

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Barrington Kirksville License LLC)	
KTVO, Kirksville, Missouri (21251))	MB Docket No. 12-151
)	CSR-8648-S
Petition for Waiver of Section 76.92(f) of the)	
Commission's Rules)	
)	

To: Chief, Media Bureau

**REPLY TO CITIZENS MUTUAL TELEPHONE COOPERATIVE'S
OPPOSITION TO PETITION FOR SPECIAL RELIEF**

Barrington Kirksville License LLC (“Barrington”), licensee of television station KTVO, Kirksville, Missouri (Facility ID 21251) (“KTVO”), files this reply in support of its Petition for Special Relief seeking a waiver of the significantly viewed exception to the network nonduplication rule set forth in Section 76.92(f). As relevant to the Opposition filed by Citizens Mutual Telephone Cooperative (“Citizens”), the requested waiver would permit KTVO to assert its nonduplication rights against KCCI, Des Moines, Iowa, in the community of Bloomfield, Iowa.¹ Barrington has satisfied the longstanding test for stations seeking waivers of the significantly viewed exception, based on objective data collected and analyzed according to procedures repeatedly approved by the Commission. As the Commission has determined, when a station such as KTVO has satisfied the requirements for a waiver, granting the waiver is in the public interest in order to allow local stations to exercise their contractually bargained-for

¹ Citizens opposes KTVO’s waiver request “solely as it relates to carriage of KCCI’s duplicating network programming in the community of Bloomfield.” Citizens Mutual Telephone Cooperative, Opposition to Petition for Special Relief, MB Docket No. 12-151, at 1 (filed June 28, 2012) (“Opp.”).

exclusivity rights. Citizens does not dispute that Barrington has satisfied the waiver requirements set by the Commission; instead, Citizens asks the Commission to revisit its settled standards and to upend the careful balance embodied in the significantly viewed exception and the accompanying waiver process. The Commission should decline this invitation and instead should grant Barrington's waiver request in accordance with the Commission's longstanding precedents.

I. BARRINGTON HAS SATISFIED THE STANDARD SET OUT BY THE COMMISSION FOR A WAIVER OF THE SIGNIFICANTLY VIEWED EXCEPTION IN THIS CASE.

Consideration of significantly viewed waiver requests is a data-driven process, as laid out by the Commission in *KCST-TV*.² The Commission will waive the significantly viewed exception when a petitioner demonstrates, “utilizing community- or system-specific data, to one standard error, . . . that the station in question has not met [the FCC’s] standards for significant viewing for two consecutive years.”³ In its Petition, Barrington provided community-specific data obtained from Nielsen Media Research (“Nielsen”) showing that KCCI no longer attains the necessary viewing levels in Bloomfield, based on Nielsen’s independent analysis of diaries obtained over the course of two years from over-the-air households in Bloomfield zip codes.⁴ Indeed, using its standard, long-accepted methods, Nielsen concluded KCCI had *no* over-the-air viewership in those two years in Bloomfield, with no standard error.⁵

² *KCST-TV, Inc.*, Memorandum Opinion and Order, 103 F.C.C. 2d 407, 411-12 (1986)

³ *Id.* at 413.

⁴ Barrington Kirksville License LLC, Petition for Special Relief, MB Docket No. 12-151, at 4-5 (filed May 31, 2012) (“Petition”).

⁵ *Id.* at 5.

Citizens concedes that “KCCI’s over-the-air viewership has no doubt declined since the conception of the 1972 Significantly Viewed List.”⁶ Citizens also concedes, as it must, that the amount and type of data Barrington provided satisfies the standards set out by the Commission.⁷ Although Citizens asserts that the Nielsen survey’s sample size was too small, the Commission has repeatedly accepted similar showings as adequate to grant past waivers. *See, e.g., WPBF-TV Co.*, Memorandum Opinion and Order, 25 FCC Rcd 9102, 9106, 9108 (MB 2010) (granting significantly viewed waiver based on survey that included two households in both the first and second years); *Barrington Myrtle Beach License LLC*, Memorandum Opinion and Order, 22 FCC Rcd 1628, 1632 (MB 2009) (granting significantly viewed waiver based on survey that included three households in the first year and six households in the second year); *Meredith Corporation*, Memorandum Opinion and Order, 22 FCC Rcd 12932, 12936 (MB 2007) (granting significantly viewed waiver based on survey that included two households in the first year and nine households in the second year); *Virginia Broadcasting Corp.*, Order on Reconsideration, 22 FCC Rcd 18109, 18118 (MB 2007) (stating that two households in each survey year is the required minimum).

Citizens argues the Commission should deny Barrington’s waiver request based on data Citizens offers regarding KCCI’s *cable* viewership,⁸ but this data is simply irrelevant under the test the Commission has established.⁹ The significantly viewed exception is a narrow

⁶ *See* Opp. at 5.

⁷ *See* Opp. at 4 (conceding “that the Commission has previously accepted the validity of community-specific Nielsen data with a relatively small number of in-tab samples in connection with prior waiver requests”).

⁸ *See* Opp. at 5-6.

