a reply form, and ask that you complete and return it to me to acknowledge receipt of this letter.

Thank you for your assistance.

The "reply forms" stated: "This is to acknowledge that I [the addressee] have received a letter from Station KFUFM seeking female and minority referrals for job openings at the station." Spaces for a signature and the date, among other things, were provided. (Church Ex. 4, pp. 14-15 and Att. 14; MMB Ex. 2, pp. 1-2, 8-9.)

120. The letters were signed by Mr. Lauher and sent by the FM station to at least 10 local universities and personnel agencies including: Roth Young Personnel Service of St. Louis, University of Missouri at St. Louis, Meramec Community College, The Broadcast Center, Southern Illinois University at Edwardsville, Lindenwood College, John N. Olin School of Business at Washington University, St. Louis Community College, Snelling & Snelling of Clayton, and Sales Recruiters Irvin-Edwards. (Church Ex. 4, p. 14 and Att. 14.)¹⁷ Mr. Lauher selected these organizations because he believed they would send him applicants with minimal experience, and those were the kind of employees the station usually hired. (Tr. 189-90.)

121. Mr. Lauher testified that the letters were sent because the lawyer conducting the EEO seminar at the fall Missouri Broadcasters Association meeting

led me to feel regardless of what had been done at any prior time that it was best to err on the side of making sure, and that's all I felt that we were doing there was just making sure . . . that we had in writing to these various agencies . . . what the letter states.

(Tr. 123, 189.) None of the letters resulted in any referrals of minority applicants. (MMB Ex. 2, p. 2; MMB Ex. 6, pp. 5-6.)

122. Between the time these letters were sent and the end of the License Term, the Stations filled nine full-time positions and five part-time positions. (Church Ex. 4, Att. 6, pp. 6-8, 14-15.) None of the local universities and personnel agencies enumerated above was contacted in connection with any of these job openings. (*Id.*)

¹⁷ Mr. Lauher believed that Meramec College had a high enrollment of minorities. (Tr. 189-90.) In the KRJY Opposition, Mr. Miller stated that Meramec Community College was a relatively "fertile" source of minority referrals. (Church Ex. 12, p. 8.)

123. According to Mr. Stortz, the EEO forms developed by Mr. Lauher were not used during the remainder of 1989 because of turnover in managerial personnel which took place in the summer of that year. (Church Ex. 4, p. 15; Tr. 616-18.) Indeed, Mr. Lauher himself left KFUE-FM in July 1989. His departure had nothing to do with his efforts concerning EEO, but related to the station's failure to meet sales expectations. (Church Ex. 6, p. 3; Tr. 867-68.)

124. After Mr. Lauher left, Reverend Devantier became acting general manager of the FM station and Mr. Stortz remained as Operations Manager of that station. (Tr. 616.) EEO compliance became the responsibility of both Reverend Devantier and Mr. Stortz, but there was no discussion of how that responsibility was to be apportioned. (Tr. 616, 618, 815-16.) According to Reverend Devantier, the routine day-to-day responsibility for the operation of the station was assigned to Mr. Stortz, and that responsibility included, for example, sending out notices of job openings and notifying job sources of the station's EEO policies. (Tr. 816.) Reverend Devantier "did not become heavily involved in the day-to-day functioning and detail of the operation" of the FM station. (*Id.*)

125. In a memorandum drafted after receiving the NAACP's January 2, 1990, Petition to Deny (MMB Ex. 3; Tr. 660), Mr. Stortz stated that the two new managers of KFUE(AM) and KFUE-FM in October 1989 had no way of knowing about any previous problems of noncompliance with Stations' EEO program other than by studying the records, and they learned of the problems by way of the Petition to Deny (NAACP Ex. 48, p. 1).

126. The Stations further augmented their efforts to comply with EEO requirements in 1989. (Church Ex. 4, p. 15; NAACP Exs. 46, 47; MMB Exs. 22, 23.) For example, the Stations began seeking referrals from the Lutheran Employment Project of St. Louis, a clearinghouse run by various Lutheran churches for employment of members of minority groups. In late 1989, KFUE interviewed three minority persons referred by the Lutheran Employment Project, and hired one of them, Ms. Cynthia Blades, an African American, on November 1, 1989. (Church Ex. 4, p. 15 and Att. 6, p. 7; Tr. 754.) The Stations also continued to utilize employee referrals and resumes on file to fill some openings during 1989. (Church Ex. 4, Att. 6, pp. 6-7.)

127. On November 21, 1989, Arnold & Porter sent a letter to Mr. Stortz containing a "quick review" of two recent Commission decisions wherein forfeitures and conditional renewals were imposed on licensees for EEO violations. The law firm again advised "that in filling job openings, stations *must* regularly utilize recruitment sources which are likely to refer qualified minority applicants." (MMB Ex. 23, emphasis in original.)

128. As discussed earlier, Mr. Stortz believed that all of Arnold & Porter's letters were form letters sent to all of their clients. Nothing in them alerted him to any particular EEO deficiency of the Stations, or dealt with the subject of religious qualifications for particular jobs. (Church Ex. 4, p. 13; Tr. 549-50.) Mr. Stortz read the letters and passed them on to the station managers. (Tr. 610-11.) During the License Term, Mr. Stortz never initiated any communication with Arnold & Porter with respect to the Stations' EEO program. (Tr. 767-68.) Mr. Stortz and Ms. Cranberg had never met in person until the depositions in this proceeding were taken. (Church Ex. 8, pp. 4-5.)

129. In the second half of January 1990, Mr. Stortz used EEO Data Forms and EEO Recruitment Program Forms in connection with new hires. (Church Ex. 4, p. 15 and Att. 15.) Moreover, at that time, the Stations continued to contact the Lutheran Employment Project and also contacted an Outreach Ministry for minority employment in northern St. Louis. (Church Ex. 11, p. 1; Tr. 539-40.) The Outreach Ministry referred prospective candidates, but none chose to fill out applications. (Church Ex. 11, p. 1.)

130. In January 1990, the Stations also advertised in newspapers, such as the *St. Louis American* and the *St. Louis Sentinel*, whose target audiences were African American, for the then-existing job vacancies. (Church Ex. 4, p. 15 and Att. 9, pp. 9-12; Tr. 538-39.) An African American male, Timothy Meeks, was hired through the *St. Louis American* for a "Maintenance" position serving both Stations, and an African American female, Bridget Williams, was hired through the *St. Louis Post Dispatch* for a "Secretary/Receptionist" position at the AM station. (Church Ex. 4, Att. 6, p. 8.) By that time, the Stations had received the NAACP's Petition to Deny and had begun to recruit more vigorously. (Tr. 534-44.)

131. In making the hires in January 1990, the Stations used a rating form developed by Angela Burger, the Stations' Assistant Director of Development, who performed the job interviews for these positions. Ms. Burger brought the format of the form with her from a prior job and had not done job interviews for the Stations before January 1990. (Tr. 520-22, 726-27.) The rating form for the Secretary/Receptionist position scored applicants on scales of 1 to 10 on such factors as "punctual," "good appearance," "good guest greeter," and "works well with people." (*E.g.*, NAACP Ex. 63, p. 1.) The applicants for the Maintenance position were similarly scored on such factors as "clean," "legible [sic] writing," and "follows orders." (*Id.* at p. 3.) Three of the four Secretary/Receptionist applicants and five of the six Maintenance applicants were African American. (Church Ex. 4, Att. 6, p. 8.) Mr. Stortz testified that the factors considered in evaluating these candidates had been used before, but he could not recall other instances in which candidates had been scored numerically on a rating form. (Tr. 727-30, 789-90.)

132. During the approximately 10-month period after the Stations reviewed their EEO policies, *i.e.*, from March 1989 to January 1990, the Stations hired 13 full-time employees of whom 3 (22%) were African American. (Church Ex. 4, Att. 6, pp. 6-8.) Two of the three minorities, however, were hired after the NAACP filed its Petition to Deny the renewal applications of the Stations. (*Id.* at Att. 6, p. 8; MMB Ex. 3.) The Stations sought referrals, including Lutheran publications and employee referrals, for at least 9 of the 13 full-time hires. (Church Ex. 4, Att. 6, pp. 6-8.)

133. During the last two-and-one-half-year period of the License Term after the FCC revised its EEO rules, *i.e.*, from August 3, 1987, to January 31, 1990, the Stations hired 24 full-time employees, of whom 4 (16%) were minority. (Church Ex. 4, Att. 6, pp. 4-8.) As noted above, however, two of the four minorities were hired after the NAACP filed its Petition to Deny. (*Id.* at Att. 6, p. 8; MMB Ex. 3.) The Stations sought referrals, including Lutheran publications and employee referrals, for at least 14 of these 24 hires. (Church Ex. 4, Att. 6, pp. 4-8.) As of the pay period ending January 31, 1990, the Stations' overall minority employment was at 71.2% of parity, but there were no minority employees in Top Four category jobs. (Church Ex. 4, Att. 12, p. 4.)

134. In the Stations' 1989 renewal applications, Mr. Stortz added a sentence to the section on "Recruitment" in the EEO Program stating that the Stations "actively seek female and minority referrals." Mr. Stortz also attached a sample of a part of one of the Stations' July 1989 recruitment letters. According to Mr. Stortz, this was done because the Stations had "generally" publicized openings for much of the License Term and had sent recruitment letters in July 1989 to at least 10 local universities and personnel agencies stating that KFUE-FM encouraged minority applications and was seeking help in recruiting minorities. Mr. Stortz believed that the letters were evidence of the Station's then-current, *i.e.*, July to September 1989, active efforts to recruit minorities and females. KFUE-FM had in fact sent the letters and Mr. Stortz testified that he had no intention of misleading the Commission by attaching the sample. (Church Ex. 4, pp. 17-18.)

135. In the Stations' 1989 renewal applications, Reverend Devantier was identified as the person responsible for implementation of the Stations' EEO program. (Church Ex. 4, Att. 16, p. 6.) He was so identified because as of the date of the application, September 29, 1989, he was the Stations' CEO, the newly-hired general manager of KFUE(AM) had not yet started working, and no permanent general manager of KFUE-FM had been hired. (Church Ex. 4, pp. 16-17; Church Ex. 7, pp. 10-11; Tr. 860-61.) In his testimony, Reverend Devantier expressed regret that the Stations had not done more to pursue sources specializing in the referral of minorities. (Church Ex. 7, p. 11.)

D. The "Requirement" for Knowledge of Classical Music

136. During the License Term, the Stations believed that it was essential or highly desirable for announcers and salespersons for the FM station to be knowledgeable about classical music. However, toward the end of the License Term, the thinking of station management evolved and they began to believe that general experience in sales was perhaps as or more important than knowledge of classical music as a qualification for salespersons at KFUE-FM. (Church Ex. 4, p. 9; Tr. 873-74.)

137. According to the Church, the FM station's views about salespersons' knowledge of classical music is best understood by reviewing the history of the station's sales efforts. Between 1983 and 1986, KFUE-FM did not hire its own salespersons but instead relied on an outside consultant, Concert Music Broadcast Sales ("CMBS"), to sell both national and local advertising time on the station. CMBS was an advertising representative firm devoted exclusively to sales of the classical radio format. In addition to its headquarters in New York City, CMBS had sales offices in Chicago, Dallas, Los Angeles, Atlanta, Detroit, and San Francisco. (Church Ex. 4, p. 9; Church Ex. 5, p. 2.)

138. In the early 1980s the founder of CMBS, Peter J. Cleary, had discovered that KFUE-FM was operating on a commercial frequency. CMBS had wanted a full-time classical music radio outlet in the St. Louis market, so Mr. Cleary contacted the Church to urge it to change KFUE-FM from a noncommercial operation. According to Mr. Cleary, it took him about three years of "arm twisting" before the Church began to sell time on KFUE-FM in July 1983. (Church Ex. 5, p. 1; Tr. 209.)

139. When the Church decided that KFUE-FM would sell advertising in 1983, there was no sales staff either on KFUE-FM or KFUE(AM). In fact, the Church had no previous experience in radio sales. Accordingly, CMBS agreed itself to become KFUE-FM's initial sales force, both

nationally and locally. CMBS opened a St. Louis office and hired Tom Jackson, who was experienced in radio and television sales and had an interest in and an understanding of classical music. (Church Ex. 5, p. 4; Tr. 509.) Mr. Jackson was an employee of CMBS. (Tr. 212.)

140. In 1986, KFUE-FM took over its own sales efforts and looked to CMBS and Mr. Cleary for guidance. Mr. Cleary believed that because KFUE-FM was a previously noncommercial station with little audience and no advertiser brand-name recognition, the Station's "formatic [sic] image" had to be developed and conveyed to the universe of advertisers. Also, because of its modest billing levels, KFUE-FM was not able to attract truly experienced radio salespeople. This meant that there was very little depth within KFUE-FM's selling ranks for on-the-job training. Hence, CMBS advised Reverend Devantier and station management that KFUE-FM should look for salespeople who were comfortable with classical music, people who could talk credibly about the music. (Church Ex. 5, p. 6; Tr. 216-17, 219-21, 873.)

141. Reverend Devantier also believed that knowledge of classical music would be a desirable trait in the station's salespeople, although he conceded that "a working knowledge" of that music could be learned on-the-job over a period of time. (Tr. 817-18, 873.) This was in accord with Mr. Cleary's opinion that KFUE-FM needed people in sales who had knowledge of classical music because the station "had to establish a new identity and then market it." (Church Ex. 5, p. 5.) According to Mr. Cleary, the station needed salespeople who were comfortable with classical music and could effectively project the essence of KFUE-FM's format to potential advertisers. (*Id.*)

142. When it came time to hire KFUE-FM's own initial sales manager, Mr. Stortz proceeded on the same premise, that is, that people with knowledge of classical music would be the best salespersons because they would know their "product." (Church Ex. 4, p. 10.) Mr. Stortz defined the "product" as a combination of the format of KFUE-FM and the demographics of the audience. (Tr. 510-11; *see also* Tr. 216, 230-31, NAACP Exs. 8, 12.) The station hired Bern Hentze, who had classical music knowledge and experience. (Tr. 647-48.)

143. Mr. Stortz testified that at times during the years 1986 to 1989, the turnover in KFUE-FM's sales force was great and economic pressures forced the station to hire replacements quickly. (Church Ex. 4, p. 10.) Mr. Lauher confirmed in his testimony that it was "a struggle" to find anyone to work in a sales position from May 1987 to July 1989 because the salary structure was low and KFUE-FM was just initiating a sales effort. KFUE-FM was not doing well financially and had difficulty competing for job applicants with the more profitable St. Louis commercial stations. (Church Ex. 6, p. 1.) Thus, there were instances in which the station had "to settle" for people who had less knowledge about the "product" than it might ideally have liked and, in some cases, persons with no such knowledge were hired. (Church Ex. 4, p. 10; Tr. 874.) Nevertheless, classical music knowledge was considered a desirable trait for an applicant for a sales position at KFUE-FM and, provided everything else was equal, the station would select an individual with that knowledge, experience, or background. (Tr. 818.)

144. Towards the end of the License Term, at least some members of the KFUE-FM staff began to believe that general experience in sales was an equal or more important criterion. (Church Ex. 4, p. 9; Tr. 873-74.) Mr. Cleary

acknowledged that among sales/marketing circles, there developed in the late 1980s and into the 1990s the viewpoint that good, experienced salespeople could sell anything and that a comfortable knowledge of the "product" could be learned on-the-job. (Church Ex. 5, pp. 5-6.)¹⁸

145. During the License Term, KFUE-FM hired 15 individuals for the position of Sales Worker. (Church Ex. 4, Att. 6, pp. 3-7.) Giving the Church the benefit of all possible doubts, 8 of the 15 had some classical music background, or experience working at a classical music station, or listened to KFUE-FM at the time they were hired. These were: Charlotte Akin (NAACP Ex. 32, p. 4), Wynn Bressler (Tr. 646), Sharisse Bush (Tr. 646-47), Bern Hentze (Tr. 647-48), Jan Hutchinson,¹⁹ Caridad Perez (Tr. 649-50), Glynelle Wells (NAACP Ex. 32, p. 25; Tr. 650), and Frank Wood (MMB Ex. 14, pp. 71-72). The record does not reflect that any of the remaining seven Sales Workers had such a background at the time they were hired. These were: James Bebo (Tr. 201), Beverly Brandt (Tr. 646), Tom Koon (Tr. 200, 649), Judy McMurty (Tr. 649), Carolyn Miller (Tr. 649), Bob Thomson (Tr. 650), and Lucy Walker (Tr. 201).

