

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

In the Matter of:)	
)	
WGME Licensee, LLC)	
)	CSR-6947-N
For Waiver of Sections 76.92(f))	
of the Commission's Rules)	

MEMORANDUM OPINION AND ORDER

Adopted: November 22, 2006

Released: November 28, 2006

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. WGME Licensee, LLC, licensee of station WGME-TV (CBS), Portland, Maine ("WGME-TV"), has filed the captioned petition seeking a waiver of the rules that preclude cable operators from deleting the duplicate programming of "significantly viewed" stations under the network nonduplication and syndicated exclusivity rules ("exclusivity rules").¹ Specifically, WGME-TV seeks a waiver of the significantly viewed exception so that it may enforce its network nonduplication rights against Station WBZ-TV (CBS), Boston, Massachusetts.² WBZ-TV is currently considered to be significantly viewed in York County, Maine, where the communities surveyed are located.³ No

¹47 C.F.R. §§ 76.92(f) and 76.106(a). Although not expressly requested in WGME-TV's petition for waiver of Sections 76.92(f) and 76.106(a) (significantly viewed exception to cable network nonduplication and syndicated exclusivity), a waiver of Sections 76.122(j) and 76.123(k) (significantly viewed exception to satellite network nonduplication and syndicated exclusivity) would also appertain based on the same showing that a station is no longer significantly viewed in the relevant community. *See* 47 U.S.C. § 340(a)(2) and 340(c); 47 C.F.R. §§ 76.92(f), 76.106(a), 76.122(j) and 76.123(k). We also take this opportunity to remind petitioners that, in accordance with Section 76.7(c)(3), petitions should be accompanied by a certificate of service showing that affected cable operators, stations, and interested persons, including satellite carriers, have been served. 47 C.F.R. § 76.7(c)(3).

²Petition at 1.

³*Id.* at 3. We note that, initially, WGME-TV submitted county-wide survey data so that it could assert its network nonduplication rights against WBZ-TV throughout York County. When it was informed that that county-wide data did not meet the requirements set forth in *KCST-TV, Inc.* and Section 76.54(b) of the Commission's rules, WGME-TV submitted additional survey information on July 25, 2006 and again on September 13, 2006. *See* Supplement to Petition for Special Relief, Letter from Kathryn R. Schmeltzer and Paul A. Cicelski, Counsel for WGME-TV, to Marlene H. Dortch, Secretary, FCC (July 25, 2006) ("July Supplement"); Letter from Kathryn R. Schmeltzer and Paul Cicelski, Counsel for WGME-TV, to Marlene H. Dortch, Secretary, FCC (September 13, 2006) ("September Letter").

opposition to this petition has been received. For the reasons discussed below, we grant, in part, WGME-TV's request.

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.⁴ Under Sections 76.92(f) and 76.106(c) 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").⁵ The Commission's rules generally provide stations such protection within a station's 35-mile geographic zone.⁶ The significantly viewed exception to the exclusivity rules is based on it being established that an otherwise distant station 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 exclusivity rules because it has established that it is viewed over the air in the subject community.

3. In the *SHVERA Significantly Viewed Report and Order*, the Commission adopted a rule for satellite carriage that mirrors the rules for cable carriage.⁷ Accordingly, the amended Sections 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 exclusivity protection to require satellite carriers to delete such programming. The duplicating station may respond to such assertions by claiming the significantly viewed exception.⁸ The party asserting 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 community or communities.⁹ 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.¹⁰

4. In order to obtain a waiver of the significantly viewed exception to the exclusivity rules, the Commission held in *KCST-TV, Inc.*¹¹ that petitioners would be required to demonstrate for two

⁴See 47 C.F.R. §76.92; 47 C.F.R. §76.101.

⁵ 47 C.F.R. §76.92(f) and 76.106(a); see 47 C.F.R. §§76.5(i) and 76.54.

⁶The 35-mile geographic zone of all major markets and the 55-mile geographic zone around all smaller markets extends from the reference point of the community of license of the television station. These reference points are listed in Section 76.53 of the Commission's rules. Where a community's reference point is not given, the geographic coordinates of the main post office in the community shall be used. See 47 C.F.R. §§73.658 and 76.53.

⁷*Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Implementation of Section 340 of the Communications Act*, 20 FCC Rcd 17278 (2005) ("*SHVERA Significantly Viewed Report and Order*").

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

⁹ See *KCST-TV, Inc.*, 103 FCC 2d 407 (1986).

¹⁰See *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17295-26; see also 47 U.S.C. § 340(e)(2).

¹¹103 FCC 2d 407 (1986).

