

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Chinese Voice of Golden City)	
)	
DKQLS-LP, Las Vegas, Nevada)	Facility ID No. 194198
)	
Application for Low Power FM License)	File No. BLL-20171120AAB
Broadcast Station License)	
)	
Application for Modification to)	File No. BMLL-20190809AAL
Transmission Parameters of)	
Licensed Facility)	

To: Secretary
Attn.: The Commission

MOTION TO QUASH LETTER OF INQUIRY

CHINESE VOICE OF GOLDEN CITY

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I. INTRODUCTION

Chinese Voice of Golden City (“CVGC”), licensee of noncommercial, low power FM radio station KQLS-LP, licensed to Las Vegas, Nevada (the “Station”), by its attorneys, pursuant to Section 1.334 of the Commission’s Rules, 47 CFR § 1.334, hereby requests that the Commission grant this Motion to Quash the Letter of Inquiry submitted to CVGC by the Enforcement Bureau, April 23, 2021 (“LOI”). Simultaneously with the filing of this Motion to Quash, CVGC is filing a Motion for Stay, requesting that the Commission stay any additional enforcement action against CVGC by the Enforcement Bureau until the appeal of the Commission’s Memorandum Opinion and Order (“MO&O”), released November 25, 2020¹,

¹ *Chinese Voice of Golden City*, FCC 20-169, November 25, 2020.

becomes final and no longer subject to appeal. CVGC has appealed the Commission's MO&O to the U.S. Court of Appeals for the D.C. Circuit.²

II. SUMMARY OF ARGUMENT

CVGC requests that the Commission grant its Motion to Quash the LOI and grant its accompanying Motion to Stay any further enforcement action against CVGC by the Enforcement Bureau. This relief is required, because the Enforcement Bureau has issued an LOI to CVGC that is legally barred, because the Commission no longer has jurisdiction of the matter being addressed by the Enforcement Bureau. CVGC's pending appeal in the U.S. District Court for the District of Columbia Circuit divests the Commission of jurisdiction over the subject matter of that appeal. The central issue in that appeal is whether CVGC continues to hold a valid license to operate. The LOI assumes that the answer to the question pending before the court is "no," and the Enforcement Bureau concludes that it may take action against CVGC. Until the appeal is decided, the Commission has no jurisdiction to determine whether CVGC has a valid license to operate, and, therefore, the LOI must be quashed.

The LOI is predicated upon the theory that CVGC, which had its license to operate KQLS-LP terminated by the Commission, is now a "pirate radio" operator within the meaning of Section 511 of the Act. However, CVGC obtained a valid license to operate and has valid legal arguments to support its right to continue broadcasting until it has exhausted its judicial remedies.

The effect of the LOI, which is to treat CVGC as a "pirate radio" operator, is contrary to every interpretation of the term "pirate radio" operator the Commission has ever used. CVGC is

² *Chinese Voice of Golden City v. FCC*, Case No. 20-1514, filed December 23, 2020.

the licensee of an LPFM radio station litigating for the reinstatement of its license. CVGC is not now, and has never been a “pirate radio,” operator.

The LOI, by attempting to depict CVGC as a pirate radio operator, has placed the officers and directors of CVGC under a threat of being subjected to forfeitures of up to \$2,023,640. Section 511 of the Act is written to apply to persons who operate pirate radio stations, not corporate licensees like CVGC. Because Section 511 is written to apply to individuals, the Enforcement Bureau’s LOI threatens the officers and directors of CVGC, whose names and information is already on file with the Commission, with up to \$2,023,640 in forfeitures. Thus, the LOI, by misapplying Section 511, leaves the officers and directors of CVGC threatened and intimidated with the potential for huge forfeitures solely because they seek to exercise their right to exhaust their judicial remedies. This is an improper use of Section 511, and the LOI must be quashed.

In addition, the LOI requires CVGC to answer a multitude of inappropriate questions and produce a number of unnecessary documents regarding every employee or volunteer at the Station. If CVGC provides the information demanded by the Enforcement Bureau, every employee and volunteer is then also under the \$2,023,640 forfeiture threat to which the officers and directors have been threatened. This is a further misapplication of Section 511, and it increases the number of innocent people who are intimidated and threatened by the LOI.

Also, because it can be argued that Section 511 would permit enforcement action against individuals even if they no longer operate a “pirate radio” station, the LOI exposes CVGC’s officers, directors, employees and volunteers to \$2,023,640 in forfeiture sanctions even if they ultimately lose their appeal and shut down their Station. This an additional misuse of Section 511.

CVGC has valid legal arguments to support its right to broadcast until the Commission's termination of its license is a final order no longer subject to appeal. Section 307(c)(3) of the Act protects a licensee with an application for license renewal pending from being ordered off the air until the renewal determination is a final order no longer subject to appeal. In addition, Section 558 of the Administrative Procedure Act requires that a licensee cannot be deprived of its license unless the licensee is given an opportunity to argue its case before the license is taken. CVGC was given no such opportunity.

The accompanying Motion for Stay should be granted to prevent the Enforcement Bureau from taking any further enforcement action against CVGC. CVGC meets the four prongs of the test for grant of a Stay.

