

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

In the Matter of	)	
	)	
WBOC, Inc.	)	
	)	CSR-8003-N
Petition For Waiver of Sections 76.92(f) and	)	
76.106(a) of the Commission's Rules	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: February 13, 2009**

**Released: February 18, 2009**

By the Senior Deputy Chief, Policy Division Media Bureau:

**I. INTRODUCTION**

1. WBOC, Inc., licensee of station WBOC-TV (CBS/Fox), Salisbury, Maryland (“WBOC-TV”), filed the captioned petition seeking a waiver of the rules that preclude cable operators from deleting the duplicate programming of “significantly viewed” stations under the network nonduplication and syndicated exclusivity rules (“exclusivity rules”).<sup>1</sup> Specifically, WBOC-TV seeks a waiver of the significantly viewed exception so that it may enforce its exclusivity rights against stations WTTG (FOX), Washington, D.C., WBAL-TV (NBC), and WJZ-TV (CBS), Baltimore, Maryland in various communities in Maryland and Delaware.<sup>2</sup> No opposition to this petition has been received. For the reasons discussed below, we grant WBOC-TV’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.<sup>3</sup> 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”

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<sup>1</sup>47 C.F.R. §§ 76.92(f) and 76.106(a). Although not expressly requested in WBOC-TV’s petition for waiver of Sections 76.92(f) and 76.106(a) (significantly viewed exception to cable network nonduplication and syndicated exclusivity), a waiver of Sections 76.122(j) and 76.123(k) (significantly viewed exception to satellite network nonduplication and syndicated exclusivity) would also appertain to a waiver for carriage on DBS systems 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), 76.106(a), 76.122(j), and 76.123(k). *See* 47 U.S.C. §§ 340(a)(2) and 340(c).

<sup>2</sup>Petition at 1.

<sup>3</sup>*See* 47 C.F.R. §76.92; 47 C.F.R. §76.101.

in a relevant community (the “significantly viewed exception”).<sup>4</sup> 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.<sup>5</sup>

3. In order to obtain a waiver of Section 76.92(f), the Commission held in *KCST-TV, Inc.*<sup>6</sup> 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.<sup>7</sup> 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.<sup>8</sup> The Commission has found that this type of test is applicable as well for waivers of the syndicated exclusivity exemption.<sup>9</sup>

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.”<sup>10</sup> Over time, The Nielsen Company (“Nielsen”) became the primary surveying organization through which a petitioner could obtain television surveys.<sup>11</sup> 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.<sup>12</sup> Accordingly, a petitioner may submit the results from two sweep

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<sup>4</sup> 47 C.F.R. §76.92(f); *see* 47 C.F.R. §§76.5(i) and 76.54.

<sup>5</sup> 47 C.F.R. §76.106(a).

<sup>6</sup> 103 FCC 2d 407 (1986).

<sup>7</sup> 47 C.F.R. §76.5(i).

<sup>8</sup> *Id.*

<sup>9</sup> *See Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640 (1990).

<sup>10</sup> 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.

<sup>11</sup> Nielsen Media Research recently changed its name to The Nielsen Company.

<sup>12</sup> 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

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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.<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> A petitioner may therefore submit the average of the two sweep periods for each year. If, however, a petitioner submits more than two

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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.

<sup>13</sup>It should be noted that Nielsen identifies individual communities by zip codes, a process not incompatible with the surveying process discussed here.

<sup>14</sup>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.

<sup>15</sup>We 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.

<sup>16</sup>47 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.”

<sup>17</sup>*Id.*

<sup>18</sup>Section 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.”

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.

