

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

In the Matter of)	
)	File Nos. BP-20111, as modified by
Royce International Broadcasting Company)	BMAP-20001020AAT and
)	BMP-20060222ABE
Request for Additional Time to Construct New)	
Unbuilt Station KIEV(AM), Culver City,)	Facility ID No. 129251
California)	

MEMORANDUM OPINION AND ORDER

Adopted: June 3, 2008

Released: June 5, 2008

By the Commission:

I. INTRODUCTION

1. The Commission has before it an Application for Review, filed by Royce International Broadcasting Company (“Royce”), permittee of new, unbuilt station KIEV(AM), Culver City, California. The Media Bureau (“Bureau”) has also referred to the Commission Royce’s related Petition for Reconsideration. At issue is whether the Bureau properly denied Royce’s request for additional time to file an Application for Review of a decision which denied Royce’s request for additional time to construct the station. For the reasons discussed below, we affirm the Bureau’s decision.

II. BACKGROUND

2. The permit to construct KIEV(AM) was issued on October 23, 1984. The Bureau extended the station’s original October 23, 1985, construction deadline ten times under the Commission’s former construction period rules¹ after Royce lost its original site, encountered difficulties obtaining local approval to build at alternative sites, and initiated litigation concerning its proposed transmitter site.²

3. In 1998, in an effort to address the warehousing of radio spectrum by permittees unable or unwilling to build, the Commission revised the broadcast construction period rules to require construction within a period of three unencumbered years.³ Under the revised rules, the three-year broadcast construction deadline is tolled only in limited circumstances directly preventing construction and not within the applicant’s control, *i.e.*, natural disasters; administrative or judicial review of a construction permit grant; judicial action related to necessary government requirements; or failure of

¹ See 47 C.F.R. § 73.3534 (1998) (“Application for extension of construction permit or for construction permit to replace expired construction permit”). The former rule explicitly allowed extensions for zoning problems. *Id.*

² See File Nos. BP-19860923AE and BMP-19981110DA (Royce’s first and last extension applications under former Section 73.3534, attached to Application for Review as Appendices 4 and 5); See also Application for Review at 5-8.

³ See 1998 Biennial Regulatory Review—Streamlining of Mass Media Applications, Rules, and Processes, Report and Order, 13 FCC Rcd 23056 (1998) (“Streamlining R&O”), *recon. granted in part and denied in part*, Memorandum Opinion and Order, 14 FCC Rcd 17525, 17536 (1999) (“Streamlining MO&O”) (collectively, the “Streamlining Orders”).

conditions precedent on the permit.⁴ Rule waivers may be granted for comparable rare and exceptional circumstances beyond the applicant's control.⁵ In the *Streamlining Orders* adopting the revised rules, the Commission generally excluded a permittee's difficulties obtaining local zoning approvals as grounds for additional construction time.⁶ Royce, as an existing permittee transitioning to the new rules, benefited from several construction deadline adjustments that the Commission made for many such permittees. As a result of these rule revisions, the KIEV(AM) construction deadline was extended to December 21, 2001.⁷

4. On January 28, 2000, Royce filed a Form 175 short-form application in the AM Auction 32 filing window proposing to change KIEV(AM)'s community of license from Burbank to Culver City, California, both of which are in the Los Angeles area. Following a Bureau determination that the proposal was not mutually exclusive with any other Auction 32 application, Royce filed its Form 301 long-form application.⁸ After the tower site identified in Royce's long form application became unavailable, Royce amended its application to specify a new tower site in the City of Montebello ("City") on an operating oil field owned by Stocker Resources, Inc. ("Stocker").⁹ Stocker already held a local use permit for one microwave tower and a satellite dish on the site. Royce planned to use that microwave tower and to build five additional towers, thereby forming a six-tower AM array. The Bureau granted Royce's application on September 28, 2001. The construction deadline remained December 21, 2001.