III. BACKGROUND

The matters addressed in this Motion to Quash are a result of CVGC's appeal of the Commission's MO&O to the U.S. Court of Appeals. In the MO&O, the Commission affirmed the Memorandum Opinion and Order of the Media Bureau, released January 15, 2020 ("Bureau MO&O").³ The Bureau MO&O affirmed the *Letter Decision* issued November 19, 2019⁴ which: (1) ruled that the Station's license expired on December 13, 2018, (2) deleted the Station's call sign, (3) dismissed the pending Application for Modification of License,⁵ (4) dismissed the Station's Request for Special Temporary Authority, and (5) dismissed the Motion for Stay that was directed to the Bureau and the Emergency Stay Request that was directed to the full Commission.⁶ This matter now comes to the Commission through the following history.

³ *Chinese Voice of Golden City*, 35 FCC Red 567 (2020).

⁴ Letter from Albert Shuldiner to CVGC, Chief, Audio Division, Media Bureau, November 19, 2019, ("*Letter Decision*").

⁵ *Id.* at 2.

⁶ *Id.*

On November 14, 2013, CVGC filed its initial application for a low power FM construction permit. Thereafter, on October 8, 2014, CVGC filed an application to change its transmission site to 120 West Owen Avenue, Las Vegas. At Section VI, LPFM Engineering, Tech Box, Question 2, of the amendment application, the coordinates for the site were listed as North 36-11-24; West 115-08-35.2. On November 20, 2014, the Commission granted the application as amended, specifying the foregoing coordinates. Following construction of the transmission facility, on November 20, 2017, CVGC filed a Form 319, Application for a LPFM License. While Form 319 does not request the specification of coordinates, at Section III, Question 2, Constructed Facility, the form asks if the facility was constructed as authorized in the underlying construction permit. CVGC answered in the affirmative, including stating that the foregoing coordinates remained unchanged. Thereafter, on December 12, 2017, the Commission granted CVGC a license to operate at the foregoing coordinates.

In August 2019, CVGC learned that the coordinates listed on its construction permit and the ensuing license inadvertently had been incorrectly stated.⁷ On August 9, 2019, CVGC filed an application on Form 319 to modify its license (“Mod Application”) to correct the coordinates of its antenna site. CVGC had determined that its license application had incorrectly measured the exact location of its antenna site. The actual site is 256 feet away from the site as specified in

⁷ Absolute precision in determining any site is a physical impossibility as the technically most sophisticated determination method, the Global Positioning Satellite System operated by the Department of Defense, is subject to multiple site-specific atmospheric and terrain variables. See, <https://www.gps.gov/systems/gps/performance/accuracy/> satellite geometry, signal blockage, atmospheric conditions, and receiver design features/quality. GPS-enabled smartphones are typically accurate to within 16 ft. Yet, that accuracy worsens near buildings, bridges, and trees. <https://www.gps.gov/systems/gps/performance/accuracy/> CVGC notes that when it calculated the variance, the Commission was off by 70 miles. See, *infra*, at the discussion of the *Letter Decision*.

the license. The Mod Application was granted on August 16, 2019. However, on August 20, 2019, the Media Bureau rescinded the grant of the Mod Application. The Media Bureau provided no explanation for the rescission. CVGC therefore filed a Request for Special Temporary Authority to continue operating at its licensed site while the Mod Application was pending.

On November 19, 2019 the Bureau, without prior warning, issued the *Letter Decision* ruling that the licensed coordinates are: 35-11-24 N, 115-08-35 W, which is a location 70 miles from CVGC's licensed site, rather than the actual licensed coordinates of 36-11-24 N, 115-08-35 W. The Bureau ruled that the Mod Application coordinate correction violated Section 73.875(b)(2) of the Commission's rules, because a coordinate correction could only be made on FCC Form 318, not on Form 319. The Bureau ruled that the Station had operated at an unauthorized site for more than a year, and that, pursuant to Section 312(g) of the Act, the Station license automatically expired on December 13, 2018. The Bureau ruled that "the facts of this case do not support reinstatement of the license to promote fairness and equity." The Bureau then deleted the Station's call sign, dismissed the Mod Application and dismissed the Request for Special Temporary Authority.

On December 5, 2019, CVGC filed a Petition for Reconsideration ("Petition") of the *Letter Decision* and a Motion to Stay the effectiveness of the *Letter Decision*. In its Petition, CVGC pointed out that the *Letter Decision* had used incorrect coordinates, 70 miles from its licensed site, as the location of the licensed transmitter site in concluding that the station had not been built at its licensed site. CVGC stated that the station was built at a site just 256 feet from the site specified in its license and that Commission rules and precedent had treated such

variances as *de minimis*. CVGC argued that it was contrary to Commission rules and precedent to treat a license as expired based upon the facts alleged in the *Letter Decision*.

