

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

In the Matter of
Royce International Broadcasting Company,
Assignor
And
Entercom Communications Corp, Assignee
Application for Consent to the Assignment of
License of Station KUDL(FM), Sacramento,
California
File No. BALH-20021120ACE
Facility ID No. 57889

MEMORANDUM OPINION AND ORDER

Adopted: September 16, 2015

Released: September 17, 2015

By the Commission:

1. We have before us an Application for Review ("AFR") filed on September 20, 2005, by Royce International Broadcasting Company ("Royce"). Royce seeks review of the Media Bureau's ("Bureau") August 22, 2005, denial of Royce's petition for reconsideration ("Petition") seeking to overturn the Bureau's grant of an application ("Application") for Commission consent to the assignment of license of Station KUDL(FM), Sacramento, California ("Station"), from Royce to Entercom Communications Corp. ("Entercom"). For the reasons set forth below, we affirm the Bureau's action below.

2. On May 12, 2003, the staff granted the Application finding, inter alia, that the Application complied with the Commission's local radio ownership rules. Entercom consummated the acquisition on May 19, 2003. On June 2, 2003, the Commission adopted new multiple ownership rules, and announced that same day by Public Notice that "[a]pplications that are still pending as of the effective date of the new

1 On October 5, 2005, Entercom filed an Opposition, to which Royce replied on October 19, 2005.

2 Formerly Station KWOD(FM).

3 Royce International Broadcasting Company, Letter, 20 FCC Rcd 13720, 13721 (MB 2005) ("Bureau Decision").

4 See Letter to Andrew S. Kersting, Esq., and Brian M. Madden, Esq., Ref. 1800B3-BSH (MB rel. May 14, 2003), p.5. In this action, the Bureau also denied Royce's petition to deny the Application pending Royce's appeal of the court order that required Royce to sign all documents necessary to effectuate the Commission's approval of the assignment of the Station's license to Entercom. See Entercom Communications Corp., v. Royce International Broadcasting Corp., et al., California Superior Court, Case No. 99AS04202.

5 See 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, Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd 13620 (2003) ("Ownership Order"), aff'd in part and remanded in part, Prometheus Radio Project, et al. v. F.C.C., 373 F.3d 372 (3d Cir. 2004), stay modified on rehearing, No. 03-3388 (3d Cir. Sep. 3, 2004), cert. denied, 73 U.S.L.W. 3466 (U.S. Jun. 13, 2005) (Nos. 04-1020, 04-1033, 04-1036, 04-1045, 04-1168 and 04-1177).

rules will be processed under the new rules.”⁶ On June 11, 2003, Royce filed its Petition, arguing that, the Application was still “pending” at the time the *June Public Notice* was released and therefore that it should have been processed under the new ownership rules. It relies on Section 1.65 of the Commission’s Rules (“Rules”), which reads, in pertinent part:

For purposes of this section, an application is “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.⁷

The Bureau denied the Petition, finding that the “grandfathering” provisions of the *Ownership Order*⁸ were controlling, that the staff properly did not apply the new rules to a transaction consummated prior to the adoption of the new rules, and therefore that Royce’s reliance on Section 1.65 was “misplaced.”⁹

3. On review, Royce claims that the Bureau did not address its argument that the Application was “pending” when the local radio ownership rules were adopted on June 2, 2003, pursuant to Section 1.65 of the Rules.¹⁰ Royce also improperly raises several arguments for the first time in the AFR, which we hereby dismiss pursuant to Section 1.115(c) of the Rules.¹¹

4. We conclude that Royce has failed to demonstrate that the Bureau erred when it determined that the Application should not be re-processed under the revised local ownership rules. The *Ownership Order* explicitly grandfathered all “existing” broadcast combinations.¹² The transaction at issue was consummated before the *Ownership Order* was adopted. Therefore, as of the adoption date, the Entercom combination was an “existing” combination that was grandfathered by the *Ownership Order*.¹³ The Bureau correctly applied the rules that were in effect on May 12, 2003, the date on which the Application was granted.¹⁴ Moreover, the *Bureau Decision* addressed Royce’s Section 1.65 “pending” argument,

⁶ See *Media Bureau Announces Processing Guidelines for Broadcast Station Applications*, Public Notice, 18 FCC Rcd 11319 (2003) (“*June Public Notice*”).

⁷ 47 C.F.R. § 1.65(a) (emphasis supplied).

⁸ *Ownership Order*, 18 FCC Rcd at 13807-14 (Section VI(D)).

⁹ *Bureau Decision* at 13722.

¹⁰ AFR at 5.

¹¹ 47 C.F.R. § 1.115(c). Royce argues for the first time that: (1) the Bureau “unlawfully” determined that the court’s stay of the rules adopted in the *Ownership Order* applies in this case, see *Prometheus Radio Project, et al. v. F.C.C.*, No. 03-3388, slip op. at 3 (3d Cir. Sept. 3, 2003) (*per curiam*); (2) the Bureau, by not addressing Royce’s Section 1.65 “pending” argument, violated 5 U.S.C § 557(c) of the Administrative Procedure Act which requires that any ruling in an adjudicatory decision “show the ruling on each finding, conclusion or exception presented”; and (3) the Bureau, by failing to apply Section 1.65(a) as well as the application processing guidelines established in the *Ownership Order*, violated the fundamental tenet that the Commission must follow its own rules. We note that while the judicial stay of the revised local radio ownership rules was subsequently lifted, and the Bureau issued a new public notice setting forth processing guidance for pending applications, *Revised FCC Forms 301, 314, & 315 Approved & Available for Use; Media Bureau Announces End to Freeze on the Filing of Forms 301, 314, & 315 for Commercial Radio Stations*, Public Notice, 19 FCC Rcd 19642 (MB 2004), that does not alter the outcome of this case for the reasons explained in this order.

