Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In re Application of	
University of San Francisco,	File No. BALED-20110125ACE
Assignor,	Facility ID Nos. 69143
And	
Classical Public Radio Network LLC	NAL/Acct. No. MB201241410032 FRN: 0010699056
Assignee,	DA 12-725
For consent to Assignment of License for Station KUSF (FM) San Francisco, Californian	

To: The Commission

APPLICATION FOR REVIEW
of Friends of KUSF

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July 7, 2012

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SUMMARY

Petitioner Friends of KUSF filed a Petition to Deny the University of San Francisco's proposed assignment of its NCE FM license (KUSF) to California Public Radio Network, LLC ("Applicants"). We raised issues relating to the assignor and the acquiring entity, permitted programming, and notably, the monetization of a noncommercial educational license, through substantial fees being paid for program time by the buyer, under a provisional operating agreement.

Recognizing that these concerns were indeed serious, the Media Bureau issued a letter of inquiry, demanding interrogatory responses and documents from the parties. Applicants were directed to serve Petitioner with their responses and a partial record was made. A number of Applicants' responses were incomplete or evasive, and they refused to give Petitioner a "privilege log" that would have explained the scope of the documents withheld and the basis therefore.

While these factual issues remained unresolved, and while Petitioner was still fully subject to the Commission's *ex parte* rules barring unilateral contact with the decision maker, the Media Bureau staff met with the Applicants in secret and hashed out a generous compromise. The Applicants would stipulate to a violation of the rules against monetization of noncommercial time. In exchange, the Bureau would grant the assignment application and let Applicants off the hook on the whole series of allegations pending from the Petition in exchange for a joint contribution of $50,000 – quite a bit of money, unless compared with the multi-millions of dollars involved in this transactional package. In parallel, the Media Bureau issued a Denial Letter stating that all the big qualification issues had been resolved by the secretly hatched Consent Decree. The Denial Letter cut-and-paste the dispositive paragraph from another case, stating that this was merely a radio format case, and that the Commission does not concern itself with formats when an assignment application is before it.

So we come before the Commission in the same posture as when we started. We seek a designation for hearing to determine whether the assignor is qualified to hold the license it seeks to assign. We also seek a hearing to determine whether the assignee, likewise, is qualified. And we submit that the bifurcated decision by staff must be set aside as a travesty of justice, one that denies Petitioner its statutory rights to have its Petition considered honestly, fairly, and within standards prescribed by law.

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APPLICATION FOR REVIEW

Friends of KUSF ("Friends" or "Petitioner"), by its attorneys, seeks review by the full Commission of the Letter, June 7, 2012, from the Chief of the Audio Division, denying our Petition to deny the referenced assignment application, and granting the application ("Denial Letter"). Concurrently we seek review of the Order of the same date, implementing Consent Decree, DA 12-725 (collectively, the "Consent Decree"). This application is submitted pursuant to Section 1.115 of the Commission's Rules and Regulations.

I. STAFF DECISIONS

On January 12, 2011, the University of San Francisco ("USF" or "Licensee") entered into an Asset Purchase Agreement for the sale of its NCE FM license to Classical Public Radio Network, LLC ("CPRN-LLC") for the purchase price of $3.8 million dollars. On January 12, 2011, USF and CPRN-LLC ("the Parties" or "the Applicants") also entered into a Public Service Operating Agreement ("PSOA") under which CPRN-LLC agreed forthwith to takeover programming on USF's 90.3 frequency "for up to 24 hours a day, seven days per week." In exchange for full-time access to its airtime, CPRN-LLC agreed to defray any expenses incurred, including certain itemized indirect expenses, and to pay USF $5,000 per month for the first 120 days the PSOA was in effect, and $7,000 for each month thereafter through the remainder of the term.

To implement these agreements, at 10:00 a.m. on January 18, 2011 USF security guards escorted all KUSF staff from the main studio and placed it under lock and key while CPRN-LLC commenced broadcasting over USF's frequency from the San Francisco studios of Entercom, the nationwide commercial radio chain. CPRN-LLC's broadcasts were identical to the program content of that formerly broadcast on commercial KDFC (which it purchased from Entercom), shorn of its advertising spots.

After submitting their assignment application, shown in the caption above, USF demolished its former station facility on or about May 15, 2011. Petitioner timely filed a petition to deny the assignment on February 28, 2011. The Commission staff recognized the seriousness of petitioner's and other objectors' claims, especially with respect to the PSOA, and by letter June 28, 2011 ("the Inquiry Letter") directed the parties to answer an extensive list of "inquiries," including sub-inquiries and document production requirements, and to serve their responses on interested parties. The Applicants, immediately grasping some of the implications of the Inquiry Letter, promptly shut down their illegal cash payments for airtime, and amended and resubmitted a PSOA with that term

deleted. Thereafter, responses were made to the Inquiry Letter, and Petitioner continued to participate with comments.

Nearly one year later, on June 7, 2012, the Media Bureau issued its concurrent Order, Consent Decree, and Denial Letter. In the Consent Decree, the Media Bureau ruled that the PSOA violated Sections 1.17 and 73.503(c) of the Commission's Rules which prevents NCE licenses from selling program time at a profit. Based on this finding, USF and CPRN-LLC stipulated to a "voluntary payment" of $50,000 to the U.S. Treasury. However, the Commission found both USF and CPRN-LLC legally qualified as NCE licensees and terminated the investigation. It walled off the adverse rulings on conduct from any further use in licensing. In the concurrent Denial Letter, the Media Bureau denied the Petitions to Deny, informal objections and other filings opposing the transfer of USF's license to CPRN-LLC. The sole basis for denying all petitions and objections was the assertion that the Commission does not regulate or consider programming formats.

As may be seen at a glance from the long list of interested persons and parties that were "cc'd" with the staff's June 7 Denial Letter, these transactions generated an outpouring of local opposition, from students, programmers, listeners, elected leaders and others. Much of the outrage was directed at the University's sale of a non-commercial asset, thus extinguishing a unique media access point for original public affairs, new music, foreign language and other programs directed towards a diverse Bay Area audience not otherwise served by existing media outlets. But equally, the transaction was seen in its sordid details as skirting, even flaunting, important Commission rules and policies. Finally, it became clear that this changeover was part of a national trend of non-commercial licensees cashing out their services after years of support from taxes, foundations, and listener donations. In the process Applicants and others like them are leaving educational broadcasting that much poorer and weaker, perhaps never to recover.

