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In re: **WMEZ(FM), Pensacola, Florida**
Facility ID No. 73256
File No. BALH-20120509AER

WXBM-FM, Milton, Florida
Facility ID No. 32946
File No. BALH-20120509AES

WABD(FM), Mobile, Alabama
Facility ID No. 70657
File No. BALH-20120709AFX

**Applications for Assignment of Licenses
Petitions to Deny**

Dear Counsel:

We have before us the above-referenced applications (the "Applications") seeking approval for: (1) the proposed assignment of the licenses for stations WMEZ(FM), Pensacola, Florida, and WXMB-FM, Milton, Florida ("Pensacola Stations"), from 6 Johnson Road Licenses, Inc. ("6 Johnson Road") to Cumulus Licensing LLC ("Cumulus") ("Pensacola Applications"); and (2) the proposed assignment of the license for station WABD(FM) (formerly WLVM(FM)), Mobile, Alabama, from Educational Media Foundation ("EMF") to Cumulus ("Mobile Application"). Also before us is a Petition to Deny the

Pensacola Applications (“Pensacola Petition”) filed on June 13, 2012, by ADX Communications of Escambia and ADX Communications of Pensacola (collectively, “ADX”) and related pleadings.¹ Also before us is a Petition to Deny the Mobile Application (“Mobile Petition”) (collectively, the “Petitions”) filed by ADX on June 13, 2012, and related pleadings.² For the reasons set forth below, we deny the Petitions and grant the Applications.

Background. On May 7, 2012, the Commission granted a modification application to change the community of license for Cumulus-owned station WDLT-FM from Atmore, Alabama (located in Escambia County, Alabama, outside of either the Pensacola or Mobile Arbitron Metro markets), to Saraland, Alabama (located in Mobile County, Alabama, within the Mobile Metro market).³

On May 9, 2012, 6 Johnson Road filed the Pensacola Applications, seeking to assign two stations in the Pensacola market, WMEZ(FM) and WXBM-FM, to Cumulus. On July 9, 2012, Cumulus and EMF filed applications for consent to assign: (1) station WLVM(FM), Chickasaw, Alabama from Cumulus to EMF;⁴ (2) station WRQQ(FM), Belle Meade, Tennessee, from Cumulus to EMF;⁵ and (3) station WABD(FM) from EMF to Cumulus (the Mobile Application).⁶ By contractual agreement, these latter three transactions are mutually contingent.⁷ Upon consummation of the proposed transactions, Cumulus

¹ On June 27, 2012, Cumulus filed an Opposition to Petition to Deny (“Pensacola Opposition”). On July 17, 2012, ADX filed a Reply to Opposition to Petition to Deny (“Pensacola Reply”). On August 10, 2012, ADX filed a Supplement to Petition to Deny (“Pensacola Supplement”). The Pensacola Supplement largely restates arguments made in the Pensacola Petition with the additional argument that Cumulus’ recent time brokerage agreement with station WABD(FM) should be taken into account in the multiple ownership analysis. Pensacola Supplement at 3. On August 29, 2012, Cumulus filed a Motion to Strike the Pensacola Supplement. On September 17, 2012, ADX filed an Opposition to Motion to Strike. On October 3, 2012, Cumulus filed a Reply to Opposition to Motion to Strike. The filing of the Pensacola Supplement is not authorized under section 1.45 of the Commission’s rules. Moreover, because we do not use the contour-overlap methodology herein, the Pensacola Supplement has no effect on our multiple ownership analysis. Accordingly, we do not address the procedural issues regarding its acceptability.

² On September 6, 2012, Cumulus filed an Opposition to Petition to Deny against the Mobile Petition (“Mobile Opposition”). On September 28, 2012, ADX filed a Reply to Opposition to Petition to Deny (“Mobile Reply”).

³ File No. BPH-20120131AJS. Station WDLT-FM was formerly assigned call signs WLVM (July 16 to July 22, 2012), WABD (February 28 to July 15, 2012), and WYOK (January 11, 1999, to February 27, 2012).

⁴ BALH-20120709AFO.

⁵ BALH-20120709AFP.

⁶ The Cumulus-to-EMF assignment applications (BALH-20120709AFO and BALH-20120709AFP) are uncontested and will be processed routinely separately from the Applications. In light of the fact that the station WABD(FM) transaction is contractually contingent upon grant of the Cumulus-to-EMF assignment applications, we remind the parties that they have 90 days from approval to either consummate the WABD(FM) transaction or submit a request to extend the consummation period. *See Mass Media Bureau Announces Revised Procedure Regarding Assignment and Transfer Consummation Deadlines*, Public Notice, DA 97-600 (MMB March 21, 1997). Because Cumulus could acquire station WABD(FM) and retain its existing Mobile Metro market stations without violating the multiple ownership rules, we do not, as a regulatory matter, make grant contingent upon the Cumulus-to-EMF transactions.

