NO. 14-1131

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ADX COMMUNICATIONS OF PENSACOLA AND
ADX COMMUNICATIONS OF ESCAMBIA,
APPELLANTS,

V.

FEDERAL COMMUNICATIONS COMMISSION,
APPELLEE

6 JOHNSON ROAD LICENSES, INC., ET AL.,
INTERVENORS.

ON APPEAL FROM AN ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

1. Parties.

The appellants are ADX Communications of Pensacola and ADX Communications of Escambia. The appellee is the Federal Communications Commission. The intervenors are 6 Johnson Road Licenses, Inc., Cumulus Licensing LLC, and Educational Media Foundation. All parties that appeared before the agency are listed in the brief of appellants.

2. Ruling under review.

6 Johnson Road Licenses, Inc., 29 FCC Rcd 6386 (2014) (JA ___).

3. Related cases.

This case has not previously been before this Court or any other court. We are aware of no pending cases related to this one.

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GLOSSARY

ADX	collectively, ADX Communications of Pensacola and ADX Communications of Escambia, the appellants in this case
Arbitron Metro	a geographically delineated radio market defined by Arbitron, the nation's leading radio rating service. Arbitron has defined Metro markets in most of the more populated urban areas in the United States.
Bureau	the FCC's Media Bureau
community of license	the city, town, or other political subdivision to which a broadcast radio station is licensed. A station's community of license is the community that the station primarily serves. It is also considered to be the station's geographic location. *See* 47 C.F.R. § 73.1120.
Cumulus	Cumulus Licensing LLC, an intervenor in support of the FCC
EMF	Educational Media Foundation, an intervenor in support of the FCC
"home" designation	a determination made by Arbitron that a particular radio station is "home" to an Arbitron Metro. Usually, a station is "home" to a Metro if: (1) its community of license is located within the Metro's boundaries; or (2) Arbitron determines that the station competes with stations located in the Metro.
6 Johnson Road	6 Johnson Road Licenses, Inc., an intervenor in support of the FCC
WDLT	an FM radio station owned by Cumulus. In May 2012, the FCC granted an unopposed application by Cumulus to change WDLT's community of license from Atmore, Alabama to Saraland, Alabama.

INTRODUCTION

In 2012, Cumulus Licensing LLC ("Cumulus") agreed to acquire two FM radio stations in the Pensacola, Florida market from 6 Johnson Road Licenses, Inc. ("6 Johnson Road") and one FM radio station in the Mobile, Alabama market from Educational Media Foundation ("EMF"). The parties to these proposed transactions applied for FCC approval to assign the licenses for these stations to Cumulus.

ADX Communications of Pensacola and ADX Communications of Escambia (collectively, "ADX") are the licensees of two Florida radio stations that compete with the stations Cumulus sought to acquire. ADX filed petitions to deny the applications. It maintained that if the proposed transactions were consummated, Cumulus – which already owned a number of radio stations in the Pensacola and Mobile markets – would exceed the FCC-imposed cap on the number of radio stations a single party may own in the same market. ADX acknowledged that if the FCC followed its normal approach and applied its numerical ownership limits to geographic markets defined by Arbitron (a national radio rating service), the transactions would comply with the limits. But ADX made two arguments against approval of the transactions.

First, ADX argued that the Commission should prohibit the transactions on the basis of an alternative market definition that accounted for the "unique" markets in Pensacola and Mobile.

Second, ADX asserted that the Commission should not use Arbitron market definitions to analyze the transactions because Cumulus had only recently sought and obtained FCC approval to change the community of license for WDLT-FM (a station it already owned). Without that change, Cumulus would have had to establish its compliance with the ownership caps under an alternative "contour-overlap" methodology – something ADX claimed that Cumulus could not do. According to ADX, a 2003 FCC order required Cumulus to wait for two years before it could rely on the change in WDLT's community of license to avoid contour-overlap analysis.

Acting on delegated authority, the FCC's Media Bureau denied ADX's petitions and granted the assignment applications. *Dan J. Alpert, Esq.*, 28 FCC Rcd 20 (Med. Bur. 2013) (JA ___) ("*Bureau Decision*"). It declined to redefine the Arbitron Metro markets for Pensacola and Mobile, finding nothing "unique" about them. *Id*. at 27 (JA ___). On the basis of Arbitron's market definitions for Pensacola and Mobile, the Bureau found that Cumulus would remain in compliance with the radio ownership limits after the proposed transactions were completed. *Id*. at 24-25 (JA ___-___). It also

took "a 'hard look'" at ADX's claim that the transactions, although facially compliant, were "not in the public interest," *id*. at 24 (JA ___), but concluded that ADX had "failed to make a *prima facie* showing" that the transactions "would harm competition for listening audiences in the relevant markets." *Id.* at 25 (JA ___). Finally, the Bureau determined that Cumulus was not required to wait two years before relying on the change in WDLT's community of license to acquire more stations. *Id.* at 26 (JA ___).

The Commission affirmed the *Bureau Decision* and denied ADX's application for review. *6 Johnson Road Licenses, Inc.*, 29 FCC Rcd 6386 (2014) (JA ___) ("*Order*").

On appeal, ADX challenges the Commission's decision on the same grounds it raised below. It lacks standing to challenge the Commission's determination with respect to the two-year waiting period because that period expired before this appeal was filed. In any event, the Commission's decision in this case was reasonable in all respects. It should be affirmed.

JURISDICTION

ADX appeals from a final order of the Federal Communications Commission. The *Order* was released on June 10, 2014. As required by 47 U.S.C. § 402(c) and 47 C.F.R. § 1.4(b)(2), (c), & (d), ADX filed a notice of appeal within 30 days after the *Order* was released. This Court has

jurisdiction pursuant to 47 U.S.C. § 402(b). As we explain in Part II of the Argument, however, ADX lacks standing to press one of its claims.

QUESTIONS PRESENTED

(1) Whether the Commission reasonably interpreted and applied its local radio ownership rule when it held that Cumulus's proposed acquisitions would neither violate the rule nor harm competition.

(2) Whether ADX has standing to challenge the Commission's decision that the two-year waiting period established by a 2003 FCC order did not apply in this case; and, if so, whether that decision was reasonable.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in an addendum to this brief.

COUNTERSTATEMENT

A. The FCC's Local Radio Station Ownership Rule

1. Before the FCC can grant an application for a broadcast license, it must determine "whether the public interest, convenience, and necessity will be served by the granting of such application." 47 U.S.C. § 309(a). Likewise, the Commission may not approve an application to transfer or assign a broadcast license unless it finds that the public interest "will be served thereby." 47 U.S.C. § 310(d).

