

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

In the Matter of)	
)	
Centex Television Limited Partnership)	
)	CSR-6986-N
Petition For Waiver of Section 76.92(f))	
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. Centex Television Limited Partnership, licensee of television broadcast station KXXV (ABC), Waco, Texas ("KXXV"), 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 rules ("exclusivity rules").¹ Specifically, KXXV seeks a waiver of the significantly viewed exception so that it may enforce its exclusivity rights against stations KTXS-TV, Sweetwater, Texas, and WFAA-TV, Dallas, Texas.² KTXS-TV and WFAA-TV are considered to be significantly viewed in Mills County and McLennan County, Texas, respectively.³ No opposition to this petition has been received. For the reasons discussed below, we deny KXXV'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. §§ 76.92(f). Although not expressly requested in KXXV's petition for waiver of Section 76.92(f) (significantly viewed exception to cable network nonduplication), a waiver of Section 76.122(j) (significantly viewed exception to satellite network nonduplication) 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) and 76.122(j). See 47 U.S.C. §§ 340(a)(2) and 340(c).

²Petition at 1.

³*Id.* at 1-2.

⁴See 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. KXXV states that it is licensed to a community in the Waco-Temple-Bryan, Texas designated market area ("DMA"), while KTXS-TV is licensed to a community located in the Abilene-Sweetwater, Texas DMA, and WFAA-TV is licensed to a community located in the Dallas-Ft. Worth, Texas DMA.¹⁸ KXXV argues that it would normally be entitled to assert exclusivity protection against KTXS-TV and WFAA-TV in the Waco DMA, but it cannot because these stations are considered significantly viewed in Mills and McLennan Counties, Texas.¹⁹ KXXV maintains, however, that KTXS-TV and WFAA-TV no longer meet the significantly viewed standard in Mills and McLennan Counties and, as proof, it submits the results of a special study conducted by Nielsen Media Research.²⁰ KXXV provides Nielsen Media Research data for over-the-air viewing of KTXS-TV and WFAA-TV for noncable/non-ADS households located in listed zip codes in the subject counties.²¹ The first year's survey audience estimates were based on November 2003, February 2004 and May 2004 audience sweep data and the second year's estimates on the November 2004, February 2005, and May 2005 audience sweep data.²² KXXV argues that these studies demonstrate that both KTXS-TV and WFAA-TV's shares of total viewing hours in over-the-air homes in Mills and McLennan Counties falls far short of the required significantly viewed

¹³See 47 C.F.R. §76.54(b).

¹⁴For 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.* KXXV states that KTXS-TV WFAA-TV 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 Exhibit 1.

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.*

minimums, within one standard error.²³ As a result, KXXV requests that the Commission grant its petition so that it can assert its exclusivity rights in the Waco DMA.

6. We reject KXXV's showing and will deny its request. KXXV does not include any description of the methodology used to conduct the surveys beyond stating that the attached data were prepared by Nielsen Media Research.²⁴ While it is clear that the actual data are from Nielsen because they are presented on the company's stationery, with its copyright and disclaimer regarding use of the data, there is no description of the source of the data, the retabulation procedures, or its limitations. Further, while Nielsen's presentation of its survey results include specified zip codes, the petition appears to be county-specific, rather than community or system-specific. We note that references in the petition specifically ask the Commission to conclude that "the exemption to the program exclusivity rules should no longer apply to KTXS-TV or WFAA-TV in those counties, respectively."²⁵ KXXV also fails to indicate any specific cable systems or communities, even when, in its petition, it refers to community-specific studies. Finally, we note that for McLennan County, only noncable data are provided, not noncable/non-ADS audience statistics, and thus would not meet the requirement that the showing include only off-air viewing.

IV. ORDERING CLAUSES

7. Accordingly, **IT IS ORDERED**, that the petition filed by Centex Television Limited Partnership **IS DENIED**.

8. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.²⁶

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division
Media Bureau

²³*Id.* at 3.

²⁴*See* Petition at 3.

²⁵*Id.*

²⁶47 C.F.R. §0.283.