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

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

To: The Commission

REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

ROYCE INTERNATIONAL BROADCASTING COMPANY ("*Royce*"), by counsel and pursuant to the provisions of Section 1.115 of the Commissions rules,[1/] hereby submits its Reply to the Opposition to Application for Review that was submitted herein on October 5, 2005, by **ENTERCOM COMMUNICATIONS CORP.** ("*ECC*"). For the ease of review, Royce shall address ECC's arguments *in seriatim*. In support hereof, the following is respectfully shown:

[1/] 47 C.F.R. § 1.115

I. ***The Superior Court Decision is Not Final.*** ECC commences its opposition with the erroneous statement that the California court decisions involving the sale of Radio Station KWOD(FM), Sacramento, California (FCC Facility ID No. 57889) by Royce to ECC are final. *See* ECC's Opposition, n. 1. That is not so.

In fact, Royce filed an appeal in the Court of Appeal for the State of California, Third Appellate District, of the so-called "Final Judgment" and the appeal was dismissed because the Court of Appeal held that interlocutory issues remain outstanding and, thus, the "Final Judgment" is not "a final, appealable judgment."[2/]

II. ***The KWOD Application Still Is Pending***. ECC cavalierly asserts that "Royce's sole contention" (Opp. p. 2) in its Application for Review is that ECC's Assignment Application pertaining to its acquisition of KWOD (hereafter the "*KWOD Application*") should be "re-processed" under the Commission's new ownership rules.[3/] In fact, that is not Royce's "sole contention." Rather, Royce also has shown

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[2/] *See* **Exhibit 1**, hereto, for a copy of the Court's Order dismissing Royce's appeal. The undersigned communications counsel for Royce is advised by California counsel that under California law, it is well settled that enforcement is stayed until entry of a "final judgment," or when bonded, until exhaustion of the parties' appellate proceedings.

[3/] Opposition at p. 2. Reference to the "new ownership rules" concerns the rule and procedures adopted pursuant to *In the Matter of 2002 Biennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd 13620, 29 CR 564 (2003) (hereafter referred to as the "*2003 Order*"), *reversed in part and remanded, Prometheus Radio Project v. FCC* 373 F3d 372, 32 CR 962 (2004).

that the Bureau did not address the gravamen of Royce's 2003 Petition for Reconsideration whether the new ownership rules were applicable to the processing of the KWOD Application. Specifically, the Bureau failed to address Royce's argument that the new processing rules enunciated by the Commission mandated review of the KWOD Application consistent with such rules. Royce also demonstrated that the Commission's denial of the Petition for Reconsideration was inconsistent with the plain language of the authority cited for the denial.

Plainly, the linchpin of this entire controversy centers on the reference in the 2003 Order to the term "pending," and the concept therein that "pending" applications will be processed consistent with the new ownership rules. ECC asserts, without citing authority, that the Bureau "expressly resolved the issue" by stating that the grandfathering provisions of the 2003 Order would be controlling. That, however, is a disingenuous and fallacious argument. The grandfathering provisions of the 2003 Order have absolutely *nothing* to do with the concept of a "pending" application and are wholly inapplicable. Those provisions pertain to whether divestiture of *established* station clusters would be required. "Pending" has nothing to do with either grandfathering or "divestiture." Reasonably, any assertion that the concept of grandfathering some how addresses the meaning or applicability of the term "pending" is a *non sequitur*. And that, too, is the error of the Bureau's decision addressed by the Application for Review.

As the Application for Review demonstrates, the grandfathering of existing station clusters is a completely inapposite answer to the question of whether an assignment or transfer application is still pending.[4/] The 2003 Order makes crystal clear that existing clusters need not be surrendered, but that buyers "must comply (with the new ownership rules) at the time of the acquisition of the stations." *See* 2003 Order at ¶ 487.

Nowhere has ECC ever demonstrated that Section 1.65 of the Commission's rules is inapplicable – or more fundamentally, not yet still applicable – with respect to it and the subject KWOD Application. ECC has presented no precedent to counter the proposition that, for the purposes of Section 1.65, the KWOD Application still remains "pending." Importantly, ECC does not dispute that Section 1.65 is applicable herein. Thus, it is an incontrovertible fact that ECC is unequivocally bound by the language of Section 1.65(a), and for that reason – even as of today – its application involving KWOD is deemed to be "pending." Pendency is like pregnancy. One cannot be "a little bit pregnant," nor logically can an application or matter be "a little bit" pending. It either is, or isn't. For that reason, Royce submits that the KWOD Application remains pending and, indeed, was "pending" at the time that the 2003 Order became effective.