146. The recruitment or referral source for 11 of the 15 Sales Workers who were hired by the station was "Resume on File" (Ms. Akin, Ms. Brandt, Mr. Bressler, Ms. Bush, Mr. Koon, Ms. McMurty, Ms. Miller, Ms. Perez, Mr. Thomson, Ms. Walker, and Mr. Wood). Other recruitment or referral sources utilized for these positions were *Broadcasting* magazine (Mr. Hentze's position), a posting at Church headquarters (Mr. Bebo and Ms. Bush's positions), and referrals from station employees (Ms. Miller, Ms. Walker and Ms. Wells' positions). One employee transferred from CMBS's payroll to the station's (Ms. Hutchinson). (Church Ex. 4, Att. 6, pp. 3-7.)

147. The record in this proceeding contained two job descriptions for the position of Account Representative (NAACP Ex. 40, pp. 10-11; NAACP Ex. 41, pp. 11-12), and two job descriptions for Sales Managers positions (NAACP Ex. 40, pp. 17-18; NAACP Ex. 41, pp. 14-15).²⁰ One of the Account Representative job descriptions (dated June 1987) and one of the Sales Manager job descriptions (also dated June 1987) included no mention of classical music knowledge, expertise, appreciation, or experience as an "Essential" or "Other Desirable" position qualification. (NAACP Ex. 40, pp. 10-11, 17-18.) The second Account Representative job description (dated June 1989) listed as "Other Desirable" position qualifications: "Knowledge of and appreciation for classical music," and "Experience with a classical music radio station." (NAACP Ex. 41, pp. 11-12.) Similarly, the second Sales Manager job description

(also dated June 1989) listed as an "Other Desirable" position qualification: "Knowledge of the classical music format." (*Id.* at pp. 14-15.)

148. In addition, two of the Chief Engineer job descriptions (dated October 1986 and June 1987) listed as an "Other Desirable" position qualification: "Knowledge of and appreciation for classical music." However, neither of these job descriptions referred to the Chief Engineer performing any functions or having any responsibilities relating to the format of, or the type of music or programming broadcast by, the FM station. (NAACP Ex. 39, pp. 9-11; NAACP Ex. 40, pp. 14-16.) In this connection, in its February 23, 1990, Opposition to the NAACP's Petition to Deny, the Church stated that the Chief Engineer's position did not require classical music training. (Church Ex. 4, Att. 7, p. 13 n.3.)

149. According to Mr. Stortz, the need for classical music knowledge for various positions, including salespersons, did not in any way affect the Stations' willingness to recruit individuals of any race. The Stations had no sense that the requirement for familiarity with classical music would single out minorities for negative effect or would disqualify members of any race. Moreover, to the best of Mr. Stortz's knowledge, no minority applicant was ever rejected for any position at KFUE-FM because he or she lacked knowledge of classical music. (Church Ex. 4, pp. 10, 16; Tr. 511-12.) Further, in a January 23, 1990, memorandum to Ms. Cranberg, Mr. Stortz, in response to the NAACP's Petition to Deny, indicated that the Stations planned to hire an additional minority during 1990, and stated:

As KFUE & KFUE FM searches for qualified people to fill its employment needs, there will be no racial barriers to block any applicants. However, applicants must qualify for positions requiring theological or classical music backgrounds. We will certainly seek any minorities having that background. It is the firm resolve of both stations to be in compliance with the EEO program submitted.

(NAACP Ex. 49, p. 3.)

150. On September 29, 1989, the Stations filed with the Commission their applications for renewal of license. (Church Ex. 4, Att. 16, p. 1.) Included in that application was the Stations' Broadcast Equal Employment Opportunity Program. (*Id.* at Att. 16, pp. 4-8.) The Program was prepared in draft form by Paula Zika, the Stations' Director of Business Affairs, and was reviewed by Mr. Stortz, the general manager. (Church Ex. 3, pp. 1-2; Church Ex. 4, p. 16.) A sentence in the Stations' EEO Program relating to

¹⁸ The view that an experienced salesperson could sell an audience to an advertiser was shared by the NAACP's witnesses, Richard J. Miller and Jan Hutchinson. (NAACP Exs. 7, 8, 12.) Mr. Miller conceded, however, that some "rudimentary familiarity" with the music would be helpful, but stated that it could be learned easily and quickly on-the-job or by taking "a course on classical music appreciation at a junior college." (NAACP Ex. 12, p. 1.) Ms. Hutchinson, too, acknowledged that it might be important for a classical music salesperson to know the difference between a symphony and an opera, but was of the opinion that any good radio salesperson could learn everything he or she would need to know about classical music in order to service an advertiser's needs "in a couple of hours or less." (NAACP Ex. 8, p. 3.)

¹⁹ Jan Hutchinson began selling commercial time for KFUE-FM in 1984. (NAACP Ex. 7, p. 1.) She was originally an employee of CMBS. (Church Ex. 5, p. 5; Tr. 222-23, 225, 648-49.) On September 29, 1986, KFUE-FM hired Ms. Hutchinson for a Sales Worker position at the station. (Church Ex. 4, Att. 6, p. 3; Tr. 225-26.) At the time she began working for CMBS in 1984, Ms. Hutchinson had no classical music knowledge. (NAACP Ex. 7, p. 1.) However, she was familiar with the format of KFUE-FM at the time she was hired by the station. (Tr. 648-49.)

²⁰ With respect to job descriptions generally, see note 3, *supra*.

"Recruitment" stated: "When vacancies occur, it is the policy of KFUE and KFUE-FM to seek out qualified minority and female applicants." (Church Ex. 4, Att. 16, p. 7.) Mr. Stortz believed that this sentence needed no change, and was accurate, "because at that time the Stations generally sought qualified minorities and females for openings on their staff." (*Id.* at p. 17.) Mr. Stortz admitted, however, that this was actually done "toward the end of the license period." (Tr. 774-75.) Although Mr. Stortz was aware that the Stations had certain job qualifications, such as theological or classical music training, he did not believe that this made the sentence in question misleading. Mr. Stortz explained that the sentence stated that the Stations sought "qualified" minority and female applicants, and he viewed this as consistent with the Stations' use of various employment criteria such as religious training or knowledge of classical music. Moreover, since the Commission had not questioned the Stations' 1982 or any prior renewal, Mr. Stortz testified that he had no reason to believe the Stations needed to enumerate the various job qualifications that the Stations used, as opposed to just stating that the Stations sought "qualified" applicants. (Church Ex. 4, p. 18.)

151. As noted earlier, on February 23, 1990, the Church filed an Opposition to the NAACP's Petition to Deny. (Church Ex. 4, Att. 7, p. 2.) The Opposition was prepared by Ms. Cranberg. (Church Ex. 8, p. 6.) Mr. Stortz reviewed the Opposition and provided an affidavit concerning the truth of the facts asserted therein, but did not formulate or draft the legal arguments. (Church Ex. 4, Att. 7, p. 53.)

152. The Opposition stated:

Given the specialized nature of KFUE's formats, nearly all of the positions within KFUE's top four job categories can only be filled by persons who have either expertise in classical music (for KFUE-FM) or theological training in the doctrine of the Lutheran church (for KFUE-AM).

* * *

Clearly nearly all of KFUE's employees must have specialized skills. However, relatively few minorities in the St. Louis area possess these skills.

(Church Ex. 4, Att. 7, pp. 13-14.)

153. Ms. Cranberg testified that, in drafting this portion of the Opposition, she used this language on the basis of a number of conversations and written communications from Mr. Stortz. Ms. Cranberg had asked Mr. Stortz whether there were any particular positions at the Stations that required certain specialized skills or background. Mr. Stortz had stated that there were such requirements, and the two discussed them and the reasons why specialized skills were necessary. (Tr. 990-91, 1020-22, 1033.) Mr. Stortz had also faxed Ms. Cranberg a two-page memorandum in which he wrote: "KFUE-FM's format is 'Classical,' with many of it's [sic] positions requiring a knowledge of classical music and foreign language, with a hope that the sales people can relate and talk knowledgeably about the format. These are not easy positions to fill." (NAACP Ex. 49, p. 3.)

154. The Opposition also contained an argument that because of KFUE-FM's classical music format, and the resulting need for certain employees to be knowledgeable about that format, the Commission should consider using alternative data to the general labor force statistics in judg-

ing the results of certain of the Station's recruitment efforts. (Church Ex. 4, Att. 7, pp. 14-16.) In this regard, the Opposition stated:

... KFUE is not aware of any specific statistics showing classical music training among members of minority groups. However, one measure is the popularity of KFUE-FM (the only full-time classical music station in the area) among persons who are members of minority groups. In October and November 1988 (the most recent figures available to KFUE), only 3.7 per cent of KFUE-FM's 72,800 listeners -- or 2,693 -- were black; 0 per cent were Hispanic or Asian. This is approximately .1 per cent of the population of the St. Louis Metropolitan Statistical Area. Figures as to persons in the labor market with classical music *expertise* -- as opposed to simply interest -- would, of course, be even lower.

Thus, KFUE's highly specialized employment needs make reliance upon overall minority labor force availability meaningless. In fact, there is but a small number of minority persons in the St. Louis SMSA -- or, for that matter, nationwide -- who possess the qualifications KFUE requires for nearly every job position at the station. By one estimate, only about .1 per cent of the St. Louis population consists of members of minority groups with classical music training; roughly two per cent of the population consists of members of minority groups with Lutheran theological training. KFUE's minority employment record must be considered in that context.

(*Id.* at pp. 15-16, emphasis in original, footnote omitted.) Similar arguments were made by the Church in a Motion to Strike and Reply to Comments, filed on September 21, 1992 (MMB Ex. 11, pp. 10-11, 16-18), and in a Reply to FCC Letter of Inquiry, filed December 28, 1992 (MMB Ex. 14, pp. 31-32).

155. In the Church's view, the argument did not describe KFUE-FM's hiring practices, and said nothing about KFUE-FM's willingness to recruit for and hire minority individuals. (Church Ex. 4, Att. 7, pp. 10-11 n.2.) Rather, as Ms. Cranberg testified, although the argument was discussed with Mr. Stortz, it was Arnold & Porter's idea to use the argument in the Opposition. (Tr. 991-92, 1022-23.) Ms. Cranberg further testified that the statistics regarding the station's minority listeners were presented solely in a preliminary effort to argue that statistics should take into account the relevant pool of qualified individuals for particular specialized employment positions in order to have any meaning. (Church Ex. 8, pp. 6-7.) Ms. Cranberg described her intent as follows:

The arguments were part of an overall discussion of a number of factors that I felt the Commission should take into account in assessing the stations' employment profile, including the small number of employees overall at the stations, the fact that the stations had a greater number of minority employees over the license period than were reflected in the annual employment reports, and the fact that a significant number of positions required very specialized skills such that relying on overall labor forces -- didn't seem to

be a very precise way of measuring the stations' performance. That was my purpose in, in making the argument.

(Tr. 992.)

156. Ms. Cranberg was of the view that the Opposition did not state, and did not intend to imply, that KFUE-FM had not or would not continue to engage in affirmative action recruitment efforts because of these statistics. Arnold & Porter also did not mean to imply that the station viewed such recruitment efforts as pointless. Indeed, Arnold & Porter had no reason to believe, based on its dealings with personnel at the Stations, that either of these supposed implications of its statements were true. (Church Ex. 8, p. 7.)

157. In Ms. Cranberg's view, this was a method of analysis the FCC had specifically endorsed in *Equal Employment Opportunity Processing Guideline Modifications for Broadcast Renewal Applicants*, 79 FCC 2d 922, 47 RR 2d 1689 (1980). It was also a method of analysis which Arnold & Porter had previously employed before the Commission on behalf of another broadcast client, classical music station WFLN in Philadelphia. (Church Ex. 8, p. 7; Joint Ex. 2, pp. 26-27.) WFLN had represented to the Commission in response to an inquiry concerning its EEO program, *1972 License Renewal Applications*, 53 FCC 2d 104, 118 (1975), that the job description for the position of "Programmer/Cataloguer" required a "love" of classical music, and the job description for the position of "Announcer" required "a working knowledge of classical music" and "a reading knowledge of French, German, Italian and Spanish as well as English." (Joint Ex. 2, Ex. 1, pp. 20, 21.) WFLN had argued that it was the only classical music station in the market, and that because its format was "highly specialized[,] [o]ver the years, it has been difficult to find any employees with the skills required in musical knowledge and foreign languages." (*Id.* at Ex. 1, p. 25, emphasis in original.) In denying the EEO challenge to WFLN and renewing its license, the Commission did not comment on this argument by WFLN. (*Id.* at Ex. 2; *Franklin Broadcasting Company*, 57 FCC 2d 130 (1975).) Reed Miller, the Arnold & Porter partner who had been involved in the WFLN case, may have discussed that case with Ms. Cranberg or mentioned it to her as a precedent. (Joint Ex. 2, pp. 26-30.)

158. Arnold & Porter acknowledged in the Opposition that the Stations were unaware of any statistics regarding the percentage of minorities with classical music training. (Church Ex. 4, Att. 7, p. 15.) Therefore, the law firm cited to the statistic regarding minority listeners "by rough analogy." (Church Ex. 8, p. 7.) Ms. Cranberg testified that this was an attempt to establish

a measure that would overstate the availability, would be a measure of persons who listen to the only full-time classical music station in the city. I assumed that persons who have expertise or interest or knowledge about classical music would likely in many cases listen to the only full-time classical music station in the city.

(Tr. 1025-26.)

159. Ms. Cranberg testified that in drafting the Opposition and subsequent pleadings, she used as synonyms the terms "knowledge of classical music," "classical music

training," "expertise in classical music," and a "working knowledge of classical music." Specifically, all of the terms meant that persons hired for the relevant positions had to have a "fairly significant knowledge of classical music." Ms. Cranberg testified that she did not intend to mislead the Commission by using these different expressions to refer to the same idea. (Church Ex. 8, p. 6 n.2.)

160. Ms. Cranberg later learned that while the station sought salespeople with knowledge of classical music, it did hire people without such knowledge. (Tr. 1028-30.) According to Ms. Cranberg, the statement in the Opposition that knowledge of classical music was a "requirement" was "probably an overstatement," and Ms. Cranberg commented: "I wish that I had used another word." (Tr. 1027-28.) Ms. Cranberg testified that there was no intention to mislead the Commission by using the word "requirement" in the Opposition. (Church Ex. 8, p. 6 n.2.)

161. Ms. Cranberg further testified that she did not believe the fact that the station hired people without a classical music background negated the argument she had formulated, stating:

I think it's still a legitimate point to make. The, the very point is that it's difficult to find people with that background and that there is not a great availability of any race, and so the fact that the station hasn't been able to find people with, with this background in all cases I don't think undermines the point that was being made.

(Tr. 1028.)

162. However, the Church's February 23, 1990, Opposition also contained the following statement:

[T]he specialized nature of KFUE's program formats have resulted in the stations' receiving a large number of qualified "write-in" applicants each year. The reason is clear -- because there are relatively few classical music or Lutheran religious stations in the country, those persons with a particular expertise in classical music, or a Lutheran theological background, actively solicit positions at stations such as KFUE. When a given job vacancy occurs, KFUE typically has available to it some 20 resumes on file for persons with the specific qualifications KFUE seeks. [Footnote]

* * *

[Footnote] Indeed, a number of KFUE's employees originally came to the stations as dedicated volunteers with a special interest in theology and/or classical music.

(Church Ex. 4, Att. 7, pp. 16-17.)

163. Similarly, in a May 12, 1992, letter in response to an April 22, 1992, Commission letter of inquiry (MMB Ex. 5), the Church stated:

As noted in our [Opposition,] we do not use outside recruitment sources for every opening at the stations (although we have used them increasingly in recent years in an effort to increase our minority employment . . .). This is due to the fact that the religious

and classical music formats of our stations attract numerous unsolicited applications from prospective employees around the country with a particular interest/expertise in these areas[.]

(MMB Ex. 6, p. 3, emphasis in original.)

