

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

In the Matter of )
)
Palm Television, L.P. and Johnstown (WWCP-TV) ) CSR 9010-N
Licensee, Inc., Johnstown-Altoona-State College, ) MB Docket No. 23-183
Pennsylvania )
Petition for Waiver of Sections 76.92(f) and )
76.106(a) of the Commission’s Rules )

MEMORANDUM OPINION AND ORDER

Adopted: November 1, 2023

Released: November 2, 2023

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

I. INTRODUCTION

1. Palm Television, L.P. (Palm), licensee of television station WATM-TV (ABC), Altoona, Pennsylvania (Facility ID 20287), and Johnstown (WWCP-TV) Licensee, Inc. (WWCP Licensee), licensee of WWCP-TV, Johnstown, Pennsylvania (Facility ID 20295) (collectively Petitioners or Palm/WWCP Licensee) filed the above-captioned petition<sup>1</sup> seeking a waiver of the significantly viewed exception to the network non-duplication and syndicated exclusivity rules.<sup>2</sup> The Petitioners seek this waiver in order for WATM-TV to exercise its network non-duplication and syndicated exclusivity rights against WTAE-TV (ABC), Pittsburgh, Pennsylvania (Facility ID 65681) in the following Pennsylvania cable communities: Johnstown, Ebensburg, and Mineral Point in Cambria County, and Boswell, Friedens, Rockwood, and Stoystown in Somerset County (the Communities).<sup>3</sup> The Petitioners state that the Communities are served by two cable providers, Cogeco US (Penn), LLC, d/b/a Breezeline and Comcast of Colorado/Pennsylvania/West Virginia, LLC.<sup>4</sup> The Petition is unopposed. For the reasons discussed below, we grant in part and deny in part Palm/WWCP Licensee’s Petition. The Petition is granted as to the Communities of Johnstown, Ebensburg, Boswell, and Friedens and denied as to Mineral Point, Rockwood, and Stoystown.

II. BACKGROUND

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

1 See Palm Television, L.P. and Johnstown (WWCP-TV) Licensee, Inc. for Waiver of Sections 76.92(f) and 76.106(a) of the Commission’s Rules for WATM-TV, Altoona, PA, Petition for Special Relief, MB Docket No. 23-183 (filed May 31, 2023) (Petition). The Media Bureau placed the Petition on public notice and sought comment. Special Relief and Show Cause Petitions, Pubic Notice, Report No. 0507 (MB June 2, 2023) (Public Notice).

2 47 CFR §§ 76.92(f), 76.106(a) (significantly viewed exception to the cable network non-duplication and syndicated exclusivity rules). Palm and WWCP Licensee are parties to a grandfathered Time Brokerage Agreement whereby WWCP Licensee brokers time on WATM-TV. Petition at 2. Therefore, Palm and WWCP Licensee argue that they both have an interest in WATM-TV’s ability to exercise its network nonduplication and syndicated exclusivity rights against out of market stations. Id.

3 Petition at 1-2.

4 Id. at n.1.

5 See 47 CFR §§ 76.92, 76.101.

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.<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup> 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. A network station qualifies 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.<sup>9</sup> In *KCST-TV, Inc.*,<sup>10</sup> 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 the rules.<sup>11</sup>

4. In pertinent part, the rules state 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.”<sup>12</sup> Nielsen Company (Nielsen) is a 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”). In applying the requirements articulated in *KCST-TV, Inc.*, it has been acceptable to replacing each week required in the analysis with a sweep period.<sup>13</sup> The replacement of a sweep period could even add to the accuracy of the audience statistics because of the increased sample size.<sup>14</sup> Accordingly, a petitioner seeking to show that a station is no longer significantly

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<sup>6</sup> 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.

<sup>7</sup> 47 CFR §§ 76.106(a), 76.123(k) (significantly viewed exception for cable and satellite carriers).

<sup>8</sup> 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).

<sup>9</sup> 47 CFR § 76.5(i).

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

<sup>11</sup> 47 CFR § 76.54(b).

