

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

In the Matter of)	
)	
United Communications Corporation)	CSR-8939-N
WWNY-TV, Carthage, New York)	MB Docket No. 17-224
)	
Petition for Waiver of Sections 76.92(f) and)	
76.106(a) of the Commission’s Rules)	

MEMORANDUM OPINION AND ORDER

Adopted: August 7, 2018

Released: August 7, 2018

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

I. INTRODUCTION

1. United Communications Corporation (United or Petitioner), licensee of television station WWNY-TV (CBS), Carthage, New York, filed the above-captioned petition¹ seeking a waiver of the significantly viewed exception to the network non-duplication and syndicated exclusivity rules.² WWNY-TV seeks this waiver in order to exercise its network non-duplication and syndicated exclusivity rights against WTVH (CBS), Syracuse, New York³ as it “relates in 41 community units” in Jefferson County, New York (Communities).⁴ The Petition is unopposed. For the reasons discussed below, we grant in part and deny in part United’s Petition.

II. BACKGROUND

2. If a local television station has exclusive rights to distribute a network or syndicated program under our rules, cable operators generally are precluded from carrying a duplicating program broadcast by a distant station.⁵ However, the Commission’s rules also provide that a signal that otherwise

¹ See *United Communications Corporation for Waiver of Sections 76.92(f) and 76.106(a) of the Commission’s Rules for WWNY-TV, Carthage, New York, Facility ID No. 68851*, Petition for Special Relief, MB Docket No. 17-224 (filed August 10, 2017) (Petition). The Media Bureau placed the Petition on public notice and sought comment. *Special Relief and Show Cause Petitions*, Pubic Notice, Report No. 0457 (MB August 31, 2017) (*Public Notice*).

² 47 CFR §§ 76.92(f) and 76.106(a) (significantly viewed exception to the cable network non-duplication and syndicated exclusivity rules). The Petitioner states that the same operative facts also apply to a waiver of 47 CFR §§ 122(j) and 123(k) relating to carriage on satellite systems serving subscribers in Jefferson County. Petition at n.1. Petitioner is therefore seeking special relief for WWNY-TV for both cable and satellite carriage.

³ WTVH is listed on the Commission’s website as significantly viewed in Jefferson County, New York. FCC Media Bureau, Documents, Reports, and Surveys, Official Documents, *Significantly Viewed List*.

⁴ Petition at 1. United names only 36 Communities in seeking a waiver of our rules. United refers to these 36 Communities in its discussion of annotations to the Commission’s Significantly Viewed List. *Id.* at 34. Because we grant United’s Petition only as to the community of Watertown, we need not resolve this discrepancy.

⁵ See 47 CFR § 76.92; 47 CFR § 76.101.

would be considered “distant” is exempt from application of both the network non-duplication and syndicated exclusivity rules, and therefore may be carried by cable operators, if it is “significantly viewed” in the relevant community.⁶ 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 the requisite viewership level is met, the station is no longer considered distant for purposes of the exclusivity rules because it has established that it is viewed over-the-air in the subject community.⁷

3. Stations may seek to reinstate their exclusivity rights vis-à-vis a significantly viewed station by seeking a waiver of the significantly viewed exception.⁸ That is what United seeks to do in this case with respect to WWNY-TV. In order to obtain a waiver, a petitioner must submit viewership surveys showing that an otherwise distant station does not meet the definition of “significantly viewed” under our rules. Section 76.5(i) defines a network station as significantly viewed if over-the-air viewership surveys demonstrate that it exceeds a three percent share of total viewing hours and a net weekly circulation of 25 percent, by at least one standard error.⁹ In *KCST-TV, Inc.*,¹⁰ the Commission held that waiver applicants 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) to establish significant viewership.¹¹

4. 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.”¹² Over time, The Nielsen Company (Nielsen) became the primary organization selling television viewership 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”). 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

⁶ 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.

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

⁸ The Commission has found that the definition of “significantly viewed” in Section 76.5(i) is equally applicable for waivers of the syndicated exclusivity exemption. *See Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640, 5640-41 at para. 6 (1990).

⁹ 47 CFR § 76.5(i).

¹⁰ *KCST-TV, Inc.*, 103 FCC 2d 407, 412 at para. 10 & n.9 (1986).

¹¹ 47 CFR § 76.54(b).

