APPENDIX TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS (Cont.)

OPINION OF THE DISTRICT OF COLUMBIA CIRCUIT (FEBRUARY 16, 2018)

UNITED STATES COURT OF APPEALS,
DISTRICT OF COLUMBIA CIRCUIT

EDWARD R. STOLZ, II, D/B/A ROYCE INTERNATIONAL BROADCASTING COMPANY,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

ENTERCOM COMMUNICATIONS CORP., and ENTERCOM LICENSE, LLC,

Intervenors.

No. 16-1248

Before: MILLETT, Circuit Judge, and EDWARDS and WILLIAMS, Senior Circuit Judges

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Millett, Circuit Judge:

Edward Stolz agreed to sell a radio station he owned to Entercom Communications Corporation and, upon approval by the Federal Communications Commission ("FCC"), to transfer the station's broadcast license to Entercom. Implementation of the agreement

soon broke down, and Stolz and Entercom have spent the ensuing two decades clashing before the FCC and state and federal courts. This long-running dispute should draw closer to a conclusion today as we deny Stolz's appeal and dismiss as moot his central claim challenging Entercom's legal eligibility to acquire the station.

I

A

Congress invested the FCC with exclusive authority to grant, deny, and approve the transfer of broadcast licenses to operate radio stations. 47 U.S.C. §§ 301, 303, 307-310. As a result, when a broadcast station owner wants to transfer ownership of a station to a third party, the FCC must approve the assignment of the station's broadcast license to the new owner. *Id.* § 310(d). The FCC may approve assignments only "upon finding . . . that the public interest, convenience, and necessity will be served thereby." 47 U.S.C. § 310 (d). That public interest includes "promoting diversity of program and service viewpoints" and "preventing undue concentration of economic power." *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 780 (1978).

To that end, the FCC limits the number of radio stations that a single entity can own within a local market. 47 C.F.R. § 73.3555(a). As relevant here, in a market with 45 or more radio stations, a single entity can only be licensed to operate up to "8 commercial radio stations in total and not more than 5 commercial stations in the same service (AM or FM)." *Id.* § 73. 3555(a)(1)(i). In a market that contains 30 to 44 radio

stations, a single entity may not hold licenses for "more than 7 commercial radio stations in total and not more than 4 commercial stations in the same service (AM or FM)." *Id.* § 73.3555(a)(1)(ii).

In 2002, the FCC completed a comprehensive review of its media ownership rules. *See* IN THE MATTER OF 2002 BIENNIAL REGULATORY REVIEW, REPORT AND ORDER, 18 FCC Rcd. 13620 (2003) ("*2002 Order*"). Among other things, the *2002 Order* retained the FCC's prior numerical limits on radio station ownership, but changed how the FCC would determine the size of a local market, and thus what ownership limits would apply to a given entity within that market. *Id.* at 13724 ¶ 273-274. Those same rules also apply to the assignment or transfer of broadcast licenses. *Id.* at 13724 ¶ 273 n.572.

The *2002 Order* included a grandfathering provision to prevent existing license holders from having to "divest their current interests in stations . . . to come into compliance with the new ownership rules." 18 FCC Rcd. at 13808 ¶ 484. The grandfathering provision also established "processing guidelines" to "govern pending and new commercial broadcast applications for the assignment or transfer" of radio licenses "as of the adoption date of this *Order*." *Id.* at 13813 ¶ 498. Pending assignment applications that had not yet been "act[ed] on" by the "Commission prior to the adoption date of the *Order*" were made subject to the *2002 Order*'s new market definitions. *Id.* at 13814 ¶ 498.

B

Appellant Edward R. Stolz, II, who does business under the name Royce International Broadcasting

Company, owned radio station KUDL (FM) in Sacramento, California and held an FCC broadcast license for the station. This regulatory saga starts in February 1996 when Stolz signed a letter of intent to sell the radio station's assets and to transfer the FCC license to Entercom.[1] Business relations between the two soured, however, before the sale and license transfer were completed.

Entercom sued Royce International in California state court seeking to enforce the agreement. In April 2002, the California Superior Court ordered specific performance of the radio station's sale and directed Stolz to sign a license transfer application to be submitted to the FCC.

In November 2002, Entercom filed the necessary license transfer application with the FCC. Stolz did not sign it though. Instead, Stolz filed a petition with the FCC asking it to deny the application. Stolz argued that the FCC's methodology for measuring the size of the Sacramento local media market was flawed and that, if an accurate standard were employed, market concentration rules would bar Entercom from acquiring any more radio stations in that market (including, specifically, KUDL).

In May 2003, the FCC's Media Bureau granted the license application and assigned the KUDL (FM) broadcast license to Entercom, finding that the transfer was permissible and in the public interest. *Letter to Andrew S. Kersting, Esq., and Brian M. Madden, Esq.*, FCC File No. BALH-20021120ACE, Ref. 1800B3-BSH

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[1] Both Entercom Communications and its wholly owned subsidiary Entercom License are intervenors in this case. We refer to the two entities collectively as "Entercom."

(May 12, 2003). Under FCC regulations, the Media Bureau's decision was not the last agency word. FCC regulations allowed Stolz to seek review of the Bureau's decision by the FCC itself. *See* 47 C.F.R. § 1.115.

Within a month of the Media Bureau's decision, the FCC adopted the *2002 Order*. The *Order* redefined the Sacramento local market along the lines for which Stolz had been arguing. As a result, if the *2002 Order* were applied to Entercom's license application, the transfer would have to be denied because Entercom already held the maximum number of broadcast licenses permitted within the Sacramento market. Stolz promptly petitioned the Media Bureau for reconsideration, arguing that the transfer application was still "pending" and thus subject to the *2002 Order*'s new local-market definition. After a two-year delay, the Bureau denied reconsideration.

Stolz then sought review by the full FCC. The FCC inexplicably delayed ten years before finally affirming the Bureau's decision in September 2015. Stolz sought reconsideration by the FCC, arguing that this court's intervening decision in *Kidd Communications v. FCC*, 427 F.3d 1 (D.C. Cir. 2005), rendered the involuntary transfer unlawful. The full FCC denied the petition for reconsideration, reasoning that Stolz should have raised his arguments under *Kidd* earlier by seeking to reopen briefing on his petition to the full FCC.

II

A

We have exclusive jurisdiction over appeals from FCC decisions granting or denying the assignment of

a radio broadcast license. 47 U.S.C. § 402(b)(3) & (b)(6). We dismiss Stolz's appeal in part as moot and deny it in part.

Stolz's central argument on appeal is that the FCC should have applied the *2002 Order*'s new local-market definition to Entercom's license transfer application because this case was still pending within the administrative process at the time the *2002 Order* took effect. The parties do not dispute that, had the *2002 Order*'s market definition been applied, Entercom's application would have been denied because it would at the time have owned too many radio stations within the Sacramento market. Under the regulatory scheme that predated the *2002 Order*, by contrast, Entercom could obtain the KUDL license without exceeding the local-market ownership rule. *See* 47 C.F.R. § 73.3555(a)(1)(ii) (2001).

As events have unfolded, we need not untangle the less-than-pellucid definition of "pending" administrative actions to determine whether the grandfather clause in the *2002 Order* applies to this license transfer application.[2] That is because, during the pendency of this case, Entercom relinquished its broad-

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[2] On the one hand, the *2002 Order*'s grandfather clause directs that parties seeking license assignments must be in compliance with the new rules at the time the assignment application is "filed." 18 FCC Rcd. at 13809 ¶ 487. But the *2002 Order* elsewhere states that the new rules apply to applications that have not yet been "act[ed] on" by the Commission by the date of the *2002 Order*'s adoption. *Id.* at 13814 ¶ 498. Elsewhere the FCC has said that the new rules do not apply to "a transaction" that was "consummated" prior to the adoption of the *2002 Order*. *In the Matter of Royce Int'l Broad. Co., Assignor and Entercom Commc'ns Corp., Assignee*, 30 FCC Rcd. 10556, 10557 ¶ 4 (Sept. 17, 2015) (citing *2002 Order*, 18 FCC Rcd. at 13808).

cast license for and ceased to operate one of its preexisting FM radio stations in the Sacramento market. *Entercom License, LLC*, FCC 17M-09, 2017 WL 1088491, at *1 (March 16, 2017) ("On February 8, 2017, Entercom forwarded the station license for KDND (FM) . . . and other KDND instruments of authorization to the Commission for cancellation[.]"). With that license returned to the FCC, Entercom now only operates four FM radio stations and one AM radio station in the Sacramento market. Transcript of Oral Argument at 8-9, *Stolz v. FCC*, No. 16-1248 (D.C. Cir. argued Sept. 11, 2017). That means that even under the *2002 Order*'s new local-market rule, Entercom is eligible to acquire KUDL's license without running afoul of market concentration limitations. Both parties conceded this point at oral argument. *Id.* at 9, 10, 19. Accordingly, that portion of Stolz's appeal is dismissed as moot.

B

Stolz separately argues that the FCC's approval of the transfer is invalid under our decision in *Kidd Communications v. FCC*, *supra*. Stolz reads that decision as broadly barring the involuntary transfers of licenses that are an outgrowth of state-court litigation. While we disagree with Stolz's reading of *Kidd*, we are also unpersuaded by the FCC's invocation of a procedural bar to even addressing intervening circuit precedent.

Our decision in *Kidd*—a precedential ruling that Stolz believes proscribes the FCC's decision in his case—came down after briefing had been completed on Stolz's application for review to the FCC challenging the Media Bureau's decision. *See* 47 C.F.R. § 1.115(d).

There of course was no possible way for Stolz to have included an argument relying on *Kidd* before that precedent actually intervened.

The FCC disputes none of that. Instead, the FCC argues that Stolz's argument about *Kidd* should have been presented to the FCC through some supplemental filing rather than waiting until after the decision issued and then seeking reconsideration. Stolz's failure to do so, the FCC insists, forever forfeited his reliance on intervening circuit precedent.

That is wrong. We have found no FCC rule permitting, let alone requiring, supplemental filings after closure of the pleading cycle. The FCC cites no such rule. Nor does anything in the FCC's procedural regulations put claimants on fair notice that failure to file a nowhere-mentioned-in-the-rules supplemental document will procedurally forfeit a claim. Worse still, what the FCC's regulations do say is that a petition for reconsideration is exactly the place in which to raise "events which have occurred or circumstances which have changed since the last opportunity to present such matters to the Commissioner." 47 C.F.R. § 1.106(b)(2)(i); *see also* 47 C.F.R. § 1.115(c) ("[N]ew questions of fact or law may be presented to the designated authority in a petition for reconsideration.").

The FCC, for its part, cites to a couple of footnotes in prior decisions and a 1979 order to demonstrate that, on occasion, the FCC has entertained such supplemental filings. That misses the point. The issue here is not whether the FCC could have entertained such a filing if Stolz had thought to attempt it. Rather, the issue is whether the FCC gave Stolz fair notice that he had to plead for an exercise of discretion under

an unwritten rule on pain of forfeiting a claim that the written rules expressly say could be presented later in a petition for reconsideration. If an agency wants a procedural requirement to have the type of claim-foreclosing consequence the FCC attached here, it needs to be explicit about the rule and upfront about consequences of noncompliance. The FCC may not, like Nero, lay out its procedural requirements in a way that makes them "harder to read and easier to transgress." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989); *see NetworkIP, LLC v. FCC*, 548 F.3d 116, 122-123 (D.C. Cir. 2008) ("'[T]raditional concepts of due process * * * preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule.'") (quoting *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987)).

It also bears remembering that the reason Stolz waited ten years to raise his *Kidd* argument is that it inexplicably took the FCC ten years to issue its barely four-page decision on Stolz's application for review. Of course Stolz could not file a petition for *reconsideration* until after the FCC first considered and decided his application for review. In other words, this is hardly the case for the FCC to be pointing a non-jurisdictional timeliness finger at others.

While Stolz wins that procedural battle, he loses the war. His reliance on *Kidd* substantially overreads that case. To be sure, in *Kidd* as in this case, a state court ordered the involuntary filing with the FCC of an application for assignment of a broadcast license. *Kidd*, 427 F.3d at 3. But the similarities end there. The problem in *Kidd* was that, once that application

was filed, the FCC woodenly granted the assignment application (i) without ensuring that transfer was in the "public interest," as federal law requires, 47 U.S.C. § 310(d), and (ii) notwithstanding that the transfer would enforce the very type of reversionary interest that FCC regulations expressly prohibit. *Kidd*, 427 F.3d at 5-6. We held that the FCC's asserted desire "to accommodate the [state] court [order]" for its own sake was unlawful. "[T]he Commission is not obliged to accommodate a state court's decision that is contrary to Commission policy . . . [and] the public interest determinations [are left] to the Commission." *Id.* at 6.

Nothing like that happened here. Contrary to Stolz's argument (Br. 23), the dispute in this matter did not involve a transfer that would have enforced a reversionary interest prohibited by FCC regulations, as was the case in *Kidd*. Furthermore, the California Superior Court did not order the FCC to grant the transfer application; the court only ordered Stolz to sign the application with the FCC as his agreement with Entercom required. The disposition of that application was left within the exclusive province of the FCC. Nor did the FCC ground its decision granting the transfer application on the state court order, as it had in *Kidd*, 427 F.3d at 6. Instead, just as *Kidd* requires, the FCC rested its decision entirely on federal law, determining that "the public interest, convenience, and necessity will be served thereby." *See* 47 U.S.C. § 310(d). And in so doing, the FCC's decision did not contravene any established policy like the ban on reversionary interests that the FCC blinked away in *Kidd*.

* * * *

Because Stolz's challenge to the FCC's application of the pre-*2002 Order*'s local-market definition is moot and his remaining challenge to the FCC decision lacks merit, Stolz's appeal is dismissed in part and denied in part.

So ordered.

MEMORANDUM OPINION OF THE FEDERAL COMMUNICATIONS COMMISSION (SEPTEMBER 8, 2017)

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

IN THE MATTER OF ENTERCOM LICENSE, LLC for Renewal of License for Station KDND (FM), Sacramento, California

MB Docket No. 16-357

Facility ID No. 65483

File Nos. BRH-20050728AUU and BRH-20130730ANM

By the Commission:

I. Introduction

1. By this memorandum opinion and order, we dismiss and, on an alternative and independent basis, deny a Petition for Reconsideration (PFR) filed November 28, 2016, by Edward R. Stolz II (Stolz), of the Hearing Designation Order (HDO) in this proceeding, which declined to permit him to intervene as a party.[1] We also dismiss an Application for Review,

[1] Hearing Designation Order and Notice of Opportunity for Hearing, *Entercom License, LLC*, 31 FCC Rcd 12196 (2016). *See also* Opposition of Entercom License, LLC to Petition for Reconsideration, filed December 8, 2016 (Opposition); Reply to "Oppo-

filed April 17, 2017, by Stolz,[2] seeking review of an order by Chief Administrative Law Judge Richard L. Sippel (ALJ) terminating this proceeding.[3]

II. Background

2. Proceedings below. The Commission designated this proceeding for hearing in response to allegations that Station KDND (FM) held an on-air water drinking contest called "Hold Your Wee for a Wii" on January 12, 2007, which resulted in the death of contestant Jennifer Lea Strange from water intoxication (hyponatremia).[4] The designated issues inquired into whether Entercom was aware of the inherent dangers of such a contest and whether Entercom increased those dangers by changing the contest rules; whether Entercom failed to warn contestants of and protect contestants from these dangers; whether Entercom prioritized entertainment over the welfare of the contestants; and whether Entercom failed to train staff and exercise appropriate supervision to ensure safety. The Commission further inquired whether, in light of the evidence adduced under the foregoing issues, Entercom operated KDND (FM) in the public

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sition of Entercom License, LLC to Petition for Reconsideration," filed December 20, 2016, by Stolz (Reply).

[2] *See also* Opposition of Entercom License, LLC to Application for Review, filed May 2, 2017; Enforcement Bureau's Opposition to Stolz Application for Review, filed May 2, 2017; Consolidated Reply to Oppositions to Application for Review, filed May 12, 2017, by Stolz.

[3] Order, FCC 17M-09 (Mar. 16, 2017) (Termination Order).

[4] HDO, 31 FCC Rcd at 12197-99, paras. 3-6. A California state court found Entercom negligent based on these same facts and awarded the Strange family $16.5 million. *Id.* at 12200, para. 10.

interest during the most recent license term and whether Entercom's 2005 and 2013 license renewal applications for KDND (FM) should be granted.[5]

3. The designated issues were based on allegations raised in a petition to deny filed by Edward Stolz, a separate petition to deny filed by his now deceased mother Irene, a petition to deny filed jointly by the Media Action Center (MAC) and Sue Wilson, and an informal objection filed by Roger D. Smith.[6] The Commission treated Edward Stolz's petition as an informal objection and denied him party status, finding that he was not a local resident or regular listener of the station and thus lacked standing to participate formally.[7] Stolz seeks reconsideration of this ruling in the PFR now before us.

4. The hearing in this proceeding did not take place. Instead, on February 3, 2017, Entercom notified the ALJ that it was discontinuing the operation of KDND (FM), no longer prosecuting its renewal applications for the station, and tendering the station's license for cancellation. On February 22, 2017, Entercom and MAC submitted a settlement agreement calling for Entercom to reimburse MAC for its hearing expenses.[8]

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[5] *Id.* at 12229-30, para. 83.

[6] *Id.* at 12196, para. 1.

[7] *Id.* at 12206, para. 23. Although Irene Stolz had died, her petition was treated as a formal petition that survived her death. *Id.*

[8] Termination Order at 1-2.

5. The ALJ approved the proposed settlement and terminated the proceeding.[9] The ALJ found that the surrender of Entercom's license for KDND (FM) made a hearing on Entercom's 2005 and 2013 renewal applications for KDND (FM) unnecessary and held that "Entercom has willingly accepted the severest penalty of a renewal case by surrendering forever its license to operate KDND (FM), Sacramento, California."[10] The ALJ approved Entercom's reimbursement of MAC's reasonable expenses. Stolz appeals the ALJ's Termination Order in the Application for Review now before us.

