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

In the Matter of University of San Francisco (Assignor), and Classical Public Radio Network LLC (Assignee) For Consent to Assignment of License KUSF(FM), San Francisco, CA	File No. BALED-20110125ACE Facility Id. No. 69143

To: The Commission

JOINT OPPOSITION TO APPLICATIONS FOR REVIEW

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I. INTRODUCTION AND SUMMARY

Classical Public Radio Network LLC ("CPRN") and the University of San Francisco ("USF") hereby oppose the Applications for Review filed in the above-captioned proceeding by (1) Friends of KUSF ("Friends") and (2) Ted Hudacko (together occasionally referred to as "Petitioners").[1] As shown below, the Applications for Review are meritless. *First*, Petitioners lack standing, a defect which, standing alone, requires dismissal of their Applications for Review. *Second*, Petitioners' claims regarding the Bureau's use of the consent decree process in this case ignore the great degree of discretion that agencies possess to determine when settlements are appropriate – discretion that the courts have held is so extensive that it shields such decisions from judicial review. Petitioners' contentions that they were entitled to participate in the negotiations leading to the *Consent Decree* are similarly misplaced, as they rest on citations to rules that simply do not apply to cases that have not been designated for hearing. *Third*, Petitioners are incorrect that the Bureau erred in finding that Petitioners had failed to demonstrate that there was a substantial and material question of fact warranting a hearing. Contrary to Petitioners' contentions, the Bureau fully examined the record and correctly concluded that they had failed to carry their burden. Accordingly, the Applications for Review should be dismissed or denied.

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[1] Mr. Hudacko's Application for Review was filed on July 5, 2012, and the Friends' Application for Review was filed on July 9, 2012; this Opposition is timely filed within 15 days of the earlier two filing dates. *See* 47 C.F.R. § 1.115(d). Each of the Applications for Review challenges (1) the Letter, dated June 7, 2012, from the Chief of the Audio Division of the Media Bureau, denying the Petitioners' Petitions to Deny and granting the application to assign KUSF(FM), which has since changed its call sign to KOSC(FM) (the "Station"), from USF to CPRN ("*Grant Letter*"); and (2) the Order that approved a Consent Decree between USF and CPRN, on the one hand, and the Bureau, on the other ("*Order*" and "*Consent Decree*").

II. PETITIONERS LACK STANDING

As an initial matter, Petitioners lack standing. Section 1.115 of the Commission's rules necessitates a showing that an applicant for review is "aggrieved" by the underlying decision,[2] and in order to satisfy this requirement a party "must 'plead 'injury in fact' fairly traceable to the conduct complained of and likely to be redressed by the requested relief.'"[3] Claims amounting to a "remote" or "speculative" injury are insufficient to confer standing.[4] In addition, in order to establish standing a party must "alleg[e] facts sufficient to show that grant of the application that it" claims should have been denied will "cause . . . a direct injury"[5] and that its harm will be redressed by a favorable agency decision. Petitioners have satisfied none of these requirements, a failure which, standing alone, requires dismissal of their Applications for Review.

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[2] 47 C.F.R. § 1.115(a).

[3] *Applications of KQQK, Inc. for Renewal of License for KQQK(FM) Galveston, Texas*, Memorandum Opinion and Order, 14 FCC Rcd 18550, 18551 (¶ 4) (1999) (citations omitted); *see Application of MCI Commc'ns Corp. and Southern Pacific Telecomms Co.*, Memorandum Opinion and Order, 12 FCC Rcd 7790, 7794 (¶ 11) (1997) (applying Article III test to determine whether an entity was a "party-in-interest" under section 309(d)(1) of the Act); *see also Timothy K. Brady, et al.*, Letter, 20 FCC Rcd 11987, 11990 n.22 ("In an assignment of license proceeding, petitioner must allege and prove: (1) it has suffered or will suffer injury-in-fact; (2) there is a causal link between the proposed assignment and the injury-in-fact; and (3) redressability, meaning that not granting the assignment would remedy the injury-in-fact."); *Wireless Co., L.P.*, Order, 10 FCC Rcd 13233, 13235 & n.25 (¶ 7 & n.25) (1995) (citing *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972)); *Lawrence N. Brandt and Krisar, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 4082 (1988); *Nat'l Broad. Co.*, Memorandum Opinion and Order, 37 F.C.C.2d 897, 898 (¶ 6) (1972).

[4] *E.g.*, *KIRV Radio*, Memorandum Opinion and Order, 50 F.C.C.2d 1010, 1010 (¶ 2) (1975).

[5] *E.g.*, *Mobile Relay Assocs., Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 4320, 4320 (¶ 2) (2001) (citing *AmericaTel Corp.*, 9 FCC Rcd 3993, 3995 (¶ 9) (1995) (in turn citing *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972))).

