Federal Communications Commission
Washington, D.C. 20554

July 22, 2011

DA 11-1226
In Reply Refer to:
1800B3-SS
Released: July 22, 2011

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In re: **WMGL(FM), Ravenel, SC**
Facility ID No. 61592
File No. BALH-20100729AAY

Application for Assignment of License

Petition to Deny

Dear Counsel:

We have before us the referenced application (the "2010 Assignment Application") seeking approval for the proposed assignment of license for Station WMGL(FM), Ravenel, South Carolina (the "Station"), from The Last Bastion Station Trust, LLC ("Trust") to Radio License Holding CBC, LLC ("Citadel"). On September 2, 2010, Georgia Eagle Broadcasting, Inc. ("Georgia Eagle") and Thomas B. Daniels (collectively, the "Petitioners") jointly filed a Petition to Deny (the "2010 Petition") the 2010 Assignment Application.[1] For the reasons set forth below, we deny the 2010 Petition and grant the 2010 Assignment Application.

Background. On March 22, 2007, the Commission granted a transfer of control application consenting to Citadel's acquisition of, *inter alia*, 24 major-market radio stations licensed to subsidiaries of The Walt Disney Company ("Disney").[2] That transfer of control resulted in the loss of Citadel's

[1] On September 15 and 27, 2010, respectively, Citadel and the Trust each filed a separate "Opposition to Petition to Deny" ("2010 Citadel Opposition" and "2010 Trust Opposition," respectively), to which Petitioners filed a joint reply on October 6, 2010.

[2] *See Existing Shareholders of Citadel Broadcasting Corp., and of The Walt Disney Co., etc. for Consent to Transfers of Control*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 7083 (2007).

"grandfathering" rights under the Commission's local ownership rules[3] to continue to own 11 stations in seven separate markets. Accordingly, in the same action, the Commission also granted an application (the "2006 Trust Application") for consent to assign the licenses for those 11 stations, including the Station, to the Trust, an insulated divestiture trust controlled by Elliot B. Evers (the "Trustee").[4] A trust agreement (the "2006 Trust Agreement"), submitted with the 2006 Trust Application[5] contained a clause stating that the Trustee "shall" assign the Station back to Citadel "if there is a change in the number of stations in the relevant Metro . . . subject to any required approval of the FCC."[6] The *Citadel Divestiture Trust Order* became final on March 22, 2007. The parties consummated the assignments authorized by the *Citadel Divestiture Trust Order* on June 12, 2007.

On January 19, 2007, Citadel, licensee of WNKT(FM), St. George, South Carolina, on Channel 298C2, filed an application (the "WNKT Application")[7] to relocate the transmission facilities and to change the community of license of WNKT(FM) from St. George to Eastover, South Carolina. On April 13, 2007, Citadel, then the licensee of WMGL(FM),[8] filed an application for minor modification of the facilities of WMGL(FM) proposing to change from Channel 269C3 to Channel 297C3 (the "WMGL Application") and, on the same day, amended the WNKT Application to reflect that it was contingently related to the WMGL Application.[9] The WMGL and WNKT Applications were both granted by the staff on July 5, 2007;[10] Citadel filed a covering license application for WNKT(FM) on November 20, 2007, which the staff granted on January 8, 2008.[11] Implementation of this modification resulted in the geographic relocation of WNKT(FM) to a new market, from the Charleston Metro to the Columbia, South Carolina, Metro ("Columbia Metro"). On December 17, 2007, Citadel and the Trustee (the "Parties")

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[3] 47 C.F.R. § 73.3555.

[4] *See Citadel Broadcasting Company,* Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 7083 (2007) (the "*Citadel Divestiture Trust Order*").

[5] *See* File No. BALH-20060228ALE-ALO at Attachment 4.

[6] *See id.*; 2006 Trust Agreement at Section 4(d)(ii).

[7] File No. BPH-20070119AEM.

[8] *See* File No. BPH-20070413AFJ.

[9] *See* File No. BPH-20070119AEM, as amended, on April 13, 2007.

