

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

In the Matter of)	
)	
Barrington Kirksville Licensee LLC)	
KTVO, Kirksville, Missouri)	CSR-8648-N
)	Docket No. 12-151
Petition For Waiver of Section 76.92(f))	
of the Commission's Rules)	

MEMORANDUM OPINION AND ORDER

Adopted: March 18, 2013

Released: March 18, 2013

By the Senior Deputy Chief, Policy Division Media Bureau:

I. INTRODUCTION

1. Barrington Kirksville License, LLC, licensee of station KTVO-TV, Kirksville, Missouri (“KTVO”), filed the above captioned petition¹ seeking a waiver of the rules that preclude cable operators from deleting the duplicate programming of “significantly viewed” stations under the network nonduplication rules (“exclusivity rules”).² KTVO is affiliated with the ABC broadcast television network on its primary stream and with the CBS broadcast television network on its digital multicast stream and the station serves the Ottumwa-Kirksville Designated Market Area (“DMA”).³ KTVO seeks to enforce its exclusivity rights in Bloomfield, Iowa against KCCI-TV, a CBS affiliate licensed to Des Moines, Iowa, and against KCRG-TV an ABC affiliate and KGAN a CBS affiliate in Fairfield, Iowa – the latter two licensed to Cedar Rapids, Iowa.⁴ Oppositions to this petition have been filed on behalf of Citizens Mutual Telephone Cooperative (“Citizens”), solely with respect to KCCI’s duplicative programming in Bloomfield, and on behalf of the Local Internet Service Company, Inc. (“LISCO”) with respect to KCRG and KGAN in Fairfield, and KTVO replied.⁵ As discussed below, we grant KTVO’s

¹ Petition for Special Relief by KTVO filed May 31, 2012 (“Petition”).

² 47 C.F.R. §§ 76.92(f). Although not expressly requested in KTVO-TV’s petition for waiver of Section 76.92(f) (significantly viewed exception to cable network nonduplication), the same showing – that a station is no longer significantly viewed in the relevant community, would also apply to a waiver of Sections 76.122(j) (significantly viewed exception to satellite network nonduplication) with respect to carriage on DBS systems. See 47 C.F.R. §§ 76.92(f), 76.106(a), 76.122(j), and 76.123(k). See 47 U.S.C. §§ 340(a)(2) and 340(c).

³ Petition at 1 & 3.

⁴ *Id.* at 1-2

⁵ Opposition to Petition for Special Relief by Citizens, filed June 28, 2012 (Citizens Opp.); Opposition of LISCO to Petition for Special Relief, filed July 9, 2012 (“LISCO Opp.”); see also Reply to Citizens Mutual Telephone Cooperative’s Opposition to Petition for Special Relief, filed July 9, 2012 (“Reply to Citizens”); Reply to Opposition of LISCO to Petition for Special Relief, filed July 19, 2012 (“Reply to LISCO”).

Petition.

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.⁶ 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 nonduplication and syndicated exclusivity rules if it is "significantly viewed" in a relevant community (the "significantly viewed exception").⁷ 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 this viewership level is met, the station is no longer considered distant for purposes of the application of the network nonduplication 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.⁸

3. In order to obtain a waiver of Section 76.92(f), the Commission held in *KCST-TV, Inc.*⁹ 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.¹⁰ The Commission has found that this type of test is applicable as well for waivers of the syndicated exclusivity exemption.¹¹

4. Since the Commission's decision in *KCST-TV*, the methodology required by Section 76.54(b) of the rules 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."¹² 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.¹³ Accordingly, a petitioner may submit the results from

⁶ See 47 C.F.R. §76.92; 47 C.F.R. §76.101.

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

⁸ 47 C.F.R. §76.106(a).

⁹ 103 FCC 2d 407 (1986).

¹⁰ 47 C.F.R. §76.5(i).

¹¹ See *Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640 (1990).

¹² 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. These types of surveys cannot be done by the affected television station, cable system or satellite operator.

