

**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)	

ORDER ON RECONSIDERATION

Adopted: February 25, 2009

Released: February 27, 2009

By the Chief, Media Bureau:

I. INTRODUCTION

1. Gulf-California Broadcast Company, licensee of station KESQ-TV (ABC), Palm Springs, California ("Gulf"), has filed a petition for reconsideration of the Bureau's decision denying Gulf's petition seeking a waiver of the Commission's significantly viewed exception to the network nonduplication and syndicated exclusivity rules.¹ For the reasons discussed below, we grant Gulf's petition for reconsideration.²

II. BACKGROUND

2. Upon the request of a local television station with exclusive rights to distribute a network or syndicated program, a cable operator generally may not carry a duplicating program broadcast by a distant station.³ Under 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"

¹*Gulf-California Broadcast Company*, 23 FCC Rcd 7406 (2008). 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.

²We note that in an opposition to Gulf's request, filed on behalf of ABC Holdings Company, Inc., licensee of KABC-TV (ABC), Los Angeles, California (KABC-TV), the sole argument raised was KABC-TV's belief that KESQ-TV had not obtained the necessary authorizations for the station's post-transition DTV operations. Both Commission records and Gulf's own statements in reply, however, confirm that KESQ-TV has received a post-transition construction permit for KESQ-DT, Channel 42. In view of this, and the fact that KABC-TV raised no further objections regarding the methodology submitted by Gulf in support of its petition for reconsideration, the issues raised by KABC-TV are moot and need not be addressed further.

³*See* 47 C.F.R. §76.92; 47 C.F.R. §76.101.

in a relevant community (the “significantly viewed exception”).⁴ 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.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 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.”¹⁰ Over time, The Nielsen Company (“Nielsen”) 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

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

⁵ 47 C.F.R. §76.106(a).

⁶ 103 FCC 2d 407 (1986).

⁷ 47 C.F.R. §76.5(i).

⁸ *Id.*

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

¹⁰ 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.

¹¹ Nielsen Media Research recently changed its name to The Nielsen Company.

¹² 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

(continued...)

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 the average of the two sweep periods for each year. If, however, a petitioner submits more than two

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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.

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 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.”

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. In its initial petition, Gulf sought a waiver of the significantly viewed exception to the network nonduplication and syndicated exclusivity rules so that it could asserts its rights to network nonduplication and syndicated exclusivity against station KABC-TV in the communities of Cathedral City, Coachella, Desert Hot Springs, Indio, Mecca, Palm Desert, and Palm Springs, California.¹⁹ The Bureau denied Gulf's request due to a failure to submit averages for each of the three individual sweep periods it provided, in addition to the overall average of all sweep periods for each year surveyed.²⁰ Gulf seeks reconsideration, based on revised information, which it argues meets the criteria required for waiver.²¹

6. In support of its petition for reconsideration, Gulf submits revised survey data correcting the deficiencies found in its previously filed survey results.²² Gulf's original request was based on community-specific re-tabulations of Nielsen audience data for the February 2004/July 2004/November 2004 and the February 2005/July 2005/November 2005 audience sweep periods. In the instant petition, Gulf provides individual audience statistics for each of the four audience sweep periods from 2004 and 2005 (*i.e.*, February, May, July and November), which corrects for the deficiency of the initial survey data.²³ Our analysis generally will be based on the original showing for the February, July and November sweep periods and a review of the individual sweep periods, including the additional May sweep data. The submitted audience information are as follows:

¹⁹These communities are served by Time Warner and USA Companies cable systems. *See* Petition for Waiver at 3.

²⁰We require this because, in instances where the petitioner submits more than two sweep periods, 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*. *See KCST-TV*, 103 FCC 2d 407 (1986); *see also WTNH Broadcasting*, 16 FCC Rcd 6781, 6784 (2001).

²¹We note that Gulf raises the argument at n.11 of its petition as to whether the Commission's policy of requiring individual averages is lawful. In view of our decision herein, however, we need not address this issue.

²²Reconsideration at Exhibit D.

²³*Id.* at Exhibits E-G.

