

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

In the Matter of)
)
Barrington Bay City License LLC)
) CSR-7576-N
Petition For Waiver of Section 76.92(f) of the)
Commission's Rules)

MEMORANDUM OPINION AND ORDER

Adopted: October 23, 2008

Released: October 24, 2008

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Barrington Bay City License LLC, licensee of television broadcast station WBSF (CW), Bay City, Michigan ("WBSF"), filed the captioned petition seeking a waiver of the rule that precludes the deletion of programming of "significantly viewed" stations under the Commission's network nonduplication rules. No opposition to this petition has been received. For the reasons discussed below, we grant WBSF's waiver request.

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. Under Section 76.92(f) of the Commission's rules, however, a signal otherwise subject to deletion is exempt from application of the network nonduplication rules if it is "significantly viewed" in a relevant community (the "significantly viewed exception"). The significantly viewed exception to the exclusivity rules is based on it being established that an otherwise distant station 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. A similar exception is provided in the syndicated exclusivity rules.

147 C.F.R. § 76.92(f). Although not expressly requested in WBSF's petition for waiver of Section 76.92(f) (significantly viewed exception to cable network nonduplication), a waiver of Section 76.122(j) (significantly viewed exception to satellite network nonduplication) would also appertain based on the same showing that a station is no longer significantly viewed in the relevant community. See 47 C.F.R. §§ 76.92(f) and 76.122(j). See 47 U.S.C. §§ 340(a)(2) and 340(c).

2See 47 C.F.R. §76.92; 47 C.F.R. §76.101.

3 47 C.F.R. §76.92(f); see 47 C.F.R. §§76.5(i) and 76.54.

4 47 C.F.R. §76.106(a).

3. In order to obtain a waiver of Section 76.92(f), the Commission held in *KCST-TV, Inc.*⁵ 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). 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.⁶ For independent stations (*i.e.*, non-network stations), to be considered significantly viewed, Section 76.5(i) of the Commission's rules requires that the survey results should exceed a 2 percent share of total viewing hours and a net weekly circulation of 5 percent, by at least one standard error.⁷ The Commission has found that this type of test is applicable as well for waivers of the syndicated exclusivity exemption.⁸

4. Since the Commission's decision in *KCST-TV*, the methodology required by Section 76.54(b) of the rules for a petitioner seeking a waiver of 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."⁹ Over time, The Nielsen Company ("Nielsen") became the primary surveying organization through which a petitioner could obtain television surveys.¹⁰ 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.¹¹ 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.¹² 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

⁵103 FCC 2d 407 (1986).

⁶47 C.F.R. §76.5(i).

⁷ *Id.*

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

⁹47 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.

¹⁰Nielsen Media Research recently changed its name to The Nielsen Company. Previously, there was at least one independent research firm that conducted audience surveys for this purpose.

¹¹Although, 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.

¹²It should be noted that Nielsen identifies individual communities by zip codes, a process not incompatible with the surveying process discussed here.

community surveyed must be approximately the same as the percentage of the total population for each community served by the cable system.¹³ 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 in-tab diaries from its database from the area served by a cable system or an individual cable community.¹⁴ 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.¹⁵ 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.¹⁶ 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 oppositions. Finally, we note that the manner in which surveys based on sweep periods are averaged, remains the same as for weekly surveys.¹⁷ A petitioner may therefore 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.

¹³47 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.

¹⁴We 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. That way there is no 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.

¹⁵47 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.”

¹⁶*Id.*

¹⁷Section 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.”

5. WBSF seeks a waiver of the significantly viewed exception so that it may enforce its network nonduplication rights against television broadcast station WKBD (CW), Detroit, Michigan (“WKBD”) for the community of Flint, Michigan.¹⁸ WKBD is considered to be significantly viewed in Genesee County, Michigan, where the community of Flint is located.¹⁹