Petitioners appear to rest their claim of standing primarily on their status as residents of the Station's city of license who will be deprived of programming that they have come to enjoy.[6] It is settled, however, that members of a broadcast station's listening audience cannot establish standing merely by alleging that they "would be deprived of program service in the public interest" if the Commission were to grant a particular license application.[7] Petitioners also offer nothing at all – and could not, in any event, offer anything more than mere speculation – to establish that the Station would have continued its previous program format absent a transfer to CPRN. But the "always available supposition" that programming "just might" be affected by denial of a transfer application is plainly insufficient to establish the causation element of standing.[8] And, of course, because the FCC does not directly oversee program formats,[9] even a denial of the assignment application would not have guaranteed continued broadcast of the Station's prior format. Petitioners' theory thus "flunks the redressibility criterion" as well.[10]

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[6] Friends' Application for Review at 15-18; Hudacko Application for Review at 1-2. The precise basis for Petitioners' claims that they have standing is not entirely clear. Mr. Hudacko, while addressing the issue summarily, states in conclusory fashion that he "has been aggrieved" and suffered "'concrete injury' which is 'likely to be redressed by a favorable decision.'" Hudacko Application for Review at 1-2. Friends do not expressly address the question of their standing at all.

[7] *Rainbow/PUSH Coalition v. FCC*, 330 F.3d 539, 546 (D.C. Cir. 2003) ("*Rainbow/PUSH Coalition I*").

[8] *Huddy v. FCC*, 236 F.3d 720, 723 (D.C. Cir. 2001).

[9] *See also supra* Section IV.

[10] *Huddy*, 236 F.3d at 724; *see also Smith v. FCC*, Order, No. 06-1381 (D.C. Cir. Mar. 29, 2007) (unpublished, copy attached as Exhibit A) (holding that "appellants lack[ed] standing to challenge . . . orders approving [a] consent decree").

Nor do Petitioners' allegations of various rule violations and assorted other misconduct[11] suffice to establish standing. The conduct underlying one of these allegations – the claimed violation of 47 C.F.R. § 73.503(c) – has long since ceased,[12] was not even raised in the petitions to deny, and most certainly cannot be relied upon to establish injury to the Petitioners.[13] More generally, the courts have soundly rejected the theory that "a person has standing to protect the 'public interest' by challenging any decision of the Commission regulating (or, as in this case, declining to regulate) a broadcaster in whose listening or viewing area the person lives."[14] Listeners simply do *not* have "public interest standing to challenge the license of a broadcaster that breaks FCC rules – any FCC rules – regardless of whether their violation affects the programming that listeners hear."[15] Indeed, "while it may be desirable for the Commission to vigorously enforce licensee compliance with its rules, 'it does not follow . . . that the audience is harmed whenever the Commission punishes a particular [violation] with less than the ultimate sanction.'"[16] Petitioners' apparent theory boils down to the exact same one that the D.C. Circuit

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[11] Friends' Application for Review at 4-8, 19-21; Hudacko Application for Review at 5-6.

[12] *Consent Decree* ¶ 4 ("The PSOA fees were ended by an amendment to the PSOA after the Bureau sent its Letter of Inquiry to USF and CPRN."); *see also* Friends' Application for Review at 2.

[13] *See, e.g.*, *Branton v. FCC*, 993 F.2d 906, 909 (D.C. Cir. 1993) ("a discrete, past injury cannot establish the standing of a complainant").

[14] *Rainbow/PUSH Coalition I*, 330 F.3d at 542.

[15] *Rainbow/PUSH Coalition v. FCC*, 396 F.3d 1235, 1243 (D.C. Cir. 2005) ("*Rainbow/PUSH Coalition II*").

[16] *Id.* (quotations and alteration in original) (quoting *Rainbow/PUSH Coalition I*, 330 F.3d at 544-45); *see KERM, Inc. v. FCC*, 353 F.3d 57, 61 (D.C. Cir.2004) (complainant "cannot establish standing simply by asserting a role as public ombudsman" but must assert "injury that is sufficiently unique as to distinguish [complainant] from any other public-minded potential litigant interested in ensuring the faithful enforcement of the Act") (citing *Sierra Club v. Morton*, 405 U.S. 727, 736–38 (1972); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998)).

considered and rejected in *Rainbow/PUSH Coalition*; there, petitioners claimed that "[w]hen the FCC permits the transfer of a license to a party that will not operate in the public interest, the FCC causes injury to the station's audience sufficient to establish standing."[17] But as the Court explained, "[i]f there were no more to standing than that, . . . then the 'irreducible constitutional minimum' would be irreducible only because it could not be any smaller and still be said to exist."[18] The same is true here, and the Applications for Review should thus be dismissed for lack of standing.[19]

III. THE ENTRY OF THE CONSENT DECREE CONSTITUTED A PROPER EXERCISE OF ENFORCEMENT DISCRETION BY THE MEDIA BUREAU.

A. Agencies Have Broad Discretion to Determine that a Matter is Appropriately Resolved by a Consent Decree, and the Bureau Properly Exercised that Discretion Here.

