

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

In the Matter of)	
)	
Gulf-California Broadcast Company)	
)	CSR-7050-N
Petition For Waiver of Sections 76.92(f) and)	
76.106(a) of the Commission's Rules)	

MEMORANDUM OPINION AND ORDER

Adopted: May 5, 2008

Released: May 6, 2008

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Gulf-California Broadcast Company, licensee of station KESQ-TV-DT (ABC), Palm Springs, California (“Gulf”), filed the captioned petition seeking a waiver of the rule that precludes the deletion of programming of “significantly viewed” stations under the cable television network nonduplication and syndicated exclusivity rules.¹ An opposition to this petition was filed on behalf of ABC Holdings Company, Inc., licensee of station KABC-TV (ABC), Los Angeles, California (“KABC-TV”) 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.² Under Section 76.92(f) of the Commission’s rules, however, a program otherwise subject to deletion is exempt from application of the network nonduplication rules if it is “significantly viewed” in a relevant community (the “significantly viewed exception”).³ The significantly viewed exception to the exclusivity rules is based on a case being established that an otherwise distant station

¹The express statutory prohibition in Section 341(b) of the Act, prevents a satellite carrier from retransmitting a significantly viewed signal to subscribers in communities in the Palm Springs DMA. 47 U.S.C. § 341(b); 47 C.F.R. § 76.54(k); *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, 20 FCC Rcd 17278, 17320 (2005) (“*SHVERA Significantly Viewed Report and Order*”). Because the stations at issue here may not be carried by a satellite carrier as significantly viewed into Palm Springs, Gulf’s waiver request is necessary and addressed only in the context of cable carriage.

²*See* 47 C.F.R. §76.92; 47 C.F.R. §76.101.

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

receives a “significant” level of over-the-air viewership in a subject community.⁴ 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 an exception to 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, Nielsen Media Research became the primary surveying organization through which a petitioner could obtain television surveys.¹¹ 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.¹² Accordingly, a petitioner may submit the results from two sweep periods

⁴See *KCST-TV, Inc.*, 103 FCC 2d 407 (1986).

⁵ 47 C.F.R. §76.106(a).

⁶103 FCC 2d 407 (1986).

⁷47 C.F.R. §76.5(i).

⁸ *Id.*

⁹See *Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640 (1990).

¹⁰47 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. Because we require independent surveys, it should be noted that these types of surveys cannot be done by the affected television station, cable system or satellite operator.

¹¹Previously, there was at least one additional independent research firm, VideoProbeIndex, Inc., that conducted audience surveys for this purpose.

¹²Although, 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 (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

(continued...)

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.¹³ 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.¹⁴ 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.¹⁵ 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.¹⁶ 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.¹⁷ 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.¹⁸ A petitioner may therefore submit

(...continued from previous page)

would be necessary to provide individual survey period results so that we could determine the effect of the third and fourth sweep periods.

¹³It should be noted that Nielsen identifies individual communities by zip codes, a process that is equivalent to (or represents) the area served.

¹⁴47 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.

¹⁵In-tab diaries are the number of diaries included in the tabulation of audience shares. Of the returned diaries, some are discarded after editing as being unusable. Thus, in-tab diaries are the number of diaries used in the sample to calculate the audience statistics. It should be noted that 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 data base 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 submitted was provided by 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.

¹⁶47 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.”

¹⁷*Id.*

¹⁸Section 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.”

