

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

In the Matter of:)	
)	
Benedek License Corporation)	
)	CSR-5836-N
For Waiver of §§76.92(f) and 76.101)	
of the Commission's rules)	

MEMORANDUM OPINION AND ORDER

Adopted: October 15, 2002

Released: October 18, 2002

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Benedek License Corporation, licensee of station WIBW-TV (CBS, Ch. 22), Topeka, Kansas ("WIBW-TV"), has filed a petition for special relief seeking a waiver of the Commission's significantly viewed exception to the network nonduplication rules (47 C.F.R. §76.92(f)) and the syndicated program exclusivity rules (47 C.F.R. §76.101). No opposition to this petition has been received.

II. BACKGROUND

2. Upon the request of a local station with exclusive rights to distribute a network program, a cable operator generally may not carry a duplicating network program broadcast by a distant station.¹ 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.² Likewise, 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.³ In both situations, the Commission's rules in general provide stations such protection within a station's 35-mile geographic zone.⁴ 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.⁵ The significantly viewed exception to the Commission's exclusivity rules is based on an otherwise distant station establishing that it receives a "significant" level

¹See 47 C.F.R. §76.92.

²47 C.F.R. §§76.5(i) and 76.54.

³See 47 C.F.R. §§ 76.92 and 76.101.

⁴The 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.

⁵See 47 C.F.R. §76.101.

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. Station WIBW-TV 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 KCTV (CBS, Ch. 5), Kansas City, Missouri ("KCTV"). KCTV is currently considered to be significantly viewed in Shawnee County, Kansas, where the community of Topeka, served by Cox Communications, is located.

4. 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, to one standard error.⁶ 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.⁷ The Commission has found that this type of test is applicable as well for waivers of the syndicated exclusivity exemption.⁸

III. DISCUSSION

5. In support of its petition, WIBW-TV states that it has obtained CBS network nonduplication and syndicated exclusivity rights in the Topeka, Kansas designated market area ("DMA"), but is prevented from asserting those rights against KCTV on the Topeka cable system operated by Cox Communications because KCTV is considered to be significantly viewed in Shawnee County, where the cable system is located.⁹ WIBW-TV points out that the Topeka cable system is within WIBW-TV's 35-mile protected zone; KCTV's Grade B contour, in contrast, does not encompass any portion of the Topeka system.¹⁰ As a result, WIBW-TV states that it would ordinarily have the right to require Cox Communications to black out the duplicating network and syndicated programming of KCTV, except for the fact that the station has been considered significantly viewed. WIBW-TV asserts, however, that KCTV no longer meets the significantly viewed standard in Topeka and, as proof, it submits the results of a special, community-specific survey conducted by Nielsen Media Research.¹¹ WIBW-TV states that Nielsen's surveys are averages of four two-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.¹² The first year surveys' audience estimates were based on the November 1999/February 2000 data and the second year's estimates on the November 2000/February 2001 data.¹³ WIBW-TV states that KCTV's share of total viewing hours in

⁶103 FCC 2d 407 (1986).

⁷See 47 C.F.R. §76.54(b).

⁸See *Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640 (1990).

⁹Petition at 1-2. WIBW-TV states that KCTV 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).

¹⁰*Id.* at 2.

¹¹*Id.* at Exhibit 1. WIBW-TV states that Nielsen's tabulation was based on noncable homes from all of the zip codes in the community of Topeka served by Cox's system.

¹²47 C.F.R. §76.54(b).

¹³Petition at Exhibit 1.

noncable homes in Topeka falls below the required 3 percent minimum, within one standard error, as shown in the table below:

<u>Survey Year</u> ¹⁴	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Nov. 99/ Feb. 00	60	1.30	0.87	4.45	3.20
Nov. 00/ Feb. 01	69	0.89	0.61	6.26	2.83

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

6. We find that, as required by the Commission, WIBW-TV has provided two sets of community-specific survey results for the community of Topeka, Kansas, for each year surveyed. 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.¹⁵ In the results obtained by Nielsen herein, the November 1999/February 2000 reported results for KCTV, with one standard error added, are 2.17 percent share of total viewing hours and a 7.65 percent net weekly circulation. For November 2000/February 2001, the reported results for KCTV with the standard errors added are 1.50 percent share of total viewing hours and a net weekly circulation of 9.09 percent. For both years, the share of total weekly viewing hours and the net weekly circulation both fall below the required 3 percent and 25 percent minimums for significantly viewed status when the standard errors are considered. Accordingly, we find that the submitted audience surveys are sufficient to show that KCTV no longer attains the viewing levels needed to demonstrate significantly viewed status in the community of Topeka, Kansas.

7. For the above reasons, we find that a 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 Topeka, Kansas, will serve the public interest.

¹⁴The survey dates of November 1999/February 2000 and November 2000/February 2001 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.

¹⁵47 C.F.R. §76.5(i).

IV. ORDERING CLAUSES

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

9. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.¹⁶

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Media Bureau

¹⁶47 C.F.R. §0.283.