

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

In the Matter of:)	
)	
Gulf-California Broadcast Company)	
)	CSR-6374-N
For Waiver of Sections 76.92(f) and 76.106(a) 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. Gulf-California Broadcast Company, licensee of station KESQ-TV (ABC), Palm Springs, California, and optionee/programmer of station KDFX-CA (FOX), Palm Springs-Indio, California ("Gulf"), 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 and syndicated exclusivity rules ("exclusivity rules").² ABC Holding Company, Inc., licensee of station KABC-TV (ABC), Los Angeles, California ("KABC-TV") filed an opposition, to which Gulf replied. For the reasons discussed below, we deny Gulf'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

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, Gulf's waiver request is only necessary and addressed in the context of cable carriage.

² 47 C.F.R. §§ 76.92(f) and 76.106(a).

³*See* 47 C.F.R. §§ 76.92 and 76.101.

otherwise subject to deletion is exempt from application of the 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 it being established 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 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) of the Commission’s rules. 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 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.⁹ The Commission has found that this type of test is applicable as well for waivers of the syndicated exclusivity exemption.¹⁰

4. Gulf seeks a waiver of the significantly viewed exception so that it may enforce its exclusivity rights against Los Angeles television stations KABC-TV; KTTV; KTLA; KCAL-TV; and KCOP in various communities within the Palm Springs, California DMA served by Time Warner and Adelphia cable systems.¹¹ All of these Los Angeles stations are considered to be significantly viewed in the portion of Riverside County, California, designated “Riverside Central,” where the communities at issue are located.¹² Gulf suggests that, in addition to nonduplication and syndicated exclusivity being available to KESQ-TV, protection would also be available to KDFX-CA, a class A television station of which Gulf states it is “optionee/programmer.”¹³

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

⁵ *See* 47 C.F.R. §§ 73.658 and 76.53.

⁶ 103 FCC 2d 407 (1986).

⁷ *See* 47 C.F.R. §76.54(b).

⁸ 47 C.F.R. §76.5(i).

⁹ *Id.*

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

¹¹ Petition at 1. Gulf states that Time Warner serves the communities of Cathedral City, Coachella, Indio, La Quinta, Mecca, Palm Desert, Palm Springs, Rancho Mirage, and Thousand Palms, California; and Adelphia serves the community of Desert Hot Springs, California.

¹² *Id.* at 2.

¹³ Gulf states that class A television stations are entitled to “nondupe and syndex protection” citing 47 C.F.R. § 73.6036. *Id.* at n.21.

III. SUMMARY OF THE RECORD

5. Gulf maintains that recent audience survey data demonstrates that, with the exception of one signal in one community, none of the Los Angeles stations are entitled to an exemption from the exclusivity rules in the Palm Springs communities.¹⁴ The exception, states Gulf, is for the community of La Quinta, where the survey data for KTTV did not meet the requirements for a waiver of the significantly viewed exemption. Gulf submits “community-specific” audience surveys of over-the-air homes, conducted over two years by Nielsen Media Research.¹⁵ Gulf asserts that, based on this data, a grant of a waiver is warranted.

6. In opposition, KABC-TV argues that Gulf has failed to meet the high burden of proof established in *KCST-TV* when a petitioner seeks to demonstrate that a station is no longer significantly viewed in a community.¹⁶ First, KABC-TV argues that Gulf fails to adequately explain the methodology it used to obtain the data it submitted and, as a result, there is insufficient information provided to conclude that Gulf’s survey data is statistically reliable.¹⁷ KABC-TV notes that, in *Radio Perry, Inc.*, the Commission established that a petitioner seeking a waiver of Section 76.92(f) is expected to provide an explanation of the methodology used to obtain the audience data submitted to the Commission.¹⁸ KABC-TV states that, except for a short conclusory statement, Gulf does not attempt to explain the methodology it used to compile the “community-specific” data it submitted.¹⁹ Specifically, KABC-TV states that Gulf did not provide: a) an explanation of how its survey data was derived; b) information regarding how the apparent retabulation was performed; c) details of the steps taken to ensure that the data adequately represented noncable households in the subject communities; d) how it converted DMA-wide data to community-specific data; e) how it calculated a standard error to account for a retabulation of the data; f) substantiation that the Nielsen surveys selected and reported represent the over-the-air viewing habits of households in the cable communities at issue; and g) proof that such samples are statistically reliable, especially given the small number of samples reported for each survey period.²⁰ KABC-TV argues that, at a minimum, Gulf should be required to explain how standard Nielsen DMA-wide survey data were used to obtain a representative sample of over-the-air households in each of the Palm Springs cable communities.²¹

7. In reply, Gulf maintains that it adequately reveals the methodology that underlies the survey data submitted with its request.²² Gulf states that the petition explained that: a) it relied upon Nielsen’s special tabulations for over-the-air homes of audience surveys conducted by Nielsen Media Research and using “community-specific” data;²³ b) Gulf’s diaries were obtained from “each zip code in

¹⁴*Id.* at 9.