5. On December 7, 2001, two weeks prior to the permit's anticipated expiration, Royce filed its *Waiver Request*.¹⁰ Royce argued that it had not yet sought zoning approval to build on the Stocker property and expected zoning proceedings to take a minimum of five months.¹¹ Royce explained that it originally believed that it could construct at the Stocker site immediately upon receipt of a Commission permit for the site, but that its plan for immediate construction was thwarted because the former Stocker manager that offered to assist Royce in this process left Stocker's employ in June 2001.¹² Royce reported that the new replacement manager did not offer to assist Royce and would not allow Royce to begin construction until Royce obtained "either a modification of the existing conditional use permit or a new permit from the City."¹³ Royce argued that a waiver was appropriate because changes

⁴ See 47 C.F.R. § 73.3598(b).

⁵ See *Streamlining MO&O*, 14 FCC Rcd at 17540. An applicant that has already received three unencumbered years to construct can be considered only for a waiver.

⁶ See *Streamlining R&O*, 13 FCC Rcd at 23091; *Streamlining MO&O*, 14 FCC Rcd at 17539-40.

⁷ To ensure a smooth transition to new construction period standards, the Commission first gave certain permittees, including Royce, until December 21, 2000, to complete construction. See *Streamlining MO&O*, 14 FCC Rcd at 17536. The Bureau subsequently gave permittees filing major modification applications in the AM Auction 32 filing window, including Royce, until December 21, 2001, to obtain permits and to complete construction. See *AM Auction No. 32 Non-Mutually Exclusive Applications*, Public Notice, 15 FCC Rcd 18004, 18005 (MMB 2000).

⁸ See File No. BMP-20001020AAT.

⁹ *Id.* (as amended Aug. 6, 2001).

¹⁰ *Request for Waiver of Section 73.3598 of the FCC's Rules* (Dec. 7, 2001) ("*Waiver Request*").

¹¹ *Id.* at 10-11.

¹² *Id.* at 10, 20, 22, 33, Exhibit E. See also Application for Review at 9.

¹³ *Waiver Request* at 10.

in Stocker's personnel and policies were matters beyond Royce's control.¹⁴ Royce also argued that it had done everything within its own control to build despite difficulties locating suitable land near Los Angeles, as evidenced by considerable monies and time it had spent since the 1980s.¹⁵

6. The Bureau issued its *Waiver Denial* on December 20, 2001, finding that initial zoning matters generally do not qualify for additional construction time under the Commission's revised rules.¹⁶ Also, as the primary difference between the positions of Stocker's former and current management seemed to be their willingness to assist Royce in the zoning process, the Bureau questioned why Royce could not have proceeded independently.¹⁷ The Bureau determined that the primary cause of Royce's construction delays was its own failure to initiate zoning proceedings prior to specifying the Stocker site.¹⁸ Although the Bureau denied Royce's *Waiver Request*, it nonetheless adjusted the KIEV(AM) construction deadline to April 25, 2002, based on other reasons.¹⁹

7. On February 11, 2002, Royce petitioned for reconsideration of the *Waiver Denial*.²⁰ Royce clarified that it could not have initiated local zoning proceedings without Stocker's assistance because the City required written consent of the landowner to commence zoning.²¹ Royce disclosed for the first time that Stocker, even under prior management, was unwilling to give its consent for Royce to seek zoning approval until several matters were resolved.²² Also, Stocker was concerned that certain

¹⁴ *Id.* at 19-24.

¹⁵ *Id.* at 11-13.

¹⁶ See *Letter to Andrew S. Kersting, Esq.* at 3 (MB Dec. 20, 2001) (citing *Streamlining MO&O*, 14 FCC Rcd at 17540), *rescinded and reissued on other grounds*, *Letter to Andrew S. Kersting, Esq.* (MB Jan. 11, 2002) ("*Waiver Denial*").

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ The Bureau waived the construction deadline on its own motion based on the mistaken belief that a matter Royce had not raised -- a condition on Royce's permit -- reflected an International Telecommunication Union ("ITU") matter that might prevent construction. However, the Commission requests ITU approval only for operations that may cause interference in countries other than Canada or Mexico, Royce's proposal affected only Mexican stations, and the government of Mexico had cleared the proposal. The Bureau soon learned of its error, issued corrected decisions on January 8, and 11, 2002, and removed the international condition from Royce's permit. The new construction deadline of April 25, 2002, gave Royce the benefit of an error made in its favor. Royce continues to believe that the Bureau's removal of the international condition was an error, but provides no basis for further Commission action on this matter. See Application for Review at 11 n.2.