As the Commission has explained, "[a]s a general matter, an agency is presumed to have the discretion to settle or dismiss an enforcement action."[20] Moreover, the FCC has specifically recognized that "the Communications Act of 1934, as amended (the 'Act'), provides [it] 'broad

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[17] *Rainbow/PUSH Coalition I*, 330 F.3d at 542.

[18] *Id.*

[19] To the extent Petitioners might claim standing based on an alleged procedural harm, this too would fail. Although in some circumstances a "'procedural injury' can constitute an injury in fact for the purpose of establishing standing," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-73 n.8 (1992), a party claiming procedural standing must: (1) demonstrate the existence of a procedural right; (2) seek "to enforce a procedural requirement the disregard of which could impair a separate concrete interest;" and (3) show that they are within the "zone of interests" protected by the procedural requirement. *E.g., City of Waukesha v. EPA*, 320 F. 3d 228, 234 (D.C. Cir. 2003); *Douglas Cnty. v. Babbitt*, 48 F.3d 1495, 1500-01 (9th Cir. 1995). Because, as shown below, Petitioners had no right to participate in the negotiations leading to the Consent Decree, they could not rely on the procedural standing doctrine either.

[20] *Emmis Communications Corp.*, Order on Reconsideration, 21 FCC Rcd 12219, 12221 (¶ 6) (2006) ("*Emmis*"); *Viacom, Inc., Infinity Radio Inc., Licensee of Station WLLD(FM), Holmes Beach, Florida*, Forfeiture Order, Order on Reconsideration, 21 FCC Rcd 12223, 12226 (¶ 6) (2006) ("*Viacom*").

discretion' to settle enforcement actions."[21] In fact, the courts – including the Supreme Court – have repeatedly held that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's *absolute* discretion."[22] As result, such decisions are presumptively not subject to judicial review,[23] and the D.C. Circuit has expressly found that the presumption of nonreviewability that is generally applied to the

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[21] *Emmis*, 21 FCC Rcd at 12221 (¶ 6) (citing *Parents Television Council, Inc. v. FCC*, 2004 WL 2931357 (D.C. Cir. Dec. 17, 2004) (holding that decision to enter into the Consent Decree at issue in that case was a nonreviewable exercise of agency discretion); *New York State Dep't of Law*, 984 F.2d 1209, 1215 (D.C. Cir. 1993) (citing S. Rep. No. 580, 95th Cong., 1st Sess. 25 (1977)).

[22] *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (emphasis added); *see New York State Dep't of Law*, 984 F.2d at 1214.

[23] *See, e.g.*, *Parents Television Council, Inc. v. FCC*, No. 04-1263, 2004 WL 2931357, *1 (D.C. Cir. Dec. 17, 2004) (rejecting challenges to consent decree because "[t]he decision of the Federal Communications Commission to enter into the consent decree is a nonreviewable exercise of agency discretion"); *Smith v. FCC*, Order, No. 06-1381 (D.C. Cir. Mar. 29, 2007) (unpublished, copy attached as Exhibit A) (same, where appellant had argued in response to FCC motion to dismiss that the agency had entered into the consent decree in order to evade its statutory obligation to designate license renewal applications for hearing pursuant to 47 U.S.C. § 309); *Baltimore Gas & Elec. Co. v. FERC*, 252 F.3d 456, 459 (D.C. Cir. 2001) ("This Court has held that the *Chaney* presumption of nonreviewability extends not just to a decision whether to bring an enforcement action, but to a decision to settle."); *Fort Sumter Tours, Inc. v. Babbitt*, 202 F.3d 349, 357 (D.C. Cir. 2000) (holding that a "settlement determination" was "nonreviewable"); *Starr v. FCC*, No. 96-1295, 1997 WL 362730, *1 (D.C. Cir. May 20, 1997) (unpublished) (granting motion to dismiss, noting presumption of nonreviewability of settlement decisions); *New York State Dep't of Law*, 984 F.2d at 1214 ("an agency's decision to settle or dismiss an enforcement action is nonreviewable"); *Operator Commc'ns, Inc. d/b/a Oncor Commc'ns, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 12506, 12514 (¶ 16) (1999) (rejecting petition for reconsideration of consent decree, citing *New York State Dep't of Law* for proposition that "a consent decree is nonreviewable"); *see also Heckler*, 470 U.S. at 831 ("an agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion" and therefore is presumptively unreviewable); *Kisser v. Cisneros*, 14 F.3d 615, 621 (D.C. Cir. 1994) (finding HUD's decision not to initiate debarment proceedings unreviewable); *Warner v. FCC*, 990 F.2d 1378, 1993 WL 87965 (D.C. Cir. Mar. 17, 1993) (No. 91-1571) (Table, text in Westlaw) (FCC decision not to commence license revocation proceedings not reviewable).

