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

In Re Applications of	) File No.: BALED-20110125ACE
University of San Francisco (Assignor)	) Facility ID No. 69143
And	)
Classical Public Radio Network LLC (Assignee)	)
For Consent to Voluntary Transfer of Control Station KUSF(FM), San Francisco, California.	)

To: The Commission

Reply in Support of Application for Review by Commission of Order and Consent Decree

July 28, 2012

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I. PETITIONER HAS STANDING

Petitioner has participated in earlier stages of the above-captioned matter and therefore is not required to provide statement re: particularity of aggrievement by the action nor a reason for inability to participate previously.[1] USF and CPRN previously unsuccessfully contested Petitioners' standing in their original Oppositions to Petition to Deny ("PTD")[2] [3], including making false claim that Petitioner had failed to file PTD with the Commission.[4] The Commission has acknowledged standing of Petitioners repeatedly, including in its June 7 Decision Letter.[5] Bogus arguments claiming lack of standing are rehashed in the present Joint Opposition, beginning with claim that Petitioner has failed to show an "injury in fact" or a non-

[1] 47 C.F.R. § 1.115 (a).
[2] *Opposition to Petition to Deny*, File No: BALED-20110125ACE, FIN: 69143, filed by Classical Public Radio Network, LLC, *circa* March 15, 2011.
[3] *Opposition to Petition to Deny*, File No: BALED-20110125ACE, FIN: 69143, filed by University of San Francisco, *circa* March 15, 2011.
[4] *See:* Footnotes 1 in *Opposition's to Petition to Deny* by each CPRN and USF.
[5] *See*: ¶ 1 and Note 1 of Decision Letter to Alan Korn, Esq., Peter Franck, Esq. (Counsels for Friends of KUSF), and Ted Hudacko, by Peter Doyle, Chief Audio Div., Media Bureau, June, 7, 2012.

speculative and "direct injury."[6] In fact, numerous specific examples of direct injury were documented by this Petitioner, as well as others.[7]

CPRN and USF in passing cite *Rainbow/PUSH Coalition I.*[8] Important differences, and parallels, between that case and the present warrant closer attention. *De facto* unauthorized and premature transfer of control by USF to CPRN was well-documented by Petitioners (but ignored by the Media Bureau) as was the "manifested...palpable intent to deceive the Commission"[9] re: main studio issues, dishonestly manipulating the process to successfully limit the scope of their response to the LOI, and withholding the Privilege Log from Petitioners which hindered our ability to effectively comment on the veracity, completeness and accuracy of the Joint Response to the LOI. Rainbow was found by the Court to lack standing, noting that Rainbow had only a single member each in just two of the ten communities of license in question and that the two Rainbow members had demonstrated only *potential* types of injury. In marked contrast, the KUSF matter has multiple Petitioners indigenous to the community of license, including Friends of KUSF with over one hundred members, and at least 23 "informal objectors" (some of whom the Media Bureau demoted to this lesser status on technicalities inapplicable to *pro se's*).[10] [11] CPRN, the proposed new assignee formerly from Colorado, is located in southern California nearly 400 miles distant the community of license. Petitioner provided numerous specific examples of particularized, nonspeculative and concrete injury in fact supported by approximately 15 signed Declarations to prove standing.[12] Those examples of injury in fact apply also resolve whether Petitioner has standing to bring the present Application for Review.

The democratic process was used by supporters of KUSF to obtain the Resolution by the San Francisco Board of Supervisors ("BOS") "recognizing the long and valuable public service of radio station KUSF" and opposing the sale of its license to CPRN[13]. The Resolution withstood the public scrutiny of readings at two full BOS Meetings and another of a BOS subcommittee. The Resolution specifically mentioned the KUSF *Senior News and Disability Report* as well as various other KUSF programs for non-