¹² *Ownership Order*, 18 FCC Rcd at 13808.

¹³ *Bureau Decision*, 20 FCC Rcd at 13721.

¹⁴ See *Bureau Decision*, 20 FCC Rcd at 13721.

finding that given the controlling grandfathering policy adopted in the *Ownership Order*, Royce's reliance on Section 1.65 was "misplaced."¹⁵

5. The *June Public Notice* implemented processing guidance provided in the *Ownership Order*, using language that is identical in all material respects to the text of the *Ownership Order*.¹⁶ The Bureau's interpretation of the Commission's processing guidance is consistent with Commission precedent¹⁷ and with the Commission's clear intent in the *Ownership Order* to avoid disturbing existing combinations of stations.¹⁸ The *Ownership Order* and the *June Public Notice* stated that petitions to deny and informal objections that were filed against "Pending Applications" before the adoption of the *Ownership Order* and that did not raise competition issues would be addressed "at the time we act on such Applications."¹⁹ This language supports the Bureau's conclusion that the word "pending" was meant to exclude applications on which the Bureau had already acted. Finally, Section 1.65(a) of the Rules does not provide an independent basis for interpreting the word "pending" to mean "non-final" in this context, as Royce claims. Section 1.65(a) explicitly states that the term is defined in this way "[f]or purposes of this section."²⁰ Section 1.65(a) requires applicants to ensure that their applications remain accurate and complete and to amend a pending application promptly whenever information furnished in the application is no longer "substantially accurate and complete in all significant respects,"²¹ a purpose that is wholly unrelated to the determination of how the Commission's ownership rules should be applied in specific cases. Thus, we reject Royce's argument that Section 1.65 governs the resolution of its AFR.²²

¹⁵ *Id.* The purpose of 47 C.F.R. § 1.65 is to ensure that the Commission has on file current information as to matters that might be subject to further proceedings before the Commission or the courts. See *Pinelands, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 6058, 6061 n.10 (1992).

¹⁶ *Ownership Order*, 18 FCC Rcd at 13813-14, ¶ 498.

¹⁷ *Golden Triangle Radio, Inc., et al.*, 20 FCC Rcd 4396, 4397-98 (2005) (affirming Bureau's processing of applications under the ownership rules then in effect even though Commission adopted revised rules while the petition for reconsideration was pending and stating, "We do not generally apply changes in ownership rules retroactively so as to require divestiture of existing combinations, and we did not do so when we revised the local radio rule [in 2003].").

¹⁸ In light of this express intent, had the Commission intended to require already-granted applications to be re-filed for processing under the new rules, with the potential result that such combinations would be found non-compliant and therefore subject to divestiture, we expect that it would have said so explicitly. Cf. *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 468 (2001) (Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not . . . hide elephants in mouseholes.").

¹⁹ *Ownership Order*, 18 FCC Rcd at 13814, ¶ 498; *June Public Notice*, 18 FCC Rcd at 11319-20.

²⁰ 47 C.F.R. § 1.65(a). See *Pinelands, Inc.*, *supra*, 7 FCC Rcd at 6061 n.10 ("The limitation of the definition [of 'pending'] for [Section] 1.65 purposes clearly implies that an application may not be deemed 'pending' for other purposes.").

²¹ 47 C.F.R. § 1.65(a).

²² See Reply to Opposition to AFR at 4 ("[F]or purposes of Section 1.65, the KWOD [now KUDL] Application still remains 'pending.'"). In its Reply to Opposition to AFR, Royce argues, for the first time, that the word "pending" appears in two sections of the Communications Act and another Commission rule and that the term is defined in all three instances to include applications that have been granted or denied by an order that is not yet final. Reply to Opposition to AFR at 5-6 & n.6 (citing 47 U.S.C. § 311(c)(4), (d)(4); 47 C.F.R. § 73.3525(h)). We dismiss this portion of the pleading because the argument was not presented to the Bureau. 47 C.F.R. § 1.115(c). As a separate and independent basis for rejecting the argument, however, we find that none of these provisions is applicable to the facts of this case or sheds any light on the meaning of the word "pending" as used in the Commission and Bureau processing guidance. See 47 U.S.C. § 311(c)-(d) (where the Commission receives conflicting applications for construction permits, or where an application for license renewal conflicts with an application for a construction permit, a pending application may not be withdrawn absent Commission approval); 47 C.F.R. § 73.3525 (parties

(continued....)

6. 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 September 20, 2005, Application for Review filed by Royce International Broadcasting Company, IS DISMISSED to the extent stated herein and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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must obtain Commission approval for agreements to withdraw or amend construction permit applications to remove conflicts between applications).