

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

In the Matter of:)	
)	
Flint License Subsidiary Corp.)	
)	CSR-6687-N
For Waiver of Sections 76.92(f))	
of the Commission's Rules)	

MEMORANDUM OPINION AND ORDER

Adopted: January 26, 2006

Released: January 31, 2006

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Flint License Subsidiary Corp., licensee of station WJRT-TV (ABC), Flint, Michigan (“WJRT-TV”), has filed a petition for special relief seeking a waiver of the Commission’s significantly viewed exception to the network nonduplication rules. No opposition to this petition has been received.

II. BACKGROUND

2. Upon the request of a local television station with exclusive rights to distribute a network or syndicated program, a cable operator generally may not carry a duplicating program broadcast by a distant station.¹ Under Section 76.92(f) of the Commission’s rules, 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 (“the significantly viewed exception”).² The Commission’s rules generally provide stations such protection within a station’s 35-mile geographic zone.³ 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. If this viewership level is met, the station is no longer considered distant for purposes of the application of the Commission’s exclusivity rules because it has established that it is viewed over the air in the subject community. A similar exception is provided in the syndicated exclusivity rules.⁴

¹See 47 C.F.R. §76.92; 47 C.F.R. §76.101.

² 47 C.F.R. §76.92(f); see 47 C.F.R. §§76.5(i) and 76.54.

³The 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.

⁴ 47 C.F.R. §76.106(a).

3. In *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, the Commission adopted a rule for satellite carriage that mirrors the rules for cable carriage.⁵ Accordingly, the amended Section 76.122(a) and (j) and 76.123(a) and (k) of the Commission's rules allow a station or distributor with exclusive rights to network or syndicated programming to assert network nonduplication or syndicated exclusivity protection to require satellite carriers to delete such programming. The duplicating station may respond to such assertions by claiming the significantly viewed exception.⁶ The party asserting network nonduplication or syndicated exclusivity protection may request a waiver of the significantly viewed exception from the Commission by demonstrating that the station is no longer significantly viewed in a particular communities or communities.⁷ If the waiver is granted, the duplicating programming must be deleted by a cable operator or satellite carrier if the station is carried in a community in which the station has been shown to no longer be significantly viewed. It should be noted that the station itself is not removed from the significantly viewed list and may continue to be carried, provided the necessary programming deletions are made.⁸

4. In order to obtain a waiver of Section 76.92(f), the Commission held in *KCST-TV, Inc.*⁹ that 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 over-the-air viewing data, following the methodology set forth in Section 76.54(b).¹⁰ For each year, the data must be the result of independent professional surveys taken during two one-week periods 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.¹¹ Section 76.5(i) of the Commission's rules requires that for network stations¹² to be considered significantly viewed, the survey results should exceed a 3 percent share of total viewing hours and a net weekly circulation of 25 percent, by at least one standard error.¹³ For independent stations (*i.e.*, non-network stations), to be considered significantly viewed, Section 76.5(i) of the Commission's rules requires the survey results should exceed a 2 percent share of total viewing hours and a net weekly circulation of 5 percent, by at least one standard

⁵FCC 05-187 (rel 11/2/05) ("*SHVERA Order*").

⁶ 47 C.F.R. §§ 76.122(j)(2) and 76.123(k)(2).

⁷ See *KCST-TV, Inc.*, 103 FCC 2d 407 (1986).

⁸ See *SHVERA Order* at ¶¶ 39-41; see also 47 U.S.C. § 340(e)(2).

⁹ 103 FCC 2d 407 (1986).

¹⁰ Section 76.54(b) describes the required survey procedures for adding a station to the significantly viewed list based on community- or system-specific surveys. For the addition of a station to the list, only one year's surveys are required. In *KCST*, the Commission required that the data demonstrate viewing levels for two years. In the *SHVERA Order*, we clarified that the independent professional audience surveys required by Section 76.54 of our rules must include surveys only from households that receive broadcast signals via an over-the-air antenna and thus amended Section 76.54 to change "noncable" to "over-the-air." See *SHVERA Order* at ¶ 32.

¹¹ See 47 C.F.R. §76.54(b).

¹² For purposes of determining whether to use the network or non-network standard for audience share, the Commission relies on the definition of network and independent station in our rules. Thus, for such purposes, affiliates of the ABC, CBS, and NBC networks are "network stations." See 47 C.F.R. §76.5(j) and (k). Other stations are treated as independent stations for this limited purpose. See 47 C.F.R. §76.5(j); *SHVERA Order* at ¶¶ 33-36.

¹³ 47 C.F.R. §76.5(i).

error.¹⁴ The Commission has found that this type of test is applicable as well for waivers of the syndicated exclusivity exemption.¹⁵

III. DISCUSSION

5. Station WJRT-TV seeks a waiver of the significantly viewed exception to the Commission's network nonduplication rules so that it may enforce its network nonduplication rights against Station WXYZ-TV (ABC), Detroit, Michigan on two cable systems currently serving Flint, Michigan – Comcast Cablevision of Flint, Inc. ("Comcast") and Charter Communications, Inc. ("Charter").¹⁶ WJRT-TV points out that WXYZ-TV, which is licensed to Detroit, Michigan, is in the Detroit designated market area ("DMA").¹⁷ WXYZ-TV is currently considered to be significantly viewed in Genesee County, Michigan, where the community of Flint is located.