[10] *See Broadcast Actions,* Public Notice, Report No. 46525 (rel. Jul. 11, 2007). Also on July 5, 2007, the day that the WNKT(FM) and WMGL(FM) contingent applications were granted, Georgia Eagle filed an application to modify the facilities and community of license of its station WMCD(FM) from Claxton, Georgia to Sullivan's Island, South Carolina (*See* File No. BPH-20070705AAA). That application, which remains pending, conflicts with WMGL(FM)'s granted construction permit. On August 10, 2007, Georgia Eagle filed a Petition for Reconsideration of the staff's grant of the WMGL(FM) Application. On March 25, 2008, the staff dismissed Georgia Eagle's Petition for Reconsideration because Georgia Eagle failed to demonstrate why it had not or could not have participated prior to grant of that application. *See Letter to The Last Bastion Station Trust, LLC, as Trustee and Georgia Eagle Broadcasting, Inc.,* 23 FCC Rcd 4941 (MB 2008). On April 24, 2008, Georgia Eagle filed an Application for Review, which the Trustee opposed on May 9, 2008. Georgia Eagle filed a Reply on May 29, 2008. On April 17, 2009, Georgia Eagle filed a "Supplement" to its Application for Review, which the Trustee opposed on May 11, 2009. Georgia Eagle filed a Reply on May 29, 2009. These pleadings remain pending.

[11] *See* BLH-20071120AJA.

filed an application to assign the Station back to Citadel (the "2007 Assignment Application").[12] Citadel contended that as a result of the grant of the covering license application for the WNKT(FM) community of license modification, it could reacquire WMGL(FM) in compliance with the radio local ownership rule.[13]

On January 22, 2008, the Petitioners jointly filed a petition to deny the 2007 Assignment Application. On January 28, 2009, during the pendency of the 2007 Assignment Application, the Parties amended the 2006 Trust Agreement to state that should changes in the relevant number of stations in a market change, "the Trustee *may* [rather than "shall"] . . . assign and otherwise convey the Station . . . to Citadel" (emphasis added).[14] On July 28, 2010, the Parties requested that the 2007 Assignment Application be dismissed, stating that Citadel's corporate parent had completed a reorganization under bankruptcy laws and that a new application or major amendment to disclose Citadel's new ownership was required.[15] On July 29, 2010, the Parties filed the 2010 Assignment Application. The trust agreement (the "2010 Trust Agreement") submitted with the 2010 Assignment Application states that "the Trustee *may* [rather than "shall"] . . . assign and otherwise convey the Station . . . to Citadel" (emphasis added).[16]

In the 2010 Petition, Petitioners argue that approval of the 2010 Assignment Application would, in effect, give Citadel a reversionary interest in the Station in violation of Section 73.1150 of the Commission's Rules (the "Rules").[17] Petitioners also argue that grant of the 2010 Assignment Application would be inconsistent with the *Citadel Divestiture Trust Order*, which "strongly encouraged" the Trust to market the stations to an "eligible entity."[18] In the 2010 Trust Opposition, the Trustee argues that the "reversionary interest rule" does not apply to "divestiture trusts."[19] In the 2010 Citadel Opposition, Citadel contends that the Petitioners have misread the relevant sections of the 2010 Assignment Application. Citadel argues that the proposed assignment does not violate the reversionary interest rule because "no mandatory right of reversion of the licenses exists" in the 2010 Trust Agreement.[20] Moreover, Citadel and the Trustee argue that their actions have been consistent with the *Citadel Divestiture Trust Order*.[21] In reply, Petitioners argue that if the Commission in the past had "allowed reversions back from a divestiture trust to occur," this was a "policy" that was never "formally announced or subject to public comment," as required by the Administrative Procedure Act.[22]

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[12] *See* File No. BALH-20071217ACR.

[13] *See* 2007 Assignment Application, Exhibit 5.

[14] *See* 2007 Assignment Application at Attachment.

[15] 2010 Citadel Opposition at 3. On August 3, 2010, the staff dismissed the 2007 Assignment Application. *See Broadcast Actions,* Public Notice, Report No. 47294 (rel. Aug. 6, 2010).

[16] *See* 2007 Assignment Application at Attachment 5 ("2007 Trust Agreement" at Section 4(d)(ii)).