164. In addition, in a Motion to Strike and Reply to Comments, filed on September 21, 1992, the Church maintained that "[b]ecause there are relatively few classical music and Lutheran religious stations, KFUO receives many unsolicited resumes from qualified applicants around the country with special expertise in classical music or Lutheran theology." (MMB Ex. 11, p. 13 n.3.) The Motion to Strike and Reply also stated that "nearly all of the full-time hiring opportunities which occurred at the stations during the license term required particular training either in classical music or Lutheran theology." (*Id.* at p. 11.) In this regard, the Motion represented that "[o]f the 35 full-time hires made from October 1, 1986 through January 31, 1990, 26 required either Lutheran theological background or classical music knowledge." (*Id.* at p. 11 n.5.)

165. On November 17, 1992, the Commission asked the Church for an explanation of "those aspects of the duties and responsibilities of the salespersons (14 positions) which require knowledge of classical music." The Church was also asked to "indicate the classical music background of persons hired for the above noted 14 FM sales positions." (MMB Ex. 13, pp. 1-2.)

166. In its December 28, 1992, Reply to FCC Letter of Inquiry, the Church stated:

The Commission has requested additional information concerning the requirement that KFUO-FM salespeople be knowledgeable about classical music. KFUO-FM enforces this requirement by making every effort to hire such persons whenever it can; it only employs salespeople who do not possess this expertise on those occasions when it is unable to secure suitable persons with the requisite classical music background.

(MMB Ex. 14, p. 14.) The Reply only identified classical music background for 2 of the 14 salespersons hired by the Church up to that point (Frank Wood and Glynelle Wells). (*Id.* at pp. 19-20, 70-72.) The Reply also noted that most of the salespersons hired had since left the station, that KFUO-FM did not have resumes for these former employees, and that Mr. Stortz knew "from personal experience that a large number of our sales staff during the license term were knowledgeable about classical music, although not all were." (*Id.* at pp. 19, 61.) The Reply was drafted by Ms. Cranberg based on information supplied to her by station staff. (Tr. 975.)

167. In an affidavit appended to the Reply, Mr. Stortz stated, in pertinent part:

We have tried in good faith to supply the information requested [by the Commission], and have not intended to mislead the Commission in any way. I would point out that I am not an attorney, and am perhaps not accustomed to providing the level of detail and precision with which attorneys, and those who deal with them frequently, may be more familiar. For example, when I advised the FCC that it is a

requirement that KFUO-FM salespeople possess a background in classical music, I believed and continue to believe that that was true, because KFUO-FM wants its salespeople to possess a background in classical music, and only when we are unable to locate such prospective employees do we hire salespeople without that background. Once the Commission raised a question about our employment practices in this regard, I recognized that I might have provided further detail about our hiring policies in this respect to ensure that the Commission understood that while we seek only salespeople with a classical music background, we are not always successful.

(MMB Ex. 14, pp. 63-64.)

168. Reverend Devantier did not object to Arnold & Porter's use of the argument about the need for "very specialized skills" (MMB Ex. 14, p. 44) because it was prepared by the Stations' legal counsel "in whom we had some confidence to know about such things" (Tr. 834). When offense was apparently taken to the arguments about knowledge of classical music and the use of alternative statistics, Dennis Stortz faxed Ms. Cranberg a note, dated September 17, 1992, making it clear to her that, while the FM station's classical music knowledge requirement was real, he did not want it to be construed as an "excuse." Mr. Stortz stated in his fax note: "While all of this information about classical music knowledge and Lutheran requirements is true and applicable, I don't want to make it sound like an excuse. It is what we do as radio stations, and there is no bent toward discrimination." (Church Ex. 4, pp. 10-11 n.2 and Att. 8.)

E. Management Turnover

169. The February 23, 1990, Opposition to Petition to Deny contained the additional argument that the Stations "experienced a tremendous degree of management turnover" during the License Term, and that this "lack of consistent leadership" increased the difficulties in maintaining "a consistent recruitment program." The Opposition noted that there were seven different managers between the two stations during the License Term, and that they were typically Lutheran ministers without broadcasting experience. The Opposition stated that a new "lay" manager with "significant broadcast experience" had been hired in 1988, and that the Church was "hopeful" that a "more stable management" would afford the opportunity to focus on a number of areas requiring attention, "including employee recruitment." (Church Ex. 4, Att. 7, pp. 7, 17-18.) According to Ms. Cranberg, Arnold & Porter originated the argument that "the management turnover should be taken into account in assessing a station's compliance with EEO requirements." (Tr. 996-97.)

III. Misrepresentation/Lack of Candor Issue

170. In specifying the misrepresentation/lack of candor issue against the Church, the *HDO* cited the following matters:

- (a) the discrepancy between the number of total hires during the 12 months preceding renewal reported in the Church's renewal application and renewal supplement, and the actual number of hires (*HDO* at para. 27);
- (b) the Church's explanation of that discrepancy (*id.*);
- (c) the Church's responses to Commission inquiries regarding the specifics of its EEO outreach efforts, particularly the representations regarding its recruitment program (*id.* at paras. 28-29);
- (d) the Church's arrangement with Concordia Seminary (*id.* at para. 29);
- (e) the Church's requirement for knowledge of Lutheran doctrine (*id.*); and
- (f) the Church's requirement for knowledge of classical music for sales positions at the FM station (*id.* at paras. 29-30).

The Church's outreach and recruiting program, the arrangement with Concordia Seminary, and the requirements for Lutheran and classical music knowledge have been discussed in earlier sections of the Findings of Fact and need not be repeated at this point. Therefore, this section will concentrate on the discrepancy between the number of total hires initially reported to the Commission and the actual number of hires, and the Church's explanation for the discrepancy.

171. The FCC Form 396 Broadcast EEO Program which was included with the 1989 license renewal applications was prepared by Paula Zika, the Director of Business Affairs at the Stations. Ms. Zika had been employed at the Stations since January 1971 working in a variety of positions relating to station operations. Since the early-to-mid 1980s, Ms. Zika served in the capacity of Director of Business Services, although the title of that position changed several times over the years. From 1987 to 1991, her title was Director of Station Operations. With the exception of the Stations' Chief Engineer and the Assistant Engineer, Ms. Zika had worked at the Stations longer than any other employee. (Church Ex. 3, p. 1; Tr. 325-26.)

172. Over the years, Ms. Zika's responsibilities included handling administrative and business matters for the Stations, including personnel matters. She also prepared FCC forms for the Stations. When the 1989 license renewal packet arrived, Ms. Zika was given the responsibility of gathering the necessary information and typing the applications. During her time at the Stations, she had prepared FCC filings for a number of different general managers and acting general managers. In preparing the FCC Form 396 Broadcast EEO Program to be included with the 1989 license renewal applications, Ms. Zika reviewed the EEO Program filed with the Stations' 1982 renewals and typed the 1989 EEO information using the Stations' 1982 Program as the basis. (Church Ex. 3, p. 1; Tr. 326-29.)

173. In responding to the questions on the Form 396, Ms. Zika went through the Stations' employment records, which she maintained as part of her duties, to provide the

employment figures requested by the FCC. Ms. Zika compiled the data regarding the question in the Form 396 asking about "Job Hires." (Church Ex. 3, pp. 1-2.) This question asked for the following information, *inter alia*:

During the twelve-month period prior to filing this application beginning (Month-Day-Year) _____ and ending (Month-Day-Year), _____ we hired:
Total hires _____ Minorities _____ Women _____

(Church Ex. 9, p. 4.) Neither the form nor the Filing Instructions specified whether the response should include part-time as well as full-time employees, or whether the renewal applicant should count people hired who thereafter departed before the end of the period. (Church Ex. 9.)

174. Ms. Zika testified that she misinterpreted the question. (Tr. 341-42.) Specifically, she thought that the question was asking only for full-time hires during the past 12 months who were still employed at the Stations at the time the renewal applications were being prepared. She did not believe the question was asking for hires who were no longer working at the Stations. (Church Ex. 3, p. 2; Tr. 341-42.) Although Ms. Zika had worked on the 1982 FCC Form 396 which had a similar question, she had not made the calculations to answer the "Job Hires" question in the 1982 application. (Church Ex. 3, pp. 1-2.)

175. Based on her understanding of the question on "Job Hires" in the Form 396, Ms. Zika answered: "During the twelve month period beginning October 1, 1988 and ending September 30, 1989, we hired a total of six persons, two white males and four white females." She reached this figure by adding the full-time hires in the previous 12 months who were still working at the Stations in September 1989. (Church Ex. 3, p. 2; Tr. 330-31.)

176. Mr. Stortz, the general manager in September 1989, recalled reading through the Form 396 EEO Program during the preparation of the renewal applications, but he did not ask Ms. Zika about the information on "Job Hires." He was aware that, in completing the applications, she had reviewed the employment records which she kept. (Church Ex. 4, p. 19.)

177. After the EEO Program for the renewal applications was prepared, Mr. Stortz asked Ms. Zika to send it to Ms. Cranberg for review. Ms. Cranberg did not suggest any material changes. Nor did she state that the Stations needed to enumerate explicitly all the criteria used to hire personnel, such as religious training, or to "remind" the Commission of the Stations' relationship to Concordia Seminary. (Church Ex. 4, pp. 18-19.) In this regard, neither Reverend Devantier, nor anyone at his instruction, kept Arnold & Porter apprised of the Stations' EEO policies, programs, and practices. Rather, Reverend Devantier "trusted those individuals in positions of responsibility at the station to do what was appropriate." (Tr. 810-11.)

178. After the renewal applications were completed, they were forwarded to Reverend Devantier so that he could have them signed by the Reverend Dr. Bohlmann, who was then President of the Church. (Church Ex. 4, p. 19.) Reverend Dr. Bohlmann signed the Stations' renewal applications and sent them on for filing with the Commission. He stated that they "appeared to be in order[,] [and]

[w]e have always been proud of the Stations' track record of programming service and their commitment to non-discrimination." (Church Ex. 1, p. 2; Tr. 278.)

179. The KFUE(AM) and FM renewal applications were filed with the Commission on September 29, 1989. (Church Ex. 4, Att. 16.) The Commission requested that the Church provide certain supplemental information, and the Church filed an EEO Supplement on December 29, 1989. (MMB Ex. 2.) That Supplement, like the renewal applications, stated that during the 12-month period beginning October 1, 1988, and ending September 30, 1989, the Stations hired a total of 6 persons, 2 white males and 4 white females. (*Id.* at p. 5.) Mr. Stortz assisted Ms. Cranberg in the preparation of the Supplement. (Church Ex. 4, p. 19.)

180. On January 2, 1990, the NAACP filed its Petition to Deny the Church's license renewal applications. (MMB Ex. 3.) On January 4, 1990, the Commission sent a letter to Reverend Devantier asking for detailed information concerning full-time and part-time job hires at KFUE during the three-year time period from October 1, 1986, to October 1, 1989. (MMB Ex. 4.) At the direction of Reverend Devantier, Ms. Zika and Mr. Stortz gathered the information requested for that three-year period. (Church Ex. 4, p. 20.) Ms. Zika and Mr. Stortz reviewed the Stations' records and collected the names, dates of hires, and the full-time or part-time status of hires over the previous three years. (Church Ex. 3, p. 2.) They sent the information to Ms. Cranberg for inclusion in the Opposition that was filed by the Church on February 23, 1990, as a response to the Petition to Deny and to the January 4, 1990, FCC letter. (Church Ex. 4, p. 20.)

181. Included in the information submitted with the Opposition was a document entitled "Table Three," which supplied the information requested by the Commission for each position filled at the Stations during the three-year period in question. When Ms. Zika and Mr. Stortz compiled the data in Table Three for the Opposition, they did not notice any disparity between that information and the information contained in the EEO Program that was appended to the 1989 license renewal applications. (Church Ex. 4, p. 20 and Att. 7 pp. 26-33.)

182. There was no further mention of the hire data until the FCC requested additional information in a June 26, 1992, letter to the Reverend Dr. Bohlmann. Therein, for the first time in more than two years, the FCC sought clarification as to why the original renewal applications listed 6 hires for the time period October 1, 1988, to September 30, 1989, while the February 1990 Opposition indicated that there had been 14 hires (10 full-time and 4 part-time) during that time period. (Church Ex. 4, p. 21; MMB Ex. 8.)

183. Upon reviewing this letter, Mr. Stortz examined the renewal applications and the Opposition to ascertain the reasons for the discrepancy. He sent Ms. Cranberg a letter stating that he did not "have a ready explanation [sic]." (Church Ex. 4, p. 21 and Att. 17.) Mr. Stortz asked Ms. Zika how she had arrived at the number six for the total number of hires in completing the renewal applications. (*Id.* at p. 21.) Ms. Zika told Mr. Stortz that she believed the difference in the answers was probably the result of the two different questions asked by the FCC. In the license re-

newal applications, the FCC had requested the number of "total hires," which Ms. Zika interpreted to mean the "net gain" of full-time hires. She had not counted employees who were hired in 1989 but who had already left by mid-September 1989 when the renewal applications were completed, since such employees had no impact on the Stations' minority or female employment profile as of the time the renewal applications were filed. Because of this, Ms. Zika told Mr. Stortz that the Stations had a "net gain" of six persons during this period and the Stations, in the license renewal applications, had referred to this "net gain" as the total number of persons hired. (Church Ex. 3.) Ms. Zika wrote a note to Mr. Stortz at the time stating that the relevant portion of the EEO Program should have stated that the Stations had a "net gain of six persons" rather than "hired" six persons. (*Id.* at Att. 1; Tr. 343-44.) At the hearing, Ms. Zika testified:

[T]he statement [in the renewal applications that the stations "hired" 6 persons] was correct insofar as I, I had understood the question. In, in checking, I realized that I had used only full time hires and people that were still working at the station. I did not count part-time, and I did not count the hires that had come and gone in that particular period.

(Tr. 335.)

184. In contrast, the January 4, 1990, letter from the Commission had asked for specific information for "each position filled" between October 1, 1986, and October 1, 1989, including its "full or part-time status." (MMB Ex. 4.) When Ms. Zika and Mr. Stortz gathered the information for Table Three in the Opposition, they reviewed all payroll and personnel records for the time period for both full-time and part-time employees and listed every hire, as requested in the January 4 letter, as opposed to the total hires, as requested in the renewal applications. (Church Ex. 4, pp. 21-22.)

185. On July 13, 1992, the Church filed a letter with the FCC in response to a June 26, 1992, letter of inquiry from the Commission. (MMB Exs. 8 and 9.) In this response, Mr. Stortz indicated that, as he now understood the FCC to interpret the question in the renewal applications, the number six included under the "Job Hires" section was inaccurate, and that section should have stated there was "a Net Gain of six persons during this period" rather than six persons "hired." (Church Ex. 4, pp. 22.) The Church's December 28, 1992, reply to an FCC letter of inquiry dated November 17, 1992, repeated Mr. Stortz's understanding that there had been a "net gain" of six employees during the time period beginning October 1, 1988, and ending September 30, 1989. (MMB Ex. 13; MMB Ex. 14, pp. 28-30.)

186. Subsequent to the February 1, 1994, release of the *HDO* in this proceeding, Ms. Zika and Mr. Stortz once again examined the Stations' records to try to confirm exactly how the discrepancy in the number of total hires had occurred. (Church Ex. 3, p. 3; Church Ex. 4, p. 22.) Ms. Zika had interpreted the question in the renewal applications to encompass only full-time hires. Consequently, she had not counted the four part-time employees who were listed in the Opposition.²¹ Most of the Stations' part-

²¹ As noted above, neither the FCC Form 396 nor the Filing

Instructions specifically requested information on part-time

time employees were from Concordia Seminary. They typically worked only 6 to 12 hours per week and received no employee benefits. In effect, they were paid interns. For this reason, Ms. Zika and Mr. Stortz testified that they believed the discrepancy referred to by the FCC should have been 6 versus 10 rather than 6 versus 14. (Church Ex. 3, pp. 3-4; Church Ex. 4, pp. 22-23.)

187. Ms. Zika reached the number six set forth in the license renewal applications because she did not count employees who were hired in 1989 but who had left the Stations before mid-September 1989 when she prepared the applications. There were two such employees. She also did not count a third employee, Reverend David Schultz, who was hired to be the new AM general manager on September 25, 1989, but who did not actually start work until after October 1, 1989. At the time Ms. Zika prepared the renewal applications in mid-September 1989, she had not been told that Reverend Schultz had been hired and did not count him among the hires for that time period. (Church Ex. 3, p. 4; Church Ex. 4, pp. 23-24; Tr. 338-39.)

