

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

In the Matter of)	
)	
Neuhoff Family Limited Partnership)	
)	CSR-8609-N
Petition For Waiver of Section 76.92(f))	Docket No. 12-88
and 76.106(a) of the Commission's Rules)	

MEMORANDUM OPINION AND ORDER

Adopted: June 26, 2013

Released: June 26, 2013

By the Senior Deputy Chief, Policy Division Media Bureau:

I. INTRODUCTION

1. Neuhoff Family Limited Partnership (“NFLP”), licensee of station KMVT(TV), a CBS affiliate licensed to Twin Falls, Idaho (“KMVT”), filed the above captioned petition seeking a waiver of the network nonduplication and syndicated exclusivity rules (“exclusivity rules”) that preclude cable operators from deleting the duplicate programming of “significantly viewed” stations.¹ Specifically, KMVT wants to demonstrate that KIDK-TV, a CBS affiliate licensed to Idaho Falls, Idaho (“KIDK”) is no longer significantly viewed in certain Idaho communities in its market so that KMVT may enforce its exclusivity rights against KIDK in these communities.² No opposition to this petition has been filed. For the reasons discussed below, we deny KMVT’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 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

¹47 C.F.R. §§ 76.92(f) and 76.106(a). Although not expressly requested in KMVT’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. KMVT states that the communities at issue are Carey, Bellevue, Hailey and Ketchum in Blaine County, Paul, Heyburn and Rupert in Minidoka County, and Murtaugh, Oakley, Burley, Malta, Declo and Albion in Cassia County. See *id.*

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

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

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 network nonduplication and syndicated exclusivity rules because it has established that it is viewed over the air in the subject community.

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

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.”⁸ 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.⁹ 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.¹⁰ 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

⁵103 FCC 2d 407, 413 ¶ 11 (1986).

⁶See 47 C.F.R. §76.5(i) & 76.55(b).

⁷See *id.* The Commission has found that this type of test is applicable as well for waivers of the syndicated exclusivity exemption. See, *e.g.*, *Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640 (1990).

⁸47 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.

⁹Although, 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 ¶ 7 (CSB 2001) (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).

¹⁰It should be noted that Nielsen identifies individual communities by zip codes, a process not incompatible with the surveying process discussed here.

cable system.¹¹ 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.¹² 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.¹³ 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.¹⁴ 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.

III. DISCUSSION

5. KMVT seeks a waiver revoking KIDK's significantly viewed status that affords KIDK protection from KMVT's network nonduplication and syndicated exclusivity rights. As part of its waiver petition, KMVT argues KIDK is no longer significantly viewed in the Idaho communities of Carey, Bellevue, Hailey and Ketchum in Blaine County, Paul, Heyburn and Rupert in Minidoka County, and Murtaugh, Oakley, Burley, Malta, Declo and Albion in Cassia County.¹⁵ KMVT-TV states it is a CBS affiliate licensed to Twin Falls, Idaho which is in the Twin Falls DMA, while KIDK is a CBS affiliate licensed to the Idaho Falls-Pocatello DMA.¹⁶ It argues it would normally be entitled to assert network

¹¹47 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.

¹²We 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 ¶ 10 (1996); *Gulf-California Broadcast Company*, 21 FCC Rcd 3476, 3479-80 ¶ 8 (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.

¹³47 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." 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. *Id.*

¹⁴Section 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."

¹⁵Petition at 1.

¹⁶*Id.* at 2.

nonduplication and syndicated exclusivity protection against other CBS affiliates, such as KIDK, but because KIDK is considered significantly viewed, cable systems in these communities are not required to delete the CBS network and syndicated programming offered by KIDK.¹⁷

6. KMVT seeks to demonstrate that KIDK no longer meets the significantly viewed standard in the communities at issue.¹⁸ KMVT submitted special tabulations of The Nielsen Company data that measures over-the-air viewing using in-tab households from noncable/non-ADS homes for the zip codes comprising the communities at issue for July and November 2010 and July and November of 2011.¹⁹ The submitted data are averages of the two four-week audience sweep periods for each of these years.²⁰ KMVT maintains the data shows KIDK did not attain a share of at least three percent of total weekly viewing hours or a net weekly circulation of at least 25 percent among over-the-air households; in fact, KMVT argues, the data shows KIDK has no measurable share of total weekly viewing hours or net weekly circulation during any of these survey periods.²¹ KMVT summarizes its data as follows:

TABLE 1 – KIDK VIEWING IN BLAINE COUNTY²²

Survey Dates	Households Studied	Total Viewing Hours Share	Standard Error	NWC Share	Standard Error
July 10/Nov. 10	2	0.00	0.00	0.00	0.00
July 11/Nov. 11	4	0.00	0.00	0.00	0.00

TABLE 2 – KIDK VIEWING IN CASSIA COUNTY²³

Survey Dates	Households Studied	Total Viewing Hours Share	Standard Error	NWC Share	Standard Error
July 10/Nov. 10	16	0.00	0.00	0.00	0.00
July 11/Nov. 11	12	0.00	0.00	0.00	0.00

¹⁷Petition at 2. KIDK was included in the Commission’s 1972 list of significantly viewed signals. *See id.*

¹⁸*Id.* at 3.

