

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

In the Matter of	)	
	)	
Gulf-California Broadcast Company and	)	
Journal Broadcast Corporation	)	CSR-8186-N
	)	
Petition For Waiver of Sections 76.92(f) and	)	
76.106(a) of the Commission's Rules	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 21, 2011**

**Released: October 24, 2011**

By the Senior Deputy Chief, Policy Division Media Bureau:

**I. INTRODUCTION**

1. Gulf-California Broadcast Company, licensee of station KESQ-TV, Palm Springs, California ("KESQ-TV"), and Journal Broadcast Corporation, licensee of station KMIR-TV, Palm Springs, California ("KMIR-TV") (collectively "Petitioners"), filed the captioned joint petition seeking a waiver of the rules that preclude cable operators from deleting the duplicate programming of "significantly viewed" stations under the network nonduplication and syndicated exclusivity rules ("exclusivity rules").<sup>1</sup> Specifically, the Petitioners seek a waiver of the significantly viewed exception so that they may enforce their exclusivity rights against television broadcast stations KNBC and KCBS-TV, both located in Los Angeles, California, in the communities of Palm Springs, Indio, Cathedral City, Coachella, and Desert Hot Springs, California.<sup>2</sup> An opposition to this petition was filed on behalf of Time Warner Cable ("Time Warner"), the cable operator serving the subject communities, to which Petitioners replied.<sup>3</sup> Subsequently, both Time Warner and Petitioners filed supplements to the

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<sup>1</sup>47 C.F.R. §§ 76.92(f) and 76.106(a). The 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.

<sup>2</sup>Petition at 1.

<sup>3</sup>We note that in their reply, Petitioners contend that there were procedural errors with regard to the filing of Time Warner's opposition which should result in its dismissal. Without ruling on these procedural deficiencies and in the interests of fairness and a complete record, however, we will accept Time Warner's opposition. There is no substantive harm to Petitioners because they have had a full and fair opportunity to respond to Time Warner's opposition.

proceeding with follow-up replies.<sup>4</sup> For the reasons discussed below, we grant Petitioner'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.<sup>5</sup> Under Section 76.92(f) of the Commission's rules, however, a signal 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").<sup>6</sup> 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. A similar exception is provided in the syndicated exclusivity rules.<sup>7</sup>

3. In order to obtain a waiver of Section 76.92(f), the Commission held in *KCST-TV, Inc.*<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> The Commission has found that this type of test is applicable as well for waivers of the syndicated exclusivity exemption.<sup>11</sup>

4. Since the Commission's decision in *KCST-TV*, the methodology required by Section 76.54(b) of the rules for a petitioner seeking a waiver of 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

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<sup>4</sup>Time Warner filed its first supplement by letter to which Petitioners responded. Petitioners filed a second supplement to which Time Warner responded. Finally, Time Warner filed a third supplement to which Petitioners responded. While we note that all of these supplements and replies are outside of the normal pleading cycle, we will accept them in the interest of a complete record.

<sup>5</sup>See 47 C.F.R. §76.92; 47 C.F.R. §76.101.

<sup>6</sup>47 C.F.R. §76.92(f); see 47 C.F.R. §§76.5(i) and 76.54.

<sup>7</sup>47 C.F.R. §76.106(a).

<sup>8</sup>103 FCC 2d 407 (1986).

<sup>9</sup>47 C.F.R. §76.5(i).

<sup>10</sup>*Id.*

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

than one of which shall be a week between the months of April and September.<sup>12</sup> Over time, The Nielsen Company (“Nielsen”) became the primary surveying organization through which a petitioner could obtain television surveys.<sup>13</sup> 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.<sup>14</sup> Accordingly, a petitioner may submit the results from 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.<sup>15</sup> If a petitioner is purchasing survey data on a system-specific basis where two or more communities are involved, the percentage 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.<sup>16</sup> In order to produce the data required for exclusivity waivers, Nielsen re-tabulates the data that it collects from over-the-air households 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.<sup>17</sup> 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.<sup>18</sup> Such

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<sup>12</sup>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. It should be noted that these types of surveys cannot be done by the affected television station, cable system or satellite operator.

<sup>13</sup>The Nielsen Company was previously known as Nielsen Media Research.

<sup>14</sup>Although, 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 would be necessary to provide individual survey period results so that we could determine the effect of the third and fourth sweep periods.

<sup>15</sup>It should be noted that Nielsen identifies individual communities by zip codes, a process not incompatible with the surveying process discussed here.

<sup>16</sup>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.

<sup>17</sup>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 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.