⁷ *See* Mobile Application, Section III, Question 6(b), Exhibit 17.

will own or control one AM and four FM stations in the Pensacola Metro market⁸ and two AM stations and three FM stations in the Mobile Metro market.⁹

ADX filed Petitions to Deny against the Pensacola and Mobile Applications on nearly identical grounds. In its Petitions, ADX argues that Cumulus' proposed acquisition of station WABD(FM) and the Pensacola Stations would violate the Commission's multiple ownership rules.¹⁰ Specifically, ADX argues that Cumulus is attempting to circumvent the need to perform a contour-overlap analysis—the methodology used when a station's community of license is located in an unrated market, *i.e.*, outside any Arbitron Metro boundary—by relocating WDLT-FM's community of license to within the Mobile Arbitron Metro boundaries.¹¹ The WDLT-FM community of license change would thus allow Cumulus to acquire station WABD(FM) and the Pensacola Stations, according to ADX, because the Applications comply with the multiple ownership rules using an Arbitron Metro-based analysis but would fail using a contour-overlap analysis.¹² ADX argues that whenever a licensee seeks to take advantage of such a change to acquire additional stations, it is subject to a two-year waiting period under the Commission's 2003 *Ownership Order*.¹³

To support this conclusion, ADX likens the WDLT-FM community of license change to an Arbitron Metro boundary or a "home" market status change, either of which, under the *Ownership Order*, triggers a two-year waiting period before an applicant can benefit from the change for multiple ownership purposes.¹⁴ A community of license change, argues ADX, is similarly an attempt to "manipulate the definitions of the relevant local radio markets in which the station is considered to exist . . ." and should therefore trigger the two-year waiting period.¹⁵ ADX contends that because two years have not yet passed

⁸ In addition to the Pensacola Stations, Cumulus would own or control: WCOA(AM), Fac. ID No. 12142, Pensacola, Florida; WCOA-FM, Fac. ID No. 12143, Pensacola, Florida; and WRRX(FM), Fac. ID No. 94009, Gulf Breeze, Florida.

⁹ In addition to WABD(FM), Cumulus would own or control: WXQW(AM), Fac. ID No. 2541, Fairhope, Alabama; WGOK(AM), Fac. ID No. 56716, Mobile, Alabama; WBLX-FM, Fac. ID No. 2540, Mobile, Alabama; and WDLT-FM, Fac. ID No. 8680, Saraland, Alabama.

¹⁰ 47 C.F.R. § 73.3555(a)(1).

¹¹ Pensacola Petition at 3; Mobile Petition at 4. Prior to the WDLT-FM change in community of license, ADX argues, Cumulus would have been "required to satisfy both the geography-based definition of radio markets based on Arbitron Metros . . . as well as the interim contour-analysis multiple ownership methodology." Pensacola Reply at 2.

¹² Pensacola Petition at 3-5; Mobile Petition at 4-6.

¹³ Pensacola Petition at 3; Mobile Petition at 4; 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, 13726 (2003) ("*Ownership Order*"), *aff'd in part and remanded in part sub nom., Prometheus Radio Project v. FCC*, 373 F.3d 372 (2004), *cert. denied*, 545 U.S. 1123 (2005).

¹⁴ Pensacola Petition at 2-3; Mobile Petition at 3-4.

¹⁵ Mobile Petition at 7-8 (emphasis in original); *See also* Pensacola Petition at 3. ADX argues for a broad reading of the *Ownership Order*, stating that the listed examples of Metro market manipulation are meant to be "illustrative, not exhaustive." Mobile Reply at 6. In support of this argument, ADX points to instances of the Commission

since grant of the WDLT-FM modification, the Applications are not properly considered using only an Arbitron Metro-based analysis and must still undergo a contour-overlap analysis.¹⁶ Because the Applications fail the contour-overlap analysis, ADX concludes, they must be denied.¹⁷

As an independent objection, ADX argues that an Arbitron Metro-based analysis is fundamentally inappropriate for the Pensacola and Mobile Metro markets, because the two markets are geographically adjacent and the contours of their home stations overlap considerably.¹⁸ In this “unique market situation,” ADX argues, Pensacola and Mobile should be treated as a single large market, and that market should always be analyzed using the contour-overlap method.¹⁹

