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

REPLY IN SUPPORT OF APPLICATION FOR REVIEW of Friends of KUSF

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August 1, 2012

INTRODUCTION

Friends of KUSF ("Friends") replies to the July 20, 2012 Joint Opposition (Opp.) of USF and CPRN ("Applicants"). The Joint Opposition is long on didacticism, but a review of the authorities marching around therein finds little relevancy. As we reply to the main contentions, we need not, and in five pages cannot show every false start charted by these citations.

I. PETITIONERS HAVE STANDING

The Opposition's claims regarding lack of standing are groundless. Reliance on 47 C.F.R. Sec. 1.115 is misplaced, because that Commission rule expressly applies only to *parties who have not previously participated in the proceeding,* who must plead that they are "aggrieved" by the underlying decision.[1] Here, Petitioners participated actively from the start and the Media Bureau acknowledged that they had standing. *See* Footnote 1 of the Denial Letter (stating that Friends of KUSF and Ted Hudacko were Petitioners, and not informal objectors).

The Opposition also erroneously states that Petitioners claim standing based solely on their status as residents of KUSF's city of license. Petitioner is comprised of former staff and volunteers of KUSF who are injured by the loss of their ability to communicate with Bay Area listeners, as well as by the continuing loss of local, diverse *educational* programming and related services on the NCE dial.[2] Those members include former programmers of the only locally-produced Chinese-language news in San Francisco (David Pang), the only programming in Farsi and French (Fari Agharabi), and the only programs directed towards seniors and the disabled (Maggie D.). Members of Petitioner are also uniquely qualified to attest to USF's violations of Commission Rules and their declarations were attached to the Petition, including those of Claudia Mueller (concerning USF's destruction of its main studio) and Robin Nordling (concerning USF's inability to broadcast from its main studio site).

Residents of the listening area may acquire standing by that fact alone. *Office of Communications of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966). That case remains good law today. Not even mentioning the dispositive case, the Opp. finds an outlier case where standing was denied, when it rested solely on a nationwide advocacy organization having two members resident in the community of interest. *Rainbow/PUSH Coalition*, 330 F.2d 539 (D.C. Cir. 2003).

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1. *See* 47 U.S.C. 1.115(a) ("Any person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission. *Any person filing an application for review who has not previously participated in the proceeding* shall include with his application a statement describing with particularity the manner in which he is aggrieved by the action taken and showing good reason why it was not possible for him to participate in the earlier stages of the proceeding. Any application for review which fails to make an adequate showing in this respect will be dismissed.") (Emphasis added); *In re: Association for Local Telecomm. Services*, 11 FCC Rcd 11662, 11665 (1996) (FCC 96-107, Par. 5) ("We see no reason to deny ALTS' participation in this phase of the proceeding in which it has already been active. We therefore deny Bell Atlantic's motion to dismiss the ALTS application for review [under Section 1.115(a)]").

2. *See* Friends of KUSF Petition to Deny at 2 and Supporting Declaration of Nathan Baker.

The Opposition then conflates stricter Article III standing requirements for judicial review of administrative decisions with the more permissive criteria for establishing "administrative" standing.[3] Applicants' selective citations to FCC and court decisions omit critical facts and law that undercut this argument.[4] Applicants' standing argument also is built from the erroneous 'straw man' claim that Petitioners are concerned solely with the type of "programming they have come to enjoy" or with the Applicants' violations of Section 73.503(c). But a cursory review of the Petition and especially of the Media Bureau's responsive Letter of Inquiry reveals that Petitioners raised far broader substantial and material questions regarding USF's and CPRN's basic qualifications. USF and CPRN never satisfactorily answered these and the Consent Decree never addressed them. The Commission knows that a ban on public participation in the absence of injury in fact would undermine the licensing scheme and render it unworkable.[5] Here the standing flows from both – local residency and claims of injury.