II. RELIEF REQUESTED (SECTION 1.115(b)(4) OF THE RULES)

The purpose of this Application is to urge the Commission to set aside the Consent Decree, set aside the Denial Letter, and designate the assignment application for hearing on the matters raised, but not fully resolved, in the Inquiry Letter.

We urge that the Commission, in its referral back to the staff, to provide clarification as to key policy and procedural issues raised by the action here:

A. Policy Issues. The assignment of USF's license goes to the heart of the Commission's public interest determination in the licensing of noncommercial, educational

broadcast services. The Commission should correct the Bureau's holding that the only issue in the assignment was radio entertainment format, from which the Commission should forbear. Such framing of the issue was incorrect (Sec. 1.115(b)(iii)), and cases precedent from the commercial format cases should not have been applied (Sec. 1.115(b)(i)). More broadly, this case squarely raises the issue of whether LLC's as licensees or Managers under LMAs (PSOA here) should be allowed in non-commercial, educational services at all (Sec. 1.115(b)(ii)). The Consent Degree expressly acknowledged (at Par. 5) that the there was no precedent to guide the Bureau's determination on the payments in violation of Sec. 73.503(c) of the Rules. In that situation, the matter should have been referred to the Commission for decision, and the Commission should examine the substance and scope of the violations, and the sanctions to follow, *de novo.* (Sec. 1.115(b)(3)).

B. **Procedural Issues**. We begin with the procedural issues, because we believe that the bifurcated proceeding at the Media Bureau was fatally flawed, and unlawful. Once Petitioner offered probative evidence and raised a substantial and material question regarding the basic qualifications of the Parties, the Commission was required by law to conduct a hearing on the matters raised. 47 U.S.C. Section 309(e). The failure to designate was prejudicial procedural error. (Sec. 1.115(b)(v)). The bifurcated proceeding violated due process by denying Petitioner important rights of participation and by enabling the staff to rule on a record that was materially incomplete in many respects. The only cure is to proceed to designate this matter for hearing now.

III. THE BIFURCATED ACTION CANNOT BE UPHELD DUE TO PREJUDICIAL PROCEDURAL ERROR

A. OUR PETITION RAISED SUBSTANTIAL AND MATERIAL QUESTIONS OF BASIC QUALIFICATION REGARDING THE ASSIGNOR AND THE ASSIGNEE ALIKE. ONCE THIS THRESHOLD WAS MET, THE COMMISSION STAFF WAS REQUIRED TO DESIGNATE THE APPLICATION FOR HEARING.

1. Premature and Unauthorized Assumption of Control by CPRN-LLC

The Media Bureau's Inquiry Letter raised several questions concerning USF's premature relinquishment of control over station operations and programming. Applicants failed to submit substantive responses to each of those questions. The Media Bureau ruling in the Denial Letter, that this was nothing more than a "format" case, ignored substantive questions raised by Petitioner and substantive matters of conduct, qualifications, truthfulness and character of the licensee and proposed assignee.

Question 2 of the Inquiry Letter asked how many hours of programming were supplied by CPRN-LLC per week. CPRN-LLC admitted that it supplied USF with 166 hours/week of programming from its premises at Entercom. Omitted from its response was the fact that the remaining two (2) hours of programming per week consisted of the parties' contractually obligated simulcast of the Metropolitan Opera from Lincoln Center in New York City. Petitioner noted that nothing in the response suggested that USF produced or originated any programming whosoever on the Station following CPRN-LLC's takeover of operations on January 18, 2011. See Petitioners Comments in response to USF and CPRN-LLC's joint response to Inquiry Letter at 7 ("*Petitioner's Comments*").

Question 2(a) of the Inquiry Letter asked for specific dates and times when USF pre-empted or rejected CPRN-LLC's programming. Petitioner noted that the applicants' response failed to cite a single instance where CPRN-LLC's programming was preempted by or rejected by USF. See *Petitioners Comments* at 8.

Question 2(b) of the Inquiry Letter asked USF to describe its ability to originate programming. USF responded by submitting a conclusory declaration of psychology professor Michael L. Bloch that failed to identify any expertise or qualifications to make this determination. Petitioners also noted that Bloch's statements here were false because USF's main studio was *dismantled* on or about May 15, 2011.[1] The gutting of Phelan Hall (where the main studio was located) is alluded to in Brenda Barnes' May 31, 2011 email, observing that the station was recently off the air for 1-1/2 days when USF turned off power to the entire university. *See* Korn Decl. in Support of *Petitioner's Comments* at Exh. 1.

In response, USF belatedly attempted to supplement the record by submitting Statements of Consulting Engineer Dane E. Erickson and Technical Consultant Brian J. Henry. These late-filed statements violated the express admonitions in the Inquiry Letter, and were also non-responsive to Question 2(b).[2] For instance, Consulting Engineer Dane Erickson concedes he was unable to confirm whether USF's "new" studio was able to originate programming between May 15, 2011

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1. *See Petitioner's Comments* at 8-13 and accompanying Declarations of Dorothy Kidd, Lowell Moulton and Robin Nordling. *See also* Supplemental Declaration of Claudia Mueller in support of Petition to Deny.

2. Petitioner filed a Motion to Strike these Supplemental Statements, and alternately sought permission to respond to the vague allegations raised therein. The Media Bureau never ruled on Petitioner's Motion to Strike or otherwise responded to Plaintiff's request to substantively respond, and its subsequent actions blocked completion of the record here.

(when USF's main studio at Phelan Hall was dismantled) and August 18, 2011. Erickson's statement also merely refers to USF's subsequent ad-hoc ability to patch in a portable mixing console (located in a briefcase) to the transmitter, without any verification as to its prior use. The Statement of Brian Henry is equally inadequate. Mr. Henry's conclusory assertion concerning the "capability of originating programming from the studio in Cowell Hall" using "equipment" he installed between June 8-10, 200 failed to describe what equipment (if any) was used or how it was installed. Mr. Henry's Statement also failed to attach photographs or other exhibits depicting any alleged broadcast equipment. Moreover, Mr. Henry's statement ignored the 3-1/2 week period from May 15, 2011 (when the main studio was dismantled) through June 8-10, 2011 when he alleges installation of "equipment" began. Further, Mr. Henry's statement is contradicted by Declarations of Professor Dorothy Kidd, Robin Nordling and Claudia Mueller in support of the Petition to Deny, all containing numerous photographs documenting the lack of any main studio or other broadcast-related equipment in Cowell Hall during that period.

