

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

2005 SEP 21 A-11:23

In re Applications of

**ROYCE INTERNATIONAL
BROADCASTING COMPANY**

Assignor

and

ENTERCOM COMMUNICATIONS CORP.

Assignee

For Consent to Assignment of License of
KWOD(FM), Sacramento, California
(FCC Facility ID No. 57889)

File No. BALH-20021120ACE

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Federal Communications Commission
Office of Secretary

To: The Commission

APPLICATION FOR REVIEW

ROYCE INTERNATIONAL BROADCASTING COMPANY (“*Royce*”), by counsel and pursuant to the provisions of Section 1.115 of the Commission’s rules,^{1/} hereby submits this Application for Review appealing the Media Bureau’s (“*Bureau*”) letter ruling of August 22, 2005,^{2/} (“*Decision*”) denying *Royce*’s Petition for Reconsideration, filed June 11, 2003 (hereafter the “*Petition*” or “*Royce’s Petition*”). The *Petition* requested the *Bureau* to properly apply its processing guidelines respecting the Com-

^{1/} 47 C.F.R. § 1.115

^{2/} DA 05-2307, Ref. 1800B3-BSH.

mission's local radio ownership rules adopted June 2, 2003,^{3/} to the above-captioned assignment application which the Bureau refused to do. In support of this request for review of the Decision, the following is respectfully shown:

I. BASIS FOR REVIEW

Conformance with Section 1.115. Section 1.115 of the Commission's Rules^{4/} provides that an application for review must specify with particularity which of five factors serves as the predicate for review.^{5/} Importantly, this case presents two such factors as the foundation for review. More specifically, the Decision (a) involves an action taken pursuant to delegated authority that is in conflict with statute, regulation, case precedent, and established Commission policy,^{6/} and (b) is tantamount to prejudicial procedural error. In fact, while the Decision aptly frames the issues presented by the Petition, it then arbitrarily and capriciously fails to properly address or resolve them. In short, the Decision is not reasoned decision making and violates the fundamental underpinnings of the Administrative Procedure Act. 5 U.S.C. §§ 551 *et seq.*

^{3/} 18 FCC Rcd 13620, 29 CR 564 (2003) (hereafter referred to as the "2003 Order"), *rev., in part and remanded, Prometheus Radio Project v. FCC* 373 F3d 372, 32 CR 962 (2004) (the 3rd Circuit decision in the Prometheus Radio Project case hereafter referred to as the "Prometheus Decision").

^{4/} See 47 C.F.R. § 1.115(b)(2).

^{5/} *Id.*

^{6/} 47 C.F.R. § 1.115(b)(2)(i).

Accordingly, the Bureau's Decision must be reversed, the grant of the above-captioned assignment application must be rescinded, and **ENTERCOM COMMUNICATIONS CORP.** ("*ECC*") must be compelled to affirmatively demonstrate that its ownership of Radio Station KWOD(FM), Sacramento, California (FCC Facility ID No. 57889), in addition to five other radio stations that serve the Sacramento, California market,^{7/} is consistent with the FCC's current ownership rules.

II. ARGUMENT

A. *The Issue Presented by the Petition.* Royce's Petition essentially presented a singular issue: Whether the Bureau had failed to process the subject ECC assignment application (FCC File No. BALH-20021120ACE) (hereafter, the "*Assignment Application*") consistent with publicly announced application-processing guidelines that had been established by the Commission,^{8/} because, at the time of the release of the 2003 Order, the Assignment Application remained pending. The application-processing guidelines specifically provided that "Pending Applications that are still pending as of the effective date of the new rules will be processed under the new

^{7/} Radio Stations KCTC(AM), Sacramento, California (FCC Facility ID No. 67848); KDND(FM), Sacramento, California (FCC Facility ID No. 65483); KRXQ(FM), Sacramento, California (FCC Facility ID No. 20354); KSEG(FM), Sacramento, California (FCC Facility ID No. 11281); and KSSJ(FM), Fair Oaks, California (FCC Facility ID No. 6810)

^{8/} By a *Public Notice*, DA 03-1877 (released June 2, 2003) ("Media Bureau Announces Processing Guidelines for Broadcast Station Applications") (hereinafter "*Public Notice*").

the effective date of the new rules will be processed under the new rules.”^{9/} In this connection, Royce demonstrated that under the plain language of Section 1.65(a) of the Commission’s Rules,

... (a)n application is still “pending” before the Commission from the time it is accepted for filing by the Commission until a Commission grant or denial of the application is no longer subject to reconsideration by the Commission or to review by any court.^{10/}

Thus, Royce argued that the Assignment Application should have been processed as a pending application since it was not yet final. The Bureau correctly summarized Royce’s argument as follows:

Royce argues that the Assignment Application was “pending” at the time the Public Notice was released because it was still subject to appeal. On this basis, Royce contends that Entercom must amend the Assignment Application to show compliance with the new local radio ownership Rule. Decision at p. 2.

