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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In re Applications of )  
)  
6 Johnson Road Licenses, Inc. )  
(Assignor) )  
)  
and )  
)  
Cumulus Licensing LLC )  
(Assignee) )  
)  
For Consent to Assignment of )  
Licenses for Stations WMEZ(FM), )  
Pensacola, Florida, and WXBM-FM, )  
Milton, Florida; and )  
)  
Educational Media Foundation )  
(Assignor) )  
)  
and )  
)  
Cumulus Licensing LLC )  
(Assignee) )  
)  
For Consent to Assignment of )  
License for Station WABD(FM), )  
Mobile, Alabama. )  
)  
)

File No. BALH-20120509AER  
Facility ID No. 73256

File No. BALH-20120509AES  
Facility ID No. 32946

File No. BALH-20120709AFX  
Facility ID No. 70657

FILED/ACCEPTED

FEB 22 2013

Federal Communications Commission  
Office of the Secretary

2013 FEB 26 A 6:12

To: Secretary  
Attn: The Commission

**OPPOSITION TO APPLICATION FOR REVIEW**

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February 22, 2013

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## Summary

ADX Communications of Escambia and ADX Communications of Pensacola (collectively referred to herein as “ADX”) filed an Application for Review challenging a decision (the “Decision”) by the Media Bureau (the “Bureau”) which granted two separate assignment applications (each an “Application” and collectively the “Applications”). One Application proposed the assignment of the licenses for radio stations WMEZ(FM), Pensacola, Florida (Facility ID No. 73256), and WXBW-FM, Milton, Florida (Facility ID No. 32946) from 6 Johnson Road Licenses, Inc. to Cumulus Licensing LLC (“Cumulus”), and the other Application proposed the assignment of the license for radio station WABD(FM), Mobile, Alabama (Facility ID No. 70657), from Educational Media Foundation (“EMF”) to Cumulus.

In granting the Applications, the *Decision* rejected arguments in ADX’s Petitions to Deny (1) that the Mobile and Pensacola Arbitron Metros constitute a single radio market, and (2) that Cumulus’ prior application to change the community of license of station WDLT-FM (formerly WYOK) from Atmore, Alabama to Saraland, Alabama was subject to a two-year waiting period before Cumulus could rely on that community of license change to demonstrate its compliance with the Commission’s local radio ownership rule. *See 2002 Biennial Regulatory Review*, 18 FCC Rcd 13620, 13814 (2003) (subsequent history omitted) (“*Biennial Review Order*”).

The *Decision* acknowledged that the Commission had stated in the *Biennial Review Order* that it would give a “hard look” to any argument that use of Arbitron Metros in any particular case was inappropriate. However, the *Decision* stated that ADX had not provided a sufficient basis to justify a departure from the Commission’s 2003 decision to use Arbitron Metros (where they exist) to define a radio market. The *Decision* observed that there would be no change in the number of competitors in the Mobile Metro because Cumulus and EMF were essentially exchanging stations. The *Decision* further observed that both the Mobile and the

Pensacola Metros would continue to be served by at least ten (10) different owners after consummation of the proposed transactions. *Decision* at 6.

The *Decision* also rejected ADX's contention that Cumulus had to wait two years before it could rely on the change in WDLT-FM's community of license. The *Decision* pointed out that the WDLT-FM application did not reflect any decision by Arbitron to eliminate or change the boundaries of any Metro or to change WDLT-FM's "home" status in any Metro. Accordingly, the *Decision* stated that the change in WDLT-FM's community of license was "distinguishable" from other types of changes that more "directly concern market definitions, the main focus of the two-year safeguard," citing *Clear Channel Broadcasting Licenses, Inc.*, 24 FCC Rcd 14078, 14085 (AD 2009), where the Bureau found that a change in a station's community of license did not trigger the two-year waiting period even if the change enabled the proponent to acquire more stations in a particular Metro. *Decision* at 7 (footnote omitted).

ADX's Application for Review reiterates the same arguments that were rejected by the Bureau but fails to provide any legal or evidentiary basis to warrant a reversal of the *Decision*.

In arguing that the Mobile and Pensacola Metros should be treated as a single market, the Application for Review states that the two Metros are adjacent to each other, that there are thirteen or fourteen "key broadcast facilities" – meaning Class C0, Class C1 and Class C FM stations – whose signals cover a majority of both Metros, and that Cumulus will own six (6) of those "key broadcast facilities" after consummation of the transactions underlying the Applications. However, the Application for Review does not provide any programming or advertising information to show that all thirteen or fourteen of those "key broadcast facilities" actually compete for listeners and advertisers in both Metros. Nor does the Application for Review provide any data to show that the signal coverage of the stations in the Mobile and

Pensacola Metros presents a unique situation. Consequently, the Application for Review again fails to satisfy ADX's heavy burden in justifying a departure from the Commission's decision to use Arbitron Metros as a bright-line test to define a radio market.

The Application for Review also fails to justify application of the two-year waiting period to the WDLT-FM community of license change. The two-year waiting period is one of several "safeguards" the Commission adopted to protect the public interest against actions taken by Arbitron (either on its own initiative or at the behest of a radio broadcaster). *Biennial Review Order*, 18 FCC Rcd at 13724. A change in a station's community of license is not an action taken by Arbitron, and the Commission has consistently stated (in application form instructions as well as decisions) that the two-year rule does not apply to such changes (because the Commission does not need a safeguard to protect the public interest against decisions by the Commission). The Application for Review does not cite any authority to demonstrate otherwise.

Having failed to present any fact or argument to undermine the *Decision*, the Application for Review should be denied.

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License for Station WABD(FM),	)	
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To: Secretary  
Attn: The Commission

**OPPOSITION TO APPLICATION FOR REVIEW**

Cumulus Licensing LLC (“Cumulus”), acting pursuant to Section 1.115(d) of the Commission’s rules, 47 C.F.R. §1.115(d), hereby opposes the Application for Review filed February 1, 2013 by ADX Communications of Escambia and ADX Communications of Pensacola (collectively referred to herein as “ADX”) seeking the reversal of the decision by the Media Bureau (the “Bureau”) with respect to the above-referenced assignment applications (each

an “Application” and collectively, the “Applications”).<sup>1</sup> *Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau, to Dan J. Alpert, Esq. et al.*, DA 13-3 (MB January 2, 2013) (the “Decision”).

### **Introduction**

The Application for Review claims that the Bureau was “arbitrary and capricious” in issuing the *Decision* and that Commission review of the *Decision* is warranted because it “involves a question of law which has not previously been resolved by the Commission.” App. Rev. at 1, 7. The reality is otherwise. There was nothing arbitrary or capricious about the Bureau’s action, and there is no novel question of law presented by this case. The *Decision* comports with Commission rules and Commission precedent and should be affirmed.

