

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

In the Matter of )  
 )  
Capitol Broadcasting Company, Inc. )  
 ) CSR-7051-N  
Petition For Waiver of Sections 76.92(f) and )  
76.106(a) of the Commission’s Rules )

MEMORANDUM OPINION AND ORDER

Adopted: January 25, 2007

Released: January 31, 2007

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Capitol Broadcasting Company, Inc., licensee of station WRAL-TV (CBS), Raleigh, North Carolina (“WRAL-TV”), 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”).<sup>1</sup> Specifically, WRAL-TV seeks a waiver of the significantly viewed exception so that it may enforce its exclusivity rights against station WFMY-TV (CBS), Greensboro, North Carolina.<sup>2</sup> WFMY-TV is considered to be significantly viewed in Durham, Lee and Orange Counties, North Carolina, where the communities of Durham, Sanford, and Hillsborough, North Carolina, served by Time Warner Cable, Charter Communications, and acquired Adelphia Cable are located.<sup>3</sup> No opposition to this petition has been received. For the reasons discussed below, we grant WRAL-TV’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

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<sup>1</sup>47 C.F.R. §§ 76.92(f) and 76.106(a). Although not expressly requested in WRAL-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 C.F.R. §§ 76.92(f), 76.106(a), 76.122(j), and 76.123(k). See 47 U.S.C. §§ 340(a)(2) and 340(c).

<sup>2</sup>Petition at 1.

<sup>3</sup>*Id.* at 1-2.

distant station.<sup>4</sup> 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").<sup>5</sup> The Commission's rules generally provide stations such protection within a station's 35-mile geographic zone.<sup>6</sup> The significantly viewed exception to the exclusivity rules is based on a demonstration 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 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.<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

4. In order to obtain a waiver of the significantly viewed exception to the exclusivity rules, the Commission held in *KCST-TV, Inc.*<sup>11</sup> 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) of the Commission's rules.<sup>12</sup> For each year, the data must be the result of independent professional surveys taken

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<sup>4</sup>See 47 C.F.R. §§76.92 and 76.101.

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

<sup>6</sup>The 35-mile geographic zone of all major markets and the 55-mile geographic zone around all smaller markets extend 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.

<sup>7</sup>*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, 20 FCC Rcd 17278 (2005) ("*SHVERA Significantly Viewed Report and Order*").

<sup>8</sup>47 C.F.R. §§ 76.122(j)(2) and 76.123(k)(2).

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

<sup>10</sup>See *SHVERA Significantly Viewed Report and Order* at ¶¶ 39-41; see also 47 U.S.C. § 340(e)(2).

<sup>11</sup>103 FCC 2d 407 (1986).

<sup>12</sup>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

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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.<sup>13</sup> Under Section 76.5(i) of the Commission's rules, network stations<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> The Commission has found that this type of test is applicable as well for waivers of the syndicated exclusivity exemption.<sup>17</sup>

### III. DISCUSSION

5. WRAL-TV states that it is licensed to a community in the Raleigh-Durham, North Carolina designated market area ("DMA"), while WFMY-TV is licensed to a community located in the Greensboro-High Point-Winston-Salem, North Carolina DMA.<sup>18</sup> WRAL-TV argues that it would normally be entitled to assert exclusivity protection against WFMY-TV in communities in the Raleigh-Durham DMA, but it cannot because WFMY-TV is considered significantly viewed in Durham, Lee and Orange Counties, North Carolina, where Durham, Sanford and Hillsborough are located.<sup>19</sup> WRAL-TV maintains, however, that WFMY-TV no longer meets the significantly viewed standard in Durham, Sanford and Hillsborough and, as proof, it submits the results of special community-specific surveys conducted by Nielsen Media Research.<sup>20</sup> WRAL-TV states that Nielsen conducted a special tabulation of over-the-air viewing using diaries from noncable/non-ADS homes for specified zip codes for the communities of Durham, Sanford and Hillsborough.<sup>21</sup> For each community, the first year's survey

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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 Significantly Viewed Report and Order* at ¶ 32.

<sup>13</sup>See 47 C.F.R. §76.54(b).

<sup>14</sup>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.

<sup>15</sup>47 C.F.R. §76.5(i).

<sup>16</sup>*Id.*

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

<sup>18</sup>Petition at 1.

<sup>19</sup>*Id.* at 2. WRAL-TV states that WFMY-TV is shown as being significantly viewed in Durham, Lee and Orange Counties on Appendix C of the *Implementation of the SHVERA Significantly Viewed Report and Order*, 70 Fed Reg. at 76589-91.

<sup>20</sup>*Id.* at Exhibit 2.