On January 15, 2020, the Media Bureau issued a Memorandum Opinion and Order (“Bureau MO&O”). In the Bureau MO&O, the Bureau completely changed its rationale for ruling that the CVGC license had expired. In the Bureau MO&O, the Bureau first asserted that the reliance of the *Letter Decision* on coordinates 70 miles from the CVGC licensed site was a typographical error. The Bureau then referred to the August 8, 2019 statement provided by Mr. Bo Tian, President of CVGC (“Bo Tian Statement”), to the Enforcement Bureau, in which Mr. Tian described in detail the operations of the station since it was licensed. Mr. Tian explained that:

1. When the station was licensed, the site for its transmission facilities was a vacant parcel with no distinguishing physical characteristics. This resulted in the site being identified as 120 West Owens Avenue (the “Constructed Site”), although the coordinates provided to the Commission were for a site 256 feet away, the 300 West Owens site (“the Licensed Site”)
2. The facilities installed at the Constructed Site consisted of a mobile van with a mast with an antenna on a mounted extension. The antenna height and other technical information was as specified in the construction permit and license application. Programming was originated from the Constructed Site beginning November 18, 2017.
3. Because of inadequate coverage of Chinatown, CVGC’s targeted community, from the Constructed Site, on or about January 20, 2018, CVGC installed transmission facilities including an antenna on the rooftop of its office-studio at 1707 East Charleston Blvd. (the “Studio Site”).
4. The Studio Site is 2.27 miles from the Constructed Site. Mr. Tian stated that he did not understand that prior Commission approval was required for this move.
5. On or about April 11, 2019, the Enforcement Bureau Regional Director visited the Studio Site. On April 25, 2019, Mr. Tian received an email message from the Regional Director making him aware, via questions, that installation of the transmission facilities at the Studio Site required prior Commission approval. On May 2, 2019, Mr. Tian re-installed the mobile van transmission system at the

Constructed Site. On August 1, 2019, Mr. Tian replaced the mobile production van with a broadcast tower with an antenna atop a semi-permanent trailer.

6. On July 22, 2019, the Regional Director sent Mr. Tian an email message requesting information on transmissions from the Licensed Site.

7. On August 8, 2019, Mr. Tian sent the Regional Director the statement in which all of the above facts were stated.

The Bureau asserted in the Bureau MO&O that, in its Petition for Reconsideration, CVGC had made statements in conflict with the statement of Mr. Tian.

On February 14, 2020, CVGC filed an Application for Review of the Bureau MO&O with the Commission. On February 17, 2020, CVGC filed a Motion for Stay, requesting a stay of the Bureau MO&O. CVGC further explained that, in its prior Petition for Reconsideration, CVGC argued only that the Station's license could not be deleted for the reasons set forth in the *Letter Decision*. CVGC said nothing in its Petition that contradicted anything in Mr. Tian's statement. Arguing against the inaccurate facts and law in the *Letter Decision* did not constitute a misrepresentation or lack of candor. CVGC argued that the Commission should rule that: (1) CVGC did not engage in misrepresentation or lack of candor, and (2) the principals of CVGC would not be obligated to submit a copy of the Bureau MO&O with every broadcast application that any of them file with the Commission within the next five years.

CVGC's Application for Review argued that, with respect to the new rationale provided in the MO&O for deleting the Station's call sign, the reliance on Section 312(g) is misplaced. CVGC argued that: (1) the Commission and court precedent that were used to support that conclusion have improperly interpreted the plain language of Section 312(g); (2) the *Eagle*⁸ case

⁸ *Eagle Broadcasting Group, Ltd v, FCC*, 563 F.3d 543 (D.C. Cir. 2009) ("*Eagle*").

improperly applied the *Chevron*⁹ case test under its original and recently reformed guidance; (3) broadcasting from an unauthorized location is still “broadcasting,” it is not being “silent;” (4) the Commission has appropriate authority to sanction a station for broadcasting from an unauthorized location without distorting the plain language of the statute to render “capital punishment” without providing basic due process rights; (5) CVGC has been providing needed programming to the Chinese speaking population within its service area; and (6) the public interest is not served by terminating that service based upon the facts before the Commission.

CVGC’s Application for Review argued that the Commission should reinterpret Section 312(g). CVGC pointed out that the clearly limited language of the statute only allows the Commission to delete the licenses of those stations that did not broadcast from any location for a 12-month period. CVGC requested the Commission to reverse the Bureau MO&O, reinstate the KQLS-LP call sign, and accord CVGC an opportunity to submit a construction permit application to correct its licensed coordinates.

In its Application for Review, CVGC pointed out that, in the Bureau MO&O, the Bureau suggested for the first time that CVGC might have engaged in misrepresentation and/or lack of candor. As a result of this suggestion, the Bureau ruled in the Bureau MO&O that the principals of CVGC are obligated to submit a copy of the Bureau MO&O with every broadcast application that any of them file with the Commission within the next five years. This is a serious suggestion, and CVGC requested that the Commission clear CVGC and its principals from the taint of this suggestion and from the obligation on the CVGC principals to submit a copy of the MO&O with future applications. CVGC’s Application for Review argued that neither it nor any

⁹ *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984) (“*Chevron*”).

of its principals engaged in any misrepresentation or lack of candor in their communications with the Commission. CVGC demonstrated that Mr. Bo Tian, on behalf of the CVGC, gave a full and honest account of the construction and operation of the Station to the Enforcement Bureau Regional Director on August 8, 2109, more than three months before the *Letter Decision* was issued November 19, 2019. The Application for Review argued that the *Letter Decision* did not address anything Mr. Tian said in his Statement, but instead ruled that the Station's license had expired and deleted the Station's call sign for reasons that were unsupported by the alleged facts in the *Letter Decision* and the law.