2. Licensee Failure to Oversee Programming Under PSOA

Question 2(c) of the Inquiry Letter asked USF to identify individuals who reviewed and evaluated CPRN-LLC's programming. USF cited the Bloch declaration, which admitted there was no review unless there was a change in regular programming. However, the Bloch declaration identified no such program changes or other instances where he engaged in any review or evaluation. Rather, Bloch offered the conclusory statement, speaking in the third person, that "prior to entering the PSOA, [it] made a determination that the programming provided by CPRN-LLC is appropriate for broadcast on KUSF[.]" Petitioner noted that USF's inability to cite any examples of oversight were likely due to Mr. Bloch's full-time obligations as Associate Dean. *Petitioner's Comments* at 13-14.

Question 3 of the Inquiry Letter asked USF to identify employees and "specified tour of duty hours" at the Station. USF identified only Professor Bloch and [his secretary] Brigid Rose Torres, and failed to identify how many hours were devoted to the Station. Petitioner noted this was likely because the Station was under lock and key from January 18, 2011 until approximately May 15, 2011 when it was dismantled and Phelan Hall condemned, and the lack of any main studio thereafter. *Id.* at 14.

Question 4 of the Inquiry Letter asked CPRN-LLC to identify and specify tour-of-duty hours for all station employees. CPRN-LLC responded that it had no employees at KUSF's main studio. Petitioner again noted this was because USF's studio was closed, locked and finally dismantled in

May 2011. Petitioner also submitted documents identifying CPRN-LLC's staff, including well-known on-air personalities from the commercial Entercom station KDFC, who continued to work "a few yards" down the hall at Entercom's San Francisco headquarters. *Id.* at 15-17.

3. Improper Third Party Fundraising

Question 7 of the Inquiry Letter asked USF and CPRN-LLC to produce all documents relating to publicity and promotion for the Station. Petitioner noted that their responses were "seriously incomplete" and failed to include printouts from CPRN-LLC's website concerning contests and sweepstakes during on-air membership drives, with funds directed for CPRN-LLC's "listener-sponsored classical KDFC" (and not USF), in violation of Section 73.503(c)'s express prohibition against third party fundraising over NCE airwaves. *Petitioner's Comments* at 18-19. Petitioner also noted other promotional materials documenting CPRN-LLC's frequent on-air pitches for "listener-supported Classical KDFC." *Id. See also* Petition to Deny, Exh. 5-D(3).

Question 11(c) of the Inquiry Letter asked applicants to "address specifically how the PSOA does not violate the third party fundraising rules, given that the PSOA permits CPRN-LLC to be the Station's sole programmer and to retain all donations, underwriting receipts, and other Station support during the PSOA term." In response, CPRN-LLC provided no declarations or other evidence to support its claim that no "third party fundraising" had occurred. Petitioner responded that applicants' answers were disingenuous and that CPRN-LLC's citations were incomplete. Petitioner also cited other evidence, including seven different employment agreements identifying on-air fundraising as the duties and responsibilities of CPRN-LLC hosts (*Petitioners Comments* at 28-31) and specific examples of on-air pitches for "listener-sponsored KDFC" while the PSOA was in effect. *See* Decl. of Michael A. Brown in Support of Petition to Deny at Exh. 5-D(3) (documenting pre-recorded promo for "The new classical KDFC. Now, listener supported at 90.3 in San Francisco.... Get the whole story, and stream us live, at KDFC.com.")

4. Failure to Produce Requested Documents Relating to Questionable Transactions and Alleged Violations

Question 9 of the Inquiry Letter asked USF for all documents to or from Rev. Stephen Privett from June 1, 2010 to present concerning the sale of the station, and all documents to or

from Charles Cross, Donna Davis, Esq. and Steve Runyon concerning the PSOA.[3] Petitioner stated that USF's limited production[4] was incomplete and non-responsive. Petitioner also noted the implausibility, bad faith and unresponsiveness of Father Privett's claim that no correspondence exists because "I do not retain e-mails," and demanded USF's production of electronically stored and archived emails as required in the Inquiry Letter. *Id.* at 20-21. As for documents relating to Michael Bloch, Steve Runyon and Donna Davis, Petitioner objected to USF's production of fragmented e-mail correspondence and its failure to produce full copies of those e-mail chains (given the absence of a privilege log) and USF's failure to produce any email correspondence regarding operation of KUSF after the PSOA went into effect. *Id.* at 22. The little email correspondence produced by USF documented psychology professor Michael Bloch's inability to perform the duties of Chief Operator, and USF's abandonment of licensee responsibility when it dismantled its main studio. *Id.*

Question 10 of the Inquiry Letter asked USF to produce all documents presented to, prepared by or issued by USF's Board of Trustee concerning the proposed sale, the PSOA or CPRN-LLC. Petitioner noted the dearth of responsive documents, and cited one document revealing the Board of Trustees did not approve the PSOA or proposed sale until five (5) months *after* the parties signed the Asset Purchase Agreement and 4-1/2 months *after* USF filed its Form 314 assignment application with the Commission. *Id.* at 22-23. This fact again raised substantial issues as to the licensee's control of station operations.

B. WHILE THE PETITIONS WERE PENDING, HAVING RAISED SUBSTANTIAL ISSUES, IT WAS PREJUDICIAL PROCEDURAL ERROR TO BIFURCATE THE PROCEEDING INTO A PRIVATELY NEGOTIATED CONSENT FROM WHICH PETITIONER WAS EXCLUDED, ON ONE HAND, AND AN ONGOING *EX-PARTE* RESTRICTED LICENSING MATTER ON THE OTHER.

The Communications Act gives two alternative situations where the Commission is directed to hold a hearing -- when:

- a substantial and material question of fact is presented; or
- if the Commission for any reason is unable to make the finding specified [i.e. that the public interest, convenience and necessity will be served].

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3. Over Petitioner's objections, the Staff agreed to limit the scope of this request at USF's request. USF subsequently responded that Father Privett had no responsive documents to Question 9, as modified, based on the claim that he never saves his e-mails.
4. See *infra* at Sections III(E) and (F) concerning Petitioner's ongoing objections to USF's failure to produce a privilege log in violation of FRCP Rule 26(b)(5) and the Inquiry Letter's instructions.

47 U.S.C. Sec. 309(e), referencing Sec. 309(a). The Telecommunications Act of 1996, adding a new Section 309(k), accorded the Commission additional flexibility in cases of broadcast renewal to make findings and apply scaled sanctions without a hearing. But by otherwise leaving Section 309(e) undisturbed the amendments did nothing to change the basic law that the Commission *must* hold a hearing whenever a petitioner raised substantial and material questions with respect to a broadcast application to which Section 309(a) applies.