¹² 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.

increased sample size.¹³ Accordingly, a petitioner seeking to show that a station is no longer significantly viewed may submit the results from two sweep periods in each year and may purchase survey data from Nielsen on either a community-specific or system-specific basis.¹⁴ 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.¹⁵ Finally, we note that the manner in which surveys based on sweep periods are averaged, remains the same as for weekly surveys.¹⁶ 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.¹⁷ This ensures that the reported audience results data are not skewed by the choice of sweep periods.

5. In its waiver request, United claims that WWNY-TV should be permitted to exercise program exclusivity rights vis-à-vis distant station WTVH in the Communities because WTVH should no longer be considered “significantly viewed” in Jefferson County.¹⁸ It submits certain Nielsen viewership data with its Petition. However, with the exception of data for Watertown, NY, United acknowledges that it does not have the specific viewership data for WTVH required under our rules to obtain a significantly viewed waiver. It maintains that such viewership data should not be required in a case such as this, where available predicted signal strength information demonstrates that the station is not viewable over-the-air in the relevant communities.

6. United argues that if a television station such as WTVH is listed as a significantly viewed station in a particular community, that listing should be grounded in two considerations: viewability (*i.e.*, “that the over-the-air signal of the station is viewable in that community”), and viewership (“a factual

¹³ 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) (concluding that, if a petitioner were to submit both May and July data, it would be necessary to provide individual survey period results so that we could determine the effect of the third and fourth sweep periods). If a petitioner is purchasing survey data 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. 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.

¹⁴ 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).

¹⁵ 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).

¹⁶ 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).

¹⁷ *Id.*

¹⁸ Petition at 1. As United notes, “signals that are significantly viewed in a county . . . are deemed to be significantly viewed within all communities in the county.” *Id.* at n.2; 47 CFR § 76.54(a).

finding that a significant proportion of local residents regularly watch the station's programming").¹⁹ United contends that in the vast majority of significantly viewed cases, the viewability of the distant station's signal is not an issue²⁰ and the only issue for resolution is the popularity of the programming and, as such, "analyses in waiver petitions are usually confined to the targeted station's viewership in a particular community."²¹ United claims that this case is unusual because WTVH's signal is not viewable over-the-air in most of the Communities, except those along the southern edge of Jefferson County.²² United argues that, "[i]f a station's signal is *not* viewable in a community, the station *a fortiori* cannot have viewership there."²³ United states that, in that event, Nielsen viewership data should show that the station garnered zero viewership.²⁴ In the present case, United states that this is exactly what the Nielsen study showed for Watertown (zip code 13601), the largest of the Communities, where the signal of WTVH is not viewable over-the-air.

7. For most of the other Communities, United states that WTVH's signal is also not viewable over-the-air and those cases also reflect universal zero viewership in the Nielsen studies. However, United reports that it does not have regular Nielsen diaries for the other Communities (*i.e.*, Nielsen does not regularly receive viewership diaries in consecutive years for these communities). With respect to these Communities, United argues that "[i]f a signal is not actually viewable in a community, the existence of zero-viewership data in each of four Nielsen reporting periods is not needed in order to confirm that empirical fact."²⁵ United therefore argues that where Nielsen survey data reflect zero viewership, and where the rate at which diaries are returned is inconsistent, the over-the-air viewability of a station, such as WTVH, must be taken directly into consideration by evaluating available predicted signal strength information.²⁶

III. DISCUSSION

8. We find that United has demonstrated that WTVH had no measurable audience during any of the survey periods and the station no longer satisfies the significantly viewed standard in Watertown,

¹⁹ *Id.* at (i), 1-2. We note that no page numbers appear on the pages of United's Petition. Accordingly, we will denote its Summary page as (i) and the body of the Petition will start with page 1.

²⁰ As United notes, the Commission has held for many years that the signals of stations that are considered to be significantly viewed are, in general, considered to be viewable over-the-air in the relevant counties and communities. *Id.* at 3. See *Network Program Exclusivity Protection by Cable Television Systems*, Petitions for Reconsideration, 68 FCC 2d 1461, 1468 at para. 20 (1978) ("We do not believe there is any serious dispute that, with few exceptions, the signals in question are available over-the-air to individuals with rooftop antennas."); see also *Desert Empire Television Corp.*, 86 FCC 2d 644, 648-649 at para. 10 (1981). Petition at 3 and n.5.

²¹ Petition at (i), 3.

²² *Id.* United argues that the key determinant of viewability is signal strength. United provides a "Viewability Analysis" of WTVH in Jefferson County Zip Code Communities utilizing the Commission's DTV Reception Tool and the Signal Analysis Tool, an independent website broadcast signal strength analysis application. *Id.* at 17-28; see http://www.tvfool.com/?option=com_wrapper&itemid=29.