The Applications reflect Cumulus’ proposed acquisition of (i) radio stations WMEZ(FM), Pensacola, Florida (Facility ID No. 73256) (“WMEZ”), and WXBM-FM, Milton, Florida (Facility ID No. 32946), in the Pensacola, Florida Arbitron Metro (the “Pensacola Metro”) from 6 Johnson Road Licenses, Inc. (“JRL”), and (ii) radio station WABD(FM), Mobile, Alabama (Facility ID No. 70657) (“WABD”), in the Mobile, Alabama Arbitron Metro (the “Mobile Metro”) from Educational Media Foundation (“EMF”). Acquisition of WMEZ and WXBM-FM would give Cumulus four (4) FM stations and one (1) AM station in the Pensacola Metro, which complies with the Commission’s local radio ownership rules.<sup>2</sup> Acquisition of WABD would give Cumulus three (3) FM stations and two (2) AM stations in the Mobile Metro, which also complies with the Commission’s local radio ownership rules.

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<sup>1</sup> This Opposition is timely filed. On February 15, 2013, Cumulus filed a Motion for Extension of Time with the consent of counsel for ADX to extend the deadline for filing the Opposition to February 22, 2013.

<sup>2</sup> Cumulus consummated its acquisition of WMEZ and WXBM-FM on January 17, 2013.

ADX's Application for Review nonetheless challenges those acquisitions with two primary arguments, neither of which has any merit. First, ADX claims that the *Decision* wrongfully used Arbitron Metros to define the Mobile and Pensacola markets and that the Bureau should have relied instead on the signal coverage of the stations in those Metros because six of the Cumulus FM stations (after consummation of the proposed acquisitions) have signals that cover both Metros. ADX asserts that use of the "Arbitron-based, 'bright-line . . . analysis' does not work" under these circumstances and that the Mobile and Pensacola Metros should be deemed to be one larger collective market. App. Rev. at 20. If the Mobile and Pensacola Metros were deemed to be one combined market, the proposed acquisitions would give Cumulus more stations than is allowed under the Commission's local ownership rule.

The *Decision* rejected the use of signal coverage as the basis for defining the Mobile and Pensacola radio markets or determining the number of stations in the Metros. The *Decision* pointed out that the Commission had "rejected such an amorphous, *ad hoc* approach when [it] adopted a rule based on Arbitron Metro markets." *Decision* at 8 (footnote omitted). It is of course true that the Commission stated that interested parties would always have the right to present evidence to show that use of Arbitron Metros was inappropriate in a particular case. But ADX's presentation to the Bureau (and repeated in its Application for Review) consisted of little more than a showing of the signal coverage for the Metros' stations – hardly a sufficient basis to conclude that the use of the bright-line Arbitron Metros was inappropriate here – especially because ADX has failed to show that there is anything "new or unique" about stations in one Metro having signals which extend into an adjacent Metro. *Decision* at 8.

ADX's second primary argument revolves around its claim that Cumulus somehow "manipulated" the Mobile radio market by changing the community of license of station WDLT-



FM (formerly WYOK) from Atmore, Alabama, a community located outside the Mobile Metro, to Saraland, Alabama, a community located within the boundaries of the Mobile Metro.

According to ADX, the Commission was required to impose a two-year waiting period before permitting Cumulus to take advantage of the WDLT-FM community of license change (which enabled Cumulus to acquire two stations – instead of one – in the Pensacola Metro) and to then employ a contour overlap methodology to define markets (which, according to ADX, would show that Cumulus’ acquisition of the JRL and EMF stations would not comply with the local radio ownership rule in two of the three markets). App. Rev. at 1, 5 n.14, 21-23.

The Bureau rejected this second argument because the change in WDLT-FM’s community of license did not involve the type of change which required invocation of the two-year waiting period. The two-year waiting period was adopted in 2003 in response to concerns that Arbitron would be receptive to changes proposed by broadcasters – its clients – in Metro boundaries or in a station’s status (and whether the station should or should not be included in the station count of a particular Metro). The Commission therefore stated that the two-year waiting period would be imposed in situations involving any decision by Arbitron to change the boundaries of a Metro or to change in a station’s “home” status. See *2002 Biennial Regulatory Review*, 18 FCC Rcd 13620, 13726 (2003) (subsequent history omitted) (“*Biennial Review Order*”). The WDLT-FM community of license change did not involve either of those circumstances, and, in accordance with prior decisions, the *Decision* explained that the change in WDLT-FM’s community of license was “distinguishable” from other types of changes which more “directly concern market definitions, the main focus of the two-year safeguard.” *Decision* at 7 (footnote omitted). Although full of sound and fury, the Application for Review fails to cite

any Commission decision or other authority that expanded the two-year rule to encompass a change in a station's community of license.

Having failed to present any fact or legal authority to undermine the *Decision*, the Application for Review should be denied.

## **I. Questions Presented for Review.**

The Questions Presented for Review in the Application for Review reflect the flawed analysis in ADX's arguments. The more appropriate questions presented for review are as follows:

1. Whether the *Decision* properly rejected ADX's proposal to depart from the Commission's required reliance on Arbitron Metros to define a radio market and to rely on the signal coverage of stations in the Mobile and Pensacola Metros when (a) the undisputed evidence shows that there would be ample competition in both Metros from at least "ten different station owners," *Decision* at 7, and (b) ADX failed to demonstrate that the Mobile and Pensacola Metros present a unique situation that would justify a departure from Commission rules?
2. Whether the *Decision* properly concluded that the two-year waiting rule did not apply to the change in WDLT-FM's community of license when the change did not involve any decision by Arbitron (a) to change a Metro boundary or (b) to change in the home status of WDLT-FM (which had already been home to the Mobile Metro since 2003)?

## **II. Legal Requirements.**

Section 309(d)(1) of the Communications Act of 1934, as amended (the "Act"), requires that petitions to deny "contain specific allegations of fact sufficient to show 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]." 47 U.S.C. §309(d)(1). That section further provides that "[s]uch allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof." *Id.* In short, the Act requires that any petition to deny an assignment application contain specific

allegations of fact sufficient to show that a grant of the application would be inconsistent with the public interest.

The Commission is obligated to perform a two-step process in reviewing petitions to deny. First, the Commission must determine – based solely on “consideration of the petition and its supporting affidavits” – whether the petition shows that a grant of the application would be *prima facie* inconsistent with the public interest. *Astroline Communications Company Limited Partnership v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988). If the petitioner demonstrates that a grant of the application would be *prima facie* inconsistent with the public interest then “the Commission determines whether ‘on the basis of the application, the pleadings filed, or other matters which it may officially notice[,] . . . a substantial and material question of fact is presented.’” *Id.* (citations omitted).

