

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

In the Matter of:)	
)	
KATC Communications, Inc.)	
)	CSR-5525-N
For Waiver of Section 76.92(f) of the)	
Commission's Rules)	

ORDER ON RECONSIDERATION

Adopted: March 19, 2001

Released: March 21, 2001

By the Deputy Chief, Cable Services Bureau:

I. INTRODUCTION

1. KATC Communications, Inc., licensee of television broadcast station KATC (Ch. 3), Lafayette, Louisiana ("KATC"), has requested reconsideration of the Bureau's decision denying KATC's petition seeking a waiver of the Commission's significantly viewed exception to the network nonduplication rules.¹ A motion for leave to file opposition and an opposition to this petition were filed on behalf of Louisiana Television Broadcasting L.L.C., licensee of station WBRZ-TV (Ch. 2), Baton Rouge, Louisiana ("WBRZ-TV"), to which KATC has replied.

II. BACKGROUND

2. In its request for waiver, KATC sought a waiver of the significantly viewed exception to the network nonduplication rules so that it could assert network nonduplication protection against WBRZ-TV in various cable communities served by Cox Cable of Lafayette, Cox Cable of New Iberia, Cox Cable of Abbeville and Charter Communications of Opelousas. The Bureau denied KATC's request because the survey information submitted by KATC failed to provide sufficient information to determine whether the survey sample met the proportionality requirements specified in the Commission's rules and KATC failed to separate the results of the three sweeps periods submitted for each year, making it impossible to determine the effect the third sweeps period may have had on the overall results.²

III. DISCUSSION

3. In support of its request, KATC argues that the Nielsen Study it submitted in support of its original request satisfied the Commission's criteria established in *KCST-TV, Inc.*³ To confirm this,

¹*KATC Communications, Inc.*, 15 FCC Rcd 14743 (2000) ("Bureau Order").

²*Bureau Order* at 14744.

³103 FCC 2d 407 (1986) (In order to obtain a waiver of the network nonduplication rules for significantly viewed stations, the Commission in *KCST-TV* held that petitioners would be required to demonstrate (continued....))

KATC states that it is providing information which clarifies the following: 1) the zip codes located within each of the cable communities served by the cable systems;⁴ 2) the 1990 Census total households and the Nielsen total television households located within each of the zip code areas surveyed in the Nielsen study;⁵ 3) the number of total surveys distributed in each of the subject zip code areas and the number of noncable household surveys returned for tabulation (“in-tab”) in each of the subject zip code areas;⁶ and 4) the relative proportion of 1990 Census households, Nielsen television households, and noncable household in-tab surveys for each of the survey periods and for each of the zip code areas in the cable communities.⁷ In addition, KATC states that, in order to demonstrate that the use of an additional third sweeps period in each of the survey years did not affect the overall results of the Nielsen Study submitted with its request, it submitted a revised Nielsen Study which separates the results for two sweep periods in each of two years using the same survey information previously submitted.⁸

4. KATC asserts that the information submitted demonstrates that the Nielsen Study satisfies the proportionality requirements specified in the Commission’s rules and confirms that WBRZ-TV is no longer significantly viewed in the subject communities.⁹ KATC argues that any disparities between population distribution and sample distribution in the Nielsen Study are comparable to the disparities accepted by the Commission in other instances.¹⁰ While KATC acknowledges that in a few isolated instances, the Nielsen Study reported no in-tab survey data for a particular zip code within one of the cable communities, it points out that little or no population was recorded for the relevant zip code area in the 1990 Census of the Nielsen television household population. KATC submits that the lack of an in-tab survey under such circumstances is statistically insignificant and should not affect the validity of the Nielsen Study. In light of the above, and WBRZ-TV’s failure to satisfy the Commission’s significant viewing standards, KATC argues that no interests would be adversely affected or disserved by allowing KATC to exercise its contractual network nonduplication rights in this instance.

5. In its motion for leave to file opposition, WBRZ-TV states that, because KATC’s original (Continued from previous page) _____
for two consecutive years that a station was no longer significantly viewed based either on community-specific or system-specific noncable viewing data, to one standard error.).

