



Federal Communications Commission
Washington, D.C. 20554

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DA 11-1519
In Reply Refer to:
1800B3-MM

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In re: **CBS Radio East Inc., Assignor**
KFWB License Trust, Assignee
KFWB(AM), Los Angeles, CA
Facility ID No. 25457
File No. BAL-20021115AAH

Application for Assignment of License

Petition for Reconsideration

Dear Counsel:

We have before us a March 8, 2010, Petition for Reconsideration (“Petition”) filed by Mt. Wilson FM Broadcasters, Inc. (“Mt. Wilson”).¹ The Petition asks the Commission to reconsider its February 1, 2010, grant of CBS Radio East Inc.’s (“CBS Radio”) application to assign the license of KFWB(AM), Los Angeles, California (“Station”) to KFWB License Trust (“Trustee”). For the reasons stated below, we deny the Petition.

¹ CBS Radio East Inc. and KFWB License Trust filed an “Opposition to Petition for Reconsideration” on March 23, 2010. Mt. Wilson filed a “Reply to CBS Opposition to Petition for Reconsideration” on March 31, 2010. On April 8, 2010, Mt. Wilson submitted a Supplement to Reply to CBS Opposition to Petition for Reconsideration. The Supplement is an unauthorized pleading that will not be considered. See *John Garziglia*, Letter, 20 FCC Rcd 12105, 12107, n.12 (MB 2005) (rejecting as unauthorized pleadings filed beyond the reply).

Background. On May 3, 2002, the Commission approved Viacom’s (now CBS Radio) acquisition of KCAL-TV, Los Angeles, California, from Fidelity Television, Inc.² As part of its review of the transaction, the Commission analyzed whether it complied with the radio-television cross-ownership rule. The Commission concurred with Viacom’s conclusion that, to comply with this rule, it needed to divest one of the seven radio stations it owned in the Los Angeles market. Thus, the Commission considered and ultimately granted Viacom’s request for a six-month temporary waiver to allow Viacom to come into compliance with the radio-television cross-ownership rule in the Los Angeles market.³

On November 15, 2002, Infinity Broadcasting Operations, Inc. (“Infinity”), a subsidiary of Viacom, filed a divestiture application (“Divestiture Application”) designed to bring Viacom into compliance with the rule.⁴ Subsequently, on February 1, 2010, CBS Radio amended the Divestiture Application. Among other things,⁵ CBS Radio submitted revised trust agreements, which “conform[ed] to the divestiture trusts approved by the Commission in *Citadel Broadcasting Company*, 22 FCC Rcd 7083 (2007) and *Existing Shareholders of Clear Channel Communications, Inc.*, 23 FCC Rcd 1421 (2008).”⁶ The revised agreements included language prohibiting the Trustee from changing the format of the station.⁷ The amended Divestiture Application was granted the day it was filed.⁸

The Petition argues that the Commission made material errors in granting the Divestiture Application and requests that we either set aside the grant or require reformation of the trust agreements. Specifically, Mount Wilson asserts that the provisions in the trust agreements that prohibit the Trustee from changing the station’s programming format: (1) contravene long-standing Commission policy; (2) violate Section 310(d) of the Communications Act of 1934, as amended (“Act”), which has been interpreted to mean that a licensee must retain ultimate control over programming;⁹ and (3) amount to CBS Radio holding a cognizable interest in KFWB, in violation of the radio-television cross-ownership rule,¹⁰ which formed the basis of the divestiture requirement set forth in the *Fidelity* decision.”¹¹

² *Fidelity Television, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 8567 (2002) (“*Fidelity*”).

³ *Id.* at 8568.

⁴ On November 18, 2004, the Commission dismissed the Divestiture Application via Public Notice for failure to conform to the new local radio ownership rules which required applicants to use the new edition of the Commission’s forms. See *Media Bureau Announces Dismissal of Unamended Form 301, 314, and 315 AM and FM Applications; Amendment Deadline Set for Certain Other Commercial Radio Station Applications*, Public Notice, 19 FCC Rcd 22776 (MB 2004). On December 14, 2004, Infinity filed an amendment to the Divestiture Application, which included responses to the Commission’s revised multiple ownership questions. That same day, the Trustee filed a Petition for Reconsideration and sought reinstatement of the application, *nunc pro tunc*. The Commission granted this petition on March 21, 2005. *Broadcast Applications*, Public Notice, Report No. 25948 (rel. March 24, 2005).

⁵ The amendment also changed the proposed assignee and revised the application to reflect the current licensee of KFWB(AM).

⁶ Divestiture Application, Exhibit 1.

⁷ *Id.* at Attachment 5, Attachment A: License Trust Agreement Section 5(c)(iii); Attachment B: Asset Trust Agreement, Section 5(e)(iii). They both state, “Without limiting the generality of the foregoing, during the term of this Trust Agreement, except as contemplated by this Trust Agreement or the KFWB Asset Trust Agreement, the Trustee shall not:...(iii) change the format of the station....”

⁸ *Broadcast Actions*, Public Notice, Report No. 47166 (rel. Feb. 4, 2010).

⁹ See *Rocking M Radio*, Letter, 25 FCC Rcd 1322, n.22 (MB 2010) (“*Rocking M Radio*”) (citing *Network Affiliated Stations Alliance (NASA) Petition for Inquiry into Network Practices and Motion for Declaratory Ruling*, Declaratory Ruling, 23 FCC Rcd 13610, 13611 (2008)).