<sup>18</sup>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

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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.<sup>19</sup> 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.<sup>20</sup> A petitioner 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. Petitioners seek a waiver of the significantly viewed exception so that they may enforce their network nonduplication and syndicated exclusivity rights against stations KNBC and KCBS-TV for the communities of Palm Springs, Indio, Cathedral City, Coachella, and Desert Hot Springs, California.<sup>21</sup> KNBC and KCBS-TV are considered to be significantly viewed in the portion of Riverside County, California, designated “Riverside Central,” where the subject communities are located.<sup>22</sup> KESQ-TV and KMIR-TV are licensed to a community in the Palm Springs, California DMA, while KNBC and KCBS-TV are licensed to a community within the Los Angeles, California DMA.<sup>23</sup>

6. Petitioners maintain that KNBC and KCBS-TV no longer meet the significantly viewed standard in the subject communities and, as proof, submit the results of special community-specific surveys conducted by The Nielsen Company.<sup>24</sup> Petitioners state that Nielsen conducted a special tabulation of over-the-air viewing using diaries from noncable/non-ADS homes for specified zip codes identified for the communities.<sup>25</sup> The submitted data are averages of two four-week audience sweep periods in each of two years. The first year’s survey audience estimates were derived from February 2007 and November 2007 audience sweep data, combined, and the second year’s estimates from the

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days prior to the initial survey period.”

<sup>19</sup>*Id.*

<sup>20</sup>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.”

<sup>21</sup>Petition at 1.

<sup>22</sup>*Id.*

<sup>23</sup>*Id.* Petitioners note that the Commission previously granted waiver requests that determined that Los Angeles TV station KABC-TV, KCOP-TV, KTTV(TV) and KTLA(TV) were not significantly viewed in the communities of Cathedral City, Coachella, Desert Hot Springs, Indio, Mecca, Palm Desert and Palm Springs, California. See e.g., *Gulf-California Broadcast Company*, 24 FCC Rcd 2738 (2009); *Gulf-California Broadcast Company*, 24 FCC Rcd 2747 (2009).

<sup>24</sup>*Id.* at Appendix A.

<sup>25</sup>*Id.* Nielsen defines Alternative Delivery Source (“ADS”) to include the following technologies: satellite (C-Band), DBS (Ku-Band), SMATV (master antennae), and MMDS (includes multi-channel multi-point and 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 at <http://www.nielsenmedia.com/glossary/>.

February 2008 and November 2008 audience sweep data, combined.<sup>26</sup> 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.<sup>27</sup> Petitioners state that for KNBC and KCBS-TV, the share of total viewing hours in over-the-air homes in the subject communities falls far short of the required significantly viewed minimums, within one standard error, as shown in the tables below:

**TABLE 1 – VIEWING IN CATHEDRAL CITY, CA**

<u>Survey Year</u> <sup>28</sup>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
<u>KNBC</u>					
Feb. 2007/ Nov. 2007	5	0.0	0.0	0.0	0.0
Feb. 2008/ Nov. 2008	4	0.0	0.0	0.0	0.0
<u>KCBS-TV</u>					
Feb. 2007/ Nov. 2007	5	0.0	0.0	0.0	0.0
Feb. 2008/ Nov. 2008	4	0.0	0.0	0.0	0.0

**TABLE 2 – VIEWING IN COACHELLA, CA**

<u>Survey Year</u>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
<u>KNBC</u>					
Feb. 2007/ Nov. 2007	3	0.0	0.0	0.0	0.0
Feb. 2008/ Nov. 2008	3	0.0	0.0	0.0	0.0

<sup>26</sup>*Id.*

<sup>27</sup>47 C.F.R. § 76.54(b).

<sup>28</sup>All of the survey dates provided meet the criteria set forth in the rules and *KCST-TV* that the two one-week surveys be separated by at least 30 days and that both surveys may not occur between April and September.

KCBS-TV

Feb. 2007/ Nov. 2007	3	0.0	0.0	0.0	0.0
Feb. 2008/ Nov. 2008	3	0.0	0.0	0.0	0.0

**TABLE 3 – VIEWING IN DESERT HOT SPRINGS, CA**

<u>Survey Year</u>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
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KNBC

Feb. 2007/ Nov. 2007	9	0.0	0.0	0.0	0.0
Feb. 2008/ Nov. 2008	7	0.0	0.0	0.0	0.0

KCBS-TV

Feb. 2007/ Nov. 2007	9	0.0	0.0	0.0	0.0
Feb. 2008/ Nov. 2008	7	0.0	0.0	0.0	0.0

**TABLE 4 – VIEWING IN INDIO, CA**

<u>Survey Year</u>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
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KNBC

Feb. 2007/ Nov. 2007	10	0.0	0.0	0.0	0.0
Feb. 2008/ Nov. 2008	6	0.0	0.0	0.0	0.0

KCBS-TV

Feb. 2007/ Nov. 2007	10	0.0	0.0	0.0	0.0
Feb. 2008/ Nov. 2008	6	0.0	0.0	0.0	0.0

**TABLE 5 – VIEWING IN PALM SPRINGS, CA**

<u>Survey Year</u>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
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KNBC

Feb. 2007/ Nov. 2007	5	0.0	0.0	0.0	0.0
Feb. 2008/ Nov. 2008	7	0.0	0.0	0.0	0.0

KCBS-TV

Feb. 2007/ Nov. 2007	5	0.0	0.0	0.0	0.0
Feb. 2008/ Nov. 2008	7	0.0	0.0	0.0	0.0

As a result, Petitioners request that the Commission grant their petition so that they can assert their exclusivity rights in the subject communities.

