

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

In the Matter of:)
TV 34, Inc.)
Petition for Waiver of Section 76.66(e)(3) of the)
Commission's Rules.) CSR-6919-M

MEMORANDUM OPINION AND ORDER

Adopted: December 29, 2005

Released: December 30, 2005

By the Chief, Media Bureau:

I. INTRODUCTION

1. TV 34, Inc., licensee of commercial television station KWFT-TV Eureka Springs, Arkansas ("KWFT"), formerly KWBS TV, filed the above-captioned petition for special relief ("Petition"), pursuant to Section 76.7 of the Commission's rules. The Petition asks the Commission to waive Section 76.66(e)(3) of the Commission's rules, which prescribes that the 2003-2004 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates (collectively, "Nielsen publications") shall be used for the retransmission consent-mandatory carriage cycle commencing January 1, 2006 and ending December 31, 2008. KWFT seeks to base its carriage election for the upcoming carriage cycle on its DMA assignment reported in the 2004-2005 Nielsen publications. EchoStar Communications Corporation ("EchoStar") has filed an Opposition and KWFT has filed a Reply. For the reasons stated below, we grant the Petition.

II. BACKGROUND

A. Legal Background

2. Section 338 of the Act, adopted as part of the Satellite Home Viewer Improvement Act of 1999 (SHVIA),¹ required satellite carriers, beginning January 1, 2002, to carry on request all local television broadcast stations' signals in local markets in which the satellite carrier carries at least one local television broadcast signal pursuant to the statutory copyright license.² A station's market for satellite carriage purposes is its designated market area ("DMA"), assigned annually by Nielsen Media Research.³

¹ See Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999).

² See 47 U.S.C. § 338; 17 U.S.C. § 122.

³ A DMA is a geographic area that describes each television market exclusive of others, based on measured viewing patterns. See 17 U.S.C. § 122(j)(2)(A)-(C); see also Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues, 16 FCC Rcd 1918, 1934 (2000) ("DBS Must Carry Report & Order"); 47 C.F.R. § 76.66(e) ("A local market in the case of both commercial and noncommercial television broadcast stations, is the designated market area in which a station is located, and [i]n the case of a commercial television broadcast station, all commercial television broadcast stations licensed to a community within the same designated market area within the same local market; and (ii) [i]n the case of a noncommercial educational television broadcast station, the market includes any station that is licensed to a (continued...)")

In November 2000, the Commission adopted rules to implement the provisions contained in Section 338.⁴

3. Under the Commission's broadcast signal carriage rules, each satellite carrier providing local-into-local service pursuant to the statutory copyright license is generally obligated to carry any qualified local television station in the particular DMA that made a timely election for mandatory carriage, unless the station's programming is duplicative of the programming of another station carried by the carrier in the DMA.⁵ To determine the DMA in which a local television station is entitled to carriage during any given mandatory carriage election cycle, the Commission's rules direct satellite carriers to consult specific editions of the Nielsen publications, which associate each local television station with a particular DMA.⁶ Focusing on the carriage cycle at issue in this Petition, Section 76.66(e)(3) states that "[t]he 2003-2004 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates shall be used for the second retransmission consent-mandatory carriage election cycle commencing January 1, 2006 and ending December 31, 2008."⁷

4. Because it is Section 76.66(e)(3) of the Commission's rules, rather than a statutory provision, that determines which edition of the Nielsen publications is to be used for each carriage cycle, that determination is subject to waiver. Section 76.7 of the Commission's rules allows an interested party to petition the Commission to "waive any provision of this part 76."⁸ When analyzing a request for a waiver of Commission rules or policies, agency rules are presumed valid, and "an applicant for waiver faces a high hurdle even at the starting gate."⁹ A rule or policy may be waived where the particular facts make strict compliance inconsistent with the public interest.¹⁰ In addition, we may take into account considerations of hardship, equity, or more effective implementation of overall policy on an individual basis.¹¹ Waiver is, therefore, appropriate if special circumstances warrant a deviation from the general rule or policy, and such deviation would better serve the public interest than strict adherence to the general rule.¹²

B. Factual and Procedural History

5. KWFT is licensed to the community of Eureka Springs, Arkansas, which is located in the Springfield, Missouri DMA. However, the station's transmitter is located in Benton County, which is in the Ft. Smith-Fayetteville-Springdale-Rogers, Arkansas ("Ft. Smith") DMA. Moreover, the majority of

(...continued from previous page)

community within the same designated market area as the noncommercial educational television broadcast station.").