5. WBOC-TV seeks a waiver of the significantly viewed exception so that it may enforce its network nonduplication and syndicated exclusivity rights against television broadcast station WTTG for the communities of Georgetown and Seaford, Delaware (located in Sussex County, Delaware), and the unincorporated areas of Somerset County, Maryland.<sup>19</sup> For stations WBAL-TV and WJZ-TV, WBOC-TV is seeking a waiver relative to the communities of Delmar, Georgetown and Seaford, Delaware (located in Sussex County, Delaware), and Salisbury and the unincorporated areas of Wicomico County, Maryland.<sup>20</sup> WTTG is considered to be significantly viewed in Sussex County, Delaware, and Somerset County, Maryland, where the communities of Georgetown, Seaford, and unincorporated Somerset County areas are located.<sup>21</sup> WBAL-TV and WJZ-TV are considered to be significantly viewed in Sussex County, Delaware, and Wicomico County, Maryland, where the communities of Delmar, Georgetown, Seaford, Salisbury, and the unincorporated Wicomico County areas are located.<sup>22</sup>

6. WBOC-TV states that it is licensed to a community in the Salisbury, Maryland designated market area (“DMA”), while WTTG is licensed to the Washington, D.C. DMA, and WBAL-TV and WJZ-TV are licensed to communities in the Baltimore, Maryland DMA.<sup>23</sup> WBOC-TV argues that it would normally be entitled to assert exclusivity protection against WTTG, WBAL-TV and WJZ-TV in the referenced communities in the Salisbury DMA, but it cannot because WTTG, WBAL-TV and WJZ-TV are considered significantly viewed in Sussex County, Delaware, Somerset County, Maryland, and Wicomico County, Maryland, where the various communities are located.<sup>24</sup> WBOC-TV maintains, however, that WTTG, WBAL-TV and WJZ-TV no longer meet the significantly viewed standard in the subject communities and, as proof, it submits the results of special community-specific surveys conducted by The Nielsen Company.<sup>25</sup> WBOC-TV states that Nielsen conducted a special tabulation of over-the-air viewing using diaries from noncable/non-ADS homes for specified zip codes identified for each community.<sup>26</sup> For all the communities, except for Delmar, Delaware, the submitted data are averages of three four-week audience sweep periods in each of two years. For the community of Delmar, the submitted data are for two four-week survey periods in each of two years. The survey dates vary by

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<sup>19</sup>Petition at 2 n.4.

<sup>20</sup>*Id.*

<sup>21</sup>*Id.* at 2.

<sup>22</sup>*Id.*

<sup>23</sup>*Id.* at 1.

<sup>24</sup>*Id.* at 2. WBOC-TV states that WTTG, WBAL-TV and WJZ-TV achieved their 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).

<sup>25</sup>*Id.* at Attachment A.

<sup>26</sup>*Id.* Nielsen Media Research 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 Nielsen Media Research at <http://www.nielsenmedia.com/nc/portal/site/Public>.

station and community, but in each case the 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.<sup>27</sup> WBOC-TV states that for WTTG, WBAL-TV and WJZ-TV, the share of total viewing hours in over-the-air homes in all of the communities falls far short of the required significantly viewed minimums, within one standard error, as shown in the tables below:

**TABLE 1 – VIEWING IN GEORGETOWN, DE**

<u>Survey Year</u> <sup>28</sup>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
<u>WTTG</u>					
May 2006/ Nov. 2006/ Feb. 2007	3	0	0	0	0
May 2007/ Nov. 2007/ Feb. 2008	7	0	0	0	0
<u>WBAL-TV</u>					
May 2006/ Nov. 2006/ Feb. 2007	3	0	0	0	0
May 2007/ Nov. 2007/ Feb. 2008	7	0	0	0	0
<u>WJZ-TV</u>					
May 2006/ Nov. 2006/ Feb. 2007	3	0	0	0	0
May 2007/ Nov. 2007/ Feb. 2008	7	0	0	0	0

<sup>27</sup>47 C.F.R. § 76.54(b).