7. In opposition, Time Warner states that it provides service to the five communities at issue in this proceeding, as well as several other communities that were not included herein, apparently because the Petitioners conceded that they did not qualify for a waiver.<sup>29</sup> Time Warner notes that KNBC has been carried on its system for decades and many of its subscribers, who have permanent residences in or hail originally from Los Angeles, rely on the receipt of this station.<sup>30</sup> Time Warner asserts that, should the instant waiver be granted, it would likely be forced to either severely curtail carriage of KNBC or discontinue it altogether which would cause significant interruption to long-established viewing patterns.<sup>31</sup> With regard to KCBS-TV, Time Warner questions how either petitioner has standing to petition for a waiver.<sup>32</sup> Time Warner points out that KESQ-TV is an ABC affiliate and KMIR-TV an

<sup>29</sup>Opposition at 1-2. Time Warner states that it also serves the communities of Indian Wells, La Quinta, Palm Desert and Rancho Mirage, California.

<sup>30</sup>*Id.* at 2.

<sup>31</sup>*Id.*

<sup>32</sup>*Id.* Time Warner states that to have standing to seek a waiver, each petitioner must show that it is  
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NBC affiliate, and neither station has established that it airs any CBS Network programming that would be entitled to network nonduplication rights or duplicative syndicated programming vis-a-vis KCBS-TV.<sup>33</sup> In any event, Time Warner states, even if the Petitioners could demonstrate that either of their stations carries such programming, it would be immaterial since KCBS-TV has not been carried in the subject communities since 2008.<sup>34</sup> While it is possible that it might resume carriage of KCBS-TV at some point, Time Warner maintains that a waiver request now is not relevant and should be dismissed without prejudice.<sup>35</sup>

8. Time Warner argues further that the statistical methodology relied on by the Petitioners is flawed and the petition should therefore be denied.<sup>36</sup> Time Warner asserts that an independent expert in statistical sampling techniques has concluded that “the survey reported in the Petition is not sufficient to draw a conclusion about the viewership of KCBS-TV or KNBC in the Palm Springs DMA.”<sup>37</sup> First, Time Warner maintains, the survey is fatally flawed due to the exceedingly small samples upon which it relies.<sup>38</sup> Time Warner points out that the largest number of in-tab households presented in any given sweep period for a single community is five and, on more than one occasion, relies solely on one in-tab household for an entire community.<sup>39</sup> Time Warner argues that such small sample sizes cannot support the conclusions that the Petitioners claim with respect to KNBC’s and KCBS-TV’s viewing patterns in the communities at issue.<sup>40</sup> Time Warner contends that, while Section 76.54(b) of the Commission’s rules and Commission precedent require waiver applicants to use multiple sweeps periods to support their conclusions, the Petitioners should not be permitted to aggregate multiple statistically insignificant data points in an attempt to reach a statistically significant conclusion.<sup>41</sup> In addition, while the Commission’s rules seek to address the statistical reliability of audience survey sample sizes by requiring results to be within at least one standard error of the required viewing level, Time Warner argues that

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suffering some cognizable injury, which will be remedied by grant of the waiver. *See Applications of Hispanic Information and Telecommunications Network, Inc.*, 18 FCC Rcd 23872, 23879 (WTB 2003); *see also Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 73-74 (1978).

<sup>33</sup>*Id.*

<sup>34</sup>*Id.* at Appendix A. Time Warner states that it is also the only cable franchisee serving the subject communities.

<sup>35</sup>*Id.* at 2-3.

<sup>36</sup>*Id.* at 4.

<sup>37</sup>*Id.* at Appendix B.

<sup>38</sup>*Id.* at 5.

<sup>39</sup>*Id.* Time Warner notes, for instance, that for the February 2008 sweeps period, Nielsen reports only one diary for the community of Cathedral City, which according to the 2000 Census data had a population of 43,129. *See id.* at n.17. Time Warner calculates that, with approximately 20,000 television households in Cathedral City, one diary represents only 0.005 percent of those households.

<sup>40</sup>*Id.* at 6. Time Warner states that, according to its expert, “[t]his miniscule sample size, coupled with survey results that on their face do not follow a normal distribution, renders the Nielsen survey data inherently unreliable in this unique case.” *See id.* at Appendix B.