II. ENTRY OF CONSENT DECREE IN A CONTESTED MATTER VIOLATED PETITIONER'S DUE PROCESS RIGHTS AND WAS AN ARBITRARY AND CAPRICIOUS ABUSE OF THE MEDIA BUREAU'S AUTHORITY

Our application for review showed that the Consent Decree, by carving out and resolving a core area of misconduct, made the approval of the assignment by Letter an empty ritual. In the process, our rights to participate as full parties under 47 U.S.C. Sec. 309(d) were thwarted. The Opp. answers, at pp. 6 - 10, that sanctions imposed (or here, agreed to) generally are a matter of agency discretion, presumptively not reviewable by the courts. *Heckler v. Chaney*, 470 U.S. 821, 105 S. Ct. 1649, 84 L. Ed.2d 714 (1985); *New York State Dept. of Law v. FCC*, 984 F.2d 1209 (D.C. Cir. 1993). This misses the point of an application for review. At this stage the Commission has the complete right and duty to examine the proceedings below. The Commission may make findings of fact *de novo*, and in no way is bound by the subordinate choice of sanction, or any other matter of decision.[6] For this reason, Opp. footnote 23, using 23 lines and citing eight cases, is irrelevant to the matter at hand. As required of a petitioner, we set forth

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3. *Envirocare, Inc. v. NRC*, 194 F.3d 72, 74 (D.C. Cir. 1999) ("Agencies, of course, are not constrained by Article III of the Constitution; nor are they governed by judicially-created standing doctrines restricting access to the federal courts. The criteria for establishing 'administrative standing' therefore may permissibly be less demanding than for the criteria for 'judicial standing.'"). Petitioner also satisfies this higher judicial threshold, of course, and nothing herein constitutes an admission that Petitioner lacks Article III standing should it become necessary to appeal the Commission's ruling.

4. For instance, see *Timothy K. Brady, et al.*, Letter, 20 FCC Rcd 11987, 11991 ("With respect to the three-pronged standing requirement, traditionally, in a sales context, injury can be asserted in three ways: . . . (3) *petitioner is a resident of the station's service area*") (emphasis added) (citing *Office of Communications of the United Church of Christ v. FCC*, 369 F.2d 994 (D.C. Cir. 1966) ("*UCC*") and *FCC v. Sanders Brothers Radio Station*, 309 US 470 (1940)).

5. See *UCC*, *supra* at p. 1003 - 1005 (explaining why public participation is necessary to bring deficiencies to the Commission's attention). *See also Rainbow/PUSH, supra* at 543.

6. Sec. 1.115(b)(iii) and (iv) of the Rules. See *Moller-Butcher v. U.S. Dept. of Commerce*, 12 F.3d 249 (D.C. Cir. 1994) (Administrative review authority can reverse or vacate the lower level decision. It can generally substitute its decision for the lower level adjudicator's.)

"specific allegation of fact sufficient to show" that the grant would be inconsistent with the needed public interest findings. 47 U.S.C. Sec. 309(d). Nothing in the Opposition pile-up of cases prevents the Commission from changing course now, agreeing with us, and designating the assignment for hearing.

Meanwhile, if the staff rulings unwisely are left to stand, even the claim of "non-reviewable discretion" is on shaky ground. *Chaney*, *supra*, is not absolute, and suggested at least two exceptions applicable to the facts here. One is where the action violated a party's Constitutional rights. *Chaney*, 470 U.S. at 838. Once a person or entity acquires party status, participation is a fundamental Due Process right. In this case, the finding of no deliberate misrepresentation by the assignor or assignee – even if insulated from review for being arbitrary – was also based on a still developing and incomplete record, denying Petitioner's rights as a party to obtain evidence that the staff had directed to be served on us, as well as denying our right to comment and to have that evidence considered. The refusal of Applicants to turn over their privilege log enabled them to freely choose factual matters to be disclosed, or suppressed.[7] In *Chaney,* a second noted exception is where the Agency's action is so extreme as to amount to the abdication of its statutory responsibilities. *Id.* at 833, n. 4.[8] Given the competent and probative evidence offered by Friends as to multiple, serious infractions by the Applicants, mutually and independently, it should be asked whether the staff action amounted to an outright repeal of public petition rights under 47 U.S.C. Section 309(d).

