

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

In the Matter of)
)
TVL Broadcasting of Rhode Island, LLC)
) CSR-8373-N
Petition For Waiver of Section 76.92(f))
of the Commission’s Rules)

MEMORANDUM OPINION AND ORDER

Adopted: November 8, 2013

Released: November 8, 2013

By the Senior Deputy Chief, Policy Division Media Bureau:

I. INTRODUCTION

1. TVL Broadcasting of Rhode Island, LLC, licensee of station WPRI-TV (CBS), Providence, Rhode Island (“WPRI-TV”), filed the captioned petition seeking a waiver of the rules that preclude cable operators from deleting the duplicate programming of “significantly viewed” stations under the network nonduplication rules (“exclusivity rules”).¹ Specifically, WPRI-TV seeks a waiver of the significantly viewed exception so that it may enforce its exclusivity rights against WBZ-TV (CBS), Boston, Massachusetts (“WBZ-TV”) in the communities of South Easton and Fall River, Massachusetts.² Oppositions to this petition have been filed on behalf of CBS Corporation, licensee of WBZ-TV, the Town of Easton, Massachusetts (“Easton”), and the Massachusetts Department of Telecommunications and Cable (“MDTC”), to all of which WPRI-TV replied.³ For the reasons discussed below, we grant, in part, WPRI-TV’s waiver request.

¹See 47 C.F.R. § 76.92(f). Although not expressly requested in WPRI-TV’s petition for waiver of Section 76.92(f) (significantly viewed exception to cable network nonduplication), a waiver of Sections 76.122(j) (significantly viewed exception to satellite network nonduplication) would also appertain to a waiver for carriage on DBS systems based on the same showing that a station is no longer significantly viewed in the relevant community. See 47 C.F.R. §§ 76.92(f) & 76.122(j).

²Petition at 1.

³We note that WBZ-TV filed a “Motion to Accept Late Filing” with regard to the filing of its opposition which was filed after the required 20-day response period required pursuant to Section 76.7 of the Commission’s rules. Although WPRI-TV filed a reply to this opposition, it also requested that the Commission strike the late-filed opposition. In the interests of a complete record, we will accept WBZ-TV’s opposition and deny WPRI-TV’s motion to strike.

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.⁴ Under Sections 76.92(f) and 76.106(a) of the Commission's rules, however, a signal otherwise subject to deletion is exempt from application of both the network nonduplication and syndicated exclusivity rules if it is "significantly viewed" in a relevant community (the "significantly viewed exception").⁵ The significantly viewed exception to the exclusivity rules is based on a demonstration 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.⁶

3. In order to obtain a waiver of Section 76.92(f), the Commission held in *KCST-TV, Inc.*⁷ 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.⁸ 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.⁹ The Commission has found that this type of test is applicable as well for waivers of the syndicated exclusivity exemption.¹⁰

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 than one of which shall be a week between the months of April and September."¹¹ Over time, The Nielsen Company ("Nielsen") became the primary surveying organization through which a petitioner could obtain television surveys. 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

⁴ See 47 C.F.R. §76.92; 47 C.F.R. §76.101.

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

⁶ 47 C.F.R. §76.106(a).

⁷ *KCST-TV, Inc.*, 103 FCC 2d 407, 413 ¶ 11 (1986).

⁸ 47 C.F.R. §76.5(i).

⁹ *Id.*

¹⁰ See *Chambers Cable of Oregon, Inc.*, 5 FCC Rcd 5640, 5640-41 ¶ 6 (1990).

¹¹ 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.

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 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

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 ¶ 7 (CSB 2001) (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 it could determine the effect of these sweeps periods).

¹³It should be noted that Nielsen identifies individual communities by zip codes, a process not incompatible with the surveying process discussed here.

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.

¹⁵We 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 provided was obtained from Nielsen. See, e.g., *Radio Perry, Inc.*, 11 FCC Rcd 10564, 10568-9 ¶ 10 (CSB 1996); *Gulf-California Broadcast Company*, 21 FCC Rcd 3476, 3479-80 ¶ 8 (MB 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

(continued...)