On February 28, 2020, Silver State Broadcasting, LLC ("SSB") filed an Opposition to CVGC's Application for Review.¹⁰ SSB stated that it is the licensee of FM Translator station K284CW,¹¹ Winchester, Nevada, and it had filed an application to modify the license of its translator, which could not be granted unless CVGC's license was no longer in effect. SSB asserted various arguments for why the CVGC Application for Review should be denied. On March 6, 2020, CVGC filed its Reply to the SSB Opposition.¹²

On November 25, 2020, the Commission issued its MO&O. The Commission ruled: (1) some of CVGC's arguments would not be considered because they had not been presented to the Bureau below, (2) the facts of the *Eagle* case were similar to the facts in this case, (3) the court in the *Eagle* case did not misapply the *Chevron* case when it considered the Commission's interpretation of Section 312(g), (4) the Bureau's decision was not inconsistent with case precedent, (5) operating from an unauthorized site is not "broadcasting," (6) imposition of a

¹⁰ SSB also filed an Opposition to CVGC's Motion for Stay on February 28, 2020. J.A. 153.

¹¹ The translator is now designated K276GX.

¹² CVGC also filed a Reply to the SSB Opposition to CVGC's Motion for Stay on March 6, 2020. J.A. 185.

monetary forfeiture would not have been an appropriate sanction, (7) the Bureau’s decision not to exercise its discretion to promote “equity and fairness” was affirmed, and (8) the Bureau’s determination that CVGC may have engaged in misrepresentation and/or lack of candor was affirmed.

CVGC then timely filed its Petition for Review, which is now pending before the Court of Appeals for the D.C. Circuit.

IV. ARGUMENT

A. The Commission Lacks Jurisdiction to Issue the LOI, because the filing of the Petition for Review with the Court of Appeals by CVGC conferred exclusive jurisdiction over issues in this proceeding with the Court

On December 23, 2020, CVGC filed its Petition for Review with the Court of Appeals, pursuant to 47 U.S.C. 402(b) and (c), seeking review of the MO&O and related proceedings, including the issue as to whether the license issued CVGC has expired or continues valid until the exhaustion of review and all appellate rights.¹³ See, CVGC Brief, at 22-47. The Communications Act provides that agency action is not final pending judicial action on any pending reviews. 47 U.S.C. Section 402(c). As the Court of Appeals has not acted upon the Petition for Review, there is no final judicial action.

Jurisdiction is the power to hear and determine the subject matter in controversy and to adjudicate or exercise power over the issues. *Rhode Island v. Massachusetts*, 37 U.S. 657, 718 (1838). It is a fundamental tenet of jurisprudence that the timely filing of an appeal, herein a petition for review with the appropriate reviewing court, transfers authority over the case proceedings to the Court of Appeals. *Griggs v Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982); *Prinz v. Federal Republic of Germany*, 998 F.2d 1, (D.C. Cir. 1993). The elements of

¹³ *Chinese Voice of Golden City v. FCC*, Case No. 20-1514; CVGC Brief filed April 12, 2021.

jurisdiction are an essential ingredient of separation and equilibration of powers that restrain courts. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998).

The filing of a notice of appeal is an event of jurisdictional significance – it confers exclusive jurisdiction on the Court of Appeals and divests the district court, herein the Commission, of its control over those aspects of the case involved in the appeal. *Griggs, supra*, citing, *United State v. Hitchmon*, 587 F.2d 1357 (5th Cir. 1979).

B. Simultaneous Court of Appeals and agency jurisdiction is impermissible

Despite settled law, the LOI attempts to assert Commission authority as to the rights of CVGC to continue broadcasting pending exhaustion of its judicial appeals. The divestiture rule is applicable, especially where one claims a right not to be investigated at all. *Abney v. United States*, 431 U.S. 651, 659-60 (1977).

The issuance of the LOI, despite administrative finality of the MO&O, and the filing of the Petition for Review, conflicts with Supreme Court holdings concerned with protection of judicial appeals. See *Griggs, supra, ICC v Locomotive Engineers*, 482 U.S. 270, 277 (1987). The holdings in *Griggs* and *Locomotive Engineers, supra*, are required, otherwise an appellant could be threatened and intimidated to abandon its appeal for fear of further sanctions, as the LOI attempts here.

The LOI negatively impacts the jurisdiction of the Court of Appeals, because it interferes with and could undermine the ultimate decision of the Court of Appeals as to the right of CVGC to continue broadcasting pending judicial finality. In probing the Station operations, the LOI asserts authority over those aspects of the case involved in the appeal and specifically threatens forfeitures for such Station operations. CVGC submits this action is precisely the confusion, waste, and conflicts that the Supreme Court intended to avoid by ruling that jurisdiction be rested

solely in the Court of Appeals. The divestiture doctrine is designed to promote judicial economy and prevent the confusion that would result from two authorities addressing the same issue. 20 Moore's Federal Practice: Civil ¶303.32[1] (3rd ed. 2009); *Neary v. Padilla*, 222 F.3d 1184, 1190 (9th Cir. 2000). This impermissibly risks inconsistent judgments and decisions.