Petitioner acknowledges that evidentiary hearings are now less common, and with their decline the Commission has become increasingly reluctant to designate. The requirement that it do so, however -- in either of the statutorily defined circumstances -- remains good and effective law. As noted in *Citizens Committee to Save WEFM v. FCC*, 506 F. 2d 246 (D.C. Cir., *en banc*, 1974), "The truth is most likely to be refined and discovered in the crucible of an evidentiary hearing. . . ." *Id* at 266. In that case, among other things, the court noted that serious allegations of misrepresentation could not be evaluated by the Commission unless it held a hearing. The Court has also reversed the Commission and mandated a hearing in the renewal context, *see e.g., California Public Broadcasting Forum v. FCC*, 752 F.2d 670 (D.C. Cir., 1985); *National Association for Better Broadcasting v. FCC*, 591 F.2d 812 (D.C. Cir., 1978); *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F. 2d 621 (D.C. Cir., 1978); *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir., 1988)) as well as in assignment of license cases involving format changes. *See Citizens Committee to Keep Progressive Rock v. FCC*, 478 F.2d 926 (1973).

Once an application is designated for hearing, the use of a consent decree to resolve a petition challenging the basic qualifications of a party to hold a license is prohibited under the Commission's Rules, "Consent orders may not be negotiated with respect to matters which involve a party's basic statutory qualifications to hold a license (see 47 U.S.C. 308 and 309)." 47 C.F.R. Sec. 1.93(b).[5]

Here the staff issued the Inquiry Letter instead of designating the assignment application for hearing, when it had more than enough substantiated and serious charges to so designate. The responsive information obtained made the duty to hold a hearing overwhelming. The subsequent bifurcated resolution of the case, in addition to being virtually unheard of, violated the spirit of Section 1.93(b) of the Rules and the letter of Section 309(e) of the Communications Act. As stated in Section 309(e) "Any hearing subsequently held upon such application shall be a full hearing in

5. "If either party is unwilling to enter negotiations, the hearing proceeding shall proceed." Sec. 1.94(a) of the Rules.

which the applicant and all other parties in interest shall be permitted to participate." The bifurcated approach here was nothing less than an arbitrary and capricious "repeal" of these standards.

The Consent Decree negotiated bilaterally between the culpable parties and the Commission's staff stipulated, against the interests of Petitioner, that in the absence of new evidence none of the findings could be used against the parties, in any pending or new proceeding (Par. 10). The Consent Decree, without findings, reached the conclusory declaration that the facts raised no substantial or material question of basic qualification as to the parties. (Par. 14). And in complete disregard of Petitioner's standing, the Consent Decree announced: "Accordingly, the Bureau is granting the Application [for assignment] as of the Effective Date." The parallel Denial Letter, granting the assignment, was able to take as a given, and thus not to discuss, any of the substantial issues of misconduct raised by Petitioner and other parties, regardless of whether or not they were addressed by the Consent Decree.

This novel procedure denied Petitioner and others the opportunity, by designation order, to have the Commission specify the matters of fact and law involved (Sec. 1.201), and thereafter to move for good cause to have the issues enlarged under Sec. 1.229(a). The denial of hearing divested Petitioner of important procedural rights, including but not limited to the opportunity to request admissions under oath (Sec. 1.246), to conduct other types of discovery (Secs. 1.311 – 1.325), to receive a transcript (Sec. 1.260), and to have the issuance of an initial decision containing "finding of fact and conclusions, as well as the reasons or basis therefore, upon all the material issues of fact, law, or discretion presented on the record . . . ." (Sec. 1.267(b)).

The adopted procedure was especially egregious because it made a farce of the Commission's *ex parte* rules. The application and related petitions to deny were unquestionably restricted proceedings under Sec. 1.1208 of the Rules. Petitioner was formally barred from making any oral or written presentations to the decision makers outside the presence of the Applicant parties. Meanwhile, to develop the Consent Decree, the Applicants met secretly and in private with the decision makers. Petitioners were excluded from all development of the crucial findings of law (and the decision to omit any findings of fact) imbedded in the consent decree. The bifurcated proceeding here renders ridiculous the avowed purpose of *ex parte* rules: "To ensure the fairness and integrity of its decision making, the Commission has prescribed rules to regulate *ex parte* presentations in Commission proceedings." Sec. 1.200 of the Rules.

C. THE CONSENT DECREE ACKNOWLEDGED THAT THE ISSUES PRESENTED BY THE PSOA HAD NEVER BEEN ADJUDCATED BEFORE. THE FINDING OF VIOLATION AND THE SCOPE OF THE SANCTIONS TO FOLLOW WERE NEW MATTER BEYOND THE AUTHORITY OF THE BUREAU AND SHOULD HAVE BEEN PRESENTED TO THE COMMISSION FOR INITIAL DECISION.

In their response to the Inquiry Letter, USF and CPRN-LLC cited several instances in which parties submitted agreements with terms similar to those of the PSOA, and argued that they relied on those submissions in certifying their compliance with Commission Rules. As Petitioner noted, the PSOA embodied a very aggressive and self-serving construction of these precedents, to justify substantial cash consideration for noncommercial station time in a manner not seen before. The Consent Decree acknowledged that "USF and CPRN-LLC did not point out any instance in which the Bureau or the Commission issued a decision in which it considered and found such payment terms to be compliant with Section 73.503(c) of the Rules[.]" (Consent Decree, Par. 5).

Pursuant to Section. 0.283 of the Rules, the Media Bureau Chief is delegated authority to perform all functions of the Bureau, described in Section 0.61, *provided that the following matters shall be referred to the Commission en banc for a decision*:

> * * *
> (c)Matters that involve novel questions of law, fact or policy that cannot be resolved under existing precedents and guidelines.

That limit on delegation here applies to each of the following: the nature of the violation, the interpretation of the rule (Sec. 73.503(c)), the appropriate penalty, and the question of whether the violation had bearing on the parties' basic qualifications. Clearly the matter should have been referred, separately or in conjunction with consideration of the PSOA, to the full Commission.

D. THE COMMISSION MUST CONDUCT A *DE NOVO* REVIEW OF THE SANCTIONS IN THIS CASE

In the unique circumstances of this bifurcated proceeding, Petitioner was denied the opportunity to comment on the sanction, which was negotiated in secret and announced without warning. We do not believe that the factual record was developed sufficiently for Petitioner to form an opinion as to the right sanction, possibly up to and including the revocation of license for KUSF. A hearing is needed going forward.

