

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

In re Application of)	
)	File No. BPCT-19960920WH
Television Capital)	Facility ID No. 83956
Corporation of Portland)	
)	
For a New Commercial Television Station)	
at Portland, Oregon)	

MEMORANDUM OPINION AND ORDER

Adopted: January 31, 2017

Released: January 31, 2017

By the Commission:

1. By this *Memorandum Opinion and Order*, we dismiss, in part, and otherwise deny an Application for Review filed by Television Capital Corporation of Portland (TCCP),¹ the dismissed applicant for a new, full-power analog television station serving Portland, Oregon.

2. TCCP challenges an October 16, 2012, letter decision by the Chief of the Video Division, Media Bureau (Division),² which dismissed its November 3, 2004, Petition for Reconsideration of the Commission's Second DTV Periodic Report and Order.³ The Division dismissed TCCP's Petition for Reconsideration as moot because TCCP ultimately sought an analog television authorization that the Commission was statutorily prohibited from issuing by the Balanced Budget Act of 2007 and Section 309(j)(14)(A) of the Act.⁴ That statutory provision, adopted as part of the congressionally-mandated broadcast television digital transition, prohibits the Commission from renewing analog television authorizations calling for service beyond June 12, 2009, the deadline by which all television stations were required to cease analog operations. Significantly, TCCP offers no argument in its AFR challenging the correctness of that Division ruling, which, for the reasons noted in the 2012 Letter Decision, we affirm.

3. The relief that TCCP actually seeks is the reversal of the Division's July 19, 2007, letter decision.⁵ That decision dismissed TCCP's application for a new analog television construction permit in Portland, Oregon, because the proposed channel 40 operation did not comply with the Commission's interference and technical rules and was predicted to cause impermissible interference to stations KKEI-CA and KOAC-DT in Portland, and noted that TCCP's related Petition for Rulemaking to substitute

¹ Application for Review of Television Capital Corporation of Portland (filed Dec. 5, 2012) (AFR).

² *Mr. Andrew Barrett et al.*, Letter Decision, 27 FCC Rcd 13001 (Vid. Div. 2012) (2012 Letter Decision).

³ *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Report and Order, 19 FCC Rcd 18279 (2004) (Second DTV Periodic Report and Order).

⁴ In so acting, the Division observed, "In the Balanced Budget Act of 1997 Congress added a new section to the [Act], prohibiting the FCC from renewing analog full power television broadcast licenses to authorize operation beyond a specified digital television transition date, subject to extension under certain circumstances. Later, Congress again amended the Act, adding a provision obligating the Commission to take affirmative steps to ensure that all analog full power television stations cease broadcasting, and to terminate their licenses, by the June 12, 2009 digital television transition deadline. Specifically, the statute mandated that the Commission 'require cessation of broadcasting by full-power stations in the analog television service' by the deadline." 2012 Letter Decision, 27 FCC Rcd at 13003 (citations omitted).

⁵ See Letter from Clay Pendarvis, Associate Chief, Video Division, Media Bureau, to Television Capital Corporation of Portland and Sinclair Communications of Portland, Inc. (dated July 19, 2007) (2007 Letter Decision).

channel 42 had been dismissed pursuant to the Second DTV Periodic Report and Order.⁶ TCCP, which has not previously disputed these dismissals in a petition for reconsideration to the Division, maintains in its AFR that it never received actual notice of the 2007 Letter Decision dismissing its application, that the 2007 Letter Decision was sent to the wrong address and that such dismissal never appeared on public notice.⁷ TCCP continues, “Thus, TCCP never received notice of the actual dismissal of its application. The Commission’s failure to provide TCCP notice of the dismissal of the TCCP application violated TCCP’s basic due process.”⁸

4. TCCP does not state how and when it first learned of the 2007 Letter Decision, much less demonstrate that this purported failure of notice prevented it from timely seeking reconsideration of that letter’s dismissal of its application. Under these circumstances, it has failed to show good cause for its untimely seeking review of the dismissal in the AFR, which was filed over five years after the 2007 Letter Decision.⁹

