

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

In re Application of

VCY/AMERICA, INC.

For Renewal of License of
Television Station WVCY-TV
Milwaukee, WI

BRCT-20050801AGS

FILED/ACCEPTED

JAN 25 2011

Federal Communications Commission
Office of the Secretary

To: The Commission

OPPOSITION TO SECOND APPLICATION FOR REVIEW

VCY/America, Inc. ("VCY"), the licensee of television station WVCY-TV, Milwaukee, Wisconsin (Fac. ID No. 72342), by its attorneys and pursuant to Section 1.115(d) of the Commission's rules,¹ hereby files this Opposition (the "*Opposition*") to the second Application for Review (the "*Second Application*") filed on January 10, 2011 by Media Access Project ("MAP") on behalf of Chicago Media Action ("CMA") and the Milwaukee Public Interest Media Coalition ("MPIMC") (collectively, the "Petitioners") against the license renewal applications of twenty television stations in the Milwaukee and Chicago markets (collectively, the "Stations"), including the renewal application of WVCY-TV.²

The *Second Application* was filed after the Media Bureau issued a decision (the "*December 2010 Decision*")³ dismissing as untimely an initial Application for Review filed by

¹ 47 C.F.R. § 1.115(d).

² See FCC File No. BRCT-20050801AGS.

³ Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau, to Chicago Media Action and Milwaukee Public Interest Coalition, *In the Matter of Application for Review filed by Chicago Media Action and Milwaukee Public Interest* (DA 10-2336) (released December 10,

Petitioners on February 16, 2010 (the “*First Application*”). In the *Second Application*, Petitioners argue that the Bureau acted without authority when it dismissed the *First Application* and that the Bureau incorrectly concluded that the *First Application* was untimely.⁴ As discussed below, Petitioners are incorrect on both counts. Accordingly, the Bureau should dismiss or deny the *Second Application* and let the grant of WVCY-TV’s license renewal become final.⁵

Petitioners’ History of Baseless and Abusive Pleadings

To date, the Bureau has rejected *four* attempts by Petitioners to challenge the license renewal applications of WVCY-TV and the other television stations in the Milwaukee and Chicago markets. MPMIC filed its initial *Petition to Deny* on November 1, 2005, which the Bureau rejected in a decision dated June 13, 2007 (the “*June 2007 Decision*”).⁶ Petitioners then filed *Petitions for Reconsideration* on July 13, 2007 (the “*First Petition*”) and August 11, 2008 (the “*Second Petition*”), which were correctly rejected by the Bureau in decisions dated July 11, 2008 (the “*July 2008 Decision*”) ⁷ and January 12, 2010 (the “*January 2010 Decision*”), ⁸

2010).

⁴ See generally *Second Application*.

⁵ In addition to the arguments discussed below, VCY reaffirms that the Bureau’s prior denials of Petitioners’ pleadings have been correct, for the reasons discussed in VCY’s prior pleadings in this matter, which VCY hereby incorporates into this *Opposition* by reference. See VCY/America, Inc., *Opposition to Petition to Deny*, BRCT-20050801AGS (filed Dec. 15, 2005); VCY/America, Inc., *Opposition to Petition for Reconsideration*, BRCT-20050801AGS (filed July 26, 2007); VCY/America, Inc., *Opposition to Second Petition for Reconsideration*, BRCT-20050801AGS (filed Aug. 25, 2008); VCY/America, Inc., *Opposition to Application for Review*, BRCT-20050801AGS (filed Mar. 3, 2010).

⁶ Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau, to Chicago Media Action and Milwaukee Public Interest Media Coalition, *In the Matter of Petitions to Deny filed by Chicago Media Action and Milwaukee Public Interest Media Coalition*, 22 FCC Rcd. 10877 (2007).

⁷ Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau, to Chicago Media Action and Milwaukee Public Interest Media Coalition, *In the Matter of Petition for*

respectively. Not to be deterred, Petitioners filed the *First Application*, which the Bureau rejected as untimely in the *December 2010 Decision*. Now, amazingly, Petitioners have chosen to further abuse the Commission's processes by filing the *Second Application*.⁹

The Bureau correctly determined that each of Petitioners' filings was without merit. Even though Petitioners have been unable to present any evidence whatsoever that would warrant denial of the renewal applications at issue, the affected licensees – along with the Bureau – have been forced to expend time, effort, and resources to address each of Petitioners' pleadings. In light of the foregoing, the Commission should reject Petitioners' latest, improper attempt to further delay these renewal applications and take whatever steps it deems necessary to deter Petitioners from submitting improper, wasteful pleadings in the future.

