

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

In the Matter of:	)	
	)	
MMK License LLC	)	
	)	CSR-6383-N
For Waiver of Sections 76.92(f) and 76.101	)	
of the Commission's Rules	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: June 28, 2005**

**Released: June 29, 2005**

By the Deputy Chief, Media Bureau:

**I. INTRODUCTION**

1. MMK License LLC, licensee of television broadcast station WNKY (NBC, Ch. 40), Bowling Green, Kentucky ("WNKY"), has filed a petition for special relief seeking a waiver of the Commission's significantly viewed exception to the network nonduplication rules and the syndicated program exclusivity rules. No opposition to this petition has been received.

**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.<sup>1</sup> Under Section 76.92(f) 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.<sup>2</sup> In addition, pursuant to the Commission's cable television syndicated programming exclusivity rules, a cable system may not import duplicating syndicated programming that has been purchased by a local station on an exclusive basis.<sup>3</sup> In both situations, the Commission's rules generally provide stations such protection within a station's 35-mile geographic zone.<sup>4</sup> However, a local station may not exercise either right if an otherwise distant station is considered "significantly viewed" within the community served by the cable system.<sup>5</sup> The significantly viewed exception to the

<sup>1</sup>See 47 C.F.R. §76.92; 47 C.F.R. §76.101.

<sup>2</sup>47 C.F.R. §76.92(f); see 47 C.F.R. §§76.5(i) and 76.54.

<sup>3</sup>See 47 C.F.R. §76.101.

<sup>4</sup>The 35-mile geographic zone extends from the reference point of the community of license of the television station. See 47 C.F.R. §§73.658 and 76.53.

<sup>5</sup>See 47 C.F.R. §§76.92(f) and 76.106.

Commission's exclusivity rules is based on an otherwise distant station establishing that it 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 Commission's exclusivity rules because it has established that it can be received over the air in the subject communities.

3. In *KCST-TV, Inc.*, the Commission held that in order to obtain a waiver of Section 76.92(f), 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 noncable viewing data.<sup>6</sup> Section 76.5(i) of the Commission's rules requires that for network stations 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.<sup>7</sup> 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.<sup>8</sup> The Commission has found that this type of test is applicable as well for waivers of the syndicated exclusivity exemption.<sup>9</sup>

### III. DISCUSSION

4. Station WNKY seeks a waiver of the significantly viewed exception to the Commission's network nonduplication and syndicated exclusivity rules so that it may enforce its rights to network nonduplication and syndicated exclusivity against Station WAVE-TV (NBC, Ch. 3), Louisville, Kentucky ("WAVE-TV").<sup>10</sup> WAVE-TV is currently considered to be significantly viewed in Adair and Hart Counties, Kentucky, where the communities of Columbia and Horse Cave, Kentucky, are located.

5. In support of its petition, WNKY states that it would have network nonduplication and syndicated exclusivity rights for NBC programming in the Bowling Green, Kentucky designated market area ("DMA"), but is prevented from asserting those rights against WAVE-TV in the subject communities because WAVE-TV is considered to be significantly viewed in Adair and Hart Counties, where the communities are located.<sup>11</sup> WNKY points out that WAVE-TV, which is licensed to Louisville, Kentucky, is part of the Louisville DMA.<sup>12</sup> As a result, WNKY states that it would ordinarily have the right to assert its network nonduplication and syndicated exclusivity rights against WAVE-TV, except for the fact that the station has been considered significantly viewed. WNKY asserts, however, that WAVE-TV no longer meets the significantly viewed standard in the communities of Columbia and Horse Cave and, as proof, it submits the results of special, community-specific surveys conducted by Nielsen Media Research.<sup>13</sup>

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<sup>6</sup>103 FCC 2d 407 (1986).

<sup>7</sup>47 C.F.R. §76.5(i).

<sup>8</sup>See 47 C.F.R. §76.54(b).

<sup>9</sup>See *Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640 (1990).

<sup>10</sup>Petition at 1.

<sup>11</sup>Petition at 1-2. WNKY states that WAVE-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 (1992).

<sup>12</sup>Petition at 3.

<sup>13</sup>*Id.* at 3 and Exhibits 1 and 2. WNKY states that Nielsen's tabulation was based on noncable homes from all of the zip codes in the communities of Columbia and Horse Cave. We note that WNKY also submitted county-wide survey information. However, for the purposes of demonstrating that a station no longer attains significantly viewed status, county data are irrelevant.

