

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

In the Matter of:)	
)	
Journal Broadcast Corporation)	
)	CSR-6570-N
For Waiver of Section 76.92(f))	
of the Commission's Rules)	

MEMORANDUM OPINION AND ORDER

Adopted: March 31, 2006

Released: April 4, 2006

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Journal Broadcast Corporation, licensee of station KMIR-TV (NBC, Ch. 36), Palm Springs, California ("KMIR-TV"), filed the captioned petition seeking a waiver of the rule that precludes cable operators¹ from deleting the duplicate programming of "significantly viewed" stations under the network nonduplication rules.² NBC Telemundo License Company, licensee of station KNBC (NBC), Los Angeles, California ("KNBC") filed a response to this petition. For the reasons discussed below, we deny KMIR-TV'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

¹Section 340 of the Communications Act, as enacted by the Satellite Home Viewer Extension and Reauthorization Act of 2004, expanded the application of the significantly viewed rules to include satellite carriers. *See* 47 U.S.C. § 340; *see also Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004; Implementation of Section 340 of the Communications Act*, MB Docket No. 05-49, Report and Order, FCC 05-187 (rel. Nov. 3, 2005) ("*SHVERA Significantly Viewed Report and Order*"). However, Section 341(b) of the Act, also enacted by the SHVERA, expressly prohibits a satellite carrier from retransmitting a significantly viewed signal to subscribers in the communities in the Palm Springs DMA. *See* 47 U.S.C. § 341(b); 47 C.F.R. § 76.54(k); *see also SHVERA Significantly Viewed Report and Order* at ¶ 108. Because the stations here at issue may not be carried by a satellite carrier as significantly viewed into Palm Springs, KMIR-TV's waiver request is only necessary and addressed in the context of cable carriage.

² 47 C.F.R. § 76.92(f). Although not expressly requested in KMIR-TV's petition for waiver of Section 76.92(f), a waiver of Section 76.106(a) (the significantly viewed exception to the cable syndicated exclusivity rules) would also appertain based on the same showing that a station is no longer significantly viewed in the relevant community. *See* 47 C.F.R. §§ 76.92(f) and 76.106(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 the network nonduplication and syndicated exclusivity rules ("exclusivity rules") if it is "significantly viewed" in a relevant community ("the significantly viewed exception").⁴ The Commission's rules provide stations such protection within specified geographic zones.⁵ The significantly viewed exception to the exclusivity rules is based on an otherwise distant station establishing that it 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 exclusivity rules because it has established that it is viewed over the air in the subject community.

3. In order to obtain a waiver of the significantly viewed exception to the exclusivity rules, 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). For each year, the data must be the result of independent professional surveys taken during two one week periods separated by at least 30 days, the viewing samples must be distributed proportionately among the relevant cable communities, and not more than one of the surveys may be taken between April and September of each year.⁷ 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.⁸ For independent stations (*i.e.*, non-network stations), to be considered significantly viewed, Section 76.5(i) requires 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.⁹ The Commission has found that this type of test is applicable as well for waivers of the syndicated exclusivity exemption.¹⁰

4. KMIR-TV seeks a waiver of the significantly viewed exception so that it may enforce its exclusivity rights against KNBC.¹¹ KNBC is considered to be significantly viewed in the portion of Riverside County, California, designated "Riverside Central," where the communities of Palm Desert and Palm Springs, California, are located.¹²

III. SUMMARY OF THE RECORD

5. KMIR-TV states that it would normally have exclusivity rights for NBC programming in the Palm Springs, California, designated market area ("DMA"), but is prevented from asserting those

³See 47 C.F.R. §§ 76.92 and 76.101.

⁴47 C.F.R. §§ 76.92(f) and 76.106(a); *see* 47 C.F.R. §§ 76.5(i) and 76.54.

⁵See 47 C.F.R. §§ 73.658 and 76.53.

⁶103 FCC 2d 407 (1986).

⁷See 47 C.F.R. § 76.54(b).

⁸47 C.F.R. § 76.5(i).

⁹*Id.*

¹⁰See *Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640 (1990).

¹¹Petition at 1.

¹²*Id.*

rights against KNBC in the subject communities because KNBC is considered to be significantly viewed in the portion of Riverside County designated “Riverside Central,” where the communities are located.¹³ KMIR-TV points out that KNBC, which is licensed to Los Angeles, California, is located in the Los Angeles DMA.¹⁴ KMIR-TV asserts, however, that KNBC no longer meets the significantly viewed standard in the communities of Palm Desert and Palm Springs and, as proof, it submits the results of a special, system-specific survey conducted by Nielsen Media Research.¹⁵ KMIR-TV states that Nielsen conducted a special tabulation of diaries from specified zip codes served by Time Warner in the Palm Springs DMA.¹⁶ The first year survey’s audience estimates were based on May 2002/February 2003 data and the second year’s estimates on the May 2003/February 2004 data.¹⁷ These 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.¹⁸