TABLE 1 – KABC-TV VIEWING IN CATHEDRAL CITY, CA

<u>Survey Year</u> ²⁴	<u>Households Studied</u>	<u>Share Viewing Hours</u>	<u>Standard Error</u>	<u>Net Weekly Circulation</u>	<u>Standard Error</u>
Feb. 2004/ July 2004/ Nov. 2004	9	0	0	0	0
Feb. 2005/ July 2005/ Nov. 2005	12	0.80	0.76	30.88	5.66

TABLE 2 – KABC-TV 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>
Feb. 2004/ July 2004/ Nov. 2004	6	0	0	0	0
Feb. 2005/ July 2005/ Nov. 2005	7	0	0	0	0

TABLE 3 – KABC-TV 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>
Feb. 2004/ July 2004/ Nov. 2004	7	0	0	0	0
Feb. 2005/ July 2005/ Nov. 2005	10	0	0	0	0

²⁴All 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.

TABLE 4 – KABC-TV 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>
Feb. 2004/ July 2004/ Nov. 2004	12	0	0	0	0
Feb. 2005/ July 2005/ Nov. 2005	14	0	0	0	0

TABLE 5 – KABC-TV VIEWING IN MECCA, 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>
Feb. 2004/ July 2004/ Nov. 2004	7	0	0	0	0
Feb. 2005/ July 2005/ Nov. 2005	10	0	0	0	0

TABLE 6– KABC-TV VIEWING IN PALM DESERT, 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>
Feb. 2004/ July 2004/ Nov. 2004	7	0	0	0	0
Feb. 2005/ July 2005/ Nov. 2005	7	0	0	0	0

TABLE 7– KABC-TV 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>
Feb. 2004/ July 2004/ Nov. 2004	14	0	0	0	0
Feb. 2005/ July 2005/ Nov. 2005	6	2.12	1.57	8.85	8.58

As a result, Gulf requests that the Commission grant its petition so that it can assert its exclusivity rights in the communities of Cathedral City, Coachella, Desert Hot Springs, Indio, Mecca, Palm Desert and Palm Springs, California.

III. DISCUSSION

7. We find that Gulf made the requisite showing to support its petition. As required by the rules, Gulf has provided community-specific survey results for each community for each year surveyed.²⁵ With the exception of the showings for Cathedral City and Palm Springs, the combined audience shares for the first and second years demonstrate that KABC-TV is no longer significantly viewed in the specified communities. For KABC-TV, the reported average audience shares – the share of total viewing hours and net weekly circulation share – are zero based on three four-week survey periods from each of two years. As required, when more than two surveys are used for each survey year, Gulf now includes the results of the individual sweep period audience estimates and standard errors in order for us to ensure that the additional sweep periods do not alter the results, or skew them in any way. In addition, Gulf has submitted the missing May sweep data. From this showing, it is clear that the third audience sweep period is consistent with all of the other periods, and that omitting the May sweeps did not alter the results. Indeed, we note that, in a number of instances, Nielsen only had one in-tab household in May, a sample size too small to use to draw any conclusion about the average viewing share. Where the sample size was sufficient, KABC-TV did not attain any measurable audience during the May sweeps. Considering the combined three audience sweep averages, along with the individual sweep period results, we can conclude that KABC-TV attains approximately no viewing in Coachella, Desert Hot Springs, Indio, Mecca, and Palm Desert.

8. With regard to the showing for KABC-TV in Cathedral City, for the second year, the

²⁵We note that there is a lack of clarity in the letter from Nielsen regarding exactly which stations they are providing data for in this case. Moreover, since the reported data are not on sheets with Nielsen's logo or usual caveat regarding the use of the data solely for this purpose, it is clear that the data have been re-typed for submission with Gulf's petition. Because it is clear from the data that KABC-TV is clearly no longer significantly viewed, we will not deny Gulf's petition for this procedural error. However, we would like to take this opportunity to clarify that the Nielsen letter needs to specifically state the stations covered by the request and that the presentation of the data must clearly indicate that it has come directly from Nielsen to ensure that it accurately reflects their retabulations.