[4/] *See* Royce's Application for Review, pp. 5 and 6. That argument is responsive to ECC's Opposition and is herein incorporated by reference.

More fundamentally, and perhaps an integral element of the entire concept of "pending," is that ECC is not able to demonstrate that the FCC's grant of the KWOD Application, and the purported consummation of the assignment – even as of this date, some two years later – cannot be undone by the Commission. Royce respectfully submits that so long as any action by the Commission involving an application is not final, it then, indeed, is "pending" and subject to the FCC's jurisdiction.[5/]

This entire concept of when "pending" begins and ends seems to be one of first impression as far as FCC precedent is concerned. Nowhere, has Royce been able to find any inclusive rule, definition or decision that clearly elucidates the comprehensive meaning of "pending," and when an application, *per se*, is no longer "pending" but, rather, in a state other than pending. In this connection, there appear to be at least three usages – in the Communications Act of 1934, as amended, and the Rules – of language similar to that found in Section 1.65(a).[6/] Clearly, the tenor of the language suggests

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[5/] The dictionary definition of the word "pending" variously is "not yet decided or settled; awaiting conclusion or confirmation; impending, imminent" (American Heritage Dictionary of the English Language, Fourth Edition, 2000); "about to happen or waiting to happen" (Cambridge Dictionary of American English); "while awaiting" (Merriam-Webster); "not yet decided; in continuance or suspense" (Webster Dictionary, 1913).

[6/] The "pending" language of § 1.65 actually tracks Sections 311(c)(4) and (d)(4) of the Communications Act of 1934, as amended. That provision, having to do with Special Requirements with Respect to Certain Applications in the Broadcasting Service, is as follows:

> (4) For the purposes of this subsection an application shall be deemed to be "pending" before the Commission from the time such application is filed with the Commission until an order of the Commission granting or denying it is no longer subject to rehearing by the Commission or to review by any court.

(continued)

that "pending" should be interpreted as meaning that applicant status is maintained until the application no longer is subject to reconsideration or review by either the Commission or the courts. And in this case, the KWOD Application is still subject to judicial review. See p. 2, *supra*.

ECC argues that the "2003 Order makes clear that it applies only to those 'pending applications' for which no action has yet been taken." ECC cites 18 FCC Rcd at 13813. ECC's citation is to Section VI(D)(3) of the 2003 Order, regarding the "Processing of Pending and New Assignment and Transfer of Control Applications" and practically speaking there is *nothing* in the cited section, nor the 2003 Order for that matter, that indicates – either clearly or obtusely – that "pending" refers specifically and only to those applications that have been neither reviewed nor granted by the Commission's staff prior to the release of the 2003 Order.[7/] ECC's assertion that anything in Section VI(D)(3) of the 2003 Order "makes clear that it applies only to those

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(continued from previous page . . .)

Similar language also appears in § 73.3525(h) (Agreements for removing application conflicts) of the Commission's Rules. In the case of § 73.3525(h), the language is more detailed, to wit:

> (h) For the purposes of this section an application shall be deemed to be "pending" before the FCC *and a party shall be considered to have the status of an "applicant"* from the time an application is filed with the FCC until an order of the FCC granting or denying it is no longer subject to reconsideration by the FCC or to review by any court. (Emphasis added.)

[7/] *See* **Exhibit 2**, hereto, for a reproduction of the complete text of Section VI(D)(3) of the 2003 Order.

'pending applications' for which no action has yet been taken" is sheer sophistry and plainly reading something into the provision that is not there.