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.

III. DISCUSSION

5. WPRI-TV seeks a waiver of the significantly viewed exception so that it may enforce its network nonduplication rights against station WBZ-TV for the communities of South Easton and Fall River, Massachusetts.¹⁹ WBZ-TV is considered to be significantly viewed in Bristol County, Massachusetts, where the communities at issue are located.²⁰

6. WPRI-TV states that it is licensed to a community in the Providence, Rhode Island-New Bedford, Massachusetts designated market area (“DMA”), while WBZ-TV is licensed to the Boston, Massachusetts DMA.²¹ WPRI-TV argues that it would normally be entitled to assert network nonduplication protection against WBZ-TV in the subject communities, but it cannot because WBZ-TV is considered significantly viewed in Bristol County, Massachusetts.²² WPRI-TV maintains, however, that WBZ-TV no longer meets the significantly viewed standard in South Easton and Fall River and, as proof, it submits the results of special community-specific surveys conducted by Nielsen.²³ WPRI-TV states that Nielsen conducted a special tabulation of over-the-air viewing using audience data from noncable/non-ADS homes for specified zip codes comprising the communities.²⁴ The submitted data are averages of two four-week audience sweep periods in each of two years. For South Easton, the first year’s audience estimates were derived from May 2007 and November 2007 audience sweep data, combined, and the second year’s estimates from the May 2008 and November 2008 audience sweep data, combined.²⁵ For Fall River, the first year’s audience estimates were derived from July 2008 and November 2008 audience sweep data, combined, and the second year’s from July 2009 and November 2009 audience sweep data, combined.²⁶ These survey dates and the method used to combine audience

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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.”

¹⁹Petition at 1.

²⁰*Id.*

²¹*Id.* at 2.

²²*Id.* WPRI-TV states that WBZ-TV achieved its significantly viewed status by its inclusion in Appendix B to the *Reconsideration of the Cable Television Report and Order*. See *Amendment of Part 74, Subpart K, of the Commission’s Rules and Regulations Relative to Community Antenna Television Systems*, Memorandum Opinion and Order on Reconsideration, 36 FCC 2d 326, App. B (1972).

²³*Id.* at Exhibit 1.

²⁴*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 over-the-air. See Nielsen Media Research at <http://www.nielsenmedia.com/nc/portal/site/Public>.

²⁵*Id.*

²⁶*Id.*

surveys are consistent with the requirements set forth in Section 76.54(b) of the Commission's rules.²⁷ WPRI-TV maintains that for WBZ-TV, the share of total viewing hours in over-the-air homes in South Easton and Fall River is far short of the required significantly viewed minimums, within one standard error, as shown in the tables below:

TABLE 1 – WBZ-TV VIEWING IN SOUTH EASTON, MA

<u>Survey Periods</u>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
May 2007/ Nov. 2007	2	0.00	0.00	0.00	0.00
May 2008/ Nov. 2008	3	0.00	0.00	0.00	0.00

TABLE 2 – WBZ-TV VIEWING IN FALL RIVER, MA

<u>Survey Periods</u>	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
July 2008/ Nov. 2008	11	1.46	1.26	14.37	10.31
July 2009/ Nov. 2009	8	0.59	0.46	9.31	8.80

As a result, WPRI-TV requests that the Commission grant its petition so that it can assert its exclusivity rights in the subject communities.

7. In its opposition, Easton argues that the survey submitted with WPRI-TV's petition is seriously flawed and should be rejected.²⁸ Easton states that: 1) the survey is based on an exceedingly small sampling of Easton residents which cannot accurately represent the views of the town's 23,357 residents; 2) the survey only takes into account the results from one section of the town, not the entire community; 3) the survey methodology is outdated because it is based on only over-the-air programming;²⁹ 4) the data supplied is statistically invalid because Nielsen failed to explain which viewers returned surveys or what "usable" means; and 5) the statistical errors inherent in the survey are so considerable as to render the survey meaningless and unacceptable.³⁰ Easton also argues that granting WPRI-TV's petition is not in the public interest because Easton residents look for and receive important

²⁷ 47 C.F.R. § 76.54(b).