6. Stolz's Petition for Reconsideration. In his PFR, Stolz challenges the ruling in the HDO denying his request to intervene as a party in this proceeding. Stolz does not renew his argument that he qualifies for standing as the owner of a residence within the listening area of the station. Instead, he argues that the HDO "overlooked" alternative bases for finding that he has standing.[11] Stolz observes that, as a principal of Royce International Broadcasting Company (Royce), he was formerly the licensee of KUDL (FM), another station in the Sacramento market.[12] The Commission affirmed the Media Bureau's grant of the assignment of KUDL (FM) (then KOWD (FM)) from Royce to Entercom, a transaction consummated in

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9 *Id.* at 2-3.

10 *Id.* at 2.

11 PFR at 2.

12 *Id.* at 3.

2003.[13] Stolz has appealed the Commission's grant to the United States Court of Appeals for the District of Columbia Circuit.[14]

7. Stolz contends that if he were to prevail in court, he would reacquire the station license and be a competitor of KDND (FM) with a cognizable interest to intervene as a party.[15] Alternatively, Stolz argues that he has a cognizable stake in the KDND (FM) proceeding because it might, pursuant to the Commission's *Character Policy Statement*,[16] have resulted in a decision disqualifying Entercom not only as the licensee of KDND (FM) but of all the Entercom stations in the Sacramento market, including KUDL (FM).[17] In that event, Stolz proposes that the KUDL (FM) station license likewise would be restored to Stolz.

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[13] *See Royce International Broadcasting Co.*, 20 FCC Rcd 13720 (MB 2005) (denying reconsideration), *rev. dismissed/denied*, 30 FCC Rcd 10556 (2015), *recon. dismissed*, 31 FCC Rcd 214 (2016), *rev. denied*, 31 FCC Rcd 7439 (2016).

[14] *Stolz v. FCC*, No. 16-1248 (D.C. Cir.).

[15] PFR at 4-5, paras. 10-12.

[16] *Character Qualifications in Broadcast Licensing*, 102 FCC 2d. 1179 (1986), *recon granted in part and denied in part*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom, National Ass'n for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. 1987), *modified*, 5 FCC Rcd 3252 (1990), *modified*, 7 FCC Rcd 6564 (1992).

[17] PFR at 3-4, paras. 7-9. Entercom is the licensee of five stations in Sacramento: KUDL (FM), KRXQ (FM), KSEG (FM), KKDO (FM), and KIFM (AM). Applications for renewal of these stations are currently pending.

8. Entercom responds that the Commission did not "overlook" Stolz's asserted alternative bases for standing. Entercom contends that Stolz, not the Commission, had the burden of identifying any bases for claiming standing and that Stolz should have raised the additional asserted bases for standing in his petition to deny instead of raising them for the first time in his PFR.[18] Further, Entercom asserts that Stolz has failed to demonstrate the kind of current, likely injury necessary to establish standing. Entercom contends that the injury asserted by Stolz is too contingent and speculative to be a basis for standing.[19]

9. Stolz's Application for Review. Stolz's Application for Review relies on three principal contentions. First, Stolz complains that, although Entercom tendered the license for KDND (FM) for cancellation, the Commission's database still lists Entercom as the licensee of the station. Second, Stolz asserts that the ALJ erred in not proceeding to hear the issues designated by the HDO and by not ruling on a petition to enlarge issues filed by another party that sought to raise issues as to whether Entercom is qualified to hold its other licenses in the Sacramento area. Third, Stolz argues that the ALJ should have required Entercom to show the actual punitive effect of surrendering the license to KDND (FM).

III. Discussion

10. Petition for Reconsideration. We dismiss and, on an alternative and independent basis, deny the PFR. As a procedural matter, we find that recon-

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[18] Opposition at 2-3.

[19] *Id.* at 3-5.

sideration is not warranted because Stolz failed to raise the grounds on which he now claims party-in-interest status in a timely manner. Stolz's petition to deny claimed "listener standing" based on his ownership of a home in the station's service area, but the Commission determined that Stolz failed to establish such standing.[20] Stolz does not renew his claim of listener standing in his PFR. Instead, Stolz asserts that the Commission "overlooked" facts that would have demonstrated alternative bases for standing (e.g. status as a potential competitor).[21] Irrespective of what facts the petition to deny may contain, Stolz did not rely on them as a basis for claiming standing prior to seeking reconsideration of the HDO. Specifically, in his petition to deny, Stolz asserted only that he had standing as a listener, and not as a potential competitor. We agree with Entercom that we had no obligation to mine Stolz's petition to deny to search for additional arguments that Stolz might have made.[22] Having failed to raise these arguments

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[20] HDO, 31 FCC Rcd at 12206, para. 23. *See* Petition to Deny, filed November 1, 2013, by Stolz at 2, para. 2, and Exhibit A, paras. 2-3 (Declaration of Edward R. Stolz II); Reply to Opposition to Petition to Deny, filed December 23, 2013, by Stolz, at 3, para. 3.

[21] He states: "While 'listener standing' . . . is a moving target, granted or denied at the Commission's whim and caprice, the Commission overlooked other facts alleged in Stolz' 2013 Petition to Deny against Entercom which accord Stolz economic standing to be a party in interest [with] respect to the KDND renewal application." PFR at 2, para. 4.

[22] *See Tindal v. McHugh*, 945 F. Supp. 2d 111, 130 (D.D.C. 2013) (an agency is not required to anticipate and address any possible argument a party might have made); *Tama Radio Licenses of Tampa Florida, Inc.*, 25 FCC Rcd 7588, 7589, para. 2

himself in a timely manner in his petition to deny, he may not do so now for the first time in his PFR. A petition for reconsideration may not rely on facts or arguments known to the petitioner but not presented at the last opportunity to address the matter.[23] This fact alone warrants dismissal of the petition for reconsideration.

11. As an alternative and independent basis for our decision, we find that even if Stolz's arguments on reconsideration for standing are considered on their merits, they do not establish that Stolz is entitled to intervene as a party in interest. To have standing to file a petition to deny or to intervene in a renewal proceeding, a person must qualify as a "party in interest.[24] That is, the petitioner must demonstrate that a grant of the application would result in, or be reasonably likely to result in, some injury of a direct, tangible or substantial nature.[25] We discern two distinct arguments in Stolz's PFR attempting to assert such an interest. First, Stolz claims standing based

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(2010) ("The Commission is not required to sift through an applicant's prior pleadings to supply the reasoning that our rules require to be provided in the application for review.").

[23] 5 CFR § 1.106(c). *See, e.g.*, *Barbour Co. Bd. of Education Ariton Alabama*, 12 FCC Rcd 11782, 11784, para. 5 (1997) (Commission will not grant a petition for reconsideration based on a showing that could have been made earlier). As the following paragraphs indicate, Stolz has shown no public interest reason to make an exception to this principle under 47 C.F.R. § 1.106(c)(2).

[24] *See* 47 U.S.C. § 309(d)(1) (petition to deny); 47 C.F.R. § 1.223(a) (intervention).

[25] *See Pinelands, Inc.*, 7 FCC Rcd 6058, 6063, para. 18 & n.20 (1992).

on economic injury from the renewal of KDND (FM) that he would allegedly suffer as the potential future licensee of competing Sacramento station KUDL (FM).[26] As set forth above, however, Stolz is not currently the licensee of KUDL (FM), but has merely appealed approval of the assignment of KUDL (FM) from him to Entercom. Stolz's claim of economic injury as a competitor of KDND (FM) thus rests on the speculative assumption that Stolz will succeed in persuading the D.C. Circuit to overturn the assignment, not on any current status as a competitor. We find that Stolz's assertion of competitive injury, depending as it does on his conjectural future acquisition of KUDL (FM) does not qualify Stolz as a competitor of KDND (FM)[27] *Interstate Broadcasting Co. v. U.S.*,[28] relied on by Stolz, is not to the contrary. The *Interstate* petitioners showed likely injury in the event of a particular outcome in that case, whereas Stolz is

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[26] P.F.R. at 4-5, paras. 10-11.

[27] *See Pinelands, Inc.*, *supra* note 25 n.20 ("Although [petitioner] competed for the Secaucus facility, it is not currently an economic competitor entitled to standing. . . . "); *Irene M. Neely*, 49 FCC 2d 311, 312 (1074) ("A mere applicant does not have standing to protest because there is no certainty that it will ever obtain the permit applied for."); *Kathleen Victory, Esq.*, 23 FCC Rcd 11910, 11911 n.18 (Aud. Serv. Div. MB 2008) ("Standing to file a petition to deny . . . as an aggrieved competitor, assumes an actual state of competition. . . . "). *See also Verde Systems, LLC.*, 25 FCC Rcd 9166, 9168 n.18 (Mob. Div. WTB 2010) ("We also reject the suggestion that the pendency of pleadings filed by [petitioner] against affiliates of the applicants with respect to Auctions Nos. 57 and 61 [in other markets] confers standing on [petitioner] to challenge the applications here.")

[28] 286 F.2d 539 (D.C. Cir. 1960). *See* Stolz Reply at 4, para.8.

trying to show likely injury in the event of a particular outcome in an entirely different case.[29]

12. Second, Stolz argues that resolution of the KDND (FM) proceeding could ultimately result in findings that Entercom is unqualified to hold KUDL (FM).[30] In Stolz's view, this would provide a basis to set aside the assignment of KUDL (FM) to Entercom and restore the station license to him.[31] Stolz argues that under the Commission's *Character Policy State-*

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[29] In *Interstate*, a petitioner attempted to intervene in a comparative proceeding based on the allegation that a grant of either of two of the eight competing applications would interfere with the petitioner's station. The court rejected the Commission's conclusion that petitioner's injury was speculative because there was no demonstration that the two interfering applicants were likely to win the proceeding. The court found that it was sufficient for the petitioner to show that likely injury would result if one of them won. In other words, the *Interstate* petitioner showed likely injury in the event of a particular outcome of the case in which it sought to intervene, whereas here Stolz is trying to show injury based on the possible outcome of an entirely different case. Absent a favorable outcome in the KUDL (FM) proceeding, no outcome of the instant, KDND (FM) renewal proceeding could possibly cause him economic injury as a competitor.

[30] PFR at 3-4, paras. 7-9; Reply at 2-3 paras. 4-6. Stolz states: "If they [Entercom] are disqualified from being a Commission licensee of KDND, why would they not also be disqualified from being a licensee of KUDL/KWOD?" P.F.R. at 4, para. 9. *See also* Reply at 2, para. 4.

[31] Stolz states: "If Entercom were disqualified as a Commission licensee in Sacramento, File No. BALH-20021120ACE [the assignment application] would have to be vacated or dismissed, and KUDL/KWOD would have to be returned to Stolz." P.F.R. at 4, para. 9. *See also* Brief of Appellant, *Stolz v. FCC*, No. 16-1248 (Oct. 31, 2016) at 30-31 (asserting that the designation of KDND (FM) should be considered in the assignment case).

ment,[32] the misconduct that occurred at KDND (FM) was sufficiently egregious to warrant disqualifying Entercom from holding stations in the Sacramento market other than KDND (FM).[33]

13. We find no support for Stolz's argument. KDND (FM) is the only station at issue in the designated proceeding. The HDO in this proceeding specifically designates for hearing only the two above-captioned license renewal applications and delineates the issue designated as "whether Entercom's Applications for Renewal of License of KDND (FM) . . . should be granted."[34] In this respect, the scope of the designated issue is restricted by the Communications Act. As the Commission stated in designating this case for hearing, the basis for designation is that "we are unable to make the finding required by [47 U.S.C. §] 309(k)(1)(A)."[35] That section provides that the Commission "shall grant the [renewal] application if it finds, with respect to that station, during the preceding term of its license [that] the station has served the public interest, convenience, and necessity . . . ." (emphasis added.)[36] Accordingly, no

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[32] *Supra* note 16.

[33] Stolz cites the *Character Policy Statement*, 102 FCC 2d at 1205 n.60, for the proposition that egregious nonbroadcast misconduct might disqualify a licensee.

[34] HDO, 31 FCC Rcd at 12229-30, para. 83.

[35] *Id.* at 12229, para. 82. *See also Id.* at 12199-200, para. 8.

[36] 47 U.S.C. § 309(k)(1)(A). In declining to designate a general character issue against Entercom, the Commission noted that section 309(K)(1)(A) limited the scope of issues relevant to a renewal proceeding to those listed. HDO, 31 FCC Rcd at 12209-10, para. 30 & n.122.

action could be taken against other Entercom licenses or applications, regardless of the *Character Policy Statement*, without further action by the Commission initiating additional proceedings.

14. Moreover, even to the extent the *Character Policy Statement* is relevant, it does not support the designation of a character issue against Entercom. Pursuant to the *Character Policy Statement*, if the Commission considers the misconduct alleged at one station to implicate other stations, it designates those other stations for hearing at the same time.[37] We did not designate additional stations here, for example, for revocation.[38] This is consistent with the policy reflected in the *Character Policy Statement* that deterrence is an important element of the character qualifications process and that the loss of a single station is generally an adequate sanction.[39]

15. In view of the foregoing, we find that Stolz has not demonstrated that he is a party in interest in the above-captioned renewal proceeding. *Elm City Broadcasting Corp. v. U.S.*, relied on by Stolz, which holds that the Commission does not have discretion

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37 *See Character Policy Statement*, 102 FCC 2d at 1224, para. 93.

38 *See* HDO, 31 FCC Rcd at 12209-10, para. 30 & n.122 (noting that under the circumstances it was not necessary to initiate a revocation proceeding to examine Entercom's character qualifications).

39 *See Character Policy Statement*, 102 FCC 2d at 1228, para. 103.

to deny intervention to a party in interest, is therefore inapposite.[40]

16. Application for Review. Given our finding that Stolz has not shown that he is a party in interest, we need not reach the merits of his Application for Review and thus we summarily dismiss it. As a non-party, Stolz has no authority to appeal the ALJ's termination of the hearing proceeding. The pertinent rule, 47 C.F.R. § 1.302, authorizes only parties to a hearing proceeding to appeal an ALJ's order terminating the proceeding. The rule that authorizes an application for review by "any person aggrieved by any action taken under delegated authority" does not apply to ALJ's rulings in hearing proceedings.[41] Actions by an ALJ in a hearing proceeding are not taken pursuant to delegated authority, but instead are taken by virtue of the authority to control the course of a hearing granted to an ALJ by the Administrative Procedure Act.[42] In any event, even if an application for review were an appropriate vehicle for seeking review, Stolz would not qualify as "aggrieved" by the ALJ's Termination Order for purposes of section 1.115 for essentially the same reasons, discussed above, that he does not qualify as a party in interest for purposes of intervention in the proceeding. That is, the ALJ's termination of the proceeding did not foreclose

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[40] P.F.R. at 5, para. 2; Reply at 4, para. 7, *citing Elm City Broadcasting Corp. v. U.S.*, 235 F.2d 811 (D.C. Cir. 1956).

[41] 47 C.F.R. § 1.115.

[42] *See Stephen D. Tarkenton*, 7 FCC Rcd 5973 (1992). The Commission's power to delegate authority derives from 47 U.S.C. § 155(c). The ALJ's authority derives from a different statutory provision (5 U.S.C. § 556(a), (c)).

the consideration of questions relevant to Stolz's stated interest (whether he could reacquire KUDL (FM)), which were not at issue in the proceeding before the ALJ and which the ALJ could not have considered. As discussed above, the Commission only designated issues with respect to KDND (FM), and the ALJ therefore could not have expanded the hearing proceeding to cover other stations.[43]

IV. Ordering Clauses

17. ACCORDINGLY, IT IS ORDERED, that the Petition for Reconsideration, filed November 28, 2016, by Edward R. Stolz II IS DISMISSED.

18. IT IS FURTHER ORDERED, that the Petition for Reconsideration, filed November 28, 2016, by Edward R. Stolz II IS, on an alternative and independent basis, DENIED.

19. IT IS FURTHER ORDERED, that Application for Review, filed April 17, 2017, by Edward R. Stolz II IS DISMISSED.

Federal Communications Commission

Marlene H. Dortch
Secretary

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[43] *Supra* paragraphs 11-13.

ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION (MARCH 16, 2017)

FEDERAL COMMUNICATIONS COMMISSION
(F.C.C.)

IN THE MATTER OF ENTERCOM LICENSE, LLC
Application for Renewal of License for Station KDND (FM), Sacramento, California

MB Docket No. 16-357

10768

Facility ID No. 65483

File Nos. BRH-20050728AUU and BRH-20130730ANM

FCC 17M-09

Before: Richard L. SIPPEL,
Chief Administrative Law Judge

On October 27, 2016, the Media Bureau released *In the Matter of Entercom License, LLC Application for Renewal of License for Station KDND (FM), Sacramento, California*, Hearing Designation Order and Notice of Opportunity for Hearing, 31 FCC Rcd 12186 (*HDO*), in the above-captioned renewal proceeding. The *HDO* alleged that Station KDND (FM), a radio station operated by Entercom License, LLC (Entercom) in Sacramento, California, held a water-drinking contest called "Hold Your Wee for a Wii" on

January 12, 2007. Following the contest, contestant Jennifer Lea Strange died from water intoxication (hyponatremia). It was determined by a court that her death was a result of the station's negligence.

The *HDO* designated for hearing various legal and factual issues related to the contest, including whether Entercom knew that the contest was dangerous and failed to warn the contestants; whether Entercom operated Station KDND (FM) in the public interest; and whether Entercom's license for Station KDND (FM) should be renewed. 31 FCC Rcd at 12229-30, para. 83.

On January 9, 2017, intervenor Sue Wilson and the Media Action Center (collectively, MAC) filed a Petition to Enlarge Issues (Petition). On January 18, 2017, the Enforcement Bureau filed an Opposition to the Petition. On January 19, 2017, Entercom filed its own Opposition to the Petition. MAC filed a Reply to the Enforcement Bureau on January 26, 2017, and a Reply to Entercom on January 27, 2017. On February 1, 2017, the Enforcement Bureau filed a Motion for Leave to File a Surreply, along with the proposed Surreply.

Prior to any ruling on the Petition, Entercom filed a Notice of Discontinuance with the Media Bureau on February 3, 2017, notifying the Media Bureau that it would "permanently discontinue operation of KDND (FM) . . . on February 8, 2017." On February 8, 2017, Entercom "forward[ed] the station license for KDND (FM) . . . and other KDND instruments of authorization to the Commission for cancellation . . . ."

The same day, February 8, 2017, Entercom filed a Motion to Dismiss Renewal Applications and Termin-

ate Hearing.[1] On February 10, 2017, MAC filed an Opposition to Entercom's Motion to Dismiss, as well as a request to hold a settlement conference.

