

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

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|--|---|----------------------|
| In the Matter of |) | |
| |) | |
| Rochester TV License Company, LLC |) | CSR 9002-N |
| KIMT(TV), Mason City, Iowa |) | MB Docket No. 21-370 |
| |) | |
| Petition for Waiver of Sections 76.92(f) and |) | |
| 76.106(a) of the Commission's Rules |) | |
| |) | |

MEMORANDUM OPINION AND ORDER

Adopted: September 27, 2022

Released: September 27, 2022

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

I. INTRODUCTION

1. Rochester TV License Company, LLC (Rochester TV or Petitioner), licensee of television station KIMT(TV) (CBS), Mason City, Iowa, filed the above-captioned petition¹ seeking a waiver of the significantly viewed exception to the network non-duplication and syndicated exclusivity rules.² KIMT(TV) seeks this waiver in order to exercise its network non-duplication and syndicated exclusivity rights against WCCO-TV (CBS), Minneapolis, Minnesota in the Rochester, Minnesota (Olmstead County) cable community.³ The Petitioner states that KIMT(TV) and WCCO-TV are carried on cable systems operated by Spectrum Mid-America, LLC (Spectrum) serving Rochester.⁴ The Petition is unopposed. For the reasons discussed below, we grant Rochester TV'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 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

¹ See *Rochester TV License Company for Waiver of Sections 76.92(f) and 76.106(a) of the Commission's Rules for KIMT(TV), Mason City, Iowa*, Petition for Special Relief, MB Docket No. 21-370 (filed Sept. 17, 2021) (Petition). The Media Bureau placed the Petition on public notice and sought comment. *Special Relief and Show Cause Petitions*, Pubic Notice, Report No. 0501 (MB Sept. 23, 2021) (*Public Notice*).

² 47 CFR §§ 76.92(f), 76.106(a) (significantly viewed exception to the cable network non-duplication and syndicated exclusivity rules).

³ Petition at 1.

⁴ The Petitioner states that Rochester is currently served by both Spectrum and CMN-RUS, Inc., but understands that the CMN-RUS, Inc. (Jaguar) system in Rochester does not currently carry WCCO-TV. *Id.* at n.1.

⁵ See 47 CFR §§ 76.92, 76.101.

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

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 Rochester TV seeks to do in this case with respect to KIMT(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. Historically, Nielsen, which routinely surveys television markets to obtain television stations’ viewership, conducted four-week audience surveys four times a year (*i.e.*, February, May, July, and November “sweep periods”). Replacing each week required under *KCST-TV, Inc.* with a sweep period¹³ was considered acceptable and, if anything, added to the accuracy of the audience statistics because of the increased sample size.¹⁴ Accordingly, a

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 *Id.* The criteria set forth in *KCST-TV, Inc.* 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.

¹³ The term “sweeps” dates from 1954, when Nielsen collected diaries from households in the Eastern United States first; from there they would “sweep” west. Seven day diaries (or eight day diaries in homes with DVRs) were mailed to homes to keep a tally of what was watched on each television set and by whom.
https://en.wikipedia.org/wiki/Nielsen_ratings.

¹⁴ 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.

petitioner seeking to show that a station is no longer significantly viewed could submit the results from two sweep periods in each year and could purchase survey data from Nielsen on either a community-specific or system-specific basis.¹⁵ In order to produce the data required for exclusivity waivers, Nielsen re-tabulated 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.¹⁶

5. In 2019, Nielsen changed the way it measures television viewing in its 210 DMAs, replacing the paper diaries that Nielsen families used to record what they watched on television in the smallest 140 DMAs entirely with electronic measurement.¹⁷ Now Nielsen uses a combination of people meters, set meters, code readers, and return path data (RPD) from cable and satellite set-top boxes to measure television viewing.¹⁸ Additionally, Nielsen now provides electronic measurements every month of the year instead of only four times per year during sweep months.¹⁹

6. In its waiver request, the Petitioner states that CBS affiliate KIMT(TV) is in the Rochester-Mason City-Austin Nielsen Designated Market Area (DMA) and acquired network programming and syndicated exclusivity rights by contract with the CBS Network and certain syndicators.²⁰ WCCO-TV, a CBS Network owned and operated station, is licensed in Minneapolis, Minnesota and located in the Minneapolis-St. Paul DMA.²¹ The Petitioner further states that Rochester is located in Olmsted County, which is part of KIMT(TV)'s DMA.²²

