

**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 OPPOSITION OF LISCO 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 Local Internet Service Company, Inc. (“LISCO”), the requested waiver would permit KTVO to assert its nonduplication rights against out-of-market stations KCRG and KGAN in the community of Fairfield, 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. LISCO’s Opposition does not challenge

¹ LISCO states it is “a competitive local exchange carrier and competitive cable TV provider in Fairfield, Jefferson County, Iowa,” and that it carries KCRG and KGAN. Local Internet Service Company, Inc., Opposition to Petition for Special Relief, MB Docket No. 12-151, at 2 (filed July 9, 2012) (“Opp.”). LISCO’s Opposition thus is not relevant to Barrington’s request for a waiver that would allow KTVO to assert its nonduplication rights against out-of-market station KCCI in Bloomfield, Iowa.

Barrington's data.² 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 exclusivity rights.³ LISCO asks the Commission to "deny" Barrington's waiver request "with respect to small cable systems in Fairfield."⁴ LISCO also states that, if the Commission's grants Barrington's request, the Commission should include a special note in its Order or on the revised Significantly Viewed List to the effect that KCRG and KGAN will retain significantly viewed status in Fairfield with respect to small cable systems.⁵ No such special procedures are required. As the Commission has made clear, granting a waiver of the significantly viewed exception does not override

² LISCO does adopt an argument advanced in a separate Opposition filed by Citizens Mutual Telephone Cooperative, which urges the Commission to change its longstanding requirements for the amount of data required to make a significantly viewed showing. *See* Opp. at 6 n.15. As is demonstrated in Barrington's Reply to the Citizens Opposition, Barrington has satisfied the Commission's existing standards, and no change to those standards is warranted or appropriate in this proceeding. *See* Barrington Kirksville License LLC, Reply to Citizens Mutual Telephone Cooperative's Opposition to Petition for Special Relief, MB Docket No. 12-151, at 3, 5 (filed July 9, 2012); *see also* WTVG, Inc. & WUPW Broad., LLC, 25 FCC Rcd 12263, 12265 (MB 2010) (rejecting cable operators' argument that Commission should "change well-established rules in order to deny waivers to stations which applied under those rules").

³ *See 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"). The Commission has recognized that the exclusivity rules protect important public interests such as localism, local broadcast competition, program diversity and stations' right to contract. *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, 2715 (1989).

⁴ Opp. at 4. LISCO also asks the Commission to rule that LISCO need not provide KTVO with syndicated exclusivity protection pursuant to the small-system exception set out at 47 C.F.R. § 76.106(b). Opp. at 9. If a station is no longer significantly viewed for purposes of the exception set forth in the network nonduplication rule, then it likewise would not be significantly viewed for purposes of the exception set forth in the syndicated exclusivity rule. Both rules refer to the definition of significantly viewed set out in 47 C.F.R. § 76.54. *See* 47 C.F.R. §§ 76.92(f) and 76.106(a).

⁵ Opp. at 8-9.

otherwise applicable exceptions to the network nonduplication and syndicated exclusivity rules, nor do such waivers alter a station's significantly viewed status for purposes other than the exclusivity rules. Thus, because Barrington's petition satisfies the Commission's existing standards for significantly viewed waivers, the Commission should grant the waiver pursuant to its standard procedures.

I. BARRINGTON HAS SATISFIED THE TEST FOR SIGNIFICANTLY VIEWED WAIVERS, WHICH DO NOT AFFECT INDEPENDENT EXCLUSIVITY EXCEPTIONS SUCH AS THE SMALL SYSTEM EXEMPTION.

Consideration of significantly viewed waiver requests is a data-driven process, as laid out by the Commission in *KCST-TV*.⁶ 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."⁷ In its Petition, Barrington provided community-specific data obtained from Nielsen Media Research ("Nielsen") showing that KCRG and KGAN no longer attain the necessary viewing levels in Fairfield, based on Nielsen's independent analysis of diaries obtained over the course of two years from over-the-air households in Fairfield zip codes.⁸ Indeed, using its standard, long-accepted methods, Nielsen concluded these stations had *no* over-the-air viewership in those two years in Fairfield, with no standard error.⁹ Barrington thus has made the showing required to qualify for a waiver of the significantly viewed exception.