6. In support of its petition, WJRT-TV states that it would normally have network nonduplication rights for ABC programming in the Flint-Saginaw-Bay City, Michigan DMA, but is prevented from asserting those rights against WXYZ-TV in the community of Flint because WXYZ-TV is considered to be significantly viewed in Genesee County, where Flint is located.¹⁸ WJRT-TV asserts, however, that WXYZ-TV no longer meets the significantly viewed standard in the community of Flint and, as proof, it submits the results of special, community-specific surveys conducted by Nielsen Media Research.¹⁹ WJRT-TV states that Nielsen's surveys are averages of two four-week sweeps in each of two years and are consistent with the requirements set forth in Section 76.54(b) of the Commission's rules.²⁰ The first year's survey audience estimates were based on November 2002/February 2003 data and the second year's estimates on the November 2003/February 2004 data.²¹ WJRT-TV maintains that these surveys indicate that WXYZ-TV's share of total viewing hours in over-the-air homes in Flint falls far short of the required significantly viewed minimums, within one standard error. As a result, WJRT-TV requests that the Commission grant its petition so that it can assert its network nonduplication rights in Flint, Michigan on both the Comcast and Charter cable systems.

7. With regard to the data submitted, we find that, as required by the Commission's rules, WJRT-TV has provided community-specific survey results from two survey periods for each of two years. In its petition, WJRT-TV submits both the results of the four individual survey periods and average audience statistics for each year. With respect to the reported average audience statistics, we note that WJRT-TV presents average weekly audience shares, net weekly circulation shares, and average standard errors to support its request.²² While it is accurate to take an arithmetic average of the two

¹⁴ *Id.*

¹⁵ See *Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640 (1990).

¹⁶ Petition at 1.

¹⁷ *Id.* at 2.

¹⁸ *Id.* at 2. WJRT-TV states that WXYZ-TV achieved its significantly viewed status by its inclusion in Appendix B to the *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 378 (1972).

¹⁹ *Id.* at 4 and Exhibits 1 and 2. WJRT-TV states that Nielsen's tabulation was based on over-the-air homes from all of the zip codes in the community of Flint.

²⁰ 47 C.F.R. §76.54(b).

²¹ Petition at Exhibit 1.

²² Petition at 4-5.

reported weekly audience shares and network weekly circulation shares by adding them together and dividing that result in half, an arithmetic average of the standard errors is not the standard error of the average – the meaningful measure if we are evaluating average results. Thus, the audience data presented in this manner cannot be used to support WJRT-TV's request.

8. However, since WJRT-TV also provides the individual sweep period results, we can evaluate its submission based on those audience statistics and their associated standard errors. For the November 2002 survey, the reported results for WXYZ-TV indicate an average share of total weekly viewing hours of 2.59 percent (1.89 reported share + 0.70 standard error) and a 36.26 percent average net weekly circulation share (24.49 reported share + 11.77 standard error). For the November 2003 survey, the reported results indicate an average share of total weekly viewing hours of 0.37 percent (0.18 reported share + 0.19 standard error) and an average net weekly circulation share of 8.83 percent (4.44 reported share + 4.39 standard error). Both the February 2003 and February 2004 surveys indicate that WXYZ-TV attains zero reported audience shares for both the total share of weekly viewing hours and net weekly circulation share with no calculable standard error.²³

9. The survey results indicate that for the share of total viewing statistics, the value for the November 2002 survey falls below the 3 percent minimum required when the standard error is considered, while the value for the net weekly circulation share for that period exceeds the 25 percent minimum when the standard error is considered. However, the criteria for determining whether a station is significantly viewed requires that both the share of total viewing hours and the net weekly circulation share exceed the criteria provided in Section 76.5(i) of the Commission's rules.²⁴ Thus, WXYZ-TV does not meet the criteria for demonstrating significantly viewed status based on the reported November 2002 viewing statistics. The reported audience statistics from the February 2003, November 2003, and November 2004 surveys do not exceed the criteria specified in Section 76.5(i) when the standard errors are added to the reported results. Accordingly, we find that the submitted audience surveys are sufficient to show that WXYZ-TV no longer attains the viewing levels needed to demonstrate significantly viewed status in the community of Flint, Michigan.²⁵

10. For the above reasons, we find that a grant of the significantly viewed exception from the network nonduplication rules with regard to the community-specific survey for the community of Flint, Michigan, will serve the public interest. The list of significantly viewed stations will be updated within 10 business days of this Order, in accordance with Section 340(c)(2) of the Act.²⁶

²³We note that it appears to be somewhat anomalous that WXYZ-TV would attain measurable audience during the two November sweep periods, but not in the two February sweeps, particularly as Nielsen reported in-tab diaries for those periods. We recognize that it is possible that the low share of total weekly viewing hours from both November sweeps might be followed by viewing levels below Nielsen's reporting minimums in the February sweeps, but it seems unusual that the average net weekly circulation share fluctuated such that it went from approximately a 24 share in November 2002, to zero in February 2003, to approximately a 4 share in November 2003, and then to zero again in February 2004. While we would normally seek clarification from the petitioner, we will not do so in this instance due to the fact that the petition is unopposed.

²⁴47 C.F.R. § 76.5(i).

²⁵While WJRT-TV claims that the tables it submits are the results of Nielsen's special tabulation, there is no Nielsen documentation. This may have been an oversight when WJRT-TV reproduced the tables or perhaps WJRT-TV created the average results. Given the low audience values reported, however, we do not believe this oversight would change our finding.

²⁶47 U.S.C. § 340(c)(2); *SHVERA Order* at ¶ 13 n.40.

IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED**, that the petition filed by Flint License Subsidiary Corp. **IS GRANTED** for the community of Flint, Michigan.

12. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.²⁷

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
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²⁷47 C.F.R. §0.283.