²⁰ Petition for Reconsideration (Feb. 11, 2002) ("*February Substantive Petition*").

²¹ See *February Substantive Petition* at 4, 7-8.

²² For example, Stocker wanted to wait until it entered into a lease with Royce and agreed on exactly where on the property to locate the towers, so as not to jeopardize Stocker's oil field operations. *February Substantive Petition* at 4-8 and Appendix B. No lease or final written agreement as to tower placement was ever reached. *Id.* at 12-13. The new manager allegedly expressed oral approval of Royce's tower locations in February 2002, but an April 2002, letter from the same manager terminated negotiations with Royce due, in part, to potential habitat for an endangered species in Royce's proposed tower locations. See *Letter from Bryan E. Stanek, Land Manager, Stocker to Edward Stolz, Royce* (Apr. 10, 2002).

details involving environmental issues be settled prior to the filing of a zoning application.²³ Royce also clarified that the primary impact of Stocker's personnel change was that the former manager had experience presenting proposals to the City and would have been willing to ask the City to allow Royce's operations by modifying Stocker's existing use permit, whereas new management required Royce to obtain a new use permit.²⁴ Royce has stated that Stocker's new manager indicated in February 2002 that Stocker would issue a letter shortly allowing Royce to file a zoning application, but that no such letter materialized.²⁵

8. On March 14, 2002, Royce met with the City and learned that modification of the existing local use permit was not an option.²⁶ The City rejected Royce's subsequent new use permit application because Royce was unable to obtain Stocker's signature to that application.²⁷ On April 10, 2002, Stocker determined that it was no longer willing to lease its property to Royce. Royce notified the Bureau of this site loss on April 23, 2002, and stated that it was investigating potential alternative transmitter sites. The construction permit expired on April 25, 2002.

9. In January 2004, while Royce's *February Substantive Petition* remained pending, the Commission opened the AM Auction 84 filing window. Royce and three others filed mutually exclusive applications to construct new California radio stations, all specifying channels and transmitter locations that could not co-exist with the KIEV(AM) permit which had, on its face, expired.²⁸ One of those mutually exclusive applicants, Levine/Schwab Partnership ("LSP"), has filed comments in the present proceeding expressing its position that Royce warehoused spectrum for 22 years and has been preventing others from using the spectrum to serve the public.²⁹ Similarly, in November 2004, Ontario Broadcasting LLC ("Ontario"), licensee of KSPA(AM), Ontario, California, filed a minor change application proposing improvements to KSPA(AM), without protecting the proposed first-adjacent channel facilities of KIEV(AM).³⁰ Ontario has also participated in this proceeding.³¹ The Bureau has been holding these

²³ See *Declaration of Cliff Clement, Stocker's Former Land Manager* at 1-2 (January 10, 2002) (Application for Review, Exhibit 11); See *Declaration of Mark Mocerri, Technical Consultant* at para. 8 (*February Substantive Petition*, Appendix C). As of February 2002, Royce and Stocker had not yet completed an environmental study which must accompany a local zoning application. See *February Substantive Petition* at 13. Royce's application to the Commission certified compliance with the Commission's environmental rules. See File No. BMP-20001020AAT, Question III(A)(11); 47 C.F.R. § 1.1307(a)(3).

²⁴ See *February Substantive Petition* at 13 and Appendix C.

²⁵ See *Declaration of Mark Mocerri, Technical Consultant* (Attached to May 24, 2002 Letter from Andrew S. Kersting to Marlene H. Dortch).

²⁶ See *Declarations of Edward Stolz, Royce's Proprietor, and Mark Mocerri, Technical Consultant* (Attached to May 24, 2002 Letter from Andrew S. Kersting to Marlene H. Dortch).

²⁷ Royce filed that application with the City on April 1, 2002.

²⁸ Specifically, the Commission received two applications to serve Culver City, California, one application for Lemon Grove, California, and one application specifying Venice, California.

²⁹ See Comments of Levine/Schwab Partnership at 2 (Feb. 14, 2006).