⁶ *KCST-TV, Inc.*, Memorandum Opinion and Order, 103 F.C.C. 2d 407, 411-12 (1986)

⁷ *Id.* at 413.

⁸ Barrington Kirksville License LLC, Petition for Special Relief, MB Docket No. 12-151, at 4-6 (filed May 31, 2012) ("Petition").

⁹ *Id.* at 5-6.

LISCO argues the Commission should “deny” Barrington’s waiver request with respect to cable systems that qualify as small systems under Section 76.95(a) of the Commission’s rules.¹⁰ This request misconstrues the nature of the significantly viewed exception and the small-system exemption. The significantly viewed exception permits all cable systems, regardless of size, to carry the duplicating network programming of a station that is considered “significantly viewed” in the relevant community.¹¹ The small system exemption states that the network nonduplication rules do not apply to cable systems with fewer than 1,000 subscribers,¹² regardless of whether the duplicating programs being aired by the small system originate from a “significantly viewed” station. These two network nonduplication exceptions are entirely independent. Barrington’s request for a waiver of Section 76.92(f) has no effect on the operation of Section 76.95(a).

The Commission previously has recognized this distinction. In *KXAN, Inc.*, KXAN’s licensee petitioned for a waiver of the significantly viewed exception so it could assert its exclusivity rights against KCEN-TV in the communities of Georgetown and Round Rock, Texas.¹³ The Commission found that KXAN had demonstrated that KCEN no longer was significantly viewed in those communities.¹⁴ Accordingly, the current Significantly Viewed List indicates both Georgetown and Round Rock are “affected communities” where KCEN’s duplicating network and syndicated programming generally is subject to deletion.¹⁵ However, a

¹⁰ *See Opp.* at 4 (citing 47 C.F.R. § 76.95(a)).

¹¹ 47 C.F.R. § 76.92(f).

¹² 47 C.F.R. § 76.95(a).

¹³ *KXAN, Inc.*, 25 FCC Rcd 3307, 3307 (MB 2010).

¹⁴ *Id.* at 3316.

¹⁵ Significantly Viewed List, at 414 & n.59, *available at* <http://transition.fcc.gov/mb/significantviewedstations120611.pdf> (last modified Dec. 6, 2011).

substantial portion of Georgetown’s population lives within KCEN’s 35-mile zone, and the entire community is within KCEN’s Grade B and digital noise limited service contours.¹⁶ The Commission therefore concluded that the independent provisions of Sections 76.92(b)(1) and 76.106(a) prevented KXAN from asserting exclusivity rights against KCEN in Georgetown.¹⁷ Contrary to LISCO’s characterization of the decision, the Commission did not deny KXAN’s request for a waiver of the significantly viewed exception; it *granted* that portion of KXAN’s petition.¹⁸ What the Commission *denied* was KXAN’s implied request for a waiver of the independent exception under Section 76.92(b)(1).¹⁹ Here, Barrington does not seek a waiver of the small system exception under 76.95(a).²⁰ Granting Barrington’s waiver request would do no more than allow KTVO to assert its exclusivity rights against KCRG and KGAN to the same extent it could assert those rights against any other station under the Commission’s rules.²¹ Barrington has satisfied the test for significantly viewed waivers, and the Commission therefore should grant Barrington’s petition.

¹⁶ *KXAN, Inc.*, 25 FCC Rcd at 3317-18.

¹⁷ *Id.*

¹⁸ *Id.* at 3307 (“In this decision, we grant KXAN-TV’s waiver of the significantly viewed exception with respect to Round Rock and Georgetown.”).

¹⁹ *Id.* at 3317 (“[T]o the extent KXAN-TV’s petition intended to seek waiver of Section 76.92(b)(1) of the Commission’s rules, such request is denied.”).

²⁰ Barrington also takes no position on whether LISCO qualifies as a small system, as that question is irrelevant to Barrington’s petition.

²¹ Moreover, despite LISCO’s assertion to the contrary, granting Barrington’s petition would not limit LISCO subscribers’ access to the distant stations’ local programming (even if LISCO were not a small system). *See Opp.* at 2-3 (arguing that “LISCO’s video service subscribers prefer the local programming from Cedar Rapids over that from Kirksville”). The network nonduplication and syndicated exclusivity rules require the deletion only of *duplicating national* programs.