Thereafter, on February 22, 2017, Entercom and MAC filed a Joint Motion for Approval of Settlement, to which the Enforcement Bureau had no objection. The settlement agreement only compensates MAC for its legal fees and nothing else, and the fees appear to be reasonable.

Rulings

Entercom has avoided the Commission hearing process by surrendering its license for KDND (FM). Entercom has also reached a settlement agreement with MAC. Therefore, there is nothing further to be done here beyond dismissal. The ultimate question in the *HDO* was whether Entercom's license for KDND (FM) should be renewed, and that has now been rendered moot by Entercom surrendering its license. Finally, Entercom has willingly accepted the severest penalty of a renewal case by surrendering forever its license to operate KDND (FM), Sacramento, California.

Accordingly, IT IS ORDERED that:

1. MAC's Petition to Enlarge and the Bureau's Motion for Leave to File a Surreply ARE DISMISSED as moot.

2. Entercom and MAC's Joint Motion for Approval of Settlement IS GRANTED; and

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[1] The Prehearing Conference set for February 8, 2017 was cancelled via email upon receipt of Entercom's Motion to Dismiss. *See Order*, FCC 17M-02 (rel. Feb. 6, 2017).

3. Entercom's Motion to Dismiss IS GRANTED, and this proceeding IS TERMINATED, with prejudice.

SO ORDERED.

Federal Communications Commission[2]

Richard L. Sippel
Chief Administrative Law Judge

[2] Courtesy copies of this Order will be sent via email to all counsel of record on the date of issuance.

MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION (JUNE 20, 2016)

FEDERAL COMMUNICATIONS COMMISSION
(F.C.C.)

IN THE MATTER OF ROYCE INTERNATIONAL BROADCASTING COMPANY,

Assignor,

and

ENTERCOM COMMUNICATIONS CORP.

Assignee.

File No. BALH-200021120ACE
Facility ID No. 57889

FCC 16-76

Application for Assignment of License of Station KUDL (FM) (Formerly KWOD), Sacramento, California

By the Commission:

1. We have before us a February 18, 2016, Application for Review (2016 AFR)[1] filed by Royce Interna-

[1] On March 1, 2016, Royce filed a Motion for Leave to File Erratum to Application for Review to correct two typographical errors in the 2016 AFR. On March 4, 2016, Entercom filed an

tional Broadcasting Company (Royce), seeking review of a Media Bureau (Bureau) decision[2] that dismissed as "plainly not warranting Commission consideration" because the Royce "fail[ed] to identify any material error, omission, or reason warranting reconsideration," pursuant to Section 1.106(p)(1) of the FCC's Rules (Rules),[3] Royce's October 19, 2015, Petition for Reconsideration (Petition). The Petition sought reconsideration of our *Memorandum Opinion and Order*[4] which dismissed in part and denied in part Royce's September 20, 2005, Application for Review (2005 AFR) seeking to overturn the Bureau's grant of the above-captioned application (Application) for Commission consent to the assignment of license of Station KUDL (FM), Sacramento, California (Station), from Royce to Entercom Communications Corp. (Entercom).[5] For the reasons set forth below, we deny the 2016 AFR.

2. The sole issue presented for review is the propriety of the Bureau's action dismissing the Petition. Royce claims that the *Bureau Order* was arbitrary, capricious and contrary to law, and that the staff dis-

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Opposition to the 2016 AFR, to which Royce replied on March 17, 2016.

[2] *See Royce International Broadcasting Company*, Order on Reconsideration, DA 16-62 (MB 2016) (*Bureau Order*).

[3] 47 C.F.R. § 1.106(p)(1).

[4] *See Royce International Broadcasting Company*, Letter Order, 20 FCC Rcd 13720 (MB 2005).

[5] *See Royce International Broadcasting Company*, Letter Order, 20 FCC Rcd 13720 (MB 2005).

missal pursuant to Section 1.106(p)(1)[6] has frustrated its ability to seek judicial review. Substantively, Royce reiterates the following arguments that were rejected in the *Bureau Order*: (1) the *2015 MO&O* violated Section 155(d) of the Communications Act of 1934, as amended,[7] and Section 706 of the Administrative Procedure Act[8] because the Commission took almost 10 years to act on the 2005 AFR; (2) this application proceeding "is governed" by *Kidd v. FCC*, [9] a case decided after the pleading cycle for the 2005 AFR had closed; and (3) the *2015 MO&O* improperly rejected three Royce arguments as procedurally barred.

3. In Opposition, Entercom alleges that the 2016 AFR "merely rehashes (often verbatim) matters that have repeatedly been addressed and resolved by the Commission."[10] It argues that: (1) the Bureau properly applied Section 1.106(p) in this case;[11] (2) Royce continues to mischaracterize Section 155(d) of the Act and 706 of the APA;[12] (3) Royce also continues to mischaracterize both *Kidd*, the appellate case on which Royce relies and the facts of this case;[13] and (4) Royce's claim that the Bureau "prevented [[it] from

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[6] 47 C.F.R. § 1.106(p)(1).

[7] 47 U.S.C. § 155(d).

[8] 5 U.S.C. § 706.

[9] *Kidd Commc'ns v. FCC*, 427 F.3d 1 (D.C. Cir 2005) (*Kidd*).

[10] Opposition at 2.

[11] *Id.* at 3.

[12] *Id.* at 3-4.

[13] *Id.* at 4-7.

getting" a ruling on three arguments presented for the first time in the 2005 AFR fails because that contention was sufficiently addressed by the *2015 MO&O* and the *Bureau Order*.[14]

4. Discussion. We affirm the dismissal of the Petition. A petition for reconsideration of the Commission's denial of an application for review will be entertained only if: (1) the petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters, or (2) the petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.[15] Petitions failing to meet these narrow grounds are subject to dismissal.[16]

5. The Petition did not meet the narrow grounds for reconsideration of the *2015 MO&O*. Initially, we find that Royce could have raised its Section 155(d) ""undue delay" argument earlier in this proceeding and therefore that this issue was impermissibly argued for the first time in the Petition. Moreover, to the extent that Royce believed that the Commission's delay

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[14] *Id.* at 8.

[15] 47 C.F.R. § 1.106(b)(2)(i) and (ii); *see also Fireside Media and Jet Fuel Broadcasting*, Memorandum Opinion and Order, 27 FCC Rcd 10694, 10696, para. 4 (2012) (Sections 1.106(b)(2)(i) and (ii) of the Commission's rules set forth the conditions under which the Commission will consider petitions for reconsideration of Commission denial of an application for review).

[16] *See, e.g.*, 47 C.F.R. §§ 1.106(b)(3) and 1.106(p)(1), (2) and (3).

in ruling on its 2005 AFR was prejudicial,[17] it fails to show how a different outcome would have been reached if action had occurred sooner.[18]

6. We also agree with the Bureau's rejection as meritless Royce's claim in the Petition that the October 2005 *Kidd* appellate decision is a new fact or changed circumstance that occurred after Royce's last opportunity to present such matters to the Commission, warranting reconsideration of our *2015 MO&O*. Royce ignores the well-established flexibility accorded parties by Commission procedures. Royce could have filed a motion to accept a late-filed pleading with the Bureau upon release of the *Kidd* decision or at any time during the pendency of the 2005 AFR. The Commission historically has found that good cause exists for acceptance of such pleadings.[19] Royce filed no such motion.

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[17] Reply at 4.

[18] *See Bureau Order* at para. 7 (Royce "fundamentally mischaracterizes" Section 155(d) of the Act as mandating Commission action within three months whereas this statutory provision merely sets a non-mandatory objective; Royce "has not shown prejudice by establishing that the result reached would likely have been different if action had occurred sooner.").

[19] *See, e.g.*, *WSTE-TV, Inc.*, Memorandum Opinion and Order, 75 FCC 2d 52, 63 (1979) (good cause exists for acceptance of additional pleadings inasmuch as they focus on the Commission's most recent views concerning the use of translator stations, a subject central to this proceeding upon remand); *Amendment of Section 73.202(B) Table of Allotments, FM Broadcast Stations (Genoa, CO)*, Report and Order, 18 FCC Rcd 1465 n.2 (MB 2003) ("We will grant the motions and accept the late-filed pleadings . . . because they will facilitate resolution of this case based upon a full and complete factual record."); *New Mexico Broadcasting, Inc.*, Memorandum Opinion and Order, 88 FCC 2d 1469

7. Finally, regarding Royce's contention in the Petition and here that the Commission acted arbitrarily in dismissing on procedural grounds three arguments that Royce claims were "subsumed within" the primary issue of whether the Bureau correctly processed the Application in accordance with the Commission's multiple ownership rules,[20] as we concluded in footnote 11 of the *2015 MO&O*, Royce never presented any of these specific arguments to the Bureau. Thus, they were properly dismissed in the *2015 MO&O*, pursuant to Section 1.115(c) of the Rules.[21] The Bureau properly noted in the *Bureau Order* that it is the Commission's obligation to rule only on allegations actually made; it is not the Commission's obligation to flesh out or embellish arguments inexpertly made by petitioners.[22] Accordingly, we conclude that these arguments were improperly raised for the first time before the Commission and therefore subject to dismissal pursuant to Section 1.106(p)(2) of the Rules.

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n.2 (1982) (Commission uses good cause standard to determine acceptance of unauthorized pleadings).

[20] 2016 A.F.R. at 11.

[21] 47 C.F.R. § 1.115(c).

[22] *See, e.g.*, *Tama Radio Licenses of Tampa, Florida, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 7588, 7589, para. 2 (2010) ("The Commission is not required to sift through an applicant's prior pleadings to supply the reasoning that our rules require to be provided in the application for review."); *Red Hot Radio, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 6737, 6745 n.63 (2004) ("Our rules do not allow for a 'kitchen sink' approach to an application for review, rather the burden is on the Applicant to set forth fully its argument and all underlying relevant facts in the application for review.").

8. Having found that each of the arguments raised in the Petition is subject to dismissal for the reasons stated above, we also conclude that the Bureau appropriately concluded that the Petition was itself subject to dismissal. Accordingly, we dismiss as moot the argument that the staff dismissal of the Petition pursuant to Section 1.106(p)(1) was arbitrary, capricious and contrary to law. In 2015, we denied Royce's 2005 AFR, concluding that Royce's contentions that the Bureau's grant of the Application was improper were without merit. Regarding Royce's untimely and unsupported contention that it was somehow prejudiced by the delay in our so affirming the Bureau, while that delay is regrettable, it does not alter the fact that the Bureau's grant of the Application was appropriate.

9. 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 Section 1.115(g) of the FCC's Rules, 47 C.F.R. § 1.115(g), the February 18, 2016, Application for Review filed by Royce International Broadcasting Company, IS DENIED.

Federal Communications Commission

Marlene H. Dortch
Secretary

ORDER ON RECONSIDERATION BY THE FEDERAL COMMUNICATIONS COMMISSION (JANUARY 19, 2016)

FEDERAL COMMUNICATIONS COMMISSION
(F.C.C.)

IN THE MATTER OF ROYCE INTERNATIONAL BROADCASTING COMPANY,

Assignor,

and

ENTERCOM COMMUNICATIONS CORP.

Assignee.

File No. BALH-200021120ACE
Facility ID No. 57889

DA. 16-62

Application for Assignment of License of Station KUDL (FM) (Formerly KWOD), Sacramento, California[1]

By the Chief, Media Bureau:

I. Introduction

1. We have before us a Petition for Reconsideration (Petition) filed on October 19, 2015, by Royce

[1] Formerly KWOD(FM).

International Broadcasting Company (Royce).[2] The Petition seeks reconsideration of the Commission's September 17, 2015, Memorandum Opinion and Order, which dismissed in part and denied in part Royce's Application for Review (AFR).[3] In this *Order on Reconsideration*, we dismiss the Petition pursuant to Section 1.106(p)(1) of the Commission's Rules (Rules).[4]

2. The AFR sought review of a Media Bureau (Bureau) decision[5] denying reconsideration of the staff's grant of the captioned application (Application) for consent to the assignment of license of Station KUDL (FM), Sacramento, California (Station), from Royce to Entercom. In the *Bureau Decision*, the Bureau held that: (1) the "grandfathering" provisions of the 2002 *Ownership Order*[6] applied to this transaction that was consummated prior to the adoption of the

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[2] Entercom Communications Corp. (Entercom) filed an Opposition to Petition for Reconsideration (Opposition) on November 3, 2015, to which Royce replied (Reply) on November 16, 2015.

[3] *Royce International Broadcasting Company*, Memorandum Opinion and Order, 30 FCC Rcd 10556 (2015) (*MO&O*).

[4] 47 C.F.R §§ 1.106(p)(1).

[5] *See Royce International Broadcasting Company*, Letter Order, 20 FCC Rcd 13720 (MB 2005) (*Bureau Decision*).

[6] *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, 13692, para. 187 (2003) (*Ownership Order*). On that same day, June 2, 2003, the Commission announced by *Public Notice* that certain "pending" applications would be processed under the new rules. *Media Bureau Announces Processing Guidelines for Broadcast Station Applications*, Public Notice, 18 FCC Rcd 11319, 11319 (2003).

new rules; and (2) Royce's reliance on Section 1.65 of the Rules[7] to support its allegation that the Application was still "pending" and should be processed under the revised rules was "misplaced." The *MO&O* affirmed the *Bureau Decision*.[8]

3. In its Petition, Royce argues that: (1) The *MO&O*'s issuance violated Section 155(d) of the Communications Act of 1934, as amended (Act), which in turn violated Section 706 of the Administrative Procedure Act (APA) because it took the Commission almost 10 years to rule on the AFR;[9] (2) the "entire proceeding" underlying the *MO&O* should be governed by *Kidd v. FCC* (*Kidd*)[10] in which the Court of Appeals for the District of Columbia Circuit ruled in 2005,

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[7] 47 C.F.R. § 1.65. Section 1.65 of the Rules 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. (emphasis supplied).

[8] *MO&O*, 30 FCC Rcd at 10557, para. 4.

[9] *Id.* at 1. Royce cites numerous cases in which federal appellate courts have recognized the principle that "justice delayed is justice denied." *See Gaur v. Gonzales*, 124 Fed. Appx. 738, 743, para. 24 (3rd Cir. 2005); *Rohr Industries, Inc. v. Washington Metropolitan Area Transit Authority*, 720 F.2d 1319, 1327, para. 21 (D.C. Cir. 1983); *U.S. v. Hastings*, 847 F.2d 923 (1st Cir. 1988); *U.S. v. Bert*, 2015 WL 5254882, Slip Op. at 10 (2nd Cir. 2015); *Willis v. Sullivan*, 931 F.2d 390, 404, para. 52 (6th Cir. 1991); *SEC v. First American Bank & Trust Co.*, 481 F.2d 673, 676 n.3 (8th Cir. 1973). Petition at 5.

[10] 427 F.3d 1 (D.C. Cir. 2005).

but after the AFR pleading cycle had closed, that the Commission is not obliged to accommodate a state court decision if it is contrary to Commission policy, thus presenting a "similar situation" that Royce has heretofore been "unable to argue";[11] and (3) in the *MO&O*, the Commission erred in rejecting as procedurally barred three arguments regarding whether the Bureau's grant of the Application was in accordance with the Commission's multiple ownership rules.[12] Royce argues that the grant of the Application should be rescinded and vacated and that the Station's license be returned to Royce.[13]

4. In its Opposition, Entercom argues that: (1) Section 155(d) of the Act, as well as Section 706 of the APA, are inapplicable; Royce inaccurately characterizes these rule sections as mandates requiring Commission action in all circumstances by a date certain;[14] (2) *Kidd* is inapposite because the *Kidd* transaction

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[11] Petition at 2-3, 6-7.

[12] *Id.* at 8. In the AFR, Royce argued 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.

[13] *Id.* at 9.

[14] Opposition at 2.

implicated the Commission's rule against a seller retaining a reversionary interest in a license; (3) Royce mischaracterizes the state court order at issue;[15] and (4) the *MO&O* correctly dismissed three arguments raised for the first time in the AFR because they could and should have been first presented to the Bureau.[16]

5. In Reply, Royce argues that the Petition is appropriate pursuant to Section 405(a)(2) of the Act and Section 1.106(b)(2) of the Rules because *Kidd* was decided after the end of the pleading cycle on Royce's AFR.[17] In addition, Royce argues that *Kidd* is applicable here because this case, like *Kidd*, involves an order of a California state court ordering an FCC licensee to, in effect, turn over its license to a party that had brought suit.[18]

II. Discussion

6. Commission rules prescribe limited circumstances under which a party may seek reconsideration of a Commission denial of an application for review. Pursuant to Section 1.106(p)(1), the staff may dismiss or deny any petition for reconsideration of a Commission action that "plainly does not warrant Commission consideration," if such petition "[f]ail[s]

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[15] *Id.* at 5.

[16] *Id.* at 6.

[17] Reply at 2. *See also* 47 U.S.C. § 405(a)(2) and 47 C.F.R. § 1.106(b)(2).

[18] *Id.*

to identify any material error, omission, or reason warranting reconsideration."[19]

7. As an initial matter, Royce fundamentally mischaracterizes Section 155(d) of the Act as mandating Commission action within three months. The Commission has held that this statutory provision merely sets a "non-mandatory" ""objective."[20] Further, Royce "has not shown prejudice by establishing that the result reached [in the *MO&O*] would likely have been different if action had occurred sooner," nor has Royce shown that the delay extinguished its appellate rights.[21] Accordingly, we dismiss this argument pursuant to Section 1.106(p)(1) of the Rules.

8. Next, we find that *Kidd* is inapposite to this proceeding and that Royce badly mischaracterizes the challenged state court order. Specifically, the *Kidd* court vacated a license assignment grant because the Commission had failed to explain how the transaction complied with the rule prohibiting seller-retained reversionary interests.[22] In contrast, the challenged Interlocutory Judgment merely ordered "the electronic filing . . . of FCC Form 314 in accordance with applicable

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[19] 47 C.F.R. §§ 1.106(p)(1). *See also Amendment of Certain of the Commission's Part 1 Rules of Practice and Procedure and Part 0 Rules of Commission Organization*, Report and Order, 26 FCC Rcd 1594, 1606, para. 27 (2011).

[20] *See Pacific and Southern Company, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 8503, 8506, para. 11 (1996) (also noting that in the license renewal context compliance with this "objective" "is an impossibility").