7. The Petitioner also states that Rochester is within KIMT(TV)'s geographic zone of exclusivity protection.²³ The Petitioner submits that KIMT(TV)'s television market is currently ranked 150 according to Nielsen and is not listed in section 76.51 of the Commission's Rules,²⁴ which means its designation for application of the geographic zone of network exclusivity protection is the 55-mile zone around the three named communities in KIMT(TV)'s Nielsen DMA: Rochester, Minnesota; Mason City, Iowa; and Austin, Minnesota.²⁵ The Petitioner states that Rochester is a named community in

¹⁵ 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). The Petitioner states that as required by 47 CFR § 76.54(c), KIMT(TV) sent letters via certified mail, return receipt requested, notifying all relevant entities more than 30 days before purchasing the studies of WCCO. Petition at 7 and Exhibit 3 (Declaration of Steve Martinson, Vice President and General Manager of KIMT(TV)).

¹⁶ We expect petitioners who commission such data to include, along with the survey data itself, a description of the procedures used to retabulate 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).

¹⁷ See *Significantly Viewed Stations, Modernization of Media Regulation Initiative*, Notice of Proposed Rulemaking, 35 FCC Rcd 3215, 3220, para. 7 (2020) (*Significantly Viewed Notice*).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Petition at 2 and Exhibit 3.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ 47 CFR § 76.51.

²⁵ Petition at 2, citing 47 CFR § 76.51 and 47 CFR § 73.658(m); *Midwest KAAL Corp. Petition for Declaratory Ruling*, Memorandum Opinion and Order, 7 FCC Rcd 5119 (CSB 1992) (*Midwest KAAL*), *recon. denied*, 8 FCC Rcd 4283 (1993). In *Midwest KAAL*, the Commission considered the zone of network non-duplication in this same market (Rochester-Mason City-Austin), which at the time was Arbitron ADI market 146. The Commission determined that KAAL, Austin was entitled to the full 55-mile zone surrounding each of the three cities in the

(continued....)

KIMT(TV)'s Nielsen DMA and, as such, KIMT(TV) "is entitled network non-duplication protection *in* and within the 55-mile zone of Rochester, as well as the 55-mile zones around Mason City and Austin."²⁶ Further, the Petitioner states that KIMT(TV) "is entitled to syndicated exclusivity protection in and within the 35-miles zones in Rochester, Mason City, and Austin."²⁷

8. Currently, the Petitioner notes that WCCO-TV is carried on Spectrum cable systems serving Rochester and it airs network and syndicated programming that duplicates programming locally broadcast by KIMT(TV) and carried on Spectrum systems.²⁸ The Petitioner states that licensees are generally entitled to exercise network non-duplication rights acquired by contract.²⁹ The Petitioner also asserts that generally cable systems serving cable communities located in a station's geographic zone of protection are required to "black out" duplicative network programming.³⁰ Likewise, licensees are permitted to exercise contractually acquired syndicated exclusivity rights within their geographic zone of protection.³¹ Further, the Petitioner states that, generally, cable systems located within the geographic zone of protection of a television station may not carry syndicated programming that duplicates syndicated programming of a station with exclusivity rights within that community.³²

9. However, as the Petitioner correctly indicates, the significantly viewed exception permits otherwise "distant" stations with duplicative network and/or syndicated programming to be carried on cable systems within a station's protected zone if certain criteria are met.³³ As the Petitioner observes, to be significantly viewed in a particular community, a station must have been included on the Commission's 1972 list or demonstrate that it meets certain minimum viewing standards.³⁴ The Commission, however, may waive a station's significantly viewed exception to the network non-duplication and syndicated exclusivity rules if a petitioner demonstrates that a station once considered significantly viewed no longer meets these minimum viewing requirements.³⁵ In that regard, the Petitioner states that according to the Commission's original 1972 designation, WCCO-TV is currently considered significantly viewed in the community of Rochester.³⁶

hyphenated market (Rochester, Mason City, Austin). *See id.*, para. 6; *TCI Cablevision of Oklahoma, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 10339 (CSB 1995), n.4 (Wichita Falls and Lawton DMA); *Grapevine of Austin License Sub, LLC*, Memorandum Opinion and Order, 15 FCC Rcd 7349 (2000) (Rochester-Mason City-Austin station KAAL granted waiver with respect to St. Paul station KSTP-TV in Rochester and other Olmstead County communities).