⁴ See generally *DBS Must Carry Report & Order*, 16 FCC Rcd at 1918. The Commission later affirmed and clarified its carriage rules. See *Implementation of the Satellite Home Viewer Improvement Act of 1999; Broadcast Signal Carriage Issues*, 16 FCC Rcd 16544 (2001) ("DBS Must Carry Reconsideration Order").

⁵ See 47 C.F.R. § 76.66.

⁶ See *id.* Ordinarily, a local television station's DMA is determined by the location of its community-of-license. Nielsen Media Research, *Local Reference Supplement*, 2004-2005 at 4-5. As discussed below, however, there are a number of circumstances in which Nielsen uses alternate methods to determine a station's DMA.

⁷ 47 C.F.R. § 76.66(e)(3).

⁸ 47 C.F.R. § 76.7(a)(1).

⁹ *WAIT Radio v. FCC*, 418 F.2d 1153, 1158 (D.C. Cir. 1969), *cert denied*, 409 U.S. 1027 (1972); see also *Family Stations, Inc. v. DirecTV, Inc.*, 19 FCC Rcd 14777, 14780 (MB 2004) (Order on Reconsideration) (same).

¹⁰ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹¹ *WAIT Radio*, 418 F.2d at 1159.

¹² *Northeast Cellular*, 897 F.2d at 1166.

both KWFT's Grade B contour and its viewing audience reside in the Ft. Smith DMA.¹³ In 2004, KWFT was a Pax-TV affiliate for the Ft. Smith market. At present, KWFT is the exclusive WB affiliate for that market.¹⁴

6. As explained in Nielsen's Local Reference Supplement, "[f]or local Market-of-Origin (MOO) assignment, a broadcast station is designated as 'local' and assigned to the local market of the DMA in which its FCC-assigned community of license is located."¹⁵ Accordingly, Nielsen originally assigned KWFT to the Springfield DMA because its community of license, Eureka Springs, was located in that DMA. As the Local Reference Supplement also explains, however, "[a] station may petition [Nielsen] to change its MOO assignment if both its transmitter and the majority of its 'Grade B' Service signal coverage are located in a different DMA than the DMA in which the station's Community-of-License is located."¹⁶ Because KWFT satisfied those conditions, KWFT requested that Nielsen reassign the station from the Springfield DMA to the Ft. Smith DMA in March 2004.¹⁷ Nielsen granted that request in April 2004, making the DMA change "effective with the start of the 2004-2005 television season."¹⁸ KWFT states that the three largest cable operators in the Ft. Smith market, as well as DirecTV, already carry KWFT in that market.¹⁹

7. Armed with its DMA reassignment, KWFT sent a letter to EchoStar in October 2004, electing carriage for KWFT in the Ft. Smith DMA. At the time, EchoStar served both the Springfield and Ft. Smith DMAs but did not carry KWFT in either market.²⁰ After EchoStar rejected the election, KWFT filed a carriage complaint with the Commission. In a May 2005 *Memorandum Opinion and Order*, the Media Bureau denied that complaint because "the rules do not allow stations to assert new carriage rights in the middle of an election cycle."²¹ In other words, because the window to make a carriage election for the 2002-2005 carriage cycle had closed, KWFT would have to wait until the 2006-2008 carriage cycle to assert carriage rights in the Ft. Smith DMA.²²

8. In denying KWFT's complaint, the Bureau raised the issue of KWFT's local market for the 2006-2008 carriage cycle. The *TV 34 Order* noted that, under Section 76.66(e)(3), KWFT could seek carriage rights in the Springfield DMA because the change to the Ft. Smith market did not appear in the 2003-2004 Nielsen publications that, in the absence of a waiver, would govern carriage elections for that cycle.²³ On the other hand, if KWFT wished to pursue carriage rights in the Ft. Smith DMA – KWFT's market designation in the 2004-2005 publications – the Bureau noted that "KWFT could file a waiver

¹³ See Petition at 1-2; "Request for re-classification of KWBS Channel 34" at 1 (attached to Reply).

