

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
United Communications Corporation)	
KEYC-TV (Fac. ID No. 68853))	CSR-8920-N
Mankato, Minnesota)	Docket 16-54
)	
Petition for Waiver of Sections 76.92(f))	
and 76.106(a) of the Commission's Rules)	
To: Chief, Media Bureau		

**CONSOLIDATED REPLY TO OPPOSITIONS TO
SUPPLEMENT TO PETITION FOR SPECIAL RELIEF
of UNITED COMMUNICATIONS CORPORATION**

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SUMMARY

United Communications Corporation is the licensee of KEYC-TV (CBS, Fox) in Mankato, Minnesota. KEYC-TV is the only television station serving the Mankato DMA. Indeed, as the FCC's own coverage maps show, in most of the DMA KEYC-TV provides the only full service television signal available off air to local residents. And KEYC-TV is the only television station providing local news, public affairs programming and emergency information focused uniquely on this predominantly-rural market.

In a Supplement to its earlier Petition for Special Relief, KEYC-TV marked out a path whereby the Media Bureau can arrive at the truth that KAAL (licensed to Austin, Minnesota) and three stations broadcasting from the antenna farm north of Minneapolis are not significantly viewed in almost all of the communities in the Mankato, Minnesota DMA.

KAAL and New Ulm Telecom filed Oppositions to the Supplement. Tellingly, the Opponents do not contend that the subject stations actually *are* significantly viewed over the air in those communities. This is because the Opponents know that they are not significantly viewed there.

Instead, the Opponents seek to derail United's efforts by misconstruing the analytical structure of the Supplement. In addition, they urge that United's Petition may not be considered unless the Commission first conducts a lengthy rulemaking proceeding, but this argument is inconsistent with the development of the law relating to the Significantly-viewed Exception.

The Opponents also assert that the viewability *vel non* of the distant stations is a matter of speculation. However, but the Commission's own sophisticated tools reveal that this is a matter

of considerable precision – very far from mere speculation. Further, while the Opponents attack United’s view of the law on the use of translator viewing data in the context of significantly viewed matters, they do so without offering any support for that view. In contrast, United’s position is well established, as United took pains to show in the Supplement.

Further, KAAL argues that a grant of United’s Petition poses a scary ‘floodgates’ threat. In doing so, however, it ignores United’s detailed showing that the facts regarding the corruption of Nielsen viewing data by a local translator network and the resulting, unjustifiable, significantly-viewed status of the Distant Station in the Mankato DMA present highly unusual fact situation.

Finally, New Ulm Telecom argues that United’s Supplement is an unauthorized pleading that “must be stricken from the record” due to a supposed failure to demonstrate extraordinary circumstances justifying the submission of the Supplement. It is difficult to fathom how New Ulm Telecom could have missed United’s painstaking delineation of extraordinary circumstance that demonstrated the need for the Supplement, but the reading ability of the Commission’s staff is more than adequate to ensure that the staff will not make the same mistake. The filing of the Supplement was adequately supported. It should be accepted.

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CONSOLIDATED REPLY TO OPPOSITIONS

On August 11, 2017, United Communications Corporation (‘United’) filed a Supplement to its pending Petition for Special Relief in the captioned proceeding. KAAL-TV, LLC (‘KAAL’) and New Ulm Telecom (‘NU Telecom’) filed Oppositions to the Supplement, on August 31 and September 7, 2017, respectively. United herewith replies to those pleadings.¹

Our reply to the arguments set forth in the Oppositions can be grouped under the following headings: (I) the Oppositions misconstrue the analytical structure of the Supplement; (ii) United’s Petition may be granted without a rulemaking proceeding, and such rulemaking would not be authorized by the Commission even if proposed by United; (iii) the viewability *vel non* of the distant stations is not speculative; (iv) the law on the use of translator viewing data in the context of significantly viewed matters is well established; (v) the grant of United’s Petition poses no ‘floodgates’ threat; and (vi) United’s Supplement is a permitted pleading.

I. The Oppositions Misconstrue the Analytical Structure of the Supplement.

KAAL: “The Commission’s rule specifically does not rely on propagation studies; it requires viewership surveys (i.e., Nielsen), which United cannot provide.” KAAL Opposition at 2.

