

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

In re Applications of)	
)	
ROYCE INTERNATIONAL BROADCASTING)	File No. BP-19970829AA
COMPANY)	Facility ID No. 92905
)	
For a Construction Permit for a New AM Station)	
at Folsom, California)	
)	
SUSQUEHANNA RADIO CORPORATION)	File No. BMP-19960830AD
)	Facility ID No. 51188
For a Modification to the Facilities of AM)	
Broadcast Station KTCT, San Mateo,)	
California)	

MEMORANDUM OPINION AND ORDER

Adopted: July 23, 2003

Released: August 1, 2003

By the Commission:

1. Royce International Broadcasting Company ("Royce") seeks review of a decision by the Mass Media Bureau ("Bureau"), dated February 26, 2001,¹ in which the Bureau denied Royce's Motion to Defer the auction of its application for a new AM broadcast station at Folsom, California.² Royce contends that its application, as well as the mutually exclusive ("MX") application of Susquehanna Radio Corporation ("SRC") for a minor modification to the facilities of SRC's station KTCT(AM), San Mateo, California,³ should be deemed "cut off" from competition with subsequently filed mutually exclusive applications. For the reasons discussed below, we deny the application for review.

2. **Background.** On August 30, 1996, SRC filed an application seeking to change the nighttime antenna system of KTCT ("KTCT Application"), a minor modification as defined by Section 73.3571(a) of our Rules.⁴ At that time, AM minor change applications remained subject to mutually exclusive proposals until the staff disposed of the application.⁵ On August 29, 1997, Royce filed an application for a major modification to its construction permit for AM Station KIOQ, Folsom, California

¹ *Letter to Royce International Broadcasting Co., et al.*, Ref. No. 1800B3-TSN (MMB Feb. 26, 2001).

² Royce filed its Application for Review March 28, 2001. Also before us are the oppositions of Susquehanna Radio Corporation ("SRC") and KM Communications ("KM"), both filed April 12, 2001. Royce filed a Consolidated Reply to both Oppositions April 25, 2001.

³ File No. BMP-19960830AD. SRC changed the station's call sign from KOFY(AM) to KTCT on July 28, 1997. We will refer to the station as KTCT.

⁴ 47 C.F.R. § 73.3571(a) (1996).

⁵ *Id.*

(“Royce Application”), seeking to move KIOQ to a new site.⁶ The Royce Application and the KTCT Application are mutually exclusive. Royce acquired the permit in 1986, and thereafter embarked on what it describes as a “protracted and litigious zoning proceeding” with the planning department and board of supervisors of El Dorado County, California.⁷ Royce filed its major change application after the Bureau granted numerous extensions to, and reinstatements of, the KIOQ construction permit, and after the Bureau returned an August 7, 1996, major change application to increase nighttime power.⁸ The Royce Application proposes a new site to resolve its zoning problems.

3. In 1998, the Commission extended to three years the construction period for all broadcast stations, and modified and limited the standards under which it will grant extensions of broadcast construction permits.⁹ We concluded that the three-year construction period announced in *Non-Technical Streamlining* “provides ample time to complete [the zoning] process and construct the station or choose a new site free from zoning difficulties.”¹⁰ Royce concluded, correctly, that because of this policy change its construction permit for KIOQ would expire, without further opportunity for extension, February 16, 1999.¹¹ On January 19, 1999, Royce filed with the Bureau a request to process the Royce Application, not as a major modification of its then-pending construction permit, but as an application for a new AM station at Folsom. Over SRC’s opposition, the Bureau granted this request on February 9, 1999, re-designating the Royce Application as a new application for an AM broadcast station and assigning a new prefix to the file number, BP-19970829AA.¹²

4. The Royce Application – either as originally filed as a major modification, or as re-designated as a new application – was never placed on an “A” cut-off list, and thus was never subject to competition from other new and major change applications.¹³ The KTCT Application, as a minor modification, was subject to competition at all times until grant, under the rules in effect at the time it was filed. Since the Royce and KTCT Applications were pending and deemed mutually exclusive, both were

⁶ *Id.* at § 73.3571(a)(1) (1997).

⁷ Application for Review at 3.

⁸ File No. BMP-19960807AA.