[21] *Id.* at 8507, para. 11.

[22] *See Kidd*, 427 F.3d at 6, para. 16.

FCC policies and rules."[23] The state court did not, as Royce claims, "order the FCC to grant the . . . [A]pplication."[24] In any event, both the Bureau and the Commission subsequently found that the Application complied with all pertinent statutory and regulatory requirements. We therefore also dismiss this argument pursuant to Section 1.106(p)(1) of the Rules.[25]

9. Finally, regarding Royce's contention that the Commission acted arbitrarily in dismissing on procedural grounds three arguments that Royce claims were "subsumed within" the primary issue of whether the Bureau correctly processed the Application in accordance with the Commission's multiple ownership rules,[26] it is clear that Royce never presented any of these

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[23] *See* Application at Attachment 1 (*Entercom Communications Corp. v. Royce International Broadcasting Corporation, Royce International Broadcasting Company, Edward R. Stoltz II, and DOES 1-10*, Case No. 99AS04202, Interlocutory Judgment (without attachments) (Sup. Ct. Cal., Sacramento County) at 4) (emphasis supplied).

[24] Petition at 7.

[25] Because we dismiss Royce's *Kidd* argument pursuant to 47 C.F.R. § 1.106(p)(1), we need not reach the issue whether the release of *Kidd* constituted a "new fact or changed circumstance" under 47 C.F.R. § 1.106(b)(2)(i). We note, however, that the Bureau has previously concluded that dismissal pursuant to Section 1.106(b)(3) is appropriate when the alleged new facts are not material to the matters at issue in the application proceeding. *See, e.g.*, *Emmis Radio License, LLC*, Order on Reconsideration, 29 FCC Rcd 9129, 9131, para. 4 (MB 2014) (Bureau finds that petitioners' citation to irrelevant Commission orders failed to demonstrate changed circumstances warranting reconsideration of a Commission *Memorandum Opinion and Order* pursuant to Section 1.106(b)(2)(i)).

[26] Petition at 7.

specific arguments to the Bureau. Thus, they were properly dismissed pursuant to Section 1.115(c) of the Rules.[27] It is the Commission's obligation to rule only on allegations actually made; it is not the Commission's obligation to flesh out or embellish arguments inexpertly made by petitioners.[28] Accordingly, we also dismiss this argument pursuant to Section 1.106(p)(1) of the Rules.

III. Ordering Clause

10. ACCORDINGLY, IT IS ORDERED that, pursuant to authority contained in Section 1.106(p) of the Commission's Rules, the Petition for Reconsideration filed on October 19, 2015, by Royce International Broadcasting Company, IS DISMISSED.

Federal Communications Commission

William T. Lake
Chief, Media Bureau

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[27] 47 C.F.R. § 1.115(c).

[28] *See, e.g., Tama Radio Licenses of Tampa, Florida, Inc.*, Memorandum Opinion and Order, 25 FCC Rcd 7588, 7589, para. 2 (2010) ("The Commission is not required to sift through an applicant's prior pleadings to supply the reasoning that our rules require to be provided in the application for review."); *Red Hot Radio, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 6737, 6745 n.63 (2004) ("Our rules do not allow for a 'kitchen sink' approach to an application for review, rather the burden is on the Applicant to set forth fully its argument and all underlying relevant facts in the application for review.").

MEMORANDUM OPINION AND ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION (SEPTEMBER 17, 2015)

FEDERAL COMMUNICATIONS COMMISSION
(F.C.C.)

IN THE MATTER OF ROYCE INTERNATIONAL BROADCASTING COMPANY,

Assignor,

and

ENTERCOM COMMUNICATIONS CORP.,

Assignee.

File No. BALH-200021120ACE

Facility ID No. 57889

FCC 15-126

Application for Assignment of License of Station KUDL (FM) (Formerly KWOD), Sacramento, California

By the Commission:

1. We have before us an Application for Review ("AFR") filed on September 20, 2005, by Royce International Broadcasting Company ("Royce").[29] Royce

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

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"),[30] from Royce to Entercom Communications Corp. ("Entercom").[31] 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.[32] Entercom consummated the acquisition on May 19, 2003. On June 2, 2003, the Commission adopted new multiple ownership rules,[33] and announced

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[30] Formerly Station KWOD (FM).

[31] *Royce International Broadcasting Company*, Letter, 20 FCC Rcd 13720, 13721 (MB 2005) ("*Bureau Decision*").

[32] *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.

[33] *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.

that same day by *Public Notice* that "[a]pplications that are still pending as of the effective date of the new rules will be processed under the new rules."[34] 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.[35]

The Bureau denied the Petition, finding that the "grandfathering" provisions of the *Ownership Order*[36] 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."[37]

Jun. 13, 2005) (Nos. 04-1020, 04-1033, 04-1036, 04-1045, 04-1168 and 04-1177).

[34] *See Media Bureau Announces Processing Guidelines for Broadcast Station Applications*, Public Notice, 18 FCC Rcd 11319 (2003) ("*June Public Notice*").

[35] 47 C.F.R. § 1.65(a) (emphasis supplied).

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

[37] *Bureau Decision* at 13722.

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.[38] 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.[39]

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

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[38] AFR at 5.

[39] 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.

combinations.[40] 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*.[41] The Bureau correctly applied the rules that were in effect on May 12, 2003, the date on which the Application was granted.[42] Moreover, the *Bureau Decision* addressed Royce's Section 1.65 "pending" argument, finding that given the controlling grandfathering policy adopted in the *Ownership Order*, Royce's reliance on Section 1.65 was "misplaced."[43]

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*.[44] The Bureau's interpretation of the Commission's processing guidance is consistent with Commission precedent[45] and with

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

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

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

43 *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).

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

45 *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

the Commission's clear intent in the *Ownership Order* to avoid disturbing existing combinations of stations.[46] 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."[47] 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."[48] Section 1.65(a) requires applicants to ensure that their applications remain accurate and complete

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existing combinations, and we did not do so when we revised the local radio rule [in 2003].").

[46] 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.").

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

[48] 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.").

and to amend a pending application promptly whenever information furnished in the application is no longer "substantially accurate and complete in all significant respects,"[49] 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.[50]

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),

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[49] 47 C.F.R. § 1.65(a).

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

(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

ORDER OF THE FEDERAL COMMUNICATIONS COMMISSION ON PETITION FOR RECONSIDERATION (AUGUST 22, 2005)

FEDERAL COMMUNICATIONS COMMISSION
(F.C.C.)

ROYCE INTERNATIONAL BROADCASTING COMPANY, C/O WILLIAM H. CRISPIN, ESQ.

CRISPIN & ASSOCIATES, PLLC

ENTERCOM COMMUNICATIONS CORP.
C/O BRIAN M. MADDEN, ESQ.

LEVENTHAL SENTER & LERMAN PLLC

File No. BALH-20021120ACE

DA 05-2307

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Washington, D.C. 20006-1809
In Reply Refer to: 1800B3-BSH

RE: KWOD (FM), Sacramento, CA Facility ID No. 57889

Petition for Reconsideration

Dear Counsel:

This letter refers to the June 11, 2003, Petition for Reconsideration filed by Royce International Broadcasting Company ("Royce"). Royce requests reconsideration of the May 12, 2003, staff decision ("Staff Decision") denying Royce's December 20, 2002, Petition to Deny and granting the above-captioned application to assign the license ("Assignment Application") of station KWOD (FM), Sacramento, California, from Royce to Entercom Communications Corp. ("Entercom").[1] For the reasons stated below, we deny the Petition for Reconsideration.

BACKGROUND

On reconsideration, Royce notes that the June 2, 2003, *Public Notice*[2] announcing adoption that day

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[1] Entercom filed an Opposition to Petition for Reconsideration on June 24, 2003, and Royce filed a Reply on July 7, 2003. Entercom filed a Motion for Leave to File and Supplement Opposition on July 22, 2003. Royce filed a Response to Motion for Leave to File and Supplement Opposition on July 30, 2003. Entercom filed untitled submissions on September 16, 2003, and August 5, 2003. We grant the Motions and consider all the above-referenced submissions.

[2] *Public Notice, Media Bureau Announces Processing Guidelines for Broadcast Station Applications* ("*Public Notice*"), 18 FCC Rcd 11319 (2003).

of new multiple ownership rules[3] states that certain pending applications will be processed under the new rules. 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. In support, Royce cites language in Section 1.65 of the Commission's rules[4] as well as a Commission decision and an unpublished court decision.[5]

Entercom counter-argues that the wording of the *Public Notice* makes clear that it applies only to those pending applications for which no action has yet been taken.[6] Entercom asserts that, had the Media Bureau intended to include within the ambit of the *Public Notice* those applications that had already been granted but remained subject to appeal, it would have stated so explicitly and also would have addressed treatment of post-grant appeals, such as petitions for

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[3] *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*, 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. Sept. 3, 2004), *cert. denied*, 73 U.S.L.W. 3466 (U.S. June 13, 2005) (Nos. 04-1020, 04-1033, 04-1036, 04-1045, 04-1168 and 04-1177).

[4] 47 C.F.R. § 1.65.

[5] *See* Reply at 3-4 (citing *Premier Broadcasting, Inc.*, 7 FCC Rcd 867 (1992) ("*Premier*") and *Edens Broadcasting, Inc. v. FCC*, No. 91-1387 (D.C. Cir., June 17, 1992) ("*Edens*").

[6] Opposition at 4.

reconsideration, in its discussion regarding the processing of petitions to deny and informal objections.[7]

DISCUSSION

The *Ownership Order* addresses the applicability of the new ownership rules in the section entitled "Grandfathering and Transition Procedures."[8] The grandfathering provisions provide that the new rules will not be applied to assignment applications that were granted and consummated under the previous rules. As the Commission stated in the *Ownership Order*, "[w]e are persuaded by the record to grandfather existing combinations of radio stations. . . . As such, we will not require entities to divest their current interests in stations in order to come into compliance with the new ownership rules."[9] Specifically with regard to radio ownership, the *Ownership Order* concluded that the decision to grandfather existing combinations reflected "the substantial equitable considerations" which outweighed the Commission's "interest in improving the precision of our radio market definition in these particular cases."[10] The Commission has since stated that "[w]e 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

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[7] *Id.*

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

[9] *Id.*, 18 FCC Rcd at 13808.

[10] *Id.*, 18 FCC Rcd at 13809.

rule."[11] The Assignment Application was granted on May 12, 2003, and was consummated on May 19, 2003. Therefore, KWOD (FM) was part of Entercom's existing combination of radio stations on June 2, 2003.

Because the grandfathering provisions are controlling, Royce's reliance on Section 1.65 is misplaced. Furthermore, shortly after the United States Court of Appeals for the Third Circuit stayed the effective date of the ownership rules adopted in the *Ownership Order*,[12] the Commission issued a *Public Notice* on September 10, 2003, abandoning, as it was required to do, the "new rules" application processing procedures set forth in the June 2, 2003 *Public Notice*.[13]

For the reasons stated above, we find Royce's arguments to be without merit. Accordingly, the June 11, 2003, Petition for Reconsideration filed by Royce International Broadcasting Company IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

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[11] *Golden Triangle Radio, Inc. et al.*, 20 FCC Rcd, 4396, 4397-98 (2005) (citing to *Ownership Order*'s grandfathering provisions, 18 FCC Rcd at 13807-09).

[12] *See Prometheus Radio Project, et al. v. F.C.C.*, No. 03-3388, slip op. at 3 (3d Cir. Sept. 3, 2003) (per curiam) (granting motion for stay).

[13] *See Public Notice, Media Bureau To Terminate Temporary Broadcast Station Application Freeze*; *Revised Processing Guidelines Announced* (DA 03-2867), 18 FCC Rcd 18631 (2003).

REPORT AND ORDER AND NOTICE OF PROPOSED RULEMAKING—RELEVANT EXCERPTS (JUNE 2, 2003)

FEDERAL COMMUNICATIONS COMMISSION
(F.C.C.)

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

MB Docket 02-277

CROSS-OWNERSHIP OF BROADCAST STATIONS AND NEWSPAPERS

MM Docket 01-235

RULES AND POLICIES CONCERNING MULTIPLE OWNERSHIP OF RADIO BROADCAST STATIONS IN LOCAL MARKETS

MM Docket 01-317

DEFINITION OF RADIO MARKETS

MM Docket 00-244

DEFINITION OF RADIO MARKETS FOR AREAS NOT LOCATED IN AN ARBITRON SURVEY AREA

MB Docket 03-130

FCC 03-127

By the Commission: Chairman Powell, Commissioners Abernathy and Martin issuing separate statements; Commissioners Copps and Adelstein dissenting and issuing separate statements.

I. Introduction

1. With this Report and Order ("*Order*"), we bring to completion our third biennial ownership review, the most extensive review yet, addressing all six broadcast ownership rules. We address these rules in light of the mandate of Section 202(h) of the Telecommunications Act of 1996 ("1996 Act"), which requires the Commission to reassess and recalibrate its broadcast ownership rules every two years. In the Notice of Proposed Rulemaking in this proceeding ("*Notice*"), we initiated review of four ownership rules: the national television multiple ownership rule; the local television multiple ownership rule; the radio-television cross-ownership rule; and the dual network rule. The first two rules . . .

[. . .]

. . . media combinations in those markets. In small to medium markets we have imposed specific limitations on particular kinds of combinations that would, in our estimation, most likely result in unacceptable harm to viewpoint diversity. In large markets, our analysis indicates that no cross-media limit is necessary, nor can one be justified, given the large number of outlets and owners that typify these markets and the operation of our intra-service television and radio caps.

481. Conclusion. Although we generally prohibit television-radio, and newspaper-broadcast, cross-ownership in at-risk markets, and we limit newspaper-broadcast combinations in small to medium size markets, we recognize that special circumstances may render these cross-media limits unnecessary or counterproductive in particular markets. Accordingly, we will continue to entertain requests for waiver of these cross-media limits and, in particular, will give special consideration to waiver requests demonstrating that an otherwise prohibited combination would, in fact, enhance the quality and quantity of broadcast news available in the market. In addition, of course, we will review our entire local broadcast ownership framework, including our new cross-media limits, beginning next year, in our 2004 biennial review. We will not, however, permit collateral attack upon our rules in individual cases on diversity grounds based upon more particularized showings using the DI in a given market. The rules we adopt herein are rules of general applicability. The lines that have been drawn and the judgments that have been made reflect our conclusions regarding the probable effects of given

transactions in the run of cases. Those conclusions necessarily rely upon generalizations, approximations, and assumptions that will not hold true in every case. Indeed, many of these assumptions would not be true in a particular context or specific market. As we stated above, the Diversity Index itself is a blunt tool capable only of capturing and measuring large effects and general trends in typical markets. It is of no use, therefore, for parties to attempt to apply the DI to a particular transaction in a particular market.

D. Grandfathering and Transition Procedures

1. Grandfathering Provisions

482. Existing Combinations. There may be some existing combinations of broadcast stations that exceed the new ownership limits due to the modifications of both the local TV and the local radio ownership rules. Because the modified local TV rule permits increased common ownership of local TV stations, we expect few existing ownership combinations to violate the rule adopted herein. However, some existing same-market combinations may not comply with the modified TV ownership rule because of the elimination of the Grade B overlap exclusion that is in the current rules. In addition, there may be instances in which a party currently owns a radio/television combination that may not comply with the new cross-media limits.

483. As for radio, we are modifying the definition of many radio markets, replacing the existing signal-contour based definition with a geographic based market definition. This may result in a different number of stations being considered as participating in a local radio market. Because our radio ownership

rule is based on a tiered system, if fewer stations comprise the radio market, and the market falls into a smaller tier, then the number of stations an entity may own would decrease. We also are attributing in-market radio JSAs, which could increase the number of radio stations that count toward an entity's numerical ownership limit.

484. We are persuaded by the record to grandfather existing combinations of radio stations, existing combinations of television stations, and existing combinations of radio/television stations. As such, we will not require entities to divest their current interests in stations in order to come into compliance with the new ownership rules. As suggested by commenters, doing so would unfairly penalize parties who bought stations in good faith in accordance with the Commission's rules. Also, we also are sensitive to commenters' concerns that licensees of current combinations should be afforded an opportunity to retain the value of their investments made in reliance on our rules and orders. We also agree with the commenters that argue that compulsory divestiture would be too disruptive to the industry. On balance, any benefit to competition from forcing divestitures is likely to be outweighed by these countervailing considerations.

485. While commenters overwhelming support grandfathering existing combinations, many nonetheless argue that grandfathering will create competitive imbalances which favor existing group owners-those that assembled combinations under the current rules-and disfavor those that cannot assemble competing combinations because of new ownership restrictions. Like all grandfathering decisions, some disparity will exist between grandfathered owners

and non-grandfathered owners. We do not believe this fact outweighs the equitable considerations that persuade us to grandfather existing combinations.

486. We expect that the issue of grandfathering existing combinations will affect predominately radio group owners because of the changes we make herein to the radio market definition. We recognize that a geographic based radio market definition may result in a fewer number of stations in certain markets. In those instances, parties may not be able to acquire the same number of stations as the largest owner in a particular market. However, those combinations were created based upon the contour-based definition that we find herein fails to adequately address our competition goals in local radio markets. To allow additional broadcasters to obtain such combinations would disserve our goals. Our decision to grandfather existing combinations simply reflects the substantial equitable considerations discussed above, considerations that we conclude outweigh our interest in improving the precision of our radio market definition in these particular cases.