NU Telecom: “The use of audience surveys is the only acceptable and lawful method of deciding whether a station is no longer viewable for determining significantly viewed status . . . KEYC-TV does not provide any Nielsen data to support its argument regarding lack of over-the-air viewership in the communities as required by Section 76.54(b) and (c).” NU Telecom Opposition at 2.

¹ This Reply is timely. By virtue of the single pleading requirement of Section 1.45(c), United’s deadline for filing this consolidated reply is measured from the date of New Ulm Telecom’s later-filed pleading. In an abundance of caution, United filed a motion on September 14, 2017 for extension of time to file its Reply on the date – actually September 21, 2017 -- pegged to the date of the NU Telecom Opposition.

Presumably the intention of the Opponents is to assert roughly the following: ‘Under the standard for seeking a waiver of the Significantly Viewed Exception, a petitioner is required to show that a distant station’s over-the-air viewership in a particular community has fallen below the threshold required to sustain significantly viewed status. Viewing surveys are the means by which this is established. United cannot provide viewership surveys reflecting the distant stations’ over-the-air viewership.’

If this is the Opponents’ view, we agree with its last sentence. Indeed, KAAL’s observation is precisely the point: United ‘cannot provide’ viewing data with respect to the Distant Stations. *The reason United cannot provide this data is that the Nielsen surveys do not reflect viewing of the Distant Stations.* The data in the Nielsen surveys that *appear* to show viewing of the Distant Stations actually derive from translator viewing, not from viewing of the Distant Stations themselves.

Given the Opponents’ apparent confusion with respect to the analytical thrust of the Supplement, we will briefly recount its logic:

If a television station is classified as significantly viewed with respect to a given community, two propositions about empirical reality are considered true: (1) The over-the-air signal of the station is viewable in that community, and (2) viewership of the station’s programming in the community is ‘significant.’ If a station’s signal is not viewable in a community, the station cannot be ‘viewed’ in that community – ‘significantly’ or otherwise.

For a petitioner to obtain a waiver of the Significantly Viewed Exception it must be demonstrated that a subject station is no longer significantly viewed “following the methodology set forth in Section 76.54(b)” – that is, by means of an “audience survey of over-the-air television homes.” In the Supplement we referred to this as the Waiver Procedure.

A Nielsen statistic indicating that a particular distant station’s viewership is ‘significant’ in a cable community ordinarily implies that the signal of the distant station is viewable in that community. If the signal of a distant station were not viewable over-the-air in the community, the Nielsen study would reflect this in viewership measurements of zero: A station cannot have ‘viewership’ in a community’s over the air homes if its signal is not viewable there.

The Waiver Procedure as normally applied using the Nielsen methodology is therefore well designed to account for both dimensions of significantly viewed status – the essential threshold-viewability of the distant

station's signal and the level of viewership the station garners in a cable community where its signal is viewable.

Viewability does not explicitly arise as a separately-addressed issue in most waiver petitions because, "with very few exceptions, the signals of the [television stations on the Significantly Viewed List] are available over-the-air to individuals with rooftop antennas." But in the rare case in which a distant station's signal is not viewable over-the-air, the Waiver Procedure ordinarily accounts for this: If a station is not viewable, it cannot register viewership. A station that is not viewable registers zero viewership. The Waiver Procedure is thus well-designed to account for both of the essential dimensions of significantly viewed status: viewability and viewership.

United implemented the Waiver Procedure. Nielsen surveys were collected in over-the-air homes in the 24 communities. With respect to communities located too far from the distant stations' transmitters for reception of those signals, the Nielsen surveys should have registered zero viewership. Instead, the Nielsen studies registered viewership at implausible distances.

In other words, United's faithful execution of the Waiver Procedure generated an anomaly. Anomalies in data often signal the influence of one or more exogenous variables. Such was the case here. Nielsen households were not viewing the signals of the distant stations. They were viewing the signals of television translators. The anomalous survey results were the product of the CTV Architecture – the configuration comprising the CTV translator network and its 97-mile fiber optic connection to the Twin Cities.