²⁸ Easton Opposition at 2.

²⁹ *Id.* Easton points out that Easton residents view television programming from multiple sources – over-the-air, cable television, personal computers, online, mobile phones, etc.

³⁰ *Id.*

programming from WBZ-TV much more so than they do from WPRI-TV.³¹ Finally, Easton asserts that WPRI-TV's petition singles out "South Easton" for exclusion, but not the entire town.³² Easton maintains that such a narrow exclusion is misleading and not in the public interest because there is no finite municipality called "South Easton."³³ Easton states that it believes the petition was focused on one zip code in the town (02375) simply because WPRI-TV could not achieve the results it was seeking for the entire town.³⁴

8. In reply, WPRI-TV argues that Easton's objections are procedurally defective and not legally cognizable because they rely on factual assertions and considerations that Easton does not support with an affidavit, as required by Section 76.7(b)(1) of the Commission's rules.³⁵ WPRI-TV maintains that Easton's arguments that the Nielsen survey methodology is seriously flawed are misplaced and come too late.³⁶ WPRI-TV states that, as required by Section 76.54(c) of the Commission's rules, it gave prior notice to potentially affected parties of its intention to conduct a survey in support of a waiver of the significantly viewed exception, one of whom was Easton.³⁷ Easton had twenty days from the receipt of this notice to respond to the procedures outlined in the notice, but did not do so.³⁸ WPRI-TV maintains that Easton should, therefore, not be allowed to raise objections for the first time here.³⁹ In any event, WPRI-TV asserts, Easton's objections to the survey methodology are simply wrong.⁴⁰ The Commission has consistently granted such waivers that relied on two or three Nielsen in-tab households and have been found to be statistically valid.⁴¹ WPRI-TV maintains that Easton's opinion that the survey may not reflect the views of all of the town's residents is not probative.⁴² Further, WPRI-TV points out that established Commission precedent requires that surveys to establish significant viewing or to waive such status must be based exclusively on non-cable/non-ADS households.⁴³ Moreover, while Easton asserts that the statistical errors in the survey are considerable, it does not explain what these errors are or any

³¹*Id.* For instance, Easton notes that in the recent Massachusetts election results on November 2, 2010, only WBZ-TV carried the results in detail. Further, Easton states that WBZ-TV carries important news, weather, traffic reports, and topical local programming of interest which are not available from WPRI-TV. *See id.* at 2-3.

³²*Id.* at 3.

³³*Id.*

³⁴*Id.*

³⁵Reply to Easton at 2, citing 47 C.F.R. § 76.7(b)(1).

³⁶*Id.*

³⁷*Id.* at Exhibit A. WPRI-TV states that Easton received its notice on July 21, 2010.

³⁸*Id.* at 3.

³⁹*Id.*

⁴⁰*Id.*

⁴¹*Id.* at 3-4, citing *WPBF-TV Company*, 25 FCC Rcd 9102, 9105 ¶ 6 (MB 2010); *Tribune Television Company*, 24 FCC Rcd 1622, 1625 ¶ 6 (MB 2009).

⁴²*Id.* at 4. WPRI-TV states that it is the viewing of the residents, as reflected in a statistically valid survey, not their supposed views that are important.

⁴³*Id.*, citing 47 C.F.R. § 76.54(b) ("Significant viewing . . . may be demonstrated by an independent audience survey of over-the-air television homes . . ."); *see also MMK License LLC*, 22 FCC Rcd 795, 800 ¶ 12 (MB 2007) ("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. . . ." (citation omitted)).

