

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

In the Matter of:
Nevada Channel 3, Inc.
Petition for Waiver of Section 76.66(e)(3) of the
Commission's Rules.
CSR-6918-M

MEMORANDUM OPINION AND ORDER

Adopted: February 27, 2006

Released: March 1, 2006

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Nevada Channel 3, Inc., licensee of commercial television station KEGS-TV Goldfield, Nevada ("KEGS"), formerly KTVY-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. KEGS seeks to base its carriage election for that carriage cycle on its DMA assignment reported in the 2004-2005 Nielsen publications. EchoStar Communications Corporation ("EchoStar") has filed an Opposition and KEGS has filed a Reply. For the reasons stated below, we grant the Petition.

II. BACKGROUND

A. Legal Background

2. Section 338 of the Communications Act, adopted as part of the Satellite Home Viewer Improvement Act of 1999 (SHVIA), 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. A station's market for satellite carriage purposes is its designated market area ("DMA"), assigned annually by Nielsen Media Research ("Nielsen"). In November 2000, the Commission adopted rules to implement

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...)")

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 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. KEGS is licensed to the community of Goldfield, Nevada, which is located in the Reno, Nevada DMA. However, the station's transmitter is located in Tonopah, Nevada which is in the Las

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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 *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.

Vegas, Nevada DMA. Moreover, the majority of KEGS' Grade B contour falls in the Las Vegas DMA.¹³

6. In March 2002, KEGS requested a temporary waiver of the "main studio rule," which requires a station to maintain a studio at or near its community of license.¹⁴ KEGS premised its waiver request on the fact that Goldfield "is located in an extremely rural and sparsely populated [area] of Nevada."¹⁵ In August 2002, KEGS petitioned for a permanent reallocation of the station from Goldfield to Tonopah on the ground that Goldfield is little more than a "ghost town." In a later supplement to its petition, KEGS explained:

Goldfield has a declining population, is not incorporated, has no local government or any government services not provided on the county level, has no employer larger than its single 28-student school, has only a part-time library, has no newspaper and no bank, and has only one church that does not have its own building.¹⁶

7. In July 2003, the Media Bureau granted KEGS a one-year waiver of the main studio rule, permitting the station to operate out of its studio in Las Vegas.¹⁷ On July 7, 2004, one day before the waiver was set to expire, KEGS requested a further extension of that waiver.¹⁸ The Bureau has not yet ruled on that request or on KEGS' request for reallocation of the station to Tonopah.

8. Also in July 2004, KEGS requested that Nielsen reassign the station from the Reno DMA to the Las Vegas DMA.¹⁹ 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

¹³ See "Request for re-classification of KTVY-TV Channel 7 – Goldfield, NV from the Reno, NV DMA to the Las Vegas, NV DMA" (attached to Reply).

¹⁴ Section 73.1125 states:

(a) Except for those stations described in paragraph (b) of this section, each AM, FM, and TV broadcast station shall maintain a main studio at one of the following locations:

- (1) Within the station's community of license;
- (2) At any location within the principal community contour of any AM, FM, or TV broadcast station licensed to the station's community of license; or
- (3) Within twenty-five miles from the reference coordinates of the center of its community of license as described in § 73.208(a)(1).

47 C.F.R. § 73.1125.

¹⁵ "Request for Temporary Waiver of Main Studio Rule" at 2 (Opposition Attachment 1).

¹⁶ *Amendment of Sections 73.606(b), Table of Allotments, Television Broadcast Stations (Goldfield and Tonopah, NV)*, PRM-02MB, "Supplement to Petition for Rulemaking," July 30, 2003, at 3-4 (available at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6514383292).

¹⁷ Letter from Clay Pendarvis, Assistant Chief, Video Division, Media Bureau to Jason S. Roberts, Counsel for Nevada Channel 3, Inc., July 8, 2003 (Opposition Attachment 2) (granting request for temporary waiver). At the time, the licensee operated two low-power television stations out of the Las Vegas studio. See "Request for Temporary Waiver of Main Studio Rule" at 1 n.1.

