

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

In the Matter of)
Saga Broadcasting, LLC)
Petition For Waiver of Sections 76.92(f) and) CSR-8524-N
76.106(a) of the Commission’s Rules)

MEMORANDUM OPINION AND ORDER

Adopted: December 13, 2013

Released: December 13, 2013

By the Senior Deputy Chief, Policy Division Media Bureau:

I. INTRODUCTION

1. Saga Broadcasting, LLC, licensee of television broadcast station WXVT (CBS), Greenville, Mississippi (“WXVT”), 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”).¹ Specifically, WXVT seeks a waiver of the significantly viewed exception so that it may enforce its exclusivity rights against television broadcast stations WJTV (CBS), Jackson, Mississippi (“WJTV”) and WREG-TV (CBS), Memphis, Tennessee (“WREG-TV”).² No opposition to this petition has been received. For the reasons discussed below, we grant in part WXVT’s waiver petition.

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

¹47 C.F.R. §§ 76.92(f) and 76.106(a). Although not expressly requested in WXVT’s petition for waiver of Sections 76.92(f) and 76.106(a) (significantly viewed exception to the cable network non-duplication and syndicated exclusivity rules), a waiver of Sections 76.122(j) and 76.123(k) (significantly viewed exception to the satellite network non-duplication and syndicated exclusivity rules) 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. 47 U.S.C. §§ 340(a)(2) and (c); 47 C.F.R. §§ 76.122(j), 76.123(k).

²Petition at 1.

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

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

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

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 *KCST-TV, Inc.*, 103 FCC 2d 407, 413 ¶ 11 (1986).

⁷ 47 C.F.R. §76.5(i). The Commission has found that this type of test is applicable as well for waivers of the syndicated exclusivity exemption. *See Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640, 5640-41 ¶ 6 (1990).

⁸ 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.

⁹ 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 ¶ 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 it could determine the effect of these sweeps periods).

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

community served by the 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 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.¹⁴ Finally, we note that the manner in which surveys based on sweep periods are averaged, remains the same as for weekly surveys.¹⁵ 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 to ensure the reported audience results data are not skewed by the choice of sweep periods.

III. DISCUSSION

5. WXVT seeks a waiver of stations WJTV and WREG-TV's significantly viewed status in Cleveland, Grenada, Greenwood, Indianola, Charleston and Greenville, Mississippi, so that it may enforce its exclusivity rights against these stations.¹⁶ WXVT states that it is licensed to a community in

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. See, e.g., *Radio Perry, Inc.*, 11 FCC Rcd 10564, 10568-9 ¶ 10 (CSB 1996); *Gulf-California Broadcast Company*, 21 FCC Rcd 3476, 3479-80 ¶ 8 (MB 2006). 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. 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."

¹⁴*Id.* 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.

¹⁵Section 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."

¹⁶Petition at 1. WJTV and WREG-TV are considered to be significantly viewed in the counties of Bolivar, Grenada, Leflore, Sunflower, Tallahatchie and Washington, Mississippi, where the communities at issue are located. See *id.* at 2. WXVT also notes that Commission records indicate these communities are served by Cable One, Inc. and Cebridge Acquisition, L.P. d/b/a Suddenlink. See *id.* at 1.

the Greenwood-Greenville, Mississippi designated market area (“DMA”), while WJTV is licensed to a community in the Jackson, Mississippi DMA and WREG-TV is licensed to a community in the Memphis, Tennessee DMA.¹⁷ WXVT 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 WJTV and WREG-TV are considered significantly viewed therein.¹⁸ WXVT maintains, however, that WJTV and WREG-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 Nielsen.¹⁹ WXVT states Nielsen conducted a special tabulation of over-the-air viewing using diaries from noncable/non-ADS homes for specified zip codes comprising the communities.²⁰ 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 and May 2010 audience sweep data, combined, and the second year’s estimates from the February and May 2011 audience sweep data.²¹ 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.²² WXVT maintains that for WJTV and WREG-TV, 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:

TABLE 1 – WREG-TV VIEWING IN CLEVELAND, MS

<u>Survey Year</u> ²³	<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	4	0.00	0.00	0.00	0.00

TABLE 2 – WREG-TV VIEWING IN GRENADA, MS

¹⁷*Id.* at 2.