<sup>41</sup>*Id.* For instance, if the three diaries collected in February 2007 for Cathedral City are not statistically representative, the Petitioners cannot cure this deficiency by adding the two diaries from November 2007, which are not statistically representative in their own right to conclude that KNBC and KCBS-TV were not significantly viewed in the community in 2007.



reliance on the mathematical concept of standard error in this case cannot cure the statistical deficiencies inherent in the instant submission.<sup>42</sup> Time Warner asserts that reliance on standard error is only appropriate in cases with reasonably-sized samples that attempt to estimate events that are not rare.<sup>43</sup> Time Warner maintains that, given these small sample sizes, Petitioners have failed to meet their high burden of proof to establish that KNBC and KCBS-TV are not significantly viewed in the communities.<sup>44</sup> Finally, Time Warner argues that the Commission should reject the petition because the data is rendered suspect by a lack of information surrounding Nielsen's determinations regarding what constitutes a "usable" diary and how "non-cable/non-ADS TV households" are defined.<sup>45</sup> In the case of the Nielsen data used herein, Time Warner asserts that there are a number of potential non-sampling errors that cast doubt on the validity of the statistical analysis used to reach the conclusions asserted by the Petitioners.<sup>46</sup> Without complete information regarding potential non-sampling errors, Time Warner concludes that it cannot accurately evaluate the Petitioners' viewership study.<sup>47</sup>

9. In reply, Petitioners state that Time Warner's opposition is flawed and fails to rebut the evidence presented herein.<sup>48</sup> Indeed, Petitioners argue that the fact that neither KNBC nor KCBS-TV opposes the petition only supports the growing recognition that cable carriage of Los Angeles television stations in the "distant" Palm Springs DMA is a historic anomaly that is no longer supported by the facts.<sup>49</sup> In this instance, it appears that Time Warner is opposing the requested waiver simply because some of its Palm Springs-area cable subscribers – who have permanent residence in Los Angeles – have come to rely on carriage of KNBC.<sup>50</sup> Petitioners point out, however, that the Commission's legal standard for such waivers is not predicated on the preferences of part-time residents' desire to view hometown programming.<sup>51</sup> Moreover, despite Time Warner's contention, Petitioners argue that they do have standing in this case, both because KMIR-TV seeks to enforce its network nonduplication rights against KNBC, but also because KESQ-TV and KMIR-TV have exclusive rights to certain syndicated programming carried by KCBS-TV.<sup>52</sup> Petitioners state that the fact that Time Warner currently does not carry KCBS-TV does not preclude them from attempting to protect their syndicated exclusivity rights in

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<sup>42</sup>*Id.* at 7.

<sup>43</sup>*Id.* Time Warner states that standard error is an appropriate technique in cases where the data has a "normal distribution," which is displayed graphically as a bell-shaped curve. Moreover, statisticians usually look for a 95 percent confidence level to accept a hypothesis. In order to achieve such a level, Petitioners would have needed a sample size of at least 11 diaries. *See id.* at Appendix B.

<sup>44</sup>*Id.* at 9.

<sup>45</sup>*Id.* at 10.

<sup>46</sup>*Id.* For instance, in a statement appended to the petition, Nielsen stated the sample source for the survey "consisted of non-cable/non-ADS TV households returning usable television viewing diaries." *See id.* at Appendix 1. However, Time Warner states, Nielsen fails to expand on what makes a diary "usable" and the method by which Nielsen makes that determination. In addition, Nielsen provides no explanation for how it determines whether or not a household is "non-cable" or "non-ADS."

<sup>47</sup>*Id.* at 11.

<sup>48</sup>Reply at 2.

<sup>49</sup>*Id.*

<sup>50</sup>*Id.*, citing Opposition at 2.

<sup>51</sup>*Id.*

<sup>52</sup>*Id.* at 3.

the subject communities.<sup>53</sup>

10. Petitioners assert that Time Warner's core arguments as to methodology are an untimely and unpersuasive attempt to challenge the Commission's long-established rules that govern waiver of the significantly viewed exception.<sup>54</sup> Petitioners note that Time Warner's opposition relies solely on the testimony of an allegedly "expert" witness who has no experience with regard to broadcast viewership surveys.<sup>55</sup> Petitioners state that, pursuant to Section 76.54(c) of the Commission's rules, Time Warner was served a lengthy "notice of survey" that named both the survey organization and described the procedures to be used, but filed no objection within the required twenty days after receipt.<sup>56</sup> Without such objection, Petitioners state that the Nielsen surveys were ordered, the survey results subsequently tabulated by Nielsen according to methodology previously accepted by the Commission, and ultimately submitted as part of the instant waiver petition.<sup>57</sup> Moreover, Petitioners argue, that by seeking the denial of the instant petition on the grounds that the survey evidence should be subjected to drastically different audience survey rules and procedures, Time Warner is, in essence, seeking a permanent change to the Commission's clearly stated rules with regard to significantly viewed petitions.<sup>58</sup> Petitioners maintain that, not only should such proposed changes be considered in the context of a rulemaking proceeding, but Time Warner fails to cite a single Commission precedent in support of its arguments regarding survey methodology.<sup>59</sup>

