

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Grapevine of Austin License Sub, LLC)	
)	CSR-5454-N
For Waiver of §§76.92(f) and 76.156(a))	
of the Commission's rules.)	

MEMORANDUM OPINION AND ORDER

Adopted: April 14, 2000

Released: April 24, 2000

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. Grapevine of Austin License Sub, LLC, licensee of Television Broadcast Station KAAL (ABC, Ch. 6), Austin, Minnesota ("KAAL"), filed a petition for special relief seeking a waiver of the Commission's significantly viewed exception to the network nonduplication rules (47 C.F.R. §76.92(f)) and the syndicated program exclusivity rules (47 C.F.R. §76.156(a)). A joint opposition to this petition was filed on behalf of Hubbard Broadcasting, Inc., licensee of Station KSTP-TV (ABC, Ch. 5), St. Paul, Minnesota ("KSTP-TV"), and Bresnan Communications Company ("Bresnan"), operator of cable television systems in Olmsted County, Minnesota. KAAL has filed a reply to this opposition.

II. BACKGROUND

2. Upon the request of a local station which has the exclusive rights to distribute a network program, a cable operator generally may not carry a duplicating network program broadcast by a distant station.¹ However, an otherwise distant station is exempt from the application of the network nonduplication rules if it is considered significantly viewed in a relevant community.² Likewise, pursuant to the Commission's cable television syndicated programming exclusivity rules, a cable system may not import duplicating syndicated programming which has been purchased by a local station on an exclusive basis.³ In both situations, the Commission's rules in general provide stations such protection within a station's 35-mile geographic zone.⁴ However, a local station may not exercise either right if an otherwise

¹See 47 C.F.R. §76.92.

²For a network station to be recognized as significantly viewed in a community or in a county, it must achieve in noncable homes a share of viewing hours of at least 3% (total week hours) and a net weekly circulation of at least 25%. 47 C.F.R. §76.5(i).

³See 47 C.F.R. §76.156.

⁴The 35-mile geographic zone extends from the reference point of the community of license of the television station. See 47 C.F.R. §§73.658 and 76.53.

distant station is considered “significantly viewed” within the community served by the cable system.⁵ The significantly viewed exception to the Commission’s exclusivity rules is based on an otherwise distant station establishing that it receives a “significant” level of over-the-air viewership in a subject community. Should this viewership level be met, the station is no longer considered distant for purposes of the application of the Commission’s exclusivity rules since it has established that it can be received over-the-air in the subject communities.

3. KAAL seeks a waiver of the significantly viewed exception to the Commission’s network nonduplication and syndicated exclusivity rules so that it may enforce its rights to network nonduplication and syndicated exclusivity against KSTP-TV, which is currently considered to be significantly viewed in the communities of Byron, Eyota, Rochester, and Stewartville, Minnesota, which are served by Bresnan and located in Olmsted County, Minnesota.

4. In *KCST-TV, Inc.*, the Commission held that in order to obtain a waiver of Section 76.92(f) of the Commission’s rules, which provides for an exemption to the network nonduplication rules for significantly viewed stations, petitioners would be required to demonstrate for two consecutive years that a station was no longer significantly viewed, based either on community-specific or system-specific noncable viewing data, to one standard error.⁶ For each year, the data must be obtained as a result of independent professional surveys taken during two one-week periods which are separated by at least thirty days, the viewing samples must be distributed proportionately among the relevant cable communities, and not more than one of the surveys may be taken between April and September of each year.⁷

III. DISCUSSION

5. In support of its petition, KAAL states that it is an ABC affiliate licensed to Austin, Minnesota, which is part of the Rochester, Minnesota-Mason City, Iowa-Austin, Minnesota DMA (“Rochester DMA”). KAAL points out that Olmsted County, where the Bresnan cable communities are located, has the highest number of television households in the Rochester DMA. In addition, KAAL notes that because each of the communities is located within its geographic zone, it is entitled to exercise its network nonduplication and syndicated exclusivity protection rights. On the other hand, KAAL states that distant ABC affiliate, KSTP-TV, is licensed to St. Paul, Minnesota, which is part of the much larger Minneapolis-St. Paul DMA, and is more than 70 miles from the subject communities. Despite the fact that KSTP-TV is located in a different market, KAAL argues that it is unable to assert its legitimate network nonduplication and syndicated exclusivity rights against KSTP-TV because the station is considered to be “significantly viewed” in the subject communities.⁸

6. KAAL maintains that as a small market station unable to enforce its network nonduplication and syndicated exclusivity rights, it is operating at a competitive disadvantage, particularly as the majority of KAAL’s programming is duplicative of the programming aired by KSTP-TV. As a result, KAAL states that it is forced to compete with KSTP-TV for both viewership and advertising

⁵See 47 C.F.R. §76.156.

⁶103 FCC 2d 407 (1986).

⁷See 47 C.F.R. §76.54(b).