⁹ *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes, Report and Order*, 13 FCC Rcd 23056 (1998) (“*Non-Technical Streamlining*”).

¹⁰ *Id.* at 23091.

¹¹ Royce filed a Petition for Partial Reconsideration of *Non-Technical Streamlining* January 19, 1999, challenging our refusal to allow zoning problems to toll the construction period (except for court appeals from adverse zoning decisions). We denied reconsideration of this issue in the *Memorandum Opinion and Order* released October 6, 1999. *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes, Memorandum Opinion and Order*, 14 FCC Rcd 17525, 17539-40 (1999).

¹² *Letter to Royce International Broadcasting Co.*, Ref. No. 1800B3-JR (MMB Feb. 9, 1999) (“*February 1999 Letter*”).

¹³ Under the cut-off rules, after an initial review for acceptability, the lead application was placed on an “A” cut-off list by a public notice, which announced a cut-off date by which applications mutually exclusive with, and petitions to deny, the lead application must have been filed. Following an initial review of applications filed in response to the “A” cut-off list and a determination as to which of these applications were mutually exclusive with the lead application, a “B” cut-off list, which enumerated such applications and set the date for filing petitions to deny against them, was released.

listed in *Public Notices* as being scheduled for inclusion in Closed Broadcast Auction No. 25.¹⁴ Additionally, in a June 11, 1999, letter,¹⁵ the Bureau requested information from Royce and SRC regarding the required threshold analysis of their applications under Section 307(b) of the Communications Act of 1934.¹⁶ This standard pre-auction letter was sent to all applicants in AM MX groups proposing different communities of license. Less than five weeks later, however, the staff determined that the Royce Application had not been cut off, and that the Royce and KTCT applications had been included inadvertently in the closed broadcast auction. On July 20, 1999, the Bureau notified the parties that it had removed the two applications from the Auction No. 25 inventory.¹⁷ Pursuant to procedures expressly set forth in the Commission's *First Report and Order* for broadcast auctions, applicants interested in further prosecuting their pending but non-cut off applications were required to confirm their interest by filing a Form 175 in the first general auction for the relevant service.¹⁸ Both Royce and KTCT complied with these procedures during the AM Auction No. 32 filing window.¹⁹ MX Group AM 17 in Auction No. 32 of AM broadcast construction permits is comprised of these two and seven other mutually exclusive applications.²⁰

5. **Discussion.** *Royce application.* On review, Royce contends that its application, and the mutually exclusive KTCT Application, should be deemed cut off from all applications first filed in the Auction No. 32 window, including each of the other applications in MX Group AM 17 of Auction No.

¹⁴ *Public Notice*, "Closed Broadcast Auction – Notice and Filing Requirements for Auction of AM, FM, TV, LPTV, and FM and TV Translator Construction Permits Scheduled for September 28, 1999," 14 FCC Rcd 10632, 10695 (MMB/WTB 1999); *Public Notice*, "Closed Broadcast Auctions Scheduled for September 28, 1999 – Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedural Issues," 14 FCC Rcd 8189, 8190 (MMB/WTB 1999) ("*Auction 25 Comment Public Notice*").

¹⁵ *Letter to Edward R. Stolz and Charles T. Morgan*, Ref. No. 1800B3-LAS/MFW (MMB June 11, 1999) ("*Stolz/Morgan Letter*").

¹⁶ 47 U.S.C. § 307(b).

¹⁷ *Letter to Gregg P. Skall, Esq., et al.*, Ref. No. 1800B3-BSH (MMB July 20, 1999) ("*Skall Letter*").

¹⁸ *Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, First Report and Order* ("*Broadcast First Report and Order*"), 13 FCC Rcd 15920, 15960 (1998).

¹⁹ *See Public Notice*, "AM Auction Filing Window and Application Freeze," 14 FCC Rcd 19490 (MMB/WTB 1999).