487. Transferability. We also asked for comments on whether to allow licensees to assign or to transfer control of grandfathered combinations that violate of the new ownership rules. In general, we will prohibit the sale of existing combinations that violate the modified local radio ownership rule, the local television ownership rule, or the cross media limits. Therefore, parties must comply with the new ownership rules in place at the time a transfer of control or assignment application is filed. However, as discussed earlier, in order to help promote diversity of ownership, we will allow sales of grandfathered combinations to and by

certain "eligible entities." We do not agree with commenters that advocate allowing grandfathered combinations to be freely transferable in perpetuity, irrespective of whether the combination complies with our adopted rules. As NABC, Idaho Wireless, and ARD suggest, such an approach would hinder our efforts to promote and ensure competitive markets. Grandfathered combinations, by definition, exceed the numerical limits that we find promote the public interest as related to competition. Moreover, in the case of radio ownership, these combinations were created pursuant to a market definition that we conclude fails to adequately reflect competitive conditions. Unlike our decision not to require existing station owners to divest stations, here, 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. Thus, they do not have the same expectations as present owners who acquired stations under the current ownership rules. In addition, because of the limited number of broadcast licenses available, station spin-offs that would be required upon sales of stations in a grandfathered group could afford new entrants the opportunity to enter the media marketplace. They could also give smaller station owners already in the market the opportunity to acquire more stations and take advantage of the benefits of combined operations. Because divestitures are not required until a sale of the station groups, owners have sufficient time to minimize any specific complications due to joint operations. Therefore, we reject the argument that prohibiting transfers of station groups that exceed the new ownership limits would be unacceptably disruptive or would negatively impact

the availability of bank financing, as some commenters suggest. Finally, requiring future assignments and transfers to comply with our ownership rules upon sale is consistent with Commission precedent. In keeping with the policy we adopted in 1975, the prohibition on the transfer of grandfathered stations will not apply to *pro-forma* changes in ownership or to involuntary changes of ownership due to a death or legal disability of the licensee.

488. Eligible Transfer. We are adopting an exception to our prohibition on the transfer of grandfathered combinations in violation of the new rules. This exception applies to grandfathered radio and television combinations that exceed the ownership limits adopted in this *Order*, cross-media combinations in at-risk markets, and cross-media combinations in small to medium sized markets that exceed the ownership limits adopted in this *Order*. Entities may transfer control of or assign a grandfathered combination to "eligible entities" as defined herein. In addition, "eligible entities" may sell existing grandfathered combinations without restriction. As we define in greater detail below, we limit "eligible entities" to small business entities, which often include businesses owned by women and minorities. We believe that facilitating new entry by and growth of small businesses in the broadcast industry will further our goals of promoting diversity of ownership as well as competition and localism.

489. We define an "eligible entity" as an entity that would qualify as a small business consistent with SBA standards for its industry grouping. For example, the SBA small business size standard for radio stations is $6 million or less in annual revenue.

For TV stations the limit is $12 million. In addition, to tailor this exception to meet our public interest objectives and ensure that the benefits of this proposal flow as intended, we will further require that any transaction pursuant to this exception may not result in a new violation of the rules. Moreover, control of the eligible entity purchasing the grandfathered combination must meet one of the following control tests. The eligible entity must hold (1) 30% or more of the stock/partnership shares of the corporation/partnership, and more than 50% voting power, (2) 15% or more of the stock/partnership shares of the corporation/partnership, and more than 50% voting power, and no other person or entity controls more than 25% of the outstanding stock, or (3) if the purchasing entity is a publicly traded company, more than 50% of the voting power.

490. In addition to the above, we will allow entities that meet the definition of "eligible entity" to transfer any existing grandfathered combination generally without restriction. We believe that small businesses that qualify as eligible entities require greater flexibility than do larger entities for the disposition of assets. Restrictions on the sale of assets could disproportionately harm the financial stability of smaller firms compared to that of larger firms, which have additional revenue streams. To prevent abuse of this policy, however, an eligible entity may not transfer a grandfathered combination acquired after the adoption date of this *Order* to an entity other than another eligible entity unless it has held the combination for a minimum of three years. Also, we will prohibit eligible entities from granting options to purchase, or rights of first refusal to prevent

non-eligible entities from financing an acquisition in exchange for an option to purchase the combination at a later date. Finally, any transaction pursuant to this policy may not result in a new violation of the rules.

491. Radio LMA Combinations. As we discussed in the context of attributable JSAs in the Local Radio Ownership Section, there also may be instances in which an existing LMA may affect a licensee's compliance with the ownership limits adopted herein. As we stated in instances of attributable JSAs, because we do not want to unnecessarily adversely affect current business arrangements between licensees and brokers, we will give licensees two years from the effective date of this *Order* to terminate any LMAs that result in a violation of the new ownership limits, or otherwise come into compliance with the new rules. If the licensee sells an existing combination of stations within the two year grace period, it may not sell or assign the LMA to the buyer if the LMA causes the buyer to exceed the ownership limits adopted in this *Order*. Parties are prohibited from entering into an LMA or renewing an existing LMA that would cause the broker of the station to exceed the ownership limits.

492. TV LMA Combinations. In our *Local TV Ownership Report and Order*, we grandfathered LMA combinations that were entered into prior to November 5, 1996, through the end of our 2004 biennial review. We do not alter this policy. These LMAs are not affected by the grandfathering policy adopted herein.

493. TV Temporary Waivers. A few licensees have been granted temporary waivers of our local TV ownership rule, and some have filed requests for an extension of waivers that are currently pending, or have sought permanent waivers. Any licensee with a

temporary waiver, pending waiver request, or waiver extension request must, no later than 60 days after the effective date of this *Order* or the date on which the waiver expires, whichever is later, file one of the following: (i) a statement describing how ownership of the subject station complies with the modified local TV ownership rule; or (ii) an application for transfer or assignment of license of those stations necessary to bring the applicant into compliance with the new rules.

494. Cross-Media Conditional Waivers. A few licensees have been granted conditional waivers of the previous one-to-a-market rule. Although we are eliminating the current radio/television cross-ownership rules, we are adopting new cross-media limits. Parties that currently have conditional waivers for radio /television combinations must submit a statement to indicate whether the combination they hold (1) is located in an at-risk market, (2) is located in a small to medium size market, and (3) is in compliance with the cross-media limits. For the combinations that comply with the cross-media limits adopted herein, we will issue a letter replacing the conditional grant with permanent approval. For any combinations that violate the cross-media limits, we will issue a letter indicating that the combination will continue to be grandfathered until a decision in the 2004 Biennial Review is final. As part of the 2004 Biennial Review, we will review and reevaluate the status of such grandfathered combinations to determine whether they should continue to be grandfathered. On a case-by-case basis, we will consider the competition, diversity, equity, and public interest factors the combinations may raise.

495. Other Cross-Media Waivers. Our cross-media limits are founded on the presumption that, by reason of cable carriage, television stations are available throughout the DMA to which they are assigned. We recognize, however, that this may not be true in every case. Accordingly, those requesting waiver of our cross-media limits may attempt to rebut this presumption in individual cases. For example, a television licensee assigned to a DMA to which only two other television stations are assigned (*i.e.*, an at-risk market) may request a waiver of the bar on its ownership of a daily newspaper published within that DMA by demonstrating that the newspaper's community of publication neither receives television 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. 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. 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. 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.

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

[. . .]

FCC CONSENT TO ASSIGNMENT (MAY 17, 2003)

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Consent to Assignment:

From: Royce International Broadcasting Company

To: Entercom Communications Corp.

Class	FM
Call Sign	KWOD
Facility ID	57889
File BALH-20021120ACE	
Station Location	Sacramento, CA
Auxiliary Stations	All Currently Authorized Auxiliary Stations

Under authority of the Communications Act of 1934, as amended, the consent of the Federal Communications Commission is hereby granted to the transaction indicated above.

The Commission's consent to the above is based on the representations made by the applicants that the statements contained in, or made in connection with, the application are true and that the undertakings of the parties upon which this transaction is authorized will be carried out in good faith.

The actual consummation of voluntary transactions shall be completed within 90 days from the date hereof,

and notice in letter form thereof shall promptly be furnished to the Commission by the buyer showing the date the acts necessary to effect the transaction were completed. Upon furnishing the Commission with such written notice, this transaction will be considered completed for all purposes related to the above described station(s).

FCC Form 323, Ownership Report, must be filed within 30 days after consummation, by the licensee/permittee or assignee.

ADDITIONAL REQUIREMENTS FOR ASSIGNMENTS ONLY:

Upon consummation the assignor must deliver the permit/license, including any modifications thereof to the assignee.

It is hereby directed that, upon consummation, a copy of this consent be posted with the station authorization(s) as required by the Commission's Rules and Regulations.

It is hereby directed that, upon consummation, a copy of this consent be posted with the station authorization(s) as required by the Commission's Rules and Regulations.

The assignee is not authorized to construct nor operate said station(s) unless and until notification of consummation in letter form has been forwarded to the Commission.

(For Chief Audio Division,
Media Bureau)

/s/ Signature not Legible
5/12/03

LETTER FROM BRIAN M. MADDEN (MAY 20, 2003)

LEVENTHAL SENTER & LERMAN PLLC

Brian M. Madden
(202) 416-6770
Email: bmadden@lsl-law.com

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Station KWOD(FM), Sacramento, California
Facility ID No. 57889

Dear Ms. Dortch:

On behalf of Entercom Sacramento License, LLC, please be advised that all acts necessary to consummate the assignment to Entercom Sacramento License, LLC of the license for Station KWOD(FM), Sacramento, California, as authorized by the Commission's grant of FCC File Nos. BALH-20021120ACE and BALH-22030205ACX, took place effective 11:59 pm on May 19, 2003. Please update the Commission's records to show that radio Station KWOD(FM) is now licensed to Entercom Sacramento License, LLC. An ownership report reflecting the consummation of this transaction is in preparation and will be filed shortly.

Please send all correspondence concerning Station KWOD to the new licensee at:

Entercom Sacramento License, LLC
c/o Entercom Communications Corp.
401 City Avenue
Suite 809
Bala Cynwyd, Pennsylvania 19004

Please send a copy of all correspondence concerning the station to the undersigned counsel.

If any additional information is desired in connection with this matter, please contact the undersigned counsel.

Very truly yours,

/s/ Brian M. Madden

cc: LeAudrey Alexander (FCC)
Druscilla Smalls (FCC)

LETTER FROM FCC GRANTING APPLICATION TO ASSIGN LICENSE (MAY 12, 2003)

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Andrew S. Kersting, Esq.
Dickstein Shapiro Morin & Oshinsky LLP
2101 L Street, N.W.
Washington, D.C. 20037-1526

Brian M. Madden, Esq.
Leventhal Senter & Lerman PLLC
2000 K Street, N.W., Suite 600
Washington, D.C. 20006-1809

RE: KWOD(FM), Sacramento, CA
Facility ID No. 57889
Assignment of License
File No. BALH-20021120ACE

Dear Counsel:

This letter refers to the above-captioned application to assign the license of station KWOD(FM), Sacramento, California, from Royce International Broadcasting Company ("Royce") to Entercom Communications Corp. ("Entercom"). On December 30, 2002, Royce filed a Petition to Deny the assignment to Entercom.[1]

[1] Entercom filed an opposition on January 10, 2003, and Royce filed a reply on January 23, 2003.

Royce explains that it was compelled by court order to proceed with this assignment application. Royce requests that the Commission defer action on the proposed assignment pending its state court appeal of the April 30, 2002, issuance of an "Interlocutory Judgment" by the Superior Court of the State of California in and for the County of Sacramento ("Superior Court") that, *inter alia*, required Royce to sign all documents necessary to effectuate the Commission's approval of the assignment of KWOD(FM) to Entercom.[2] In addition, Royce argues the merits of the case and claims that, while the application facially complies with the radio local ownership rule (47 C.F.R. Section 73.3555(a)), the Commission's current contour methodology produces a station count that is grossly inconsistent with commercial market definitions. Royce asserts that the Commission should apply a different methodology in the instant case, contending that the use of any one of the four alternative methodologies it proffers would be more consistent with the economic realities of the Sacramento radio marketplace. Properly applying a more realistic definition of the radio market, however, precludes grant of the assignment application, according to Royce. For the reasons stated below, we deny the Petition to Deny and grant the assignment application.

DISCUSSION

Section 310(d) of the Communications Act of 1934, as amended ("the Communications Act"), 47 U.S.C.

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[2] Petition to Deny at 4. *See also Entercom Communications Corp. v. Royce International Broadcasting Corp. et al.*, California Superior Court Case No. 99AS04202.

Section 310(d), requires the Commission to find that the public interest, convenience and necessity would be served by the assignment of Royce's radio broadcast license to Entercom before the assignment may occur. The Commission will designate an application for hearing: (1) if the petition to deny contains specific allegations of fact that, taken as true, make out a prima facie case that grant of the application would not serve the public interest; and (2) the allegations, together with opposing evidence, raise a substantial and material question of fact whether grant of the application would serve the public interest.[3]

The first step of our inquiry is to ask the following: " . . . if all the supporting facts alleged in the affidavits were true, could a reasonable factfinder conclude that the ultimate fact in dispute has been established."[4] "Allegations within these documents that consist of ultimate, conclusionary facts or more general allegations on information and belief, supported by general affidavits are not sufficient."[5] "At the second step, a substantial and material question is raised when 'the totality of the evidence arouses a sufficient doubt on the question whether grant of the application would serve the public interest that fur-

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[3] 47 U.S.C. § 309. *See Serafyn v. FCC*, 149 F.3d 1213, 1216 (D.C. Cir. 1998) ("*Serafyn*"). *See also Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

[4] *Gencom Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987).

[5] *North Idaho Broadcasting Company*, 8 FCC Rcd 1637, 1638 (1993), citing *Gencom Inc.*, 832 F.2d at 180, n.11.

ther inquiry is called for.'"[6] "Should the Commission conclude that such a question of fact has been raised, or if it cannot, for any reason, find that grant of the application would be consistent with the public interest, it must conduct a hearing in accordance with 47 U.S.C. Section 309(d)(2)."[7] We find that Royce has failed to establish that grant of the application is inconsistent with the public interest. We further find that no substantial and material question of fact exists as to whether grant of the application is in the public interest.

Multiple Ownership Analysis

The Commission's local radio ownership rules restrict the number of radio stations in the same service and the number of stations overall that may be commonly owned m any given local radio market.[8] For purposes of the rules, the relevant local radio market is defined by the area encompassed by the mutually overlapping principal community contours of the stations proposed to be commonly owned.[9] The number of stations in the market is determined based on the principal community contours of all commercial

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[6] *Serafyn*, 149 F.3d at 1216, citing *Citizens for Jazz on WRVR. Inc. v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985).

[7] *North Idaho Broadcasting Company*, 8 FCC Rcd at 1638.

[8] 47 C.F.R. § 73.3555(a).

[9] *Id.*; *Implementation of Sections 202(a) and 202(b)(I) of the Telecommunications Act of 1996*, 11 FCC Rcd 12368 (1996).

stations whose principal community contours overlap or intersect the principal community contours of any of the commonly owned and mutually overlapping stations.[10] Under the rules, as amended by the Telecommunications Act of 1996,[11] in a local radio market with 45 or more stations, for example, a single owner may own up to eight stations, no more than five of which are in the same service.[12]

Using the Commission's current definition of "radio market,"[13] Entercom's multiple ownership showing indicates that the transaction creates a single radio market formed by the mutually overlapping principal community contours of KSSJ(FM), Fair Oaks, California, and KCTC(AM), KSEG(FM), KRXQ(FM), KDND(FM) and KWOD(FM), Sacramento, California. The application's multiple ownership exhibit states that there are 51 radio stations in this market, and that therefore, pursuant to 47 C.F.R. Section 73.3555(a)(1)(i), Entercom may own up to eight stations, up to five of which may be in the same service.[14] In

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[10] 47 C.F.R. § 73.3555(a)(3)(ii).

[11] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[12] *See id.*, § 202(b)(1); 47 C.F.R. § 73.3555(a)(1).

[13] *See Definition of Radio Markets*, Notice of Proposed Rule Making, 15 FCC Rcd 25077, 25077-78 ##2-3 (2000) ("*Radio Markets Definition NPRM*"); 47 C.F.R. § 73.3555 (a)(3).

[14] Royce argues that the exhibit should show that there are 50, rather than 51, stations in the relevant market. Petition to Deny at 7, n. 10 and Appendix B at 3. Royce does not contest that there are at least the necessary 45 stations in the market using the Commission's

this defined radio market, Entercom currently owns four FM stations and one AM station; post-transaction it would own an additional FM station.

Royce argues, however, that, because the Commission's methodology produces a market definition "that bears no rational relationship to the economic realities of the Sacramento radio market," the staff should apply one of four proposed alternative means to calculate the number of stations in the relevant market.[15] Applying any of the four would render the proposed assignment in violation of Section 73.3555(a). The four alternatives recommended by Royce to determine the relevant market are as follows: (1) using the Arbitron-defined market for Sacramento which, Royce asserts, would result in a 37-station market;[16] (2) confining the market to common overlap of Entercom's post-transaction, commonly owned stations which, Royce asserts, would result in a market with only 33 stations;[17] (3) excluding the KCTC(AM) signal contour from the analysis because that station's enormous signal contour—due to the extremely high soil conductivity values in the Sacramento and San Joaquin Valleys—is substantially disproportional to the signal contours of the FM stations which are proposed to be commonly owned, an approach which yields a 39-station market, according to Royce;[18] or

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present contour methodology to demonstrate compliance of the transaction with Section 73.3555(a).

[15] Petition to Deny at 17.

[16] *Id.* at 9.

[17] *Id.* at 11.

[18] *Id.* at 14.

(4) confining application of the Commission's contour methodology to the geographic boundaries of the Arbitron-defined market which, Royce asserts, would result in 42 stations comprising the market.[19] Use of any of Royce's suggested alternatives precludes grant of the instant assignment application because, in a market with between 30-44 stations, the proposed ownership combination would exceed the same-service station limit set forth in our rules.[20]

To determine the number of stations in the market, "we count all stations whose principal community contours overlap the principal community contour of any one or more of the stations whose contours define the market."[21] The rules do not provide for selective exclusion of certain stations from the analysis and we will not do so based on Royce's criticism of the Commission's current method of defining local radio markets. Since 1992, the Commission has used contour overlap methodology in radio transactions to determine compliance with Section 73.3555(a).[22] An adjudicatory process is not the appropriate forum in which to

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[19] *Id.* at 16.

[20] *See* 47 C.F.R. § 73.3555(a)(1)(i).

[21] *Radio Markets Definition NPRM*, 15 FCC Rcd at 25079.

[22] *See Revision of Radio Rules and Policies*, 7 FCC Rcd 6387, 6395-96 (1992); *Radio Markets Definition NPRM*, 15 FCC Rcd at 25077-79; *Pine Bluff Radio, Inc.* ("*Pine Bluff*"), 14 FCC Rcd 6594, 6598-99 (1999) (the local radio ownership rules are based first on contour overlap).

accomplish the extensive rule changes suggested by Royce.