III. ***ECC's Purported Compliance with the New Rules Has Not Been Demonstrated.*** ECC argues that even if the KWOD Application was processed in accordance with the new rules, it would not violate the ownership limits because there are a sufficient number of stations in the market to permit ECC's ownership of eight stations, five of which are in the same service. ECC also argues that Royce "never once asserts that ... (it) has any good faith basis to believe that the Application does not comply with the new rules." Opposition at p. 6. ECC's statement is patently false. In fact, Royce argued vehemently in its July 30, 2003, "Response to Motion for Leave to File and Supplement to Opposition" (hereafter referred to as "*Response to Supplement*") that ECC's station count for the Sacramento metro market is, and was, flawed.[8/]

As a preliminary note, the 2003 Order specifically provides the Commission "... will not permit a party to receive the benefit of a change in Arbitron Metro boundaries unless that change has been in place for at least two years." 2003 Order at ¶ 278. What remains totally unsettled is which of the stations that are listed on the July 14, 2003, BIA Radio Technical Report (the "*BIA Report*"), that is relied upon by ECC, were not part of the Sacramento metro market within two years of the KWOD

[8/] Royce hereby incorporates by reference its July 30, 2003, Response to Supplement.

Application. It is evident from the basic facts that several of the stations, counted on by ECC to achieve a count of 47 stations for the market, were new or added to the metro market less than two years before the BIA Report.

For example, the BIA Report lists KBAA(FM), Grass Valley, California (FCC Facility ID No. 87969).[9/] The permit for KBAA was not granted until October 7, 2002 (FCC File No. BPH-19970814MO), a mere 44 days prior to the filing of the KWOD Application and only ten months prior to the date of the BIA Report.[10/] Thus, it would be impermissible for ECC to count KBAA to determine ownership limits, but nevertheless it has done so.[11/]

Further, Royce argued in its Response to Supplement that until the BIA Report, Radio Station KMYC(AM), Marysville, California, neither had been assigned to the Sacramento metro market, nor listed as a "home" station in that market. Not clear, however, from the BIA Report is when KMYC was added to the Sacramento metro market. If it was added after November 20, 2000, then KMYC should not be included

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[9/] Listed on the BIA Report as a Construction Permit for 103.3 MHz (Channel No. 277).

[10/] KBAA was not licensed until June 30, 2004, so there is a material question as to whether the station even was operational as of the time of the BIA Report.

[11/] In the Response to Supplement, Royce also argued that Radio Station KTKE(FM), Truckee, California (FCC Facility ID No. 88673) should not have been included in the BIA Report. The Construction Permit for KTKE was granted on April 26, 2000, and the station was not licensed until August 15, 2003. Accordingly, the question is pregnant as to whether KTKE should have been included in the Sacramento market as of November 20, 2000, two years prior to the date of the KWOD Application.

in the Sacramento station count. Nevertheless, KMYC has been and is relied upon by ECC to achieve its count of 47 stations in the market. Discounting KBAA and KMYC, the Sacramento station count is reduced to only 45. If only one more station, such as KTKE, is discounted, then ECC plainly will have exceeded the ownership limits permitted by the 2003 Order.

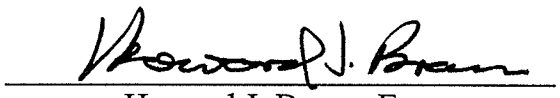
In fact, Royce argued in the Response to Supplement that the BIA Report included two expanded band AM stations, and that inclusion of those stations in the BIA Report for purposes of the new multiple ownership rules was improper, and that only one of the stations from a lower-band/expanded-band combination should be counted for purposes of determining the size of the Sacramento market.

ECC argues that Royce "fails to show that acquisition by Entercom of Station KWOD violates ..." the new ownership rules. That, plain and simple, is a red herring. The burden is upon ECC, not Royce to demonstrate compliance with the Commission's rules. Royce fervently maintains that the rules as set forth in the 2003 Order are, indeed, applicable to ECC, and that ECC has failed – and actually is unable – to demonstrate compliance with the ownership limits set by the Commission. Accordingly, the KWOD Application is basically flawed and ECC should be required to promptly unwind its acquisition of the station.

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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October 19, 2005

➢ ORDER ≺

COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

ENTERCOM COMMUNICATIONS CORP.,

Plaintiff and Appellant,

v.

ROYCE INTERNATIONAL BROADCASTING CORP. et al.,

Defendants and Appellants.

C044783

(Super. Ct. No. 99AS04202)

ORDER DISMISSING APPEAL

THE COURT:

Defendants Royce International Broadcasting Corp. and Edward R. Stolz II filed a notice of appeal from a June 18, 2003, "FINAL JUDGMENT," which (1) incorporated an earlier interlocutory judgment awarding specific performance of a contract for defendants to sell radio station KWOD-FM to plaintiff, and (2) made an equitable accounting regarding compensation incident to specific performance. Plaintiff filed a cross-appeal.