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) of the Commission's rules.¹² 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.¹³ Under Section 76.5(i) of the Commission's rules network stations¹⁴ are considered significantly viewed if the survey results show more than a 3 percent share of total viewing hours and a net weekly circulation of 25 percent, by at least one standard error.¹⁵ Independent stations (*i.e.*, non-network stations), are considered significantly viewed if the survey results show more than a 2 percent share of total viewing hours and a net weekly circulation of 5 percent, by at least one standard error.¹⁶ The Commission has found that this type of test is applicable as well for waivers of the syndicated exclusivity exemption.¹⁷

III. DISCUSSION

5. In support of its petition, WGME-TV states that it would normally have network nonduplication rights for CBS programming in the Portland-Poland Spring, Maine designated market area ("DMA"), but is prevented from asserting those rights against WBZ-TV in York County because WBZ-TV is considered to be significantly viewed.¹⁸ WGME-TV points out that WBZ-TV, which is licensed to Boston, Massachusetts, is located in the Boston, Massachusetts DMA.¹⁹ WGME-TV asserts, however, that WBZ-TV no longer meets the significantly viewed standard in York County and, as proof, it submits the results of a study that is a retabulation of the data collected by Nielsen Media Research for its routine audience sweep period measurements.²⁰ WGME-TV states that Nielsen's study is based on a sample of

¹² 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 Significantly Viewed Report and 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 the reference from "noncable television homes" to "over-the-air television homes." See *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17292-23.

¹³ See 47 C.F.R. §76.54(b).

¹⁴ 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 Significantly Viewed Report and Order*, 20 FCC Rcd at 17293-34.

¹⁵ 47 C.F.R. §76.5(i).

¹⁶ *Id.*

¹⁷ See *Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640 (1990).

¹⁸ Petition at 2. WGME-TV states that WBZ-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.*

²⁰ Petition at Exhibit 1 and July Supplement.

over-the-air viewing of WBZ-TV in noncable/non-ADS households²¹ located in the zip codes of the York County communities served by the cable systems subject to this petition.²² The first year survey's audience estimates were based on November 2003, February 2004, and May 2004 sweep periods combined, and the second year's estimates of the November 2004, February 2005, and May 2005 sweeps periods combined.²³ These survey dates and the method used to combine audience surveys are consistent with the requirements set forth in Section 76.54(b) of the Commission's rules.²⁴

6. Three cable systems subject to this waiver request are single community systems.²⁵ With regard to the Adelpia-Acton cable system, the submitted Nielsen report shows no sample households. As a result, we cannot draw any conclusion about WBZ-TV's audience in the over-the-air television homes in that community, and we must deny the requested waiver.

7. For the other two cable systems – Cablevision-Lebanon and Time Warner-Biddleford - that serve only one community, the information provided is based on actual sampled households. As shown in the tables below, WBZ-TV no longer attains a measurable share of total viewing hours or net weekly circulation share (*i.e.*, its reported audience share is zero in each case) in over-the-air television homes in the communities served by the cable systems. Accordingly, we agree with WGME-TV that WBZ-TV is no longer significantly viewed in these communities.

TABLE 1 – WBZ-TV VIEWING IN LEBANON, MAINE

<u>Survey Year</u> ²⁶	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Nov. 03/ Feb.04/ May 04	3	0.00	--	0.00	--

²¹Nielsen Media Research defines Alternative Delivery Source (“ADS”) to include the following technologies: satellite (C-Band), DBS (Ku-Band), SMATV (master antenna), and MMDS (includes multi-channel multi-point and multi-point distribution service). Thus, noncable/non-ADS homes are those that do not subscribe to an MVPD, and view the broadcast signal in question over-the-air. See Nielsen Media Research at <http://www.nielsenmedia.com/nc/portal/site/Public>.

²²The cable systems and their respective communities are: 1) Cablevision – Lebanon, Maine; 2) Comcast – Berwick and South Berwick, Maine; 3) Comcast – Eliot, Kittery and Kittery Point, Maine; 4) Adelpia – Acton, Maine; 5) Adelpia – Alfred, Arundel, Buxton, Cornish, Dayton, East Waterloo, Hollis Center, Kennebunk, Kezar Falls, Limerick, Limington, North Waterloo, Saco, Waterboro and West Buxton, Maine; 6) Cablevision – Acton, Lebanon, Sanford, Shapleigh and Springvale, Maine; 7) Time Warner – Old Orchard Beach and Saco, Maine; 8) Time Warner – Biddleford, Maine; and 9) Time Warner – Cape Neddick, North Berwick, Ogunquit, Wells and York, Maine. Below, for convenience, we refer to each cable system by the name of the cable operator and the first community listed alphabetically.

²³July Supplement.

