

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

In the Matter of:)	
)	
Sainte Partners, II, LP)	
)	CSR-6960-N
For Waiver of Sections 76.92(f), 76.106(a),)	
76.122(j), and 76.123(k) of the Commission's)	
Rules)	

MEMORANDUM OPINION AND ORDER

Adopted: March 31, 2006

Released: April 4, 2006

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Sainte Partners, II, LP, licensee of television broadcast station KCVU (FOX), Paradise, California ("KCVU"), filed the captioned petition seeking a waiver of the rules that preclude cable operators and satellite carriers from deleting the duplicate programming of "significantly viewed" stations under the cable television network nonduplication and syndicated exclusivity rules ("exclusivity rules").¹ The record contains no opposition to this petition. For the reasons discussed below, we grant KCVU's waiver 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.² Under Sections 76.92(f) and 76.106(a) of the Commission's rules, however, a signal otherwise subject to deletion is exempt from application of the exclusivity rules if it is "significantly viewed" in a relevant community ("the significantly viewed exception").³ The Commission's rules provide stations such protection within specified geographic zones.⁴ 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

¹ 47 C.F.R. §§ 76.92(f), 76.106(a), 76.122(j), and 76.123(k).

² See 47 C.F.R. §§ 76.92 and 76.101.

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

⁴ See 47 C.F.R. §§ 73.658 and 76.53.

has established that it is viewed over the air in the subject community.

3. In the 2005 Report and Order implementing Section 340 of the Communications Act, 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 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 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.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 the significantly viewed exception to the exclusivity rules, 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). For each year, the data must be the result of independent professional surveys taken during two one week periods separated by at least 30 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.¹⁰ Section 76.5(i) of the Commission's rules requires that for network stations¹¹ 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.¹² For independent stations (*i.e.*, non-network stations), to be considered significantly viewed, Section 76.5(i) 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 error.¹³ The Commission has found that this type of test is applicable as

⁵*Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Implementation of Section 340 of the Communications Act*, MB Docket No. 05-49, Report and Order, FCC 05-187 (rel. Nov. 3, 2005) (“*SHVERA Significantly Viewed Report and Order*”).

⁶47 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 Significantly Viewed Report and Order* at ¶¶ 39-41; *see also* 47 U.S.C. § 340(e)(2).

⁹103 FCC 2d 407 (1986).

¹⁰*See* 47 C.F.R. §76.54(b).

¹¹ 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* at ¶¶ 33-36.

¹²47 C.F.R. §76.5(i).

¹³ *Id.*

well for waivers of the syndicated exclusivity exemption.¹⁴

5. KCVU seeks a waiver of the significantly viewed exception so that it may enforce its exclusivity rights against television broadcast station KTXL, Sacramento, California.¹⁵ KTXL is now considered to be significantly viewed in Butte County, California, where the community of Chico, California, is located.¹⁶ The community of Chico is served by Comcast Cable and KCVU states that it has also received notice from both DIRECTV and Dish Network of their intent to retransmit KTXL into Chico.¹⁷

III. DISCUSSION

6. KCVU states that it would normally have exclusivity rights for FOX programming in the Chico-Redding, California designated market area (“DMA”), but is prevented from asserting those rights against KTXL in the subject communities because KTXL is significantly viewed in Butte County, where the community of Chico is located.¹⁸ KCVU points out that KTXL, which is licensed to Sacramento, California, is located in the Sacramento-Stockton-Modesto, California DMA.¹⁹ KCVU asserts, however, that KTXL no longer meets the significantly viewed standard in Chico and, as proof, it submits the results of a special community-specific survey conducted by Nielsen Media Research.²⁰ KCVU states that Nielsen conducted a special tabulation of over-the-air viewing using diaries from noncable and non-ADS households for specified zip codes for the community of Chico.²¹ The first year’s survey audience estimates were based on February 2004/May 2004 data, combined, and the second year’s estimates on the February 2005/May 2005 data, combined.²² 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.²³ KCVU states that KTXL’s share of total viewing hours in over-the-air homes in Chico falls far short of the required significantly viewed minimums, within one standard error, as shown in the table below:

¹⁴See *Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640 (1990).

¹⁵Petition at 1-2.

¹⁶*Id.* at 2.

¹⁷*Id.* at n.4.

¹⁸*Id.* KCVU states that KTXL 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*Id.* at 3 and Exhibit 2.

²¹*Id.*

²²*Id.*

²³47 C.F.R. § 76.54(b).

<u>Survey Year</u> ²⁴	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Feb. 2004/ May 2004	48	0.06	0.04	3.68	2.62
Feb. 2005/ May 2005	48	0.42	0.27	7.06	3.57

As a result, KCVU requests that the Commission grant its petition so that it can assert its exclusivity rights in Chico, California.

7. We find that KCVU has made the requisite showing to support its petition. As required by the rules, KCVU has provided community-specific survey results for each year surveyed. Although KCVU cites the significantly viewed criteria for network stations (*i.e.*, 3 percent share of total viewing hours and a net weekly circulation of 25 percent), in this context, FOX affiliates are treated as independent stations and the appropriate criteria for comparison is a 2 percent share of total viewing hours and a net weekly circulation of 5 percent.²⁵ In the combined results obtained by Nielsen for the February 2004/May 2004 survey periods, the reported results indicate that KTXL attains a 0.10 percent share of total weekly viewing hours (0.06 reported share + 0.04 standard error) and a 6.30 percent average net weekly circulation share (3.68 reported share + 2.62 standard error). The combined results for the February 2005/May 2005 survey periods indicate KTXL attains a 0.69 percent share of total viewing hours (0.42 reported share + 0.27 standard error) and a 10.63 percent average net weekly circulation share (7.06 reported share + 3.57 standard error). For both 2004 and 2005, the average shares of total viewing hours, with one standard error added, fall below the criteria set forth in Section 76.5(i) of the rules. With respect to the average net weekly circulation shares, when the standard errors are added, the resulting audience estimates for both 2004 and 2005 exceed the criteria for independent stations. 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 in Section 76.5(i).²⁶ Accordingly, we find that the submitted audience surveys are sufficient to show that KTXL no longer attains the viewing levels needed to demonstrate significantly viewed status in the community of Chico, California, and we grant KCVU's request.

²⁴The survey dates of February 2004/May 2004 and February 2005/May 2005 meet the criteria set forth in the rules and *KCST-TV* that the two one-week surveys be separated by at least 30 days and that both surveys may not occur between April and September.

²⁵*See* 47 C.F.R. § 76.5(i).

²⁶*Id.*

IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED**, that the petition filed by Sainte Partners, II, LP, **IS GRANTED**.

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

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Media Bureau

²⁷47 C.F.R. §0.283.