

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

In the Matter of
WHP Licensee, LLC
WHP-TV, Harrisburg, Pennsylvania
Petition for Waiver of Sections 76.92(f) and
76.106(a) of the Commission's Rules
CSR-8915-N
MB Docket No. 15-232

MEMORANDUM OPINION AND ORDER

Adopted: April 2, 2018

Released: April 2, 2018

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. WHP Licensee, LLC (WHP), licensee of television station WHP-TV (CBS and MyNetworkTV), Harrisburg, Pennsylvania, filed the above-captioned petition seeking a waiver of the significantly viewed exception to the network non-duplication and syndicated 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.

1 47 CFR §§ 76.92(f) and 76.106(a) (significantly viewed exception to the cable network non-duplication and syndicated exclusivity rules). The Petitioner does not seek the waiver for DBS carriage. We note that Petitioner did not specifically request a waiver of our syndicated exclusivity rule, but has requested only a waiver of our network non-duplication rule.

2 Petition at 1. WPHL-TV and KYW-TV are licensed in Philadelphia, Pennsylvania. Lancaster and Elizabethtown are both located in Lancaster County, Pennsylvania.

3 See 47 CFR § 76.92; 47 CFR § 76.101.

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 as demonstrated by the submission of viewership surveys. 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.⁵

3. 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 The Commission has found that this type of test is equally applicable for waivers of the syndicated exclusivity exemption.⁷ In order to obtain a waiver of the significantly viewed exception, the Commission held in *KCST-TV, Inc.*⁸ 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).

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.”⁹ 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 Cable Services Bureau (the predecessor to the Media Bureau) 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.¹⁰ 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.¹¹ If a petitioner is purchasing survey data

⁴ 47 CFR §§ 76.92(f); 76.122(j) (network non-duplication exception for cable and satellite carriers); *see* 47 CFR §§ 76.5(i) and 76.54.

⁵ 47 CFR §§ 76.106(a); 76.123(k) (significantly viewed exception for cable and satellite carriers).

⁶ 47 CFR § 76.5(i).

⁷ *See Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640, 5640-41 at para. 6 (1990).

⁸ 103 FCC 2d 407, 412 at para. 10 & n.9 (1986).

⁹ 47 CFR § 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. These surveys cannot be performed by the affected television station, cable system or satellite operator.

¹⁰ 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 periods in a year where more than two are submitted. *See WTNH Broadcasting, Inc. and K-W TV, Inc.*, 16 FCC Rcd 6781, 6784 at para. 7 (CSB 2001), where the Cable Services 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.

¹¹ 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. 47 CFR § 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

(continued...)

on a system-specific basis where two or more communities are involved, the proportion of diaries from each community surveyed must be approximately the same as the proportion of the population for each community served by the cable system.¹² 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.¹³ 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.¹⁵ This ensures that the reported audience results data are not skewed by the choice of sweep periods.

III. DISCUSSION

5. We find that WHP-TV is entitled to exercise network non-duplication and syndicated exclusivity rights against WPHL-TV and KYW-TV in the Communities. KYW-TV and WPHL-TV are both currently considered significantly viewed in Lancaster County. Accordingly, for WHP to enforce its network nonduplication and syndicated exclusivity rights in the Communities, it must demonstrate that the stations are no longer significantly viewed there. We find that it has made this showing.

6. In support of its request for waiver of the significantly viewed exception to the network nonduplication and syndicated exclusivity rules, WHP submits surveys that were conducted by Nielsen of over-the-air broadcast television homes in the Communities.¹⁶ Both WHP's Petition and Reply Comments

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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.* 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.

¹² 47 CFR § 76.54(b). Proportionality based on population ensures 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.

¹³ We expect petitioners who commission such data to include, along with the survey data itself, a description of the procedures used to re-tabulate the data, which data base it is using, what communities (or zip codes) are covered, the station(s) surveyed, and time periods covered. *See e.g., Radio Perry, Inc.*, 11 FCC Rcd 10564, 10568-9 at para. 10 (CSB 1996); *Gulf-California Broadcast Company*, 21 FCC Rcd 3476, 3479-80 at para 8 (MB 2006).

¹⁴ Section 76.54(b) states that "[i]f two surveys are taken, they shall include samples sufficient to assure that the combined surveys result in an average calculation 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." 47 CFR § 76.54(b).