¹⁴ Petition at 5.

¹⁵ Nielsen Media Research, Local Reference Supplement at 4-5 (2004-05).

¹⁶ *Id.* at 4-6. Even if a station satisfies those requirements, the reassignment is not automatic. At all times, Nielsen "reserves the right to use its best judgment based upon the information available to it in considering whether the change sought by the petition reflects the reality of the markets affected." *Id.*

¹⁷ See "Request for re-classification of KWBS Channel 34" at 1.

¹⁸ Letter dated April 13, 2004, from Nielsen Media Research (attached to Petition).

¹⁹ Petition at 5.

²⁰ *TV 34, Inc. v. EchoStar Communications Corp.*, 20 FCC Rcd 8747, 8748 (MB 2005).

²¹ *Id.*

²² The broadcast carriage rules allow a "new television station" to elect carriage rights mid-cycle. 47 C.F.R. § 76.66(d)(3). As the *TV 34 Order* notes, however, KWFT does not meet the regulatory definition of a new station. 20 FCC Rcd at 8748.

²³ *TV 34, Inc.*, 20 FCC Rcd at 8749.

request to be considered eligible for mandatory carriage in the Ft. Smith market before KWFT is required to make a carriage election for the next cycle.”²⁴ KWFT chose the latter alternative, leading to the petition for waiver that is currently before us. To ensure that it was not left without carriage rights in either market during the 2006-2008 carriage cycle, KWFT seeks carriage rights in both the Springfield DMA and Ft. Smith DMA, while clarifying that, should Commission rule favorably on its waiver request, the station would abandon its pursuit of carriage rights in the Springfield DMA.²⁵

III. DISCUSSION

A. The Commission’s Authority to Substitute Later Editions of the Nielsen Publications

9. Before deciding whether a waiver would more effectively serve the public interest than strict adherence to Section 76.66, we must first determine if we have authority to waive that rule. KWFT characterizes as “arbitrary” the rule’s selection of the 2003-2004 edition of the Nielsen publications for determining a station’s local market for the 2006-2008 carriage cycle.²⁶ For its part, EchoStar argues vigorously that KWFT is seeking “to undertake a regulatory change that Congress specifically denied the FCC.”²⁷ EchoStar points to a distinction between Section 338 of the Act, which governs the carriage of local signals by satellite carriers, and Section 614(h), which governs carriage of local signals by cable operators. Although both statutory provisions determine markets by reference to “commercial publications which delineate television markets based on viewing patterns,”²⁸ only Section 614(h) contains a procedure to modify those market designations by allowing cable operators to add or remove particular communities upon request. As the Commission has noted elsewhere, Congress contemplated a similar procedure in the context of satellite carriage but ultimately did not include such a provision:

We find that the Act does not permit the Commission to change the shape of a television market . . . [T]here is no explicit provision providing the Commission with the authority to modify markets in the manner permitted under Section 614(h). Therefore, we cannot establish a market modification policy on our own motion. We note that the Senate version of the SHVIA had, at one point in time, a market modification provision. This subsection was not adopted by Congress. Thus, any attempt by the Commission to implement a market modification regime would run counter to the express intent of Congress.²⁹

10. The absence of a “market modification regime” applicable to satellite carriers led to the Bureau’s rejection of KWFT’s carriage complaint against EchoStar. The Bureau noted that “markets should be updated triennially for each market cycle,” and that “Section 338 does not provide for a market modification procedure for satellite carriers as Section [614] does for cable operators.”³⁰ Simply put,

²⁴ *Id.*

²⁵ Petition at 2-3 n.3.

²⁶ *Id.* at 4.

²⁷ Opposition at 6.

²⁸ 47 U.S.C. § 614(h)(1)(C)(i).

²⁹ *DBS Must Carry Report and Order*, 16 FCC Rcd at 1937.

³⁰ *TV 34, Inc.*, 20 FCC Rcd at 8748. Section 325(b)(3)(C)(i) of the Communications Act (as enacted by the Satellite Home Viewer Improvement Act of 1999) required the Commission to establish time periods for the election and carriage cycle with respect to satellite carriage that correspond to the Cable Television Consumer Protection and Competition Act of 1992. 47 U.S.C. § 325(b)(3)(C)(i). The 1992 Cable Act prescribes that “one year after the date of enactment . . . and every three years thereafter, [commercial stations] make an election between” retransmission

(continued....)

there was no statutory or regulatory mechanism permitting KWFT to change its market before the next carriage cycle.

