

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

In the Matter of)	
)	
WTNH Broadcasting, Inc.)	
)	CSR-8283-N
Petition For Waiver of Sections 76.92(f) and)	
76.106(a) of the Commission's Rules)	

MEMORANDUM OPINION AND ORDER

Adopted: December 19, 2012

Released: December 20, 2012

By the Senior Deputy Chief, Policy Division Media Bureau:

I. INTRODUCTION

1. WTNH Broadcasting, Inc., licensee of television broadcast station WTNH-TV (ABC, Ch. 8), New Haven, Connecticut ("WTNH-TV"), filed the above 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").¹ Specifically, WTNH-TV seeks a waiver of the significantly viewed exception so that it may enforce its exclusivity rights against WABC-TV (ABC, Ch. 7), New York ("WABC-TV") in the communities of Meriden, Milford, Wallingford and Waterbury, Connecticut.² An opposition to this petition has been filed on behalf of American Broadcasting Companies, Inc., licensee of WABC-TV to which WTNH-TV replied. For the reasons discussed below, we grant, in part, WTNH-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.³ 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

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

²Petition at 1.

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

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 would be necessary to provide individual survey period results so that we could determine the effect of the third and

(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 the separate sweep data for each individual sweep period used. This ensures that the reported audience

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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.”

results data are not skewed by the choice of sweep periods.

5. WTNH-TV seeks a waiver of the significantly viewed exception so that it may enforce its network nonduplication and syndicated exclusivity rights against station WABC-TV for the communities of Meriden, Milford, Wallingford and Waterbury, Connecticut.¹⁸ WTNH-TV states that it is licensed to a community in the Hartford-New Haven, Connecticut designated market area (“DMA”), while WABC-TV is licensed to the New York, New York DMA.¹⁹ WTNH-TV argues that it would normally be entitled to assert network nonduplication and syndicated exclusivity protection against WABC-TV in the subject communities, but it cannot because WABC-TV is considered significantly viewed in New Haven County, Connecticut.²⁰ WTNH-TV maintains, however, that WABC-TV no longer meets the significantly viewed standard in Meriden, Milford, Wallingford and Waterbury and, as proof, it submits the results of special community-specific surveys conducted by The Nielsen Company.²¹ WTNH-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.²² The submitted data are averages of two four-week audience sweep periods in each of two years. For Meriden and Waterbury, the first year’s audience estimates were derived from November 2007 and May 2008 audience sweep data, combined, and the second year’s estimates from the November 2008 and May 2009 audience sweep data, combined.²³ For Milford, the first year’s audience estimates were derived from November 2006 and July 2007 audience sweep data, combined, and the second years from November 2007 and July 2008, combined.²⁴ For Wallingford, the first year’s audience estimates were derived from February 2007 and July 2007 audience sweep data, combined, and the second years from February 2008 and July 2008, combined.²⁵ 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.²⁶ WTNH-TV maintains that for WABC-TV, the share of total viewing hours in over-the-air homes in Meriden, Milford, Wallingford and Waterbury is far short of the required significantly viewed minimums, within one standard error, as shown in the tables below:

¹⁸Petition at 1. While WTNH-TV does not identify the cable operators serving these communities, Cox Communications serves Meriden; Cablevision service Milford; and Comcast serves Wallingford and Waterbury.

¹⁹*Id.* at 2.

²⁰*Id.* WTNH-TV states that WABC-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).

²¹*Id.* at Exhibit 1.

²²*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>.

²³*Id.*

²⁴*Id.*

²⁵*Id.*

²⁶47 C.F.R. § 76.54(b).