B. The Decision does not Address Royce’s Argument About the Pendency of the Assignment Application. Importantly, the Bureau wrongly dismissed Royce’s Petition upon the faulty rationale that the 2003 Order had specifically grandfathered existing clusters of commonly owned stations that existed prior to and as of the time of the adoption of the 2003 Order finding that the grandfathering provisions of the 2003

^{9/} The Public Notice defined the term “Pending Applications” as meaning “long-form assignment or transfer of control applications (FCC Form 314 or 315) ... that are *pending* as of the adoption of the *Order*” (i.e., the Report and Order in MB Docket No. 02-277 and MM docket Nos. 01-235, 01-317 and 00-244 (adopted June 2, 2003), 18 FCC Rcd 13620.

^{10/} 47 C.F.R. § 1.65(a).

Order were controlling. The Bureau also unlawfully determined that the temporary suspension of the radio ownership rules contained in the 2003 Order as the result of the Prometheus Decision was a further basis for not applying the new ownership rules to ECC in connection with the Assignment Application, essentially because the Assignment Application had been granted prior to the release of the 2003 Order.

Most importantly, the Bureau never resolved the issue of the “pending” status of the Assignment Application pursuant to Section 1.65, and totally failed to explain why the Assignment Application was not legally “pending” at the time the 2003 Order was adopted, or when the radio ownership rules thereunder became effective, or when the Third Circuit Court of Appeals reinstated the applicability of the radio ownership rules as set forth in the 2003 Order. Clearly, the unambiguous language of Section 1.65 provides that the Assignment Application still remains pending as of the date of this pleading. Yet the Bureau totally ignored the merits of this argument and did not explain its reason for doing so.

The rationale used by the Bureau for the Decision is inconsistent with the Public Notice and the 2003 Order. The grandfathering provisions of the 2003 Order pertain to the question of whether existing commonly-owned clusters would be required to divest stations, notwithstanding whether an assignment application was pending. Plainly, grandfathering of existing clusters is a totally different situation from this case where an assignment or transfer application is still pending.

Significantly, that salient difference was observed by the Commission in the 2003 Order. Indeed, after explaining its rationale for grandfathering existing station combinations that may exceed the numerical limits contained in the new multiple ownership rules, the Commission stated: “In general, we will prohibit the sale of existing combinations that violate the modified local radio ownership rule, the local television ownership rules, or the cross media limits.” 2003 Order at ¶ 487.

And, in discussing the difference between permitted grandfathered clusters and the creation of new clusters, the Commission remarked as follows:

Unlike our decision not to require existing station owners to divest stations, here (in connection with transfers or the creation of combination that would create a new violation of the ownership rules), the threat to competition is not outweighed by countervailing considerations. Buyers will be on notice that ownership combinations must comply at the time of the acquisition of the stations. *Id.*

It is patent from the plain language of the 2003 Order that if an assignment application, as here, was “pending” it then would be processed in accordance with the ownership rules that were effective with the adoption of the 2003 Order, to wit:

These guidelines also cover pending and new modification applications that implicate our multiple ownership rules. Applications filed on or after the effective date of this *Order as well as applications that are still pending as of such effective date will be processed under the new multiple ownership rules*, including, where applicable, the interim methodology for defining radio markets as adopted herein. 2003 Order, ¶ 498 (*emphasis added*).

The Bureau’s rationale for denying Royce’s Petition is a illogical and disingenuous. It compares apples (grandfathered station combinations) to oranges (assignments, transfers and the creation of new violating combinations) and wrongly con-

cludes that the two are the same. They are not, and the 2003 Order plainly recognizes the difference, but the Bureau has failed to do so.

C. The Decision Violates the Administrative Procedure Act. As such, the Bureau's Decision violates the Administrative Procedure Act^{11/} which requires that any ruling in an adjudicatory decision "shall show the ruling on *each* finding, conclusion or exception presented."^{12/} Since the Decision fails to address Royce's argument that the Assignment Application remains pending, and accordingly should have been processed in accordance with the express language of the 2003 Order, the Bureau's Decision constitutes reversible error in contravention of the Administrative Procedure Act.