The monetary sanction of $50,000 to be paid jointly by the Parties is inadequate. By the time the cash payments under the PSOA were suspended in approximately July 2011, USF had received $34,000 in improper cash payments, over and above the terms of the asset sale. As the licensee, it had an enhanced duty to be in full compliance with the rules, compared with the Manager, who was

not a Commission regulatee. A "joint" responsibility for the fine, jointly with a wealthy and motivated buyer, all but assured that the University would walk and pay nothing. In conjunction with the release of the consent decree, the chief of the Media Bureau issued a news release, stating in part: "I hope that our Consent Decree in this case will remind NCE licensees that they cannot monetize their licenses by selling program time for a profit." If so, it certainly will not be by the threat of an empty sanction such as the one we see here.

E. IN WAKE OF THE DOCUMENTS DEMANDED BY STAFF, THE STAFF FAILED OR REFUSED TO PROVIDE TO PETITIONERS THE SO-CALLED PRIVILEGE LOG. IN THE ABSENCE OF EVIDENTIARY HEARING, THE LACK OF OPPORTUNITY TO CHALLENGE THE PRIVILEGE LOG DENIED PETITIONERS DUE PROCESS.

The Consent Decree was issued prior to any ruling on Petitioner's right of access to the privilege log, a key document that was improperly withheld by USF. Procedural due process and the Administrative Procedure Act impose a high degree of formality on agency adjudication.[6] In footnote 1 of their July 29, 2011, joint response to the Inquiry Letter, USF and CPRN-LLC stated they were not providing complete copies, but rather redacted copies of their Response to Petitioners. A significant redaction was USF's request for "confidential treatment" of its privilege log, submitted in response to Request No. 9 seeking all documents from June 1, 2010 to or from Rev. Stephen Privett and other USF employees concerning the proposed sale of the Station, the PSOA or CPRN-LLC. Petitioners never received USF's privilege log prior to issuance of the Consent Decree, despite their strenuous objections. *See Petitioners Comments*, pp. 2 to 5. The practical effect of this refusal was huge. It enabled Applicants to pick and choose the documents they would present, without ever having to state the scope of matters not produced to Petitioners or the reasons for not producing them. This single action did more than anything to reduce Petitioner's nominal participation in the proceeding to a sham.

Under F.R.C.P. Section 26(b)(5), any privilege log should be served on the opposing parties, and be specific enough to determine whether the privilege asserted applies to the document in question. "Generally a party may not file a privilege log under seal absent court order. Even when stipulated to by adverse parties, a court must weigh any interests in confidentiality against that of the

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6. The basic elements of adjudication were famously identified by Judge Friendly in his influential law review article "Some Kind of Hearing." See Hon. H. J. Friendly *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267 (1975). Many of those elements, including the right to engage in discovery or otherwise obtain opposing evidence, and the right to a decision based exclusively on the evidence presented, are entirely absent here.

public to open records. Additionally, by not providing a copy to the opposing party, a party negates the very purpose of the privilege log, which is to enable other parties to assess the applicability of the privilege log or protection." J. E. Grenig, *Federal Civil Discovery and Disclosure: E-Discovery and Records Management*, Section 7:14 at 154 (2012) (citing Carty v. Government of Virgin Islands, 203 F.R.D. 229, 230 (D.V.I. 2001). Cf *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 165 (3d Cir. 1993); *Citizens First Nat. Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944 (7th Cir. 1999). Importantly, adjudicatory bodies typically have discretion to reject a claim of privilege where an insufficient privilege log is provided. *United States v. Construction Products Research, Inc.* 73 F.3d 464 (2nd Cir. 1996); *United States v. British American Tobacco (Investments) Ltd.* 387 F3d 884, 890-891; *Muro v. Target Corp.* 243 F.R.D. 301, 310 (N.D. IL 2007). The Media Bureau, by permitting the Applicants' gamesmanship with the record, preserved the empty shell of an adversarial process, while denying Petitioner it right opportunity participate in this inquiry, or to have its Petition considered on the merits as required by law.

F. WITHOUT AN ADVERSARIAL TESTING OF THE PRIVILEGE LOG, THE COMMISSION'S CONCLUSION THAT THE PARTIES HAD NOT MADE MISREPRESENTATIONS OR LACKED CANDOR WAS WITHOUT ANY ADEQUATE FACTUAL RECORD AND WAS ARBITRARY AND CAPRICIOUS.

Because the claims of privilege never were tested in the adversarial context, the conclusions made by the staff, favorable to the parties to the Consent Decree, cannot be seen to have any basis in fact and, in any event, were completely unexplained. The finding of an absence of intent to conceal was particularly unsupported, because the refusal to produce the privilege log to Petitioners, along with the refusal to produce archived e-mails and other relevant documents was done in bad faith and for the sole purpose of obtaining a tactical advantage in this proceeding.[7] By resolving this dispute via Consent Decree, the Media Bureau effectively precluded Petitioner from reviewing documents (and a summary of withheld documents) that could enable it to evaluate whether USF was in fact truthful in its responses to the Commission. Here, the only stated basis by USF for withholding the privilege log is that some "information contained therein *could* breach the attorney-client privilege." (Joint Response, fn. 26) (emphasis added). As noted in our Reply, USF's refusal to produce its privilege log violated FRCP 26(b)(5)(A)(ii)[8] and Section 0.459(c) of the Commission's Rules and

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7. Indeed, USF's only basis for seeking to limit the scope of the Inquiry Letter was an alleged concern for the Commission's resources.

8. (A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material, the party must:

Regulations, 47 C.F.R. Sec. 0.459(c), as well as the Media Bureau's specific instructions in the Inquiry Letter at page 3. Petitioners strenuously objected to the withholding of the Privilege Log. *See* Reply at 2-5.[9]

Another petitioner, Ted Hudacko, submitted a Freedom of Information Act request, seeking production of the privilege log and certain other relevant documents. See 47 C.F.R. Section 0.46. Incredibly, at the time of the Consent Decree Mr. Hudacko's request was still pending. This approach of "don't confuse us with the facts" truly shows that there was no process of reasoned decision making to be based on a record, and equally no regard for the rights of parties whose participation was invited and then negated by the dealings in private. The process began as an open and public adversarial proceeding, with the Petitioner and all other parties having rights protected by relevant laws, and then ended in dark corridors and a back room, with Bureau staff choosing to believe whatever it wanted to believe of matters whispered in their ears before a complete record had been amassed.

G. WHILE THE PETITION WAS PENDING IN PARALLEL, THE CONSENT DECREE PROCESS HERE WAS MISUSED TO IMMUNIZE THE APPLICANTS AGAINST ANY CONSEQUENCES OF THEIR PROVED OR ADMITTED MISCONDUCT.

