

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

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

MEMORANDUM OPINION AND ORDER

Adopted: September 16, 2015

Released: September 17, 2015

By the Commission:

1. The Commission has before it: (a) an Application for Review by Commission of Order and Consent Decree (“Hudacko AFR”) filed by Ted Hudacko (“Hudacko”) on July 5, 2012; (b) an

Application for Review (“Friends AFR”) filed by Friends of KUSF (“Friends”) on July 9, 2012; and (c) related pleadings.¹ Both the Hudacko AFR and the Friends AFR seek review of two orders issued in connection with the captioned assignment of license application (the “Application”) for noncommercial educational (“NCE”) radio station KOSF(FM) (formerly KUSF(FM)), San Francisco, CA (the “Station”): (a) a Media Bureau (“Bureau”) letter decision that denied petitions to deny and informal objections to the Application (“Bureau Letter”)²; and (b) a Bureau Order (“Order”) approving a Consent Decree (“Consent Decree”) among the Bureau, University of San Francisco (“USF”), and Classical Public Radio Network LLC (“CPRN”).³ For the reasons set forth below, we deny both the Hudacko AFR and the Friends AFR.

2. Both Hudacko and Friends filed petitions to deny the Application, which sought consent to the sale of the Station by USF to CPRN. Those petitions focused on the programming aired by the Station pursuant to a time brokerage agreement between USF and CPRN and argued that the sale transaction would not serve any educational purpose or promote broadcast localism or diversity. The Friends petition to deny also questioned CPRN’s qualifications to hold an NCE license and alleged certain statutory and rule violations at the Station (an unauthorized transfer of control of the Station and a violation of the main studio rule).⁴ Based on its review of the record, the Bureau initiated an investigation into potential statutory and rule violations at the Station.⁵ That investigation culminated in the Consent Decree, in which USF and CPRN admitted that (a) a time brokerage agreement (entitled “Public Service Operating Agreement” (“PSOA”)) that they entered into and submitted with the Application violated a Commission rule precluding a for-profit sale of programming time at an NCE station, and (b) they had submitted unintentionally false certifications in the Application that their agreements (including the PSOA, as originally filed) complied with the Commission’s rules and policies.⁶ The Order adopted the Consent Decree resolving these violations, and found that nothing in the record created a substantial and material question of fact whether either USF or CPRN possessed the basic qualifications to be a Commission licensee.⁷ When the Bureau issued the Order addressing these

¹ The related pleadings are a Joint Opposition to Applications for Review (“Opposition”) filed by University of San Francisco and Classical Public Radio Network LLC on July 20, 2012, a Reply in Support of Application for Review by Commission of Order and Consent Decree filed by Hudacko on Aug. 1, 2012, and a Reply in Support of Application for Review filed by Friends on Aug. 1, 2012. The Opposition argues that Hudacko and Friends lack standing to seek review of the Bureau Letter and Order, while the reply pleadings contest that argument. In light of the outcome here, we need not decide whether Hudacko and Friends satisfy the criteria for administrative standing. *See U.S. Cellular Corp.*, Order, 24 FCC Rcd 8729, 8737 and n.73 (2009) (“*U.S. Cellular*”).

² *Alan Korn, Esq., Peter Franck, Esq., and Ted Hudacko*, Letter (MB June 7, 2012).

³ *University of San Francisco*, Order, 27 FCC Rcd 5674 (MB 2012).

⁴ *See* Bureau Letter at 1 and n.1.

⁵ *See University of San Francisco*, Letter, 26 FCC Rcd 9251 (MB 2011).

⁶ Order, 27 FCC Rcd at 5674-75. The Consent Decree stipulated, among other things, that USF and CPRN would collectively make a \$50,000 voluntary contribution to the United States Treasury.