decision to settle "is not rebutted by the FCC's substantive statute."[24] Petitioners' suggestions that the *Consent Decree* was somehow *ultra vires*[25] are, accordingly, incorrect.[26]

Petitioners' claims that the Bureau improperly exercised delegated authority are similarly unfounded. Their principal contention on this score relates to the construction of the restrictions imposed by 47 C.F.R. § 73.503(c) on the receipt of payments by NCE-FM stations and the finding that the PSOA's payment terms violated those restrictions.[27] Although Petitioners are correct that, prior to the *Consent Decree* in this case, there were no decisions expressly holding payment terms such as those set forth in the PSOA to be permissible, here the parties *admitted* a violation of the regulatory restriction, making the absence of precedent immaterial. Once that admission was made, the question whether the short-term violation of such a rule created a substantial and material question of fact warranting a hearing fell squarely within the scope of the Bureau's delegated authority. So, too, did the question whether Petitioners' remaining claims – including those concerning unauthorized transfer of control, main studio issues, provision of a qualified NCE-FM service, and misrepresentation[28] – necessitated a hearing. And, contrary to

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[24] *New York State Dep't of Law*, 984 F.2d at 1215.

[25] Friends' Application for Review at 8-10, 14-15; Hudacko Application for Review at 2-3.

[26] The use of a consent decree to resolve the allegations raised by Petitioners is also consistent with the manner in which the Commission routinely resolves contested applications seeking approval of license transfers or assignments. In countless transactions, the FCC resolves claims raised in petitions to deny and/or informal objections by relying on applicants' voluntary commitments – which are then made conditions of the FCC's approval – to take or not to take certain actions. *See, e.g.*, *Qwest Commc'ns Int'l Inc. and CenturyTel, Inc. d/b/a Centurylink*, Memorandum Opinion and Order, 26 FCC Rcd 4194 (2011). Although different in form, the *Consent Decree* used here was no different in substance.

[27] *See* Friends' Application for Review at 11; *see* Hudacko Application for Review at 5.

[28] Hudacko Application for Review at 5.

Friends' contention,[29] the question of the appropriate amount to be paid pursuant to the *Consent Decree* was a matter properly resolved by the Bureau on delegated authority.

Despite Friends' claims to the contrary,[30] the Bureau also acted well within its discretion in agreeing not to use the facts developed in its investigation or the existence of the *Consent Decree* concerning the subjects of the investigation or to institute any other proceeding or take any other actions against USF or CPRN with respect to either party's qualifications to hold Commission licenses. This type of agreement is commonplace in FCC consent decrees. Particularly in cases, such as this one, in which a consent decree itself expressly finds no basis to question a party's basic qualifications, this provision merely memorializes the binding nature of that express finding. Further, as the Commission has explained in rejecting similar challenges, an "agreement in return [for a voluntary payment] to terminate the pending enforcement actions against [a licensee], and not to consider the facts related to such actions in connection with other [. . .] applications, 'simply represents the *quid pro quo* that the agency found necessary to procure' [the licensee's] agreement to resolve these matters."[31]

B. Petitioners Were Not Entitled to Participate in the Consent Decree Negotiations.

Petitioners also contend that they were deprived of an alleged right to participate in the negotiations which led to the *Consent Decree*,[32] but this too is incorrect. In support of their claim, Petitioners point to a number of FCC rules that grant parties the right to participate in

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[29] Friends' Application for Review at 11.

[30] *Id.* at 14.

[31] *Viacom*, 21 FCC Rcd at 12227 (¶ 6) (quoting *Schering Corp. v. Heckler*, 779 F.2d 683, 687 (D.C. Cir. 1985)).