<sup>12</sup> *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. Because we require independent surveys, it should be noted that these surveys cannot be performed by the affected television station, cable system, or satellite operator. *See In the Matter of Gulf-California Broadcast Company*, 23 FCC Rcd 7400, 7401 at para. 4, n.11 (2008).

<sup>13</sup> 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](https://en.wikipedia.org/wiki/Nielsen_ratings).

<sup>14</sup> 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

(continued....)

viewed could rely on Nielsen data reflecting the results from two sweep periods in two years and survey data could be prepared on either a community-specific or system-specific basis.<sup>15</sup> 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.<sup>16</sup>

5. In 2019, Nielsen changed the way it measures television viewing in its 210 designated market areas (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.<sup>17</sup> 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.<sup>18</sup> Additionally, Nielsen now provides electronic measurements every month of the year instead of only four times per year during sweep months.<sup>19</sup>

6. *The Palm/WWCP Licensee Petition.* In this case Palm/WWCP Licensee seeks to reinstate their exclusivity rights vis-à-vis significantly viewed station WATM-TV by seeking a waiver of the significantly viewed exception. In their waiver request, the Petitioners state that ABC affiliate WATM-TV, which is in the Johnstown-Altoona-State College Nielsen DMA (Johnstown DMA), acquired network nonduplication and syndicated exclusivity rights by contract with the ABC Network and certain syndicators.<sup>20</sup> As the Petitioners assert, licensees are generally entitled to exercise contractually acquired network non-duplication rights<sup>21</sup> and syndicated exclusivity rights within their

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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.

<sup>15</sup> 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 Petitioners here state that as required by 47 CFR § 76.54(c), WATM-TV sent letters via certified mail, return receipt requested, notifying all relevant entities more than 30 days before purchasing the studies of WTAE-TV. Petition at 6-7 and Exhibit B (Declaration of Keri Rhodes, Manager of Palm Television, L.P.). It is noted in the Declaration that notice was sent via certified mail to WTAE-TV on March 16, 2023, but returned to sender as "unclaimed." The notice was subsequently re-delivered via Fed Ex and the Station Manager of WATM-TV states successful delivery was confirmed. Declaration of Keri Rhodes at n.1.

<sup>16</sup> 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, 10568-69 at para. 10 (CSB 1996); *Gulf-California Broadcast Company*, 21 FCC Rcd 3476, 3479-80 at para 8 (MB 2006).

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

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Petition at 2 and Exhibit B.

<sup>21</sup> Petition at 3; *see* 47 CFR §§ 76.92 and 76.93. Generally, cable systems serving cable communities located in a station's geographic zone of protection are required to "black out" duplicative network programming. *See* 47 CFR § 76.92.

geographic zone of protection.<sup>22</sup> According to the Petitioners, ABC affiliate WTAE-TV, which is in the Pittsburgh DMA, is carried on cable systems serving the Communities and it airs network and syndicated programming that duplicates programming locally broadcast by WATM-TV and carried on those systems.<sup>23</sup> The Petitioners assert that each of the Communities is located in the Johnstown DMA and is within WATM-TV's 35-mile geographic zone of exclusivity protection.<sup>24</sup> Specifically, the Petitioners state that WATM-TV's market designation for application of the geographic zone,<sup>25</sup> is Johnstown-Altoona, Pennsylvania.<sup>26</sup> Accordingly, the Petitioners contend that WATM-TV is "entitled to exclusivity within the 35-mile zone of each of Johnstown and Altoona."<sup>27</sup> The Petitioners note that as a named community in the hyphenated market, Johnstown is, on its face, within the zone of exclusivity protection.<sup>28</sup> Further, the Petitioners assert that each of the other Communities is also within the zone of protection because the coordinates for each Community's U.S. Post Office are within 35 miles of the reference coordinates as listed in section 76.53 of the Commission's Rules for Johnstown and Altoona.<sup>29</sup>

7. As noted above, 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.<sup>30</sup> As the Petitioners observe, 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.<sup>31</sup> In that regard, the Petitioners state that according to the Commission's original 1972 designation, WTAE-TV is currently considered significantly viewed in the Communities.<sup>32</sup> Petitioners argue, however, that the Bureau should waive the station's significantly viewed exception to the network non-duplication and syndicated exclusivity rules because the data submitted demonstrates that this station that was once considered significantly viewed no longer meets these minimum viewing requirements.<sup>33</sup> That data is considered below.