¹⁸*Id.* at 2 & 4. WXVT states that WJTV and WREG-TV achieved their significantly viewed status by their inclusion in Appendix B to the *Reconsideration of the Cable Television Report and Order. Amendment of Part 74, Subpart K, of the Commission’s Rules and Regulations Relative to Community Antenna Television Systems*, Memorandum Opinion and Order on Reconsideration, 36 FCC 2d 326, App. B (1972).

¹⁹*Id.* at Exhibit 1.

²⁰*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>.

²¹*Id.*

²²47 C.F.R. § 76.54(b).

²³The survey dates of March 2009, May 2009, February 2010 and May 2010 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.

<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	3	0.00	0.00	0.00	0.00
Feb. 2011/ May 2011	6	0.00	0.00	0.00	0.00

TABLE 3 – WREG-TV VIEWING IN CHARLESTON, MS

<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	2	0.00	0.00	0.00	0.00
Feb. 2011/ May 2011	1	0.00	0.00	0.00	0.00

TABLE 4 – WJTV VIEWING IN GREENWOOD, MS

<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	7	0.00	0.00	0.00	0.00
Feb. 2011/ May 2011	9	0.00	0.00	0.00	0.00

TABLE 5 – WJTV VIEWING IN INDIANOLA, MS

<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	7	0.00	0.00	0.00	0.00

TABLE 6 – WJTV VIEWING IN GREENVILLE, MS

<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	10	0.00	0.00	0.00	0.00

As a result, WXVT requests that the Commission grant its petition so that it can assert its exclusivity rights in Cleveland, Grenada, Greenwood, Indianola, Charleston and Greenville, Mississippi.

6. We find that WXVT made the requisite showing to support its petition, in part. As required by the rules, WXVT has provided community-specific survey results for the subject communities for each station for each year surveyed. For the communities of Cleveland and Grenada, the submitted data for both years indicates that WREG-TV has no measurable audience shares. Similarly, for the community of Greenwood, the submitted data for both years indicates that WJTV has no measurable audience shares. For significant viewing purposes, network stations, such as WJTV and WREG-TV, must exceed an average 3 percent share of total viewing hours and an average 25 percent net weekly circulation to be considered significantly viewed, as set forth in Section 76.5(i) of the Commission's rules.²⁴ 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 WREG-TV no longer attains the viewing levels needed to demonstrate significantly viewed status in Cleveland and Grenada, Mississippi, and WJTV no longer attains the viewing levels needed to demonstrate significantly viewed status in Greenwood, Mississippi, and we grant WXVT's request with regard to these communities.

7. The showings for WREG-TV in Charleston, and WJTV in Indianola and Greenville, 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 WREG-TV, the reported audience in Charleston for the second year (February 2011/May 2011) is based on one in-tab household as is the audience for WJTV in Indianola for the first year (February 2010/May 2010). In each case, there were no in-tab households in 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."²⁵ The Commission has also emphasized that "the rules for a community-specific survey only require that each community be represented in each survey . . ."²⁶ 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

²⁴See 47 C.F.R. § 76.5(i).

²⁵See *Gulf-California Broadcasting Company*, 23 FCC Rcd 7406, 7411 ¶ 9 (MB 2008).

²⁶*Id.*

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.²⁷ Accordingly, the data reported by WXVT for WREG-TV in Charleston and WJTV in Indianola is not acceptable for a showing of significantly viewed status.