¹³ Although, in general, petitioners are prohibited from using two surveys between April and September (*i.e.*, May or
(continued...)

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.¹⁴ If a petitioner is purchasing survey data on a system-specific basis where two or more communities are involved, the percent of diaries from each community surveyed must be approximately the same as the percentage of the total population for each community served by the cable system.¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸ 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.¹⁹ A petitioner

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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.

¹⁴ It should be noted that Nielsen identifies individual communities by zip codes, a process not incompatible with the surveying process discussed here.

¹⁵ 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.

¹⁶ 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 database it is using, what communities (or zip codes) are covered, the station(s) surveyed, and time periods covered. Because Nielsen routinely provides this information in a cover letter along with its survey data, it is most helpful if this letter is included. That way there is no doubt that the data provided was obtained from Nielsen. See e.g., *Radio Perry, Inc.*, 11 FCC Rcd 10564, 10568-9 (1996); *Gulf-California Broadcast Company*, 21 FCC Rcd 3476, 3479-80 (2006). We further suggest that the petitioner make it clear that the data they are submitting, along with the description of methodology, are as agreed on between the petitioner and Nielsen.

¹⁷ 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.”

¹⁸ *Id.*

¹⁹ 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.”

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. As described above, KTVO seeks a waiver of KCCI, KCRG and KGAN's significantly viewed statuses which exempts these stations from KTVO's network nonduplication and syndicated exclusivity rights in two communities. As part of its waiver petition, KTVO argues KCCI is no longer significantly viewed in the community of Bloomfield, Iowa, and that KCRG and KGAN are no longer significantly viewed in Fairfield, Iowa.²⁰ KTVO, operating out of Kirksville, Missouri, carries ABC affiliated broadcast television network programming on its primary stream and CBS network programming on its digital multicast stream, whereas KCCI-TV is a CBS affiliate licensed to Des Moines, Iowa in the Des Moines-Ames DMA, while KCRG-TV is an ABC affiliate and KGAN is a CBS affiliate, both licensed to Cedar Rapids, Iowa in the Cedar Rapids-Waterloo-Iowa City-Dubuque DMA.²¹ KMVT argues it would normally be entitled to assert network nonduplication and syndicated exclusivity protection against other CBS and ABC affiliates such as KCCI, KCRG and KGAN, but because the latter are considered significantly viewed, cable systems in Bloomfield and Fairfield are not required to delete the network and syndicated programming offered by KCCI, KCRG and KGAN.²²

6. To demonstrate that KCCI, KCRG and KGAN no longer meet the significantly viewed standard in the communities at issue, KTVO commissioned surveys by Nielsen that measured over-the-air viewing using diaries from noncable/non-ADS homes based on the zip codes for Bloomfield and Fairfield.²³ As shown in the following tables reproduced from KTVO's Petition, the submitted data are averages of two four-week audience sweep periods in each of two years.²⁴ Both for Bloomfield and Fairfield, the first year's audience estimates were derived from February 2010 and May 2010 audience sweep data, combined, and the second year's estimates from February 2011 and May 2011.²⁵ 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.²⁶

TABLE 1 – KCCI VIEWING IN BLOOMFIELD

²⁰ Petition at 1-2.

²¹ *Id.* at 1-2

²² *Id.* at 3. KCCI, KCRG and KGAN were included in the Commission's 1972 list of significantly viewed signals. *See id.*

²³ *Id.* at Attachment 1, Nielsen Report at 1.

²⁴ *See id.*

²⁵ *Id.*

²⁶ 47 C.F.R. § 76.54(b). The Bureau previously determined that substituting data from one four-week sweep period for the one-week period specified in the rules is acceptable.