If Royce believes that these rules and our implementation of them are flawed, its argument is more appropriately addressed in a notice and comment rulemaking, with the benefit of the extensive and well-counseled record that can be developed in such a proceeding. It has long been Commission practice to make decisions that alter fundamental components of broadly applicable regulatory schemes in the context of rulemaking proceedings, not adjudications where the many parties potentially affected by the change lack the opportunity to participate.[23] Royce has had ample opportunity to submit comments in the ongoing rulemaking proceedings that address the market

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[23] *See, e.g., Pine Bluff*, 14 FCC Rcd at 6599 (any changes in methodology for determining "radio markets," for purposes of the multiple ownership rule, are best addressed in the context of a rulemaking); *Great Empire Broadcasting, Inc.*, 14 FCC Rcd 11145 (1999) (it is generally inappropriate to address arguments for a change in rules "where third parties, including those with substantial stakes in the outcome, have had no opportunity to participate, and in which we, as a result, have not had the benefit of a full and well-counseled record," citing *Capital Cities/ABC, Inc.*, 11 FCC Rcd 5841, 5888 (1996)); *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 511 (1983) ("rulemaking is generally better, fairer, and more effective method of implementing a new industry wide policy than the uneven application of conditions in isolated [adjudicatory] proceedings").

definition issue.[24] As Royce has provided no basis to depart from our multiple ownership rules in this case, we count all stations whose principal community contours overlap the principal community contour of any one or more of the stations whose contours define the market. Accordingly, we find that the proposed transaction is in compliance with the Commission's multiple ownership rules, as acknowledged by Royce[25] and established in Entercom's multiple ownership exhibit.

Request for Delay Pending State Court Action

On April 30, 2002, the Superior Court issued the Interlocutory Judgment requiring specific performance by Royce that led to the filing of the captioned application.[26] Pursuant to an order from the Court of Appeal of the State of California in and for the Third

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[24] *See Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861 (2001) (incorporating the earlier proceeding on radio markets definition, *see supra* note 13). More recently, the Commission initiated an omnibus biennial ownership proceeding examining various broadcast ownership rules, and the radio rulemaking proceedings were incorporated therein. *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*, Notice of Proposed Rulemaking, 17 FCC Rcd 18503 (2002).

[25] Petition to Deny at 1-2.

[26] *Id.* at 4. *See also* File No. BALH-20021120ACE, Exhibit 1.

Appellate District ("Appeal Court"),[27] on October 29, 2002, the Superior Court issued an order requiring Royce to, *inter alia*, post a $10 million bond in order to stay the Interlocutory Judgment pending its appea1.[28] Royce states that, as a result of its inability to post a bond in this amount, it complied with the court's specific performance mandate and Entercom filed the captioned application.[29] Royce further states that the Superior Court's decision is presently on appeal before the Appeal Court.[30]

Royce's request for deferment relates to private contractual claims between itself and Entercom. The Commission has consistently held that it is not the proper forum for the resolution of such private disputes, and that the parties should seek redress for such matters in courts of competent jurisdiction.[31] Royce has not provided evidence of an injunction or a stay issued by a local court against the proposed sale. In the absence of such an order from a local court, the Commission has routinely acted favorably on license assignment applications pending resolution of private disputes such as those reported by Royce.[32]

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[27] C041067, Sacramento County, Case No. 99AS04202, filed June 28, 2002. *See also* Petition to Deny at 5-6.

[28] Petition to Deny at 6.

[29] *Id.*

[30] *Id.* at 2.

[31] *See John R. Runner, Receiver* (*KBIF*), 36 RR 2d 773, 778 (1976); *Decatur Telecasting, Inc.*, 7 FCC Rcd 8622 (1992).

[32] *See, e.g., Paso Del Norte Broadcasting Corporation*, 12 FCC Rcd 6876, 6878 (MMB 1997) (no reason

Moreover, Commission grant of an assignment application merely finds that the parties are qualified under, and the proposed transaction does not violate, the Communications Act of 1934, as amended, and the Commission's rules and policies. It is permissive only and does not prejudice any relief that the parties may ultimately be entitled to under civil suit.[33] Accordingly, we will not defer action in this case.

CONCLUSION

Based on our review of the record and for the reasons set forth above, we find that Entercom is qualified as the assignee and that grant of the transaction is consistent with the public interest, convenience and necessity. Accordingly, IT IS ORDERED that the application for assignment of license of station KWOD(FM), Sacramento, California (File No. BALH-20021120ACE), from Royce International Broadcasting Company to Entercom Communications Corp. IS GRANTED. IT IS FURTHER ORDERED that the Petition to Deny filed by Royce IS DENIED.

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to defer action on assignment application until resolution of pending civil litigation),

[33] In any event, the staff has determined that, in an unpublished opinion filed on May 5, 2003, the Appeal Court affirmed the Interlocutory Judgment. *Entercom Communications Corp. v. Royce International Broadcasting Corp. et al.*, Case No. C041067 (Cal. Ct. App. May 5, 2003).

Sincerely,

/s/ Nina Shafran
for Peter H. Doyle, Chief
Audio Division, Media Bureau

ORDER FIXING THE SUM OF UNDERTAKING AND CONDITIONS FOR STAY (CCP 917.2) (OCTOBER 29, 2002)

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

ENTERCOM COMMUNICATIONS CORPORATION,

Plaintiff,

v.

ROYCE INTERNATIONAL BROADCASTING CORPORATION, a California Corporation, ROYCE INTERNATIONAL BROADCASTING COMPANY, a California Sole Proprietorship, EDWARD R. STOLZ, II, an Individual,

Defendants.

Case No.: 99AS04202

Dept. No: 11

Before: Gail D. OHANESIAN, Judge

As directed on June 28, 2002, by the Court of Appeal of the State of California, Third Appellate District, proceedings were had in the above-entitled action to determine an undertaking in a sum and upon conditions as fixed by the Court. At a trial status conference held on September 13, 2002 with counsel appearing for each party, the parties agreed

and the Court directed the parties to submit briefs and declarations in accordance with their position on the issue of setting an undertaking in an amount consistent with the requirements under section 917.2 of the Code of Civil Procedure. The matter was taken under submission upon the filing of the last brief on October 18, 2002.

Having reviewed and considered the declarations and briefs on file, the Court issues its ruling as follows:

Plaintiff, in its Reply Brief filed on October 18, 2002, requests that the Court set the amount of the undertaking in the amount of $12.4 to $17 million to perfect a stay of the Court's Interlocutory Judgment. As provided under section 917.2 of the Code of Civil Procedure, plaintiff argues that an undertaking in this range is necessary to protect Entercom if the value of KWOD-FM to Entercom is damaged and to compensate Entercom for the value of the loss of use of such property for the period of the delay caused by the appeal. In requesting the undertaking, plaintiff has submitted declarations in support of the estimated value of the use of the property during the projected appeals period to be $5,408,897. Such calculations are based on the anticipated revenues of KWOD-FM if owned and operated by Entercom rather than defendant. Plaintiff also puts forth the declaration of W. Lawrence Patrick as evidence that the fair market value of KWOD-FM, as of the filing of the appeal, is approximately $30 million. Notwithstanding the contract purchase price of $25 million, plaintiff attempts to put forth evidence that the purchase price will be further adjusted downwards based on damages suffered by Entercom as lost

profits due to defendant's delay in transferring ownership measured from January 1, 1997. Plaintiff also submits that the value of KWOD-FM could potentially decrease by $7,422,107 should there be action by the FCC that is adverse to plaintiff in the worse case [sic] scenario.

Unlike plaintiff's brief, defendant's Opposition brief declines to state an amount for the undertaking necessary to satisfy the requirement of section 917.2 of the Code of Civil Procedure. Instead, defendant Royce takes the legal position that Code of Civil Procedure section 917.2 does not apply to the interlocutory judgment on appeal, that no bond is necessary to protect the security because plaintiff can always reduce the purchase price it pays to defendant, and that if a bond is necessary, the bond amount requested by plaintiff Entercom is not justified.

Notwithstanding defendant's argument that Code of Civil Procedure section 917.2 does not apply to the situation at hand, the requirement for the trial court to set the amount of the undertaking under section 917.2 has been clearly mandated by the Court of Appeal in its conditional stay order of June 28, 2002. The matter before for the Court is to determine the amount of the undertaking.

Defendant's argument that plaintiff's interest is fully protected because of a potential offset to the $25 million purchase price has cursory appeal. As plaintiff points out, however, defendant Royce does not have "another action pending on a disputed claim" against plaintiff for $25 million as provided under section 918.5 of the Code of Civil Procedure. Upon taking judicial notice of the file, defendant's cross-complaint was for declaratory relief and rescission

and not for a claim against plaintiff for payment of the $25 million purchase price. Thus, the principle of setoff has no application for the purpose of setting an amount of the undertaking. Clearly in this case and even with the evidence before it, the Court will be challenged to set an undertaking in the precise amount that will fully compensate plaintiff for actual damages suffered to such property and the value of the use of such property for the period of the delay caused by the appeal. The Court does not intend adjudicate the issue of actual damages that plaintiff will suffer during the projected appeals period. But, the declarations executed by W. Lawrence Patrick and Brian Madden do offer some evidence and methodology for the limited purpose to set an amount for an undertaking.

After considering the arguments of counsel and the declarations and exhibits offered in support and opposition to the request for an undertaking, the Court determines that defendant shall post an undertaking in the amount of $10 million and shall abide by conditions during the stay as follows:

1. Defendants shall operate KWOD-FM during the delay and exercise good faith with its current operations.

2. Defendants shall not encumber KWOD-FM or its assets in any manner during the delay.

3. Defendants shall not remove or replace any broadcast equipment or any other tangible asset from KWOD-FM's office, studio, or transmitter site except in the normal course of business.

4. Upon affirmation of the Interlocutory Judgment, defendants shall comply fully with the Interlocutory Judgment and shall not otherwise interfere with the transfer of KWOD-FM to Entercom.

5. Defendants shall post an undertaking in the amount of $10 million not later than 20 days from the date of this order.

SO ORDERED.

/s/ Gail D. Ohanesian
Judge of the Superior Court

Dated: October 29, 2002

ORDER OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA (JUNE 28, 2002)

IN THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA IN AND FOR
THE THIRD APPELLATE DISTRICT

ENTERCOM COMMUNICATIONS CORP.,

Plaintiff,
Cross-defendant
and Respondent,

v.

ROYCE INTERNATIONAL BROADCASTING
CORPORATION ET AL,

Defendants,
Cross-complainants
and Appellants.

C041067

Sacramento County
No. 99AS04202

Before: SCOTLAND, P.J.

BY THE COURT:

The "Interlocutory Judgment," filed by the superior court on April 30, 2002, constitutes a mandatory Injunction, which is immediately appeal-

able. However, the Interlocutory Judgment is not automatically stayed by the appeal because the statutory provision which establishes authority for the automatic stay (Code Civ. Proc., § 916, subd. (a)) is subject to the more specific provisions of Code of Civil Procedure sections 917.2 and 917.3. (Further statutory references are to the Code of Civil Procedure.)

Accordingly, in order to obtain a stay of the Interlocutory Judgment, appellants must execute and deposit with the superior court clerk the documents identified in the Interlocutory Judgment, and further must give "an undertaking in a sum and upon conditions fixed by" the superior court. (§§ 917.2, 917.3)

However, when appellants attempted to obtain a stay per sections 917.2 and 917.3, the superior court erroneously refused to entertain proceedings to fix an undertaking and ordered the clerk to turn over the documents to respondent.

We shall treat the petition for writ of supersedeas filed in this court on June 18, 2002, as a request for stay pending appeal and on that basis grant the petition, on the following terms: Respondent shall forthwith redeposit with the superior court clerk the documents which appellant previously deposited with the clerk. The superior court shall forthwith entertain proceedings to determine the amount and conditions of an undertaking pursuant to section 917.2. Enforcement of the Interlocutory Judgment shall be stayed pending proceedings in the superior court under section 917.2. Upon the superior court's entry of an order fixing the sum of an undertaking and conditions required for a stay per section 917.2, this stay shall automatically be vacated.

Scotland, P.J.

Dated: June 28, 2002

INTERLOCUTORY JUDGMENT OF THE SUPERIOR COURT OF CALIFORNIA (APRIL 30, 2002)

SUPERIOR COURT OF THE
STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF SACRAMENTO

ENTERCOM COMMUNICATIONS CORP.
a Pennsylvania Corporation,

Plaintiff,

v.

ROYCE INTERNATIONAL BROADCASTING CORPORATION, a California Corporation, ROYCE INTERNATIONAL BROADCASTING COMPANY, a California Sole Proprietorship, EDWARD R. STOLZ, II, an Individual and DOES 1-10.,

Defendants.

AND RELATED CROSS-COMPLAINT.

Case No.: 99AS04202

Before: The Hon. Sheldon H. GROSSFELD, Judge of the Superior Court of California County of Sacramento

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This cause came for trial on October 22, 2001, in Department 45 of the above entitled court. The

Honorable Sheldon H. Grossfeld sat without a jury. Plaintiff and Cross-Defendant, Entercom Communications Corp. ("Entercom"), appeared by its attorneys Michael A. Kahn and Jiyun Cameron Lee of Folger Levin & Kahn LLP. Defendants and Cross-Plaintiffs, Royce International Broadcasting Corporation, a California corporation, Royce International Broadcasting Company, a California sole proprietorship, and Edward R. Stolz, II, an individual (collectively "Defendants"), appeared by their attorney Michael W. McCann of Cappello & McCann. Evidence, both oral and documentary, was presented by both parties and the cause was argued and submitted for decision.

IT IS ORDERED, ADJUDGED AND DECREED that Entercom is awarded specific performance of Defendants' obligation, under the contract executed by the parties on February 8, 1996, to assign and transfer to Entercom all the assets relating to KWOD-FM (the "Station") real and personal, tangible and intangible, including authorizations issued by the Federal Communication Commission ("FCC"), used or useful in the operation of the Station, excluding cash and accounts receivable (the "Assets"), in exchange for $25 million in cash. The parties are hereby directed to prepare and execute all documents required under FCC regulations and all other applicable state or federal laws to effectuate the transfer of the Station to Entercom.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court shall conduct an equitable accounting, as set forth in *Stratton v. Tejani*, 139 Cal. App. 3d 204 (1982), to determine whether Entercom should be awarded a reduction in the contractual purchase price. The accounting shall take place

within 90 days of the Closing Date, as that term is defined in Paragraph 5 below. Also as set forth in *Stratton v. Tejani*, Entercom may be entitled to an additional adjustment to the purchase price, if any, incurred during the period from the date of the entry of a final judgment in this action until such date when all appeals have been exhausted or all deadlines for appealing this Judgment have been allowed to expire (the "Appeal Period"). This Court shall retain jurisdiction to make any necessary adjustments to the purchase price based on an accounting after the Appeal Period.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the assignment and transfer of the Assets shall take place in the following manner:

1. Defendants shall sign all documents necessary, under applicable FCC regulations and state or federal laws, to effectuate the transfer of the Station to Entercom. Immediately upon the entry of this Interlocutory Judgment ("Judgment"), Defendants shall deliver to Entercom's counsel the following:

(a) FCC Form 314, Application for Consent to Assignment of Broadcast Station Construction Permit or License ("FCC Form 314"). Defendants shall sign, date and verify the accuracy of answers to all questions in Section II-Assignor. The completed document shall be substantively consistent with the document titled Application for Consent to Assignment of Broadcast Station Construction Permit or License, which was marked as Trial Exhibit 21 at the trial in this action. A copy of Trial Exhibit 21 is attached hereto as Exhibit A and is hereby specific-

ally incorporated herein and made part of this Judgment.

(b) Documentation of the assignment, transfer and conveyance of all FCC licenses, permits, and authorizations to Entercom ("Assignment of Licenses"). Defendants shall sign the document but leave the document undated. The document delivered to Entercom's counsel shall be substantively consistent with the document titled Assignment of Licenses, which was marked as Trial Exhibit 22 at the trial in this action. A copy of Trial Exhibit 22 is attached hereto as Exhibit B and is hereby specifically incorporated herein and made part of this judgment.

(c) Documentation of the assignment, transfer and conveyance of the lease for the Station's main transmitter site to Entercom ("Assignment of Lease"). Defendants shall sign and properly complete all information regarding the lease, but leave the document undated. The document delivered to Entercom's counsel shall be substantively consistent with the document titled Assignment and Assumption of Lease, which was marked as Trial Exhibit 23 at the trial in this action. A copy of Trial Exhibit 23 is attached hereto as Exhibit C and is specifically incorporated hereto and made part of this judgment.

(d) Documentation of the transfer, assignment and delivery of the assets used or useful in the operation of the Station ("Bill of Sale"). Defendants shall sign the document but leave the document undated. The document

> delivered to Entercom's counsel shall be substantively consistent with the document titled Bill of Sale, which was marked as Trial Exhibit 24 at the trial in this action, except that the attachment to the Bill of Sale, which was the Asset Schedule dated November 1, 1995, shall be replaced by Entercom's counsel with the Asset List prepared in accordance with the provisions of Paragraph 15 below. A copy of Bill of Sale that was marked as Trial Exhibit 24 is attached hereto as Exhibit D and is specifically incorporated hereto and made part of this judgment.

2. If Defendants fail to complete, sign and deliver each of the documents identified in Paragraph 1, the Court may complete and sign the documents on behalf of Defendants. This provision shall be in addition to and not in lieu of the Court's contempt power.

3. The signing and delivery of FCC Form 314 by Defendants in accordance with Paragraph 1(a) or the signing and delivery of FCC Form 314 by the Court in accordance with Paragraph 2 shall authorize the electronic filing by Entercom of FCC Form 314 in accordance with applicable FCC policies and rules.

4. The signing and delivery of Assignment of Licenses, Assignment of Lease, and Bill of Sale by Defendants or the Court in accordance with Paragraphs 1(b)-(d) or (2) shall obligate Entercom's counsel to maintain the signed original documents pending the receipt of FCC approval and the expiration of all periods for administrative or judicial appeal, review, or reconsideration of such approval without the insti-

tution of a stay or such further proceedings (the "Final FCC Order") or, in the event Entercom chooses to waive the requirement of finality, such date specified by Entercom following the grant by the FCC of FCC Form 314.

5. The signed Assignment of Licenses, Assignment of Lease, and Bill of Sale shall not become valid and effective until five (5) business days after the Final FCC Order, unless the requirement of finality is waived by Entercom, in which event, until five (5) business days after any such date specified by Entercom following the grant by the FCC of FCC Form 314. For purposes of this Judgment, the fifth business day after the Final FCC Order or, if the requirement of finality is waived by Entercom, the fifth business day after the date specified by Entercom following the grant by the FCC of FCC Form 314 shall be the "Closing Date."