justification for reversal of long-standing precedent.⁴⁴ WPRI-TV argues that Easton also misunderstands the intent of its waiver request in its contention that residents would lose access to “important programming from WBZ-TV.”⁴⁵ WPRI-TV states that it is seeking a waiver to require cable systems to delete CBS network programming carried on WBZ-TV when that programming duplicates CBS network programming carried on WPRI-TV. WPRI-TV states that it does not seek to block any cable system from carrying WBZ-TV’s non-network programming and therefore grant of its waiver should have no effect on the availability of programming of interest to Easton’s residents.⁴⁶ Finally, WPRI-TV argues that there is nothing nefarious or improper in its selection of the South Easton zip code for the survey.⁴⁷ WPRI-TV states that it is simply adhering to the long-standing practice, approved by the Commission, of relying on the United States Postal Service (“USPS”) Zip Code database to determine which zip codes apply for each community survey.⁴⁸ WPRI-TV points out that in *KATC Communications, Inc.*, the Commission states that “[i]t should be noted that not all zip codes for each community are represented, but as the rule is written, they need not be.”⁴⁹ WPRI-TV states that it should also be noted that the USPS database distinguishes between North Easton and South Easton.⁵⁰ WPRI-TV argues that, while it would have been helpful to consolidate ZIP codes from different USPS community designations in order to aggregate in-tab households for the entire community, the USPS does not allow such flexibility.⁵¹

9. In its opposition, the MDTC agrees with Easton that it is not in the public interest to grant WPRI-TV’s request because then it would become the sole provider of CBS programming in the communities.⁵² MDTC notes that WBZ-TV is included on the Commission’s list of significantly viewed stations for Bristol County, Massachusetts, where the subject communities are located. MDTC argues that it does not believe that the Commission should remove a television station from this list in specific communities simply because those communities may not view the station at levels sufficient for significantly viewed status.⁵³ Further, MDTC asserts that the residents of Fall River and Easton, many of whom work in Massachusetts, have a significant interest in receiving Massachusetts-specific local news, political information, weather, and traffic reports.⁵⁴ It is, therefore, imperative that cable systems in these two communities carry television stations, like Boston-based WBZ-TV, that provide such information.⁵⁵ Finally, MDTC states that, for basic service tier subscribers, excluding carriage of WBZ-TV would remove a channel from an already extremely limited channel line-up.⁵⁶ In reply, WPRI-TV argues that,

⁴⁴*Id.* at 5.

⁴⁵*Id.*, citing Easton Opposition at 2.

⁴⁶*Id.*

⁴⁷*Id.* at 6.

⁴⁸*Id.* at 6 & Exhibit B. WPRI-TV notes that this information was also available in the Section 76.54(c) survey notification to Easton. *See id.* at 6.

⁴⁹*Id.* at 7, citing *KATC Communications, Inc.*, 16 FCC Rcd 6861, 6865 ¶ 13 (CSB 2001).

⁵⁰*Id.* at Exhibit B. WPRI-TV notes that the address listed on Easton’s opposition is “North Easton, Massachusetts.”

⁵¹*Id.* at 8.

⁵²MDTC Opposition at 2.

⁵³*Id.*

⁵⁴*Id.*

⁵⁵*Id.*

⁵⁶*Id.*

not only is MDTC's opposition procedurally defective and unsupported by affidavit, but essentially repeats the same arguments raised by Easton.⁵⁷ It therefore requests that this opposition be stricken or denied.⁵⁸

10. In its opposition, CBS argues that grant of WPRI-TV's request would almost certainly result in the removal of WBZ-TV from the cable systems serving Fall River and South Easton; a loss which would be a grave disservice to the affected communities.⁵⁹ CBS states that while WPRI-TV is an outstanding television station, it is firmly rooted in Rhode Island. In an analysis of the last four issues-quarterly reports prepared by WPRI-TV, CBS notes that, out of a total of 206 programs or program segments, only seven could be classified as "Massachusetts Interest."⁶⁰ In contrast, CBS states, WBZ-TV's reports reflect that 272 out of 584 cited programs or program segments describe "Massachusetts Interest" rather than "General Interest."⁶¹ CBS points out that WBZ-TV has combined its newsgathering resources with sister stations WSKB-TV and WBZ (AM) news radio and is now the largest newsgathering operation in Massachusetts.⁶² For example, CBS states that WBZ-TV provided extensive coverage of the 2010 midterm election campaign.⁶³ Moreover, WBZ-TV regularly covers news that is of particular interest to residents in Bristol County, including viewers in Fall River and South Easton.⁶⁴