11. However, Section 338 says nothing about which edition of the Nielsen publications should govern when a station is making an election for a new carriage cycle. The statute states only that a satellite carrier shall carry local television signals in its local market, as that term is defined in Section 122 of the Copyright Act.³¹ In turn, Section 122 defines a station's local market in terms of its "designated market area, as determined by Nielsen Media Research and published in the 1999-2000 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates or any successor publication."³² Nowhere in either Section 122 of the Copyright Act or Section 338 of the Communications Act does Congress state *which* successor publication is to be used to determine a station's local market. Instead, Congress mandated that the Commission promulgate regulations to answer that question³³ and, in Section 76.66 of the Commission's rules, the Commission has done so. Accordingly, the Commission is empowered to waive that rule in appropriate circumstances.

B. Public Interest Considerations.

12. As noted above, the propriety of granting a request to waive a Commission rule turns on whether adherence to the rule in question is inconsistent with the public interest or whether, given particular facts, deviating from a rule would serve more effectively the public interest or overall policy than would strict compliance.³⁴ In locating the relevant public interests at issue in this dispute, the parties direct us to various sources and concerns. KWFT argues that "SHVIA's goals of preserving over-the-air broadcasting and providing satellite subscribers with a full complement of local station signals"³⁵ are better served by granting a waiver here because the Ft. Smith DMA more accurately reflects the station's "natural" viewing audience, as reflected in 2004-2005 Nielsen publications.³⁶ EchoStar emphasizes the role of Section 76.66(e)(3) in avoiding disruption to satellite subscribers and in avoiding excessive burdens on satellite carriers.³⁷ EchoStar also stresses the importance of maintaining regulatory parity between cable operators and satellite carriers, arguing that "[w]ith each waiver granted, the parallel regulatory treatment for cable and DBS envisioned by the FCC will drift further and further apart."³⁸ We will address these public interest considerations in turn.

1. Providing local station signals to satellite subscribers while avoiding disruption or confusion.

13. In both its Petition and its Reply, KWFT stresses the importance of allowing DBS subscribers in its "natural" local market to receive the station's signal, arguing that this is one of SHVIA's

(...continued from previous page)

consent or mandatory carriage rights. 47 U.S.C. § 325(b)(3)(B) (emphasis added). Accordingly, the three-year interval between carriage cycles is the product of legislative, rather than regulatory, prerogative.

³¹ 47 U.S.C. § 338(a)(1), (k)(3)

³² 17 U.S.C. § 122(j)(2)(C) (emphasis added).

³³ See 47 U.S.C. § 338(j) ("the Commission shall issue regulations implementing this section following a rulemaking proceeding"); 47 U.S.C. § 325(b)(3)(C) (similar).

³⁴ *Northeast Cellular*, 897 F.2d at 1166.

³⁵ *DBS Must Carry Report and Order*, 16 FCC Rcd at 1935.

³⁶ Petition at 3.

³⁷ Opposition at 4.

³⁸ *Id.* at 10.

principal concerns.³⁹ KWFT argues that, in its case, using the 2003-2004 Nielsen publications for the 2006-2008 carriage cycle, as Section 76.66(e)(3) would require, leads to considerable “disparity between the actual market in which a television station operates and the artificial market imposed by the Commission.”⁴⁰ Accordingly, the station contends, adherence to the rule runs counter to the public’s interest in ensuring that television audiences have access to local stations.

14. EchoStar, however, sees the same disparity between KWFT’s “actual” market and its market as determined by the most recent Nielsen publications. The Opposition depicts KWFT as a station that “could not be competitive serving its natural audience” and therefore asked Nielsen to reassign it to a more lucrative DMA.⁴¹ Similarly, the Opposition alludes to questionable motives on the part of Nielsen in granting KWFT’s request, stating that Nielsen “makes market assignment changes based on factors that may include, among other things, the financial benefit to Nielsen in making such a change.”⁴² EchoStar does not explain how the alleged financial benefit to Nielsen factors into its decisions with respect to market assignments.

