

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

In the Matter of)
Saga Quad States Communications, LLC)
Petition For Waiver of Sections 76.92(f) and)
76.106(a) of the Commission’s Rules) CSR-8527-N

MEMORANDUM OPINION AND ORDER

Adopted: November 27, 2012

Released: November 28, 2012

By the Senior Deputy Chief, Policy Division Media Bureau:

I. INTRODUCTION

1. Saga Quad States Communications, LLC, licensee of station KOAM-TV (CBS), Pittsburg, Kansas (“KOAM-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”).

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.

147 C.F.R. §§ 76.92(f) and 76.106(a). Although not expressly requested in KOAM-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.

2Petition at 1.

3See 47 C.F.R. § 76.92; 47 C.F.R. § 76.101.

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 viewed exception”).⁴ 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.⁵

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

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.”¹⁰ 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.¹¹ Accordingly, a petitioner may submit the results from two sweep

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

⁵ 47 C.F.R. § 76.106(a).

⁶ 103 FCC 2d 407 (1986).

⁷ 47 C.F.R. § 76.5(i).

⁸ *Id.*

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

¹⁰ 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.

¹¹ 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

(continued...)

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 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

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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.

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 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.

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.”

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. KOAM-TV seeks a waiver of the significantly viewed exception so that it may enforce its network nonduplication and syndicated exclusivity rights against station KCTV for the communities of Fort Scott, Kansas, and Nevada, Missouri; KOTV-DT for the communities of Miami and Commerce, Oklahoma; and KOLR for the community of Nevada, Missouri.¹⁸ KCTV is considered to be significantly viewed in Bourbon County, Kansas and Vernon County, Missouri; KOLR is considered to be significantly viewed in Vernon County, Missouri; and KOTV-DT is considered to be significantly viewed in Ottawa County, Oklahoma, where the communities at issue are located.¹⁹

6. KOAM-TV states that it is licensed to a community in the Joplin, Missouri – Pittsburg, Kansas designated market area (“DMA”), while KCTV, KOTV-DT, and KOLR are licensed to communities in the Kansas City, Missouri DMA, Tulsa, Oklahoma DMA, and the Springfield, Missouri DMA, respectively.²⁰ KOAM-TV argues that it would normally be entitled to assert network nonduplication and syndicated exclusivity protection against these stations in the subject communities, but it cannot because KCTV, KOTV-DT and KOLR are considered significantly viewed in the counties of Bourbon County, Kansas, Vernon County, Missouri and Ottawa County, Oklahoma.²¹ KOAM-TV maintains, however, that these stations 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.²² KOAM-TV states that Nielsen conducted a special tabulation of over-the-air viewing using diaries from noncable/non-ADS homes for specified zip codes comprising the communities.²³ 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 2010 and May 2010 audience sweep data, combined, and the second year’s estimates from the February 2011 and May 2011 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 KOAM-TV maintains that for KCTV, KOTV-DT and KOLR, the shares of total viewing hours in over-the-air homes in the subject communities are far short of the required significantly viewed minimums, within one standard error, as shown in the tables below:

¹⁸Petition at 1. KOAM-TV notes that Commission records indicate these communities are currently served by WK Communications, Inc., d/b/a Suddenlink; Cebridge Telecom, LLC; and Cable One, Inc.

¹⁹*Id.* at 2.

²⁰*Id.*

²¹*Id.* at 2 and 4. KOAM-TV states that KCTV, KOTV-DT and KOLR achieved their significantly viewed status by their 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.

²³*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>.

²⁴*Id.*

²⁵47 C.F.R. § 76.54(b).

TABLE 1 – KCTV VIEWING IN FORT SCOTT, KANSAS

<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>
Feb. 2010/ May 2010	4	0.00	0.00	0.00	0.00
Feb. 2011/ May 2011	1	0.00	0.00	0.00	0.00

TABLE 2 – KCTV VIEWING IN NEVADA, MISSOURI

<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. 2010/ May 2010	6	0.00	0.00	0.00	0.00
Feb. 2011/ May 2011	5	0.00	0.00	0.00	0.00

TABLE 3 – KOLR VIEWING IN NEVADA, MISSOURI²⁷

<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. 2010/ May 2010	6	0.52	0.56	8.08	9.18
Feb. 2011/ May 2011	5	0.00	0.00	0.00	0.00

²⁶The survey dates of February 2010, May 2010, February 2011 and May 2011 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. We note that, because of the impending digital transition in February 2009, Nielsen moved the usual February 2009 audience sweep period to March for that year. Given that the March 2009 audience sweep period was intended to be equivalent to the February 2009 one, we will accept this submission.

²⁷We note that the petitioner inadvertently transposed the station's call in its petition. See Petition at 7.

TABLE 4 – KOTV VIEWING IN MIAMI, OKLAHOMA

<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. 2010/ May 2010	4	0.00	0.00	0.00	0.00
Feb. 2011/ May 2011	7	2.38	2.52	3.81	4.33

TABLE 5 – KOTV VIEWING IN COMMERCE, OKLAHOMA

<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. 2010/ May 2010	1	0.00	0.00	0.00	0.00
Feb. 2011/ May 2011	1	0.00	0.00	0.00	0.00

As a result, KOAM-TV requests that the Commission grant its petition so that it can assert its exclusivity rights in Fort Scott, Kansas; Nevada, Missouri; and Miami and Commerce, Oklahoma.