The problem confronting United was *not* the Commission's Waiver Procedure – it was that the CTV Architecture foreclosed the possibility of obtaining evidence of the viewability of the distant stations by means of audience surveys.

Without an unveiling of what the CTV Architecture masks, the purpose of the Waiver Procedure would be thwarted because it would not reveal the "over-the-air realities of [the] situation."² Where the survey data are demonstrably useless in revealing signal strength, the viewability of the Distant Stations must be ascertained by considering signal strength evidence directly. It was therefore incumbent upon United to examine the signal strengths of the Distant Stations explicitly.³

² *Network Program Exclusivity Protection by Cable Television Systems*, 68 FCC 2d 1461, ¶19 (1978).

³ United's undertaking to explain the anomalous survey data was not only permissible; it was required. See, e.g., *Radio Perry, Inc.*, 11 FCC Rcd 10564, ¶8 (1996) ("Petitioner's failure to provide a sufficient explanation of the submitted data requires that we deny its request for waiver of [the significantly viewed exception to the network non-duplication] rules"). In *Radio Perry*, the petitioner sought a waiver of the Significantly Viewed Exception. It submitted Nielsen audience data but the Commission considered the showing inadequate for lack of explanatory detail. "It is not clear whether the diaries used . . . properly represent the city's noncable [over-the-air] viewing habits The petitioner, at a minimum, should have

The Commission's highly accurate signal propagation models generate the necessary evidence. One such model is the computational engine of the FCC's DTV Reception Tool. Utilizing this tool, United generated the predicted signal strength of each distant station at each of the subject communities.

The necessity of considering signal strength data followed from United's affirmatively executing the Waiver Procedure. Because of the confounding influence of the CTV Architecture, the use of signal strength data was the only way to effect the Waiver Procedure's design. United is not asking for a waiver of Section 76.54 – and United is not asking for a 'waiver' of the Waiver Procedure. Rather, United merely seeks to have the Waiver Procedure applied in a sensible fashion in light of the demonstrated anomalies in the Nielsen data.⁴

II. United's Petition May Be Granted without a Rulemaking Proceeding.

KAAL: "United wants to rewrite the fundamental substance of the FCC's local viewership policies with self-serving waivers. United should be required to initiate a rulemaking proceeding if it believes such wholesale revisions to the Commission's rules are warranted." KAAL Opposition at 2.

NU Telecom: "[I]t is inappropriate for the Bureau, or, for that matter, the Commission, to change the manner of deciding these significantly viewed cases without submitting the issue to a Notice of Proposed Rulemaking." NU Telecom Opposition at 2.

This is an irresponsible mischaracterization of United's position. *No change in the Commission's Waiver Procedure is requested by United and no change is necessary.* United is *not* asking the Bureau to change the waiver standard. The standard is analytically elegant, efficient and ordinarily works exceptionally well to reveal the "over-

described how the routine Nielsen data were used to provide a representative sample of the city for the purpose of demonstrating over-the-air viewing. . . . [U]nless the petitioner provides an explanation of the Nielsen diaries selected for this tabulation, based on the record before us, we cannot make such a finding. Specifically, we are unable to determine whether this sample . . . is reliable and applicable for the intended showing." *Id.* at ¶10.

⁴ See *WKBC Cablevision, Inc.*, 54 FCC 2d 442, ¶5 ("In these unusual circumstances we are persuaded that a mechanical application of Section 76.59 of the Rules would serve no useful purpose: it would be anomalous indeed were we to protect the signal of a...station in an area where the signal is not received").

the-air realities of [the] situation.”⁵ United would have liked nothing more than to benefit from the Procedure’s typical power to evince the non-viewability of a distant signal by returning statistics indicating zero viewership. But because this is precluded by the CTV Architecture, the Waiver Procedure requires consideration of signal strength data in order to achieve a just and justifiable result.

It is important to recognize that this is in *full harmony* with the prescribed Procedure. Where a distant signal is not viewable over-the-air at a particular community, this occurs *ceteris paribus* because the signal level is inadequate for television service. When a Nielsen statistic reflects zero viewership in such a case, that statistic is simply the token of the underlying technical reality.