Survey Dates	No. of Diaries	Total Viewing Hours Share	Standard Error	NWC Share	Standard Error
Feb. 10/May 10	6	0.00	0.00	0.00	0.00
Feb. 11/May 11	3	0.00	0.00	0.00	0.00

TABLE 2 – KCRG VIEWING IN FAIRFIELD

Survey Dates	No. of Diaries	Total Viewing Hours Share	Standard Error	NWC Share	Standard Error
Feb. 10/May 10	5	0.00	0.00	0.00	0.00
Feb. 11/May 11	4	0.00	0.00	0.00	0.00

TABLE 3 – KGAN VIEWING IN FAIRFIELD

Survey Dates	No. of Diaries	Total Viewing Hours Share	Standard Error	NWC Share	Standard Error
Feb. 10/May 10	5	0.00	0.00	0.00	0.00
Feb. 11/May 11	4	0.00	0.00	0.00	0.00

7. Barrington states that network stations, such as KCCI, KCRG, and KGAN, must achieve at least a 3 share of total weekly viewing hours and at least a 25 net weekly viewing share to be considered significantly viewed in a community, pursuant to Section 76.5(i) of the Commission's rules.²⁷ It observes that the submitted audience surveys show no measurable audience during any the survey periods. Accordingly, it argues that KCCI, in Bloomfield, and KCRG and KGAN, in Fairfield, are no longer significantly viewed and the Bureau should grant the requested waiver.²⁸

8. Opposing only the waiver request for carriage of KCCI in Bloomfield, Citizens argues that that a very small sample, by itself, should not compel the deletion of programming from a distant station that has historically been considered significantly viewed and carried in the community.²⁹ Citizens observes that the survey for Bloomfield includes six in-tab households for 2010 and three in-tab households for 2011 and, based on this small sample of non-cable, non-ADS households, estimated that the over-the-air audience share for KCCI fall short of the criteria for significantly viewed status.³⁰ It concedes Barrington's methodology is consistent with previously accepted showings,³¹ but, it argues that, in the absence of a more meaningful survey or other persuasive evidence that KCCI is not available over-the-air to viewers in Bloomfield, Barrington's request for waiver should be denied as not in the public interest.³² Citizens provides its system-specific subscriber information to demonstrate that KCCI

²⁷ Petition at 4.

²⁸ *Id.* at 6.

²⁹ Citizens Opposition at 1, 4-5.

³⁰ *Id.* at 4.

³¹ *Id.*

³² *Id.* at 5. LISCO states that it joins with Citizens with respect to the small sample issue. It asserts that it does not
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consistently outperforms KTVO in attracting viewers, and argues that with a majority of households viewing programming through an MVPD, deletion of KCCI would result in significant public inconvenience, confusion, and dissatisfaction.³³

9. Barrington replies that Citizens' data regarding KCCI's *cable* viewership is irrelevant given that the significantly viewed exception was designed to ensure access to programming of a distant station that was significantly viewed over-the-air.³⁴ Furthermore, Barrington argues, allowing MVPDs to import duplicating portions of distant signals that are no longer significantly viewed distorts the local broadcast marketplace,³⁵ and the established waiver process ensures that MVPDs cannot artificially undermine a stations' ability to enjoy the benefits of their bargained-for exclusivity arrangements.³⁶

10. Citizens also argues Barrington's request for waiver is contrary to the public interest because deletion of KCCI's signal will abrogate Citizens' bargained-for contractual rights; it notes it entered into a retransmission consent agreement with Hearst-Argyle Television, Inc., to carry the primary and multicast streams of KCCI on the Bloomfield system, a cost ultimately borne by its subscribers who are entitled to receive its programming without deletions or interruptions.³⁷ LISCO points out that when KCRG, KGAN, and KTVO doubled their retransmission consent prices in 2012, it began to only transmit Cedar Rapids stations (*i.e.*, KCRG and KGAN) because of the high cost of offering duplicative programming on its small system.³⁸ LISCO is concerned that if a waiver is granted, the national ABC and CBS networks will cause the Cedar Rapids affiliates to terminate their retransmission consent agreements with LISCO in Fairfield because their affiliation agreements bar them from being carried outside of their markets in any area where they are not significantly viewed.³⁹ Accordingly, by becoming the exclusive provider of ABC and CBS programming in Fairfield and Bloomfield, KTVO would force LISCO to enter a retransmission agreement with it.⁴⁰ Barrington replies that it is not in a position to comment on the contractual restrictions to which KCRG or KGAN are subject and that such arguments are irrelevant to the processing of its request under the Commission's rules.