⁸KSTP-TV was granted significantly viewed status in the communities of Byron and Eyota, Minnesota, pursuant to a February 9, 1982 letter from William H. Johnson, Chief, Cable Television Bureau. For the communities of Rochester and Stewartville, Minnesota, KSTP-TV was granted significantly viewed status pursuant to a July 19, 1989 letter from Ronald Parver, Chief, Cable Television Branch.

revenues in a county that has 42,730 television viewing households.⁹ KAAL asserts that such competition has caused a significant financial strain and undermined its efforts to remain a viable competitor in its own DMA.

7. KAAL argues that KSTP-TV is no longer significantly viewed in the cable communities herein and that it commissioned VideoProbeIndex (“VPI”), an independent professional survey organization, to undertake surveys to determine KSTP-TV’s current significantly viewed status. KAAL states that VPI conducted surveys of two one-week periods for each of two consecutive years consistent with the requirements set forth in Section 76.54(b) of the Commission’s rules. The first year’s surveys were conducted during the weeks of June 10-16, and September 16-22, 1998, and the second year’s surveys during the weeks of June 9-15, and September 15-21, 1999.¹⁰ The results of the VPI survey submitted by KAAL are as follows:

<u>Survey Year</u>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
1998	191	3.6	1.4	14.8	3.4
1999	183	1.3	1.0	11.5	3.4

As a result, KAAL requests that the Commission grant its petition so that it can assert its network nonduplication and syndicated exclusivity rights in the subject communities.

8. In opposition, KSTP-TV and Bresnan argue that KAAL’s petition should be denied because KSTP-TV continues to receive a significant level of over-the-air viewership in the communities.¹¹ The parties point out that KSTP-TV has been carried on the cable systems that serve the communities since 1958 and that the station provides coverage of news and other programming of interest. Moreover, they state that because KSTP-TV was found to achieve significant viewership levels in 1982 and 1989 in the subject communities, Bresnan may carry both KSTP-TV and KAAL on its cable systems.

9. KSTP-TV and Bresnan assert that the survey provided in KAAL’s petition is not accurate and cannot support the requested conclusion. KSTP-TV and Bresnan argue that VPI engaged in data-mining to achieve the desired results by conducting only two weekly surveys and choosing to take the surveys during the two months in each year that have historically the lowest viewing levels.¹² The parties maintain that the use of data from June and September produces a skewed sample and therefore the results are not accurate. KSTP-TV and Bresnan state that the Commission should instead rely on Nielsen’s *County/Coverage Study 1999* which they contend is more accurate since Nielsen is in the business of

⁹Petition at 2.

¹⁰*Id.* at 3-4.

¹¹KSTP-TV and Bresnan state that the *Nielsen Station Index, County/Coverage Study 1999* indicates that KSTP-TV receives a total viewing hours share of 5 percent and a net weekly circulation of 29 percent in the noncable homes in Olmsted County. While this is not community-specific data as provided by KAAL, the parties state that as one of the communities, Rochester, comprises roughly 90 percent of the population contained in KAAL’s study and 67 percent of the overall population of the county, the results are comparable. Petition at 2.

¹²Opposition at Exhibit 1. KSTP-TV and Bresnan point out that networks traditionally air reruns during the months of June and September.

conducting audience surveys and it conducts impartial surveys of television stations on a county-by-county basis. KSTP-TV and Bresnan point out that Nielsen's study is based on a larger number of sample periods than VPI's survey. They argue that it is a basic precept of statistics that a larger sample size, chosen correctly, yields more accurate results with a lower margin for error. Moreover, KSTP-TV and Bresnan state that Nielsen uses four-week sample periods that better represent year-round viewing patterns during the months of November, February, May and July.¹³ The parties assert that the VPI study submitted by KAAL unfairly gives the summer rerun period a weight equal to the entire broadcast season.

10. KSTP-TV and Bresnan state further that although KAAL complains that the requested relief is necessary so that it may compete more fairly and improve its ratings it does not explain how the station's profitability relates to, much less serves, the public interest. Moreover, the parties point out that nowhere does KAAL offer evidence that its viability is threatened by cable carriage of KSTP-TV. In any event, KSTP-TV and Bresnan argue that KAAL can compete whether KSTP-TV is carried or not simply by providing more attractive programming to entice viewers in the communities. KSTP-TV and Bresnan state that if KAAL's petition is granted, Bresnan would be required to blackout all duplicative network and syndicated programming carried on KSTP-TV, a move which would be burdensome and likely to result in removing KSTP-TV from carriage altogether.¹⁴ The parties state that such removal would not be in the public interest because it would severely affect Bresnan's cable subscribers, who have come to rely on KSTP-TV's news and public affairs programs and its entertainment programming.¹⁵

11. In reply, KAAL argues that, despite KSTP-TV and Bresnan's contention that VPI's study is inaccurate, the Commission has repeatedly stated that in seeking an exemption, the determination of a local station's significant viewership status must be based on either community-specific or system-specific data, to one standard error.¹⁶ KAAL states that VPI's study conforms to this requirement by using community-specific data which is a more accurate determination of KSTP-TV's significantly viewed status in the communities. Moreover, KAAL points out that not only has VPI been conducting significantly viewed surveys since 1973, but it has been the key provider of significant viewing data in support of programming exclusivity waiver requests.¹⁷ KAAL maintains that the Commission has consistently recognized VPI's studies as reliable and determinative of significantly viewed status.¹⁸ Indeed, KAAL states that it was acknowledged in the opposition that KSTP-TV itself utilized VPI when it initially requested significantly viewed status in the subject communities in 1982 and 1989.¹⁹

12. KAAL argues that KSTP-TV and Bresnan's allegation that VPI cherry-picked data to achieve the desired results is erroneous. KAAL states that it initially engaged VPI to conduct a survey

¹³Opposition at Exhibit 1 citing Nielsen's *1998 Report on Television*.