The instant case springs from a rare situation in which extraneous conditions preclude the valid rendering of that token. What could be more appropriate, therefore, than evaluating the signal level directly? The non-viewability of the signal is what the zero-viewership Nielsen statistic – produced through the standard methodology – would otherwise signify.⁶ In the unusual case where that technique will not work, securing the same datum by considering the signal strength is the only way to complete the design of the Waiver Procedure.⁷

⁵ *Network Program Exclusivity Protection by Cable Television Systems*, 68 FCC 2d 1461, ¶19 (1978).

⁶ See, e.g., *Gulf-California Broadcasting Co.*, 21 FCC Rcd 3476, n. 45 (Media Bureau 2006) (“[S]uppose we have a sample that includes . . . a household [that] subscribes to a satellite service that does not carry the station of interest. Therefore, the station receives no, or zero, audience share [in the viewing survey]”).

⁷ As we explained at length in the Supplement, this exigency does not often arise because “with very few exceptions,” the signals of stations on the Significantly Viewed List are viewable over-the-air in the counties and communities the List delineates. *Network Program Exclusivity Protection by Cable Television Systems* (Reconsideration), 68 FCC 2d 1461, ¶20 (1978); see also *Desert Empire Television Corp.*, 86 FCC 2d 644, ¶10 (1981). Guidance is available, however, from the Bureau’s *modus operandi* in the context of market modifications. Notwithstanding the clarity of the evidence schema applied in market modification analyses, there are circumstances where a mechanical adherence to the wording of the standard will, in the nature of the case, fail to generate the evidence needed for an intelligent and fair decision. In such cases the Bureau relies on data that “provide[s] a clearer picture and the best available alternative evidence.” *CSC TKR, Inc.*, 16 FCC Rcd 12577 at ¶8 (2001). It should be noted, as explained in Section II(D)(3) of the Supplement, that a viewing survey alternative to Nielsen’s standard diary format was not feasible because the psip structure masks the underlying mechanics of CTV subscriber viewing.

The fact that in the unusual circumstances of the instant case this cannot occur is *not* a legitimate basis for a rulemaking proceeding, contrary to the argument of the Opponents. As United showed in its Supplement, this is an isolated case. It is not an appropriate factual predicate on which to urge the initiation of a rulemaking proceeding. Instead, the course United has laid out is the proper one.⁸

To the extent that the Opponents argue that the Media Bureau does not have the authority to interpret the Commission's rules, they are plainly wrong.⁹ Indeed, the Commission is exceedingly deferential to the Bureau's judgments where the Bureau has applied its unique expertise to resolve issues before it.¹⁰

Against the argument that "this should be a rulemaking," the Opponents seem unaware that the relevant verb as to the use of ratings data in Section 76.54 is "may." In effect, they want to change the word "may" in Section 76.54 to "must." Thus the objecting parties are the ones in need a rulemaking in order to validate their position.

It is significant that the rule only talks about establishing significantly-viewed status in places other than those already on the significantly-viewed stations list. It has only been through case law (not rulemakings) that Section 76.54 has been interpreted to

⁸ Cf. *Illinois Consolidated Telephone Co.*, 5 FCC Rcd 3246, ¶9 ("We agree with [the waiver proponent] that, given the narrow scope of its waiver request . . . a rulemaking proceeding is unnecessary").

⁹ See, among scores of examples, *Royce International Broadcasting Co.*, 30 FCC Rcd 10556, ¶5 (2015) (Commission affirms the "[Media] Bureau's interpretation" of the subject Rules); *Christian Charities Deliverance Church*, 30 FCC Rcd 10548, ¶8 (2015) ("The [Media] Bureau's interpretation of Sections 73.870(c) and 73.3566(a) as allowing the acceptance and processing of LPFM applications filed with appropriate second-adjacent channel waiver requests is consistent with the flexible waiver process established by LCRA"); *Bloomberg L.P. v. Comcast Cable Communications, LLC*, 28 FCC Rcd 14346 (2013) (Commission affirms "the Media Bureau's interpretation of news neighboring condition"); *WDKA Acquisition Corporation*, 29 FCC Rcd 9781, ¶4 (2014) ("the [Media] Bureau's interpretation of the term 'willful' was proper").