¹⁹*Id.* 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* Nielsen Media Research at <http://www.nielsenmedia.com/nc/portal/site/Public>.

²⁰*Id.* at Exhibit A, Significant Viewing Studies for Minidoka, Cassia and Blaine Counties for 2010 and 2011.

²¹*Id.* at 3.

²² This table shows the re-tabulations of Nielsen data for Carey (zip code 83320), Bellevue (zip code 83313), Hailey (zip code 83333), and Ketchum (zip code 83340). *See* Petition at Exhibit A at 1.

²³ This table shows the re-tabulations of Nielsen data for Murtaugh (zip code 83344), Oakley (zip code 83346), Burley (zip code 83318), Malta (zip code 83342), Declo (zip code 83323), and Albion (zip code 83311). *See* Petition at Exhibit A at 1.

TABLE 3 – KIDK VIEWING IN MINIDOKA COUNTY²⁴

Survey Dates	Households Studied	Total Viewing Hours Share	Standard Error	NWC Share	Standard Error
July 10/Nov. 10	10	0.00	0.00	0.00	0.00
July 11/Nov. 11	9	0.00	0.00	0.00	0.00

Based on these reported results from Nielsen's re-tabulations of its survey data, KMVT requests that the Commission grant its petition and allow it to assert its exclusivity rights in the subject communities.

7. Based on our analysis of the data submitted, we deny KMVT's petition because its data does not meet the standard for demonstrating that KIDK is no longer significantly viewed in the communities at issue. As noted above, KMVT may demonstrate that KIDK no longer qualifies as a significantly viewed station through the use of community-specific (i.e., community-by-community) or system-specific over-the-air viewing data.²⁵ A community-specific approach requires that separate audience statistics be submitted for each of the communities of interest. For a system-specific approach, Section 76.5(b) states in part: "[i]f a cable television system serves more than one community, a single survey may be taken, provided that the sample includes over-the-air television homes from each community that are proportional to the population."²⁶ In other words, average survey results for the cable system can be submitted as long as in-tab households from all the cable communities comprising the entire cable system are included in the sample, and the sample households for each community are proportional to the population of that community as compared to the populations of all the communities served by that cable system, to ensure that the result is representative and weights communities according to their relative size.

8. In this case, KMVT did not provide audience survey results either on a community-by-community or system-specific basis. Instead it submitted data on a county basis, providing average audience statistics for each county incorporating audience survey data for certain zip codes representing communities in that county.²⁷ Because KMVT did not submit audience statistics for individual communities, it does not meet the requirements for a community-by-community survey. Alternatively, if KMVT's intention was to provide data on a system-specific basis, it failed to provide audience survey data for all communities comprising each cable system, and it failed to demonstrate that the in-tab household sample from each community served by each cable system was proportionally representative of the included communities based on population. The communities KMVT named in its petition represent some, but not all, of the communities served by several cable systems in the region, and some of these systems serve communities in multiple counties.

9. For example, KVMT wants to show that KIDK is no longer significantly viewed in Blaine County, which it describes as including the communities of Carey, Bellevue, Hailey and Ketchum,

²⁴ This table shows the re-tabulations of Nielsen data for Paul (zip code 83347), Heyburn (zip code 83336) and Rupert (zip code 83350). See Petition at Exhibit A at 1.

²⁵ See *supra* ¶ 3 & n.5 (citing *KCST-TV*, 103 FCC 2d at 412 ¶ 11).

²⁶ 47 C.F.R. § 76.54(b).

²⁷ Section 76.54(d) of the Commission's rules does allow new television broadcast stations that came on the air after 1972 to use county-wide independent professional audience survey data collected from three separate, consecutive four-week periods, to demonstrate their significant viewership, but only during the first three years of such new stations' operations. See 47 CFR § 76.54(d). Furthermore, such a county-wide showing can only be used to establish significantly viewed status, but it cannot be used to show that a station is no longer significantly viewed.

and for which it provides a collected block of viewing data.²⁸ According to the Commission's COALS database, the Blaine County communities of Bellevue, Hailey and Ketchum are part of a Coxcom, Inc. cable system (PSID 003758); however, our records indicate that this system also serves two additional Blaine County cable communities, Sun Valley (CUID ID0007) and Blaine (CUID ID0067) – which KMVT did not include in its submission for this county.²⁹ Thus, the submitted data for Blaine County neither includes all the communities in the county, nor could it constitute a system-specific survey, even if information regarding proportionality were included in the petition. In fact, under our rules, communities (whether or not they are in the same county) can only be combined if they are served by one system - and then, proportionality information is also needed; whereas here, KMVT provided information about a subset of the communities in the county.