11. CBS argues further that the Nielsen study submitted by WPRI-TV is flawed and insufficient to override the public interest considerations in permitting WBZ-TV to remain accessible to cable subscribers in Fall River and South Easton.⁶⁵ With respect to Fall River, CBS states that the survey appears to conform to the letter of the Commission's rules, although they believe that the choice of a May rather than July "sweeps" period would be far more representative of over-the-air viewing patterns.⁶⁶ With regard to South Easton, however, CBS maintains that WPRI-TV chose to reach back to 2007 and 2008 for survey data because there are simply no more recent over-the-air diarists in the community's one zip code.⁶⁷ CBS argues, however, that reliance on these dated reports is inappropriate in a community where WBZ-TV's share of overall audience relative to WPRI-TV has increased both in 2009 and 2010.⁶⁸ CBS contends that if indeed there have been no over-the-air Nielsen diaries in South Easton since 2008, the Commission should not accept a "significantly viewed" survey of the community

⁵⁷Reply to MDTC at 2.

⁵⁸*Id.*

⁵⁹CBS Opposition at 3.

⁶⁰*Id.* at Exhibit A.

⁶¹*Id.*

⁶²*Id.* at 3. CBS states that the coverage WBZ-TV offers Massachusetts residents of the economic, social and especially political life of their state is unparalleled and is truly indispensable to any resident would wants to be well-informed.

⁶³*Id.* at Exhibit B.

⁶⁴*Id.* at Exhibit C.

⁶⁵*Id.* at 5.

⁶⁶*Id.* at 6.

⁶⁷*Id.*

⁶⁸*Id.*

based on outdated Nielsen sweeps data.⁶⁹ CBS maintains that in a significantly viewed study it commissioned from Nielsen using the same unrepresentative measure of over-the-air viewing submitted by WPRI-TV, WBZ-TV meets the Commission's "significantly viewed" test.⁷⁰ CBS states that for its study, Nielsen examined Fall River's in-tab households for the May 2009 and February 2010 sweeps periods and found that WBZ-TV had a total viewing share of 10.66 percent and a net weekly circulation of 44.60 percent.⁷¹ CBS therefore argues that WPRI-TV's request should be denied.

12. In reply, WPRI-TV states that CBS' only objection appears to relate to the viewership showing submitted for South Easton because it relies on surveys from 2007 and 2008.⁷² While WPRI-TV concedes that CBS is correct in its assertion that there are no more recent over-the-air diaries in the community's one ZIP code, CBS does not cite any Commission case which rejected an otherwise qualifying waiver petition simply because an opponent preferred that the petitioner meet a higher standard than Commission precedent requires.⁷³ WPRI-TV notes that CBS doesn't contend that the petition's showing is deficient pursuant to Commission precedent, but instead simply does not want WBZ-TV to lose carriage in two communities that are not in the Boston DMA.⁷⁴ WPRI-TV states that, in essence, CBS is asking that the Commission change its longstanding policy regarding waivers of significant viewed status because it does not like the results in this instance.⁷⁵ WPRI-TV argues, however, that the instant order cannot be used to change Commission policy and CBS has presented no justification for such a policy change.⁷⁶ Indeed, WPRI-TV states that the only reliable evidence CBS provides is a significant viewing re-tabulation which clearly shows that WBZ-TV fails to achieve the level of viewing required for significantly viewed status.⁷⁷ Moreover, CBS's contention that WPRI-TV should have surveyed Bristol County as a whole ignores the fact that, since the Commission's decision in *KCST-TV*, petitions seeking waiver of the significantly viewed exception must adhere to the methodology set forth in Section 76.54(b) of the Commission's rules which requires viewership data be based on either community-specific or system-specific over-the-air viewing.⁷⁸

13. Further, WPRI-TV argues that CBS offers no support for its speculative contention that grant of the instant waiver would not be in the public interest.⁷⁹ WPRI-TV states that if WBZ-TV's local news coverage is truly indispensable, as CBS claims, then there is no reason to expect that a cable operator will choose to drop WBZ-TV entirely from its lineup just because of a routine network

⁶⁹*Id.*

⁷⁰*Id.* at Exhibit D.

