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

In the Matter of	)	
	)	
Gray Television Licensee, LLC	)	CSR-8789-N
WHSV-TV	)	MB Docket No. 13-121
	)	
Petition for Waiver of Section 76.92(f) and	)	
76.106(a) of the Commission's Rules	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: August 14, 2013 **Released: August 14, 2013**

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

I. INTRODUCTION

1. Gray Television Licensee, LLC, licensee of WHSV-TV (Fox), Harrisonburg, Virginia ("Gray"), 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").[1] Specifically, Gray seeks a waiver of the significantly viewed exception in two communities in WHSV-TV's market, Harrisonburg and Staunton, Virginia, so that it may enforce its exclusivity rights against WTTG (Fox), Washington, DC.[2] No one filed an opposition to the petition. For the reasons discussed below, we grant Gray's waiver request.

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.[3] 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").[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

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

a subject community. 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. 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] For independent stations (*i.e.,* non-network stations), to be considered significantly viewed, Section 76.5(i) of the Commission's rules requires that the survey results should exceed a 2 percent share of total viewing hours and a net weekly circulation of 5 percent, by at least one standard error.[8] The Commission has found that this type of test is applicable as well for waivers of the syndicated exclusivity exemption.[9]

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.[10] 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.[11] 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.[12] 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

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[5] 47 C.F.R. § 76.106(a).

[6] *KCST-TV, Inc.*, 103 FCC 2d 407, 413 ¶ 11 (1986).

[7] 47 C.F.R. § 76.5(i).

[8] *Id.*

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

[10] 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.

[11] 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 ¶ 7 (CSB 2001) (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 it could determine the effect of these sweeps periods).

[12] It should be noted that Nielsen identifies individual communities by zip codes, a process not incompatible with the surveying process discussed here.

cable system.[13] 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.[14] 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.[15] 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.[16] 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.[17] 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.

III. DISCUSSION

5. WTTG is considered to be significantly viewed under the Commission's original 1972 list of significantly viewed stations in the two Virginia communities at issue – Harrisonburg and Staunton.[18] Gray seeks a waiver of the significantly viewed exception so that it may enforce its network non-duplication and syndicated exclusivity rights against WTTG in these communities.

6. Gray states that Harrisonburg and Staunton are within the protected "geographic zone" for WHSV-TV, and that the "significantly viewed" status of WTTG prevents it from claiming protection under the network non-duplication and syndicated exclusivity rules. It also claims that WTTG no longer meets the standard for "significantly viewed" status. As proof, it submits the results of special, community-specific surveys conducted by The Nielsen Company. Gray states that Nielsen conducted a

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[13] 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.

[14] 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 ¶ 10 (CSB 1996); *Gulf-California Broadcast Company,* 21 FCC Rcd 3476, 3479-80 ¶ 8 (MB 2006).

[15] 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."

[16] *Id.*

[17] 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."

[18] *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, Memorandum Opinion and Order on Reconsideration, 36 FCC 2d 326, App. B (1972).

special tabulation of diaries obtained from non-cable/non-ADS homes in February and May 2011 and February and May 2012. Gray states that it provided prior notice of its intent to purchase special tabulations of these dates to all interested parties, and that it received one response from Fox Television Licensee, LLC, licensee of WTTG ("Fox"), objecting to the methodology that Nielsen routinely uses and the Bureau routinely accepts for waiver petitions.[19] Gray explains that, in light of Fox's objection and to ensure a complete record, Gray commissioned The Nielsen Company to prepare a second special tabulation of over-the-air diaries from non-cable/non-ADS households in July and November 2011 and July and November 2012.[20]

7. Gray asserts that WTTG is far short of the required minimum circulation and share thresholds, within one standard error, for significantly viewed status. Indeed, Gray maintains that WTTG cannot actually deliver an over-the-air signal to Harrisonburg or Staunton. Tables 1 and 2 below present the data for Harrisonburg, Virginia based on the Feb./May and July/Nov. collection dates, respectively, and Tables 3 and 4 show the comparable data for Staunton, Virginia.

TABLE 1 – WTTG VIEWING IN HARRISONBURG, VA – FEB./MAY

Survey Dates	Households Studied	Total Viewing Hours Share	Standard Error	Net Weekly Circulation Share	Standard Error
Feb. 11/May 11	21	0.00	0.00	0.00	0.00
Feb. 12/May 12	17	0.00	0.00	0.00	0.00

TABLE 2 – WTTG VIEWING IN HARRISONBURG, VA – JULY/NOV.

Survey Dates	Households Studied	Total Viewing Hours Share	Standard Error	Net Weekly Circulation Share	Standard Error
July 11/Nov. 11	18	0.00	0.00	0.00	0.00
July 12/Nov. 12	15	0.00	0.00	0.00	0.00

TABLE 3 – WTTG VIEWING IN STAUNTON, VA – FEB./MAY

Survey Dates	Households Studied	Total Viewing Hours Share	Standard Error	Net Weekly Circulation Share	Standard Error
Feb. 11/May 11	9	0.00	0.00	0.00	0.00
Feb. 12/May 12	10	0.00	0.00	0.00	0.00

TABLE 4 – WTTG VIEWING IN STAUNTON, VA – JULY/NOV.

Survey Dates	Households Studied	Total Viewing Hours Share	Standard Error	Net Weekly Circulation Share	Standard Error
July 11/Nov. 11.	8	0.00	0.00	0.00	0.00
July 12/Nov. 12	10	0.00	0.00	0.00	0.00

As a result, Gray requests that the Commission grant its petition so that it can assert its exclusivity rights

[19] Petition at 3. Fox, however, did not file an opposition to Gray's current Petition.

[20] Gray states that it notified all interest parties about the additional survey periods, and that Fox again responded, reiterating its earlier objections. Petition at 4.

in both Harrisonburg and Staunton, Virginia.

8. We find that Gray made the requisite showing to support its petition. The survey dates and the method used to combine audience surveys are consistent with the requirements set forth in Section 76.54(b) of the Commission's rules.[21] Either set of tabulations of the Nielsen data submitted by Gray, the Feb./May periods or the July/Nov. periods, is sufficient on its own to demonstrate that WTTG is no longer significantly viewed in either Harrisonburg or Staunton, Virginia. For purposes of significant viewing, stations affiliated with the Fox Network are considered independent stations and must exceed a 2 percent share of total viewing hours and a net weekly circulation of 5 percent, by at least one standard error, to be considered significantly viewed, as set forth in Section 76.5(i) of the Commission's rules.[22] As each table shows, WTTG received no measurable over-the-air viewing in any of the four reporting periods over two years. Accordingly, we find that WTTG no longer meets the criteria for significantly viewed status in Harrisonburg and Staunton, Virginia and we grant Gray's request.

IV. ORDERING CLAUSES

9. Accordingly, **IT IS ORDERED**, that the petition filed by Gray Television Licensee, LLC **IS GRANTED**.

10. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's Rules.[23]

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
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[21] 47 C.F.R. § 76.54(b).

[22] 47 C.F.R. § 76.5(i).

[23] 47 C.F.R. § 0.283.