[32] Friends' Application for Review at 9-10; Hudacko Application for Review at 3-4.

consent decree negotiations,[33] but all of the rules that they cite apply only to *hearing* proceedings. 47 C.F.R. § 1.93(b) permits negotiation of a "consent order," which 47 C.F.R. § 1.93(a) defines as "a formal decree accepting an agreement between a party to an adjudicatory *hearing* proceeding held to determine whether that party has violated statutes or Commission rules or policies and the appropriate operating Bureau."[34] 47 C.F.R. § 1.94, in turn, sets forth the procedures that apply to negotiations of "consent orders" defined in 47 C.F.R. § 1.93(a).[35] Moreover, 47 C.F.R. § 1.94(f) expressly states that Section 1.94 "shall *not* alter any existing procedure for informal settlement of any matter *prior to designation for hearing*."[36] But here, although Petitioners claim that the application *should have been* designated for hearing (an argument which, as shown in Section IV below, lacks merit), it never was. The FCC's rules that *did* apply to this proceeding, moreover, expressly exempt communications "requested by (or made with the advance approval of) the Commission or staff for the clarification or adduction of evidence or for the resolution of issues, *including possible settlement*" from the class of communication that are prohibited in "restricted proceedings,"[37] as the agency has itself

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[33] *See* Friends' Application for Review at 9 (citing 47 C.F.R. § 1.93(b)); Hudacko Application for Review at 3-4 (citing 47 C.F.R. §§ 1.93(b), 1.94(a)-(b), 1.94(e)); *see also* Friends' Application for Review at 9-10 (citing 47 U.S.C. § 309(e) for the proposition that "'[a]ny hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate").

[34] 47 C.F.R. § 1.93(a) (emphasis added).

[35] *Id.* § 1.94; *see id.* § 1.93(a) (setting forth definition of "consent order" "[a]s used in this subpart"). Mr. Hudacko's citation of 47 C.F.R. § 1.302, *see* Hudacko Application for Review at 4 n.16, is similarly inapposite, as that provision affords administrative appeal rights only in the event that a "presiding officer . . . terminates *a hearing proceeding*." 47 C.F.R. § 1.302 (emphasis added). And, even Friends itself contends only that the right of participation applies "[o]nce an application is designated for hearing." Friends' Application for Review at 9.

[36] 47 C.F.R. § 1.94(f) (emphases added).

[37] 47 C.F.R. § 1.1204(a)(10) (emphasis added).

explained in rejecting numerous identical challenges before.[38] In addition, both the Commission and the courts have held that the FCC has discretion to conduct settlement negotiations in private under the APA.[39] More generally, the Communications Act provides the FCC with broad discretion regarding "the manner of conducting its business which would most fairly and reasonably accommodate the proper dispatch of its business and the ends of justice."[40] In short, the manner in which the parties negotiated the *Consent Decree* was entirely permissible.

IV. THE BUREAU CORRECTLY FOUND, BASED ON THE RECORD BEFORE IT, THAT PETITIONERS FAILED TO RAISE A SUBSTANTIAL AND MATERIAL QUESTION OF FACT WARRANTING A HEARING.

Petitioners also claim that the Bureau erred in determining that a hearing was not required.[41] But in order to justify the burden of an evidentiary hearing, Petitioners were required

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[38] *See, e.g.*, *Viacom*, 21 FCC Rcd at 12227 n.22 (¶ 6 & n.22) ("Petitioners' suggestion that the settlement discussions leading to the Consent Decree violated the Commission's *ex parte* rules lacks merit. . . . Those discussions fall within the exception to the general prohibition of *ex parte* communications in restricted proceedings for communications "requested by (or made with the advance approval of) the Commission or staff for the clarification or adduction of evidence or for the resolution of issues, including possible settlement.") (quoting 47 C.F.R. § 1.1204(a)(10) and citing *New York State Dep't of Law*, 984 F.2d at 1217-18); *Emmis Commc'ns Corp.*, 21 FCC Rcd 12219, 12221 (¶ 6) (2006) (same); *Capstar TX Ltd. P'ship*, 22 FCC Rcd 4866, 4871 (¶ 5) (2007) (rejecting petition for reconsideration based on alleged *ex parte* violations stemming from negotiation of consent decree and stating that "Section 1.1204(a)(10) of the Commission's Rules specifically exempts from the ex parte prohibitions those presentations "requested by (or made with the advance approval of) the Commission or staff for the clarification or adduction of evidence, or for the resolution of issues, including possible settlement, subject to" certain limitations not present here. Any discussions that led to the consent decree with Clear Channel fell within this exception.") (footnote omitted).

[39] *See Operator Commc'ns, Inc. d/b/a Oncor Commc'ns, Inc.*, 14 FCC Rcd 12506, 12514-15 (¶ 16) (1999); *New York State Dep't of Law*, 984 F.2d at 1218-19 (holding that under the APA "agencies and parties are authorized to undertake the informal settlement of cases," and leaves the "precise nature of [such] informal procedures," including whether to provide public notice, to the agency itself) (quoting S. Doc. No. 248, 79th Cong., 2d Sess. 24 (1945)).

[40] *FCC v. Schreiber*, 381 U.S. 279, 289 (1965) (quoting *FCC v. WJR, The Goodwill Station*, 337 U.S. 265, 282 (1949)).