"In setting its licensing policies, the Commission has long acted on the theory that diversification of mass media ownership serves the public interest by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power." *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978). Consistent with this theory, the FCC for many years has imposed limits on the number of commercial radio stations a single party may own in the same local market.[1]

As part of the Telecommunications Act of 1996 ("1996 Act"), Pub. L. No. 104-104, 110 Stat. 56 (1996), Congress directed the FCC to revise its local radio station ownership rule, 47 C.F.R. § 73.3555(a), to relax existing restrictions on multiple ownership. The 1996 Act specified that the revised rule should permit a party to own, operate, or control:

- up to 8 commercial radio stations, not more than 5 of which are in the same service (*i.e.*, AM or FM), in a market with 45 or more commercial radio stations;
- up to 7 commercial radio stations, not more than 4 of which are in the same service, in a market with between 30 and 44 commercial radio stations;
- up to 6 commercial radio stations, not more than 4 of which are in the same service, in a market with between 15 and 29 commercial radio stations; and

[1] *See Amendment of Section 73.3555 of the Commission's Rules*, 4 FCC Rcd 1723, 1723 ¶¶ 5-6 (1989); *Revision of Radio Rules and Policies*, 7 FCC Rcd 2755, 2773-84 ¶¶ 34-57 (1992).

- up to 5 commercial radio stations, not more than 3 of which are in the same service, in a market with 14 or fewer commercial radio stations (except that a party may not own, operate, or control more than 50 percent of the stations in such market).

1996 Act, § 202(b)(1)(A)-(D), 110 Stat. 110.

Shortly after the 1996 Act became law, the FCC amended its radio ownership rule by adopting the numerical limits prescribed by Congress. *Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996 (Broadcast Radio Ownership)*, 11 FCC Rcd 12368 (1996).

2. Pursuant to section 202(h) of the 1996 Act, the FCC must periodically review its media ownership rules to "determine whether any of such rules are necessary in the public interest," and it must "repeal or modify any regulation it determines to be no longer in the public interest." 1996 Act, § 202(h), 110 Stat. 111-12.[2] In accordance with this statutory mandate, the FCC has reviewed its media ownership rules several times since 1996. Each time, it has concluded that the numerical limits on radio station ownership

[2] Originally, section 202(h) required biennial FCC review of the media ownership rules. Congress later amended the statute to require quadrennial review. Consolidated Appropriations Act, 2004, 118 Stat. 3, 100 (2004).

established by the 1996 Act continue to serve the public interest.[3] Those limits remain unchanged.[4]

In 2003, however, the FCC made two significant revisions to its radio ownership rule. First, it decided "to count noncommercial stations" when calculating the number of radio stations in a market. *2003 Ownership Order*, 18 FCC Rcd at 13712-13 ¶ 239.[5]

Second, the agency substantially altered its method for defining the markets to which the radio ownership limits apply. Previously, when assessing whether a proposed transaction would breach those limits, the FCC considered all the "stations that will be commonly owned after the proposed

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[3] *See 1998 Biennial Regulatory Review*, 15 FCC Rcd 11058, 11087 ¶ 52 (2000) ("*2000 Ownership Order*"), *rev'd on other grounds*, *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir.), *reh'g granted*, 293 F.3d 537 (D.C. Cir. 2002); *2002 Biennial Regulatory Review*, 18 FCC Rcd 13620, 13712 ¶ 239 (2003) ("*2003 Ownership Order*"), *aff'd in part and rev'd in part*, *Prometheus Radio Project v. FCC*, 373 F.3d 372 (3d Cir. 2004) ("*Prometheus I*"); *2006 Quadrennial Regulatory Review*, 23 FCC Rcd 2010, 2071 ¶ 113 (2008) ("*2008 Ownership Order*"), *aff'd in part and rev'd in part*, *Prometheus Radio Project v. FCC*, 652 F.3d 431 (3d Cir. 2011) ("*Prometheus II*").

[4] In 2004, the Third Circuit held that the FCC lacked "a reasoned analysis for retaining these specific numerical limits," and it remanded "for the Commission's additional justification." *Prometheus I*, 373 F.3d at 432. After the agency responded to the remand by adopting a different rationale for retaining the limits, the Third Circuit in 2011 affirmed the Commission's finding that "the existing numerical limits are necessary in the public interest." *Prometheus II*, 652 F.3d at 462.

[5] The Third Circuit upheld this change. *Prometheus I*, 373 F.3d at 425-26.

transaction is consummated" and grouped them "into 'markets' based on which stations have mutually overlapping signal contours" (*i.e.*, coverage areas). *2000 Ownership Order*, 15 FCC Rcd at 11091-92 ¶ 62. Finding that this "contour-overlap methodology" was "flawed as a means to preserve competition," the agency adopted "an entirely new approach to market definition." *2003 Ownership Order*, 18 FCC Rcd at 13718-19 ¶ 256. This new approach relied primarily on the market definitions used by Arbitron, "the principal radio rating service in the country." *Id.* at 13725 ¶ 275.[6]

The Commission justified its move to an Arbitron-based approach by pointing to the serious "conceptual problems" with the contour-overlap methodology. *2003 Ownership Order*, 18 FCC Rcd at 13719 ¶ 257. Sometimes under contour-overlap, for example, a station was "counted in the market for purposes of establishing the number of stations in the market," but was *not* "counted against a licensee's cap on the number of stations it may own in that market." *2000 Ownership Order*, 15 FCC Rcd at 11093 ¶ 66; *see also 2003 Ownership Order*, 18 FCC Rcd at 13718 ¶¶ 253-255.

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[6] Arbitron has been conducting market research on the size and composition of broadcast radio audiences since the 1960s. *2003 Ownership Order*, 18 FCC Rcd at 13725 n.579. In 2013, Arbitron was acquired by Nielsen, the leading television rating service in America. *See* Ben Sisario, *Nielsen Deal For Arbitron Is Complete*, N.Y. TIMES, Oct. 1, 2013, at B2. Although Arbitron has since been renamed Nielsen Audio, we will refer to the company as Arbitron to avoid confusion.

In other instances, contour-overlap analysis yielded nonsensical market definitions. In a case involving Wichita, Kansas, "a 24-station market according to … Arbitron," the contour-overlap methodology "counted 52 radio stations in the market, including several Oklahoma stations whose signals did not even reach Kansas." *2000 Ownership Order*, 15 FCC Rcd at 11093 n.161.

Moreover, under the contour-overlap approach, "the size of a radio market" was "unique to the proposed combination being evaluated." *2003 Ownership Order*, 18 FCC Rcd at 13719 ¶ 256. The Commission concluded that this "singular and unusual method for determining the size of a market" was "not in line with coherent and accepted methods for delineating geographic markets for purposes of competition analysis." *Id*.

The Commission also found that "the contour-overlap system actually encourages consolidation of powerful radio stations because stations with larger signal contours are more likely to create larger radio markets," which could enable a party "to acquire additional radio stations." *2003 Ownership Order*, 18 FCC Rcd at 13719 ¶ 257. The Commission believed that "this perverse incentive" could "undermine the primary public interest rationale" for the radio ownership rule. *Id*.