C. The LOI intrudes upon and undermines the Court of Appeal's jurisdiction

The LOI demands information from CVGC that clearly prejudices the pending appeal and thus infringes upon and undermines the Court's authority to decide whether CVGC still holds a valid license. Moreover, the manner in which the LOI conducts this probe is in two completely conflicting manners, in that it treats CVGC as both a licensed station and a "pirate radio" operation, at the same time. First, the LOI specifically demands CVGC to submit to the Commission a range of information which could be requested of a licensee, including Emergency Alert System logs; ownership information; antenna site leasing agreements; financial information; programming information, and the names of any and all persons involved in all of these activities and assisting in station operations. See LOI, Attachment at Questions 13-27. But, at the same time, the LOI treats CVGC as "pirate radio" operator. Ignoring the pendency of CVGC's appeal, the LOI concludes that CVGC is no longer a licensee/regulate, as the Commission has declared an automatic forfeiture of the CVGC license as of November 19, 2019. LOI, Attachment at 4. Further, the Commission has deleted the CVGC station call sign; CDBS application files and license files from its public database. MO&O, at para. 13.¹⁴ Thus, the Enforcement Bureau is treating CVGC as a licensee and "pirate radio" operator in the same LOI.

¹⁴ The deletions are for all purposes, save those necessary for the filing of notices and pleadings required or occasioned by CVGC prosecuting its appeals and historic records.

Pivotaly, a federal agency's issuance of a subpoena for documents and written testimony impacting issues in a pending appeal before the Court of Appeals is an intrusion upon judicial jurisdiction. In *Winchester v. U.S. Attorney for the Southern District of Texas*, 68 F.3d 947, 949 (5th Cir. 1995), appellant Winchester filed an appeal from a judgment entered against him in the district court in favor of the Resolution Trust Corporation ("RTC"), a then federal agency, as to loans granted him by the RTC predecessor. While the appeal was pending, the RTC was considering a civil monetary penalty action against him for failing to protect the RTC interests in a bankruptcy proceeding. As part of its investigation, the RTC caused to be served upon the appellant Winchester an administrative subpoena seeking production of documents and written testimony concerning the loans. On review of a motion to quash the administrative subpoena, the Court of Appeals reaffirmed the core principle that the filing of a notice of appeal divests the district court of jurisdiction "except to take action in aid of the appeal, until the case is remanded to it by the appellate court, or to correct clerical errors." *Winchester* at 949. The same result is compelled here.

D. The Commission must be consistent and respect the exclusive jurisdiction of the Court of Appeals

The issuance of the LOI, while the CVGC appeal is pending before the Court, thus raises the possibility that the Commission has treated the pending appeal as an interlocutory matter, permitting the Commission to retain jurisdiction over the matter. Previously the Commission noted that it was troubled that the Commission caused the Department of Justice to take an inconsistent position before the Supreme Court that a decision the Commission deemed to be final was actually "interlocutory." The Commission candidly conceded:

We are troubled, however, by the seeming inconsistency between this analysis and the statement made to the Supreme Court that this case was 'interlocutory,' which could be read to mean that the government was representing to the

Supreme Court that Galaxy would be entitled to participate in this remand proceeding. We also take note of the Court of Appeals' denial of Bechtel's earlier attempt to terminate Galaxy's participation in this proceeding. Accordingly, although the Court of Appeals left it to us 'in the first instance' to rule on Galaxy's status, we decline to issue the order requested.

Anchor Broadcasting Limited Partnership, 10 FCC Red 2, para. 14, (1995). CVGC submits that positioning the case before the Court as final, while seeking additional enforcement against CVGC in manner that would appear "interlocutory" is inconsistent. The inconsistent positions are arbitrary and capricious in violation of the APA. The Commission must be consistent and abide by controlling judicial precedent, which precludes the Commission from intruding upon the exclusive jurisdiction of the Court of Appeals.

E. The LOI has unlawfully threatened to use Section 511 of the Act against CVGC as an alleged pirate operator, which would permit assessment of forfeitures up to \$2,023,640

In addition to being jurisdictionally barred, the LOI must be quashed, because it is based upon a tortured misinterpretation of the term "pirate radio" that improperly seeks to treat CVGC as a "pirate radio" operation. CVGC has an appeal pending in the Court of Appeals, arguing that the Commission's termination of its license to operate was arbitrary and capricious and a violation of applicable law. The substance of that argument is provided above in the Background section. However, while its case is now pending in the Court, CVGC received the LOI regarding its station operations. Ostensibly, the LOI seeks to determine whether CVGC is continuing to broadcast while its appeal is pending. As CVGC shall demonstrate below, it has very good legal arguments for why it is lawful for CVGC to continue broadcasting while its appeal is pending. In addition, as the LOI came from the Field Director of the Enforcement Bureau, the Bureau is fully capable of determining whether CVGC is still broadcasting, without the need to send CVGC the LOI.

