

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

In the Matter of
H3 Communications, LLC, licensee of
WXVT (CBS), Greenville, Mississippi
Petition for Waiver of Sections 76.92(f) and
76.106(a) of the Commission's Rules
CSR-8890-N
MB Docket No. 14-137

MEMORANDUM OPINION AND ORDER

Adopted: February 5, 2015

Released: February 6, 2015

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

I. INTRODUCTION

1. H3 Communications, LLC ("H3"), licensee of Station WXVT (CBS), Greenville, Mississippi, filed the above-captioned petition seeking a waiver of the rules that preclude cable operators from deleting the duplicate programming of "significantly viewed" stations under the network non-duplication and syndicated exclusivity rules ("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. 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 non-duplication and syndicated exclusivity rules if it is "significantly viewed" in a relevant community (the "significantly viewed exception").

1 47 C.F.R. §§ 76.92(f) and 76.106(a). Although not expressly requested in H3'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).

2 Petition at 1.

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

4 47 C.F.R. §§ 76.92(f); see 47 C.F.R. §§ 76.5(i) and 76.54.

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 The Commission has found that this type of test is applicable as well for waivers of the syndicated exclusivity exemption.⁸

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 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.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 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

⁵ 47 C.F.R. § 76.106(a).

⁶ 103 FCC 2d 407, 412 ¶ 10 & n.9 (1986).

⁷ 47 C.F.R. § 76.5(i).

⁸ See *Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640, 5640-41 ¶ 6 (1990).

⁹ 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.

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 in a year where more than two are submitted. See *WTNH Broadcasting, Inc. and K-W TV, Inc.*, 16 FCC Rcd 6781, 6784 (2001), where the 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 It should be noted that Nielsen identifies individual communities by zip codes, a process not incompatible with the surveying process discussed here.

¹² 47 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.

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 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.¹⁴ 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.¹⁵ 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. 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. This ensures that the reported audience results data are not skewed by the choice of sweep periods.

5. In support of its request for waiver of the significantly viewed exception to the network nonduplication and syndicated exclusivity rules, H3 submits separate data for Indianola and Greenville from The Nielsen Company to demonstrate that WJTV is no longer significantly viewed in these communities.¹⁷ The submitted audience statistics are the results of re-tabulations of Nielsen's audience data for non-cable/non-ADS homes identified by zip codes.¹⁸ The submitted data are averages for two-four week audience sweep periods in each of two years. The first year survey's audience estimates come from Nielsen's February 2012 and November 2012 audience sweep data and the second year estimates are based on February 2013 and November 2013 data. These surveys satisfy the requirement that petitioners provide a showing of significantly viewed status for each station based on two one-week surveys, separated by at least 30 days, of non-cable/non-ADS homes conducted by an independent audience survey firm for two consecutive years.

6. The report provided by Nielsen and submitted by the petitioner shows audience statistics for Indianola and Greenville. The following tables show the number of in-tab households used to derive the audience estimates, the total viewing hours, the standard error about the total viewing hours, the net

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 (1996); *Gulf-California Broadcast Company*, 21 FCC Rcd 3476, 3479-80 (2006).

¹⁴ 47 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.”

¹⁵ *Id.*

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 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.”

¹⁷ *See* Exhibit 2 (includes the description of Nielsen's methodology and the survey data).

¹⁸ *See* Petition at 7 and Exhibit 2. The zip code for Indianola is 38751. The zip codes for Greenville are 38701 and 39703. *Id.* at Exhibit 2.

weekly circulation share, and the standard error about the net weekly circulation share.¹⁹

TABLE 1 – WJTV VIEWING IN INDIANOLA

Survey Dates	No. of Diaries	Total Viewing Hours Share	Standard Error	NWC Share	Standard Error
Feb 12/Nov. 12	3	0.00	0.00	0.00	0.00
Feb 13/Nov. 13	4	0.00	0.00	0.00	0.00

TABLE 2 – WJTV VIEWING IN GREENVILLE

Survey Dates	No. of Diaries	Total Viewing Hours Share	Standard Error	NWC Share	Standard Error
Feb 12/Nov. 12	10	0.00	0.00	0.00	0.00
Feb 13/Nov. 13	8	0.00	0.00	0.00	0.00

As a result, H3 requests that the Commission grant its petition so that it can assert its exclusivity rights in both Indianola and Greenville, Mississippi.

III. DISCUSSION

7. We find that H3 has made the requisite showing to support its petition. H3 has demonstrated that WJTV had no measurable audience during any of the survey periods. The results of Nielson's study submitted by H3 demonstrate that WJTV failed to achieve at least a 3 share of total weekly viewing hours and at least a 25 net weekly viewing share as required by Section 76.5(i) of the Commission's rules for a network affiliate.²⁰ Based on these results, WJTV fails to achieve significantly viewed status in either of the communities. Accordingly, we grant H3's request for a waiver of the significantly viewed exception to the network nonduplication and syndicated exclusivity rules regarding WJTV, Jackson, Mississippi in the cable communities of Indianola and Greenville, Mississippi.

¹⁹ See Exhibit 2.

²⁰ 47 C.F.R § 76.5(i).

IV. ORDERING CLAUSES

8. Accordingly, **IT IS ORDERED**, that the petition filed by H3 Communications, LLC **IS GRANTED**.

9. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's Rules.²¹

FEDERAL COMMUNICATIONS COMMISSION

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²¹ 47 C.F.R. § 0.283.