II. BARRINGTON'S PETITION DOES NOT AFFECT THE DISTANT STATIONS' SIGNIFICANTLY VIEWED STATUS FOR PURPOSES BEYOND THE EXCLUSIVITY RULES.

LISCO argues that, if the Commission's grants Barrington's petition, the Commission should include a special note in its Order or on the revised Significantly Viewed List to the effect that KCRG and KGAN will retain significantly viewed status in Fairfield with respect to small cable systems.²² LISCO cites no precedent for this request, nor is any such note necessary. When the Commission grants a waiver of the significantly viewed exception, it updates the Significantly Viewed List to indicate that a station has "been the subject of application of the Commission's *exclusivity rules*" and therefore is "subject to programming deletions in the indicated communities."²³ LISCO apparently believes that this note is equivalent to a statement that the station "is no longer considered to be significantly viewed in that area."²⁴ LISCO is mistaken.

The Commission has made it clear from the outset that granting a waiver of the significantly viewed exception does not delete the affected station from the list of significantly viewed signals.²⁵ The Commission recognized in *KCST-TV* that deleting stations from the Significantly Viewed List could have side effects such as "possibly expos[ing] cable systems to increased copyright liability for carriage of nonduplicative" programming.²⁶ Accordingly, under

²² Opp. at 8-9.

²³ Significantly Viewed List, *supra* n.15, at 1 (emphasis added).

²⁴ Opp. at 7-8.

²⁵ *KCST-TV*, 103 F.C.C. 2d at 412. *See also Journal Broad. Corp.*, 21 FCC Rcd 3471, 3474-75 (MB 2006) ("[T]he grant of a waiver of the significantly viewed exemption does not cause that station to be deleted from the Significantly Viewed List ('SV List'). ... Rather, the SV List identifies with a pound sign (#) those stations and related communities subject to programming deletions because we granted a waiver of the significantly viewed exception.").

²⁶ *KCST-TV*, 103 F.C.C. 2d at 409.

the Commission's rules, an FCC grant of a waiver of the significantly viewed exception does no more than allow local stations to assert their exclusivity rights against stations that the Significantly Viewed List deems to be significantly viewed in a particular area.²⁷

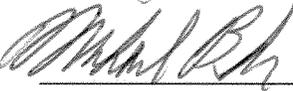
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The Commission has long recognized that allowing stations to enforce their network nonduplication rights serves the public interest in promoting a healthy local broadcast market. The Commission has provided a narrow exception to the network nonduplication 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 KCRG and KGAN no longer are significantly viewed in Fairfield, Iowa. Accordingly, the Commission should grant Barrington's waiver request and permit KTVO to assert its nonduplication rights in Fairfield against cable and satellite operators' carriage of the out-of-market signals, in accordance with the Commission's rules.

²⁷ Barrington is not in a position to comment on LISCO's speculation that KCRG and/or KGAN may be subject to additional contractual restrictions, nor would such contractual terms be relevant to the application of the Commission's rules.

Respectfully submitted,

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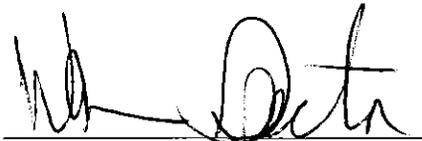
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DECLARATION OF WARREN SPECTOR

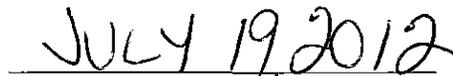
I, Warren Spector, declare as follows:

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 Opposition of LISCO 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 19th day of July 2012 I caused copies of the foregoing Reply to Opposition of LISCO to Petition for Special Relief to be served by first-class U.S. mail on the following:

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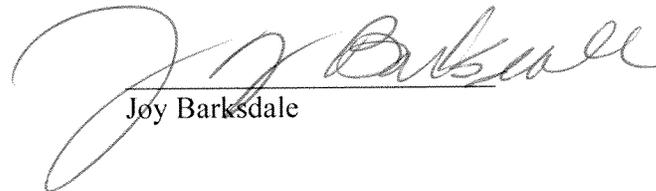
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