To address these concerns, the FCC adopted "a more rational and coherent methodology" based on the "geographically-determined markets" defined by Arbitron. *2003 Ownership Order*, 18 FCC Rcd at 13717 ¶ 249. Arbitron "has defined radio markets for most of the more populated urban areas" in the nation. *Id.* at 13725 ¶ 275. The Commission found that "Arbitron's market definitions" – known in the radio industry as Arbitron Metros – "are an industry standard and represent a reasonable geographic market delineation within which radio stations compete." *Id.* at 13725 ¶ 276.[7]

In industry parlance, the radio stations that Arbitron assigns to a particular Metro market are designated as "home" to that market. For purposes of calculating the number of radio stations within an Arbitron Metro, the Commission said that it would count those stations that Arbitron designated as "home" to the Metro (usually stations that "are either licensed to a community within the Arbitron Metro or are determined by Arbitron to compete with the radio stations located in the Metro") as well as "any other … radio station [not designated by Arbitron as home to the Metro] whose

[7] The Third Circuit held that the FCC adequately justified its decision to replace the contour-overlap methodology with an Arbitron-based market definition. *Prometheus I*, 373 F.3d at 423-25.

community of license is located within the Metro's geographic boundary." *2003 Ownership Order*, 18 FCC Rcd at 13727 ¶¶ 279-280.[8]

In response to concerns that parties might try "to manipulate Arbitron market definitions" to evade the radio ownership limits, the FCC stated that it would "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." *2003 Ownership Order*, 18 FCC Rcd at 13726 ¶ 278. The agency also declared that it would "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." *Id.* The Commission adopted these safeguards to "ensure that changes in Arbitron Metro boundaries and home market designations will be made to reflect actual market conditions and not to circumvent the local radio ownership rule." *Id.*

The Commission anticipated that "in virtually all cases," application of the numerical limits of the radio ownership rule to Arbitron Metros would

[8] Each AM and FM radio station is "licensed to the principal community or other political subdivision which it primarily serves." 47 C.F.R. § 73.1120. This community, which is known as the community of license, is "considered to be the geographical station location." *Id*. Stations located outside an Arbitron Metro may still be designated as "home" to the Metro if Arbitron determines that those stations compete with stations located in the Metro.

"protect against excessive concentration levels in local radio markets that might otherwise threaten the public interest." *2003 Ownership Order*, 18 FCC Rcd at 13813 ¶ 497. Nonetheless, the Commission stressed that if "an interested party believes this not to be the case" for a particular transaction, "it has a statutory right to file a petition to deny a specific radio station application and present evidence that makes the necessary prima facie showing that the transaction is contrary to the public interest." *Id*. (citing 47 U.S.C. § 309(d)).

3. Because Arbitron Metros do not cover the entire country, the FCC also launched a rulemaking to develop radio market definitions for non-Metro areas. *2003 Ownership Order*, 18 FCC Rcd at 13729 ¶¶ 282-283, 13870-73 ¶¶ 657-670. The Commission said that until that rulemaking was completed, it would monitor compliance with the radio ownership rule in non-Metro areas by employing a modified version of its prior contour-overlap methodology. This interim methodology applies to any proposed radio station combination involving one or more stations whose communities of license are not located within an Arbitron Metro. *Id.* at 13729-30 ¶¶ 284-286. "The interim methodology [is] triggered even if a radio station is 'home' to an Arbitron Metro, as long as its community of license is located outside of the Metro." *Id*. at 13730 n.606.

B. The Proceeding Below

1. On May 7, 2012, the FCC granted Cumulus's unopposed application to change the community of license for Cumulus-owned station WDLT-FM from Atmore, Alabama to Saraland, Alabama. Unlike Atmore, which is not located in an Arbitron Metro market, Saraland is located in the Mobile, Alabama Metro market. *Bureau Decision*, 28 FCC Rcd at 21 (JA ___). Even before the change in WDLT's community of license, however, Arbitron had designated the station as "home" to the Mobile Metro. *See* Br. 8-9. Thus, the Commission-approved change did not result in any change in WDLT's "'home' designation status." *Bureau Decision*, 28 FCC Rcd at 26 n.45 (JA ___).

2. On May 9, 2012, 6 Johnson Road filed an application to assign WMEZ(FM) and WXBM-FM – two stations in the Metro market for Pensacola, Florida – to Cumulus. *Bureau Decision*, 28 FCC Rcd at 21 (JA ___). On July 9, 2012, EMF and Cumulus filed applications for consent to assign one station in the Metro market for Mobile, Alabama from EMF to

Cumulus and to assign two stations (including one in the Mobile Metro) from Cumulus to EMF. *Id.*[9]

ADX is a licensee of two Florida radio stations whose service contours overlap with the three stations Cumulus proposed to obtain. On June 13, 2012, ADX filed a petition to deny the application for assignment of the two Pensacola Metro stations to Cumulus. Pensacola Petition at 1 (JA ___). On August 13, 2012, ADX filed a petition to deny the application for assignment of the Mobile Metro station to Cumulus. Mobile Petition at 1 (JA ___).

ADX contended that if the proposed transactions were approved, Cumulus would own more radio stations than it was permitted to hold under the local radio ownership rule. In support of its claim, ADX presented two arguments.

First, ADX argued that Cumulus should not be "allowed to take advantage" of the recent change in WDLT's community of license from Atmore to Saraland. Pensacola Petition at 3 (JA ___); Mobile Petition at 4

[9] Cumulus and EMF proposed to transfer: (1) WLVM(FM), Chickasaw, Alabama – in the Mobile Metro – from Cumulus to EMF; (2) WRQQ(FM), Belle Meade, Tennessee – not in the Mobile Metro – from Cumulus to EMF; and (3) WABD(FM), Mobile, Alabama – in the Mobile Metro – from EMF to Cumulus. By contractual agreement, the transactions between EMF and Cumulus were mutually contingent. *Bureau Decision*, 28 FCC Rcd at 21 (JA ___). The two applications involving assignments from Cumulus to EMF were uncontested and are not at issue here. *Id*. at 21 n.6 (JA ___).

(JA ____). On the basis of that change, Cumulus relied solely on the Arbitron Metro market definitions to show that its proposed transactions comply with the radio ownership limits. If WDLT's community of license had remained in Atmore (a community located outside Arbitron Metro boundaries), Cumulus also would have been required to use the interim contour-overlap analysis to verify its compliance with the radio ownership rule. ADX asserted that Cumulus could not avoid contour-overlap analysis because "less than two years [had] elapsed" since the change in WDLT's community of license. Pensacola Petition at 3 (JA ___); Mobile Petition at 4 (JA ___).

The FCC requires licensees to wait two years before they can benefit from changes in Arbitron Metro boundaries or home market designations to acquire additional stations. *2003 Ownership Order*, 18 FCC Rcd at 13726 ¶ 278. While ADX acknowledged that no such changes occurred here, it contended that the two-year waiting period should be extended to apply to the change in WDLT's community of license, and that the Commission must therefore use contour-overlap analysis to evaluate Cumulus's proposed acquisitions. According to ADX, such analysis would show that these acquisitions would give Cumulus more than five FM stations in each of two

different markets, in violation of the radio ownership rule. Pensacola Petition at 3-5 (JA ___-___); Mobile Petition at 4-8 (JA ____-____).

Second, ADX claimed that the "unique market situation" in this case justified a departure from the use of Arbitron Metros to define the relevant markets. Mobile Petition at 10 (JA ___). ADX asserted that because the Pensacola and Mobile Metro markets "are geographically adjacent and the contours of their home stations overlap considerably," they "should be treated as a single large market" and "analyzed using the contour-overlap method." *Bureau Decision*, 28 FCC Rcd at 23 (JA ___) (citing Mobile Petition at 8-11 (JA ___-___); Pensacola Reply at 8-11 (JA ___-___)). ADX posited that if the Commission properly applied contour-overlap analysis, it would be compelled to deny the assignment applications to prevent Cumulus from violating the radio ownership rule. Pensacola Petition at 3-5 (JA ___-___); Mobile Petition at 4-8 (JA ___-___).