⁷ *Id.*

violations through the Consent Decree, it simultaneously issued the Bureau Letter denying the petitions to deny and informal objections and granting the application for consent to assignment of the license for radio station KUSF(FM) from USF to CPRN.⁸

3. The Hudacko AFR and the Friends AFR allege various procedural and substantive deficiencies in the Bureau's investigation and resolution of the case. We disagree, and below discuss the insufficiency of these allegations. Friends and Hudacko argue, *inter alia*, that the Bureau erred by entering into negotiations with USF and CPRN, and executing the Consent Decree with those parties, without the knowledge of Friends and Hudacko and prior to their receipt of a privilege log from the Bureau pursuant to a Freedom of Information Act ("FOIA") request.⁹ Friends and Hudacko cite 47 C.F.R. §§ 1.93 and 1.94, but those rule sections apply to negotiations of consent decrees after a case has been designated for hearing, which was not the case here.¹⁰ The Commission has previously noted that the type of settlement discussion at issue here is specifically exempted from the *ex parte* rules.¹¹ Moreover, the timing of settlement negotiations relative to the status of the agency's investigation is a matter within the agency's "broad discretion" in settlement of enforcement actions.¹² With respect to the privilege log, Friends and Hudacko make no attempt to show that the privilege log provided relevant information supporting their claims, nor do they show that the Bureau's resolution of their due process claims involving the privilege log violated any Commission rule or precedent.¹³

4. In addition, we reject Friends' claim that the portion of the Consent Decree involving the violation of Section 73.503(c) presented a novel issue that exceeded the Bureau's delegated authority.¹⁴

⁸ Bureau Letter at 2.

⁹ See Friends AFR at 8-15; Hudacko AFR at 1-6; *Ted Hudacko*, Memorandum Opinion and Order, 27 FCC Rcd 16483 (2012) (upholding the Bureau decision finding that the privilege log is an agency record subject to FOIA and ordering the log to be produced to Hudacko unless USF received a judicial stay of that order).

¹⁰ See 47 C.F.R. §§ 1.93(a) and 1.94(f).

¹¹ See 47 C.F.R. § 1.1204(a)(10); *Viacom, Inc.*, Order on Reconsideration, 21 FCC Rcd 12223, 12227 n.22 (2006). Friends and Hudacko do not address this rule and the line of cases applying the rule.

¹² *Viacom, Inc.*, 21 FCC Rcd at 12226.

¹³ Friends claim a violation of due process rights based on the Federal Rules of Civil Procedure. Friends AFR at 12-13; see also Hudacko AFR at 2. However, the Federal Rules of Civil Procedure do not apply here. Under the Act and the Commission's rules, only the Commission or its staff has the right to undertake inquiries of applicants. 47 U.S.C. §§ 308, 403; 47 C.F.R. § 73.1015. There is no right for petitioners such as Friends and Hudacko to participate in inquiries or any form of discovery outside the context of a hearing. Compare 47 C.F.R. §§ 1.250, 1.311-1.325 (discovery in a hearing) with 47 C.F.R. § 73.3584 (procedures for petitions to deny). The arguments by Friends and Hudacko involving the privilege log ignore the fact that the Bureau had access to the privilege log from the time that USF and CPRN produced documents, and that is exactly what the Act and the Commission's rules required. Friends and Hudacko also make generalized claims about failure by USF to produce certain types of documents, but these claims are based on suspicion or speculation rather than proof of any violation. See Friends AFR at 7-8; Hudacko AFR at 2.

¹⁴ Friends AFR at 11 (citing 47 C.F.R. §0.283(c)).

The Bureau merely enforced a longstanding Commission rule that USF and CPRN admitted that they violated in carrying out their PSOA.¹⁵ Although Friends argues that the size of the penalty assessed by the Consent Decree was insufficient,¹⁶ Friends fails to cite any authority to support that argument or to rebut statutory language and Commission precedent to the contrary.¹⁷

5. Hudacko and Friends claim that the Bureau failed to address an alleged premature and unauthorized transfer of control of the Station from USF to CPRN.¹⁸ We find that Hudacko and Friends failed to present a substantial and material question of fact on this issue. Neither party cites any Commission precedent or authority to indicate that the PSOA, either on its face or as effectuated, violated the Commission's policies on licensee control.¹⁹

¹⁵ Consent Decree, 27 FCC Rcd at 5679. Friends cites no authority to support its claim that an admitted rule violation presents a novel issue. Section 73.503(c), the rule that USF and CPRN violated, has been in effect since 1961. *See* 26 Fed. Reg. 1027, 1028 (Feb. 2, 1961). The facts presented in this case constituted a violation of that rule. *See* Consent Decree, 27 FCC Rcd at 5677. The initial attempt by USF and CPRN to defend their actions with an argument unsupported either by the language of the rule or by Commission precedent (*see* Friends AFR at 11 and Consent Decree, 27 FCC Rcd at 5678) does not create a novel issue in this matter.