[17] 2010 Petition at 4; *see also* 47 C.F.R. § 73.1150.

[18] *Id.* at 10.

[19] 2010 Trust Opposition at 5.

[20] 2010 Citadel Opposition at 4.

[21] *See* 2010 Trust Opposition at 10 and 2010 Citadel Opposition at 8.

[22] Reply at 5; *see also* 5 U.S.C. § 553.

Discussion. Under Section 309(d)(1) of the Communications Act of 1934, as amended (the "Act"),[23] any party in interest may file a petition to deny an application. In order to assess the merits of a petition to deny, a two-step analysis is required. First, the petition must make specific allegations of fact sufficient to demonstrate that the petitioner is a party in interest and that a grant of the application would be *prima facie* inconsistent with the public interest, convenience, and necessity.[24] If the petition meets this threshold requirement, the Commission must then examine all of the material before it to determine whether there is a substantial and material question of fact calling for further inquiry and requiring resolution in a hearing.[25] If no such question is raised, the Commission will deny the petition and grant the application if it otherwise serves the public interest, convenience, and necessity. Using this standard, we consider the Petitioners' allegations.

Standing. Citadel argues that petitioner Thomas B. Daniels ("Daniels") lacks standing. Specifically, Citadel contends that as owner of two stations in the Charleston market, Daniels fails to demonstrate how Citadel's proposed ownership of the Station is relevant to the operation of Daniels's stations. Further, Citadel claims that Daniels is merely participating to bolster Georgia Eagle's "questionable standing."[26]

We conclude that Daniels has standing to file the 2010 Petition. It is well established that a competitor of an applicant has party-in-interest status.[27] Here, Daniels's stations WJNI(FM), Ladson; WAZS(AM), Summerville; and WZJY(AM), Mount Pleasant, all South Carolina, are located in the same market as the Station. Contrary to Citadel's assertions, where standing is derived from status as a competitor in the market, a petitioner "does not need to demonstrate that it will suffer a direct injury from grant" of an application.[28] Nor, as a competitor, "must it demonstrate, or even allege . . . that it will be subjected to increased or materially different competition as a result of the proposed assignment."[29]

We conclude, however, that petitioner Georgia Eagle lacks standing to file the 2010 Petition. Georgia Eagle's station WMCD(FM) is currently licensed to Claxton, Georgia. It is not located in the same market as the Station, and Georgia Eagle has not demonstrated that it competes with the Station for listeners or advertisers. Moreover, Georgia Eagle proffers no other basis to establish its standing to file a petition to deny the Assignment Application. Therefore, the Georgia Eagle 2010 Petition will be considered an informal objection, pursuant to Section 73.3587 of the Rules.[30]

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[23] 47 U.S.C. § 309(d)(1).

[24] *See id.*; *Astroline Communications Co. v. FCC,* 857 F.2d 1556, 1561 (D.C. Cir. 1988).

[25] 47 U.S.C. § 309(d)(2).

[26] *See* 2010 Citadel Opposition at note 2.

[27] *See FCC v. Sanders Brothers Radio Station*, 309 U.S. 470, 476-477 (1940).

[28] *See Waterman Broadcasting Corporation of Florida*, Letter, 17 FCC Rcd 15742, 15744 n.2 (MB 2002) (citing *American Mobilphone, Inc. and Ram Technologies, Inc.,* Order, 10 FCC Rcd 12297, 12298 (WTB 1995) ("*American Mobilphone*").

[29] *American Mobilphone*, 10 FCC Rcd at 12298.

[30] 47 C.F.R. § 73.3587.

Reversionary Interest. Petitioners argue that approval of the 2010 Assignment Application would give effect to an unlawful "reversionary interest." Specifically, they argue that the 2010 Trust Agreement contains a clause stating, ". . . consistent with FCC rules and policies, the Trustee shall . . . assign and otherwise convey the Station . . . to Citadel." (the "Citadel Assignment Term").[31] Petitioners also aver that the Citadel Assignment Term is inconsistent with the decision of the Court of Appeals for the District of Columbia Circuit in *Kidd Communications*.[32] They urge the Commission, therefore, to also deny the 2010 Assignment Application on this basis.

