

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

In the Matter of:)	
)	
Virginia Broadcasting Corporation)	
)	CSR-6914-N
Petition for Waiver of Sections 76.92(f))	
And 76.106(a) of the Commission's rules)	

ORDER ON RECONSIDERATION

Adopted: October 11, 2007

Released: October 12, 2007

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Virginia Broadcasting Corporation, licensee of station WVIR-TV (NBC), Charlottesville, Virginia ("WVIR-TV"), has filed a petition for reconsideration of the Bureau's decision denying WVIR-TV's petition seeking a waiver of the Commission's significantly viewed exception to the network nonduplication and syndicated exclusivity rules.¹ WVIR-TV subsequently filed a supplement to its petition. No opposition to this petition has been received. For the reasons discussed below, we grant, in part, WVIR-TV's petition for reconsideration.

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.² Under Sections 76.92(f) and 76.106(a) of the Commission's rules, however, a signal otherwise subject to deletion is exempt from application of the exclusivity rules if it is "significantly viewed" in a relevant community (the "significantly viewed exception").³ The Commission's rules generally provide stations such protection within a station's 35-mile geographic zone.⁴ The significantly viewed exception to the exclusivity rules is based on a demonstration that an otherwise distant station

¹Virginia Broadcasting Corporation, 21 FCC Rcd 3462 (2006).

²See 47 C.F.R. §§76.92 and 76.101.

³47 C.F.R. §§ 76.92(f) and 76.106(a); see 47 C.F.R. §§ 76.5(i) and 76.54.

⁴The 35-mile geographic zone of all major markets and the 55-mile geographic zone around all smaller markets extend from the reference point of the community of license of the television station. These reference points are listed in Section 76.53 of the Commission's rules. Where a community's reference point is not given, the geographic coordinates of the main post office in the community shall be used. See 47 C.F.R. §§ 73.658 and 76.53.

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 exclusivity rules because it has established that it is viewed over the air in the subject community.

3. In the 2005 Report and Order implementing Section 340 of the Communications Act, the Commission adopted a rule for satellite carriage that mirrors the rules for cable carriage.⁵ Accordingly, the amended Sections 76.122(a) and (j) and 76.123(a) and (k) of the Commission’s rules allow a station or distributor with exclusive rights to network or syndicated programming to assert exclusivity protection to require satellite carriers to delete such programming. The duplicating station may respond to such assertions by claiming the significantly viewed exception.⁶ The party asserting exclusivity protection may request a waiver of the significantly viewed exception from the Commission by demonstrating that the station is no longer significantly viewed in a particular community or communities.⁷ If the waiver is granted, the duplicating programming must be deleted by a cable operator or satellite carrier if the station is carried in a community in which the station has been shown to no longer be significantly viewed. It should be noted that the station itself is not removed from the significantly viewed list and may continue to be carried, provided the necessary programming deletions are made.⁸

4. In order to obtain a waiver of the significantly viewed exception to the exclusivity rules, the Commission held in *KCST-TV, Inc.*⁹ that 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 over-the-air viewing data, following the methodology set forth in Section 76.54(b) of the Commission’s rules.¹⁰ Under Section 76.5(i) of the Commission’s rules, network stations¹¹ are considered significantly viewed if the survey results show more than a 3 percent share of total viewing hours and a net weekly circulation of 25 percent, by at least one standard error.¹² Independent stations

⁵Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Implementation of Section 340 of the Communications Act, MB Docket No. 05-49, Report and Order, 20 FCC Rcd 17278 (2005) (“*SHVERA Significantly Viewed Report and Order*”).

⁶47 C.F.R. §§ 76.122(j)(2) and 76.123(k)(2).

⁷See *KCST-TV, Inc.*, 103 FCC 2d 407 (1986).

⁸See *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd 15 17295-26; see also 47 U.S.C. § 340(e)(2).

⁹103 FCC 2d 407 (1986).

¹⁰Section 76.54(b) describes the required survey procedures for adding a station to the significantly viewed list based on community or system-specific surveys. For the addition of a station to the list, only one year’s surveys are required. In *KCST-TV, Inc.*, the Commission required that the data demonstrate viewing levels for two years. In the *SHVERA Significantly Viewed Report and Order*, we clarified that the independent professional audience surveys required by Section 76.54 of our rules must include surveys only from households that receive broadcast signals via an over-the-air antenna and thus amended Section 76.54 to change “noncable” to “over-the-air.” See *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd 15 17292-23.