¹⁶ Friends AFR at 11-12.

¹⁷ *See Hoosier Broad. Corp.*, Order, 30 FCC Rcd 10 (MB 2015) (adopting Consent Decree requiring \$50,000 payment for violations of Sections 1.17 and 73.503(c) of the Commission's rules and premature transfer of control in violation of Section 310(d) of the Act). Friends concedes that the penalty exceeded the improper payments made under the PSOA by \$16,000, which is substantially larger than the base forfeiture amounts for rule violations set forth in Section 1.80 of the Commission's rules. Friends AFR at 11; 47 C.F.R. § 1.80, Note to Paragraph (b)(8) (base forfeiture amounts ranging from \$1,000 to \$10,000). However, the Bureau was not required to negotiate for a payment that was related to the amount of the PSOA payments. Section 503(b)(2)(E) of the Act specifically provides discretion to "the Commission or its designee" to vary the amount of a forfeiture penalty based on the factors delineated in that provision. 47 U.S.C. § 503(b)(2)(E); *see also Eagle Broad. Grp., Ltd.*, Memorandum Opinion and Order, 23 FCC Rcd 588, 596 (2008) (Commission has discretion to shape penalties for rule violations), *aff'd sub nom. Eagle Broad. Grp., Ltd. v. FCC*, 563 F.3d 543 (D.C. Cir. 2009).

¹⁸ Hudacko AFR at 2 and 5; Friends AFR at 4-7. Friends also argues that the case presents the policy question of whether, in the NCE context, a limited liability company ("LLC") should be allowed to enter into time brokerage arrangements such as the PSOA. Friends AFR at 4. Any such policy issue is appropriately resolved in a notice-and-comment rulemaking, rather than through an adjudication. *See S'holders of Renaissance Comm. Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 11866, 11887-88 (1997); *Cnty. Television of S. Cal.*, 459 U.S. 498, 511 (1983). Friends further argues that the Bureau failed to adequately address its claim that CPRN should not be allowed to hold an NCE license due to its LLC status. Friends AFR at 19. However, Section 73.503(a) simply requires the NCE radio station to be licensed to a nonprofit educational "organization." 47 C.F.R. § 73.503(a). Friends has shown no functional distinction between an LLC and a corporation, unincorporated association or other organizational form in the context of NCE licensing, and therefore we reject this theory. CPRN thus qualifies as an "organization" as required by 47 C.F.R. § 73.503(a).

¹⁹ *See* FCC Form 314, Instructions, Worksheet #3, Section D.3 (delineating criteria for assessing licensee control over programming, personnel, and finances). Apart from the payment violation addressed in the Consent Decree, neither Hudacko nor Friends made any showing of any departure from such criteria. In addition, the record here does not support Friends' claims (Friends AFR at 6-7) suggesting inadequate review of CPRN's programming and failure to identify KUSF's employees for the Station and their work schedules. *See* "Declaration of Charles Cross"

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6. Hudacko and Friends also argue that the Bureau failed to address claims of a main studio violation by USF, specifically the claim that USF lacked program origination capability from May 22 to June 21, 2011.²⁰ During this period, the PSOA was in effect and CPRN was providing programming, but USF was renovating Phelan Hall, where the Station's transmitter and main studio were located.²¹ Friends and USF agree that the main studio was not then used to program the Station because CPRN was providing programming from its studio.²² However, they disagree over USF's claim to have maintained program origination capability from the transmitter location in Phelan Hall with portable equipment between May 22, when the Phelan Hall studio was dismantled, and June 21, when Michael Bloch (the Station's Chief Operator and an Associate Dean at USF) confirmed that a new studio with program origination capability was available in Cowell Hall.²³ We find that USF adequately explained its

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(dated July 27, 2011) and "Declaration of Michael I. Bloch" (dated July 26, 2011) ("Bloch Declaration") (documenting licensee supervision and programming responsibilities of USF, including review of CPRN programming, preemption of CPRN programming for Metropolitan Opera broadcasts, Michael Bloch's designation as Chief Operator of the Station and his full-time employment by USF and his availability around the clock for University business, including overseeing the Station, and Brigid Rose Torres's designation as administrative assistant for the Station and her full-time employment by USF); *see also Gisela Huberman*, Letter, 6 FCC Rcd 5397 (MMB 1991) (Commission policy allows a time brokerage agreement for 100% of programming time, with licensee retaining the right to reject or preempt programming but not required to exercise such rights).

