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FCC Sticks To Geographic Radio Market Definitions

But still grants waiver in light of unique circumstances

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In a recent decision approving the purchase of a radio station in Burlington, Vermont, the FCC again strongly reaffirmed its commitment to its new method of using Arbitron geographic markets and BIA station data to determine the number of radio stations “in” a market for purposes of the FCC’s multiple ownership rules.

However, in a rare deviation from its strict (at least thus far) adherence to that Arbitron market/BIA station data method, the FCC granted the buyer a waiver of the two-year waiting period which must elapse before a change in an Arbitron market’s boundaries or a change in the BIA stations in a market may be taken into account under the multiple ownership rules. In doing so, however, the FCC strongly emphasized that it was a one-time waiver granted in unique circumstances resulting directly from the FCC’s transition to the new method. Importantly, the FCC made clear that it does not anticipate granting similar waivers in the future.

The problem confronting the applicants and the Commission here arose from the implementation of the Commission’s “new” multiple ownership rules. Those rules are hardly “new”, since they were first adopted by the FCC in June, 2003, almost three years ago. But then there was that pesky appeal, and the resulting remand of the case to the Commission by the U.S. Court of Appeals for the Third Circuit, which put the brakes on implementation of the new rules. As a result, the effective date of this particular aspect of the rules was delayed until September, 2004.

And therein lay much of the problem.

The buyer already owned nine radio stations in the Burlington area and was requesting approval to purchase a tenth. Under the FCC’s multiple ownership rules, an individual or company could own no more than seven stations in a market the size of Burlington. But wait, you say, how could they own nine already, if the limit was seven? Under the old way of calculating stations in a market – the way which was abandoned by the

Commission in its June, 2003 decision, at least with respect to Arbitron-designated markets – it was possible to achieve such a result because “markets” were defined by the overlap of contours of the stations which were proposed to be commonly owned. As a result, stations which, from a practical perspective, clearly served the same general “market” might be deemed *not* to be in the same market for multiple ownership purposes because their contours did not happen to overlap.

The new rules sought to impose a greater measure of objectivity by relying instead on Arbitron’s market definitions (although stations in areas not including in Arbitron’s market designations are still, for the time being, subject to the contour-overlap approach). Under the “new” Arbitron market approach – which is also based on BIA-generated station data to determine exactly which stations happen to be in any particular Arbitron market – all nine of the buyer’s existing stations were in the Burlington market, as was the tenth station it wanted to purchase. While the FCC was willing to grandfather the licensee’s ownership of the nine stations it had owned before the new rules kicked in, it did not look good for acquisition of a tenth station under the circumstances.

Undaunted by the facts, the buyer pointed to Arbitron’s August, 2004 creation of two new radio markets in what previously had been a portion of the Burlington market: Montpelier-Barre-Waterbury (St. Johnsbury), VT and Lebanon-Rutland-White River Junction, NH-VT. The buyer explained that creation of the new markets had removed four of the buyer’s existing stations from the Burlington market in August, 2004, before the new method went into effect on September 3, 2004. Thus, the buyer claimed, it owned only five stations in the Burlington market and could acquire a sixth without violating the multiple ownership rules.

The FCC wasn’t persuaded, pointing out instead that, despite Arbitron’s August, 2004 change in the Burlington market boundaries, the BIA station data which happened to be in effect on September 3, 2004 still listed all nine of the buyer’s existing stations as being in the Burlington market. The FCC again took the opportunity to emphasize that when it adopted Arbitron radio market boundaries for its multiple ownership rules, the FCC had specifically chosen to rely on BIA station data in lieu of Arbitron station data to determine the number of radio stations “in” an Arbitron geographic market. Thus, the BIA station data in effect on September 3, 2004 established the number of stations in the Burlington market and subsequent changes made by BIA (presumably to bring the BIA market definition into conformity with Arbitron’s definition) to the number of stations in the market would *not* be taken into account until a two-year waiting period had elapsed on September 3, 2006 (*i.e.*, two years after the effectiveness of the rules).

But let’s not accuse the Commission of being too hard-hearted – they managed to find it in their bureaucratic heart to waive the two-year waiting period.

According to the FCC, a waiver was warranted by the unique circumstances related to the FCC's transition to the new Arbitron boundaries/BIA station data method of determining the number of radio stations in a market. The FCC explained that it established the two-year waiting period because Arbitron occasionally modifies market boundaries and/or Arbitron station market data in response to a station owner's request, and the FCC wanted to deter station owners from manipulating Arbitron data to avoid complying with the multiple ownership rules.

Still, the FCC pointed out, BIA also eventually followed Arbitron's lead and redesignated the same four of the buyer's nine existing stations from the Burlington market to the two new markets. That confirmed (in the FCC's view, at least) that Arbitron's August 2004 market modification had been based on market realities. Since the BIA station data upon which the FCC had chosen to rely to safeguard its multiple ownership rules had confirmed the reliability of the Arbitron market modification, and since the issue had arisen under the unique circumstances of the FCC's transition to the new "method" of determining the number of radio stations in a market, the FCC decided that requiring a two-year waiting period was not necessary in this case. Granting the buyer a waiver of the two-year waiting period, the FCC found that the buyer owned only five stations under more recent BIA date and, thus, could purchase a fifth in compliance with the multiple ownership rules.

This case demonstrates that the new market definition approach can be subject to manipulation by affected private parties. That is, if a multiple owner finds itself maxed out in a particular market, that owner might seek relief *not* by asking the FCC for a waiver, but rather by asking Arbitron simply to re-define its markets in a way which eliminates the problem. But this case also re-confirms that the FCC is aware of that potential and that the FCC will not be inclined to cut much slack for those who try that particular gambit. It appears for the time being that the two-year waiting period will be enforced stringently on a going-forward basis.