As an initial matter, we note that the Citadel Assignment Term appears in the 2006 Trust Agreement and not, as Daniels claims, in the 2010 Trust Agreement.[33] Section 73.1150(a) of the Rules states, in pertinent part, that "[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."[34] We agree with Petitioners that the Citadel Assignment Term did not comply with Section 73.1150(a) of the Rules because it creates a mandatory "right to reassignment of the license in the future" to beneficiary Citadel.[35] In these circumstances, the Commission should have required modifications to the 2006 Trust Agreement. [36] The grant of the 2006 Trust Application is final, however, and the original 2006 Trust Agreement is not before us.

With respect to the 2010 Assignment Application, the controlling 2010 Trust Agreement states that "the Trustee *may* [rather than "shall"] . . . assign and otherwise convey the Station . . . to Citadel" (emphasis added).[37] We find that the revised language does not create a right of reversion on behalf of Citadel and, therefore, that it cures the Section 73.1150 violation. We also conclude that the 2010 Trust Agreement is otherwise consistent with Section 310 of the Act. We base our conclusion on the fact that the Station remains freely alienable. For instance, the 2010 Trust Agreement also obligates the Trustee to accept an offer with the best reasonable terms available from a third party.[38] Concerns about continuing

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[31] 2010 Petition at 4.

[32] *Kidd Communications v. FCC*, 427 F.3d 1 (D.C. Cir. 2005) ("*Kidd*"). In *Kidd*, a state court determined that a promissory note, executed and defaulted upon by the current licensee of a radio station, created a security interest in favor of the former licensee in *both* the station's physical assets and FCC license. Accordingly, the court ordered that the station's license be assigned to the former licensee, and the Commission granted the assignment application effectuating the court order. The D.C. Circuit, however, vacated and remanded the case, holding that the Commission failed to reconcile its grant of the assignment with its general policy prohibiting the creation of security and reversionary interests in FCC authorizations.

[33] *See* 2010 Trust Agreement at Section 1(c)(i).

[34] 47 C.F.R. § 73.1150(a). Daniels also cites several cases enforcing the Commission's ban on the retention of reversionary interests in the context of assignments: *WNYG(AM), Babylon, NY*, Letter, Ref. 1800-B3 (MB rel. Apr. 9, 1999); *Kirk Merkley*, Memorandum Opinion and Order, 94 FCC 2d 829 (1983) ("*Merkley*"); and *Faith Center, Inc.*, Memorandum Opinion and Order, 88 FCC 2d 788 (1981).

[35] *See* 2007 Assignment Application at Exhibit 4.

[36] *See Merkley*, 94 FCC 2d at 838 (1983).

[37] *See* 2010 Trust Agreement at Section 1(c)(i).

[38] Sections 4(a) and 5(e) of the 2010 Trust Agreement state, in pertinent part:

(continued . . .)

assignor control over a station, the rationale identified by the *Kidd* Court for the prohibition on reversionary interests, also are not implicated in this case and the 2010 Trust Agreement continues to sharply limit communication between Citadel and the Trustee, permitting no communications with regard to the day-to-day management or operations of the Station.[39] Thus, the 2010 Trust Agreement "removes any significant concern" that Citadel could impermissibly exercise control over the Station.[40] Finally, we note that similar provisions have been previously approved by the Commission, although the reversionary interest issue was not addressed in those decisions.[41]

(Continued from previous page)

> Except as otherwise expressly set forth in this [Amended and] Restated Trust Agreement, the Trustee shall have the power, authority and *obligation* to consummate a sale or sales of the Stations as soon as reasonably practicable after the Closing pursuant to the conditions contained herein and at prices that render to Citadel *the maximum consideration reasonably attainable* for the Station Assets . . . . [The Trustee is required to] maintain the status quo of such operations as currently conducted with a view to *maximizing the value to be received by Citadel* consistent with Trustee's duties as a licensee of the FCC and as a fiduciary of Citadel. (emphasis added).