10. With respect to Cassia County, a waiver is sought for the communities of Murtaugh, Oakley, Burley, Malta, Declo, and Albion,³⁰ and, for Minidoka County, KMVT seeks a waiver for Paul, Heyburn, and Rupert. Again, neither are these exhaustive or accurate lists of the communities in these respective counties, nor could KMVT average data from communities by county under our rules; however, the data KMVT provides also fail as system specific studies. In these counties, the COALS database identifies three active cable systems including: (1) a Cable One, Inc. cable system (PSID 006871); (2) a Project Mutual Telephone Cooperative Association Inc. cable system (PSID 016468); (3) and, in Cassia County only - a Telsat Systems Inc. cable system (PSID 019884).³¹ The Telesat System only serves the community of Albion (CUID ID0151), which would need to be reported as a separate system pursuant to the requirements of Section 76.54(b). The other two systems serve multiple communities in multiple counties, and due to the repeated community names in the COALS database, it is also not clear whether the petitioner's request covers one or both systems. The Cable One systems serve two cable communities in Cassia County included in KMVT's request, both named Burley (CUIDs ID0002 and ID0150) – and a number of other communities in other counties, including the Minidoka County cable communities of Paul (CUID ID0052), Heyburn (CUID ID0051), and Rupert (CUID ID0003) that are included in the petitioners' request.³² The Project Mutual system is listed as serving four cable communities: Burley (CUID ID0248), in Cassia County, and the three communities in Minidoka County – Paul (CUID ID0244), Heyburn (CUID ID0245), and Rupert (CUID ID0243). In these instances, a

²⁸ See *supra* n.2 & Table 1.

²⁹ See Federal Communications Commission, Cable Operations and Licensing System, COALS, <https://apps.fcc.gov/coals/forms/search/cableSearchNf.cfm>, (enter Blaine in the "County" field and ID in the "State" field and press execute) (last visited June 25, 2013) ("COALS database") Further, one of the communities for which KMVT sought a waiver in Blaine County – Carey – is not listed in the Commission's database as part of any Blaine County cable system. See *id.*

³⁰ Petition at 1. However, the COALS database does not list the communities of Murtaugh, Malta, and Declo as part of any cable system in Cassia County, while it does list several cable communities named Burley in Cassia County. See COALS database, <https://apps.fcc.gov/coals/forms/search/cableSearchNf.cfm>, (enter Cassia in the "County" field and ID in the "State" field and press execute) (last visited June 25, 2013). Furthermore, the Commission's COALS database indicates that a second Cable One system (PSID 011661), which served Oakley (CUID ID0192), is inactive, and therefore it is unclear whether it is appropriate to include this community in the request for waiver.

³¹ See See COALS database, <https://apps.fcc.gov/coals/forms/search/cableSearchNf.cfm> (Cassia County).

³² See *id.* The other cable communities served by this system, by county, are: Burley (CUID ID0077), Minidoka County; Gooding (CUID ID0023), Gooding (CUID ID0120), Wendell (CUID ID0082), Wendell (CUID ID0122), and Hagerman (CUID ID0142), Gooding County; Jerome (CUID ID0024) and Jerome (CUID ID0121), Jerome County; Filer (CUID ID0028), Kimberly (CUID ID0029), Twin Falls (CUID ID0030), Buhl (CUID ID0080), Hanson (CUID ID0086), and Twin Falls (CUID ID0087), Twin Falls County; and Shoshone (CUID ID0084), Lincoln County.

system-specific survey would require that the Nielsen data be combined, as appropriate, for the relevant cable systems and all the communities they serve, and reported with information regarding the distribution of the sample households among these communities to demonstrate that the proportionality requirement is met.

11. As this analysis indicates, KMVT has provided neither community-specific nor system-specific audience data sufficient to demonstrate that KIDK is no longer significantly viewed in the communities for which it requests a waiver. Thus, we reject the survey results submitted by KMVT because they do not meet the requirements of Section 76.54(b). Accordingly, the Neuhoff Family Limited Partnership request for a waiver of the significantly viewed exception to the network non-duplications and syndicated exclusivity rule with respect to KIDK, Idaho Falls, Idaho, is denied.³³

IV. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED**, that the petition filed by the Neuhoff Family Limited Partnership, licensee of station KMVT(TV), Twin Falls, Idaho is **DENIED**.

13. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.³⁴

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division
Media Bureau

³³ The Neuhoff Family Limited Partnership is free to file a new Petition that includes either community specific information or proportional system specific information in accordance with our rules and precedent. *See supra* ¶¶ 2-4.

³⁴47 C.F.R. §0.283.