¹⁵ *Id.*

¹⁶ *See* Petition, Exhibit A. ABC notes in its Comments that the data for KYW-TV did not cover zip code 17611 in Lancaster and requested that WHP address that omission. ABC Comments at 3. WHP responded that the zip code 17611 was accidentally omitted from the purchase order submitted to Nielsen. Reply Comments at 2. WHP states that it has since obtained from Nielsen data for all four Lancaster, Pennsylvania zip codes and has included the revised data in its Reply Comments. *Id.*, Exhibit A. WHP maintains, and we agree, that the inclusion of zip code 17611 does not affect the data originally submitted by WHP because there were zero in-tabs (homes sampled) for that zip code. *Id.*

include community-specific surveys conducted by Nielsen.¹⁷ These surveys comport with the survey methodology as specified in Section 76.54(b) of the Commission's rules.¹⁸ The data demonstrate the significantly viewed status of KYW-TV and WPHL-TV over two consecutive years and the results are based on community-specific over-the-air viewing data to one standard error.¹⁹ The data cover all the zip codes of the relevant communities. The Nielsen data also satisfy the requirement of two one-week surveys per year separated by at least 30 days, and conducted by an independent audience survey firm. The submitted data are the combined averages for the two separate weekly samples in each of two years.

7. The data include estimated audience shares for KYW-TV and WPHL-TV by community and survey year. The following table shows the number of homes sampled to derive the audience estimates, the total viewing hours, and standard errors.²⁰ A waiver requires the petitioner to show that the station's average audience share is below a threshold viewing level plus one standard error.²¹ For network stations to be considered significantly viewed,²² survey results should exceed both a three percent share of total viewing hours and a net weekly circulation of 25 percent, by at least one standard error.²³ For independent stations to be considered significantly viewed, the Commission's rules requires the survey results to exceed a two percent share of total viewing hours and a net weekly circulation of five percent, by at least one standard error.²⁴ The sample results show that KYW-TV and WPHL-TV produced no measurable audience during any of the survey periods.²⁵ Thus, neither station meets the significantly viewed standard.

Viewing Audience Estimates KYW-TV and WPHL-TV
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¹⁷ Petition, Exhibit A; Reply Comments, Exhibit A.

¹⁸ See 47 CFR §76.54(b).

¹⁹ See Petition at 2-3, Exhibit A; Reply Comments at 2, Exhibit A.

²⁰ See Reply Comments, Exhibit A.

²¹ See 47 CFR §76.5(i).

²² To determine whether to use the network or non-network standard for audience share, the Commission relies on the definition of network and independent station in our rules. Affiliates of the ABC, CBS, and NBC networks are "network stations." See 47 CFR §76.5(j) and (k). Other stations are treated as independent stations for this limited purpose. See 47 CFR §76.5(l).

²³ See 47 CFR §76.5(i).

²⁴ *Id.*

²⁵ See Petition at 3, Exhibit A; Reply Comments at 2, Exhibit A.

Station and Community	Survey Year	Number of Households Surveyed	Total Viewing Hours		Net Weekly Circulation	
			Share	Standard Error	Share	Standard Error
KYW-TV						
Lancaster	2012	14	0.00	0.00	0.00	0.00
	2013	8	0.00	0.00	0.00	0.00
Elizabethtown	2012	6	0.00	0.00	0.00	0.00
	2013	7	0.00	0.00	0.00	0.00
WPHL-TV						
Lancaster	2012	14	0.00	0.00	0.00	0.00
	2013	8	0.00	0.00	0.00	0.00
Elizabethtown	2012	6	0.00	0.00	0.00	0.00
	2013	7	0.00	0.00	0.00	0.00

8. We find that WHP has demonstrated that WPHL-TV and KYW-TV had no measurable audience during any of the survey periods and the stations no longer satisfy the significantly viewed standard in Lancaster and Elizabethtown, Pennsylvania. Accordingly, we grant WHP's request for a waiver of the significantly viewed exception to the network nonduplication and syndicated exclusivity rules regarding WPHL-TV and KYW-TV in the cable communities of Lancaster and Elizabethtown, Pennsylvania.

IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED**, pursuant to Sections 76.92(f) and 76.106(a) of the Commission's rules, 47 CFR §§ 76.92(f) and 76.106(a), that the captioned petition filed by WHP Licensee, LLC **IS GRANTED**.

10. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's Rules.²⁶

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker
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Media Bureau

²⁶ 47 CFR § 0.283.