### **III. Application for Review Has No Merit.**

ADX’s Petitions to Deny did not present a *prima facie* case that grant of the Applications would be inconsistent with the public interest. Accordingly, the Application for Review should be denied.

#### **A. Reliance on Arbitron Metros Was Warranted.**

##### **1. ADX’s Contentions.**

ADX states that the Commission never intended for the “bright-line geography based definition for determining the boundaries of a radio market” to be applied in all cases and that interested parties were free to demonstrate that use of Arbitron Metros would be inappropriate in a particular situation. App. Rev. at 8. ADX claims that the instant matter warrants a departure from the use of Arbitron Metros and that the Bureau was “arbitrary and capricious” in failing to credit the information provided by ADX to show that it was inappropriate to use Arbitron Metros

in assessing Cumulus' compliance with the Commission's local radio ownership rule. App. Rev. at 1, 8.

To support its position, ADX invokes a statement from the *Biennial Review Order* that, in establishing the ownership limitations in its rules, the Commission's "objective is to prevent firms from gaining market dominance through the consolidation of a significant number of key broadcast facilities." App. Rev. at 11, *quoting Biennial Review Order*, 18 FCC Rcd at 13737. According to ADX, the "key broadcast facilities" referenced in the Commission's *Biennial Review Order* are Class C, C0 and Class C1 FM facilities, which are authorized to operate with reference maximum facilities of an effective radiated power of 100 kilowatts and an antenna height above average terrain ranging from 299 meters (for a Class C1 facility) to 600 meters (for a full Class C facility).<sup>3</sup> App. Rev. at 12.

ADX contends (i) that the Mobile and Pensacola Metros really constitute one large radio market because there are fourteen (14) "key broadcast facilities" whose signals are "effectively serving both Markets" and (ii) that use of Arbitron Metros to define the radio market here is inappropriate because six (6) of those fourteen (14) "key broadcast facilities" will be owned by Cumulus after consummation of the transactions underlying the Applications.<sup>4</sup> App. Rev. at 2-3, 13. ADX claims that consideration of the stations' signals is compelled by Congress' statutory directive for the Commission to provide a definition of a radio market that accounts for the number of stations to which listeners have access. According to ADX, that directive, in turn, requires the Commission to

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<sup>3</sup> The term "key broadcast facilities" is not defined in the *Biennial Review Order*, and ADX does not cite the source of its definition of that term. However, the Application for Review has no merit even if the Commission did define the term as the ADX Application for Review proposes.

<sup>4</sup> These six (6) stations include (i) four (4) Class C FM stations and a Class C0 FM station operating from transmitter sites no more than 2.5 miles apart, and (ii) a sixth Class C FM station operating from a transmitter site 12 miles away. App. Rev. at 19-20.

take into account (i) the specific centralized transmitter sites chosen by the licensees in the markets, . . . (ii) the power at which those stations are permitted to operate; (iii) the coverage of those stations; and (iv) the extent to which those stations serve areas outside the otherwise delineated “market” . . . .

App. Rev. at 14. ADX claims that the *Decision*’s reliance on Arbitron Metros in the instant case failed to account for the foregoing factors.<sup>5</sup> *Id.*

According to ADX, consideration of the signals of the stations in the Mobile and Pensacola Metros reveals the following facts which are “*believed* to collectively exist in *no* other market in the United States.”<sup>6</sup>

- The Mobile Metro is adjacent to the Pensacola Metro.
- The transmitter sites for all of the Class C, C0 and C1 stations in the Mobile Metro are all located in Baldwin County, Alabama, which is in the Mobile Metro.
- The transmitter sites for all of the Class C, C0 and C1 stations in the Pensacola Metro are all located in Baldwin County, Alabama.
- Based solely on the stations’ signal coverage, the “13” high-powered “Key Broadcast Facilities” in the Pensacola and Mobile Metros “*serve the majority of both radio markets.*”<sup>7</sup> App. Rev. at 17-18 (emphasis in original).
- Two Class C FM stations owned by Cumulus – WDLT-FM and WCOA-FM – have transmitters which are co-located and, based solely on the stations’ signal coverage, “serve literally identical listeners and advertisers” but are assigned by Arbitron to different Metros. *Id.* at 18.
- WMEZ and WXBM-FM, the two Pensacola stations to be acquired by Cumulus from JRL, operate from a transmitter site located 2.3 miles east from the transmitter sites

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<sup>5</sup> In support of its argument, the Application for Review quotes language from *Whitehall Enterprises, Inc.*, 17 FCC Rcd 17509 (2002) (“*Whitehall Enterprises*). App. Rev. at 16-17. As ADX acknowledges, however, *Whitehall Enterprises* was decided when the Commission was still using the contour overlap methodology to define a radio market and prior to the Commission’s decision in the *Biennial Review Order* to replace that contour overlap methodology with Arbitron Metros to define radio markets. Therefore, *Whitehall Enterprises* has no relevance in defining a radio market where an Arbitron Metro exists.

<sup>6</sup> App. Rev. at 17 (first emphasis added; second emphasis in original).

<sup>7</sup> The Application for Review states that various points that there are “13” and “14” Key Broadcast Facilities. *See e.g.* App. Rev. at 6 (referencing “fourteen of the most powerful Key Broadcast Facilities”).

of WDLT-FM and WBLX-FM and cover 96% of the same population as WDLT-FM and WBLX-FM, which are located in the Mobile Metro.

App. Rev. at 17-18.

ADX claims that a “blind application of the Commission’s Arbitron-based market analysis makes no sense” in light of the foregoing facts. App. Rev. at 19.

## **2. Nothing Unique About Mobile and Pensacola to Warrant Any Deviation.**

The Commission decided in 2003 to use Arbitron Metros to avoid the never-ending problems it had encountered in using the contour overlap methodology to define radio markets. As the Commission explained, use of that contour overlap methodology was “producing irrational and inconsistent results.” *Biennial Review Order*, 18 FCC Rcd at 13712 (footnote omitted). The Commission concluded that replacement of the *ad hoc* approach with the use of Arbitron Metros (where they existed) would eliminate “the harm caused by a lack of regulatory certainty” by creating a bright-line test to define a market and assess relevant competition. 18 FCC Rcd at 13646.