³⁰ See File No. BP-20041115AFC. KIEV(AM) has grandfathered prohibited daytime groundwave contour overlap with that station. See *Waiver Request* at 27 (referring to the Ontario station by its former call sign, KXMN).

³¹ See *Opposition to Application for Review* (Mar. 2, 2006).

applications in queue because none could be granted absent confirmation of the Bureau's conclusion that the KIEV(AM) permit has expired.

10. The Bureau denied Royce's *February Substantive Petition* on July 8, 2004.³² The deadline for filing an Application for Review was August 12, 2004.³³ On August 17, 2004, Royce filed a motion seeking until September 10, 2004, to file such an Application for Review.³⁴ Royce stated that it had retained new counsel because it discovered on August 10, 2004, the date when it believed an Application for Review was due, that previous counsel had not made such a filing. The Bureau denied Royce's motion.³⁵ The Bureau found no good cause to extend the filing deadline based on Royce's misunderstanding with its former counsel or its retention of new counsel to file an application for review.³⁶ Royce petitioned for reconsideration of that ruling and Ontario opposed Royce's petition.³⁷ The Bureau denied reconsideration.³⁸ Royce sought review of that procedural ruling, and Ontario filed an Opposition.³⁹

11. Subsequently, the Bureau, on its own motion, issued a letter which set aside its December 2004 procedural ruling and stated that it would refer Royce's *September Procedural Petition for Reconsideration* to the Commission.⁴⁰ The Bureau allowed time for Royce to file a substantive Application for Review and for Ontario to file an Opposition thereto, thereby preserving the Commission's ability to reach the merits of the case should it decide that such action was appropriate. LSP filed Comments expressing its disagreement with the Bureau's decision to refer the matter to the Commission.⁴¹ Royce filed an Application for Review, as well as an application to modify the KIEV(AM) permit to specify a new transmitter site.⁴² Ontario filed an Opposition to which Royce filed a Reply.⁴³

³² See *Letter to Andrew S. Kersting, Esq.*, Ref. 1800B3-IB/GDG (MB July 8, 2004).

³³ The Commission released a public notice of the denial on July 13, 2004. *Broadcast Applications*, Public Notice (Report No. 25775, July 13, 2004). Therefore, any Application for Review was due on or before August 12, 2004.

³⁴ Motion for Extension of Time (dated Aug. 11, 2004 and received Aug. 17, 2004).

³⁵ See *Letter to Lauren A. Greenberg, Esq.*, Ref. 1800B3-IB/GDG (MB Aug. 20, 2004).

³⁶ *Id.*

³⁷ See *Petition for Reconsideration* (Sept. 20, 2004) ("*September Procedural Petition for Reconsideration*"); *Opposition of Ontario to Petition for Reconsideration* (Oct. 14, 2004).

³⁸ See *Letter to Lauren A. Greenberg, Esq.*, Ref. 1800B3-IB/GDG (MB Dec. 17, 2004). See also 47 C.F.R. § 1.106(a)(1).

³⁹ See *Application for Review* (Jan 28, 2005); *Opposition of Ontario to 2005 Application for Review* (Feb. 7, 2005).

⁴⁰ See *Letter to William H. Crispin, Esq.* (MB Jan. 18, 2006). In view of this action, the Bureau also dismissed as moot Royce's January 28, 2005, Application for Review and Ontario's February 7, 2005, Opposition.

⁴¹ See Comments of LSP (Feb. 14, 2006). See *supra* ¶ 9.

⁴² See *Application for Review* (Feb. 22, 2006); File No. BMP-20060222ABE.

⁴³ See *Opposition of Ontario to 2006 Application for Review* (Mar. 2, 2006); *Reply* (Mar. 14, 2006).

