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*In Reply Refer to:*

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John F. Garziglia, Esq.  
Womble Carlyle Sandridge & Rice, PLLC  
1401 I Street, N.W., 7<sup>th</sup> Floor  
Washington, D.C. 20005

Lewis J. Paper, Esq.  
Dickstein Shapiro LLP  
1825 Eye Street, N.W.  
Washington, D.C. 20006

Nancy A. Ory, Esq.  
Leventhal Senter & Lerman, PLLC  
2000 K Street, N.W., Suite 600  
Washington, D.C. 20006

Dorann Bunkin, Esq.  
Wiley Rein LLP  
1776 K Street, N.W.  
Washington, D.C. 20006

In re: **WBCK(AM), Battle Creek, Michigan**  
Facility ID No. 37459  
File No. BAL-20070824AGZ

**Application for Assignment of License  
Petition to Deny**

Dear Counsel:

We have before us the above-captioned application (the "Assignment Application") seeking approval for the proposed assignment of license for Station WBCK(AM), Battle Creek, Michigan (the "Station"), from Cumulus Licensing LLC to Stratus Radio, LLC ("Stratus"). On September 20, 2007, Midwest Communications, Inc. ("Midwest") filed a Petition to Deny the Assignment Application.<sup>1</sup> For the reasons stated below, we deny the Petition to Deny and grant the Assignment Application, as conditioned.

**Background.** On November 10, 2006, Cumulus Licensing LLC, Cumulus Broadcasting LLC (collectively, "Cumulus"), Capstar Radio Operating Company and Capstar TX Limited Partnership (collectively, "Clear Channel") entered into an Asset Exchange Agreement relating to stations in the Ann Arbor, Michigan, Battle Creek, Michigan, and Canton, Ohio, radio markets (the "Exchange Agreement").

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<sup>1</sup> On October 3, 2007, Stratus filed an Opposition to Petition to Deny and Cumulus filed an Opposition to Petition to Deny. On October 10, 2007, Midwest filed a Reply to Oppositions to Petition to Deny.

As contemplated by the Exchange Agreement, Clear Channel proposes to assign to Cumulus the licenses for eight radio stations in the Ann Arbor, Michigan, and Battle Creek, Michigan radio markets,<sup>2</sup> in exchange for acquisition of the licenses and other assets for Station WRQK-FM, Canton, Ohio.<sup>3</sup> Included in the Exchange Agreement is an application for the assignment of the WBCK(AM) license from Clear Channel to Cumulus.<sup>4</sup> Commission approval and consummation of the transaction proposed in the Exchange Agreement, however, would result in Cumulus owning more stations in the Battle Creek, Michigan market than permissible under the Commission's local radio ownership rule.<sup>5</sup> Accordingly, Cumulus filed the Assignment Application for Commission consent to assign the WBCK(AM) license to a divestiture trust to be managed by Stratus, as a condition to its consent to the Exchange Agreement transaction.

**Discussion.** Midwest opposes grant of the Assignment Application on three grounds. First, Midwest argues that the Assignment Application violates Section 73.3518 of the Commission's Rules (the "Rules")<sup>6</sup> as an inconsistent and conflicting application. Second, Midwest asserts that the proposed assignment to the divestiture trust violates Section 73.1150 of the Rules<sup>7</sup> and is a sham transaction. Finally, Midwest asserts that Stratus "improperly certified in the affirmative to Question 6.c.3 of Section III [of the Assignment Application] regarding the insulation of non-party investors."<sup>8</sup>

*Inconsistent Application.* Midwest argues that the simultaneously pending applications to assign the Station from Clear Channel to Cumulus, and then from Cumulus to Stratus, are conflicting, and therefore impermissible under Section 73.3518 of the Rules. Midwest has erroneously inferred, however, that because Station WBCK(AM) is the subject of two assignment applications, the applications are necessarily in conflict. Initially, Cumulus sought assignment of Station WBCK(AM) under a waiver of the local radio ownership rule. The waiver was subsequently withdrawn, and the Clear Channel to Cumulus application was amended with an express request "that grant of the instant assignment application include a condition that consummation of the transactions contemplated . . . occur simultaneously with the consummation of a transaction that will place the Licenses for WBCK in an independent trust."<sup>9</sup> Midwest disregards the simultaneous consummation proviso, and as a result, has mistakenly concluded that the two applications conflict with one another. Moreover, the procedure

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<sup>2</sup> See (lead) File No. BALH-20061226AAY.