5. In fact, TCCP suggests in its AFR that it was aware of the 2007 Letter Decision years before the 2012 Letter Decision, yet failed to timely seek reconsideration. On July 24, 2009, it filed a “Request for Action,” in which, in its words, it “argued that the Commission reinstate the TCCP application and allow TCCP to amend to specify a digital channel....”¹⁰ Attachment I to that 2009 filing was a copy of the 2007 Letter Decision, and Attachment J was a printout from the Commission’s Consolidated Data Base System pertaining to the status of TCCP’s application, which, by the date of its printing contained in the hyperlink at the bottom of the page, indicates that TCCP knew of the application’s dismissal by at least November 18, 2008. Thus, TCCP’s implication in its AFR in 2012 that it “never received notice of the actual dismissal of its application” in violation of its “basic due process rights” is disingenuous, at best. It was fully aware of the dismissal years before the 2012 Letter Decision of which it seeks review in its AFR, yet failed to seek reconsideration of the 2007 Letter Decision. At a minimum, it should have sought reconsideration by the Division as soon as it learned of the dismissal rather than delaying until after the 2012 Letter Decision and seeking Commission review by its 2012 AFR. We reject TCCP’s untimely attempt in its AFR to belatedly question the dismissal and impermissibly raise a new matter that the Division has had no opportunity to consider.¹¹ Accordingly, as it relates to this argument, we dismiss the AFR pursuant to Section 1.115(c) of the Rules.

6. Finally, TCCP’s AFR is also premised on its contention that, before dismissing its application, the Commission should have ruled on its November 3, 2004, Petition for Reconsideration¹² of the Commission’s Second DTV Periodic Report and Order, which, to facilitate the DTV transition, directed the Bureau to “dismiss all pending petitions to change the NTSC Table of Allotments in which a

⁶ See 2007 Letter Decision; 2012 Letter Decision, 27 FCC Rcd at 13002, n. 5.

⁷ AFR at 5-6.

⁸ *Id.* at 5.

⁹ See *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976). A party seeking consideration of an untimely filed pleading has the burden to show: (a) when and how it received notice in fact; (b) that the time remaining was inadequate to allow it reasonably to timely file; and (c) that it acted promptly to file on receiving actual notice. *Id.* at 1091-92, n. 24. “Because persons directly affected typically become aware of the release of decisions, through items in the general or trade press, before the official letter arrives from the agency’s secretary, it will be an extraordinary case...where a petitioner can meet that burden.” *Id.* See also, *Centro Cultural de Mexico en el Condado de Orange*, 31 FCC Rcd 383, 840, n. 7. TCCP fails to satisfy any of this three-part test.

¹⁰ AFR at 14.

¹¹ See 47 C.F.R. § 1.115(c) (“No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.”).

¹² Petition for Reconsideration of Television Capital Corporation of Portland, filed Nov. 3, 2004 (2004 Petition for Reconsideration).

Notice of Proposed Rulemaking has not been issued prior to the Adoption of this Order.”¹³ As noted in the 2007 Letter Decision, the TCCP Petition for Rulemaking fell within this category of petitions to be dismissed. We agree that the Commission should have acted on TCCP’s 2004 Petition for Reconsideration before the TCCP application was dismissed. However, we find that this was harmless error. In its 2004 Petition for Reconsideration, TCCP requested that the Bureau “immediately issue an NPRM proposing the allotment of the requested channel and not defer processing of the allotment proposal due to the channel election and repacking process...”¹⁴ Dismissal of the Petition for Rulemaking, the TCCP application,¹⁵ and the Petition for Reconsideration, was appropriate because, as noted above, TCCP had requested an analog authorization that the Commission was prohibited from issuing by Section 309(j)(14)(A) of the Act, and we therefore affirm the actions by the Division. Furthermore, because TCCP failed to challenge the Division’s actions and allow the Division to consider its arguments, we also dismiss the AFR pursuant to Section 1.115(c) of the Rules, to the extent it seeks to raise those matters before us. In light of our actions, we also dismiss, as moot, TCCP’s Request for Action discussed in paragraph 5 above.

7. Accordingly, **IT IS ORDERED** that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, 47 U.S.C. § 155(c)(5), and Sections 1.115(c) and (g) of the Commission’s rules, 47 C.F.R. §§ 1.115(c), (g), the Application for Review filed by Television Capital Corporation of Portland on December 2, 2012, **IS DISMISSED**, in part, and otherwise **IS DENIED**.

8. **IT IS FURTHER ORDERED** that the “Request for Action” filed by Television Capital Corporation of Portland on July 24, 2009, **IS DISMISSED**, as moot.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

¹³ AFR at 6. *See Second DTV Periodic Report and Order*, 19 FCC Rcd at 18308, para. 68 (adopted on August 4, 2004).

¹⁴ 2004 Petition for Reconsideration at 7.

¹⁵ As noted *supra*, the Division dismissed the application due to the failure of the proposal to comply with the Commission’s technical rules, causing predicted objectionable interference to two existing Portland television stations.