¹¹For purposes of determining whether to use the network or non-network standard for audience share, the Commission relies on the definition of network and independent station in our rules. Thus, for such purposes, affiliates of the ABC, CBS, and NBC networks are “network stations.” See 47 C.F.R. §76.5(j) and (k). Other stations are treated as independent stations for this limited purpose. See 47 C.F.R. §76.5(j); *SHVERA Significantly Viewed Report and Order*, 20 FCC Rcd at 17293-34.

¹²47 C.F.R. §76.5(i).

(i.e., non-network stations), are considered significantly viewed if the survey results show more than a 2 percent share of total viewing hours and a net weekly circulation of 5 percent, by at least one standard error.¹³ The Commission has found this test is also applicable for waivers of the syndicated exclusivity exemption.¹⁴

5. Since the Commission's decision in *KCST-TV*, the methodology required by Section 76.54(b) of the rules for a petitioner seeking an exception to the significantly viewed exception has evolved, pursuant to case law and market realities. Section 76.54(b) states in pertinent part that significant viewing "may be demonstrated by an independent professional audience survey of [over-the-air] television homes that covers at least two weekly periods separated by at least thirty (30) days but no more than one of which shall be a week between the months of April and September."¹⁵ Over time, Nielsen Media Research became the primary surveying organization through which a petitioner could obtain television surveys.¹⁶ Nielsen, which routinely surveys television markets to obtain television stations' viewership, conducts four-week audience surveys four times a year (i.e., February, May, July, and November "sweep periods"). The Bureau has found that replacing each week required under *KCST-TV* with a sweep period is acceptable and, if anything, adds to the accuracy of the audience statistics because of the increased sample size.¹⁷ Accordingly, a petitioner may submit the results from two sweep periods in each year. For use in exclusivity waivers, a petitioner may purchase survey data from Nielsen on either a community-specific or system-specific basis.¹⁸ If a petitioner is purchasing survey data on a system-specific basis where two or more communities are involved, the percent of diaries from each community surveyed must be approximately the same as the percentage of the total population for each community served by the cable system.¹⁹ In order to produce the data required for exclusivity waivers, Nielsen re-tabulates the over-the-air data that it collects for its routine audience sweep periods, selecting

¹³ *Id.*

¹⁴ See *Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640 (1990).

¹⁵ 47 C.F.R. § 76.54(b). The criteria set forth in *KCST-TV* require that two separate surveys be performed pursuant to Section 76.54(b) in consecutive years. The provisions of Section 76.54(b) therefore apply to each year's survey. It should be noted that these types of surveys cannot be done by the affected television station, cable system or satellite operator.

¹⁶ Previously, there was at least one independent research firm that conducted audience surveys for this purpose.

¹⁷ Although, in general, petitioners are prohibited from using two surveys between April and September (i.e., May or July sweeps), we have not ruled out a petitioner providing all sweeps in a year where more than two are submitted. See *WTNH Broadcasting, Inc. and K-W TV, Inc.*, 16 FCC Rcd 6781, 6784 (2001), where the Bureau did not reject the petition because of the inclusion of both May and July data, but only concluded that, in such a case, it would be necessary to provide individual survey period results so that we could determine the effect of the third and fourth sweep periods.

¹⁸ It should be noted that Nielsen identifies individual communities by zip codes, a process not incompatible with the surveying process discussed here.

¹⁹ 47 C.F.R. § 76.54(b). Proportionality based on population demonstrates that more weight is given to larger communities. While there must be at least one diary from each community in each survey, there is no minimum sample size since the standard error allows us to be sure that there is a high probability that the reported result meets or falls below our criteria. Because Nielsen is able to weight its sampling, they can provide such proportionality.

"in-tab" diaries²⁰ from its database from the area served by a cable system or an individual cable community.²¹ It should be noted that, despite the fact that a petitioner is purchasing a re-tabulation of data that has already been collected, it is still obligated to notify interested parties prior to the purchase of such data pursuant to the requirements set forth in Section 76.54(c) of the Commission's rules.²² Such notice should indicate the surveying organization, the methodology used to calculate the viewing shares (*e.g.*, a description of the process used to re-tabulate the information in an existing database), the manner in which the communities (and/or zip codes) were selected, and the survey periods used.²³ Notification to interested parties before the purchase of Nielsen data allows a petitioner to correct any errors or clarify issues related to the methodology before the data are purchased and the petition is actually filed and, perhaps, avoid the filing of unnecessary or misinformed oppositions. Finally, we note that the manner in which surveys based on sweep periods are averaged remains the same as for weekly surveys.²⁴ A petitioner therefore may submit the average of the two sweep periods for each year. If, however, a petitioner submits more than two sweep periods, in addition to the average or combined audience shares for the year, it must also include the separate sweep data for each individual sweep period used. This ensures that the reported audience results data are not skewed by the choice of sweep periods.