²⁴47 C.F.R. § 76.54(b).

²⁵They are: Cablevision-Lebanon, Adelpia-Acton, and Time Warner-Biddleford.

²⁶The survey dates of November 2003/February 2004/May 2004 and November 2004/February 2005/May 2005 meet the criteria set forth in the rules and *KCST-TV* that the audience survey cover at least two one-week periods separated by at least 30 days and that both surveys may not occur between April and September.

Nov. 04/ Feb. 05/ May 05	2	0.00	--	0.00	--
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TABLE 2 – WBZ-TV VIEWING IN BIDDLEFORD, MAINE

<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>
Nov. 03/ Feb. 04/ May 04	6	0.00	--	0.00	--
Nov. 04/ Feb. 05/ May 05	5	0.00	--	0.00	--

8. For the remaining six systems surveyed, WGME-TV has not provided sufficient data to determine that WBZ-TV is no longer significantly viewed. Each of these six cable systems serves multiple communities. Section 76.5(b) of the Commission's rules requires that "[i]f a cable television system serves more than one community, a single survey may be taken, provided that the sample includes over-the-air television homes from each community that are proportional to the population."²⁷ Thus, under the rule, each community must be included in the sample and the total sample must include households from each community that are proportional to the population. Our analysis of each of these systems is listed below:

- Comcast-Eliot: For the first year, there were no homes sampled in two of the three communities (Kittery and Kittery Point). For the second year, there were no sampled homes in any of the three system communities (Eliot, Kittery and Kittery Point) and, as a result, there was no way to estimate WBZ-TV's audience for that time period.
- Adelphia-Alfred: No homes were sampled in two communities (Buxton and Kezar Falls) during either survey period. For six other communities (Alfred, Arundel, Hollis Center, North Waterloo, Waterboro and West Buxton) there were no sampled homes in one of the two years.
- Cablevision-Acton: One community (Springvale) is not represented in the first year's sample and another (Acton) is not represented in the sampled homes for either year.
- Time Warner-Cape Neddick: There are no sampled homes from two communities (Ogunquit and York) in either year, nor any sampled homes from another community (Cape Neddick) in the second year. We note that the community of York represents 39 percent of the cable system's population. As a result, the lack of sampled households from that community is particularly significant.

²⁷47 C.F.R. § 76.5(b).

- Comcast-Berwick: The population percentages of the two communities served by this cable system are Berwick, 49 percent, and South Berwick, 51 percent. For each of the two years, there was only one sampled household from Berwick and three from South Berwick. The proportion of the sample from each community was thus 25 percent from Berwick and 75 percent from South Berwick. While it is not expected that the sample proportion match the population proportion exactly, we believe that the deviation in this instance makes the sample unrepresentative because it is too heavily weighed in favor of South Berwick.²⁸
- Time Warner-Old Orchard Beach: The population percentages of the two communities served by this cable system are Old Orchard Beach, 31 percent, and Saco, 69 percent. In the first year, both communities are represented in the sample. However, while the sample proportion deviates somewhat from the population proportions (17 percent from Old Orchard Beach and 83 percent from Saco), it is clear that the sample is weighted towards the larger community. Although this would be acceptable, for the second year, the sample does not include any sampled households from Old Orchard Beach. As a result, the sample for the second year does not include homes from each community as required.

9. For the above reasons, we deny WGME-TV's request for a waiver of the significantly viewed exemption to the network nonduplication rules with regard to the following cable systems: Adelphia-Acton, Comcast-Eliot, Adelphia-Alfred, Cablevision-Acton, Time Warner-Cape Neddick, Comcast-Berwick, and Time Warner-Old Orchard Beach. For the Cablevision-Lebanon and Time Warner-Biddleford cable systems, however, we grant WGME-TV's request.

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED**, that the petition filed by WGME Licensee, LLC **IS GRANTED** to the extent indicated above and **OTHERWISE DENIED**.

11. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.²⁹

FEDERAL COMMUNICATIONS COMMISSION

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Media Bureau

²⁸We note that even if we were to accept this wide variation between the population and sample proportions, the submitted data for this system appears questionable. For the first year, there is no standard error listed for the net weekly circulation share (33.33 percent). In addition, that share and the total weekly viewing share with the standard error added (3.29 + 3.39 = 6.68 percent) exceed the criteria in the rules (*i.e.*, 3 percent share of total viewing hours and net weekly circulation of 25 percent). Accordingly, WGME-TV has not demonstrated that WBZ-TV was no longer significantly viewed in the first year precluding a finding that WBZ-TV did not meet the significant viewing criteria for the required two year period.

²⁹47 C.F.R. §0.283.