C. The Bureau Decision

On January 2, 2013, the FCC's Media Bureau denied ADX's petitions and granted the assignment applications. *Bureau Decision*, 28 FCC Rcd at 20-27 (JA ___-___). "As a threshold matter," the Bureau found that "Cumulus has demonstrated compliance with the numerical ownership limits for both the Pensacola and Mobile Metro markets under the Arbitron Metro-

based methodology." *Id.* at 25 (JA ___). Because each of these markets has "between 15 and 29 full-power radio stations," the radio ownership rule permits Cumulus to "hold a cognizable interest in no more than six commercial radio stations" in either market, "not more than four of which may be in the same service." *Id.* (citing 47 C.F.R. § 73.3555(a)(1)(iii)). The Bureau determined that, "upon consummation" of the proposed transactions, "Cumulus will control one AM [station] and four FM stations in the Pensacola Metro and two AM stations and three FM stations in the Mobile Metro, in compliance with" the applicable limits. *Id.*

Then, in accordance with Commission precedent, the Bureau gave "a 'hard look' to" ADX's "petitions alleging that a facially-compliant transaction is not in the public interest." *Id*. at 24 (JA ___). In reviewing ADX's petitions to deny, the Bureau applied the analysis prescribed by section 309(d)(1) of the Communications Act, 47 U.S.C. § 309(d)(1). Under section 309(d)(1), ADX bore the burden of establishing "a *prima facie* case" that granting the assignment applications would not be in the public interest. *Bureau Decision*, 28 FCC Rcd at 24 (JA ___). The Bureau explained that ADX could not carry this burden unless it "made specific allegations of fact that, if true, would demonstrate" that granting the applications "would be *prima facie* inconsistent with the public interest." *Id*.

Although ADX argued in its petitions that "the Pensacola and Mobile Metros should be considered one market," the Bureau noted that the Commission "expressly rejected such an amorphous, *ad hoc* approach when [it] adopted a rule based on Arbitron Metro markets." *Bureau Decision*, 28 FCC Rcd at 27 (JA ___). In the Bureau's judgment, a departure from the Arbitron-based rule was unwarranted because there was "nothing new or unique about two adjacent Arbitron markets sharing numerous radio stations. Many Arbitron Metro markets nationwide are adjacent to each other." *Id.*

After examining ADX's petitions, the Bureau concluded that ADX "failed to allege specific facts to indicate that," despite Cumulus's "facial compliance with the Commission's rules," the applications "pose a risk of harm to competition within the Pensacola or Mobile markets." *Bureau Decision*, 28 FCC Rcd at 25 (JA ___). The record showed that both the Pensacola and Mobile Metro markets would "continue to be served by at least ten different station owners" if the transactions were executed. *Id.* Furthermore, because Cumulus and EMF proposed to swap two stations in the Mobile Metro market, approval of that transaction would produce "no change in the number of competitors" in that Metro. *Id*. On this record, the Bureau found that ADX "failed to make a *prima facie* showing that the proposed transaction[s] would harm competition for listening audiences in the

relevant markets," and that there was no "substantial and material question of fact raised on this point." *Id.*

Finally, the Bureau concluded that the two-year waiting period established by the *2003 Ownership Order* did not apply to Cumulus in this case. It explained that the waiting period applied only to changes that "directly concern market definitions," such as "a change in the boundaries" of an Arbitron Metro "or a change in [a station's] 'home' designation status." *Bureau Decision*, 28 FCC Rcd at 26 (JA ___). The Bureau had previously "found that a change in community of license, even where it affects the relevant markets for multiple ownership purposes, does *not* trigger" the waiting period. *Id.* (citing *Clear Channel Broad. Licenses, Inc.*, 24 FCC Rcd 14078, 14085 (Med. Bur. 2009)). Adhering to this precedent, the Bureau concluded that "WDLT-FM's community of license relocation did not trigger" the waiting period. *Id.*

D. The Order On Appeal

ADX filed an application for Commission review of the *Bureau Decision*. It argued that the Bureau erred by: (1) relying on Arbitron Metros to define the "unique market situation" in Pensacola and Mobile, Application for Review at 16-20 (JA ___-___); and (2) declining to apply the two-year waiting period to the change in WDLT's community of license, *id.* at 20-24

(JA ___-___). The Commission rejected these contentions and denied the application for review. *Order* ¶¶ 1-7 (JA ___-___).

The Commission found no merit in "ADX's arguments that an Arbitron-Metro-based ownership analysis should not apply to the Mobile and Pensacola markets." *Order* ¶ 4 (JA ___). It agreed with the Bureau that "redefining these two markets based solely on transmitter locations and signal contours" – the approach advocated by ADX – "would be precisely the approach that the Commission rejected when it adopted the Arbitron Metro standard in 2003." *Id.* Like the Bureau, the Commission found "nothing new or unique about" the Mobile and Pensacola Metros, "two adjacent Metro markets 'sharing' numerous stations." *Id.* It observed that, for example, "the Orlando, Florida, and Melbourne-Titusville-Cocoa, Florida, Arbitron Metros share many of the characteristics of the Mobile and Pensacola Metros." *Order* n.6 (JA ___) (citing Opposition at 10-12, Exhibit B (JA ___-___, ___-___)).

In the Commission's view, "the Bureau did not 'mechanically' apply the numerical ownership limits," as ADX claimed, but instead "conducted a full public interest analysis and concluded that, post-transaction, competition for listeners would be preserved in the Mobile and Pensacola markets." *Order* ¶ 4 (JA ___). The Commission agreed with this conclusion. *Id.*

Finally, the Commission upheld the Bureau's ruling that the change in WDLT's community of license did not trigger the two-year waiting period. *Order* ¶ 5 (JA ___). The Commission agreed that changes in community of license do not implicate the concern that the two-year safeguard was designed to address: "the malleability of Arbitron Metro market definitions." *Id.* (quoting *Bureau Decision*, 28 FCC Rcd at 26 (JA ___)). The Commission saw no reason to apply the waiting period for the first time to the situation presented by this case, where Cumulus "satisfie[d] the numerical limits" of the radio ownership rule, neither "the defined Arbitron Metro" nor WDLT's "home" designation had changed, and Cumulus had "not manipulated the Arbitron market definition." *Id.* (JA ___ -___).

SUMMARY OF ARGUMENT

When assessing whether a proposed combination of radio stations complies with the radio ownership rule, the FCC first determines whether the stations are all located in Arbitron Metro markets. If so, the procedure for evaluating compliance is straightforward: The agency simply applies the numerical limits of the radio ownership rule to the relevant Arbitron Metro markets. The FCC properly followed this procedure when it found that Cumulus would remain in compliance with the applicable ownership caps after its proposed acquisitions are completed.

ADX contends that the transactions at issue, although facially compliant with FCC rules, are not in the public interest. The FCC took a "hard look" at ADX's claims, and it found no basis for ADX's assertion that the transactions would harm competition.