III. DISCUSSION

7. We find that, in part, KOAM-TV made the requisite showing to support its petition. As required by the rules, KOAM-TV has provided community-specific survey results for the subject communities for each station for each year surveyed. For the community of Nevada, Missouri, the submitted data for both years indicates that KCTV has no measurable audience shares. Also for the community of Nevada, for the first year, the results show that KOLR attained a 1.08 percent share of total viewing hours (0.52 reported share + 0.56 standard error) and a 17.26 percent net weekly circulation share (8.08 reported share + 9.18 standard error). For the second year, the results indicate that KOLR received no measurable audience shares. For significant viewing purposes, network stations, such as KCTV and KOLR, must exceed an average 3 percent share of total viewing hours and an average 25 percent net weekly circulation share to be considered significantly viewed, as set forth in Section 76.5(i) of the Commission's rules.²⁸ When the standards errors are added, both stations fail to meet the criteria threshold. Accordingly, we find that the submitted audience surveys are sufficient to show that KCTV and KOLR no longer attain the viewing levels needed to demonstrate significantly viewed status in the community of Nevada, Missouri, and we grant KOAM-TV's request with regard to this community.

8. For the community of Miami, Oklahoma, the submitted data indicates that KOTV, for the first year, has no measurable audience shares. For the second year, the results indicate that KOTV received a 4.90 percent share of total viewing hours (2.38 reported share + 2.52 standard error) and a

²⁸See 47 C.F.R. § 76.5(i).

8.14 percent net weekly circulation share (3.81 + 4.33 standard error). Although KOTV's reported share of weekly viewing hours, plus one standard error, exceeds the criterion for a network station set forth in Section 76.5(i) of the Commission's rules (*i.e.*, a 3 percent share of total weekly viewing hours), a station must exceed both the total weekly viewing and net weekly circulation shares to be considered significantly viewed, which is not the case here. Accordingly, we find that KOLR has been shown to no longer be significantly viewed in the community of Miami, Oklahoma, and we grant KOAM-TV's request with regard to this community.

9. The showings for KCTV in Fort Scott, Kansas, and KOTV in Commerce, Oklahoma, however, do not meet the methodological requirements for demonstrating that a station is no longer significantly viewed, despite the fact that that reported results show no audience in each case. For KCTV, the reported audience in Fort Scott for the first year (February 2010/May 2010) and for KOTV in Commerce for both years (February 2010/May 2010 and February 2011/May 2011), are based on only one in-tab household. In each case, there were no in-tab households in at least one of the survey periods claimed to be used to calculate the average audience. The Commission has previously stated that "there is no requirement that a specific number of in-tab diaries be used to calculate the average audience in a specific community in each survey period."²⁹ The Commission has also emphasized that "the rules for a community-specific survey only require that each community be represented in each survey"³⁰ We allow petitioners to combine two survey periods – combining in-tab households and audience levels – and provide average audience statistics over the two periods to increase the sample size and the reliability of the estimates. Because we allow petitioners to combine surveys, the fact that an average cannot be calculated for an individual survey period (*i.e.*, one four-week sweep period) since its results are based on only one in-tab household does not invalidate a submission. However, if there are no in-tab households for one of the survey periods, then the process of combining surveys is contrary to our intent because the individual survey adds nothing, and the claimed average is solely the result of one survey period.³¹ Accordingly, the data reported by KOAM-TV for KCTV in Fort Scott, Kansas, and KOTV in Commerce, Oklahoma, is not acceptable for a showing of significantly viewed status.

10. For the above reasons, we find that a partial grant of a waiver of the significantly viewed exception from the network nonduplication and syndicated exclusivity rules with regard to the community-specific surveys for Nevada, Missouri, for KCTV and KOLR and for Miami, Oklahoma, for KCTV, will serve the public interest. With regard to the communities of Fort Scott, Kansas, and Commerce, Oklahoma, however, KOAM-TV's waiver request is denied.

²⁹See *Gulf-California Broadcasting Company*, 23 FCC Rcd 7406, 7411 (2008).

³⁰*Id.*; see also *Virginia Broadcasting Corporation*, 22 FCC Rcd 18109, 18117-18 (2007) (denying a request for waiver of the significantly viewed exception to the network nonduplication and syndicated exclusivity rules in communities for which the reported data for one survey year was based on one in-tab household, and thus could not be the average of the reported audience for two survey periods).

³¹See *MMK License LLC*, 20 FCC Rcd 11704, 11705 (2005) (petitioner submitted the separate sweep period data, although it was not required, and we disallowed the showing because for several survey periods there were no in-tab households).

IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED**, that the petition filed by Saga Quad States Communications, LLC **IS GRANTED** to the extent indicated above, and otherwise **DENIED**.

12. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.³²

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
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³²47 C.F.R. § 0.283.