<sup>3</sup> File No. BALH-20061226ABJ.

<sup>4</sup> File No. BAL-20061226ABC.

<sup>5</sup> See 47 C.F.R. § 73.3555(a)(1)(iv).

<sup>6</sup> 47 C.F.R. § 73.3518. The rule states: "While an application is pending and undecided, no subsequent inconsistent or conflicting application may be filed by or on behalf of or for the benefit of the same applicant, successor or assignee."

<sup>7</sup> 47 C.F.R. § 73.1150. In pertinent part, this rule states that a licensee selling a station "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." 47 C.F.R. § 73.1150(a).

<sup>8</sup> Petition to Deny at 9.

<sup>9</sup> See Stratus Opposition at 2-3 (citing amendment to BAL-20061226ABC).

contemplated herein is consistent with established Commission practice. Accordingly, we reject Midwest's argument that the simultaneous closing proposed by the parties is only permitted in transfer of control contexts. We find no reason to disallow the procedure in the proposed assignments at issue, and accordingly, will place the appropriate conditions on the applications to ensure simultaneous consummation, as requested by the parties.

*Section 73.1150 Violation/Sham Transaction.* Midwest first asserts that Section 73.1150 is violated by provisions in the Cumulus-Stratus WBCK(AM) Trust Agreement (the "Trust Agreement") that provide for possible reassignment of the license to Cumulus under specified circumstances, such as a change in the multiple ownership rules that would make such a sale permissible.<sup>10</sup> Midwest further argues that the proposed Trust constitutes a sham transaction. Specifically, Midwest notes that Scott Knoblauch ("Knoblauch"), the sole member of Stratus, is also the managing member of Signal Ventures, LLC, which is an affiliate of Media Services Group, Inc. ("MSG"). Since MSG "has had business dealings with Cumulus Licensing, LLC or its affiliates in at least 11 separate transactions in the purchase of radio stations,"<sup>11</sup> Midwest alleges that Stratus is not independent of Cumulus, as claimed. Midwest also contends that portions of the Trust Agreement itself illustrate the deceptive aspects of the transaction. In particular, Midwest challenges Trust Agreement provisions that set an unstated minimum purchase price for the Station,<sup>12</sup> or that place restrictions on what the Trust can do, such as prohibiting any change in the Station's format<sup>13</sup> or the execution of a local marketing agreement.<sup>14</sup> Additionally, Midwest argues that the Trust Agreement is a sham because "there is neither a termination date on the trust nor a requirement that the trustee sell WBCK(AM) within any set amount of time."<sup>15</sup> Finally, Midwest contends that the proposal for Stratus to operate the Station from the same offices and studios used by other Cumulus-owned stations illustrates that "WBCK(AM) will simply be operated as one of the [Cumulus] group of radio stations in Battle Creek."<sup>16</sup>

*Section 73.1150 Violation.* Midwest's claim that the Trust Agreement violates Section 73.1150 is at odds with provisions in the agreement and with Commission precedent. In fact, the Trust Agreement expressly obligates Stratus to "take all actions necessary or appropriate to secure a Sale Agreement with a third party."<sup>17</sup> The only situation under which the Trust Agreement provides for the sale of the Station to the beneficiary Cumulus is if a sale to an independent third party has not yet occurred *and* the conditions

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<sup>10</sup> Trust Agreement, § 1(c)(i).

<sup>11</sup> Petition to Deny at 6.

<sup>12</sup> Trust Agreement, § 4(c)(i).

<sup>13</sup> *Id.*, § 5(e)(iii).

<sup>14</sup> *Id.*, § 5(e)(vii).

<sup>15</sup> Petition to Deny at 6.

<sup>16</sup> *Id.* at 8.