6. In support of its petition, WBSF states that it is licensed to a community in the Flint-Saginaw-Bay City, Michigan designated market area (“DMA”), while WKBD is licensed to a community located in the Detroit, Michigan DMA.²⁰ WBSF argues that it would normally be entitled to assert network nonduplication protection against WKBD in the community of Flint, but it cannot because WKBD is considered significantly viewed in Genesee County, where Flint is located.²¹ WBSF maintains, however, that WKBD no longer meets the significantly viewed standard in Flint and, as proof, it submits the results of two separate community-specific re-tabulations of Nielsen audience data based on noncable/non-ADS homes for the specified zip codes comprising the community of Flint.²² The submitted data are averages for two four-week audience sweep periods in each of two years.²³ The first year’s survey audience estimates were derived from November 2005 and February 2006 audience sweep data, combined, and the second year’s estimates from the November 2006 and February 2007 audience sweep data, combined.²⁴ These survey dates and the method used to combine audience surveys are consistent with the requirements set forth in Section 76.54(b) of the Commission’s rules.²⁵ KBSF states that WKBD’s share of total viewing hours in over-the-air homes in Flint falls far short of the required significantly viewed minimums, within one standard error, as shown in the table below:

¹⁸Petition at 1.

¹⁹*Id.* at 2.

²⁰*Id.*

²¹*Id.* WBSF states that WKBD 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 (1972).

²²*Id.* at Exhibit 1. Nielsen defines Alternative Delivery Source (“ADS”) to include the following technologies: satellite (C-Band), DBS (Ku-Band), SMATV (master antennae), and MMDS (includes multi-channel multi-point and multi-point distribution service). Thus, noncable/non-ADS homes are those that do not subscribe to an MVPD, and view the broadcast signal in question off-air. See The Nielsen Company at <http://www.nielsenmedia.com/nc/portal/site/Public/>.

²³Petition at 2.

²⁴*Id.*

²⁵47 C.F.R. § 76.54(b).

TABLE 1 – WKBD VIEWING IN FLINT, MI

<u>Survey Year</u> ²⁶	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Nov. 2005/ Feb. 2006	24	0.773	0.675	6.72	4.96
Nov. 2006/ Feb. 2007	32	0.853	0.620	6.32	4.49

As a result, WBSF requests that the Commission grant its petition so that it can assert its exclusivity rights in Flint, Michigan.

III. DISCUSSION

7. We find that WBSF made the requisite showing to support its petition. As required by the rules, WBSF has provided community-specific survey results for each year surveyed. For the first year, the submitted data show that for the November 2005/February 2006 audience sweep periods, combined, with the standard errors added, WKBD attains a 1.448 percent share of total weekly viewing hours (0.773 reported share + 0.675 standard error) and a 11.68 percent net weekly circulation share (6.72 reported share + 4.96 standard error). For the second year, the submitted data show that for the November 2006/February 2007 audience sweep periods, combined, WKBD attains a 1.473 percent share of total weekly viewing hours (0.853 reported share + 0.620 standard error) and a net weekly circulation share of 10.81 percent (6.32 reported share + 4.49 standard error). For significant viewing purposes, stations affiliated with the CW Network, such as WKBD, are considered independent stations and, as such, must exceed an average 2 percent share of total weekly viewing hours and an average 5 percent net weekly circulation share to be considered significantly viewed, as set forth in Section 76.5(i) of the Commission's rules.²⁷ For WKBD, both the November 2005/February 2006 and November 2006/February 2007 average shares of total viewing hours, with one standard error added, are below the 2 percent criterion. With respect to the average net weekly circulation shares, when standard errors are added, WKBD's average net weekly circulation shares for both years exceeds the 5 percent criteria. However, in order to demonstrate significantly viewed status, a station must exceed both the total weekly viewing share and the net weekly circulation share by one standard error. Because both conditions have not been satisfied, we can conclude that WKBD is no longer significantly viewed in Flint, Michigan. Accordingly, we find that the submitted audience surveys are sufficient to show that WKBD no longer attains the viewing levels needed to demonstrate significantly viewed status in the community of Flint, Michigan, and we grant WBSF's request.

²⁶The survey dates of July 2005, November 2005, July 2006, and November 2006 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.

²⁷47 C.F.R. § 76.5(i).

IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED**, that the petition filed by Barrington Bay City License LLC **IS GRANTED**.

9. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.²⁸

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Senior Deputy Chief, Policy Division
Media Bureau

²⁸47 C.F.R. §0.283.