6. No later than 90 days after the Closing Date, this Court shall hold further proceedings to conduct an accounting consistent with *Stratton v. Tejani*, 139 Cal. App. 3d 204 (1982), and enter final judgment upon the conclusion of those proceedings.

7. No later than five (5) business days after the entry of this Judgment, Entercom shall place the sum of $25 million (less the amount of the loan advanced to Defendants under the terms of the Time Brokerage Agreement identified in Paragraph 11 below) in an interest-bearing escrow account (the "Escrow Account") with an escrow company or financial institution in Sacramento, California (the "Escrow Agent"). After the Closing Date, Defendants may withdraw up to $15 million (less the amount of the loan advanced to Defendants under the terms of the

Time Brokerage Agreement) from the Escrow Account. The remaining sum in the Escrow Account shall be held by the Escrow Agent until further Order of this Court.

8. No later than five (5) business days after the entry of this Judgment, Entercom shall place a standby irrevocable letter of credit in the amount of $7.5 million (the "Security") with the Escrow Agent. This Security is intended to protect Defendants against damages, if any, incurred by them as a result of this Judgment in the event that the Judgment is reversed on appeal. The Escrow Agent shall hold the Security and may not release any amount from the Security to any person until further Order of this Court.

9. If the portion of this Judgment relating to specific performance is upheld at the conclusion of the Appeal Period, the Court shall conduct additional proceedings to make a final adjustment to the contractual purchase price, consistent with *Stratton v. Tejani*, 139 Cal. App. 3d 204 (1982). In making this adjustment, the amount then being held in the Escrow Account by the Escrow Agent shall not operate as a ceiling on Entercom's right to an accounting.

10. If the portion of this Judgment relating to specific performance is reversed at the conclusion of the Appeal Period, the Court shall conduct additional proceedings to determine the amount of damages, if any, incurred by Defendants as a result of this Court's decree of specific performance. The sum of the amount of the Security, the amount previously withdrawn by Defendants from the Escrow Account, and the amount then being held in the Escrow

Account shall not operate as a ceiling on Defendants' right to recover damages in the event of reversal.

11. Until the Closing Date (the "Interim Period"), Entercom shall operate the Station in accordance with a Time Brokerage and Program Services Agreement (the "Time Brokerage Agreement"), the terms of which have been agreed to by the parties and a true and correct copy of which is attached hereto as Exhibit E. Under the Time Brokerage Agreement, Edward R. Stolz, II, dba Royce International Broadcasting Company, shall continue to be the licensee of the Station. Entercom shall retain all profits earned from the operation of the Station during the term of the Time Brokerage Agreement and shall not be required to make any payments of any nature to Defendants during the term of that agreement except as specifically provided therein. In the event that the portion of this Judgment concerning specific performance is reversed on appeal and the Station and all of its Assets are transferred back to Defendants, all profits (computed after deducting the amount of any payments made to Defendants under the Time Brokerage Agreement and all other expenses reasonably incurred by Entercom in operating the Station in accordance with Generally Accepted Accounting Principles) earned by Entercom during the term of the Time Brokerage Agreement shall be returned to Defendants. The Court retains jurisdiction to resolve all disputes arising between the parties under the Time Brokerage Agreement.

12. Defendants shall effect all public notices of the filing of FCC Form 314 required under 47 C.F.R. section 73.3580, including but not limited to the broadcast of on-air announcements and publications

of such announcements in the local newspaper as required by 47 C.F.R. Section 73.3580, and shall place a copy of FCC Form 314, as filed electronically, in the Station's public file. In the event that the Parties agree the public notices required under 47 C.F.R. section 73.3580 shall be effected by Entercom as agent for Defendants, Defendants shall not interfere with or impair in any manner Entercom's ability to effect the public notices.

13. Except to the extent it is inconsistent with other laws, Defendants shall comply with all FCC requirements, reasonably cooperate with Entercom to effectuate, and not undertake any action, whether directly or acting through others, to delay, impede or obstruct the successful assignment to Entercom of the Station's FCC licenses, permits, and authorizations in a timely manner. If requested by the FCC, Defendants shall promptly provide additional information in support of FCC Form 314. Nothing in this paragraph shall constitute a waiver by Defendants of any rights they may have under applicable FCC rules and regulations, including but not limited to 47 U.S.C. section 309(d).

14. Defendants shall, within thirty (30) days from the date of entry of this Judgment, deliver the following to Entercom's counsel:

- A copy of its lease of the Station's main transmitter site located at 14150 White Rock Road, Sacramento, California; and
- A list of call letters, copyrights, trademarks, and other intellectual property associated with the Station.

15. Defendants and Entercom shall, within thirty (30) days from the date of entry of this Judgment, jointly conduct an inventory and compile a list of all the tangible property used or useful in the operation of the Station (the "Asset List"). The Asset List shall include office furniture, fixtures, vehicles, computer equipment and broadcast equipment, together with all other tangible property used or useful in the operation of the Station. If Defendants and Entercom cannot agree on an Asset List or if Defendants fail to provide Entercom adequate access to their premises for the purpose of compiling this Asset List within thirty (30) days, the Court shall, upon ex parte application by Entercom, appoint a special master to compile the Asset List on behalf of the parties. In the event the appointment of a special master is found to be necessary by the Court, all fees and costs relating to the employment of such a special master shall be paid by the party or parties whom the Court finds was the primary cause for the need to appoint a special master.

16. On the Closing Date, all of Defendants' rights in FCC licenses, permits, and other authorizations used or useful in the operation of the Station shall be deemed assigned, transferred, and conveyed to Entercom. Such licenses, permits, and authorizations shall include the following:

FM Authorizations

- Main Station License-FCC File No. BLH-19830216AD; expires 12/1/2005
- Auxiliary Antenna License-FCC File No. BLH-19840221A1-1; expires 12/1/2005

- Renewal Authorization-
  BRH-19970801R2; expires 12/1/2005

Auxiliary Service Licenses

- Remote Pickup-KA88917-
  FCC File No. 830217MC
- Remote Pickup-KEZ628-
  FCC File No. 902269
- Remote Pickup-KK4794-
  FCC File No. 922371
- Remote Pickup-KQB326-
  FCC File No. 910596
- Remote Pickup-KU5439-
  FCC File No. 9903D122697
- Aural STL-WBG626-
  FCC File No. 930607ME

Other

- Any other FCC authorizations used in the operation of KWOD(FM) including, without limitation, special temporary authorizations and other permissible authorizations not requiring prior FCC approval pursuant to FCC rules.

17. On the Closing Date, all of Defendants' rights and interests in the lease for the Station' s main transmitter site, which is located at 14150 White Rock Road, Sacramento, California, shall be deemed assigned, transferred and conveyed to Entercom. On the Closing Date, Entercom shall be deemed responsible for all duties and obligations arising

under the lease for the Station's main transmitter site from and after the Closing Date.

18. On the Closing Date, all tangible and intangible property used or useful in the operation of the Station, whether real, personal, or mixed, but excluding therefrom cash and accounts receivable, shall be deemed assigned, transferred and conveyed to Entercom. Such property shall include the assets listed on the Asset List prepared in accordance with Paragraph 15 herein. Such property shall also include the following:

- Public files and originals or, if unavailable, photocopies, of all files, records, studies, data, lists, filings, general accounting records, books of accounts, computer programs and software, and logs, of every kind, relating to the operations or business of the Station;
- The call letters, copyrights, trademarks, and other intellectual property associated with the Station;
- Manufacturers' and vendors' warranties relating to items included in the Assets of the Station;
- All vehicles and titles thereto, properly executed and notarized for transfer to Entercom; and
- All tangible personal property at the Station's studio at 801 K Street, Renaissance Tower, Sacramento, California and at the transmitter facility located at 14150 White Rock Road, Sacramento, California.

Defendants shall be allowed to retain a copy of any financial records necessary to maintain all cash accounts and collect accounts receivable belonging to Defendants.

19. Defendants shall, on or before the Closing Date, provide Entercom with access to the Station's studio at 801 K Street, Renaissance Tower, Sacramento, California and the transmitter facility located at 14150 White Rock Road, Sacramento, California, and shall otherwise reasonably cooperate with Entercom in the transfer of the property described in Paragraph 18 of this Judgment.

20. If Defendants fail to comply with Paragraphs 18 and 19 of this Judgment, the Court shall, upon ex parte application by Entercom, immediately issue a writ of possession for the property described in Paragraph 18 and shall order the levying officer to seize such property pursuant to Code of Civil Procedure ("CCP") section 699.030 and to deliver such property to Entercom. This provision shall be in addition to and not in lieu of the Court's contempt power.

21. On or before the Closing Date, Entercom's counsel shall insert the Closing Date as the effective date of the Assignment of Licenses, Assignment of Lease, and Bill of Sale, and transmit the documents to Entercom and to Defendants.

22. Defendants shall complete all W-9's and other required tax forms and documentation in connection with the transfer of the Station and its Assets to Entercom. To the extent that the Parties are required to complete additional documentation not specifically enumerated in this Judgment to

effectuate the transfer of the Assets, Defendants shall cooperate with Entercom to complete such documentation within a reasonable time. For purposes of this paragraph, failure by the Defendants to complete any necessary additional documentation within fourteen (14) calendar days after notice by Entercom shall be deemed unreasonable.

23. The Court retains jurisdiction to enforce the provisions of the Time Brokerage Agreement, to conduct an accounting after the Closing Date, to make any necessary adjustments to the contractual purchase price or to award damages to Defendants upon the conclusion of the Appeal Period, and to make such further orders as may be proper or necessary to effectuate and enforce the provisions of this Judgment.

/s/ Hon. Sheldon H. Grossfeld
Judge of the Superior Court of
California County of Sacramento

Dated: April 30, 2002

ORDER OF THE DISTRICT OF COLUMBIA CIRCUIT DENYING PETITION FOR REHEARING (MARCH 20, 2018)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EDWARD R. STOLZ, II, D/B/A ROYCE INTERNATIONAL BROADCASTING COMPANY,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

ENTERCOM COMMUNICATIONS CORP., and ENTERCOM LICENSE, LLC,

Intervenors.

No. 16-1248

FCC-16-76

Before: MILLETT, Circuit Judge; EDWARDS and WILLIAMS, Senior Circuit Judges

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Upon consideration of appellant's petition for panel rehearing filed on March 2, 2018, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/
Ken R. Meadows
Deputy Clerk

RELEVANT STATUTORY AND REGULATORY PROVISIONS

5 U.S.C. § 704—Actions Reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

47 U.S.C. § 301—License for Radio Communication or Transmission of Energy

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channel of radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any State, Territory, or

possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States (except as provided in section 303(t) of this title); or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

47 U.S.C. § 303—Powers and Duties of Commission

Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall-

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this chapter: Provided, however, That changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this chapter will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

(k) Have authority to exclude from the requirements of any regulations in whole or in part any radio station upon railroad rolling stock, or to modify such regulations in its discretion;

(l)

(1) Have authority to prescribe the qualifications of station operators, to classify them according to the duties to be performed, to fix the forms of such licenses, and to issue them to persons who are found to be qualified by the Commission and who otherwise are legally eligible for employment in the United States, except that such requirement relating to eligibility for employment in the United States shall not apply in the case of licenses issued by the Commission to (A) persons holding United States pilot certificates; or (B) persons holding foreign aircraft pilot certificates which are valid in the United States, if the foreign government involved has entered into a reciprocal agreement under which such foreign government does not impose any similar requirement relating to eligibility for employment upon citizens of the United States;

(2) Notwithstanding paragraph (1) of this subsection, an individual to whom a radio station is licensed under the provisions of this chapter may be issued an operator's license to operate that station.

(3) In addition to amateur operator licenses which the Commission may issue to aliens pursuant to paragraph (2) of this subsection, and notwithstanding section 301 of this title and paragraph (1) of this subsection, the Commission may issue authorizations, under such conditions and terms as it may prescribe, to permit an alien licensed by his government as an amateur radio operator to operate his amateur radio station licensed by his government in the United States, its possessions, and the Commonwealth of Puerto Rico provided there is in effect a multilateral or bilateral agreement, to which the United States and the alien's government are parties, for such operation on a reciprocal basis by United States amateur radio operators. Other provisions of this chapter and of subchapter II of chapter 5, and chapter 7, of Title 5 shall not be applicable to any request or application for or modification, suspension, or cancellation of any such authorization.

(m)

(1) Have authority to suspend the license of any operator upon proof sufficient to satisfy the Commission that the licensee-

(A) has violated, or caused, aided, or abetted the violation of, any provision of any Act, treaty, or convention binding on the United States, which the Commission is authorized to administer, or any regulation made by the Commission under any such Act, treaty, or convention; or

(B) has failed to carry out a lawful order of the master or person lawfully in charge of the ship or aircraft on which he is employed; or

(C) has willfully damaged or permitted radio apparatus or installations to be damaged; or

(D) has transmitted superfluous radio communications or signals or communications containing profane or obscene words, language, or meaning, or has knowingly transmitted—

(1) false or deceptive signals or communications, or

(2) a call signal or letter which has not been assigned by proper authority to the station he is operating; or

(E) has willfully or maliciously interfered with any other radio communications or signals; or

(F) has obtained or attempted to obtain, or has assisted another to obtain or attempt to obtain, an operator's license by fraudulent means.

(2) No order of suspension of any operator's license shall take effect until fifteen days' notice in writing thereof, stating the cause for the proposed suspension, has been given to the operator licensee who may make written application to the Commission at any time within said fifteen days for a hearing upon such order. The notice to the operator licensee shall not be effective until actually received by him, and from that time he shall have fifteen days in which to mail the said application. In the event that physical conditions prevent mailing of the application at the expiration of the fifteen-day period, the application shall then be mailed as soon as possible thereafter, accompanied by a satisfactory explanation of the delay. Upon receipt by the Commission of such application for hearing, said order of suspension shall be held in abeyance until the conclusion of the hearing which shall be conducted under such rules as the Commission may prescribe. Upon the conclusion of said hearing the Commission may affirm, modify, or revoke said order of suspension.

(n) Have authority to inspect all radio installations associated with stations required to be licensed by any Act, or which the Commission by rule has authorized to operate without a license under section 307(e)(1) of this title, or which are subject to the provisions of any Act, treaty, or convention binding on the United States, to ascertain whether in construction, installation, and operation they conform to the requirements

of the rules and regulations of the Commission, the provisions of any Act, the terms of any treaty or convention binding on the United States, and the conditions of the license or other instrument of authorization under which they are constructed, installed, or operated.

(o) Have authority to designate call letters of all stations;

(p) Have authority to cause to be published such call letters and such other announcements and data as in the judgment of the Commission may be required for the efficient operation of radio stations subject to the jurisdiction of the United States and for the proper enforcement of this chapter;

(q) Have authority to require the painting and/or illumination of radio towers if and when in its judgment such towers constitute, or there is a reasonable possibility that they may constitute, a menace to air navigation. The permittee or licensee, and the tower owner in any case in which the owner is not the permittee or licensee, shall maintain the painting and/or illumination of the tower as prescribed by the Commission pursuant to this section. In the event that the tower ceases to be licensed by the Commission for the transmission of radio energy, the owner of the tower shall maintain the prescribed painting and/or illumination of such tower until it is dismantled, and the Commission may require the owner to dismantle and remove the tower when the Administrator of the Federal Aviation Agency determines that there is a rea-

sonable possibility that it may constitute a menace to air navigation.

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party.

(s) Have authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in interstate commerce, or is imported from any foreign country into the United States, for sale or resale to the public.

(t) Notwithstanding the provisions of section 301(e) of this title, have authority, in any case in which an aircraft registered in the United States is operated (pursuant to a lease, charter, or similar arrangement) by an aircraft operator who is subject to regulation by the government of a foreign nation, to enter into an agreement with such government under which the Commission shall recognize and accept any radio station licenses and radio operator licenses issued by such government with respect to such aircraft.

(u) Require that, if technically feasible-

(1) apparatus designed to receive or play back video programming transmitted simultaneously with sound, if such apparatus is manufactured in the United States or imported for use in the United States and uses a picture screen of any size-

(A) be equipped with built-in closed caption decoder circuitry or capability designed to display closed-captioned video programming;

(B) have the capability to decode and make available the transmission and delivery of video description services as required by regulations reinstated and modified pursuant to section 613(f) of this title; and

(C) have the capability to decode and make available emergency information (as that term is defined in section 79.2 of the Commission's regulations (47 CFR 79.2)) in a manner that is accessible to individuals who are blind or visually impaired; and

(2) notwithstanding paragraph (1) of this subsection-

(A) apparatus described in such paragraph that use a picture screen that is less than 13 inches in size meet the requirements of subparagraph (A), (B), or (C) of such paragraph only if the requirements of such subparagraphs are achievable (as defined in section 617 of this title);

(B) any apparatus or class of apparatus that are display-only video monitors with no playback capability are exempt from the requirements of such paragraph; and

(C) the Commission shall have the authority, on its own motion or in response to a petition by a manufacturer, to waive the requirements of this subsection for any apparatus or class of apparatus-

(i) primarily designed for activities other than receiving or playing back video programming transmitted simultaneously with sound; or

(ii) for equipment designed for multiple purposes, capable of receiving or playing video programming transmitted simultaneously with sound but whose essential utility is derived from other purposes.

(v) Have exclusive jurisdiction to regulate the provision of direct-to-home satellite services. As used in this subsection, the term "direct-to-home satellite services" means the distribution or broadcasting of programming or services by satellite directly to the subscriber's premises without the use of ground receiving or distribution equipment, except at the subscriber's premises or in the uplink process to the satellite.

(w) Omitted.

(x) Require, in the case of an apparatus designed to receive television signals that are shipped in

interstate commerce or manufactured in the United States and that have a picture screen 13 inches or greater in size (measured diagonally), that such apparatus be equipped with a feature designed to enable viewers to block display of all programs with a common rating, except as otherwise permitted by regulations pursuant to section 330(c)(4) of this title.

(y) Have authority to allocate electromagnetic spectrum so as to provide flexibility of use, if-

(1) such use is consistent with international agreements to which the United States is a party; and

(2) the Commission finds, after notice and an opportunity for public comment, that-

(A) such an allocation would be in the public interest;

(B) such use would not deter investment in communications services and systems, or technology development; and

(C) such use would not result in harmful interference among users.