<sup>17</sup> Trust Agreement, § 4(d).

requiring assignment to a divestiture trust are materially altered. Similar provisions have been previously approved by the Commission<sup>18</sup> and do not constitute a violation of Section 73.1150.<sup>19</sup>

*Sham Transaction.* We disagree with Midwest's characterization that the assignee is not independent, due to Knoblauch's "substantial past business dealings with Cumulus Licensing LLC."<sup>20</sup> As explained in the Stratus Opposition,<sup>21</sup> MSG is an independent corporation providing media brokerage services to many communications companies and is legally unaffiliated with Stratus. While Knoblauch was at one time employed by a principal of MSG, he is no longer employed by MSG or its principals in any capacity. Furthermore, Stratus states, of the "11 separate transactions Midwest cites, *all* were transactions in which MSG *represented selling parties, not Cumulus*. Thus, MSG's fees were paid by the selling parties, and the brokerage relationships were, in fact, *adverse* to Cumulus."<sup>22</sup> Additionally, the Assignment Application indicates that Knoblauch "is not a 1 percent or greater stockholder, officer, director, or employee of Cumulus or any of its affiliates. The Trustee will have the power and authority to operate that Station at all times."<sup>23</sup> We find that Midwest fails to demonstrate that the assignee lacks independence, or that the participation of Knoblauch and Stratus in the proposed assignment is improper.

Moreover, the Trust Agreement explicitly provides that neither Cumulus nor any of its officers, directors, employees, stockholders or affiliates will communicate with the Trustee regarding the management or operation of the Station. Thus, the concerns expressed by Midwest regarding Station control by Cumulus are allayed by express Trust Agreement provisions. Specifically, the Trust Agreement requires that the "Trustee shall have absolute and complete control over the operations of the Station . . . and no person other than Trustee or managers designated by Trustee shall have any authority with respect to management of the Station" during the term of the Trust Agreement.<sup>24</sup> The Trust Agreement further provides that "Trustee shall operate the Station as a separate, independent . . . competitor to [Cumulus], and Trustee shall ensure that management of the Station is kept separate and apart from, and not influenced by, [Cumulus]."<sup>25</sup> Furthermore, the Trust Agreement prohibits Cumulus

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<sup>18</sup> See *Citadel Broadcasting Company*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 7083 (2007), Trust Agreement ("Citadel Trust Agreement") § 4(d)(ii) (provisions specifying circumstances that authorize the reassignment of the station to the trust beneficiary).

<sup>19</sup> Moreover, as noted by Cumulus, a divestiture trust is not an arrangement that the rule is meant to safeguard. Section 73.1150 was designed to prohibit a former licensee from continuing to exercise operational control after the station is sold. The trust arrangement, on the other hand, is intended to accommodate transactions that involve the break-up of ownership combinations that no longer comply with the Rules. Here, Cumulus will be the licensee only as a pass-through entity and will have no occasion to actually operate the Station at any time prior to its acquisition by the Trust.

<sup>20</sup> Petition to Deny at 6.

<sup>21</sup> See Stratus Opposition at 3-4.

<sup>22</sup> *Id.* at 4 (emphasis in original).

<sup>23</sup> Assignment Application, Exhibit 4, Section II, Question 3.

<sup>24</sup> Trust Agreement, § 5(a)(i).

<sup>25</sup> *Id.*, § 5(a)(ii).

from “communicat[ing] with Trustee regarding the operation or management of the Station,”<sup>26</sup> other than for an expressly provided purpose, such as the sale of the Station to a third party,<sup>27</sup> and that any such communications “shall be evidenced in writing and shall be retained by Trustee for inspection upon request by FCC.”<sup>28</sup> Contrary to Midwest’s assertions, responsibility for Station WBCK’s management, sales, programming, finances and personnel clearly falls to Stratus.

We also find that the Trust Agreement provision allowing the beneficiary to establish a minimum purchase price for the Station is consistent with precedent,<sup>29</sup> and establishes neither improper control by Cumulus nor that the Assignment Application is a sham. We make a similar finding with respect to the restrictive conditions placed upon the Trustee.<sup>30</sup> The Trust Agreement complies with the requirements established by the Commission to qualify as a properly insulated and independent divestiture trust.<sup>31</sup>

Finally, we agree with Cumulus that “the failure to establish a termination date for the Trust or a definitive time within which to sell the WBCK assets does not transform the trust arrangement into a sham transaction.”<sup>32</sup> Cumulus argues that it “makes no sense to require the termination of the Trust if the trustee has not been able to sell the station.”<sup>33</sup> Contrary to Midwest’s assertions, the trustee is required to consummate a sale as soon as reasonably practicable. As support, Cumulus cites the Trust Agreement provisions that require the trustee to “take all actions necessary or appropriate to secure a Sale Agreement with a third party”<sup>34</sup> and to file a report to Cumulus if the Station is not sold within six months.<sup>35</sup> While we do not find the lack of a termination date to be disqualifying, we strongly encourage Stratus to consummate the sale of the Station within six months of the consummation of its acquisition. If Stratus is unable to do so, it must provide the Commission with a copy of the confidential report referenced in Section 4(f) of the Trust Agreement submitted with the Assignment Application. With that condition in place, we find that the Trust Agreement complies with the Act and the Rules.<sup>36</sup> In light of the above, and our review of the Trust Agreement, we find that the trust arrangement conforms with established Commission standards, where an interim trustee operates a station independently pending its eventual divestiture.