Rather, it is clear that the purpose and effect of the LOI is to intimidate and threaten the officers and directors of CVGC. Specifically, the LOI states:

Section 301 of the Act prohibits individuals from operating radio stations without a license or other authority from the Commission.⁶ Likewise, **section 511 of the Act establishes penalties for any individual who engages in or permits acts of pirate radio broadcasting**, which is defined as ‘the transmission of communications on spectrum frequencies between 535 and 1705 kilohertz, inclusive, or 87.7 and 108 megahertz, inclusive, *without a license issued by the Commission.*’⁷ The purpose of this investigation is to determine the extent to which CVGC operates or has operated the Station without therequisite Commission authority after its license expired. (emphasis added)¹⁵

This paragraph of the LOI clearly threatens that, if CVGC is broadcasting, its officers and directors may be subject to sanctions pursuant to Section 511 of the Communications Act – the provision applicable to pirate radio operations. Section 511 provides:

§511. Enhanced penalties for pirate radio broadcasting; enforcement sweeps; reporting

(a) Increased general penalty

Any person who willfully and knowingly does or causes or suffers to be done any pirate radio broadcasting shall be subject to a fine of not more than \$2,000,000.¹⁶

Section 511 now imposes a possible maximum forfeiture against the officers and directors of CVGC up to \$2,023,640. This is a total and complete misapplication of Section 511. The title of Section 511 clearly and explicitly applies to “pirate radio.” The Commission has consistently applied its rules against “pirate radio” to parties who operate radio facilities without obtaining a Commission license. Thus, in its first report to Congress regarding enforcement of the PIRATE

¹⁵ LOI at 2.”

¹⁶ *Preventing Illegal Radio Abuse Through Enforcement Act (“PIRATE Act”)*, Pub. L. No. 116-109, 134 Stat. 3 (2020) (codified at 47 U.S.C. § 511). On March 25, 2021, the Commission published in the Federal Register an amendment to Section 1.80 of its Rules, reporting that the maximum forfeiture under Section 511 of the Act has been increased from \$2,000,000 to \$2,023,640.

Act¹⁷ the Commission stated:

The Commission has taken the following steps to begin implementing the PIRATE Act:

- Notice to property owners and property managers. The PIRATE Act granted the Commission authority to pursue enforcement sanctions against any party that “suffers to be done,” or allows, pirate radio activities. This provides us with the ability to take enforcement action against property owners and property managers that, after receiving notice of pirate radio transmissions emanating from properties that they own or control, continue to allow such activity.¹⁸

The Commission went on to report:

The Commission took the following enforcement actions against pirate radio operators in 2020:

- On July 1, 2020, the Commission resolved a long-running pirate radio investigation with Acerome Jean Charles, reaching a settlement with this individual. He agreed to a monetary settlement with the Commission, including a significant suspended monetary penalty that will be triggered if Jean Charles resumes pirate broadcast operations, along with voluntary surrender of the station’s broadcasting equipment.
- On July 1, 2020, the Commission resolved a long-running pirate radio investigation with Gerlens Cesar, reaching a settlement with him. This individual agreed to a monetary settlement with the Commission, including a significant suspended monetary penalty that will be triggered if Cesar resumes pirate broadcast operations, along with voluntary surrender of broadcasting equipment.
- On June 18, 2020, the Bureau imposed a monetary forfeiture on Gerald Sutton for operating an unauthorized radio station.
- On June 17, 2020, Anthony M. Edwards agreed to a monetary settlement with the Bureau, including a significant suspended monetary penalty that will be triggered if Edwards resumes pirate broadcast operations, along with voluntary surrender of broadcasting equipment.¹⁹

What all of these PIRATE Act enforcement proceedings have in common is that they were all

¹⁷ *Report on Pirate Radio Enforcement and Implementation of the Preventing Illegal Radio Abuse Through Enforcement Act*, Enforcement Bureau, January 4, 2021 (“*Pirate Report*”).

¹⁸ *Pirate Report* at 1-2

¹⁹ *Id.* at 2-3.

brought against persons who: (1) operated clandestine radio operations, (2) without first obtaining a license from the Commission. Indeed, the Commission has begun targeting landlords, because the Commission usually has no knowledge of who the persons are that are operating these clandestine operations.

Applying Section 511 to CVGC corrupts the entire meaning of the term “pirate radio.” CVGC has a license from the FCC. The FCC was given full information about CVGC, its officers and directors and the location of its operations when CVGC applied for its license. Calling CVGC a “pirate radio” operation is arbitrary and capricious and an abuse of discretion in violation of the APA. CVGC obtained a license to operate KQLS-LP, and CVGC has been and continues to be pursuing legal redress of what it believes was an unlawful termination of its license. KQLS-LP is not now, and never has been, a pirate radio operation, as that term has been consistently interpreted by the Commission. It is an abuse of the Commission’s authority for the Enforcement Bureau to threaten CVGC and its officers and directors with enforcement under Section 511.

F. The LOI attempts to draw employees and volunteers into the Bureau’s threatened pirate radio enforcement net

The LOI does not limit its threats and intimidation to CVGC’s officers and directors. The LOI creates more threats and intimidation by asking a long litany of questions about all persons involved in every aspect of the station operation. The LOI makes clear that the Bureau is looking to draw employees and volunteers of CVGC into the threatened Section 511 forfeiture exposure. The LOI orders CVGC:

15. With regard to the Station’s programming, provide the following information:
 - a. Describe fully the nature of the Station’s programming.
 - b. Identify the **persons** who have established or modified the Station’s

programming and programming policies.

- c. Identify the **persons** who make programming decisions at the Station.
- d. State whether there is a **person** in charge of the Station's programming (i.e., a program manager). If so, then Identify that **person**, including his or her official title and a description of his or her official duties.