In making that decision, the Commission certainly knew that there were many situations where the signals of stations in one Metro extended into a neighboring Metro – sometimes to a substantial extent. The Commission nonetheless concluded that use of Arbitron Metros to define radio markets would constitute “a more rational market definition . . . that, *in virtually all cases*, . . . will protect against excessive concentration levels in local radio markets that might otherwise threaten competition.” *Biennial Review Order*, 18 FCC Rcd at 13813 (emphasis added). In reaching that conclusion, the Commission drew comfort from the knowledge that Arbitron Metros “are an industry standard and represent a reasonable geographic market definition within which radio stations compete” and that the United States Department of Justice relied on Arbitron Metros “as the relevant geographic market for antitrust purposes.” 18 FCC Rcd at 13725 (footnote omitted).

ADX has not presented any evidence to show that consideration of the signal coverage of stations in the Mobile and Pensacola Metros warrants a departure from the Commission's decision to use Arbitron Metros where they exist. As a starting point, all of the so-called unique facts identified on pages 17-18 of the Application for Review are peculiar to the Mobile and Pensacola Metros. There is nothing in those facts which reflects any analysis of any other Metro in the country. All ADX can say is that those facts are "*believed* to collectively exist in no other market in the United States." App. Rev. at 17 (emphasis added). Nowhere did ADX explain in its Petitions to Deny or in its Application for Review the basis for that belief. For all the record shows, ADX's belief is nothing more than an assumption which falls far short of the requisite "specific allegations of fact sufficient to show that a grant of the Applications would be prima facie inconsistent with" the public interest. 47 U.S.C. § 309(d)(1).

ADX's failure to demonstrate that the Mobile and Pensacola Metros are unique could and probably would have unintended and substantial adverse consequences for other radio markets if the Commission were to conclude that those two Metros are one larger collective market. If the Mobile and Pensacola Metros are deemed to be one larger market, then other adjacent markets would have to be treated as a single market as well. As the *Decision* observed, there are many Metros across the country that are adjacent to one another. *See Decision* at 8. Those Metros include situations where a smaller radio market is treated as a separate Metro even though it is completely embedded in another larger Metro.<sup>8</sup> *See id.* at 8, citing *Biennial Review Order*, 18 FCC Rcd at 13725, n.580.

Consideration of the Orlando, Florida Arbitron Metro (the "Orlando Metro") and the Melbourne-Titusville-Cocoa, Florida Arbitron Metro (the "Melbourne Metro") highlights ADX's failure to provide a reasoned basis for distinguishing the Mobile/Pensacola Metros from other

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<sup>8</sup> Annexed hereto as Exhibit A is a list of nine (9) Metros which are embedded in another larger Metro.

Metros around the country. Those two Metros – like the Mobile and Pensacola Metros – are adjacent to each other. Like the Mobile and Pensacola Metros, the Melbourne and Orlando Metros have fourteen (14) “key broadcast facilities.” And like the Mobile/Pensacola Metros, six (6) of the “key broadcast facilities” in the Melbourne/Orlando Metros cover almost all of the two Metros from transmitter sites located in one of the Metros (the Orlando Metro): the transmitter sites of WRUM(FM), Orlando, Florida, WTKS-FM, Cocoa Beach, Florida, WOMX-FM, Orlando, Florida, and WJRR(FM), Cocoa Beach, Florida are all located in the Orlando Metro; and the transmitters of two additional Class C FM stations – WWKA(FM), Orlando, Florida and WDBO-FM, Orlando, Florida – are co-located only 1.5 miles away from the transmitter sites of the other four (4) Class C FM stations. As demonstrated in Exhibit B annexed hereto, the predicted 60 dBu service contours of all six (6) Class C stations – like the “key broadcast facilities” ADX identified in the Mobile and Pensacola Metros – cover both Metros. Another similarity with the Mobile/Pensacola Metros concerns the transmitter locations for WTKS-FM and WJRR: the transmitters for both of those stations (like WMEX and WXBM-FM, the two Pensacola radio stations Cumulus proposed to acquire from JRL) are located in one Metro (Orlando) even though both stations are licensed to serve a community (Cocoa Beach) in another Metro (Melbourne). As reflected in Exhibit B annexed hereto, both WTKS-FM and WJRR (like WMEX and WXBM-FM) have signals which cover almost all of the two Metros. See Exhibit B at 2.

The signal coverage of the stations in the Melbourne/Orlando Metros demonstrates that there is nothing unique about the Mobile and Pensacola Metros to warrant ADX’s draconian request that those latter two Metros be treated as a single radio market. If the Commission decided to treat the Mobile and Pensacola Metros as a single market – as ADX requests – the



Commission would have to conclude that the Melbourne/Orlando Metros are also a single Metro.<sup>9</sup>

ADX's failure to satisfy its burden to demonstrate that the signal coverage of the Mobile/Pensacola Metro stations is unique is compounded by ADX's persistent assumption that signal coverage equates to service. *See e.g.* App. Rev. at 2 ("fourteen stations in the two Markets actually serve *both* Metro Markets in substantially identical fashion"), at 3 (there are "14 FM stations effectively serving both Markets"), and at 4 (the Cumulus stations "have the *same* coverage, serve *both* Arbitron Metros, and for competitive purposes, compete with other licensees for the *same* audiences"). ADX did not present any evidence to the Bureau to demonstrate that every one of the "key broadcast facilities" in the Mobile and Pensacola Metros serves every part of the area included within its signal coverage – even if that area is outside the Arbitron Metro to which it is assigned. There is, for example, no evidence or information whatsoever in ADX's Petitions to Deny concerning the programming or advertising of the Cumulus stations (whether existing or proposed) in the Mobile and Pensacola Metros. Nor is there any evidence or other information concerning the programming or advertising of the other "key broadcast facilities" in those two Metros to show that those other stations are targeting listeners and advertisers in both Metros. Stated another way, there is no record basis for ADX's assertion that every one of the fourteen stations allegedly "intertwined" with both the Mobile and Pensacola Metros is in fact *servicing* both Metros "in substantially identical fashions."<sup>10</sup> App. Rev. at 2 (footnote omitted).

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<sup>9</sup> If the Melbourne/Orlando Metros were deemed to be a single market, Clear Channel Communications, Inc. ("Clear Channel") would be deemed to own far more stations than is permitted under the Commission's local ownership rule: Clear Channel has a total of 11 stations (7 FMs and 4 AMs) in those two Metros, which is three more stations (and two more FMs) than allowed by the Commission's local radio ownership rule.

<sup>10</sup> Having failed to present any information on programming and advertising to the Bureau, ADX is precluded from submitting such information to the Commission now. *See* 47 C.F.R. §1.115(c) ("[n]o

There is thus no novel question of law that requires Commission consideration here. The Commission has already made it clear that a party bears a heavy burden in justifying a departure from the bright-line analysis facilitated by the use of Arbitron Metros and that that burden requires the submission of compelling economic and other data to show that competition will be compromised if the Commission fails to use an alternative method for defining a radio market.