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. Gulf seeks a waiver of the significantly viewed exception so that it may enforce its network nonduplication and syndicated exclusivity rights against KABC-TV in various communities within the Palm Springs, California DMA served by Time Warner and USA Companies cable systems.¹⁹ KABC-TV is considered to be significantly viewed in the portion of Riverside County, California, designated “Riverside Central,” where the communities at issue are located.²⁰

III. DISCUSSION

6. Gulf previously filed a network nonduplication and syndicated exclusivity waiver similar to the one herein that was denied by the Bureau.²¹ Rather than file a petition for reconsideration of the earlier decision, Gulf opted to file a totally new waiver request. In support of this petition, Gulf argues that not only does a Longley-Rice study demonstrate that KABC-TV’s signal does not effectively reach into the Palm Springs DMA, but recent audience survey data demonstrates that KABC-TV is no longer significantly viewed in the communities of Cathedral City, Coachella, Desert Hot Springs, Indio, Palm Desert, Palm Springs, and Mecca, California.²² Gulf points out that for the communities of Indian Wells, La Quinta, Rancho Mirage, and Thousand Palms, California, there were insufficient diary samples to measure the audience for KABC-TV and it therefore does not seek a waiver for these communities although it does provide Nielsen information for each community.²³ For the communities where there was sufficient survey data, Gulf submits “community-specific” Nielsen Media Research data to demonstrate that KABC-TV is no longer significantly viewed in each of the specified communities.²⁴ The submitted audience statistics are the result of three separate community-specific re-tabulations of Nielsen’s audience data based on noncable/non-ADS homes located in the zip codes comprising each of the communities.²⁵ The submitted data are averages for three four-week audience sweep periods in each

¹⁹Petition at 3. Gulf states that Time Warner serves the communities of Cathedral City, Coachella, Desert Hot Springs, Indio, Mecca, Palm Desert, Palm Springs, Indian Wells, La Quinta, Rancho Mirage, and Thousand Palms, California; USA Companies serves the community of Mecca, California.

²⁰*Id.*

²¹*See Gulf-California Broadcast Company*, 21 FCC Rcd 3476 (2006).

²²*Id.* at 3 and Exhibits A, B and C.

²³*Id.* at 4 n.13 and Exhibit C. We note that Gulf provided audience statistics for three separate zip code groupings – Palm Springs, North Palm Springs, and Palm Springs Total. Our evaluation indicates that the zip codes in the Palm Springs Total group are simply the ones for the other two groups combined. *See* Petition at Exhibit C. Moreover, while Gulf indicates that it was told that North Palm Springs was a separate community, some of that area is, in fact, part of the incorporated community of Palm Springs. Gulf does not seek a waiver for North Palm Springs, but it did not withdraw its request for Palm Springs Total. However, because no showing of proportionality is included, the reported audience for Palm Springs Total would not be acceptable.

²⁴*Id.* at Exhibit C. KABC-TV noted in its opposition that Gulf also included system-specific audience survey results in its submission. Although it does not appear that Gulf seeks a determination of significantly viewed status on that basis, we agree with KABC-TV that these data would not be acceptable because no information has been provided to show that the communities included in each system are proportionally represented in the samples.

²⁵*Id.* Nielsen Media Research defines Alternative Delivery Source (“ADS”) to include the following technologies: satellite (C-Band), DBS (Ku-Band), SMATV (master antenna), and MMDS (includes multi-channel

(continued...)

of two years. The first year's survey audience estimates were derived from February 2004, July 2004, and November 2004 audience sweep data and the second survey year's estimates were based on February 2005, July 2005, and November 2005 data.

7. In opposition, KABC-TV raises four main arguments. First, KABC-TV argues that the data submitted by Gulf should not be considered because it cannot be reconciled with data for the same communities and measurement periods previously submitted by Gulf in an unsuccessful effort to obtain a similar waiver.²⁶ KABC-TV states that, for some communities, the number of diaries set forth in the instant petition is lower than the number enumerated in the data Gulf previously submitted.²⁷ KABC-TV argues that it is not clear how Gulf can include more measurement periods in its latest survey results, but review fewer diaries.²⁸ Second, KABC-TV argues that Gulf has excluded the May 2004 and May 2005 measurement periods from the data submitted, despite the Commission's express clarification in Gulf's 2006 Decision that "if surveys [are] taken for more than 2 weekly periods in any 12 months, all such surveys [must be] included in the average figure."²⁹ KABC-TV states that it appears that Gulf has "cherry-picked" the data that best suits its needs.³⁰ Third, KABC-TV also argues that Gulf has not provided sufficiently large samples to demonstrate KABC-TV's off-air viewership.³¹ KABC-TV states that, to its knowledge, the Commission has never granted a waiver of the significantly viewed exception based on data from fewer than five diaries per survey period.³² Fourth, KABC-TV argues that Gulf has not provided sufficient documentation explaining Nielsen's procedures with respect to the KABC-TV significantly viewed study as required by the Commission.³³ KABC-TV asserts that such inconsistencies demonstrate that Gulf's viewing data cannot be relied on to make an accurate determination of the off-air viewership of its signal in the subject communities.