6. In its request, WVIR-TV sought a waiver of the significantly viewed exception to the network nonduplication and syndicated exclusivity rules so that it could assert its rights to network nonduplication and syndicated exclusivity against television broadcast station WWBT (NBC), Richmond, Virginia ("WWBT") in integrated cable systems operated by Adelphia and located in Albemarle, Madison, and Rockingham Counties, Virginia, and against station WRC-TV (NBC), Washington, D.C. ("WRC-TV") solely for Adelphia's cable systems in Madison County. The Bureau denied WVIR-TV's request due to a failure to demonstrate adequate proportionality between in-tab responses and the populations of the communities served by each cable system. WVIR-TV seeks reconsideration, based on revised information, which it argues meets the criteria required for waiver.

²⁰In-tab diaries are the number of diaries included in the tabulation of audience shares. Of the returned diaries, some are discarded after editing as being unusable. Thus, it is the number of diaries in the sample used to calculate the audience statistics.

²¹We expect petitioners who commission such data to include, along with the survey data itself, a description of the procedures used to re-tabulate the data, which data base it is using, what communities (or zip codes) are covered, the station(s) surveyed, and time periods covered. Because Nielsen routinely provides this information in a cover letter along with its survey data, it is most helpful if this letter is included. This eliminates any doubt that the data provided was provided by Nielsen. *See e.g., Radio Perry, Inc.*, 11 FCC Rcd 10564, 10568-9 (1996); *Gulf-California Broadcast Company*, 21 FCC Rcd 3476, 3479-80 (2006). We further suggest that the petitioner make it clear that the data they are submitting, along with the description of methodology, are as agreed on between the petitioner and Nielsen.

²²47 C.F.R. § 76.54(c). Section 76.54(c) states that "[n]otice of a survey to be made pursuant to paragraph (b) of this section shall be served on all licensees or permittees of television broadcast stations within whose predicted Grade B contour the cable community or communities are located, in whole or in part, and on all other system community units, franchisees, and franchise applicants in the cable community or communities at least (30) days prior to the initial survey period."

²³*Id.*

²⁴Section 76.54(b) states that "[i]f two surveys are taken, they shall include samples sufficient to assure that the combined surveys result in an average figure at least one standard error above the required viewing levels. If surveys are taken for more than 2-weekly periods in any 12 months, all such surveys must result in an average figure at least one standard error above the required viewing level."

III. DISCUSSION

7. In support of its request, WVIR-TV submits revised survey data correcting the deficiencies found in its previously filed survey results.²⁵ WVIR-TV states that the “system-wide” surveys it previously supplied were based on the assumption that it was permissible under the Commission’s standards to submit surveys: a) which focused only on cable communities served by a particular cable system located within the particular county where the station against whom waiver was sought was considered to be significantly viewed; and b) which contain at least one survey response for each cable community served by the system, but which do not necessarily contain at least one survey response from each cable community in each of the two survey years.²⁶ WVIR-TV states that the changes in the survey data submitted herein are as follows:

- Replaces the survey filed for the two-community system in Madison County with a community-specific survey for the unincorporated areas of Madison County served by Comcast (formerly Adelphia) (PSID #014388) because Nielsen does not have sufficient in-tab households for the Town of Madison.
- Replaces the originally filed survey for Albemarle County with two community-specific surveys – one for Charlottesville and the other for the unincorporated areas of Albemarle County. Both communities are served by Comcast (PSID #004062). Previously, the Albemarle County data and proportionality information provided combined PSIDs 004062 and 013595.
- Replaces the originally filed survey for Rockingham County (which combined data for two cable systems) with community-specific surveys for most of the cable communities served by Comcast (PSID #003729). WVIR-TV no longer seeks a ruling for the communities served by Comcast’s system identified as PSID #001791. The request is limited to the communities of Harrisonburg, Broadway, Bridgewater, Dayton, Mount Crawford, Timberville, and areas of unincorporated Rockingham County.