11. In their oppositions, both Citizens and LISCO also argue the Bureau should find that the small system exemption to the network non-duplication rule contained in Section 76.95(a) applies to their systems.⁴¹ Citizens states it owns and operates a wireline digital video MVPD system providing IPTV based service to only 500 subscribers in Bloomfield,⁴² and LISCO states it is a cable service provider

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have the resources to refute the showing, but finds it troubling that a station's significantly viewed status can be overcome by the submission of limited data sets consisting of only four or five households. LISCO Opposition at 6 n.15.

³³ *Id.* at 5-6 & n.10 (citing Attachment 1, Exhibit).

³⁴ Reply to Citizens at 3-4 (emphasis in original).

³⁵ *Id.* at 4.

³⁶ *Id.* at 6.

³⁷ Citizens Opp. at 5-6.

³⁸ LISCO Opp. at 2.

³⁹ *Id.* at 8.

⁴⁰ *Id.* at 3.

⁴¹ Section 76.95(a) exempts cable systems with fewer than 1000 subscribers from the network non-duplication rules.

⁴² Citizens Opp. at 1, 2-4 & 7.

servicing fewer than 1000 subscribers in Fairfield.⁴³ If the waiver request is granted, both Citizens and LISCO ask that the Media Bureau delineate the scope of any waiver, and explicitly state that it will not require the deletion of network programming by video systems which qualify as small systems under Section 76.95(a).⁴⁴

12. In reply to LISCO, Barrington asserts it does not seek a waiver of the small system exception, it seeks only to assert its non-duplication rights as permitted under the rules;⁴⁵ however, it notes that Citizens in particular has not proven that it qualifies for this exemption.⁴⁶ Barrington argues that the waiver it seeks would have no effect on the applicability of the small system exemption and the ability of qualifying systems from availing themselves of this exemption as long as they have fewer than 1,000 subscribers.⁴⁷

13. LISCO also asks the Commission to include a special note in its final decision that will either explicitly exempt small cable companies from any change in KCRG and KGAN's significantly viewed status in Fairfield or state that these stations will continue to be considered significantly viewed in Fairfield with respect to small cable systems.⁴⁸ However, Barrington responds that a waiver of the significantly viewed exception with respect to a community does not delete an affected station from the list of significantly viewed signals.⁴⁹ Accordingly, a grant of the requested waiver does no more than allow local stations to assert exclusivity rights against other stations listed as significantly viewed in a particular area.⁵⁰

III. DISCUSSION

14. With regard to the significantly viewed issue, KTVO has submitted the necessary re-tabulations of Nielsen data to demonstrate that KCCI in Bloomfield and KCRG and KGAN in Fairfield are no longer significantly viewed.⁵¹ Indeed, Citizens concedes the showing meets all the Commission's requirements.⁵² Citizens also submitted data containing cable subscribers' viewership information

⁴³ LISCO Opp. at 1-2.

⁴⁴ Citizens Opp. at 2, 6-7; LISCO Opp. at 8-9.

⁴⁵ See Reply to LISCO at 5.

⁴⁶ Reply to Citizens at 6 (noting that Citizens' assertion that its system serves 500 subscribers in Bloomfield, the largest community served by its system, does not rule out that there may be more subscribers on Citizens' system as a whole). However, Barrington also states it takes no position on the question of whether Citizens qualifies for the small system exemption. *Id.* at n.20.

⁴⁷ *Id.* at 6-7; Reply to LISCO at 4.

⁴⁸ LISCO Opp. at 8-9.

⁴⁹ Reply to LISCO at 6 (also noting that the Commission recognized that deleting a station from the list would have implications for copyright liability).