²³ *Id.* at 3 (emphasis in original).

²⁴ *Id.* United asserts that zero viewership can also manifest where a station is viewable in a community, but nobody watches it. For purposes of its Petition, however, United states that such a scenario is not relevant here. According to United, "[t]he point is that, *if it were the case that a distant signal was not viewable*, Nielsen studies should reveal this in the form of statistics indicating zero viewership, provided that Nielsen distributes enough diaries in non-cable, non-ADS [*i.e.*, over-the-air] homes in each subject community." *Id.* at n.7 (emphasis in original).

²⁵ *Id.* at 4.

²⁶ *Id.* at 5. United asserts that in "66 percent of the Communities, the signal strength of WTVH is -100 dBm or worse" and in "83 percent of the communities, the signal strength is -90 dBm or worse." United argues that "[t]hese signal strength values are decisional" and "[w]here they obtain, WTVH cannot be classified as significantly viewed." *Id.* at 6.

NY (Zip Code 13601). Accordingly, we grant WWNY-TV's request for a waiver of the significantly viewed exception to the network nonduplication and syndicated exclusivity rules regarding WTVH in Watertown, NY (Zip Code 13601) and deny the request for the remainder of the named Communities.

9. As required under Section 76.54(b), the Petition includes a study of over-the-air viewing of WTVH in Watertown. The study was conducted by the Nielsen Company and is based on four television audience surveys taken in February and November of 2014 and February and May of 2015.²⁷ The Nielsen study submitted by United with respect to Watertown comports with the provisions of Section 76.54(b), which require at least two surveys per year separated by at least 30 days in each of two consecutive years, conducted by an independent audience survey firm, on a community-specific basis. Nielsen describes the survey data as re-tabulations of data collected in surveys of the Watertown DMA on a zip code basis.²⁸ Data are reported by survey for the zip codes identified as comprising the community areas where waiver is sought.²⁹

10. The estimates of viewing levels presented in the Petition represent the averages of the two audience surveys for each year, and results are estimated to one standard error. Grant of a waiver depends on the study demonstrating that WTVH was not significantly viewed using the standards in Section 76.5(i) of the Commission's rules.³⁰ As a network station, WTVH (CBS) is subject to the network station viewing standards, which require that survey results must show a share of total viewing hours of at least 3 percent minus one standard error, and net weekly circulation of at least 25 percent minus one standard error, in each of two consecutive years.³¹

11. The table below shows the survey results for the Watertown community.³² Each survey (and thus the combined results of the two surveys in each year) showed no viewing of station WTVH. Therefore, the Nielsen study demonstrates that WTVH does not meet the viewing thresholds necessary to be considered significantly viewed in the community of Watertown.

WTVH Viewing in Watertown (Zip Code 13601)						
Survey Year	Survey Periods	Homes Sampled	Total Viewing Hours Share	Standard Error	Net Weekly Circulation	Standard Error
2014	February	5	0.00	0.00	0.00	0.00
2014	November	4	0.00	0.00	0.00	0.00
2015	February	5	0.00	0.00	0.00	0.00
2015	May	9	0.00	0.00	0.00	0.00

12. With respect to the remaining Communities, United requests that we undertake a novel

²⁷ *Id.* at Exhibit 1 (Nielsen description of the survey methodology and reports of survey data).

²⁸ *Id.*

²⁹ *Id.* Communities were matched to zip codes using a zip code generator on the United States Postal Service (USPS) website. USPS, <http://www.unitedstateszipcodes.org>. Petition at n.50. These matches were verified using maps on Jefferson County's website. Jefferson County, New York, Departments and Services, Town and Village Overview Maps. <http://www.co.jefferson.ny.us/index.aspx?page=369>. *Id.* Community and zip code associations are made in the Petition in Table 6 at 32-34.

³⁰ 47 CFR § 76.5(i) (Viewership requirements for network stations).

³¹ *Id.*; 47 CFR § 76.54(b); *KCST-TV, Inc.*, 103 FCC 2d at 412, para. 10 & n. 9.