¹⁸ "Request for extension of the main studio waiver" (attached to Reply).

¹⁹ "Request for re-classification of KTVY-TV."

the DMA in which its FCC-assigned community of license is located.”²⁰ Accordingly, Nielsen originally assigned KEGS to the Reno DMA because its community of license, Goldfield, 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.”²¹ KEGS’ request noted that the station satisfied both those conditions and mentioned other considerations that arguably militated in favor of a DMA reassignment.²² Nielsen granted the station’s request on November 3, 2004, making the DMA change effective the following day.²³ As a result, KEGS is listed in the Las Vegas DMA in the 2004-2005 Nielsen Station Index Directory.²⁴

9. Shortly after Nielsen reassigned KEGS to the Las Vegas DMA, the station filed the instant petition to waive Section 76.66(e)(3) so that it may exercise carriage rights in the Las Vegas DMA during the 2006-2008 carriage cycle. To ensure that it was not left without carriage rights in any market during the 2006-2008 carriage cycle, KEGS requested carriage in both the Reno DMA and Las Vegas DMA, while clarifying that, should Commission rule favorably on its waiver request, the station would abandon its pursuit of mandatory carriage in the Reno DMA.²⁵ At present, EchoStar does not carry KEGS in either DMA.

III. DISCUSSION

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

10. EchoStar views KEGS’ waiver as a form of ad hoc market modification that Congress implicitly proscribed in the satellite context under Section 338.²⁶ Quite recently, the Bureau considered, and rejected, EchoStar’s characterization of the legislative intent behind Section 338 and its attempt to analogize a waiver request – very similar to the one at issue here – to a mid-cycle market modification.²⁷

²⁰ Nielsen Media Research, Local Reference Supplement at 4-5 (2004-05).

²¹ *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.*

²² See “Request for re-classification of KTVY-TV,” at 1. For example, KEGS notes that it “has entered into an affiliation agreement with ImaginAsian TV, which recognizes [KEGS’] coverage in the Las Vegas DMA and actually states that [KEGS] will be the affiliate for the Las Vegas Market.” It is unclear whether that affiliation agreement is still in effect. In any event, we agree with KEGS that “the programming on a station is not a factor in determining carriage.” Reply at 6.

²³ Letter from Hayley Hamilton, Senior Account Executive, Nielsen Media Research to Larry Morton, President, Equity Broadcasting, November 3, 2004 (attached to Petition).

²⁴ Nielsen Media Research, Nielsen Station Index Directory of TV Stations at 18, 34 (2004-2005). At the time of publication, Nevada Channel 3 still operated the station under the call letters KTVY.

²⁵ Petition at 2 n.1.

²⁶ See Opposition at 7 (arguing that granting the waiver request would “fl[y] in the face of clear Congressional intent”). In particular, 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,” only Section 614(h) contains a procedure to modify those market designations by allowing cable operators to add or remove particular communities upon request. 47 U.S.C. § 614(h)(1)(C)(i). As the Commission has noted, Congress’ omission of a similar provision in the context of satellite carriage was deliberate. *DBS Must Carry Report and Order*, 16 FCC Rcd at 1937.

²⁷ See *TV 34, Inc.; Petition for Waiver of Section 76.66(e)(3) of the Commission’s Rules*, 2005 WL 3590933 (MB (continued...))

As the Bureau noted, the station's waiver request was more properly characterized as a request to premise an election for a new carriage cycle on a more recent DMA assignment. Moreover, the Bureau noted, Section 338 of the Act says nothing about which edition of the Nielsen publications should govern when a station is making an election for a new carriage cycle.²⁸ The relevant statutory provision states only that a station's local market is 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.*"²⁹ As we observed in the *TV 34 Waiver Order*,

[n]owhere 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 question and, in Section 76.66 of the Commission's rules, the Commission has done so.³⁰

Because it is a Commission rule that identifies the "successor publication" to be used for each retransmission consent-mandatory carriage cycle, the Commission is empowered to waive that rule in appropriate circumstances.