15. As the Commission has noted in the past, “Nielsen DMA market assignments provide the most accurate method for determining the areas serviced by local stations.”⁴³ Here, for example, EchoStar does not dispute that the majority of KWFT’s viewers and the majority of its Grade B contour fall within the Ft. Smith DMA. Moreover, Nielsen’s determination that Ft. Smith is KWFT’s proper market is echoed by cable operators and DirecTV, who carry the station in that market, and by the WB network, which has entered into an exclusive affiliation agreement with KWFT for that market. In aggregate, the above facts persuade us that KWFT is properly deemed local to the Ft. Smith market and that allowing KWFT to use its 2004-2005 market designation for purposes of the upcoming carriage cycle would serve SHVIA’s goal of “furthering the availability of local-into-local service.”⁴⁴

16. We also conclude that granting the waiver serves the public’s interest in avoiding confusion of and disruption to DBS subscribers. We agree with EchoStar that Section 76.66(e)(3) was intended to avoid undue disruption to subscribers.⁴⁵ Concerns about subscriber confusion and disruption historically have guided our decisions implementing changes in market definitions.⁴⁶ Because EchoStar currently does not carry KWFT in *any* market, however, adherence to Section 76.66(e)(3) in this instance would cause more subscriber confusion and disruption in viewing patterns than would granting KWFT’s waiver request. Under the rule, EchoStar would be obliged to carry KWFT in the Springfield DMA because KWFT has elected must carry rights in that market in the event that we deny its waiver request. In the following carriage cycle, however, EchoStar would be incapable of carrying KWFT in the Springfield DMA and would be obliged to carry KWFT in the Ft. Smith DMA. Thus, EchoStar subscribers in the Springfield DMA who, after three years, have grown accustomed to the presence of KWFT in their channel lineup would discover in 2009 that the channel has disappeared. If, on the other

³⁹ Petition at 3; Reply at 3.

⁴⁰ Petition at 4.

⁴¹ Opposition at 6.

⁴² *Id.*

⁴³ *Definition of Markets for Purpose of the Cable Television Broadcast Signal Carriage Rules*, 14 FCC Rcd 8366, 8371 (1999) (“*Market Modification Final Report and Order*”).

⁴⁴ *DBS Must Carry Report and Order*, 16 FCC Rcd at 1936.

⁴⁵ See Opposition at 4.

⁴⁶ See, e.g., *Market Modification Final Report and Order*, 14 FCC Rcd at 8368 (“Our principal goal is to reduce, to the extent feasible, cable subscriber confusion and disruption in viewing patterns that may arise because of the switch from [Arbitron’s Areas of Dominant Influence (ADIs)] to DMAs.”).

hand, we were to grant the waiver, EchoStar would begin carrying KWFT in the Ft. Smith DMA at the start of the upcoming carriage cycle and thereafter. Comparing those two outcomes, it is clear that granting the waiver in this case more effectively serves the purposes of Section 76.66(e)(3) than simple adherence to the rule. In this sense as well, then, granting the waiver is more consistent with the public interest than adhering to the rule's designation of the 2003-2004 Nielsen publications for the upcoming carriage cycle.

2. Avoiding excessive burden or disruption to EchoStar.

17. Of course, DBS viewers are not the lone constituency whose interests we must consider when deciding whether to grant a waiver of Section 76.66(e)(3). In promulgating regulations to implement the Satellite Home Viewer Improvement Act, we also sought “[t]o avoid overburdening satellite carriers.”⁴⁷ Here again, the fact that EchoStar currently does not carry KWFT in any market proves highly probative because, in a sense, strict adherence to Section 76.66(e)(3) imposes a heavier burden on EchoStar than granting the waiver. Should the Commission grant the waiver request, EchoStar need only add one station to one market. On the other hand, were we to deny the waiver, EchoStar would need to carry KWFT in the Springfield DMA for three years and then move the station to the Ft. Smith DMA. It is unclear how the latter scenario amounts to a lesser burden on EchoStar, or more faithfully serves the *purpose* – if not the letter – of Section 76.66(e)(3), than granting KWFT carriage rights in the Ft. Smith DMA in the first instance.