A paradigm case on point is *Eagle Broadcasting Company, Inc.*, 20 FCC Rcd 8753 (MB 2005), *rev. denied*, 23 FCC Rcd 18440 (2008) (“*Eagle Broadcasting*”). In that case, Finger Lakes Alliance for Independent Media (“FLAIM”) filed a petition to deny against applications proposing the assignment of four (4) radio stations in the Ithaca, New York Metro to Saga Communications of New England, LLC (“Saga”). FLAIM argued that use of Arbitron Metros to define the Ithaca, New York radio market would be inappropriate because the Metro included four (4) stations which did not cover the entire Metro or “receive a minimal share of local advertising revenue” and that the market should be confined to seven (7) stations which had a “listenable” signal and provided virtually all of the local news coverage. 23 FCC Rcd at 18442, 18444. If FLAIM’s argument was accepted, Saga’s ownership of four (4) stations in the market would exceed the level of ownership permitted by the Commission’s local ownership rule.

The Commission rejected FLAIM’s proposal to deviate from use of the Arbitron Metro and upheld the Bureau’s decision denying FLAIM’s petition to deny. As the Commission explained, it was not prepared to revert to the “case-by-case approach” advocated by FLAIM in the absence of compelling economic and demographic data:

The Commission has expressly rejected such an approach due to the “harm caused by lack of regulatory certainty” and because “the adoption of bright line rules” is preferable in implementing the Commission’s competition and other goals. FLAIM has failed to proffer sufficient economic and demographic data to support a departure from the Arbitron Metro definition in this case. In particular, we note

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application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass”).

that the Commission has concluded that advertising revenue share is of “decreasing relevance . . . as a barometer of competition.”

23 FCC Rcd at 18445. *See also WASK, Inc.*, 20 FCC Rcd 19069, 19072 (MB 2005) (Bureau rejected proposal to abandon numerical limits and evaluate a transaction using a “case-by-case” approach which relied on advertising revenue shares because petitioner “failed to proffer sufficient economic data to permit meaningful economic analysis or substantiate its claim of competitive harm”).

It is of course true that FLAIM was trying to *exclude* stations from the market count while ADX is trying to *include* stations in the market count. That, however, is a distinction without a difference. In both cases, the parties were or are trying to manipulate the number of radio stations in the market based largely, if not entirely, on signal coverage (in FLAIM’s case, because the stations in question did not have a “listenable” signal, and in ADX’s case, because the stations in question have a signal that extends beyond the boundaries of a single Metro). In either case – whether it be FLAIM’s proposal or ADX’s proposal – the Commission would be forced to evaluate competition on a case-by-case basis using “subjective factors such as ‘listenability’ . . .” 23 FCC Rcd at 18444. *Eagle Broadcasting* therefore confirms that ADX has failed to meet its burden of proof to overcome the presumption that use of Arbitron Metros “will protect against excessive concentration levels in local radio markets that might otherwise threaten the public interest.” *Biennial Review Order*, 18 FCC Rcd at 13813.

**B. Two-Year Rule Does Not Apply.**

ADX claims that the Bureau erred in not subjecting the community of license change for WDLT-FM to a two-year waiting period before Cumulus could rely on that change in demonstrating compliance with the Commission’s local radio ownership rule. If the two-year waiting period were applied, the Application for Cumulus to acquire the licenses for WMEZ and WXLM-FM in the Pensacola Metro would have to be examined on the assumption that WDLT-

FM had not changed its community of license, and, according to ADX, that assumption would require use of the Commission's contour overlap methodology in determining whether the acquisition would comply with the Commission's local radio ownership rule (which, according to ADX, it would not). App. Rev. at 5 n.14, 20-21.

ADX's argument cannot withstand scrutiny. It distorts applicable precedent and disregards other authorities that undermine its argument.

In deciding to use Arbitron Metros, the Commission was mindful of comments from various parties that Arbitron was a private company and that Arbitron could be persuaded by its clients – radio broadcasters subject to the Commission's multiple ownership rules – to make changes to an Arbitron Metro or to a station's status in order to maximize the number of stations a party could own in a particular Metro. In response, the Commission stated that it would “establish safeguards to deter parties from attempting to manipulate Arbitron market definitions for purposes of circumventing the local radio ownership rule.” *Biennial Review Order*, 18 FCC Rcd at 13724. To that end, the Commission stated that a radio broadcaster would have to wait two years before exploiting change in a Metro boundary or a change in a station's status:

Specifically, we will not allow a party to receive the benefit of a change in Arbitron Metro boundaries unless that change has been in place for at least two years. This safeguard includes both enlarging the Metro (to make a market larger) and shrinking the Metro (to split a party's non-compliant station holdings into separate markets). Similarly, a station combination that does not comply with the rule cannot rely on a change in Arbitron Metro definitions to show compliance and thereby avoid the transfer restrictions outlined in the grandfathering section below, unless that change has been in effect for two years. We also will not allow a party to receive the benefit of the inclusion of a radio station as “home” to a Metro *unless such station's community of license is located within the Metro or such station has been considered home to that Metro for at least two years.*

18 FCC Rcd at 13726 (emphasis added). The common thread of these proscriptions underlying the two-year waiting period is an action taken by Arbitron (whether on its own initiative or at the behest of a radio broadcaster).

In that context, it is understandable why the Commission did not apply the two-year waiting period to any change in a station's community of license and stated instead that the two-year waiting period would *not* apply if the station's community of license is located in the Metro. That kind of change cannot be orchestrated by Arbitron. Only the Commission has the authority to change a station's community of license. The Commission did not need to provide a safeguard against actions which it had taken.

ADX nonetheless contends that the two-year waiting period applies to a community of license change like the one which the Commission approved for WDLT-FM. In support of that contention, ADX twists the above-quoted language in the *Biennial Review Order* to argue that the two-year proscription was intended to apply to a change in a station's community of license, but that effort distorts the plain meaning of the Commission's statement. ADX's contention is further belied by numerous other Commission statements.

As a starting point, Worksheet #3 to the FCC Form 314 application states as follows:

To demonstrate compliance with the numerical limits in the local radio ownership rule, applicants may not rely on a change in the Metro's geographic boundaries that has occurred since September 4, 2003, unless such change has been in effect for at least two years. In addition, applicants also may not rely on the inclusion of a radio station as "home" to a Metro unless (a) such station was listed by BIA as "home" to the Metro as of September 3, 2004, or (b) such "home" designation has been in effect for at least two years, or (c) *such station's community of license is located within the Metro.*

FCC Form 314 (June 2010), Worksheet #3 at 3 (emphasis added). Worksheet #3 confirms that the two-year waiting period does not apply to situations like the WDLT-FM modification application where a station has relocated to a community inside a Metro boundary (because, again, such action would have been approved by the Commission and would not involve any action by Arbitron).