TABLE 1 – WABC-TV VIEWING IN MERIDEN, CT

<u>Survey Year</u> ²⁷	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Nov. 2007/ May 2008	7	0.00	0.00	0.00	0.00
Nov. 2008/ May 2009	8	0.00	0.00	0.00	0.00

TABLE 2 – WABC-TV VIEWING IN MILFORD, CT

<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>
Nov. 2006/ July 2007	2	0.00	0.00	0.00	0.00
Nov. 2007/ July 2008	2	0.00	0.00	0.00	0.00

TABLE 3 – WABC-TV VIEWING IN WALLINGFORD, CT

<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. 2007/ July 2007	2	0.00	0.00	0.00	0.00
Feb. 2008/ July 2008	2	0.00	0.00	0.00	0.00

²⁷The survey dates of November 2007, May 2008, November 2008 and May 2009 for Meriden and Waterbury; November 2006, July 2007, November 2007 and July 2008 for Milford; and February 2007, July 2007, February 2008 and July 2008 for Wallingford. All these dates 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 – WABC-TV VIEWING IN WATERBURY, CT

<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>
Nov. 2007/ May 2008	4	0.00	0.00	0.00	0.00
Nov. 2008/ May 2009	5	0.00	0.00	0.00	0.00

As a result, WTNH-TV requests that the Commission grant its petition so that it can assert its exclusivity rights in the subject communities.

6. In opposition, WABC-TV argues that WTNH-TV has failed to meet its burden of proof with regard to its contention that WABC-TV is not significantly viewed in the community of Milford, Connecticut.²⁸ WABC-TV states that WTNH-TV indicated in its petition that there were two in-tab households for Milford for the first year's audience data from the November 2006/July 2007 viewing period.²⁹ However, WABC-TV asserts that, based upon its review of this data, it appears that while there are two in-tab households for the November 2006 viewing period, there are no in-tab households for the July 2007 viewing period.³⁰ WABC-TV maintains that in *Gulf-California Broadcast Company*, the Commission stated where a petitioner elects to submit community-specific data to support a waiver of the significantly viewed exception, each community that is subject to the waiver request must be represented in each survey period for which data is submitted.³¹ WABC-TV argues that because there are no in-tab households for Milford for July 2007, WTNH-TV has not met the Commission's requirement that the community of Milford be represented in each survey.³²

7. In reply, WTNH-TV argues that WABC-TV's opposition is deficient and should not be considered.³³ WTNH-TV states that the re-tabulation of Nielsen data it submitted in support of its petition shows two in-tab households for the November 2006/July 2007 viewing period for Milford.³⁴ WTNH-TV points out that WABC-TV does not submit any Nielsen data itself or state the name or qualifications of the individual who apparently reviewed the data for Milford.³⁵ Such an unsupported

²⁸Opposition at 2.

²⁹*Id.* at 2-3.

³⁰*Id.* at 3.

³¹*Id.* at 2, citing 23 FCC Rcd 7406, 7411 (2008) ("rules for a community-specific survey . . . require that each community be represented in each survey.").

³²*Id.*, citing *MMK License LLC*, 20 FCC Rcd 11704, 11707 (2005) (denying request for waiver with respect to community of Horse Cave, Kentucky in part because petitioner submitted data for one survey period without any diaries).

³³Reply at 1.

³⁴*Id.*

³⁵*Id.* at 2.

assertion, maintains WTNH-TV, does not constitute a “detailed full showing, supported by affidavit, of any facts or considerations relied on,” as required by Section 76.7(b)(1) of the Commission’s rules.³⁶ Moreover, WTNH-TV argues that WABC-TV’s reliance on *Gulf-California* is misplaced.³⁷ WTNH-TV states that in *Gulf-California* the Commission specifically rejected WABC-TV’s argument, stating 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.”³⁸ In addition, *Gulf-California* relied on three sweeps periods and was therefore required to provide separate data for each sweeps periods and an average of all sweeps periods for each year.³⁹ In this case, WTNH-TV asserts that it has submitted the statistically valid average of two sweeps periods, as permitted by Commission precedent.⁴⁰ WTNH-TV maintains that there is no reason to believe that it is trying to skew the viewership results by avoiding survey periods. Indeed, it states that in Milford, as in all of the other three communities herein, WABC-TV had zero shares in all of the survey periods presented.⁴¹