⁷¹*Id.*

⁷²Reply to CBS at 2-3.

⁷³*Id.* at 5. WPRI-TV agrees that a lack of diaries conforming to the Commission's strict requirements poses challenges to filers of significantly viewed waiver petitions. It was because of the lack of a sufficient number of diaries which led it to seek waiver only in Fall River and South Easton and not additional communities.

⁷⁴*Id.* at 3.

⁷⁵*Id.*

⁷⁶*Id.*

⁷⁷*Id.*

⁷⁸*Id.* at 6, citing 47 C.F.R. § 76.54(b).

⁷⁹*Id.* at 4.

nonduplication request.⁸⁰ In any event, WPRI-TV points out, it has not asked for and is not entitled to enforce deletion of any of WBZ-TV's local programming.⁸¹ Moreover, despite CBS' claims, WPRI-TV states that it provides extensive daily coverage of news, politics and public affairs throughout its coverage area, including a substantial portion that falls in Massachusetts.⁸²

14. Initially, with regard to the procedural arguments raised by WPRI-TV regarding Easton's and MDTC's lack of an affidavit, we concur with WPRI-TV that Section 76.7(b)(1) of the Commission's rules does require an affidavit to be filed with any opposition to a petition for special relief.⁸³ However, given that our finding herein would not have been changed had acceptance of the oppositions been denied, we see no reason to strike the oppositions and will accept them as part of the record.

15. We find that, for South Easton, the data submitted by WPRI-TV demonstrates that WBZ-TV is no longer significantly viewed because the station attains zero audience in both years surveyed. We agree with WPRI-TV that these data are from a properly conducted survey and are consistent with Commission precedent. As a result, Easton's assertions regarding the study's flaws are rejected. However, Easton separately questioned whether South Easton was properly a community for purposes of determining significantly viewed status. In this regard, we agree with Easton that South Easton is not a community, as defined by the Commission's rules. Section 76.54(b) of the rules sets forth procedures for determining whether a television station is significantly viewed in a "cable television or satellite community."⁸⁴ Section 76.5(dd) of the rules defines a system community unit as "[a] cable television system, or portion of a cable television system that operates or will operate within a separate and distinct community or municipal entity (including unincorporated communities within unincorporated areas and including single, discrete unincorporated areas)."⁸⁵ A community in this context would therefore be assigned a community unit identifier number ("CUID") when registered with the Commission, pursuant to Section 76.1801 of the rules.⁸⁶ According to Commission records, there is no assigned CUID for South Easton, but only for Easton, an incorporated town.⁸⁷ As a result, it appears that the Town of Easton is one cable community and any survey for significantly viewed status should have included the entire town, using all the zip codes assigned to the town for purposes of identifying the community for Nielsen's re-tabulation of its existing data. On this basis, the request for waiver for South Easton is denied.

16. We also point out in the interests of clarity that WPRI-TV misinterprets the Commission's position on the use of zip codes in these types of waivers. While we have approved the use of zip codes for identifying the relevant cable community for Nielsen's database search, we have never stated that the zip codes used for purposes of significantly viewed status data must match USPS designations. Rather, we expect that the zip codes used for identifying communities for Nielsen match

⁸⁰*Id.*

⁸¹*Id.*

⁸²*Id.* at Exhibits A and B.

⁸³*See* 47 C.F.R. § 76.7(b)(1).

⁸⁴*See* 47 C.F.R. § 76.54(b).

⁸⁵*See* 47 C.F.R. § 76.5(dd).

⁸⁶*See* 47 C.F.R. § 76.1801.