In its Opposition, Cumulus contends that the two-year waiting period applies only in situations where parties have manipulated either Metro boundaries or “home” market designations.²⁰ In the *WCCL Letter Decision*, Cumulus argues, the Commission did not fundamentally expand the scope of the policy but merely held that elimination of a Metro market “constituted a change in Metro boundaries.”²¹ Moreover, Cumulus argues, the two-year waiting period does not apply where, as here, “the triggering station is licensed to a community that is geographically within the Metro boundaries . . .”²² Cumulus further argues that even if the two-year waiting period did apply, it has been satisfied because station WDLT-FM has been “home” to the Mobile Metro since 2003.²³ Finally, Cumulus argues that use of Arbitron Metro market definitions for the Pensacola and Mobile markets is appropriate because there is nothing new or unique about two adjacent Arbitron Metro markets sharing numerous radio stations.²⁴ Cumulus also notes that the Commission specifically rejected a proposal to apply a different test to embedded Metro markets, because “such a scheme could be inconsistent with our general reliance on Arbitron’s market definition and [would be] cumbersome to administer.”²⁵

applying the two-year waiting period where (1) a Metro market was entirely eliminated (*John M. Pelkey, Esq.*, Letter, 23 FCC Rcd 17978 (MB 2008) (“*WCCL Letter Decision*”)) and (2) a Metro market was reclassified to a higher tier (larger) market, allowing more stations in that market per owner (*Mark N. Lipp, Esq.*, Letter, 22 FCC Rcd 17788 (MB 2007)). Mobile Petition at 6-8.

¹⁶ Pensacola Petition at 2-3; Mobile Petition at 3-4.

¹⁷ Pensacola Petition at 4-5; Mobile Petition at 5-6.

¹⁸ Mobile Petition at 8-11; Pensacola Reply at 8-11.

¹⁹ Mobile Petition at 10; *See also* Pensacola Reply at 8-11. For the same reasons, ADX requests that the Commission prohibit Cumulus and 6 Johnson Road from entering into a local marketing agreement (“LMA”) with respect to the Pensacola Stations. Pensacola Petition at 5.

²⁰ Pensacola Opposition at 2, 6-10; Mobile Opposition at 2, 6-12.

²¹ Mobile Opposition at 10.

²² Pensacola Opposition at 3 (citing *WCCL Letter Decision*, 22 FCC Rcd at 17790, n. 12).

²³ Pensacola Opposition at 10-11; Mobile Opposition at 14.

²⁴ Mobile Opposition at 13-14.

²⁵ Mobile Opposition at 13 (quoting the *Ownership Order*, 18 FCC Rcd at 13725-26, n. 580).

In reply, ADX clarifies its argument, explaining that “[w]hile it is of course true that . . . Cumulus is not literally changing the station’s ‘home’ status or effecting any change in the Arbitron Metro boundary definition, there is no doubt that the voluntary change of community of license is changing the station’s *status* vis a vis the radio markets in which it is considered to be local.”²⁶ The fact that WDLT-FM was “home” to the Mobile Metro for more than two years is irrelevant, ADX argues, because the triggering change was not the inclusion of WDLT-FM as “home” to the Mobile Metro but its *exclusion* from unrated, contour-defined markets.²⁷ The key issue, according to ADX, is that Cumulus “effectively removed the station from analysis in contour created [markets] and is requesting *immediate* credit for this removal . . .”²⁸

Discussion. Section 309(d)(1) of the Communications Act of 1934, as amended, (the “Act”) provides a two-step analysis for judging the adequacy of the Petitions.²⁹ We must first determine whether ADX has made specific allegations of fact that, if true, would demonstrate that grant of the Applications would be *prima facie* inconsistent with the public interest.³⁰ These specific allegations must be supported by the affidavit of a person with knowledge of the facts alleged, except for those of which we may take official notice.³¹ If the specific allegations support a *prima facie* case, we next examine and weigh all the evidence presented, to determine whether “a substantial and material question of fact” is presented,³² *i.e.* “whether the totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for.”³³ We must also determine whether grant of the Applications would serve the public interest.³⁴

Compliance with Arbitron Metro numerical ownership limits. In 2003, the Commission adopted a bright-line, geography-based definition for determining the boundaries of radio markets based on commercial Arbitron Metro markets where they exist, stating that “[b]y 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.”³⁵ Although we give a “hard look” to petitions alleging that a facially-compliant transaction is not in the public interest,³⁶ such petitions must still present specific allegations of

²⁶ Pensacola Reply at 3; Mobile Reply at 5 (emphasis in original).