WVIR-TV contends that because it is now seeking only community-specific surveys, and not system-specific surveys, there is no longer any need to demonstrate proportionality between the number of survey responses and community populations.²⁷

8. In order to demonstrate that WWBT and WRC-TV no longer meet the significantly viewed criteria in the subject communities, WVIR-TV submits Nielsen Media Research data collected for its routine audience sweep reports.²⁸ The average audience statistics reported by Nielsen are special tabulations of the combined results from the February and November 2003 sweep periods and the combined results from the February and November 2004 audience sweeps.²⁹ The special tabulations for each community are based on the Nielsen in-tab diaries for noncable and non-ADS (alternative delivery

²⁵Supplement to Reconsideration at 1. This supplement incorporates by reference the petition for reconsideration.

²⁶*Id.* at 2.

²⁷*Id.* at 3.

²⁸*Id.* at Attachment 2.

²⁹*Id.*

services) households located in zip codes that identify the cable communities.³⁰ The submitted audience statistics are based on off-air viewing only, meet the requirement that the showing be based on audience surveys for two periods in each of two years, and have been obtained using acceptable techniques. The submitted audience information are as follows:

TABLE 1 – WWBT VIEWING IN CHARLOTTESVILLE, VA

<u>Survey Year</u> ³¹	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Feb. 2003/ Nov. 2003	32	0.00	0.00	0.00	0.00
Feb. 2004/ Nov. 2004	31	0.00	0.00	0.00	0.00

TABLE 2 – WWBT VIEWING IN UNIN. AREAS OF ALBEMARLE COUNTY, VA

<u>Survey Year</u>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Feb. 2003/ Nov. 2003	24	3.17	1.83	13.66	5.81
Feb. 2004/ Nov. 2004	19	2.80	2.89	3.05	3.21

TABLE 3 – WWBT VIEWING IN HARRISONBURG, VA

<u>Survey Year</u>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Feb. 2003/ Nov. 2003	40	0.00	0.00	0.00	0.00
Feb. 2004/ Nov. 2004	38	0.00	0.00	0.00	0.00

³⁰*Id.* ADS households are those that subscribe to a video service other than cable, such as DBS.

³¹The survey dates of February 2003/November 2003 and February 2004/November 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.

TABLE 4 – WWBT VIEWING IN BROADWAY, VA

<u>Survey Year</u>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Feb. 2003/ Nov. 2003	5	0.00	0.00	0.00	0.00
Feb. 2004/ Nov. 2004	3	0.00	0.00	0.00	0.00

TABLE 5 – WWBT VIEWING IN BRIDGEWATER, VA

<u>Survey Year</u>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Feb. 2003/ Nov. 2003	5	0.00	0.00	0.00	0.00
Feb. 2004/ Nov. 2004	2	0.00	0.00	0.00	0.00

TABLE 6 – WWBT VIEWING IN DAYTON, VA

<u>Survey Year</u>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Feb. 2003/ Nov. 2003	2	0.00	0.00	0.00	0.00
Feb. 2004/ Nov. 2004	2	0.00	0.00	0.00	0.00

TABLE 7 – WWBT VIEWING IN TIMBERVILLE, VA

<u>Survey Year</u>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Feb. 2003/ Nov. 2003	4	0.00	0.00	0.00	0.00
Feb. 2004/ Nov. 2004	6	0.00	0.00	0.00	0.00

TABLE 8 – WWBT VIEWING IN UNIN. AREAS OF ROCKINGHAM COUNTY, VA

<u>Survey Year</u>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Feb. 2003/ Nov. 2003	10	0.00	0.00	0.00	0.00
Feb. 2004/ Nov. 2004	10	0.00	0.00	0.00	0.00

TABLE 9 – WWBT VIEWING IN MOUNT CRAWFORD, VA

<u>Survey Year</u>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Feb. 2003/ Nov. 2003	4	0.00	0.00	0.00	0.00
Feb. 2004/ Nov. 2004	1	0.00	0.00	0.00	0.00

TABLE 10 – WWBT VIEWING IN UNIN. AREAS OF MADISON COUNTY, VA

<u>Survey Year</u>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Feb. 2003/ Nov. 2003	1	0.00	0.00	0.00	0.00
Feb. 2004/ Nov. 2004	12	1.29	1.26	6.01	5.72

TABLE 11 – WRC-TV VIEWING IN UNIN. AREAS OF MADISON COUNTY, VA

<u>Survey Year</u>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Feb. 2003/ Nov. 2003	1	0.00	0.00	0.00	0.00
Feb. 2004/ Nov. 2004	12	2.64	2.75	4.33	4.49

WVIR-TV requests that the Commission grant its petition for reconsideration so that it can assert its exclusivity rights in the above-listed communities.³²