ADX also claims that its position is supported by *John M. Pelkey, Esq.*, 23 FCC Rcd 17978 (MB 2008) ("*WCCL*"). However, *WCCL* did not involve the Commission's approval of a

change in a station's community of license. Rather, *WCCL* concerned an action taken by Arbitron and thus fell within the scope of the concerns which underlie the two-year waiting period.

In *WCCL*, Forever Broadcasting LLC ("Forever") filed an application on October 31, 2007 seeking to acquire four radio stations in the Johnstown, Pennsylvania Arbitron Metro (the "Johnstown Metro"). Months before that application was filed, Forever's parent entity canceled its Arbitron subscriptions in several Pennsylvania markets, including Johnstown. Following the cancellation of those subscriptions – but before the assignment application was filed – Arbitron announced that it had canceled the Johnstown Metro effective that fall. In the absence of an Arbitron Metro, the assignment application proposed to use the Commission's interim contour-overlap methodology to show that Forever's acquisition of the four stations satisfied the ownership limits in the Commission's local radio ownership rule. That approach would have resulted in a substantial benefit to Forever because it would have been able to own nine (9) stations, including six (6) FM stations. If the Johnstown Metro had not been eliminated, Forever would have been limited to six (6) stations, only four (4) of which would have been FM stations.

The Bureau agreed with the argument in a petition to deny that the two-year waiting period was designed to apply to changes in an Arbitron Metro and that "the elimination of an entire Arbitron Metro should be treated as a market definition change within the scope this policy." 23 FCC Rcd at 17980. The Bureau explained that Forever should not be allowed "to benefit immediately from this market definition change" and that application of the two-year waiting period was therefore applicable. 23 FCC Rcd at 17981, *citing Biennial Review Order*, 18 FCC Rcd at 13726.

The facts in *WCCL* could not be more different from those surrounding the WDLT-FM application. The WDLT-FM modification application did not involve cancellation of an

Arbitron Metro or a change in the boundaries of an Arbitron Metro. Hence, there is no basis to conclude here, as there was in *WCCL*, that Cumulus is seeking the benefit of an action taken by Arbitron.

The same analysis undercuts ADX's reliance on *Citicasters Licenses, L.P.*, 22 FCC Rcd 17788 (AD 2007) ("*Citicasters*"). See App. Rev. at 22. In that case, Citicasters Licenses, L.P. ("*Citicasters*") filed an application to change the community of license of station WMRN-FM from Marion, Ohio – a community located outside the Columbus, Ohio Arbitron Metro ("*Columbus Metro*") – to Dublin, Ohio – a community located inside the Columbus Metro. At the time the application was filed, Citicasters' proposal to acquire another station in the Columbus Metro did not comply with the Commission's multiple ownership rules because Citicasters already held an attributable interest in four (4) FM stations in the Metro, and the Metro only had 44 stations (meaning that Citicasters could not own more than four FM stations). The relocation of WMRN-FM into the Columbus Metro would have allowed Citicasters to own five (5) FM stations in the Columbus Metro.

Subsequent to the filing of the WMRN-FM application, an application was filed by Southeastern Ohio Broadcasting System, Inc. to move station WHIZ-FM from Zanesville, Ohio – a community located outside the Columbus Metro – to Baltimore, Ohio – a community located within the Columbus Metro. As a result of the grant of the WHIZ-FM modification application, BIA reclassified the Columbus Metro as having 45 stations, a result which enabled Citicasters to acquire another station without regard to the change in WMRN-FM's community of license.

ADX acknowledges that the grant of the WHIZ-FM application enlarged the Columbus Metro to permit the grant of Citicasters' application to acquire another station in the Columbus Metro. Nevertheless, ADX latches onto a footnote in the Bureau's decision to make the following claim:

. . . the Commission indicated that while ordinarily the two year prohibition *would* be applicable, “[w]e are allowing Clear Channel to implement the Dublin allotment without delay, notably because we see no evidence that Clear Channel influenced the WHIZ-FM relocation.”

App. Rev. at 22 (emphasis in original), quoting *Citicasters*, 22 FCC Rcd at 17790 n.12.<sup>11</sup>

ADX has cherry-picked certain language in *Citicasters* and, in so doing, not only mischaracterized the Bureau’s decision but also ignored the controlling language in the same footnote. Immediately following the language quoted above by ADX, the Bureau stated the well-established principle that the two-year rule does *not* apply where, as here, the subject station moves to a community that is within the geographic boundaries of an Arbitron Metro:

The two-year restriction does not apply, however, if the triggering station is licensed to a community that is geographically within the metro boundaries, as here. WHIZ-FM – which is now licensed to Baltimore, Ohio, a community within the geographical boundary of the Columbus Metro – triggered the market size increase. We believe that allowing Clear Channel to proceed *pursuant to the exception and without delay is not inconsistent with the Commission’s concerns about manipulation of market size as expressed in Definition of Radio Markets.*

*Citicasters*, 22 FCC Rcd at 17790 n.12 (citations omitted & emphasis added). Thus, contrary to ADX’s allegations, the grant of *Citicasters*’ application was not based on its lack of influence over the WHIZ-FM relocation. On the contrary, the Bureau granted *Citicasters*’ application because the triggering station (WHIZ-FM) was relocated to a community within the geographic boundary of the Columbus Metro based on action taken by the Commission – not Arbitron.

The holding in *Citicasters* has been followed by the Bureau in subsequent cases where stations have moved from communities located outside an Arbitron Metro to communities within the geographic boundaries of a Metro – without regard to whether the relocating station is owned by the applicant or a third party. Indeed, the facts surrounding WDLT-FM’s community of

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<sup>11</sup> *Citicasters* is a subsidiary of Clear Channel Communications, Inc. The Bureau therefore referred to *Citicasters* as “Clear Channel” in its decision.



license change are substantially similar to those in *Clear Channel Broadcasting Licenses, Inc.*, 24 FCC Rcd 14078, 14085 (MB 2009) (“*Clear Channel Broadcasting*”). Clear Channel Broadcasting Licenses, Inc. (“Clear Channel”) is the licensee of FM stations WKGR and WLDI, both of which were licensed to communities within the Ft. Pierce Metro but were listed by Arbitron as “home” to the West Palm Beach Metro. Clear Channel filed an application to change the community of license of WKGR from Ft. Pierce to Wellington, Florida, which is located inside the West Palm Beach Metro. Clear Channel also filed a separate application to change the community of license of WLDI from Ft. Pierce to Juno Beach, Florida, which was also located inside the West Palm Beach Metro. Neither application proposed any change in the technical facilities of either station.