188. Based on her review of the Stations' records after the *HDO* was released, Ms. Zika discovered that the only full-time employee who was hired between October 1, 1988, and September 30, 1989, that she inadvertently failed to list was Robert Thomson, a white male, who was hired as a salesperson on October 24, 1988. (Church Ex. 3, p. 4; Tr. 339.) Since the Stations did not have computerized employee records during the license renewal period, and Ms. Zika had not remembered any hires in the last quarter of 1988 when she was preparing the license renewal applications, she did not check Mr. Thomson's hire date in his personnel record and inadvertently failed to count him. Ms. Zika explained that the "net gain" of full-time hires between October 1, 1988, and September 30, 1989, was therefore actually seven rather than the six stated in the license renewal applications. Three of the hires were white males and four were white females. (Church Ex. 3, pp. 4-5.)

189. When it came time in January and February 1990 to review the payroll records to answer the detailed questions about each hire as requested in the Commission's January 4, 1990, letter, it was found that Reverend Schultz was added to the payroll on September 25, 1989, and so that date was used in Table Three of the Opposition. When Ms. Zika and Mr. Stortz reviewed the 1986, 1987, 1988, and 1989 payroll records to create Table Three, Mr. Thomson was also included. (Church Ex. 4, pp. 23-24.)

190. In Mr. Stortz's opinion, the discrepancy between the number of hires in the renewal applications and Table Three of the Opposition was "unfortunate" because it caused "much confusion and expenditure of effort." However, Mr. Stortz believed it was the result of Ms. Zika's good faith effort to answer the question that she believed the FCC had posed in the renewal applications. (Church Ex. 4, p. 25.) Ms. Zika testified that she never intended to deceive the Commission in any way. She stated that the discrepancy was simply the result of her confusion regarding the question posed in Form 396, her failure to recall that Mr. Thomson had been hired during the relevant

12-month period, and her lack of knowledge that Reverend Schultz was to be hired during the relevant period. (Church Ex. 3, p. 5.)

191. Similarly, according to Mr. Stortz, while the explanation for the discrepancy proved to be more complicated than the simple "net gain" of employees that he originally understood it to be, that "misunderstanding" resulted from confusion between Mr. Stortz and Ms. Zika as to what was meant by "net gain." Because of the complexity of the events that occurred, the misunderstanding went undetected until the matter was re-examined after the *HDO* was released. Although the information concerning "total hires" submitted to the FCC in the license renewal applications may not have been fully accurate, Mr. Stortz testified that any inaccuracies were unintentional and the result of a good-faith misinterpretation. According to Mr. Stortz, there was no intent to deceive the FCC on these or any other matters. (Church Ex. 4, pp. 25-26.)

CONCLUSIONS OF LAW

192. This proceeding involves the applications of The Lutheran Church-Missouri Synod for renewal of its licenses for Stations KFUE(AM) and KFUE-FM, Clayton, Missouri. Issues were specified to determine whether the Church complied with the nondiscrimination and affirmative action provisions of the Commission's EEO rule, whether the Church made misrepresentations of fact or was lacking in candor with regard to the Stations' EEO program, and whether a grant of the renewal applications would serve the public interest, convenience and necessity.

I. Issue 1 -- Compliance with the EEO Rule and Policies

193. The findings establish, and it is concluded, that the Stations, while not discriminating against any person because of race or color, improperly gave preferential hiring treatment to individuals with knowledge of the LCMS or Lutheran doctrine, and to active members of Christian or LCMS congregations, for positions which were not reasonably connected with the espousal of the Church's religious views. It is also concluded that, during the period from February 1, 1983, to August 3, 1987, the Stations' overall affirmative action efforts, though flawed, were acceptable. However, it must additionally be concluded that, during the period from August 3, 1987, to February 1, 1990, the Stations' overall affirmative action efforts were unsatisfactory, and were not in substantial compliance with Sections 73.2080(b) and (c) of the Commission's Rules.

A. Nondiscrimination Aspect of the EEO Rule

194. The findings establish that no individual was discriminated against by the Stations because of race, color, religion, national origin, or sex. There is not one scintilla of evidence in the record to indicate that any adverse discriminatory act ever occurred, or that any individual ever even made an allegation of racial or other discrimination regarding the Stations' employment practices. In this regard, not a single exhibit was submitted indicating that any employee, or applicant for employment at the Stations,

hires. In this regard, the Filing Instructions indicated that it was only necessary to complete and file the Form 396 with the Commission if the station employed five or more full-time employees. (Church Ex. 9.)

had alleged that he or she had been the victim of discrimination. Nor was any evidence produced that any potential applicant was ever discouraged from applying to the Stations because of his or her race or religion. Similarly, several witnesses testified that they were not aware of any acts of racial discrimination at the Stations or allegations to that effect. Where allegations of discrimination have been made but, as here, investigation revealed no complaints or other evidence of discrimination, the questions have been resolved in favor of the licensee. *Applications of Certain Television Stations Serving Communities in the State of California*, 6 FCC Rcd 2340, 2343 (1991), *recon. denied* 8 FCC Rcd 417 (1993); *CBS, Inc.*, 88 FCC 2d 649, 668-69 (1991).

195. Further, the Church has made efforts throughout the years to eliminate racism and discrimination, and to further the presence of African Americans in the Church. The Church has approximately 50,000 African American members out of a total membership of 2.6 million, has African American Lutheran pastors serving both African American and white congregations, and has African Americans serving in the national, regional, district, and area Church leadership. There is also African American representation at the schools operated by the Church, and the Church has a history of providing educational opportunities for minorities. Moreover, Reverend Devantier, the "CEO" of the Stations during the License Term, has two bi-racial children in his own household, one adopted, and one a foster child.

196. During the course of the License Term, and prior to the filing of the NAACP's Petition to Deny, the Stations hired one Hispanic (Caridad Perez), and four African American employees (Ruth Clerkly, Helen Richardson, Lisa Harrison, and Cynthia Blades).²² Ms. Perez was hired for a Top Four job category position. The Stations also employed one other African American (Lula Daniels) in a Top Four position until her death, and considered another African American (Ruth Clerkly) for promotion to a management-level position. If the Church had been bent on racial discrimination, it is highly unlikely that these African American or Hispanic individuals would have filled any position at the Stations.

197. The NAACP contends that the FM station's classical music knowledge employment criterion is an indicator of a discriminatory intent on the part of the Church. However, the record reflects no evidence of a racially discriminatory intent behind that criterion. The evidence establishes that the Church was advised by Peter J. Cleary, the founder of CMBS and the Stations' outside consultant, that classical music experience was a valuable job qualification for salespersons. Mr. Cleary's rationale for his view was completely reasonable and logical, and is fully credited. In addition, there was no evidence that any minority applicant was turned away or discouraged from applying for a job at KFUFM because of a lack of classical music expertise. It does not, therefore, appear that the criterion was ever used as a pretext for discrimination.

198. In its Opposition to Petition to Deny, the Church argued that any lack of minorities at KFUFM should be excused because there were a minuscule number of minor-

ities in the service area who were interested in classical music. The HDO apparently considered this argument as "inherently discriminatory." (HDO at paras. 25-26.) However, the advancement of such an argument, in and of itself, does not establish a discriminatory mind-set on the part of the Church. In *License Renewal Applications of Pasco Pinellas Broadcasting Co.*, 8 FCC Rcd 398, 399 (1993), *aff'd sub nom. Florida State Conference of NAACP v. FCC*, 24 F.3d 271 (D.C. Cir. 1994), the Commission specifically rejected a contention by the NAACP that it should analyze an EEO defense concerning the availability of minority job applicants to determine whether it was indicative of a discriminatory intent on the part of the licensee. The Court of Appeals agreed with the Commission, stating that "[w]e do not understand [the NAACP's] argument. . . . The [licensee] was only submitting an explanation to meet the inference of discrimination that [the NAACP] sought to draw from the statistics." 24 F.3d at 274. Similar defenses have also been raised by licensees in a number of other EEO proceedings, and in none of them has the Commission even questioned the appropriateness of making the defense, much less found that it indicated a discriminatory mind-set. *E.g., Sun Mountain Broadcasting, Inc.*, 9 FCC Rcd 2124, 2125-26, 2126 n.11 (1994); *San Luis Obispo Limited Partnership*, 9 FCC Rcd 894, 903 n.20 (1994); *Winfas, Inc.*, 5 FCC Rcd 4902, 4902-03, 4904-05 (1990), *recon. denied* 8 FCC Rcd 3897 (1993); *Delaware Broadcasting Co.*, 58 RR 2d 1297, 1299 n.6 (1985); *Voice of Charlotte Broadcasting Co.*, 77 FCC 2d 299, 300 (1980).

199. In this regard, when the EEO processing guidelines were revised in 1980, the Commission itself stated that if a broadcaster's minority hires were low,

[t]he Commission will, in its in-depth reviews, take cognizance of a licensee's inability to employ women or minorities in positions for which the licensee documents that only a very limited number of women or minority group members have the requisite skills. The licensee should show in its EEO program that the skills are in fact required, and provide Census or similar data indicating that, as to women or minorities, individuals possessing these skills are as yet in short supply. . . .

Equal Employment Opportunity Processing Guideline Modifications for Broadcast Renewal Applicants, supra, 79 FCC 2d at 932, 47 RR 2d at 1697. *See also Equal Opportunity Rules for Broadcasters, supra* at 3973. Whether or not the Commission accepts such a defense on the merits, a licensee cannot be faulted for making the very argument that the Commission invited it to make.

200. Although there was no evidence that the Stations intentionally discriminated against any particular individual on the basis of race, color, religion, national origin or sex, the findings establish that the Stations improperly gave preferential hiring treatment to individuals with knowledge of the LCMS or Lutheran doctrine, and to active members of Christian or LCMS congregations, for positions which

²² The Stations also hired Bridget Williams and Timothy Meeks, both African Americans, after the NAACP filed its Petition to Deny and after the January 4, 1990, Commission letter of inquiry. Since the Church then knew that the Stations' hiring practices with respect to African Americans were under

review, the hiring of these two minorities is not probative and the Church will be given no credit therefor. *Cf. Rust Communications Group, Inc.*, 73 FCC 2d 39, 53-54 (1979); *Alabama Educational Television Commission*, 50 FCC 2d 461, 475-76 (1975).

were not reasonably connected with the espousal of the Church's religious views. In this category were receptionist, secretarial, engineering, and business manager positions. In addition, the Stations' employment application in use from 1986 or 1987 to the end of April 1989, clearly stated that the Church's policy was to give preference to "persons who are members in good standing of an LCMS congregation."

201. These hiring practices are contrary to the holding in *King's Garden, supra*, that a station licensed to a religious organization may discriminate on the basis of religion in its employment practices only as to those hired to espouse the licensee's religious philosophy over the air. Conversely, religious licensees may not discriminate "in the employment of persons whose work is not connected with the espousal of the licensee's religious views." 34 FCC 2d at 938.

202. The Church argues that *King's Garden* has been, in effect, overruled by *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987). This is erroneous. *Amos* 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 the nonprofit activities of religious employers." 483 U.S. at 339. Neither the Communications Act nor the Commission's Rules contain such an exemption, and the Commission and the courts have consistently distinguished the Commission's EEO requirements from those of Title VII. See, e.g., *Florida State Conference of NAACP v. FCC, supra* at 274 n.4; *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 628 (D.C. Cir. 1978) ("the FCC is not the Equal Employment Opportunity Commission . . . , and a license renewal proceeding is not a Title VII suit").

203. The Church's reliance on *dicta* in *King's Garden*, which opined that the Title VII exemption was unconstitutional, is misplaced. The analysis and holding of the *King's Garden* majority was not based on the premise that the Title VII exemption was unconstitutional. Rather, *King's Garden* held that the exemption was not relevant to the Commission's EEO requirements. 498 F.2d at 58. Indeed, it was for this very reason that Judge Bazelon did not join in the opinion. His concurrence was based on his view that the exemption was applicable, but unconstitutional. *Id.* at 61.

204. The Church also contends that its own judgement as to which employment positions require religious knowledge, training or expertise may not be subjected to second-guessing by a government agency such as the Commission. This position is without merit. As the Commission stated in *Faith Center, Inc.*, 82 FCC 2d 1, 21 (1980), *recon. denied* 86 FCC 2d 891 (1981), such an interpretation "would tend to create a favored class of licensees immune from Commission scrutiny although questions justifying inquiry into other licensees existed." The Commission also noted that "evenhanded inquiry into allegations of misconduct by both religious and secular licensees places the government in a less objectionable posture." *Id.* Further, the *King's Garden* court observed:

A religious sect has no constitutional right to convert a licensed communications franchise into a church. A religious group, like any other, may buy and operate a licensed radio or television station. . . . But, like any other group, a religious sect takes its franchise "burdened by enforceable public obligations."

* * *

[A religious sect] confronts the FCC's rules only because the sect has sought out the temporary privilege of holding a broadcasting license. . . . But the Constitution does not obligate the FCC to relinquish its regulatory mandate so that religious sects may merge their licensed franchises completely into their ecclesiastical structures.

* * *

Where 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 60-61 (citations omitted).

B. Affirmative Action Aspect of the EEO Rule

205. February 1, 1983, to August 3, 1987. The findings establish that, during the period from February 1, 1983, to August 3, 1987, the Stations' overall affirmative action efforts, though flawed, were in substantial compliance with the Commission's rules. In reaching this conclusion, it has been recognized that a significant amount of time has passed since the occurrence of the activities under review and that the Commission's EEO policies have evolved both during and after this time period. Consequently, it is necessary to construct the appropriate historical context by which to judge the affirmative action efforts of the Stations.

206. From February 1, 1983, to August 3, 1987, the standard being used by the Commission for processing renewal applications was result-oriented. See *EEO Processing Guidelines for Broadcast Renewal Applicants*, 46 RR 2d 1693 (1980), *recon. denied* 79 FCC 2d 922 (1980). Licensees were generally free to craft their own approach to affirmative action as long as they could demonstrate that it resulted in minority hires. *Id.* For stations such as KFYO(AM) and KFYO-FM, the *EEO Processing Guidelines* provided that:

Stations with 11 or more full-time employees will have their EEO programs reviewed if minority groups and/or women are not employed full-time at a ratio of 50 percent of their availability in the workforce overall and 50 percent in the upper-four job categories.

Id. at 1693.

207. Licensees were further guided by the provisions of Section 73.2080(b) of the Commission's Rules which, with very minor changes not pertinent here, continued in effect throughout the License Term. Compare Section 73.2080(b) as adopted in *FCC Form 395--EEO*, 70 FCC 2d 1466, 1480 (1979), with the current Section 73.2080(b) of the Rules. This section required each broadcast station to "establish, maintain, and carry out, a positive continuing program of specific practices designed to assure equal opportunity in every aspect of station employment policy and practice." Under the terms of such a program, a station was required to: (1) define management responsibility for the application and enforcement of the EEO policy and establish a procedure to review the performance of management (Section 73.2080(b)(1)); (2) inform its employees and prospective employees of the EEO policy (Section 73.2080(b)(2)); (3)

communicate its EEO policy and program and its employment needs to nondiscriminatory sources of qualified applicants and solicit their recruitment assistance on a continuing basis (Section 73.2080(b)(3)); (4) conduct a continuing campaign to exclude every form of prejudice or discrimination from the station's personnel practices and policies (Section 73.2080(b)(4)); and (5) conduct a continuing review of job structure and employment practices and adopt positive recruitment, job design and other measures needed to ensure genuine equality of opportunity (Section 73.2080(b)(5)).

208. Although the Stations' 1982 and 1983 EEO Programs touched on all of the elements included in Section 73.2080(b) of the Rules, there does not appear to have been any consistent, continuing, or systematic effort made by the Stations to follow through on most of these elements. First, despite the statement that Mr. Anderson, and later Reverend Abatie, was responsible for the Stations' EEO program, there was no evidence establishing that either of these individuals, or any other management-level employee, took any steps to truly oversee, administer or implement a coherent, organized, consistent, or continuous EEO program. Similarly, no evidence was produced that any management-level employee was instructed to implement the Commission's EEO requirements. In this regard, Reverend Devantier admitted that no one was explicitly charged in a position description with noting the presence or absence of minority applicants. There was also no evidence that the Stations established any procedures for reviewing the EEO performance of management.

209. Second, it does not appear that employees and prospective employees were continuously and routinely kept informed of the Stations' EEO policies. The Stations did not distribute to its employees an Employee Handbook, which reflected the Stations' EEO policies, until 1986. The Handbook was published in October 1985, more than two and one-half years after the License Term began. In addition, not all of the Stations' employment advertisements contained a statement that the Stations were Equal Opportunity Employers. Indeed, of the four advertisements contained in the record which were placed prior to the date the NAACP filed its Petition to Deny, three did not contain this statement. Even though the record reflects that these omissions may have been the result of inadvertent errors, the fact remains that the statements were not in the advertisements.