11. In a supplement, Time Warner reiterates its belief that the instant petition is not ripe for review with regard to KCBS-TV.<sup>60</sup> In addition, despite Petitioners' objections, Time Warner maintains that its arguments regarding methodology are not untimely.<sup>61</sup> Time Warner states that it had and has no objections to the general methodology employed by the Petitioners, but it asserts that the survey notice failed to disclose the intent to rely on a statistically invalid sample size and this objection could only be raised after the petition was filed.<sup>62</sup> Time Warner argues further that it is significant that the Petitioners, in reply, do not even attempt to rebut the statistical invalidity of their sample size, but instead merely contend that the Commission has previously condoned the practice of aggregating statistically insignificant data points to reach allegedly statistically significant results.<sup>63</sup> Time Warner states that, while it recognizes that the Commission may have allowed past petitioners to use aggregation in some form, it does not believe that this practice has ever been substantively challenged nor has the

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<sup>53</sup>*Id.*

<sup>54</sup>*Id.* at 4.

<sup>55</sup>*Id.* at 4-5.

<sup>56</sup>*Id.* at 5, citing 47 C.F.R. § 76.54(c).

<sup>57</sup>*Id.* Petitioners state that it is curious that Time Warner not only accepted this same Nielsen survey methodology in the two previous Gulf-California Broadcast decisions, but failed to file an objection. *See supra* n.23 (discussing the previous Gulf-California Broadcast decisions).

<sup>58</sup>Reply at 7.

<sup>59</sup>*Id.* at 8.

<sup>60</sup>Time Warner Supplement at 1.

<sup>61</sup>*Id.* at 2.

<sup>62</sup>*Id.*

<sup>63</sup>*Id.*

Commission explicitly condoned the method.<sup>64</sup> In any event, Time Warner states, even if aggregating data is permissible, the Petitioners' submissions still do not meet the minimum sample size necessary to reach a statistically significant result.<sup>65</sup> Moreover, Time Warner contends, Petitioners' misleading and meritless attack on the statistical expert used herein does nothing to assist them in meeting the "high hurdle" their waiver request faces in this proceeding.<sup>66</sup> Petitioners state in reply that Time Warner's unorthodox letter supplement is merely another attempt to unlawfully rewrite the Commission's rules and is expressly prohibited in these proceedings.<sup>67</sup>

12. In Petitioners' supplement, they reference the Commission's decision in *WTVG, Inc. and WUPW Broadcasting, LLC*, which denied a request for stay, filed by a Toledo-based cable operator.<sup>68</sup> In that decision, the Media Bureau squarely rejected the cable company's challenge to the petitioner's evidence demonstrating that the Detroit stations were not significantly viewed, concluded that the Nielsen data was adequate and the cable company's proposed changes to longstanding evidentiary rules were beyond the scope of the special relief proceeding.<sup>69</sup> Petitioners contend that this order is relevant to the arguments advanced by Time Warner herein.<sup>70</sup> In reply, Time Warner argues that the Petitioners' reliance on the Toledo decision is misplaced, the case is not material to the Bureau's decision herein and does not assist the Petitioners in satisfying the Commission's waiver requirements.<sup>71</sup> Time Warner states that, according to the Petitioners, *WTVG* is relevant primarily because it rejected a cable operator's attempt to challenge the Commission's rules regarding significantly viewed waivers.<sup>72</sup> However, Time Warner asserts that its opposition to Petitioners' petition is not a general challenge of the Commission's rules in this area or the methodology developed over time by case law.<sup>73</sup> Rather, Time Warner states, it merely opposes the manner by which Petitioners have utilized such methodology herein by relying on flawed data.<sup>74</sup> As a result, Time Warner maintains, the factual circumstances of *WTVG* are in clear contrast to those in the present case.<sup>75</sup>

13. In a second supplement, Time Warner references a recently-released Commission decision, *WISN Heast-Argyle Television, Inc.*, which denied a request for waiver of the significantly viewed exception due to questions about the reliability of the data submitted in support of the waiver request.<sup>76</sup> Specifically, notes Time Warner, *WISN* stated that data for the November 2005 sweeps period, based on only one in-tab household, is "an extremely unreliable statistic since it is based on the viewing

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<sup>64</sup>*Id.*

<sup>65</sup>*Id.*

<sup>66</sup>*Id.* at 3.

<sup>67</sup>Reply to Supplement at 1-2, citing 47 C.F.R. § 76.7(d).