⁵⁰ *Id.* at 7.

⁵¹ As set forth in Section 76.5(i), the significant viewing criteria for a network station are an audience of at least a 3 share of total weekly viewing hours and at least a 25 net weekly viewing share, and the data shows these stations fail to attain any measurable over-the-air viewing for each community for each year surveyed.

⁵² See Citizens Opposition at 4. Moreover, neither opposing party submits data that calls into question the results of Nielsen's re-tabulated data submitted by Barrington. See *WISN Hearst-Argyle Television, Inc.*, CSR-7764-N, 26 FCC Rcd 4044 (2011).

collected from set-top boxes, but this does not provide relevant information since it fails to reflect over-the-air viewing.⁵³ With respect to Citizens' concerns with the small sample size of Barrington's studies, as we have stated in the past, there is no requirement to use a specific number of in-tab diaries to calculate the average audience in a specific community in each survey period.⁵⁴ The Commission's rules for a community-specific survey only require that each community be represented in each survey.⁵⁵ In this case, the sample sizes of three and six in-tab diaries for the first and second year respectively for Bloomfield (and five and four in-tab diaries for Fairfield), while small, exceed the minimum sample of two in-tab diaries needed to calculate an average and sufficiently represent each survey period.⁵⁶ Moreover, our rules require that the survey results exceed a 3 percent share of total viewing hours and a net weekly circulation of 25 percent, by at least one standard error, to ensure that the reported results are representative of actual viewing, taking sample size into account, which is frequently small for Nielsen's retabulations.⁵⁷

15. Sections 76.95(a) and 76.106(b) of our rules provide that small cable systems serving fewer than 1,000 subscribers are exempt from both the network nonduplication and syndicated exclusivity rules, respectively.⁵⁸ However, both our network nonduplication and syndicated exclusivity rules may only be invoked by television stations with respect to programming aired over cable or satellite systems,⁵⁹ and it is unclear from this record whether Citizens and LISCO are cable operators as defined by the Communications Act and the Commission's rules.⁶⁰ If they are cable operators, and if these systems meet the definition of small cable systems having less than 1,000 subscribers, then they would be subject to the exemption. Therefore, although we waive the significantly viewed status of KCCI, KCRG, and KGAN with respect to the communities of Fairfield and Bloomfield, we do not take a position on whether Citizens or LISCO will have to delete the programming of these stations upon KTVO's assertion of its network nonduplication and syndicated exclusivity rights. We would expect the parties to resolve whether Citizens and LISCO are cable systems and, if so, whether the cable systems at issue have sufficiently few subscribers to qualify for the exemption. If the parties are unable to reach an agreement, they may raise the issue at the Commission through the normal complaint process.

IV. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED**, that the petition filed by Barrington Kirksville License, LLC, licensee of station KTVO-TV, Kirksville, Missouri **IS GRANTED** for the communities of Bloomfield and Fairfield, IOWA.

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

⁵³ See Citizens Opposition at 5 & Exhibits.

⁵⁴ See, e.g., *Gulf-California Broadcasting Company*, CSR-7050-N, 23 FCC Rcd 7406, 7411 (2008).

⁵⁵ *Id.*

⁵⁶ Without evidence to the contrary, we assume that at least one in-tab household was included from each survey period when the average reported values were calculated.

⁵⁷ 47 C.F.R. §76.5(i); 47 C.F.R. § 76.54(b).

⁵⁸ See 47 C.F.R. § 76.95(a) and 47 C.F.R. § 76.106(b).

⁵⁹ See, e.g., 47 C.F.R. §§ 76.94(a), 76.105(a), 76.122(c) and 76.123(d).

⁶⁰ 47 U.S.C. § 522(5) ("cable operator"); 47 C.F.R. § 76.5(cc) ("cable system operator").

rules.⁶¹

FEDERAL COMMUNICATIONS COMMISSION

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⁶¹ 47 C.F.R. §0.283.