ADX seeks reversal of the *Order* on two grounds. First, it asserts that the Commission should not have applied Arbitron's market definitions in this case because they do not accurately reflect the "unique" features of the Pensacola and Mobile markets. Br. 33-47. Second, ADX argues that the agency improperly allowed Cumulus to rely on Arbitron's market definitions to win approval of its transactions before the expiration of a two-year waiting period. Br. 47-52.

ADX lacks standing to raise the second claim. In any event, neither claim has merit.

I. The Bureau correctly concluded that Cumulus "demonstrated compliance with the numerical ownership limits for both the Pensacola and Mobile Metro markets under the Arbitron Metro-based methodology." *Bureau Decision*, 28 FCC Rcd at 25 (JA ___). It also reasonably determined that ADX "failed to make a *prima facie* showing that the proposed transaction[s] would harm competition for listening audiences in the relevant markets." *Id*. The Commission properly affirmed the Bureau's conclusions.

Under 47 U.S.C. § 309(d)(1), parties that petition the FCC to deny a license application bear the burden of alleging sufficient facts to show that granting the application would be *prima facie* inconsistent with the public interest. ADX failed to carry that burden in this case.

Contrary to ADX's assertion, there was no good reason for the Commission to "redefine" the Pensacola and Mobile markets by using contour-overlap analysis. As the agency explained, those markets are not "unique." Many Arbitron Metro markets nationwide are adjacent to one another and "share" numerous radio stations. *Order* ¶ 4 (JA ___); *Bureau Decision*, 28 FCC Rcd at 27 (JA ___). Moreover, the Commission had ceased applying contour-overlap analysis to Arbitron Metro markets in 2003 because it found serious defects in the contour-overlap methodology. The Commission saw no purpose in resurrecting that discredited methodology in this proceeding.

ADX claims that, notwithstanding Cumulus's compliance with the radio ownership rule, the proposed transactions are not in the public interest because they will harm competition in Pensacola and Mobile. The record refutes that claim. The Bureau determined that after the transactions are completed, both the Pensacola and Mobile Metro markets "will continue to be served by at least ten different station owners," and "there will be no

change in the number of competitors" in the Mobile Metro market because Cumulus and EMF are simply swapping stations there. *Bureau Decision*, 28 FCC Rcd at 25 (JA ___). Those findings, which ADX does not dispute, foreclose any serious argument that the proposed transactions will harm competition.

II. ADX lacks standing to challenge the FCC's decision not to apply a two-year waiting period to WDLT's change in community of license. Even if ADX were correct that a waiting period should have been applied here – and it is not – the waiting period would have expired in May 2014, before ADX filed this appeal. Therefore, a remand from the Court on this issue would not alter the outcome of the administrative proceeding. Because ADX cannot demonstrate that its injury would be redressed if this Court ruled in its favor on the waiting period, it lacks standing to present – and the Court lacks jurisdiction to consider – any claim concerning the waiting period.

Even if ADX had standing to raise this issue, its arguments are baseless. The FCC reasonably concluded that the change in WDLT's community of license did not trigger the two-year waiting period established by the *2003 Ownership Order*. This waiting period – which the Commission created to deter licensees from manipulating Arbitron's market definitions – covers only modifications made by Arbitron, such as changes in an Arbitron

Metro's boundaries or a station's "home" designation status. *Bureau Decision*, 28 FCC Rcd at 26 (JA ___). The Commission reasonably declined to expand the categories of changes covered by the waiting period to include the change in WDLT's community of license. That change was approved by the *FCC*, and did not alter any market definition or "home" designation adopted by *Arbitron*. Thus, it did not "implicate the Commission's underlying concern regarding the malleability of Arbitron Metro market definitions." *Id*. (quoted in *Order* ¶ 5 (JA ___)).

ADX's claim that Cumulus improperly "manipulated" WDLT's community of license rings hollow. Although ADX had ample opportunity to object to the application to modify WDLT's community of license, it failed to make a timely objection. And because the station relocation proposed by Cumulus was permissible under the FCC's rules and procedures, the Commission had no good reason to subject this change to a waiting period.

STANDARD OF REVIEW

The FCC's *Order* may not be overturned unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Under this highly deferential standard of review," the Court "presumes the validity of agency action." *Cellco P'ship v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004) (internal quotation marks omitted). To prevail,

"[t]he Commission need only articulate a 'rational connection between the facts found and the choice made.'" *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983)).

"[A]n agency's interpretation of its own orders and rules is entitled to substantial deference." *AT&T Corp. v. FCC*, 448 F.3d 426, 431 (D.C. Cir. 2006). Therefore, in reviewing ADX's claims, the Court must give a "high level of deference" to the FCC's interpretation of its radio ownership rule and its 2003 order adopting the two-year waiting period. *See Cellco P'ship v. FCC*, 700 F.3d 534, 544 (D.C. Cir. 2012) (internal quotation marks omitted). "The Commission's interpretation of its own rules is entitled to controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Star Wireless, LLC v. FCC*, 522 F.3d 469, 473 (D.C. Cir. 2008) (internal quotation marks omitted). Likewise, the Court "must defer" to the FCC's "reasonable application of its own precedents." *Vernal Enters., Inc. v. FCC*, 355 F.3d 650, 658 (D.C. Cir. 2004).

ARGUMENT

I. THE COMMISSION REASONABLY CONCLUDED THAT THE PROPOSED TRANSACTIONS WOULD NEITHER VIOLATE THE RADIO OWNERSHIP RULE NOR HARM THE PUBLIC INTEREST

More than a decade ago, the FCC "adopted a bright-line, geography-based definition for determining the boundaries of radio markets" that are subject to the numerical limits of the radio ownership rule. *Bureau Decision*, 28 FCC Rcd at 24 (JA ___). The agency believed that application of the numerical limits to Arbitron Metros would "protect against excessive concentration levels in local radio markets" in "virtually all cases," *id.* (quoting *2003 Ownership Order*, 18 FCC Rcd at 13813 ¶ 497), but acknowledged that it is obligated to "give a 'hard look' to petitions alleging that a facially-compliant transaction is not in the public interest." *Id*. (quoting *2003 Ownership Order*, 18 FCC Rcd at 13647 ¶ 85).

The Commission and its staff followed that well-established procedure here. The Media Bureau found that Cumulus "demonstrated compliance with the numerical ownership limits for both the Pensacola and Mobile Metro markets under the Arbitron Metro-based methodology." *Bureau Decision*, 28 FCC Rcd at 25 (JA ___). Specifically, the Bureau determined that if the proposed transactions were consummated, Cumulus would "control one AM [station] and four FM stations in the Pensacola Metro and two AM stations

and three FM stations in the Mobile Metro." *Id*. Those combinations of radio stations fall within the applicable ownership limits for those particular markets. Because each of those markets has "between 15 and 29 full-power radio stations," *id.*, Cumulus may hold up to "6 commercial radio stations in total" and up to "4 commercial stations in the same service (AM or FM)" in each market. 47 C.F.R. § 73.3555(a)(1)(iii).

ADX does not dispute that under a straightforward application of the numerical ownership caps to the Arbitron Metro markets for Pensacola and Mobile, the proposed transactions pass muster. Nonetheless, ADX contends that the FCC should have blocked the transactions because, notwithstanding their compliance with the ownership caps, they are "not in the public interest." Br. 25.