8. With regard to the showing for WJTV in Greenville, the audience reported in the petition is improperly derived from the results shown in the exhibit providing the Nielsen data. As shown in Exhibit 1, Nielsen separately reports audience for two zip codes, which appear to be the correct ones for designating Greenville.²⁸ For instance, for zip code 38701, Nielsen shows 2 in-tab households for the first year and 5 in-tab households for the second year. For zip code 38703, Nielsen also reports 2 in-tab households in the first year and 5 in-tab households for the second year. Nielsen reports no audience for either zip code or survey year.²⁹ In its petition, WXVT provides one set of data for Greenville, and it appears to have done so by combining the separate results for the two zip codes to create its chart showing 4 in-tab households for first year and 10 for the second year in Greenville with no reported audience.³⁰ Because all of the audience statistics in this case are zero, what WXVT presents in the petition is likely to be statistically accurate, but it is not appropriate for a petitioner to simply combine data provided by Nielsen. Had there been any audience reported, the petitioner could not accurately combine the data from two defined areas in this manner to produce a statistically reliable result since Nielsen's re-tabulations are based on sampling and weighting procedures that are not readily apparent from their reports. Accordingly, the data reported by WXVT for WJTV in Greenville is not acceptable for a showing of significantly viewed status.

9. We note further, that it is also not appropriate to accept the showing for Greenville, based on the fact that Nielsen provided separate results for the two zip codes that make up Greenville, when it should have provided data for one cable community comprised of both zip codes.³¹ Zip codes may be used by petitioners to identify cable communities for Nielsen to use to retrieve in-tab households from its databases to re-tabulate audience statistics for this purpose. We expect that the zip codes used for identifying communities for Nielsen match the area served by the cable community, or CUID, where a petitioner seeks significantly viewed status or a station is seeking a waiver of the significantly viewed exception. In many cases, this is simply another way of identifying an incorporated city, town, or other political jurisdiction in lieu of or in addition to stating its name. In some cases, however, the cable community may not have a standard community name, such as the case of unincorporated areas or

²⁷See *MMK License LLC*, 20 FCC Rcd 11704, 11707. ¶ 7 (MB 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); see also *Virginia Broadcasting Corporation*, 22 FCC Rcd 18109, 18117-18 ¶ 12 (MB 2007) (denying a request for waiver of the significantly viewed exception to the 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).

²⁸See <http://zip4.usps.com/zip4/citytown.jsp>. Of the five zip codes listed by the USPS for Greenville, it appears that the two zip codes used by Nielsen are the correct ones for this community. This website indicates that two others, 38702 and 38704, are post office boxes or other special cases. A fifth zip code – 38731, was identified with Chatham or Greenville, so it is reasonable to conclude that it may not coincide with the cable community at issue.

²⁹See Petition at Exhibit 1.

³⁰See *id.* at 7.

³¹If the two zip codes represented different CUIDs, separate reporting would be accurate. But, since WXVT combined the results, it appears to have sought consideration of Greenville as one community. In WXVT's Section 76.54(c) notice attached as Exh. 2 to its petition, Greenville is also listed as one community with two zip codes.

multiple CUIDs in a political jurisdiction. As we have stated in other cases, it is not necessary that there be in-tab households from each and every zip code used to identify the community (*i.e.*, not all zip codes assigned to a community must be included in the sample), once the list of relevant zip codes have been enumerated by the petitioner in its request for a re-tabulation of Nielsen's data. Therefore, in this situation, WXVT should have asked Nielsen to provide audience data for Greenville, Mississippi, which is comprised of zip codes 38701 and 38703. Nielsen then would have provided WXVT with one result for Greenville that would have been appropriate for this showing and one likely to show the same audience viewing levels. However, because the procedures followed herein are not consistent with the approach we have approved previously, it is not acceptable in this instance.

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 Cleveland, Grenada and Greenwood, Mississippi, will serve the public interest. With regard to the communities of Indianola, Charleston and Greenville, Mississippi, however, WXVT's waiver petition is denied.

IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED**, that the Petition filed by Saga Broadcasting, 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

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³²47 C.F.R. §0.283.