¹⁴*Id.* at Exhibit 5.

¹⁵*Id.* at 9. Bresnan indicates that its subscribers have consistently indicated that they prefer to keep KSTP-TV, despite the existence of KAAL.

¹⁶See e.g., *Cypress Broadcasting Corporation*, 13 FCC Rcd 20293 (1998), and *KCST-TV*, 103 FCC 2d 207 (1986).

¹⁷Reply at Exhibit A, Declaration of Robert Schultz.

¹⁸See e.g., *Northeast Kansas Broadcast Service, Inc.*, 14 FCC Rcd 12087 (1999); *Delmarva Broadcast Service General Partnership*, 14 FCC Rcd 10509 (1999); *Radio Perry, Inc.*, 14 FCC Rcd 7841 (1999); *Cypress Broadcasting Corporation*, 11 FCC Rcd 21073 (1996); and *Lebanon Valley TV Cable, Inc.*, 61 FCC 2d 53 (1976).

¹⁹Opposition at Exhibits 2 and 3.

during the month of April, 1998, but due to the amount of time necessary to prepare the survey and fulfill the requisite notice requirements June was the first month in which the first survey could be conducted.²⁰ KAAL states that VPI then selected September as the next viewer survey period simply because it was the next available month in which to conduct a survey in accordance with the Commission's rules.²¹ In any event, KAAL asserts that the Commission has in the past found significant viewer surveys conducted during the months of June and September to be determinative of significantly viewed status.²² Finally, KAAL maintains that with regard to the issue of public interest, the Commission has stated that "the public interest requires that free, local, over-the-air broadcasting be given full opportunity to meet its public interest obligations. An essential element of this responsibility is to create a local television market that allows broadcasters to compete fully and fairly with other market participants."²³ KAAL contends that it has not been able to compete fairly in its own market or serve the public interest with KSTP-TV duplicating the majority of its programming.

13. We find that, as required by the Commission, KAAL has provided two sets of community-specific survey results for the communities of Byron, Eyota, Rochester, and Stewartville, Minnesota, for each year surveyed. Section 76.5(i) of the Commission's rules requires that for network affiliate stations to be considered significantly viewed, the survey results should exceed a 3 percent share of total viewing hours and a 25 percent net weekly circulation share, by at least one standard error.²⁴ In the results obtained by VPI herein, the 1998 reported results for KSTP-TV, with one standard error added, are a 5 percent share of total viewing hours and an 18.2 percent net weekly circulation. For 1999, the reported results with the standard errors added are a 2.3 percent share of total viewing hours and a 14.9 percent net weekly circulation share. With the exception of the 1998 average for total weekly viewing hours, each of the reported values is below the required minimum necessary to achieve significantly viewed status. However, since both values must exceed the criteria for a station to be considered significantly viewed, the 1998 results demonstrate that KSTP-TV does not attain significantly viewed status during this survey period. Accordingly, we find that the submitted audience surveys are sufficient to show that KSTP-TV no longer attains the viewing levels needed to demonstrate significantly viewed status in the subject communities.

14. Further, we do not agree with the arguments raised by KSTP-TV and Bresnan and find that VPI conducted its surveys according to approved and reasonable statistical methodology and that they fully comply with the requirements of Section 76.54(b) of the Commission's rules. While it may be true, as KSTP-TV and Bresnan maintain, that additional survey time periods lead to more accurate results, the Nielsen study relied on by the opposing parties does not meet the requirements set forth in Section 76.54(b) and *KCST-TV* nor does it include two years of surveys, as required under *KCST-TV*.

15. For the above reasons, we find that a grant of a waiver of the significantly viewed exception from the network nonduplication and syndicated exclusivity rules with regard to the community-specific survey for the communities of Byron, Eyota, Rochester and Stewartville, Minnesota, will serve the public interest.

²⁰Reply at Exhibit A, Declaration of Robert Schultz.

²¹See 47 C.F.R. §76.54(b).

²²*Cypress Broadcasting Corporation*, 13 FCC Rcd 20293 (1998).

²³See *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd 5299, 5311 (1988).

²⁴47 C.F.R. §76.5(i).

IV. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED**, that the petition filed by Grapevine of Austin License Sub, LLC **IS GRANTED**.

17. This action is taken pursuant to authority delegated under Section 0.321 of the Commission's rules.²⁵

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Cable Services Bureau

²⁵47 C.F.R. §0.321.