

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

In the Matter of:)	
)	
WTNH Broadcasting, Inc. and K-W TV,)	
Inc.)	CSR-5599-N
)	
Petition for Waiver of Sections 76.92(f))	
and 76.156(a) of the Commission's rules)	

ORDER ON RECONSIDERATION

Adopted: September 6, 2001

Released: September 11, 2001

By the Deputy Chief, Cable Services Bureau::

I. INTRODUCTION

1. WTNH Broadcasting, Inc., licensee of station WTNH-TV (Ch. 8), and K-W TV, Inc., licensee of television broadcast station WCTX¹ (Ch. 59), both New Haven, Connecticut (collectively "WTNH"), have filed a petition for partial reconsideration of the Bureau's decision denying WTNH's petition seeking a waiver of the Commission's significantly viewed exception to the network nonduplication and syndicated exclusivity rules.² Comments on this petition were filed on behalf of Comcast Cablevision of New Haven, Inc. ("Comcast") to which WTNH replied.

II. BACKGROUND

2. In its request for waiver, WTNH sought a waiver of the significantly viewed exception to the network nonduplication and syndicated exclusivity rules so that it could assert its rights to network nonduplication and syndicated exclusivity against Stations WABC-TV (Ch. 7), New York, New York, and WWOR-TV (Ch. 9), Secaucus, New Jersey. The *Bureau Order* rejected WTNH's original system-wide submission because it did not appear to be reasonably proportional to the individual cable communities included (i.e., New Haven, West Haven and Hamden, Connecticut). In addition, the *Bureau Order* denied WTNH's request because the petition relied on four four-week Nielsen audience sweep data from two consecutive years, rather than providing data from only two periods in each of the two years. WTNH seeks partial reconsideration, for the community of New Haven only, based on the narrower two Nielsen four-week sweeps periods for each of two years.

¹Formerly WBNE.

²WTNH Broadcasting, Inc. and K-W TV, Inc., DA 01-705 (released March 19, 2001)("Bureau Order").

III. DISCUSSION

3. In support of its petition, WTNH states that the Commission grants waivers of the significantly viewed rule exception if a study by an independent, professional audience survey organization shows that a station, over two consecutive one-year periods, does not meet the applicable significantly viewed benchmark based either on “community-specific” or “system-specific” non-cable viewing data calculated to one standard error.³ WTNH states that the data for each year of such a study must include, at a minimum, two one-week periods separated by at least 30 days, with not more than one of the survey periods falling between April and September.⁴ WTNH states that because the *Bureau Order* finds its originally-submitted “system-specific” study covering four four-week sweeps periods for each of two consecutive years unacceptable, it now submits the results of a revised custom “community-specific” audience study covering two four-week sweeps periods for two consecutive years.⁵ WTNH points out that this study was prepared by Nielsen Media Research from the November 1997/February 1998 and November 1998/February 1999 audience sweeps periods using non-cable household diaries for the zip codes included in New Haven that have been gathered for their routine audience sweep measurements. The submitted audience information is 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>
1997/1998					
WABC-TV	20	0	0	0	0
WWOR-TV	20	0.77	0.72	3.88	3.95
1998/1999					
WABC-TV	22	1.52	1.21	9.37	5.12
WWOR-TV	22	0.10	0.10	7.17	7.46

WTNH argues that the Bureau found this type of submission acceptable in its recent decision in *Benedek License Corporation*.⁶ WTNH asserts that this study establishes that, for two consecutive years, WABC-TV and WWOR-TV have not met the applicable viewing levels required for a distant station to be considered significantly viewed in the community of New Haven. As a result, WTNH requests that its petition for partial reconsideration be granted.

4. In its comments, Comcast, the operator of the cable system serving the communities of New Haven, West Haven and Hamden, states that a grant of WTNH’s petition would undoubtedly result in WTNH’s request for nonduplication and syndicated exclusivity protection in the community of New Haven. However, Comcast argues, WTNH has not inquired as to whether the New Haven cable system has the capacity to partially black out programming in the community of New Haven without also blacking it out in West Haven and Hamden. Comcast asserts that it does not currently have that technological

³Petition at 2.

⁴*Id.*

⁵*Id.* at Annex A.