In making this argument, ADX "faces a high hurdle." *Clear Channel*, 24 FCC Rcd at 14084 ¶ 16. In order to satisfy 47 U.S.C. § 309(d)(1), ADX's petitions to deny the assignment applications had to contain "specific allegations of fact that, if true, would demonstrate" that granting the applications "would be *prima facie* inconsistent with the public interest." *Bureau Decision*, 28 FCC Rcd at 24 (JA ___). If a petition to deny "does not meet this threshold requirement, it can form no basis for an evidentiary hearing," let alone justify denial of an application. *Citizens for Jazz on*

WRVR, Inc. v. FCC, 775 F.2d 392, 394 (D.C. Cir. 1985). ADX failed to make the required *prima facie* showing here.

ADX based its petitions to deny on allegations that the Pensacola and Mobile Metro markets are "unique" because they are adjacent to each other, and because many radio stations transmit their signals to both Pensacola and Mobile from transmitters located in the same county in Alabama. Br. 40-42. Citing this allegedly "unique market situation" (Br. 42), ADX argued that "Pensacola and Mobile should be treated as a single large market" and "analyzed using the contour-overlap method." *Bureau Decision*, 28 FCC Rcd at 23 (JA ___).

The Bureau and the Commission rightly rejected the notion that the Pensacola and Mobile Metro markets are "unique." "Many Arbitron Metro markets nationwide are adjacent to each other." *Bureau Decision*, 28 FCC Rcd at 27 (JA ___). Thus, there is nothing "unique" about two adjacent Arbitron Metro markets "sharing" numerous radio stations. *Id*.; *Order* ¶ 4 (JA ___).[10] Indeed, as the Commission observed, "the Orlando, Florida, and Melbourne-Titusville-Cocoa, Florida, Arbitron Metros share many of the

[10] Attached as Exhibit A to this brief is a map depicting all of the Arbitron Metro markets in the United States in 2012 (the year that the assignment applications were filed in this proceeding). As the map illustrates, numerous Metros throughout the nation are adjacent to other Metros.

characteristics of the Mobile and Pensacola Metros." *Order* n.6 (JA ___) (citing Opposition at 10-12, Exhibit B (JA ___-___, ___-___)).

ADX presented "no facts or argument to justify differential treatment of the Pensacola and Mobile Metro markets." *Bureau Decision*, 28 FCC Rcd at 27 (JA ___). It simply asserted that the FCC should redefine those markets "based solely on transmitter locations and signal contours." *Order* ¶ 4 (JA ___). This sort of contour-overlap analysis was "precisely the approach that the Commission rejected when it adopted the Arbitron Metro standard in 2003." *Id*.

As the Third Circuit recognized when it affirmed the FCC's shift to an Arbitron-based market definition, the agency had "ample justification" to move away from the flawed contour-overlap approach. *Prometheus I*, 373 F.3d at 425. Under that approach, "the size of a radio market" varied with each "proposed combination being evaluated." *2003 Ownership Order*, 18 FCC Rcd at 13719 ¶ 256. As a result, the contour-overlap methodology encouraged "consolidation of powerful radio stations," creating a "perverse incentive" that undermined the purpose of the radio ownership rule. *Id*. at 13719 ¶ 257; *see also Prometheus I*, 373 F.3d at 424. It also impaired the FCC's "ability accurately to measure and compare competition in

consistently defined markets." *Prometheus I*, 373 F.3d at 425 (citing *2003 Ownership Order*, 18 FCC Rcd at 13720 ¶ 259).

Given these inherent problems with contour-overlap analysis, the FCC stopped applying this flawed methodology to Arbitron Metro markets in 2003. The Commission sensibly declined to revert to this "amorphous, *ad hoc* approach" to redefine the Arbitron Metro markets in Pensacola and Mobile. *Bureau Decision*, 28 FCC Rcd at 27 (JA ___).

ADX claims that the FCC ignored "market realities" (Br. 22) by "robotically applying" the Arbitron-based market definitions. Br. 25. To the contrary, the Bureau did not just "'mechanically' apply the numerical ownership limits" to the Pensacola and Mobile Metros; it "conducted a full public interest analysis." *Order* ¶ 4 (JA ___). In particular, the Bureau examined whether the proposed transactions "would harm competition for listening audiences in the relevant markets." *Bureau Decision*, 28 FCC Rcd at 25 (JA ___).

After studying the potential competitive impact of the proposed transactions, the Bureau reached two conclusions: (1) both the Pensacola and Mobile Metro markets "will continue to be served by at least ten different station owners" after the transactions are completed; and (2) because "Cumulus and EMF are essentially exchanging stations," there will be "no

change in the number of competitors" in the Mobile Metro market. *Bureau Decision*, 28 FCC Rcd at 25 (JA ___). ADX did not challenge these findings in either its application for review to the Commission or its appellate brief.

On the basis of these uncontested findings, the Commission reasonably determined that Cumulus's proposed acquisitions would not harm the public interest. *Order* ¶ 4 (JA ___). In this context, the Commission's "paramount concern in [its] public interest analysis" is "[p]reserving competition for listeners." *2003 Ownership Order*, 18 FCC Rcd at 13716 ¶ 246. The FCC's objective in imposing numerical limits on radio station ownership is "to keep the available radio spectrum from becoming 'locked up' in the hands of one or a few owners." *2008 Ownership Order*, 23 FCC Rcd at 2072 ¶ 116. That objective was met here. The record showed – and ADX did not dispute – that if the proposed transactions were consummated, both the Pensacola and Mobile Metro markets would "continue to be served by at least ten different station owners." *Bureau Decision*, 28 FCC Rcd at 25 (JA ___). In light of this undisputed evidence, ADX could not "make a *prima facie* showing" that the proposed transactions "would harm competition for listening audiences in the relevant markets," nor was there "a substantial and material question of fact raised on this point." *Id.*

ADX complains that the Commission did not give a "hard look" to the petitions to deny. Br. 25. That claim is baseless. Where (as here) a party asks the FCC to deviate from strict application of a rule, the Commission must give the request "a 'hard look' to ensure that the agency is not rigidly applying a rule where it is not in the public interest." *Delta Radio, Inc. v. FCC*, 387 F.3d 897, 900 (D.C. Cir. 2004). The Commission provided the requisite "hard look" here. It reasonably determined that approval of the proposed transactions on the basis of Arbitron market definitions was consistent with the public interest. Specifically, it concluded that the transactions would not harm competition in the Pensacola and Mobile Metro markets. The "hard look" doctrine requires nothing more. *See BellSouth Corp. v. FCC*, 162 F.3d 1215, 1224-25 (D.C. Cir. 1999); *see also Mary V. Harris Found. v. FCC*, 2015 WL 233446, *7 (D.C. Cir. Jan. 20, 2015) ("the agency, as the author of the policy embodied in its rule, is the appropriate body to determine whether a situation presents unanticipated circumstances that make it more appropriate to create an exception than to apply the rule").