<sup>28</sup>All of the survey dates provided 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 2 – VIEWING IN SEAFORD, DE

<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>
<u>WTTG</u>					
July 2006/ Nov. 2006/ Feb. 2007	4	0	0	0	0
July 2007/ Nov. 2007/ Feb. 2008	5	0	0	0	0
<u>WBAL-TV</u>					
July 2006/ Nov. 2006/ Feb. 2007	4	0.516	0.485	25	0
July 2007/ Nov. 2007 Feb. 2008	5	0	0	0	0
<u>WJZ-TV</u>					
July 2006/ Nov. 2006/ Feb. 2007	4	0	0	0	0
July 2007/ Nov. 2007/ Feb. 2008	5	0	0	0	0

TABLE 3 – VIEWING IN UNINCORPORATED SOMERSET COUNTY, MD

<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>
<u>WTTG</u>					
May 2006/ Nov. 2006/ Feb. 2007	3	0	0	0	0
May 2007/ Nov. 2007/ Feb. 2008	7	0	0	0	0

TABLE 4 – VIEWING IN DELMAR, DE

<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>
<u>WBAL-TV</u> Feb. 2005/ May 2005	2 <sup>29</sup>	0	0	0	0
Feb. 2006/ May 2006	4	0	0	0	0
<u>WJZ-TV</u> Feb. 2005/ May 2005	2	0	0	0	0
Feb. 2006/ May 2006	4	0	0	0	0

TABLE 5 – VIEWING IN SALISBURY, MD

<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>
<u>WBAL-TV</u> May 2006/ Nov. 2006/ Feb. 2007	14	0	0	0	0
May 2007/ Nov. 2007/ Feb. 2008	23	0	0	0	0
<u>WJZ-TV</u> May 2006/ Nov. 2006/ Feb. 2007	14	0	0	0	0
May 2007/ Nov. 2007/ Feb. 2008	23	0	0	0	0

<sup>29</sup>The table included in the petition for WBAL-TV lists 3 in-tab households for Delmar for the Feb. 2005/May 2006 combined surveys. However, in Annex A to Attachment A, Nielsen lists only 2 households for the combined survey.

TABLE 6– VIEWING IN UNINCORPORATED WICOMICO COUNTY, MD

<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>
<u>WBAL-TV</u>					
May 2006/ Nov. 2006/ Feb. 2007	4	0	0	0	0
May 2007/ Nov. 2007/ Feb. 2008	5	0	0	0	0
<u>WJZ-TV</u>					
May 2006/ Nov. 2006/ Feb. 2007	4	0	0	0	0
May 2007/ Nov. 2007/ Feb. 2008	5	0	0	0	0

As a result, WBOC-TV requests that the Commission grant its petition so that it can assert its exclusivity rights in the communities of Georgetown, Seaford, and Delmar, Delaware, Salisbury, Maryland, and the unincorporated areas of Somerset County, Maryland and Wicomico County, Maryland.

### III. DISCUSSION

7. We find that WBOC-TV made the requisite showing to support its petition. As required by the rules, WBOC-TV has provided community-specific survey results for each community for each year surveyed. With the exception of the showing for Delmar, Delaware, and the showing for WBAL-TV in Seaford, Delaware, each of the reported average audience shares – the share of total viewing hours and net weekly circulation share – is zero based on three four-week survey periods from each of two years. As required, when more than two surveys are used for each survey year, WBOC-TV provides individual sweep period audience estimates and standard errors in order for us to ensure that the additional sweep periods do not alter the results, or skew them in any way.<sup>30</sup> In this case, Nielsen does not have in-tab households for the specified zip codes in all sweeps, thereby necessitating the use of more than two sweep periods in each year to demonstrate that one or more of these stations are no longer significantly viewed. Considering the combined four audience sweep averages, along with the individual sweep period results, we can conclude that WTTG attains approximately no viewing in Georgetown and Seaford, Delaware, and the unincorporated areas of Somerset County, Maryland; WBAL-TV attains approximately no viewing in Georgetown, Delaware, Salisbury, Maryland, and the unincorporated areas

<sup>30</sup>In its petition, WBOC-TV pointed out that the additional sweeps were added in the interest of achieving a robust number of in-tab households for the study. See Petition at 5 n.13; see also Attachment A, Annex A, showing in-tab households for the individual sweep periods.



of Wicomico County, Maryland; and WJZ-TV attains approximately no viewing in Georgetown and Seaford, Delaware, Salisbury, Maryland, and the unincorporated areas of Wicomico County, Maryland.