[41] Friends' Application for Review at 4-9; Hudacko Application for Review at 3, 5.

to put forth evidence establishing the existence of "substantial and material questions of fact,"[42] a burden which the Bureau, after considering the full record before it (including the voluminous materials submitted in response to the Commission's LOI), properly found they failed to meet.

Petitioners contend that the Bureau improperly overlooked certain of their contentions,[43] but the Bureau's own statements demonstrate otherwise. The *Order* approving the *Consent Decree* indicates that the Bureau considered the entire record compiled in response to the LOI in reaching its conclusions. As the *Grant Letter* explains, the investigation initiated by the LOI was an outgrowth, in part, of the petitions to deny filed by Petitioners,[44] and – as Friends' own Application for Review makes clear – the LOI posed inquiries relevant to each of the alleged "substantial and material questions of basic qualification" that Friends claims it raised.[45] The record compiled in response to the LOI was extensive. Indeed, it included a voluminous response from USF and CPRN, and Petitioners themselves (and certain other individuals) submitted "Comments" and numerous other pleadings.[46] Furthermore, those pleadings purported

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[42] 47 U.S.C. § 309(d)(2).

[43] Friends' Application for Review at 15-21 (claiming that the Bureau unduly emphasized format-related issues and overlooked "other important issues of law and fact that the denial letter failed to address"); Hudacko Application for Review at 4-6 (claiming that "[t]he consent agreement addresses only violations from the [PSOA]" and that "Petitioners in this matter have raised material and substantial issues of violations besides the PSOA").

[44] *Grant Letter* at 1 (enumerating petitions to deny and informal objections and stating that "[b]ased on those filings, together with our review of the application and related documents, we initiated an investigation into the proposed transaction").

[45] Friends' Application for Review at 4-8, 15-16; *see id.* at 19-20.

[46] These filings, some of which were the subject of responsive pleadings by USF and/or CPRN, included, among others, a June 28, 2011 "Motion to Dismiss" filed by Mr. Hudacko; "Comments" filed by Friends and "Commentary" filed by Mr. Hudacko on August 11, 2011; "Commentary" filed by Loren Dobson on August 18, 2011; an August 29, 2011 "Motion to Strike" filed by the Friends, as well as a response to CPRN's opposition to that document filed by Friends on September 9, 2011.

to raise additional issues that had appeared nowhere in the initial petitions to deny, including issues related to compliance with 47 C.F.R. § 73.503(c).

The *Order* expressly stated its decision was "[b]ased on the record before" it, and concluded that "nothing in that record creates a substantial or material question of fact whether either USF or CPRN possesses the basic qualifications to be a Commission licensee."[47] The *Grant Letter*, in turn, relied on the *Order*'s finding that that record provided no basis for concluding that a substantial or material question of fact had been raised in support of its decision to grant the applications. In so doing, the *Grant Letter* considered a record that included *more* than it was required to, including issues not raised in any of the petitions to deny, and thereby, if anything, *exceeded* the agency's statutory obligations. In any event, the Bureau's action was entirely consistent with numerous other cases in which applications have been granted, over petitions to deny and other third-party objections, based on similar findings

[47] *Order* ¶ 4.

contained in consent decrees.[48] Thus, contrary to Petitioners' contentions, the Bureau's consideration of their claims was more than adequate.[49]

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[48] *See, e.g., Applications of Comcast Corp., Gen. Elec. Co. and NBC Universal, Inc.*, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4349 (¶ 275) (2011) (denying petitions to deny based on consent decree and "based upon our review of the record," "conclud[ing] that NBCU has the basic qualifications to be a Commission licensee" and "that there are no remaining substantial and material questions of fact at issue"); *Percy Squire*, Letter, 24 FCC Rcd 2453, 2454-55 (2009) (denying informal objection alleging, *inter alia*, unauthorized transfer of control and granting assignment applications in reliance on finding in consent decree that investigation raised no substantial or material questions of fact regarding the assignee's basic qualifications); *Rev. Giacomo Capoverdi*, Letter, 23 FCC Rcd 209, 211, 212 (2008) (denying petition to deny and granting renewal applications based on finding that consideration of certain allegations was barred by a consent decree and rejecting arguments that the consent decree was unlawful); *Howard F. Jaeckel, Esq.*, Letter, 22 FCC Rcd 20089, 20090-92 (2007) (denying informal objection alleging, *inter alia*, unlawful broadcasts that pre-dated an existing consent decree and violation of that consent decree and granting renewal application based on findings that consideration of programming-related allegations was barred by the existing consent decree and that a new consent decree resolved other issues).