¹⁰ See, e.g., *Complaints of Maine Public Broadcasting Corp.*, 11 FCC Rcd 1893, n. 10 and ¶10 ((1995) ("This has been the Mass Media Bureau's interpretation of the Commission's rules regarding translator status for more than a decade . . . No grounds exist for reversing the Bureau's decision"); *Reallocation of Channel 2 from Jackson, WY to Wilmington, DE*, 26 FCC Rcd 13696, ¶1 ("We agree with the [Media] Bureau's interpretation of the term 'reallocation' in the second sentence of Section 331(a)"); *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies*, 28 FCC Rcd 14238, ¶104 ("Consistent with the [WTB] Bureau's interpretation, we propose to find that [statutory provision applies as Bureau recommended]").

allow petitioners to show a *lack* of significantly-viewed status so as to delete certain communities from the significantly-viewed list with respect to particular stations. In other words, given that the entire body of law on deletion of signals from the significantly-viewed list consists of case precedent, there is no reason why the aspect highlighted in United’s Supplement should, uniquely, have to be the subject of a rulemaking of general applicability.

In light of the original purpose of the rule, it should surprise no one that the rule does not specifically address the “viewability” prong of the significantly-viewed exception. That is because in order to convince the FCC that a station was significantly viewed in an area that the original List had missed, the bare demonstration that the station had a good signal there was not adequate. Perhaps the station in question broadcast a home shopping format with a great signal that hardly anyone bothered to watch. That is why the focus in the text of the rule was on ratings data. Since the opposite sort of showing – one of a lack of significant viewing – was not addressed at all in the drafting of the rule, no conclusions can be drawn from the failure of Section 76.54 to include a provision stating that such lack of viewing can be demonstrated either by ratings data consisting of columns filled with zeros, or by a showing that the subject distant station’s signal is unviewable in the particular communities. It is basic logic that if a given station has no signal in some town, it should not be necessary to present ratings data in addition to the showing of invisibility – and that logic is bolstered by the quotations that United marshaled in the Supplement from Commission pronouncements in the original significant viewing rulemaking.

III. The Viewability *Vel Non* of the Distant Stations Is Not Speculative.

KAAL-TV: “United claims that [the Distant Stations] are viewed over the air because of TV translator services and it offers its view of propagation to suggest that the stations simply cannot be seen over the air, except by TV translators.” KAAL Opposition at 2.

NU Telecom: “United’s sole argument is that the basis for off-air viewing is not [the Distant Stations themselves] but translator stations KEYC-TV simply speculates that the signal contours of these stations do not encompass [the Subject Communities] and, therefore, the only explanation is carriage by translators operated by Cooperative Television

The dismissive tone of the Oppositions on this score belies an odd perspective – as if KAAL and NU Telecom think that United blithely advanced a dubious proposition devoid of warrant. Perhaps they did not actually read United’s Supplement. In any case, their criticisms are misguided. *As a matter of empirical reality*, the signals of the distant stations cannot be viewed over-the-air. The Opponents do not attempt to refute and do not otherwise deny that this is the case. This is remarkable considering that the non-viewability of the Distant Stations is the fundamental empirical predicate of the Supplement. It is reasonable to interpret the Oppositions’ silence on this score as a concession that, in fact, the signals of the Distant Stations are not viewable except to the extent described in Section III of the Supplement.

KAAL states that United’s position is based on “its view of propagation.” If KAAL is suggesting that United’s conclusions with respect to the viewability of the Distant Stations are merely a function of self-interested or eccentric theorizing on United’s part, that is a false characterization.¹¹ The data and the engineering principles set out in the Supplement are based, not on United’s views, but on the Media Bureau’s extraordinary body of technical expertise reflected *inter alia* in the FCC proceedings, regulations and laboratory studies cited in the Supplement. Specifically:

- The signal-level data in the Viewability Tables (Supplement, Tables 3-6, 14-19) is *not* a product of United’s calculations. The data were generated by the Longley-Rice computer program that drives the Commission’s DTV Reception Tool. *See* Supplement at 20-21.