²⁰ Friends AFR at 5-6; Hudacko AFR at 5. We note that there were intermittent interruptions of Station operations during this period. *See* Friends AFR at 5 (referencing instance when "the station was . . . off the air for 1-1/2 days when USF turned off power to the entire university."); Bloch Declaration at 1-2 (listing fourteen interruptions). We consider these to be irrelevant because broadcast stations are allowed to discontinue operation for up to 10 days without notifying the Commission. *See* 47 C.F.R. § 73.1740(a)(4). Friends has never claimed that these interruptions constituted a rule violation.

²¹ Hudacko AFR at 5; Friends AFR at 5-6.

²² In 1987, the Commission deleted its rule requiring that a certain percentage of programming originate from a broadcast station's main studio. *See Main Studio and Program Origination Rules*, Report and Order, 2 FCC Rcd 3215 (1987), *recon. denied*, 3 FCC Rcd 5024 (1988). However, each station is required to have a main studio with program origination capability. *See* 47 C.F.R. § 73.1125. Without such capability, USF would not have been able to exercise its right to preempt CPRN's programming. *See Gisela Huberman, supra* note 19.

²³ *Compare* Friends filing of "Supplemental Declaration of Claudia Mueller in Support of Petition to Deny" (May 26, 2011) ("Mueller Declaration") with USF filings of Bloch Declaration, Statement of Dane E. Ericksen (dated Aug. 19, 2011) ("Ericksen Declaration") and "Statement of Brian J. Henry" (dated Aug. 19, 2011) ("Henry Declaration"). The Bloch Declaration was filed by USF on July 29, 2011, as part of its initial response to the Bureau's letter of inquiry dated June 28, 2011 ("LOI"). The Ericksen Declaration and Henry Declaration were submitted by USF in a Supplement filed on Aug. 22, 2011. Friends moved to strike that Supplement on Aug. 30, 2011, arguing that the LOI (at 6-7) specifically stated that further correspondence from the parties (after the LOI response and the petitioners' comments on the LOI response) was not anticipated or authorized. *See* Friends Motion to Strike. However, the LOI (at 3) did direct USF to supplement its response if it learned that its initial response was incomplete or incorrect. We believe the Bureau was correct in accepting the KUSF Supplement on the basis that the Bloch Declaration was incomplete, because it did not provide specific details about how USF retained program origination capability while the Phelan Hall renovation took place. The Ericksen Declaration and the Henry Declaration provided such details and thus were beneficial to the Bureau's investigation. Although Friends attempts to raise questions about the periods from May 15-22 and June 21-Aug. 18, 2011 based on those declarations

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ability to originate programming on a temporary basis with portable equipment during the period in question. The declarations cited by Friends (AFR at 5 n.1) are not inconsistent with this explanation, and therefore there was no substantial and material question of fact on this issue.

7. Friends argues that CPRN engaged in fund-raising for the Station by airing programming that solicited donations for CPRN's existing station, KDFC(FM), "in violation of Section 73.503(c)'s express prohibition against third-party fundraising over NCE airwaves."²⁴ However, Section 73.503(c) does not address third-party fundraising. Rather, it prohibits payments to the licensee in excess of expenses in return for airing programming on an NCE station.²⁵ Section 73.503(c) is the provision that USF and CPRN admitted violating in the Consent Decree. Accordingly, we reject this allegation.