WNKY states that Nielsen's surveys are averages of two four-week sweeps in each of two years and is consistent with the requirements set forth in Section 76.54(b) of the Commission's rules.<sup>14</sup> The first year survey's audience estimates were based on May 2002/February 2003 data and the second year's estimates on the May 2003/February 2004 data.<sup>15</sup> WNKY states that WAVE-TV's share of total viewing hours in noncable homes in Columbia and Horse Cave falls far short of the required significantly viewed minimums, within one standard error, as shown in the table below:

<u>Survey Year</u> <sup>16</sup>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
<u>Columbia:</u>					
May 2002/	11	0	0	0	0
Feb. 2003	17	2.20	2.20	5.67	6.06
May 2003/	18	4.05	3.34	7.78	5.1
Feb. 2004	14	0	0	0	0
<u>Horse Cave:</u>					
May 2002/	2	0	0	0	0
Feb. 2003	3	0	0	0	0
May 2003/	3	2.68	2.97	50	0
Feb. 2004	0	-	-	-	-

As a result, WNKY requests that the Commission grant its petition so that it can assert its network nonduplication and syndicated exclusivity rights in the subject communities.

6. With respect to the community of Columbia, we find that, as required by the Commission's rules, WNKY has provided two sets of community-specific survey results for each year surveyed. In the results obtained by Nielsen herein for the May 2002 and February 2004 survey periods, the reported results for WAVE-TV indicate a zero share of total viewing hours and no net weekly circulation share. For the February 2003 survey, the reported results for WAVE-TV with the standard errors added are 4.40 percent share of total viewing hours and a net weekly circulation of 12.03 percent.

<sup>14</sup>47 C.F.R. §76.54(b).

<sup>15</sup>Petition at Exhibit 1. We note that, with respect to the community-based data provided, it is not clear from the information provided that the data are only from noncable homes. WNKY claims that the tables it submits are the results of Nielsen's special tabulation, however there is no Nielsen documentation. This may have been an oversight when WNKY reproduced the tables or the petitioner may have failed to reiterate the work "noncable" when referring to the special tabulation requested from Nielsen. However, upon request, WKNY's counsel confirmed that the sample source for the survey consisted of noncable TV households.

<sup>16</sup>The survey dates of May 2002/February 2003 and May 2003/February 2004 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.

The results for the May 2003 survey, with the standard errors added are 7.39 percent share of total viewing hours and a net weekly circulation of 12.88 percent. For these latter two survey periods, the net weekly circulation shares fall below the required 25 percent minimum for significantly viewed status when the standard errors are considered. For the share of total viewing statistics, for both periods, the values exceed the 3 percent minimum required when the standard errors are considered. 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 provided in Section 76.5(i) of the Commission's rules.<sup>17</sup> Accordingly, we find that the submitted audience surveys are sufficient to show that WAVE-TV no longer attains the viewing levels needed to demonstrate significantly viewed status in the community of Columbia, Kentucky.

7. For the community of Horse Cave, Kentucky, we do not believe that WNKY has demonstrated that WAVE-TV is no longer significantly viewed. For the February 2004 survey there are no diaries included and thus no information about viewing for that period. For the May 2003 survey, both statistics appear to exceed the requirements (i.e., a 5.65 percent share of total viewing hours and a net weekly circulation of 50 percent).<sup>18</sup> Based on the above, we cannot conclude that WAVE-TV is no longer significantly viewed in Horse Cave, Kentucky.

8. For the above reasons, we find that a partial grant of a waiver of the significantly viewed exception from the network nonduplication and syndicated exclusivity rules with regard to the community-specific survey for Columbia, Kentucky, will serve the public interest.

#### IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED**, that the petition filed by MMK License LLC **IS GRANTED** for the community of Columbia, Kentucky and **IS DENIED** for the community of Horse Cave, Kentucky.

10. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.<sup>19</sup>

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson  
Deputy Chief, Media Bureau

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<sup>17</sup>47 C.F.R. § 76.5(i).

<sup>18</sup>We note that WNKY indicates that the net weekly circulation share is 50, with no standard error, based on 3 diaries. While this may be a typographical error, it is extremely unlikely that any viewing share would result in no standard error and this reported result is inconsistent with the other reported values for this community.

<sup>19</sup>47 C.F.R. §0.283.