

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

In the Matter of)	
)	
WGFL License Corporation)	
)	CSR-7032-N
Petition For Waiver of Section 76.106(a))	
of the Commission's Rules)	

MEMORANDUM OPINION AND ORDER

Adopted: January 30, 2007

Released: January 31, 2007

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. WGFL License Corporation, licensee of television broadcast station WGFL, High Springs, Florida ("WGFL"), 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 syndicated exclusivity rules ("exclusivity rules").¹ Specifically, WGFL seeks a waiver of the significantly viewed exception so that it may enforce its exclusivity rights against television broadcast stations WESH, Daytona Beach, Florida, and WTLV and WJXT, both Jacksonville, Florida.² WESH, WTLV and WJXT are considered to be significantly viewed in Alachua County, Florida, where the community of Gainesville, Florida, served by Cox Cable-Gainesville/Ocala, Inc. is located.³ No opposition to this petition has been received. For the reasons discussed below, we grant WGFL'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.⁴ 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

¹47 C.F.R. §76.106(a). Although not expressly requested in WGFL's petition for waiver of Section 76.106(a) (significantly viewed exception to cable syndicated exclusivity), a waiver of Section 76.123(k) (significantly viewed exception to satellite 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. §§ 76.106(a), and 76.123(k). *See* 47 U.S.C. §§ 340(a)(2) and 340(c).

²Petition at 1.

³*Id.* at 1-2.

⁴*See* 47 C.F.R. §§76.92 and 76.101.

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 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.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 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 30 days, the viewing samples must be distributed

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 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.

⁷*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*”).

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

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

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

¹¹103 FCC 2d 407 (1986).

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 “noncable” to “over-the-air.” *See SHVERA Significantly Viewed Report and Order* at ¶ 32.

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. WGFL states that it is licensed to a community in the Gainesville, Florida designated market area ("DMA"), while WESH is licensed to a community in the Orlando-Daytona Beach-Melbourne, Florida DMA and WTLV and WJXT are licensed to a community located in the Jacksonville-Brunswick, Florida DMA.¹⁸ WGFL argues that it would normally be entitled to assert exclusivity protection against WESH, WTLV and WJXT in Gainesville, Florida, but it cannot because WESH, WTLV and WJXT are considered significantly viewed in Alachua County, Florida, where Gainesville is located.¹⁹ WGFL maintains, however, that WESH, WTLV and WJXT no longer meet the significantly viewed standard in Gainesville and, as proof, it submits the results of a special community-specific survey conducted by Nielsen Media Research.²⁰ WGFL 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 community of Gainesville.²¹ The first year's survey audience estimates were based on November 2004/February 2005 data and the second year's estimates on the November 2005/February 2006 data.²² These survey dates and the method used to combine audience surveys are consistent with the requirements set forth in Section

¹³See 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* at ¶¶ 33-36.

¹⁵47 C.F.R. §76.5(i).

¹⁶ *Id.*

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

¹⁸Petition at 2.

¹⁹*Id.* WGFL states that WESH, WTLV AND WJXT achieved their significantly viewed status by their inclusion in Appendix B to the *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 378 (1972).

²⁰*Id.* at Exhibits 1, 2 and 3.

²¹*Id.* Nielsen Media Research defines Alternative Delivery Source ("ADS") to include the following technologies: satellite (C-Band), DBS (Ku-Band), SMATV (master antennae), 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 <http://www.nielsenmedia.com/nc/portal/site/Public/>.

²²*Id.*

76.54(b) of the Commission's rules.²³ WGFL states that WESH, WTLV and WJXT's share of total viewing hours in over-the-air homes in Gainesville falls far short of the required significantly viewed minimums, within one standard error, as shown in the table below:

TABLE 1 – WESH VIEWING IN GAINESVILLE

<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>
Nov. 2004	12	0.00	0.00	0.00	0.00
Feb. 2005	13	0.09	0.10	9.24	11.65
Nov. 2005	18	0.00	0.00	0.00	0.00
Feb. 2006	24	0.00	0.00	0.00	0.00

TABLE 2 – WTLV VIEWING IN GAINESVILLE

<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. 2004	12	3.43	3.55	5.53	6.49
Feb. 2005	13	1.22	0.99	13.60	12.49
Nov. 2005	18	0.17	0.16	2.12	2.28
Feb. 2006	0.00	0.00	0.00	0.00	0.00

TABLE 3 – WJXT VIEWING IN GAINESVILLE

<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. 2004	12	0.00	0.00	0.00	0.00
Feb. 2005	13	0.92	0.76	13.60	12.49
Nov. 2005	18	0.00	0.00	0.00	0.00
Feb. 2006	24	0.26	0.26	1.39	1.46

As a result, WGFL requests that the Commission grant its petition so that it can assert its exclusivity rights in Gainesville, Florida.

²³47 C.F.R. § 76.54(b).

²⁴The survey dates of November 2004/February 2005 and November 2005/February 2006 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.

6. We find that WGFL made the requisite showing to support its petition. As required by the rules, WGFL has provided community-specific survey results for each station for each year surveyed. WESH and WTLV are network affiliates and, therefore, to demonstrate that they are no longer significantly viewed it must be shown that the reported audience statistics, plus one standard error is below the criteria used to establish significantly viewed status for a network station (*i.e.*, 3 percent share of total weekly viewing hours and a 25 percent net weekly circulation share).²⁵ For WESH the data for all four surveys indicate that its average share of total weekly viewing hours, plus one standard error and its net weekly circulation share, plus one standard error, is below the required viewing levels for significantly viewed status. For WTLV, the data for November 2004, November 2005 and February 2006 indicate that its average share of total weekly viewing hours, plus one standard error and its net weekly circulation share, plus one standard error, is below the required viewing levels for significantly viewed status. For the February 2005 survey, the net weekly circulation share, plus one standard error, exceeds the criterion of a 25 percent share, but the significantly viewed test requires that both the total viewing hours and the net weekly circulation shares must meet or exceed the minimum percentages required. As a result, we find that the data demonstrates that WESH and WTLV are no longer significantly viewed with respect to the community of Gainesville, Florida.

7. WJXT is an independent station and to demonstrate that it is no longer significantly viewed it must be shown that the reported audience statistics, plus one standard error is below the criteria used to establish significantly viewed status for an independent station (*i.e.*, 2 percent share of total viewing hours and a 5 percent net weekly circulation share).²⁶ For WJXT, the data for November 2004, November 2005 and February 2006 indicate that its average share of total weekly viewing hours, plus one standard error and its net weekly circulation share, plus one standard error, is below the required viewing levels for significantly viewed status. For the February 2005 survey, the net weekly circulation share, plus one standard error, exceeds the criterion of a 5 percent share, but the significantly viewed test requires that both the total viewing hours and the net weekly circulation shares must meet or exceed the minimum percentages required. As a result, we find that the data demonstrates that WJXT is no longer significantly viewed with respect to the community of Gainesville, Florida.

IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED**, that the petition filed by WGFL License Corporation **IS GRANTED**.

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

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division
Media Bureau

²⁵47 C.F.R. § 76.5(i).

²⁶*Id.*

²⁷47 C.F.R. §0.283.