[49] *See Viacom*, 21 FCC Rcd at 12227 (¶ 7) (rejecting claim that Commission "ignore[d] the potential character issues raised by" the licensee's alleged violations of FCC rules, and stating that, "[r]ather, we fully considered all potential basic qualifications issues raised . . . and specifically determined that they did not raise substantial and material questions of fact as to whether [the licensee] possesses the requisite qualifications necessary to be a Commission licensee") (citing *Viacom, Inc.*, 19 FCC Rcd 23100, 23103 (¶ 4) (2004), in which the FCC had stated "[b]ased on the record before us, in particular [the licensee's] admission that some of the material it broadcast [violated FCC rules], and the remedial efforts to which [it] has agreed, we conclude that there are no substantial and material questions of fact in regard to these matters as to whether [the licensee] possesses the basic qualifications, including its character qualifications, to hold or obtain any FCC licenses or authorizations"); *Emmis*, 21 FCC Rcd at 12221-22 (¶ 7) (rejecting similar claim and stating that "[h]ad we not so concluded, we could not have agreed to the provisions of the Consent Decree regarding our use of the facts here in connection with future applications"); *see also, e.g., Frizelle v. Slater*, 111 F.3d 172, 176-177 (D.C. Cir. 1997) ("[A]n agency's decision need not be a model of analytic precision to survive a challenge. A reviewing court will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned. All that is required is that the Board's decision minimally contain a rational connection between the facts found and the choice made.") (internal quotations and alteration omitted); *Dibble v. Fenimore*, 545 F.3d 208, 219 (2d Cir. 2008) ("[T]he Board was not required to provide written findings about every piece of evidence that it considered. Agencies need only articulate a rational connection between the facts found and the choice made, and a court will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned. Nor do policy considerations favor such a rule. Requiring agencies to give explicit notice of every piece of evidence that they consider and find unpersuasive would merely multiply the length of agency decisions, and the time taken in rendering them, with no significant

Friends' allegation that the Bureau focused disproportionately on issues related to the change in the Station's format is similarly unfounded and is based on a misreading – or mischaracterization – of the *Grant Letter*. As the *Grant Letter* makes clear, the *Consent Decree* "does not address format or programming issues," pursuant to longstanding Commission policy that has been upheld by the Supreme Court.[50] Because the Petitions themselves raised concerns regarding programming and format, however, the Bureau found it appropriate to explain, *separate and apart* from the *Order* and *Consent Decree*, why it was also rejecting those claims. Thus, rather than ruling that Friends was "merely protesting a format change,"[51] the Bureau was simply explaining why such a protest – which was indisputably *a part* of Petitioners' challenge – did not warrant a hearing under established Commission precedent.

In any event, as CPRN and USF demonstrated in their oppositions to the petitions to deny, Petitioners failed to establish the existence of substantial and material questions of fact as necessary to warrant a hearing. In short, CPRN has previously been found qualified as a Commission licensee, and both of its members themselves hold FCC licenses; USF remained in *de jure* and *de facto* control of the Station prior to consummation of the assignment following Commission approval; and there were no violations of any rules, let alone any violations serious enough to have required a hearing in this case.[52] And, although the Applications for Review make plain Petitioners' *disagreement* with the FCC's policy of deferring to licensee judgment

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(Continued . . .)
increase in clarity or utility.") (internal quotations and citations omitted).

[50] *Grant Letter* at 2.

[51] Friends' Application for Review at 15; *see id.* at 15-18.

[52] The Oppositions of USF and CPRN to the Petitions to Deny, both filed on March 15, 2011, are hereby incorporated by reference in their entirety.

regarding whether a particular program format advances an educational program as required by 47 C.F.R. § 73.503(a),[53] there can be no dispute that the Bureau properly applied that policy in this case. Not only has the policy been in effect since 1976 and upheld by the Supreme Court,[54] but it is also supported by abundant contemporary precedent[55] and, indeed, compelled by the First Amendment and the prohibition on censorship set forth in the Communications Act.[56]

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[53] Friends' Application for Review at 15-18.

[54] *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 595 (1981) (holding that in deciding not to review format changes, "the Commission has not forsaken its obligation to pursue the public interest," but, "[o]n the contrary, it has assessed the benefits and the harm likely to flow from Government review of entertainment programming, and on balance has concluded that its statutory duties are best fulfilled by not attempting to oversee format changes.").