<sup>68</sup>Petitioners' Supplement at 1, citing 25 FCC Rcd 12263 (2010) ("*WTVG*").

<sup>69</sup>*Id.* at 1-2.

<sup>70</sup>*Id.* at 2.

<sup>71</sup>Reply to Supplement at 1-2.

<sup>72</sup>*Id.* at 2.

<sup>73</sup>*Id.*

<sup>74</sup>*Id.*

<sup>75</sup>*Id.* at 3.

<sup>76</sup>Time Warner Supplement at 2, citing 26 FCC Rcd 4044 (2011) ("*WISN*").

of one household and not the average of a sample of households.”<sup>77</sup> Conversely, the data submitted for the May 2007 sweeps period was based on seven in-tab households, “a small sample but one that allows for the calculation of an average audience share and a standard error.”<sup>78</sup> Time Warner argues that *WISN* supports its primary argument that the data submitted by the Petitioners was not sufficient to make a statistically significant conclusion about the viewing of stations KNBC or KCBS-TV in the subject communities.<sup>79</sup> Time Warner contends that, in this instance, Petitioners’ data is even more flawed than that at issue in *WISN* because they often rely upon a single in-tab household in a community during a sweeps period (*i.e.*, November 2007 and February 2008 for Coachella, and February 2008 for Cathedral City).<sup>80</sup> Moreover, Time Warner states that for several sweeps periods – February 2007 and November 2008 for Coachella, November 2007 and November 2008 for Palm Springs, and November 2007 for Cathedral City – the data consists of only two in-tab households.<sup>81</sup> Indeed, Time Warner points out, the largest number of in-tab households submitted by the Petitioners for a community in any one sweeps period was five which means that every sample submitted is less than the seven in-tab household sample *WISN* found barely sufficient.<sup>82</sup>

14. In reply, Petitioners assert that the Commission’s decision in *WISN* does not support Time Warner’s contention, but instead is clearly distinguishable from the situation herein.<sup>83</sup> Petitioners argue that in *WISN*, the opposing party provided more recent data than the petitioner, which called into question the reliability of the originally-submitted data.<sup>84</sup> Also, the petitioner in *WISN* submitted the results of three survey periods for each year, rather than the average of two survey periods and thus was required to submit the individual sweep period audience statistics.<sup>85</sup> Petitioners argue that it was in the context of examining the separate survey results in *WISN* that the Bureau expressed concern about the single in-tab household.<sup>86</sup> Petitioners maintain that, in the situation here, the number of in-tab households for any isolated one-week sweep period is not decisively determinative because the Commission focuses on the average of two sweep periods for each year surveyed.<sup>87</sup> Petitioners state that the Commission has clearly held that where a petition present “averages” from two [Nielsen sweep periods] surveys per year and where the number of in-tab households relied on to obtain those averages totals at least two, the data is deemed to be reliable.<sup>88</sup> Petitioners contend that, since the Commission’s decision in *KCST-TV*, the precedent to permit a petitioner to aggregate in-tab households from two separate

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<sup>77</sup>*Id.*, citing *WISN*, 26 FCC Rcd at 4052.

<sup>78</sup>*Id.*

<sup>79</sup>*Id.*, citing Opposition at 4-9.

<sup>80</sup>*Id.* at 2-3.

<sup>81</sup>*Id.* at 3.

<sup>82</sup>*Id.*, citing *WISN*, 26 FCC Rcd at 4052.

<sup>83</sup>Reply at 3.

<sup>84</sup>*Id.*, citing *WISN*, 26 FCC Rcd at 4052.

<sup>85</sup>*Id.* at 4.

<sup>86</sup>*Id.*

<sup>87</sup>*Id.* at 5.

<sup>88</sup>*Id.* at 5-6, citing *Virginia Broadcasting Corporation*, 22 FCC Rcd 18109 (2007); *Tribune Television Company*, 24 FCC Rcd 1622 (2009); *Barrington Myrtle Beach License, LLC*, 24 FCC Rcd 1628 (2009); *KXAN, Inc.*, 25 FCC Rcd 3307 (2010); *Gulf-California Broadcast Company*, 23 FCC Rcd 7400 (2008).

weekly periods (or two separate four-week sweeps periods) to obtain an “average” for each of two years, has been both a necessary and rational procedure.<sup>89</sup> To abandon such a long-standing precedent, given the difficulties in obtaining any survey diaries from “over-the-air” households in communities such as those in the Palm Springs DMA, is unmerited in light of today’s market realities.<sup>90</sup>

### III. DISCUSSION

15. In 1972, the Commission established procedures for determining significantly viewed status based on the methodology used to create the original list of significantly viewed signals.<sup>91</sup> The procedures were similar to those used by Arbitron, the entity under contract to the Commission at that time to create the original significantly viewed list, which allowed new stations and stations not meeting the standards for significantly viewed status in 1972 to have an opportunity to be granted significantly viewed status in a similar manner. As a result of the decision in *KCST-TV*, the Commission added procedures to grant waivers of significantly viewed status, again based on the statistical methodology used for the Arbitron study.