- The viewability results set out in Table 7 of the Supplement are *not* United’s calculations. They were produced by the Media Bureau at the direction of the Commission for its *2016 Report to Congress*.¹²

- The correlations between signal level, field strength and viewability that United

¹¹ In a similar vein, NU Telecom asserts that United “simply speculates” concerning the signal levels of the Distant Stations in the Subject Communities.

¹² *Designated Market Areas: Report to Congress Pursuant to Section 109 of the STELA Reauthorization Act of 2014* (MB Docket No. 15-43), Report, released June 3, 2016. *See* Supplement at 26-28.

presents in the Supplement are *not* United's views. They are the intellectual product of the Commission's engineering teams. *See* Supplement at 20-22; 26-27.

■ The noise-limited contour graphics included for various Figures in the Supplement were created with the Commission's TV Query Tool, authored by the Bureau's engineering and programming staff.¹³

■ The distance-related data in the Viewability Tables (Supplement, Tables 3-6, 14-19) were generated by the Commission's Distance and Azimuths Tool.¹⁴

As additional support for the validity of United's position, we would note that KAAL is the only one of the Distant Stations whose signals are not repeated by the CTV translators. Thus in the areas served by the CTV translators, the Nielsen data report substantial "viewing" of the Twin Cities Distant Stations, but zero viewing of KAAL. This is consistent with the evidence (from the FCC report and tools listed above) that none of the Distant Stations' signals are viewable in places like St. James and New Ulm, while the signals of the CTV translators are eminently viewable there.

IV. The Law on the Use of Translator Viewing Data in the Context of Significantly Viewed Matters is Well Established.

KAAL: "United also alleges that TV translator service cannot be the basis for viewership, relying on a decision which is 35 years old, from the infancy of the TV translator service. However, this United assertion is far from clear."

Translator viewership is not a permitted source of viewership data in the context of significantly viewed determinations. This is not an "allegation" – it is a statement of FCC law. Three cases articulating this principle are cited in United's Supplement.¹⁵ The earliest case, *Scranton Broadcasters, Inc.*, is a Commission-level decision from 1982. The second and third cases cited in the Supplement are Bureau-level decisions from 1983 and 1986. The dispositions of those cases were expressly predicated on the *Scranton*

¹³ *See* Supplement at 4 and <https://www.fcc.gov/media/television/tv-query>.

¹⁴ *See* <https://www.fcc.gov/media/radio/distance-and-azimuths#block-menu-block-4>.

¹⁵ *See* Supplement at p. 54 and nn 49, 88.

Broadcasters decision. Significantly, the Commission affirmed those Bureau decisions on applications for review.¹⁶

The law has not been modified.¹⁷ The vintage of the cases (the 1980s) is irrelevant. What is relevant is that neither KAAL nor NU-Telecom has disputed that the Nielsen viewership of the Twin Cities Distant Stations is attributable to the CTV translator network – because this fact is truly indisputable.¹⁸

V. The Grant of United’s Petition Poses No ‘Floodgates’ Threat.

KAAL states: Grant of the waiver would “likely open the floodgates to similar waiver requests” KAAL Opposition at 1.

This concern is unfounded. KAAL invokes the specter of broken floodgates when it has no actual quantified sense of the matter. We refer KAAL to Section V and Exhibit 5 of the Supplement. United therein examined the implications of a grant of the requested waiver, quantifying the analysis by use of data published by the Commission in Appendix C of the *2016 Report to Congress* and other FCC public files.

VI. United’s Supplement Is a Permitted Pleading.

NU Telecom states: “KEYC-TV has made no showing of extraordinary circumstances and, therefore, the KEYC-TV Supplement which raises new arguments and is an additional pleading should be stricken from the record.” NU Telecom Opposition at 2.

¹⁶ *Scranton Broadcasters, Inc.*, 88 FCC 2d 1482 (1982); *KOIN-TV, Inc.* (Application for Review), 93 FCC 2d 186 (1983); *Taft Television and Radio Co., Inc.* (Application for Review), 103 FCC 2d 883 (1986).