[55] *See Reexamination of the Comparative Standards for Noncommercial Educ. Applicants, Further Notice of Proposed Rulemaking*, 13 FCC Rcd 21167, 21668 n.2 (¶ 2 n.2) (1998) ("NCE stations must promote a primarily educational purpose and not air commercials. Within those limits, there are many programming choices on NCE stations, such as instructional programs, programming selected by students, bible study, cultural programming, in-depth news coverage, and children's programs such as Sesame Street that entertain as they teach."); *Casa de Oracion Getsemani*, 23 FCC Rcd 4118, 4121 (¶ 6) (2008) (same); *Creative Educational Media Corp., Inc.*, 22 FCC Rcd 12947, 12949 (2007) (stating that "we generally defer to a licensee's editorial judgment as to what constitutes 'educational' programming, unless that judgment is arbitrary or unreasonable" and rejecting claims regarding programming presented by informal objector that "[u]ltimately, amount[ed] to little more than a difference of opinion with [the licensee] over what types of programming best serve the needs of the community of Moore, Oklahoma"); *Amendment of Section 73.202(b)*, 19 FCC Rcd 3449, 3450 (¶ 6) (2004) ("[W]e have held that a noncommercial educational station is required to meet the needs and interests of the community and thus is a transmission service for purposes of the allotment priorities. We do not consider format in these matters.") (footnotes omitted); *see also William Marsh Rice University*, 26 FCC Rcd 5966, 5968 (2011) (rejecting petition to deny assignment application where petitioner complained of format change to classical music); *Trinity Int'l Found., Inc, WKCP (FM), Miami, FL*, Letter, 23 FCC Rcd 4000 (2008) (same).

[56] 47 U.S.C. § 326 ("Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.").

Equally groundless are Petitioners' claims regarding whether the privilege log produced by USF as part of its LOI response should be released in response to Mr. Hudacko's FOIA request.[57] The mere pendency of a dispute regarding the release of that document provided no basis for delaying action in the assignment application, and all arguments concerning the FOIA request are appropriately subject to resolution in the separately pending FOIA proceeding in which Mr. Hudacko has fully participated.[58] In any event, however, as shown in USF's Application for Review in the FOIA proceeding, his claim of entitlement to the privilege log lacks merit.

V. CONCLUSION

For the foregoing reasons, the Applications for Review should be dismissed or denied.

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[57] Friends' Application for Review at 12-13; Hudacko Application for Review at 2. Petitioners' repeated citation to the provisions of the Federal Rules of Civil Procedure is particularly inapposite, as those rules do not apply to Commission proceedings. *See Stale or Moot Docketed Proceedings*, 19 FCC Rcd 2527, 2534 (¶ 18) (2004) ("the Federal Rules of Civil Procedure govern the judicial proceedings of the federal district courts, not the administrative proceedings of the FCC").

[58] *See Percy Squire*, Letter, 24 FCC Rcd 10669, 10673 (2009) (denying objections to assignment applications and granting applications while admonishing filer "for filing frivolous and obstructive pleadings" and stating, with respect to issues raised concerning a separately pending FOIA proceeding, that "[a]lthough not fully resolved as of the date of this letter, any concerns regarding the FOIA request should be directed to th[e] Bureau" that was considering the request).

Respectfully submitted,

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Dated: July 20, 2012

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

EXHIBIT A

No. 06-1381

September Term, 2006

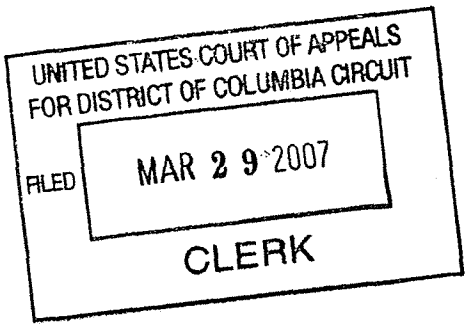
Filed On:

David Edward Smith, et al.,
Appellants

v.

Federal Communications Commission,
Appellee

Emmis Communications Corporation and Emmis Radio License, LLC,
Intervenors



BEFORE: Randolph, Brown and Kavanaugh, Circuit Judges

ORDER

Upon consideration of the motion to dismiss and to defer filing of record and briefing schedule, the opposition thereto, and the reply, it is

ORDERED that the motion to dismiss be granted. The decision of the Federal Communications Commission to enter into the consent decree is a nonreviewable exercise of agency discretion. See Heckler v. Chaney, 470 U.S. 821 (1985). Furthermore, the appellants lack standing to challenge the orders approving the consent decree. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992); Branton v. FCC, 993 F.2d 906, 909 (D.C. Cir. 1993). It is

FURTHER ORDERED that the motion to defer filing of record and briefing schedule be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Linda D

Deputy Clerk/LD

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing JOINT OPPOSITION TO APPLICATIONS FOR REVIEW was served on the following via U.S. Mail, postage prepaid, on July 20, 2012:

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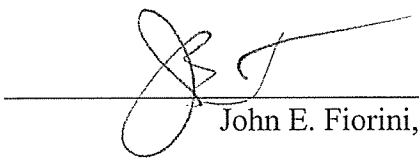

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