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Forgotten But Not Gone: Arbitron-Abandoned Market Still Alive and Kicking For Multiple Ownership Purposes

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We'll leave to others to decide who's the Scrooge in this Yuletide saga, but the facts do provide an important cautionary tale: you can try to run, but you can't hide from dead markets. When the FCC says that it will not recognize changes to radio markets for two years, it means it. Even if a market ceases to exist on Arbitron's books, you cannot exceed the FCC's ownership limitations in a once-defined geographic market for two years following the market's demise.

Check out this cautionary saga that popped up just before Christmas, 2008.

Historically, Arbitron recognized a radio market in Johnstown, Pennsylvania. Forever Communications, which owns a number of stations in Pennsylvania – including in that Johnstown market – told Arbitron in March, 2007, that Forever wasn't going to be renewing its subscription to the Johnstown book. Six months later, Arbitron announced that it was “cancelling” the Johnstown book, effective Fall, 2007.

Less than a month after that announcement, Forever filed an application seeking consent to its acquisition of four stations in the Johnstown area. The proposed acquisition would have put Forever over the permissible ownership limits for the Johnstown market. But, Forever pointed out, as of the date of its application there was no longer any Johnstown market and, therefore, its application was subject to the contour-overlap multiple ownership test, a test which Forever passed with flying colors.

Not so fast, said a petitioner who objected to the application. The petitioner pointed out that the Commission has consistently held that changes in a market will *not* be deemed effective, for purposes of determining multiple ownership compliance, until the changes have been in place for at least two years. Under that analysis, Forever had jumped the gun by about 23 months.

Forever countered that the two-year limit applied only to changes in market boundaries –

which, according to Forever, means only expansions or contractions of existing markets, but *not* elimination of markets. This creative argument was based on language in the FCC's 2003 Ownership Report and Order in which the Commission referred to Arbitron actions "enlarging" a market or "shrinking" a market, with no reference to "eliminating a market".

The Audio Division was not convinced. As they saw it, the two-year limit was intended to prevent circumvention of the multiple ownership rules through alteration of Arbitron markets. The Division had little problem seeing the wholesale dumping of a market – apparently as a result of a business decision of an interested party (*i.e.*, Forever's decision not to re-up for the Johnstown book) – as leading to just such a circumvention. As far as the Division is concerned, obliteration is just the ultimate form of shrinkage.

The FCC did say that if Forever (and its proposed seller) are patient for another year, the deal could be granted. So mark your calendars for October, 2009, and let's see what might roll in the door then.

There's a very prosaic point here: any station sale transaction involving an Arbitron market must take into account the two-year market definition change requirements. No changes to such markets – even the elimination of the market itself – counts until the second anniversary of the change. Any station sale transaction should take this timing into account – otherwise, you risk suffering Forever's fate: stuck in a unexpected, and possibly unpleasant, two-year holding pattern.