⁹ *See* 47 C.F.R. § 76.54(b) (significantly viewed status “may be demonstrated by an independent professional audience survey of *over-the-air television homes*”) (emphasis added); *KCST-TV*, (continued...)

exception designed to ensure that if a distant station is significantly viewed by *over the air* viewers in a particular area, cable subscribers in that area likewise have access to the duplicating programming contained in that station's signal.¹⁰ Allowing MVPDs to import the duplicating portions of distant signals that are *not* significantly viewed over the air distorts the local broadcast market rather than preserving it. Thus, if a distant station is not significantly viewed, local stations are entitled to assert their nonduplication rights.

II. BARRINGTON'S REQUEST FOR A WAIVER TO ALLOW KTVO TO ASSERT ITS NETWORK NONDUPLICATION RIGHTS IS IN THE PUBLIC INTEREST.

The Commission has long acknowledged the value of network exclusivity arrangements, which support local affiliates' service to their communities. As the Commission has recognized, the "network non-duplication and syndicated exclusivity rules provide a regulatory means for broadcasters to prevent MVPDs from undermining their contractually negotiated exclusivity rights."¹¹ Citizens asserts that the Commission should not interfere with Citizens' bargained-for right to retransmit KCCI.¹² By the same token, however, local stations have bargained for their network exclusivity rights, and it is in the public interest to allow stations to enjoy the benefit of these bargained-for rights. The importation of duplicating programming undermines local stations' ability to support their programming investments,

Inc., 103 F.C.C. 2d at 411 (standard for waiver same as standard for establishing significantly viewed status).

¹⁰ As the Commission recognized in *KCST-TV*, when a station is significantly viewed it essentially presents a "local station versus local station situation." See *KCST-TV*, 103 F.C.C. 2d at 411 (1986). In contrast, "a station that is not significantly viewed need not, for the purposes of the nonduplication rules, be viewed as a local station." *Id.*

¹¹ *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, 2005 WL 2206070, at ¶ 17 (2005) ("2005 Report to Congress").

¹² *Opp.* at 6.

including investments in local news.¹³ Thus, as the Commission has recognized, the exclusivity rules protect localism, local broadcast competition, program diversity and stations' right to contract.¹⁴

Citizens asserts that Barrington's petition should be denied "in order to appropriately balance competing interests, and in light of the evolving legal and economic realities concerning the retransmission of commercial broadcast stations."¹⁵ However, the Commission has already "appropriately balance[d]" the competing interests by establishing the significantly viewed exception and its accompanying waiver process. In prior proceedings involving significantly viewed waivers, the Commission has rejected cable operators' arguments that the Commission should "change well-established rules in order to deny waivers to stations which applied under those rules." *WTVG, Inc. & WUPW Broad., LLC*, 25 F.C.C.R. 12263, 12265 (MB 2010). As the Commission has recognized, "the public as a whole has an interest in local station viability, and, in virtually all cases, any lost network programming will be available to [cable] subscribers from the [local] stations." *Id.* at 12669 (footnote omitted). Some subscribers "may lose their preferred source of network programming," when the Commission grants a waiver of the significantly viewed exception, "but in adopting the exclusivity rules, the

¹³ Although Citizens Mutual states that the retransmission fees it pays to broadcasters have increased "exponentially," the absolute amount of retransmission fees collected by broadcasters remains far lower than what cable systems pay for less popular non-broadcast programming.

¹⁴ *2005 Report to Congress*, 2005 WL 2206070, at ¶ 33; *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Memorandum Opinion and Order, 4 FCC Rcd 2711, at ¶ 24 (1989).

¹⁵ *Opp.* at 5.

Commission found that the public interest supported their application in situations just such as this.” *Id.* at 12669.¹⁶

The established process for waiver of the significantly viewed exception ensures that MVPDs cannot artificially undermine stations’ ability to enjoy the benefit of their bargained-for exclusivity arrangements. The rules thus represent a careful balance that preserve the public’s interest in robust and competitive local television service.

III. BARRINGTON SEEKS ONLY TO ASSERT ITS NETWORK EXCLUSIVITY RIGHTS AS PERMITTED BY THE COMMISSION’S RULES.

Citizens asks the Commission to “explicitly state that regardless of the significantly viewed status of station KCCI in Bloomfield, Citizens is not required to provide network-non-duplication protection” to KTVO in Bloomfield based on Citizens’ status as a small system.¹⁷ Section 76.95(a) of the Commission’s rules exempts small cable systems with fewer than 1,000 subscribers from the non-duplication rules.¹⁸ Citizens refers to its “system” in the singular, states that Bloomfield is the largest community served by the system, and states that the system has fewer than 500 subscribers in Bloomfield.¹⁹ Because Citizens does not state how many subscribers the system as a whole serves, Citizens has not shown that it qualifies for the small system exemption.²⁰ Regardless, the waiver Barrington seeks would have no effect on the

¹⁶ *See also KSWB, Inc.*, 13 F.C.C.R. 21867, 21869-70 (Cab. Servs. Bur. 1998) (“[W]e have consistently held that by their very nature, enforcement of the syndicated program exclusivity rules often causes some disruption of established viewing habits. Accordingly, such disruption is not, in itself, sufficient grounds upon which to grant a stay [from an order finding a station was no longer significantly viewed].”).