[39] *See, e.g.,* 2010 Trust Agreement at Sections 5(a)(i) ("During the term of this [Amended and] Restated Trust Agreement, the right to manage the business of any Station held in . . . Trust shall be solely vested in the Trustee, subject to the following conditions . . . . The Trustee shall have absolute and complete control over the operations of a Station . . . for so long as this Restated Trust Agreement is in effect.") and 11(a) ("Except as otherwise expressly provided . . . , during the term of this . . . Trust Agreement, neither Citadel nor any of its officers, directors, employees, stockholders, members, partners or affiliates shall communicate with the Trustee regarding the operation or management of the Stations."); *see also Shareholders of AMFM, Inc.,* Memorandum Opinion and Order, 15 FCC Rcd 16062, 16072 (2000) ("[T]here will be no communications with the trustee regarding the management or operation of the stations subject to the trusts.").

[40] *See, e.g., Sewell,* ,43 Fed. Comm. L.J. at 334 (Where a trust is established to avoid a conflict with the Commission's media ownership limits, "the trustor must be insulated from the trustee, and the Commission's insulation standards are stringent. That fact, coupled with the trustee's fiduciary obligation to protect the trust assets, should remove any significant concern about the ability of the trustee to operate the station without interference from the trustor.").

[41] *See, e.g., Clear Channel Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 1421 (2008); *see also* File No. BAL-20070619ABU at Attachment 5; Exhibit C at Section 1(c)(1), which was approved in that Order ("The . . . Trust shall be irrevocable as to each Station . . . until . . . such time as . . . the Trustee causes the Stations to be sold to a third party buyer . . . with the prior approval by the FCC or . . . the Company or its subsidiaries divest themselves of sufficient attributable interests in radio stations in the relevant Metro, or there is a change in the number of stations in the relevant Metro, to permit the Company or its subsidiaries to have an attributable interest in such Station under the FCC's rules, in which case the Trustee shall . . . promptly assign the . . . Station back to the Company."); *see also Kansas City Trust, LLC, Trustee,* File No. BALH-20061010ALQ at Attachment 5; Trust Agreement at Section 1(c)(i) ("The . . . Trust shall be irrevocable until . . . such time as . . . the Trustee causes the Stations to be sold to a third party buyer . . . with the prior approval by the FCC or . . . there is a change in the number of stations in the market, to permit [the Beneficiaries] . . . to hold the FCC Licenses for the Station, in which case the Trustee shall . . . promptly assign the FCC Licenses . . . to the Beneficiaries . . . .") (unpublished); and *Garziglia,* File No. BAL-20070824AGZ at Attachment 5; Trust Agreement at Section 1(c)(i) ("The . . . Trust shall be irrevocable until . . . such time as . . . the Trustee causes the Stations to be sold to a third party buyer . . . with the prior approval by the FCC or there is a change in the number of stations in the market, to permit the Beneficiaries . . . to hold the FCC Licenses for the Station, in which case the Trustee shall . . . promptly assign the FCC Licenses . . . to the Beneficiaries . . . .").

Based on the above discussion, we now consider our earlier treatment of a trust agreement which included a reversionary interest provision in *John F. Garziglia, Esq.*[42] *Garziglia* observed that "a divestiture trust is not an arrangement that [Section 73.1150] is meant to safeguard."[43] However, Section 73.1150 was designed to prohibit a former licensee from continuing to exercise operational control after the station is sold. We find that this "control-based" rationale applies as much in a trust situation as it does to mortgage or other security interests. Moreover, nothing in the rule or its history suggests that the Commission intended to except divestiture trusts from the rule's scope. Accordingly, we overrule *Garziglia* to the extent that the decision found agreements such as those presented in this case do not implicate Section 73.1150.