18. EchoStar also contends that granting the waiver will disrupt the overall regulatory scheme because that decision would increase the number of stations that are located in one DMA but assigned to another.⁴⁸ EchoStar argues that adding new “out of market” stations “could prove highly disruptive to the carefully balanced regulatory structure.”⁴⁹ Even if we agreed with EchoStar, there is little we could do about that disruption. As the statute makes clear, it is Nielsen, rather than the Commission, that assigns stations to DMAs.⁵⁰ Moreover, nothing suggests that KWFT's original assignment to the Springfield DMA is necessarily more “correct” than its reassignment to the Ft. Smith DMA. KWFT faces a predicament common to stations located near a DMA border: a station may or may not be placed in the DMA containing most of its viewers depending on which side of the border the community of license falls. With the reassignment in this case, KWFT at least will be serving the same state in which its community of license is located and most of its viewers reside. Finally, any marginal increase in “regulatory” disruption caused by granting the waiver is more than offset by the decrease in subscriber disruption and confusion that certainly would arise were we to force KWFT to elect carriage rights in one DMA for the upcoming cycle and then elect carriage rights in a different DMA in the next. Again, the regulatory scheme aims “to reduce channel line-up disruptions whenever possible.”⁵¹ Because EchoStar does not carry KWFT in the Springfield DMA, overall channel line-up disruption will be reduced by granting the waiver.

3. Equal treatment of satellite carriers and cable operators.

19. EchoStar also argues that granting the waiver in this case will lead to disparate treatment of satellite carriers and cable operators. In developing our rules for the timing of revisions to market definitions, the Commission strove to “establish comparable timelines and requirements for satellite

⁴⁷ *DBS Must Carry Report and Order*, 16 FCC Rcd at 1936.

⁴⁸ Opposition at 5.

⁴⁹ *Id.*

⁵⁰ See 17 U.S.C. § 122(j).

⁵¹ *Market Modification Final Report and Order*, 14 FCC Rcd at 8381.

carriers,” thereby “providing effective competition to incumbent cable systems.”⁵² EchoStar contends that if we waive the timeline established by Section 76.66(e)(3), which mirrors the timeline for cable operators established in Section 76.55(e)(2), we will injure the regulatory parity that exists between cable and DBS services.⁵³

20. To support that proposition, EchoStar points to our *Market Modification Final Report and Order* addressing carriage rights in the cable context. There, the Commission affirmed its decision to delay the transition to DMAs until January 1, 2000 and chose to rely on the 1991-92 Arbitron ADIs through the end of 1999.⁵⁴ EchoStar argues that because the Commission was willing to use market definitions that were nine years out of date in the cable context, we should deny KWFT’s petition, notwithstanding the fact that the station will have to wait until 2009 to enjoy carriage rights in the market to which, according to Nielsen, it belongs. In drawing that analogy, however, EchoStar overlooks an important distinction between the statute and rules governing carriage in the cable context and those that control carriage rights against satellite carriers. In rejecting the request of the two stations that sought to use their current DMAs, rather than their 1991-92 ADIs for the upcoming carriage cycle, the Commission noted that the stations could secure carriage in at least part of their current DMAs through the market modification process set forth in Section 614(h) of the Act:

We believe there is no reason to make special exceptions for these two stations. The individual circumstances that apply to WBSX-TV and KSTV-TV are most appropriately dealt with through the market modification process, which takes into consideration their future DMA assignments. Both stations have used the market modification process to seek significant expansion of their ADI markets for must carry purposes. The Commission has specifically indicated that information regarding DMAs could be useful in resolving individual ad hoc market modification requests filed pursuant to Section 614(h). The stations may therefore use the modification process to change their DMAs, in the future, if the situation so warrants.⁵⁵

21. As the Commission made clear in the *Market Modification Final Report and Order*, stations can resort to the market modification procedure when their assigned ADIs (or DMAs) no longer reflect accurately the actual viewing patterns of those stations, when asserting carriage rights against cable operators. As discussed above, however, “Section 338 does not provide for a market modification procedure for satellite carriers as Section [614(h)] does for cable operators.”⁵⁶ In other words, our attempt to maintain parallel regulatory treatment of cable operators and satellite carriers must proceed from the basic recognition that the rules governing carriage rights in those two contexts are asymmetrical in one very important respect: unlike Section 614(h), there is no mechanism for ad hoc market modifications under Section 338.⁵⁷

⁵² *DBS Must Carry Report and Order*, 16 FCC Rcd at 1935-36; see also 47 U.S.C. § 324(b)(3)(C).