Another nefarious result of the Consent Decree is that this *ex parte* process immunized Applicants from the consequence of their misconduct. In essence, the Commission agreed not to do anything with the facts collected in this proceeding, once the decision was made to exclude Petitioners and make a deal. Paragraph 10 of the Consent decree states that in addition to terminating its investigation into violations by the parties,

> The Bureau further agrees that, in the absence of new material evidence, it will not use the facts developed in the Investigation through the Effective Date of this Consent Decree, or the existence of this Consent Decree, to institute any new proceeding, formal or informal, or take

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(i) expressly make the claim; and
(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

9. For instance, Petitioner observed at page 5 of their Reply: "Moreover, because the key affidavits submitted by Applicants are conclusory in nature, and contain summaries of the scope of search for documents, their refusal even to inform Petitioners as to what documents have been withheld undermines Petitioner's ability to examine all of that direct testimony, in comparison with the available factual record."

any action on its own motion against USF or CPRN concerning the matters that were the subject of the Investigation. The Bureau also agrees that it will not use the facts developed in the Investigation through the Effective Date of this Consent Decree, or the existence of this Consent Decree, to institute any proceeding, formal or informal, or take any action against USF or CPRN with respect to either party's basic qualifications, including character qualifications, to be a licensee.

The results here are problematic inasmuch as the Media Bureau staff failed to make any ruling on, or otherwise acknowledge, Petitioner's arguments concerning Applicants' other misconduct, lack of truthfulness and qualification issues. The Media Bureau relieved itself of any duty to investigate or rule on these substantive issues and guaranteed that Applicants' misconduct would remain unpunished going forward. Moreover, it accomplished this goal by short-circuiting the adversarial process and violating Petitioners' due process rights. The immunizing of Applicants' misconduct, while major factual issues remained open, was nothing less than an arbitrary and capricious use of the Consent Decree process.

IV. THIS CASE RAISES FUNDAMENTAL QUESTIONS ABOUT THE COMMISSION POLICY IN LICENSING NONCOMMERCIAL EDUCATIONAL BROADCASTING AND ITS OBLIGATION TO ENSURE THAT THE NCE SPECTRUM IS USED TO PROMOTE THE PUBLIC INTEREST.

A. THE BUREAU INCORRECTLY HELD THAT ALL ISSUES RELATING TO THE ASSIGNEE COULD BE SWEPT AWAY, BY RULING THAT PETITIONERS WERE MERELY PROTESTING A PROGRAM FORMAT CHANGE, A MATTER FOR COMMISSION FORBEARANCE.

Petitioner presented undisputed facts that, once the PSOA went into effect, KUSF' airtime was devoted entirely to broadcasts of a former commercial station, using the same content, the same announcers, and even originating from the same studios that previously originated the commercial programming. The advertisements were omitted. Based on these facts, Petitioners raised the issue of whether this new service complied with requirements of noncommercial, educational licensing.

The Media Bureau initially appeared to share Petitioner's concerns. Question 11(a) of the Inquiry Letter directed the parties to "address specifically how the airing of CPRN-LLC programming over the Station furthers the Licensee's obligation to use the Station for the advancement of an educational program, as required by Section 73.503(a) of the Rules." CPRN-LLC repeated its response that it intended to promote educational purposes "by creating and disseminating cultural broadcast material in the form of specially formatted classical music

programming." This vague and circular response (included nowhere in the initial application) did nothing to clarify how or why "specially formatted classical music" furthers an educational purpose.

Notwithstanding the vacuity of these responses, the Denial Letter concluded that Petitioner had merely raised a "format" issue. "[T]he Commission does not regulate programming formats, nor does it take potential format changes into consideration in reviewing license assignment applications." The Letter, in the dispositive paragraph at the top of page 2, simply cut and paste verbatim text from the earlier case of *Trinity International Foundation, Inc. (WKCP(FM))*, 23 FCC Red 400 (MB, March 12, 2008) ("*Trinity*"). This did not reflect a serious effort, or any effort whatsoever, to come to grips with Petitioner's contentions.[10]

The Denial Letter (and/or the *Trinity* letter, *supra*) cited the Commission's 1976 Policy Statement[11] on Changes in Entertainment Formats, which found program diversity best served by market forces. These letters appear to recognize that virtually all rulings precedent in this area concerned *commercial* formats, not noncommercial service. Both the Denial Letter and *Trinity* letter acknowledged that "market forces cannot be relied upon to regulate programming in the NCE realm," and instead assert that the Commission has a "limited role of facilitating the development of the public broadcasting system rather than determining the content of its programming." The claim in these letters is that forbearance is even more appropriate in noncommercial broadcasting.[12]

Given the special rules for noncommercial eligibility, fund raising, and governmental and tax-exempt support, this claim is impossible to take seriously. The special role of the Commission in

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10. An Agency relying on a previously adopted policy statement rather than a rule must be ready to justify the policy "just as if the policy statement had never been issued," *Bechtel v. F.C.C.*, 957 F.2d 873, 881 (D.C.Cir.1992) ["*Bechtel I* "] (quoting *Pacific Gas & Elec. Co. v. FPC,* 506 F.2d 33, 38- 39 (D.C.Cir.1974)). That was held in Bechtel even though the policy had been followed for nearly 30 years in a myriad of decided cases. Likewise here an Agency replicating the language of an earlier decision on delegated authority, *verbatim*, has not shown that the merits of the case before it were even considered.

11. *See Changes in the Entertainment Formats of Broadcast Stations*, Memorandum Opinion and Order, 60 FCC 2d 858, 865-66 (1976), *recon. denied*, Memorandum Opinion and Order, 66 FCC 2d 78 (1977), *rev'd sub nom. WNCN Listeners Guild v. FCC*, 610 F.2d 838 (D.C. Cir. 1979), *rev'd*, 450 U.S. 582 (1981).

12. The Media Bureau cites *License Renewal Applications of Certain Commercial Radio Stations Serving Philadelphia, Pennsylvania*, Memorandum Opinion and Order, 8 FCC Rcd 6400, 6401 (1993) for the proposition that licensees have broad discretion over programming decisions. Petitioner does not disagree with that precept, but again notes that the decision concerned "commercial" licenses.

furthering noncommercial broadcasting recently was noted in *Minority Television Project, Inc. v. FCC*, 676 F.3d 869 (9th Cir. 2012) ("*MTP*"), which upheld the Commission's ban on commercial advertising over noncommercial broadcast outlets. In upholding that ban (while striking down the Commission's prohibition on public interest and political advertising), the Court reviewed testimony before Congress noting that "commercialization of public broadcasting threatened to focus its programming towards the "lowest common denominator," rather than "diverse audiences," including minorities, women and others. *MTP*, *supra* at 886-887 (citing Hearings before the Subcomm. On Telecommunications, Consumer Protection, and Finance of the H. Comm. on Energy and Commerce, on H.R. 3238 and H.R. 2774, 9th Cong. 1st Sess. (1981)).[13] The Court's decision was a ringing affirmance that Commission involvement in the basic architecture of noncommercial, educational broadcasting, including programming, is Constitutional. Further, we submit, it is an appropriate and, possibly, a required task under the Commission's general duty to "Classify radio stations," and to "Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class." *See* 47 U.S.C. Sec. 303(a) and 303(b).