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<sup>26</sup> *Id.*, § 11(a).

<sup>27</sup> *Id.*, § 11(b).

<sup>28</sup> *Id.*, § 11(c).

<sup>29</sup> *See* Citadel Trust Agreement, § 4(d)(i).

<sup>30</sup> *Id.*, §§ 5(e)(iii) and 5(e)(vii).

<sup>31</sup> *See Citadel Broadcasting Company*, 22 FCC Rcd at 7108.

<sup>32</sup> Cumulus Opposition at 9.

<sup>33</sup> *Id.*

<sup>34</sup> Trust Agreement, § 4(d).

<sup>35</sup> *Id.*, § 4(f).

<sup>36</sup> *See Citadel Broadcasting Company*, 22 FCC Rcd at 7108.

*Improper Certification.* Midwest argues that Stratus improperly certified to Section III, Question 6(c)(3) of the Assignment Application, that the proposed assignment complies with the Commission’s restrictions relating to the insulation and nonparticipation of non-party investors and creditors. Midwest alleges that Stratus did so “in an effort to obtain a grant of this application without FCC scrutiny.”<sup>37</sup>

The Commission’s policy regarding the insulation of non-party investors restricts the power of investors with nonattributable interests over the operations of the licensee. This policy is directed towards preventing putatively insulated investors with nonattributable interests, and persons not disclosed as parties to the application, from placing limitations on the assignee’s programming discretion, or otherwise restricting an assignee’s actions on matters relating to programming, personnel or finances. Stratus denies that its certification was improper and states that it “is a single member limited liability company, and thus, has no insulated or non-party investors.”<sup>38</sup> We agree. Midwest erroneously claims that Cumulus is a non-party investor, for purposes of the insulation policy, as a result of its beneficial interest in the Trust. In this regard, Midwest’s assertion is incorrect. Rather, Cumulus is the beneficial owner of the station.

Midwest contends that the restrictive provisions in the Trust Agreement, *i.e.*, precluding format changes by the trustee and limiting the circumstances in which the trustee may execute time brokerage agreements, prevent Stratus from accurately providing its certification to the Question 6(c)(3). We disagree with Midwest’s conclusion, and reject the assertion that Stratus’s certification was intended to avoid Commission scrutiny. As an initial matter, we note that the Trust Agreement, which contains the terms upon which Midwest’s allegation is based, was submitted with the Assignment Application for Commission and the public’s review. Assuming *arguendo* that Cumulus was considered a non-party investor, we agree with Stratus that the restrictive covenants in the Trust Agreement are consistent with those included in standard asset purchase agreements filed with the Commission, which require sellers to maintain the status quo and preserve the assets pending consummation of a transaction. Stratus, as an interim operator of the Station, is entrusted with preserving the assets so that the Station can be sold to an ultimate buyer at the highest possible price. We find that the restrictive covenants do not amount to prohibited restrictions by undisclosed, non-party investors and conclude that Stratus has not provided an improper non-party investor certification.

**Conclusion/Actions.** Based on the above, we find that the Midwest has not raised a substantial and material question of fact warranting further inquiry. We further find that Stratus is qualified to hold the Station WBCK(AM) license and that grant of the Assignment Application is consistent with the public interest, convenience and necessity. Accordingly, IT IS ORDERED, that the Petition to Deny filed by Midwest Communications, Inc. IS DENIED, and that the application for approval to assign the license for Station WBCK(AM), Battle Creek, Michigan (File No. BAL-20070824AGZ) from Cumulus Licensing, LLC to Stratus Radio, LLC IS GRANTED, as conditioned.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

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<sup>37</sup> Petition to Deny at 9.

<sup>38</sup> Stratus Opposition at 6.