16. **Identify by name, address, title, dates of employment, and employer, the specific persons who participated in the following activities with respect to the Station and who:**

- a. Control and have access to the Station's financial records and books;
- b. Prepare and keep the Station's financial records;
- c. Pay the Station's operating expenses;
- d. Prepare and sign the Station's checks;
- e. Pay rent for the studio;
- f. Pay rent for the antenna tower site or usage;
- g. Interview, hire, or fire Station personnel;
- h. Establish, implement, or alter Station management policy;
- i. Control or have access to the Station's bank accounts;
- j. Prepare or pay the Station's payroll, insurance, income and property taxes, withholding statements, workmen's compensation, and social security obligations;
- k. Staff transmitter facilities;
- l. Provide necessary monitoring and engineering operations; and
- m. Perform emergency alert system operations.

17. **State whether CVGC maintained any full-time employees at the Station. If so, then Identify any such persons, the dates of their employment, and describe their official duties.**

18. **Identify in whose name the Station's accounts payable (including but not limited to, utility accounts, network affiliation agreements, syndicated wire service contracts, credit accounts, rent/mortgage, equipment contracts, and employee compensation) are listed. As to each account and contract, state which person or entity pays the vendor or employees for the services or goods provided, and on which person's or entity's bank account such payment checks were drawn. List the name and address of each signatory on each such bank account. (emphasis added)²⁰**

²⁰ LOI at 5-6.

This extensive and invasive inquiry is totally inappropriate when directed at CVGC, a licensed station operator, seeking to obtain its day in court with respect to having the license of KQLS-LP reinstated. Once CVGC identifies the persons targeted by the LOI, that group of persons are then at risk of being sanctioned with a forfeiture up to \$2,023,640. There is no legitimate reason for the Bureau to seek this information. CVGC is not a “pirate radio” operator.

G. The LOI threatens sanctions against CVGC, its officer, directors, employees and volunteers, even though CVGC would shut down its Station if it loses its appeal

By asserting that CVGC, its officer, directors, employees and volunteers are operating a “pirate radio” station, the LOI, invokes the authority of Section 511 of the Act. Section 511 is written to apply to individuals who operate pirate radio stations, not to corporate entities. Once persons have been found to have operated a pirate radio station, Section 511 appears to permit enforcement action against the persons without regard to whether they are still operating the pirate radio station. CVGC is seeking to exhaust its judicial remedies for the unlawful termination of its license. If CVGC is unsuccessful in its appeal and has exhausted its judicial remedies, it will accept that it has no authority to broadcast and will shut down its Station. However, by invoking Section 511, the Enforcement Bureau could argue that it can go after the officers, directors, employees and volunteers of CVGC **after** they have closed the Station down. This would be a gross miscarriage of justice. As is clear from everything that CVGC has submitted to the Commission and the Court, CVGC merely wants its day in court. If CVGC loses its appeal, its officers, directors, employees and volunteers should not be threatened with enforcement sanctions, up to \$2,023,640, for seeking their day in court, **after** they have lost their station.

H. CVGC has a right to continue broadcasting until it has exhausted its appeal rights for what it submits is an unlawful termination of its license

The LOI asserts that CVGC is operating as a “pirate radio” operation, because on November 19, 2019, the Media Bureau issued the *Letter Decision*, in which the Media Bureau ruled that, “because CVGC had operated the Station at an unauthorized location for more than a year, the Station’s license had expired by operation of Section 312(g) of the Act.”²¹ CVGC submits that it is entitled to broadcast, because the Media Bureau’s decision is not final and is subject to judicial review. The Enforcement Bureau apparently relies upon Section 1.102(b) of the Commission’s Rules, which provides that a Bureau decision is effective upon release, as obligating CVGC to cease broadcasting. However, that interpretation of Section 1.102(b) is inconsistent with the Administrative Procedure Act (“APA”) and with the policy established by Section 307(c)(3) of the Communications Act. Section 307(c)(3) specifically provides for continued operation for licensees with a renewal application pending, but it is silent with respect to a licensee in the situation of KQLS-LP. CVGC submits that Section 307(c)(3) clearly expresses the view of Congress that requiring a station to go off the air would do irreparable harm to the station. Thus, Congress specifically prevented the Commission from having the authority to do so while an application for license renewal was pending and subject to Commission or court review. CVGC submits that the Act’s silence as to other situations in which the Commission may order a station off the air cannot be taken as a signal that the Commission may routinely order stations off the air before providing them an opportunity to present their positions to the Bureau, full Commission and a reviewing court. Rather, Section 307(c)(3) provides guidance to the Commission that it should give great consideration and

²¹ *Letter Order* at 2.

review before ordering a station off the air. Here, CVGC had its license terminated by the Media Bureau. CVGC was provided no Commission review and no court review before having its license terminated. CVGC submits, if the Commission interprets Section 1.102(b) as requiring CVGC to cease broadcasting, that interpretation is inconsistent with the policy underlying Section 307(c)(3).

Also, with respect to the right to broadcast while exhausting its administrative and judicial remedies, the Commission protects from use by other parties the frequency of a station that has had its call sign deleted until the station has exhausted its administrative and judicial remedies.²² This provides further support for CVGC's argument that it can continue broadcasting.