B. Public Interest Considerations.

11. As in the *TV 34 Waiver Order*, the parties' arguments with respect to the relevant public interest considerations revolve around three basic concerns. First, both parties address the interest of satellite subscribers. KEGS insists that a waiver is necessary to give satellite subscribers access to local signals,³¹ while EchoStar suggests that a waiver may cause undue disruption to those subscribers.³² Second, EchoStar emphasizes the role of Section 76.66(e)(3) in avoiding excessive burdens on satellite carriers.³³ Finally, EchoStar stresses the importance of maintaining regulatory parity between cable operators and satellite carriers, warning that "[w]ith each waiver granted, the parallel regulatory treatment

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2005) at ¶¶ 9-11 ("*TV 34 Waiver Order*"). In many key respects, the factual background of this petition, and the arguments made by both parties, parallel those presented in the *TV 34 Waiver Order*. There, station KWFT – indirectly owned by Nevada Channel 3's parent corporation – persuaded Nielsen to reassign the station from the DMA in which its community-of-license was located to the DMA in which the station's transmitter and the majority of its Grade B contour were located. KWFT at first sought immediate carriage rights in its new DMA based on the reassignment. In a May 2005 Memorandum Opinion and Order, the Bureau denied that complaint because "the rules do not allow stations to assert new carriage rights in the middle of an election cycle." *TV 34 Inc. v. EchoStar Communications Corp.*, 20 FCC Rcd 8747, 8748 (MB December 30, 2005) ("*TV 34 Must Carry Order*"). 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 its reassigned DMA. KWFT next filed a waiver request, very similar to the request presently before us, to be considered eligible for mandatory carriage in its new DMA for the then-upcoming 2006-2008 election cycle. The Bureau granted KWFT's request in the *TV 34 Waiver Order*.

²⁸ *TV 34 Waiver Order*, 2005 WL 3590933 at ¶ 11.

²⁹ 17 U.S.C. § 122(j)(2)(C) (emphasis added). SHVIA incorporates by reference Section 122's definition of local markets. 47 U.S.C. § 338(a)(1), (k)(3).

³⁰ *TV 34 Waiver Order*, 2005 WL 3590933 at ¶ 11.

³¹ Petition at 2.

³² Opposition at 3.

³³ *Id.* at 4-5.

for cable and DBS envisioned by the FCC will drift further and further apart.”³⁴ We will address these considerations in turn.

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

12. The principal contention of KEGS’ waiver petition is that “SHVIA’s goals of preserving over-the-air broadcasting and providing satellite subscribers with a full complement of local station signals” are better served by granting the waiver, thus making the station available to DBS subscribers in KEGS’ “natural” market.³⁵ KEGS notes that the Las Vegas DMA is where the “overwhelming viewing population resides.”³⁶ The station contends that adherence to Section 76.66(e)(3), which would give KEGS carriage rights only in the Reno DMA, would run counter to the public’s interest in ensuring that television audiences have access to local stations.

13. For its part, EchoStar questions whether Nielsen’s reassignment of the station to the Las Vegas DMA is any more accurate than the original assignment to the Reno DMA. The Opposition depicts KEGS as a station that “could not be competitive serving its natural audience” and therefore asked Nielsen to reassign it to a more lucrative DMA.³⁷ In turn, EchoStar suggests, Nielsen may evaluate such requested changes based in part on whether they are lucrative to Nielsen.³⁸ EchoStar does not explain how the reassignment of a station from one DMA to another financially benefits Nielsen.