6. In its comments, KNBC states that it does not oppose KMIR-TV’s petition, but reserves the right to restore the significantly viewed status of KNBC in Palm Springs in the future, should the circumstances warrant.¹⁹ While KMIR-TV’s petition does not clearly identify the geographic area involved, KNBC assumes that the zip codes listed apply only to the relevant cable communities involved and, as such, will not oppose the request.²⁰ KNBC states, however, that its concurrence is limited only to the cable context.²¹ Finally, KNBC requests that the Commission should note that KMIR-TV does not seek, nor will it grant, a waiver request that would delete KNBC entirely from the list of significantly viewed signals.²²

IV. ANALYSIS

7. We reject KMIR-TV’s showing because the sample includes satellite households. Originally, Section 76.54(b) of the Commission’s rules used the term “noncable” to refer to the households of interest because in 1972, when the rule was adopted, broadcast television stations were either received off-air or via a cable television system, although the Commission clearly referred to over-the-air viewing in adopting its rules for significant viewing.²³ In 1986, when *KCST-TV* was decided and the procedures for demonstrating that a station is no longer significantly viewed were established, viewers still received broadcast television stations either off-air or via a cable system. In the *SHVERA*

¹³Petition at 3. KMIR-TV states that KNBC achieved its significantly viewed status by its inclusion in Appendix B to the *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 378 (1972).

¹⁴Petition at 2.

¹⁵*Id.* at 3 and Exhibits 1 and 2.

¹⁶*Id.* We note that the petition does not make clear exactly what geographic area these zip codes cover and whether they correspond exactly to all the zip codes of Palm Springs and Palm Desert.

¹⁷*Id.* at Exhibit 1.

¹⁸47 C.F.R. § 76.54(b).

¹⁹KNBC Response at 1.

²⁰*Id.* at 2.

²¹*Id.* at 3.

²²*Id.* at 4.

²³See *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 346-47 (1992); see also *Cable TV Report and Order*, 36 FCC 2d at ¶ 83.

Significantly Viewed Report and Order, the Commission stated that “[i]t would also be inconsistent with the original intent of the [significantly viewed] process to permit satellite carriers to use their own subscribers in audience surveys to demonstrate [significantly viewed] status.”²⁴ Consequently, we cannot accept survey data that includes satellite households.

8. Further, KMIR-TV’s showing does not satisfy Section 76.54(b)’s proportionality requirement for system-specific surveys.²⁵ If a cable system serves more than one community, a petitioner may elect to submit a system-specific survey, as is the case here. However, Section 76.54(b) requires that “[i]f a cable television system serves more than one community, a single survey may be taken, provided that the sample includes over-the-air television homes from each community that are proportional to the population.”²⁶ KMIR-TV’s submission does not provide sufficient information to assess whether Palm Springs and Palm Desert are proportionally represented in the sample used for the Nielsen tabulation of audience statistics. Thus, the survey data is deficient.

9. We also take this opportunity to address KNBC’s statement that, if the waiver request were granted, it would affect only cable carriage of the significantly viewed station at issue. This is true, but not for the reasons argued by KNBC.²⁷ As noted above,²⁸ Section 341(b) of the Act prevents a satellite carrier from retransmitting a significantly viewed signal to subscribers in the Palm Springs and Bakersfield, California DMAs.²⁹ Thus, because the station at issue may not be carried by a satellite carrier as significantly viewed into Palm Springs, KMIR-TV’s waiver request is only applicable, and would only be necessary, in the context of cable carriage. We clarify, however, that absent application of Section 341(b), actions involving significantly viewed status would apply equally to both cable and satellite carriage.³⁰

10. We also clarify that, contrary to KNBC’s claim, the grant of a waiver of the significantly viewed exemption does not cause that station to be deleted from the Significantly Viewed List (“SV List”).³¹ Indeed, in *KCST-TV*, the decision that established the criteria required for waivers of the network nonduplication exemption, it was emphasized that the “decision to grant KCST-TV’s waiver request does not delete KNBC from our 1972 list of significantly viewed signals.”³² Rather, the SV List identifies with a pound sign (#) those stations and related communities subject to programming deletions

²⁴See *SHVERA Significantly Viewed Report and Order* at ¶ 32.

²⁵47 C.F.R. § 76.54(b).

²⁶*Id.*

²⁷KNBC incorrectly states that “Until the Commission reaches a decision on how to tailor the cable exclusivity rules, including the significantly viewed exemption, to satellite carriage, rulings regarding waivers of the significantly viewed exception to the rules must remain limited to cable carriage.” See KNBC Response at 3-4.

²⁸See note 1.

²⁹47 U.S.C. § 341(b); 47 C.F.R. § 76.54(k); see also *SHVERA Significantly Viewed Report and Order* at ¶ 108.

³⁰See *SHVERA Significantly Viewed Report and Order* at ¶ 41 (“If [a network nonduplication] waiver is granted, the duplicating programming must be deleted by a cable operator or satellite carrier if the station is carried in a community in which the station has been shown to no longer be significantly viewed.”).

³¹See KNBC’s Response at 4.

³²103 FCC 2d at 412.

because we granted a waiver of the significantly viewed exception.³³

V. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED**, that the petition filed by Journal Broadcast Corporation **IS DENIED**.

12. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.³⁴

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
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³³*SHVERA Significantly Viewed Report and Order* at ¶ 14.

³⁴47 C.F.R. §0.283.