Similarly, the Bureau wrongly asserts that, since the Assignment Application had been granted before the date the 2003 Order was adopted, the 2003 Order did not apply to either the Assignment Application or the KWOD assignment because the assignment already had closed before the adoption of the Order. However, since the grant was not final, the Bureau's logic conflicts with the pendency language of Section 1.65(a) of the Commission's rules. Plainly, the fact that the Assignment Application was granted and that ECC chose to voluntarily close the transaction prior to the finality of the order should have absolutely no effect on the "pending" status of the ap-

^{11/} 5 U.S.C. §§ 551, *et seq.*

^{12/} 5 U.S.C. § 557(c).

plication, since the grant manifestly was not final.^{13/} Moreover, it is well established that the Commission may rescind the grant of an assignment application, even after the transaction has been consummated prior to finality. See the Letter from Barbara A. Kreisman, Chief, Video Division, Media Bureau, to *CFM Communications, et al.* (DA 05-1695), respecting the transfer of control pertaining to Television Station KOWH, Lincoln, Nebraska (FCC Facility ID No. 84453) (FCC File No. BTCCT-20040330BDM), dated June 17, 2005, released June 20, 2005. See, *Gator Broadcasting Corp. (WOCA(TV))*, 48 RR 2d 510 (1980) (upholding the Broadcast Bureau's rescission of a grant due to the permittee's failure to meet a permit condition); see also *Airtouch Paging, Inc.*, 12 FCC Rcd 19455 (Chief, Wireless Telecom. Bureau, 1997). In sum, the Bureau's denial of Royce's Petition was contrary to law and constituted prejudicial procedural error.

D. The Commission Must Follow Its Own Rules. It is a well-established and fundamental tenet that the Commission must follow its own rules. *Reuters Limited v. Federal Communications Commission*, 781 F.2d 946, 251 U.S. App. DC 93 (D.C. Cir., 1986); see also *Teleprompter Cable Systems, Inc. v. Federal Communications Commission*, 543 F.2d 1379; 178 U.S. App. DC 66 (D.C. Cir., 1976). The Bureau's failure

^{13/} Royce submits that ECC failed to exercise due diligence in ascertaining whether the information in BALH-20021120ACE remained valid when it proceeded with the consummation of the acquisition of KWOD. ECC failed to meet its burden under Section 1.65. See, *KWQJ(FM) Anchorage, AK*, 10 FCC Rcd 8774, 1 CR 46 (1995), citing Section 1.65(a).

to apply Section 1.65(a) – as well as the application processing guidelines established by the 2003 Order – to BALH-20021120ACE, was an irreconcilable deviation from the plain language of Section 1.65 and the application processing guidelines and a fatal error respecting the grant of the Assignment Application. The Commission is not bound to follow staff error. *Joseph I. Kendrick*, 11 FCC Rcd 19635 (1996), *citing, inter alia*, *North Texas Media, Inc. v. FCC*, 778 F.2d 28 (DC Cir., 1985), *Quinnipiac College*, 8 FCC Rcd 6285 (1993); and *Walter P. Faber v. FCC* 962 F.2d 1076 (DC Cir., 1992). Accordingly, the Decision must be reversed and the assignment processed consistent with the processing guidelines set out in the 2003 Order.

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WHEREFORE, the premises considered, Royce respectfully requests that the Commission (i) reverse the Decision, (ii) find that the Assignment Application, indeed was still "pending" as of the effective date of the new radio ownership rules, as set forth in the 2003 Order, (iii) rescind the grant of its consent to the assignment of licenses for KWOD in connection with the Assignment Application, and (iv) compel ECC to demonstrate that its acquisition of Radio Station KWOD(FM), Sacramento, California (FCC Facility ID No. 57889) will comply with the Commission's new multiple ownership rules.

Respectfully submitted,

**ROYCE INTERNATIONAL
BROADCASTING COMPANY**



By: _____

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September 20, 2005

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CERTIFICATE OF SERVICE

The undersigned, an employee of **KATTEN MUCHIN ROSENMAN LLP**, hereby certifies that the foregoing **APPLICATION FOR REVIEW** regarding FCC File No. BALH-20021120ACE, was mailed this date by First Class U.S. Mail, postage prepaid, and/or served electronically via e-mail to the following:

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September 20, 2005

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