¹⁷ See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“An agency may not depart . . . from a prior policy *sub silentio* or simply disregard rules that are still on the books”).

¹⁸ KAAL’s statement that the *Scranton Broadcasters* series of cases dates “from the infancy of the translator service” is incorrect, by several decades. The television translator service has been extant since the 1950s. See e.g., *Palm Springs Translator Station, Inc.*, 43 FCC 987, n.2 (1957); *Report and Order in Docket No. 11611* (Authorizing UHF Translators), 13 R.R. 1561 (1956).

In the Supplement, United went to a great deal of trouble to demonstrate that the distortion of the ratings data precipitated by CTV's translator operations is "extraordinary." Thus United actually did provide a "demonstration of extraordinary circumstances," and asked the Bureau to accept the showing set forth in the Supplement. Accordingly, United satisfied Section 76.7(d) in spades. Further, the pendency of United's Petition for over a year was, in and of itself, an extraordinary circumstance. It suggested that the staff viewed the facial conflict between the Nielsen data and the realities of signal proposition as a knotty problem, and that the Bureau could use further illumination of the issues in order for it to proceed to a just result.¹⁹ The Supplement provided the sword with which the staff could, in Alexandrine fashion, sever that knot.

CONCLUSION

Except for the handful of instances noted in the Supplement, *the signals of the Distant Stations are not viewable over-the-air* in the communities where KEYC-TV wishes to enforce its network non-duplication and syndicated program exclusivity rights. As to that proposition – which no party to this case disputes – there is no genuine question. The methodology of the Waiver Procedure should confirm this. The procedure is intelligently designed to reveal not merely a distant station's viewership in a given community but also the rare instances in which the station's signal is not viewable over the air in that community.

United has explained in detail that – in the circumstances of this case – the Waiver Procedure is unable to generate crucial viewability evidence. That is not an extraordinary concept: methodologies sometimes reveal anomalies in data-sets. When they do, the cause of the anomaly must be explained. For this reason, the Commission requires that data submissions be accompanied by explanations. When the cause of the anomaly precludes the generation of data in which the Commission can have confidence, this too should be explained. Where the roadblock can be worked around by a minor adjustment

¹⁹ See WKBC Cablevision, Inc., 54 FCC 2d 442 (1975) ("We have reserved in Section 76.7 of our rules the right to grant special relief where appropriate without imposing time restrictions on when a petitioner can file such a petition").

in the nature of the evidence demonstrating non-viewability, that is an occasion for the Commission to accept the petitioner's efforts as contributing value to the agency's processes. It should not be – as the Opponents seem to think – an occasion for declaring 'gotcha' and demanding initiation of a rulemaking merely because a new tool is available to arrive at the truth. In other words, the Waiver Procedure is not a game governed by procedures inimical to good sense.²⁰

In the present case, it is only through consideration of signal level data that the Bureau can determine the empirical reality that is the Waiver Procedure's purpose. The logic of this course of action is overwhelmingly obvious. The necessity of such action for the sake of the fair administration of the Rules with respect to United is likewise obvious.

The Media Bureau has the interpretive authority and the technical expertise to take this action. United urges the Bureau do so decisively and swiftly. KEYC-TV will then be liberated – finally – from the fiction that has long precluded the exercise of its exclusivity rights in its own back, front and side yards.

Respectfully submitted,

**UNITED COMMUNICATIONS
CORPORATION**

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²⁰ Chairman Pai's observation is apt: "The laws of physics aren't liberal or conservative, Democratic or Republican; they are immutable. Or as a young boy told Neo in the original Matrix, 'Do not try and bend the spoon. That's impossible. Instead . . . *only try to realize the truth.*'" *Unlicensed Operations in the Television Bands*, 29 FCC Rcd 12248 (2014), Statement of (then) Commissioner Ajit Pai, Approving in part and concurring in part.

CERTIFICATE OF SERVICE

I, Barry Wood, hereby certify that on September 21, 2017, a copy of the foregoing “Consolidated Reply to Oppositions to Supplement to Petition for Special Relief” was deposited in the U.S. mail, postage prepaid, addressed to the following:

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