III. DISCUSSION

8. We find that, for the communities of Meriden, Wallingford and Waterbury, WTNH-TV made the requisite showing to support its petition. As required by the rules, WTNH-TV has provided community-specific survey results for the subject community for each year surveyed. For all of these communities, the submitted data show that WABC-TV does not attain a measurable audience, either in terms of total weekly viewing hours or net weekly circulation share. Accordingly, we find that the submitted audience surveys are sufficient to show that WABC-TV no longer attains the viewing levels needed to demonstrate significantly viewed status in the communities of Meriden, Wallingford and Waterbury, Connecticut.

9. With regard to the community of Milford, WABC-TV raised a question with respect to the placement of the in-tab households for Milford for the first year’s survey, claiming that the two in-tab households from that year were from the November 2006 survey and none from the July 2007 survey. WTNH-TV argued that it meets the requirements and need not submit separate sweeps results, although doing so could resolve the question of the placement of the in-tab households for the surveys chosen. Our precedent makes clear that the rules for a community-specific survey require that each community be represented in each survey.⁴² Furthermore, we have held that one household is insufficient to estimate average viewing for a community in a community-based survey; at a minimum, two households must be sampled, at least one from each survey period, to calculate an average for a community.⁴³ We allow

³⁶*Id.*, citing 47 C.F.R. § 76.7(b)(1).

³⁷*Id.*

³⁸*Id.*, citing *Gulf-California Broadcast Company*, 23 FCC Rcd at 7411.

³⁹*Id.* The Commission found that the petitioner’s failure to provide the required separate data raised questions of whether the inclusion of additional sweeps periods had skewed the results. *Id.*

⁴⁰*Id.* at 3, citing *Virginia Broadcasting Corporation*, 22 FCC Rcd 18109, 18111 (2007); *WBOC, Inc.*, 24 FCC Rcd 1635, 1636 (2009).

⁴¹*Id.* WTNH-TV points that that WABC-TV’s reliance on *MMK License* is also misplaced because in that case the Commission denied the request not only because individual data for two sweeps periods, submitted without requirement by the petitioner, showed that there was no data for one of two sweeps periods, but more critically, that the other sweeps periods showing viewing far above the required threshold.

⁴²See *Gulf-California Broadcast Company*, 23 FCC Rcd at 7411.

⁴³See *Virginia Broadcasting Corporation*, 22 FCC Rcd at 18117-18.

petitioners to combine two survey periods and provide average audience statistics over the two periods because that increases the sample size and the reliability of the estimates. In this case, for the community of Milford, WTNH-TV used two in-tab households, a very small sample, but an average could have been calculated and the sample would have met the requirements of the rules, if at least one in-tab household was included for each survey period. However, we must reject the showing for Milford because there are no in-tab households for one of the survey periods, and the claimed average is solely the result of one survey period.⁴⁴ We note that for the second year survey data for Milford (November 2007/July 2008) and for both first and second year data for Wallingford (February 2007/July 2007; February 2008/July 2008) the reported results were also based on 2 in-tab households. The distinguishing difference in those results was that one in-tab household came from each survey period. Had WTNH submitted comparable results for the first year survey period for Milford, that reported result would have satisfied the minimum requirements of our rules. As it did not, we cannot conclude that WABC-TV is no longer significantly viewed in the community of Milford, Connecticut.

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED**, that the petition filed by WTNH-TV Broadcasting, Inc **IS GRANTED** for the communities of Meriden, Wallingford and Waterbury, Connecticut, but **IS DENIED** for the community of Milford, Connecticut.

11. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.⁴⁵

FEDERAL COMMUNICATIONS COMMISSION

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⁴⁴This is consistent with the decision in *MMK License* where the 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. See *MMK License*, 20 FCC Rcd at 11707.

⁴⁵47 C.F.R. §0.283.