8. Gulf argues in reply that KABC-TV merely reiterates most of the same arguments it made against Gulf's previous waiver request and they are inapposite with respect to the current petition.³⁴

(...continued from previous page)

multi-point distribution service). Thus, noncable/non-ADS homes are those that do not subscribe to an MVPD, and view the broadcast signal in question off-air. See Nielsen Media Research at <http://www.nielsenmedia.com/nc/portal/site/Public>.

²⁶Opposition at 4. Gulf notes that it previously filed a petition for special relief (CSR-6374-N) seeking the same waiver, but was denied because the Commission concluded that Gulf had failed to adequately explain the methodology it used to calculate KABC-TV's viewership in the Palm Springs' cable communities. See *Gulf-California Broadcast Company*, 21 FCC Rcd 3476 (2006) ("2006 Decision").

²⁷Opposition at 4. KABC-TV points to Zip Code Groups 1 (Cathedral City) and 3 (Desert Hot Springs).

²⁸*Id.* at 5. KABC-TV contends that even where the diaries in the latest surveys exceed the previous number used, the data is still questionable.

²⁹*Id.* at 6, citing 2006 Decision, 21 FCC Rcd at 3480.

³⁰*Id.* at 7.

³¹*Id.*

³²*Id.*

³³*Id.* at 3 n.9. KABC-TV states that it is also unclear in the e-mail appended to the Petition that the study related to KABC-TV and not KMIR and KESQ. We note that while KABC-TV is correct that Nielsen's description of its methodology did not originally indicate the station for which the data were being requested, but rather the stations paying for the survey, an attachment to Gulf's reply remedied this problem.

³⁴Reply at 1.

While KABC-TV argues that the petition fails because it contains insufficient documentation explaining the methodology utilized by Nielsen, Gulf maintains that it submitted not only a thorough explanation of the Nielsen Study's methodology, but also cites an even more extensive discussion of Nielsen's Study methodology.³⁵ Gulf points out that KABC-TV was notified well in advance of Gulf's intent to use Nielsen to conduct another significantly viewed study of KABC-TV in the Palms Springs communities and was apprised of the methodology and procedures that would be followed.³⁶ With respect to the number of diaries, Gulf argues that the Commission's rules do not require that any significantly viewed study must be based on a finite number of diaries from each survey period.³⁷ Moreover, Gulf states that KABC-TV ignores several important facts. First, that the Commission's requirement of subjecting all survey results in a given year to "one standard error" renders irrelevant the question of whether there are two diaries or 20 diaries in any particular survey period. Second, the Commission's requirement that all surveys in a given year be combined and averaged renders irrelevant, in any one survey, the number of diaries obtained.³⁸ Gulf argues further that KABC-TV also misreads the 2006 Decision in claiming that Gulf's instant petition erroneously fails to include survey data for May of 2004/2005.³⁹ On the contrary, Gulf states that it is prohibited by Section 76.54(b) of the Commission's rules from the inclusion of two surveys taken between the months of April and September.⁴⁰ Gulf states that because it included July 2004/2005 data in its current submission, it could not submit May data.⁴¹ Gulf further states that, although KABC-TV is factually correct in that the previous survey data is different from that presented here, it ignores the Commission requirement that all significantly viewed studies exclude satellite and ADS diaries from all audience surveys and its inclusion was the major reason for the Commission's denial in the 2006 Decision of Gulf's earlier waiver request.⁴²