⁴KATC states that community specific zip code information was obtained from the United States Postal Service Internet site, <http://www.usps.gov/cgi-bin/zip4/ctystzip2>. See Petition at Exhibit 3.

⁵Census household populations for each zip code were obtained from the United States Census Bureau Internet site, <http://venus.census.gov/cdrom/lookup>. See Petition at Exhibit 4. KATC states that some of the cable communities’ zip codes did not exist at the time of the 1990 Census. Further, Nielsen annually retabulates total television households. See Petition at Exhibit 5. KATC maintains, therefore, that the information provided by Nielsen in Exhibit 5 reflects Nielsen’s television household counts for each of the survey periods.

⁶Petition at Exhibits 6 and 7. KATC states that the Nielsen information provided in Exhibit 7 reflects in-tab proportions in relation to the universe of sampled zip codes rather than proportions within each of the subject cable systems.

⁷*Id.* at Exhibit 8.

⁸*Id.* at Exhibit 2.

⁹47 C.F.R. §76.54(b).

¹⁰See e.g., *KSWB, Inc.*, 13 FCC Rcd 15470 (1998), application for review pending; and *Cypress Broadcasting Corp.*, 11 FCC Rcd 21073 (1996).

petition was plainly defective, it decided not to file an opposition at that time. WBRZ-TV argues that it had every reason to expect that once KATC's petition was denied, KATC would follow the appropriate procedural course and submit a new petition, rather than an improperly filed petition for reconsideration as it has done here, and that WBRZ-TV would be given the normal twenty days to respond.¹¹ WBRZ-TV states that once it became aware of the instant petition, it determined after review that it would need the assistance of a consultant with the expertise in evaluating significantly viewed studies. It therefore retained the services of such a consultant and, after the consultant's input, acted diligently in preparing and submitting its opposition to KATC's request for reconsideration.¹² WBRZ-TV asserts that KATC should not be permitted to profit from its improper use of a petition for reconsideration to supply new facts that could and should have been submitted earlier. Therefore, WBRZ-TV requests that, in order to reach the proper disposition of this case, the Commission accept its opposition.

6. WBRZ-TV argues that Sections 1.106(b)(2) and (c) of the Commission's rules state that petitions for reconsideration which rely on facts not previously presented to the Commission may not be granted unless the new facts "relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters" or were "unknown to the petitioner until after the last opportunity to present such matters and which could not, through the exercise of diligence, have been learned prior to such opportunity."¹³ WBRZ-TV maintains that KATC's petition for reconsideration relies entirely on facts which it, or its agent Nielsen, were either fully aware or could have discovered and presented at the time of its original waiver request. WBRZ-TV states that KATC should, more properly, have filed an entirely new petition for waiver and that its petition for reconsideration herein should be dismissed.¹⁴

7. WBRZ-TV states that the Nielsen Study of viewing in areas served by the Cox Cable of Lafayette and the Cox Cable of New Iberia cable systems is seriously defective because there is no adequate proportionality between the populations of the communities served and the number of in-tab diaries from the respective communities that were considered in the study.¹⁵ For instance, for Cox's Lafayette system, the community of Lafayette, which is the largest cable community served by the system with 71 percent of the total population of all of the system communities, is represented by only 33 percent of all of the diaries considered in the study.¹⁶ WBRZ-TV argues that this degree of disproportionality between the diaries considered and the population of the cable communities in question is unacceptable. WBRZ-TV's consultant states that such a disparity "is sufficiently large, and the departure from proportionality is sufficiently great, to introduce a probability of error more than sufficient to materially affect the ultimate conclusion of the Nielsen study – that WBRZ is not significantly viewed."¹⁷ WBRZ-TV asserts that the Commission should not accept such a faulty study.

¹¹See 47 C.F.R. §1.106(b)(2) & (c).

¹²Motion at 2.

¹³*Id.*

¹⁴Opposition at 2.

¹⁵Opposition, Declaration of Robert Schultz.