A grant of the applications would remove both WKGR and WLDI from the Ft. Pierce Metro. 24 FCC Rcd at 14080. That removal would in turn permit Clear Channel to acquire additional stations in the Ft. Pierce Metro. While the community of license change applications were pending, Clear Channel filed an application to re-acquire WOLL(FM), Hobe Sound, Florida (“WOLL”), a station that was home to the Ft. Pierce market but had been placed in a trust (because its continued ownership by Clear Channel would have violated the Commission’s local radio ownership rule as long as WKGR and WLDI were located in the Ft. Pierce Metro).

Vero Beach Broadcasters, LLC (“VBB”) filed an informal objection to the Clear Channel modification applications and a Petition to Deny the WOLL assignment application. In those pleadings, VBB claimed that, as a practical matter, WKGR and WLDI would continue to compete in the Ft. Pierce Metro (because there would be no changes in the stations’ technical facilities), and with the addition of WOLL, Clear Channel would effectively have more stations in the Ft. Pierce Metro than Commission rules allowed. For

that reason, VBB argued (just as ADX has argued in this proceeding) that Clear Channel should not be allowed to rely on the changes in the WKGR and WLDI communities of license until expiration of the two-year waiting period referenced in *Biennial Review Order*.

The Bureau rejected VBB's objections and granted the Clear Channel applications. The Bureau explained that "the Commission established a two-year waiting period for changes in Metros as 'safeguards to deter parties from attempting to manipulate' the relevant data boundaries and home market designations." 22 FCC Rcd at 14085 (citation omitted). The Bureau observed that "there is no change in the Metro boundaries, creation of new Metros, and/or changes in a station's home designation by 'opting in' or 'opting out' of a Metro." *Id.* (footnote omitted). Instead, Clear Channel proposed to change the communities of license of stations WKGR and WLDI to communities located inside the West Palm Beach Metro. The Bureau concluded that invoking the two-year waiting period "is not appropriate in this instance." *Id.* The Bureau therefore granted the assignment application to allow Clear Channel to acquire WOLL.

*Clear Channel Broadcasting* provides further confirmation that Cumulus' reliance on the grant of the WDLT-FM modification application is not subject to the two-year waiting period. As was the case with WKGR and WLDI in *Clear Channel Broadcasting*, Cumulus relocated WDLT-FM from a community outside the relevant Metro to a community located within the boundaries of the Metro and did not make any changes in WDLT-FM's technical facilities. Consequently, as in the case of WKGR and WLDI, there is no change in the Metro boundaries, creation of a new Metro, and/or changes in a station's home designation by Cumulus either "opting in" or "opting out" of a Metro. For all of these reasons, invoking the

Commission's two-year "safeguard" would not be appropriate in this instance any more than it would have been in *Clear Channel Broadcasting*.<sup>12</sup>

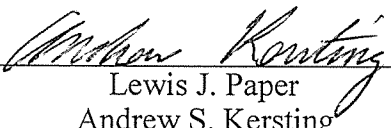
### Conclusion

WHEREFORE, in view of the foregoing and the entire record herein, it is respectfully requested that ADX's Application for Review be denied.

Respectfully submitted,

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<sup>12</sup> The same conclusion – that the two-year restriction does not apply when a station is relocated to a community inside a Metro – is reflected in other actions as well. For example, the Bureau granted an application to change the community of license of station WIIL(FM) from Kenosha, Wisconsin (a community located within the Chicago, IL Arbitron Metro) to Union Grove, Wisconsin (a community located within the Milwaukee-Racine, WI Metro), where no changes were proposed in WIIL's technical facilities. File No. BPH-20091209AAC. As a result of the grant of the WIIL modification application, the licensee/beneficiaries were required to divest only two (rather than three) of their Chicago Metro radio stations to a divestiture trustee in a Form 314 assignment application without waiting for expiration of a two-year waiting period. File No. BALH-20100401AFQ.

