

FEDERAL COMMUNICATIONS COMMISSION
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In Reply Refer To:
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In re: KIEV(AM), Culver City, CA
Facility ID No. 57893
BP-20111, as modified
by BMAP-20001020AAT

Dear Counsel:

This letter concerns the February 11, 2002, petition (“Petition”), filed on behalf of Royce International Broadcasting Company (“Royce”), for reconsideration of the staff’s January 11, 2002, denial of Royce’s request (“Request”) for waiver of the Commission’s construction period rule.¹ Royce seeks additional time to construct unbuilt station KIEV(AM), Culver City, California, based on difficulties at its transmitter site. Absent a waiver, Royce’s permit would have expired on April 25, 2002. For the reasons detailed below, Royce’s Petition is denied.

Background. Royce had a permit to construct KIEV(AM) for more than eighteen years. The staff extended the station’s October 23, 1985, construction deadline ten times under our former construction period rules.² Royce also benefited from several grants of additional time thereafter.³ On October 20, 2000, in the AM Auction 32 filing window,

¹ See 47 C.F.R. § 73.3598(a). Waivers are required to extend the construction period of any station that received three or more unencumbered years to construct. See *Wendell & Associates*, 17 FCC Rcd 18576, 18577-78 (2002) (citing *Texas Grace Communications*, 16 FCC Rcd 19167, 19170 (2001) (“*Texas Grace*”).

² See former rule section 73.3534, 47 C.F.R. § 73.3534 (1998) (“Application for extension of construction permit or for construction permit to replace expired construction permit.”).

³ To ensure a smooth transition to new construction period standards, the Commission first gave certain permittees, including Royce, until December 21, 2000, to complete construction. See *1998 Biennial Regulatory Review—Streamlining of Mass Media Applications, Rules, and Processes*, 13 FCC Rcd 23056 (1998) (“*Streamlining R&O*”), *recons. granted in part and denied in part*, 14 FCC Rcd 17525, 17536 (1999) (“*Streamlining MO&O*”). The staff subsequently gave permittees filing major modification applications in the AM Auction 32 filing window, including Royce, until December 21, 2001, to obtain

Royce applied to co-locate the station's transmitting antenna on KDIS(AM)'s tower and to change KIEV(AM)'s community of license from Burbank to Culver City, California. Royce amended this application on August 6, 2001, to specify a tower site on land owned by an oil company, Stocker Resources, Inc. ("Stocker"), in the City of Montebello, California ("Montebello"). On September 28, 2001, the staff granted Royce's amended proposal, making no change to the permit's December 21, 2001, expiration date.

Two weeks prior to the permit's expiration, Royce requested a waiver of the Commission's rules. Royce sought to extend its construction deadline for a three-year period, *i.e.*, to December 21, 2004. Royce explained that it had not yet sought zoning for the Stocker property, that zoning approval takes a minimum of five months, and that new personnel at Stocker were negating Stocker's earlier promise to assist Royce in obtaining zoning. Royce, while recognizing that the Commission's *Streamlining* orders did not contemplate waivers based on initial zoning, argued that the Commission in the *Texas Grace* case "has apparently taken a completely different view" with respect to certain local zoning matters and community of license changes.⁴ In support of its request, Royce provided a November 2001 Declaration from Cliff Clement, Stocker's previous land manager. Clement offers his understanding that the site availability assurances he had provided Royce -- to allow use of Stocker's existing microwave permit, and to help Royce get a new or modified use permit to authorize additional AM towers following FCC approval -- were modified after his June 2001 departure. The modified assurances prohibited Royce from using the property until it obtained a new land use permit from Montebello's authorities.⁵

On January 11, 2002, the staff waived the rules on its own motion based on circumstances that Royce never raised. Specifically, the staff revised KIEV(AM)'s construction deadline to April 25, 2002, to compensate Royce for an 84-day period connected to an international condition on Royce's permit. However, the staff denied Royce's waiver request. The staff stated that the standard for grant of a construction period waiver is "rare and exceptional circumstances" beyond the applicant's control that would prevent construction, and that Royce's zoning problems were not such circumstances.⁶ The staff emphasized that diligent permittees apply for local zoning approval prior to issuance of a construction permit.⁷ The staff further noted that there

permits and to complete construction. *See AM Auction No. 32 Non-Mutually Exclusive Applications*, DA 00-2142 (MMB Sep. 22, 2000). The staff also revised KIEV(AM)'s construction deadline to April 25, 2002, to compensate Royce for an 84-day period connected to an international condition on Royce's permit. *Letter to Andrew S. Kersting, Esq.* (MMB Jan. 11, 2002) ("*Staff Decision*").

⁴ Request at 16 (citing *Requests for Further Extension of the November 1, 2000, Digital Television Construction Deadline*, 16 FCC Rcd 8122 (2001) ("*DTV Decision*") and *Texas Grace*, *supra* note 1).