III. DISCUSSION

12. Applications for Review must be filed within thirty days of public notice, as that date is defined in the Commission's Rules.⁴⁴ Waiver of the deadline is appropriate only where equities so require and no party would be prejudiced thereby.⁴⁵ Motions for extension of time generally must be filed at least seven days prior to the filing deadline, except that the motion may be filed within the last seven days if the party orally notifies other parties and the Commission staff responsible for acting on the motion that the motion has been or is being filed.⁴⁶ Such motions are not routinely granted.⁴⁷

13. The Bureau properly denied Royce's motion for additional time to file its Application for Review. Royce's motion was untimely. The motion was filed after the Application for Review deadline, and therefore did not comply with the rules applicable to extensions of time.⁴⁸ Moreover, the motion was based entirely on Royce's misunderstanding with its former counsel regarding the preparation of an Application for Review. Counsel is merely an applicant's agent, chosen by the applicant, and thus the applicant is ultimately responsible if counsel does not vigorously prosecute the applicant's interests.⁴⁹ The Commission has sometimes considered late-filed pleadings if no party would be prejudiced. In the present case, however, such action could prejudice Ontario and LSP because their applications are in queue behind the KIEV(AM) permit. Thus, those applications become ripe for consideration with the expiration of the KIEV(AM) permit.⁵⁰

14. Finally, we reject Royce's arguments that its efforts to obtain replacements for the Stocker site provide a basis for waiver of the Application for Review filing deadline. Royce first raised this argument on reconsideration in 2002, at which time it reported that it was close to negotiating an agreement with Multicultural Communications to co-locate KIEV(AM) with KBLA(AM).⁵¹ That possibility did not materialize.⁵² Royce has since reported that, following unsuccessful attempts to use several other sites, it obtained reasonable assurance from the City of Glendale, California, on February 15, 2006, to use a municipally owned site in Scholl Canyon.⁵³ Such post-construction deadline efforts,

⁴⁴ See 47 C.F.R. §§ 1.115(d) and 1.4(b).

⁴⁵ See *Crystal Broadcast Partners*, Memorandum Opinion and Order, 11 FCC Rcd 4680, 4681 (1996) (citing *MTD, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 34, 35 n.2 (1991) and *Hancock Communications, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 13068, 13069 (1995)).

⁴⁶ See 47 C.F.R. § 1.46(c).

⁴⁷ *Id.* at § 1.46(a).

⁴⁸ See 47 C.F.R. § 1.46. See also 47 C.F.R. §§ 1.115(d) and 1.4(b).

⁴⁹ See *Hillebrand Broadcasting, Inc.*, Order, 1 FCC Rcd 419, 420 n.6 (1986). Prosecution of an application includes timely compliance with both procedural and substantive rules. *Id.* at 419.

⁵⁰ See 47 C.F.R. § 73.3573. Compare *MTD, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 34, 35 n.2 (1991) (consideration of application for review filed 10 days late where no party would be prejudiced); *Noble Syndications, Inc.*, Memorandum Opinion and Order, 74 FCC2d 124, 128-29 (1979) (consideration of opposition filed 9 days late where no party would be prejudiced).

⁵¹ *February Substantive Petition* at 1-3.

⁵² See Application for Review at 14.

⁵³ See Application for Review at 15. The assurance was conditional on Royce's submitting a satisfactory local application, receipt of approval from the local zoning commission and city council following public input, and (continued....)

however, warrant neither a waiver of the Commission's procedural rules nor of the Section 73.3598-mandated construction deadlines.⁵⁴ We conclude that the KIEV(AM) permit expired under its own terms on April 25, 2002, as a result of the Bureau's denial of Royce's request for additional construction time and Royce's failure either to file a timely Application for Review of that ruling or to construct within the time allotted. Having resolved this case procedurally, we need not reach the substantive arguments in the untimely Application for Review that the staff permitted Royce to file in the interest of a complete record. That filing will be dismissed. Similarly, we will dismiss as moot Royce's 2006 application to modify the expired construction permit.

15. We observe that Royce would not have prevailed even had we found a basis for reaching the merits of its Application for Review. The Commission's revised construction standards, consistent with Section 319(b) of the Act, balance a generous, three-year deadline for bringing service to the public with strict tolling and waiver standards governing requests for additional time to construct. This approach is designed both to avoid permittee hardships and also to prevent the indefinite warehousing of spectrum by permittees that do not diligently construct facilities and commence operations.⁵⁵ The expansion of radio station construction periods from eighteen months to three years was adopted, in part, to eliminate zoning issues as a basis for obtaining additional time to complete station construction.⁵⁶ The Commission similarly rejected suggestions to add site-related difficulties to the tolling criteria.⁵⁷ Under our current broadcast station construction policies, the selection of a transmitter site is an independent business decision within a permittee's control.⁵⁸ Even accepting *arguendo* that Royce's delay in initiating zoning stemmed from restrictions required by Stocker and that it is difficult to obtain suitable AM transmitter sites near urban Los Angeles, it nevertheless remains the case that Royce's selection of the site and acceptance of Stocker's terms were matters within Royce's control.⁵⁹ Accordingly, these facts would not have warranted a waiver of the construction deadline.⁶⁰