¹⁶*Id.*

¹⁷*Id.* at 3.

8. WBRZ-TV states that the same disproportionality situation also exists to a slightly lesser degree with respect to Cox's New Iberia system.¹⁸ For that system, the largest community, New Iberia, which contains 57 percent of the population served as opposed to 43 percent for the three smaller communities combined, is represented by only 41 percent of the diaries while 59 percent of diaries come from the three smaller communities. WBRZ-TV notes that this degree of disproportionality could also have affected the ultimate outcome of the study.¹⁹

9. WRBZ-TV argues that, according to the 1999 Nielsen study, it was very close to achieving significantly viewed status in the areas served by the Lafayette system and was only slightly less close in achieving such status in the New Iberia system.²⁰ It maintains, therefore, that it would be improper to conclude, based on studies which suffer from a serious lack of proportionality, that WBRZ-TV is no longer significantly viewed in the areas served by these two cable systems.

10. In reply, KATC argues that both WBRZ-TV's opposition and its motion to file opposition should be dismissed and denied, respectively, because WBRZ-TV knowingly and voluntarily declined to oppose KATC's original petition for special relief and is therefore without standing to participate in the instant proceeding.²¹ KATC states that it provided WBRZ-TV with multiple opportunities to participate, each of which it declined. KATC states that following the filing of its waiver request, it met with WBRZ-TV's general manager and discussed the petition. At that time, WBRZ-TV indicated that it would not oppose KATC's petition. Even after the filing of its petition for reconsideration, KATC states that WBRZ-TV again declined to participate. KATC argues that, as a result, WBRZ-TV's contention in its opposition that it decided not to oppose the waiver petition because that petition was "plainly defective" is false.²² Even assuming that WBRZ-TV does have standing, KATC maintains that WBRZ-TV has failed to adhere to the Commission's procedures or to demonstrate a legitimate reason for being unable to submit its pleadings within the specified time, as required by section 1.46(a) of the Commission's rules.²³ KATC argues that WBRZ-TV's assertion that it needed "the assistance of a consultant with expertise in the evaluation of significantly viewed studies" is insufficient under the Commission's standards to justify its failure to submit its opposition in a timely manner.²⁴

11. Moreover, KATC states that, contrary to WBRZ-TV's assertions, the instant petition for reconsideration does not rely upon nor include facts not previously presented to the Commission, but rather affirmatively demonstrates KATC's entitlement to a waiver of the significantly viewed exception by using the same significantly viewed study submitted in the original waiver petition. KATC states that, rather than submit a new study, it merely clarified the information previously submitted to demonstrate that the

¹⁸*Id.*

¹⁹*Id.*

²⁰Opposition at 3. WBRZ-TV states that the 1999 study indicated shares of 2.44 percent total viewing hours and a net weekly circulation of 23.31 percent for the Lafayette system and shares of 1.5 percent total viewing and a net weekly circulation of 28.34 percent for New Iberia.

²¹47 C.F.R. §1.106(b)(1).

²²Motion at 2.

²³47 C.F.R. §1.46(a).

²⁴Motion at 2.

Nielsen Study conformed to the Commission's proportionality standards and that it proved that WBRZ-TV no longer is significantly viewed in the subject communities. KATC maintains that Nielsen's sampling methodology already accounts for proportionality by means of weighting the in-tab surveys.²⁵ KATC points out that, according to Nielsen, at the individual county level each household in the sample is assigned a weighting factor based on geography, presence of children, household size, age of the head of household, cable subscribership and ethnicity.²⁶ KATC states, therefore, that Nielsen accounts for variations in the number of returned in-tab samples in different communities by applying a geographic weighting factor. KATC notes that the declaration submitted by WBRZ-TV concedes that "some skewing" of proportionality is acceptable "especially . . . among very small communities where diary shortfalls would have minimal statistical impact."²⁷ KATC submits that in this instance, with the exception of two zip codes in the City of Lafayette, one in New Iberia, and one in Opelousas, all of the communities included in the Nielsen study are very small, ranging in population from 44 to 8886.²⁸ As a result, KATC contends that the Nielsen Study presented in its waiver request and the instant petition comport with the Commission's proportionality requirements.