²⁶ Petition at 3, *citing* 47 CFR §§ 76.92 (note) and 73.658(m). The Petitioner notes that Rochester is within KIMT(TV)'s primary (35 mile) zone of network non-duplication protection. *See* 47 CFR § 76.92(b). The Petitioner further states that Rochester is more than 80 miles from Minneapolis, WCCO-TV's community of license. Petition at n.3.

²⁷ Petition at 3, *citing* 47 CFR § 76.101 (note).

²⁸ *Id.* and Exhibit 3.

²⁹ *Id.*; *see* 47 CFR § 76.93.

³⁰ Petition at 3; *see* 47 CFR § 76.92.

³¹ Petition at 3; *see* 47 CFR § 76.103(a).

³² Petition at 3; *see* 47 CFR § 76.101 and note.

³³ Petition at 4; *see* 47 CFR §§ 76.92(f) and 76.106(a).

³⁴ *Id.*; *see Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Systems*, Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order, 36 FCC 2d 326, App. B (1972) (list) (1972 Order); 47 CFR § 76.5(i) (significant viewing standards).

³⁵ Petition at 4.

³⁶ *Id.* at 5, *citing* 1972 Order, App. B. The Petitioner points out that the current significantly viewed list is available at <https://www.fcc.gov/files/significantviewedstations030819pdf> (see page 216 which lists Rochester and Rochester (continued....))

10. As determined in *KCST-TV, Inc.*, waivers of the significantly viewed exception may be granted if petitioner can show that, in each of two consecutive years, a station no longer meets the threshold significantly viewed requirements in a cable community or communities.³⁷ The Petitioner, however, submits that in order to buttress its Petition and remove any doubt about WCCO-TV's significantly viewed status, KIMT commissioned two viewing studies: one measuring WCCO-TV's over-the-air viewing using Nielsen diary data (Study 1) and a second study using RPD+ data (over-the-air-only) (Study 2).

III. DISCUSSION

11. We find that Rochester TV has demonstrated that WCCO-TV no longer meets the minimum viewing requirements or had no measurable viewing during the survey periods presented and the station no longer satisfies the significantly viewed standard in the Rochester, Minnesota (Olmstead County) cable community. Accordingly, we grant KIMT(TV)'s request for a waiver of the significantly viewed exception to the network nonduplication and syndicated exclusivity rules regarding WCCO-TV in Rochester, Minnesota.

12. The first of the two Nielsen studies commissioned by the Petitioner³⁸ measures WCCO's over-the-air viewing using Nielsen diary data, while the second study uses RPD+ data (over-the-air only). For Study 1, Rochester TV submitted a tabulation of Nielsen's over-the-air diaries from two four-week sweeps periods in each of two years for Rochester zip codes.³⁹ For Study 2, Rochester TV submitted Nielsen's RPD+ survey data for two four-week periods in each of two years for the same zip codes. The survey periods for both studies meet the requirements of section 76.54(b) and *KCST-TV, Inc.*⁴⁰ Study 1's audience estimates are from July 2016 and November 2016 (combined), and July 2017 and November 2017 (combined). Study 2's estimates are from July 2019 and November 2019 (combined), and July 2020 and November 2020 (combined).

13. The following table shows the results of Nielsen's study using diary data, included in Exhibit 1 of the Petition. This table includes the number of in-tab households, the average share viewing hours, the standard error of the average share viewing hours, the average share viewing hours with one standard error, the average net weekly circulation, the average net weekly circulation standard error, and the average net weekly circulation with one standard error.

| Year | Survey Periods | Number in Tab | Avg. Share Viewing Hours | Avg. Share SE | Avg. View Share w/1 SE | Avg. Net Weekly Circ. | Avg. Net Weekly Circ. SE | Avg. Net Weekly Circ. w/1 SE |
|------|-------------------------|---------------|--------------------------|---------------|------------------------|-----------------------|--------------------------|------------------------------|
| 1 | July 2016/ Nov. 2016 | 72 | 0.91 | 0.72 | 1.63 | 1.6 | 1.15 | 2.75 |

Township). The Petitioner notes that the U.S. Postal Service does not recognize a separate zip code for Rochester Township. *Id.* at n.15.