9. We find that, with the exception of three communities discussed below, WVIR-TV has made the requisite showing to support its petition. As required by the rules, WVIR-TV has provided community-specific survey results for each community for each year surveyed. WWBT and WRC-TV are network affiliates and, therefore, to demonstrate that they are no longer significantly viewed it must be shown that the reported audience statistics, plus one standard error is below the criteria used to establish significantly viewed status for a network station (*i.e.*, 3 percent share of total weekly viewing hours and a 25 percent net weekly circulation share).³³

10. For the unincorporated Areas of Albemarle County, the combined results obtained by Nielsen for the February 2003/November 2003 survey periods, indicate that WWBT attains a 5 percent share of total viewing hours (3.17 reported share + 1.83 standard error) and a 19.47 percent net weekly circulation share (13.66 reported share + 5.81 standard error). The combined results for the February 2004/November 2004 survey periods indicate that WWBT attains a 5.68 percent share of total viewing hours (2.80 reported share + 2.89 standard error) and a 6.26 percent net weekly circulation share (3.05 reported share + 3.21 standard error). For both survey years, WWBT exceeds the required 3 percent minimum for total viewing hours, but its net weekly circulation shares fall short of the required 25 percent minimum for network stations to be considered significantly viewed. The significantly viewed test requires that both the total viewing hours and the net weekly circulation shares must meet or exceed the minimum percentages required. As a result, we find that the data demonstrates that WWBT is no longer significantly viewed with respect to the unincorporated areas of Albemarle County, Virginia.

11. For the communities of Charlottesville, Harrisonburg, Broadway, Bridgewater, Dayton, Timberville, and the unincorporated areas of Rockingham County, the combined results obtained by Nielsen for both years indicate that for WWBT the shares of total viewing hours and net weekly circulation shares are zero. Because the submitted data represent the lack of viewing from a reasonable sample, we can conclude that WWBT attains approximately no viewing in the above-listed communities. Accordingly, we find that the submitted audience surveys are sufficient to show that WWBT no longer attains the viewing levels needed to demonstrate significantly viewed status in the communities of Charlottesville, Harrisonburg, Broadway, Bridgewater, Dayton, Timberville, and the unincorporated areas of Rockingham County, Virginia.

12. We do not find that WVIR-TV has made the requisite showing for WWBT for the community of Mount Crawford or for WWBT and WRC-TV for the unincorporated areas of Madison County. While the viewership numbers shown for each area would appear to be sufficient to demonstrate that WWBT and WRC-TV are no longer significantly viewed, the showings must be rejected because the sample used for WWBT for the February 2004/November 2004 survey period for Mount Crawford and the samples used for WWBT and WRC-TV for the February 2003/November 2003 survey periods for the unincorporated areas of Madison County include only one household each. Section 76.54(b) of the Commission's rules specifically requires that if "two surveys are taken, they shall include samples sufficient to assure that the combined surveys result in an average figure. . . ."³⁴ One household is

³²For these purposes, unincorporated county areas are treated as a community.

³³47 C.F.R. § 76.5(i).

³⁴47 C.F.R. § 76.54(b).

insufficient to estimate the average viewing in a surveyed community. At a minimum, two households would have to be sampled to calculate an average for the community in the survey year. In calculating average audience, a community-based survey differs from a system-wide survey where one household from a particular community would satisfy the requirements of the rules. We accept one in-tab household from a community in a system-wide showing because we are looking at the average viewing from the entire system and, in such a case, the reported audience statistic would be an average of the total number of sampled households from the multiple communities that constitute the cable communities served by the cable system in question. The data provided here satisfies only one year's survey requirement to demonstrate that a station is no longer significantly viewed. As a result, we cannot conclude that WWBT is no longer significantly viewed in Mount Crawford, Virginia, or that WWBT and WRC-TV are no longer significantly viewed in the unincorporated areas of Madison County, Virginia.

IV. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED**, that the petition for reconsideration filed by Virginia Broadcasting Corporation **IS GRANTED** with respect to the communities of Charlottesville, unincorporated areas of Albemarle County, Harrisonburg, Broadway, Bridgewater, Dayton, Timberville, and the unincorporated areas of Rockingham County, Virginia.

14. **IT IS FURTHER ORDERED**, that for the communities of Mount Crawford and the unincorporated areas of Madison County, Virginia, the petition **IS DENIED**.

15. This action is taken pursuant to authority delegated under Sections 0.283 and 1.106 of the Commission's rules.³⁵

FEDERAL COMMUNICATIONS COMMISSION

Rosemary C. Harold
Deputy Chief
Media Bureau

³⁵47 C.F.R. §§ 0.283 and 1.106.