12. Initially, with regard to procedural issues, we note the following. First, WBRZ-TV is correct that KATC should more properly have filed a new petition for waiver rather than a petition for reconsideration. While it is true that some of the information contained in its petition for reconsideration had been submitted in its earlier petition, KATC also submits new information which it could have presented at the time of its original request. Second, WBRZ-TV fails to justify its failure to participate in KATC's original petition for waiver. In both instances, however, we do not find that the public interest would be served by requiring KATC to file a new petition, or by dismissing WBRZ-TV's opposition.

13. Each of the cable systems included in KATC's submission covers multiple cable communities. In accordance with Section 76.54(b) of the Commission's rules, a single survey may be taken in such case provided that the sample includes non-cable television homes from each community that are proportional to the population. Based on the information provided in Exhibit 8 of KATC's petition for reconsideration, the criterion to include each community is not met for three of the four cable systems. The sample for Cox Cable of Lafayette includes no diaries from Milton for either year. The sample for Cox Cable of Abbeville includes no diaries from Delcambre and Charter Communications of Opelousas' sample includes no diaries from Leonville. The only survey which meets the criteria to include samples from each community is the one for Cox Cable of New Iberia. It should be noted that not all zip codes for each community are represented, but as the rule is written, they need not be. However, while Nielsen may weight its sample and in-tab diaries to account for variation in return rates among communities for its routine surveys, and the effect of no in-tab diaries for very small communities may be *de minimis*, the failure to include each community for the purpose of a Commission showing is not acceptable. The failure of Nielsen to include diaries from every community in its audience sweep surveys is one of the major reasons parties have found it difficult to use Nielsen data initially gathered for other purposes in demonstrating significantly viewed status or the lack thereof. As a result, we find that the submitted audience surveys for Cox Cable of Lafayette, Cox Cable of Abbeville and Charter Communications of Opelousas are deficient in this respect.

²⁵Reply at Exhibit 1.

²⁶*Id.* at Exhibit 2.

²⁷Opposition, Schultz Declaration at 2.

²⁸Reply at 7.

14. With regard to Cox Cable of New Iberia, we note that since combined surveys were conducted for the four cable communities served, the rules require that each community be proportionately represented on the basis of its relative population in the sample. A comparison of the percentage of the population in each community with the percentage of the diaries from each community in the two samples indicates that the community of New Iberia is under-represented and the three other communities over-represented.²⁹ We recognize that obtaining a proportional sample is difficult when petitioners use data not specifically collected for the purpose of determining significantly viewed status. We also recognize that conducting surveys solely for this purpose can be time-consuming and costly. However, to ensure that the submitted audience statistics accurately reflect whether a station remains significantly viewed, we require that the representation of the cable communities in the sample be reasonably proportional to the population of the respective communities. In this case, we find a significant deviation between the proportion of the population and the percent of diaries in each community surveyed. As a result of this deviation, the reported audience statistics may not accurately reflect the noncable household viewing of WBRZ-TV in the cable communities. Accordingly, we conclude that the surveys provided by KATC for Cox Cable of New Iberia do not meet the proportionality requirements specified in the Commission's rules.

15. In view of the fact that KATC's showings do not meet the criteria established in *KCST-TV* for waiver of the network nonduplication rules, we will deny KATC's petition for reconsideration.

IV. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED**, that the petition for reconsideration filed by KATC Communications, Inc. **IS DENIED**.

17. This action is taken pursuant to authority delegated under Sections 0.321 and 1.106 of the Commission's rules.³⁰

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson, Deputy Chief
Cable Services Bureau

²⁹For instance, New Iberia represents 57 percent of the population of the cable system, but only 41 percent of the 1999 sample while the 1999 sample for the three smaller communities, which represent 43 percent of the population, consists of 59 percent of the total.

³⁰47 C.F.R. §§0.321 and 1.106.