

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

In the Matter of)	
)	
The Curators of the University of Missouri, licensee)	
of Station KWMU-FM)	File. No. BRED-960930WI
St. Louis, Missouri)	NAL/Acct No. 200118030011
)	FRN 0004-3037-56
)	

MEMORANDUM OPINION AND ORDER

Adopted: November 26, 2003

Released: February 17, 2004

By the Commission: Commissioners Copps and Adelstein dissenting and issuing a statement.

1. The Commission has before it for consideration: (i) the *Memorandum Opinion and Order and Notice of Apparent Liability* in *The Curators of the University of Missouri*, 16 FCC Rcd 1174 (2001) (“*MO&O*”), which granted the license renewal application of the Curators of the University of Missouri (“licensee”) for Station KWMU-FM, St. Louis, Missouri, subject to a Notice of Apparent Liability (“NAL”) for an \$8,000 forfeiture, and reporting conditions requiring the station to report to the FCC any new complaints of discrimination during the license term; (ii) the licensee’s response to the NAL in the form of a Petition for Reconsideration, which seeks rescission of the forfeiture and reporting conditions; (iii) an Opposition and Comments on Petition for Reconsideration filed by Rainbow-PUSH Coalition (“Rainbow”);¹ (iv) a Reply to Opposition and Comments on Petition for Reconsideration filed by the University; and (v) other pleadings.

2. In the *MO&O*, we found that the licensee had violated Section 73.1015 of the Commission’s Rules in the filing of FCC Form 396 (Broadcast Equal Employment Opportunity Program Report) with its license renewal application.² Section VII of the Form 396 that was effective at the time required a brief description of any complaint that had been filed before any body having competent jurisdiction under Federal, State, territorial or local law, alleging unlawful discrimination in the employment practices of the station. In response, the licensee stated: “None.” In response to a letter of inquiry,³ however, the licensee stated that it had inadvertently answered “None” in response to that section. The

¹ In its pleading, Rainbow requests that the Commission withhold ruling on the licensee’s Petition for Reconsideration until the United States Court of Appeals for the District of Columbia Circuit rules on Rainbow’s appeal of the Commission’s decision in this case. See *Rainbow/PUSH Coalition v. FCC*, No. 01-1072 (D.C. Cir. Feb. 16, 2001). By *Order* dated April 20, 2001, however, the United States Court of Appeals for the District of Columbia Circuit granted the Commission’s motion to hold Rainbow’s appeal in abeyance until the Commission first considers the licensee’s Petition for Reconsideration. Accordingly, we deny Rainbow’s request.

² On March 4, 2003, the Commission amended Section 73.1015 and cross referenced it with Section 1.17 of the Commission’s Rules dealing with truthful and accurate statements to the Commission. The Commission also amended Section 73.1015 to cross reference the revised Section 1.17. See *Section 1.17 of the Commission’s Rules Concerning Truthful Statements to the Commission*, 18 FCC Rcd 4016 (2003).

³ On May 29, 1997, Commission staff sent the licensee a letter of inquiry requesting information about the licensee’s EEO efforts over a three-year period -- from February 1, 1994 to February 1, 1997.

licensee submitted an amendment to its Form 396 to reflect one discrimination suit, and stated that there were no other employment discrimination complaints filed against KWMU during the license term. Rainbow thereupon alleged that the licensee's representation that no other complaints were filed against the station was false. In response, the licensee disclosed that another discrimination complaint had in fact been filed against the station and that both complaints had been resolved favorably. The licensee maintained that its second failure to report the complaints was also inadvertent.⁴

3. We found no evidence in the *MO&O* that the licensee's failure to report the discrimination complaints resulted from an intent to deceive. We concluded, however, that the licensee had omitted material facts from its Form 396 and, accordingly, issued the licensee an NAL for an \$8,000 forfeiture for willfully omitting material facts from its Form 396 in violation of Section 73.1015 of the Commission's Rules. The Commission also imposed reporting conditions on the station concerning any new charges or complaints of discrimination filed against the station or personnel during the current license term, and referred discrimination allegations made by Rainbow against the licensee to the Equal Employment Opportunity Commission ("EEOC").

4. In its Petition for Reconsideration, the licensee asserts that the Commission has no authority to impose sanctions against the station because the FCC's then-existing Equal Employment Opportunity ("EEO") rule was declared unconstitutional and vacated by the U.S. Court of Appeals in *MD/DC/DE Broadcasters Association v. FCC* ("*Association*").⁵ The licensee argues that reporting discrimination complaints on FCC Form 396 is inextricably related to a then-vacated EEO rule. In *Association*, however, the Court found only the EEO program requirements of the then-existing EEO rule unconstitutional. The anti-discrimination requirement of the rule was not challenged in *Association*. The requirement to report discrimination complaints related to our enforcement of the rule prohibiting discrimination. There is accordingly no basis for the licensee's claim that the requirement to report discrimination complaints was found to be unconstitutional in *Association*.