Other Matters. Petitioners claim that "[the] Commission . . . clearly envisioned . . . only *brief* stewardship of the eleven stations by Last Bastion;"[44] nevertheless, they argue, Citadel has taken the benefits of the Commission's ruling, without exercising its concomitant responsibilities.[45] Petitioners also note that the Commission "strongly encouraged" the Trustee "to take reasonable steps to market the stations to any 'eligible entity'. . . ."[46] They claim that Citadel is attempting to "avoid compliance with the Commission's . . . rules" by seeking to avoid assignment of the Station to an independent third-party minority and/or female interest through its re-acquisition of the Station.[47] In opposition, Citadel and the Trustee contend that they have taken steps to market the stations and make them available to third-party buyers, including entities controlled by minorities and women, but observe that such efforts have "have been significantly hampered" by recent declines in radio station valuations and volatility in the credit markets.[48] The Trustee notes, however, that it has been successful in consummating the sale of three of the 11 trust stations.[49]

The Commission "strongly encouraged" the Trustee to take "reasonable steps" to market the stations to any "eligible entity," and it "further encouraged" the Trustee to consummate the sale of all of

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[42] *Letter to John F. Garziglia, Esq., et. al.*, 22 FCC Rcd 21786 (MB 2007) ("*Garziglia*").

[43] *See Garziglia,* 22 FCC Rcd at 21789, n.19.

[44] 2010 Petition at 10.

[45] *Id.*

[46] *Id.*; *see also Citadel Divestiture Trust Order,* 22 FCC Rcd at 7107-08, ¶ 60.

[47] 2010 Petition at 11.

[48] Citadel and the Trustee also state that through cooperation with the Minority Media and Telecommunications Council, Citadel and the Trustee endeavored to market the "trust stations" to entities with female and/or minority ownership even before the stations were assigned to the Trustee. 2010 Citadel Opposition at 9; 2010 Trust Opposition at 11. These efforts, state Citadel and the Trust, included co-sponsoring an event at the National Association of Broadcasters annual convention in Las Vegas. *Id.* Citadel states specifically that the failure to sell the stations to minority and female-controlled entities is a result, in part, of the recent tightening of the credit markets. 2010 Citadel Opposition at 9.

[49] 2010 Trust Opposition at 11. *See* File No. BALH-20070827AEA, consummated on November 1, 2007 (assignment of WLCZ(FM), Brunswick, Maine, to Saga Communications of New England, LLC); File No. BALH-20080324AHQ, consummated on May 23, 2008 (assignment of WLUN(FM) (formerly WYLZ), Pinconning, Michigan, to Michigan Radio Communications, Inc.); File No. BALH-20080228ABM, consummated on June 5, 2008 (assignment of WARX(FM) (formerly WCYI), Lewiston, Maine, to Educational Media Foundation).

the trust stations within six months.[50] These aspirational goals therefore were not conditions imposed on the assignment of the stations to the Trust and, in any event, Daniels has produced no evidence that establish that the Trustee did not take reasonable steps to market the station to eligible entities. While divestiture trusts are designed as temporary mechanisms to permit the orderly sale of the trust assets, importantly, the Commission did not impose any specific deadline for the divestiture of the eleven stations. Moreover, the Trustee remains obligated under the 2006 Trust Agreement to continue to actively market the stations. In this regard we find credible the Trustee's explanation that the current economic environment has made it difficult to complete expeditiously station sales.

Conclusion/Actions. Based on the above, we find that Daniels and Georgia Eagle have not raised a substantial and material question of fact warranting further inquiry. We further find that Citadel is qualified to hold the Station's 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 Thomas B. Daniels, IS DENIED.

IT IS FURTHER ORDERED that the Petition to Deny filed by Georgia Eagle Broadcasting, Inc., treated as an Informal Objection, IS DENIED.

IT IS FURTHER ORDERED, that the application for consent to assign the license for Station WMGL(FM), Ravenel, South Carolina (File No. BALH-20100729AAY) from The Last Bastion Station Trust, LLC, to Radio License Holding CBC, LLC, IS GRANTED subect to the following condition:

> Grant of this application is subject to the condition that the transaction proposed herein be consummated by August 1, 2011. If consummation does not occur prior to August 1, 2011, the transaction may not be consummated until after the license for the station has been renewed.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Radio License Holding CBC, LLC
Georgia Eagle Broadcasting, Inc.
Thomas B. Daniels
The Last Bastion Station Trust, LLC

[50] *See Citadel Divestiture Trust Order,* 22 FCC Rcd at 7107-08, ¶ 60.