8. Friends argues that the Bureau failed to adequately address its contention that the change in the Station's programming under CPRN did not comply with "requirements of noncommercial, educational licensing."²⁶ Section 73.503(a) provides that NCE broadcast stations may be licensed to nonprofit educational organizations upon a showing that the station will be used for the advancement of an educational program.²⁷ Assignees must meet the same standard as an applicant seeking to obtain a new NCE license.²⁸ Form 340, the application for an NCE broadcast station construction permit, asks the applicant to certify that the Commission has previously granted a broadcast application that found the applicant qualified as an NCE entity with a qualifying educational program, and that the applicant will use the proposed station to advance a program similar to that which the Commission has found qualifying in the previous application.²⁹ If the applicant makes such a showing, no further action is required.³⁰ As originally filed, the Application was deficient because it lacked the necessary showing to meet these requirements.³¹ Friends pointed out this deficiency in its Petition to Deny the Application.³²

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(Friends AFR at 5-6), we find there is no support for any claim of inability to originate programming in those periods. See Mueller Declaration, Bloch Declaration, Ericksen Declaration, Henry Declaration.

²⁴ Friends AFR at 7. Friends cites no other authority for this allegation.

²⁵ 47 C.F.R. § 73.503(c).

²⁶ AFR at 15; see also AFR at 15-18 (discussing Commission policy on format issues).

²⁷ 47 C.F.R. § 73.503(a). Section 73.503(b) of the rules provides that NCE stations "may transmit educational, cultural, and entertainment programs to the public." 47 C.F.R. § 73.503(b).

²⁸ 47 U.S.C. § 310(d); FCC Form 314, Section III, Item 2.

²⁹ FCC Form 340, Section II, Question 4(a).

³⁰ *Id.*, Question 4(b). See *Michael Lazarus, Esq.*, Letter, 26 FCC Rcd 5966, 5969 (MB 2011).

³¹ See Application, Ex. 18 (as filed on Jan. 25, 2011). At that time, CPRN had not been approved as an NCE licensee in any other application and the Application lacked an educational purpose showing. Although CPRN attempted to rely on the Commission's past approvals of CPRN's 90% owner (the University of Southern California) as an NCE licensee, this did not meet the requirement that CPRN satisfy Section 73.503(a).

³² Friends Petition to Deny (filed Feb. 27, 2011) at 9-10.

However, CPRN amended the Application on April 26, 2011 to provide an Educational Purpose Statement.³³ That amendment showed that CPRN had been approved as an NCE licensee in another application granted on March 9, 2011 and described how the Station would be used for the advancement of an educational program.³⁴ Friends has not shown any deficiencies in this amendment. Because this amendment satisfied the Commission's requirements, we find that there is no substantial and material question of fact as to this issue.³⁵

9. Upon review of the Hudacko AFR, the Friends AFR, and the entire record, we conclude that Hudacko and Friends have failed to demonstrate that the Bureau erred. We find that there is no substantial and material question of fact concerning statutory or rule violations, including violations of 47 C.F.R. §§ 1.17, 73.503 and 73.1125, which have been resolved in the Consent Decree. We further find that the Bureau's settlement of the violations admitted in the Consent Decree represented an appropriate exercise of the agency's broad discretion to settle enforcement actions.³⁶ Finally, we uphold the Bureau's determinations in the Bureau Letter and grant of the Application.³⁷

10. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended,³⁸ and Section 1.115(g) of the Commission's Rules,³⁹ the Application for Review filed by Friends of KUSF and the Application for Review by Commission of Order and Consent Decree filed by Ted Hudacko ARE DENIED.

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³³ See Application, Ex. 11 (as amended on Apr. 26, 2011).

³⁴ *Id.* ("CPRN 'shall promote educational purposes by creating and disseminating cultural broadcast material in the form of specially formatted classical music programming on noncommercial broadcasting outlets that are owned by the Company, its affiliates, or others.'").

³⁵ *Michael Lazarus, supra* note 30.

³⁶ See *U.S. Cellular*, 24 FCC Rcd at 8738; *Emmis Commc'ns Corp.*, Order on Reconsideration, 21 FCC Rcd 12219, 12221 (2006); *Viacom, Inc.*, 21 FCC Rcd at 12226-27 (2006). Based on our review of the record, we affirm the Media Bureau's resolution of admitted rule violations through the Consent Decree and resolution of the remaining claims in the Friends and Hudacko petitions to deny the Application.

³⁷ See Bureau Letter, *supra* note 2 and accompanying text.

³⁸ 47 U.S.C. § 155(c)(5).

³⁹ 47 C.F.R. § 1.115(g).

Marlene H. Dortch

Secretary