5. The licensee further asserts that the Commission acted contrary to FCC case precedent in imposing the \$8,000 forfeiture and reporting conditions. The licensee argues that the circumstances in its case are significantly different from other cases in which the Commission has imposed forfeitures for the same violation because those cases included failures to report pending discrimination complaints, whereas here the station failed to report discrimination complaints already resolved favorably for the licensee. The licensee reasons that complaints of this type are immaterial in comparison to still pending complaints. The licensee maintains that its failures to report the complaints were thus not covered under Section 73.1015, which applies only to material omissions. The licensee also asserts that the Commission acted arbitrarily and capriciously in referring Rainbow's discrimination pleadings to the EEOC.

6. Rainbow contends that the forfeiture and reporting conditions imposed by the *MO&O* are meaningless and that we should have designated the licensee's renewal application for hearing. Rainbow acknowledges, however, that the propriety of our decision not to designate the application for hearing is appropriately resolved in connection with its pending appeal.⁶

⁴ The licensee again amended its Form 396 to include the second complaint.

⁵ 236 F.3d 13, *rehearing den.* 253 F.3d 732 (D.C. Cir. 2001), *cert. denied*, 122 S. Ct. 920 (2002).

⁶ *See* Comments on Supplement to Petition for Reconsideration filed February 6, 2002.

7. Upon further consideration of the facts in this case, we will rescind the NAL issued to the licensee. In assessing a forfeiture, we must take into account, among other matters, “the nature, circumstances, extent, and gravity” of the alleged violation.⁷ The omissions were not of sufficient gravity to warrant the assessment of a forfeiture under all of the circumstances.⁸ Both discrimination complaints were resolved favorably to the licensee and would not, standing alone, have raised a substantial and material question of fact concerning the licensee’s renewal application. Indeed, in light of the fact that both complaints were resolved favorably to the licensee before it filed its renewal application, it appeared to have had no motive to conceal the fact that those complaints had been filed. In light of these and all other pertinent circumstances, we do not find the assessment of a forfeiture under the former Section 73.1015 is warranted. We will also rescind the special reporting conditions concerning future charges or complaints of discrimination imposed by the *MO&O*.

8. With respect to the licensee’s claim that the Commission acted arbitrarily and capriciously in referring Rainbow’s discrimination pleadings to the EEOC, we reiterate that the FCC acts as a receiving agency for the EEOC for individual charges of employment discrimination under Title VII.⁹ It is for the EEOC, not this agency, to determine whether such claims are actionable. Hence, the licensee should direct any further comments in this regard to the EEOC.

9. Accordingly, IT IS ORDERED that the Notice of Apparent Liability and reporting conditions issued to the Curators of the University of Missouri pursuant to the NAL ARE HEREBY RESCINDED.

10. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by the Curators of the University of Missouri IS GRANTED to the extent indicated herein.

11. IT IS FURTHER ORDERED that the Opposition and Comments on Petition for Reconsideration filed by Rainbow-PUSH Coalition ARE DENIED.

12. IT IS FURTHER ORDERED that a copy of this Memorandum Opinion and Order and Forfeiture Order be sent by Certified Mail – Return Receipt Requested – to the Curators of the University of Missouri and Rainbow-PUSH Coalition.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁷ See Section 503(b)(2)(D) of the Communications Act of 1934, as amended, 47 U.S.C. § 507(b)(2)(D).

⁸ The Commission recently said that all pending and resolved complaints filed during the license term should be included, because complaints resolved on procedural grounds or pursuant to a settlement could lead to relevant evidence of discrimination. See *Second Report and Order and Third Notice of Proposed Rule Making*, 17 FCC Rcd 24018, 24069 (2002).

⁹ See *MO&O* at 1178-79.

**JOINT STATEMENT OF
COMMISSIONERS MICHAEL J. COPPS AND JONATHAN S. ADELSTEIN,
DISSENTING**

*Re: Curators of the University of Missouri, Licensee of Station KWMU-FM, St. Louis, Missouri,
Memorandum Opinion and Order*

We disagree with the decision to rescind the \$8,000 forfeiture assessed against this licensee for failure to make truthful statements to the Commission in the face of repeated written requests from the Commission. Here, KWMU-FM, St. Louis, Missouri, twice failed to disclose the existence of two employment discrimination complaints filed against the station even after Commission staff sent a specific letter of inquiry to the station asking it to identify any such complaints.

Our regulatory structure is premised upon the assumption that applicants will provide the Commission with truthful and accurate information, without misrepresentation or omission. This is a straightforward matter of a licensee failing to respond truthfully to the Commission on not one but two occasions. What message does this send to other licensees as we enter another license renewal cycle? What is the consequence for filing inaccurate information with the Commission? In our view, the NAL was properly issued against the licensee and should be affirmed.