¹⁵*Id.* at Exhibits 1-10.

¹⁶Opposition at 3, citing 103 FCC 2d 407 (1986).

¹⁷*Id.* at 4.

¹⁸*Id.*, citing 11 FCC Rcd 10564 at ¶ 8 (1996).

¹⁹*Id.* at 4 n.15.

²⁰*Id.* at 5-6.

²¹*Id.* at 5.

²²Reply at 2.

²³*Id.*, citing Petition at 9.

every community;”²⁴ c) survey results were subjected to “one standard error;”²⁵ and d) because survey data from over-the-air homes for the 10 communities does not exclude satellite reception, the survey results tend to overstate the extent to which Los Angeles stations are viewed (over-the-air) in the 10 communities.²⁶ Gulf argues that it followed the established policies and practices of both the Commission and former successful petitioners in relying on special tabulations of Nielsen data and that its methodology has been endorsed in numerous cases.²⁷ Gulf states that it relied on recent data extracted from “community-specific” data from Nielsen “sweeps” surveys for “two consecutive years,” with two periods of survey data from each of the two years that were separated by more than 30 days, and the average survey results were reported to “one standard error.”²⁸ Gulf argues that KABC-TV’s reliance on *Radio Perry* is also mistaken as that case involved a petitioner that failed to present the “average audience shares” that the Commission’s rules require and failed to subject the survey data to one standard error.²⁹

IV. ANALYSIS

8. We reject Gulf’s showing, and agree with KABC-TV’s opposition,³⁰ because Gulf has failed to adequately explain the methodology it used to obtain the data submitted. Gulf’s petition, while it claims to present a retabulation of Nielsen’s routine audience sweep data, lacks sufficient documentation including an explanation of Nielsen’s procedures. Specifically, Gulf does not provide the retabulation directly from Nielsen, omits the Nielsen description of how the relevant diaries from its sweeps database were selected along with any limitations on the data or weighting procedures used.³¹ As a result, Gulf’s showing is not sufficient under *KCST-TV*, the Commission’s rules,³² or previous decisions.³³ *KCST-TV* established the methodology required to support waivers based on Section 76.54(b).³⁴ In a subsequent decision, *Radio Perry*, the Commission observed that the *KCST-TV* decision required that a petitioner must show that a station has not met the standards for significant viewing for two consecutive years using the methodology mandated by Section 76.54(b).³⁵ In *Radio Perry*, we concluded that the submitted data appeared to be a retabulation of Nielsen’s routine audience sweep diaries. The submission in *Radio Perry* was rejected, however, because the petitioner submitted a retabulation of routine Nielsen audience sweep

²⁴*Id.*, citing Petition at n.25.

²⁵*Id.*, citing Petition at Exhibits 1-10.

²⁶*Id.*, citing Petition at n.14.

²⁷*Id.* at 2-3, citing *MMM License LLC*, 17 FCC Rcd 20875, 10876-87 (2002); *WTVH Broadcasting, Inc. and K-W TV, Inc.*, 16 FCC Rcd 16377, 16378-9 (2001); *Wyomedia Corporation*, 17 FCC Rcd 20348, 20450-51 (2002).

²⁸*Id.* at 3.

²⁹*Id.* at 4, citing 11 FCC Rcd at 10566, 10568-9.

³⁰ Opposition at 4-5.

³¹See e.g., *Barrington Broadcasting Corporation*, 19 FCC Rcd 2046 (2004). Exhibits 1-2 of the petition filed by Barrington Broadcasting include a letter regarding methodology and reported data as supplied directly by Nielsen to the petitioner.

³² See 47 C.F.R. § 76.54(c).

³³*Id.*

³⁴*KCST-TV, Inc.*, 103 FCC 2d 407 at ¶¶ 10-11; see also 47 C.F.R. § 76.54(b).

³⁵*Radio Perry*, 11 FCC Rcd 10568 at ¶ 9.

data without describing how the routine Nielsen data were used to provide a representative sample for purposes of demonstrating that the over-the-air viewing no longer meets the criteria for significantly viewed status.³⁶ As in *Radio Perry*, we find that Gulf has not provided sufficient information to allow us to determine whether its sample, which was part of a larger sample selected for an entirely different purpose, is reliable and applicable for the intended showing.³⁷ Accordingly, we reiterate that we expect petitioners to include a description of the sampling methodology and other statistical procedures used to derive the audience estimates and associated standard errors, even if the community or system-specific data are retabulations of routine Nielsen sweep data for the communities of interest.