²⁰ In addition to the captioned applications, MX Group AM 17 includes an application filed by James K. Zahn ("*Zahn*") for a new AM broadcast station in Clovis, California (File No. BP-19970815AC), and six applications filed during the AM filing window opened from January 24, 2000 through February 1, 2000. *See Public Notice*, "AM Auction Filing Window and Application Freeze," 14 FCC Rcd 19490 (1999) ("*Auction 32 Public Notice*"); *Public Notice*, "AM Auction Filing Window and Application Freeze Extended to February 1, 2000," 15 FCC Rcd 7463 (2000). The six window-filed applications are: an application by SRC for a new AM station at Folsom, California (File No. BNP-20000131ABW); two applications filed by KM Communications, Inc. ("*KM*") for new AM stations at Fowler, California (File No. BNP-20000201AEV) and Elk Grove, California (File No. BNP-20000201AFA); an application by Kidd Communications for a new AM station at Sparks, Nevada (File No. BNP-20000201AFL); an application by Pamplin Broadcasting-Washington, Inc. for a new AM station at Union Gap, Washington (File No. BNP-20000131ABW); and an application by Horizon Broadcasting Group LLC for a new AM station at Prineville, Oregon (File No. BNP-20000128ABH). According to the *Public Notice*, "AM Auction No. 32 Mutually Exclusive Applicants Subject to Auction," 15 FCC Rcd 20449, 20454 (MMB/WTB 2000), MX Group AM 17 thus consists of nine applications filed by seven separate parties.

32. Royce's contention is based on the treatment accorded certain reclassified major change applications in the 1998 radio technical streamlining proceeding.²¹ We find no merit in Royce's argument.

6. In *Tech I*, the Commission modified its rules to extend first come / first served processing to applicants for minor changes to AM facilities, and expanded the definition of "minor change." *Tech I* also specified that major modification applications filed prior to the *Tech I* effective date that were subject to reclassification as minor changes would be reclassified automatically, provided that they had not been challenged by petitions to deny and were not mutually exclusive with any other application also filed prior to the effective date.²² In contrast, pending minor change applications, such as the KTCT Application, that were mutually exclusive with other pending applications as of the *Tech I* effective date [May 21, 1999] were to be handled "under our existing procedures,"²³ i.e., competitive bidding. This process was clearly stated in the Bureau's *February 1999 Letter*, when it indicated that the conflict between the KTCT and Royce Applications would "be resolved pursuant to procedures adopted in the [Broadcast First Report and Order]."²⁴

7. SRC's application for a change to KTCT's nighttime antenna system was properly filed as a minor change application.²⁵ It did not propose an increase in power, or a change in frequency, hours of operation, or community of license – facility modifications that constituted "major changes" under former Section 73.3571.²⁶ Additionally, SRC paid a \$650 filing fee under code "MPR," indicating a minor change application.²⁷ The KTCT Application remains a "minor change" under the revised rules. The Royce Application, whether treated as an application for a new station or as one for a major change, also does not qualify for reclassification under *Tech I*. Applications for new stations were not reclassified under *Tech I*, and the Bureau granted Royce's request to treat its application as one for a new station on February 9, 1999, before the *Tech I* effective date. Moreover, even had the Royce Application remained one for a major change, it could not have been reclassified because it was mutually exclusive with both the KTCT Application and Zahn's application for a new station at Clovis, California. In short, neither of the two applications is subject to reclassification under *Tech I*, and therefore Royce's reliance on procedures established to expedite the processing of certain reclassified applications is wholly misplaced.

8. Royce claims that footnote 52 to *Tech I* establishes a different procedure for the Royce and KTCT Applications:

For applications in this category that have not achieved cut-off protection, we will announce by public notice "B" cut-off list filing periods for the acceptance of petitions to deny only, and

²¹ 1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, 14 FCC Rcd 5272 (1999) ("Tech I").

²² *Id.* at 5284.

²³ *Tech I*, 14 FCC Rcd at 5284.

²⁴ *February 1999 Letter* at 4.

²⁵ The KTCT Application was accepted for filing September 13, 1996. *Public Notice*, "Broadcast Applications," Report No. 23825 (MMB Sept. 13, 1996).

²⁶ See *supra* note 4. See also *Policy Statement Concerning Standard Broadcast Applications for Major and Minor Changes*, 23 F.C.C. 2d 811 (1970) (changes in AM antenna pattern generally considered to be minor changes, unless associated with changes in frequency, power, hours of operation, or station location).