¹⁰ Petition at 3; 47 C.F.R. § 73.3555(c).

CBS Radio and the Trustee oppose the Petition. They argue that the wording of the trust agreements conforms to the divestiture trust agreements approved by the Commission in *Citadel Broadcasting Co.*¹² and *Existing Shareholders of Clear Channel Communications, Inc.*¹³ In those decisions, they claim that the Commission approved divestiture trust agreements that contained “identical” restrictive covenants.¹⁴ In Reply, Mt. Wilson discounts the precedents cited by CBS Radio as contrary to Section 310(d) of the Act and repeats its claims regarding violations of the *Fidelity* mandate and the radio-television cross-ownership rule.¹⁵

Discussion. Reconsideration is warranted only if the petitioner sets forth an error of fact or law, or presents new facts or changed circumstances which raise substantial or material questions of fact that otherwise warrant reconsideration of the prior action.¹⁶ Mt. Wilson has not met this burden.

Mt. Wilson claims that the Commission erred by granting the Divestiture Application because the trust agreements’ provisions violate Section 310 of the Act, the radio-television cross ownership rule, and the ruling in *Fidelity* which mandated complete divestiture. We disagree. Mt. Wilson cites to *Rocking M Radio*, *Cumulus*, and *Twin States* as examples of the Commission’s “longstanding policy” that “restricting a licensee’s ability to control program formats is inconsistent with Section 310(d) of the Communications Act.”¹⁷ While the Commission has interpreted Section 310(d) of the Act as such, we note that it has not done so in the divestiture trust context. Indeed, in the divestiture trust context, the Commission has deemed acceptable restrictive covenants identical to the one at issue here.¹⁸ Mt. Wilson itself has acknowledged as much.¹⁹

We reject Mount Wilson’s assertion that these precedents approving trust agreements with the same restrictive covenant at issue here are inconsistent with Section 310(d) of the Act.²⁰ As we have stated before, these restrictive covenants are consistent with those included in standard trust agreements filed with the Commission, which require trustees to maintain the *status quo* and preserve the assets being placed into trust pending their sale to another party.²¹ In short, the Commission has consistently treated divestiture trusts differently in light of the need to preserve assets so that the station(s) being placed into the trust can be sold to an ultimate buyer at the highest possible price. Here, the restrictive covenants serve the purpose of preventing the Trustee from making changes outside the normal course of business while the Station is on the market. Other provisions also support this overall goal. For example, in furtherance of the *status quo*, the trust agreements require the Trustee to: “use all commercially

¹¹ Petition at 3.

¹² *Citadel Broadcasting Co.*, Memorandum Opinion and Order and Notice of Apparent Liability, 22 FCC Rcd 7083 (2007) (“*Citadel*”).

¹³ *Existing Shareholders of Clear Channel Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd 1421 (2008) (“*Clear Channel*”). We have reviewed the *Citadel* and *Clear Channel* provisions and find them almost identical to the provision at issue. Here, the trust agreements include the phrase, “or the KFWB Asset Trust Agreement,” an insignificant difference.

¹⁴ Opposition at 2.

¹⁵ Reply at 3.

¹⁶ See 47 C.F.R. § 1.106.

¹⁷ Reply at 1.

¹⁸ See *Citadel*, 22 FCC Rcd 7083 (2007); *Clear Channel*, 23 FCC Rcd 1421 (2008).

¹⁹ Reply at 2. Given the fact that the Commission has considered this very issue in the divestiture trust context, the cases cited by Mt. Wilson, which do not involve divestiture trusts, are inapposite.

²⁰ Reply at 3.

²¹ See *WBCK(AM) Battle Creek, Michigan*, Letter, 22 FCC Rcd 21786, 21791 (MB 2007).

reasonable efforts to preserve intact the present business organization of the Station and the Station's relationships with its customers, suppliers and others having business dealings with it."²² Other provisions prohibit the Trustee from selling, leasing or disposing of assets such as personal or real property, technical information, documents in the public file, or technical data used in operation of the Station. Still others require the Trustee to maintain these assets in their current condition, save for ordinary wear and tear,²³ and to "use commercially reasonable efforts to maintain the ability of the station to operate at maximum power and full coverage at all times."²⁴

We find that staff did not err in granting the Divestiture Application. In light of this finding, we find we need not address Mt. Wilson's claims that the trust agreements' restrictive covenants amount to a violation of the radio-television cross-ownership rules; and CBS Radio is not in compliance with the *Fidelity* decision.

Conclusion/Actions. Based on the above, we find that Mt. Wilson FM Broadcasters, Inc. has not raised a substantial and material question of fact warranting further inquiry. Accordingly, IT IS ORDERED, that the Petition for Reconsideration filed by Mt. Wilson FM Broadcasters, Inc. IS DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

²² License Trust Agreement at Section 5(c)(i); Asset Trust Agreement at Section 5(e)(i).

²³ See License Trust Agreement at Section 5(c)(v), (ii); Asset Trust Agreement at Sections 2(a) and 5(e)(v), (ii).

²⁴ License Trust Agreement at Section 5(c)(viii); Asset Trust Agreement at Section 5(e)(viii).