(z) Require that-

(1) if achievable (as defined in section 617 of this title), apparatus designed to record video programming transmitted simultaneously with sound, if such apparatus is manufactured in the United States or imported for use in the United States, enable the rendering or the pass through of closed captions, video description signals, and emergency informa-

tion (as that term is defined in section 79.2 of title 47, Code of Federal Regulations) such that viewers are able to activate and de-activate the closed captions and video description as the video programming is played back on a picture screen of any size; and

(2) interconnection mechanisms and standards for digital video source devices are available to carry from the source device to the consumer equipment the information necessary to permit or render the display of closed captions and to make encoded video description and emergency information audible.

(aa) Require-

(1) if achievable (as defined in section 617 of this title) that digital apparatus designed to receive or play back video programming transmitted in digital format simultaneously with sound, including apparatus designed to receive or display video programming transmitted in digital format using Internet protocol, be designed, developed, and fabricated so that control of appropriate built-in apparatus functions are accessible to and usable by individuals who are blind or visually impaired, except that the Commission may not specify the technical standards, protocols, procedures, and other technical requirements for meeting this requirement;

(2) that if on-screen text menus or other visual indicators built in to the digital apparatus are used to access the functions of the

apparatus described in paragraph (1), such functions shall be accompanied by audio output that is either integrated or peripheral to the apparatus, so that such menus or indicators are accessible to and usable by individuals who are blind or visually impaired in real-time;

(3) that for such apparatus equipped with the functions described in paragraphs (1) and (2) built in access to those closed captioning and video description features through a mechanism that is reasonably comparable to a button, key, or icon designated for activating the closed captioning or accessibility features; and

(4) that in applying this subsection the term "apparatus" does not include a navigation device, as such term is defined in section 76.1200 of the Commission's rules (47 CFR 76.1200).

(bb) Require-

(1) if achievable (as defined in section 617 of this title), that the on-screen text menus and guides provided by navigation devices (as such term is defined in section 76.1200 of title 47, Code of Federal Regulations) for the display or selection of multichannel video programming are audibly accessible in real-time upon request by individuals who are blind or visually impaired, except that the Commission may not specify the technical standards, protocols, procedures,

and other technical requirements for meeting this requirement;

(2) for navigation devices with built-in closed captioning capability, that access to that capability through a mechanism is reasonably comparable to a button, key, or icon designated for activating the closed captioning, or accessibility features; and

(3) that, with respect to navigation device features and functions—

(A) delivered in software, the requirements set forth in this subsection shall apply to the manufacturer of such software; and

(B) delivered in hardware, the requirements set forth in this subsection shall apply to the manufacturer of such hardware.

47 U.S.C. § 307—Licenses

(a) Grant

The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

(b) Allocation of facilities

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power

among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

(c) Terms of licenses

(1) Initial and renewal licenses

Each license granted for the operation of a broadcasting station shall be for a term of not to exceed 8 years. Upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed 8 years from the date of expiration of the preceding license, if the Commission finds that public interest, convenience, and necessity would be served thereby. Consistent with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, the public interest, convenience, or necessity would be served by such action.

(2) Materials in application

In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which

previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings.

47 U.S.C. § 308—Requirements for license

(a) Writing; exceptions

The Commission may grant construction permits and station licenses, or modifications or renewals thereof, only upon written application therefor received by it: Provided, That (1) in cases of emergency found by the Commission involving danger to life or property or due to damage to equipment, or (2) during a national emergency proclaimed by the President or declared by the Congress and during the continuance of any war in which the United States is engaged and when such action is necessary for the national defense or security or otherwise in furtherance of the war effort, or (3) in cases of emergency where the Commission finds, in the nonbroadcast services, that it would not be feasible to secure renewal applications from existing licensees or otherwise to follow normal licensing procedure, the Commission may grant construction permits and station licenses, or modifications or renewals thereof, during the emergency so found by the Commission or during the continuance of any such national emergency or war, in such manner and upon such terms and conditions as the Commission shall by regulation prescribe, and without the filing of a formal application, but no author-

ization so granted shall continue in effect beyond the period of the emergency or war requiring it: Provided further, That the Commission may issue by cable, telegraph, or radio a permit for the operation of a station on a vessel of the United States at sea, effective in lieu of a license until said vessel shall return to a port of the continental United States.

(b) Conditions

All applications for station licenses, or modifications or renewals thereof, shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/ or such statement of fact shall be signed by the applicant and/or licensee in any manner or form, including by electronic means, as the Commission may prescribe by regulation.

(c) Commercial Communication

The Commission in granting any license for a station intended or used for commercial communication between the United States or any Territory or possession, continental or insular, subject to the jurisdiction of the United States, and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses by section 35 of this title.

(d) Summary of Complaints

Each applicant for the renewal of a commercial or noncommercial television license shall attach as an exhibit to the application a summary of written comments and suggestions received from the public and maintained by the licensee (in accordance with Commission regulations) that comment on the applicant's programming, if any, and that are characterized by the commentor as constituting violent programming.

47 U.S.C. § 309—Application for License

(a) Considerations in Granting Application

Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that

public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

47 U.S.C. § 310—License Ownership Restrictions

(a) Grant to or Holding by Foreign Government or Representative

The station license required under this chapter shall not be granted to or held by any foreign government or the representative thereof.

(b) Grant to or Holding by Alien or Representative, Foreign Corporation, etc.

No broadcast or common carrier or aeronautical en route or aeronautical fixed radio station license shall be granted to or held by-

(1) any alien or the representative of any alien;

(2) any corporation organized under the laws of any foreign government;

(3) any corporation of which more than one-fifth of the capital stock is owned of record or voted by aliens or their representatives or by a foreign government or representative thereof or by any corporation organized under the laws of a foreign country;

(4) any corporation directly or indirectly controlled by any other corporation of which more than one-fourth of the capital stock is owned of record or voted by aliens, their representatives, or by a foreign government or representative thereof, or by any corporation organized under the laws of a foreign

country, if the Commission finds that the public interest will be served by the refusal or revocation of such license.

(c) Authorization for Aliens Licensed by Foreign Governments; Multilateral or Bilateral Agreement to Which United States and Foreign Country are Parties as Prerequisite

In addition to amateur station licenses which the Commission may issue to aliens pursuant to this chapter, the Commission may issue authorizations, under such conditions and terms as it may prescribe, to permit an alien licensed by his government as an amateur radio operator to operate his amateur radio station licensed by his government in the United States, its possessions, and the Commonwealth of Puerto Rico provided there is in effect a multilateral or bilateral agreement, to which the United States and the alien's government are parties, for such operation on a reciprocal basis by United States amateur radio operators. Other provisions of this chapter and of subchapter II of chapter 5, and chapter 7, of Title 5 shall not be applicable to any request or application for or modification, suspension, or cancellation of any such authorization.

(d) Assignment and Transfer of Construction Permit or Station License

No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by trans-

fer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee.

(e) Administration of Regional Concentration Rules for Broadcast Stations

(1) In the case of any broadcast station, and any ownership interest therein, which is excluded from the regional concentration rules by reason of the savings provision for existing facilities provided by the First Report and Order adopted March 9, 1977 (docket No. 20548; 42 Fed. Reg. 16145), the exclusion shall not terminate solely by reason of changes made in the technical facilities of the station to improve its service.

(2) For purposes of this subsection, the term "regional concentration rules" means the provisions of sections 73.35, 73.240, and 73.636 of title 47, Code of Federal Regulations (as in effect June 1, 1983), which prohibit any party from directly or indirectly owning, operating, or controlling three broadcast stations in one or several services where any two of such stations are

within 100 miles of the third (measured city-to-city), and where there is a primary service contour overlap of any of the stations.

47 U.S.C. § 405—Petition for Reconsideration; Procedure; Disposition; Time of Filing; Additional Evidence; Time for Disposition of Petition for Reconsideration of Order Concluding Hearing or Investigation; Appeal of Order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where

the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: Provided, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)

(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

47 C.F.R. § 1.106—Petitions for Reconsideration in Non-Rulemaking Proceedings

(p) Petitions for reconsideration of a Commission action that plainly do not warrant consideration by the Commission may be dismissed or denied by the relevant bureau(s) or office(s). Examples include, but are not limited to, petitions that:

(1) Fail to identify any material error, omission, or reason warranting reconsideration;

(2) Rely on facts or arguments which have not previously been presented to the Commission and which do not meet the requirements of paragraphs (b)(2), (b)(3), or (c) of this section;

(3) Rely on arguments that have been fully considered and rejected by the Commission within the same proceeding;

(4) Fail to state with particularity the respects in which petitioner believes the action taken

should be changed as required by paragraph (d) of this section;

(5) Relate to matters outside the scope of the order for which reconsideration is sought;

(6) Omit information required by these rules to be included with a petition for reconsideration, such as the affidavit required by paragraph (e) of this section (relating to electrical interference);

(7) Fail to comply with the procedural requirements set forth in paragraphs (f) and (i) of this section;

(8) Relate to an order for which reconsideration has been previously denied on similar grounds, except for petitions which could be granted under paragraph (c) of this section; or

(9) Are untimely.

47 C.F.R. § 1.115—Application for Review of Action Taken Pursuant to Delegated Authority

(a) Any person aggrieved by any action taken pursuant to delegated authority may file an application requesting review of that action by the Commission. Any person filing an application for review who has not previously participated in the proceeding shall include with his application a statement describing with particularity the manner in which he is aggrieved by the action taken and showing good reason why it was not possible for him to participate in the earlier stages of the proceeding. Any application for

review which fails to make an adequate showing in this respect will be dismissed.

(b)

(1) The application for review shall concisely and plainly state the questions presented for review with reference, where appropriate, to the findings of fact or conclusions of law.

(2) The application for review shall specify with particularity, from among the following, the factor(s) which warrant Commission consideration of the questions presented:

(i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.

(ii) The action involves a question of law or policy which has not previously been resolved by the Commission.

(iii) The action involves application of a precedent or policy which should be overturned or revised.

(iv) An erroneous finding as to an important or material question of fact.

(v) Prejudicial procedural error.

(3) The application for review shall state with particularity the respects in which the action taken by the designated authority should be changed.

(4) The application for review shall state the form of relief sought and, subject to this requirement, may contain alternative requests.

(c) No application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.

Note: Subject to the requirements of § 1.106, new questions of fact or law may be presented to the designated authority in a petition for reconsideration.

(d) Except as provided in paragraph (e) of this section and in § 0.461(j) of this chapter, the application for review and any supplemental thereto shall be filed within 30 days of public notice of such action, as that date is defined in § 1.4(b). Opposition to the application shall be filed within 15 days after the application for review is filed. Except as provided in paragraph (e)(3) of this section, replies to oppositions shall be filed within 10 days after the opposition is filed and shall be limited to matters raised in the opposition.

(e)

(1) Applications for review of interlocutory rulings made by the Chief Administrative Law Judge (see § 0.351) shall be deferred until the time when exceptions are filed unless the Chief Judge certifies the matter to the Commission for review. A matter shall be certified to the Commission only if the Chief Judge determines that it presents a new or novel question of law or policy and that the ruling is such that error would be likely to require remand should the appeal be deferred and raised as an exception. The request to

certify the matter to the Commission shall be filed within 5 days after the ruling is made. The application for review shall be filed within 5 days after the order certifying the matter to the Commission is released or such ruling is made. Oppositions shall be filed within 5 days after the application is filed. Replies to oppositions shall be filed only if they are requested by the Commission. Replies (if allowed) shall be filed within 5 days after they are requested. A ruling certifying or not certifying a matter to the Commission is final: Provided, however, That the Commission may, on its own motion, dismiss the application for review on the ground that objections to the ruling should be deferred and raised as an exception.

(2) The failure to file an application for review of an interlocutory ruling made by the Chief Administrative Law Judge or the denial of such application by the Commission, shall not preclude any party entitled to file exceptions to the initial decision from requesting review of the ruling at the time when exceptions are filed. Such requests will be considered in the same manner as exceptions are considered.

(3) Applications for review of a hearing designation order issued under delegated authority shall be deferred until exceptions to the initial decision in the case are filed, unless the presiding Administrative Law Judge certifies such an application for review to the Commission. A matter shall be certified

to the Commission only if the presiding Administrative Law Judge determines that the matter involves a controlling question of law as to which there is substantial ground for difference of opinion and that immediate consideration of the question would materially expedite the ultimate resolution of the litigation. A ruling refusing to certify a matter to the Commission is not appealable. In addition, the Commission may dismiss, without stating reasons, an application for review that has been certified, and direct that the objections to the hearing designation order be deferred and raised when exceptions in the initial decision in the case are filed. A request to certify a matter to the Commission shall be filed with the presiding Administrative Law Judge within 5 days after the designation order is released. Any application for review authorized by the Administrative Law Judge shall be filed within 5 days after the order certifying the matter to the Commission is released or such a ruling is made. Oppositions shall be filed within 5 days after the application for review is filed. Replies to oppositions shall be filed only if they are requested by the Commission. Replies (if allowed) shall be filed within 5 days after they are requested.

(4) Applications for review of final staff decisions issued on delegated authority in formal complaint proceedings on the Enforcement Bureau's Accelerated Docket (see, *e.g.*, § 1.730) shall be filed within 15 days of public notice

of the decision, as that date is defined in § 1.4(b). These applications for review oppositions and replies in Accelerated Docket proceedings shall be served on parties to the proceeding by hand or facsimile transmission.

(f) Applications for review, oppositions, and replies shall conform to the requirements of §§ 1.49, 1.51, and 1.52, and shall be submitted to the Secretary, Federal Communications Commission, Washington, DC 20554. Except as provided below, applications for review and oppositions thereto shall not exceed 25 double-space typewritten pages. Applications for review of interlocutory actions in hearing proceedings (including designation orders) and oppositions thereto shall not exceed 5 double-spaced typewritten pages. When permitted (see paragraph (e)(3) of this section), reply pleadings shall not exceed 5 double-spaced typewritten pages. The application for review shall be served upon the parties to the proceeding. Oppositions to the application for review shall be served on the person seeking review and on parties to the proceeding. When permitted (see paragraph (e)(3) of this section), replies to the opposition(s) to the application for review shall be served on the person(s) opposing the application for review and on parties to the proceeding.

(g) The Commission may grant the application for review in whole or in part, or it may deny the application with or without specifying reasons therefor. A petition requesting reconsideration of a ruling which denies an application for review

will be entertained only if one or more of the following circumstances is present:

(1) The petition relies on facts which related to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or

(2) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

(h)

(1) If the Commission grants the application for review in whole or in part, it may, in its decision:

(i) Simultaneously reverse or modify the order from which review is sought;

(ii) Remand the matter to the designated authority for reconsideration in accordance with its instructions, and, if an evidentiary hearing has been held, the remand may be to the person(s) who conducted the hearing; or

(iii) Order such other proceedings, including briefs and oral argument, as may be necessary or appropriate.

(2) In the event the Commission orders further proceedings, it may stay the effect of the order from which review is sought. (See § 1.102.) Following the completion of such further proceedings the Commission may

> affirm, reverse or modify the order from which review is sought, or it may set aside the order and remand the matter to the designated authority for reconsideration in accordance with its instructions. If an evidentiary hearing has been held, the Commission may remand the matter to the person(s) who conducted the hearing for rehearing on such issues and in accordance with such instructions as may be appropriate.

Note: For purposes of this section, the word "order" refers to that portion of its action wherein the Commission announces its judgment. This should be distinguished from the "memorandum opinion" or other material which often accompany and explain the order.

(i) An order of the Commission which reverses or modifies the action taken pursuant to delegated authority is subject to the same provisions with respect to reconsideration as an original order of the Commission. In no event, however, shall a ruling which denies an application for review be considered a modification of the action taken pursuant to delegated authority.

(j) No evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission believes should have been taken in the original proceeding shall be taken on any rehearing ordered pursuant to the provisions of this section.

(k) The filing of an application for review shall be a condition precedent to judicial review of any action taken pursuant to delegated authority.

47 C.F.R. § 73.1150—Transferring a Station

(a) In transferring a broadcast station, the licensee may retain no right of reversion of the license, no right to reassignment of the license in the future, and may not reserve the right to use the facilities of the station for any period whatsoever.

(b) No license, renewal of license, assignment of license or transfer of control of a corporate licensee will be granted or authorized if there is a contract, arrangement or understanding, express or implied, pursuant to which, as consideration or partial consideration for the assignment or transfer, such rights, as stated in paragraph (a) of this section, are retained.

(c) Licensees and/or permittees authorized to operate in the 535-1605 kHz and in the 1605-1705 kHz band pursuant to the Report and Order in MM Docket No. 87-267 will not be permitted to assign or transfer control of the license or permit for a single frequency during the period that joint operation is authorized.

(d) Authorizations awarded pursuant to the noncommercial educational point system in subpart K are subject to the holding period in § 73.7005. Applications for an assignment or transfer filed prior to the end of the holding period must demonstrate the factors enumerated therein.

47 C.F.R. § 73.3555—Multiple Ownership

(a)(1) Local radio ownership rule. A person or single entity (or entities under common control) may have a cognizable interest in licenses for AM or FM radio broadcast stations in accordance with the following limits:

(i) In a radio market with 45 or more full-power, commercial and noncommercial radio stations, not more than 8 commercial radio stations in total and not more than 5 commercial stations in the same service (AM or FM);

(ii) In a radio market with between 30 and 44 (inclusive) full-power, commercial and non-commercial radio stations, not more than 7 commercial radio stations in total and not more than 4 commercial stations in the same service (AM or FM);

(iii) In a radio market with between 15 and 29 (inclusive) full-power, commercial and non-commercial radio stations, not more than 6 commercial radio stations in total and not more than 4 commercial stations in the same service (AM or FM); and

(iv) In a radio market with 14 or fewer full-power, commercial and noncommercial radio stations, not more than 5 commercial radio stations in total and not more than 3 commercial stations in the same service (AM or FM); provided, however, that no person or single entity (or entities under common control) may have a cognizable interest in more than 50% of the full-power, commercial and noncommercial radio stations in such market unless

the combination of stations comprises not more than one AM and one FM station.

(2) Overlap between two stations in different services is permissible if neither of those two stations overlaps a third station in the same service.