### III. DISCUSSION

8. We find that Palm/WWCP Licensee have demonstrated that WTAE-TV no longer meets the minimum viewing requirements by having no measurable viewing during the survey periods presented and the station no longer satisfies the significantly viewed standard in the Communities of

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<sup>22</sup> *Id.*; see 47 CFR § 76.103(a). 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. See 47 CFR § 76.101 and note.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> 47 CFR § 76.51.

<sup>26</sup> Petition at 3.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*; see <https://tools.usps.com/find-location.htm>. The Petitioners note that the 35-mile geographic zone of all major markets extends from the reference point of the community of license of the television station. Those reference points are listed in section 76.53 of the Commission's rules. Where a community's reference point is not given, the geographic coordinates of the main post office in the community shall be used. See 47 CFR §§ 73.658 and 76.53. *Id.* at n.4.

<sup>30</sup> *Id.* at 4; see 47 CFR §§ 76.92(f) and 76.106(a).

<sup>31</sup> *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).

<sup>32</sup> Petition at 4.

<sup>33</sup> *Id.*, citing 47 CFR §§ 76.5(i) and 76.54.

Johnstown, Ebensburg, Boswell, and Friedens. However, we cannot conclude the same for the Communities of Mineral Point, Rockwood, and Stoystown. Accordingly, we grant WATM-TV's request for a waiver of the significantly viewed exception to the network nonduplication and syndicated exclusivity rules regarding WTAE-TV in the Communities of Johnstown, Ebensburg, Boswell, and Friedens, and we deny the request with regard to the Communities of Mineral Point, Rockwood, and Stoystown.

9. As determined in *KSCT-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.<sup>34</sup> The Petitioners state that in markets such as the Johnstown DMA, Nielsen uses the RPD+ methodology which incorporates set-top box data that captures cable and satellite viewing and code readers that capture over-the-air viewing.<sup>35</sup> Consistent with this practice, the Petitioners submit data that represents recent over-the-air only RPD+ data for two consecutive years.<sup>36</sup> Specifically, the Petitioners requested that Nielsen tabulate over-the-air RPD+ data from the periods November 2021 and February 2022 (combined) and November 2022 and February 2023 (combined) for the Communities' zip codes.<sup>37</sup> Table 1 and Table 2, below, present Nielsen's report for Year 1 (November 2021 and February 2022) and Year 2 (November 2022 and February 2023).<sup>38</sup> As the Tables indicate, Nielsen reports that the shares of viewing hours and the average weekly circulation are both zero for all the Communities and for the years represented. Additionally, Nielsen reports that the standard errors for these measures are also zero. We note, however, that the number of households (Number in Tab) is small for these geographic Communities. For three of the Communities and the zip codes represented the Number in Tab is 1, including Mineral Point (15942), Rockwood (15557), and Stoystown (15563). It has previously been determined that one household is insufficient to estimate a viewing average for a community in a community-based survey.<sup>39</sup> Additionally, we note that the formulas that Nielsen uses to compute standard errors require a number of households greater than 1.<sup>40</sup>

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<sup>34</sup> 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.

<sup>35</sup> Petition at 6.

<sup>36</sup> *Id.* at 7 and Exhibit A (Nielsen Significant Viewing Study).

<sup>37</sup> *Id.* and Exhibit B.

<sup>38</sup> See Exhibit A. These Tables include 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.

<sup>39</sup> See *United Communications Corporation WWNY-TV, Carthage NY*, 33 FCC Rcd 8048, para. 13 (2018); *Virginia Broadcasting Corporation*, 22 FCC Rcd 18109, 18117-18, paras. 12-13 (2007) (denying a 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).