FCC Staff Had the Authority to Dismiss the First Application

Citing Sections 0.283 and 1.115 of the Commission's rules,¹⁰ the *Second Application* claims that the Bureau did not have authority to dismiss the *First Application* and, instead, was

Reconsideration filed by Chicago Media Action and Milwaukee Public Interest Media Coalition, 23 FCC Rcd. 10608 (2008).

⁸ Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau, to Chicago Media Action and Milwaukee Public Interest Media Coalition, *In the Matter of Second Petition for Reconsideration filed by Chicago Media Action and Milwaukee Public Interest Media Coalition*, 25 FCC Rcd. 167 (2010).

⁹ It should be noted that MAP also represented advocacy groups that raised similar challenges to the license renewal application of television stations in the Portland, Oregon market on similar grounds. Those efforts, too, were unsuccessful. See Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau, to Oregon Alliance to Reform Media, *In the Matter of Petition to Deny License Renewal Applications of Portland, Oregon, Area Commercial Television Stations* (DA 07-3609) (released Aug. 15, 2007) (denying Petition to Deny renewal applications of eight Oregon television stations, finding that Petitioner failed to show that any stations failed comply with the obligation to provide public interest programming).

¹⁰ 47 C.F.R. §§ 0.283, 1.115.

required to refer it to the full Commission.¹¹ To the contrary, the Media Bureau acted within its authority under the Commission's rules in dismissing the *First Application*. The Media Bureau has, on several occasions, denied Applications for Review because they were untimely.¹² And the Commission has recognized in a related context that the Media Bureau can properly deny an application for review for violating the procedural requirements of Section 1.115 of the Commission's rules.¹³ Accordingly, the Media Bureau's denial of the *First Application* was consistent with the Commission's rules and precedent.

The Bureau Correctly Concluded that the Second Petition Was Procedurally Improper and that the First Application Was Therefore Untimely

In the *January 2010 Decision*, the Bureau denied the *Second Petition* as procedurally improper. Under Section 1.106(c) of the Commission's rules,¹⁴ "reconsideration is warranted only if a petitioner presents facts that could not, with diligence, have been presented to the

¹¹ *Second Application* at 2-3.

¹² See, e.g., Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, to Mr. Evan Doss, *In re: Station DWKPG(AM) 1 Port Gibson, MS Facility ID No. 19865 License Cancelled and Call Sign Deleted "Emergency Petition"*, 22 FCC Rcd. 5361 (2007) (dismissing an untimely filed request under Section 1.115(d) of the Commission's rules); *Curly Thornton Against ABC, CBS, Fox Broadcasting, NBC, PBS, CNN, C-Span, Democratic National Party, Democratic National Committee, and Carl Wagner*, 7 FCC Rcd. 4904 (Aug. 3, 1992) (dismissing an Application for Review because the application "was not timely filed pursuant to 47 C.F.R. Section 1.115.").

¹³ *In the Matter of Royce Int'l Broad. Co.*, Memorandum Opinion and Order, 23 FCC Rcd. 9010 ¶¶ 12-13 (2008) (affirming Media Bureau denial of a motion to extend time to file an application for review on account of untimeliness pursuant to Section 1.115(d)).

¹⁴ 47 C.F.R. 1.106(c) provides that "a petition for reconsideration that relies on facts not previously raised before the staff or Commission may only be granted only if: (a) the facts relied on relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; (b) the facts relied on were unknown to the petitioner until after the last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity; or (c) the Commission or designated authority determine that consideration of such facts is in the public interest."

Commission in earlier filings.”¹⁵ The only “new” basis for the *Second Petition* was the Commission’s so-called *Enhanced Disclosure Decision*, which “was released on January 24, 2008, over five months before denial of the [*First Petition*].”¹⁶ The diligence required under 1.106(c) of the Commission’s rules mandated that the *First Petition* be amended to include a discussion of the *Enhanced Disclosure Decision*, but Petitioners failed to do so.¹⁷ Petitioners’ attempt to raise the *Enhanced Disclosure* decision in the *Second Petition* was therefore untimely, and the Bureau correctly rejected the pleading as repetitious.¹⁸

There are additional reasons for concluding that the *Second Petition* was procedurally improper. While Section 1.106 of the Commission’s rules permits a party to file a Petition for Reconsideration with the designated authority seeking review of new questions of fact or law, such questions must be relevant to the reason for the initial denial.¹⁹ Without such a requirement, a party could delay the grant of an application merely by seeking reconsideration based on any possible new fact. But the *Enhanced Disclosure Decision* is irrelevant to the

¹⁵ Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau to Dennis J. Kelly, Esq. and Gregory L. Masters, Esq., *In the Matter of Applications for Assignment of License Petition for Reconsideration*, 23 FCC Rcd. 2646, 2647 (2008).” Similarly, “[t]he Commission will not grant reconsideration ‘merely for the purpose of again debating matters on which the tribunal has once deliberated and spoken.’” *See id.* at 2648 (quoting *WWIZ, Inc.*, 37 FCC 685, 686 (1984), *aff’d sub nom. Lorain Journal Company v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967, *rehearing denied*, 384 U.S. 947, *petition to reopen denied*, 4 FCC.2d 608 (1966)).