⁵³ Opposition at 10.

⁵⁴ *Market Modification Final Report and Order*, 14 FCC Rcd at 8371-72.

⁵⁵ *Id.* at 8374. See also *Blackstar of Ann Arbor, Inc.; Petition for Modification of Area of Dominant Influence of WBSX(TV)*, 11 FCC Rcd 14992, 15001 (MB 1996) (concluding that the Commission does not have the authority to reassign a station to a different ADI, but granting the station’s request for market modification to add communities within that ADI).

⁵⁶ *TV 34, Inc.*, 20 FCC Rcd at 8748.

⁵⁷ In noting that asymmetry, we do not suggest that a waiver similar to the one requested here is unavailable with respect to cable operators. We merely note that the absence of market modification procedure in the satellite context is an important factor to our analysis.

22. It is therefore significant that, at present, KWFT is being carried by the three largest cable operators in the Ft. Smith market, as well as by DirecTV. Although the actions of other multi-channel video programming distributors (MVPDs) do not necessarily mandate the grant of the waiver in this case, they do reflect existing viewership patterns. Moreover, the fact that cable operators are carrying KWFT in the Ft. Smith DMA alters our analysis when it comes to maintaining the parallel treatment of cable operators and satellite carriers. In light of that carriage, granting a waiver of Section 76.66(e)(3) and concluding that KWFT is entitled to carriage in the Ft. Smith DMA leads to parallel treatment of cable operators and satellite carriers.

IV. CONCLUSION

23. Allowing KWFT to use the 2004-2005 Nielsen publications for purposes of making its carriage election would further the availability of local-into-local service and would avoid unnecessary subscriber confusion and disruption to channel line-ups. Because EchoStar does not carry the station in any market, granting a waiver also would impose no greater administrative burden on EchoStar than that which it would face were we to adhere strictly to the terms of Section 76.66(e)(3). Finally, because the three largest cable operators in the Ft. Smith DMA and DirecTV already carry the station in that market, granting a waiver will result in parallel carriage of the station among MVPDs. EchoStar warns that granting KWFT's petition will lead to more petitions from other stations, leading to greater disharmony between our satellite and cable carriage regulations. However, our task here is not to decide whether a waiver is appropriate in any and all cases. Rather, we must determine whether, given the unique facts of this case, a waiver more effectively serves the public interest than strict compliance with Section 76.66(e)(3). We conclude that it does and, therefore, that "special circumstances warrant a deviation from the general rule."⁵⁸

⁵⁸ *Northeast Cellular*, 897 F.2d at 1166.

V. ORDERING CLAUSES

24. Accordingly, **IT IS ORDERED**, pursuant to Section 338(f) of the Communications Act, as amended, 47 U.S.C. § 338(f), and Section 76.7 of the Commission's rules, 47 C.F.R. § 76.7, that the petition for waiver filed by TV 34, Inc., licensee of commercial television station KWFT, Eureka Springs, Arkansas, **IS GRANTED**.

25. **IT IS FURTHER ORDERED**, pursuant to Section 338 of the Communications Act, 47 U.S.C. § 338, as amended, and Section 76.7 of the Commission's rules, 47 C.F.R. § 76.7, that KWFT-TV's Designated Market Area assignment in the 2004-2005 Nielsen Station Index Directory and Nielsen Station Index United States Television Household Estimates shall apply with respect to satellite carriage for the carriage cycle commencing January 1, 2006. Beginning 75 days from the date of this order, KWFT-TV is entitled to carriage, pursuant to 47 U.S.C. § 338(a), in the Ft. Smith-Fayetteville-Springdale-Rogers, Arkansas Designated Market Area by satellite carriers providing local-into-local service in that market area pursuant to the statutory copyright license, 17 U.S.C. § 122.

26. This action is taken by the Chief, Media Bureau, pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

Donna C. Gregg
Chief, Media Bureau