We acknowledge that settlement discussions may be conducted in private under certain provisions of the Administrative Procedure Act. But there is no precedent for what was done here: resolution of a Petition to Deny in an assignment case, by separating out a main issue for resolution by private negotiation, to the exclusion of petitioners. Neither of the two cases relied on (fn. 39) supports this course. In *New York State Dept of Law v FCC*, 984 F.2d 1209 (D.C. Cir. 1993) an enforcement matter proceeded as normally from Order to Show Cause to Consent Degree. Only one appellant claimed "party" status, and that by having participated after the issuance of the OSC. *Id.* at 1217. No separate proceeding, like the petition to deny here, was being eviscerated as a by-product of the private settlement. The only other precedent offered was *Operator Communications, Inc. d/b/a Oncor Communications Inc.*, 14 FCC Rcd 12506 (1999). There the Commission resolved a Title II enforcement action by consent decree and certain objectors sought reconsideration, unsuccessfully. Here the Applicants, citing case after case, apparently were too busy to notice the separate statement of Commissioner Harold Furchtgott-Roth:

> *Re: Oncor Communications, Inc. (File No. ENF 95-04)*
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> I support today's Order denying various petitions and letters requesting reconsideration of our Consent Decree with Oncor Communications. In this Order, the Commission concludes that it

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7. Amazingly, the finding of no disqualifying misrepresentation was made while Mr. Hudacko's FOIA request for the key documents that would confirm or deny the central facts still was pending.
8. *See Northern Indiana Public Service Co. v. FERC*, 782 F.2d 730, 745-6 (7th Cir. 1986) (FERC's refusal to investigate abusive actions alleged by customers amounted to abandonment of regulatory function of ensuring just, reasonable and preferential rates, and therefore was reviewable).

was proper to participate in private negotiations that resulted in a Consent Decree terminating an enforcement matter. I write separately to distinguish this legitimate exercise from the wholly improper, months-long, secretive set of negotiations between FCC bureau staff, at the direction of Chairman Kennard, and the applicants in the proposed SBC/Ameritech license transfer. *Whereas negotiations in the context of an enforcement matter are a common, efficient means of resolving a notice of apparent liability, secret meetings to discuss a license transfer are unprecedented. I repeat here my strenuous opposition to the latter.*

(Emphasis added). In fact we have located no precedent for the bifurcated action here, certainly none where a Petitioner has made a formal, timely and detailed factual and legal case, in good faith, and found itself brushed aside by secret dealings. Even if such a course could be massaged into the precedents for use of consent decrees, the Commission needs to think long and hard about whether or not its processes should be, or should appear to be, so brazenly sleazy.

III. THE MEDIA BUREAU'S FAILURE TO DESIGNATE FOR HEARING OR OTHERWISE ADDRESS PETITIONER'S CONCERNS ALSO CONSTITUTES AN ARBITRARY AND CAPRICIOUS MISUSE OF THE COMMISSION'S STATUTORY AUTHORITY

In arguing that the Media Bureau "considered the full record," the Opp. merely repeats the Order's conclusory statement that "nothing in th[e] record creates a substantial or material question of fact whether either USF or CPRN possesses the basic qualifications to be a Commission licensee."[9] This is a thin thread on which to hang their argument inasmuch as the Order and Denial Letter never addressed those disputed facts or why they were insufficient. For example, Petitioners sought to deny the assignment based on numerous violations of the Act and Commission Rules by USF and CPRN that amounted to a pattern of abuse.[10] Petitioners further argued that CPRN's purpose and programming lacked any educational component whatsoever, thus rendering it unqualified as a NCE licensee.[11] Although the Media Bureau viewed these allegations seriously enough to issue a LOI with detailed question on point, its subsequent Denial Letter failed to provide a "Background" summary of Petitioners arguments (other than mischaracterizing them as "format" related) and evaded any "Discussion" of those arguments or the evidence adduced that would confirm or deny specific points.

