

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

In the Matter of:)
)
WTVB, Inc.)
) CSR-6147-N
For Waiver of Section 76.92(f) of the)
Commission’s Rules)

MEMORANDUM OPINION AND ORDER

Adopted: April 15, 2004

Released: April 21, 2004

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. WTVB, Inc., licensee of television broadcast station WTVB (NBC, Ch. 9), and permittee of WTVB-DT (Ch. 58), Tupelo-Columbus, Mississippi (“WTVB”), has filed a petition for special relief seeking a waiver of the Commission’s significantly viewed exception to the network nonduplication rules.¹ An opposition to this petition was filed on behalf of Raycom America, Inc., licensee of station WMC-TV (NBC, Ch. 5), Memphis, Tennessee (“WMC-TV”) to which WTVB has replied.

II. BACKGROUND

2. Upon the request of a local television 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.² 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.³ The Commission’s rules generally provide stations such protection within a station’s 35-mile geographic zone.⁴ However, a local station may not exercise this right if an otherwise distant station is considered “significantly viewed” within the community served by the cable system. The significantly viewed exception to the Commission’s exclusivity rules is based on an otherwise distant

¹See 47 C.F.R. § 76.92(f).

²See 47 C.F.R. § 76.92.

³For a network station to be recognized as significantly viewed in a community or in a county, it must achieve in noncable homes a share of at least 3 percent (total week hours) and a net weekly circulation of at least 25 percent. See 47 C.F.R. §§ 76.5(i) and 76.54.

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.

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, to one standard error.⁵ For each year, the data must be obtained as a result of independent professional surveys taken during two one-week periods that are separated by at least thirty days and are distributed proportionately among the relevant communities. Not more than one of the surveys may be taken between April and September of each year.⁶

III. DISCUSSION

4. WTVA seeks a waiver of the significantly viewed exception to the Commission’s network nonduplication rules so that it may assert network nonduplication protection against WMC-TV in the cable communities served by Comcast Communications (“Comcast”).⁷ WMC-TV is considered to be significantly viewed in the Mississippi Counties of Lee, Chickasaw, Pontotoc, Prentiss and Itawamba, where the cable system communities served by Comcast are located.

5. In support of its petition, WTVA states that it wishes to enforce its network nonduplication protection rights against WMC-TV in the subject communities, but is prevented from doing so because WMC-TV is considered to be significantly viewed in the counties where the cable communities are located.⁸ WTVA asserts, however, that WMC-TV no longer meets the significantly viewed standard in the subject communities and, due to unique circumstances, submits the results of both a traditional audience survey and a field strength engineering study.⁹ WTVA states that the viewership study is a system-specific audience survey prepared by VideoProbeIndex, Inc. (“VPI”) of the noncable homes in the communities served by Comcast.¹⁰ The engineering study is a survey that relies on field strength data prepared by the consulting firm of du Triel, Lundin & Racle, Inc. (“du Triel Study”).¹¹

6. WTVA states that VPI’s surveys were conducted during the weeks of August 15-21 and November 28-December 4, 2001, using the polling services of a company whose expertise it has relied on since 1988.¹² WTVA maintains that each community served by Comcast was represented in the sampling

⁵103 FCC 2d 407 (1986).

⁶See 47 C.F.R. § 76.54(b).

⁷The cable communities served by Comcast are Tupelo, Mantachie, Marietta, Okalona, Plantersville, Saltillo, Sherman, Tremon, Verona, and the unincorporated areas of Lee County, Mississippi (known as Morreville, Belden, and Bissell).

⁸Petition at 2. WMC-TV achieved its significantly viewed status in the subject counties by its inclusion in Appendix B to the *Reconsideration of the Cable Television Report and Order*, 36 FCC Rcd 2d 326, 378 (1992).

⁹Petition at 3.

¹⁰*Id.* at Exhibit A.

¹¹*Id.* at Exhibit B.