II. ADX LACKS STANDING TO CHALLENGE THE COMMISSION'S DECISION THAT A TWO-YEAR WAITING PERIOD DID NOT APPLY IN THIS CASE; IN ANY EVENT, THAT DECISION WAS REASONABLE

In its *2003 Ownership Order*, the FCC established "safeguards to deter parties from attempting to manipulate Arbitron market definitions for

purposes of circumventing the local radio ownership rule." *2003 Ownership Order*, 18 FCC Rcd at 13726 ¶ 278. Under those safeguards, licensees seeking to obtain more radio stations must wait for two years before they can benefit from "a change in Arbitron Metro boundaries" or "the inclusion of a radio station as 'home' to a Metro." *Id*.

ADX contends that the FCC erred by failing to apply this two-year waiting period to the change in WDLT's community of license. Br. 47-52. As a threshold matter, ADX lacks standing to make this claim, thus depriving the Court of jurisdiction to consider it.

ADX asserts that it "will be subjected to a much higher level of competition" because the FCC granted the assignment applications. Br. 2-3. To establish Article III standing, ADX "must demonstrate that it is likely" that this asserted injury "will be redressed by a favorable decision of the court." *Spectrum Five LLC v. FCC*, 758 F.3d 254, 260 (D.C. Cir. 2014) (internal quotation marks omitted); *see also* Br. 2 (quoting *Alvin Lou Media, Inc. v. FCC*, 571 F.3d 1, 6 (D.C. Cir. 2009)). ADX cannot make that showing with respect to its claim concerning the waiting period.

Even if ADX could convince the Court that the FCC should have applied a two-year waiting period to Cumulus, a favorable ruling on this issue would provide no meaningful relief to ADX. By the time ADX filed this

appeal in July 2014, more than two years had passed since the FCC approved the change in WDLT's community of license. Thus, even under ADX's theory of the case, the waiting period expired before ADX filed its appeal, and any remand concerning this issue would not change the outcome of the administrative proceeding. Because a favorable ruling from the Court on this issue would not redress ADX's alleged injury, ADX lacks standing to argue that the FCC erred by failing to apply the waiting period to Cumulus.[11]

In any event, the Commission reasonably concluded that the change in WDLT's community of license did not trigger the waiting period. ADX's claims to the contrary lack merit.

When the FCC moved to an Arbitron-based market definition in 2003, it recognized that "companies often successfully petition Arbitron to change Metro boundaries, create new Metros, and/or change a station's home

[11] Because ADX lacked standing at the time it filed its appeal, the Court lacks jurisdiction to consider the waiting period claim. ADX may argue on reply that the Court should nonetheless consider the claim because this issue is "capable of repetition yet evading review." This exception to mootness, however, does not apply here because the claim became moot before ADX filed its appeal, leaving ADX without standing to press the claim. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000) ("if a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum"); *Renne v. Geary*, 501 U.S. 312, 320 (1991) ("the mootness exception for disputes capable of repetition yet evading review … will not revive a dispute which became moot before the action commenced").

designation." *Clear Channel*, 24 FCC Rcd at 14085 ¶ 19. The agency adopted the two-year waiting period to address concerns about "the malleability of Arbitron Metro market definitions." *Order* ¶ 5 (JA ___) (quoting *Bureau Decision*, 28 FCC Rcd at 26 (JA ___)). Consequently, the Commission has applied this restriction only to modifications made *by Arbitron*. Originally, it specified that "changes in Arbitron Metro boundaries and home market designations" would trigger the waiting period. *2003 Ownership Order*, 18 FCC Rcd at 13726 ¶ 278. The Media Bureau later applied the waiting period to "the cancellation of an entire Arbitron Metro" by Arbitron. *John M. Pelkey, Esq.*, 23 FCC Rcd 17978, 17981 (Med. Bur. 2008).

Unlike the changes that have previously been subjected to the waiting period, a change in a station's community of license "is reviewed and approved by the Commission," *not* Arbitron. *Bureau Decision*, 28 FCC Rcd at 26 (JA ___). Moreover, such a change does not "directly concern" Arbitron's "market definitions." *Id*. Thus, a change in community of license does not implicate the concern that the waiting period was created to address: the prospect that licensees might "manipulate Arbitron market definitions for purposes of circumventing the local radio ownership rule." *2003 Ownership Order*, 18 FCC Rcd at 13726 ¶ 278.

For these reasons, the Media Bureau ruled in 2009 that it was "not appropriate" to apply the two-year waiting period to changes in stations' communities of license. *Clear Channel*, 24 FCC Rcd at 14085 ¶ 19. The Bureau reached the same conclusion here. *Bureau Decision*, 28 FCC Rcd at 26 (JA ___).[12]

ADX argues that the FCC should have applied the waiting period in this case because Cumulus should not "be permitted to manipulate the *city of* license of a particular station" for the purpose of acquiring additional stations. Br. 51. But if ADX believed that there was something improper about Cumulus's request to change WDLT's community of license, it had ample opportunity to present its objections to the FCC. It failed to do so.

In a February 2012 notice in the Federal Register, the FCC announced that it had received an application to modify WDLT's community of license, and it invited public comment on the application through April 16, 2012. *See*

[12] ADX asserts that a 2007 Bureau order indicated that "ordinarily the two year prohibition *would* be applicable" to a change in community of license. Br. 50 (citing *Mark N. Lipp, Esq.*, 22 FCC Rcd 17788, 17790 n.12 (Med. Bur. 2007) ("*Citicasters*")). That order said no such thing. It stated that "under certain circumstances, applicants may not take advantage of a market size increase until two years after" the home market designation of "the station that triggered the market size increase." *Citicasters*, 22 FCC Rcd at 17790 n.12. A home market designation – a determination made by Arbitron – is subject to the waiting period under the express terms of the *2003 Ownership Order*, 18 FCC Rcd at 13726 ¶ 278.

77 Fed. Reg. 8869 (Feb. 15, 2012). "No objections were filed against" the application by ADX or any other party. *Bureau Decision*, 28 FCC Rcd at 26 n.51 (JA ___). After the FCC granted the application, it provided public notice of its action on May 10, 2012. *See Broadcast Actions*, Report No. 47735, 2012 WL 1652908 (FCC May 10, 2012). No "reconsideration petitions" were "filed against the grant." *Bureau Decision*, 28 FCC Rcd at 26 n.51 (JA ___).

Insofar as ADX now seeks to challenge the FCC's authorization of the change in WDLT's community of license, any such challenge is untimely. *See Bureau Decision*, 28 FCC Rcd at 26 (JA ___); 47 U.S.C. § 402(c) (an appeal from the FCC's grant of an application to modify a license "shall be taken by filing a notice of appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of"); *N. Am. Catholic Educ. Programming Found., Inc. v. FCC*, 437 F.3d 1206 (D.C. Cir. 2006) (dismissing an appeal for failure to comply with the 30-day filing deadline).

In the proceeding that is the subject of this appeal, ADX urged the agency to take the unprecedented step of applying the two-year waiting period to an FCC-approved community of license change that did not modify

a station's home market designation. The Commission was justified in declining this invitation.