¹⁷ Opp. at 6.

¹⁸ 47 C.F.R. § 76.95(a).

¹⁹ Opp. at 2-3.

²⁰ Barrington takes no position on that question, which is in any case irrelevant to Barrington’s waiver request.

applicability of the small system exemption, and therefore would do nothing to prevent qualifying systems from availing themselves of this exemption for as long as they have fewer than 1,000 subscribers.

* * *

The Commission has long recognized that allowing stations to enforce their network nonduplication rights serves the public interest in promoting a healthy local broadcast market. The Commission has provided a narrow exception to the network nonduplication rule with respect to distant stations that are significantly viewed over the air in the relevant community. Barrington has satisfied the standard established by the Commission for demonstrating that KCCI is no longer significantly viewed in the community of Bloomfield, Iowa. Accordingly, the Commission should grant Barrington's waiver request and permit KTVO to assert its nonduplication rights in Bloomfield against cable and satellite operators' carriage of KCCI's signal, in accordance with the Commission's rules.

Respectfully submitted,

BARRINGTON KIRKSVILLE LICENSE LLC

By:


Kurt A. Wimmer
Eve R. Pogoriler
Michael Beder*
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 662-6000

Its Attorneys

July 9, 2012

* Member of the Bar of Maryland; not admitted in the District of Columbia. Supervised by principals of the firm.

DECLARATION OF WARREN SPECTOR

I, Warren Spector, declare as follows:

1. I am the Chief Financial Officer of Barrington Broadcasting Group, LLC, the parent company of Barrington Kirksville License LLC, which is the licensee of KTVO, Kirksville, Missouri.

2. I have read the foregoing Reply to Citizens Mutual Telephone Cooperative's Opposition to Petition for Special Relief, and to the best of my knowledge, information, and belief formed after reasonable inquiry, it is well-grounded in fact and is warranted by existing law and it is not interposed for any improper purpose.



Warren Spector



Date

CERTIFICATE OF SERVICE

I, Joy Barksdale, a paralegal with the law firm of Covington & Burling LLP, certify that on this 9th day of July 2012 I caused copies of the foregoing Reply to Citizens Mutual Telephone Cooperative's Opposition to Petition for Special Relief to be served by first-class U.S. mail on the following:

KCCI
Des Moines Hearst Television Inc.
c/o Brooks, Pierce, et. al.
P.O. Box 1800
Raleigh, NC 27602

John Mintzer
General Counsel
Hearst Television, Inc.
300 W. 57th St,
New York, NY 10019-3789

KGAN
KGAN Licensee, LLC
c/o Pillsbury Winthrop Shaw Pittman LLP
2300 N Street, N.W.
Washington, DC 20037

KGAN Licensee, LLC
600 Old Marion Rd. N.E.
Cedar Rapids, IA 52406

KCRG
Cedar Rapids Television Company
501 2nd Ave S.E.
Cedar Rapids, IA 52401

KCRG
Cedar Rapids Television Company
2nd Ave. at 5th Street, NE
Cedar Rapids, IA 52401

KYOU
KYOU License Subsidiary, LLC
2131 Ayrley Town Boulevard, Suite 300
Charlotte, NC 28273

KGCW
Burlington Television Acquisition Licensing
LLC
915 Middle River Drive, Suite 409
Ft. Lauderdale, FL 33304

KIIN
Iowa Public Broadcasting Board
Post Office Box 6450
Johnston, IA 50131

KWKB
KM Television of Iowa, L.L.C.
3654 West Jarvis Avenue
Skokie, IL 60076

DIRECTV, Inc.
2230 East Imperial Highway
El Segundo, CA 90245

DISH Network L.L.C.
9601 S. Meridian Boulevard
Englewood, CO 80112
Attn: Executive Vice President and General
Counsel

Jane Belford
Vice President Programming and Legal Affairs
Mediacom LLC
100 Crystal Run Road
Middletown, NY 10941

Iowa City Telecommunications Commission
410 E. Washington St.
Iowa City, IA 52240

Citizens Mutual Telephone, Inc.
114 W. Jefferson St.
Bloomfield, IA 52537

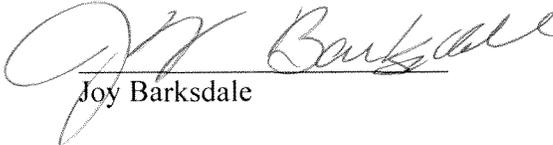
City of Bloomfield
City Clerk
111 West Franklin Street
Bloomfield, Iowa 52537

Dave Magill
LISCO
1708 S. Main St., Suite 208
Fairfield, IA 52556

Tony S. Lee
Counsel for LISCO
Venable LLP
575 7th St., N.W.
Washington, DC 20004

Iowa Utilities Board
1375 E. Court Avenue, Room 69
Des Moines, Iowa 50319-0069

City of Fairfield
Environmental & Franchise Utilities Cmte.
118 S. Main
Fairfield, IA 52556


Joy Barksdale