¹²*Id.* at 3. The polling company used by VPI is 21st Century Copernicus of Tarboro, North Carolina.

on a proportionate basis and that, using the same survey methodology it has relied on in the past, the results of VPI's study for 2001 indicates no viewership for WMC-TV among any of the noncable households encompassed by Comcast's communities.¹³ WTVA states that although VPI scheduled a second set of surveys for two, one-week periods in August and November-December 2002, it was unable to complete the surveys because the polling company it used had recently gone out of business.¹⁴ When VPI could not identify another survey firm that would be able to undertake the August 2002 survey in a timely manner, WTVA states that VPI suggested that the station commission the du Triel Study.¹⁵ WTVA argues that the du Triel Study, which indicates that WMC-TV's signal is extremely weak in the Tupelo area, corroborates VPI's determination that WMC-TV is no longer significantly viewed within the survey area.¹⁶ WTVA states that VPI supports this conclusion.¹⁷ WTVA notes that in *Cypress Broadcasting Corp.*, the Commission granted a waiver of Section 76.92(f) based solely on the fact that the viewership percentage was below the required level of 2 percent for an independent station.¹⁸ WTVA asserts that because, in this instance, the reported shares are zero, the lack of a second set of surveys is not material to VPI's conclusion, particularly in light of du Triel's field strength study.

7. WMC-TV argues that WTVA's petition does not conform to the requirements for a waiver of Section 76.92(f) of the Commission's rules and should be denied. WMC-TV states that in *KCST-TV, Inc.*, the Commission established specific standards by which a station may seek a waiver of the significantly viewed exemption, namely that a petitioner must demonstrate through audience surveys conducted over two consecutive years that the station no longer meets the applicable significantly viewed audience levels in the communities at issue.¹⁹ WMC-TV states that WTVA's petition falls far short of satisfying these requirements.²⁰ First, it offers only a single year of audience survey data and second, it would create a new legal standard allowing petitioners to meet the second-year survey requirement via the use of a signal strength survey. WMC-TV asserts that the Commission's requirements for waivers of Section 76.92 are plainly based on survey data and not the predicted or measured intensity of a station's signal.²¹

8. In reply, WTVA argues that WMC-TV does not attack the methodology VPI used for its 2001 audience surveys nor does it dispute VPI's ultimate conclusion.²² WTVA states that WMC-TV also does not question the reliability of the signal intensity studies conducted by du Triel that established that WMC-TV's signal was deficient in the Tupelo area.²³ WTVA states that, instead, WMC-TV hides behind

¹³*Id.* at 3-4 and Exhibit A. Upon review, we note that two small communities - Mantache and Marietta, each representing approximately one percent of the total population - are not represented in the sample.

¹⁴*Id.* at 4.

¹⁵*Id.* at 5.

¹⁶*Id.*

¹⁷*Id.* at Exhibit A, pg. 6.

¹⁸10 FCC Rcd 8621, 8622 (1995) (Because the reported viewing shares were below the minimum 2 percent required, the Commission decided not to consider the viewing share standard error or the circulation level).

¹⁹Opposition at 2.

²⁰*Id.*

²¹*Id.* at 3.

²²Reply at 2.

²³*Id.*

the procedural hurdles the Commission has set up to avoid reevaluating a station's significantly viewed status in a close case. WTVA asserts that this is not even a close case. It maintains that because VPI's 2001 surveys found that WMC-TV's viewership was zero and du Triel's Study found that WMC-TV did not deliver a Grade B signal, it is clear that even if VPI had been able to commission a second set of surveys in 2002, the results would have been identical.²⁴ WTVA concludes that there is no logical reason why the Commission should continue to consider WMC-TV significantly viewed in the communities surveyed.

9. We disagree with WTVA and will deny its request. The standard promulgated in *KCST-TV, Inc.*, explicitly requires that the results of two years of viewership data be provided when seeking a waiver of the significantly viewed exception to the network nonduplication rules. WTVA in this instance has only partially met this standard by submitting one year of survey data. WTVA's submission of engineering data for the second year, however, does not conform to the standard set in *KCST-TV, Inc.*, and cannot be accepted. WTVA's reliance on *Cypress Broadcasting* is also misplaced. In that instance, the petitioner submitted the required two years' audience data, including standard errors, consistent with the requirements of the waiver standard; the Commission determined that analysis of the standard errors was unnecessary due to the low reported audience statistics.

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that the petition filed by WTVA, Inc., **IS DENIED**.

11. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.²⁵

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Media Bureau

²⁴*Id.* at 2-3.

²⁵47 C.F.R. § 0.283.