The Denial Letter also centrally relies upon *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 585 (1981) in support of the proposition that "a change in programming is not a material factor that should be considered by the Commission in ruling on applications for license assignment or transfer." However, in that case the Supreme Court emphasized that "the Policy Statement[14] only applies to entertainment programming. It does not address the broadcaster's obligation to respond to community needs in the area of informational programming. See Tr. Of Oral Arg. 81 (remarks of counsel for the Commission)." Those community needs, and Applicants' refusal to respond to them

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13. In a footnote, The Ninth Circuit also focused on public broadcasting's unique character and purpose, which would disappear if those stations were allowed to resemble commercial stations:

> Since 1939, the FCC has reserved certain frequencies for public television and radio broadcasting stations. 47 CFR Sections 4.131-4.133 (1939) (radio); *41 F.C.C. 148 (1952)* (television). The FCC justified its reservation of frequencies for public broadcast television stations by noting that broadcast frequencies are a scarce national resource, and public broadcast stations would provide "programming of an entirely different character from that available on most commercial stations." *Id. at 166, para. 57.* "When the FCC set aside television frequencies for public broadcast stations, it noted that the 'objective for which special educational reservations have been established--i.e., the establishment of a genuinely educational type of service--would not be furthered by permitting educational institutions to operate in substantially the same manner as commercial applicants.'" *Id.*

14. *Memorandum Opinion and Order*, 60 FCC 2d 858, *recon. denied* 66 FCC 2d 78 (1977).

under the PSOA or as a future licensee, were the specific focus of Petitioner's concerns. The Court in *WNCN* noted that "the Commission should be alert to the consequences of its policies and should stand ready to alter its rule if necessary to serve the public interest more fully." *Id.* at 603 (quoted with approval in *WNYC Communications Group*, 11 FCC Rcd 13841 at Par. 11 (VSD, 1996)). That is precisely what we asked.

Cases applying the notion of forbearance in matters of format to noncommercial licensees or assignees are indeed rare. The 1997 case *WDCU(FM)*, 12 FCC Rcd 15242, DA 97-2069 (MB, Rel. September 24, 1997) concerned the sale of a radio station from the University of the District of Columbia to the National Cable Satellite Corp. (C-SPAN). That case was easily resolved because of the assignee's well-known and admired activities in education, news and public affairs. The holding – which remained at the staff level – has never been broadened to say that the Commission is prevented from determining whether a proposed educational assignee offers a truly educational program service. The only subsequent case citing *WDCU(FM)* again contained cautionary language that weighs against the broad conclusion drawn here. In *Applications of WQED Pittsburgh and Cornerstone Television, Inc.*, 15 FCC Rcd 202, FCC 99-393 Rel. (Dec. 29, 1999), *vacated in part*, 15 FCC Rcd 2534 (2000),[15] the Commission chose not to explore a politically sensitive programming issue involving a religious assignee. But it also noted:

> We will continue, as we have in the past, to closely scrutinize all applications for assignment of noncommercial educational licenses, to ensure that the facility will continue to operate in accordance with our noncommercial educational rules and policies upon assignment, and to take appropriate actions when viewers or other interested parties notify the Commission that a noncommercial educational station is operating contrary to our rules and policies.

Id. at Par. 13. In contrast, the Denial Letter stated: "[I]t is well-settled policy that the Commission does not regulate programming formats, nor does it take potential format changes into consideration in reviewing license assignment applications." As shown above, noncommercial licensee have *always* been subject to special content rules. There is no policy, settled or otherwise, to ignore program proposals and plans in the noncommercial services. And such few subordinate decisions as may exist do not automatically command adherence as times change and new challenges present themselves.

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15. Reversed on other grounds, *National Public Radio, Inc. v FCC*, 254 F.3d 226 (D.C. Cir. 2001).

B. PETITIONER RAISED OTHER IMPORTANT ISSUES OF LAW AND FACT THAT THE DENIAL LETTER FAILED TO ADDRESS.

Upon an application for assignment, it is settled that the Commission is to determine the qualifications of the assignee in the same manner that it would qualify a new applicant.[16] A noncommercial, educational applicant, at a minimum, must comply with three special rules:

1. The entity must be a "non profit educational organization," Sec. 73.503(a), and see FCC Form No. 340, Section II, Question II.

2. The applicant must make a showing "that the station will be used for an educational program," Sec. 73.503 Id., Section II, Question 4(b).

3. The applicant must comply with noncommercial programming restrictions that include a bar to the use of programs in exchange for consideration (Sec. 73.503(c)) and that bar promotional announcements in behalf of for profit entities (Sec. 73.503(d)).

On the third criterion, the Consent Decree here was based on the admission that the Parties had violated the rules restricting consideration. However, Petitioners also raised significant issues in the other areas of qualification. Neither the Consent Decree nor the Denial Letter addressed these issues in any way.

We questioned whether a Limited Liability Company (such as the assignee) could hold a noncommercial, educational license. Here the assignee apparently qualified as an IRS-approved 501(c)(3) tax exempt organization. But not all such organizations have an educational program, and that status does not automatically establish noncommercial eligibility. The eligible entity traditionally is governed by a collective group of offices, the directors, held by persons who have authority only insofar as they act collectively as a board. Conversely, an LLC is composed of Members, and governed by Managing Members, consisting of one or more individuals. The locus of actual authority can be, and usually is, quite obscure. Whether or not such an organization may truly function as a noncommercial entity is an unresolved question of law, notwithstanding that LLCs have received a number of uncontested license grants in the past. CPRN-LLC attempted to avoid this issue, as to themselves, by referencing the recent acquisition of a station in Angwin, CA, BALED-20110118ADM. But that action was uncontested, was routine, and contained no discussion of these issues.