9. Section 76.54(b) provides that “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.”³⁸ When adopting the standards for significant viewing studies, the Commission stated that the standards, including the requirement that the study be undertaken by an independent, professional survey organization, were designed “so that the survey methods, survey times, etc. are not keyed to produce only the desired results and so that numerous surveys are not taken with the hope that through random variations a favorable sample and result are achieved.”³⁹ Because there is nothing in the record setting forth in detail the methodology employed, it is not possible to conclude that the requirements of the rule were complied with; that if surveys were taken for more than 2 weekly periods in any 12 months, all such surveys were included in the average figure. Gulf is free, as it contends, to select any two survey periods (in each of two consecutive years), regardless of what other survey periods during those years might show. It is not free, however, to obtain data for more than two survey periods in a 12 month period and include in the average only those periods that are most favorable to the conclusion it seeks. Although Gulf maintains that it is making use of Nielsen data of the same type accepted by the Commission in other cases, that does not appear to be the case. There is nothing here, as there typically is, indicating that the data, including calculation of the standard errors and selection of the data from within sampling periods, was as prepared by Nielsen, using its independent professional judgment.

10. Gulf also states that it averaged the audience share data and standard errors it received from Nielsen for the two periods of survey data from each of two years.⁴⁰ While it is accurate to take an arithmetic average of the reported audience shares, an arithmetic average of the standard errors is not the standard error of the average. The standard error calculation is supposed to compare the variation of the individual observations with the average, taking into account the sample size, and provides a standardized statistical measurement that is used to determine how accurately the sample reflects the actual viewing shares. Because the data to calculate the standard errors comes from the survey diaries, the standard error needs to be provided as part of Nielsen’s retabulation of its survey data. This was not done, and thus the average audience statistics and their associated standard errors that Gulf submits for our evaluation do not meet the requirement that the data come from an independent audience survey organization.⁴¹

11. We also reject Gulf’s showing because it includes satellite households. Gulf asserts that,

³⁶*Id.* at 10568-9 ¶ 10. The petition also was rejected because the standard errors for the audience estimates were omitted. *Id.* at ¶ 11.

³⁷*Id.* at ¶ 10.

³⁸See 47 C.F.R. § 76.54(b).

³⁹*Cable Television Report and Order Reconsideration*, 36 FCC 2d 326, ¶ 60 (1972).

⁴⁰Reply at 3.

⁴¹See 47 C.F.R. § 76.54(b).

by not excluding satellite households from the sample, the survey results tend to overstate the extent to which Los Angeles stations are viewed (over-the-air) in the cable communities.⁴² Gulf appears to base this claim on an assumption that the satellite carriers offer the Los Angeles stations in these cable communities. In fact, during the relevant time period, satellite carriers were unable to retransmit out-of-market stations except to “unserved households,”⁴³ so there is no reason to believe that the Los Angeles signals were widely available in “Riverside Central” in the Palm Springs DMA by satellite. Moreover, as noted above, Section 341(b) of the Act prevents satellite carriers from retransmitting out-of-market significantly viewed signals to subscribers in the Palm Springs DMA.⁴⁴ If the Los Angeles stations are not distributed in these communities, then their audience is zero and when that zero is averaged with a measurable audience level in truly off-air households, the resulting average is lower than the actual off-air viewing level.⁴⁵ Thus, including satellite diaries would dilute the viewing levels and understate the actual off-air audience of these stations. Moreover, the Commission has recently restated its view, based on the original intent of the rules, that significant viewing is to be based on off-air viewing and that significant viewing surveys should not include data from satellite households.⁴⁶ Consequently, we cannot accept survey data that includes satellite households.⁴⁷

12. Finally, we also reject Gulf’s claim that Class A television stations are entitled to exclusivity protection.⁴⁸ Nothing in Section 73.6026, or in the exclusivity rules, supports this assertion.⁴⁹

⁴²*Id.*, citing Petition at n.14.

⁴³*See* 17 U.S.C. § 119.

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

⁴⁵Using a simple numerical example, suppose we have a sample that includes three households. One household subscribes to a satellite service that does not carry the Los Angeles station of interest. Therefore, the station receives no, or zero, audience share. For the other two households, which receive television off-air, including the Los Angeles station, assume the station receives a 4 percent share of viewing hours in one home and a 5 percent share of viewing hours in the second home. If the audience from all three homes is averaged, then the result is a 3 percent share (0+4+5=9 and 9/3=3). If only off-air viewing is measured, then the average audience is 4.5 (4+5=9 and 9/2=4.5). Clearly, including a sample household where the station is not available lowers the audience share.

⁴⁶*See* *SHVERA Significantly Viewed Report and Order* at ¶ 32. (“It 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.”).

⁴⁷*See* 47 C.F.R. § 87.54(c).

⁴⁸ *See* Petition at n.21 (citing 47 C.F.R. § 73.6026).

⁴⁹ 47 C.F.R. § 73.6026.

V. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED**, that the petition filed by Gulf-California Broadcast Company **IS DENIED**.

14. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.⁵⁰

FEDERAL COMMUNICATIONS COMMISSION

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⁵⁰47 C.F.R. §0.283.