14. 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.”³⁹ More importantly, Congress has determined that the Commission should rely on Nielsen’s expertise in determining a stations’ local market by defining local market in terms of a station’s Nielsen DMA.⁴⁰ That reliance on Nielsen’s market determinations is well-placed, at least with respect to KEGS. The engineering data submitted by KEGS shows that the majority of its Grade B contour and the majority of its viewing population are indeed in the Las Vegas DMA.⁴¹ Thus, allowing KEGS to use its 2004-2005 market designation for purposes of the current carriage cycle would serve SHVIA’s goal of “furthering the availability of local-into-local service.”⁴²

15. When assessing EchoStar’s claim of subscriber confusion, it is essential to bear in mind that EchoStar currently does not carry the station in *any* market. Thus, rote application of Section 76.66(e)(3) would oblige EchoStar to carry KEGS, for the first time, in the Reno DMA for the current carriage cycle because the 2003-2004 Nielsen publications list KEGS in that DMA. In the following

³⁴ *Id.* at 10.

³⁵ Petition at 4; Reply at 2.

³⁶ Reply at 5.

³⁷ Opposition at 5.

³⁸ *Id.* at 6.

³⁹ *Definition of Markets for Purpose of the Cable Television Broadcast Signal Carriage Rules*, 11 FCC Rcd 6201, 6220 (1996) (“*Market Modification FNPRM*”); *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*”) (same).

⁴⁰ See 17 U.S.C. § 122(j)(2).

⁴¹ See “Request for re-classification of KTVY-TV.”

⁴² *DBS Must Carry Report and Order*, 16 FCC Rcd at 1936. Assignment to the Las Vegas DMA is also consistent with our waiver of the “main studio rule,” permitting KEGS to operate out of Las Vegas, and with KEGS pending request to change its community of license to Tonopah, which is located in the Las Vegas DMA.

carriage cycle, however, EchoStar would be compelled to carry KEGS in the Las Vegas DMA. Thus, EchoStar subscribers in the Reno DMA who, after three years, have grown accustomed to the presence of KEGS in their channel lineup would discover in 2009 that the channel has disappeared. Granting the waiver, on the other hand, would yield a single channel addition to a single channel line-up: EchoStar would begin carrying KEGS in the Las Vegas DMA during the current carriage cycle and thereafter. Comparing those two outcomes, it is clear that adherence to Section 76.66(e)(3) would cause unnecessary subscriber confusion that is easily avoided by using the 2004-2005 Nielsen publications to determine KEGS' local market. In this sense as well, granting the waiver more effectively serves the public interest.

2. Avoiding excessive burden or disruption to EchoStar.

16. In addition to providing subscribers with local signals, the Commission's regulations implementing SHVIA sought "[t]o avoid overburdening satellite carriers."⁴³ EchoStar argues that granting KEGS' waiver request is flatly inconsistent with that goal.⁴⁴ Our evaluation of that argument proceeds from two crucial observations. First, as mentioned above, EchoStar currently does not carry KEGS in any market. Second, rather than requesting to change its DMA in the middle of a carriage cycle, KEGS requests only that it be allowed to rely on a more current DMA assignment when making its election for a new carriage cycle. With those observations in mind, it is again useful to compare EchoStar's potential carriage obligations if we grant the waiver with those that would obtain were we to adhere to the terms of Section 76.66(e)(3). 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 KEGS in the Reno DMA for three years and then move the station to the Las Vegas DMA. It is unclear how the latter scenario amounts to a lesser burden on EchoStar.

17. We are unmoved by EchoStar's warning that granting the waiver will disrupt the overall regulatory scheme by increasing the number of stations whose communities-of-license are located in one DMA but are assigned to another.⁴⁵ KEGS "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."⁴⁶ In certain circumstances – as in this case – reassignment may be an appropriate means to associate a station with the DMA that contains the majority of its viewers. Moreover, even if we agreed with EchoStar that additional "out of market" stations are disruptive in a meaningful sense, there is little we could do about that disruption. Under the statute, Nielsen, rather than the Commission, assigns or reassigns stations to DMAs.⁴⁷ The question before us is not whether KEGS will be carried in the Las Vegas DMA, but when that carriage will commence. With that in mind, any marginal disruption caused by granting the waiver is more than offset by the decrease in subscriber disruption and confusion that would arise were we to force KEGS to elect carriage rights in one DMA for the current carriage 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."⁴⁸ Because EchoStar presently does not carry KEGS in any DMA, overall channel line-up disruption will be reduced by granting the waiver.