<sup>40</sup> For example, the formula that Nielsen uses to compute the Share Standard Error (shown in Exhibit A) includes the term  $n/(n - 1)$ , where  $n$  equals the number of households. To avoid 0 in the denominator of this expression,  $n$  must be greater than 1.

Table 1: November 2021/ February 2022

Community and Zip Codes	Number in Tab	Average Share Viewing Hours	Average Share Standard Error	Average View Shares w/1 Standard Error	Average Net Weekly Standard Circ.	Average Net Weekly Standard Error	Average Net Weekly Circ. w/1 Standard Error
Johnstown, PA 15901, 15902, 15904, 15905, 15906, 15909	5	0.0	0.0	0.0	0.0	0.0	0.0
Ebensburg, PA 15931	2	0.0	0.0	0.0	0.0	0.0	0.0
Mineral Point, PA 15942	1	0.0	0.0	0.0	0.0	0.0	0.0
Boswell, PA 15531	4	0.0	0.0	0.0	0.0	0.0	0.0
Friedens, PA 15541	2	0.0	0.0	0.0	0.0	0.0	0.0
Rockwood, PA 15557	1	0.0	0.0	0.0	0.0	0.0	0.0
Stoystown, PA 15563	1	0.0	0.0	0.0	0.0	0.0	0.0

Table 2: November 2022/ February 2023

Community and Zip Codes	Number in Tab	Average Share Viewing Hours	Average Share Standard Error	Average View Shares w/1 Standard Error	Average Net Weekly Standard Circ.	Average Net Weekly Standard Error	Average Net Weekly Circ. w/1 Standard Error
Johnstown, PA 15901, 15902, 15904, 15905, 15906, 15909	5	0.0	0.0	0.0	0.0	0.0	0.0
Ebensburg, PA 15931	2	0.0	0.0	0.0	0.0	0.0	0.0
Mineral Point, PA	1	0.0	0.0	0.0	0.0	0.0	0.0

15942							
Boswell, PA	4	0.0	0.0	0.0	0.0	0.0	0.0
15531							
Friedens, PA	2	0.0	0.0	0.0	0.0	0.0	0.0
15541							
Rockwood, PA	1	0.0	0.0	0.0	0.0	0.0	0.0
15557							
Stoystown, PA	1	0.0	0.0	0.0	0.0	0.0	0.0
15563							

10. When standard errors are added to the reported audience shares, WTAE-TV does not meet the criteria for significantly viewed status for a network affiliate in Johnstown, Ebensburg, Boswell, and Friedens. 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).<sup>41</sup> Indeed, in these Communities the reported statistics indicate that WTAE-TV had no measurable viewing and is therefore no longer significantly viewed.

11. We cannot conclude based on the data provided that WTAE-TV is not significantly viewed in Mineral Point, Rockwood, and Stoystown. Because the reported data for the survey years was based on only one in-tab household that data is insufficient to estimate a viewing average for a community in a community-based survey and does not allow us to make the determination that WTAE-TV is no longer significantly viewed in these Communities.

12. Accordingly, we conclude that the Petitioners have met their burden and demonstrate that WTAE-TV fails to meet the requirements to maintain its status as significantly viewed in the Communities of Johnstown, Ebensburg, Boswell, and Friedens. The Petitioners, however, have failed to meet that burden with regard to the Communities of Mineral Point, Rockwood, and Stoystown.

#### IV. ORDERING CLAUSES

13. 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. 23-183, CSR 9010-N) filed by Palm Television, L.P. and Johnstown (WWCP-TV) Licensee, Inc. **IS GRANTED IN PART AND DENIED IN PART** as discussed herein.

14. This action is taken pursuant to authority delegated under section 0.283 of the Commission's Rules.<sup>42</sup>

FEDERAL COMMUNICATIONS COMMISSION

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

<sup>41</sup> 47 CFR § 76.5(i).

<sup>42</sup> 47 CFR § 0.283.