²⁷ See 47 C.F.R. 1.1104 (1995).

thereafter process them under our existing procedures. We shall not issue any “A” cut-off lists for the acceptance of competing applications, because to do so would be inconsistent with our purpose of reducing unnecessary administrative burdens and delays associated with certain proposed technical facility changes.²⁸

Royce contends that “this category” refers to major change applications that could not be reclassified as minor changes due to mutual exclusivity with other applications filed before the effective date. We reject this interpretation for several reasons.

9. First, the procedures set forth in this portion of *Tech I* clearly and unequivocally pertain to “major change applications subject to reclassification as minor changes”²⁹ Secondly, Royce’s interpretation directly contradicts the policy, set forth in the same paragraph, that mutually exclusive applications will be handled under “current procedures”³⁰ rather than the expedited footnote 52 procedures. Royce provides no guidance on harmonizing these conflicting claims or any independent support for its interpretation. Finally, even granting, *arguendo*, Royce’s assumption that the footnote 52 cut-off policy applies to any major change application subject to reclassification except for the pendency of a mutually exclusive application, the Royce and KTCT Applications still would not be subject to the footnote 52 procedures. As noted above, the KTCT Application was properly filed as a minor change under the former rules and, thus, analytically cannot be reclassified as a minor change, regardless of the scope of definitional changes adopted in *Tech I*. The Royce Application was likewise not subject to reclassification under *Tech I* because, as noted above, at Royce’s request it had been reclassified as a new application prior to the *Tech I* effective date, and it was mutually exclusive with other applications.

10. The staff’s erroneous characterization, in 1999, of the KTCT Application as a major modification does not warrant a departure from the *Tech I* cut-off procedures.³¹ There is no dispute regarding the fact that the KTCT Application, as filed and at all times thereafter, was and is a minor change application. Moreover, the material error in the *Stolz/Morgan Letter* – treating the Royce Application as a cut-off application subject to closed group auction procedures – was promptly identified and corrected by the *Skall Letter*, which removed both applications from Closed Broadcast Auction No. 25.³²

11. Fundamentally, the treatment accorded these applications does not turn on whether the KTCT Application can – on any basis – be characterized as a major change. Rather, the critical fact is that the Royce new station application has never been subject to competing new station and major change applications. Nothing in *Tech I* announces a change in our long-standing policy that interested parties will have an opportunity to file competing proposals against “new” or “major change” applications, as those terms are defined under our Rules.

12. With regard to the KTCT minor change application, the procedures set forth in the *Broadcast First Report and Order* generally do not subject applications for minor modifications to competitive bidding. In order to avoid mutual exclusivity between minor modification applications and

²⁸ 14 FCC Rcd at 5284 n.52.

²⁹ *Tech I*, 14 FCC Rcd at 5284.

³⁰ *Id.*

³¹ See *Stolz/Morgan Letter*, *supra* note 15.

³² See *supra* note 17.

new and major applications submitted during an auction filing window, we now routinely impose a freeze on minor change applications during the brief period that auction filing windows are open.³³ At the same time, however, the Commission recognized that there might be exceptional situations in which circumstances necessitate subjecting minor change applications to competitive bidding.³⁴ In this case, the KTCT Application is mutually exclusive with two new station applications that have never been cut off – the captioned Royce Application and the Zahn application for a new station at Clovis, California. Under these circumstances, the staff properly included the KTCT Application with the other mutually exclusive applications in MX Group AM 17.

13. **Conclusion.** The Royce Application has never been subject to the Commission's cut-off procedures. *Tech I* did not create cut-off rights for non-reclassified applications. Accordingly, Royce and SRC's mutually exclusive application for a minor change to KTCT were properly subjected to competing filings during the Auction No. 32 filing window. On this basis, Royce's Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³³ *Broadcast First Report and Order*, 13 FCC Rcd at 15989.

³⁴ *See, e.g., id.* at 15990 (due to large number of low-power television and television translator displacement applications filed June 1, 1998, Commission reserved right to auction any mutually exclusive applications unable to resolve mutual exclusivity by other means); *see also Auction 32 Public Notice*, 14 FCC Rcd at 19491 (minor change applications contingent on grant of pending application for WOWO, and those mutually exclusive with such applications, accepted for filing in Auction 32 filing window).