16. While Time Warner’s statistical consultant makes valid points in his assessment of the appropriate theoretical statistical model and the required sample size for a rigorous statistical analysis, the procedures for determining significantly viewed status are only intended to estimate over-the-air viewing levels. We recognize that they do not require a sophisticated statistical analysis, but rather constitute a practical methodology, within reasonable statistical bounds, to permit the carriage of available stations or grant waivers when viewing levels no longer demonstrate that a station is “significantly viewed” over the air. It would be unfair to the Petitioners, in this instance, to impose a different and more difficult test than has been sufficient in the past even though employing the statistical techniques discussed by Time Warner’s consultant could theoretically produce more precise results. The methodology used for significant viewing showings is unique to the particular purpose and without further study should not, and cannot, be changed in the context of this petition, even if we think we should consider modifying these requirements.<sup>92</sup>

17. Time Warner also argues that, based on this same analysis, we do not know how Nielsen determines whether a household is a non-cable/non-ADS household or what constitutes a usable in-tab household. It maintains that these sampling errors cast doubt on the statistical analysis. Pursuant to Section 76.54(c) of the Commission’s rules, Petitioners provided Time Warner with notification that they intended to purchase Nielsen data and included an explanation of Nielsen’s procedures for re-tabulation

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<sup>89</sup>*Id.* at 6. Petitioners state that, unlike *WISN*, they submitted for the record all of the Nielsen data for each of the five communities, from each of the four Nielsen sweep periods for each of two years.

<sup>90</sup>*Id.* at 6-7. Petitioners point out that in this case the number of over-the-air households is only five percent. *See id.* at Appendix A.

<sup>91</sup>*See Reconsideration of the Cable Television Report and Order*, 36 FCC Rcd 2d 326 (1972).

<sup>92</sup>For example, Time Warner’s consultant argues that we should use a 95 percent confidence interval (*i.e.*, 2 standard errors) to determine the sample size that will produce statistically reliable results. While it is true that statisticians most frequently use a 95 percent confidence level to determine the appropriate sample size for a study and to assess the reliability of a reported statistic, Section 76.54 of the Commission’s rules sets forth a lower level of confidence – approximately 68 percent, based on a confidence level of one standard error. The Commission previously determined that one standard error provides reasonable confidence about the reported audience estimates, even with small samples, both in adopting the rule and in subsequent significant viewing cases. *See supra* n.91 We therefore should not use a different standard here beyond the requirements of the existing rule.

of its routine data for this purpose as well as an offer to provide the entire Nielsen Reference Supplement that would answer the questions raised by Time Warner in this regard.<sup>93</sup> Time Warner not only failed to question Nielsen's methodology when it received this notice, but it also did not oppose or question Gulf California's previous requests for waiver with respect to other Los Angeles stations in these same communities.<sup>94</sup> It is therefore unclear why it raises this issue now. Nielsen's editing procedures used to decide whether information from an in-tab household is usable and its definitions are well known and there is no reason to believe that such non-sampling errors affect the reported results here in an unacceptable manner.<sup>95</sup> To accept the procedures and statistical model proposed in Time Warner's opposition would overturn the long-established methodology for the determination of significantly viewed status or grants of waivers under the exclusivity rules pursuant to *KCST-TV*. Thus, we deny Time Warner's arguments in this regard.<sup>96</sup>

18. We find that the Petitioners made the requisite showing to support their petition. As required by Section 76.54(b) of the rules and *KCST-TV*, Petitioners provided community-specific survey results for each community for each year surveyed. In each case, the reported audience statistics were zero. As a result, KNBC and KCBS-TV do not meet the criteria for significantly viewed status in any of the communities. We note that these estimates are based on small samples, which was much of the focus of Time Warner's opposition. For instance, Petitioners' showing provided audience statistics based on between 3 and 10 in-tab households when the two survey periods were combined and individual sweep data based on 1 and 5 in-tab households. While meeting Bureau and precedential standards for showings that a station is no longer significantly viewed, we feel that the sample size issue merits further comment.

19. We allow petitioners to combine two survey periods and provide average audience statistics over the two periods to increase the sample size and the reliability of the estimates. In this case, the smallest sample used to calculate the average audience is 3 in-tab households for Coachella.<sup>97</sup> Three in-tab households is a small sample, but one sufficient to calculate an average. Because we allow petitioners to combine surveys, the fact that an average cannot be calculated for an individual survey period due to its results being based on only one in-tab household is irrelevant. We look at the average audience statistics from the combination of the two survey periods, combining in-tab households and audience levels. Thus, while the sample is minimal in this case, an average can be calculated and the sample meets the requirements of the rules. On the other hand, if there are no in-tab households for one of the survey periods, then the process of combining surveys is contrary to our intent because the individual survey adds nothing, and the claimed average is solely the results of one survey period. In such a case, we would reject the showing.

