

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

In the Matter of	)	
	)	
WyoMedia Corporation	)	
	)	CSR-8371-N
Petition For Waiver of Sections 76.92(f) and	)	
76.106(a) of the Commission's Rules	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: March 9, 2011**

**Released: March 10, 2011**

By the Senior Deputy Chief, Policy Division Media Bureau:

**I. INTRODUCTION**

1. WyoMedia Corporation, licensee of television broadcast station KLWY(DT) (ABC), Cheyenne, Wyoming ("KLWY"), 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, KLWY seeks a waiver of the significantly viewed exception so that it may enforce its exclusivity rights against KMGH-TV (ABC), Denver, Colorado ("KMGH-TV") in the community of Cheyenne, Wyoming.<sup>2</sup> No opposition to this petition has been received. For the reasons discussed below, we grant KLWY'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 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 both the network nonduplication and syndicated exclusivity rules if it is "significantly viewed" in a relevant community (the "significantly

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<sup>1</sup>47 C.F.R. §§ 76.92(f) and 76.106(a). Although not expressly requested in KLWY'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.

viewed exception”).<sup>4</sup> The significantly viewed exception to the exclusivity rules is based on a demonstration 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. 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>11</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> 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.

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>12</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>13</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>14</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>15</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>16</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>17</sup> 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.

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

<sup>13</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>14</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 obtained from 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>15</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>16</sup>*Id.*

<sup>17</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.”

5. KLWY seeks a waiver of the significantly viewed exception so that it may enforce its network nonduplication and syndicated exclusivity rights against station KMGH-TV for the community of Cheyenne, Wyoming.<sup>18</sup> KMGH-TV is considered to be significantly viewed in Laramie County, Wyoming, where Cheyenne is located.<sup>19</sup>

6. KLWY states that it is licensed to a community in the Cheyenne-Scotts Bluff, Colorado designated market area (“DMA”), while KMGH-TV is licensed to Denver, Colorado, located in the Denver, Colorado DMA.<sup>20</sup> KLWY argues that it would normally be entitled to assert network nonduplication and syndicated exclusivity protection against KMGH-TV in Cheyenne, but it cannot because KMGH-TV is considered significantly viewed in Laramie County, Wyoming.<sup>21</sup> KLWY maintains, however, that KMGH-TV no longer meets the significantly viewed standard in Cheyenne and, as proof, it submits the results of special community-specific surveys conducted by The Nielsen Company.<sup>22</sup> KLWY states that Nielsen conducted a special tabulation of over-the-air viewing using diaries from noncable/non-ADS homes for specified zip codes comprising Cheyenne.<sup>23</sup> The submitted data are averages of two four-week audience sweep periods in each of two years. The first year’s audience estimates were derived from February 2007 and May 2007 audience sweep data, combined, and the second year’s estimates from the February 2008 and May 2008 audience sweep data, combined.<sup>24</sup> 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.<sup>25</sup> KLWY states that for KMGH-TV, the share of total viewing hours in over-the-air homes in Cheyenne is far short of the required significantly viewed minimums, within one standard error, as shown in the table below:

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<sup>18</sup>Petition at 1.

<sup>19</sup>*Id.*

<sup>20</sup>*Id.* at 2.

<sup>21</sup>*Id.* KLWY states that KMGH-TV 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).

<sup>22</sup>*Id.* at Exhibit A.

<sup>23</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>.

<sup>24</sup>*Id.*

<sup>25</sup>47 C.F.R. § 76.54(b).

TABLE 1 – VIEWING IN CHEYENNE, CO

<u>Survey Year</u> <sup>26</sup>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Feb. 2007	13	4.91	4.28	3.73	3.98
May 2007	9	0.00	0.00	0.00	0.00
Feb. 2008	11	0.00	0.00	0.00	0.00
May 2008	14	0.00	0.00	0.00	0.00

As a result, KLWY requests that the Commission grant its petition so that it can assert its exclusivity rights in Cheyenne, Colorado.

### III. DISCUSSION

7. We find that KLWY made the requisite showing to support its petition. As required by the rules, KLWY has provided community-specific survey results for the subject community for each year surveyed. For the February 2007 survey, the submitted data show that KMGH-TV receives an average 9.19 percent share of total viewing hours (4.91 reported share + 4.28 standard error) and a 7.35 percent net weekly circulation share (3.37 reported share + 3.98 standard error). For the remaining surveys for May 2007, February 2008, and May 2008, the submitted data show that KMGH-TV does not attain a measurable audience, either in terms of total weekly viewing hours or net weekly circulation share. In order for a network station, such as KMGH-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, as set forth in Section 76.5(i) of the Commission's rules.<sup>27</sup> With respect to the average total viewing hours share for the February 2007 survey, when the standard error is added, KMGH-TV's average total weekly viewing hours share exceeds the 3 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 for the February 2007 survey and KMGH-TV received no viewership totals for the three remaining surveys, we conclude that KMGH-TV is no longer significantly viewed in Cheyenne. Accordingly, we find that the submitted audience surveys are sufficient to show that KMGH-TV no longer attains the viewing levels needed to demonstrate significantly viewed status in Cheyenne, Wyoming, and we grant KLWY's request.

<sup>26</sup>The survey dates of May 2007, November 2007, May 2008 and November 2008 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.

<sup>27</sup>47 C.F.R. § 76.5(i).

**IV. ORDERING CLAUSES**

8. Accordingly, **IT IS ORDERED**, that the petition filed by WyoMedia Corporation **IS GRANTED**.

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

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert  
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<sup>28</sup>47 C.F.R. §0.283.