²⁷ Pensacola Reply at 8.

²⁸ Mobile Reply at 5 (emphasis in original).

²⁹ 47 U.S.C. § 309(d)(1).

³⁰ *Id.*; See also *Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985) (“*Citizens for Jazz*”).

³¹ 47 U.S.C. § 309(d)(1).

³² 47 U.S.C. § 309(d)(2).

³³ *Citizens for Jazz*, 775 F.2d at 395.

³⁴ 47 U.S.C. § 309(a); See also *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

³⁵ *Ownership Order*, 18 FCC Rcd at 13813.

³⁶ *Id.* at 13647.

fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest and that a substantial and material question is presented to be determined by the Commission.³⁷ ADX has not met this burden.

As a threshold matter, Cumulus has demonstrated compliance with the numerical ownership limits for both the Pensacola and Mobile Metro markets under the Arbitron Metro-based methodology.³⁸ In a radio market with between 15 and 29 full-power radio stations, a single entity may hold a cognizable interest in no more than six commercial radio stations, not more than four of which may be in the same service.³⁹ Here, upon consummation of the proposed transaction and contingent WABD(FM) assignment, Cumulus will control one AM and four FM stations in the Pensacola Metro and two AM stations and three FM stations in the Mobile Metro, in compliance with section 73.3555(a)(1)(iii).

Public interest. ADX has failed to allege specific facts to indicate that, despite Cumulus' facial compliance with the Commission's rules, the Applications pose a risk of harm to competition within the Pensacola or Mobile markets. The numerical limits approach is designed to promote competition by assuring that a sufficient number of rivals are actively engaged in competition for listening audiences.⁴⁰ The Commission has emphasized that "[p]reserving competition for listeners is of paramount concern" in our public interest analysis.⁴¹ In the Mobile Metro market, there will be no change in the number of competitors, as Cumulus and EMF are essentially exchanging stations; both parties will continue to participate in the market post-transaction. Furthermore, both the Pensacola and Metro markets will continue to be served by at least ten different station owners. In these markets, therefore, available radio spectrum has not become "'locked up' in the hands of one or a few owners."⁴² ADX thus has failed to make a *prima facie* showing that the proposed transaction would harm competition for listening audiences in the relevant markets, nor is there a substantial and material question of fact raised on this point.

Two-year waiting period. Generally, the Commission requires applicants to provide the most current relevant Arbitron information available, so that our decisions are based on up-to-date data.⁴³ However, the Commission has recognized that in some cases companies may successfully petition Arbitron to change Metro boundaries or change a station's "home" market designation (*i.e.*, "opt in" or "opt out" of a Metro market). Therefore, the Commission requires an applicant to wait two years before it can rely on such changes to support its acquisition of additional stations.⁴⁴

³⁷ *Clear Channel Broadcasting Licenses, Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture, 24 FCC Rcd 14078, 14084 (MB 2009) ("*Clear Channel Decision*").

³⁸ See 47 C.F.R. §73.3555, note 4.

³⁹ 47 C.F.R. §73.3555(a)(1)(iii).

⁴⁰ *Ownership Order*, 18 FCC Rcd at 13716.

⁴¹ *Id.*

⁴² See 2006 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 Order on Reconsideration, 23 FCC Rcd 2010, 2072 (2008).

⁴³ See *Capitol Broadcasting Corporation*, Letter, 23 FCC Rcd 5478, 5481 (MB 2008).

⁴⁴ *Ownership Order*, 18 FCC Rcd at 13726.

We find that station WDLT-FM's community of license relocation did not trigger the two-year safeguard established by the *Ownership Order*; therefore, the multiple ownership compliance of the Applications is properly assessed using the Arbitron Metro-based methodology. First, the community of license change did not involve the type of change expressly addressed by the *Ownership Order*, *i.e.*, a change in the boundaries of the Mobile Metro or a change in WDLT-FM's "home" designation status.⁴⁵ Nor was it the type of change that we have found to be equivalent to a Metro boundary change, such as the creation or elimination of an entire Metro.⁴⁶ These types of changes are distinguishable from a community of license change because they directly concern market definitions, the main focus of the two-year safeguard.⁴⁷ In fact, we have specifically found that a change in community of license, even where it affects the relevant markets for multiple ownership purposes, does *not* trigger the two year waiting period.⁴⁸