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[6] *See:* CPRN's and USF' *Joint Opposition to Applications for Review*, pp. 2—5, July, 20, 2012.
[7] *See: Petition to Deny of Friends of KUSF*, sections (IV)(C)(2) and (3), pp. 12—16. *Also see:* Exhibits 1, 4(A)—4(H). February 27, 2011.
[8] *Rainbow/PUSH Coalition v. FCC,* 330 F.3d 539, 546 (D.C. Cir. 2003)
[9] *Id., 541.*
[10] *Picking v. Pennsylvania Railway*, (151 F2d. 240), Third Circuit Ct. of Appeals.
[11] *Puckett v. Cox*, 456 F. 2d 233 (1972) (6th Cir. USCA).
[12] *See:* Hudacko *Reply in Support of Petition to Deny*, pp. 3—5, and Exhibits C—R
[13] *See:* Exhibit C of Hudacko *Petition to Deny*, Feb. 26, 2011. *Also see:* Exhibit D, Letter of California State Senator Lelan Yee to USF, dated February 9, 2011.

English language listeners.[14] Petitioner also introduced Declarations of Margaret Dowling, the *Senior News and Disability* Producer, and Marty Omoto, Director of the California Disability Community Action Network, and asks for the Commission's careful review.[15]

The ruling in Rainbow narrowed the 1966 United Church of Christ v. FCC ("UCC") decision which Rainbow had used as its authority for automatic audience standing.[16] In UCC, "[t]he appellants there had petitioned to intervene in opposition to a broadcaster's application to renew its license, alleging that the station 'did not give a fair and balanced presentation of controversial issues, especially those concerning Negroes.' ... [W]e recognized that 'standing is accorded to persons not for the protection of their private interest but only to vindicate the public interest.'... [W]e found 'no reason to exclude those with such an obvious and acute concern as the listening audience.' We therefore remanded the matter to the Commission with instructions to 'allow standing to one or more of [the appellants] as responsible representatives 'of the audience."[17] Continuing, "[t]he appellants had complained that 'Negro individuals and institutions are given very much less television exposure than others are given and that programs are generally disrespectful toward Negroes.' The Court found Rainbow "ha[d] not made a comparable showing [as UCC's]; indeed it ha[d] not even tried to do so."[18]

Petitioner has passed a test that Rainbow failed by showing that the disabled are an underserved audience in 2012 as African Americans (aka, "Negroes") were in 1966 and have suffered a concrete, specific and particularized injury. KUSF's *Senior News and Disability Report* was the *only* broadcast program of its kind in the entire nation prior to CPRN's assumption of station control January 18, 2011. CPRN has presented no evidence whatsoever of its own efforts to redress the needs of either the disabled audience nor those of the diverse foreign language programming previously served by KUSF.[19]

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[14] *Id. See:* Exhibit C, second page of BOS Resolution, lines 7—17.
[15] *Id.*, p5. and Exhibits Q and R: Declarations of Margaret Dowling, Producer of *KUSF Senior News and Disability Report*, and Marty Omoto, Director, Calif. Disability Community Action Network.
[16] *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966).
[17] *Rainbow/PUSH Coalition v. FCC,* 330 F.3d 542--543 (D.C. Cir. 2003) *"Rainbow/PUSH Coaltion I)").* (Internal citations to the UCC decision omitted for brevity).
[18] *Id.* 543. (Internal citations to the UCC decision omitted for brevity).
[19] *Id.* 544--545.

Furthermore, Rainbow was disqualified on a second grounds because the Commission had by then revised the former "duopoly rule" such that it no longer applied, thus depriving any support for Rainbow's second argument. There is no present analogous rule change by which to disqualify Petitioner. Indeed, the requirements for main studio, capability for broadcast origination, non-abdication of control, and candor in proceedings remain viable and necessary rules. The Rainbow decision continues: **"[T]he Commission would be wise to enforce aggressively the requirement of candor in its proceedings, as a deterrent to potential violators. In that regard, the Supreme Court has stated that the Commission may refuse to renew a license because of the licensee's misrepresentations,** *FCC v. WOKO, Inc., 329 U.S. 223, 67 S. Ct. 213, 91 L. Ed. 204 (1946)*, and we have stated that the Commission '**would be derelict if it did not hold broadcasters to high standards of punctilio, given the special status of licensees as trustees of a scarce public resource.**' *Leflore Broad. Co. v. FCC, 636 F. 2d 454, 461 (D.C. Cir 1980).*"[20] There are no open frequencies in San Francisco and NCE's are scarcer relative to commercial ones. Petitioner finds the willful and repeated misrepresentations by parties CPRN and USF to consummate their deal to the detriment and at the expense of disabled people simply reprehensible and the actions of the Media Bureau to permit such through the flawed consent order arbitrary, capricious and abusive of its discretionary authority.