¹⁶ *See January 2010 Decision*, 25 FCC Rcd. at 168 (discussing *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, Report and Order, 23 FCC Rcd. 1274 (2008) (the “*Enhanced Disclosure Decision*”).

¹⁷ *See id.*

¹⁸ *See id.*; 47 C.F.R. § 1.106(k)(3) (“A petition for reconsideration of an order which has been previously denied on reconsideration may be dismissed by the staff as repetitious”).

¹⁹ Absent new evidence, MPIMC’s filing was merely a petition “for reconsideration of petitions for reconsideration,” which the Commission has squarely refused to consider. *See, e.g., United Broad. Co. of Fla., Inc.*, Memorandum Opinion and Order, 61 FCC 2d 970, 972 (1976).

Petition to Deny because it did nothing to alter the general obligation of broadcast stations to provide public interest programming. Indeed, the Commission *specifically rejected* this notion in the *Enhanced Disclosure Decision* itself, stating that:

... neither the [newly-adopted FCC] form nor [the *Enhanced Disclosure Decision*] establishes any new programming obligations. Editorial control will remain in the hands of the licensee. All that we require is that broadcasters report the quantities of different types of programming that they choose to air . . . Each licensee will remain free to determine how best to address the issues facing its community.²⁰

In light of the foregoing, the “new facts” presented by the *Enhanced Disclosure Decision* cannot serve as a proper basis for the *Second Petition*, and the Bureau’s dismissal of the *Second Petition* as repetitious under Section 1.106(k)(3) was therefore proper.²¹

Petitioners were required to seek Commission-level reconsideration of the Bureau’s denial of the *First Petition* within 30 days of public notice of the *July 2008 Decision*.²² Instead, Petitioners filed the improper *Second Petition* and, as a result, are now foreclosed from seeking review of matters addressed in the *July 2008 Decision* and Petitioners’ prior pleadings. As the Bureau concluded, Petitioners “cannot . . . seek review of a procedurally faulty pleading and, thereby, bootstrap substantive arguments that otherwise would be untimely.”²³ Accordingly, the

²⁰ See *Enhanced Disclosure Decision*, 23 FCC Rcd. at 1293. Moreover, even if the *Enhanced Disclosure Decision* had addressed substantive programming requirements, any changes adopted would be *prospective*, and, therefore, would have no impact on the conduct of WVCY-TV or any other broadcast station during the prior license term.

²¹ See also *Great Lakes Broad. Academy, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd. 11655, 11656 (2004) (observing that “neither [the Communications Act of 1934, as amended, nor the Commission’s rules] provides for the filing of a second petition for reconsideration should the original petition be denied” and that “[i]f the ‘tacking’ of petitions were permitted, Commission actions might never become final and the rule would become nugatory”) (citing *Brainerd Broad. Co.*, 25 RR 297, 298 (1963)).

²² 47 C.F.R. §1.115(d).

²³ See *December 2010 Decision*.

Bureau's decision that the *First Application* was untimely except with respect to the *January 2010 Decision* dismissing the *Second Petition* on procedural grounds was correct.²⁴

Conclusion

For the reasons set forth above, the *Second Application*, like Petitioners' other pleadings in this proceeding, is wholly without merit. Accordingly, the Commission should dismiss or deny the *Second Application*, allow the renewal application of WVCY-TV to become final, and take whatever steps it deems necessary to deter similar pleadings from Petitioners going forward.

Respectfully submitted,

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²⁴ *See id.*

CERTIFICATE OF SERVICE

I, Gina Stuart, a secretary at the law firm of Wiley Rein LLP, hereby certify that on this 25th day of January, 2011, I caused a copy of the foregoing *Opposition to Second Application for Review* to be mailed via first-class postage prepaid mail to the following:

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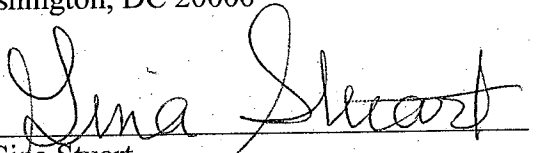
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