**Embedded Radio Markets**

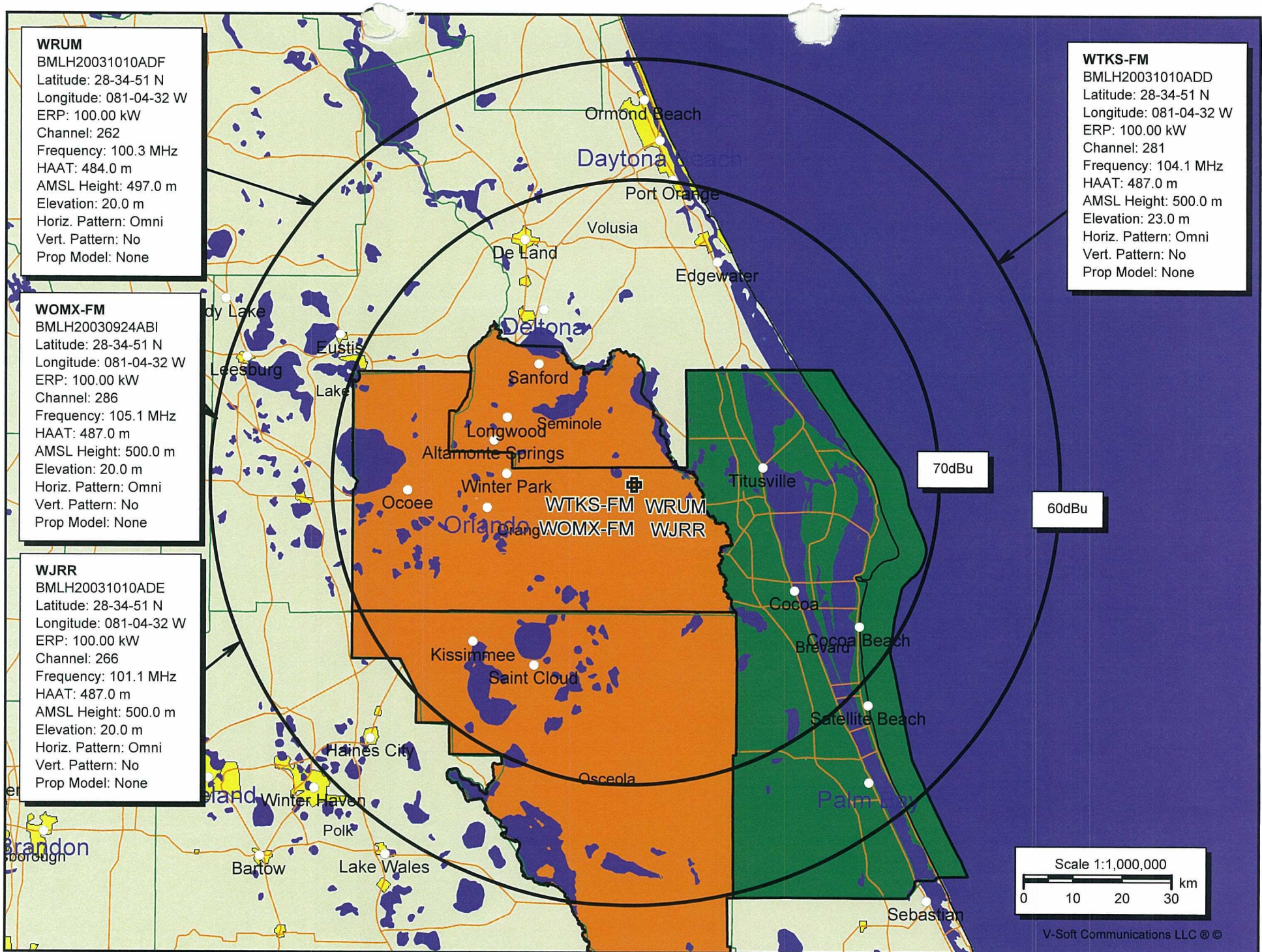
**EXHIBIT B**

**Predicted Signal Contours of Class C FM Stations:**

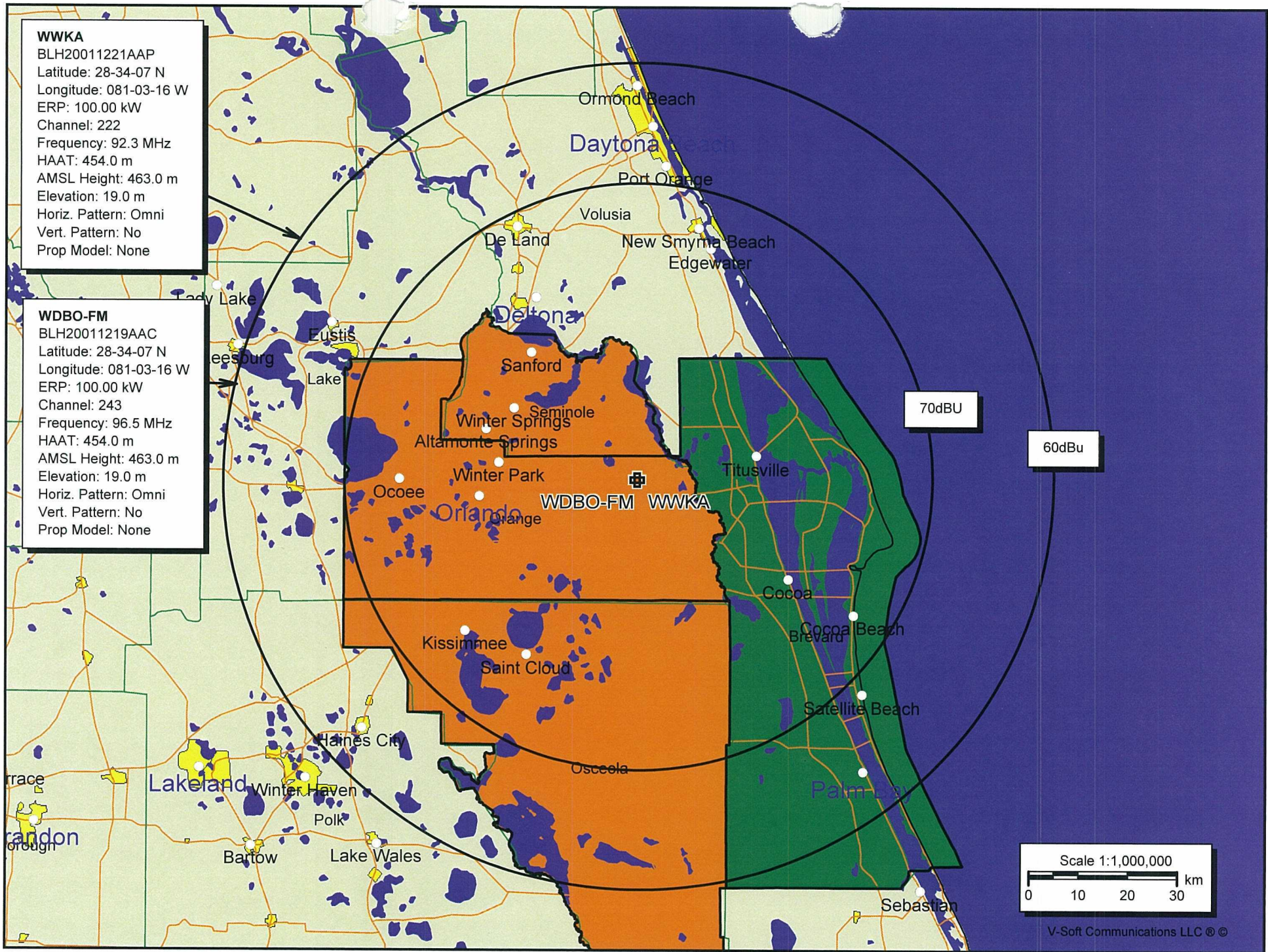
**WRUM(FM), Orlando, FL  
WTKS-FM, Cocoa Beach, FL  
WOMX-FM, Orlando, FL  
WJRR(FM), Cocoa Beach, FL**

**WWKA(FM), Orlando, FL  
WDBO-FM, Orlando, FL**







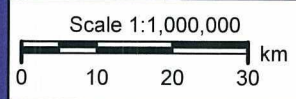


**WWKA**  
 BLH20011221AAP  
 Latitude: 28-34-07 N  
 Longitude: 081-03-16 W  
 ERP: 100.00 kW  
 Channel: 222  
 Frequency: 92.3 MHz  
 HAAT: 454.0 m  
 AMSL Height: 463.0 m  
 Elevation: 19.0 m  
 Horiz. Pattern: Omni  
 Vert. Pattern: No  
 Prop Model: None

**WDBO-FM**  
 BLH20011219AAC  
 Latitude: 28-34-07 N  
 Longitude: 081-03-16 W  
 ERP: 100.00 kW  
 Channel: 243  
 Frequency: 96.5 MHz  
 HAAT: 454.0 m  
 AMSL Height: 463.0 m  
 Elevation: 19.0 m  
 Horiz. Pattern: Omni  
 Vert. Pattern: No  
 Prop Model: None

70dBu

60dBu



## CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 2013, a copy of the foregoing Opposition to Application for Review was sent by first-class U.S. mail, postage prepaid, to the following:

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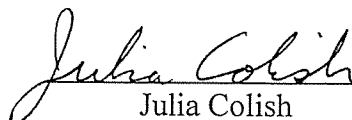
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