⁵ Request at Exhibit E ("It is my understanding that despite the agreement I made with Mr. Stolz concerning his use of the oil company's property, Stocker is no longer willing to make its property available to Mr. Stolz for the KIEV transmitter site unless he first obtains a new or modified conditional use permit authorizing the construction of the additional towers.").

⁶ *Staff Decision* (citing *Streamlining MO&O*, 14 FCC Rcd at 17540).

⁷ *Id.*

was no evidence that Royce was prevented from initiating the local permit process without Stocker's assistance.⁸

On February 11, 2002, Royce filed the instant Petition. Royce alleges that staff erroneously concluded that the local permit process could commence without the site owner's participation and challenges the staff's interpretation of the *DTV Decision* and *Texas Grace*, which involved an FM permittee. Royce also argues that the staff failed to distinguish the KIEV(AM) request in accordance with Section 319(b) of the Act, 47 U.S.C. § 319(b), which states that a construction permit will be automatically forfeited if the station is not ready for operation by the specified permit deadline unless causes not under the permittee's control prevent completion of the authorized facilities.⁹ Finally, Royce argues that the staff was mistaken that the international matters on which the staff based its 84-day waiver were completed, and that additional time beyond the 84 days is warranted.

Discussion. Reconsideration is appropriate when a petitioner raises additional facts not known or not existing until after its last opportunity to present such matters, or when there is a material error or omission in the original action.¹⁰ New facts may be relied upon: (1) if they relate to events that occurred or circumstances that changed since the last opportunity to present such matters; (2) if they relate to events unknown to the petitioner until after its last opportunity to present such matters and the petitioner could not, through the exercise of ordinary diligence, have learned of them prior to such opportunity; or (3) if consideration of the facts is required in the public interest.¹¹

Royce submits new documentation with its petition consisting of: (1) a January 23, 2002, letter from the Montebello authorities explaining that city procedures mandate that zoning applications be accompanied by written consent of the land owner; (2) a January 10, 2002, declaration from Cliff Clement ("New Clement Declaration") stating that Stocker did not provide such written consent during Clement's tenure;¹² and (3) a

⁸ Allegations that are not based on personal knowledge, but instead on second-hand information, are insufficient. *See Rocky Mountain Radio Co.*, 15 FCC Rcd 7166 (1999) (citing *KRPL, Inc.*, 5 FCC Rcd 2823, 2824 (1990)).

⁹ *Petition* at 14.

¹⁰ *Infinity Radio License, Inc.*, 17 FCC Rcd 18339 (EB Sep. 27, 2002) (citing *WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied* 383 U.S. 967 (1966)). *See also* 47 C.F.R. Section 1.106(c).

¹¹ *See* 47 C.F.R. § 1.106(c). This rule is fundamental to the Commission's processes, encouraging applicants and others to provide complete information at an early stage, thereby enabling efficiency in the process rather than having facts presented in a piecemeal fashion. *See Carolyn S. Hagedorn*, 11 FCC Rcd 1695, 1696 (1996). *See also Payne of Virginia, Inc.*, 66 FCC 2d 633, 637 (1977) (the public interest is served by orderly adjudicative processes and administrative finality should not be sacrificed to consider additional evidence seeking to offset a party's oversight or lack of diligence).

¹² *See Petition* at Appendix B.

February 7, 2002, declaration from Mark Mocerri (“Mocerri Declaration”), Royce’s technical contractor, indicating that land use negotiations with Stocker continued through the date of his declaration.¹³

Although each new document is dated after our denial of the waiver request, Royce offers no evidence that such documents could not have been submitted with the waiver request. Moreover, the recently-filed documents do not establish that Montebello’s zoning processes are unique or even unusual so as to warrant an exception to the general principle that initial zoning problems do not form a basis for grant of additional construction time. An applicant must have reasonable assurance of the availability of its specified tower location when it applies to construct its transmitting facilities at that location.¹⁴ An applicant specifying a tower site dependent upon local zoning does not have reasonable assurance of that site unless it contacts the local authority prior to filing the construction permit application.¹⁵ The present record indicates that Royce specified the Stocker tower site in August of 2001 but did not contact local zoning authorities until January of 2002.¹⁶

Royce argues that the decision not to seek zoning approval prior to FCC grant of Royce’s major change application was Stocker’s rather than Royce’s. The New Clement Declaration explains that the Stocker property is environmentally sensitive because the area near the towers contains sagebrush, a protected plant under federal and California law, which Stocker would be required to relocate. Clement notes that the land is also adjacent to property administered by a state-funded conservancy whose mission is to “strategically buy back, preserve, protect, restore, and enhance treasured pieces of Southern California to form an interlinking system of urban, rural, and river parks, open space trails and wildlife habitats.”¹⁷ According to Clement, it would not have been in Stocker’s interest to have Royce file a zoning application, potentially raising local controversy, until it was certain that the FCC would approve the project.

Royce’s decision not to pursue zoning based on concerns of local opposition was a choice that it made; this was not a matter beyond its control.¹⁸ We also reject Royce’s

¹³ Royce supplemented this information on April 23, 2002, and on May 24, 2002, reporting that Stocker terminated land use negotiations on April 10, 2002, and that the search for an alternate site succeeded in locating property within Montebello that was unlikely to require local zoning approval.