Moreover, we note that the WDLT-FM community of license change does not implicate the Commission's underlying concern regarding the malleability of Arbitron market definitions. In contrast to an Arbitron Metro boundary change, a community of license change is reviewed and approved by the Commission, including an analysis of compliance with the multiple ownership rules.⁴⁹ In this case, grant of the WDLT-FM community of license change was based on WDLT-FM's immediate inclusion in the Mobile Metro market and concomitant removal from any contour-defined market.⁵⁰ To the extent that the Petitions challenge the grant of the WDLT-FM modification application, such a challenge is untimely.⁵¹

Therefore, ADX fails to make a *prima facie* case that WDLT-FM's community of license change triggered the two-year waiting period as set out in the *Ownership Order*. We find that the Applications are properly assessed using the Arbitron Metro-based methodology and comply with the numerical limits set out in section 73.3555(a)(1)(iii) of the rules.⁵²

⁴⁵ Cumulus argues that even if the two-year waiting period is applicable, the WDLT-FM change in community of license would be exempted because: (1) WDLT-FM has already been deemed "home" to the Mobile Metro for more than two years, and (2) WDLT-FM's community of license is located within the Mobile Metro boundaries. Pensacola Opposition at 10-11; Mobile Opposition at 12, 14. These arguments would be relevant if the applicable triggering change was one in "home" market designation. *Ownership Order*, 18 FCC Rcd at 13726. However, because both parties stipulate that there has been no change in WDLT-FM's "home" designation status, these arguments are not relevant here.

⁴⁶ *WCCL Letter Decision*, *supra* note 15; *See also Michelle A. McClure, Esq.*, Letter, 24 FCC Rcd 7054, 7056 n. 14 (2009).

⁴⁷ *See* note 15, *supra*.

⁴⁸ *See Clear Channel Decision*, 24 FCC Rcd at 14085.

⁴⁹ *See* 47 U.S.C. § 307(b); 47 C.F.R. § 73.3555, note 4.

⁵⁰ *See* BPH-20120131AJS, Section II, Item 4.b, Exhibit 5.

⁵¹ 47 C.F.R. § 1.106(f). Grant of the WDLT-FM modification application, BPH-20120131AJS, was placed on public notice on May 10, 2012. *See Broadcast Actions*, Report No. 47735. No objections were filed against the WDLT-FM modification application, nor were any reconsideration petitions filed against the grant.

⁵² 47 C.F.R. § 73.3555(a)(1)(iii).

Redefinition of Pensacola and Mobile markets. With respect to ADX's arguments that the Pensacola and Mobile Metros should be considered one market, we expressly rejected such an amorphous, *ad hoc* approach when we adopted a rule based on Arbitron Metro markets.⁵³ The Commission found that the Arbitron Metro approach would serve the public interest in most circumstances, and ADX has failed to show that such departure is warranted in this case. We agree with Cumulus that there is nothing new or unique about two adjacent Arbitron markets sharing numerous radio stations. Many Arbitron Metro markets nationwide are adjacent to each other. Indeed, as Cumulus points out, some are even embedded in another Metro market, yet are still treated separately under the *Ownership Order*.⁵⁴ ADX presents no facts or argument to justify differential treatment of the Pensacola and Mobile Metro markets.

Based on the foregoing, ADX has not established a *prima facie* case—nor raised a substantial and material question of fact—that grant of the Applications (or station operation under a related LMA) will result in competitive harm or violate the Commission's multiple ownership rules and policies. Therefore, we will deny the Petitions.

Conclusion/Actions. We find that ADX fails to provide the necessary specific allegations of fact to make a *prima facie* case that grant of the Applications would be inconsistent with the public interest. We further find that ADX has not raised a substantial and material question of fact warranting further inquiry and that grant of the Applications is consistent with the public interest, convenience, and necessity. Accordingly, IT IS ORDERED, that the Petitions to Deny filed by ADX Communications of Escambia and ADX Communications of Pensacola ARE DENIED.

IT IS FURTHER ORDERED, that the applications to assign the licenses of stations WMEZ(FM), Pensacola, Florida, and WXBM-FM, Milton, Florida, from 6 Johnson Road Licenses, Inc. to Cumulus Licensing LLC ARE GRANTED.

IT IS FURTHER ORDERED, that the application to assign the license of station WABD(FM), Mobile, Alabama, from Educational Media Foundation to Cumulus Licensing LLC IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

⁵³ *Ownership Order*, 18 FCC Rcd at 13724-28.

⁵⁴ *Id.* at 13725, n.580.