210. Third, it appears that the Stations made some effort to solicit the assistance of likely sources of qualified minority applicants. However, those efforts were sporadic, and were unsuccessful in attracting minorities to the Stations. Indeed, the evidence establishes that the major source of African American employees during the period between February 1, 1983, and August 3, 1987, was Ms. Daniels, who referred two of the three African American hires the Stations made during that time frame. The Stations' other efforts went for naught. Although the Stations placed advertisements for a few positions in the *St. Louis Post Dispatch*, a newspaper which the NAACP's witness, Richard J. Miller, believed was a good source for minority recruitment, no minority hires resulted. In addition, such advertisements commenced more than two and one-half years after the License Term began, and the record does not establish that this newspaper was used on any consistent basis. Similarly, advertisements in *The Lutheran Witness* were not consistently placed and, when they were utilized, resulted in no minority hires. Likewise, even though job openings were posted at the International Center, such postings did not begin until about four years after the commencement of the License Term, and resulted in no minority hires. Nor did the use of the Broadcast Center in St. Louis, a major source of minority referrals for Mr. Miller's stations, result in any minority hires. Even then, the Broadcast Center was not utilized until about four years after the start of the License Term. Fourth, the record does not establish that there was a continuing review, or any review, of the Stations' job structure and recruitment efforts during the period under consideration.

211. Despite the infirmities discussed above, and considering "all the facts of the case," *Bilingual Bicultural*, *supra* at 627 n.15, the Stations' minority representation for most of the years within the February 1, 1983, to August 3, 1987, time period was satisfactory. Table 3, below, which is based upon the Stations' FCC Form 395s, summarizes the percentage of parity statistics for the Stations during the time period under consideration.

212. Although the percentages appear to be low, the figures are quite misleading. Specifically, for the years 1983, 1984 and 1986, the addition of 0.3 or 0.4 employees would have brought the Stations' overall minority representation up to 50% of parity. For the year 1987, the addition of 1.4 employees would have achieved that result. Similarly, for the years 1983 through 1987, the addition of 0.1 or 0.2 employees at the Top Four job level would have

TABLE 3

As of January 31	Overall Minority Representation	Top Four Job Category Minority Representation
1983	37.7% of parity	45.8% of parity
1984	35.6% of parity	42.7% of parity
1985	75.4% of parity	42.7% of parity
1986	37.7% of parity	0% of parity
1987	0% of parity	0% of parity

brought that category up to 50% of parity. Further, the parity statistics derived from the FCC Form 395s understate the Stations' overall minority representation in 1984 and 1985 because the Stations hired three full-time African Americans who were not employed during the weeks used to complete some of the Form 395s. Moreover, the Stations hired 19 full-time employees between February 1, 1983, and August 3, 1987. Of the 19 new full-time hires, 3 were African American. Thus, 15.8% of the full-time hires in this period were minorities. This figure actually exceeded 100% of parity. It is clear that, on balance, the Stations' affirmative action efforts during the period from February 1, 1983, to August 3, 1987, while flawed, were acceptable because they resulted in minority hires.

213. August 3, 1987, to February 1, 1990. The findings establish that, during the period from August 3, 1987, to February 1, 1990, the Stations' overall affirmative action efforts were unsatisfactory. In reaching this conclusion, the historical context of the Commission's EEO policies has again been considered.

214. Effective August 3, 1987, the Commission amended its EEO rule to incorporate the recruitment guidelines that had previously appeared only in its Model EEO Program Reports. *Equal Opportunity Rules for Broadcasters, supra* at 3968-69. The Commission also de-emphasized the use of statistics to evaluate a licensee's EEO program and emphasized the overall efforts made by the licensee to operate in a nondiscriminatory manner. To this end, the Commission adopted a new two-step approach for processing renewal applications. Under that approach, the Commission's procedure was first to examine the EEO information submitted with the renewal application to determine whether the licensee's overall EEO efforts had been satisfactory. If the Commission was unable to make that determination, an investigation of the deficiencies was to be initiated. The investigation was to involve requests that the licensee submit additional information concerning the specific areas of its EEO program that appeared deficient. *Id.* at 3968, 3973-74.

215. The Commission's new rule, Section 73.2080(c), stated that a station's EEO program "should reasonably" address itself, to the extent possible and to the extent appropriate to the station's size and location, to the following areas: (1) disseminating its EEO program to job applicants and employees (Section 73.2080(c)(1)); (2) using minority organizations, organizations for women, media, educational institutions, and other potential sources of minority and female applicants to supply referrals whenever job vacancies are available in its operation (Section 73.2080(c)(2)); (3) evaluating its employment profile and job turnover against the availability of minorities and women in its recruitment area (Section 73.2080(c)(3)); (4) undertaking to offer promotions of qualified minorities and women in a nondiscriminatory fashion to positions of greater responsibility (Section 73.2080(c)(4)); and (5) analyzing its efforts to recruit, hire, and promote minorities and women and addressing any difficulties encountered in implementing its EEO program (Section 73.2080(c)(5)).

216. The new rule gave several "suggestions" under each subsection of ways in which each of these requirements could be met. The Commission stressed, however, that these suggestions were "not intended to be either exclusive or inclusive," but were made "simply to provide guidance." *Equal Opportunity Rules for Broadcasters, supra* at 3969. Minor changes, not pertinent to this proceeding, were also made in Section 73.2080(b). *Id.* at 3976.

217. The record reflects that, during the period August 3, 1987, to February 1, 1990, the Stations, once again, failed to make any consistent, continuing, or systematic effort to follow through on most of the elements contained in their 1982 and 1983 EEO Programs. This is true despite the laudable efforts of Thomas M. Lauher, the general manager of the FM station from May 1987 to July 1989, to review that station's compliance with the Commission's EEO requirements, and his attempt to correct the deficiencies he found. Mr. Lauher's review began in the fall of 1988 and culminated in March 1989, at which time he sent two memorandums to Reverend Devantier, the Stations' CEO. Although certain EEO program reforms were begun as a consequence of Mr. Lauher's efforts, many were not utilized after his departure in July 1989. Therefore, it cannot be concluded that the Stations were substantially compliant with Sections 73.2080(b) and (c) of the Commission's Rules.

218. First, until the arrival of Mr. Lauher, and after his departure, no management-level employee of the Stations made any attempt to implement a continuous or consistent EEO program. Nor was any management-level employee specifically instructed to put into effect the Commission's EEO requirements. Indeed, after Mr. Lauher left, EEO compliance became the responsibility of both Reverend Devantier and Dennis Stortz. However, there was no discussion of how that responsibility was to be apportioned, and it does not appear that either of these individuals took any steps to carry out the Stations' EEO Program or Mr. Lauher's reforms. Further, the two new general managers of the AM and FM stations did not even know about EEO noncompliance problems until the filing of the NAACP's Petition to Deny in January 1990.

219. Second, during this period, the employment application in use at the Stations did not contain a notice informing prospective employees that discrimination was prohibited and that they could notify the appropriate agencies if they believed they had been the victims of discrimination. On the contrary, the employment application forms contained a statement that the Church retained the right to give hiring preferences to persons who were members in good standing of an LCMS congregation. Although Mr. Lauher corrected these shortcomings, the fact remains that, until he did so, prospective employees were given no notice of the Stations' EEO policies, and the employment application contained a statement that was squarely contrary to the Commissions' EEO policies.

220. Third, although the Stations made an effort to solicit the assistance of likely sources of qualified minority applicants, these efforts were irregular, and were generally unsuccessful in attracting minorities to the Stations. Thus, Mr. Lauher, in initiating the process of hiring salespersons, contacted the St. Louis Broadcast Center and placed advertisements in the *St. Louis Post Dispatch*. As noted earlier, Mr. Miller, the NAACP's witness, identified these as promising sources for minority candidates. In July 1989, about six months prior to the end of the License Term, Mr. Lauher sent letters to 10 local universities and personnel agencies requesting minority and female referrals. The letters mentioned no specific job openings, and stated that the Stations would be contacting the addressees as job openings arose. Although the Stations filled nine full-time and five part-time positions after these letters were sent, no further contacts were made with these organizations, and none of the letters resulted in any referrals of minority applicants. In 1989, the last year of the License Term, the Stations

sought referrals from the Lutheran Employment Project of St. Louis, a clearinghouse run by various Lutheran churches for employment of members of minority groups. These efforts were successful in that, in late 1989, three minority referrals were interviewed and one minority was hired (Cynthia Blades).

221. Fourth, there is no evidence that the Stations formally evaluated their employment profile and job turnover against the availability of minorities and women in their recruitment area. In this regard, it does not appear that the composition of the relevant labor area was compared with the composition of the Stations' workforce. Nor were the Stations' policies and practices examined to determine whether qualified minorities were being inadvertently screened out. However, from the beginning of his term as FM general manager in May 1987, Mr. Lauher did notice that there were no minorities working at the station, and he determined that he wanted to hire minorities. But none were hired until March 1988, nearly a year later, when Caridad Perez, an Hispanic, was hired as a salesperson. There is no indication that Mr. Lauher's desire to hire minorities, or that Ms. Perez' hire in particular, resulted from the type of evaluation contemplated in the Commission's rules.

222. Fifth, the record does not reflect that, from the time of Mr. Lauher's departure to the time the Petition to Deny was filed, there was a continuing review of the Stations' job structure, or that their efforts to recruit and hire minorities were analyzed. In addition, until corrected by Mr. Lauher, the Stations used a selection technique that gave hiring preferences to members in good standing of an LCMS congregation.

II. Issue 2 -- Misrepresentation/Lack of Candor

223. This issue was specified to inquire into the discrepancy between certain hiring figures reported to the Commission by the Church and the Church's explanation for that discrepancy, questions relating to the Church's representations of its outreach efforts and recruitment program, questions regarding the Church's arrangement with Concordia Seminary, and questions concerning the Church's requirement for knowledge of Lutheran doctrine or classical music for certain positions at the Stations. The findings establish, and it is concluded that, while the Church's responses to the Commission's various inquiries were not models of clarity or complete accuracy, none of those responses rises to the level of a disqualifying misrepresentation. However, it must also be concluded that the Church lacked candor in describing the Stations' minority recruitment program in their 1989 renewal applications, and in informing the Commission that knowledge of classical music was a requirement for the position of sales-

person at the FM station. These instances of lack of candor constituted willful and repeated violations of Section 73.1015 of the Commission's Rules.²³

A. Discrepancy in the Number of Job Hires

224. The *HDO* questioned a discrepancy in the number of hires reported by the Stations for the October 1, 1988, to September 30, 1989, time period. The Stations' renewal applications, and a supplement thereto, reported a total of 6 hires, while a February 23, 1990, Opposition to Petition to Deny indicated that there had been 14 hires during this time period (10 full-time and 4 part-time).

225. The findings establish that the discrepancy between the number of hires reported in the renewal applications and supplement, and the number reported in the Opposition, was the result of innocent and inadvertent errors made by Paula Zika, the Stations' Director of Business Affairs. Ms. Zika understood the renewal applications to be asking only for full-time hires during the 12 months preceding the filing of the applications who were still employed at the Stations at the time of filing. She did not believe the question was asking for hires who were no longer working at the Stations, reasoning that no credit could be claimed for hiring employees that had already left and were not part of the Stations' then-current EEO profile.

226. Nor did Ms. Zika believe that part-time hires should be included, because most were students working only 6 to 12 hours per week. In this connection, neither the FCC Form 396 nor the Filing Instructions specified whether the response to the pertinent question should include part-time as well as full-time employees, or whether the renewal application should count people hired who thereafter departed before the end of the filing period. Indeed, the Filing Instructions indicated that it was only necessary to complete and file the Form 396 if a station employed five or more *full-time* employees. There was, therefore, a reasonable and logical basis for Ms. Zika's beliefs.

227. Excluding part-time employees and full-time employees who left the Stations before the end of the reporting period, the findings show that Ms. Zika understated the Stations' total hires by only two employees. Of the two, one employee was hired just before the end of the reporting period, and Ms. Zika had not been informed of his hiring. The remaining employee was simply overlooked by Ms. Zika. None of these errors suggest intentional deceit, or reflect adversely on the basic qualifications of the Church. See, e.g., *National Capital Christian Broadcasting, Inc.*, 3 FCC Rcd 1919, 1922 n.6 (1988); *Radio Station WABZ, Inc.*, 90 FCC 2d 818, 825-27 (1982); *Kaye-Smith Enterprises*, 71 FCC 2d 1402, 1414-16 (1979).

²³ In its proposed findings of fact and conclusions of law, the NAACP alleges, for the first time, numerous additional misrepresentations which were not raised in the *HDO* in this proceeding. No conclusions will be reached with regard to these new allegations. Suffice it to say, since these matters were initially raised in the NAACP's findings and conclusions, the Church had no notice or opportunity to introduce evidence thereon. In this connection, it is noted that the vast majority of the misrepresentations alleged by the NAACP relate to matters about which it did not cross-examine the witnesses. Therefore, the Church could not even address these matters on re-direct

examination. It is axiomatic that the purpose of a hearing designation order is to provide the licensee with notice of the misconduct alleged so that it may have an adequate opportunity to prepare a defense. Cf. *Faith Center*, *supra* at 9. It would be manifestly unfair and a denial of due process to reach conclusions on matters about which the Church was given no prior notice. Cf. *Algreg Cellular Engineering*, 9 FCC Rcd 5098, 5146 (Rev. Bd. 1994), *recon. denied* 9 FCC Rcd 6753 (Rev. Bd. 1994); *Garrett, Andrews & Leitzia, Inc.*, 88 FCC 2d 620, 625 (1981). Nevertheless, to assist the reviewing authorities, findings of fact have been made on these matters.

228. The *HDO* also questioned the Church's failure to submit an explanation for the discrepancy at the time it reported the accurate information to the Commission. The record reflects, however, that the reason for this failure was both simple and innocuous. Specifically, at the time the Opposition containing the correct data was filed by the Church, neither Ms. Zika nor Mr. Stortz noticed that there was a discrepancy between the information contained therein and the hiring data reported with the Stations' renewal applications and supplement.

229. It is important to recognize in this regard that the hiring data contained in the Opposition was submitted in direct response to the Commission's January 4, 1990, letter of inquiry. That letter requested detailed information concerning each and every full-time and part-time position filled during the three-year time period from October 1, 1986, to October 1, 1989. On the other hand, the time frame covered in the renewal applications was the one-year period from October 1, 1988, to September 30, 1989, and Ms. Zika had not counted part-time employees and employees who left the Stations prior to the end of the reporting period. Moreover, there appeared to have been no reason for Mr. Stortz or Ms. Zika to have compared the hiring data in the Opposition with the data in the renewal applications; the time periods covered by the two submissions were different, the information sought by the Commission was different, and the former encompassed all hires including part-timers, whereas the latter did not. Ms. Zika's testimony that the discrepancy probably resulted from the two different questions being asked by the Commission is completely credible. Consequently, the failure to notice the discrepancy or to explain it in the Opposition is understandable. This simple oversight does not constitute a misrepresentation or lack of candor. *Kaye-Smith Enterprises, supra*; *Gary D. Terrell*, 59 RR 2d 1452, 1454 (Rev. Bd. 1985).

B. Outreach Efforts and Recruitment Program

230. The findings establish that the Church was lacking in candor when describing portions of the Stations' minority recruitment program in the 1989 EEO Program contained in their renewal applications. Specifically, the Church described the Stations' EEO recruitment program, in pertinent part, as follows:

[1] When vacancies occur, it is the policy of KFUO and KFUO-FM to seek out qualified minority and female applicants. [2] We deal only with employment services, including state employment agencies, which refer job candidates without regard to their race, color, religion, national origin or sex. [3] We contact the various employment services and actively seek female and minority referrals and we specifically request them to provide us with qualified female and minority referrals. [4] See sample reply form attached.

As will be shown below, these statements were highly misleading.