¹⁴ See *William F. and Anna K. Wallace*, 49 F.C.C.2d 1424, 1427 (Rev. Bd. 1989); *Genesee Communications, Inc.*, 3 FCC Rcd 3595 (1988); *National Innovative Programming Network*, 2 FCC Rcd 5641 (1987).

¹⁵ *Streamlining MO&O*, 14 FCC Rcd at 17540.

¹⁶ *Petition* at Appendix C.

¹⁷ *Petition* at 5.

¹⁸ We observe that in its modification application to move to the Stocker site, Royce certified compliance with our environmental rules, yet such site would have required an environmental assessment if the facilities might have an effect on a threatened or endangered species and/or critical habitat. See 47 C.F.R.

argument that Section 319(b) of the Act requires our extension of construction deadlines for any matter beyond the control of the permittee.¹⁹ The Commission rejected an identical assertion that Royce had made in a petition for reconsideration of the Commission's *Streamlining R&O*.²⁰

Royce continues to allege that the staff's action is inconsistent with the Commission's *Texas Grace* decision, in which a community of license change was the basis for granting additional time to construct.²¹ As explained in the *Staff Decision*, *Texas Grace* is clearly distinguishable. In that case, the Commission found that language in a Commission Order could have created uncertainty about whether modification applications combined with a rulemaking proceeding to change community of license encumbered a permittee's efforts to complete construction.²² In contrast, Royce's modification application was not associated with any rulemaking proceeding and, most importantly, was filed after the Commission issued *Texas Grace* and clarified its position in this matter. Likewise, the *DTV Decision* (*see supra* note 3) is distinguishable. As the staff indicated in the January 11, 2002, *Staff Decision*, the DTV waivers were granted on the basis of documented zoning/tower siting problems, whereas Royce never applied for zoning and failed to document any zoning/tower siting problem. The DTV waivers were also based on matters associated with rulemaking proceedings. AM permittees are not subject to such rulemaking proceedings.

Finally, we address Royce's international arguments. The staff revised KIEV(AM)'s construction deadline to compensate Royce for any time lost as a result of the staff's erroneous reading of a condition placed on the station's authorization following grant of its major modification application for Culver City. The condition read:

This application is being granted prior to the completion of the International Telecommunications Union ("ITU") registration process. Therefore, any construction and operation with the facilities specified

§ 1.1307. We also note that the alleged environmental matters would not qualify for tolling under 47 C.F.R. Section 73.3598 because such matters were not before any court of competent jurisdiction.

¹⁹ Section 319(b) states that construction permits "shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee." 47 U.S.C. § 319(b).

²⁰ *Streamlining MO&O*, 14 FCC Rcd at 17539 (Section 319 is not violated by provisions balancing public interest in expediting new service, preventing warehousing of broadcast spectrum, while recognizing legitimate obstacles that may encumber construction). *See Jelks v. FCC*, 146 F.3d 878, 881 (1998), *cert. denied*, 525 U.S. 1147 (1999) (a subordinate body like a Division cannot alter a policy set by the Commission itself).

²¹ *Petition* at 21.

²² *Texas Grace*, 16 FCC Rcd at 19173.

herein is at [the] applicant's own risk and subject to modification, suspension or termination without right to hearing, if found by the Commission to be necessary in order to conform to the provisions of the registration process of the ITU, and to bilateral and other multilateral agreements between the United States and other countries.

The staff, in determining whether Royce was entitled to additional time, originally believed that this condition was placed on the permit due to the ITU registration process. Based on the mistaken notion that the permit was encumbered by the ITU process, the staff later granted Royce an additional 84 days corresponding to the time between the grant of KIEV(AM)'s Culver City authorization, which contained the condition, and the permit's expiration date. The International Bureau subsequently informed the staff that Royce's proposal was subject only to approval from Mexico, that Mexico had cleared the proposal on November 8, 2001, and that no other international matter was relevant. Royce thus benefited from the additional 84-day extension that was, in reality, not warranted by the facts.

On reconsideration, Royce alleges that "that the KIEV authorization will, in fact, be forwarded to ITU for approval by that International body."²³ Royce is correct that information about KIEV(AM)'s permit will be forwarded to the ITU. It is, however, incorrect in its claim that ITU "approval" is needed or that the ITU process will somehow prevent construction. We request ITU approval only for proposed operations that may cause interference to stations in foreign countries other than Mexico and Canada. Royce's proposal affected only Mexican stations, and, as noted above, was subsequently cleared by the Mexican government. The International Bureau's notification to the ITU about the particulars of Royce's authorization is solely to update that organization's records, not to seek that organization's approval. As KIEV(AM)'s ability to operate is not dependent on ITU approval, this matter is not an "encumbrance" and forms no basis for granting Royce additional time to construct.

Accordingly, Royce's Petition for Reconsideration IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

²³ *Petition* at 21.