ADX has not offered any basis for finding that the change in WDLT's community of license was inappropriate under the FCC's rules. In reviewing an application to modify a community of license, the Commission makes three inquiries: (1) Does the proposed change comply with certain technical requirements?[13] (2) Does the proposed change promote the "fair, efficient, and equitable distribution of radio service" in accordance with 47 U.S.C. § 307(b)?[14] (3) Would grant of the proposed change cause a licensee's holdings to exceed the ownership caps under 47 C.F.R. § 73.3555(a)(1)? In approving the relocation of WDLT's community of license, the Commission determined that the proposed change complied with all pertinent technical rules, met the requirements of section 307(b), and would not result in a violation of the radio ownership caps.

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[13] *See, e.g.*, 47 C.F.R. § 73.3573(g)(2) (proposed facilities must be mutually exclusive with the applicant's currently licensed facilities); 47 C.F.R. § 73.207 (stations must be separated from other stations and pending applications by certain minimum distances).

[14] *See Revision of Procedures Governing Amendments To FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, 21 FCC Rcd 14212 (2006).

ADX does not really dispute that the change in WDLT's community of license satisfied all of the relevant criteria. Because that change was permissible under the FCC's rules and procedures, there was no need for the Commission "to expand the established categories of changes covered by" the waiting period "to include the community of license change at issue here." *Order* ¶ 5 (JA ___). As the Commission pointed out, Cumulus "satisfies the numerical limits" of the radio ownership rule, "the defined Arbitron Metro has not changed," WDLT was "already designated as 'home'" to the Mobile Metro, and Cumulus "has not manipulated the Arbitron market definition." *Id*. (JA ___-___). When these "basic conditions are present," the FCC has determined that it can "protect against excessive market concentration in 'virtually all cases'" by applying the numerical ownership limits to Arbitron Metro markets. *Id*. (JA ___) (quoting *2003 Ownership Order*, 18 FCC Rcd at 13813 ¶ 497). Accordingly, it was reasonable for the Commission to conclude that expanding the application of the waiting period to cover the circumstances of this case was neither required nor warranted.

CONCLUSION

The Court should dismiss ADX's appeal in part for lack of jurisdiction, and should deny the remainder of ADX's claims on the merits. If the Court determines that it has jurisdiction to address all of ADX's claims, it should affirm the FCC's *Order* in all respects.

Respectfully submitted,

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February 3, 2015

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

ADX COMMUNICATIONS OF PENSACOLA AND ADX COMMUNICATIONS OF ESCAMBIA, APPELLANTS, v. FEDERAL COMMUNICATIONS COMMISSION, APPELLEE 6 JOHNSON ROAD LICENSES, INC., ET AL., INTERVENORS.	**No. 14-1131**

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed.R.App. P. 32(a)(7), I hereby certify that the accompanying Brief For Appellee in the captioned case contains 8,870 words.

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February 3, 2015

EXHIBIT A

Map of Arbitron Metro Markets in the United States

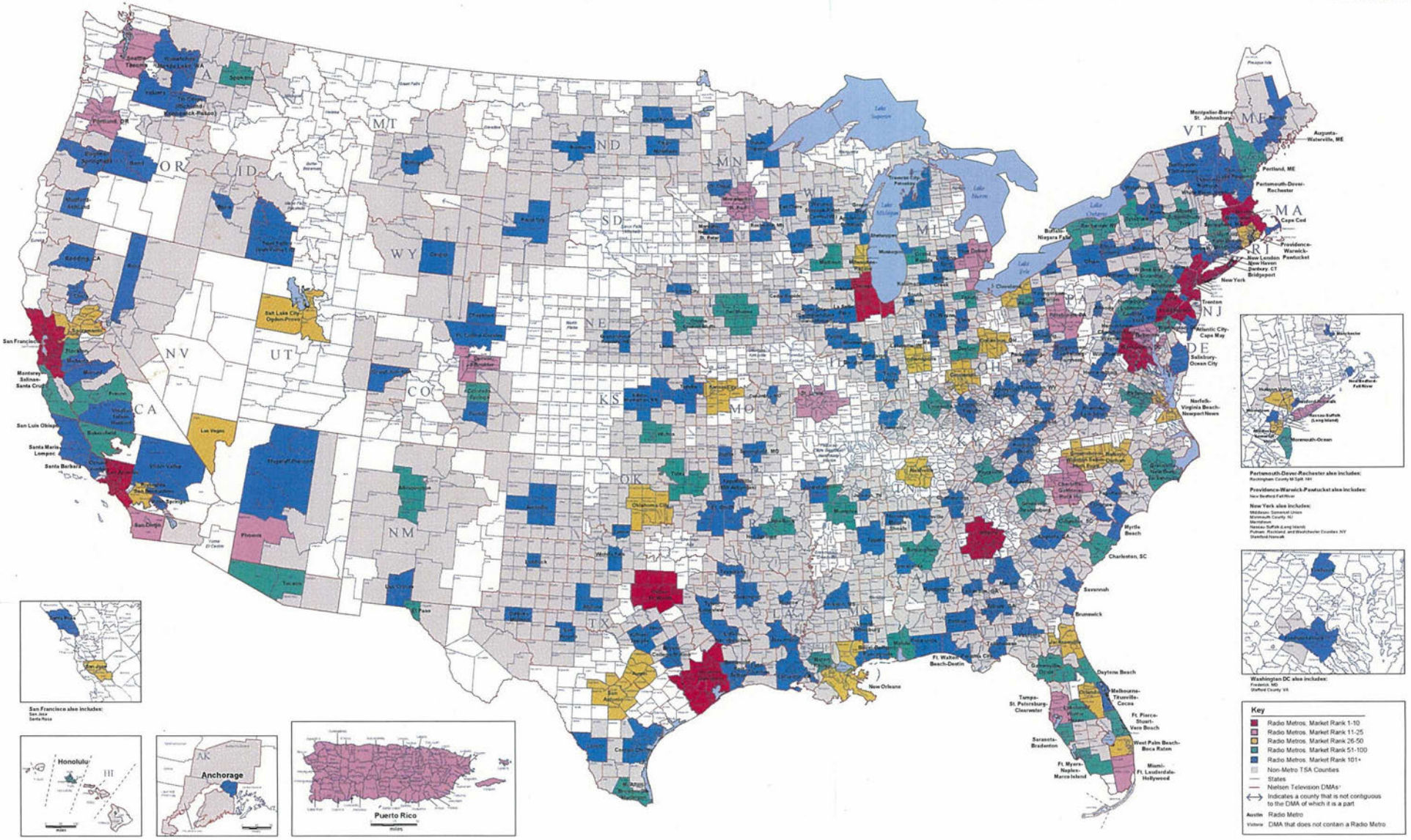
(Fall 2012)

www.arbitron.com/downloads/Arb_US_Metro_Map_12.pdf

2012 Arbitron Radio Metro Map | Based on Fall 2012 Market Definitions

ARBITRON

www.arbitron.com



IN THE UNITED STATES COURT OF APPEALS
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ADX COMMUNICATIONS OF PENSACOLA, AND
ADX COMMUNICATIONS OF ESCAMBIA,
APPELLANTS

v. **No. 14-1131**

FEDERAL COMMUNICATIONS COMMISSION,
APPELLEE
6 JOHNSON ROAD LICENSES, INC., ET AL.,
INTERVENORS.

CERTIFICATE OF SERVICE

I, James M. Carr, hereby certify that on February 3, 2015, I electronically filed the foregoing Brief For Appellee with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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