We requested supplemental letter briefs as to whether the judgment was a final, appealable judgment (Code Civ. Proc.,

§ 904.1), in light of the fact that the "FINAL JUDGMENT" stated in part that the trial court retained jurisdiction "to conduct a further accounting after all appeals have been exhausted or all deadlines for appealing the Interlocutory Judgment or this Final Judgment have expired. Upon motion of either party, the Court shall conduct a further accounting based on the delay in transfer of KWOD-FM to Entercom from March 1, 2003 through May 19, 2003, the value of any assets used or useful in the operation of KWOD-FM that were not transferred to Entercom, any expenses or costs incurred by Entercom in the transfer of KWOD-FM that are appropriately chargeable to Defendants, the amount of costs awarded to the prevailing party, and any other adjustments found by the Court to be necessary and proper at the time of the accounting."

Although the judgment is labeled, "FINAL JUDGMENT" and indicates further accounting would take place after exhaustion of this appeal, the form of the decree is not determinative, and a decree is generally deemed to be a nonappealable, interlocutory decree where anything further in the nature of judicial action on the part of the trial court is essential to a final determination of the rights of the parties. (*Wesley N. Taylor Co. v. Russell* (1961) 194 Cal.App.2d 816, 820-825.)

Here, it appears the parties in the trial of the equitable accounting agreed to assume the date of transfer of the radio station would be March 1, 2003, but the actual transfer did not

take place until May 20, 2003. Thus, the June 18, 2003, judgment provided for a further accounting. This further accounting clearly calls for judicial action on the part of the trial court essential to a final determination of the rights of the parties.

Accordingly the June 18, 2003, judgment is not a final, appealable judgment.

Defendant's supplemental brief concedes the appeal from the nonappealable judgment must be dismissed.

In its supplemental brief, plaintiff offers to waive a further accounting in order to proceed with this appeal. Plaintiff claims no reciprocal waiver by defendant would be required, because the further accounting would benefit only plaintiff. However, we have no basis upon which to make such a factual finding that any further accounting would benefit only plaintiff. Thus, plaintiff's offer to waive the further accounting does not render the judgment appealable.

We deny plaintiff's request that we exercise our discretion to treat the appeal as a writ petition.

Because an appealable judgment or order is essential to appellate jurisdiction, the parties cannot by consent make a nonappealable order appealable, and this court must, on its own motion, dismiss an appeal from a nonappealable judgment or order. (*Old Republic Ins. Co. v. St. Paul Fire & Marine Ins.*

Co. (1996) 45 Cal.App.4th 631, 638.)

The appeal and cross-appeal are dismissed. The parties are to bear their own costs. (Cal. Rules of Court, rule 27.)

SIMS, Acting P.J.

ROBIE, J.

CANTIL-SAKAUYE, J.

EXHIBIT 2

TEXT OF SECTION VI(D)(3) OF THE 2003 ORDER

service from the station over-the-air nor through cable carriage.

2. Elimination of Flagging and Interim Policy

496. In August 1998, the Commission began "flagging" public notices of radio station transactions that, based on an initial analysis by the staff, proposed a level of local radio concentration that implicated the Commission's public interest concern for maintaining diversity and competition.[1046] Under this policy, the Commission flagged proposed transactions that would result in one entity controlling 50% or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70% or more of the advertising revenues in that market.[1047] Flagged transactions were subject to a further competition analysis, the scope of which is embodied in the interim policy we adopted in the *Local Radio Ownership NPRM.*

497. We believe that the changes we make today to the market definition will address many of the market concentration concerns that led the Commission to begin flagging radio station transactions and to adopt the interim policy. By applying the numerical limits of the local radio ownership rule to a more rational market definition, we believe that, in virtually all cases, the rule will protect against excessive concentration levels in local radio markets that might otherwise threaten the public interest. To the extent an interested party believes this not to be the case, it has a statutory right to file a petition to deny a specific radio station application and present evidence that makes the necessary prima facie showing that the transaction is contrary to the public interest.[1048] Accordingly, effective upon adoption of this *Order*, the Commission will no longer flag radio sales transactions or apply the interim policy procedures adopted in the *Local Radio Ownership NPRM* in processing them.