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finalization of mutually acceptable lease terms. See Letter from James E. Starbird, City Manager, City of Glendale to Royce (Feb. 15, 2006) (Application for Review, Exhibit 3A). Royce argues that the Commission should hold the Application for Review in abeyance and remand its Scholl Canyon proposal for Bureau review. See Application for Review at 17.

⁵⁴ See generally 47 C.F.R. § 73.3598. Moreover, matters occurring after the construction permit expired can neither encumber authorized construction nor remedy a failure to act during the construction period.

⁵⁵ See *Streamlining MO&O*, 14 FCC Rcd at 17537-39.

⁵⁶ *Id.* at 17539, ¶37 ("We affirm the exclusion of zoning matters from the category of circumstances triggering the tolling provisions.")

⁵⁷ *Id.* at 17538-41.

⁵⁸ *Id.* at 17539, note 51 (citing, *Business Radio Communications Systems, Inc.*, 102 FCC 2d 714, 716-7 (1985)).

⁵⁹ Moreover, as the permit's expiration date approached – approximately 18 years following initial grant -- Royce and Stocker had not yet settled the most basic, preliminary matters needed to begin construction such as establishing exact tower locations, determining steps that might be needed at those locations to reduce or avoid environmental impact, and signing a site lease.

⁶⁰ See *Cram Communications, LLC*, 23 FCC Rcd 658, 661-63 (2008) (no additional time for zoning delays and site-related difficulties); *Birach Broadcasting*, 23 FCC Rcd 3141, ¶13 (2008)(failure to seek zoning approval until 27 months into construction period is a matter within permittee's control and therefore tolling for zoning difficulties is unwarranted); *JNE Investments, Inc.*, 23 FCC Rcd 623, 631, ¶21(2008), citing *Streamlining MO&O*, (continued....)

III. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED, That the Petition for Reconsideration filed on September 20, 2004, and supplemented October 8, 2004, by Royce International Broadcasting Company IS DENIED.

17. IT IS FURTHER ORDERED, That the Application for Review filed on February 22, 2006, by Royce International Broadcasting Company IS DISMISSED.

18. IT IS FURTHER ORDERED, That the application filed by Royce International Broadcasting Company on February 22, 2006, to modify its expired construction permit (BMP-20060222ABE) IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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supra, at 17539, ¶37 (a diligent permittee can resolve zoning and other site-related difficulties in the vast majority of cases, either by securing an alternative site or by obtaining the necessary approvals). Moreover, the waiver cases advanced by Royce are factually distinct. The Commission's holding in *Texas Grace* was limited to the specific facts at issue there, *i.e.*, a modification application that was pending at the time the Commission adopted its revised construction deadline and that stemmed from an FM rulemaking proceeding to modify a station's community of license. See *Texas Grace Communications*, 16 FCC Rcd 19167, 19170-71 (2001) ("*Texas Grace*"). The equities applicable to the permittee in *Texas Grace*, which had initiated a rulemaking and modification process well before adoption of the revised construction rules, are not present for Royce, which filed its modification application after the rule change, and whose application did not stem from a rulemaking proceeding. The staff level cases cited by Royce are inapposite as well. See *WMLB(AM)*, Letter, 18 FCC Rcd 5034 (MB 2003) (government taking of site by eminent domain); *Further Extension of the November 1, 2000, Digital Television Construction Deadline*, Order, 16 FCC Rcd 8122 (2001) (applying the standards for waiving the digital television implementation schedule, 47 C.F.R. § 73.624(d), which were similar to the more lenient AM and FM extension rule superseded by Section 73.3598).