submitted data show that for the February 2005/July 2005/November 2005 audience sweep periods, combined with the standard errors added, KABC-TV attains a 1.56 percent share of total weekly viewing hours (0.80 reported share + 0.76 standard error) and a 36.54 percent average net weekly circulation share (30.88 reported share + 5.66 standard error). While KABC-TV's net weekly circulation share exceeds the 25 percent criterion for significantly viewed status for a network station, the station's total weekly viewing share falls below the 3 percent criterion. In order to be considered significantly viewed in Cathedral City for this survey year, KABC-TV's viewership would need to meet or exceed both of the required minimum criteria. In this case, KABC-TV does not meet both criteria when the combined survey results are evaluated, and it appears that KABC-TV is not significantly viewed in Cathedral City based on this survey. But, because Gulf submits the results of more than two audience sweep periods in each year and omits the May sweeps, the individual sweep period average audience also needs to be reviewed. For Cathedral City, KABC-TV attains a measurable audience share in only one out of the eight survey periods for which data are submitted based on three in-tab households. For the July 2005 audience sweep period, KABC-TV attains a 7.08 percent share of total weekly viewing hours when the standard error is added (3.58 reported share + 3.50 standard error) and a 50 percent net weekly circulation share (50 reported share + 0 standard error). These values exceed the criteria for a network station for this one survey period. These anomalous results, however, may simply be due to the small samples available for analysis. In particular, Gulf has provided a variety of calculations and combinations of survey results in its reconsideration. Among these are the combined results of 7 in-tab households from February 2004/November 2004 audience sweep periods and the combined results from 7 in-tab households for February 2005/November 2005. Based on the February 2004/November 2004 and February 2005/November 2005 audience sweep periods, KABC-TV attains no measurable share and this information alone is sufficient to demonstrate that KABC-TV is no longer significantly viewed in Cathedral City.²⁶ On this basis, we conclude that KABC-TV is no longer significantly viewed in Cathedral City.

9. For Palm Springs, when the standard errors are added to the reported audience shares for the February 2004/July 2004/November 2004 audience sweep periods, KABC-TV attains a 3.69 percent total weekly viewing share (2.12 reported share + 1.57 standard error) and a net weekly circulation share of 17.43 percent (8.85 reported share + 8.58 standard error). In this case, the share of total weekly viewing hours exceeds the 3 percent criterion specified in Section 76.5(i) of the rules for a network station, but KABC-TV is no longer significantly viewed because it does not meet both parts of the test. Further, a review of the individual sweep periods indicates that KABC-TV attains a measurable audience share in only one out of eight survey periods for which data are submitted on three in-tab households. For the July 2005 audience sweep period, KABC-TV attains a 4.35 percent share of total weekly viewing hours when the standard error is added (4.35 reported share + 0 standard error) and a net weekly circulation share of 33.33 percent (33.33 reported share + 0 standard error). These values exceed the criteria for a network affiliate for this one survey period. These anomalous results, however, may simply be due to the small samples available for analysis. In particular, Gulf has provided a variety of calculations and combinations of survey results in its reconsideration. Among these are the combined results of 10 in-tab households from February 2004/November 2004 audience sweep periods and the combined results from 3 in-tab households for February 2005/November 2005. Based on the February 2004/November 2004 and February 2005/November 2005 audience sweep periods, KABC-TV attains no measurable share and this information alone is sufficient to demonstrate that KABC-TV is no longer

²⁶The survey dates of February 2004/November 2004 and February 2005/November 2005 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.

significantly viewed in Palm Springs. On this basis, we can conclude that KABC-TV is no longer significantly viewed in Palm Springs.

10. Accordingly, we find that the submitted audience surveys are sufficient to show that KABC-TV no longer attain the viewing levels needed to demonstrate significantly viewed status in the communities of Cathedral City, Coachella, Desert Hot Springs, Indio, Mecca, Palm Desert and Palm Springs, California, and we grant Gulf's petition for reconsideration.

IV. ORDERING CLAUSES

11. Accordingly, **IT IS ORDERED**, that the petition for reconsideration filed by Gulf-California Broadcast Company **IS GRANTED**.

12. This action is taken pursuant to authority delegated under Sections 0.283 and 1.106 of the Commission's rules.²⁷

FEDERAL COMMUNICATIONS COMMISSION

Monica Desai
Chief, Media Bureau

²⁷47 C.F.R. §§0.283 and 1.106.