9. We agree with Gulf's contention that there is no reason for the survey data from its original petition and the current petition to be identical. Gulf's earlier submission included ADS in-tab households, which was incorrect. At least some of the differences KABC-TV noted in the number of diaries is attributable to removing the ADS homes from the sample. In any event, because the earlier submission was rejected in the 2006 Decision, it is not relevant for this analysis. Gulf is also correct that there is no requirement that a specific number of in-tab diaries be used to calculate the average audience in a specific community in each survey period. The Commission's original 1972 survey set a minimum number of diaries in a county at 5, but the rules for a community-specific survey only require that each community be represented in each survey and that the average audience figure, plus one standard error meet the criteria for significantly viewed status.

10. Section 76.54(b) provides that stations seeking to establish significantly viewed status may provide survey data "of noncable television homes that cover 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

³⁵*Id.* at 2, citing Petition at n.16 (offer to provide CD-Rom with 240-page further explanation of Study's methodology).

³⁶*Id.* at Exhibit C at 1. Gulf notes that KABC-TV filed no objection to this proposed survey.

³⁷*Id.* at 4.

³⁸*Id.*

³⁹*Id.* at 5.

⁴⁰*Id.*, citing 47 C.F.R. § 76.54(b).

⁴¹*Id.*

⁴²*Id.* at 6.

and September.”⁴³ Over time, petitioners began to substitute one Nielsen audience sweep period, consisting of data collected over a four-week period, for each week. This generally permitted petitioners to obtain a sufficient sample for such a showing. Moreover, we noted in *Radio Perry, Inc.*, that providing average audience statistics based on 12 weeks, rather than two sweep periods or eight weeks, would add to the accuracy of the statistics.⁴⁴ Also, while it is clear that Section 76.54(b) of the rules prohibits the use of both May and July sweep periods, there is no Bureau precedent prohibiting the use of both the May and July survey periods. In *WTNH Broadcasting, Inc. and K-W TV, Inc.*, for instance, 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.⁴⁵ In this instance, Gulf submitted three sweep periods in each year instead of the required two. In instances where petitioners submit more than two sweep periods, we require them to submit averages for each independent sweep period in addition to an overall average of all sweep periods for each year surveyed.⁴⁶ We require this because the extra sweep period may skew the survey results by raising the overall average when each sweep period considered alone would not meet the requirements of *KCST-TV*.⁴⁷ Gulf’s submission fails to meet these requirements. It did not submit averages for each of the three independent sweep periods submitted. Consequently, its petition will be denied. Furthermore, in this instance, the petitioner could have used three sweep periods from the November, February and May sweeps to increase the sample size and survey reliability. The choice of skipping May without submitting the separate audience sweep data raises a question of whether the May data was not included in order to skew the survey results.

11. In view of the foregoing, we cannot find that Gulf has demonstrated that KABC-TV is no longer significantly viewed in the communities because they failed to submit proper ratings samples as required by our rules and precedent. Accordingly, Gulf’s petition is denied.

⁴³47 C.F.R. § 76.54(b).

⁴⁴11 FCC Rcd 10564 (1996).

⁴⁵16 FCC Rcd 16377, 16380 (2001). (“Given Nielsen’s routine sampling procedures and their method for placing diaries for a four-week sweeps period, we find it reasonable that the results of two sweep periods in each of two years be provided to make the required showing instead of merely the minimum two one-week surveys. However, in this case, four sweeps periods were used for each year. Because WTNH does not provide the separate results for each sweeps period, but only an average for each year, we cannot determine the effect the third and fourth sweeps periods may have had on the overall result.”).

⁴⁶See *WTNH Broadcasting*, 16 FCC Rcd at 6784.

⁴⁷See *KCST-TV*, 103 FCC 2d 407 (1986).

IV. ORDERING CLAUSES

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

13. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.⁴⁸

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division, Media Bureau

⁴⁸47 C.F.R. §0.283.