The Enforcement Bureau's interpretation of Section 1.102(b) is also inconsistent with the APA. The Bureau interprets Section 1.102(b) as giving it the authority to prevent a licensee from broadcasting unless and until the Bureau's decision is overturned by the Commission or a reviewing court. This has the effect of allowing the Bureau to impose "capital punishment" and put a licensee out of business. If a licensee is improperly forced off the air for many months, or even years – as is the case for CVGC – as it exercises its review rights, it will be virtually impossible to regain its antenna site, staffing, volunteers, listeners and donors, if it is ultimately successful. Further, the loss of an antenna site location by a low power FM station is more critical than in other broadcast services. The antenna site landlord could find alternative uses for the site, and, for an LPFM licensee, finding a Commission acceptable alternative site in an urban

²² *Letter to Silver State Broadcasting, LLC*, BSTA-20200107AAL, from Dale Bickel, Senior Engineer, Audio Division, Media Bureau, January 8, 2020, *supra*.

area is extremely difficult, as the Commission has acknowledged.²³ Thus, if it is off the air while waiting for successful action on review, a licensee will be so severely harmed that it may never be able to resume broadcasting. In essence, the Bureau's interpretation of Section 1.102(b) would impose "capital punishment" on CVGC prior to providing it an opportunity to seek review. This interpretation of Section 1.102(b) allows the Bureau to negate the value of the due process rights accorded by the APA. This interpretation of Section 1.102(b) is in conflict with the overall policy of the APA, and in particular with Section 558.²⁴

Section 558 of the APA provides:

(c) ... Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, *before* the institution of agency proceedings therefor, the licensee has been given— (1) notice by the agency in writing of the facts or conduct which may warrant the action; and (2) opportunity to demonstrate or achieve compliance with all lawful requirements. (Emphasis added.)

Section 558 clearly requires that sanctions may not be imposed until after a licensee has been provided a reasonable notice of the facts or conduct warranting action and an opportunity to demonstrate or achieve compliance. Here, CVGC's license was declared expired, and its call sign deleted before receiving the benefits of Section 558. Therefore, whether the Commission's interpretation of Section 1.102(b) is consistent with requirements of Section 558 of the APA is precisely the type of question that a reviewing court should address. The APA and Section 307(c)(3) of the Act support the view that CVGC has the right to continue broadcasting until it has had its day in court.

Therefore, the LOI must be quashed. It is premised on a complete misinterpretation of

²³ *Creation of a Low Power Radio Service (Second Order on Reconsideration)*, 20 FCC Rcd. 6563, par. 13 (2005).

²⁴ 5 U.S.C. § 550 et. seq., *Overton Park*, *supra*.

Section 511, and purports to treat CVGC as the operator of a pirate radio station, which CVGC clearly is not. The LOI does not seek any information that the Enforcement Bureau needs from a licensed radio station seeking its day in court to have its license reinstated. The only purpose that the LOI serves is to intimidate and threaten the officers, directors, employees and volunteers with forfeitures up to \$2,023,640. However, all these people want is to finish their appeal without being threatened and intimidated. CVGC will abide by the decision of the Court.

I. The public interest is not served by issuance of the LOI

CVGC was issued a license to operate its Station. At that time, the Commission determined that operation of KQLS-LP would serve the public interest. That determination included underlying determinations that KQLS-LP would not interfere with other stations, FAA operations, or pose a threat to any other radio frequency operations regulated by the Commission. Therefore, the continued operation of CVGC in the manner licensed is not, and cannot be, a threat to any other Commission regulated entity. The continued operation of KQLS-LP poses no threat to the public interest that requires its immediate cessation of operations.

Therefore, for all of the above-stated reasons, the LOI should be quashed. And, as set forth below, once the LOI is quashed, CVGC requires a Stay of all further proceedings against it by the Enforcement Bureau.

V. CONCLUSION

CVGC has demonstrated that this Motion to Quash should be granted and the LOI should be quashed. The Commission lacks jurisdiction to take further action related to whether CVGC has a valid license to broadcast until CVGC's appeal is decided by the Court Of Appeals. Additionally, the LOI serves no regulatory purpose other than to threaten and intimidate CVGC and its principals with being treated like a "pirate radio" operation subject to potential forfeitures

of up to \$2,023, 640. CVGC is not a pirate radio operator, it is a licensee seeking to have its day in court to demonstrate that its license was wrongfully terminated. Therefore, the Commission should grant the Motion to Quash. Additionally, upon grant of this Motion to Quash, the Commission should grant the accompanying Motion for Stay to prevent the Enforcement Bureau from taking any further enforcement action against CVGC. The four factors to be considered in the Motion for Stay all weigh in favor of granting the Stay: (1) CVGC is likely to prevail on the merits; (2) CVGC will be irreparably harmed if the Stay is not granted; (3) no other party will be harmed by grant of the Stay and (4) the public interest will be significantly served by a grant of the Stay. Therefore, CVGC requests that the Commission immediately grant this Motion to Quash and the accompanying Motion for Stay.

Respectfully submitted,

CHINESE VOICE OF GOLDEN CITY

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May 10, 2021

CERTIFICATE OF SERVICE

I, James Winston, do hereby certify that I sent via electronic mail (except where indicated), on this 10th day of May, 2021 copies of the foregoing MOTION TO QUASH LETTER OF INQUIRY to the following:

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