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3. Processing of Pending and New Assignment and Transfer of Control Applications.

498. The processing guidelines below will govern pending and new commercial broadcast applications for the assignment or transfer of control of television and radio authorizations commencing as of the adoption date of this *Order*. 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. The staff is directed to issue a Public Notice containing these guidelines contemporaneously with the adoption of this *Order.*

- *New Applications.* The Commission has established a freeze on the filing of all commercial radio and television transfer of control and assignment applications that require the use of FCC Form 314 or 315 ("New Applications"). We will revise application Forms 301, 314 and 315 to reflect the new rules adopted in the *Order*. The freeze will be in effect starting with the *Order's* adoption date until notice has been published by the Commission in the *Federal Register* that OMB has approved the revised forms. Upon such publication, parties may file New Applications, but only if they demonstrate compliance with the new multiple ownership rules adopted in the *Order*, including where applicable, the interim methodology for defining

[1046] *See* Broadcast Applications, Rep. No. 24303 (Aug. 12, 1998).

[1047] *See AMFM, Inc.*, 15 FCC Rcd at 16066 ¶ 7 n.10.

[1048] 47 U.S.C. § 309(d).

radio markets outside Arbitron metros, or submit a complete and adequate showing that a waiver of the new rules is warranted. We will continue to allow the filing of short-form (FCC Form 316) applications at any time and will process them in due course.

- *Pending Applications.* Applicants with long-form assignment or transfer of control applications (FCC Form 314 or 315) or with modification applications (FCC Form 301) that are pending as of adoption of the *Order* ("Pending Applications") may amend those Applications by submitting new multiple ownership showings to demonstrate compliance with the ownership rules adopted in the *Order*, including where applicable, the interim methodology for defining radio markets outside of Arbitron metros, or by submitting a request for waiver of the new rules.[1049] Parties may file such amendments once notice has been published by the Commission in the *Federal Register* that OMB has approved the information collection requirements contained in such amendments. Pending Applications that are still pending as of the effective date of the new rules will be processed under the new rules. Applications proposing *pro forma* assignments and transfers (FCC Form 316) will be processed in the normal course.

- *Pending Petitions and Objections.* Petitions to deny and informal objections that were submitted to the Commission prior to the adoption date of the *Order* and that raise issues unrelated to competition against Pending Applications (as defined above) will be addressed with respect to those issues at the time we act on such Applications. Petitions and informal objections that were submitted to the Commission prior to the adoption date of the *Order* and that contest Pending Applications solely on grounds of competition pursuant to the interim policy[1050] will be dismissed as moot.

VII. NATIONAL OWNERSHIP RULES

499. In this section, we consider the national TV ownership rule and the dual network rule. We conclude that we should modify the former by raising the cap to 45%, and we retain the latter.

A. National TV Ownership Rule

500. The current national TV ownership rule prohibits any entity from owning televisions stations that in the aggregate reach more than 35% of the country's television households.[1051] In the *Notice*, we sought comment on whether we should retain, eliminate, or modify this rule.[1052] We asked

[1049] The Commission may determine that the nature of the amendment warrants a new public notice for the Pending Application.

[1050] *See Local Radio Ownership NPRM,* 16 FCC Rcd at 19894-97 ¶¶ 84-89.

[1051] Section 73.3555(e)(1) of the Commission's rules provides that "[n]o license for a commercial TV broadcast station shall be granted, transferred or assigned to any party (including all parties under common control) if the grant, transfer or assignment of such license would result in such party or any of its stockholders, partners, members, officers or directors, directly or indirectly, owning, operating or controlling, or having a cognizable interest in TV stations which have an aggregate national audience reach exceeding thirty-five (35) percent." 47 C.F.R. § 73.3555(e)(1). Reach is determined by the number of television households in a DMA. 47 C.F.R. § 73.3555(e)(2).

[1052] *Notice*, 17 FCC Rcd at 18543-52 ¶¶ 126-55.

CERTIFICATE OF SERVICE

The undersigned, an employee of **KATTEN MUCHIN ROSENMAN LLP**, hereby certifies that the foregoing **REPLY TO OPPOSITION TO 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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By: _____
Dolly M. La Fuente

October 19, 2005

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