<sup>21</sup>*Id.* Nielsen 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 off-air. See Nielsen Media Research at

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audience estimates were based on November 2004/February 2005/May 2005 audience sweep data, combined, and the second year's estimates on the November 2005/February 2006/May 2006 audience sweep data, combined.<sup>22</sup> 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.<sup>23</sup> WRAL-TV states that WFMY-TV's share of total viewing hours and net weekly circulation shares in over-the-air homes in Durham, Sanford and Hillsborough have not met the applicable viewing levels required to be considered significantly viewed for two years, as shown in the table below:

**TABLE 1 – WFMY-TV VIEWING IN DURHAM, NC**

<u>Survey Year</u> <sup>24</sup>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Nov.04/ Feb. 05/ May 05	39	0.58	0.36	11.55	6.31
Nov.04/ Feb. 06/ May 06	40	0.00	0.00	0.00	0.00

**TABLE 2 – WFMY-TV VIEWING IN SANFORD, NC**

<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. 04/ Feb. 05/ May 05	12	0.05	0.06	2.38	2.88
Nov. 05/ Feb. 06/ May 06	17	0.42	0.45	3.87	4.67

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<http://www.nielsenmedia.com/nc/portal/site/Public>.

<sup>22</sup>*Id.*

<sup>23</sup>47 C.F.R. § 76.54(b).

<sup>24</sup>The survey dates of November 2004/February 2005/May 2005 and November 2005/February 2006/May 2006 meet the criteria set forth in the rules and *KCST-TV*. They require that the reported audience estimates for each of two years be based on two one-week surveys separated by at least 30 days and that both surveys may not occur between April and September. In this case, the petitioner submitted the combined audience data from three four-week audience sweep periods. That is, the data were collected from 12 weeks of consecutive audience sweep periods over the two-year survey periods. As the number of weeks exceeds the two one-week requirement for each year under *KCST-TV*, the selected survey periods are acceptable and, if anything, should lead to more accurate results from a statistical standpoint. See *Radio Perry, Inc.*, 11 FCC Rcd 10564, 10568 n.13 (1996).

TABLE 3 – WFMY-TV VIEWING IN HILLSBOROUGH, NC

<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. 04/ Feb. 05/ May 05	7	1.30	1.45	8.08	9.20
Nov. 05/ Feb. 06/ May 06	3	0.00	0.00	0.00	0.00

6. As a result, WRAL-TV requests that the Commission grant its petition so that it can assert its exclusivity rights in Durham, Sanford and Hillsborough, North Carolina.

7. We find that WRAL-TV made the requisite showing to support its petition. As required by the rules, WRAL-TV has provided community-specific survey results for each community for each year surveyed.

8. For the community of Durham, the combined results obtained by Nielsen for the November 2004/February 2005/May 2005 survey periods, indicate that WFMY-TV attains a 0.94 percent share of total viewing hours (0.58 reported share + 0.36 standard error) and a 17.76 percent net weekly circulation share (11.55 reported share + 6.31 standard error). For the November 2005/February 2005/May 2006 survey periods the combined audience share results are zero. For both survey periods, the average shares of total viewing hours and net weekly circulation, with one standard error added, fall below the criteria set forth in Section 76.5(i) of the rules.<sup>25</sup>

9. For the community of Sanford, the combined results for the November 2004/February 2005/May 2005 survey periods, indicate that WFMY-TV attains a 0.11 percent share of total viewing hours (0.05 reported share + 0.06 standard error) and a 5.26 percent net weekly circulation (2.38 report share + 2.88 standard error). For the second year, the reported results are a 0.87 percent share of total weekly viewing hours (0.42 reported share + 0.45 standard error) and a 8.54 percent net weekly circulation (3.87 reported share + 4.67 standard error). For both survey periods, the average shares of total viewing hours and net weekly circulation, with one standard error added, fall below the criteria set forth in Section 76.5(i) of the rules.

10. For the community of Hillsborough, the first year's survey results indicate that WFMY-TV attains a 2.75 percent total viewing hours (1.30 reported share + 1.45 standard error) and a 17.28 percent net weekly circulation (8.08 reported share + 9.20 standard error). For the second year, the combined audience share results are zero. Thus, for both survey periods, the average shares of total viewing hours and net weekly circulation, with one standard error added, fall below the criteria set forth in Section 76.5(i) of the rules.

<sup>25</sup>47 C.F.R. § 76.5(i).

11. Accordingly, we find that the submitted audience surveys are sufficient to show that WFMY-TV no longer attains the viewing levels needed to demonstrate significantly viewed status in the communities of Durham, Sanford and Hillsborough, North Carolina, and we grant WRAL-TV's request.

#### IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED**, that the petition filed by Capitol Broadcasting Company, Inc. **IS GRANTED**.

13. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.<sup>26</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert  
Deputy Chief, Policy Division  
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<sup>26</sup>47 C.F.R. §0.283.