231. The first sentence of the quoted paragraph clearly connoted that it was the Stations' usual policy and practice to seek out qualified minorities on a regular and systematic basis whenever vacancies occurred. However, the record reflects that this was not the case. On the contrary, as discussed earlier, the Stations' minority recruitment efforts

were sporadic, irregular, and inconsistent. The Stations certainly did not affirmatively seek out minority applicants as a matter of routine, or on a regular or systematic basis, as implied in their applications. This sentence failed to provide the Commission with a complete and fully informative depiction of the Stations' License Term minority recruitment efforts and, therefore, lacked candor. *Fox River Broadcasting, Inc.*, 93 FCC 2d 127, 129 (1983).

232. The Church argues that this sentence was literally true because it did *not* state that the Stations sought out minorities "for each job opening throughout the License Term." (Church's Proposed Findings and Conclusions, at p. 134, emphasis omitted.) This argument is without merit. Put simply, it completely ignores the plain meaning of the language contained in the Stations' EEO Program, and the obvious implication of that language.

233. The second sentence of the quoted paragraph is also inaccurate. The only employment service which the Stations utilized during the License Term was the Lutheran Employment Project of St. Louis. Even then, it was not utilized until the final year of the License Term. Yet the Church used the plural word "services" in this sentence. Further, the record does not reflect that the Stations ever dealt with, or sought referrals from, state employment agencies. This sentence exaggerated the Stations' efforts and, once again, was not fully informative.

234. The third and fourth sentences of the quoted paragraph are the most misleading. As discussed in the findings, the third sentence was added to the EEO Program by Mr. Stortz because the Stations "generally" publicized openings and had sent recruitment letters in July 1989 to 10 local universities and personnel agencies. However, what the Church did not reveal was that the various employment services were contacted on only one occasion, that such contact was not made with respect to any specific job opening, and that the Stations never again communicated with those services in connection with the nine full-time or five part-time positions they filled during the remainder of the License Term. Mr. Stortz was in a unique position to know these facts inasmuch as he was the Operations Manager of the Stations during the entire License Term, and was given the responsibility for the day-to-day operation of the FM station in July 1989, after Mr. Lauher left. Those responsibilities included sending out notices of job openings and notifying job sources of the FM stations' EEO policies. As a result, he had direct knowledge that the representations contained in this sentence were misleading. The fourth sentence only compounded the deceptive nature of the third sentence because it purported to provide evidence of the Stations' contacts. Thus, the portrayal of key aspects of the Stations' minority recruitment program was not totally accurate, and significant information which could have illuminated the Stations' program was omitted. This is the essence of lack of candor. *Fox River, supra*.

235. The Church maintains that a conclusion that language in an EEO Program, in and of itself, could constitute a misrepresentation or lack of candor is unprecedented, and that the Commission has never previously suggested that a licensee's failure to live up to its EEO program could raise misrepresentation or lack of candor questions. (Church's Reply Findings and Conclusions, at p. 27.) This argument is rejected for the simple reason that the *HDO* itself, at paragraph 28, raised such questions about the minority recruitment representations made by the Church in its renewal applications. The possibility that adverse conclusions could be reached as a

consequence of statements made by the Church in the Stations' EEO Program should, therefore, come as no surprise.

236. The Church further contends that no misrepresentation or lack of candor can be found because the Form 396 is unclear as to whether its questions cover the preceding or upcoming license term. (Church's Reply Findings and Conclusions, at pp. 27-28, 29-30.) This contention is irrelevant. The language used in the pertinent paragraph of the Stations' 1989 EEO Program, on its face, speaks in terms of what the Stations did in the past and were continuing to do as of the date of filing in connection with their recruitment of minorities. That language was misleading in that it omitted significant information. If the purpose of the Church's language was to speak only in terms of then-current (*i.e.*, July to September 1989) or future practice, then the paragraph under consideration should have contained some language explaining that fact. It did not. Moreover, it is significant to note that the practices referred to in the third and fourth sentences of the quoted paragraph were no longer being used by the Stations in late September 1989, when their renewal applications were filed. In other words, they were not the then-current practices, as Mr. Stortz well knew, yet they were cited by the Church. Even assuming that the Commission's forms were ambiguous, the Church's representations were not.

237. The Church also alleges that there was no intent to deceive and that no misrepresentation or lack of candor may be found without such intent. (Church's Reply Findings and Conclusions, at pp. 21-22, 28-29.) However, an intent to deceive may be found under the circumstances of this case. As noted above, Mr. Stortz was the Operations Manager of the Stations throughout the License Term, and was responsible for the daily management of the FM station beginning in July 1989. In those capacities, Mr. Stortz was in a singular position to know all of the facts pertaining to the actual manner in which the Stations implemented their EEO program, including their recruitment efforts. Specifically, Mr. Stortz knew that the Stations did not seek out qualified minority job applicants on anything resembling a regular or systematic basis. He knew that employment "services" (plural) and state employment agencies were not used as referral sources. And he knew that the 10 local universities and personnel agencies which had received recruitment letters were never contacted while he was in charge of the FM station. Yet Mr. Stortz allowed the misleading and incomplete information referred to above to be filed with the Commission. In fact, the most misleading statement of all, the third sentence, was even accompanied by a "sample" reply form in a transparent attempt to support the Stations' assertions. Mr. Stortz testified that he had no intention of misleading the Commission by attaching the sample. But what else could his intention have been, other than to create an erroneous impression of the Stations' actual recruitment efforts. It is abundantly clear that the Church, through Mr. Stortz, was fully aware of all the facts, but the renewal applications only revealed selected portions of those facts, *i.e.*, those

portions which were entirely favorable to the Church. Consequently, it must be concluded that there was a willful intent to mislead.²⁴

238. The evidence further establishes that there was, as well, a motive to mislead. Mr. Stortz had knowledge of Mr. Lauher's memorandums to Reverend Devantier concerning the FM station's EEO compliance problems. Mr. Stortz had received copies of those documents. Because of this, Mr. Stortz knew that failure to take corrective action "could create significant jeopardy [sic] in license retention"; that "[i]f the concerns are not addressed quickly, the worst possible consequence is loss of license"; that EEO compliance was "the most critical area in license renewal"; that "[n]umbers do not work anymore"; that "[t]he question is: Is the station following its own plan?"; that "broadcasters are held to a higher EEO standard than most other private employers"; that "the FCC reviews station [EEO] compliance as part of the . . . renewal process"; that Mr. Lauher discovered that "we are operating in violation of our own [EEO] policy as currently on file"; and that Mr. Lauher had "reason to believe this applies to the AM operation as well as the FM operation." Mr. Stortz also knew that, after Mr. Lauher's departure, many of the EEO reforms initiated by his predecessor were not implemented or utilized, and the Stations' EEO efforts were still deficient. As a result, it is reasonable to conclude that had the Church given the Commission a complete and accurate description of the Stations' recruitment efforts, questions were likely to have been raised, as Mr. Lauher predicted, concerning their renewal applications. By giving only a partial and favorable picture, the Church hoped to avoid careful scrutiny.

C. The Arrangement with Concordia Seminary

239. The HDO questioned the silence of the renewal applications regarding the arrangement with Concordia Seminary, and the Bureau concludes that it should have been reported, stating that "the Commission could not have guessed that recruitment was affected by an arrangement for the employment of Concordia Seminary students and their spouses." (Bureau's Proposed Findings and Conclusions, at p. 58.) The findings establish that there was no misrepresentation or lack of candor in connection with the Seminary.

240. The record reveals that the arrangement with the Seminary was a decades-old work/study training program. Students and their spouses were paid to work at the Stations part-time, only 6 to 12 hours a week, while being trained in the use of radio as a medium in the Church's mission and ministry. The FCC Form 396 did not request information on whether a broadcast facility was being used for training purposes, unless the training program was specially designed to train women and minorities. Even then, the provision of information on such a program was optional. Further, the Commission had previously considered the EEO programs of a number of licensees that were affiliated with a school and that either utilized their station

²⁴ Even assuming, *arguendo*, that Mr. Stortz did not have direct knowledge of all of these matters, it must be concluded that, as the individual responsible for the daily management of the FM station during the critical time period, he should have known these things. That being the case, his failure to ascertain the true, complete and accurate facts pertaining to the Stations' recruitment program, and the failure of the Church to report

all such facts in the Stations' renewal applications, constituted gross negligence and wanton carelessness, which are the functional equivalents of an intent to deceive. See *Golden Broadcasting Systems, Inc.*, 68 FCC 2d 1099, 1106 (1978).

to train students, or utilized the school as a favored source for station hiring. In none of these cases had the Commission questioned the propriety of such an arrangement. See *Seattle Public Schools*, 4 FCC Rcd 625, 632 (Rev. Bd. 1989); *Catawba Valley Broadcasting Company, Inc.*, 3 FCC Rcd 1913, 1916 (1988); *University of North Carolina at Chapel Hill*, 79 FCC 2d 248, 255 (1980). The Church, therefore, had no reason to believe that information about the training program at the Seminary would be of interest to the Commission.

241. Further, because the EEO Program included with the renewal applications discussed only full-time employees, there would have been no reason for the Church to have mentioned the arrangement with the Seminary. Indeed, the FCC Form 396 Filing Instructions did not request information on part-time hires. Rather, the Instructions indicated that it was only necessary to complete and file the form if the Stations employed five or more *full-time* employees. Given the focus of the Form 396 on full-time employees, it is understandable that the Church did not discuss the arrangement with the Seminary. Moreover, as soon as the Commission requested, as part of its expanded inquiry, information beyond the raw employment data contained in the renewal applications, the Church provided information about its training program.

D. Knowledge of Lutheran Doctrine or Classical Music

242. "**Qualified**" Minorities and Females. The EEO Program contained in the Church's renewal applications stated that the Stations sought out "qualified minority and female applicants," and requested referral sources to provide them with "qualified female and minority referrals." The *HDO* questioned the failure of the renewal applications to reveal that the Stations had a requirement that employees have Lutheran or classical music training in order to qualify for certain positions. The Bureau concludes that these requirements should have been specifically disclosed in the renewal applications because the use of the modifier "qualified" could not reasonably have alerted the Commission that the Stations' recruitment efforts were limited by employment criteria such as Lutheran training or knowledge of classical music. (Bureau's Proposed Findings and Conclusions, at p. 58.)

243. The findings establish that there was no misrepresentation or lack of candor with respect to the use of the phrases in question in the renewal applications. The FCC Form 396 Filing Instructions state: "Broadcast station licensees are required to afford equal opportunity to all *qualified persons* . . ." (Church Ex. 9, p. 1, emphasis added.) Similarly, the Form 396 itself, under the heading "Recruitment" states: "A broadcast station must make efforts to attract *qualified minority and women applicants* for all types of jobs at the station whenever vacancies occur." (*Id.* at p. 3, emphasis added.) Throughout the years, the Commission's Model EEO Programs have contained similar language. *E.g.*, *Nondiscrimination in Employment Practices*, 60 FCC 2d 226, 249-50 (1976) ("It is our policy to provide equal employment opportunity to all *qualified individuals*"; "We attempt to maintain systematic communication . . . with a variety of minority and women [sic] organizations to encourage the referral of *qualified minority and female applicants*"; emphasis added); *Equal Employment Opportunity*, 49 RR 2d 1295, 1299-1300 (1981) ("It will be our policy to provide equal employment opportunity to all *qualified individuals*"; "We will attempt to maintain system-

atic communication . . . with a variety of minority and women's organizations to encourage the referral of *qualified minority and female applicants*"; emphasis added.)

244. However, nowhere in the Filing Instructions, the Form 396, or the Commission's Model EEO Programs are the phrases "qualified individuals," "qualified persons," "qualified minority and female applicants," or "qualified minority and women applicants" defined. Likewise, nowhere in the Filing Instructions, the Form 396, or the Model EEO Programs does the Commission require a licensee to provide a detailed explanation, or indeed any explanation, of the criteria that the licensee uses to determine whether minority or female applicants are "qualified." Under these circumstances, the Church can hardly be faulted for following the language of the Commission's own forms and models, or for failing to include information not requested by the Filing Instructions or the Form 396. In this vein, it may be argued that job requirements such as a bachelor's or postgraduate degree may have a disproportionate impact upon minority job applicants. But the Form 396 has never requested from licensees information on these requirements, nor has the Commission ever apparently found the failure to disclose such requirements to be an issue. There is no reason to treat the Church's religious and classical music criteria any differently.

245. Moreover, the Church disclosed these job qualification criteria at the first possible opportunity after its EEO program was questioned, and there is no evidence in the record that the Church sought to conceal that information by not including it in the renewal applications. Supposing that the Church had believed that the employment criteria were requested by the renewal applications and had wanted to conceal them, there would have been no reason for the Church to have then revealed that information at the very first opportunity. *Dixie Broadcasting, Inc.*, 8 FCC Rcd 4386, 4403 (ALJ 1993); *Emerald Broadcasting Co.*, 30 FCC 2d 879, 883 (1971). There is no hint of misrepresentation or lack of candor in the Church's actions.

246. "**Requirement**" for Knowledge of Classical Music. The findings establish that the Church was lacking in candor when it stated in its February 23, 1990, Opposition to the NAACP's Petition to Deny, and again in its September 21, 1992, Motion to Strike and Reply to Comments, that classical music knowledge was a requirement for a position as a salesperson at the FM station. While the Opposition was drafted by Marcia A. Cranberg, the Stations' former legal counsel, it was reviewed by Mr. Stortz, who provided an affidavit concerning the truth of the facts asserted therein.

247. The language in the Opposition concerning the classical music knowledge requirement was derived from a number of conversations and written communications between Ms. Cranberg and Mr. Stortz. Ms. Cranberg had asked Mr. Stortz whether there were any particular positions at the Stations that required any specialized skills or background. Mr. Stortz responded that there were, and the two discussed them and the reasons why specialized skills were necessary. Mr. Stortz sent a memorandum to Ms. Cranberg in which he stated that: "KFUO-FM's format is 'Classical,' with many of its [sic] positions *requiring* a knowledge of classical music . . ." (Emphasis added.) Ms. Cranberg used the representation concerning the requirement for specialized skills as an integral part of the Church's argument urging the Commission to employ alternative data to the labor force statistics in judging the results of the Stations' recruitment efforts. The law firm for

which Ms. Cranberg worked had apparently used a similar argument successfully in an earlier EEO case involving another classical music broadcast station client.

248. The record reflects, however, that classical music knowledge, although desirable, was not a requirement for a sales position at the FM station. On the contrary, giving the Church the benefit of all possible doubts, only 8 of the 15 individuals hired for the position of Sales Worker during the License Term had some classical music background or experience. In other words, 7 of the 15, or nearly half, did not.

249. As Operations Manager for the Stations during the entire License Term, Mr. Stortz knew that knowledge of classical music was not an absolute requirement for the position of salesperson at the FM station. Indeed, he admitted this in an affidavit appended to the Church's December 28, 1992, Reply to FCC Letter of Inquiry. In his affidavit, Mr. Stortz claimed, in essence, that when he advised the Commission that knowledge of classical music was a requirement, he did so because he was not an attorney and was "not accustomed to providing the level of detail and precision with which attorneys, and those who deal with them frequently, may be more familiar." He denied any intention to mislead.

250. But he did mislead, and it must be concluded that his actions were deliberate. Thus, an individual does not have to be an attorney, or deal with attorneys frequently, to know the usual and customary meaning of the words "required," "requiring," or "requirement."²⁵ Either something is a requirement or it is not. Classical music knowledge was not a job requirement, and Mr. Stortz knew it. Yet he permitted the Church to represent to the Commission, on two occasions, that it was. By concealing the complete facts, by failing to be fully forthcoming and informative, the Church lacked candor. *Fox River, supra*.²⁶

251. The Church maintains that this dispute is a matter of semantics, that there was no motive to deceive the Commission through the use of the word "required," and that there was no motive for Mr. Stortz to have used the word "requirement" rather than the word "preferred." (Church's Reply Findings and Conclusions, at pp. 31-32.) This is erroneous. Initially, it must be noted that "required" and "requirement" were not the only questionable words used in the Church's Opposition. The Church also represented that the jobs in question "can *only* be filled" by persons with expertise in classical music, and that certain employees "must have" specialized skills. (Emphasis added.) Consequently, this issue involves more than simple semantics. Further, as demonstrated earlier, Mr. Stortz, a recipient of Mr. Lauher's memorandums, knew that the Stations' EEO efforts were deficient and knew that a Commission review of those efforts could place the Stations' licenses in jeopardy. By representing that classical music knowledge was a requirement for sales positions, and by maintaining that few minorities had the required expertise, the Church was attempting to show that the labor pool

from which it could draw qualified minorities was extremely small, and that the Church's "minority employment record must be considered in that context." Use of words such as "preferred" or "preference" would not have conveyed the same meaning or carried nearly the same weight, and would have significantly weakened the Church's position.²⁷

III. Sanctions

A. Issue 1 -- EEO Violations

252. It has been concluded that the Stations violated the Commission's EEO rules and policies by improperly giving preferential hiring treatment to individuals with knowledge of LCMS or Lutheran doctrine, and to active members of Christian or LCMS congregations, for positions which were not reasonably connected with the espousal of the Church's religious views. Further, the Stations were not substantially compliant with the EEO rules and policies during the period from August 3, 1987, to the end of the License Term.