⁶DA 01-704 (released March 19, 2001).

capability.⁷ As a result, Comcast argues that even if the Bureau finds, based on WTNH's revised study, that WABC-TV and WWOR-TV are no longer significantly viewed in New Haven, Comcast would be unable to comply with WTNH's probable request for protection.⁸ Although Comcast notes that, historically, cable systems in similar situations have requested a waiver of the Commission's rules, it is filing these comments in this proceeding because the relief WTNH is requesting on reconsideration is not routinely granted. Comcast states, however, that if WTNH's relief is granted, it will necessitate the immediate filing of a petition for special relief of the network nonduplication and syndicated exclusivity rules.⁹

5. WTNH states in reply that while it is committed to working with Comcast in good faith to resolve any carriage issues which may arise from a grant of its request, it is essential at this juncture for WTNH to obtain confirmation in this proceeding that the facts demonstrate that WABC-TV and WWOR-TV are no longer significantly viewed in the community of New Haven.¹⁰ WTNH notes that Commission policy creates a very strong presumption in favor of enforcement of program exclusivity rights in the portion of a cable system's service area subject to such rights.¹¹ In this instance, WTNH argues that the community of New Haven is especially important because it is the core of WTNH-TV's and WCTX's market, is their community of license and is, by far, the largest of the three communities served by Comcast.¹²

6. Initially, we note that the issue of proportionality raised in the *Bureau Order* is no longer relevant as WTNH's revised submission is only for one community, rather than the system-wide waiver it originally requested. In *KCST-TV, Inc.*, the Commission determined that Section 76.92(f) of the Commission's rules could be waived if it could be shown that a station has not met the standards for significantly viewed status for two consecutive years based on community-specific or system-specific data, to one standard error.¹³ WTNH submits on reconsideration the results of a revised custom community-specific survey prepared by Nielsen from its November 1997/February 1998 and November 1998/February 1999 audience sweeps periods over two consecutive years. These data indicate, with the standard errors included, that WABC-TV attained 0 percent shares for both total viewing hours and net weekly circulation for the first year and, for the second year, with the standard errors included, a 2.73 percent share of total weekly viewing hours and a net weekly circulation of 14.49 percent.¹⁴ For WABC-TV for both years, the share of total weekly viewing hours and the net weekly circulation share statistics fall below the required minimum for significantly viewed status.¹⁵ Accordingly, the submitted audience surveys for WABC-TV are sufficient to show that it no longer attains the viewing levels needed to demonstrate significantly viewed

⁷Comments at 2.

⁸*Id.*

⁹*Id.*

¹⁰Reply at 2.

¹¹See *Continental Cablevision of Ohio, Inc.*, 7 FCC Rcd 499 (1992).

¹²Reply at 2.

¹³103 FCC 2d 407 (1986).

¹⁴Petition at Appendix A.

¹⁵For 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 percent (total week hours) and a net weekly circulation of at least 25 percent. 47 C.F.R. §765(i).

status in the community of New Haven.

7. For WWOR-TV the shares for the first year, with the standard errors included, were 1.49 percent of total weekly viewing hours and a 7.83 percent net weekly circulation, and for the second year, with the standard errors included, shares of 0.20 percent and 14.63 percent, respectively.¹⁶ For WWOR-TV for both years, the share of total weekly viewing hours falls below the required minimum for significantly viewed status while the net weekly circulation shares exceed the required minimum.¹⁷ However, since both conditions must be met, WWOR-TV does not meet the requirements for significantly viewed status and the audience surveys submitted are therefore sufficient to show that WWOR-TV no longer attains significantly viewed status in New Haven.

8. With regard to the issue raised by Comcast of its inability to black out programming only in the community of New Haven, Comcast has not formally requested a waiver of the exclusivity requirements. Therefore, based on the evidence before us, we see no reason to delay or deny grant of WTNH's petition for reconsideration. Should Comcast subsequently file a petition for waiver in light of our action herein, we will review such a request on its merits at that time.

9. Based on the revised data and information provided, we conclude that the surveys provided by WTNH now meet the requirements specified in the Commission's rules.

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED**, that the petition for reconsideration filed by WTNH Broadcasting, Inc. and K-W TV, Inc. **IS GRANTED**.

11. This action is taken pursuant to authority delegated under Sections 0.321 and 1.106 of the Commission's rules.¹⁸

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

¹⁶Petition at Appendix A.

¹⁷For an independent station, such as WWOR-TV, to be considered significantly viewed in a particular area, it must demonstrate that it achieves at least a 2 percent share of noncable viewing hours (total week hours) and a 5 percent net weekly circulation. 47 C.F.R. §76.5(i).

¹⁸47 C.F.R. §§0.321 and 1.106.