⁴³ *Id.*

⁴⁴ Opposition at 4-5.

⁴⁵ *Id.*

⁴⁶ *TV 34 Waiver Order*, 2005 WL 3590933 at ¶ 18.

⁴⁷ See 17 U.S.C. § 122(j).

⁴⁸ *Market Modification Final Report and Order*, 14 FCC Rcd at 8381.

3. Equal treatment of satellite carriers and cable operators.

18. Finally, 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.⁴⁹ EchoStar argues that a waiver would frustrate the Commission's attempt to "establish comparable timelines and requirements for satellite carriers," thereby "providing effective competition to incumbent cable systems."⁵⁰ EchoStar notes that the Commission's rules for cable operators have tolerated market determinations far more out of date than the market assignment of which KEGS now complains. In particular, when the Commission implemented the transition from Arbitron Areas of Dominant Influence (ADIs) to Nielsen DMAs, it tolerated reliance on ADIs that were as many as nine years out of date.⁵¹ From this, EchoStar concludes that KEGS has no entitlement to reliance on more recent Nielsen publications.

19. That conclusion fails to account for a significant distinction between the relevant statutes and regulations governing carriage by cable operators and those governing carriage by satellite carriers. As made clear in our *Market Modification Final Report and Order*, our rules for cable operators could tolerate reliance on out-of-date ADIs because of the availability of a mid-cycle market modification to correct gross disparities between a station's reported ADI and its contemporary local market. 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 explained:

We believe there is no reason to make special exceptions for these two stations. The individual circumstances that apply to [them] 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.⁵²

20. By contrast, there is no similar ad hoc modification procedure in the satellite context.⁵³ Instead, there is a single opportunity – at the beginning of each three-year carriage cycle – for a local station to place in issue the accuracy of its local market for purposes of retransmission by satellite carriers. Stations do not face this same disability in the cable context. Thus, "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."⁵⁴ Moreover, as we noted in the *TV 34 Waiver Order*, nothing in the applicable statutes or regulations forecloses a station from seeking a waiver of Section 76.55(e)(2) to substitute a later edition of the Nielsen

⁴⁹ Opposition at 10.

⁵⁰ *DBS Must Carry Report and Order*, 16 FCC Rcd at 1935-36; see 47 U.S.C. § 324(b)(3)(C).

⁵¹ Opposition at 8.

⁵² *Id.* at 8374. See *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).

⁵³ *TV 34 Must Carry Order*, 20 FCC Rcd at 8748.

⁵⁴ *TV 34 Waiver Order*, 2005 WL 3590933 at ¶ 21.

publications than that specified in the rules applicable to cable operators.⁵⁵ On balance, therefore, granting KEGS' waiver request has little effect on the overall parallel treatment of cable operators and satellite carriers.

IV. CONCLUSION

21. Allowing KEGS to use the 2004-2005 Nielsen publications for purposes of making its carriage election for the 2006-2008 retransmission consent-mandatory carriage cycle furthers the availability of local-into-local service. Because EchoStar does not carry the station in any market and because this is not a request for a mid-cycle market modification, 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, a waiver would minimize channel line-up disruptions. We therefore conclude that a waiver in this case is more consistent with the public interest and the purposes of Section 76.66(e)(3) than would be strict compliance with the rule's provisions.

V. ORDERING CLAUSES

22. 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 Nevada Channel 3, Inc., licensee of commercial television station KEGS, Goldfield, Nevada, **IS GRANTED**.

23. **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 KEGS-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, KEGS-TV is entitled to carriage, pursuant to 47 U.S.C. § 338(a), in the Las Vegas, Nevada 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.

24. This action is taken by the Deputy 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

William H. Johnson
Deputy Chief, Media Bureau

⁵⁵ See *id.* at 7 n.47 (“[W]e do not suggest that a waiver similar to the one requested here is unavailable with respect to cable operators.”).