253. These deficiencies are sufficiently severe so as to warrant the imposition of EEO reporting conditions. The reporting conditions will afford the Stations the opportunity to design and put into practice an EEO program which is fully consistent with all aspects of the Commission's rules and policies. They will also enable the Commission to review the Stations' EEO program periodically to ensure that it is being utilized on a consistent, continuing, and systematic basis. The necessity for the imposition of reporting conditions is manifested by the fact that, throughout the License Term, the Stations' former legal counsel kept the Stations apprized of developments in the Commission's EEO rules and policies, often emphasizing the seriousness with which the Commission viewed EEO matters. However, with the exception of Mr. Lauher, there is no evidence that any management-level employee of the Stations ever heeded former counsel's advice and admonishments. Therefore, there appears to be a need for a formal mechanism to monitor the Stations' EEO compliance efforts.

254. Contrary to the arguments of the NAACP and the Bureau, denial of the renewal applications would not be appropriate under the circumstances of this case. There is not one scintilla of evidence that the Stations intentionally discriminated against minorities. On the contrary, during the period between February 1, 1983, and August 3, 1987, the Stations hired 19 full-time employees, of which 3 were African American. As a result, 15.8% of the full-time hires during this period were minorities, a figure which exceeded 100% of parity. Similarly, during the period from August 3, 1987, to January 2, 1990, the date the Petition to Deny was filed, the Stations hired 22 full-time employees, of which 2 were minorities (1 Hispanic and 1 African American). Further, one of those minorities was hired for

²⁵ The American Heritage Dictionary (New College Ed. 1976), defines "requirement" as: "1. That which is required; something needed. 2. Something obligatory; a prerequisite."

²⁶ There is no evidence indicating that Ms. Cranberg, prior to the preparation of the Church's December 28, 1992, Reply, knew that the FM station hired individuals without classical music knowledge for Sales Worker positions.

²⁷ The American Heritage Dictionary, *supra*, defines "prefer" as: "1. To select in preference to another or others; value more highly; like better." "Preference" is defined as: "1.a. The selecting of someone or something over another or others. . . . 2. The state of being better liked or more valued. . . . 4. The granting of precedence or advantage to one over all others. . . ."

a Top Four position. Thus, 9.1% of the full-time hires during this period were minorities, a figure which exceeded the Commission's 50% of parity guideline.

255. Moreover, the Stations, through Mr. Lauher, did conduct a review of their EEO efforts on their own initiative and without prompting or threat from either the Commission or the NAACP. The Stations also made a genuine and good-faith attempt to begin to correct the deficiencies found during that review. In addition, there is no evidence that anyone at the Stations or the Church attempted to impede either the review or the corrective measures which were initiated. Unfortunately, no one continued the work Mr. Lauher had begun. The imposition of reporting conditions should cause the Stations to complete their EEO reform efforts.

256. Finally, the Stations' EEO derelictions do not warrant non-renewal of their licenses because the imposition of such a draconian sanction would be contrary to all precedents in which the Commission has even remotely considered similar factual situations. See, e.g., *United Communications Corp.*, 54 RR 2d 22 (1983) (AM license renewed without reporting conditions but licensee asked to file a revised EEO program where no minorities were employed or hired during the license term and licensee failed to seek referrals from any minority sources); *Auburn Broadcasting Co.*, 57 RR 2d 1427 (1985) (AM and FM station licenses renewed with reporting conditions where licensee failed to contact minority referral sources or to hire minorities in parity with the local labor force, but had hired some minority employees during the license term); *National Capital Christian Broadcasting, Inc.*, supra (television license renewed with reporting conditions where licensee made few, if any, efforts to contact minority referral sources, failed to monitor the results of its EEO program, omitted information from 2 sections of the EEO program filed with the FCC, but hired 2 minorities out of 18 hires during the last 12 months of the license term); *Letter to Allan W. Roberts*, 4 FCC Rcd 3463 (1989) (FM license renewed with reporting conditions where licensee had contacted a minority referral source only once during its ownership of the station without mentioning any specific job opening, failed to maintain any records to allow evaluation of the program, and had no minorities on the station's staff); *Applications of Certain Broadcast Stations Serving Communities in the State of Texas*, 4 FCC Rcd 6685, 6687 (1989) (television license renewed with reporting conditions where licensee only contacted a single minority referral source in the last year of the license term and failed to evaluate its EEO program until the end of the license term, but hired 2 minority employees out of 17 hires during the last 2 years of the license term); *Letter to Pegram Harrison*, 4 FCC Rcd 8255 (1989) (AM and FM licenses renewed for a full term and \$18,000 forfeiture and reporting conditions imposed where licensee failed to contact minority recruitment sources for specific job openings, failed to evaluate its EEO program, hired only 1 minority in filling 53 job openings despite the fact that 10.5% of the local labor force was minority, and that one minority employee left after only 6 weeks); *Letter to Kerby Confer*, 5 FCC Rcd 579 (1990) (FM license renewed for a full term and \$10,000 forfeiture and reporting conditions imposed where licensee contacted no minority referral sources until the end of the license term, failed to evaluate its EEO program, and had only 1 minority applicant for 11 job openings despite the fact that 51.1% of the local labor force was African American); *Letter to John P. Healy*, 5

FCC Rcd 3745 (1990) (FM license renewed for a full term and \$10,000 forfeiture and reporting conditions imposed where licensee used no minority recruitment sources, failed to evaluate its EEO program, and had no minority applicants despite 32 upper-level job openings); *Applications of Certain Broadcast Stations Serving Communities in the Miami, Florida Area*, 5 FCC Rcd 4893, 4895 (1990) (FM license renewed with reporting conditions where licensee made no specific efforts to recruit minorities during the license term, did not evaluate the effectiveness of its EEO program, and hired no African Americans, the dominant minority in the labor force, for any of the 32 openings during the last 2 years of the license term); *Winfas, Inc.*, supra at 4902-03 (where FM licensee argued that station's country and western format made it difficult to attract minority applicants, license renewed with reporting conditions where licensee used no minority referral sources prior to the filing of its renewal application, interviewed only 7 minorities for 31 openings over a 3-year period, and failed to evaluate its EEO program); *Application for Renewal of License of Certain Broadcast Stations Serving Melbourne, Florida and Other Communities in the Florida Area*, 5 FCC Rcd 6738, 6739 (1990), recon. denied 7 FCC Rcd 6045 (1992), 8 FCC Rcd 4223 (1993), appeal pending No. 92-1546 (D.C. Cir.) (AM and FM licenses renewed with reporting conditions where licensee contacted no minority referral sources, had minority applicants apply for only 4 of 36 job openings, and failed to evaluate its EEO program); *Certain Broadcast Stations Serving Communities in the State of Arkansas*, 6 FCC Rcd 4938, 4939-40 (1991) (Commission noted that "it is apparent that the licensee in fact engages in significant efforts to recruit and hire minorities" and granted an unconditional license renewal where 6 of 7 Annual Employment Reports filed by licensee were inaccurate, the licensee contacted minority-specific referral sources for only 21 of 70 job openings, and only 4 of 70 hires (5.7%) were minority in a market with a 17.3% minority labor force); *Application of Group Six Communications, Inc.*, 7 FCC Rcd 1815, 1816 (1992) (FM license renewed for a full term and \$20,000 forfeiture and reporting conditions imposed where licensee "rarely activated its EEO program," reported no minority applicants, interviewees, or hires for any of its 26 job openings, failed to keep records necessary to assess its program, and failed to modify its EEO program until just prior to filing its renewal application); *Radio Seaway, Inc.*, 7 FCC Rcd 5965, 5968 (1992) (FM license renewed with reporting conditions where licensee failed to contact outside referral sources for 20 of 31 job openings, and failed to recruit for any job openings prior to the reporting year that preceded the filing of its renewal application); *Goodrich Broadcasting, Inc.*, 7 FCC Rcd 6655, 6656-57 (1992) (AM and FM licenses renewed with reporting conditions where licensee failed to keep any applicant flow data, thereby leaving it unable to determine the referral sources contacted for 29 of 42 job openings, failed to evaluate its EEO program, and appeared to have had no minority applicants in the interview pools for 35 of 38 job openings).

B. Issue 2 -- Lack of Candor

257. It has been concluded that the Church lacked candor, in violation of Section 73.1015 of the Rules, in describing the Stations' minority recruitment program in its 1989 renewal applications, and in informing the Commission that knowledge of classical music was a require-

ment for the position of salesperson at the FM station. This lack of candor warrants the imposition of a forfeiture in the amount of \$50,000.

258. Prior to 1986, the only appropriate sanction for a lack of candor such as that demonstrated in this case would have been denial of license renewal. However, in 1986 the Commission added to its rules Section 73.1015. It did so in order to allow greater flexibility to level sanctions short of disqualification. *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1233-34 (1986); see also *Proposals to Reform the Commission's Comparative Hearing Process*, 6 FCC Rcd 157, 164 (para. 51) (1990), and Section 1.229(f) of the Commission's Rules. In this connection, the Commission has stated that its focus in assessing the sanction due a licensee for the violation of its rules, including Section 73.1015, is the predictive value such misconduct has with respect to a licensee's future truthfulness and reliability. In making this predictive judgment, the Commission considers the willfulness of the misconduct, its frequency, and the licensee's overall record of compliance with the Commission's rules and policies. *Policy Regarding Character Qualifications, supra* at 1225-29.

259. Both the NAACP and the Bureau maintain that the Church's misconduct warrants the denial of the Stations' renewal applications. Their position must be rejected. While the Church's lack of candor is a serious matter, it is not sufficiently egregious so as to justify the "ultimate sanction" of denial of renewal. This is so because the misconduct was largely the product of the actions of one individual, Mr. Stortz. There is no indication that Reverend Devantier, the Stations' CEO during the License Term, or Reverend Dr. Ralph Bohlmann, the President of the Church during the License Term, had any prior knowledge of the misconduct. Similarly, there was no evidence that Reverend Devantier or Reverend Dr. Bohlmann participated in the misconduct. The testimony of Reverend Devantier also reveals that he was genuinely embarrassed and troubled by the situation in which the Church found itself. He expressed sincere contrition, and his testimony in this regard was entirely credible. For his part, Mr. Stortz testified truthfully at the hearing, even when that testimony was likely to have had an adverse effect on the Church's case. It is highly unlikely, therefore, that the Church will deal with the Commission in the future in anything less than a fully forthright, candid, and truthful manner.

260. Moreover, the Church has been a Commission licensee for more than 70 years. Station KFUD(AM) went on the air in December 1924, and its first license was issued to Concordia Seminary in January 1925. Over the course of that 70-year period, the Stations have had a spotless record with the Commission. With the exception of this proceeding, the Stations have never been cited for any violations of the Commission's rules or policies. Thus, the Church's overall record of compliance has been exem-

plary. Viewed in this light, the Church's misconduct may be seen as an isolated occurrence, an aberration, confined to a single Commission investigation.

261. Under all of these circumstances, no useful purpose would be served by denying the Church's renewal applications. However, as noted above, the Church's misconduct was serious and warrants the imposition of a forfeiture in the amount of \$50,000 for its willful and repeated violation of Section 73.1015 of the Commission's Rules. *Dixie Broadcasting, supra* at 4404.

MOTION TO ENLARGE ISSUES

262. On June 20, 1994, the very day the hearing began, the NAACP filed a Motion to Enlarge, and for Injunctive Relief.²⁸ The NAACP seeks, *inter alia*, the addition of the following issues to this proceeding:

- (3) To determine whether The Lutheran Church/Missouri Synod abused the Commission's processes by using a person under its control to obtain, by trickery and under false pretenses, the attorney work product of the NAACP's attorney, which work product constitutes virtually the NAACP's entire trial strategy; and
- (4) To determine whether The Lutheran Church/Missouri Synod abused the Commission's processes by interfering with an NAACP witness and improperly attempting to induce such witness not to provide testimony in this proceeding.

For the reasons which follow, the NAACP's Motion will be denied.²⁹

I. Requested Issue 3 -- Alleged "Theft" of Attorney Work Product

263. The NAACP argues that the Church used Mr. Lauher to obtain information regarding the NAACP's trial strategy, and that this constituted a "theft" of the work product of the NAACP's counsel. In support, the NAACP recites the following facts. The NAACP retained the services of Michael C. Blanton, a third-year law student, to conduct an interview of Mr. Lauher. Mr. Blanton called Mr. Lauher on or about May 19, 1994, and told Mr. Lauher that he worked for the NAACP's counsel and that the NAACP was "looking for witnesses to testify and give Declarations on behalf of the NAACP in its lawsuit against [the Church]." Mr. Lauher agreed to the interview, which took place on May 23, 1994. The interview was tape-recorded by Mr. Lauher after obtaining Mr. Blanton's permission. Mr. Blanton asked Mr. Lauher approximately 20 questions about the two memorandums he had written to Reverend Devantier. The questions had been prepared by the NAACP's counsel. After reviewing a lengthy memoran-

²⁸ An Opposition to Motion to Enlarge and Request for Injunctive Relief was filed by the Church on July 8, 1994; Comments on Motion to Enlarge and for Injunctive Relief were filed by the Bureau on July 8, 1994; a Motion for Acceptance of Reply *Nunc Pro Tunc* was filed by the NAACP on July 25, 1994; a Reply to Opposition to Motion to Enlarge was filed by the NAACP on July 25, 1994; and Comments on NAACP's "Motion for Acceptance of Reply *Nunc Pro Tunc*" was filed by the Church on August 3, 1994. In its Motion for Acceptance, the

NAACP requests that its Reply, which was filed one working day late, be accepted *nunc pro tunc*. Although the Church takes umbrage at the tone and certain language contained in the Reply, it does not oppose the acceptance of that pleading. Therefore, the Reply will be accepted.

²⁹ Those portions of the NAACP's motion which requested injunctive relief were taken up and ruled on at the June 20, 1994, hearing session. See Tr. 79-89, 93-100. Consequently, no further consideration will be given to those matters.

dum from Mr. Blanton relating to the interview, the NAACP's counsel determined that Mr. Lauher "would not be a particularly useful witness." On the date the direct case exhibits were exchanged, the NAACP's counsel learned that Mr. Lauher was going to appear as a witness for the Church, and that Mr. Lauher's declaration had been executed on May 21, 1994, two days prior to the interview with Mr. Blanton. Mr. Lauher never informed Mr. Blanton that he had already given a declaration to the Church or that he would be a witness in their behalf. (Motion to Enlarge at pp. 2-5 and Annex 1.)

264. From this scenario, the NAACP alleges that Mr. Lauher was "in a difficult position" with the Church because he knew that his two memorandums "deeply incriminated" the Church. The NAACP maintains that Mr. Lauher was "in need of remaining in [the Church's] continued good graces" because he was "still in the market in the advertising business." The NAACP asserts that Mr. Lauher "evidently made a pact" with the Church pursuant to which he would renounce and repudiate his memorandums, interview with the NAACP, and "fraudulently pos[e] as a potential NAACP witness." The NAACP contends that Mr. Lauher was under the Church's control, "had to have" told the Church that he was meeting with Mr. Blanton, and made the tape recording "at [the Church's] direction." In this regard, the NAACP states that it would be "amazing" if Mr. Lauher did not give the Church a copy of the tape. In addition, the NAACP claims that the written direct case testimony of Mr. Stortz and Reverend Devantier show that the Church "must have had and used" Mr. Lauher's tape recording. Further, the NAACP avers that its "trial strategy" was "embedded" within its questions for Mr. Lauher, and that this incident constituted a "theft" of its attorney's work product. The NAACP also suggests that attorneys in the law firm of Fisher Wayland Cooper Leader & Zaragoza, the Church's counsel, may have been implicated in "what amounts to a conspiracy to obstruct justice." (Motion to Enlarge at pp. 2, 5-7, emphasis omitted.)