³⁷ See *KCST-TV, Inc.*, 103 FCC 2d at 412, 413, paras. 10-11. While the Commission considers changes in methodologies for significantly viewed cases in its *Significantly Viewed Notice*, the standards established in *KCST-TV, Inc.* remain in effect.

³⁸ Nielsen's description of its methodology is provided in the Petition at Exhibits 1-3 (and Attachment A to Exhibit 3). Nielsen states that all measurements are for non-cable/non-ADS households in Rochester zip codes. See Exhibit 1 for a description of the diary data for 2016 and 2017, and Exhibit 2 for a description of the RPD+ data for 2019 and 2020.

³⁹ The list of zip codes used to identify Rochester are noted in Exhibits 1 and 2. The Petitioner states that the zip codes for Rochester were obtained from the US Postal Service (<http://www.usps.com/>). See Petition at n.28. The Rochester zip codes used are 55901, 55902, 55903, 55904, 55905, and 55906.

⁴⁰ 47 CFR § 76.54(b); *KCST-TV, Inc.*, 103 FCC 2d at 412, 413, paras. 10-11.

| | | | | | | | | |
|---|-------------------------|----|------|------|------|------|------|------|
| 2 | July 2017/ Nov. 2017 | 71 | 1.57 | 1.32 | 2.89 | 1.11 | 1.12 | 2.23 |
|---|-------------------------|----|------|------|------|------|------|------|

14. When standard errors are added to the reported audience shares, WCCO-TV does not meet the criteria for significantly viewed status for a network affiliate. In each case, the reported audience statistic plus one standard error is less than the required audience share to establish significantly viewed status for a network affiliate (*i.e.*, a 3 share of total weekly viewing hours and a 25 net weekly circulation share) set forth in section 76.5(i).⁴¹ These reported statistics indicate that WCCO-TV is no longer significantly viewed in Rochester.

15. Additionally, Rochester TV submitted over-the-air only RPD+ data from Nielsen. This information is included in Exhibit 2 of the Petition and is summarized below.

| Year | Survey Periods | Number in Tab | Avg. Share Viewing Hours | Avg. Share SE | Avg. View Share w/1 SE | Avg. Net Weekly Circ. | Avg. Net Weekly Circ. SE | Avg. Net Weekly Circ. w/1 SE |
|------|-------------------------|---------------|--------------------------|---------------|------------------------|-----------------------|--------------------------|------------------------------|
| 1 | July 2019/ Nov. 2019 | 27 | 0 | 0 | 0 | 0 | 0 | 0 |
| 2 | July 2020/ Nov. 2020 | 31 | 0 | 0.02 | 0.02 | 0.89 | 0.92 | 1.81 |

16. When using RPD+ data from Nielsen, WCCO-TV continues to fail to achieve sufficient viewership to meet the minimum requirements of section 76.5(i) in the Rochester market for each of two consecutive years.⁴² In 2019 WCCO-TV had no measurable viewing, and in 2020 it reached a 0.02 percent share of total viewing hours and 1.81 percent net weekly circulation including one standard error. Accordingly, we conclude that the Petitioner has met its burden and demonstrates that WCCO-TV fails to meet the requirements to maintain its status as significantly viewed in Rochester.

IV. ORDERING CLAUSES

17. 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 for Special Relief (MB Docket No. 21-370, CSR 9002-N) filed by Rochester TV License Company, LLC **IS GRANTED**.

18. This action is taken pursuant to authority delegated under section 0.283 of the Commission's Rules.⁴³

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckart
Senior Deputy Chief, Policy Division
Media Bureau

⁴¹ 47 CFR § 76.5(i).

⁴² *Id.*

⁴³ 47 CFR § 0.283.