Applicants gloss over the absence of any factual record and demand that Petitioners accept this omission as adequate, arguing the Bureau's silence was consistent with prior cases.[12] However, their citations (at fn. 48) are distinguishable because those cases either provide full "Background" and "Discussion" of petitioners and objectors claims, or alternately, summarize those claims and address the basis for their dismissal.[13] Moreover, Applicants' citations at fn. 49 actually support Petitioners claims that

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9. Joint Opposition at 11-12.
10. Application for Review at pp. 1-8.
11. Although Applicants argue CPRN was found qualified as a licensee (by uncontested grant) in 2011, that issue was never examined by the Commission.
12. *See* Opposition at 12-13 and fn. 48 and fn. 49.
13. *See e.g. Rev. Giacomo Capoverdi*, 23 FCC Rcd 209 (2008) and *Percy Squire*, 24 FCC Rcd 2453 (2009).

the Order and Denial Letter were "arbitrary and capricious" because the Media Bureau failed to articulate any basis whatsoever for denying Petitioners claims regarding USF and CPRN's numerous Rules violations, CPRN's premature and unauthorized assumption of control and CPRN's lack of educational purpose or content. [14]

With respect to our legal contentions, Applicants do not address the conclusion that the "Policy Statement" applies only to commercial entertainment programming, and does not address an educational, or any, broadcaster's obligation to provide informational programming.[15] They also fail to address Petitioner's claims that the Consent Decree presented matter beyond the Media Bureau's authority that should have been referred to the Commission.[16] They gloss over the Media Bureau's failure to rule on Petitioner's Motion to Strike, while evading the issue of Applicant's refusal to produce privilege logs despite the express terms of the LOI.[17] These matters take us far beyond the 'straw man' claim that Petitioners were concerned solely with a station's program format change.

CONCLUSION

The inquiry triggered by our petition was terminated before the facts were in. For the reasons given, it is well within the Commission's powers and duties to vacate the consent decree and Letter Decision, and to designate this assignment application for hearing. We submit that it is required to do so in the public interest. Thereafter the facts adduced can determine whether the application should be granted or denied.

August 1, 2012

Respectfully submitted,

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14. *Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997) ("However, because the Board's decision did not respond to two of Frizelle's arguments, which do not appear frivolous on their face and could affect the Board's ultimate disposition, we conclude that the Board's decision was arbitrary."); *Dibble v. Fenimore*, 545 F.3d 208, (2d Cir. 2008) (affirming subsequent district court findings that administrative record supported denial of enlistment, only after "the district court directed the [Air Force] Board to make 'specific and numbered findings of fact, and conclusions of law based on such factual findings' as to each of Dibble's claims, taking special care to enunciate a reason for its decision [so] that the district court would be able to evaluate under the APA's 'arbitrary and capricious' standard.") (citing *Dibble v. Fenimore*, 84 F.Supp. 2d, 315, 322 (N.D.N.Y. 2000)).
15. Application for Review at p. 17 (citing *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 604, fn. 46 (1981))
16. Application for Review at p. 11 (citing Section 0.283(c) of the Rules).
17. Applicants misapprehend Petitioner's cite to the Federal Rules of Civil Procedure and the policy underlying them, which were highlighted to contrast Applicants' flagrant disregard and contempt for Media Bureau instructions and due process generally.

CERTIFICATE OF SERVICE

On August 2, 2012, the above REPLY IN SUPPORT OF APPLICATION FOR REVIEW was served by United States Mail, postage prepaid to the following addressees:

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