265. In its Opposition, the Church states that, in preparing for the hearing, Kathryn R. Schmeltzer and Barry H. Gottfried, two of the Church's counsel, talked with many individuals whom the Church believed had knowledge of the facts relevant to the hearing issues. One of the individuals interviewed was Mr. Lauher. When it came time to select witnesses for the hearing, the Church decided that Mr. Lauher's testimony would be useful. Consequently, Ms. Schmeltzer and Mr. Gottfried obtained a declaration from Mr. Lauher on May 21, 1994, for its direct case presentation. On that date, Mr. Lauher informed the Church's counsel for the first time that he had agreed to talk to a representative of the NAACP.

266. After obtaining Mr. Lauher's declaration, the Church's counsel contacted Mr. Lauher by telephone to determine his availability for the hearing. Mr. Lauher told the Church's counsel during that conversation that he had talked to the NAACP's representative. Mr. Lauher reported that he had been asked whether he had been fired from his job at KFUD-FM because of the memorandums he had written on the station's employment practices, and that he had told the NAACP's representative that his dismissal was not connected with those memorandums. Mr. Lauher mentioned that he had taped the interview. There was no further discussion of the NAACP's interview.

267. Mr. Lauher arrived in Washington, D.C., at about 9:30 p.m. on Sunday, June 19, 1994, approximately 12 hours before the beginning of the hearing. At a meeting with Ms. Schmeltzer and Mr. Gottfried that evening, Mr. Lauher provided them with a transcript of the interview with the NAACP. Both counsel "glanced over" the 10-page transcript, noted the "routine nature" of the questions and answers, but did not discuss the contents of the transcript with Mr. Lauher. No further attention was given to the transcript until the next morning, when counsel for the NAACP raised the matter at the commencement of the hearing. (Opposition to Motion to Enlarge at Ex. A, declaration under penalty of perjury of Mr. Gottfried.)

268. The requested issue will not be added to this proceeding. Section 1.229(d) of the Commission's Rules requires that petitions to enlarge the issues be supported by "affidavits of a person or persons having personal knowledge" of the facts alleged therein. The NAACP's motion fails in this regard. Specifically, its key factual allegations that Mr. Lauher was under the Church's control, that he tape-recorded the interview "at [the Church's] direction," that he "evidently made a pact" with the Church, the nature of that "pact," and that the tape recording was used in connection with the direct case testimony of Mr. Stortz and Reverend Devantier, are supported by nothing more than pure, unadulterated speculation, conjecture, innuendo, and surmise. It is well settled that issues will not be added on this basis. *E.g., Folkways Broadcasting Co., Inc.*, 33 FCC 2d 806, 811 (Rev. Bd. 1972); *West Central Ohio Broadcasters, Inc.*, 1 FCC 2d 1178 (Rev. Bd. 1965).

269. Moreover, the facts which were supported by sworn testimony at the hearing establish that Mr. Lauher was independent of the Church, and that there was no conspiracy to steal the work product of the NAACP's counsel or to obstruct justice. Thus, Mr. Lauher testified that he owned Station WRYT, Edwardsville, Illinois, and that his station did not do any business of any kind with the Church or the Stations. (Tr. 111-12.) Mr. Lauher testified that he was not a Lutheran. (Tr. 134.) Mr. Lauher testified that it was his idea to tape-record the interview with Mr. Blanton, and that no one at the Church suggested that he do so. (Tr. 127-28.) Mr. Lauher testified that he did not tell Mr. Stortz or Reverend Devantier that he had made the tape. (Tr. 131-32.) Mr. Lauher testified that he did not tell Mr. Blanton about the May 21, 1994, declaration he provided to the Church because "Mr. Blanton didn't ask" and "It didn't appear to be relevant at the time[.]" (Tr. 127.) Mr. Lauher testified that he personally prepared the transcript of the tape recording, that it was made at his own expense, and that Ms. Schmeltzer did not ask him to make the transcript. (Tr. 132-33.)

270. In addition, Mr. Stortz testified that, although he did not know of the Blanton-Lauher interview at the time of its occurrence, one of the Church's attorneys mentioned it to him prior to the time he signed his direct case testimony. However, the attorney did not tell Mr. Stortz what was said during the interview, and Mr. Stortz had never heard the tape recording or seen the transcript of that recording. (Tr. 460-63.) Similarly, Reverend Devantier testified that he had not heard the tape recording or seen the transcript of the Blanton-Lauher interview, and that neither the contents of the tape nor the transcript had been described to him. (Tr. 794.)

271. Further, while the Motion to Enlarge alleges the "theft" of attorney work product, the work product doctrine is not applicable under the circumstances surround-

ing this incident. This is so because the NAACP's questions to Mr. Lauher, a third-party, were not privileged. Mr. Lauher was neither a principal nor an agent of the NAACP; he was nothing more than a potential witness. No reasonable expectation of confidentiality attaches in such a situation. What occurred, therefore, was not the theft of attorney work product, but rather the voluntary disclosure by a third-party potential witness of his conversation with an NAACP representative, which conversation was tape-recorded with the NAACP's consent. Even assuming, *arguendo*, that the NAACP's questions to Mr. Lauher did reveal the NAACP's "trial strategy" and did constitute work product, any privilege which might have attached was waived when the questions were intentionally disclosed to an individual, such as Mr. Lauher, who was not a principal or an agent of the NAACP. Consequently, the NAACP interviewed Mr. Lauher, and asked its 20 questions, at its own peril. *See, generally, Data General Corporation v. Grumman Systems Support Corporation*, 139 F.R.D. 556 (D. Mass. 1991).

272. Finally, an analysis of the transcript of the Blanton-Lauher interview reveals that the NAACP's "trial strategy" could not possibly have been discerned from the questions Mr. Blanton asked Mr. Lauher. Indeed, nearly all of the questions Mr. Lauher was asked related to the two memorandums he wrote to Reverend Devantier, and the questions were both predictable and routine. Asking Mr. Lauher questions of that nature can hardly be described as disclosing the NAACP's "trial strategy."

II. Requested Issue 4 -- Alleged Witness Interference

273. In its February 23, 1990, Opposition to Petition to Deny and Response to Inquiry, the Church stated that Reverend Otis D. Woodard, a Lutheran lay minister who was the director of Lutheran North St. Louis Outreach, had referred several minority applicants to the Stations. In its Motion to Enlarge, the NAACP argues that the Church contacted Reverend Woodard, "an NAACP witness," and attempted to induce him not to testify in this proceeding. The NAACP maintains that these contacts constituted an abuse of process. In support, the NAACP relies on the following facts. Mr. Stortz called Reverend Woodard on the morning of June 15, 1994, and offered to let him make public service announcements on the Stations. According to Reverend Woodard, Mr. Stortz also "inferred" the possibility of a future job at the Stations. That same afternoon, Reverend Woodard executed a declaration to be used in the NAACP's rebuttal case in which he stated that the Stations never approached him as a referral source for minority applicants. On June 17, 1994, Reverend Woodard received a second call from Mr. Stortz. Mr. Stortz told Reverend Woodard that whoever had told him that the Church had mentioned him as a minority referral source had been misinformed, and that it had been his former wife, Katherine Woodard, who had been the Stations' minority referral source.

274. From these facts, the NAACP contends that Mr. Stortz's contacts, taken together, were improper. Specifically, the NAACP asserts that the first call constituted "a tangible inducement not to come forward to be a witness for the other side," and the second call was "an implication that if Rev. Woodard testified, he would be embarrassed with questions . . . about his former wife." (Motion to Enlarge at pp. 11-12, Annex 5, and Annex 6.)

275. In a declaration appended to the Church's Opposition, Mr. Stortz states that in February 1994 he received a letter from Reverend Woodard, whom he had met several times before, expressing an interest in working on a regular basis as on-air talent at the Stations. Mr. Stortz interviewed Reverend Woodard for an on-air job on March 1, 1994. Reverend Woodard stated during the interview that he wanted "to be part of the KFUE family," that he wanted to "retire" at the Stations, and that his interest was based on the fact that he was a life-long Lutheran. Reverend Woodard left his "General Resume." Mr. Stortz told Reverend Woodard that he would be considered for an on-air job at the Stations as openings occurred. Several weeks later, Mr. Stortz received a message that Reverend Woodard had called him. He returned the call, but was unable to reach Reverend Woodard. Later that day, Reverend Woodard's wife called Mr. Stortz. When Mr. Stortz told her that he had received a message earlier in the day that Reverend Woodard had called, Reverend Woodard's wife said that she was sure the call was about Reverend Woodard's desire to work at the Stations. In May 1994, Mr. Stortz received another call from Reverend Woodard asking if he would be interested in receiving an "air check tape." Mr. Stortz said he would be happy to have it and Reverend Woodard delivered the tape to him at the Stations.

276. On June 15, 1994, Mr. Stortz received a telephone message from Reverend Woodard asking him to call Reverend Woodard "immediately." Mr. Stortz called and was told by Reverend Woodard that the NAACP had contacted him to discuss the Stations. Reverend Woodard wanted to know what it was about. Mr. Stortz told Reverend Woodard that the NAACP had raised an EEO matter against the Stations. The next day, June 16, 1994, Mr. Stortz called Reverend Woodard to ask how the interview with the NAACP had gone. Reverend Woodard stated that the NAACP had asked about "some referral source" and that he did not know what was meant by that. During that call, Reverend Woodard again reminded Mr. Stortz that he wanted to work at KFUE and to "retire" at the Stations. He did not tell Mr. Stortz that he had given a statement to the NAACP, nor did Mr. Stortz ask whether he had done so.

277. On June 17, 1994, at about 3:00 p.m. Central Time, Mr. Stortz telephoned Reverend Woodard in reference to his "referral source" comment of the previous day. Mr. Stortz told Reverend Woodard that the Stations' records indicated that his Outreach Ministry had been used as an employment referral source, and that the records showed that the specific person talked to at the Outreach Ministry was Kathy Woodard. When asked, Reverend Woodard stated that Kathy Woodard was his ex-wife, and that it was quite possible that his ex-wife would have handled a referral contact without discussing it with him. Mr. Stortz and Reverend Woodard continued to converse, and Mr. Stortz told him that he would be glad to air public service announcements for his organization if Reverend Woodard would send them over. According to Mr. Stortz, "[t]his was hardly unusual, particularly given [Reverend] Woodard's prior appearances on KFUE to promote his organization and its needs." During the call, Reverend Woodard reminded Mr. Stortz once again of his desire to work and "retire" at the Stations, and Mr. Stortz reiterated his earlier statement that he would be considered for any on-air openings as they arose. Mr. Stortz again did not ask whether

Reverend Woodard had signed a statement for the NAACP, and Reverend Woodard did not tell him that he had done so.

278. At about 5:30 p.m. Central Time on June 17, 1994, subsequent to all of the conversations described above, Mr. Stortz learned for the first time that Reverend Woodard had in fact given a signed statement to the NAACP. Mr. Stortz had no further contacts with Reverend Woodard after that time. (Opposition to Motion to Enlarge at Ex. C.)

279. The issue requested will not be added. It is well established that the proponent of a motion to enlarge issues has the burden of coming forward with a *prima facie* showing in support of the requested issue. *Scott & Davis Enterprises*, 88 FCC 2d 1090 (Rev. Bd. 1982). The NAACP has failed to meet this standard. Put simply, no factual basis exists for the addition of Issue 4 since it does not appear that Mr. Stortz attempted to interfere with or improperly influence Reverend Woodard's testimony. Thus, Reverend Woodard's declarations do not state that Mr. Stortz made any reference in his telephone calls to the possibility of Reverend Woodard's testifying in this case. Similarly, those declarations do not state that Mr. Stortz attempted to dissuade Reverend Woodard from testifying, or that Mr. Stortz tried to influence his possible testimony.

280. Further, the declaration of Mr. Stortz indicates that it was Reverend Woodard, not Mr. Stortz, who first brought up the subject of employment at the Stations during their telephone calls. The NAACP had the opportunity to challenge this assertion in its Reply to the Church's Opposition by providing a further declaration from Reverend Woodard. However, it did not do so. Therefore, Mr. Stortz's account of these aspects of the telephone conversations will be credited. Moreover, even assuming that Mr. Stortz initially raised the subject, the fact that he and Reverend Woodard discussed employment at the Stations during the calls in question does not establish that Mr. Stortz was attempting to influence or interfere with Reverend Woodard's testimony. This is so because Reverend Woodard had applied for employment at the Stations, had interviewed with Mr. Stortz, had discussed the matter with Mr. Stortz in several previous telephone calls, and the Stations had Reverend Woodard's resume and air check tape on file.

281. Next, the NAACP has provided no support for its contention that Mr. Stortz impliedly threatened Reverend Woodard with embarrassing questions about his former wife. On the contrary, Reverend Woodard did not even state in his declarations that he inferred this from his second conversation with Mr. Stortz. Consequently, the NAACP's argument must be rejected since it is based on nothing more than sheer speculation. *Folkways Broadcasting, supra*; *West Central Ohio Broadcasters, supra*. Finally, Mr. Stortz's offer to broadcast public service announcements for Reverend Woodard's Outreach Ministry does not appear to have been unusual, particularly since Reverend Woodard had previously appeared on KFUE to promote his ministry. Once again, the NAACP had the opportunity in its Reply to provide a declaration from Reverend Woodard disputing these facts, but failed to do so. In this

connection, the mere opinion of the NAACP as to the significance of the facts alleged in its Motion to Enlarge is not a sufficient basis for the addition of issues. *Erway Television Corp.*, 2 FCC 2d 1037 (Rev. Bd. 1966).

ULTIMATE CONCLUSION

282. In view of all of the foregoing, it is ultimately concluded that the public interest, convenience and necessity would be served by a grant of the Church's applications for renewal of the licenses of Stations KFUE(AM) and KFUE-FM, Clayton, Missouri. However, it is also ultimately concluded that the Church violated Sections 73.1015 and 73.2080 of the Commission's Rules. Consequently, the Church's renewal applications will be granted subject to EEO reporting conditions, and a forfeiture in the amount of \$50,000 will be assessed against the Church.

Accordingly, IT IS ORDERED that the Motion for Acceptance of Reply *Nunc Pro Tunc*, filed by the NAACP on July 25, 1994, IS GRANTED, and the Reply to Opposition to Motion to Enlarge, filed by the NAACP on July 25, 1994, IS ACCEPTED.

IT IS FURTHER ORDERED that the Motion to Enlarge, and for Injunctive Relief, filed by the NAACP on June 20, 1994, IS DENIED.

IT IS FURTHER ORDERED that, unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules, the applications of The Lutheran Church-Missouri Synod, for the renewal of the licenses of Stations KFUE(AM) and KFUE-FM, Clayton, Missouri, ARE GRANTED subject to the EEO reporting conditions specified herein.³⁰

IT IS FURTHER ORDERED that The Lutheran Church-Missouri Synod SHALL SUBMIT four reports containing the following information, the first report being due six months after this Initial Decision becomes final, and the second, third, and fourth reports being due at six-month intervals thereafter:

(a) a list of all persons hired as well as all persons who applied for each position filled (i) during the six months preceding the first report, and (ii) during the period between the first and second, second and third, and third and fourth reports, indicating their referral or recruitment source, job title, part-time or full-time status, FCC Form 395 classification, date of hire, sex and race or national origin;

(b) a list of all employees as of the most recent payroll period prior to each filing date, by job title with part-time or full-time status indicated (ranked from the highest paid to the lowest paid), FCC Form 395 classification, date of hire, sex and race or national origin;

³⁰ In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d) of the Rules.

(c) a narrative statement detailing the Stations' efforts to recruit minorities for each position filled during the specified periods, including identification of sources used, and indicating whether any of the applicants declined actual offers of employment; and

(d) any additional information the licensee believes relevant regarding the Stations' EEO performance and efforts.

IT IS FURTHER ORDERED that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, this Initial Decision SHALL CONSTITUTE an Order of Forfeiture in the amount of \$50,000.

IT IS FURTHER ORDERED that, within 30 days after the date this Initial Decision becomes final, The Lutheran Church-Missouri Synod SHALL PAY the full amount of the forfeiture by check or money order made payable to "Federal Communications Commission." The remittance should identify the payor, be marked "NAL Control No. FCC 94-23; NOF Control No. FCC 95D-11," and be sent to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, IL 60673-7482

FEDERAL COMMUNICATIONS COMMISSION

Arthur I. Steinberg
Administrative Law Judge