³² Petition at 29-30 and Exhibit 1. The Petition states that Watertown is comprised of Watertown City, Watertown Town, Glen Park and Fort Drum. *Id.*

bifurcated approach in which we analyze predicted viewability and incomplete Nielsen data to determine significant viewership. Although we are sympathetic to petitioners, such as United, that face significant challenges in accumulating the evidence to support a significantly viewed waiver pursuant to Section 76.54(b), we cannot accede to United's unprecedented proposal. Our rules accord us no such flexibility and require that petitioners follow the traditional methodology outlined in Section 76.54(b) of our rules.³³ These rules require that petitioners provide the standard Nielsen survey data with a consistent and complete rate of diaries returned.³⁴ The Petitioner here is, in essence, seeking a change of our significantly viewed rules through adjudication which is not permitted under the Administrative Procedure Act.³⁵ The rule change sought would have general applicability and affect entities (broadcasters, cable operators, and satellite providers) far beyond United and WTVH. Substantive changes to our rules, such as those proposed by United, are properly a subject for "notice and comment" rulemaking. Under the rulemaking process, the Commission gives the public notice that it is considering adopting or modifying rules on a particular subject and seeks public comment, and the Commission considers the comments received in developing final rules.³⁶ Accordingly, for the reasons explained above, we decline United's invitation to create a new adjudicatory framework for evaluating significantly viewed waiver petitions by considering incomplete evidence and evidence not contemplated by Section 76.54 of the Commission's rules.

13. With respect to these Communities, the survey that United submitted does not meet the requirements under Section 76.54(b) that two surveys taken in two consecutive years include samples sufficient to assure that the combined surveys result in an average calculation at least one standard error above the required viewing levels.³⁷ In none of the zip codes associated with these other Communities did each of the four surveys have at least one sample household. 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.³⁸ On this basis, we deny the waiver request for the Communities of Adams Town, Adams Village, Alexandria, Alexandria Bay, Antwerp Town, Antwerp Village, Black River, Brownville Village, Brownville Town, Cape Vincent Town, Cape Vincent Village, Carthage, Wilna, West Carthage, Champion, Clayton Village, Clayton Town, Deferiet, Depauville, Dexter, Evans Mills, LeRay, Pamela, Rutland, Orleans, Philadelphia

³³ See 47 C.F.R. § 76.54(b).

³⁴ *Id.* See *MMK Licensee LLC*, 20 FCC Rcd 11704, 11707, para. 7 (MB 2005) ("For the February 2004 survey there are no diaries included and thus no information about viewing for that period . . . we cannot conclude that WAVE-TV is no longer significantly viewed in Horse Cave, Kentucky."); see also *Virginia Broadcasting Corporation*, 22 FCC Rcd 18109, 18117-18, paras. 12-13 (MB 2007) (denying request for a 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); *WTNH Broadcasting Inc.*, 27 FCC Rcd 15895, 15901-02, para. 9 (MB 2012) (same); *Saga Quad States Communications LLC*, 27 FCC Rcd 14859, 14865, para. 9 (MB 2012) (same).

³⁵ The Administrative Procedure Act, Pub. L. 79-404, 60 Stat. 237, enacted June 11, 1946; 5 U.S.C. ch. 5, subch. 1 § 500 et seq. See *NOS Communications, Inc. and Affinity Network Incorporated*, 16 FCC Rcd 8133, 8147 (2001) (Dissenting Statement) ("The distinction between rulemaking and adjudication is fundamental: '[T]he entire Act is based upon a dichotomy between rulemaking and adjudication Rulemaking is agency action which regulates the future conduct of either groups of persons or a single person; it is essentially legislative in nature, not only because it operates in the future but also because it primarily [is] concerned with policy considerations Conversely, adjudication is concerned with the determination of past and present rights and liabilities.'" Attorney General's Manual on the Administrative Procedure Act 13-13 (1947).)

³⁶ See <https://www.fcc.gov/about-fcc/rulemaking-process>. United is free to file a petition for rulemaking seeking such a change in our rules. Nothing in the instant proceeding is intended to prejudge the outcome of such a rulemaking.

³⁷ 47 CFR § 76.54(b).

³⁸ See *supra* n.34.

Town, Philadelphia Village, Rodman, Hounsfield, Sackets Harbor, Theresa Town, and Theresa Village.³⁹

IV. ORDERING CLAUSES

14. 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 United Communications Corporation **IS GRANTED IN PART AND DENIED IN PART**.

15. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's Rules.⁴⁰

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division
Media Bureau

³⁹ United argues that WWNY-TV serves the public interest in Jefferson County. United further asserts that WTVH's exception to the non-duplication and program exclusivity rules, including the financial implications thereof, run counter to allowing WWNY-TV to meet its public interest obligations. Petition at 6-15. While we acknowledge a local broadcast station's importance to a community, we find that this information does not alter our findings in this proceeding.

⁴⁰ 47 CFR § 0.283.