On the question posed above, whether a wholly commercial program service could be stripped of its advertising and reintroduced on a noncommercial station, Applicants baldly alleged

16. *Citizens Committee to Keep Progressive Rock v. FCC*, 478 F.2d 926 (1973).

that there were no program service rules for noncommercial licensees so they could not be in violation.[17] Because this point was never analyzed or considered in conjunction with the Denial Letter and the Consent Decree, we have no idea whether Applicants' self-serving and overly broad view of noncommercial service was accepted here.

The Commission has revisited the question of third party fundraising by NCE stations as recently as this year, and the question of permissible program underwriting (as distinguished from advertising) in recent years. The Commission has not reviewed its policies and priorities for the NCE spectrum as a whole since 1984. *See Commission Policy Concerning the Noncommercial Educational Nature of Educational Broadcasting Stations*, 97 FCC 2d 255 (1984).

Petitioner challenged the educational nature of CPRN-LLC's broadcasts in connection with the PSOA and the pending application. Petition at 7-11; Reply at 2-8. Petitioner noted that CPRN-LLC failed to include any description of educational activities in its application.[18] CPRN-LLC attempted belatedly to cure this defect by submitting a self-serving "Educational Purpose Statement" stating its objective is "creating and disseminating cultural broadcast material in the form of specially formatted classical music programming[.]" However, the program stream offered under the PSOA remained as before, and cannot be expected to change. CPRN-LLC failed to submit any evidence or argument as to how the 24/7 broadcast of classical music, by itself, furthers any educational objective as required under 47 C.F.R. Sec. 73.503(a).

Petitioner also noted CPRN-LLC's intended use of the license as an entryway to a proposed internet-based Music Delivery Service (as described in the Barnes Dissertation). We noted that USF's airwaves had been transformed to broadcast nothing more than a heavily branded commercial FM classical musical stream with the commercials stripped out and with repeated exhortations to visit its website, featuring sponsored links where that music could be purchased. *Petitioner's Comments* at 25. This type of promotion, not done in support of the Station, at least skirts if it does not actually violate the underwriting rules. To consign all these issues to a matter of format change was unfair and arbitrary. As we said:

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17. Response to the Inquiry Letter, July 29, 2011, p 16: "Most recently, the FCC's Working Group on Information Needs of Communities noted that, "[b]ecause noncommercial stations have an educational mission, whose contours have been left unspecified, the FCC has never adopted public interest programming rules for noncommercial stations," [citing S. Waldman and Working Group on Information Needs of Communities, *The Information Needs of Communities - The Changing Landscape in a Broadband Age*, June 9, 2011, at 315 www.fcc.gov/infoneedsreport.

18. *See Commission Policy Concerning the Noncommercial Educational Nature of Educational Broadcasting Stations*, 97 FCC 2d 255 (1984).

> [T]hese issues touch on the very nature of noncommercial radio, and of the activities that are encouraged and protected by Government action, with the reservation of noncommercial spectrum, with the underwriting rules, and with the Federal commitments to funding that date from the Public Broadcasting Act of 1967, 47 U.S.C. Sec. 390 et seq. These issues are not issues of format, but they certainly are issues of money, where it flows and to what purpose.
>
> The proposed transfer also raises substantial public interest issues about consolidation and loss of local control in the Commission's non-commercial educational broadcast service. Both are policies that the Commission has indicated are of great concern. *See e.g. Broadcast Localism,* Report on Localism and Notice of Proposed Rule Making, 23 FCC Rcd 1234 (2008).

Reply at 8.

To reach the conclusion that the new Station design was a valid noncommercial, educational service, the staff appears to have gone no further than the conclusory and self-serving declarations by applicants that they have an educational purpose and program. In view of changed circumstances, the staff instead should have referred the proposal to the Commission, for consideration of the novel policy questions found here. "Even though cable, satellite, and the Internet have changed the nature of television and radio, the broadcast spectrum remains a finite national resource. Congress set aside broadcast frequencies for public stations to ensure Americans would have access to niche programming such as public affairs shows and educational programs for children. *See 41 F.C.C. at 156*, Par. 57 (FCC reserves broadcast frequencies for public broadcast stations because they offer "programming of an entirely different character from that available on most commercial stations." *Minority Television Project, Inc. v. FCC*, 676 F.3d at 882.

In the Public Broadcasting act of 1967, as amended (47 U.S.C. 396, section a) Congress found in pertinent part that:

> (5) it furthers the general welfare to encourage public telecommunications services which will be responsive to the interests of people both in particular localities and throughout the United States, which will constitute an expression of diversity and excellence, and which will constitute a source of alternative telecommunications services for all the citizens of the Nation;

The conditions on noncommercial licensing, set forth in Sec 73.503(c) and analyzed above, are fair implementations of this and related policies. Whether the present applications could be reconciled with that aim is not a simple question. Certainly it is one that takes the Commission's required review well beyond the area of program format.

IV. CONCLUSION

Our Petition to Deny presented competent evidence to establish a series of substantial and material qualification questions, as to assignor and assignee alike. Media Bureau staff should have designated this application for hearing. Instead, it proceeded to propound a series of interrogatories, as though starting down the path to a "paper hearing." Before the record was complete, the staff veered off that course and negotiated a Consent Decree with the Applicants, closing out Petitioner's role and disregarding our statutory rights to participate. In one leg of the bifurcated proceeding, the Consent Decree found a violation of a single rule, concerning program fees, and levied and extracted agreement to a mild fine. All other factual allegations in the Petition and Inquiry Letter were disregarded without comment. In the other leg of the bifurcated proceeding, the Denial Letter characterized our position merely as a "format case," and in lieu of any factual or legal analysis instead cut-and-paste a rejection of that position from a prior case. The excerpt relied on stated the law inaccurately and did not come to grips with our proven facts.

Confronted with such an overall breakdown of decision making by its staff, the Commission has several options: If the Commission grants an application for review, it may affirm, modify, or set aside the order, decision, report, or action, or it may order a rehearing upon such order, decision, report, or action in accordance with Section 405. *See* 47 U.S.C. Sec. 155(c)(6).

The violations of Petitioner's fundamental procedural rights and the failure of Media Bureau staff to complete the factual record preclude their actions from being affirmed. Under the circumstances, we believe the required course is to set aside the Consent Decree, set aside the Denial Letter, and designate the application for hearing on the issues sought initially. On the larger questions of the direction and scope of noncommercial educational broadcast services, we encourage the Commission to issue a clarification in its Order. Alternately, the Commission might prefer to wait until a full record and a full briefing are before it following the Initial Decision.

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July 7, 2012.

CERTIFICATE OF SERVICE

On July 9, 2012, the above APPLICATION FOR REVIEW was served by United States Mail, postage prepaid to the following addressees:

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