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<sup>93</sup>See Reply to Opposition at Appendix C.

<sup>94</sup>See, e.g., *Gulf-California Broadcast Company*, 23 FCC Rcd 7406 (2008), *recon. granted*, 24 FCC Rcd 2738 (2009); *Gulf-California Broadcast Company*, 23 FCC Rcd 7400 (2008), *recon. granted in part*, 24 FCC Rcd 2747 (2009).

<sup>95</sup>Nielsen's Reference Supplement explains its definitions and editing procedures in detail and they have been accepted as the industry standard.

<sup>96</sup>Time Warner is free to file a Petition for Rulemaking if it believes the Commission should abandon its current significantly viewed methodology in favor of a more rigorous statistical method. See 47 C.F.R. § 1.401.

<sup>97</sup>The reported audience for Coachella is based on 2 in-tab households in February 2007, 1 in-tab household in November 2007, 1 in-tab household in February 2008 and 2 in-tab households in November 2008. In addition, the reported audience for Cathedral City for February 2008 is based on 1 in-tab household, with 4 total number of in-tab households used to determine for its reported 2008 average audience. See Petition at Appendix A.

20. With respect to Time Warner's claim that *WISN* supports its arguments regarding the Petitioners failure to use an acceptable sample size, we agree with Petitioners that we can differentiate *WISN* from the situation herein. In *WISN*, the Commission rejected the petitioner's showing because there was conflicting evidence submitted by the opposition that led us to question the initial data and whether it actually supported the contention that the station was no longer significantly viewed. Moreover, we found that, when the required individual sweep period data were submitted, there were inconsistencies among the survey periods and noted the sample sizes used to produce the survey results in that context.<sup>98</sup> Contrary to Time Warner's assertion, we did not deny *WISN* based on the sample sizes used for its showing. Moreover, *WISN* did not say that we found 7 in-tab households barely sufficient, but rather noted that 7 is a small sample, but a usable sample. In the context of examining the separate survey results in *WISN*, we expressed concern about the single in-tab household, especially in light of the conflicting results, and noted the fact that the reported audience statistic was based on the viewing of one household and not the average of a sample of households. In this case, where there is one in-tab household, it is combined with other in-tab households to determine an average audience statistic, consistent with the Commission's rules. Thus, the use of one in-tab household in this case is different from that used in *WISN* and it follows established procedures.

21. Additionally, with respect to Petitioners' reliance on the Commission's decision in *WTVG*, we agree with Time Warner that the factual issues raised therein does not comport with the issues presented in the present case. In *WTVG*, the cable system involved sought a stay of the Commission's earlier decisions granting waivers of the network nonduplication protection and syndicated exclusivity rules in conjunction with the filing of applications for review attempting to overturn the orders by challenging the validity of the significantly viewed methodology accepted by the Commission in the original requests.<sup>99</sup> Time Warner states that it is not seeking to challenge already accepted methodology in this instance, but rather the way in which Petitioners have utilized such methodology. Therefore, we find that *WTVG* has little relevance to the situation here.

22. Finally, we agree with Petitioners that they have standing to include KCBS-TV in their request for waiver. Petitioners have stated that both KESQ-TV and KMIR-TV have exclusive rights to certain syndicated programming carried by KCBS-TV. The fact that KCBS-TV is not currently carried does not preclude Petitioners from seeking to protect their programming rights, particularly in light of the possibility that KCBS-TV may be carried in the future.

23. Accordingly, we find that the Petitioners have followed established procedures to demonstrate that KNBC and KCBS-TV are no longer significantly viewed in the communities of Palm Springs, Indio, Cathedral City, Coachella, and Desert Hot Springs, California, and we grant Petitioners' request.

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<sup>98</sup>While the Petitioners in this case were not required to submit the individual survey results, they not only submitted the individual survey data used to calculate the reported averages, but also submitted the audience data for all four sweep periods in 2007 and 2008. In each case, the reported audience is zero, demonstrating consistency from one survey period to another. See Petition at Appendix A.

<sup>99</sup>See *WTVG, Inc.*, 25 FCC Rcd 2665 (2010); *WUPW Broadcasting, LLC*, 25 FCC Rcd 2678 (2010).

**IV. ORDERING CLAUSES**

24. Accordingly, **IT IS ORDERED**, that the petition filed by Gulf-California Broadcast Company and Journal Broadcast Corporation **IS GRANTED**.

25. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.<sup>100</sup>

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broecker  
Senior Deputy Chief, Policy Division  
Media Bureau

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<sup>100</sup>47 C.F.R. §0.283.