⁸⁷There are two CUID numbers for Easton – MA0233 for cable system operated by Comcast Communications and MA0472 for a cable system operated by Verizon.

the area served by the cable community where a petitioner seeks significantly viewed status or an exclusivity waiver for a station.⁸⁸ In the case herein, WPRI-TV should have requested a Nielsen re-tabulation of all the zip codes assigned to Easton, Massachusetts.⁸⁹

17. With regard to the community of Fall River, WPRI-TV made the requisite showing to support its petition. As required by the rules, WPRI-TV has provided community-specific survey results for the subject community for each year surveyed. When the standard errors are added to the reported audience shares, WBZ-TV does not meet the criteria for significantly viewed status for a network affiliate in Fall River. For the first year, the results show that WBZ-TV attained a 2.72 percent share of total viewing hours (1.46 reported share + 1.25 standard error) and a 24.68 percent net weekly circulation share (14.37 reported share + 10.31 standard error). For the second year, the results indicate that WBZ-TV attained a 1.05 percent share of total viewing hours (0.59 reported share + 0.46 standard error) and an 18.11 percent net weekly circulation share (9.31 reported share + 8.80 standard error). Accordingly, we find that the submitted audience surveys are sufficient to show that WBZ-TV no longer attains the required viewing levels needed to demonstrate significantly viewed status for a network affiliate (*i.e.*, 3 percent share of total weekly viewing hours and a 25 percent net weekly circulation share). Therefore, we conclude that WBZ-TV is no longer significantly viewed in the community of Fall River, Massachusetts.

18. We note that CBS claimed that more recent data demonstrated that WBZ-TV remains significantly viewed in Fall River and submitted the combined results of two audience survey periods. While the survey CBS provides for two survey periods and the dates it uses would be permissible for a showing that a station is significantly viewed, the reported results do not demonstrate that WBZ-TV remains significantly viewed as CBS has claimed. To ensure that the reported audience statistics reflect the actual viewing in an area, we examine the reported results in conjunction with the standard error calculated by Nielsen for its data. By considering the standard error along with the reported audience statistic, we are creating a confidence interval, or upper and lower bounds, around the reported statistic to take into account the effect of potential sampling error. Where these bounds are derived using one standard error, we can be approximately 70 percent confident that the actual viewing level is within the upper and lower bounds, if all households had been surveyed. Thus, to demonstrate that a station is or remains significantly viewed, the standard error is subtracted from the reported audience statistics to find their lower bounds to be reasonably sure that these lower bounds exceed the required criteria. If so, then the station is shown to be significantly viewed. When the standard errors are subtracted from CBS's data, WBZ-TV attains a 2.22 percent share of total viewing hours (6.44 reported share – 4.22 standard error) and a net weekly circulation share of 11.24 percent (27.92 reported share – 16.68 standard error), both of which fall below the criteria for significantly viewed status for a network affiliate.

19. Finally, with regard to the public interest arguments raised by all the parties, regarding the potential deletion of the valuable local programming provided by WBZ-TV, we point out that a grant of a waiver of the network nonduplication rules only requires the cable operator to delete the duplicating

⁸⁸WPRI-TV misinterprets prior Commission precedent. *See supra* ¶ 8. In prior decisions, it has been stated that there need not be in-tab households from each and every zip code used to identify the community (*i.e.*, not all zip codes assigned to a community by the USPS must be included in the sample), once they have been enumerated by the petitioner in its request for a re-tabulation of Nielsen's data.

⁸⁹In WPRI-TV's Reply to Easton's Opposition at Exhibit B, USPS lists four zip codes for Easton – 02334, 02256, 02357, and 02375 – which should have been identified for Nielsen. It appears from this submission that one zip code is assigned to one or more PO Boxes and another is a unique zip code. Since it is likely that neither of these codes contains residences, they would not be represented in the sample, which is acceptable.

network programming carried by the competing station and not the entire station. Therefore, any programming that WBZ-TV carries that does not infringe on WPRI-TV's rights in its market may still be made available to cable system subscribers.

IV. ORDERING CLAUSES

20. Accordingly, **IT IS ORDERED**, that the petition filed by TVL Broadcasting of Rhode Island, LLC **IS GRANTED** for the community of Fall River, Massachusetts, but **IS DENIED** for the community of South Easton, Massachusetts.

21. This action is taken pursuant to authority delegated under Section 0.283 of the Commission's rules.⁹⁰

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Deputy Chief, Policy Division
Media Bureau

⁹⁰47 C.F.R. §0.283.