II. IMPROPRIETY OF SO-CALLED CONSENT ORDER

Pursuant to 47 C.F.R. § 1.94(e) and by not having joined in the agreement, Petitioner appeals the so-called Consent Order. In an attempt to justify the Order to which Petitioner was not aware and most definitely did not consent, the Joint Opposition presents a convoluted chain of references transiting sections 1.93(b), 1.93(a), 1.94, back to 1.93(a),and ending at 1.94(f). Omitted is 47 U.S.C. 208, which is referenced within 1.94(f). 47 U.S.C. 208 provides no further specificity re: consent decrees. The conditions under which *any* consent decree may be negotiated being *only* provided in 47 C.F.R § 1.94(b) as Petitioner originally noted in his Appeal. Indeed, 47 U.S.C. 208 (b)(3) affirms the right of Petitioner to appeal pursuant to 47 U.S.C 402 (a) *contrary* to the claim that an agency consent decree is nonreviewable.

Similarly, the Joint Opposition's claim that the Consent Order is unreviewable is merely a presumption which is inapplicable and rebuttable when either an agency has abdicated its statutory enforcement obligations or abused its discretion in an arbitrary and capricious manner.[21] Permitting this

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[20] *Id.* 545. (**Bold emphasis added**).
[21] *Heckler v. Chaney et. al.,* 105 S. Ct. 1649, 470 U.S., pp. 850--854 (1985).

abusive Consent Order in the present case despite Petitioners having succeeded the tests where Rainbow had failed and having followed the available democratic processes in San Francisco as nearly perfectly as possible as explained above does not serve the public interest and necessity and further will have deleterious impact on our civic polity and will serve to undermine confidence in the Commission as a public institution.

The use and abuse of consent decrees has become a topic of concern by the legislative branch, with the Subcommittee on the Courts, Commercial and Administrative Law, Committee on the Judiciary, United States House of Representatives having conducted a Hearing on the topic February 3, 2012. The judiciary also has criticized the practice, notably Judge Wilkey's dissent which aptly describes the consent decree in the KUSF matter despite having been written in 1983:

"The flaws with government by consent decree run deeper than the superfluity of the device. The device invites abuse--intentional or unintentional.... The device can just as easily be used, however, to establish regulatory "processes" which guarantee the bare minimum of regulation or which enable regulated industries to evade prosecution.... Under the typical broad and imprecise administrative statute, almost any agency action would pass the majority's vague test that the decree somehow be "consistent" with the law.... The abuses to which this device can be put are limited only by the almost inexhaustible imaginations of litigants. The same sorts of "procedural" agreements that the majority finds so innocuous *could be used to limit the manner in which an agency goes about seeking evidence or to constrain the investigative practices of federal agencies*....The greatest evil of government by consent decree, however, comes from its potential to freeze the regulatory processes of representative democracy. At best, even with the most principled and fair-minded courts, the device adds friction....First, the device makes far more difficult the task of those citizens who wish to monitor agency actions and influence their development. ... The commitment that occurs through a consent decree takes place, however, without recourse to the public notice requirements of notice and comment rulemaking.... This weakening of democratic control over agency policy accompanies an increase in the power of two nondemocratic groups. *Government by consent decree enshrines at its very center those special interest groups who are party to the decree. They stand in a strong tactical position to oppose changing the decree, and so likely will enjoy material influence on proposed changes in agency policy*.... As a policy device, then, government by consent decree serves no necessary end. It opens the door to unforeseeable mischief; it degrades the institutions of representative democracy and augments the power of special interest groups. It does all of this in a society that hardly needs new devices that emasculate representative democracy and strengthen the power of special interests."[22]

Respectfully submitted,

Ted Hudacko

Ted Hudacko

Dated July 29, 2012

[22] *Citizens for a Better Environment*, 718 F.2d 1117, (1983). ¶ 89-98. (Wilkey, J., dissenting). *Emphasis added.*