8. The showings for Delmar, Delaware are for two four-week survey periods in each of two years for WBAL-TV and WJZ-TV.<sup>31</sup> Each of the reported average audience shares – the share of total viewing hours and net weekly circulation share – is zero based on the two four-week survey periods from each of the two years. Because WBOC-TV provides the combined audience share for two consecutive sweep periods, it need not provide the audience shares for the separate sweep periods, and it does not. Based on the average audience share shown, WBOC-TV has demonstrated that WBAL-TV and WJZ-TV are no longer significantly viewed in Delmar, Delaware.

9. With regard to the showing for WBAL-TV in Seaford, Delaware, for the first year, the submitted data show that for the July 2006/November 2006/February 2007 audience sweep periods, combined, with the standard errors added, WBAL-TV attains a 1.001 percent share of total weekly viewing hours (0.516 reported share + 0.485 standard error) and a 25 percent average net weekly circulation share (25 reported share + 0 standard error). For a network station, such as WBAL-TV, to be considered significantly viewed, it must attain a 3 percent share of total weekly viewing hours and a 25 percent net weekly circulation share. In this case, for the first year, WBAL-TV does not meet the criterion for share of total weekly viewing hours and is exactly at the criterion for net weekly circulation share. However, since both criteria must be met, the combined audience share data shows that WBAL-TV is no longer significantly viewed in Seaford for the first survey year. It should be noted that since the combined survey for the first year included audience estimates for more than two sweep periods, WBOC-TV provides the results of the individual sweep periods.<sup>32</sup> There were no in-tab households for the November 2006 survey period, but this survey is clearly included to show that data were collected from Nielsen's database for consecutive survey periods. The February results show no audience. However, WBAL-TV attained measurable audience based on two in-tab households during the July 2006 audience sweep period. For this particular sweep period, Nielsen reports that WBAL-TV received a 1.899 share of total weekly viewing hours (1.191 reported share + 0.708 standard error) and a 50 percent share of net weekly circulation with no standard error. While these results seem a bit anomalous, given the small samples available, the share of total viewing hours is below the requirement for significantly viewed status. We therefore conclude that, during this survey period, WBAL-TV is no longer significantly viewed in Seaford, Delaware. For the second year, the submitted data show that for the July 2007/November 2007/February 2008 audience sweep periods, combined, WBAL-TV attains no measurable audience in any of the sweep periods. Thus, for the second survey year, the individual survey results support the claim that WBAL-TV is no longer significantly viewed in Seaford, Delaware.

10. Accordingly, we find that the submitted audience surveys are sufficient to show that WTTG no longer attains the viewing levels needed to demonstrate significantly viewed status in the communities of Georgetown and Seaford, Delaware, and the unincorporated areas of Somerset County, Maryland; and that WBAL-TV and WJZ-TV no longer attain the viewing levels needed to demonstrate significantly viewed status for the communities of Delmar, Georgetown and Seaford, Delaware, Salisbury, Maryland and the unincorporated areas of Wicomico County, Maryland and we grant WBOC-TV's request.

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<sup>31</sup>WBOC-TV did not include Delmar as one of the communities for which waiver was sought for WTTG.

<sup>32</sup>See Petition at Attachment A, Annex A, showing in-tab households and survey estimates for the individual sweep periods.

**IV. ORDERING CLAUSES**

11. Accordingly, **IT IS ORDERED**, that the petition filed by WBOC, Inc. **IS GRANTED**.

12. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.<sup>33</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert  
Deputy Chief, Policy Division  
Media Bureau

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<sup>33</sup>47 C.F.R. §0.283.